No. S232622

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

AARON LEIDER,
Plaintiff and Appellant

vs.

JOHN LEWIS, ET AL.,
Defendants and Appellants.

After an Opinion by the Court of Appeal,
Second Appellate District, Division Eight
Case No. B244414

On Appeal from the Superior Court of the State of California
County of Los Angeles, Case No. BC375234
Honorable John L. Segal, Judge Presiding

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI LEAGUE OF CALIFORNIA CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANTS AND APPELLANTS JOHN LEWIS AND CITY OF LOS ANGELES

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.488.

DATED: October 24 2016

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Tani Cantil-Sakauye:

Pursuant to rule 8.200(c) of the California Rules of Court, the League of California Cities ("League"), the International Municipal Lawyers Association ("IMLA"), and the California State Association of Counties ("CSAC") respectfully request permission to file an amicus curiae brief in support of Defendants and Appellants John R. Lewis and City of Los Angeles. This application is timely made within 30 days of the filing of the Reply Brief.

Amici represent public agencies and their officials with substantial interest here because all public agencies are subject to illegal expenditure claims under Code of Civil Procedure section 526a, the scope of which Plaintiff and Appellant Aaron Leider seeks to significantly expand.

The trial and appellate courts' conclusions here, if upheld, will expand section 526a's scope far beyond what the Legislature intended, subjecting public agencies and officials to civil suits claiming they violated criminal laws. This will undercut prosecutorial discretion, draw courts into political disputes, undermine the separation of powers fundamental to our democracy, and infringe the power of the political branches. Amici believe they can aid this Court's review by providing a broader framework to

analyze the practical implications of these issues than can the parties' briefs.

Counsel for Amici have examined the parties' briefs and are familiar with the issues and the scope of the presentations, and submit that additional briefing would be helpful for the reasons noted above.

Therefore, and as further amplified in the Interest of Amici portion of the proposed brief, Amici respectfully request leave to file the brief combined with this application.

IDENTITY OF AMICI CURAE AND STATEMENT OF INTEREST

The League of California Cities is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The International Municipal Lawyer's Association has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The California State Association of Counties is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties

statewide and has determined that this case is a matter affecting all counties.

DATED: October 24, 2016

COLANTUONO, HIGHSMITH & WHATLEY, PC

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INTRODUCTION

Civil enforcement of criminal laws was once part of our legal tradition, but was banished as barbaric two centuries ago.[1] Known as the "private right of appeal," English law permitted a relative of a homicide victim to sue civilly following a jury's acquittal of a defendant in a criminal trial. In 1818 the noted case of *Ashford v. Thornton* (1818) 106 ER 149 involved just those facts, plus the defendant's audacious demand for trial by combat, which Parliament had not yet abolished. The King's Bench found itself compelled to grant the demand and promptly proposed legislation to repeal both the right to trial by battle and the right of private appeal. Fortunately, for the defendant in *Ashford*, that trial by combat never occurred.

This history is useful context for this present case in which Plaintiff and Appellant Aaron Leider ("Leider") seeks judicial

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[1] The history recited here is taken from Rembar, The Law of the Land: The Evolution of our Legal System (1980) ch. 2 "Battle" and Wikipedia's discussion of *Ashford v. Thorton* <https://en.wikipedia.org/wiki/Ashford_v_Thornton> (last viewed Sept. 15, 2016) with acknowledgement to Ben Shatz's summary of both in his blog post, "Private Right of Appeal Abolished," posted August 2, 2016 to his blog, Southern California Appellate news. <http://socal-appellate.blogspot.com/search?updated-max=2016-08-03T17:47:00-07:00&max-results=20&start=34&by-date=false> (last viewed Oct. 7, 2016).

enforcement of his policy objections to the ongoing care and captivity of elephants at the Los Angeles Zoo. He sues Defendants and Appellants City of Los Angeles and the Executive Director of the Zoo, John R. Lewis (collectively, "the City"), under Code of Civil Procedure section 526a — the taxpayer waste statute. Leider's 526a claim is novel, however, in that it alleges the City violated criminal laws — specifically, Penal Code provisions criminalizing animal cruelty.

Leider's 526a theory, if affirmed by this Court, would be a dangerous expansion of taxpayer standing that would allow the entire body of criminal law to be tried as civil injunction matters without the exercise of prosecutorial discretion by one selected, trained, and bound by prosecutorial ethics to do so and without the other protections afforded defendants in criminal cases, such as trial by jury. Additionally, his theory would draw courts into political disputes which the separation of powers demands be resolved by the political branches, which are more directly responsible to voters than our courts are intended to be. Finally, his theory would impair state and local government by intimidating officials with the constant threat of quasi-criminal charges by holders of any of myriad opinions on important matters of policy. The Legislature's solicitude for the discretion and immunity of public officials infuses legislation such as the Government Claims Act and reflects legislative understanding that government cannot function unless

government itself must defend its policies — not the individuals who do its bidding. Who would serve in government were the price of doing so constant risk of suit?

Accordingly, Amici respectfully request this Court grant the relief sought by the City and declare that taxpayer standing under Code of Civil Procedure section 526a does not extend to enforcement of penal laws as required by Civil Code section 3369 and common law.

STATEMENT OF FACTS AND THE CASE

Amici adopt these portions of the Opening Brief on the Merits and the Reply Brief on the Merits by reference.

ARGUMENT

I. PRIVATE ENFORCEMENT OF CRIMINAL LAWS WOULD UNDERMINE PROSECUTORIAL DISCRETION

A. Prosecutorial Discretion is Rooted in the Separation of Powers

Prosecutorial discretion, including decisions to bring charges and what charges to bring, is fundamental to our criminal justice system. (*People v. Valli* (2010) 187 Cal.App.4th 786, 801, citing *People v. Jerez* (1989) 208 Cal.App.3d 132, 137–138.) Prosecutorial discretion, "though recognized by statute in California, is founded upon constitutional principles of separation of powers and due

process of law. [Citations.] 'The district attorney's function is quasi-judicial in nature [citation], and ... he is vested with discretionary power in determining whether to prosecute in any particular case. **An unbroken line of cases in California** has recognized this discretion and its insulation from control by the courts ... .'" (*Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1543, quoting *People v. Municipal Court* (1972) 27 Cal.App.3d 193, 207 [original emphasis].)

There is good reason for this approach: it reflects the need to limit prosecutorial powers to a select few officials with expertise in criminal matters, who are personally removed from individual controversies, but represent and are accountable to the public. This Court has recognized that such powers, which reside in the executive branch and are exercised by the federal and state Attorneys General, elected District and City Attorneys, and their subordinates,[2] are ill-suited to judicial control:

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[2] See Cal. Const., art. V, § 13 ["The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices ... ."]; Gov. Code, §§ 1194 ["When not otherwise provided for, each deputy possesses powers and may perform the duties attached by law to the office of his principal."], 12502 ["The Attorney General may appoint and fix the salaries of such Assistant Attorneys General [and]

It is impossible, of course, for every violation of every public law to be redressed by executive action. That does not mean, however, that the answer lies in permitting anyone who wishes to file a lawsuit to do so. Instead, the answer resides in public confidence that executive officials charged with enforcing the law will exercise an informed discretion that will maximize the effectiveness of their powers, while observing the canons of fundamental fairness that govern our public life. The United States Supreme Court has said that prosecutorial discretion "rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." (*Wayte v. United States* (1985) 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547.)

Deputy Attorneys General … as he deems necessary for the proper performance of the duties of his office."], 12550 ["The Attorney General has direct supervision over the district attorneys of the several counties of the State … ."].

(*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 592, superseded by statute on other grounds as stated in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 977–978.)

For these reasons, public prosecutors are empowered to file criminal charges, and courts have consistently refrained from extending that power to private citizens. "The Legislature … has **no constitutional power** to subject the prosecutor's decision [to investigate or prosecute] to the control of a private citizen, whether a defendant or not. [Citation.] … [R]ecognition of citizen standing to intervene in criminal prosecutions would have ominous implications. [Citation.] It would undermine the People's status as exclusive party plaintiff in criminal actions, interfere with the prosecutor's broad discretion in criminal matters, and disrupt the orderly administration of justice." (*Gananian, supra,* 199 Cal.App.4th at pp. 1545–1546 [original emphasis]; see also *People v. Shults* (1978) 87 Cal.App.3d 101, 106; *People v. Birks* (1998) 19 Cal.4th 108, 134–136; *People v. Municipal Court, supra,* 27 Cal.App.3d at p. 204.)

Moreover, this Court has also determined that individuals who disagree with an exercise of prosecutorial discretion are not deprived of due process. "Prosecutors have broad decisionmaking power in charging crimes. [Citation.] The judiciary historically has shown an extraordinary deference to the prosecutor's decision-making function. [Citation.] Although relief may be available if a defendant can demonstrate selective prosecution [citation] or

vindictive prosecution [citation] reversals on these grounds are rare. [Citation.] Plaintiffs cite no authority for the proposition that the prosecutor's failure to exercise sufficient, or indeed any, discretion in determining whether to file charges constitutes a denial of due process." (*Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1132 (*Sundance*).)[3]

Here, as the Reply Brief discusses at length, many agencies — including the Los Angeles County District Attorney, the Los Angeles City Attorney, the California Attorney General, and the United States Department of Justice — are responsible for enforcing criminal animal cruelty laws in Los Angeles and all have determined not to charge the Zoo regarding the elephant enclosure. (Reply Brief, pp. 1–

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[3] Amici recognize the Court of Appeal determined in *Culp v. City of Los Angeles* (Sept. 23, 2009, B208520) [nonpub. opn.] (*Culp*) that Leider's illegal expenditure claims are justiciable and found the *Sundance* decision inapplicable. (*Id.* at *8–9.) Yet the *Culp* decision barely addressed the political and policy implications of allowing private litigants to enforce criminal laws as Leider demands, focusing only on whether "there is a legal standard by which the alleged governmental conduct may be tested." (*Ibid.*) That judges **can** review the exercise of prosecutorial discretion does not mean they ought to do so. Thus, Amici urge the Court to take into account its reasoning from *Sundance,* which well articulates the dangers of judicial interference in matters best left to the political branches.

6, 23.) Yet Leider would arrogate to himself alone the unsupervised power to do so.

B. Because Prosecutorial Discretion Balances Enforcement Priorities with Scarce Resources, its Elimination Would Lead to Absurd Results, as Demonstrated by Several Current Policy Disputes

Prosecutorial discretion must also be preserved because the Attorney General and District Attorneys are attuned to nuances in criminal policy and enforcement priorities that private citizens may not be. Prosecutors are either elected or supervised by those who are, and this gives the demos of our democratic society fundamental control over the use of the State's power to coerce. Current policy disputes demonstrate the contexts in which these principles apply, and underscore that discretionary power to bring criminal charges should reside only with public prosecutors, not private citizens.

1. Conflicting local, state, and federal perspectives on marijuana use create a patchwork regulatory scheme that defies consistent enforcement.

As this Court knows from its own docket, marijuana regulation is much contested. California's turn away from strict criminal prohibition on marijuana use began in 1996 when voters

adopted Proposition 215, legalizing medical marijuana for the first time in the nation. (Health & Saf. Code, § 11362.5 [Compassionate Use Act of 1996, added by Proposition 215].) In 2003, the Legislature enacted the Medical Marijuana Program Act, adding sections 11362.7 through 11362.83 to the Health & Safety Code, to clarify the scope of Proposition 215. The statewide regulatory scheme of these laws is controversial and frequently litigated in this Court. (E.g., *People v. Mower* (2002) 28 Cal.4th 457; *People v. Wright* (2006) 40 Cal.4th 81; *People v. Kelly* (2010) 47 Cal.4th 1008; *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729.)

More recent statutes expand state regulation of medical marijuana, particularly the Medical Marijuana Regulation and Safety Act of 2015 (Health & Saf. Code, § 19300, et seq.), which adopted a comprehensive, "seed to sale," regulatory program for medical marijuana while also allowing significant local control. The November 2016 ballot includes Proposition 64 which, if adopted, would authorize nonmedical marijuana use by adults, as have measures in Colorado, Oregon, and Washington. (See Legis. Analyst, Analysis of Proposition 64, at <http://www.lao.ca.gov/ballot/2016/Prop64-110816.pdf> [last viewed Oct. 7, 2016]; Office of the Attorney General, Amended text of Proposition 64, at

<https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf> [last viewed Oct. 24, 2016]; State of Colorado, Official state information on the laws and health effects of retail marijuana, at <https://www.colorado.gov/marijuana> [last visited Oct. 24, 2016]; State of Oregon, Recreational Marijuana Program, at <http://www.oregon.gov/olcc/marijuana/pages/default.aspx> [last visited Oct. 24, 2016]; Washington State Liquor and Cannabis Board, FAQS on I-502, at <http://www.lcb.wa.gov/mj2015/faqs_i-502> [last viewed Oct. 24, 2016].)

Because of uncertainty over marijuana's present and future legal status in California, and disputed readings of current law, police agencies often struggle to enforce state marijuana laws, leading to different outcomes in different places. Moreover, police in rural jurisdictions often have different marijuana enforcement priorities and funding levels than their urban peers. For example, a recent news article on local regulation of medical marijuana noted that a major issue in Los Angeles is the "crushing volume of illegal dispensaries," with one Los Angeles Police Department officer stating "Even if I had 10,000 more officers, would I have them tackling marijuana? Because we have to prioritize the needs of us as an agency to match the needs of the community. We also go public safety first." (Jenkins, *California cities create their own rules for medical*

marijuana, inewsource.org (Aug. 25, 2015) at <http://inewsource.org/2015/08/25/california-medical-marijuana-rules> [last viewed Oct. 7, 2016].) By contrast, rural jurisdictions like Humboldt County deal more often with cultivation, with the Eureka Police Chief stating: "In order to find most of these grows it would take aircraft and a little county doesn't really have a great deal of aircraft, and then if you do, how do you get the resources to get up there to collect 10,000 plants that are 12 feet tall? … You need federal resources to do that." (*Ibid.*)

Even neighboring jurisdictions take diverse regulatory approaches, reflected in the differing results in adjacent (but different) Yuba and Nevada Counties at the June election on marijuana cultivation initiatives. (See Creasey, *Election results: Marijuana measures fall in Yuba County*, Appeal-Democrat (June 8, 2016) <http://www.appeal-democrat.com/news/election-results-marijuana-measures-fall-in-yuba-county/article_8ad45adc-2d4a-11e6-a7e3-cb0b39b39378.html> [last viewed Oct. 7, 2016] ["Yuba County voters spoke out against medical marijuana cultivation and dispensaries on Tuesday. They voted down Measures A and B, which would have eased restrictions on cultivation and allowed marijuana dispensaries in Yuba County."]; Riquelmy, *Election 2016: Truckee, Nevada Co. voters reject marijuana Measure W*, Sierra Sun (June 8, 2016) <http://www.sierrasun.com/news/22376984-113/election-2016-nevada-county-voters-reject-marijuana-measure>

[last viewed Oct. 7, 2016] ["Measure W, the contentious outdoor marijuana ban initiative that dominated this election, appears headed for defeat."].)

There is also conflict between state and federal law, as the latter classifies marijuana as a Schedule I drug. (21 C.F.R. § 1308.11 [listing marihuana, tetrahydrocannabinols as Schedule I drugs].) Indeed, the federal Drug Enforcement Agency recently decided to maintain marijuana in this category of the most highly restricted drugs. (See Johnson, *DEA Rejects Attempt to Loosen Federal Restrictions on Marijuana*, National Public Radio (Aug. 10, 2016) <http://www.npr.org/2016/08/10/489509471/dea-rejects-attempt-to-loosen-federal-restrictions-on-marijuana> [last viewed Oct. 7, 2016].) But recently, the 9th Circuit, citing the federal budget statute, forbade enforcement of criminal penalties for use of medical marijuana against those whose conduct is lawful under state law. (*United States v. McIntosh* (9th Cir. Aug. 16, 2016) No. 15–10117 ___ F.3d ___ [2016 WL 4363168], *9 ["We therefore conclude that, at a minimum, § 542 [of the Consolidated Appropriations Act of 2016] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws."].)

Despite, or perhaps because of these policy conflicts, federal authorities up to and including President Obama have not settled on

a uniform approach for enforcing federal marijuana laws nationally. (See Weiner, *Obama: I've got 'bigger fish to fry' than pot smokers*, The Washington Post (Dec. 14, 2012) <https://www.washingtonpost.com/news/post-politics/wp/2012/12/14/obama-ive-got-bigger-fish-to-fry-than-pot-smokers> [last viewed Oct. 7, 2016] ["President Obama told Barbara Walters that recreational pot smoking in states that have legalized the drug is not a major concern for his administration."].)

Thus, the ongoing national controversy over marijuana regulation demonstrates the essential role in our democratic society of prosecutorial discretion by politically responsive prosecutors familiar with local conditions, resources, and priorities. By comparison, under Leider's theory any committed ideologue with strong views on marijuana policy, and criminal enforcement of marijuana laws, could file a lawsuit in a search for a judge willing to impose those views. This could include claims by both marijuana opponents who demand strict enforcement of marijuana laws, and by marijuana advocates who believe aggressive enforcement is illegal waste and expenditure of taxpayer funds.

For example, Health and Safety Code section 11357, subdivision (c), imposes misdemeanor penalties for "every person who possess more than 28.5 grams of marijuana." Alternatively, if voters approve Proposition 64 in November, section 11357 will retain these penalties for possession of more than 28.5 grams by

those 18 or older. (Office of the Attorney General, Amended text of Proposition 64, p. 53, at <https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf> [last viewed Oct. 7, 2016].) However, even possession of these larger amounts may not be an enforcement priority for police agencies with limited resources, as noted in the examples above.

Leider's theory would allow marijuana opponents to sue these police agencies and police officials to compel them to enforce these penalties as the advocates see fit. Additionally, the advocates might sue under the federal Controlled Substances Act, under which it remains generally unlawful to possess marijuana. (21 U.S.C. § 801, et seq.; see also *City of San Jose v. MediMarts, Inc.* (2016) 1 Cal.App.5th 842, 848.) Allowing advocates for one side or the other to use courts as tools to impose their own views on government officials, with Code of Civil Procedure section 526a as their vehicle, would draw courts into policy disputes best left to the other branches. Nor are courts well equipped to consider more voices than those who appear in court, evaluate prosecutorial resources of staff and funding, and establish priorities in a world of limited resources in which not every social value can be implemented fully. The extensive resources devoted to judicial supervision of jails and prisons demonstrates the limits of the courts' ability to substitute for other forms of governance. (E.g., *Brown v. Plata* (2011) 563 U.S. 493 [affirming receivership for delivery of medical services in California prisons].)

This is not the purpose of Code of Civil Procedure section 526a, and this Court should resist the temptation to allow Leider to so dramatically expand that statute.

2. Enforcement of immigration laws also reflects policy and political differences between states and the federal government.

Similarly, private enforcement of immigration laws would complicate that fraught issue. Immigration law is also frequently litigated, with many recent high-profile cases in this Court and the United States Supreme Court. (E.g., *United States v. Texas* (2016) 136 S.Ct. 2271 [affirmed by an evenly divided Court]; *Arizona v. United States* (2012) 132 S.Ct. 2492; *In re Garcia* (2014) 58 Cal.4th 440.) Indeed, the division between California and federal laws on this topic would make Leider's theory unworkable while inviting litigants to assert in court policy views best addressed to the political branches.

Specifically, Government Code section 7282.5, adopted in 2014, prohibits local law enforcement agencies from enforcing federal immigration holds as to inmates eligible for release, with some exceptions, as for those who commit violent crimes. This reflects differing views of the California Legislature and Congress on immigration. (See White, *California law enforcement detaining fewer undocumented immigrants*, The Sacramento Bee (Oct. 17, 2014)

<http://www.sacbee.com/news/politics-government/capitol-alert/article2952964.html> [last viewed Oct. 7, 2016].)

Under Leider's theory, courts could be called to enforce either the state or the federal view of this issue by taxpayers of one persuasion or the other granted under Code of Civil Procedure section 526a. Specifically, title 8, section 1324, subdivision (a)(1)(A) of the United States Code imposes criminal penalties on any person who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation." Thus, Leider's theory would expose jailors who release individuals despite immigration holds to personal suit (as Defendant Lewis here) under section 526a, to defend claims they spent agency funds "conceal[ing], harbor[ing], or shield[ing] from detection" an alien from federal authorities. The Court should avoid this destabilizing outcome by rejecting Leider's claim.

Preservation of prosecutorial discretion, and declining Leider's invitation to open enforcement of criminal laws to any ideologue with the means to sue, avoids these dangers. Instead, prosecutors who are elected or subject to supervision by elected officials are better situated to balance society's interest in

even-handed enforcement of the law with allocation of resources to reflect local conditions, resources, and priorities.

II. THE JUDICIAL BRANCH SHOULD AVOID ADJUDICATING PURELY POLITICAL DISPUTES

This Court has long refrained from adjudicating policy disputes better left to the political branches. As the Court explained, "waste" as used in Code of Civil Procedure section 526a:

> [M]eans something more than an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion. To hold otherwise would invite constant harassment of city and county officers by disgruntled citizens and could seriously hamper our representative form of government at the local level. Thus, the courts should not take judicial cognizance of disputes which are primarily political in nature, nor should they attempt to enjoin every expenditure which does not meet with a taxpayer's approval. On the other hand, a court must not close its eyes to wasteful, improvident and completely unnecessary public spending, merely because it is done in the exercise of a lawful power.

(*Sundance, supra,* 42 Cal.3d at pp.1138–1139; see also *Sharpe v. City of Los Angeles* (1934) 136 Cal.App. 732, 735 ["It is a general rule that a

court of equity has no jurisdiction in matters of a political nature, and that no injunction to protect a person in the enjoyment of a political right or to assist him in acquiring such a right will be granted. No such jurisdiction has ever been conceded to a chancery court, either by the English or American judiciary. To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of the other departments of government, or of the courts of common law."].)

Leider styles his challenge to conditions in the LA Zoo's elephant enclosure as an attack on purportedly "illegal expenditures" under section 526a rather than "waste." (Respondent's Brief, p. 23.) This is a distinction without a difference — Leider cannot avoid, and this Court should not ignore, that his challenge to the Zoo is "primarily political in nature." This suit is merely a vehicle for Leider to express his political opposition, not only to conditions at the Zoo's elephant enclosure, but to elephants' captivity at the Zoo under any conditions. Indeed, Leider seeks more than simply changes in the elephants' treatment and habitat; the First Amended Complaint and later cross-appeal request closure of the $40 million elephant exhibit and to compel the Zoo to release the elephants to a sanctuary. (See Opening Brief, pp. 1, 16.)

The trial court and the Court of Appeal denied that relief. (*Leider v. Lewis* (2016) 243 Cal.App.4th 1078, 1104–1105.) But Leider

believes no zoo can provide adequate conditions for captive elephants, and keeping elephants captive is fundamentally inhumane. (E.g., Respondent's Brief, p. 15 ["As summarized by Dr. Poole, the behavior of elephants in the wild is like 'night and day' from that of the Los Angeles Zoo elephants."].) Leider is entitled to his views and to all the means our democracy affords him to persuade policymakers of them. He is not entitled to use the power of the courts to impose them on a majority that disagrees.

Indeed, the legislative branch has a comparative advantage over courts on such issues. It can hold hearings on zoo conditions, commission reports and studies, survey public opinion, and otherwise engage in the policymaking in ways foreign to the judicial role in our legal system. (See *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1095, overruled on other grounds by *Green v. Ralee Eng'g Co.* (1998) 19 Cal.4th 66 ["[I]t is generally agreed that 'public policy' as a concept is notoriously resistant to precise definition, and that courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, 'lest they mistake their own predilections for public policy which deserves recognition at law.' [Citation.] Indeed ... courts 'should proceed cautiously' if called upon to declare public policy absent some prior legislative expression on the subject. [Citations.]")

Injecting criminal law into public policy debates will debilitate state and local governments. As noted above, questions about

whether and how to spend taxes are often fraught with controversy. Such debates are fundamental to our democracy and courts therefore tread cautiously when called to review fiscal legislation. (E.g., *Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684.) Courts also narrowly apply Code of Civil Procedure section 526a. (E.g., *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 875; *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 480).

To further illustrate the risk created by Leider's theory, child protective services agencies are responsible for investigating claims of child abuse. Indeed, state law **requires** social workers to investigate such claims. (Welf. & Inst. Code, § 328 ["Whenever the social worker has cause to believe that there was or is within the county, or residing therein [a child at risk of, or who has suffered from, abuse], the social worker shall immediately make any investigation he or she deems necessary to determine whether child welfare services should be offered to the family and whether proceedings in the juvenile court should be commenced."].)

Courts have held social workers immune from negligence and civil rights claims when removing a child from a home due to suspected abuse, even if those suspicions prove unfounded. (*Jenkins v. County of Orange* (1989) 212 Cal.App.3d 288.) There is good reason for this — a contrary rule would endanger children by chilling investigation of suspected child abuse:

> Should we hold a state or social worker acting within the scope of his or her employment is not absolutely immune from suits arising from the voluntary intervention to protect a child, we would indirectly eliminate the protection afforded to children. The state's interest in preventing child abuse will be diminished due to fear of retaliatory suits. The state and its social workers would not take the child into custody until the inflicted injuries could be 'recorded' to meet the 'objectively reasonable' test of qualified immunity or until they obtain a court order which ensures absolute immunity. Such a result negates the purpose of child protective services by postponing prevention of further abuse to avoid liability.

(*Id.* at p. 287.)

Leider's expansive view of Code of Civil Procedure section 526a would wreck this delicate balance by subjecting child protective agencies and their employees to section 526a suits for acting on child abuse claims later disproved. A family involved in a false claim could bring the section 526a suit defeated in *Jenkins* citing criminal statutes rather than common law torts. This in turn could lead to the very outcome — "diminished" abuse investigations "due to fear of retaliatory suits" —*Jenkins* sought to avoid. (*Jenkins, supra,* 212 Cal.App.3d at p. 287.)

Accordingly, rejection of Leider's theory not only protects the courts from involvement in policy disputes best addressed by the other branches, it also avoids the dangerous unintended consequences that will likely result if public officials are subject to criminal penalties for carrying out their public duties.

CONCLUSION

Leider seeks to impose on the City his view that elephants belong in sanctuaries, not zoos, by means of a judicial injunction. If this Court affirms his interpretation of Code of Civil Procedure section 526a, public agencies and officials throughout California will be threatened with quasi-criminal claims in courts of equity, but without prosecutorial discretion, trial by jury, or other protections our Constitution ensures criminal defendants. This approach undercuts prosecutorial discretion and control of the awesome power of indictment by one responsible to the people and overseen by a court. Prosecutorial discretion is particularly necessary in cases such as this, which contest fraught policy questions. Indeed, whether and how elephants should be kept in captivity is a political dispute best resolved by the political branches, not the courts; and certainly not based on a taxpayer claim that a public agency and its staff have violated the Penal Code.

For all these reasons, Amici urge this Court to grant the relief sought by the City and to conclude that taxpayer claims under Code

of Civil Procedure section 526a cannot enforce penal laws under Civil Code section 3369 and long-standing case law.

DATED: October 24 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(b) and 8.204(c), the foregoing Brief of Amicus Curiae in Support of Defendants and Appellants John R. Lewis and City of Los Angeles, contains 4,711 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000-word limit set by rules 8.520(b) and 8.204(c). In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

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PROOF OF SERVICE

Aaron Leider v. John Lewis, et al.
Supreme Court Case No. S232622
Court of Appeal, Second District, Division 8 Case No. B244414
Los Angeles County Superior Court Case No. BC375234

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. On October 25, 2016, I served the document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI LEAGUE OF CALIFORNIA CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANTS AND APPELLANTS JOHN LEWIS AND CITY OF LOS ANGELES** on the interested parties in this action addressed as follows:

SEE ATTACHED LIST

X **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Grass Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 25, 2016, at Grass Valley, California.

Ashley A. Lloyd

SERVICE LIST

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