E070634

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

DR. SANG-HOON AHN, et al.,
Plaintiffs and Respondents,

v.

MICHAEL HESTRIN, etc., et al.,
Defendants,

MATTHEW FAIRCHILD, JOAN NELSON, and DR. CATHERINE S. FOREST,
Movants and Appellants.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE, DEPARTMENT 4
CASE NO. RIC 1607135 • DANIEL A. OTTOLIA, JUDGE

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL Fourth APPELLATE DISTRICT, DIVISION Two	COURT OF APPEAL CASE NUMBER:
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APPELLANT/ PETITIONER: Matthew Fairchild, Joan Nelson, and Dr. Catherine S. Forest RESPONDENT/ REAL PARTY IN INTEREST: Dr. Sang-Hoon Ahn, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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[ ] Continued on attachment 2.

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Date: June 6, 2018

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INTRODUCTION

This appeal challenges the superior court's determination that the End of Life Option Act (Health & Saf. Code, § 443 et seq.) (the "EOLOA" or the "Act"), which was adopted during a special session of the Legislature, is void as beyond the scope of the special session and thus in violation of Article IV, section 3(b) of the California Constitution. The EOLOA authorizes the practice of medical aid-in-dying, in which mentally capable adults who have six months or less to live may obtain a doctor's prescription for aid-in-dying medication.

The superior court erred in determining that the EOLOA is beyond the special session's scope. The governor's proclamation calling the special session opened "the entire subject" of health care to legislation. (*Martin v. Riley* (1942) 20 Cal.2d 28, 39 (*Martin*).) The entire subject of health care includes "any care, treatment, service, or procedure" that "affect[s] an individual's physical or mental condition." (Prob. Code, § 4615.) Medical aid-in-dying under the EOLOA affects one's physical condition by "bring[ing] about his or her death due to a terminal disease" (Health & Saf. Code, § 443.1, subd. (b)) and by alleviating physical pain that the person might otherwise experience at the end of life. It affects one's mental condition by alleviating emotional distress prior to death.

The superior court erred by (1) failing to consider the entire subject of health care as including any care, treatment, service, or procedure that affects a patient's physical or mental condition, (2) wrongly restricting the proclamation's scope to legislation

specifically called out in the proclamation, and (3) failing to consider the governor's view that the EOLOA is within the scope of the proclamation.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Complaint and Intervention

The operative complaint in this action, filed on June 8, 2016, sought declaratory relief and an injunction enjoining defendant District Attorney Michael Hestrin "from recognizing any exceptions to the criminal law created by the Act in the exercise of his criminal enforcement duties." (Appellants' Appendix 21 (hereafter AA).) The State of California by and through the California Department of Public Health and the Attorney General of the State of California intervened in this action as defendants on June 27, 2016. (AA 29.)

B. The Motion for Judgment on the Pleadings

On February 9, 2018, plaintiffs filed a motion for judgment on the pleadings, asserting that the EOLOA "was passed by a special session of the Legislature in violation of Article IV §3(b) of [the] California Constitution because the Act is not encompassed by any 'reasonable construction' of the Proclamation granting the special session the authority to legislate." (AA 45.) The motion sought a judgment "permanently enjoining Defendant State of California from recognizing or enforcing the Act, and permanently enjoining

Defendant District Attorney Hestrin from recognizing any exceptions to the criminal law created by the Act in the exercise of his criminal enforcement duties." (*Ibid.*)

On May 15, 2018, at the hearing on the motion for judgment on the pleadings, the superior court ruled that the EOLOA "violates Article [IV], Section 3, of the California Constitution and is thus void as unconstitutional." (Reporter's Transcript [Motion for Judicial Notice filed June 15, 2018, Exh. A] 5 (hereafter RT).) The court stated that it would grant the motion for judgment on the pleadings without leave to amend but would "hold off" entering the order for five days to give the Attorney General time to file a writ petition in the Court of Appeal. (RT 11, 13.)

On May 21, 2018, the superior court entered the order granting judgment on the pleadings, stating "IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' Motion for Judgment on the Pleadings is GRANTED." (AA 70.) That same day, defendants State of California and the California Attorney General filed a writ petition in this court challenging the merits of the order granting judgment on the pleadings. (*People ex rel. Becerra v. Superior Court (Ahn)*, No. E070545; see AA 74.) On May 23, 2018, this court issued an order to show cause on the writ petition, giving real parties in interest 25 days to file a formal return and giving petitioners 15 more days to file a traverse. (AA 116.)

C. The Judgment

On May 24, 2018, the superior court entered its final judgment in this action. The judgment recites that the court granted judgment on the pleadings without leave to amend and that the court held the EOLOA "void as unconstitutional," and the court "permanently enjoined Defendant State of California from recognizing or enforcing the Act and permanently enjoined the District Attorney of Riverside County ('District Attorney') from recognizing any exceptions the act creates to existing criminal law in the exercise of the District Attorney's criminal enforcement duties." (AA 120.) The judgment concludes: "IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is ordered in favor of Plaintiffs and against Defendant-Intervenors Attorney General of the State of California and the California Department of Public Health." (*Ibid.*)

D. Appellants' Motion to Vacate the Judgment

On May 29, 2018, Joan Nelson, Dr. Catherine S. Forest, and Matthew Fairchild filed a motion to vacate the judgment pursuant to Code of Civil Procedure section 663. (AA 130.)

Ms. Nelson is dying of terminal leiomyosarcoma and has obtained a prescription for medical aid-in-dying. She received her aid-in-dying medication on May 17, 2018. The superior court's judgment caused her to be uncertain as to whether she could use the medication without adverse legal consequences from her death

being considered a suicide rather than caused by leiomyosarcoma. (AA 151.)

Dr. Forest is a Clinical Associate Professor of Family Medicine at UCSF Natividad in Salinas. In her practice, she treats terminally ill patients and has worked with patients who have sought a prescription for aid-in-dying medication. She wants to be able to offer medical aid-in-dying as an option to terminally ill patients consistent with the procedures afforded by the EOLOA. (AA 155.)

Mr. Fairchild is seriously ill with cancer but does not presently qualify for medical aid-in-dying because he has not received a six-month terminal diagnosis. He has been comforted by the fact that under the EOLOA he would have the option of taking aid-in-dying medication if his suffering became unbearable. (AA 159.)

On May 30, 2018, the superior court denied the motion to vacate the judgment. (AA 211.) As a result, Ms. Nelson, Dr. Forest, and Mr. Fairchild became parties of record to this action and have standing to appeal from the judgment. (*Cty. of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736-738.)

E. The Notice of Appeal

On June 1, 2018, Ms. Nelson, Dr. Forest, and Mr. Fairchild filed a timely notice of appeal from the order of May 21, 2018 to the

extent it grants an injunction (Code Civ. Proc., § 904.1, subd. (a)(6)), from the judgment of May 24, 2018 (Code Civ. Proc., §904.1, subd. (a)(1)), and from the order of May 30, 2018 denying the motion to vacate (Code Civ. Proc., § 904.1, subd. (a)(2)). (AA 213.)

F. This Court's Orders of June 15, 2018

On June 15, 2018, this court issued orders in the present appeal (E070634, order filed June 15, 2018) and in the writ proceeding (E070545, order filed June 15, 2018) granting an immediate stay of the superior court's orders of May 21 and 24, 2018, affording the appeal calendar preference, issuing a superseding order to show cause in the writ proceeding with a new 25-day/15-day briefing schedule, and stating that the appeal and writ petition will be considered together and set on the same oral argument calendar.

STATEMENT OF APPEALABILITY

The order of May 21, 2018 is appealable to the extent it grants an injunction. (Code Civ. Proc., § 904.1, subd. (a)(6).) The judgment of May 24, 2018 is appealable as a final judgment. (Code Civ. Proc., §904.1, subd. (a)(1).) The order of May 30, 2018 denying the motion to vacate is appealable as an order made after final judgment. (Code Civ. Proc., § 904.1, subd. (a)(2).)

LEGAL DISCUSSION

I. THE SUPERIOR COURT ERRED IN DETERMINING THAT THE EOLOA IS BEYOND THE SCOPE OF THE LEGISLATURE'S SPECIAL SESSION

A. The Governor's Proclamation Opened "the Entire Subject" of Health Care to Legislation

In *Martin, supra,* 20 Cal.2d 28, the California Supreme Court, citing cases from various other states, prescribed rules governing the determination whether legislation is within the scope of a special legislative session. (See Cal. Const., art. IV, § 3(b) [when assembled in special session, the Legislature "has the power to legislate only on subjects specified in the [governor's] proclamation" calling the special session].)

The overarching principle is that the governor's proclamation calling the special session opens "the entire subject" of the proclamation to legislation. (*Martin, supra,* 20 Cal.2d at p. 39, citing *Baldwin v. State* (1886) 21 Tex.App. 591, 593 [3 S.W. 109] (*Baldwin*).) The Legislature may enact "any appropriate legislation within that field." (*Martin, supra,* at pp. 40-41.)

Within this overarching principle are several corollaries:

- "The same presumptions in favor of the constitutionality of an act passed at a regular session apply to acts passed at a special session." (*Martin, supra,* 20 Cal.2d at p. 39.)

- The Legislature's power to legislate during a special session is "'practically absolute.'" (*Ibid.,* quoting *Baldwin, supra,* 21 Tex.App. at p. 593.)

- Any instructions in the governor's proclamation on specific legislation to be considered are "advisory or recommendatory only and not binding on the Legislature." (*Ibid.*, citing *People v. District Court* (1896) 23 Colo. 150, 152 [46 P. 681] ["Such specific instructions can, at best, be regarded as advisory only and not as limiting the character of legislation that might be had upon the general subject"].)

- The language of the proclamation "should not be considered in a narrow sense." (*Id.* at p. 40.) The law "will be held to be constitutional if by any reasonable construction of the language of the proclamation it can be said that the subject of legislation is embraced therein." (*Ibid.*)

- When legislation passed during a special session "'receive[s] the approval of the executive,'" courts should "'be reluctant to hold that such action is not embraced in'" the governor's proclamation and "'will not so declare unless the subject manifestly and clearly is not embraced therein.'" (*Id.* at pp. 39-40, quoting *Long v. State* (1910) 58 Tex.Crim. 209, 212 [127 S.W. 208].)

Thus, for example, in *Baldwin, supra,* 21 Tex.App. 591, where the governor's proclamation called a special legislative session for the purposes of *reducing* certain ad valorem and occupation taxes, it was within the scope of the proclamation for the Legislature to *levy new taxes* upon property and occupations not previously taxed, because the proclamation "embrace[d] the *whole subject of taxation*, and authorize[d] any and all such legislation upon that subject as may be deemed necessary by the legislature." (*Id.* at p. 593, emphasis added.)

In *Sturgeon v. Cty. of Los Angeles* (2010) 191 Cal.App.4th 344, the proclamation's stated purpose was "'[t]o consider and act upon legislation to address the economy, including but not limited to efforts to stimulate California's economy, create and retain jobs, and streamline the operations of state and local governments.'" (*Id.* at p. 349.) The Court of Appeal held it was within the scope of the proclamation for the Legislature to enact legislation requiring counties to continue providing sitting judges with certain compensation. (*Id.* at p. 352.) The court did *not* require that the legislation actually "streamlined" government operations in some way. To the contrary, the court explained: "Whether the legislation in fact streamlined those operations is not of concern to us." (*Id.* at p. 352.) All that mattered was that the legislation "manifestly dealt with the *operations* of superior courts, their relationship with the county governments where they are located and the Legislature's duty to prescribe judicial compensation"—which meant the legislation "was squarely within the area of state and local government operations and hence within the scope of the Governor's proclamation." (*Ibid*, emphasis added.) Thus, although the proclamation specified the purpose to *streamline* the operations of state and local governments, *the entire subject* of the proclamation was *government operations generally*, and thus the Legislature could enact legislation within that subject even if the legislation *did not streamline* government operations.

In the present case, a stated general purpose of the governor's proclamation was for the Legislature "[t]o consider and act upon legislation necessary to . . . [i]mprove the efficiency and efficacy of

the *health care system*, reduce the cost of providing *health care services*, and improve the *health* of Californians." (AA 23, emphasis added.) Thus, the proclamation's "entire subject" (*Martin, supra,* 20 Cal.2d at p. 39) encompasses *health care*, and the salient question is whether medical aid-in-dying under the EOLOA is within the scope of health care.

B. The Entire Subject of Health Care Includes "Any Care, Treatment, Service, or Procedure" That "Affect[s] an Individual's Physical or Mental Condition"

In determining whether the phrase "health care" in the governor's proclamation includes medical aid-in-dying under the EOLOA, this court should indulge "any reasonable construction" that brings the EOLOA within the subject of health care. (*Martin, supra,* 20 Cal.2d at pp. 40-41.) Such a construction appears elsewhere in California law, in the Health Care Decisions Law (Prob. Code, § 4600 et seq.) (HCDL), which addresses a subject that is similar to medical aid-in-dying—the right to end one's own life by refusing life-sustaining medical treatment.

Specifically, the HCDL defines health care as "any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental condition." (Prob. Code, § 4615.) A subset of this definition is any care, treatment, service, or procedure that *affects a patient's physical or mental condition.*

If, for purposes, of the HCDL, the Legislature saw fit to define "health care" so broadly as to include any care, treatment, service, or procedure that *affects a patient's physical or mental condition*, then surely that is a "reasonable construction." (*Martin, supra,* 20 Cal.2d at p. 41.) Necessarily, therefore, it is reasonable to so construe the phrase "health care" in the governor's proclamation.

C. Medical Aid-in-Dying Affects One's Physical Condition by Bringing About a Painless Death, and it Affects One's Mental Condition by Alleviating Emotional Distress Prior to Death

Plainly, medical aid-in-dying under the EOLOA affects a patient's physical condition. It does so by allowing a terminally ill person to self-administer aid-in-dying medication and thereby "bring about his or her death due to a terminal disease." (Health & Saf. Code, § 443.1, subd. (b).) It also alleviates physical pain that the person might otherwise experience at the end of life.

Equally plainly, medical aid-in-dying under the EOLOA affects a patient's mental condition, by alleviating emotional distress at the end of life. The EOLOA serves to alleviate such distress by giving mentally capable, terminally ill adults the option of requesting a doctor's prescription for end-of-life medication, which they can decide for themselves whether to take in order to die peacefully in their sleep if their end-of-life suffering becomes unbearable. Under the EOLOA, patients who qualify for medical aid-in-dying can take comfort in knowing that this option is

available to them, even if they never use it. And those who choose to use it can ensure that they die a peaceful death.

Even the governor, in his signing message for the EOLOA, expressed certainty that for terminally ill Californians who are at risk of "dying in prolonged and excruciating pain," "it would be a comfort to be able to consider the options afforded by this bill." (AA 82.) Such "comfort" is a powerful salve for emotional distress at the end of life.

D. The Superior Court Erred by Failing to Consider the Proclamation's Entire Subject, by Wrongly Restricting its Scope to the Specific Legislation it Recommended, and by Failing to Consider the Governor's View That It Encompassed the EOLOA

The governor's proclamation calling the special legislative session stated that a general purpose of the special session was to "[i]mprove the efficiency and efficacy of the health care system, reduce the cost of providing health care services, and improve the health of Californians." (AA 23.) The proclamation also specified that legislation was "necessary to enact permanent and sustainable funding from a new managed care organization tax and/or alternative fund sources to provide sufficient funding to "stabilize the General Fund's costs for Medi-Cal," "continue the 7 percent restoration of In-Home Supportive Services hours beyond 2015-16," and "provide additional rate increases for providers of Medi-Cal and developmental disability services." (AA 22.)

The superior court reasoned that the EOLOA was not within the scope of the proclamation because "[g]iving terminally ill patients the right to request aid-in-dying prescription medication and decriminalizing assisted suicide for doctors prescribing such medication have nothing to do with healthcare funding for Medi-Cal patients, the developmentally disabled, or in-home supportive services, and does not fall within the scope of access to healthcare services, improving the efficiency and efficacy of the healthcare system, or improving the health of Californians." (RT 4.) This reasoning is fundamentally flawed in three respects.

First, in addressing the proclamation's "entire subject" (*Martin, supra*, 20 Cal.2d at p. 39), the superior court failed to consider the definition of health care as including any care, treatment, service, or procedure that affects a patient's physical or mental condition. That definition is a reasonable construction of the phrase "health care" in the governor's proclamation, which means medical aid-in-dying under the EOLOA—which plainly affects one's physical or mental condition—is within the scope of the proclamation's entire subject. The superior court contravened the rule against construing the language of the proclamation "in a narrow sense." (*Id.* at p. 40.)

Second, the superior court erred in restricting the proclamation's scope to legislation addressing "funding for Medi-Cal patients, the developmentally disabled, or in-home supportive services . . . ." (RT 4.) This reasoning arises from the proclamation's specification of a need for legislative funding "to stabilize the General Fund's costs for Medi-Cal," "to continue the 7

percent restoration of In-Home Supportive Services hours beyond 2015-16," and "to provide additional rate increases for providers of Medi-Cal and developmental disability services." (AA 22.) The law is clear that such instructions are "advisory or recommendatory only and not binding on the Legislature." (*Martin, supra,* 20 Cal.2d at p. 39.) As a Texas appellate court explained a century ago: "The designation by the Governor of particular laws [is] not binding upon the Legislature. It [is] but suggestive of the views of the Governor relating to means of accomplishing the purpose for which the Legislature was called in special session." (*Ex parte Davis* (1919) 86 Tex.Crim. 168, 174 [215 S.W. 341] (*Davis*).) Thus, in the present case, the proclamation's specific instructions on the need for legislative funding did not prevent the Legislature from enacting *other* legislation within the entire subject of health care—such as the EOLOA.

Courts "presume that the Legislature understands the constitutional limits on its power and intends that legislation respect those limits." (*Kraus v. Trinity Mgmt. Servs., Inc.* (2000) 23 Cal.4th 116, 129.) Here, that presumption is borne out by the fact that the Assembly explicitly determined the EOLOA to be within the scope of the governor's proclamation as pertaining to health care despite the proclamation's specification of funding needs. During the special session, Assembly Member James Gallagher objected that the EOLOA was not properly before the special session. (AA 168 [Assembly Floor Hearing of 09-09-2015, at https://ca.digitaldemocracy.org/hearing/562?startTime=679&vid=DgVvXUz7n-U [as of June 13, 2018]].) Speaker Pro Tempore Kevin

Mullin responded that the EOLOA is "germane to health care." (*Ibid.*) Gallagher called for a vote on this "point of order," arguing: "This extraordinary session was called for the specific purpose of finding funding for MediCal, and other healthcare issues for the developmentally disabled. This bill is not consistent with the subject of this extraordinary session." (*Ibid.*) The Assembly, however, determined on a vote of 41 to 28 that the EOLOA *was* properly before the special session. (*Id.* at p. 169.) The Assembly well understood that the EOLOA was within the scope of the power to legislate in special session despite the proclamation's specific mention of funding needs.

Third, the superior court failed to consider the fact that the governor signed the EOLOA instead of vetoing it. When the governor signs legislation passed during a special session instead of vetoing the legislation, courts should "'be reluctant to hold that such action is not embraced in'" the proclamation calling the special session. (*Martin, supra,* 20 Cal.2d at p. 40.) By signing the EOLOA instead of vetoing it, the governor signaled that he considered the EOLOA to be within the scope of his proclamation. (*Id.* at p. 42 (conc. opn. of Carter, J.) ["since the Governor could have included such subjects in his proclamation, and he having approved the legislation by signing the bill embracing such subjects, I am forced to conclude that he considered his proclamation sufficiently broad to cover the subjects embraced in the bill"]; see generally *Davis, supra,* 86 Tex.Crim. at p. 174 ["The session having been called by [the governor] to deal with the subject embraced in his message, the discretion within the scope of the limits of the Constitution was

with the Legislature and beyond the control of the executive save in his exercise of the power to veto."].)

II. THIS COURT SHOULD REVERSE THE ORDER OF MAY 21, 2018, THE JUDGMENT OF MAY 24, 2018, AND THE ORDER OF MAY 30, 2018

The procedural posture of this appeal is peculiar in the following respects:

- The superior court's order of May 21, 2018 granting judgment on the pleadings does not expressly state that an injunction is granted (AA 66-67), yet the superior court's judgment of May 24, 2018 states that the court "permanently enjoined Defendant State of California" and "permanently enjoined the District Attorney of Riverside County" (AA 120).

- The superior court's judgment of May 24, 2018 states that "judgment is ordered in favor of Plaintiffs and against Defendant-Intervenors Attorney General of the State of California and the California Department of Public Health" (AA 120), but does not include any judgment as to District Attorney Hestrin.

It is evident from the language of the judgment that the superior court viewed its previous order granting judgment on the pleadings as implicitly granting injunctive relief, and that the court simply committed an oversight in omitting District Attorney Hestrin from the judgment. The result is that the order of May 21, 2018 is appealable to the extent it grants an injunction (Code Civ. Proc., § 904.1, subd. (a)(6)), and the judgment of May 24, 2018 is appealable because it is final as to the State of California by and

through the California Department of Public Health and as to the Attorney General of the State of California (Code Civ. Proc., § 904.1, subd. (a)(1); see *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437 [appeal lies from judgment that is final as to a party]).

On this appeal, therefore, the appropriate disposition is for this court to (1) reverse the order of May 21, 2018 to the extent it grants an injunction, (2) reverse the judgment of May 24, 2018, and (3) reverse the order of May 30, 2018 denying appellants' motion to vacate the judgment.

CONCLUSION

For the foregoing reasons, this court should reverse the appealed judgment and orders.

June 18, 2018

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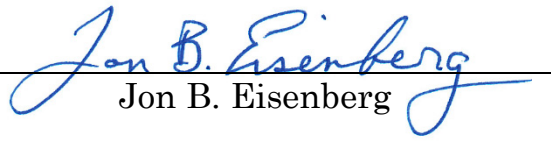
By: 
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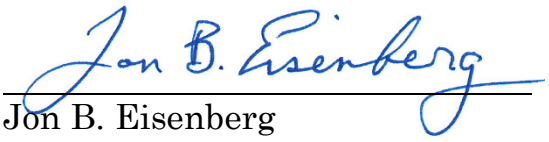
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 3,868 words as counted by the Microsoft Word version 2010 word processing program used to generate the petition.

Dated: June 18, 2018



Jon B. Eisenberg

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 610 Newport Center Drive, 17th Floor, Newport Beach, California 92660.

On June 18, 2018, I served true copies of the following document(s) described as **(1) APPELLANTS' OPENING BRIEF**; and **(2) APPELLANTS' APPENDIX (Volume 1 of 1, pp. 001-276)**.
on the interested parties in this action as follows:

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STATE OF CALIFORNIA
Court of Appeal, Fourth Appellate District Division 2

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Case Name: **Sang-Hoon Ahn et al. v. Michael Hestrin, as District Attorney, etc. et al.; Matthew Fairchild et al.**
Court of Appeal Case Number: **E070634**
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Date

/s/John Kappos

Signature

Kappos, John (171977)

Last Name, First Name (PNum)

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