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IN THE SUPREME COURT OF CALIFORNIA

XAVIER BECERRA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA and CALIFORNIA DEPARTMENT OF PUBLIC HEALTH,
Petitioners,

v.

SUPERIOR COURT OF RIVERSIDE COUNTY,
Respondent,

Dr. SANG-HOON AHN, et al.,
Real Parties in Interest,

MATTHEW FAIRCHILD and DR. CATHERINE S. FOREST,
Real Parties in Interest.

REVIEW OF A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO, CASE NO. E070545
RIVERSIDE SUPERIOR COURT CASE NO. RIC 1607135

ANSWER TO PETITION FOR REVIEW

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ADDITIONAL ISSUE PRESENTED

Is California's law of standing prudential rather than jurisdictional, so that a court may decide an issue of public interest without adjudicating standing?

INTRODUCTION

The End of Life Option Act (Health & Saf. Code, § 443 et seq.) (the "EOLOA" or the "Act"), which was adopted as of 2016 during a special session of the Legislature, 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 in the present case determined that the EOLOA is void as beyond the scope of the special session in which it was adopted and thus in violation of article IV, section 3(b) of the California Constitution.

The Court of Appeal, in a 2-1 decision on a prejudgment writ petition, deferred resolution of the constitutional issue and remanded the case to the superior court for further litigation to demonstrate the plaintiffs' standing to challenge the EOLOA. The majority opinion held that California's law of standing is jurisdictional, so that the court lacked power to adjudicate the constitutional issue absent the demonstration of standing. A concurring and dissenting opinion disagreed, concluding that California's law of standing is *not* jurisdictional—so that even absent standing the Court of Appeal may decide a matter of public

interest—and that the EOLOA is within the scope of the special legislative session.

The case law on the question of jurisdiction is in disarray, with conflicting cases supporting both positions taken in the Court of Appeal. Review is necessary to resolve the decisional conflict and "secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).) Thus, if review is granted on this petition for review to adjudicate the constitutional issue, the Court should also adjudicate the additional question of whether California's law of standing is prudential rather than jurisdictional, so that the Court may decide the constitutional issue—which plainly is a matter of public interest—without adjudicating standing.[1]

A related petition for review filed simultaneously with this answer brief also seeks this Court's review of an order involuntarily dismissing an appeal from the judgment in this action.

BACKGROUND

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

[1] Review as to whether plaintiffs have standing is not necessary, because the public importance of the constitutional issue makes it unnecessary to adjudicate standing.

enforcement duties." (Exh. 3, p. 27.)[2] 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. (Exh. 4, p. 34.)

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." (Exh. 10, p. 188.) 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." (Exh. 16, p. 403.) 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

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[2] The exhibits to the writ petition in the Court of Appeal were mistitled "Appellant's Appendix." This answer brief will cite them as "Exh. __, p. __."

the Attorney General time to file a writ petition in the Court of Appeal. (Exh. 16, pp. 408, 410.)

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." (Exh. 17, p. 416.)

C. The Present Writ Petition and the Supersedeas Orders

That same day, defendants State of California and the California Attorney General filed a writ petition in the Court of Appeal challenging the merits of the order granting judgment on the pleadings. (No. E070634, Appellants' Appendix 74 (hereafter "AA").)[3] On May 23, 2018, the Court of Appeal issued an order to show cause on the writ petition. (AA 116.) On June 15, 2018, the Court of Appeal granted an immediate stay of the superior court's orders of May 21 and 24, 2018.

D. The Judgment

On May 24, 2018, the superior court entered its final judgment. The judgment recites that the court granted judgment

[3] Some of the documents cited in this answer brief appear in the appellants' appendix for the related appeal from the superior court judgment (No. E070634) and are cited herein by reference to that appendix.

on the pleadings without leave to amend and that the court held the EOLOA "void as unconstitutional." (AA 120.) The judgment also recites that 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." (*Ibid.*) 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.*)

E. The Motion to Vacate the Judgment

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

Mr. Fairchild is seriously ill with cancer but does not presently qualify for medical aid-in-dying because he has not received a prognosis of six months or less to live. 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.)

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.)

At the time the motion to vacate was filed, Ms. Nelson was dying of terminal leiomyosarcoma. She had obtained a prescription for medical aid-in-dying and received her aid-in-dying medication on May 17, 2018. (AA 151.) She ingested her aid-in-dying medication and died on October 31, 2018.

On May 30, 2018, the superior court denied the motion to vacate the judgment. (AA 211.) As a result, Mr. Fairchild, Ms. Nelson, and Dr. Forest became parties of record to this action and gained standing to appeal from the judgment. (*Cty. of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736-738.) Further, as parties of record, they have an interest that is directly affected by the present writ proceeding, and thus they have standing to appear in this proceeding as real parties in interest. (*Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1132 ["A person or entity whose interest will be directly affected by writ proceedings has standing to appear in a writ matter"]; *Simpson v. Superior Court* (2001) 92 Cal.App.4th Supp. 1, 5 ["The real party in interest is not necessarily the opposing party, but need only have an interest that "'will be directly affected by writ proceedings"'].) Although they were not named in the caption for the writ petition, by appearing in the writ proceeding through the filing of a return they consented to

appellate jurisdiction. (See *Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1296-1297.)[4]

F. The Fairchild Appeal

On June 1, 2018, Mr. Fairchild, Dr. Forest, and Ms. Nelson filed a timely notice of appeal (hereafter "the Fairchild appeal") from the order of May 21, 2018, to the extent it granted 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)) (No. E070634). (AA 213.)[5]

G. The Court of Appeal's Decision in the Present Writ Proceeding

On November 27, 2018, the Court of Appeal issued a 2-1 decision in the present writ proceeding (No. E070545), in which the court granted a writ of mandate directing the superior court to vacate its order granting judgment on the pleadings and to vacate the judgment. The majority opinion, by Presiding Justice Manuel A. Ramirez (with Justice Richard T. Fields separately concurring),

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[4] The Court of Appeal determined that they became parties to the writ proceeding "by appearing and participating without any objection by the other parties." (Opn. 9.)

[5] The California Department of Public Health and the Attorney General filed a separate notice of appeal on July 23, 2018 (No. E070969).

was based on lack of standing and did not adjudicate the constitutional challenge to the EOLOA, while expressly conceding "[i]t is possible" that on remand the plaintiffs will be able to allege and demonstrate standing and thus litigate the constitutional challenge. (Opn. 27.) A concurring and dissenting opinion, by Justice Marsha G. Slough, disagreed with the majority on standing, stated that the Court of Appeal had discretion to decide the constitutional issue without adjudicating standing, and concluded that the EOLOA is within the scope of the special legislative session in which it was enacted.

H. The Court of Appeal's Order Dismissing the Fairchild Appeal

On December 14, 2018—just 17 days after the Court of Appeal's decision in the present writ proceeding, and thus prior to its finality—Presiding Justice Ramirez issued a one-sentence order dismissing the Fairchild appeal as purportedly moot in light of the decision in the writ proceeding.[6] The petition for review filed simultaneously with this answer brief (see *ante*, p. 9) seeks this Court's review of the dismissal order.

[6] The order likewise dismissed the appeal filed by the California Department of Public Health and the Attorney General.

LEGAL DISCUSSION

I. THE EOLOA IS WITHIN THE SCOPE OF THE SPECIAL LEGISLATIVE SESSION IN WHICH IT WAS ENACTED

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

In *Martin v. Riley* (1942) 20 Cal.2d 28 (*Martin*), this Court, citing cases from various other states, prescribed rules governing the determination of 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 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." (Exh. 1, pp. 8-9, 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. It plainly is.

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 pp. 40-41.) 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 Before 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 (thus alleviating emotional distress), 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 a 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." (Governor's message to Assem. on Assem. Bill No. Abx2-15 (Oct. 5, 2015); see 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." (Exh. 1, p. 9.) The proclamation also specified, by way of non-limiting recommendatory statements of purpose, 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," "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." (Exh. 1, p. 8.)

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." (Exh. 16, p. 402.) 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 thus 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 . . . ." (Exh. 16, p. 402.) 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." (Exh. 1, p. 8.) 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 Jan. 23, 2019]].) 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.

Judicial deference is to be afforded the Assembly's determination that the EOLOA was within the scope of the governor's proclamation. "[E]xtensive latitude or wide range will be conceded to the legislature in deciding what comes within the purview of the call." (*Pope v. Oliver* (1938) 196 Ark. 394 [117 S.W.2d 1072, 1075; see also *Arkansas State Highway Comm'n v. Dodge* (1932) 186 Ark. 640 [55 S.W.2d 71, 73] ["We must therefore, under well-settled rules, where the question is doubtful, place the same interpretation on the call as the Legislature"], overruled on another point in *Arkansas State Highway Comm'n v. Nelson Bros.* (1935) 191 Ark. 629 [87 S.W.2d 394, 397].)

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."].)

E. The Scope of the Governor's Proclamation Calling the Special Session is Defined by its Subject, Not by a Statement of its Purpose

A fundamental misconception permeated plaintiffs' briefing in the Court of Appeal—that the scope of the governor's proclamation calling the special legislative session is defined by a statement of its *purpose*. But article IV, section 3(b) of the California Constitution makes clear that the proclamation's *subject*, not a statement of its purpose, defines its scope. As this Court explained in *Martin, supra,* 20 Cal.2d at page 39, the proclamation opens "the entire

subject" of the proclamation to legislation. This focus is expressly set forth in the California Constitution itself, which states that when convened in special session the Legislature has power to legislate on "*subjects* specified in the proclamation." (Cal. Const. art. IV, § 3(b), emphasis added.)

The proclamation at issue here specified several "purposes" (Exh. 1, p. 8), but that was just a vestige of a defunct constitutional requirement that a special session proclamation include a statement of its purpose. The California Constitution of 1879 provided that the governor "may, on extraordinary occasions, convene the Legislature by proclamation, *stating the purposes for which he has convened it*, and when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation . . . ." (Cal. Const., former art. V, § 9 [Stats. 1880, p. xxix], emphasis added.) The current version of this provision, adopted in 1966, omits the requirement of a statement of the proclamation's purpose, while retaining the provision affording the power to legislate on *subjects* specified in the proclamation. (Cal. Const., art. IV, § 3(b) ["When so assembled [the Legislature] has power to legislate only on subjects specified in the proclamation"].)

In the present case, the governor—evidently bowing to tradition—included a statement of purpose in his proclamation, even though he was not required to do so. But the proclamation's scope is—and always has been—defined by the proclamation's "subject," not by a statement of its purpose. (*Martin, supra,* 20 Cal.2d at p. 39.) This was true under the 1879 Constitution, which

included the requirement of a statement of purpose, and it remains true under the 1966 Constitution, which omits that requirement.

Thus, even if it were true that the proclamation convened the Legislature for the purpose of securing funding for certain enumerated programs, that would not have restricted the Legislature to funding those programs. The defining feature of the proclamation is its "entire subject" (*Martin, supra,* 20 Cal.2d at p. 39), not a statement of its purpose.

Moreover, it is not true that the only stated purpose of the proclamation was for the Legislature to fund the specific programs the proclamation mentioned. The proclamation set forth multiple "purposes" (Exh. 1, p. 8), one of which was "[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." (Exh. 1, p. 9.) Thus, the proclamation's stated purposes embraced legislation pertaining to improvement of the health care system for—and the health of—*all* Californians, not just the persons served by the enumerated programs.

F. The Proclamation is Subject to the "Any Reasonable Construction" Standard Set Forth in *Martin*, Not to the Rules of Statutory Construction

Plaintiffs contended below that the usual rules of statutory construction apply here. Plaintiffs are wrong. The rules of statutory construction are used to resolve *ambiguity* in *legislation*.

The governor's proclamation is not legislation and there is no ambiguity to resolve. Thus, neither predicate exists here.

The rules of statutory construction apply—obviously—to *statutes*. They also apply to acts that are *quasi-legislative*—such as administrative regulations and executive orders—in the sense of having "'the force and effect of law.'" (*U.S. v. Demerritt* (2d Cir. 1999) 196 F.3d 138, 141 [rules of statutory construction govern interpretation of federal sentencing guidelines because they have the force and effect of law]; see generally *Soap and Detergent Ass'n v. Natural Resources Com'n* (1982) 415 Mich. 728, 756-757 [330 N.W.2d 346] ["The use of the same rules of construction for both statutes and executive orders or administrative regulations is not illogical because executive orders and administrative regulations are both quasi-legislative in nature"].)

But a governor's proclamation calling a special legislative session does not have the force and effect of law—and thus it does not implicate the rules of statutory construction—because it does not operate on all persons in all future cases. (*Am. Fed'n of Labor v. Eu* (1984) 36 Cal.3d 687, 709 [definition of "law" as "'those legislative actions which operate on all persons in society, and must be enforced by the executive department, and sustained by the judiciary'"]; *S. Cal. Cement Masons Joint Apprenticeship Comm. v. Cal. Apprenticeship Council* (2013) 213 Cal.App.4th 1531, 1541 [definition of quasi-legislative decisions as those involving "the formulation of a rule to be applied to all future cases" (internal quotation marks omitted)].) The proclamation merely calls a special session. It is neither legislative nor quasi-legislative.

The significance of this distinction lies in the judicial treatment of textual ambiguity. Where a statute, a regulation, or an executive order is ambiguous, courts use the rules of statutory construction to resolve the ambiguity one way or another. (See, e.g., *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 55; *Casteneda v. Holcomb* (1981) 114 Cal.App.3d 939, 942.) In contrast, for a proclamation calling a special legislative session, there is no need to resolve ambiguity, because of the rule—applied uniquely to special session legislation—that the legislation will be upheld unless it "'manifestly and clearly is not embraced'" by the proclamation. (*Martin, supra,* 20 Cal.2d at p. 40.) Where there is merely ambiguity as to the proclamation's scope, it is neither manifest nor clear that the proclamation does not embrace the ensuing legislation. Thus, the legislation must be upheld if, "by any reasonable construction of the language of the proclamation it can be said that the subject of legislation is embraced therein." (*Ibid.*)

The applicable rule of construction here is to give the proclamation any reasonable interpretation that brings the EOLOA within the entire subject of the proclamation. Any textual ambiguity only serves to uphold the EOLOA. The rules of statutory construction—which are used to resolve textual ambiguity one way or another—are irrelevant.

II. BECAUSE CALIFORNIA'S LAW OF STANDING IS PRUDENTIAL RATHER THAN JURISDICTIONAL, A COURT MAY DECIDE A MATTER OF PUBLIC INTEREST WITHOUT ADJUDICATING STANDING

The majority opinion in the present writ proceeding declined to adjudicate the constitutional challenge to the EOLOA on the ground that, purportedly, California's law of standing is jurisdictional and has no public interest exception. (Opn. 12-18.) Justice Slough opined that California's law of standing is *not* jurisdictional and *does* have a public interest exception. (Conc. & dis. opn. 30-47.) The existing decisional law is in disarray, with conflicting cases supporting both positions. Review on this point is thus "necessary to secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).)[7]

At the outset, it is essential to distinguish between federal constitutional standing and prudential standing. "Article III of the [United States] Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" (*Valley Forge Christian College v. Americans United* (1982) 454 U.S. 464, 471 (*Valley Forge*).) This federal constitutional standing requirement is a jurisdictional constraint. (*Singleton v. Wulff* (1976) 428 U.S. 106, 112 (*Singleton*).)

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[7] Because it is unnecessary to decide the issue whether plaintiffs have standing, this answer brief does not take a position on that issue.

Additionally, the federal courts have crafted "a set of prudential principles that bear on the question of standing," which generally prohibit plaintiffs from asserting the legal rights and interests of third parties. (*Valley Forge, supra,* 454 U.S. at p. 474.) The federal rule of prudential standing is *not* jurisdictional. (*Glassdoor, Inc. v. Superior Court* (2017) 9 Cal.App.5th 623, 631.) It is "merely a factor to be balanced in the weighing of so-called 'prudential' considerations," whereas the rule of federal constitutional standing "states a limitation on federal power." (*Valley Forge, supra,* 454 U.S. at p. 475.) The rule of prudential standing "should not be applied where its underlying justifications are absent." (*Singleton, supra,* 428 U.S. at p. 114.)

The California Constitution contains no such jurisdictional standing requirement. As this Court recently stated in *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-1249 (*Weatherford*), "our state Constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine." (Accord, *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117, fn. 13; *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 990.)

Thus, the California state courts are guided only by prudential considerations when assessing standing. (*Bilafer v. Bilafer* (2008) 161 Cal.App.4th 363, 370.) As this Court explained in *Weatherford*, California's "standing jurisprudence" reflects only "a sensitivity to broader prudential and separation of powers considerations." (*Weatherford, supra,* 2 Cal.5th at p. 1248.)

Weatherford would seem to make clear that California's prudential standing jurisprudence, like the federal rule of prudential standing, is not jurisdictional. Yet this Court previously stated in *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 438, that "contentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding." (Accord, *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233; *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1592 ["A 'lack of standing' is a jurisdictional defect"].)

Weatherford and *Common Cause* are in conflict as to whether California's rule of prudential standing is jurisdictional. If review is granted on this petition, the Court should resolve the conflict. The issue is critical in the present case because if California's rule of prudential standing is not jurisdictional, then this Court may decide the constitutionality of the EOLOA on this petition—or, alternatively, may grant review and transfer the case to the Court of Appeal with directions to decide the EOLOA's constitutionality. (Cal. Rules of Court, rule 8.528(d).)

Scrutiny of the cases cited in *Common Cause* demonstrates that *Common Cause* got it wrong and *Weatherford* got it right. *Common Cause* cited *McKinny v. Bd. of Trustees* (1982) 31 Cal.3d 79, 90 (*McKinny*) and *Horn v. Cty. of Ventura* (1979) 24 Cal.3d 605, 619 (*Horn*) for the proposition that state court standing challenges are jurisdictional. (*Common Cause, supra,* 49 Cal.3d at pp. 438-439.) But those cases said nothing of the sort.

McKinny and *Horn* addressed Code of Civil Procedure section 430.80, subdivision (a), which provides that an objection to a pleading, by either demurrer or answer, is waived "unless it is an objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading or an objection that the pleading does not state facts sufficient to constitute a cause of action." *McKinny* held that "a plaintiff who lacks standing *cannot state a valid cause of action*," and thus "a contention based on a plaintiff's lack of standing cannot be waived under Code of Civil Procedure section 430.80 and may be raised at any time in the proceeding." (*McKinny, supra,* 31 Cal.3d at p. 90, emphasis added.) *Horn* simply cited section 430.80 for the proposition that a challenge to standing "may be raised for the first time on appeal." (*Horn, supra,* 24 Cal.3d at p. 619.) Both cases cited *Parker v. Bowron* (1953) 40 Cal.2d 344, 351, which held that an objection that a complaint *fails to state a cause of action* "is not waived by failure to raise it by demurrer or answer, and may be raised at any point in the proceedings."

Thus, *McKinny* and *Horn* applied the portion of section 430.80, subdivision (a), stating that a challenge to a pleading cannot be waived if it is "an objection that the pleading does not state facts sufficient to constitute a cause of action." Those cases did *not* apply the portion of section 430.80, subdivision (a), stating that a challenge to a pleading cannot be waived if it is "an objection that the court has no jurisdiction." They held only that a standing challenge cannot be waived because a plaintiff who lacks standing *cannot state a valid cause of action*. Neither case stands for the

proposition that standing is a jurisdictional requirement. The *Common Cause* opinion overlooked this nuanced distinction.

The absence of a jurisdictional component to California's rule of prudential standing opens the door to a public interest exception—that is, a decisional rule that the California state courts may decide an issue of public interest without adjudicating standing. As Justice Slough correctly observed, both this Court and the Courts of Appeal have occasionally done so. (See, e.g., *Collier v. Lindley* (1928) 203 Cal. 641, 645; *Hayward Area Planning Assn. v. Alameda Cty. Trans. Authority* (1999) 72 Cal.App.4th 95, 104; *Cal. Water & Tel. Co. v. Los Angeles* (1967) 253 Cal.App.2d 16, 26.) Witkin explains: "The refusal to decide a case lacking in actual controversy is usually regarded as an exercise of discretion. . . . Hence, a court will occasionally depart from its practice in order to decide a matter of public interest." (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 29, p. 95, citation omitted.)

CONCLUSION

For the foregoing reasons, if the Court grants this petition for review, the grant of review should include the additional issue presented in this answer brief.

January 23, 2019

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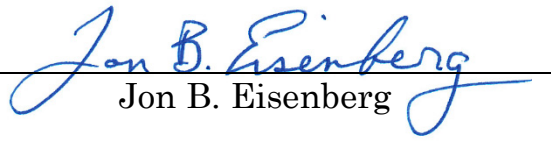
By: 
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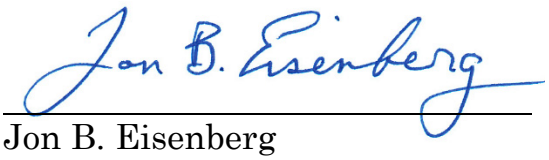
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 6,391 words as counted by the Microsoft Word version 2010 word processing program used to generate the petition.

Dated: January 23, 2019



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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 January 23, 2019, I served true copies of the following document(s) described as **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

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BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

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

Executed on January 23, 2019, at Newport Beach, California.

Kristin Godfrey

SERVICE LIST

The People, ex rel. Xavier Becerra as Attorney General etc. v. The Superior Court; Sang-Hoon Ahn et al.; Fairchild et al.

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