

No. B _____

(Related Case No.: B292773)

In the Court of Appeal of the State of California
Second Appellate District, Division _____

DEMETRIUS CRUMP, et al.,
Victims and Petitioners,

vs.

APPELLATE DIVISION OF SUPERIOR COURT OF
LOS ANGELES COUNTY,
Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Real Party in Interest, and

SOUTHERN CALIFORNIA GAS COMPANY,
Defendant and Real Party in Interest.

**PETITION FOR WRIT OF MANDATE, PROHIBITION
AND/OR OTHER APPROPRIATE RELIEF**

Appellate Division Case No. BR053255
Los Angeles County Superior Court Case No. 6SC00433

Margaret M. Grignon (SBN 76621)
Anne M. Grignon (SBN 230355)
GRIGNON LAW FIRM LLP
6621 E. Pacific Coast Highway, Suite 200
Long Beach, CA 90803
Tel.: 562.285.3171
Fax: 562.453.3571
mgrignon@grignonlawfirm.com
agrignon@grignonlawfirm.com

Brentford Ferreira (SBN 113762)
BRENTFORD FERREIRA
ATTORNEY AT LAW
PMB #399
5318 E. 2nd Street
Long Beach, CA 90803
Tel.: 562.400.8578
bjferreira47@hotmail.com

*Attorneys for Demetrius Crump, et al., Victims and Petitioners
Additional Counsel Continued on Next Page*

R. Rex Parris (SBN 96567)
Patricia K. Oliver (SBN 193423)
PARRIS LAW FIRM
43364 10th Street West
Lancaster, CA 93534
Tel.: 661.949.2595
Fax: 661.949.7524
rrparris@parrislawyers.com
poliver@parrislawyers.com

Brian Panish (SBN 116060)
Robert Glassman (SBN 269816)
PANISH SHEA & BOYLE LLP
11111 Santa Monica Blvd.,
Suite 700
Los Angeles, CA 90025
Tel.: 310.477.1700
Fax: 310.477.1699
panish@psblaw.com
glassman@psblaw.com

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I. INTRODUCTION

This case involves thousands of victims of the largest natural gas leak in the country—the Aliso Canyon/Porter Ranch gas leak—who suffered staggering losses arising out of Defendant and Real Party in Interest Southern California Gas Company’s (“SoCalGas”) criminal conduct in releasing toxic substances into the air and failing to give notice of the release for days. Although the California Constitution guarantees the Victims of this most serious environmental crime restitution for their losses, the trial court failed to order the mandated restitution and the Appellate Division first deprived the Victims of their constitutional right to appeal and then affirmed the deprivation of their restitution rights. This Court should grant this petition to resolve these novel issues of great public importance.

SoCal Gas misrepresented to the State for decades that its natural gas storage field in Alison Canyon was safe, permitted a gas blowout that spewed massive amounts of toxic substances into the Porter Ranch and the neighboring communities, exposed tens of thousands of residents including children to blood-and-immune-system-damaging benzene and highly toxic methyl mercaptans, failed to report the blowout to the proper agencies for at least three days, repeatedly minimized the health risks of the toxic gas exposure to the residents and government agencies, and agreed to pay some relocation costs only after ordered to do so.

In contravention of its prosecutorial responsibilities to the Victims, the Los Angeles County District Attorney's Office ("DA"), representing Plaintiff and Real Party in Interest the People of the State of California, structured an extremely favorable, secret plea agreement with SoCalGas to avoid an order of direct restitution to the Victims/Petitioners. The plea agreement allowed SoCalGas to plead guilty to failing to timely notify the appropriate government agencies of its criminal discharge of toxic gases and the DA agreed to dismiss the count alleging the criminal discharge. The plea agreement primarily required SoCalGas only to make its gas storage fields safe, as it should have done before the blowout. The DA ignored the Victims' restitution request, entered into the no-restitution plea agreement behind the Victims' back, and acted in concert with SoCalGas to vehemently oppose the Victims' restitution request at the sentencing hearing.

Under California law, the Victims have a constitutional right to complete restitution for all economic losses arising from SoCalGas's conduct encompassed in the crime to which it pleaded guilty. The Victims also have a right to restitution for the conduct underlying the dismissed count of criminal discharge, because that count is transactionally related to the pleaded-to notice count and the criminal conduct in the dismissed count is involved in the criminal conduct in the pleaded-to count. Nevertheless, the trial court denied the Victims *any* restitution for SoCalGas's crimes. The Victims

appealed the order denying them restitution.

Despite express constitutional language providing crime victims the right to appeal an adverse restitution order, Respondent Appellate Division held the Victims had no right to appeal the adverse restitution order. Although the Appellate Division treated the appeal as a writ petition, it then affirmed the trial court's order denying the Victims all restitution. The Appellate Division erroneously concluded (1) the criminal discharge of toxic substances was not encompassed within SoCalGas's failure to report its toxic discharge, (2) the criminal discharge count that was dismissed was not transactionally related to the pleaded-to count of failing to timely notify of that discharge, and (3) the Victims must meet an overly strict causation analysis.

The unpublished Opinion addressed several precedential criminal restitution issues, some of which involve conflicting authorities, and all of which are critically important to crime victims' rights and extremely relevant based on the ever-increasing number of environmental toxic torts. The Appellate Division summarily denied the Victims' publication request and certification of the appeal for transfer to this Court.

In addition to this mandate petition, the Victims have filed with the Court a Petition for Transfer of the appeal. In light of the uncertainty created by the Appellate Division's

decision to treat the Victims' appeal as a petition for writ of mandate, the Victims seek review through a mandate petition also. In both petitions, based on the significant, precedential issues in this appeal, the Victims request that to settle important questions of law and to secure uniformity of decision, this Court reverse the Appellate Division's decision and instruct the Appellate Division to remand to the trial court to allow the Victims to finally receive the restitution to which they are entitled. The Opinion should be reversed because (1) crime victims have a constitutional right to appeal an adverse restitution order, (2) when an entity pleads guilty to failing to give notice of its criminal conduct, it is also liable in restitution for losses caused by the underlying criminal conduct, (3) the transactionally-related rule for dismissed charges applies to *all* adverse sentencing consequences including restitution, and (4) the strict causation standard the Appellate Division applied violates crime victims' broad rights to restitution.

Each of these issues, standing alone, warrants reversal of the Appellate Division's decision. The Opinion did nothing to clarify the few and often conflicting authorities in this significant area of law—the constitutional restitution rights of crime victims. This Court should grant the petition to restore crime victims' constitutional rights to restitution to their proper place.

II. PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

The Victims petition this Court for a writ of mandate and/or prohibition or other appropriate relief, directed to the Appellate Division of Respondent Superior Court for the County of Los Angeles and by this verified petition allege:

A. Beneficial Interests Of Petitioners; Capacities Of Respondent And Real Parties In Interest

1. Petitioners are the Victims in a criminal proceeding entitled *People v. Southern California Gas Company*, Los Angeles County Superior Court No. 6SC00433 and Appellate Division Case No. BR053255, in which the Appellate Division affirmed the trial court's order denying the Victims restitution for their economic losses arising out of the defendant's criminal conduct. The Victims are residents of the Porter Ranch community who suffered serious losses as a result of SoCalGas's discharge of hazardous substances into their community. The People of the State of California are the Plaintiff and Real Party in Interest and are represented by the Los Angeles County District Attorney's Office. SoCal Gas is the Defendant and Real Party in Interest. Real parties in interest have aligned together to prevent the Victims from obtaining a restitution order. The trial court is Judge Alan S. Rosenfield (Ret.), Department 14, and

the Respondent Appellate Division judges are Judges Tony L. Richardson, Sanjay T. Kumar and Patti Jo McKay.

B. Authenticity Of Exhibits

2. The exhibits accompanying this Petition consist of the Reporter's Transcripts, the Clerk's Transcripts, and the parties' appellate briefs filed in the Appellate Division of the Los Angeles Superior Court in Appellate Division No. BR053255, the Appellate Division's Opinion and orders, and the docket. The exhibits, labeled numerically and consecutively paginated, are true and correct copies of original documents on file in the appellate division of the superior court. All exhibits are incorporated by reference as if fully set forth in this petition.

C. Timeliness Of The Petition

3. This petition challenges the Opinion of the Appellate Division filed on August 7, 2018, and which became final on September 6, 2018. The Opinion found the Victims appeal had no standing to the trial court order denying the Victims restitution and instead treated the appeal as a petition for writ of mandate. (1 EX 1374.) The Opinion denied the petition for writ of mandate on the merits. This petition is timely filed.

D. Chronology Of Pertinent Events

In One Of The Most Serious Environmental Crimes In History, SoCalGas Spews Toxic Substances Over Porter Ranch And Neighboring Communities, Causing Millions Of Dollars Of Losses For Which The Victims Are Entitled To Restitution

4. SoCalGas owns a massive natural gas storage field in Aliso Canyon adjacent to the residential community of Porter Ranch. (1 EX 0182-0183.) For over 30 years, SoCalGas reported to state officials at the Division of Oil, Gas & Geothermal Resources that the gas storage wells at their Aliso Canyon facility were safe, and specifically reported that well SS-25 (drilled in 1953) had a subsurface safety valve designed to prevent the release of any gases into the surrounding community. (See 1 EX 0161-0162, 0171, 0174-0184, 0187-0188.) Yet SoCalGas knew the mandatory subsurface safety valve on well SS-25 had failed in the 1970s and been deliberately removed. (1 EX 0187-0194.) For decades, SoCalGas willfully concealed this information from state safety inspectors and instead knowingly sent test reports showing an operational subsurface safety valve in place. (1 EX 0174-0194.)

5. On October 23, 2015, the casing in well SS-25 failed, causing the largest gas blowout in history. Because SoCalGas had removed the subsurface safety valve, well SS-25 spewed benzene, hydrogen sulfide, methane, mercaptans, and numerous other toxic substances into the atmosphere over Porter

Ranch and neighboring residential communities. (1 EX 0106, 0187-0194, 0215, 0221.) This release of toxic substances continued for months. (1 EX 0106, 0187-0188.)

6. For at least three days, SoCalGas kept the blowout a secret, while over 30,000 residents in Porter Ranch, and their homes, businesses and schools were exposed to toxic gases. (1 EX 0106, 0187-0194, 0220-0223.) Specifically, SoCalGas failed to report the release of hazardous material to the California Emergency Management Agency and to the Los Angeles County Fire Department in violation of Health and Safety Code section 25510, subdivision (a).¹ (1 EX 0106.)

7. Once the public learned of the well's eruption, SoCalGas claimed the well was so far away, that the natural gas would dissipate before it reached Porter Ranch, and there was no public health threat: "[T]he leak does not pose an imminent threat to public safety. The well is located in an isolated, mountain area more than a mile away from and more than 1,200 feet higher than the closest home or public area.... In outdoor locations such as this, natural gas quickly dissipates into the air, greatly reducing the possibility for ignition and further diluting the gas as it reaches the public." (1 EX 0197.)

8. Environmental groups and attorneys for the

¹ All further references to statutes are to the Health and Safety Code unless otherwise designated.

Victims obtained an infrared camera to film the ongoing blowout and capture contrary evidence of natural gas, noxious odors, hazardous chemicals, and toxic pollutants rolling in a plume down the hill and into Porter Ranch. (1 EX 0138, 0157, 0167.)

9. SoCalGas also identified an oily mist emanating from the Aliso Canyon facility, but after initial concerns, SoCalGas affirmatively misrepresented to the Victims that “the mist would not travel beyond the facility.” (1 EX 0204.) SoCalGas further told residents “there was no reason to stay indoors.” (1 EX 0204.) The oily mist could not be seen with the naked eye and took several weeks before evidence started building up on homes, cars, and in playgrounds. (1 EX 0204, 0210, 0228-0229.) Children, vulnerable people, and pets breathed in the oily mist from the blowout for weeks *before* they knew the mist had traveled outside of the facility. (1 EX 0204, 0210, 0228-0229.)

10. SoCalGas misrepresented to the Victims that the only gas to which residents were being exposed was methane along with mercaptans (a toxic substance added to natural gas so people will detect gas leaks and leave dangerous areas). (See 1 EX 0156, 0197-0201.) SoCalGas’s blatant misrepresentations were made knowing that the community was also being exposed to benzene, hydrogen sulfide, and various other toxic substances. (1 EX 0106, 0215.) SoCalGas further misrepresented to the community these gases were harmless. (1 EX 0197, 0204, 0215.)

Reporters eventually discovered and broke the news of the misrepresentations about the levels of toxins released by SoCalGas. (1 EX 0197-0204, 0220-0223.)

11. More than 114 SoCalGas wells in Aliso Canyon did not meet rudimentary safety requirements. (1 EX 0137, 0158, 0189.) These wells were ordered shut down until SoCalGas complied with minimum safety standards. (1 EX 0158, 0239-0250.) SoCalGas was also ordered to plug old wells to prevent gases from rising into the community. (1 EX 0137, 0239-0250.)

12. Based on SoCalGas's intentional conduct, thousands of Porter Ranch residents suffered catastrophic health consequences, including death. (1 EX 0042-0059, 0139.) The County of Los Angeles ordered SoCalGas to relocate these families [1 EX 0207], but SoCalGas refused, necessitating a court order. (2 EX 00359-0360.) Thousands of Porter Ranch residents had to stay in their homes while their neighbors and pets began to die, and their children became sicker. (1 EX 0042-0059, 0139.) Porter Ranch homes soon redefined the word "uninhabitable." (1 EX 0042-0059, 0139.)

The Los Angeles County District Attorney's Office First Charges SoCalGas With Environmental Crimes And Then Structures A Plea Agreement With The Intended Purpose Of Depriving The Victims Of Restitution

13. Several months after the blowout began, the DA filed a misdemeanor complaint against SoCalGas, alleging four misdemeanor counts. (1 EX 0106-0108.)

14. Count 1 alleged a failure to report a release of hazardous materials, violating section 25510, subdivision (a), based on SoCalGas's failure to report the leak for three days. The complaint stated, "On or about October 23, 2015 to October 26, 2015, in the County of Los Angeles, the crime of FAILURE TO REPORT RELEASE OF HAZARDOUS MATERIAL, in violation of HEALTH AND SAFETY CODE SECTION 25510(a), a Misdemeanor, was committed by SOUTHERN CALIFORNIA GAS COMPANY, which failed, upon discovery, to immediately report a release or threatened release of hazardous material, to wit: NATURAL GAS OR ITS COMPONENTS (including, but not limited to, METHANE, METHYL MERCAPTAN, BUTYL MERCAPTAN, BENZENE AND BUTANE) to the California Emergency Management Agency and to the unified program agency." (1 EX 0106.)²

² Section 25510, subdivision (a) provides in part: "[A business that handles hazardous materials] shall, upon discovery, immediately report any release or threatened release of a hazardous material to the unified program agency, and to the

15. Count 4 alleged discharge of air contaminants violating section 41700, subdivision (a), based on SoCalGas's release of toxic substances. "On or about October 23, 2015 to the present, in the County of Los Angeles, the crime of DISCHARGE OF AIR CONTAMINANTS, in violation of HEALTH AND SAFETY CODE SECTION 41700(a), a Misdemeanor, was committed by SOUTHERN CALIFORNIA GAS COMPANY, which discharged air contaminants and other materials, to wit: NATURAL GAS OR ITS COMPONENTS (including, but not limited to, METHANE, METHYL MERCAPTAN, BUTYL MERCAPTAN, BENZENE AND BUTANE) that caused injury, detriment, nuisance or annoyance to any considerable number of persons or to the public, or that endangered the comfort, repose, health, or safety of any of those persons or the public, or that caused or had a natural tendency to cause, injury or damage to business or property." (1 EX 0108.)³

16. SoCalGas was charged in Counts 2 and 3 with failures to report the release under Los Angeles County Code

[Los Angeles County Fire Department], in accordance with the regulations adopted pursuant to this section."

³ Section 41700(a) provides: "[A] person shall not discharge from any source whatsoever quantities of air contaminants or other material that cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or that endanger the comfort, repose, health, or safety of any of those persons or the public, or that cause, or have a natural tendency to cause, injury or damage to business or property."

section 12.56.030 and Title 19 of the California Code of Regulations section 2703, subdivision (a). (1 EX 0107.)

17. A few days after the DA filed this case, attorneys representing many of SoCalGas's Victims, including attorneys from the Parris Law Firm representing more than 7,000 Victims, put the DA on notice that the Victims sought restitution under the California Constitution for their losses. (1 EX 0150.) These losses included cleaning costs, lost livelihood, unreimbursed relocation expenses, and damage to, and diminution in the value of, the Victims' property. (1 EX 0043-0061, 0091.) The DA assured the Victims' attorneys no plea agreement would be entered that did not include full restitution to the Victims for SoCalGas's criminal acts. (1 EX 0150.) SoCalGas was arraigned and pleaded not guilty on February 17, 2016. (1 EX 0112-0113.)

18. On June 14, 2016, an attorney from the Parris Law Firm appeared for a pre-trial hearing and advised the deputies district attorney, who were meeting with SoCalGas attorneys, that he represented the Victims, who sought restitution from SoCalGas. (1 EX 0152.) He was asked to leave and no proceedings were held in open court that day. (1 EX 0152.) The parties and their counsel met in chambers. (1 EX 0036-0037.) The minute order reflects that the prosecution and defense counsel conferred in chambers and does not reflect the presence of the Victims' counsel. (1 EX 0117.)

19. Presumably eager to garner the first settlement headlines and less than one year after the largest gas blowout in history, the DA's office reneged on its promise to the Victims and agreed SoCalGas could plead no contest to a failure to immediately report the leak without any probation or victim restitution. On September 13, 2016, the DA announced in open court it had entered a plea agreement with SoCalGas. (1 EX 0150.) None of the Victims of SoCalGas's criminal acts were notified or consulted about the terms of the plea agreement in advance. (1 EX 0150, 0153.) Prior to the agreement, the DA did not advise the Victims or their representatives regarding the terms of the plea agreement or the Victims' right to restitution. (1 EX 0090-0091.) The settlement was presented to the trial court as a *fait accompli* with no notice to, or input from, the Victims. (1 EX 0034, 0090-0091.) The plea agreement is deliberately silent on direct victim restitution. (1 EX 0122-0125.)

20. Under the plea agreement, SoCalGas pleaded no contest to one misdemeanor count of failing to immediately notify the California Office of Emergency Services and the Los Angeles County Fire Department of the leak that began on October 23, 2015 (Count 1). (1 EX 0122.) Under the plea agreement, SoCalGas would receive a non-probationary sentence, including fines, response costs, and remediation. (1 EX 0122-0124.) The other three counts would be dismissed. (1 EX 0124.) The plea agreement includes no requirement for direct restitution of the Victims' losses. (1 EX 0122-0125.) The plea agreement

also includes no requirement for a pre-sentence investigation report, which would have resulted in notice to the Victims and an opportunity for the Victims to submit restitution claims. (1 EX 0122-0125.) The plea agreement entitled the county to approximately \$250,000 in fines and the government agencies' \$246,672.88 in response costs. (2 EX 0339-0347.) The only other conditions were for SoCalGas to implement measures to which it was already obligated by various statutes and regulations to prevent gas leaks. (2 EX 0339-0347.)⁴

21. On September 13, 2016, again with none of the Victims or their counsel present, SoCalGas pleaded no contest to Count 1 under the plea agreement and the trial court accepted the plea. (1 EX 0009-0029.) The trial court set the matter for sentencing on November 29, 2016. (1 EX 0028.) The Probation Department never contacted the Victims about restitution and did not prepare a pre-sentence investigation report. (1 EX 0090-

⁴ The DA erroneously claims the settlement agreement amounts to \$4 million, by counting costs it estimates SoCalGas paid to comply with its already statutorily-required obligations to prevent its pipes from leaking hazardous materials into the Porter Ranch airspace. In any event, regulation of underground natural gas storage facilities is not within the DA's purview. In late June 2018, in direct response to SoCalGas's leak at Aliso Canyon, the California Conservation Commission adopted new regulations addressing the safety of these facilities, rendering much of the plea agreement null. The new rules take effect on October 1, 2018, and are to be administered by the Division of Oil, Gas & Geothermal Resources, an entity that does regulate underground natural gas storage facilities. (Cal. Code Regs., Tit. 14, Ch. 4, Subch. 1, Art. 4, § 1726 et seq.)

0091.)

The Trial Court Denies The Victims Their Constitutionally Mandated Restitution And The Appellate Division Affirms

22. On October 18, 2016, the Victims requested their constitutional direct restitution rights, a restitution hearing, and that the trial court retain jurisdiction over restitution. (1 EX 0130-0148.) The Victims' motion was based on the lack of notice and of any award of direct restitution. (1 EX 0130-0148.) The Victims' motion was supported by declarations and a request for judicial notice. (1 EX 0150-0160.)

23. Both SoCalGas and the DA filed oppositions to the Victims' requests. (1 EX 0287-0306; 2 EX 0440-0455.) SoCalGas argued the Victims could not receive restitution because it had pleaded no contest only to a failure to report and had not been placed on probation. (1 EX 0302.) SoCalGas also argued it paid relocation expenses to some residents, including for interior cleaning, and since a civil action was pending, direct restitution was unnecessary (though involving many different costs). (1 EX 0295-0296.) Finally, SoCalGas argued the prosecution had agreed to dismiss the only count for which restitution might have been ordered. (1 EX 0299.) The DA argued *against* the Victims, claiming they could not recover diminution in property value as restitution and that the Victims were not entitled to restitution for the failure to report count to which SoCalGas had pleaded no contest. (2 EX 0449-0450.)

24. In reply (2 EX 0472), the Victims argued they were entitled to restitution for SoCalGas's failure to report, because "[t]he failure to report an emission of toxic gases cannot occur unless there are emissions." (2 EX 0476.) They also argued economic loss was a broad concept that encompasses diminution in property values. (2 EX 0480-0481.)

25. Liaison Counsel for Plaintiffs in the coordinated civil actions (not in the criminal case), declared that he had been contacted by a deputy district attorney on September 11, 2016 to set up a conference call, but the deputy district attorney told him that none of the Victims' other attorneys (including the Parris Law Firm) could participate. (2 EX 0468.) The next day, Liaison Counsel spoke to two deputies district attorney, who told him only that a preliminary settlement of the criminal charges had been reached, with no discussion of the terms (including restitution), other than that the terms were confidential until disclosed publicly. (2 EX 0468-0469.) The DA refused to give Liaison Counsel a copy of the settlement agreement. (2 EX 0469.) Neither the Parris Law Firm nor any of the other attorneys for the Victims received *any* notice of the terms of the plea agreement. (1 EX 0090-0091.) Liaison Counsel stated in his declaration he *would* discuss the matter with the Plaintiff Steering Committee Co-Leads, but did not state he ever *actually* discussed the agreement with any of the Victims' other attorneys. (2 EX 0469.)

26. The trial court accepted SoCalGas's no contest plea on September 13, 2016—the very next day—with no representatives of the Victims present or even mention of the Victims. (1 EX 0009-0029.)

27. The trial court held a sentencing hearing on November 29, 2016. (1 EX 0030-0031.) The Victims' counsel were finally given notice and were present. (1 EX 0030-0031.) The trial court had been unclear whether just the Victims' motion requesting restitution, or the evidence for a restitution hearing and sentencing were to be heard, so only a few Victims were present. (1 EX 0031-0033, 0042-0043, 0054.) The trial court stated at the hearing it had set aside the entire day for all aspects of the case. (1 EX 0042-0043.) In addition, both the trial court and the Victims' attorney noted that they were unsure how the trial court should proceed with taking evidence on restitution, before the trial court nonetheless proceeded with the only hearing allowing evidence of restitution. (1 EX 0042-0043, 0092-0096.) With no prior notice that Victim witnesses would be allowed to testify, much less prior notice this would be their *only* chance to produce any evidence on their restitution rights, only a handful of Victims were available to testify. (1 EX 0042-0059, 0092-0096.)

28. The Victims' counsel argued the Victims were improperly excluded from plea negotiations and received inadequate notice of the plea agreement: “[M]any victims and lawyers made requests to be heard before any sentence or before

any plea agreement was entered into. There was written communication. There [were] verbal guarantees to Mr. Parris by the District Attorney's Office that the Victims would have a say. We went to meetings. We showed up in court." (1 EX 0036-0037.) The Victims' counsel also argued the DA had improperly bargained away the Victims' constitutional restitution rights: "We were shut out of all these proceedings, never had notice as required." (1 EX 0037, 0039.) And, the Victims' counsel argued the Victims were entitled to full restitution of losses pursuant to SoCalGas's plea agreement, and those losses were calculable. (1 EX 0038.) Alternatively, counsel argued restitution was due for the Victims' losses caused by the three-day delay in reporting. (1 EX 0085.)

29. The DA and SoCalGas aligned to oppose the Victims' request for restitution. (1 EX 0068-0084.) A deputy district attorney argued the Victims could not have restitution for Count 1 and disputed the necessity for any direct restitution to the Victims. (1 EX 0072-0075.) Despite the Victims' entitlement to full restitution of their losses, the deputy district attorney claimed the settlement with SoCalGas and money SoCalGas spent to relocate some Porter Ranch residents was sufficient restitution. (1 EX 0074-0075, 0077.) The deputy made these representations despite testimony from Victims recounting their uncompensated losses, including house cleaning, lost livelihood, unreimbursed relocation expenses, damage to and diminution in value of their property, and even the cost of an ambulance

relocating one couple's son, who died during the blowout. (1 EX 0043-0061.) The deputy district attorney also argued the Victims could not receive restitution for the diminution in value of their properties. (1 EX 0073-0074.) SoCalGas argued primarily that its failure to report the emission of toxic substances was not transactionally related to the emission of those toxic substances. (1 EX 0083-0084.)

30. The trial court continually noted irrelevant concerns about the large number of Victims entitled to restitution and the pendency of a civil action. (1 EX 0033-0034, 0092-0096.) At the conclusion of the hearing, the trial court denied the Victims' requests for direct restitution or even for the trial court to retain jurisdiction to accomplish restitution since the DA's hasty plea agreement occurred long before the extensive damages from this massive environmental disaster could be fully evaluated. (See 1 EX 0092-0096.) The trial court distributed a written opinion confirming this denial. (1 EX 0092; 2 EX 0527-0541.)

31. The trial court concluded in the opinion that the Victims had standing to be heard, but could not intervene. (2 EX 0527.) The trial court also concluded restitution could be ordered in a non-probationary context only for crimes of which the defendant had been convicted. (2 EX 0532-0534.) The trial court concluded restitution was not recoverable for the count to which SoCalGas had pleaded no contest. (2 EX 0539-0540.)

Inexplicably, the trial court concluded the prosecution had reasonably notified the Victims and legally exercised its discretion in entering the plea agreement. (2 EX 0539-0540.) The trial court accepted the plea, sentenced SoCalGas to a non-probationary sentence, and dismissed the remaining counts. (1 EX 0096-0098; 2 EX 0540.)

32. On December 28, 2016, the Victims timely filed a notice of appeal from the judgment and the order denying their request for restitution. (2 EX 0594-0596.) On December 29, 2016, the Victims also timely petitioned the Appellate Division for a writ of mandate. (2 EX 0598-0625.)

33. On January 5, 2017, the Appellate Division denied the Victims' writ petition on the ground they had "an adequate remedy at law via their direct appeal from the order denying restitution." (3 EX 1022.)

34. On June 7, 2017, the Victims filed their Appellant's Opening Brief. (4 EX 1031.) On September 7, 2017, SoCalGas filed its Respondent's Brief. (4 EX 1133.) On September 15, 2017, the DA filed its Respondent's Brief. (4 EX 1177.) On October 26, 2017, the Victims filed their Appellants' Reply Brief. (4 EX 1228.)

35. On January 24, 2018, the Appellate Division issued an order requesting briefing on the issue of whether the

trial court's order denying the Victims restitution was appealable by the Victims. (4 EX 1269-1270.) On February 21, 2018, the Victims filed a Supplemental Brief on this issue. (4 EX 1272.) On March 23, 2018, the DA and SoCalGas filed Supplemental Briefs again combining to argue against the Victims. (4 EX 1296, 1320.) On April 12, 2018, the Victims filed a Supplemental Reply Brief. (4 EX 1338.)

36. Oral argument was heard on May 10, 2018. (4 EX 1386.)

37. On August 7, 2018, the Appellate Division issued its Opinion, affirming the trial court's order denying the Victims any restitution. (4 EX 1357.) It held: (1) despite express constitutional language to the contrary, the Victims have no standing to appeal the trial court's denial of their request for restitution (4 EX 1363-1370); (2) the Victims have standing to bring a writ petition, and the court exercises its discretion to treat the appeal as a writ petition and decide the writ petition on the merits (4 EX 1370-1374); (3) an entity's criminal discharge of toxic substances is not encompassed within the crime of failing to timely report that discharge (4 EX 1377-1380); (4) unlike other adverse sentencing consequences, the transactionally-related test for dismissed charges does not apply to restitution (4 EX 1375-1377.) (5) a strict causation standard applies with scientific precision to victim restitution less than one year after the

blowout and the Victims did not establish that they had been harmed by SoCalGas's criminal conduct (4 EX 1380.)

38. On August 22, 2018, the Victims filed a request for publication and an application for transfer of the appeal to this Court. On August 27, 2018, SoCalGas opposed the Victims' request for publication and application for transfer. On September 4, 2018, the Appellate Division denied the request and application. (4 EX 1384.)

39. In addition to this Petition, the Victims are filing a Petition to Transfer the appeal to this Court.

E. Basis For Relief

40. There are four significant issues addressed by the Opinion that are wrongly decided and require this Court's review to settle important questions of law for crime victims statewide, to provide uniformity of decision because of conflicting authorities, and/or to provide guidance to trial courts. First, crime victims' constitutional right to appeal a trial court's denial of restitution is an important issue to crime victims statewide, as well as the administration of justice, and is the subject of conflicting opinions.

41. Second, whether other criminal conduct is encompassed in a crime to which the defendant pleaded guilty is

an important and ongoing issue for crime victims seeking direct restitution.

42. Third, whether the transactionally-related test for dismissed charges applies to all adverse sentencing consequences including restitution is an important issue of first impression needing this Court's guidance.

43. Fourth, whether a strict causation standard should be applied to a crime victim's restitution claim at the early stages of a massive criminal case, is also an important issue needing guidance by this Court. For each of these reasons, the Court should grant the Victims' Petition to address these issues.

F. Absence Of Other Remedies

44. Less than a year after this unprecedented environmental disaster, the DA hastily settled this prosecution for a pittance and with no restitution for the Victims—presumably to receive the first headlines of a “victory.”

45. In contrast to the DA's hasty, insufficient monetary penalties attempting to preclude the Victims from receiving restitution, two and a half years after this environmental disaster, state and other government entities entered into a more measured settlement with SoCalGas for *\$119.5 million*. This settlement, however, also did not address

the Victims' injuries, "I want to make this clear: This does not resolve another crucial component that resulted from this incident and that is the personal harm and injury and damages that Angelenos suffered from this leak."⁵

46. Lost in the shuffle of these government agencies' settlements, however, are the Victims of SoCalGas's crimes. Although they are constitutionally entitled to first priority of payment for their restitution losses (Cal. Const., art. 1, §28, subd. (b)(13)(C)), the Victims have received *nothing* from the DA's hurried plea agreement, and nothing from the state's more fulsome settlement. The Victims have no other remedies to obtain their criminal restitution losses, losses that differ in type and magnitude from other losses that might qualify for civil relief, such as lost wages for Victim caregivers, relocation expenses, attorneys' fees and other items. (Pen. Code, §1202.4, subd. (f)(3)(A)-(L).)⁶

⁵ The Attorney General stated this in an August 9, 2018 *Daily Journal* article on the settlement, "State, city settle Porter Ranch case."

⁶ Pen. Code, §1202.4, subd. (f)(3)(A)-(L) sets forth some recoverable expenses:

(A) Full or partial payment for the value of stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible.

(B) Medical expenses.

(C) Mental health counseling expenses.

(D) Wages or profits lost due to injury incurred by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, while caring for the

47. Though SoCalGas and the DA collusively claimed throughout this case that the Victims will receive full

injured minor. Lost wages shall include commission income as well as base wages. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown.

(E) Wages or profits lost by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, due to time spent as a witness or in assisting the police or prosecution. Lost wages shall include commission income as well as base wages. Commission income shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown.

(F) Noneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288, 288.5, or 288.7.

(G) Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the court.

(H) Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim.

(I) Expenses incurred by an adult victim in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items.

Expenses incurred pursuant to this section shall be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim.

(J) Expenses to install or increase residential security incurred related to a violation of Section 273.5, or a violent felony as defined in subdivision (c) of Section 667.5, including, but not limited to, a home security device or system, or replacing or increasing the number of locks.

(K) Expenses to retrofit a residence or vehicle, or both, to make the residence accessible to or the vehicle operational by the victim, if the victim is permanently disabled, whether the disability is partial or total, as a direct result of the crime.

(L) Expenses for a period of time reasonably necessary to make the victim whole, for the costs to monitor the credit report of, and for the costs to repair the credit of, a victim of identity theft, as defined in Section 530.5.

compensation in the civil case, that is clearly false. For example, SoCalGas argued in the civil case brought by many of the same home and business owners injured by the Porter Ranch gas leak (Victims in this case), that business entities may not recover economic damages when they suffer no personal or property injury. (*Southern California Gas Leak Cases* (Supreme Court Case No. S246669, Court of Appeal Case No. B283606, JCCP Case No. 4861). The trial court in the civil case agreed with SoCalGas, and the Court of Appeal affirmed. However, in light of the importance of the issues involved, the Supreme Court has accepted the issue for review and the matter is pending.

48. In addition, it is well-established that civil damages are no substitute for criminal restitution. (*Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 443-445 [victim suffering economic loss from criminal conduct has right to both criminal restitution and a civil judgment]. The two remedies are distinct and serve different purposes. (*Id.* at pp. 444-445; see also *People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1132-1133 [right to restitution for economic losses is mandatory and not forfeited by pursuing damages in a civil action].) And the Victims have a right to full and complete restitution, so the fact that some of the Victims have been compensated by SoCalGas for some of their losses does not deprive them of their right to full restitution, including for the diminution in value of their property. (See, e.g., *People v. Mearns* (2002) 97 Cal.App.4th 493, 497, 501-502.)

49. The trial court denied the Victims their constitutional right to restitution. The Appellate Division denied the Victims their constitutional right to appeal the trial court's adverse restitution order and then denied the Victims their constitutional right to restitution on the merits. The Victims have petitioned this Court for transfer of the appeal. Alternatively, the Victims petition this Court for a writ of mandate because of the confusion caused by the Appellate Division's decision to treat the Victims' appeal as a petition for writ of mandate, which may not be subject to transfer. This Court is the court of last resort for thousands of victims of SoCalGas's criminal conduct to recover their economic losses as restitution. The Victims have no alternative means to receive the criminal restitution to which they are entitled. Accordingly, the Court should grant the petition, reverse the decision of the Appellate Division, and afford the Victims the restitution to which they are entitled.

PRAYER

Petitioners and Victims respectfully request that this Court:

1. Either:
 - (a) Issue a peremptory writ of mandate and/or prohibition in the first instance or such other appropriate writ as

the facts warrant, commanding the Appellate Division of respondent superior court to (1) vacate and set aside its August 7, 2018 Opinion affirming the trial court's denial of the Victims' request for restitution and (2) enter a new and different opinion reversing the order and directing the trial court to award the Victims direct restitution, or

(b) Issue an alternative writ commanding the Appellate Division of respondent superior court to grant the relief specified in paragraph 1(a) of this prayer, or to show cause why it should not be ordered to do so, and upon return to the alternative writ, if any, issue a peremptory writ as set forth in paragraph 1(a);

2. Award the Victims their costs under California Rules of Court, rule 8.493; and

3. Grant such other relief as may be just and proper.

DATED: September 21, 2018 GRIGNON LAW FIRM LLP

By /s/ Margaret M. Grignon
Margaret M. Grignon
Attorneys for Victims and
Petitioners

VERIFICATION

I, Margaret M. Grignon, declare as follows:

I am one of the attorneys for the Victims and Petitioners herein. I have read the foregoing Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief and know its contents. The facts alleged in the petition are within my own knowledge, and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than petitioners, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on September 21, 2018 in Long Beach, California.

/s/ Margaret M. Grignon
Margaret M. Grignon

MEMORANDUM OF POINTS & AUTHORITIES

I. WRIT RELIEF IS APPROPRIATE UNDER THE FACTS OF THIS CASE

For the sake of brevity, petitioners incorporate by reference paragraphs 1 to 49 of the verified petition, immediately above, in their entirety.

II. STANDARD OF REVIEW

A superior court judgment that grants or denies a petition for writ of mandate directed to a lower court, regarding a matter pending in the lower court, is nonappealable, but the aggrieved party may seek interlocutory appellate review by filing a new petition for a writ of mandamus or prohibition with the Court of Appeal. (Code Civ. Proc., § 904.1, subd. (a)(1); *Rosenberg v. Superior Court* (1998) 67 Cal.App.4th 860, 864; see also *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 829, fn. 3.)

A petition for writ of mandate may be granted to correct an abuse in the exercise of discretion by the respondent court. (See *State Farm Mutual Automobile Ins. Co. v. Superior Court* (1956) 47 Cal.2d 428, 432; *RLI Ins. Co. Group v. Superior Court* (1996) 51 Cal.App.4th 415, 433.) Such a petition may also be granted to enforce a nondiscretionary duty to act on the part of a court. (See *Hendrix v. Superior Court* (2011) 191 Cal.App.4th 889, 893.) To prevail, a petitioner must establish there is no

other adequate remedy at law (no right to immediate appeal) and the petitioner will suffer irreparable injury if the writ is not granted. (See, e.g., *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1274-1275.) Writ review also is granted to address novel issues of great public importance, resolve issues of first impression, and to provide guidance to litigants and the trial courts.

III. LEGAL ARGUMENT

A. Crime Victims Have A Constitutional Right To Directly Appeal The Denial Of Restitution

Crime victims have an independent right to appeal a trial court's denial of their constitutional right to restitution. The California Constitution gives the Victims certain "personally held and enforceable rights," including to restitution, along with the right to enforce those rights in the appellate courts. (Cal. Const., art. 1, §28, subd. (b)(10) [right to provide information to a probation officer for pre-sentence investigation]; subd. (b)(11) [right to receive a pre-sentence report]; subd. (b)(13) [right to receive restitution]; subd. (c)(1) [right to enforce restitution rights].)

The right to restitution "cannot be bargained away or limited, nor can the prosecution waive the victim's right to receive restitution." (*People v. Gross* (2015) 238 Cal.App.4th 1313, 1318; see also *People v. Brown* (2007) 147 Cal.App.4th

1213, 1226 (*Brown*.) Not only can the prosecution not bargain away the victim's rights directly, it cannot do so indirectly as was done here by the DA deliberately designing a plea agreement to foreclose restitution: a "sentence without an award of victim restitution is invalid." (*Brown, supra*, 147 Cal.App.4th at p. 1225.)

1. Crime Victims' Right To Appeal Adverse Restitution Orders Is Constitutional

Crime victims were given new restitution rights when Section 28 was added to the California Constitution by the voters through Proposition 8 on June 8, 1982, and amended by the voters through Proposition 9 (Marsy's Law) on November 4, 2008. The individual constitutional rights created include: (1) the right to seek and secure restitution, (2) the right to an order of restitution "in every case ... in which a crime victim suffers a loss," and (3) "All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim." (Cal. Const., art. 1, §28, subd. (b)(13)(A)-(C).)

Specifically, California Constitution, article 1, section 28, subdivision (b)(13)(A)-(B) states in pertinent part that crime victims are entitled as of right to restitution for all losses from a crime: "[T]o preserve and protect a victim's rights to justice and due process, a victim shall be entitled to ...

restitution. (A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.”

Crime victims also have the constitutional right to enforce their restitution rights: “A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) [including restitution] in any trial or *appellate court* with jurisdiction over the case as a matter of right. The court shall act promptly on such a request.” (Cal. Const., art. 1, §28, subd. (c)(1) (emphasis added); see also Cal. Const., art. 1, §28, subd. (f) [referring to “enumerated rights provided in subdivision (b) [including restitution] that are personally enforceable by victims as provided in subdivision (c)”].)

2. Any Failure On The Legislature’s Part To Adopt An Implementing Statute Cannot Deprive Crime Victims Of Their Constitutional Right To Criminal Restitution And To Appeal

The Legislature enacted Penal Code section 1202.4 to implement crime victims’ express constitutional right to restitution, with subdivision (f) providing in pertinent part: “in

every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.”

The DA and SoCalGas argued that the Legislature's failure to implement the voters' intentions by amending the Penal Code to provide express statutory language providing Victims with appellate rights prevents victims from appealing, and the Appellate Division agreed. (4 EX 1365-1370.) However, whether the Legislature properly enacted statutory appellate procedures to effectuate the voter's intent to protect victims' rights to restitution and to appeal the denial of those rights, the Constitutional provision provides the victims with a personal right to appeal that must be enforced. (See *Byers v. Smith* (1935) 4 Cal.2d 209, 212-215 (*Byers*) [enforcing a constitutional protection where the Legislature had not properly enacted it by statute].)

When the Constitution confers jurisdiction, “the power is conferred [on the Legislature] to adopt such measures and rules as will render the constitutional grant effective and operative, otherwise the [L]egislature might by mere inaction defeat the will of the people expressed in the fundamental law.” (*Byers, supra*, 4 Cal.2d at pp. 213-214.) “[T]he Legislature has not the power, either through direct enactment or indirect device,

to destroy or abridge the right of an appeal constitutionally granted.” (*Id.* at p. 214.)

Thus, any ministerial failure on the Legislature’s part to amend the criminal statutes to expressly provide an appellate right to victims does not comply with the voters’ intent and cannot prevent the Victims from exercising their constitutional right to appeal. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 450-454 (*Dix*) [decided before Marsy’s Law, but distinguishing the restitution rights of crime victims from the DA’s right to negotiate criminal pleas].)

3. Other Than Appellate Division Outliers, Appellate Decisions Acknowledge A Crime Victim’s Right To Appeal

Even before Marsy’s Law amended the Constitution to expressly provide crime victims with the right to appeal, the Court of Appeal recognized that victims had such rights. (*Melissa J. v. Superior Court* (1987) 190 Cal.App.3d 476, 478-479 (*Melissa J.*)) Crime victims are typically not considered parties to a criminal proceeding, but “where the court has issued an order concerning restitution, the victim may assert his or her legitimate rights by the procedures available to parties.” (*Id.* at p. 479.) In *Melissa J.*, the Court of Appeal allowed the crime victim to proceed by petition for writ of mandate, because the victim had no prior notice that an appeal would have been available. (*Id.* at pp. 478-479.) But, because victims have the

right to employ a party's procedures when it comes to restitution, *future* victims would have standing to appeal. (*Id.* at p. 479.) Since the parties to a criminal appeal have the right to appeal restitution awards, *Melissa J.* establishes that the Victims also have appellate rights to appeal the denial of restitution. (See *ibid.*; see also *Dix, supra*, 53 Cal.3d at p. 453 [citing *Melissa J.* with approval].)

Moreover, the Court of Appeal in *People v. Hannon* (2016) 5 Cal.App.5th 94, 105-107 (*Hannon*) recognized that crime victims must have a right to appeal the denial of restitution. "If a victim does not have a right to appeal an inadequate restitution award, and the People decline to appeal, then the victim's claims of error may go unheard. Arguably, a victim has a right to appeal under Section 28, subdivision (c)(1), which states that '[a] victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right.'" (*Id.* at p. 107, fn. 7.)

The Appellate Division's Opinion in this case and the Orange County Appellate Division's Opinion in *People v. Subramanyan* (2016) 246 Cal.App.4th Supp. 1 (*Subramanyan*), conflict with the express language of the Constitution, the Court of Appeal's *Melissa J.* and *Hannon* opinions, and the Supreme Court's clear demarcation between the rights of victims and the

rights of prosecutors in *Dix*. The *Subramanyan* Court wrongly concluded: “There is no provision in [the Constitution] that specifically permits a victim to appeal a restitution order. The Penal Code specifically directs that appeals are limited to the People or the defendant. (Pen. Code § 1466.) Penal Code section 1202.4 does not authorize an appeal by the victim after a restitution hearing.” (246 Cal.App.4th Supp. at p. 7.) The *Subramanyan* Court discounted the constitutional provision authorizing crime victims and their attorneys to personally enforce the victims’ restitution rights in the appellate courts. (*Ibid.*) Furthermore, the Court of Appeal in *Hannon* disagreed with this analysis: “*Subramanyan* did not explain how its result was consistent with the language of Section 28, subdivision (c)(1) and did not explain how, consistent with due process, a victim could enforce the right to restitution without the ability to appeal an erroneous restitution award.” (5 Cal.App.5th at p. 107, fn. 7.)

The Opinion’s reliance on the Penal Code and the Appellate Division’s discredited *Subramanyan* decision instead of the Court of Appeal decisions in *Melissa J.* and *Hannon* created a conflict in the law and failed to adequately account for the express constitutional right provided by voters for crime victims to appeal these denials of restitution. (4 EX 1365-1370.)

The right to appeal the denial of criminal restitution is an issue of immense importance to these Victims and crime victims statewide. And the Appellate Division’s “allowance” of

discretionary writ review in this case does not correct the fundamental problem. As the Supreme Court held in *Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109, 1119, the right to a direct appeal provides relief not available in an extraordinary writ, including a written opinion, oral argument and a right to a decision on the merits. The Appellate Division's denial of an appeal continues to prejudice the Victims in this case by creating confusion about the appropriate procedure to obtain review by this Court—Petition for Transfer of the Appeal or Petition for Writ of Mandate of the denial of a writ petition.

Therefore, the Opinion should be reversed and the Court should hold that crime victims have the right to appeal adverse restitution orders.

B. Crime Victims Have The Right To Restitution For Losses Resulting From Criminal Conduct Encompassed In A Crime To Which The Defendant Pleaded Guilty

Victims have a constitutional and statutory right to restitution for losses they suffer as a result of a defendant's criminal activity. (Cal. Const., art. 1, §28, subd. (b)(13); Pen. Code, §1202.4, subd. (a)(1).) The trial court must order restitution for the victim's losses arising out of "the criminal conduct for which the defendant has been convicted." (*People v. Walker* (2014) 231 Cal.App.4th 1270, 1274 (*Walker*).) To determine the conduct for which a defendant stands convicted, courts examine whether the conduct is encompassed in or part of

the pleaded-to crime. (*Id.* at pp. 1274-1275.)

The Supreme Court's recent decision in *People v. Martinez* (2017) 2 Cal.5th 1093, 1102-1103 (*Martinez*), is one of the first in years to address the issue of conduct encompassed within a crime for purposes of restitution. In *Martinez*, the Supreme Court held that a defendant convicted of leaving the scene of an accident *he did not cause* could not be ordered to pay restitution to the victim for losses caused only by the accident and not by his crime or negligent conduct itself. (*Id.* at pp. 1104-1105.) Vehicle Code section 20001, subdivision (a)—hit and run—requires no criminal, wrongful, or even negligent conduct in causing the accident by one who flees the scene of a crime. (*Id.* at pp. 1102-1103.) As the Supreme Court held, only when *all* of the injury-producing conduct is noncriminal is restitution foreclosed. (*Id.* at pp. 1104-1107.)

Unlike the accident in *Martinez*, here SoCalGas's criminal discharge of hazardous materials is criminal conduct encompassed in its criminal failure to timely report that discharge. Section 25510, subdivision (a), the statute under which SoCalGas was charged and to which it pleaded guilty in Count 1, provides liability for failing to give notice of a hazardous discharge: "[T]he handler [including a storer] ... shall, upon discovery, immediately report any release or threatened release of a hazardous material to the [appropriate government agency]." In Count 4, SoCalGas was charged under section 41700,

subdivision (a) with the actual hazardous discharge of which it failed to give notice. Section 41700, subdivision (a) provides: “[A] person shall not discharge from any source whatsoever quantities of air contaminants or other material that cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or that endanger the comfort, repose, health, or safety of any of those persons or the public, or that cause, or have a natural tendency to cause, injury or damage to business or property.” SoCalGas was charged with violating this statute in Count 4, but it was dismissed.

As relevant here, the elements of section 25510, subdivision (a) are: (1) discovery by a storer of hazardous materials (2) of its release of those hazardous materials into the environment and (3) failing to immediately report the release to the proper government agencies. The legislative purpose of the statutory scheme is “to protect the public health and safety” and “to prevent or mitigate the damage to the health and safety of persons ... from the release or threatened release of hazardous materials into the workplace and environment” that pose “a significant present or potential hazard to human health and safety.” (§25500, subd. (a); §25501, subds. (c), (l), (m), and (n).) Awarding direct restitution to the victims of such environmental crimes, thus, promotes the legislative purpose to protect health and property.

SoCalGas pleaded guilty to and was convicted of failing to give notice of its *release of hazardous contaminants* in Count 1, while Count 4 alleged liability for *the same release of hazardous contaminants* into the air. (1 EX 0106-0108.) Because SoCalGas's discharge of methane, methyl mercaptan, butyl mercaptan, benzene and butane into the air was also part of the crime to which SoCalGas pleaded guilty in Count 1 (failure to report its release of methane, methyl mercaptan, butyl mercaptan, benzene and butane), the criminal discharge is encompassed within Count 1. There can be no failure to notify of a storer's criminal release of hazardous materials without the storer's release having occurred. Accordingly, the Victims are entitled to restitution for their losses arising out of the criminal activity that formed the basis of the crime for which SoCalGas was convicted. (See, e.g., *Walker, supra*, 231 Cal.App.4th at pp. 1275-1276 [defendant convicted of driving under the influence causing injury properly ordered to pay restitution to all victims of an eight-car collision, even those not named in the case].)

It is undisputed SoCalGas stored hazardous materials, released them into Porter Ranch and failed to immediately report the release. (1 EX 0001-0023, 0106-0108.) The crime of causing a release of hazardous materials is encompassed within the crime to which SoCalGas pleaded guilty—failure to give notice of its criminal release of hazardous materials. And SoCalGas's criminal release of these hazardous materials resulted in catastrophic health consequences and

property losses to the Victims, including death, massive disruption, temporary relocation, cleaning costs, lost livelihood, damage to property, and diminution of the Victims' property values.

Thus, SoCalGas is liable for criminal restitution for the losses arising from its failure to notify of its criminal release *and* for the underlying criminal conduct of causing the release, and the decision should be reversed.

C. The Transactionally-Related Test For Dismissed Counts Applies To All Adverse Sentencing Consequences Including Criminal Restitution

Not only are the Victims entitled to restitution because the discharge of hazardous materials was encompassed in SoCalGas's failure to timely report the discharge in its guilty plea for Count 1, the Victims also are entitled to restitution because the discharge itself is transactionally-related criminal conduct for which SoCalGas was charged in dismissed Count 4. This dismissed count based on SoCalGas's discharge of hazardous materials is transactionally related to SoCalGas's failure to timely *notify* of the discharge. It is well-established the transactionally-related test applies to every adverse-sentencing consequence. Because restitution is an adverse sentencing consequence, the transactionally-related test applies to restitution.

A dismissed count is transactionally related to a crime to which a defendant pleaded guilty if “some action of the defendant giving rise to the dismissed count was also involved in the admitted count.” (*People v. Beagle* (2004) 125 Cal.App.4th 415, 421-423 (*Beagle*) [weapons charge not transactionally related to drug charge]; see also *People v. Klaess* (1982) 129 Cal.App.3d 820, 823-824 (*Klaess*) [accessory after the fact transactionally related to crime for which defendant was an admitted accessory]; *People v. Guevara* (1979) 88 Cal.App.3d 86, 91-94 (*Guevara*) [possession of shotgun was involved in kidnapping and thus proper aggravating sentencing factor].)

Since *People v. Harvey* (1979) 25 Cal.3d 754, 758-759 (*Harvey*), case law has uniformly held that a defendant may suffer adverse sentencing consequences for *any* conduct transactionally related to the conduct for which the defendant has been convicted. This is true even when the transactionally-related count is dismissed—the *Harvey* rule.⁷ If the conduct in the dismissed count is transactionally related to the conduct in the count to which the defendant pleaded guilty, adverse sentencing consequences may be based on the dismissed count.

⁷ If a defendant pleads guilty to one count and other counts that are not transactionally related are dismissed, a court may not consider the conduct in the dismissed counts in sentencing the defendant without a defense waiver at the time of the plea; this is called a *Harvey* waiver. (See *Harvey, supra*, 25 Cal.3d at pp. 758-759.) No *Harvey* waiver is required, where, like here, the dismissed count is transactionally related to the charged and pleaded to count. (*Ibid.*)

(See *Klaess, supra*, 129 Cal.App.3d at pp. 823-824.) The adverse sentencing consequences for transactionally-related conduct can include an aggravated prison term, a consecutive sentence, or an enhanced sentence. (*Harvey, supra*, 25 Cal.3d at pp. 758-759; *Guevara, supra*, 88 Cal.App.3d at pp. 92-94; *Klaess, supra*, 129 Cal.App.3d at pp. 823-824.) The rule also has been applied to the adverse sentencing consequence of probation conditions. (*Beagle, supra*, 125 Cal.App.4th at pp. 420-421 [*Harvey* rule applies to *all* adverse sentencing consequences].)

It is well-established that direct restitution is an adverse sentencing consequence. (See 4 EX 1163; *Brown, supra*, 147 Cal.App.4th at pp. 1221-1223 [victim restitution constitutes criminal punishment].) Accordingly, the *Harvey* rule should apply to restitution, as it does to *all other* adverse sentencing consequences. (See, e.g., *Beagle, supra*, 125 Cal.App.4th at pp. 420-421.) No previous case has suggested that the transactionally-related test does not apply to restitution as an adverse-sentencing consequence. (See *Walker, supra*, 231 Cal.App.4th at p. 1274 [referring to *Harvey* in the context of restitution]; see also Opinion's citation at 4 EX 1376 to *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123 [not involving the *Harvey* rule or barring restitution for similar criminal transactions].) But the Appellate Division broke with precedent and decided that the transactionally-related test did not apply to restitution. (4 EX 1375-1377.)

The Appellate Division's Opinion inexplicably relied on *Martinez, supra*, 2 Cal.5th at p. 1099 to claim that the transactionally-related test does not apply to the adverse sentencing consequence of restitution. (4 EX 1375-1377.) But there was only *one* criminal count in *Martinez* and thus no other dismissed criminal counts could have been transactionally related. (*Martinez, supra*, 2 Cal.5th at p. 1099; see also Opinion's citation at 4 EX 1377 to *People v. Jessee* (2013) 222 Cal.App.4th 501, 510 [involving restitution where there were no dismissed criminal counts].) Under well-settled law, the transactionally-related test applies to *all* adverse sentencing consequences (including restitution), but nevertheless the Opinion erroneously stated, "Nothing in the California Constitution or the Penal Code indicates a *dismissed charge* can or must give rise to a restitution award in the nonprobationary context, as the Victims contend." (Opinion at 4 EX 1377.)

Here, section 41700, subdivision (a) prohibits the release of hazardous air contaminants that cause injury, endanger the health and safety of persons, or that tend to cause injury or damage to business or property. SoCalGas was charged with violating this statute in Count 4. SoCalGas pleaded guilty to and was convicted in Count 1 of failing to report *the same release of hazardous contaminants* into the air that constituted the violation in Count 4. The two counts are inextricably intertwined and thus transactionally related. This is because SoCalGas's conduct giving rise to the dismissed Count 4 (release

of methane, methyl mercaptan, butyl mercaptan, benzene and butane into the air) was also involved in the conduct in Count 1 to which SoCalGas pleaded guilty (failure to report its release of methane, methyl mercaptan, butyl mercaptan, benzene and butane).

SoCalGas reported the leak three days after it began. (1 EX 0106.) The well continued to disperse hazardous chemicals for months thereafter. The health effects of this massive environmental disaster continue to remain under study. Whether the Victims actually are safe in their homes to this day also remains under study.

The Victims are entitled to restitution for their losses incurred from SoCalGas's delay in reporting the gas leak in Count 1 and from the transactionally-related ongoing discharge described in Count 4, because the two crimes involve the same conduct. Without its criminal discharge of hazardous materials, SoCalGas could not have been guilty for failing to give notice of the same criminal discharge. The required element in both crimes is the hazardous criminal discharge. Thus, the two crimes were transactionally related and the trial court should have ordered restitution for all the Victims' losses from both counts regardless of whether the DA imprudently dismissed Count 4. (See *Guevara, supra*, 88 Cal.App.3d at pp. 92-94.)

Because SoCalGas's criminal release of hazardous materials is transactionally related to the crime to which it pleaded guilty of failing to give notice of its criminal release of hazardous materials, the trial court erred in not considering losses from this related criminal conduct in awarding restitution. The decision should be reversed with instructions to consider all transactionally-related conduct in determining what restitution to award the Victims.

D. The Erroneous Strict Causation Standard The Appellate Division Applied To The Victims' Restitution Claims Requires Reversal

The Appellate Division's application of a narrow causation standard to the Victims' required showing for criminal restitution is unprecedented, unsupported by the law, and requires reversal.

1. Restitution Is Mandatory For All Losses Caused By The Defendant's Criminal Conduct

To obtain restitution, a victim's loss must have been caused by the criminal conduct for which the defendant was convicted. (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1249.) But as the Supreme Court has previously held, Penal Code section 1202.4, implementing the constitutional right to restitution, is to be broadly and liberally construed. (*Martinez, supra*, 2 Cal.5th at p. 1107.)

A crime victim has the right to be *fully reimbursed* by the defendant for all losses suffered from the criminal conduct underlying the defendant's conviction. (*Martinez, supra*, 2 Cal.5th at pp. 1100-1101.) Restitution also must be ordered where the defendant's conduct exacerbates or enhances the victim's injuries. (*Id.* at p. 1107.) In determining whether a victim's loss occurred because of the defendant's criminal conduct, tort principles of causation apply. (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1321 (*Holmberg*)). Such loss results from a defendant's criminal conduct if that conduct was a substantial factor in causing the victim's loss. (*Id.* at pp. 1321-1322.) There can be more than one cause of loss. (*Ibid.*)

A "cause in fact is something that is a substantial factor in bringing about the injury." (*People v. Foalima* (2015) 239 Cal.App.4th 1376, 1396 (*Foalima*)). The substantial factor test should not be narrowly applied. (*Id.* at p. 1397.) "The test, put simply, is whether [the victim] would have incurred damages had there been no [crime for which the defendant was convicted]." (*Ibid.*) If the defendant's criminal conduct was a substantial factor and proximate cause of the victim's damages, the victim is entitled to restitution. (*Ibid.*) When the defendant in *Foalima* was convicted of the stabbing murder of the victim's father but acquitted of arson of the victim's apartment, the trial court properly awarded restitution for the victim's loss of clothing and household goods in the fire. (*Ibid.*) The fire was set by the defendant or one of his companions to destroy evidence of the

murder, and therefore the murder was a substantial factor in the destruction of the victim's property by fire. (*Ibid.*) The fire would not have been set and the victim's property would not have been destroyed in the absence of the murder. (*Ibid.*)

And in *Holmberg*, for example, restitution was ordered though the defendant was not convicted of the burglary during which the victims' property was stolen; he was convicted only of receiving the victims' stolen property. (195 Cal.App.4th at p. 1322.) The defendant's act of concealing the stolen property was a concurrent cause with the burglary in depriving the victims of their property's use. (*Ibid.*) Therefore, the defendant was properly ordered to pay restitution for the victims' loss in replacing the stolen property. (*Id.* at pp. 1323-1324.) "[B]y holding on to the equipment, knowing it was stolen, defendant's conduct was a concurrent cause of the victims' losses and a substantial factor in causing their damages." (*Id.* at pp. 1323-1324.)

2. SoCalGas's Criminal Conduct Was A Substantial Factor In The Victims' Losses

Here, the Victims are entitled to full restitution for their losses arising from SoCalGas's criminal conduct. SoCalGas's criminal discharge of hazardous materials was encompassed within the notice crime to which SoCalGas pleaded guilty and dismissed Count 4 was also transactionally related to charged Count 1. (See *Martinez, supra*, 2 Cal.5th at pp. 1102-

1103; *Beagle, supra*, 125 Cal.App.4th at pp. 421-423.) *All* of the Victims' losses arose from SoCalGas's actual hazardous discharge transactionally related to and encompassed within the count to which it pleaded guilty, as well as from SoCalGas's failure to give notice of the hazardous discharge for several days.

In addition, even apart from the discharge, SoCalGas's failure to report its release of hazardous materials is a licensing or notification crime entitling the Victims to restitution. (See *Walker v. App. Div. of Superior Court* (2017) 14 Cal.App.5th 651, 656 [contracting without a license]; *People v. Baumgart* (1990) 218 Cal.App.3d 1207, 1222-1224 [selling securities without a permit], impliedly overruled on other grounds in *People v. Simon* (2006) 9 Cal.4th 493, 508.) And the reporting violation alone was a substantial factor in the losses the Victims suffered. (See *Holmberg, supra*, 195 Cal.App.4th at pp. 1321-1322; *Foalima, supra*, 239 Cal.App.4th at p. 1397.) Had SoCalGas truthfully, accurately and immediately reported the release and nature of these toxic substances, the losses suffered by the Victims could have been lessened or obviated altogether by their immediate relocation out of the affected area. Like the defendants in *Holmberg* and *Foalima*, SoCalGas is not relieved of its criminal liability for restitution simply because it claims there were other causes of the Victims' losses. There is a causal connection between the losses, SoCalGas's release of toxic substances, and its failure to immediately report the release of the toxic substances.

However, the Appellate Division, while acknowledging that the Victims are entitled to restitution under SoCalGas's guilty plea for Count 1, applied an overly stringent causation standard in contravention of the broad nature of criminal restitution rights. (4 EX 1377-1381.) This overly-strict standard caused the Appellate Division to erroneously affirm the trial court's finding that the Victims should receive *no* criminal restitution for SoCalGas's pleaded-to crime. (4 EX 1380.) Without acknowledging the broad nature of criminal restitution, the extremely early phase of this case because of the DA's rush to reach the first (inadequate) settlement, and the fact that several Victims testified about personal and property damage, the Appellate Division stated the Victims made "no satisfactory offer of proof to support the claim...." (4 EX 1380.) The Appellate Division further imposed an erroneous new requirement under the substantial factor test, that the Victims scientifically separate "*what* damages were specifically attributable to defendant's delay in reporting the leak, as opposed to the leak itself." (4 EX 1380.) That is not the way restitution is supposed to work.

Imposing this strict standard on thousands of *crime victims*, only months after one of the largest environmental disasters in the county, when they were fighting the combined efforts of both SoCalGas and the DA to deprive them of restitution, has no support in the law. As the Supreme Court has established, Penal Code section 1202.4 is to be broadly and liberally construed. (*Martinez, supra*, 2 Cal.5th at p. 1107.) And

as the Constitution requires, “[T]o preserve and protect a victim’s rights to justice and due process, a victim shall be entitled to ... restitution.... (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.” (Cal. Const., art. 1, §28, subd. (b)(13)(B).)

As the Victims’ counsel argued at the sentencing hearing, the Victims’ losses began with SoCalGas’s attempt to keep the blowout secret: “We are not conceding that there is no restitution for the three days. Presumably the requirement that you report to the regulatory agencies, the release of these substances requires a truthful, an[d] accurate report as to what’s being released. If the Victims of Porter Ranch had known immediately that benzene, fluorocarbons, [etc.] that were ultimately disclosed as being released in those three days, I can tell you that there’s nobody in this courtroom that wouldn’t have packed up their children and left immediately. These are known carcinogens. There is no safe amount. There was hydrogen sulfide that was put onto these homes.” (1 EX 0085.) The Victims’ counsel also stated: “During those three days, there’s a consequence.... had they done their duty, had they followed the law, had they reported exactly what they released into the environment, all of this damage would have been prevented because I think the health department would come in and say— they would red tag all those houses. It was that dangerous.” (1 EX 0085.)

In addition, both the trial court and the Victims' attorney noted that they were unsure how the trial court should proceed with taking evidence on restitution, before the trial court nonetheless proceeded with the only hearing allowing evidence of restitution. (1 EX 0042-0043, 0092-0096.) With no prior notice that Victim witnesses would be allowed to testify, much less prior notice this would be their *only* chance to produce any evidence on their restitution rights, only a handful of Victims were available to testify. (1 EX 0042-0059, 0092-0096.) The Victims testified to health effects, injuries, death, extensive un-reimbursed property expenses, and loss of property value. (1 EX 0042-0059.) In particular, one Victim testified SoCalGas's "irresponsible behavior in not reporting, you can't prepare yourself for harm. It's terrible that there's elementary schools in the area. People are sick.... I get respiratory ailments." (1 EX 0058.)

Additionally, the Victims' attorney's sworn declaration stated that a 20-year old man who had grown up in Porter Ranch had died of a rare cancer linked to formaldehyde exposure, which likely came from SoCalGas's compressor station. (2 EX 0457.) The declaration further stated the Victims had many out-of-pocket costs that had not been reimbursed, including ambulance transport for the man who later died and the costs of cleaning many homes, and attached a bid for home cleaning. (2 EX 0457, 0464.) The declaration stated it would take the Victims at least a year to procure all cleaning bids. (2 EX 0458.)

Had the DA waited to sufficiently assess the impacts to health and property from this enormous environmental disaster, as the State did, or had the trial court retained jurisdiction to determine the proper amount of restitution, the Victims' harms and injuries would have been even more evident, as is clear from the State's recent \$119.5 million settlement. In light of the trial court's accepting the hasty plea agreement without the Victims' attorneys being present, and the confusion about whether and what type of restitution hearing to which the Victims would be entitled, the evidence in the record is more than sufficient to meet the *to-be-broadly-applied* right to restitution.

The Victims here suffered losses because of SoCalGas's underlying criminal conduct. SoCalGas discharged hazardous materials into the environment and failed to timely report that discharge, as a result of which the Victims suffered significant losses. At a minimum, the Victims are entitled to a fully-noticed opportunity to present evidence on their right to restitution as required by due process and their Constitutional right to criminal restitution.

The Opinion's overly-strict application of the causation standard to Victims' traditionally-broad restitution rights requires reversal of the Opinion with directions to hold a properly-noticed restitution hearing.

IV. CONCLUSION

The Victims respectfully request that this Court grant their petition for writ of mandate or other relief and direct respondent court to vacate its August 7, 2018 Opinion affirming the trial court's denial of criminal restitution to the Victims and to remand for a proper hearing on restitution.

DATED: September 21, 2018 GRIGNON LAW FIRM LLP

By /s/ Margaret M. Grignon
Margaret M. Grignon
Attorneys for Victims and
Petitioners

CERTIFICATE OF WORD COUNT
CRC SECTIONS 8.204(c)(1) and 8.486(a)(6)

On behalf of Victims and Petitioners, I, Margaret M.

Grignon, certify that in compliance with California Rules of Court 8.204(c)(1) and 8.486(a)(6), the above petition and its supporting memorandum of points and authorities is comprised of 12,473 words. To verify this number, I employed the word count feature made part of the Microsoft Word processing program used by my Firm's offices

Dated: September 21, 2018

/s/ Margaret M. Grignon
Margaret M. Grignon

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Tiffany Singer, declare that I am, and was at the time of service of the papers herein referred to, over the age of 18 and not a party to the within action or proceedings. My business address is 6621 E. Pacific Coast Highway, Suite 200, Long Beach, California 90803, which is located in the county in which the within-mentioned mailing occurred.

On September 21, 2018, I served: **PETITION FOR WRIT OF MANDATE, PROHIBITION AND/OR OTHER APPROPRIATE RELIEF** in the manner specified below on the interested parties listed on the SERVICE LIST.

BY U.S. MAIL: I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice such sealed envelope(s) would be deposited on the date listed below with the United States Postal Service with postage thereon fully prepaid, at Long Beach, California.

BY ELECTRONIC TRANSMISSION: The above-referenced document listed above was posted directly on the TrueFiling website at <https://www.truefiling.com> via electronic transmission for service on counsel at the electronic-email addresses indicated in the attached Service List

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

Executed on September 21, 2018, at Long Beach, California.

/s/ Tiffany Singer
Tiffany Singer

SERVICE LIST

Nathan J. Hochman, Esq. (SBN 139137) Morgan Lewis & Bockius, LLP 2049 Century Park East, Suite 700 Los Angeles, CA 90067 Telephone No. (310) 907-1000 Email: nathan.hochman@morganlewis.com <i>Attorneys for Defendant and Real Party in Interest Southern California Gas Company</i>	Via Electronic Service through TrueFiling
James J. Dragna, Esq. (SBN 91492) David L. Schrader, Esq. (SBN 149638) Yardena Zwang-Weissman, Esq. (SBN 247111) Morgan Lewis & Bockius, LLP 300 South Grand Avenue, 22 Floor Los Angeles, CA 90071 Telephone No. (213) 612-2500 Email: jim.dragna@morganlewis.com Email: david.schrader@morganlewis.com Email: yardena.zwang-weissman@morganlewis.com <i>Attorneys for Defendant and Real Party in Interest Southern California Gas Company</i>	Via Electronic Service through TrueFiling
Thomas M. Peterson, Esq. (SBN 96011) Morgan Lewis & Bockius, LLP One Market Street, Spear Tower San Francisco, CA 94105 Telephone No. (415) 442-1000 Email: thomas.peterson@morganlewis.com <i>Attorneys for Defendant and Real Party in Interest Southern California Gas Company</i>	Via Electronic Service through TrueFiling
Manuel A. Abascal, Esq. (SBN 171301) Latham & Watkins 355 S. Grand Avenue, Suite 100 Los Angeles, CA 90071 Telephone No. 485-1234 Email: manny.abascal@lw.com <i>Attorneys for Defendant and Real Party in Interest Southern California Gas Company</i>	Via Electronic Service through TrueFiling

Robert J. Nelson, Esq. (SBN 132797)
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111
Telephone No. (415) 956-1000
Email: rnelson@lchb.com
Attorneys for Petitioners

Via Electronic
Service through
TrueFiling

Derek W. Loeser, Esq.
Keller Rohrback, LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101
(206) 623-1900
Email: dloeser@kellerrohrback.com
Attorneys for Petitioners

Via Electronic
Service through
TrueFiling

Raymond P. Boucher, Esq. (SBN 115364)
Boucher LLP
21600 Oxnard Street, Suite 600
Woodland Hills, CA 91367-4903
Telephone No. (818) 340-5400
Email: ray@boucher.la
Attorneys for Petitioners

Via Electronic
Service through
TrueFiling

Paul R. Kiesel, Esq. (SBN 119854)
Kiesel Law LLP
8648 Wilshire Boulevard
Beverly Hills, CA 90211-2910
Telephone No. (310) 854-4444
Email: kiesel@kiesel.law
Attorneys for Petitioners

Via Electronic
Service through
TrueFiling

Roland K. Tellis, Esq. (SBN 186269)
Baron & Budd, PC
15910 Ventura Boulevard, Suite 1600
Encino, CA 91436
Telephone No. (818) 839-2333
Email: rtellis@baronbudd.com
Attorneys for Petitioners

Via Electronic
Service through
TrueFiling

Taras P. Kick, Esq. (SBN 143379)
The Kick Law Firm, APC
815 Moraga Drive
Los Angeles, CA 90049
Telephone No. (310) 395-2988
Email: taras@kicklawfirm.com
Attorneys for Petitioners

Via Electronic
Service through
TrueFiling

Cassandra Hart Thorp, Esq. (SBN 147067)
LA County Deputy District Attorney
210 W. Temple Street, Suite 18000
Los Angeles, CA 90012
Email: cthorp@da.lacounty.gov
*Attorneys for Plaintiff and Real Party in Interest the
People of the State of California*

Via Electronic
Service through
TrueFiling

Yael A. Massry, Esq. (SBN 167227)
LA County Deputy District Attorney
211 West Temple Street, Suite 1200
Los Angeles, CA 90012
Telephone No. (213) 257-2451
Email: ymassry@da.lacounty.gov
*Attorneys for Plaintiff and Real Party in Interest the
People of the State of California*

Via Electronic
Service through
TrueFiling

Office of the District Attorney
320 W. Temple Street, Room 540
Los Angeles, CA 90012

via U.S. MAIL
(Petition Only)

Office of the Attorney General
300 S. Spring Street, Suite 1700
Los Angeles, CA 90013

via U.S. MAIL
(Petition Only)

Clerk for Department 3
Los Angeles County Superior Court
Santa Clarita Courthouse
23747 West Valencia Boulevard, Dept. 3
Santa Clarita, CA 91355

via U.S. MAIL
(Petition Only)

Appellate Clerk
Los Angeles County Superior Court
Appellate Court Division
111 N. Hill Street, Room 607
Los Angeles, CA 90012

Via Overnight Mail
(Petition Only)