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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, Plaintiff and Appellant, v. GAVIN C. NEWSOM, as Governor, etc., Defendant and Respondent; NORTH FORK RANCHERIA OF MONO INDIANS, Intervener and Respondent.	F086849 (Super. Ct. No. MCV072004) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Michael J. Jurkovich, Judge.

Paul Hastings, Navi Singh Dhillon, Sean D. Unger, Lucas V. Grunbaum and Max Epstein-Shafir for Plaintiff and Appellant.

Rob Bonta, Attorney General, Noel A. Fischer, Assistant Attorney General, Bart E. Hightower, Deputy Attorney General, for Defendant and Respondent.

No appearance on behalf of Intervener and Respondent.

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Plaintiff Picayune Rancheria of the Chukchansi Indians (Picayune-Chukchansi) challenges the trial court's conclusion that its complaint and petition for writ of mandate failed to state a cause of action against the Governor. As explained below, we conclude the trial court correctly determined a cause of action was not stated. In addition, Picayune-Chukchansi failed to carry its burden (in the trial court or on appeal) of demonstrating there is a reasonable possibility that the defects could be cured by amendment. Thus, leave to amend the mandamus cause of action was properly denied.

We therefore affirm the judgment of dismissal in favor of the Governor.

FACTS

The parties are familiar with the factual history underlying this lawsuit and part of this history is set forth in the "FACTS" section of *Picayune Rancheria of the Chukchansi Indians v. North Fork Rancheria of Mono Indians* (Dec. 16, 2025, F088551) ___ Cal.App.5th ___. Therefore, this unpublished opinion does not repeat those facts here, except to describe the challenged concurrence of Governor Edmund G. Brown, Jr. and to provide some context for Picayune-Chukchansi's challenge.

In September 2011, the United States Department of the Interior announced the two-part determination by the Secretary of the Department of the Interior (Interior Secretary) that a proposed casino on a 305-acre parcel near the City of Madera (1) would be in the best interest of the North Fork Rancheria of Mono Indians (North Fork) and its members and (2) would not be detrimental to the surrounding community.

On August 30, 2012, the Governor issued a letter to the Interior Secretary concurring in the two-part determination. On August 31, 2012, the Governor and North Fork signed a tribal-state compact addressing the terms and conditions for conducting class III gaming on the Madera site. In 2013, the Legislature ratified the tribal-state compact by passing Assembly Bill No. 277 (2013-2014 Reg. Sess.), which added section 12012.59 to the Government Code. The Governor signed the legislation and it became

chapter 51 of the Statutes of 2013. (*Stand Up for California! v. State of California* (2021) 64 Cal.App.5th 197, 204 (*Stand Up II*).) Opponents of the proposed off-reservation casino began the referendum process and succeeded in having a statewide referendum on the ratification statute. (*Ibid*.) At the November 4, 2014 General Election ballot, the electorate rejected the ratification statute when a 61 percent majority voted "No" on Proposition 48. (*Stand Up II, supra,* at p. 205.)

PROCEEDINGS

In March 2016, Picayune-Chukchansi filed a verified complaint for declaratory relief combined with a petition for writ of mandate against the Governor. The declaratory relief claim was pleaded as the first cause of action and the mandamus petition as the second cause of action. In the prayer for relief, Picayune-Chukchansi sought a "judgment declaring that the Governor's concurrence did not take effect and is not in effect" and requested "a writ of mandate directing the Governor to vacate and set aside the concurrence and to take all action as may be necessary to notify the [Interior] Secretary that the concurrence did not take effect and is not in effect."

We omit a description of the early proceedings in this lawsuit and the proceedings in other lawsuits that eventually produced the opinions in *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538 (*United Auburn*) and *Stand Up II, supra*, 64 Cal.App.5th 197. The following describes how the mandamus cause of action and the declaratory relief cause of action were resolved in the Governor's favor at the pleading stage.

Motion for Judgment on the Pleadings

In February 2022, Governor Gavin C. Newsom substituted in as the defendant in this action in place of former Governor Brown. The next day, the Governor filed a motion for judgment on the pleadings contending the declaratory relief claim was moot and the mandamus cause of action failed because it did not identify a clear, present, ministerial duty that the Governor was required to perform.

In July 2022, the trial court issued a tentative ruling on the pending motions for judgment on the pleadings filed by Picayune-Chukchansi, North Fork and the Governor, stating it intended to grant the Governor's motion and dismiss the action. As to the claims against the Governor, the tentative ruling stated (1) the issues raised in the complaint against the Governor appeared to be moot and (2) the petition for a writ of mandate had not identified a ministerial duty that could be enforced by issuance of a writ.

On September 9, 2022, the trial court held a hearing on the pending motions. During argument, counsel for Picayune-Chukchansi asserted that if the court needed anything to be made clearer or other points addressed, it could amend to "fix it if you need." In response, counsel for North Fork argued (1) the complaint did not present the new theory that the concurrence was void ab initio and (2) given the timeline of the case, leave to amend should be denied. The court stated that it thought the tentative was right and, if not for what it considered to be an oral motion for leave to amend, it would adopt the tentative. The court then determined it was not appropriate at that time to grant or deny the oral motion to amend. The court proposed reserving its ruling on the motions for judgment on the pleadings, setting a date for a hearing on a motion for leave to amend, and allowing counsel for Picayune-Chukchansi "to file his motion, which, of course, is going to require [he] attach his proposed amend[ed] pleading."[1] The court identified two issues that the motion for leave to amend should address: (1) whether there was a reasonable possibility of curing the defects and (2) whether Picayune-Chukchansi should even be given the opportunity to amend so late in the proceeding. After further discussion with counsel, the court adopted its proposed procedure and set

[1] California Rules of Court, rule 3.1324(a) provides that a motion to amend a pleading before trial must include a copy of the proposed amended pleading and must identify the allegations that are proposed to be deleted and the allegations that are proposed to be added.

October 21, 2022, as the date for Picayune-Chukchansi to file its motion for leave to amend.[2]

Motion for Leave to Amend

Picayune-Chukchansi filed its motion for leave to amend on schedule and the Governor and North Fork filed oppositions.[3] On December 12, 2022, after a reply was filed, the trial court issued a tentative ruling. Four days later, the court held a hearing on the pending matters. The order issued after the hearing addressed the declaratory relief cause of action by granting Picayune-Chukchansi's motion for leave to file a first amended complaint for declaratory relief and directing Picayune-Chukchansi to file and serve a first amended complaint by January 3, 2023. The order addressed the petition for writ of mandate by (1) denying Picayune-Chukchansi's leave to file a first amended petition for writ of mandate and (2) adopting the tentative ruling on the competing motions for judgment on the pleadings, which granted the Governor's and North Fork's motions solely as to Picayune-Chukchansi's petition for writ of mandate without leave to amend.

Picayune-Chukchansi filed a first amended complaint seeking (1) a judicial declaration that the vote on Proposition 48 annulled the Governor's August 2012 concurrence, rendering it void ab initio such that it never took effect and was not in

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[2] The need for the parties to address the latter issue—that is, whether the proposed amendment was untimely—explains why the trial court did not simply grant the motion for judgment on the pleadings *with* leave to amend both claims against the Governor. The court's procedure was appropriate and tailored to the unusual circumstances of this case, which included a long stay pending the finality of the decisions in *United Auburn* and *Stand Up II*.

[3] The appellant's appendix submitted by Picayune-Chukchansi contains its two-page notice of motion and motion for leave to file a first amended complaint and petition, but it does not include the supporting memorandum of points and authorities, the supporting declaration of the attorney who filed the motion, the proposed order, or the proposed first amended complaint and petition.

effect; (2) a judicial declaration that North Fork could not conduct class III gaming on the Madera Site by relying on the void concurrence; and (3) injunctive relief precluding the Governor and North Fork from taking any action predicated on the Governor's concurrence ever having had legal effectiveness.

Governor's Demurrer to Declaratory Relief Claim

In February 2023, the Governor and North Fork filed separate demurrers to the first amended complaint. On July 5, 2023, after Picayune-Chukchansi filed its oppositions, the trial court filed a tentative ruling on the demurrers that proposed sustaining the Governor's demurrer without leave to amend and overruling North Fork's demurrer. The tentative ruling stated an actionable dispute did not exist between Picayune-Chukchansi and the Governor. The tentative ruling explained this conclusion by stating (1) the parties all agreed the Governor's concurrence is no longer in effect and (2) there was no allegation in the first amended complaint "that there is any future act that the Governor can take, or a suggestion he will take, to attempt to 'enforce' or 'act on' the presently ineffective concurrence, such as to create an 'actual controversy' between the two parties beyond an 'academic disagreement.' "

The hearing on the demurrers of the Governor and North Fork to the first amended complaint was held on July 14, 2023. On July 17, 2023, the court filed an order after hearing stating the court adopted its tentative ruling and, accordingly, the Governor's demurrer was sustained without leave to amend. The order did not expressly dismiss the causes of action against the Governor. (See Code Civ. Proc., § 581d [effect of written dismissal orders].)[4]

The Appeal

In September 2023, Picayune-Chukchansi filed a notice of appeal on Judicial Council form APP-002, incorrectly marking the box stating the appeal was from a

[4] Undesignated statutory references are to the Code of Civil Procedure.

"Judgment of dismissal after an order sustaining a demurrer." The notice of appeal stated the judgment appealed from was entered on July 14, 2023, which was the date of the hearing on the demurrers. No judgment or order of dismissal in favor of the Governor is contained in the appellate record.[5]

DISCUSSION

I. APPEALABILITY

"It is well settled law that an order sustaining a demurrer without leave to amend is nonappealable, and a formal judgment must be entered against the unsuccessful party from which the appeal can be taken." (*Schisler v. Mitchell* (1959) 174 Cal.App.2d 27, 28–29; see *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 457 ["order sustaining a demurrer with leave to amend is not a final judgment and therefore not itself appealable"]; § 581d.) Appellate courts, however, have the discretion to deem an order sustaining a demurrer as incorporating a judgment of dismissal and to treat the plaintiff's notice of appeal as applying to that fictional judgment of dismissal. (*Nowlon v. Koram Ins. Center, Inc.* (1991) 1 Cal.App.4th 1437, 1440–1441; *Munoz v. Davis* (1983) 141 Cal.App.3d 420, 431.) Here, an exercise of that discretion is appropriate because all Picayune-Chukchansi's causes of action against the Governor have been finally adjudicated, the Governor has not raised appealability as an issue and has not been misled or prejudiced by the absence of a judgment of dismissal, and little purpose would be served by dismissing the appeal so a judgment of dismissal could be entered. (See *Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 203–204; *Estate of Dito* (2011) 198 Cal.App.4th 791, 800.) Consequently, in the interest of justice

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5 We have taken judicial notice of the June 26, 2024 "JUDGMENT IN FAVOR OF PICAYUNE AND AGAINST NORTH FORK" that declared the Governor's concurrence was "void *ab initio*, and as such the Governor's concurrence never took effect and is not in effect." It did not comply with the one final judgment rule by stating judgment was entered in favor of the Governor or by dismissing the causes of action against the Governor.

and to prevent delay, we treat the trial court's orders as though they include an appealable judgment of dismissal and treat Picayune-Chukchansi's notice of appeal as taken from that judgment. (See *Nowlon, supra*, 1 Cal.App.4th at p. 1440–1441.)

II. DE NOVO REVIEW OF THE PLEADINGS

A complaint or writ petition must contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language." (§ 425.10, subd. (a)(1).) When a pleading "does not state facts sufficient to constitute a cause of action," a defendant may raise that objection by filing a demurrer or a motion for judgment on the pleadings. (§ 430.10, subd. (e); 438, subd. (c)(3)(B)(ii).) In either procedural context, determining whether a cause of action has been stated is a question of law subject to de novo review. (See *People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777; *Bichai v. Dignity Health* (2021) 61 Cal.App.5th 869, 876.)

When a general demurrer is sustained or a motion for judgment on the pleadings granted, the reviewing court must determine whether the pleading alleges facts sufficient to state a cause of action under any legal theory. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 870 (*Dinuba*) [complaint alleged facts sufficient to state a claim for a writ of mandate]; *Villery v. Department of Corrections & Rehabilitation* (2016) 246 Cal.App.4th 407, 413, 416 (*Villery*) [inmate alleged sufficient facts to state a claim for a writ of mandate to enforce a ministerial duty].) Generally, courts give the pleading a reasonable interpretation, reading it as a whole and its parts in their context. (*Dinuba, supra*, at p. 865.) Courts treat the defendant's demurrer or motion as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. (*Ibid*.) The plaintiff's contentions or conclusions of law are not controlling because the appellate court must independently decide questions of law without deference to the legal conclusions of either the pleader or the trial court. (*Villery, supra*, at p. 413.)

III. DECLARATORY RELIEF

Picayune-Chukchansi's March 2016 complaint for declaratory relief and petition of writ of mandate alleged, "[o]n information and belief, the Governor maintains that the concurrence was and is effective, or he has failed and refused to acknowledge that the concurrence was and is ineffective." The cause of action for declaratory relief averred:

> "An actual controversy has arisen and now exists between the Picayune Tribe and the Governor concerning the effectiveness and legal status of the concurrence, including the parties' rights and duties with respect thereto. As set forth more fully above, the Picayune Tribe contends that the concurrence is ineffective. On information and belief, the Governor contends to the contrary. A judicial determination and declaration as to the effectiveness and legal status of the concurrence is therefore necessary and proper to determine the respective rights and duties of the parties."

The complaint contained no allegations of fact about a context or contexts in which the Governor was then contending the concurrence was valid.

The legal principles applicable to this lawsuit became somewhat better defined after the finality of our May 2021 decision in *Stand Up II*, *supra,* 64 Cal.App.5th 197. There, we concluded "the people retained the power to annul a concurrence by the Governor and the voters exercised this retained power at the 2014 election by impliedly revoking the concurrence for the Madera site. As a result, the concurrence is no longer valid, and the demurrer[s of North Fork and the Governor] should have been overruled." (*Id*. at p. 201.)

In December 2022, Picayune-Chukchansi filed a first amended complaint alleging: "The Governor and North Fork do not agree with Picayune as to the legal status of the concurrence. While both the Governor and North Fork acknowledge that Proposition 48 invalidated the Governor's concurrence, the Governor and North Fork claim the concurrence for North Fork's Madera Site project only has been invalidated *prospectively*. North Fork, for example, has expressly taken the view the Governor's concurrence was valid and effective through the People's vote on Proposition 48 in

2014." The first amended complaint asserted this disagreement was a "present controversy among the parties" and, as a remedy, sought "a judicial declaration that the Governor's concurrence has been annulled, is void *ab initio*, and was never effective and remains ineffective under California law." The pleading included the legal conclusion that the requested declaratory "relief is mandated by the People's vote on Proposition 48."

As described earlier, the trial court's July 2023 order after hearing sustained the Governor's demurrer to the declaratory relief cause of action without leave to amend on the ground that there was no justiciable controversy between Picayune-Chukchansi and the Governor and, therefore, the declaratory relief claim was moot.

A. Basic Legal Principles

"Any person interested under a written instrument, ... or who desires a declaration of his or her rights or duties with respect to another ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action ... for a declaration of his or her rights and duties ... including a determination of any question of construction or validity arising under the instrument or contract." (§ 1060.) Pursuant to section 1061, a "court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." These statutes have been interpreted to mean that "[t]he construction or validity of a statute or ordinance is a proper subject of declaratory relief." (5 Witkin, Cal. Procedure (6th ed. 2021) Pleadings, § 857, p. 263; e.g., *City of Carmel-By-The-Sea v. Young* (1970) 2 Cal.3d 259, 263 [declaratory relief a proper remedy where city attacked the constitutionality of a financial interest public disclosure statute].)

To state a cause of action for declaratory relief, the plaintiff must allege (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable

questions relating to the rights or obligations of a party. (*Childhelp, Inc. v. City of Los Angeles* (2023) 91 Cal.App.5th 224, 235.) Here, we conclude the first element has been properly pleaded. In our view, the proper subjects of declaratory relief include the construction and validity of a concurrence issued by the Governor because a concurrence is a "written instrument" for purposes of section 1060 and the principle that the validity or construction of a statute is a proper subject of declaratory relief is appropriately extended to concurrences. The Governor does not argue otherwise.

Consequently, the main issue regarding declaratory relief against the Governor is whether the second element had been properly pleaded. (See *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 29 ["a complaint for declaratory relief is sufficient if it alleges facts demonstrating the existence of an actual controversy between the parties about their legal rights and duties and requests adjudication of the controversy"].) The second element is satisfied where there is a justiciable controversy, but not where the dispute is moot, or only hypothetical or academic. (*Ghost Golf, Inc. v. Newsom* (2024) 102 Cal.App.5th 88, 100 (*Ghost Golf*).) In other words, a court has no duty to determine rights and duties of the parties where the questions presented for declaratory relief have become moot. In those situations, the claim for relief should be dismissed. (*Ibid*.)

Under California's justiciability doctrine, "mootness occurs when a once ripe actual controversy no longer exists due to a change in circumstances." (*Ghost Golf, supra,* 102 Cal.App.5th at p. 99.) A case is moot if the court cannot grant practical, effective relief. (*Ibid*.) Relief is effective if there is a prospect of a remedy that can have a practical, tangible impact on the parties' conduct or legal status. (*Ibid*.; see *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1053; *In re I.A.* (2011) 201 Cal.App.4th 1484, 1490.) An example of a change in circumstances that renders a challenge to the validity of a law moot is the repeal of that law before an appeal is concluded. (*Ghost Golf, supra,* at p. 100.)

B. Actual Controversy or Academic Dispute

1. Trial Court's Rationale

The trial court correctly identified the legal principles governing declaratory relief, justiciability, and mootness and methodically applied those principles to the first amended complaint. Here, we summarize the court analysis of the existence of an actual controversy involving justiciable issues. The trial court stated that the parties agreed the decision in *Stand Up II* "invalidated the Governor's concurrence, making it 'no longer valid.' " The court also stated the amended pleading did not (1) allege the Governor intended to enforce any part of the since invalidated concurrence or had any control regarding North Fork's intent to continue to rely on the concurrence to conduct class III gaming on the Madera site; (2) state how the Governor had any impact or control over North Fork's proposed future actions; (3) allege any future plans or ability of the Governor to effectuate the invalidated concurrence; and (4) articulate an actual controversy remaining *between Picayune-Chukchansi and the Governor* beyond an academic dispute regarding the proper interpretation of *Stand Up II* and whether the concurrence was void from inception. Based on this analysis, the court determined the amended pleading failed to state a cause of action for declaratory relief against the Governor. We note that this conclusion stands in contrast to the court's determination that an actual controversy existed between Picayune-Chukchansi and North Fork and its subsequent grant of a declaratory judgment in favor of Picayune-Chukchansi.[6]

2. Picayune-Chukchansi's Arguments on Appeal

Picayune-Chukchansi contends the trial court's reasons for sustaining the Governor's demurrer to its declaratory relief cause of action were mistaken. Picayune-Chukchansi asserts the pleaded disagreement between it and the Governor was more than

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6 In *Picayune Rancheria of the Chukchansi Indians v. North Fork Rancheria of Mono Indians, supra,* ___ Cal.App.5th ___, which was argued the same day as this appeal, we affirmed the declaratory judgment against North Fork.

an academic dispute. It contends an actual controversy exists based on the allegations "that North Fork intends to continue with its project, that [North Fork] intends to rely on the Governor's concurrence to do so, *and* that such continuation will injure Picayune[-Chukchansi]."

We reject Picayune-Chukchansi's attempt to equate Picayune-Chukchansi's dispute with North Fork as an actual controversy between Picayune-Chukchansi and the Governor. In light of our determination below that a petition for a writ of mandate is not available in the circumstances presented (see pt. IV., *post*) and absence of allegation of any future action the Governor might take involving the concurrence, we conclude an actual controversy between Picayune-Chukchansi and the Governor about their respective rights and duties regarding the concurrence has not been adequately alleged. Stated another way, there is no "probable future dispute over the legal rights between" Picayune-Chukchansi and the Governor because there is no future conduct of the Governor that would be shaped by a declaratory judgment. (*Steinberg v. Chiang* (2014) 223 Cal.App.4th 338, 343; see *Cordoba Corp. v. City of Industry* (2023) 87 Cal.App.5th 145, 157 [purpose of declaratory relief is to allow the parties to shape their conduct in accordance with the rights and duties clarified in the declaration].) As a result, Picayune-Chukchansi has failed to plead the second element of a cause of action for declaratory relief and the trial court properly sustained the demurrer to that cause of action without leave to amend.

We have considered the case law analyzed by Picayune-Chukchansi and conclude those cases, which do not involve a concurrence, are not controlling. Consequently, the foregoing conclusion is based on an application of basic principles defining justiciability, mootness, and when an actual controversy exists.

IV. WRIT OF MANDATE

Next, we consider whether a claim for a writ of ordinary mandamus was properly alleged. The prayer for relief in Picayune-Chukchansi's complaint and petition requested "a writ of mandate directing the Governor to vacate and set aside the concurrence and to take all action as may be necessary to notify the [Interior] Secretary that the concurrence did not take effect and is not in effect." The Governor's motion for judgment on the pleadings asserted Picayune-Chukchansi's claims were moot and the mandamus cause of action failed to identify a clear, present, ministerial duty that the Governor was required to perform. The trial court's December 2022 order granted the Governor's motion for judgment on the pleading as to Picayune-Chukchansi's petition for writ of mandate without leave to amend.

Picayune-Chukchansi challenges the December 2022 order, contending the Governor (1) conceded the August 2012 concurrence is no longer valid; (2) disputed whether it was void ab initio; (3) failed to take any steps to notify federal officials that the concurrence had been annulled and was never effective as a matter of California law; and (4) argued he had no duty to notify federal officials. Picayune-Chukchansi argues such a duty exists because, where a government act has been annulled or rendered void ab initio, mandamus will lie to undo the voided act, which is the relief sought in its original pleading.

In response, the Governor reiterates that Picayune-Chukchansi cannot state a cause of action for writ relief because it has not identified a clear, present and ministerial duty that the Governor has failed to perform. The Governor also contends there has been no abuse of discretion, and the requested remedy exceeds the relief available through the issuance of a writ of mandate.

A. Legal Principles

Section 1085, subdivision (a) provides that a writ of ordinary (i.e., traditional) mandate "may be issued by any court to any inferior tribunal, corporation, board, or

person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station ...." Section 1086 provides that a writ of mandate "must be issued upon the verified petition of the party beneficially interested." These statutory provisions identify two of the requirements for stating a cause of action for the issuance of the writ of ordinary mandate: "(1) [a] clear, present and *usually* ministerial duty upon the part of the respondent [citations] and (2) a clear, present and beneficial right in the petitioner to the performance of that duty." (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491 (*Younger*), italics added.) The clear and present duty enforced through mandamus has also been referred to as "a definite, existing duty." (*San Diego Public Library Foundation v. Fuentes* (2025) 111 Cal.App.5th 711, 721.)

A ministerial act is one that a public officer or agency " ' "is required to perform in a prescribed manner in obedience to the mandate of legal authority" ' " without the exercise of individual judgment or discretion. (*Los Angeles Waterkeeper v. State Water Resources Control Bd.* (2023) 92 Cal.App.5th 230, 265.) Typically, the required *mandate of legal authority* exists when a statute, ordinance, or constitutional provision clearly defines the specific duties or course of conduct that the public officer or agency must take, which eliminates any element of discretion. (*Id*. at pp. 265–266.)

The court in *Younger* used the phrase "usually ministerial duty" to reflect that a writ of ordinary mandate also will lie to correct abuses of discretion by a public agency or official. (*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799; see *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 105 [writ of mandamus may be used to correct an abuse of discretion].) A writ of mandate will not lie to control a public agency or public official's exercise of discretionary authority in a particular manner—that is, courts will not force the exercise of discretion in a particular manner. (*Helena F., supra*, at p. 1799.)

Grants of writs of ordinary mandate on the ground a public agency or official abused its discretion are not common because it is difficult to establish discretionary authority was abused. The relevant inquiry is whether the "action was arbitrary, capricious, or entirely without evidentiary support, and whether it failed to conform to procedures required by law." (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1004.) Accordingly, if reasonable minds may disagree as to the wisdom of the agency or official's determination, there is no abuse of discretion. (*Helena F.*, *supra*, 49 Cal.App.4th at p. 1799.)

B. No Ministerial Duty Not to Concur

First, we conclude Picayune-Chukchansi has not identified a clear, present and ministerial duty upon the part of the Governor (1) to not issue the August 2012 concurrence or (2) to notify anyone, including federal officials, that the concurrence had been annulled and was never effective as a matter of California law. The Governor's authority to concur in the Interior Secretary's two-part determination is an *implied* power under California law. Consequently, the California Constitution, state and federal statutes, and state and federal regulations do not define the specific duties or course of conduct that the Governor must take when exercising (or declining to exercise) that power. Picayune-Chukchansi's argument that the Governor's "concurrence breached a ministerial duty he had *not* to concur" fails to identify a duty that was both clear and present when the Governor acted in August 2012. (See *United Auburn*, *supra*, 10 Cal.5th at p. 563 [Governor's implied power to concur falls within a zone of twilight].) The voter's exercise of their retained power to render the concurrence void ab initio did not create a ministerial duty not to concur that was clear and present in 2012. The reality is that various issues defining or related to the concurrence power were ill defined at that time or even over four years later when this court issued its decision in *Stand Up for California! v. State of California* (2016) 6 Cal.App.5th 686 (*Stand Up I*), abrogated by

United Auburn, supra, 10 Cal.5th 538. In *Stand Up I*, each justice on the panel adopted a separate legal analysis for concluding "[t]he Governor's concurrence is invalid under the facts alleged in this case." (*Stand Up, supra,* at p. 705.)

C. Abuse of Discretion

Second, we consider Picayune-Chukchansi's alternate contention that a writ of ordinary mandate should be issued based on "the established principle that mandamus may issue … to correct an abuse of discretion." (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 344.) It asserts mandate proceedings are governed by equitable principles and, accordingly, a court has the inherent ability to craft appropriate relief to correct an abuse of discretion. Picayune-Chukchansi's arguments emphasize the phrase "to correct" and assert courts are not limited to ruling only on the legality of the prior decision but may order reasonable steps to unwind or correct an unlawful decision. This emphasis on correction overlooks whether discretionary authority was abused in the first place and, thus, needs correction.

We divide Picayune-Chukchansi's argument about an abuse of discretion into two parts. The first is a challenge to the affirmative act of concurring and the second is a challenge to a purported omission—that is, the Governor's failure to notify federal officials that the concurrence is void ab initio.

We conclude the act of concurring did not constitute an abuse of discretion because that act was not "arbitrary, capricious, or entirely without evidentiary support" and, given the lack of established procedures for issuing a concurrence, the issuance of the August 2012 concurrence did not "fail[] to conform to procedures required by law." (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne, supra,* 157 Cal.App.4th at p. 1004.)

In analyzing the omission, we initially conclude the Governor's concurrence power includes the discretionary authority to notify other officials that a concurrence has

been rendered void ab initio by the electorate. Consequently, we consider whether the failure to notify federal officials was arbitrary or capricious. The decision in *Stand Up II* established the voters at the 2014 election impliedly revoked the concurrence and, as a result, it was no longer valid. (*Stand Up II*, *supra*, 64 Cal.App.5th at p. 201.) That decision became final when the California Supreme Court denied review in September 2021. Here, Picayune-Chukchansi has not shown that federal officials will give no consideration to a final decision of a California court but would, upon receiving notice from the Governor, treat that final decision differently. Stated another way, the Governor could reasonably determine that his notification to federal officials of the outcome of litigation in state court was unnecessary or superfluous because the decision in *Stand Up II* was a matter of public record. In such a situation, the decision not to notify federal officials was not arbitrary or capricious.

Next, we consider whether the Governor arbitrarily or capriciously decided not to provide federal officials with a stronger notification—that is, one informing them the concurrence was not only invalid but was void ab initio. Again, the Governor could reasonably decide such a notification would be superfluous because the Governor's notification would have no impact on the federal officials or whether class III gaming is conducted on the Madera site. Thus, the Governor's failure to notify federal officials that the concurrence is void ab initio is not arbitrary, capricious, or without evidentiary support. To hold otherwise would amount to this court ordering a state official to exercise his discretionary authority in a particular manner, which is contrary to basic principles of mandamus relief. (See *Helena F.*, *supra*, 49 Cal.App.4th at p. 1799.) Picayune-Chukchansi's disagreement with the Governor about the wisdom of not providing notice is insufficient to establish an abuse of discretion.

In summary, we conclude the trial court did not err in determining the writ of mandate claim did not state a cause of action to (1) enforce a clear and present ministerial duty or (2) correct an abuse of discretionary authority. Thus, we do not reach the issue

whether the omission that purportedly constituted an abuse of discretion prejudiced Picayune-Chukchansi. (*Crestwood Behavioral Health, Inc. v. Baass* (2023) 91 Cal.App.5th 1, 21 [petitioner seeking writ of mandate must show the abuse of discretion prejudiced him].)

V. LEAVE TO AMEND

Picayune-Chukchansi also asserts its appeal raises the following issue: "Did the Court below commit prejudicial error in denying Picayune leave to amend its original Complaint to state a writ of mandate cause of action against the Governor when nothing on the face of the Complaint suggested amendment would be futile?"

Picayune-Chukchansi argues the trial court erred in denying leave to amend the writ claim when it determined Picayune-Chukchansi's *proposed* amended petition failed to state a cognizable claim for relief. Picayune-Chukchansi contends the proper legal analysis was to examine the original complaint and petition and determine whether it precluded amendment.

A. Standards for Granting Leave to Amend

We begin with the "fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate … the trial court committed an error that justifies reversal of the judgment." (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) This principle is derived from the constitutional doctrine of reversible error. (See Cal. Const., art. VI, § 13.)

Determining whether Picayune-Chukchansi met its burden of demonstrating prejudicial error begins with identifying the legal principles that define what a plaintiff must show to be granted leave to amend. Picayune-Chukchansi relies on *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730 (*Stockton*), which states: "If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is

liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment." (*Id*. at p. 747; see *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852 [where "a motion for judgment on the pleadings is granted as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment"].) The appellate briefs of both sides quote all or part of the foregoing statement from *Stockton*, which this opinion refers to as the *Stockton* standard. If the *Stockton* standard applies, all Picayune-Chukchansi would have to do to meet its burden on appeal is include the original complaint and petition in the appellate record and show that its contents did not establish it was incapable of amendment.

In contrast to the lenient *Stockton* standard, many other Supreme Court opinions state that when a demurrer is sustained without leave to amend, the appellate court decides " 'whether there is a reasonable possibility that the defect can be cured by amendment.' " (*County of Santa Clara v. Superior Court* (2023) 14 Cal.5th 1034, 1041, quoting *City of Dinuba v. County of Tulare, supra,* 41 Cal.4th at p. 865.) The burden of demonstrating a reasonable possibility of curing the pleading's defect " ' "is squarely on the plaintiff." ' " (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010 (*Centinela*); accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

B. The Reasonable Probability Standard Applies

In *Stockton*, the Supreme Court identified a condition that must be met before the lenient *Stockton* standard applies. Specifically, only when "the plaintiff has not had an opportunity to amend the complaint in response to the demurrer" or motion for judgment on the pleadings does the *Stockton* standard apply. (*Stockton, supra,* 42 Cal.4th at p. 747.)

In this case, the trial court did not give Picayune-Chukchansi the opportunity to amend its pleading to expand the allegations in its writ claim. Rather, the court (1) issued a tentative ruling identifying why Picayune-Chukchansi's pleading does not state a claim for mandamus relief and (2) gave Picayune-Chukchansi the opportunity to file a motion for leave to amend and present the court with a proposed amended pleading. In our view, these two steps are the practical equivalent of giving a plaintiff "an opportunity to amend the complaint" as that phrase was used in *Stockton*, *supra*, 42 Cal.4th at page 747, because Picayune-Chukchansi was given an unhurried opportunity to show what the amended writ petition would contain. In view of this opportunity, we conclude the *Stockton* standard does not apply in this case. Rather, Picayune-Chukchansi had (and, on appeal, has) the burden of affirmatively demonstrating a reasonable possibility of curing the pleading's defects. (See *Centinela*, *supra*, 1 Cal.5th at p. 1010; *Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

Our determination that the reasonable possibility standard applies should come as no surprise to Picayune-Chukchansi. During the September 9, 2022 hearing on the motions for judgment on the pleadings, its counsel acknowledged its burden by stating that "under bedrock California law, the legal standard is: Is there any reasonable possibility that any pleading defect could be cured by way of amendment. And our view on that is[:] absolutely." The chance of surprise was further reduced when the trial court confirmed this standard's application by advising counsel that "you need to establish not just a reasonable possibility o[f] cure," but also needed to address why, given how much time had passed, Picayune-Chukchansi should be provided an opportunity to amend. In sum, both the trial court and counsel for Picayune-Chukchansi correctly identified the applicable legal standard during the September 2022 hearing. On appeal, counsel for Picayune-Chukchansi has reversed itself and incorrectly relied on the *Stockton* standard.

C. How a Reasonable Probability Is Shown

Next, we consider whether Picayune-Chukchansi has carried its burden of demonstrating a reasonable possibility that the defects in its mandamus cause of action can be cured by amendment. (See *Centinela*, *supra*, 1 Cal.5th at p. 1010; *Tukes v. Richard* (2022) 81 Cal.App.5th 1, 27 (*Tukes*) ["To show entitlement to leave to amend, 'the appellant must show there is a reasonable possibility that the defect in the complaint can be cured by amendment.' "].)

This question leads us to the principles defining how a plaintiff goes about carrying the burden of showing a reasonable possibility of curing the defective pleading. In *Tukes*, a case cited in Picayune-Chukchansi's appellate briefing, the court referred to those principles by quoting *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39 (*Rakestraw*). In *Rakestraw*, the court stated:

> "To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] Plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.]" (*Rakestraw*, *supra*, 81 Cal.App.4th at pp. 43–44.)

The appellant's appendix filed by Picayune-Chukchansi does not include the proposed amended pleading that should have accompanied its October 2022 motion for leave to amend. (See Cal. Rules of Court, rule 3.1324(a)(1) [a motion to amend a pleading before trial must include a copy of the proposed amended pleading].) Thus, Picayune-Chukchansi has not attempted to carry its burden on appeal of demonstrating an ability to cure by presenting the proposed amended pleading it submitted to the trial court.

Further, the briefing filed by Picayune-Chukchansi with this court made no attempt to ' "show in what manner [it] can amend [its] complaint and how that amendment will change the legal effect of [its] pleading.' " (*Rakestraw*, *supra*, 81 Cal.App.4th at p. 43.) As a result, Picayune-Chukchansi has not "set forth factual allegations that sufficiently state all required elements of [a mandamus] cause of action." (*Ibid.*) Picayune-Chukchansi's failure to make the showing necessary to carry its burden is explained by its erroneous reliance on the *Stockton* standard.

To summarize, the trial court conscientiously gave Picayune-Chukchansi the opportunity to demonstrate a reasonable possibility that an amendment could cure the defects in the mandamus cause of action. Picayune-Chukchansi did not make that demonstration, either in the trial court or on appeal. Consequently, the order granting the motion for judgment on the pleadings as to the mandamus cause of action without leave to amend must be upheld.

DISPOSITION

The judgment of dismissal in favor of the Governor, which we have deemed to be included in the trial court's orders, is affirmed. As the prevailing respondent, the Governor shall recover his costs on appeal.

DETJEN, Acting P. J.

WE CONCUR:

PEÑA, J.

SNAUFFER, J.