Case No. 23-55018
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMY SHERLOCK, on her own behalf and on behalf of her minor children, T.S. and S.S.,
Plaintiff-Appellant,

and

ANDREW FLORES, an individual,
Plaintiff,

v.

GINA M. AUSTIN, an individual; et al.,
Defendants-Appellees.

On Appeal from the United States District Court, Southern District of California
Case No. 20-cv-00656-JO-DEB
The Honorable Jinsook Ohta, United States District Judge

APPELLEE'S BRIEF

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I.

INTRODUCTION

This appeal arises from two civil actions in the Superior Court of California, County of San Diego ("Superior Court"), over which Appellee-Defendant the Honorable Joel R. Wohlfeil, Judge of the Superior Court ("Judge Wohlfeil"), presided. Unhappy with Judge Wohlfeil's rulings, Appellant Amy J. Sherlock, on her own behalf and on behalf of her minor children, T.S. and S.S. ("Sherlock"), and Plaintiff Andrew Flores ("Flores"),[1] filed the underlying federal District Court action against Judge Wohlfeil and a multitude of other defendants.[2]

The state court actions both concerned a dispute regarding an alleged real estate purchase and sale agreement between Darryl Cotton ("Cotton") and Larry Geraci ("Geraci"), and specifically whether Cotton agreed to sell Geraci his real property for the purpose of establishing a Medical Marijuana Consumer Collective on the property. Cotton lost in both state court actions. Although neither Sherlock

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[1] Flores, who is an attorney, represented himself and Sherlock in the underlying district court proceedings, and also is the attorney of record on this appeal. Although Appellant's Opening Brief indicates that Flores is an appellant, he is not a proper party to this appeal because the Notice of Appeal only designates "Amy Joe Sherlock" as the Appellant. Fed. R. App. P. 3(c)(1)(A); *Tarabochia v. Adkins*, 766 F.3d 1115, 1118 n.1 (9th Cir. 2014); *Torres v. Oakland Scavenger Co*., 487 U.S. 314, 317 (1988). Accordingly, this brief will refer to "Appellant" rather than "Appellants."

[2] Appellant named over twenty individuals, many of whom are attorneys, seven corporate entities, and one municipality in this action.

nor Flores were parties in the state court actions, they filed this federal action seeking to void the state court judgments and recover damages for their alleged losses resulting from the two state lawsuits.

Concerning Judge Wohlfeil, the First Amended Complaint ("FAC") alleged a claim for violation of civil rights under 42 U.S.C. § 1983 and a claim for declaratory relief, requesting the District Court to make various determinations concerning the underlying state court actions. Judge Wohlfeil moved to dismiss the FAC arguing, among other things, that the action against him was barred by the doctrine of absolute judicial immunity. At the March 23, 2022 hearing on the motion to dismiss, Flores conceded that all of Judge Wohlfeil's alleged conduct concerned actions and rulings he made within his jurisdiction as a state court judge, and that he should therefore be dismissed from the action. Accordingly, in its March 23, 2022 order ("March 23, 2022 Order"), the District Court dismissed Judge Wohlfeil, with prejudice, based on judicial immunity grounds.[3]

In the March 23, 2022 Order, the District Court also dismissed with prejudice Defendants Michael Weinstein, Scott Toothacre, Elyssa Kulas, Rachel Prendergast,

[3]Judge Wohlfeil also moved to dismiss the FAC on the basis that it: (i) was barred by Eleventh Amendment immunity; (ii) failed to allege a viable § 1983 claim; and (iii) failed to allege facts sufficient to state a cognizable claim for declaratory relief. (District Court ("D.C.") ECF No. 27). Although, the District Court did not expressly rule on these issues, this Court may affirm the dismissal on any ground that is supported by the record. *Wood v. City of San Diego*, 678 F.3d 1075, 1086 (9th Cir. 2012).

and Ferris & Britton APC (collectively "F&B Defendants") based on the *Noerr-Pennington* doctrine. As to all the remaining Defendants who had not yet appeared, the March 23, 2022 Order dismissed them without prejudice and with leave to amend, based on Plaintiffs' lack of standing. However, Plaintiffs never amended the FAC. Accordingly, the District Court dismissed the entire action with prejudice for failure to prosecute, and entered judgment on December 9, 2022. Sherlock here appeals from that judgment.

As an initial matter, Appellant is precluded as a matter of law from appealing the March 23, 2022 Order dismissing Judge Wohlfeil. The March 23, 2022 Order dismissing Judge Wohlfeil is an interlocutory, non-final order, which did not merge with the final judgment. As a result, Appellant is prohibited from seeking review of said order. Moreover, Appellant waived any challenge to the District Court's ruling dismissing Judge Wohlfeil because she conceded to the District Court that the action against him was barred by the doctrine of judicial immunity and, in addition, Appellant failed to raise this issue in her Opening Brief. Further, as in the District Court, Appellant lacks standing to bring this appeal. Finally, to the extent the interlocutory order dismissing Judge Wohlfeil with prejudice is reviewable, it should be affirmed based on the doctrine of absolute judicial immunity.

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II.

JURISDICTIONAL STATEMENT

Pursuant to Ninth Circuit Rule 28-2.2, Judge Wohlfeil submits the following statement of jurisdiction:

A. The District Court did not have subject matter jurisdiction over this action against Judge Wohlfeil because the Appellant lacked Article III standing to bring the action. (U.S. Const. Art. III, § 2; *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493-2492 (2019).

B. The District Court entered final judgment on all claims for relief in the underlying action on December 9, 2022. (ER-130-132). The judgment is final under Federal Rule of Civil Procedure 41(b) and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

C. Appellant appeals from the District Court's judgment, entered December 9, 2022. (ER-130-132, 143, D.C. ECF No. 52). The Notice of Appeal was filed on January 5, 2023 (ER-133), and is timely pursuant to 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a).

III.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether Appellant is precluded from seeking review of the District Court's March 23, 2022, interlocutory order dismissing Judge Wohlfeil with

prejudice because said order did not merge with the final judgment, which dismissed the action for failure to prosecute.

B. Whether Appellant waived her right to appeal the order dismissing Judge Wohlfeil, with prejudice, when she: (1) conceded at the District Court hearing that the action against Judge Wohlfeil should be dismissed due to absolute judicial immunity; and (2) failed to challenge the District Court's ruling in her Opening Brief on appeal.

C. Whether the appeal should be dismissed because Appellant, who was not a party to the two underlying state court actions, but nevertheless filed this federal court action challenging Judge Wohlfeil's rulings in those cases, lacks Article III standing.

D. Whether the District Court properly concluded that the claims against Judge Wohlfeil were barred by the doctrine of absolute judicial immunity where, as Appellant conceded at oral argument, the claims against him were solely predicated on his judicial actions while presiding over the two underlying state court actions.

IV.

STATEMENT OF THE CASE

Judge Wohlfeil presided over the following two state court civil actions: *Larry Geraci v. Darryl Cotton,* San Diego Superior Court Case ("SDSC") No. 37-2017-00010073-CU-BC-CTL ("*Cotton I*") and *Darryl Cotton v. City of San Diego, et al.,*

SDSC No. 37-2017-00037675-CU-WM-CTL ("*Cotton II*"). In *Cotton I,* Geraci alleged breach of contract, breach of covenant of good faith and fair dealing, specific performance, and declaratory relief as it related to an alleged real estate purchase and sale agreement between Cotton and Geraci. (WohlfeilSER-112). A jury rendered a verdict in favor of Geraci. (WohlfeilSER-21-45). Judge Wohlfeil denied Cotton's motion for a new trial. (WohlfeilSER-122-123). Cotton appealed, but the California Court of Appeal, Fourth Appellate District, Division One, dismissed the appeal because Cotton failed to timely designate the record and also failed to timely deposit costs for preparing the record on appeal. (WohlfeilSER-46-47).

In *Cotton II*, Cotton filed an action seeking an alternative writ of mandate against Geraci. (WohlfeilSER-126). Judge Wohlfeil denied Cotton's petition for writ of mandate. (WohlfeilSER-126). Judgment was entered in Geraci's favor. (WohlfeilSER-48-49). Cotton appealed and the Remittitur was issued on November 5, 2018, dismissing the appeal because Cotton failed to timely designate the appellate record. (WohlfeilSER-50-51).

Flores was not a party in *Cotton I* or *Cotton II*. (WohlfeilSER-52-53). Instead, he is an attorney who made isolated special appearances on behalf of Cotton in *Cotton I* (WohlfeilSER-121) and, at one point, moved to intervene and become a party to the action, which was denied by Judge Wohlfeil. (WohlfeilSER-121). Sherlock and her minor children were also not parties in *Cotton I* or *Cotton II*.

(WohlfeilSER-52-53, 99). Nor were they in privity with any parties in *Cotton I* and *II*. (WohlfeilSER-99).

Despite not being parties in the underlying state court action, Flores and Sherlock filed a lawsuit in the District Court against Judge Wohlfeil and various other defendants concerning the real property dispute at issue in *Cotton I* and *Cotton II*. In the FAC,[4] which is the pleading at issue here, Flores alleged "he ha[s] become the equitable owner of the Property" at issue in *Cotton I*. (WohlfeilSER-121, 130). Sherlock alleged that she and her children have an interest in two cannabis conditional use permits, the "Balboa CUP" and the "Ramona CUP," which she claimed were fraudulently acquired by certain defendants named in the FAC, but not by Judge Wohlfeil. (WohlfeilSER-106-109).

Flores asserted a 42 U.S.C. § 1983 civil rights claim against Judge Wohlfeil (the First Cause of Action), alleging that Judge Wohlfeil's erroneous rulings in *Cotton I* violated his civil rights.[5] (WohlfeilSER-131-133). Flores and Sherlock alleged a declaratory relief cause of action against Judge Wohlfeil (the Sixth Cause

[4] The First Amended Complaint that Appellant refers to in her Opening Brief, which is included in her Excerpts of Record, was actually withdrawn, as reflected in the District Court Docket. (ER-140, D.C. ECF No. 15). The correct and operative First Amended Complaint is included in Judge Wohlfeil's Supplemental Excerpts of the Record. (WohlfeilSER-94; ER-140, D.C. ECF No. 17).

[5] Since Flores is not a party to this appeal, the dismissal of his § 1983 claim is not at issue on appeal.

of Action), claiming declaratory relief is required because the judgments in *Cotton I* and *II* are void, in part, "for being the product of judicial bias" and a controversy "exists between Plaintiffs and Defendants . . . concerning the validity of the judgements [sic] in question and (i) their acts or failure to act that contributed to the procurement of those judgments and (ii) their knowledge that those judgments are void." (WohlfeilSER-139). Plaintiffs sought damages, injunctive, and declaratory relief. (WohlfeilSER-139-140).

On January 13, 2021, Judge Wohlfeil moved to dismiss the FAC on the grounds that it was barred by judicial and Eleventh Amendment immunities and because the FAC failed to state a viable claim for relief, including on the basis that Plaintiffs lacked standing to assert their declaratory relief claim. (D.C. ECF No. 27; ER-141). On March 23, 2022, the District Court held a hearing on Judge Wohlfeil's and the F&B Defendants' motions to dismiss. (ER-102-123).

With regard to Judge Wohlfeil, the District Court stated its tentative was to dismiss the FAC with prejudice based on the doctrine of absolute judicial immunity, and invited Plaintiffs to provide argument on the issue of whether Judge Wohlfeil's alleged conduct occurred outside of his judicial role. (ER-104-106). Plaintiffs declined to provide any such argument, stating they "agree[d] with the court in that aspect." (ER-106-107). Plaintiffs explained that they had thought they needed to include Judge Wohlfeil as "a necessary party" because they were "attempting to

revisit [Judge Wohlfeil's] ruling … for federal relief purposes … ." (ER-106-107). Plaintiffs thus concluded, "we will submit on the court's tentative, and Judge Wohlfeil will be removed from the action." (ER-107). Accordingly, the District Court adopted its tentative and granted Judge Wohlfeil's motion to dismiss, with prejudice, on absolute judicial immunity grounds. (ER-104-107, WohlfeilSER-4-5).

Also on March 23, 2022, the District Court dismissed the F&B Defendants, with prejudice, based on the *Noerr-Pennington* doctrine. (ER-107, 111-114). Lastly, the District Court addressed the FAC as to the remaining Defendants who had not appeared in the action. (ER-114-123). The District Court stated the Plaintiffs "haven't adequately pled that you have standing, and that you are the one that suffered the injury and that Ms. Sherlock was the one who suffered the injury. . . [and] there are problems of redressability…." (ER-119). Accordingly, the District Court dismissed the FAC as to these remaining Defendants, without prejudice, and provided Plaintiffs an opportunity to amend their pleading. (ER-119-123).

Plaintiffs chose not to file an amended complaint and, on December 9, 2022, the District Court dismissed the entire case for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b) and entered judgment. (ER-130-134, 143).

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V.

STANDARD OF REVIEW

A district court's dismissal for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b) is reviewed for abuse of discretion. *Al-Torki v. Kaempen*, 78 F.3d 1381, 1384 (9th Cir. 1996).

A district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is reviewed de novo. *Stone v. Travelers Corp*., 58 F.3d 434, 436 (9th Cir. 1995).

VI.

SUMMARY OF ARGUMENT

For a number of reasons, this Court should affirm the District Court's March 23, 2022 Order dismissing the FAC.

First, Appellant is precluded from seeking review of the March 23, 2022 Order dismissing Judge Wohlfeil. Interlocutory orders "are not appealable after a dismissal for failure to prosecute." *Al-Torki v. Kaempen*, 78 F.3d 1381, 1386 (9th Cir. 2016); *see also Brown v. Rawson-Neal Psychiatric Hosp.,* 840 F.3d 1146, 1148 (9th Cir. 2016). The March 23, 2022 Order, which (i) dismissed Judge Wohlfeil with prejudice, (ii) dismissed the F&B Defendants with prejudice, and (iii) dismissed the FAC as to all other Defendants with leave to amend, is an interlocutory order issued prior to the December 9, 2022 Order and Judgment dismissing the entire action for

failure to prosecute. Therefore, Appellant cannot seek review of the March 23, 2022 interlocutory order dismissing Judge Wohlfeil.

Second, even if the March 23, 2022 Order is appealable, Appellant waived any challenge to the ruling dismissing Judge Wohlfeil because: (i) she conceded in the District Court proceedings that the action was barred by the doctrine of judicial immunity; and (ii) on appeal, the Opening Brief is devoid of any argument challenging the ruling dismissing Judge Wohlfeil.

Further, the appeal should be dismissed because, as in the District Court, Appellant lacks Article III standing. The District Court addressed the issue of standing at the hearing on March 23, 2022, and dismissed the action as to the remaining Defendants without prejudice on the basis that Plaintiffs lacked standing. Although provided an opportunity to cure the standing defect, Plaintiffs neglected to remedy said defect. Therefore, as Appellant lacked standing in the District Court, she also lacks standing to bring this appeal.

Finally, to the extent that the March 23, 2022, Order is reviewable on appeal, the ruling dismissing Judge Wohlfeil with prejudice based on absolute judicial immunity should be affirmed.

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VII.

ARGUMENT

A. Appellant Is Precluded From Seeking Review Of The District Court's March 23, 2022 Order Dismissing Judge Wohlfeil With Prejudice.

Appellant's Notice of Appeal states that she is appealing the District Court's December 9, 2022 Judgment, which dismissed the case for failure to prosecute. (ER-133). However, to the extent Appellant seeks review of the dismissal of Judge Wohlfeil, this appeal would necessarily challenge the March 23, 2022 Order, which dismissed Judge Wohlfeil with prejudice. However, this order is not reviewable because (i) it is an interlocutory order which is not appealable from the final judgment because the case was dismissed for failure to prosecute and (ii) Appellant has waived any challenge to the order dismissing Judge Wohlfeil.

i. The March 23, 2022 Order Is An Interlocutory Order Which Is Not Appealable From The Final Judgment Dismissing This Action For Failure To Prosecute.

"Federal circuit courts have jurisdiction over appeals from 'final decisions' of district courts." *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 723 (9th Cir. 2017). "[A]bsent an 'express determination that there is no just reason for delay and ... an express direction for the entry of judgment[,]'" an order dismissing fewer than all parties and claims, is "not a final,

appealable order." *Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 993 (9th Cir. 2004) (quoting Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291); *see also M.M. v. Lafayette Sch. Dist.*, 681 F.3d 1082, 1089 (9th Cir. 2012) ("An order that adjudicates fewer than all claims of all parties is not final"). It therefore follows, that generally, "[a]n appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment." *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984).

However, there are exceptions to this general rule. One exception to this rule are orders dismissing a case for failure to prosecute under Federal Rule of Civil Procedure 41(b). *Ash v. Cvetkov*, 739 F.2d 493, 498 (9th Cir. 1984); *Al-Torki v. Kaempen*, 78 F.3d 1381, 1386 (9th Cir. 2016). Interlocutory, non-final orders "are not appealable after a dismissal for failure to prosecute." *Al–Torki*, 78 F.3d at 1386; *see also Brown v. Rawson-Neal Psychiatric Hosp.,* 840 F.3d 1146, 1148 (9th Cir. 2016).

"[I]mportant policy considerations underlie [the] application of this exception." *Erickson v. PNC Mortg*., 585 F. App'x 467 (9th Cir. 2014).

> If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C.A. § 1291. To review the district court's refusal ... is to invite the inundation of appellate dockets with

> requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases.

Ash, 739 F.2d at 497 (quoting *Huey v. Teledyne, Inc.,* 608 F.2d 1234, 1240 (9th Cir. 1979); *see also Sere v. Bd. of Trustees of Univ. of Illinois*, 852 F.2d 285, 288 (7th Cir. 1988) (adherence to the general rule that rulings on interlocutory orders are merged within a subsequent final judgment is inapplicable if it "would reward a party for dilatory and bad faith tactics"). Therefore, "[t]here is no good reason to allow plaintiff to revive his case in the appellate court after letting it die in the trial court." *Al-Torki,* 78 F.3d at 1386.

On March 23, 2022, the District Court issued an order (i) dismissing Judge Wohlfeil with prejudice, (ii) dismissing the F&B Defendants with prejudice, and (iii) dismissing the FAC as to all other defendants with leave to amend. (WohlfeilSER-4-5). The March 23, 2002 Order, which encompassed rulings dismissing the action with prejudice as to some Defendants, *and* dismissing it without prejudice with leave to amend as to other Defendants, constitutes an interlocutory, non-final order. Therefore, the exception to the general rule described above applies and the March 23, 2022 Order does not merge into the final judgment issued on December 9, 2022, dismissing the entire case for failure to prosecute. Consequently, Appellant is prohibited from seeking appellate review of the March 23, 2022 Order, which dismissed Judge Wohlfeil from this action.

ii. Appellant Waived Any Challenge To The March 23, 2022 Order Dismissing Judge Wohlfeil When She Conceded To The District Court That Judicial Immunity Warranted Dismissal And Failed To Raise This Issue In Her Opening Brief.

A party generally waives the right to raise an issue on appeal if they conceded or otherwise stipulated to it in the district court. *See CDN Inc. v. Kapes*, 197 F.3d 1256, 1259 (9th Cir. 1999); *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1995); *Blaisdell v. Frappiea*, 720 F.3d 1237, 1241-1242 (9th Cir. 2013). Here, Appellant conceded to the District Court that all of Judge Wohlfeil's alleged conduct concerned his judicial actions in the state court proceedings and that dismissal was appropriate. (ER-106-107). Accordingly, Appellant has waived her right to assert on appeal that judicial immunity did not apply and that the dismissal of Judge Wohlfeil was erroneous.

Further, issues that are not "specifically and distinctly" raised in an appellant's opening brief are waived. *Moran v. Screening Pros, LLC,* 25 F.4th 722, 728, n.6 (9th Cir. 2022); *Tri-Valley Cares v. United States Dept. of Energy*, 671 F.3d 1113, 1129-1130 (9th Cir. 2012); *Padgett v. Wright*, 587 F.3d 983, 985, n.2 (9th Cir. 2009). Indeed, the Ninth Circuit has "repeatedly admonished that [they] cannot 'manufacture arguments for an appellant' and therefore [] will not consider any claims that were not actually argued in appellant's opening brief." *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). "Judges are not like

pigs, hunting for truffles buried in briefs," and are thus prohibited from creating arguments for appellants which are not clearly and specifically set forth in the opening brief. *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) (quoting *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir.1991).

In her Opening Brief, Appellant failed to raise any challenge to the District Court's ruling dismissing Judge Wohlfeil based on judicial immunity or any other grounds. Instead, the Opening Brief appears to exclusively challenge the District Court's March 23, 2022 dismissal of the F&B Defendants. Specifically, according to Appellant:

> This appeal focuses on just one issue. It is the foundation of Appellants' case and allegations of the unlawful actions taken by the Enterprise in furtherance of the Antitrust Conspiracy. That one issue is that F&B's representation of Lawrence Geraci in a state court actions seeking to enforce a contract was sham petitioning because the object of the contract, Geraci's ownership of a dispensary, was criminally illegal and violates the Federal Controlled Substance Act (CSA).

(Appellant's Opening Br. 5-6, ECF No. 10).

Additionally, the two issues identified in the Opening Brief concern whether the F&B Defendants' "petitioning for Geraci to own a dispensary in the name of a third-party [is] sham petitioning" and whether the District Court abused its discretion in dismissing this action under Federal Rule of Civil Procedure 41(b) in light of Appellant's assertion that the F&B Defendants committed sham petitioning. (*Id.* at

7). Clearly, these issues do not concern Judge Wohlfeil or the District Court's specific ruling dismissing him with prejudice from the action.

Further, the argument section of the Opening Brief is devoid of any challenge or discussion of the specific ruling dismissing Judge Wohlfeil with prejudice from the action. To the contrary, the argument section focuses on the alleged sham petitioning by the F&B Defendants and argues said Defendants do not enjoy immunity under the *Noerr-Pennington* doctrine. Thus, as Appellant has not specifically and distinctly raised a challenge to the District Court's ruling dismissing Judge Wohlfeil, she has waived the issue on appeal.

For all of the foregoing reasons, Appellant is precluded from seeking review of the March 23, 2022 Order dismissing Judge Wohlfeil with prejudice from this action.

B. The Appeal Should Be Dismissed Because Appellant Lacks Article III Standing In The District Court And This Court.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); *see also Hollingsworth v. Perry,* 570 U.S. 693, 704 (2013). A plaintiff must establish that they have standing in order to satisfy the case-or-controversy requirement. *Clapper*, 568 U.S. at 408. Article III standing consists of three elements: (1) the appellant must have suffered an "injury in fact;" (2) a causal connection between the injury and the conduct at issue; and (3) "it must be 'likely,'

as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). The plaintiff must clearly allege facts demonstrating that he or she is a proper party to invoke the court's authority to resolve the dispute. *Warth v. Seldin*, 422 U.S. 490, 518 (1975). In other words, "[t]he party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

In order to satisfy the "injury in fact" element, Appellant "must assert a grievance that is both 'concrete and particularized.'" *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 908 (9th Cir. 2011). For the causal connection element to be satisfied "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. Evaluating redressability, the third element, turns on whether the court has the authority to right or prevent the alleged injury. *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561.

Further, although standing issues are often addressed early in litigation, the case-or-controversy requirement persists throughout all stages of a case, such that standing "'must be met by persons seeking appellate review, just as it must be met

by persons appearing in courts of first instance.' (Citation omitted)." *Perry v. Newsom*, 18 F.4th 622, 631 (9th Cir. 2021). In fact, "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. (Citation omitted)." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). In those instances when the lower federal court lacked jurisdiction, the appellate court has jurisdiction on appeal, not of the merits but for purposes of correcting the lower court's error in entertaining the suit. *Id.*

Just as Appellant lacked Article III standing in the District Court, she lacks standing in this appeal. Although Judge Wohlfeil was dismissed with prejudice based on absolute judicial immunity, he did raise the issue of standing in the District Court. Moreover, on March 23, 2022, the District Court addressed the standing issue as to the other Defendants who had not appeared in the action. The District Court found that Plaintiffs lacked standing because they had failed to adequately plead "injury in fact." (ER-119). As a result, the District Court dismissed the FAC without prejudice as to the remaining Defendants, giving Plaintiffs an opportunity to amend the complaint to establish standing. (ER-114-120, 127).

However, as reflected in the December 9, 2022 Order dismissing the entire action, Appellant never filed an amended pleading attempting to cure the fatal

standing deficiencies. (ER-130-132). Thus, the standing defects identified by the District Court are still in effect and require the dismissal of this appeal.

C. To The Extent The March 23, 2022 Order Is Reviewable, The Ruling Dismissing Judge Wohlfeil With Prejudice Based On Absolute Judicial Immunity Should Be Affirmed.

Judicial officers are generally immune from civil liability for damages for acts performed in their judicial capacity. *Mireles v. Waco*, 502 U.S. 9 (1991) (per curiam); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc); *Mullis v. United States Bankr. Ct.*, 828 F.2d 1385, 1394 (9th Cir. 1987). "This immunity reflects the long-standing 'general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.'" *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004) (quoting *Bradley v. Fisher*, 13 Wall. 335, 347 (1871)).

Judicial immunity applies even where a judge is accused of acting in bad faith, maliciously, corruptly, erroneously, or in excess of jurisdiction. *Mireles,* 502 U.S. at 11-13. Immunity is overcome in only two situations: where the judge "acts in the clear absence of all jurisdiction, [citation], or performs an act that is not 'judicial' in nature." *Ashelman*, 793 F.2d at 1075; *see also Mireles,* 502 U.S. at 11.

When determining whether judicial immunity applies, jurisdiction is construed broadly. *Crooks v. Maynard*, 913 F.2d 699, 701 (9th Cir. 1990) (holding

immunity applied where judicial officer had "colorable authority" to hold parties in contempt). A judge is not deprived of immunity for "[g]rave procedural errors or acts in excess of judicial authority" or if the judge "misinterpret[s] a statute and erroneously exercise[s] jurisdiction and thereby act[s] in excess of his jurisdiction." *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988). Thus, in *Schucker*, the Ninth Circuit held that even assuming the judge had acted in excess of his jurisdiction, judicial immunity applied because the alleged conduct by the judge "was not done 'in the clear absence of jurisdiction.'" *Id.* (quoting *Stump v. Sparkman,* 435 U.S. 349, 357 n.7 (1978)).

"The factors relevant in determining whether an act is judicial 'relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.'" *Ashelman*, 793 F.2d at 1075 (quoting *Stump*, 435 U.S. at 362); *see also Mireles*, 502 U.S. at 11. The inquiry focuses on whether the "'nature' and function of the 'act'" is normally performed by a judge, "not the 'act itself.'" *Mireles*, 502 U.S. at 13. Additional factors to be considered include whether the events occurred in the judge's chambers, and whether the controversy centered around a case then pending before the judge. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001).

Absent from the FAC or Appellant's Opening Brief are any allegations or argument suggesting that Judge Wohlfeil lacked jurisdiction over the civil cases. Moreover, as conceded by Appellant during the March 23, 2022 District Court hearing, the claims against Judge Wohlfeil arose solely from the rulings he made while presiding over *Cotton I* and *II*. (ER-106-107). Because it is undisputed that Judge Wohlfeil was acting in his judicial capacity, the doctrine of absolute judicial immunity bars the claims asserted against him. Accordingly, this appeal is without merit and the District Court's order dismissing Judge Wohlfeil should be affirmed.

VIII.

CONCLUSION

Appellant is precluded as a matter of law from seeking review of the District Court's March 23, 2022 Order dismissing Judge Wohlfeil with prejudice because it is an interlocutory order, which is not appealable after a dismissal for failure to prosecute. Also, by conceding to the District Court that her action against Judge Wohlfeil was barred by judicial immunity, and by failing to raise any challenge to the ruling dismissing him in her Opening Brief, Appellant has waived the issue on appeal. Further, Appellant lacks Article III standing to bring this appeal. Lastly, to the extent that the March 23, 2022 Order is reviewable, the dismissal of Judge Wohlfeil with prejudice should be affirmed because he enjoys absolute judicial immunity.

DATED:

May 5, 2023

Respectfully submitted,
OFFICE OF GENERAL COUNSEL
Superior Court of California, County of San Diego

By: _s/ Carmela E. Duke_____
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The Honorable Joel R. Wohlfeil, Judge of the
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STATEMENT OF RELATED CASE
[CIRCUIT RULE 28-2.6]

Pursuant to Ninth Circuit Rule 28-2.6, the following two cases are deemed related cases although they may be no longer pending in this Court:

1. Darryl Cotton v. Larry Geraci, et al., Ninth Circuit Court of Appeal Docket No. 21-55519. This case is related because it involves the same transaction or event and it raises the same or closely related issues as the instant action Additionally, there are a number of similar parties in the related case, including Judge Wohlfeil.
2. Darryl Cotton v. Gina Austin, et al., Ninth Circuit Court of Appeal Docket No. 22-56077. This case is related because it involves the same transaction or event and it raises the same or closely related issues as the instant action. There are also a number of similar parties in the related case.

Respectfully submitted,
OFFICE OF GENERAL COUNSEL
Superior Court of California, County of San Diego

May 5, 2023

By: __s/ Carmela E. Duke_____
Susanne C. Koski, General Counsel
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The Honorable Joel R. Wohlfeil, Judge of the
Superior Court of California, County of San Diego

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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