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July 8, 2013

Hon. Tani Cantil-Sakauye, Chief Justice
Associate Justices of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Lockaway Storage v. County of Alameda*, 216 Cal.App.4th 161, 156 Cal.Rptr.3d 607, Supreme Court Case No. S211470 (Petition for Review filed June 19, 2013): Request for Depublication

Dear Chief Justice Cantil-Sakauye and Associate Justices:

We write on behalf of the League of California Cities ("League") and the California State Association of Counties ("CSAC") to vigorously urge this Court to depublish the Court of Appeal's opinion in *Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161 ("Opinion" or "*Lockaway*"). As described below, the Opinion sets a troubling precedent for the application of "regulatory takings" doctrine to local land use decisions.

Lockaway is the third Court of Appeal decision to address, but not resolve, the impact of the United States Supreme Court's decision in *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528 on this Court's decision in *Landgate, Inc. v. California Coastal Commn.* (1998) 17 Cal.4th 1006. This Court's clear voice is urgently needed to reiterate that *Landgate* remains vital, if altered, after *Lingle.*

One of the rare opinions to find that land use regulation effected a regulatory taking, *Lockaway* advances an unprecedented application of *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, the polestar of modern takings jurisprudence. *Lockaway* focuses almost exclusively on the impact of the County of Alameda's action on Lockaway's ability to use its property for its *preferred* purpose, as opposed to evaluating the impact on the property's value and the totality of available land uses. It also improperly considers the "reasonableness" of the County's decision, in direct conflict with the *Lingle* decision.

The League and CSAC respectfully request that the Court depublish the Opinion. (Cal. Rules of Court, rule 8.1125.)

INTERESTS OF THE PARTIES

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Members of both CSAC and the League are public entities charged with regulating land use and are thus uniquely vulnerable to cases, such as this one, that expand the reach of regulatory takings claims.

PROCEEDINGS BELOW

Lockaway sought to develop a storage facility for recreational vehicles and boats in the unincorporated County ("the property"). (*Lockaway, supra,* 216 Cal.App.4th at 168.) In 1999, Lockaway obtained a conditional use permit ("CUP") to develop the property, but unless implemented, the permit would expire in September 2002. (*Ibid.*)

In 2000, Alameda County voters approved Measure D, a growth control initiative which, if applicable, would have prohibited Lockaway's project. (*Ibid.*) Measure D states that it applies to "development or proposed development which has not received all necessary discretionary County and other approvals and permits prior to the effective date of the ordinance." (*Id.* at 169.)

Lockaway contends that the County Administrator assured it Measure D did not prohibit its project because it had received all discretionary approvals. (*Ibid.*) But before expiration of the CUP, County staff, in consultation with County Counsel, concluded that the project was in fact subject to Measure D. Lockaway then applied for a new CUP, which the Board of Supervisors denied in March 2003.

Lockaway filed this action shortly after. It alleged inverse condemnation and denial of substantive due process and sought a writ of mandate to overturn the

permit denial. The Alameda County Superior Court issued the writ and the County issued the necessary permits four months later. (*Id.* at 172.) After a subsequent trial, the court rejected the due process claim, but found that the County's application of Measure D to Lockaway caused a temporary taking and awarded a total of $989,640 in just compensation and $728,015 in attorneys' fees. (*Id.* at 173.)

On appeal, the First District Court of Appeal dismissed the County's appeal of the writ as moot. (*Id.* at 172.) It then found that Lockaway's project was not subject to Measure D because it had "received all discretionary County and other approvals and permits" prior to the Measure's enactment. (*Id.* at 181.)

In determining whether the County's action caused a temporary regulatory taking, the court applied the United States Supreme Court's three-factor test from *Penn Central*, *supra*. (*Id.* at 184.) Considering the economic impact of the permit denial, the court focused on the County's interference with Lockaway's intended use of the property as a storage facility and found that the County had "unreasonably impaired" the value of the property. (*Id.* at 185.) Applying *Penn Central*'s "investment-backed expectations" factor, the court concluded that Lockaway had a reasonable expectation of building its project when the County initially assured it that Measure D did not apply. (*Id.* at 186.) Finally, the court concluded that the County's change in its interpretation of Measure D was "manifestly unreasonable" and thus supported finding a taking under *Penn Central*'s "character of the governmental action" factor. (*Id.* at 185-88.)

The court also addressed *Landgate*, in which this Court reiterated that ordinary regulatory delay does not constitute a taking, even when that delay involves litigation over the agency's legal position. (17 Cal.4th at 1018, 1029.) The *Lockaway* court found that the County's actions fell into *Landgate's* exception for regulatory decisions taken for the purposes of delay. *(Lockaway, supra,* 216 Cal.App.4th at 190-91.) It also suggested, but did not expressly hold, that *Lingle* overruled *Landgate*, and thus that the case may no longer protect public entities whose legal positions in the land use regulatory process are ultimately deemed erroneous by a court.

GROUNDS FOR DEPUBLICATION

I. The Opinion Demonstrates the Urgent Need for This Court to Explain How *Lingle* Affected This Court's Decision in *Landgate*.

The Opinion is the third decision of the California Courts of Appeal to address, but not resolve, the interaction of this Court's important decision in *Landgate* and the United States Supreme Court's *Lingle* decision, which fundamentally reori-

ented takings jurisprudence. Those three Court of Appeal decisions demonstrate continued uncertainty about whether *Landgate* may be reconciled with *Lingle*.

It is well-settled that delays occurring during the land use approval process, absent exceptional circumstances, do not give rise to takings claims. "When a regulation merely delays a final land-use decision, we have recognized that there are other background principles of state property law that prevent the delay from being deemed a taking." (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 351 (citing, *inter alia*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987) 482 U.S. 304, 321); see also *Calprop Corp. v. City of San Diego* (2000) 77 Cal.App.4th 582, 596 [public agencies are "largely relieve[d] . . . of liability" for regulatory delays].) This is because "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.'" (*Tahoe-Sierra*, 535 U.S. at 332 (quoting *Danforth v. United States* (1939) 308 U.S. 271, 285).)

In *Landgate*, this Court applied that unremarkable principle to the situation in which approval of a land use proposal is delayed while the landowner and local government litigate a question of state or local land use law. This Court held that such litigation is typically considered ordinary regulatory delay for which land use regulators are not liable. (17 Cal.4th at 1021.) However, *Landgate* identified a narrow exception for cases in which the local government's legal position in the litigation was so "objectively unreasonable" that it could only have been adopted for the improper purpose of delaying or scuttling the project. (*Id.* at 1024-25.) In those circumstances, the Court held, the agency's decision would fail to "substantially advance a legitimate state interest" and therefore could be a taking under the standard adopted by the United States Supreme Court in *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260. (*Landgate,* 17 Cal.4th at 1021-25.)

Six years later, in *Lingle,* the United States Supreme Court repudiated the *Agins* "substantially advances" standard as a basis for takings liability. The *Lingle* Court held that the touchstone for takings analysis is "the severity of the burden that government imposes upon private property rights" (544 U.S. at 539), but the substantially advances test focuses on the regulator's conduct, not the harm to the property owner. (*Id.* at 542.) Rather, the Court noted, it is a substantive due process test, under which, with appropriate deference to the government's action, a court may consider whether the action is utterly divorced from any legitimate governmental purpose. (See *id.* at 540-42.)

There is a patent tension between *Lingle* and the *Landgate* exception. Before *Lockaway,* the California Courts of Appeal had recognized that tension in two cases,

but declined to resolve it, finding that the challenged actions were not takings regardless. (See *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 270; *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1281.) *Lockaway* strongly implies that *Landgate* did not survive *Lingle,* but it too concluded that any conflict did not change the result: a taking. (*Lockaway*, 216 Cal.App.4th at 190-91.)

Lingle represented a major course change in takings jurisprudence, as it abandoned a legal theory employed in countless challenges to land use regulation. (See Frank, *The Dog That Didn't Bark, Imperial Water, I Love L.A., and Other Tales From the California Takings Litigation Front* (2007) 34 Ecology L.Q. 517, 523.) In California, *Landgate* has had comparable significance, preventing protracted takings litigation in many cases by clarifying that litigation is an unfortunate but frequent part of modern land use regulation and that local governments should not be held liable for the attendant delays.

In fact, contrary to *Lockaway*'s suggestion, *Lingle* did not displace *Landgate*. The two cases can be largely harmonized to preserve *Landgate*'s important function in preventing a flood of constitutional litigation over common state law disputes and give effect to *Lingle*'s insight that the Takings Clause looks to the severity of regulatory burdens on property owners, not the wisdom or good faith of regulators.

In *Loewenstein v. City of Lafayette* (2002) 103 Cal.App.4th 718, 736-37, a pre-*Lingle* case, the Court of Appeal explained that *Landgate* is an application of the test set out in *Penn Central, supra. Lingle* itself emphasized that the *Penn Central* test is at the heart of takings analysis, because it appropriately focuses on the impact to the landowner's use of its property and its reasonable investment-backed expectations. (See *Lingle, supra,* 544 U.S. at 538-39.)

Loewenstein concluded that the *Landgate* rule is an application of the "reasonable investment-backed expectations" factor from *Penn Central*. "A landowner can have no reasonable expectation that there will be no delays or bona fide differences of opinion in the application process for development permits. Sometimes the application process must detour to the court process to resolve a genuine disagreement." (*Loewenstein,* 103 Cal.App.4th at 737.) But "such delay comes within the *Landgate* category of normal delays," and thus "there is no taking even if the value of the subject property is diminished in some way." (*Ibid.*; see also *Tahoe-Sierra, supra*, 535 U.S. at 352 ["[T]he short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law *and part of a landowner's reasonable investment-backed expectations.*"] (emphasis added).)

Lowenstein demonstrates that, at its core, *Landgate* is not an application of the substantially advances test that *Lingle* repudiated. Rather, the court recognized

that *Landgate* applied the principle that landowners cannot have a reasonable expectation of avoiding regulatory delays. *Lingle* did nothing to question the Court's pronouncements on regulatory delay in prior cases. (See, e.g., *Tahoe-Sierra*, *supra,* 535 U.S. at 351-52; *First English, supra,* 482 U.S. at 321.)

This does not mean that local governments may adopt frivolous legal arguments to delay proposed developments. Both the *Lingle* majority and Justice Kennedy's concurrence emphasize that due process remains a check on public agencies in such egregious circumstances. (*Lingle, supra,* 544 U.S. at 542; *id.* at 548 (conc. opn. of Kennedy, J.).) The Ninth Circuit has also recognized the possibility of "class of one" equal protection claims in such extreme cases. (See *Squaw Valley Development Co. v. Goldberg* (9th Cir. 2004) 375 F.3d 936, 944-48; *Armendariz v. Penman* (9th Cir. 1996) 75 F.3d 1311, 1326-28.) To be sure, these standards give public agencies great leeway to decide that regulation best balances competing policy considerations. A landowner must show something more than a mere violation of state law to prevail. (See, e.g., *Shanks v. Dressel* (9th Cir. 2008) 540 F.3d 1082, 1089.) But due process and equal protection provide assurance that courts will not allow local governments to abuse their power to control land use.[1]

Lockaway mistook *Landgate*'s exception as its rule. *Landgate* is a particular application of the *Penn Central* test, subject to a narrow exception based on the since-rejected substantially advances test. On that view, *Landgate* survives *Lingle* mostly, if not entirely, unscathed. The exception remains as a substantive due process or equal protection test. This Court should depublish the Opinion to prevent continued confusion among the lower courts.

II. The Opinion Misconstrues the Economic Impact and Character Factors of *Penn Central.*

The Court of Appeal applied the three-factor test from *Penn Central Transportation Co. v. City of New York, supra*, to hold that the County's actions effected a taking. The three *Penn Central* factors are (1) the economic impact of the regulation on the property, (2) the extent to which the regulatory action interfered with the property owner's reasonable investment-backed expectations, and (3) the character of the agency's action. (*Penn Central, supra,* 438 U.S. at 124.) *Lockaway*'s application of the economic impact and character factors is unprecedented and inconsistent with numerous prior decisions. Its improper formulation significantly expands the

[1] Plaintiffs joined a substantive due process claim, which the trial court rejected. (*Lockaway*, 216 Cal.App.4th at 173.) Plaintiffs did not appeal that decision.

universe of government regulation that would require compensation as a taking. This Court should accordingly depublish the Opinion on this basis as well.

A. The Opinion Fails to Find the Extreme Economic Impact Required for a Taking Under *Penn Central*.

In applying the first *Penn Central* factor, the Opinion fails to identify the severe economic impact to Plaintiffs' property that might warrant a finding of a taking. In *Lingle*, *supra*, the United States Supreme Court teaches—and the Court of Appeal agreed—that a regulatory taking may be found under *Penn Central* only for "regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." (*Lingle*, *supra,* 544 U.S. at 539; *Lockaway, supra*, 216 Cal.App.4th at 185.) To meet this standard, regulation must logically render property valueless or close to it. Here, however, the lower court found only that the County's action "unreasonably impaired the value and use of the Lockaway property." (*Ibid.*)

Lockaway acknowledges that the County's actions "did not render the property worthless" and that Plaintiffs' property had "some alternative uses." (*Ibid.*) But the court did not analyze the difference in value of the property before and after the County's regulatory action, the degree of impairment of value during the period the County delayed Plaintiffs' project, or the available uses during the delay. "Unreasonable impairment of value" falls well short of the extreme economic impact tantamount to an eminent domain taking mandated by *Lingle*. (See, e.g., *MHC Financing Ltd. Partnership v. City of San Rafael* (9th Cir. 2013) 714 F.3d 1118, 1127 ["81% diminution in value (from $120 million to $23 million)" insufficient economic impact to justify a finding of a taking].)

Moreover, we are aware of no other case in which a court found a regulatory taking based on the property owner's inability to reap a profit from a chosen prospective use of its property. On the contrary, courts—including the *Penn Central* Court itself—have consistently held that a property owner has no right to a particular desired use of property in the absence of vested rights:[2] "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was

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[2] The Opinion acts as if, but notably does not hold, that Lockaway had obtained vested rights. (*Lockaway*, 216 Cal.App.4th at 185-86.) Such rights require the receipt of all required approvals and commencement of construction. (See *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 793.)

available for development is quite simply untenable." (*Penn Central, supra,* 438 U.S. at 130; accord, *Terminals Equipment Co. v. City and County of San Francisco* (1990) 221 Cal.App.3d 234, 243; see also *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1035 [regulation is not a taking merely because the available "possibilities for development" under the regulation do not include "what [the landowner] desires to build"].)

B. By Considering the Reasonableness of the County's Conduct Under the Character Factor of *Penn Central*, the Opinion Squarely Conflicts with *Lingle*.

The Court of Appeal also erroneously misconstrued *Penn Central*'s character factor as allowing it to scrutinize the reasonableness and good faith of the County's action. The court's analysis would re-introduce a substantive due process test to takings doctrine in California, requiring courts to second-guess the motives behind, and the efficacy of, regulation under the Takings Clause—in utter disregard of *Lingle*. (See *Lingle, supra,* 544 U.S. at 544.)

Penn Central explained that the character factor is concerned with the degree to which the government action is similar to direct condemnation: "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." (*Penn Central, supra,* 438 U.S. at 124 (citations omitted).) Thus, the character factor is concerned only with where a regulation falls on the spectrum between the extremes of direct physical occupation of property and a pure regulation of the use of the property for a public program. A regulation that results in a physical interference with property rights is thus more likely to effect a taking; a regulation that merely limits the owner's use of property is not likely to be a taking.

Nothing in *Penn Central* invited courts to decide whether a public agency's conduct was wise or unwise, legitimate or illegitimate, good or bad, or reasonable or unreasonable. As *Lingle* explained, "The [Takings] Clause expressly requires compensation where government takes private property *'for public use.'* It does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference*, amounting to a taking." (544 U.S. at 543 (citing *First English Evangelical Lutheran Church, supra,* 482 U.S. at 315 (emphasis in original)); see also *Brown v. Legal Foundation of Washington* (2003) 538 U.S. 216 [legitimate government action is precondition of taking claim].)

Moreover, *Lingle* emphasizes that the Takings Clause is not concerned with whether a government regulation has a "legitimate purpose" or is "arbitrary or irra-

tional," but rather whether the regulation is "functionally comparable to government appropriation or invasion of private property." (544 U.S. at 542.) The takings inquiry is focused solely on the "actual burden imposed on property rights," meaning the severity of the economic burden on the property in question. (*Id.* at 543.) Any other reading of the Takings Clause, the *Lingle* Court held, would require "courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited." (*Id.* at 544.)

The Court of Appeal here acknowledged that, after *Lingle*, takings claims may not be predicated on the alleged impropriety of government action: "the goal is to assess the '*magnitude or character of the burden* a particular regulation imposes upon private property rights' in order to determine whether its effects are 'functionally comparable to government appropriation or invasion of private property.'" (*Lockaway*, 216 Cal.App.4th at 189 (emphasis in original) (quoting *Lingle*, *supra*, 544 U.S. at 542).)

Although *Lockaway* accurately recited *Lingle*'s holding, it did not apply it. Instead it found that the County's alleged unreasonable conduct and bad faith were relevant, and indeed important, factors. By focusing on the reasonableness of the County's conduct, rather than the economic burden on or degree of physical interference with Plaintiff's property, *Lockaway* disregards the very takings standard of judicial review that it recited.

In analyzing the County's conduct under the character factor, the Court of Appeal observes that the County did not cause a physical invasion of Plaintiffs' property. (*Id.* at 186.) But after conceding that the County merely regulated the Plaintiffs' *use* of the property, the court proceeds to analyze the legitimacy and reasonableness of the County's actions under the character factor—a result expressly and emphatically rejected by *Lingle*.

In its analysis of the character factor, the Court of Appeal relied on the facts that the County: (1) "made a 'showstopping U-turn'" in its policy regarding the application of Measure D to Plaintiffs' application, (2) in December 2000 it "encouraged Lockaway to continue its development efforts for 18 months" and then "changed its position and announced that the project had been doomed since December 2000," (3) "refused to even consider whether Section 22 exempted the Lockaway project," (4) "deprived Lockaway of a meaningful opportunity to attempt to protect its property rights," (5) "'utterly failed to analyze, account for, or even mention, the safe harbor language in Section 22 of the measure' during the regulatory process leading up to this litigation," and (6) urged the Court of Appeal to adopt an interpretation of Section 22 of Measure D that the County failed to raise earlier in the proceedings. (*Id.* at 186-87.) The Court of Appeal found that the County's

conduct was thus "manifestly unreasonable" (*id.* at 187), and that the County's interpretation of Section 22 was not "reasonable." (*Ibid.*) These facts go not to the severity of the economic impact of the County's conduct on the property interest at issue, but rather on the legitimacy and rationality of the County's regulatory actions. Whether there was a reasonable basis for the County's policies and whether the County acted in good faith, or instead was motivated by an illegitimate purpose, may be appropriate for a due process analysis, but they are not properly considered in takings analysis. (*Lingle, supra*, 544 U.S. at 542; see also Echeverria, *Making Sense of* Penn Central (2005) 23 UCLA J. Envtl. L. & Pol'y 170, 202 [finding that *Lingle* "preclude[s] the notion that the character of the government action should turn on the good faith versus bad faith of government officials"].)

The County's actions thus could not constitute a valid basis for finding a taking under the character factor of *Penn Central*. This Court should depublish the Opinion on the grounds that *Lingle* precludes reimporting substantive due process to takings analysis through the back door of the character factor of *Penn Central*.

III. The Court Should Depublish the Opinion to Prevent Mischief in Future Cases.

The League and CSAC respectfully request that the Court order the Opinion depublished. The Court of Appeal's errors in (1) suggesting that *Landgate* was overruled by *Lingle* and (2) upholding a finding of a taking under *Penn Central* based on negligible evidence of economic impact and improper consideration of the reasonableness of the County's conduct, justify depublication to prevent the Opinion from misleading the lower courts, local governments, and landowners. Whatever the merits of the outcome in this particular case, the Court of Appeal's reasoning would open a Pandora's box of challenges to land use regulation.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Andrew W. Schwartz
Matthew D. Zinn

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PROOF OF SERVICE

Lockaway Storage v. County of Alameda
Case No. S211470
Supreme Court of the State of California

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On July 8, 2013, I served true copies of the following document(s) described as:

REQUEST FOR DEPUBLICATION

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on July 8, 2013, at San Francisco, California.

Sara L. Breckenridge

SERVICE LIST
Lockaway Storage v. County of Alameda
S211470
Supreme Court of the State of California

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S211470

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Lockaway Storage, et al.,
Plaintiffs and Respondents,
v.
County of Alameda, et al.
Defendants and Appellants.

After a Decision by the Court Of Appeal
First Appellate District, Division Three
Case Nos. A130874; A132768

PROOF OF SERVICE OF REQUEST FOR DEPUBLICATION

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PROOF OF SERVICE

Lockaway Storage, et al. v. County of Alameda
Case No. S211470
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SERVICE LIST
Lockaway Storage, et al. v. County of Alameda
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