CASE NO. S215132

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

ELAINA NOVOA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALYSSA GOMEZ, DECEASED,

Plaintiff and Petitioner,

v.

CALIFORNIA DEPARTMENT OF MENTAL HEALTH, CLIFF ALLENBY, AND STEPHEN MAYBERG,

Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE
CASE NO. B248603

Vacating an Order of the Superior Court of Los Angeles County
The Honorable John L. Segal
Case No. BC487936

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTRODUCTION

Respondents' position is simple: when it comes to the Sexually Violent Predators Act, they can do (or not do) whatever they like, however they see fit. But this claim of absolute discretion simply does not square with the language that the Legislature actually used in the SVPA.

Respondents argue, first, that no mandatory duty can be found anywhere in the SVPA because, in general, it grants them "substantial discretion" and the entire process is purportedly "clothed in immunity." By taking this approach, Respondents apparently hope to avoid the actual questions presented here, namely whether the statutory language imposes mandatory duties and if so, what those duties are. But Respondents' approach is the opposite of how statutory construction should proceed. Here, plain statutory language shows that mandatory duties are created, and immunity does not apply to such duties. The cases Respondents cite do not assist them because those cases involved different statutory schemes.

Second, Respondents argue, or rather state, that causation was not sufficiently pleaded because the undisputed facts show that no other conclusion was reasonable. They do not explain that conclusion, however, and again the case law they rely on is inapplicable. The Court should reaffirm *Alejo* and hold that the trial court properly denied the demurrer.

Last, Respondents argue that they should be immune from liability under 845.8(a). This is the same argument as above: that because Respondents have absolute immunity, they must have complete discretion. Both lower courts properly rejected this argument. Respondents have discretion in some areas, but not in others. In particular, they have no discretion with regard to the number of medical professionals used for screening or to the requirement that they establish and follow an established protocol. This Court should enforce those mandatory duties.

Both the lower courts found that the SVPA imposed a mandatory duty on Respondents and they were not immune from liability under 845.8(a). (See Petitioner's Opening Brief (POB) App. A; Pet. For Rev., App. A.) Respondents chose not to petition to have that finding reviewed, and Petitioner does not ask that those findings be reviewed. At issue are the two points in Petitioner's opening brief: the scope of the DMH's mandatory duties and whether causation can be adequately pled under the SVPA. For the reasons stated below, this Court should affirm in part, and overrule in part, the decision of the Court of Appeal.

ARGUMENT

I. The SVPA does not grant Respondents absolute discretion.

Statutory construction begins with the words of the statute, and if they are not clear then the overall structure and purpose of the statute *may* also be relevant. (See, e.g., *Morris v. Marin* (1977) 18 Cal.3d 901, 910.) Respondents would have it the other way around: because the SVPA gives them discretion "in general," they argue, it cannot contain any mandatory duties. But that approach ignores the actual language of the statute.

A. Respondents do not show the statutory framework gives DMH absolute discretion.

Respondents' brief begins by characterizing the entire SVPA process as discretionary. (Respondents' Answer Brief (RAB), pp. 10-12.) But to support this contention, Respondents offer only a brief outline of the entire SVPA process. Much of what they cite does not relate to the Department of Mental Health itself. That the scheme may give discretion to Corrections or county counsel does not necessarily add to the discretion it gives DMH. More importantly, Respondents offer no authority for the contention that statutory interpretation should begin with the general rather than the specific. Nor could they. Rather, the express language of the statute should

be the first source of legislative intent. (*Morris*, 18 Cal.3d at 910 ["The court, as in all cases of statutory construction and interpretation, must ascertain the legislative intent. *In the absence of express language*, the intent must be gathered from the terms of the statute, construed as a whole."], emphasis added.)

B. Respondents also do not show that their duty to conduct a full evaluation is discretionary.

Respondents next argue, more specifically, that there is no mandatory duty to conduct a full evaluation. (RAB pp. 12-21.) They argue that the evaluation is only a duty to investigate, not to take any action, and so they have complete discretion as to how to investigate. This is simply not what the statute says. In fact, in Respondent's answer brief, they acknowledge the requirement of a full evaluation. (RAB p. 12 ["Although the DSH *must* designate two mental health professionals to conduct the 'full evaluation' there is no requirement that they find the person they evaluate to be a sexually violent predator"; emphasis added].) Respondents also rely on case law that is inapplicable here because the cited cases interpret different statutory schemes that provided greater discretion.

Respondents do not contest that use of the word "shall" in a statute generally imposes a mandatory duty. (*Alejo v. City of Alhambra* (1999) 75 Cal. App. 4th 1180, 1185-87) [finding the language "shall report the known or suspected instance of a child abuse" to be "imperative language" that imposed a mandatory duty]; *State v. Superior Court (Perry)* (1984) 150 Cal. App. 3d 848, 854-55 [finding that the language "shall upon verified complaint in writing of any person, investigate," constituted language imposing a mandatory duty"].) Ignoring the mandatory nature of "shall" and, instead, focusing on "whether the statutorily required act lends itself to

a normative or qualitative debate over whether it was adequately fulfilled" undermines the statute.

California case law and the language of the SVPA impose mandatory duties. The DMH must: 1) develop a protocol that defines how the evaluators must conduct a full evaluation; (2) conduct a full evaluation on every referral using two mental health professionals who apply the protocol; and (3) refer inmates found to be likely SVPs pursuant to the protocol for civil commitment. (Welf. & Inst. Code § 6601(c)-(d).) Despite Respondent's contentions, discretion allotted at separate steps in the SVPA process does not affect the duties imposed on the DMH. When Pitre was referred for a full evaluation, the DMH failed to carry out the second and third mandatory duties listed above. Despite the duty to set a protocol for a full evaluation, Respondents did not require evaluators to apply it on every referral. Rather, they only required one evaluator to perform a limited review of the inmate's records from the last incarceration, using an informal screening device that was not the same as the developed protocol for a full evaluation.

Simply because some discretion is allowed in a law's application does not mean that it does not impose a mandatory duty. (*Johnson v. State of California* (1968) 69 Cal. 2d 782, 793.) Respondents rely on several cases in support of the argument that a mandatory duty cannot be found. (*De Villers v. County of San Diego* (2007) 156 Cal.App.4th 238; *Ortega v. Sacramento County Dept. of Health and Human Services* (2008) 161 Cal.App.4th 713; *Guzman v. County of Monterey* (2009) 46 Cal.4th 887; *Brenneman v. State of California* (1989) 208 Cal.App.3d 812; *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490; *Creason v. State Department of Health Services* (1998) 18 Cal.4th 623.) These cases are distinguishable because the statutes at issue either did not impose any mandatory duties or the harm suffered was not the type of harm the statute intended to protect

against. In fact, the case law cited by Respondents supports the proposition that courts should examine statutory language more closely, and not generally as Respondents have here.

As stated in Petitioners' Opening Brief, *de Villers* and *Ortega* are distinguishable from the present case. (POB pg. 13-14; see *de Villers* 156 Cal.App.4th at 263 [holding that the harm alleged was not the type of harm statute was intended to protect against]; see *Ortega*, 161 Cal.App.4th at 728 [holding that the investigation at issue was not mandated by statute, but was part of the Department of Social Services' manual of policies and procedures].)

The additional case law now cited by Respondents also does not support their position. In *Creason*, a minor and her parents sued the state, seeking damages for the failure of the State Department of Health Services to diagnose and report timely and accurately that the minor was suffering from hypothyroidism, a breach of a mandatory duty under the Hereditary Disorders Act. (*Creason*, 18 Cal.4th at 632.) In dismissing plaintiffs' claim, this Court found no mandatory duty, emphasizing that the language of the statute made discretion clear: "This language points forcefully towards the conclusion that the Legislature left the selection of necessary and appropriate testing and reporting standards to the sound discretion of the Director." (*Id.* at 632.) In the present case, while the Legislature gave some discretion as to other steps in the SVPA process, it simply did not do so as to the full investigation required of the DMH.

In *Guzman*, plaintiffs sued the county for failure to notify residents of contaminated water in a mobile home park. (*Guzman*, supra, 46 Cal. 4th at 887.) The Court rejected the plaintiffs' claim the county had breached an implied mandatory duty to report the contamination, but specifically limited the holding: "Our holding that the county was not subject to any mandatory duty for the purposes of Government Code 815.6 liability is limited to the

implied duty to instruct a water system to notify customers of water contamination." (*Id.* at 911.) The court also noted that "this statute itself does not require the County to perform any particular act and, as such, imposes no mandatory duty." (*Id.* at 910.) Again, in the present case, the statute does require a particular act, in fact more than one.

Brenneman is also distinguishable. There, the court dismissed an action for negligent failure to control or supervise the parolee or to warn their son of his dangerous proclivities. The court found no mandatory duty because "the reassessment process does not automatically trigger any specific action." (*Brenneman*, supra, 208 Cal.App.3d at 818.) Additionally, the court also held there was no violation of a mandatory duty because the alleged duty was found in the department manual, not an enacted statute, thus falling outside the scope of 815.6. (*Id.* at 817.) Here, DMH's duties are imposed by statute and include duties to take specific action following investigation.

Finally, in *Haggis*, a plaintiff brought four actions for breach of mandatory duty arising out of the city's failure to follow directives in the municipal code regarding development by a previous owner of property in landslide zones. (*Haggis*, supra, 22 Cal.4th at 501-08.) The court dismissed three of the claims based on a finding that the alleged mandatory duties breached did not involve any action after investigation. (*Id.*) On the fourth claim, the court found that although a mandatory duty was found, the breach was not the type of harm the municipal code was designed to protect against. (*Id.* at 499-500.) As stated earlier, the SVPA does require the DMH to take action, and the harm suffered here was exactly the type of harm the statute was intended to protect against.

In contrast to the statutory schemes mentioned in these cases, the SVPA's language explicitly requires that Corrections shall screen an inmate prior to release and if the person is likely to be a SVP, he or she shall be

referred to the DMH for a full evaluation by two mental-health professionals in "accordance with a standardized assessment protocol." (Welf. & Inst. Code § 6601(a)-(d).). Regardless of any discretion given to the mental-health evaluators in applying the protocol using their clinical judgment, the statute explicitly requires DMH to develop a protocol and assign two evaluators to conduct a full evaluation according to the protocol. Unlike *Ortega*, the issue here does not concern the discretion involved in conducting an assessment, but rather the actual performance of that assessment. Dismissing the DMH's mandatory duty to develop a protocol and have evaluators conduct a full evaluation according to that protocol, just because the evaluation process itself contains a normative assessment, is a misapplication of the law and should be reversed.

Respondents attempt to blur the line between the discretion given to Corrections and to the mental-health evaluators and the mandatory duties imposed on the DMH and its directors. (RAB p. 20.) For example, they cite Corrections' discretion in referring a person to the DMH and the discretion given to the two mental-health evaluators as support for their argument that the DMH has substantial discretion in the SVPA process. (*Id.*) But again, the discretion given to others does not establish discretion on the part of the DMH, which is the party being sued here.

Respondents also contend that the full evaluation is not mandatory because the statute does not require any action following the evaluation. (RAB p. 19.) But it does. Under the SVPA, once two mental health professionals perform a full evaluation, the Director of Mental Health must take one of two actions. If both professionals concur that the person is a likely SVP, the Director of Mental Health "shall forward a request for a petition for commitment under 6602." (Welf. & Inst. Code § 6601(d).) If the mental-health professionals disagree, the Director of Mental Health "shall arrange for further examination of the person by two independent

professionals" (Welf. & Inst. Code § 6601(e).) The Director of Mental Health exercises no discretion: He must take one of those two actions.[1]

Respondents also challenge the language of the statute by arguing that "the Legislature's use of mandatory language is not the dispositive criteria. Instead the courts have found the enactment created a mandatory duty under Government Code 815.6 'only where the statutorily commanded act did not lend itself to a normative or qualitative debate over whether it was adequately fulfilled'." (RAB p. 20.) But Respondents do not explain how that rule might apply here. In fact, there is no debate over whether the duties on which Petitioner's claim is based were fulfilled. The SVPA expressly requires a full evaluation, followed by mandatory action based on the evaluation.

C. The statute requires the use of two evaluators.

Respondents concede that the SVPA says that two evaluators shall be used. (RAB p. 12.) However, again they argue that the Legislature did not mean what it said: "Nothing in the SVPA requires the CDCR or DSH to conduct a 'full evaluation' in order to determine that an inmate would *not* qualify as a sexually violent predator." (RAB p. 21 (emphasis in original).) This argument makes little sense. It is like saying that drug testing is mandatory to catch those using banned substances, but not mandatory if used to find those *not* using them. These are two sides of the same coin. The purpose of the SVPA is to identify and keep this small class of highly dangerous repeat offenders out of the community. (Ct. App. Writ Opp., Ex.

[1] The SVPA is silent on what must occur if both mental-health professionals agree that a person is *not* a threat to society, but we assume the DMH would not contend it would have discretion to refer that person for civil commitment regardless. Indeed, doing so would likely violate due process.

A at p. 4; see also Welf. and Inst. Code § 6601.) To separate SVPs from non-SVPs, everyone must go through a full evaluation.

Additionally, the DMH's cursory file review of inmate referrals from Corrections frustrates the legislative intent of the SVPA. This cursory review has released thousands of flagged inmates without a full evaluation, despite the fact that the Legislature has deemed full evaluations to be necessary to determine whether an inmate has a diagnosable disorder and should be either released or referred for civil commitment. (Ct. App. Writ Opp. Ex. A at ¶¶ 22-27, 33-34.) Nonetheless, the Court of Appeal's opinion tacitly approves the DMH's ineffectual and illegal paper-screening process, allowing the agency to continue to avoid an important and popular mandate. (See *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53 ["The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such funds."].)

D. Government Code section 845.8(a) does not provide absolute immunity for breach of mandatory duty.

Finally, Respondents make the circular argument that no breach of mandatory duty can be found because Government Code section 845.8 provides absolute immunity even where a mandatory duty is breached. This argument fails because this Court has found on multiple occasions that immunity under 845.8(a) is not absolute. Additionally, the case law cited by Respondents does not stand for the proposition that 845.8(a) provides immunity for a breach of mandatory duty.

1. This Court has held that Government Code 845.8(a) does not provide absolute immunity.

Respondents' argument for immunity appears to confuse 845.8(a) with 845.8(b). Section 845.8(a) provides immunity to a public entity or

employee for decisions relating to the determination of whether to parole a prisoner. (Gov. Code § 845.8(a).) Section 845.8(b) provides immunity for injuries caused by an escaped or escaping prisoner, or a person resisting arrest. (Gov. Code § 845.8(b).) This Court has examined the scope of immunity under 845.8. (*County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479.) The issue there was whether section 845.8(b) provided absolute immunity from liability for both discretionary and ministerial acts that led to a prisoner's escape. (*Id.* at 481.) Looking at the language of 845.8 and other immunity provisions under the Tort Claims Act, the court determined that the Legislature intended 845.8(b) to provide absolute immunity. (*Id.* at 483-84.)

But this case involves 845.8(a). While 845.8(b) contains no limitation in its immunity, stating that the government is not liable for "any injury," 845.8(a) "by its terms is limited to any injury 'resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.'" (*Id.* at 484.) It is not the absolute immunity for which Respondents argue.

This Court revisited the issue of 845.8(a)'s immunity in *Perez-Torres*. (*Perez-Torres v. State of California* (2007) 42 Cal.4th 136.) There, the plaintiff had been mistakenly arrested for a parole violation. After he was released, he sued the state and several parole agents for negligence and false imprisonment. (*Id.* at 138.) The trial court granted defendants' motion for summary judgment, finding immunity under 845.8(a). On appeal, the holding was affirmed. This Court reversed.

First, the Court found that because defendants had assigned plaintiff the wrong identification number, when a mistake led to his wrongful arrest this "administrative error was the basis for the parole revocation determination and thus was an integral part of that decision, it was part of

determining whether to revoke parole." (*Id.* at 141-42.) Based on a prior decision in *Johnson*, the Court held that immunity did not "extend to plaintiff's continued incarceration after defendants knew or should have known he was the wrong man." (*Id.* at 142; see also *Johnson v. State of California* (1968) 69 Cal.2d 782, 784 [holding Youth Authority was not immune under 845.8(a) for negligent action of placing a youth in plaintiff's foster care without warning them of his violent tendencies].)

The Court in *Perez-Torres* rejected the state's argument that 845.8(a) provides absolute immunity, "rendering inapplicable any distinctions between discretionary and ministerial decisions," distinguishing the cases on which the state relied. (*Id.* at 144.) The state cited to *Kisbey v. State of California* (1984) 36 Cal. 3d 415, but the Court noted that the decision concerned only the application of 845.8(b), which the Court had held in *County of Sacramento* to be absolute. Additionally, the Court rejected the state's reliance on *Swift*, a case in which the plaintiff claimed that the state improperly revoked his parole. (*Swift v. Department of Corrections* (2004) 116 Cal.App.4th 1365.) In *Swift*, the court held that the immunity under 845.8(a) applied to "ministerial implementation of correctional programs." (*Swift*, 116 Cal. App. 4th at 1373.) This Court explained that *Swift* was contrary to *Johnson*, which "applied the distinction between basic or discretionary decisions and ministerial decisions when it addressed 845.8(a). (*Perez-Torres*, supra, 42 Cal.App.4th at 144; see also *id.* at 145, fn. 4 ["To the extent *Swift v. Department of Corrections* is inconsistent with the views expressed here, it is disapproved." (citation omitted).] In short, this Court made it clear in *Perez-Torres* that immunity under 845.8(a) does not apply to ministerial or mandatory duties.

2. Respondents' other authorities do not support their immunity argument.

Respondents cite to the decisions in *Fleming*, *Brenneman*, *Whitcombe* and *Martinez* for the proposition that immunity under 845.8(a) applies broadly, even in instances where there was a breach of a mandatory duty. (RAB pp. 36-41 [citing *Fleming v. State of California* (1995) 34 Cal.App.4th 1378; *Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698; *Brenneman,* supra, 208 Cal.App.3d 812; *Martinez v. State of California* (1978) 85 Cal.App.3d 430.) Again, *Perez-Torres* squarely rejected this proposition and held that immunity under 845.8(a) applies only to discretionary, and not ministerial, acts relating to probation decisions. To the extent Respondents' cases hold otherwise, they should be disapproved as inconsistent with *Perez-Torres*.

Moreover, close examination of these cases clarifies that none of them hold that the government is immune under 845.8(a) from harm resulting from a breach of a mandatory duty. In fact, each case held that no mandatory duty existed. (*Fleming*, 34 Cal.App.4th at 1383-84 [finding no mandatory duty under Penal Code § 3059]; *Brenneman*, 69 Cal.2d at 818 [finding initial reassessment in the Corrections Parole Procedures Manual was not a mandatory duty because it was merely a duty to investigate and not to take action]; *Whitcombe*, 73 Cal.App. 707-08 [holding no mandatory duty was imposed under Penal Code §§ 123.10 and 1203.12 because the judge would not be bound by a probation officer's report when deciding whether to grant or revoke probation.]; *Martinez*, 85 Cal.App.3d 430, 435 [finding no mandatory duty because all the acts or omissions were part of the discretionary act of releasing a prisoner].) None of these cases supports Respondents' position that 845.8(a) provides immunity for a breach of a mandatory duty.

In sum, this Court held in *County of Sacramento* and *Perez-Torres* that 845.8(a) immunity is limited to discretionary acts involving parole, not ministerial ones such as the mandatory duty under 815.6. The cases Respondent relies upon (*Fleming, Brenneman, Whitcombe* and *Martinez*) simply highlight the differences between those cases where no mandatory duty under 815.6 existed, and the present case in which the law does create a statutory scheme imposing mandatory duties on the DMH. Respondents' position that they have complete discretion as to all aspects of the SVPA should be rejected.

II. The Superior Court correctly followed *Alejo* to find that petitioner sufficiently alleged causation at the pleading stage.

Respondents argue that the Court of Appeal correctly held that causation was not sufficiently pleaded, stating that causation can be decided as a matter of law because "no reasonable conclusion could have been drawn otherwise." (RAB pp. 29-30.) But, Respondents do not explain why the undisputed facts show this. (*Id.* at 30.) As stated in Petitioner's opening brief, this Court should hold that *Alejo*, not the cases relied upon by Respondents, control the pleading question. (POB pp. 17-18.)

A. In breach-of-mandatory-duty cases, courts have repeatedly held that causation should not be decided at the pleading stage.

Respondents' contention that causation has not been sufficiently pled because "no reasonable conclusion could have been drawn otherwise" is conclusory and unsupported. Courts examining whether a plaintiff has properly pled sufficient facts at the pleading stage that a breach of a mandatory duty caused the plaintiff's harm have answered the question in the affirmative. (POB pp. 18-19; see *Landeros v. Flood*, (1976) 17 Cal.3d 399, 410 [allowing plaintiff to present expert testimony that a reasonable

physician would have properly assessed the plaintiff's injuries and reported them to the proper authorities]; see *Henderson v. Newport-Mesa Unified School District* (2013) 214 Cal.App.4th 478, 497 [holding that facts showing available teaching positions and plaintiff's qualifications, "if proved, are sufficient to demonstrate the District's alleged failure to comply with its mandatory obligation" and would provide "the proximate cause of her not being rehired."].)

Cases have also specifically addressed causation in breach-of-mandatory-duty cases where the state agency had a duty to investigate and also had a duty to take action based on the outcome of the inquiry. (POB pp. 19-20; *Bramen*, 28 Cal.App.4th at 356 [holding that although DOJ had considerable discretion in how to carry out its background checks on prospective handgun buyers, causation was a question of fact for the jury]; *Alejo*, 75 Cal.App.4th at 1191-92 [holding that whether or not department would have taken action after a proper investigation "is not a matter of speculation but a question of fact to be determined at trial through expert testimony."].)

This Court should find that the present scenario is in in line with *Alejo*. It is foreseeable that if two mental-health professionals had conducted a full evaluation on Pitre, a prisoner whose sexually violent tendencies are undisputed, they would have found him to be a threat to society, and action would have followed that could have prevented Ms. Novoa's death. Petitioner should have the opportunity to present (for example) expert testimony that a full evaluation according to the correct protocol would have revealed Pitre's dangerous tendencies. This Court should find that causation is a question for the jury and reverse the decision of the Court of Appeal on that point.

B. The cases relied upon by Respondents are distinguishable.

Respondents rely upon *Whitcombe*, *Perry*, and *Fleming* in finding that Petitioner's causation allegations were too speculative at the pleading stage. These cases are distinguishable because none of them found a breach of mandatory duty, and where such a duty was alleged, no mandatory actions followed the fulfillment of that duty. (see POB p. 21; *Fleming*, 34 Cal.App.4th at 1383-84 [alleging that defendant failed to hold and arrest parolee who violated the terms of parole, without providing for any mandatory subsequent action]; *Perry*, 150 Cal. App. 3d at 860 [noting that defendant only had a duty to investigate and was not required to take a specific action at the conclusion of the investigation]; *Whitcombe*, 73 Cal. App. 3d at 708 [holding that "while the court must consider a probation officer's report, it is not bound by that report and recommendation...."].) The defendants in those cases had considerable discretion after they had fulfilled their initial duty, unlike the present case.

Here, the DMH had an initial duty to conduct a full evaluation. If the two evaluators found a likely SVP at the conclusion of those evaluations, it had a subsequent duty to refer the inmate for civil commitment. If the two evaluators disagreed, the DMH had a subsequent duty to forward the case to two outside mental-health professionals for further evaluation. Unlike *Fleming*, *Perry* and *Whitcombe*, the DMH had a subsequent duty to take one of two actions. Rather, the case at bar is similar to *Bramen* or *Alejo*, where the state agency had a mandatory duty to conduct an initial investigation, and a mandatory duty to act following the inquiry. (*Alejo*, 75 Cal.App.4th at 1188-89 [holding state officer was required to report child abuse to the appropriate authorities if his investigation revealed that a child was likely being abused]; *Bramen*, 28 Cal.App.4th at 350 [holding state was required to block the sale of a handgun if a background check revealed the person was ineligible to possess a handgun].)

In sum, the Court of Appeal failed to distinguish *Fleming, Perry* and *Whitcombe* from the present case, and Respondent's reliance on these cases is misguided. This Court should rule instead that *Alejo* applies for the reasons stated above.

Additionally, the Court of Appeal's decision essentially nullifies Government Code section 815.6. Section 815.6 was enacted to provide individuals with relief when harmed by a state actor's failure to fulfill a legally mandated duty:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

(Gov. Code § 815.6.) To preclude injured parties from bringing suit under section 815.6 at the pleading stage because proximate cause is allegedly too tenuous would deprive them of any opportunity to obtain relief, rendering the statute largely ineffectual.

III. The Court of Appeal correctly held that immunity under Government Code section 845.8 is not absolute immunity.

Respondents also seek to reargue the issue of governmental immunity under Government Code section 845.8. This argument is identical to Respondents' argument under section I(D) of their answer, and Petitioner addressed it above. (RAB pp. 23-29; supra pp. 9-15). Both the trial court and the Court of Appeal found for Petitioner on this issue, and did so correctly. (POB, App. A, pg 6-7; Pet. Rev. App. A, pg. 11-14.) This Court should affirm those findings.

CONCLUSION

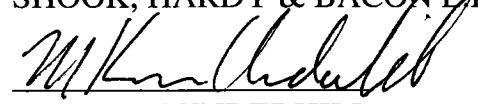
The SVPA gives DMH the responsibility to identify potential predators and refer them for civil commitment hearings. It imposes a mandatory duty on the DMH to assess every potential SVP using two qualified mental-health professionals. It also has a mandatory duty to develop a protocol for those full evaluations and to see to it that the mental-health professionals use that protocol to determine if the inmate meets the criteria for an SVP. The Court of Appeal's decision to the contrary should be reversed in part and the trial court's order overruling Respondents' demurrer should be reinstated.

Additionally, case law establishes that proximate cause is a question of fact that generally should not be decided at the pleading stage. The Court of Appeal erroneously followed the *Whitcombe* line of cases, which is distinguishable. To the extent there is a split of authority, this Court should resolve the split and adopt the rationale in *Alejo*. The Court of Appeal's decision leaves those who may be harmed by the DMH's breach of mandatory duties (or similar breaches by other agencies) with no ability to obtain redress because few if any cases could proceed past the pleading stage. Petitioner respectfully requests that this Court reverse the decision of the Court of Appeal on this ground as well.

DATED: June 23, 2014

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.



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Personal Representative of the Estate of
Alyssa Gomez, Deceased

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ELAINA NOVOA

PROOF OF SERVICE

I, Jessica Lee, am employed in the City and County of San Francisco in the State of California. I am over the age of eighteen years and not a party to the within action. My business address is Shook, Hardy & Bacon L.L.P., One Montgomery, Suite 2700, San Francisco, California 94104.

I am readily familiar with the practice of Shook, Hardy & Bacon L.L.P. for collection and processing of documents by express mail next day delivery, an overnight delivery service: By placing a true and correct copy of the above document(s) in a sealed envelope addressed as indicated above and causing such envelope(s) to be delivered to the FEDERAL EXPRESS Service Center, on June 23, 2014, to be delivered by their next business day delivery service on June 24, 2014, to the addressee designated.

On June 23, 2014, I served the following document:

- **PETITIONER'S REPLY BRIEF ON THE MERITS**

on the parties in this action by placing a true copy thereof in a sealed FEDERAL EXPRESS envelope addressed as follows:

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Attorney General of California
Kathleen A. Kenealy
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on **June 23, 2014,** at San Francisco, California.

JESSICA LEE