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Supreme Court No. _____
Court of Appeal No. 2d Civ. Case No. B330202
Superior Court No. Case No. 22SMCV00736

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CHARLES COHEN, ET AL.,
Defendants and Petitioners,
vs.
THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
Respondent.

THOMAS SCHWARTZ, INDIVIDUALLY AND AS TRUSTEE
OF THE THOMAS M. SCHWARTZ TRUST DATED MAY 27, 2010, ET AL.,
Real Parties in Interest.

From the Superior Court for Los Angeles County, Case No. 22SMCV00736
Hon. Lisa Sepe-Wiesenfeld, Judge

PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, OVERTURNING, VIA WRIT, *RILEY V. HILTON HOTELS CORP*. **(2002) 100 Cal.App. 4th 599**

Keith J. Turner [SBN 152685]
Justin Escano [SBN 311703]
TURNER LAW FIRM, APC
11878 La Grange Ave., Second Floor
Los Angeles, California 90025
Phone: 310.454.6190 | Fax: 310.882.5563
Email: kjt@turner.law | je@turner.law
Attorneys for Real Parties in Interest Thomas and Lisa Schwartz

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CHARLES COHEN, ET AL.,
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PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT OVERTURNING, VIA WRIT, *RILEY V. HILTON HOTELS CORP*. (2002) 100 Cal.App. 4th 599

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

This petition for review follows the *published* decision of the Court of Appeal, Second Appellate District, Division *Four*, Case No. B330202 filed on June 5, 2024. A copy of the opinion is attached to this petition as an appendix.

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I. ISSUES PRESENTED

1. Can a Court of Appeal (CCA) Grant a Writ Overturning a Superior Court's Decision When the Superior Court Followed Existing Precedent (Civ. Proc. Code § 1085)?

2. Did the CCA Adequately Consider that an Order Granting a Demurrer May Be Reviewed on an Appeal from the Final Judgment (Code Civ. Proc., § 904.1, 906)?

3. Did the CCA Err by Revisiting and Overruling *Riley v. Hilton Hotels Corp*. (2002) 100 Cal.app.4th 599?

4. Did *Riley* Correctly Decide that Government Code Section 36900 (a), Which Permits Civil Redress of a Municipal Ordinance, Created a Private Right of Action?

5. Did the CCA Overlook That the Courts and the Legislature Recognize That Private Citizens Need a Mechanism to Enforce the Law. (See CCP 1021.5 Which Codified the Private Attorney General Doctrine)

6. Did the CCA Properly Award Costs to the Petitioners under Cal Rules of Court, Rule 8.493(a)(1)(A)?

II. NECESSITY FOR REVIEW

The Court of Appeal overturned, by granting a writ of mandate to overturn *Riley v. Hilton Hotels Corp*. (2002) 100 Cal.App.4th 599 ("*Riley*"), a 20-year precedent that allows private persons to seek civil redress when a municipality fails to enforce its laws. Although a court can decide issues about *Government Code* section 36900 subdivision (a) and can revisit *Riley*, the issue should not be resolved via a writ after a demurrer where the superior court followed existing Court of Appeal precedent under *Code of*

Civil Procedure ("*CCP*") section 1085.

The CCA engaged in a lengthy historical analysis of *Government Code* section 36900, subdivision (a). The issues fail to justify a lengthy historical analysis because no ambiguity exists in *Government Code* section 36900, subdivision (a), and the plain meaning of the statute permits citizens to enforce an ordinance via civil redress.

By overturning *Riley*, the CCA negatively impacts the right of private citizens to enforce laws when the government fails to do. Private citizens need a mechanism to enforce the law when the government does not. *See CCP* section 1021.5, which codified the private attorney general doctrine and created an exception that litigants are to bear their own attorney fees; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565 as modified (Jan. 12, 2005).

Additionally, the CCA improperly denied the Schwartzes their fundamental right to dismiss the case. The CCA conveniently ignored the fact that it issued a stay order that precluded the Schwartzes from filing a request for dismissal in the Superior Court. Accordingly, the Schwartzes filed a motion to dismiss in the CCA. The CCA was beyond disingenuous in saying "while the Schwartzes may want to dismiss the underlying action, they have yet to do so." (Slip Opin. p. 7*)* What else could the Schwartzes' have done beyond filing a motion to dismiss?

III. STATEMENT OF THE CASE

For purposes of this petition, the Schwartz's adopt the statement of the case in the CCA's Opinion.

IV. STATEMENT OF THE FACTS

The parties, Defendants/Petitioners Charles and Katyna Cohen, and Plaintiffs/Real Parties Tom and Lisa Schwartz own homes across the street from each other in the Mandeville Canyon section of the Brentwood neighborhood in the City of Los Angeles. Mandeville Canyon is in the Santa Monica Mountains. Both the Cohen's and Schwartzes' homes should enjoy incredible views of the Santa Monica Bay, including Catalina Island, and the entire West L.A. basin.

The Schwartzes filed this action because the Cohens refused to trim their over-in-height hedges that violate the six-foot height limit required by *Los Angeles Municipal Code* ("*LAMC*") section 12.22.C.20. The Schwartzes sought relief from the City but the City failed to enforce the Cohens' blatant violation of the LAMC.

V. THE COURT SHOULD GRANT REVIEW TO DECIDE THE JURISDICTIONAL ISSUE.

A. The CCA Erred by Granting a Writ at the Pleading Stage.

The CCA erred by granting writ review because an order overruling a demurrer "may be reviewed on an appeal from the final judgment [citations],

and . . . such an appeal is normally presumed to be an adequate remedy at law, thus barring immediate review by extraordinary writ." *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 913.

The CCA also overlooks that courts have been reluctant to extend extraordinary relief at the pleading stage See, *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851; *Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185, fn. 4.

The CCA also overlooks that an order overruling a demurrer is not directly appealable and it may be reviewed on an appeal from the final judgment. *CCP* §904.1 [appeal may be taken from a judgment]; §906 [court may be review a judgement on appeal].)

Instead, the CCA finds writ review appropriate because "(1) 'the remedy by appeal would be inadequate' [citation] or (2) the writ presents a 'significant issue of law' or an issue of 'widespread' or 'public interest' [citations]", citing *California Dept. of Tax & Fee Administration v. Superior Court* (2020) 48 Cal.App.5th 922, 929 ("*Tax*"). However, *Tax* differs because *Tax* involved a dispute between a taxpayer and a state agency about whether a taxpayer could avoid the pay first rule by challenging an unpaid assessment via a declaratory relief claim. The plaintiff sued the California Department of Tax and Fee Administration and filed a petition for writ of mandate.

Unlike the instant case, *Tax* did not involve a case where the superior court followed existing precedent and, relying on a 20-year precedent, overruled a demurrer involving a dispute between private parties. Cf. *See's Candies, Inc. v. Superior Court* (2021) 73 Cal. App. 5th 66, 76 (finding employer liability for COVID-19 exposure a significant issue of law and of public interest).

The CCA claims, "the widespread invocation of a private right of action under section 36900, subdivision (a) could profoundly affect cities in this state." The Schwartzes disagree because, during the 20 years since the court decided *Riley*, the civil redress option has not adversely affected the City. Neither the Cohens nor the City (as amicus) provided any evidence that the use of section 39600 in the past twenty years has had any effect on the City. Moreover, the City acknowledged that was not even aware that section 39600 has been used.

The CCA overlooks that the Schwartzes' arguments rely on a theoretical possibility. The CCA states section 36900 "*potentially* creat[e]d legal precedent binding on the city in all cases involving that local law. Courts could rule on arguments about ordinances without input from the city that enacted them. This result would also eliminate prosecutorial discretion, as any private party could choose to proceed with the civil enforcement of any ordinance.'" (Slip Opn. p. 25) (Italics added).

In fact, the CCA finds that "*Riley* has not been widely relied upon since its publication 22 years ago. . . and has only been cited in 20 decisions" two of which were published namely *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1181, fn. 10; see also *Huntingdon Life Sciences Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1263-1264.) (Slip Opn. 15)

The CCA overlooks that the case involves a private dispute between private parties. Citizens, voters, and residents need the mechanism to enforce their rights when the City, the elected officials, and civil servants cannot or fail to enforce their laws. The only important issue involves the ability and right of private parties to resolve issues amongst themselves. The City should support the ability of private parties to resolve issues among themselves because it saves city workers time and expense.

B. The CCA Overlooks That the Issue Cannot Be Resolved via a Writ Because the Superior Court Relied on Proper Authority.

The CCA finds the case qualifies as a matter of public interest and it properly granted the writ petition. (Slip Opn. p. 8) The CCA overlooks that the issue cannot be resolved via a writ after a demurrer where the superior court followed existing precedent. Instead, the CCA finds it can disagree with *Riley* because appellate courts can reconsider even disapprove of other

appellate court decisions. (Slip Opn. p. 9)

The CCA relies on inapposite cases. Both *Estate of Sapp* (2019) 36 Cal.App.5th 86, and *Saucedo v. Mercury Sav. & Loan Assn.* (1980) 111 Cal.App.3d 309, involved appellate decisions, not writ petitions. (Slip Opn. p. 9) Even *Moradi-Shalal v. Fireman's Fund Ins. Cos*. (1988) 46 Cal. 3d 287, 292 held that no private action could be brought under *Insurance Code* section 790.03(h) unless a final judicial determination of the insured's liability had been first obtained. As in *Moradi-Shalal,* the Schwartzes never obtained a final determination of the case.

The CCA also rejects the notion that (1) when faced with conflicting appellate court opinions, trial courts "must make a choice between the conflicting decisions" (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456); and (2) "'[a] decision by a court of appeal is not binding in the courts of appeal[,]'" and therefore "'[o]ne district or division may refuse to follow a prior decision of a different district or division. . . .'" (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4; *Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187, 1193 [noting "there is no horizontal stare decisis in the California Court of Appeal"].)

The CCA overlooks that the superior court was not faced with conflicting decisions. The superior court relied on a single existing 20-year precedent, *Riley*. And the CCA overlooks that *CCP* section 1085 states

defines the parameters of a writ.[1] A writ issues when an inferior court or agency has acted without or in excess of its jurisdiction (prohibition) or has failed to act as prescribed by law (mandate). *CCP* §§1102 (prohibition), 1084, 1085 (mandate); *People v Superior Court (Mitchell)* (2010) 184 Cal.App. 4th 451, 456 [act that exceeds grants of statutory power qualifies for writ review]; see also *Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 483 [relief available when discretion can be exercised in only one way].)

Because the Superior Court properly followed *Riley*, the superior court did not act without or in excess of its jurisdiction and writ relief should not have been granted.

VI. THE COURT SHOULD NOT OVERRULE RILEY'S 20 YEAR PRECEDENT BECAUSE CITIZENS NEED THE RIGHT OF CIVIL REDRESS

A. The CCA Relies on Inapposite Cases to Overturn Riley.

The CCA relies on the inapposite cases of *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592 and *Moradi–Shalal v. Fireman's Fund Ins.*

[1] *CCP* section 1085 states: (a) A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person."

Companies (1988) 46 Cal.3d 287. *(Slip Opn.)* Neither *Lu* nor *Moradi-Shalal* involved Government Code section 36900 or a city ordinance.

Instead, Moradi-Shalal involved a state statute, Ins. Code, § 790.03 (unfair insurer practices) and Ins. Code, § 790.09 (civil liability savings clause). *Lu* involved another state law, *Labor Code* §351, a statute that prohibited employers from taking any gratuity patrons leave for their employees. Neither statute provided for a civil action if the statute was violated.

This Court in *Lu* and *Moradi-Shalal* did hold that "whether a party has a right to sue [for a violation of state statute] depends on whether the Legislature has 'manifested an intent to create such a private cause of action' under the statute. [Citations.] Such legislative intent, if any, is revealed through the language of the statute and its legislative history." *Lu, supra*, 50 Cal.4th at 596.

One of the issues that this Petition for Review is asking the Court to address is whether that analysis applies to ordinances. The CCA rejected that there is a difference between statutes and ordinances, as being a "distinction without a difference." (Slip Opn., p.17)

But there are relevant differences between statutes and ordinances, particularly with respect to procedural enforcement rights.

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First, there is no statute law (statute) equivalent to *Government Code* section 36900(a), which provides for a civil action to seek redress for a violation of an ordinance. There should be no need to determine whether the local city council intended to create a private cause of action because *Government Code* section 36900(a) provides that a violation of an ordinance "may be prosecuted by city authorities in the name of the people of the State of California, or redressed by civil action." *Gov't Code* §36900(a). The legislature expressly declared its intent that a violation of an ordinance can "redressed by civil action."

Also, the scope and authority differ significantly between statutes and ordinances. Statutes are statewide laws enacted by the legislature, while ordinances are local laws tailored to address specific community needs. Statutes are enforced by career civil servants at state agencies, which are inherently less subject to local influence. On the other hand, local ordinances that are only enforceable at the discretion of local offices are subject to abuse and favoritism. The practical question here is what if your neighbor is head of the local code enforcement department?

As to the difference in authority, because as a matter of California law, all ordinances can be "redressed by civil action," but statutes cannot unless the statues provides for a cause of action, as per the language of the statute and its legislative history." *Lu, supra*, 50 Cal.4th at 596.

Another compelling difference is the fact that the Los Angeles City Attorney took the Cohen's side in this dispute is also telling. The City Attorney could not even answer the question at oral argument why the City has not even started investigating the hedge height violation.

Perhaps the most compelling reason is that in this day of limited or taxed governmental resources, the property owners need the right to seek redress in court.

B. The CCA Overlooks That the Government Has Traditionally Recognized a Right of Civil Redress.

C. ized a Right of Civil Redress.

The CCA overlooks that courts recognize that private citizens need a codified mechanism to enforce the law, particularly when a city or other entity does not enforce the law. For example, *CCP* section 1021.5, codified the private attorney general doctrine and created an exception that litigants are to bear their own attorney fees. *Graham, supra,* 34 Cal.4th at p. 565.

"'[T]he private attorney general doctrine 'rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award for attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.'" *Id.* The fundamental purpose of

the doctrine is to encourage suits enforcing important public policies by rewarding attorneys who successfully prosecute such cases and prevent worthy claimants from being silenced or stifled by a lack of legal resources. (*Id.* at pp. 565, 568.)

D. The Statute is Clear on its Face; and CCA Did Not Need to Resort to Statutory Construction

The CCA reinterprets *Government Code* section 36900, subdivision (a), reviews *Government Code* section 36900(a)'s legislative history, and finds the Legislature did not intend to create a private cause of action. The CCA did not need to rely on statutory reconstruction because the statute clearly allows a law to be enforced via civil redress. "A fundamental principle of statutory construction is that '[i]f there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not 'interpret away clear language in favor of an ambiguity that does not exist....'" *Coble v. Ventura County Health Care Agency* (2021) 73 Cal.App.5th 417, 425–426 [citations omitted].

Here, the CCA held that 36900(a) the is ambiguous because it did not "'contain clear, understandable, unmistakable terms,' which strongly and directly indicate that the Legislature intended to create a private cause of action.'" (*Slip. Opin.* p. 16, citing *Lu, supra,* 50 Cal.4th at 597.)

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One of the legal issues for this Court to consider is whether the "clear, understandable, unmistakable terms" strong and direct intend standard per *Lu* applies to whether an ordinance provides for a private cause of action. The Schwartzes request the opportunity make their argument to this Court.

Assuming for the sake of argument that the Court wants to consider the legislative intent, the CCA ignored that language "at the option of said authorities" after the phrase "redressed by civil action" was deleted from draft bill. In other words, section 36900(a) as originally drafted was: "Violation of a city ordinance is a misdemeanor. Such a violation may be prosecuted by city authorities in the name of the people of the State of California, or redressed by civil action, at the option of said authorities." [RJN, Exh. 1, Vol. 1 pp. 16; Exhibit C, Vol. 6 pp. 1862].

The deletion of "at the option of said authorities" limit should be considered in determining the legislative intent. *CCP* section 1858 states the well-established "general rule" statutory construction" as: "In the construction of a statute ... the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, …"" *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 133.

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E. <u>The CCA Overlooks that Public Entities, Including the Federal Government, Consistently Allow Private Parties to Redress Violations of Law by Civil Action</u>

Federal Law

Federal Law also gives citizens the right to redress by civil action. "Any person who is deprived of any rights, privileges, or immunities secured by the Constitution and laws" of the United States by an individual acting under the color of state law may *seek redress through a civil action*. 42 U.S.C. § 1983. (Italics added.) Conspiracies to violate civil rights are also actionable. 42 U.S.C. § 1985.

42 USCS § 1983, which authorizes redress for violations of constitutional and statutory rights, is not itself source of substantive rights, but rather method for vindicating federal rights conferred by those parts of United States Constitution and federal statutes that it describes. *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433, 1979 (1979).

28 USCS § 1915A provides, " The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, *a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.* The IDEA contains a formal structure for resolving disputes, 20 U.S.C. § 1415(b) through (i), beginning

with a due process hearing before an administrative agency and culminating in the right of an unhappy parent or child to *seek redress via a civil action in* a state or federal court. 20 U.S.C. § 1415(i)(2)(A); *K.S. v. Warwick Sch.* Comm., No. 1:17-cv-00258-MSM-LDA, 2020 U.S. Dist. LEXIS 138535, at *5-6 (D.R.I. Aug. 4, 2020) (Italics added.)

Los Angeles County

Los Angeles County Government Code Section 25132 expressly grants counties the option to prosecute ordinance violations by civil action. It provides: "The violation of a county ordinance may be prosecuted by county authorities in the name of the people of the State of California, or redressed by civil action." (§ 25132, subd. (a).) Section 25845 authorizes a county to enact local enforcement ordinances establishing procedures to abate public nuisances.

Under County Code section 1.12.050, any violation of the County Code "shall be deemed a public nuisance and may be abated as such." County Code section 19.01.030 sets forth alternative procedures for the enforcement of county land use regulations. It provides in subdivision (a) that "[a]ny violation of a land use regulations [sic] shall be enforced through one or more of" several enumerated remedies. The enumerated remedies include a criminal prosecution (County Code § 19.01.030,subd. (a)(3)) ; an administrative hearing pursuant to County Code Section 1.12.070, "including

the recovery of civil penalties and enforcement costs," (County Code § 19.01.030, subd. (a)(4); and a *"[c]ivil action for injunction, civil penalties, or other appropriate remedies."* County Code §19.01.030, subd. (a)(5)). (Italics added.)

Other States Allow Redress by Civil Action

Kentucky

Maupin v. Tankersley (Feb 15, 2018) 540 S.W.3d 357 and its final section provided "[a]ny person injured by the horse, cattle or dog of another, such as described in this chapter, shall have redress by civil action." *Id.* , art. V, § 1 ....

Massachusetts

Some jurisdictions imposed liability against gun owners who caused injury to another or to one's property under trespass or strict liability theories. *See, e.g., Cole v. Fisher* (1814) 11 Mass. 137, 138-39 (discussing trespass and strict liability theories for discharging firearms near highways, and stating that "the party injured, either in his person or property, by the discharge of a gun . . . is *entitled to redress in a civil action*") (Italics added.)***;*** *Welch v. Durand* (1969) 36 Conn. 182, 185-86 (discussing trespass theory for liability against firearm owner who injured another). "Why" these jurisdictions burdened arms bearers overlap with the Insurance Mandate: to provide redress to those individuals injured by firearms. *Koons v. Platkin,* No.

22-7464 (RMB/AMD), 2023 U.S. Dist. LEXIS 85235, at *127-28 (D.N.J. May 16, 2023).

Nevada

Nevada has waived sovereign immunity for civil actions against state officials, and as such, an aggrieved person, has the right to sue in tort under state law. See NRS §§ 41.031; 41.0322. Nevada law enables a person, including an incarcerated person, who has been wrongfully deprived of property to seek redress through a state civil action. See NRS §§ 41.0322; 73.010; 41.031. *Pamplin v. Warden Baker,* No. 3:16-cv-00745-MMD-CLB, 2020 U.S. Dist. LEXIS 88274, at *9 (D. Nev. Mar. 5, 2020)

VII. THE CCA SHOULD HAVE DENIED COSTS

The CCA, relying on proceeding *Cal. Rules of Court*, rule 8.493(a)(1)(A), awards costs to the Schwartzes. (Slip Opn. p. 30) *Cal Rules of Court*, Rule 8.493 (a) permits a court to award costs to the "prevailing party in an original proceeding is entitled to costs if the court resolves the proceeding by written opinion after issuing an alternative writ, an order to show cause, or a peremptory writ in the first instance." However, in the interests of justice, the court may also "deny costs as it deems proper. . "

This Court should deny costs, in the interests of justice, because the Cohens have refused to comply with the law. The Schwartzes filed the action because the Cohens inexplicably refuse to trim their over-in-height hedges

that violate the six-foot height limit required by *LAMC* section 12.22.C.20. The Schwartzes sought relief from the City but the City failed to enforce the Cohen's violation of the LAMC. And, existing case law, namely *Riley* upheld the Schwartzes right to seek civil redress.

VIII. THE CCA SHOULD NOT HAVE ORDERED THE SUPERIOR COURT TO SUSTAIN PETITIONERS' DEMURRER TO THE SECOND AND THIRD CAUSES OF ACTION WITHOUT LEAVE TO AMEND.

The CCA ordered the superior court to enter an order sustaining the Cohens' demurrer to the second and third causes of action without leave to amend, because "nowhere in their three briefs filed in opposition to the Cohens' petition have the Schwartzes specified what facts, if any, they could allege to establish they meet either of the requisite conditions to fall within the purview of the cases they have cited." (*Slip Opin.,* p. 29).

That was another fundamentally unfair decision, because the sole scope of the writ proceeding was whether *Riley* should be overruled. *Riley* did not require to a plaintiff seeking redress to allege (1) "suffers a 'special injury to himself in person or property of a character different in kind from that suffered by the general public'"; or (2) "is a 'member of the community for whose particular welfare the ordinance was enacted.' (*Slip Opin.*, p. 28 (quoting *Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community*

(1986) 178 Cal.App.3d 1147, 1152-1153).

The Schwartzes did need to allege "special injury" or "particular welfare" facts in their complaint because *Riley* did not require that. If that is going to be requirement in order to allege a violation of ordinance civil action, the Schwartzes should have the opportunity to allege that before they their case is thrown out of court.

IX. THE CCA SHOULD NOT HAVE DENIED THE MOTION TO DISMISS

The CCA denied the Schwartzes' motion to dismiss because the Schwartzes "have yet to do so." (*Slip. Opin.*, p. 7). The CCA conveniently ignored the fact that it previously issued a STAY order that precluded the Schwartzes from filing a request for dismissal in the Superior Court. Accordingly, the Schwartzes filed a motion to dismiss in the CCA.

The Schwartzes did try to dismiss by filing a motion to dismiss.

What else could the Schwartzes have done beyond filing a motion to dismiss?

The CCA's decision to "exercise our discretion to resolve the issues presented" put the Schwartzes it the impossible position of having to defend a fundamental right, the right to redress, on behalf of all Californians, which is a task and burden that a single-family homeowner should not be placed in because their neighbor refuses to trim their hedges as required by the local

ordinance.

X. ALTERNATIVELY, THE SCHWARTZES REQUEST DEPUBLICATION

Alternatively, the Schwartzes request that this Court order de-publication of the CCA's Opinion because the Opinion goes far beyond a simply neighbor dispute and effects all citizens. Denying homeowners and all other citizens the right to redress should be by a writ from a demurrer in a hedge-height case. In the 20 years since *Riley,* there is no evidence of abuse or complaints that citizens were seeking redress regarding ordinances. The facts and unfair procedural context of a writ from a demurrer is not a fair basis to issue a published decision that affects all citizens.

XI. CONCLUSION

The Schwartzes respectfully request that review be granted and that the Court uphold *Riley* and the people's right to seek civil redress under Government Code section 36900 (a). The Schwartzes further request that they be allowed to file an amended complaint.

Also, the Schwartzes request that the Court order that neither party is entitled to costs.

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Alternatively, the Schwartzes request that the Court order de-publication of the CCA's opinion.

DATED: June 14, 2024

Respectfully submitted,

By: /s/ Keith J. Turner
Keith J. Turner
Attorneys for Real Parties in Interest Thomas and Lisa Schwartz

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204 and Rule 8.504 of the *California Rules of Court*, I hereby certify that this Petition for Review is produced using 13-point Century Schoolbook font; its lines are at least one-and-a-half-spaced; and it contains approximately 4,428 words (as counted by the Microsoft Office Word program used to generate this brief), which is less than the maximum amount of words permitted by the rules of court.

DATED: June 14, 2024

Respectfully submitted,

By: /s/ Keith J. Turner
Keith J. Turner
Attorneys for Real Parties in Interest Thomas and Lisa Schwartz

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

CHARLES COHEN et al.,

Petitioners;

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

THOMAS SCHWARTZ, Individually and as Trustee, etc., et al.,

Real Parties in Interest.

B330202

Los Angeles County
Super. Ct. No.
22SMCV00736

COURT OF APPEAL – SECOND DIST.
FILED
Jun 05, 2024
EVA McCLINTOCK, Clerk
S. Veverka Deputy Clerk

ORIGINAL PROCEEDINGS in mandate. Lisa Sepe-Wiesenfeld, Judge. Petition granted.

Complex Appellate Litigation Group, Rex S. Heinke, Jessica Weisel; Kozberg & Bodell and Joel Kozberg, for Petitioners.

No appearance for Respondent.

Turner Law Firm, Keith J. Turner and Justin Escano for Real Parties in Interest.

Hydee Feldstein Soto, City Attorney, Denise C. Mills, Chief Deputy City Attorney, Scott Marcus, Chief Assistant City Attorney, Shaun Dabby Jacobs, Supervising Assistant City Attorney, and Michael M. Walsh, Deputy City Attorney, for City of Los Angeles and the League of California Cities as Amici Curiae.

INTRODUCTION

Government Code,[1] section 36900, subdivision (a) provides: "Violation of a city ordinance is a misdemeanor unless by ordinance it is made an infraction. The violation of a city ordinance may be prosecuted by city authorities in the name of the people of the State of California, *or redressed by civil action*." (Italics added.) Is the right to redress violations of municipal ordinances by filing a civil suit under section 36900 limited to officials of the city that enacted those ordinances? Or does the italicized phrase confer upon anyone and everyone, including all private citizens, the right to redress violations of municipal ordinances by filing suit against alleged violators? Over 20 years ago, in *Riley v. Hilton Hotels Corp.* (2002) 100 Cal.App.4th 599 (*Riley*), a different panel of this court briefly considered the question and summarily concluded that anyone can sue to redress violations of municipal ordinances.

Arguing *Riley* was wrongly decided, Charles Cohen and Katyna Cohen (collectively, the Cohens) petition for a writ of mandate directing the trial court to: (1) vacate the portion of its order overruling their demurrer to the second and third causes of action asserted in the complaint filed by the Cohens' neighbors, Thomas Schwartz and Lisa Schwartz (collectively, the Schwartzes); and (2) enter an order sustaining their demurrer to these causes of action without leave to amend. By way of these causes of action, the Schwartzes seek redress for the Cohens' maintenance of landscaping and hedges on their property in alleged violation of certain provisions of the Los Angeles Municipal Code (LAMC).

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1 Unless otherwise indicated, all statutory references are to the Government Code.

As discussed below, we agree with the Cohens that *Riley*'s interpretation of section 36900, subdivision (a) is incorrect. Having reviewed the statute's plain language and legislative history, we conclude the Legislature only intended section 36900 to grant city authorities—not all private parties—the right to redress violations of municipal ordinances via either criminal prosecution or civil action. We also conclude the doctrine of stare decisis does not prevent us from reexamining and disagreeing with *Riley*. Thus, we overrule *Riley* and disavow its recognition of a private right of action by members of the general public under section 36900, subdivision (a). We therefore will issue a peremptory writ of mandate as requested by the Cohens.

To be clear, we hold only that section 36900 does not authorize private parties to bring civil suits to enforce local ordinances. We do not disturb caselaw recognizing that, in some instances, a defendant's violation of a local ordinance may be relevant to, or provide an element of, some other cause of action by a private party, such as nuisance or public nuisance.

BACKGROUND

The Schwartzes and the Cohens own homes in Los Angeles, located directly across the street from each other. In their complaint, the Schwartzes allege trees and plants in the Cohens' yard exceed height limits specified in LAMC section 12.22, subdivision (C)(20). The complaint also alleges that, without first obtaining the requisite permits, the Cohens removed trees and plants from the parkway fronting their property and replaced them with landscaping non-compliant with the Residential Parkway Landscaping Guidelines adopted by the Los Angeles Board of Public Works, in violation of LAMC section 62.129. According to the Schwartzes, the Cohens' landscaping

unreasonably interferes with the Schwartzes' use and enjoyment of their property, negatively impacts their property's value, and causes them to suffer severe annoyance, discomfort, and distress.

Based on these allegations, the complaint asserts four causes of action: (1) nuisance; (2) violation of LAMC section 12.22, subdivision (C); (3) violation of LAMC section 62.129; and (4) declaratory relief. With respect to the second and third causes of action, the complaint alleges: "Under Government Code section 36900, a violation of a city ordinance may be redressed by civil action [citing *Riley*]. Plaintiffs are affected private individuals who seek to redress Defendants' violation with this action." (Italics omitted.) The Schwartzes seek compensatory damages, punitive damages, injunctive relief, declaratory relief, and attorneys' fees and costs.

The Cohens demurred to each of the causes of action asserted in the complaint, arguing the Schwartzes failed to state sufficient facts to constitute a cause of action. Following a hearing, the trial court issued an order sustaining the demurrer to the first and fourth causes of action with leave to amend, and overruling the demurrer to the second and third causes of action.

With respect to the first cause of action, the trial court observed the Schwartzes "fail[ed] to allege specific facts describing how [the Cohens'] conduct has compromised [their] ability to use and enjoy their property." It therefore concluded the complaint did not plead sufficient facts to state a cause of action for public or private nuisance.

Regarding the second and third causes of action, the trial court declined the Cohens' invitation to depart from *Riley*. Instead, noting the absence of authority to the contrary, the court applied *Riley* to conclude the Schwartzes "may assert private

causes of action for violations of the Los Angeles Municipal Code as alleged [in their complaint]."

Finally, the trial court determined the Schwartzes' claim for declaratory relief was duplicative of their other causes of action and, thus, was subject to demurrer.

The Schwartzes filed a first amended complaint, which does not reassert their claims for nuisance or declaratory relief. Instead, it only asserts two causes of action: (1) violation of LAMC section 12.22, subdivision (C)(2); and (2) violation of LAMC section 62.169. Again, for both claims, the Schwartzes allege they are entitled to seek redress for the Cohens' violations of the LAMC based on section 36900 and *Riley*.

The Cohens filed a petition for writ of mandate in this court. In response, the Schwartzes filed a preliminary and supplemental preliminary opposition. The Cohens filed a preliminary reply.

This court issued an order directing the trial court to show cause "why a peremptory writ of mandate should not issue directing [it] to vacate [its] order overruling [the Cohens'] demurrer to [the Schwartzes'] causes of action to enforce provisions of the Los Angeles Municipal Code and to issue a new order sustaining the demurrer on the ground that, contrary to the holding in *Riley* . . . , Government Code section 36900, subdivision (a) does not create a private right of action." Thereafter, the Schwartzes filed a return, to which the Cohens filed a reply.[2]

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2 Because the return does not contain a demurrer or a verified answer, as required by California Rules of Court, rule 8.487(b)(1) and Code of Civil Procedure section 1089, the Cohens

We invited the City of Los Angeles and the League of California Cities (collectively, the City Amici) to file briefs as amici curiae to address the issues presented in this case, namely: (1) whether section 36900, subdivision (a) authorizes a private right of action to enforce municipal ordinances; and (2) whether this court should decline to revisit *Riley* due to the doctrine of stare decisis. Subsequently, the City Amici filed a joint amicus brief largely agreeing with the arguments presented in the Cohens' briefs. The City Amici also note they "were completely unaware of the case [pending in this court]" until we invited them to submit amicus briefs.[3]

DISCUSSION

I. The Schwartzes' Motion to Dismiss

Preliminarily, we address the Schwartzes' motion to dismiss the Cohens' petition. The Schwartzes contend dismissal is required because: (1) the present case is moot, as they "wish to dismiss their case [against the Cohens] in the Superior Court";

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assert it should be stricken. (See Cal. Rules of Court, rule 8.487(b)(1) [where an order to show cause is issued, "any real party in interest . . . may serve and file a return by demurrer, verified answer, or both"]; see also Code Civ. Proc., § 1089 ["the party upon whom the writ or notice has been served may make a return by demurrer, verified answer or both"].) While we decline to strike the return, we will deem the factual allegations in the Cohens' petition true because the Schwartzes failed to answer or file a demurrer to the petition. (*Dorsey v. Superior Court* (2015) 241 Cal.App.4th 583, 589.)

3 We grant the City Amici's request for judicial notice. We deny Fay Arfa's application to file an amicus brief.

and (2) this court lacks jurisdiction to grant the writ and issue the Cohens' requested relief. We address each point in turn.

A. Mootness

"A case is considered moot when 'the question addressed was at one time a live issue in the case' but has been deprived of life 'because of events occurring after the judicial process was initiated.' [Citation.] 'The pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief.' [Citation.] However, '[w]hen a question of general public concern is involved, . . . a reviewing court may reject mootness as a bar to a decision on the merits of an issue. [Citation.] Thus, a reviewing court has "inherent discretion" to resolve an issue of broad public interest that is likely to recur, even though an event occurring during the pendency of the case would normally render the matter moot.'" (*Hernandez-Valenzuela v. Superior Court* (2022) 75 Cal.App.5th 1108, 1121-1122.)

As noted above, the Schwartzes argue that "this case is moot because [they] wish to dismiss their case in the Superior Court." This "wish" is insufficient to moot the case, however, because, while the Schwartzes may want to dismiss the underlying action, they have yet to do so. Unless and until the Schwartzes act upon their intention, we can "'grant [the Cohens] . . . effectual relief'" by issuing the requested writ of mandate. (*Hernandez-Valenzuela v. Superior Court*, *supra*, 75 Cal.App.5th at p. 1121.) Therefore, the Cohens' writ petition is not moot. (See *ibid.*)

In any event, even if the Schwartzes had dismissed the underlying case, we would exercise our discretion to resolve the issues presented in this case. The key question before us is of significant public interest, as it bears upon whether section

36900, subdivision (a) confers upon *all* private citizens—as opposed to only city authorities—the right to enforce municipal ordinances by filing a lawsuit against an alleged violator. The Cohens have shown this issue is likely to recur by presenting undisputed evidence demonstrating some citizens have relied on section 36900, subdivision (a) to seek redress for alleged violations of municipal ordinances in the past and therefore may continue to do so in the future. Consequently, even if the Schwartzes had dismissed the underlying action, we would decline to dismiss the writ petition as moot.

B. Jurisdiction

The Schwartzes contend we lack jurisdiction to issue the requested writ for two reasons. First, relying on *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, they argue that writ review is inappropriate because an order overruling a demurrer "may be reviewed on an appeal from the final judgment [citations], and . . . such an appeal is normally presumed to be an adequate remedy at law, thus barring immediate review by extraordinary writ."

But writ review is appropriate here. "Even though a trial court's order overruling a demurrer is subject to review on appeal from the final judgment, an appellate court has the option to review such an order prior to final judgment through writ of mandate. [Citation.] However, writ review is appropriate only when (1) 'the remedy by appeal would be inadequate' [citation] or (2) the writ presents a 'significant issue of law' or an issue of 'widespread' or 'public interest' [citations]." (*California Dept. of Tax & Fee Administration v. Superior Court* (2020) 48 Cal.App.5th 922, 929.) Both conditions are satisfied here. As noted above, this case "presents a 'significant issue of law.'"

(*Ibid.*) And this court's issuance of an order to show cause in October 2023 "determined, in effect, that [the Cohens'] remedy at law was inadequate." (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 476.)

Next, the Schwartzes contend we "lack[ ] jurisdiction to order the superior court to disregard *Riley*." We reject their argument as unsupported by the authority on which it relies. The cases they cite establish: (1) when faced with conflicting appellate court opinions, trial courts "must make a choice between the conflicting decisions" (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456); and (2) "'[a] decision by a court of appeal is not binding in the courts of appeal[,]'" and therefore "'[o]ne district or division may refuse to follow a prior decision of a different district or division . . . .'" (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4; *Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187, 1193 [noting "there is no horizontal stare decisis in the California Court of Appeal"].) These authorities do not—as the Schwartzes contend—demonstrate we lack jurisdiction to revisit and/or disagree with *Riley*. Courts of Appeal, and divisions thereof, are empowered to reconsider—and in the appropriate case disapprove of or overrule—prior decisions of those courts. (See, e.g., *Estate of Sapp* (2019) 36 Cal.App.5th 86, 109, fn. 9 [overruling decision by prior panel of the same court after determining the decision "wrongly interpreted the term 'mismanagement' [under former Probate Code section 521] for purposes of removing a personal representative of an estate"]; *Saucedo v. Mercury Sav. & Loan Assn.* (1980) 111 Cal.App.3d 309, 310-311 [overruling a decision by a prior panel of the same court after determining the decision was wrongly decided].)

C. Conclusion

For the reasons discussed above, we deny the Schwartzes' motion to dismiss the writ petition.[4] We now turn our attention to the merits of the Cohens' petition.

II. Standard of Review

"'The standard of review for an order overruling a demurrer is de novo. The reviewing court accepts as true all facts properly pleaded in the complaint in order to determine whether the demurrer should be overruled. [Citation.]' [Citations.] We liberally construe the pleading with a view to substantial justice between the parties. [Citations.] We do not, however, assume the truth of the legal contentions, deductions or conclusions; questions of law, such as the interpretation of a statute, are reviewed de novo." (*Ralphs Grocery Co. v. Superior Court* (2003) 112 Cal.App.4th 1090, 1096, overruled on other grounds in *Prachasaisoradej v. Ralphs Grocery Co., Inc.* (2007) 42 Cal.4th 217, 244.)

III. Reasons to Reexamine *Riley*

Well-settled principles govern the respect accorded prior opinions published by this court. "It is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, 'is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to

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4 In light of this ruling, we deny as moot the City Amici's motion for leave to file opposition to the motion to dismiss.

regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.'" (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296 (*Moradi-Shalal*).) At least in California, this is especially true of judicial decisions establishing important constitutional rights upon which residents rely to protect their interests or those of others.

"It is likewise well established, however, that the foregoing policy is a flexible one which permits this court to reconsider, and ultimately depart from, our own prior precedent in an appropriate case." (*Moradi-Shalal*, *supra*, 46 Cal.3d at p. 296.) "Although the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield [all] court-created error from correction." (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 924.) Accordingly, "in appropriate and rare cases, appellate court precedent is open for reexamination and critical analysis." (*In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409.) After reexamination and analysis, a Court of Appeal can disapprove of its prior opinion reflecting judicial error. (See *People v. Yeats* (1977) 66 Cal.App.3d 874, 879 [Court of Appeal admitting error in and disapproving of one of its prior published opinions].)

With these principles in mind, we turn to *Riley* and consider whether to revisit its holding relating to section 36900, subdivision (a). In *Riley*, the plaintiff alleged the defendants, who were hotel operators, ran a vehicle parking facility within the meaning of Beverly Hills Municipal Code (BHMC) section 4-4.201(b), and charged a fee for parking, but failed to display signs showing the rates and fees to be charged as required by BHMC sections 4-4.202 and 4-4.206. (*Riley*, *supra*, 100 Cal.App.4th at p.

602.) At the time the plaintiff filed her complaint, BHMC section 4-4.201(b) defined "'vehicle parking facility'" as "'an off-street facility used for the parking of motor vehicles.'" (*Ibid.*)

While the case was pending, in May 2001, the Beverly Hills City Council amended BHMC section 4-4.201(b) to read: "'"Vehicle parking facility" shall mean an off-street parking facility, where the primary use of the property is to accommodate the parking of motor vehicles by members of the public. A vehicle parking facility does not include an off-street parking facility that accommodates the parking of motor vehicles by the occupants, customers, clientele, and employees of an on-site or adjacent structure where the primary use of that structure is for office, retail or hotel purposes.'" (*Riley*, *supra*, 100 Cal.App.4th at p. 602.) Ultimately, the trial court granted the defendants' motion for judgment on the pleadings and entered judgment in their favor. (*Id.* at p. 603.) It reasoned as follows: (1) the 2001 version of BHMC section 4-4.201 effected a change in the law, but was intended by the City Council to apply retroactively; (2) the operative complaint alleged the defendants were liable solely based on their violations of BHMC section 4-4.202 and 4-4.206; and (3) since defendants did not operate a "vehicle parking facility" within the amended version of BHMC section 4-4.201, they owed no duty under sections 4-4.202 and/or 4-4.206. (*Riley,* at p. 603.)

In reversing the judgment, the *Riley* decision first analyzed whether the 2001 amendment to BHMC section 4-4.201(b) was a clarification of existing law or a substantive change in the law. (*Riley*, *supra*, 100 Cal.App.4th at p. 603.) After considering the language used in the original version of the ordinance enacted in 1962, along with its legislative history and relevant caselaw, the

opinion held the 2001 version of BHMC section 4-4.201(b) amounted to a substantive change in the law. (*Riley,* at pp. 604-605.)

Next, the *Riley* opinion addressed whether the City Council intended the 2001 version of BHMC section 4-4.201(b) to apply retroactively. (*Riley*, *supra*, 100 Cal.App.4th at p. 606.) Based on the language of the new ordinance and its history, the decision held that the trial court erred by finding the ordinance applied retroactively. (*Id.* at p. 607.)

Finally, the *Riley* decision considered the defendants' argument "that a separate basis for affirmance [of the judgment entered in their favor] is the absence of a private right of action under the Municipal Code." (*Riley*, *supra*, 100 Cal.App.4th at p. 607.) On this point, the defendants argued "[t]he comprehensive regulatory scheme for violations of the Municipal Code . . . indicates the Council's intent to occupy the enforcement field to the exclusion of private lawsuits." (*Ibid.*) The opinion rejected this argument, explaining, in full: "However, Government Code section 36900, subdivision (a), expressly permits violations of city ordinances to be 'redressed by civil action.' Both our Constitution and the Government Code prohibit giving effect to city ordinances in conflict with state law. (Cal. Const., art. XI, § 7; Gov. Code, § 37100.) Defendants refer us to no law that allows a city to abrogate the right of redress created in the Government Code. We decline to read into the Municipal Code an intent to create an impermissible conflict with state law by abrogating the right to a civil action created by the Government Code." (*Riley,* at p. 607.)

Having reviewed *Riley*, we agree with the Cohens that its interpretation of section 36900, subdivision (a) should be reexamined. The decision's perfunctory recognition of a private

right of action under the statute is untethered to reasoned analysis applying principles of statutory construction. (See *Riley*, *supra*, 100 Cal.App.4th at p. 607.) Instead, without explanation, the opinion concludes the phrase "'redressed by civil action'" as used in the second clause of the statute's second sentence means that all members of the public may file suit under the statute. When interpreting that phrase, the opinion did not discuss the context in which it appears and, consequently, did not address the ambiguity in the statute regarding whether the Legislature assigned a right to file suit only to city authorities, or afforded that right to all private litigants seeking redress for another's violation of an ordinance.[5] (See *ibid.*)

In addition, it is unclear to what extent, if any, the parties in *Riley* briefed or otherwise addressed the existence of a private right of action under section 36900, subdivision (a). (See *Riley*, *supra*, 100 Cal.App.4th at p. 607.) So far as we can tell, the defendants did not discuss section 36900, subdivision (a) at all when asserting "the absence of a private right of action under the Municipal Code." (See *Riley,* at p. 607.) Nor is there any indication the *Riley* court considered legislative history, including legislative history wholly inconsistent with the court's holding.

Further, we acknowledge that, when deciding whether to revisit an opinion construing a statute, "questions of reliance are often crucial." (*People v. Latimer* (1993) 5 Cal.4th 1203, 1213.) This is because "[p]arties, society, and legislative bodies may act in reliance on a particular statutory interpretation" and, therefore, "overruling that interpretation might have undesirable consequences not present at the time of the original decision."

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5 We explain the ambiguity in the statute's plain language in section IV.B.1 below.

(*Ibid.*) Accordingly, "'[s]tare decisis has added force when the [L]egislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" (*Id.* at pp. 1213-1214 (italics omitted).)

These principles do not justify adherence to stare decisis in this case, however, as *Riley* has not been widely relied upon since its publication 22 years ago. So far as we can tell, between all federal and state courts, *Riley* has only been cited in 20 decisions. Of those decisions, only two are published California appellate court opinions adopting *Riley*'s interpretation of section 36900, subdivision (a). (See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1181, fn. 10; see also *Huntingdon Life Sciences Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1263-1264.) Both opinions accept *Riley*'s recognition of a private right of action without question, and do not comment upon the holding's supporting analysis (or lack thereof). (*Ibid.*) And the parties do not cite, nor could we locate, any evidence or authority demonstrating the Legislature has considered, let alone relied upon, *Riley*'s interpretation of the statute.

"Stare decisis plays a vitally important role in our work as a common law court; the policy of adherence to precedent ensures the certainty, stability, and predictability on which the rule of law depends. But stare decisis concerns have no real place here. The doctrine 'does not "'shield court-created error from correction"' but 'permits us "to reconsider and ultimately depart from, our own prior precedent in an appropriate case."' [Citation.] Here, none of the factors . . . identified as relevant to the question

of adherence to precedent—including 'the age of the precedent, the nature and extent of public and private reliance on it, and its consistency or inconsistency with other related rules of law' [citation]—suggests we are bound to preserve an [erroneous or unworkable precedent.]" (*People v. Hardin* (2024) 15 Cal.5th 834, 850.)

Accordingly, we conclude this is an "appropriate and rare case[ ]" to subject a prior opinion to "reexamination and critical analysis" (*In re Marriage of Shaban*, *supra*, 88 Cal.App.4th at p. 409), and thereby revisit whether a private right of action exists under section 36900, subdivision (a).

IV. Section 36900, Subdivision (a) Does Not Create a Private Right of Action to Enforce City Ordinances

A. General Principles and Analytical Framework

In *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592 (*Lu*), our Supreme Court summarized the two-part analytical framework governing the question whether a private right of action exists under a statute. Relying heavily on its prior decision in *Moradi-Shalal*, *supra*, 46 Cal.3d 287, the *Lu* court stated: "[W]hether a party has a right to sue depends on whether the Legislature has 'manifested an intent to create such a private cause of action' under the statute. [Citations.] Such legislative intent, if any, is revealed through the language of the statute and its legislative history." (*Lu*, *supra*, at p. 596.)

In discerning the Legislature's intent, courts first examine the statutory language to determine whether it "contain[s] '"clear, understandable, unmistakable terms,"' which strongly and directly indicate that the Legislature intended to create a private cause of action." (*Lu*, *supra*, 50 Cal.4th at p. 597.) On this point, the Supreme Court explained: "For instance, the statute may

expressly state that a person has or is liable for a cause of action for a particular violation. [Citations.] Or, more commonly, a statute may refer to a remedy or means of enforcing its substantive provisions, i.e., by way of an action." (*Ibid*, fn. omitted.) If the statute is ambiguous and "does not include explicit language regarding a private cause of action," courts then "look to [its] legislative history for greater insight." (*Id.* at p. 598.)

Preliminarily, the Schwartzes contend *Lu* and *Moradi-Shalal* do not apply here because those cases addressed the existence of a private right of action to enforce a statute, whereas they seek to enforce city ordinances. We reject this contention because it merely points out a distinction without a difference. As noted above, the Schwartzes' complaint relies on section 36900, subdivision (a), along with *Riley*'s interpretation of the statute, to seek redress for the Cohens' maintenance of their hedges and landscaping in alleged violation of the LAMC.[6] Thus, the ultimate question in this case is whether section 36900, subdivision (a)—i.e., a statute—permits the Schwartzes to pursue their claims for damages and injunctive relief in court. Our Supreme Court addressed questions of precisely that nature in *Lu* and *Moradi-Shalal*. (*Lu*, *supra*, 50 Cal.4th at p. 596 [addressing "whether [Labor Code] section 351 gives employees a private right of action" (fn. omitted)]; *Moradi-Shalal*, *supra*, 46 Cal.3d at p. 292

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6 For the first time in the original proceedings in this court, the Schwartzes contend they need not rely on section 36900 to assert their claims based on the Cohens' alleged violations of the LAMC. Specifically, they assert "California law has long held a private person who suffers identifiable harm by reason of a violation of a municipal zoning law may sue the violator, including seeking injunctive relief." We address their arguments on this point in section V below.

[reexamining whether Insurance Code section 790.03, subdivision (h) created a private right of action against insurers].) Accordingly, the analytical framework employed in those cases applies here.

B. Analysis

1. Plain Language

We begin our analysis with the relevant statutory language. Section 36900, subdivision (a) states, in full: "Violation of a city ordinance is a misdemeanor unless by ordinance it is made an infraction. The violation of a city ordinance may be prosecuted by city authorities in the name of the people of the State of California, *or redressed by civil action*." (Italics added.)

The Schwartzes contend section 36900, subdivision (a) unambiguously reflects the Legislature intended to authorize a private right of action by members of the public. In support of their position, they repeatedly emphasize that while the first clause of the statute's second sentence expressly states "city authorities" may prosecute violations of ordinances, the second clause does not likewise mention "city authorities" when specifying those violations may also be "redressed by civil action." According to the Schwartzes, the Legislature's omission of any reference to "city authorities" in the second clause unequivocally demonstrates it did not intend to restrict the right to sue under the statute to those authorities. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117 ["Where different words or phrases are used in the same connection in

different parts of a statute, it is presumed the Legislature intended a different meaning"].)[7]

Even assuming, *arguendo*, the Schwartzes' interpretation of the statute is reasonable, it does not render unreasonable or otherwise foreclose the Cohens' proffered interpretation. On this point, the Cohens argue—and we agree—that when read in context with the statute's first sentence and the first clause of the second sentence, which collectively grant "city authorities" the right to prosecute the violation of an ordinance as a misdemeanor, the second clause of the second sentence could reasonably be interpreted as affording only those same authorities the right to utilize civil lawsuits as an alternative enforcement mechanism. (See § 36900, subd. (a).)

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7 The Schwartzes also rely on two other principles of statutory construction to contend section 36900, subdivision (a) creates a private right of action. Under the first principle, known as the last antecedent rule, "'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.'" (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680.) The second principle, known as *expressio unius est exclusio alterius*, "means that 'the expression of certain things in a statute necessarily involves exclusion of other things not expressed . . . .'" (*Center for Community Action & Environmental Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th 689, 699.) Neither of these principles apply here. In interpreting section 36900, subdivision (a), we are not determining the application of any qualifying words to certain preceding phrases. And, nowhere in the statute did the Legislature expressly identify the individuals to whom it granted the right to seek redress by civil action, and thereby exclude all others not mentioned.

The Cohens' interpretation of the statute is supported by principles of interpretation governing clauses "written in the 'passive voice.'"(*Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4th 1512, 1524 (*Coso*).) Specifically, where, as here, the drafter of a sentence identifies the actor in the first clause, but uses the passive voice in the next clause, and therefore does not identify the actor to whom that clause applies, "[i]t is reasonable to infer that the undisclosed actor in the second clause is the same actor specified in the first; the lack of disclosure in the second instance can be attributed to the desire to avoid redundancy." (*Id.* at p. 1525.) Applying this principle to the second sentence of section 36900, subdivision (a), it is reasonable to infer the "city authorities"—i.e., the sole actors referenced in the sentence's first clause—are the same individuals entitled to "redress[ ] [the violation of a city ordinance] by civil action" by way of the second clause. Further, it is reasonable to infer that, having specified "city authorities" as the actors in the first clause, the Legislature did not re-identify those same actors in the next clause to avoid being "unnecessarily repetitive" (*Coso*, at p. 1525), and did not intend to grant all citizens the right to file suit.

For the reasons discussed above, we conclude section 36900, subdivision (a) does not "contain '"clear, understandable, unmistakable terms,"' which strongly and directly indicate that the Legislature intended to create a private cause of action." (*Lu*, *supra*, 50 Cal.4th at p. 597.) Instead, the statutory language is ambiguous, as it is '"susceptible to more than one reasonable interpretation."' (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1495.) We therefore turn to section 36900's legislative history "for greater insight." (*Lu*, at p. 598.)

2. Legislative History[8]

Section 36900, subdivision (a) derives from sections 769 and 867 of the Municipal Incorporation Act of 1883.[9] (60 Ops.Cal.Atty.Gen. 83, at *4 (1977).) Section 769 stated, in relevant part: "The violation of any ordinance of such city shall be deemed a misdemeanor, and may be prosecuted by the authorities of such city in the name of the people of the State of California, or may be redressed by civil action, *at the option of said authorities*." (Stats. 1883, ch. 49, § 769, p. 256, italics added.) Section 867 likewise provided, in pertinent part: "The violation of any ordinance of such city or town shall be deemed a misdemeanor, and may be prosecuted by the authorities of such city or town in the name of the people of the State of California, or may be redressed by civil action, *at the option of said authorities*." (Stats. 1883, ch. 49, § 867, p. 272, italics added.)

In other words, section 36900's predecessor statutes explicitly granted only city authorities—rather than all members of the public—the right to enforce violations of local ordinances by filing suit. These predecessor statutes contained the same language verbatim when Senate Bill No. 750 (SB 750), the bill adding section 36900 to the Government Code, was introduced in January 1945. (See Stats. 1905, ch. 74, § 1, p. 72; see also Stats. 1933, ch. 516, § 20, p. 1332.)

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8 We grant the Cohens' first request for judicial notice and their supplemental request for judicial notice. Likewise, we grant the Schwartzes' amended request for judicial notice. However, we deny the Cohens' final motion for judicial notice for failure to demonstrate relevance.

9 We refer to these predecessor statutes as section 769 and section 867, respectively.

SB 750 was drafted by the California Code Commission[10] (the Commission) at the Legislature's direction. Among other provisions, SB 750 added section 36900 as part of Title 4 to the Government Code "to consolidate and revise the law relating to the organization, operation, and maintenance of a system of state and local government . . . ." In so doing, SB 750 consolidated section 867 with section 769 and revised the relevant language to read as follows: "Violation of a city ordinance is a misdemeanor. Such violation may be prosecuted by city authorities in the name of the people of the State of California, or may be redressed by civil action." In other words, by way of SB 750, the Legislature (per the Commission's recommendation) deleted the phrase "at the option of said authorities" from the clause specifying violations of ordinances may be "redressed by civil action."

From the time it was drafted to its enactment, the Commission and other officials involved in the process consistently, and repeatedly, avowed SB 750 was not intended to make any substantive changes to existing law. At the outset, in its report to the Governor and the Legislature transmitted on January 1, 1949, the Commission noted it prepared Title 4 of the Government Code for enactment in 1949 to "codif[y] the laws relating to municipal corporations," and that it has suggested substantive changes to existing law more than once in the past. For the 1949 legislative session, however, the Commission stated:

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10 Created in 1929, the Commission was directed by the Legislature to "revise all the laws of the State." Among other duties, it was tasked with "[t]he codification, consolidation, compilation, or revision of all statutes in force" and "[t]he suggestion of . . . substantive changes in the existing law as may be deemed proper."

"*[N]o comprehensive substantive revision has been attempted*, due to the priority which the commission has given to the codification program. The commission believes that *a restatement of existing law in clearer form* will serve to call attention to many inequities and irregularities of a substantive nature, and result in their correction by other interested parties." (Italics added.)

Similarly, in a report dated April 14, 1949, the Office of the Legislative Counsel noted SB 750 "[a]dds Title 4 and Sections 500041 to 500045, inclusive, to the Government Code, relating to the organization, operation, and maintenance of a system of city government." Following its approval of the bill's form, title, and constitutionality, the report analyzed SB 750 as follows: "This bill, prepared by the California Code Commission, assembles, codifies, and consolidates the law relating to cities and, if approved, will constitute Title 4 of the Government Code. [¶] *It makes no substantive changes in existing law, but rearranges and restates in simplified language the substance of existing laws,* and repeals obsolete and superseded statutes." (Italics added.)

Consistent with these reports, the Attorney General stated in a memorandum to the Governor dated April 14, 1949: "Senate Bill No. 750 adds Title 4 to the Government Code, codifying the law relating to the government of cities. We have not compared each provision of Senate Bill No. 750 with the repealed acts specified therein in detail, *but a careful sampling indicates that there are no substantive changes in the law. Senate Bill No. 750 was prepared by the California Code Commission, which has informed us that to the best of their knowledge no substantive changes were made*." (Italics added.)

In a letter to the Governor dated April 18, 1949, the Secretary of the Commission addressed the proposed revisions to

the Government Code. With respect to SB 750, the Secretary stated: "Senate Bill 750 is a codification and consolidation of the laws relating to the government of cities, placing the various provisions of law relating to these matters in Title 4 of the Government Code." Then, after briefly describing the other bills before the Governor, the Secretary stated: "It is the belief of the California Code Commission that these codifications will render numerous acts more readily accessible than they now are in the various scattered acts. While Titles 4 and 5 are *mainly restatements of the laws relating to cities and local agencies*, many obsolete and superseded acts are repealed. *No substantive change in the existing law is made in any of these bills*." (Italics added.)

Subsequently, in a legislative memorandum dated April 22, 1949, Legislative Secretary Beach Vasey described SB 750 to the Governor as follows: "Adds new title to the Government Code relating to the organization, operation, and maintenance of city governments. Codification bill prepared by the California Code Commission and *making no substantive changes in existing law*." (Italics added.) After briefly summarizing the reports by the Office of the Legislative Counsel and Attorney General discussed above, the memorandum recommended SB 750's approval "as a further step in the long process of codification of State statutes, *making no substantive changes in existing law*." (Italics added.)

Finally, after SB 750 was enacted, the Legislature confirmed the bill did not make any substantive changes to existing law. The Legislative Counsel's Digest of Statutes Enacted in the 1949 Regular Session described SB 750 as follows: "Assembles, codifies, and consolidates law relating to city government *without change in legal effect*." (Italics added.) That the Summary Digest does not state or otherwise suggest the

statutes enacted by SB 750, including section 36900, created a private right of action "is a strong indication the Legislature never intended to create such a right of action." (*Moradi-Shalal*, *supra*, 46 Cal.3d at p. 300.)

The City Amici observe—and the Schwartzes do not appear to dispute—the widespread invocation of a private right of action under section 36900, subdivision (a) could profoundly affect cities in this state. The Amici explain: "[C]ities would lose their ability to monitor and influence courts' interpretation of their ordinances once enacted. Self-interested private parties could seek to enforce ordinances in whatever fashion suited [to] their purposes in that litigation. Outside a city's knowledge or participation, unskilled or underrepresented defendants lacking legislative history or context could default or even lose cases (including facial challenges to ordinances), thus potentially creating legal precedent binding on the city in all cases involving that local law. Courts could rule on arguments about ordinances without input from the city that enacted them. This result would also eliminate prosecutorial discretion, as any private party could choose to proceed with the civil enforcement of any ordinance."

In sum, the relevant legislative history shows section 36900, subdivision (a)'s predecessor statutes afforded only city authorities the right to redress violations of ordinances by way of civil action. Through SB 750, the Legislature consolidated those statutes and revised their language. In so doing, it removed the phrase specifying violations of ordinances could be redressed by civil action "at the option of [city] authorities." By making these revisions, however, the Legislature only sought to consolidate, codify, and restate existing law. It did not intend to make any substantive changes to laws then in effect. For these reasons, we

reject the contention that, by enacting section 36900, subdivision (a), the Legislature intended to recognize a private right of action as a new, alternative means of enforcing city ordinances. Instead, we conclude the Legislature removed the phrase "at the option of said authorities" from the clause stating violations of ordinances may be "redressed by civil action" to simplify the statutory language and avoid unnecessary repetition. (See *Coso*, *supra*, 122 Cal.App.4th at p. 1525.) It intended no change in meaning.

3. Public Policy

We acknowledge that, in addition to their arguments based on statutory language and legislative history, the Schwartzes assert their proffered interpretation of section 36900, subdivision (a) should be adopted because it is supported by public policy. Specifically, they contend private parties should be allowed to file suit under the statute because city authorities cannot be relied upon to enforce violations of ordinances due to their limited resources and the potential for abuse of prosecutorial discretion. They also assert that allowing citizens to file suit will "encourage compliance with the law" and more efficiently redress violations of ordinances when they occur.

These arguments are unavailing for two reasons. First, they have been forfeited because they are unsupported by citations to evidence or legal authority. (See *L.O. v. Kilrain* (2023) 96 Cal.App.5th 616, 629.) Second, and more important, the Schwartzes misunderstand our role as a reviewing court. "Our role here is to interpret the statute [as written], not to establish policy. The latter role is for the Legislature." (*Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1140.) Thus, their policy arguments are "best directed to the Legislature,

which can study the various policy and factual questions and decide what rules are best for society." (*Ibid.*)

4. Conclusion

The language of section 36900, subdivision (a) is ambiguous with respect to who may redress violations of city ordinances "by civil action." Having reviewed the pertinent legislative history, however, we conclude the Legislature did not intend to afford members of the public the right to bring suit to redress violations of local ordinances. Rather, the legislative history reveals that, when enacting section 36900, subdivision (a), the Legislature sought to restate and simplify existing law granting only city authorities the right to redress violations of ordinances, either through criminal prosecutions or by filing civil suits.

For these reasons, we hold section 36900, subdivision (a) does not authorize a private right of action. To the extent *Riley* held to the contrary, it is overruled.[11]

V. The Schwartzes' Argument on Caselaw Recognizing a Private Right of Action

Finally, the Schwartzes argue that, even if section 36900, subdivision (a) does not create a private right of action, they can still pursue their claims based on the Cohens' alleged violations of the LAMC because "California decisional law has repeatedly held that a private citizen can seek to enforce violations of local ordinances under certain circumstances."

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11 In addition, to the extent they relied on *Riley* to recognize a private right of action under section 36900, subdivision (a), we disapprove of and decline to follow *Amaral v. Cintas Corp. No. 2*, *supra*, 163 Cal.App.4th at p. 1181, fn. 10, and *Huntingdon Life Sciences Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, *supra*, 129 Cal.App.4th at pp. 1263-1264.

The authorities cited by the Schwartzes establish that an individual may file suit based on another's violation of an ordinance when he or she: (1) "suffers a 'special injury to himself in person or property of a character different in kind from that suffered by the general public'"; or (2) "is a 'member of the community for whose particular welfare the ordinance was enacted.'" (*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1152-1153.) In other words, where either of these criteria are met, the violation of a local ordinance may be relevant to, and may even satisfy an element of, a claim other than one based on section 36900, subdivision (a), such as a public nuisance claim. (See, e.g., *Sapiro v. Frisbie* (1928) 93 Cal.App. 299, 305-306 ["where a right is given by . . . municipal ordinance to a particular class of persons for their special protection, and not merely for the protection of the public at large, a liability is thereby created in favor of any such particular class against any person who violates such right and as a result injures the person or property of the former, which liability may be enforced by means of civil action"]; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939-940 ["a private person who suffers identifiable harm by reason of a violation of a municipal zoning law may sue the violator for compensatory damages and may also seek injunctive relief when applicable"]; *Castillo v. Friedman* (1987) 197 Cal.App.3d Supp.6 14 [violations of city ordinances are actionable by "'any injured member of the public for whose benefit the [ordinance] was enacted'"]; *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1498-1499 ["courts have generally permitted a citizen to enjoin violations of local ordinances only when the violations work a special injury on the citizen"]; *McIvor v. Mercer-Fraser Co.* (1946)

76 Cal.App.2d 247, 250, 254 [affirming judgment in favor of plaintiffs who adequately alleged defendants' excavation of their property in violation of a city zoning ordinance caused several identifiable injuries to plaintiffs and their property].)

The complaint, however, does not allege any facts showing the Schwartzes satisfy either of the requisite criterion. Indeed, in sustaining the Cohens' demurrer to the first cause of action, the trial court effectively found the Schwartzes did not satisfy the first criterion, as they "fail[ed] to allege specific facts describing how [the Cohens'] conduct has compromised [their] ability to use their property." And, while they were given leave to amend to cure this defect in their nuisance claim, they chose not to reassert it in their first amended complaint. Further, nowhere in their three briefs filed in opposition to the Cohens' petition have the Schwartzes specified what facts, if any, they could allege to establish they meet either of the requisite conditions to fall within the purview of the cases they have cited.[12]

In sum, we conclude the Schwartzes have not shown they have been authorized by caselaw or by statute to pursue their claims based on the Cohens' alleged violations of the LAMC. Thus, the trial court erred by overruling the demurrer to the second and third causes of action asserted in the complaint.

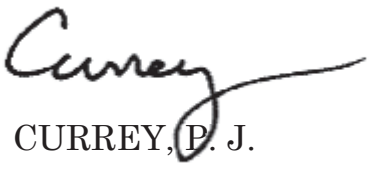
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12 For this reason, we conclude the Schwartzes have already had the opportunity to "bolster their allegations of 'special injury' or 'particular welfare'" sought in their return and deny their request for leave to "amend their complaint in light of this [c]ourt's decision" to overrule *Riley*.

DISPOSITION

Let a peremptory writ of mandate issue lifting the stay in the respondent court and ordering that court to: (1) vacate the portion of its June 1, 2023 order overruling petitioners' demurrer to the second and third causes of action asserted in respondents' original complaint filed May 19, 2022; and (2) enter an order sustaining petitioners' demurrer to the second and third causes of action without leave to amend. Petitioners are awarded their costs for this original proceeding. (Cal. Rules of Court, rule 8.493(a)(1)(A).)

CERTIFIED FOR PUBLICATION



CURREY, P. J.

We concur:



COLLINS, J.



ZUKIN, J.

PROOF OF SERVICE

I am employed in the County of Los Angeles, in the State of California. I am over the age of 18 and not a party to the within action; my business address is 11878 La Grange Ave., 2nd Floor, Los Angeles, CA 90025; and my email address is je@turner.law

On the below date I served the foregoing document:

PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, OVERTURNING, VIA WRIT, RILEY V. HILTON HOTELS CORP. (2002) 100 Cal.App. 4th 599

on all parties in this action as detailed in the below service list.

[X] **BY ELECTRONIC SERVICE:** I caused such document(s) to be delivered to the email address(es) listed below through the Court's TrueFiling electronic filing system, which addresses are known to the sender to be the email address of the recipient(s) registered with TrueFiling to be served electronically.

[X] **BY U.S. MAIL:** I am readily familiar with this firm's practice for the collection and the processing of correspondence for mailing with the U.S. postal service. It is deposited for collection with the U.S. postal service on that same day with postage thereon fully prepaid for delivery by first-class mail at Los Angeles, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one business day after date 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 June 14, 2024 in Los Angeles, California.

/s/ Justin Escano
Justin Escano

SERVICE LIST

Joel M. Kozberg, Esq. Kozberg & Bodell LLP 1801 Century Park East 16th Floor Los Angeles, CA, 90067 Jkozberg@kozberglaw.com	Attorneys for Petitioners/ Defendants Charles Cohen and Katyna V. Cohen *(By Electronic Service Only)*
Rex S. Heinke, Esq. Jessica Weisel, Esq. Complex Appellate Litigation Group LLP 811 Wilshire Blvd., 17th Floor Los Angeles, CA 90017 rex.heinke@calg.com jessica.weisel@calg.com	Attorneys for Petitioners/ Defendants Charles Cohen and Katyna V. Cohen *(By Electronic Service Only)*
Office of the Clerk Los Angeles Superior Court For: Hon. Lisa K. Sepe-Weisenfeld, Dept. N Santa Monica Courthouse 1725 Main St. Santa Monica, CA 90401	*(By U.S. Mail Only)*
Office of the Clerk 2nd District Court of Appeal, Division 4 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	*(By U.S. Mail Only)*

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court

STATE OF CALIFORNIA
Supreme Court of California

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