Case No. S274147

IN THE SUPREME COURT OF CALIFORNIA

DAVID MEINHARDT,

Petitioner and Appellant,

vs.

CITY OF SUNNYVALE, SUNNYVALE PERSONNEL BOARD,

Respondent,

SUNNYVALE DEPARTMENT OF PUBLIC SAFETY,

Real Party in Interest.

After a Decision by the Court of Appea, Fourth District, Division One
Court of Appeal Case No. D079451
Dismissing an Appeal of a Judgment Entered in
the Superior Court of Santa Clara County
Superior Court Case No. 19CV346911
Hon. Peter Kirwan

APPELLANT'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

California Cases

Other Cases

Statutes

Californa Rules

Other Rules

Other Authorities

QUESTION PRESENTED

The Court granted review to answer this question: "Did the Court of Appeal correctly dismiss the appeal as untimely?" Specifically, the Court of Appeal here held that the time to take an appeal under Rule 8.104(a)(1)(A) of the Rules of Court ran from the time the trial court entered an order denying Petitioner David Meinhardt's petition for a writ of administrative mandate on the merits. It reached that result even though the trial court subsequently entered a separate final judgment, which had been jointly submitted by the parties, finally adjudicating the claim. Officer Meinhardt filed his notice of appeal within sixty days of the notice of entry of the judgment but the Court of Appeal nonetheless dismissed the appeal as untimely because Officer Meinhardt filed his notice more than sixty days after notice of entry of the trial court's order denying the petition.

This Court has held, in myriad contexts, that the time to appeal runs from the entry of *a separate final judgment*, not from some prior *order* setting out the trial court's reasons for making a final decision disposing of a civil action. (See *Alan v. American Honda Motor Co.* (2007) 40 Cal.4th 894, 901 (*Alan*) [decision on court trial]; *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 920–21 (*Molien*) [demurrer]; *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 307 fn.10 (1997) (*Sullivan*) [summary judgment].) As the Court explained in *Alan*, "the desire to cut off a litigant's right to appeal cannot justify creating an exception to the general rule." (*Alan*, *supra*, 40 Cal.4th at p. 901.) This case presents the question of whether the Court of Appeal correctly

determined that an exception nevertheless applies in administrative mandate appeals.

STATEMENT OF THE CASE

I.
Officer David Meinhardt Unsuccessfully Challenges a Disciplinary Decision in a Petition for Administrative Mandate, and Appeals.

David Meinhardt was and is an officer in the Sunnyvale Department of Public Safety. (See AA000008.) Acting as a union official, he criticized decisions by the department's Director, for which he was rewarded with a disciplinary suspension without pay. (AA000010–11.) He unsuccessfully challenged the suspension as retaliatory with the City of Sunnyvale's Personnel Board. (AA000011–12.)

On May 3, 2019, Officer Meinhardt filed a petition for administrative mandate. (AA000007.) The petition alleged that the suspension was retaliatory and in violation of his constitutional and statutory rights to free speech. (*Ibid*.) The superior court denied Officer Meinhardt's petition in a signed, file-stamped order on August 6, 2020. (AA000111–17.) The clerk served a file-stamped copy of the order on both parties the same day. (AA000120–29.)

On September 4, 2020, the parties jointly submitted a proposed final judgment, which the superior court signed on September 17, 2020. (AA000133–34.) Officer Meinhardt served a notice of entry of the judgment on September 22, 2020. (AA000131.) The superior court entered the judgment on its docket on September

25, 2020.[1] (AA000144 [date of filestamp] ; see also AA000167 [register of actions].) On October 15, 2020—20 days after the docketing of the judgment and 23 days after service of notice of entry—Officer Meinhardt filed and served his notice of appeal. (AA000155–56.)

II.
The Court of Appeal Dismisses Officer Meinhardt's Appeal as Untimely.

After the appeal was fully briefed, this Court ordered the appeal transferred from the Court of Appeal's Sixth District to the Fourth District, Division One. (Case No. D079451, docket entry dated Sept. 9, 2021, *available at* https://tinyurl.com/5n85wwtz.) On October 28, 2021, the Court of Appeal requested supplemental briefing on the timeliness of the appeal, particularly in light of its recent decision in *City of Calexico v. Bergeson* (2021) 64 Cal.App.5th 180 (*City of Calexico*). (*Id.*, docket entry Dated Oct. 28 2021.) After oral argument, the Court of Appeal dismissed the appeal as untimely in a published decision. (Slip Op. at p. 33.)

Relying primarily on *City of Calexico*, *supra*, 64 Cal.App.5th at p. 190 and *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583 (*Laraway*), the Court of Appeal held the August 6, 2020 order denying the petition for writ of administrative

[1] It is curious that Officer Meinhardt gave notice of entry of the judgment before it was entered on the docket. But the explanation is mundane. After the judgment was signed—on September 17—but before it was entered—on September 25—the superior court clerk provided Officer Meinhardt's trial counsel with a copy. Counsel promptly filed and served a Notice of Entry on September 22.

mandate was itself a "final determination of the rights of the parties" and thus constituted an appealable "final judgment" under Code of Civil Procedure section 1064. (Slip Op. at pp. 10–24.) The Court of Appeal held that the trial court's subsequent entry of "the September 25 document styled as a 'judgment' that merely reiterated the rulings contained in the court's August 6 ruling" was "irrelevant" and did not restart the time to appeal. (*Id.* at p. 23.)

The Court of Appeal believed its analysis was bolstered by language from this Court's decision in *Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109 (*Dhillon*). *Dhillon* held that a trial court's decision to grant a writ of administrative mandate and remand of the matter back to an administrative body was sufficiently final to be appealable. (*Id.* at p. 1112.) That is the case because such a result "terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." (*Id.* at p. 1115.) *Dhillon* did not address the question presented here—whether a sufficiently final *order* counts as a *judgment* in an administrative mandate case when formal judgment is subsequently entered. But the Court of Appeal read *Dhillon* as holding that the *order* itself must be the appealable event. (Slip Op. at pp. 12–15.)

The Court of Appeal did, however, recognize that another line of cases stood for the proposition that an appeal in an administrative mandate action is appropriately taken from (and its timeliness determined by) a separately entered formal final judgment. Under these cases, that is the case even if some prior order had

effectively resolved the petition on the merits, because the separately entered judgment itself was the appealable event. (See *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 368 fn. 2 (*Protect Our Water*); see also *MCM Construction, Inc. v. City and County of S.F.* (1998) 66 Cal.App.4th 359, 367, fn. 3 (*MCM*); *Catalina Inv., Inc. v. Jones* (2002) 98 Cal.App.4th 1, 5, fn. 3 (*Catalina*); and *Hadley v. Superior Court* (1972) 29 Cal.App.3d 389, 393 (*Hadley*).) The Court of Appeal declined to follow these cases, however, because it found their analyses "cursory" and that they were distinguishable on various factual and procedural grounds. (Slip Op. at pp. 28–31.) It instead followed *Laraway* and *City of Calexico* and held that the order denying Officer Meinhardt's petition was the appealable final judgment. (*Id.* at pp. 31-33.) It dismissed his appeal—timely taken from the later-entered formal judgment—as untimely. (*Id.* at 34.)

* * *

On April 18, 2022, Officer Meinhardt filed a Petition for Review with this Court. On June 15, 2022, the Court, by unanimous vote of six Justices with Justice Guerrero recused, granted review on the question: "Did the Court of Appeal correctly dismiss the appeal as untimely?"

ARGUMENT

In California, a civil action concludes with the trial court entering a separate formal decree that finally adjudicates the rights of the parties. That document—"the final determination of the rights of the parties" in the action or proceeding, (Code Civ. Proc., §§ 577, 1064)—is the appealable "judgment" for the purposes of Code of Civil Procedure § 904.1 and Rule of Court 8.104.[2] As the Court explained in *Alan v. American Honda Motor Co.* (2007) 40 Cal.4th 894, that is the case, even when some prior reasoned order effectively resolves all the open issues. "[A] statement of decision is not treated as appealable when a formal order or judgment does follow[.]" (*Id.* at p. 901.) Indeed, "the desire to cut off a litigant's right to appeal cannot justify creating an exception to the general rule." (*Ibid.*)

There are accordingly two fundamental aspects of an appealable final judgment in a civil case in California: It must be both: (1) final; and (2) separately entered. Although this Court has exercised its discretion to the second element when equitably necessary to preserve the right of appeal, (*Id.* at p. 901), it has *never* adopted the converse rule: that a sufficiently final order *is* an appealable judgement, such that a later, separately entered, judgment is "irrelevant"—in essence, a nullity, as the Court of Appeal did here. There is nothing about about administrative mandate procedure that merits a departure from the longstanding practice requiring entry of a separate judgment. The Court of Appeal accordingly

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[2] Further citations to undesignated "§" are to the Code of Civil Procedure and to "Rules" are to the Rules of Court.

erred when it relied on such a rule to dismiss Officer Meinhardt's appeal.

I.
Appealability Requires Entry of a Separate and Final Judgment, Even After an Order that Satisfies the Finality Requirement.

"The one final judgment rule is a fundamental principle of appellate practice." (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 756, cleaned up.) "[B]right lines are essential in this area, to avoid both inadvertent forfeiture of the right to appeal and excessive protective appeals by parties afraid they might suffer such a forfeiture." (*Id.* at p. 761 fn. 3, quoting *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 962–63 (*Kinoshita*).) In matters of appealability, "[a] definite rule is necessary to reduce both the temptation to file dilatory appeals and the compulsion to file protective ones." (*Kinoshita*, *supra*, 186 Cal.App.3d at p. 968.)

The Code of Civil Procedure permits a civil appeal to be taken from any of fourteen enumerated instruments. (§ 904.1.) The first such instrument, with exceptions not relevant here, is "a judgment, except an interlocutory judgement. . . ." (*Id.*, subd. (a)(1).) In both civil actions and special proceedings (such as proceedings in mandate) a judgment is defined as "the final determination of the rights of the parties[.]" (§§ 577 [civil action]; 1064 [special proceeding].) "As a general rule, a litigant may appeal an adverse ruling only after the trial court renders a final judgment. This general rule applies equally in administrative mandamus proceedings." (*Dhillon*, *supra*, 2 Cal.5th at p. 1115.)

The Court of Appeal here concluded that "a trial court's complete denial of a petition for administrative mandamus *is* a final judgment that may be appealed by the petitioner." (Slip Op. at p. 2, italics added, citing *Dhillon*, *supra*, 2 Cal.5th at p. 1113.) The Court so concluded because the superior court's order denying Officer Meinhardt's writ petition "completely resolved all issues between all parties," (Slip Op. at pp. 4, 18, citing *Laraway*, *supra*, 98 Cal.App.4th at pp. 582–83.) That is, in the Court of Appeal's view, the order was sufficiently final to satisfy the finality requirements set out in cases like *Dhillon.*

But the finality of a decision is not and cannot be the *only* hallmark of a final judgment. In myriad civil contexts, courts issue orders that completely resolve all the issues in an action. But it is invariably the entry of a separate final and formal judgment that starts the clock to appeal, not the entry of some prior order, however dispositive it may be.

For example, an order granting a demurrer as to all causes of action without leave to amend indisputably meets the Court of Appeal's finality standard—it completely and finally resolves all issues between all parties. (Accord *Dhillon*, *supra*, 2 Cal.5th at p. 1115.) Yet, "such an order is neither appealable per se nor as a final judgment." (*Molien, supra,* 27 Cal.3d at p. 920; see also *Beazell v. Schrader* (1962) 205 Cal.App.2d 673, 674 [collecting cases].) "The normal method of resolving such issues in favor of a defendant is by ruling upon a demurrer and thereafter rendering a judgment based upon the ruling." (*Lavine v. Jessup* (1957) 48 Cal.2d 611, 614.) Any "appeal must be taken from the ensuing judgment."

(*Ibid.*) Absent the separate entry of a judgment, an order granting a demurrer is not appealable, even when it otherwise meets the finality standard set out in *Dhillon* and adopted by the Court of Appeal here. (See also *Vibert v. Berger* (1966) 64 Cal.2d 65, 68; *Berri v. Superior Court* (1955) 43 Cal.2d 856, 860.

So too for summary judgment proceedings. An order granting a summary judgment satisfies the Court of Appeal's finality standard because it resolves the entire action. (See *Hypertouch, Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805, 834 ["A summary judgment may be granted only where it is shown that the entire 'action' 'has no merit,'" quoting § 437c, subd. (a)].) But although a "summary judgment is appealable … an order granting summary judgment is not." (*Saben, Earlix & Associates v. Fillet* (2005) 134 Cal.App.4th 1024, 1030; *Modica v. Merin* (1991) 234 Cal.App.3d 1072, 1074–75 [appeal from order granting summary judgment dismissed].) Again, appealability requires the confluence of finality and separate entry.

The same finality-plus-separate-entry rule holds true for other final dispositions as well. It applies when an order grants judgment on the pleadings. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 289, fn.1.) After a final statement of decision issues in a bench trial. (*Alan*, *supra*, 40 Cal.4th at p. 901.) After a jury verdict. (*Sullivan*, *supra*, 15 Cal.4th at p. 307, fn. 10.) When a motion for judgment notwithstanding the verdict is granted. (*Jordan v. Talbot* (1965) 55 Cal.2d 597, 602.) And when a motion for new trial is denied. (*Walker v. L.A. Cnty. Metro. Transp. Auth.* (2005) 35 Cal.4th 15, 19.)

It is thus well-established that, in civil litigation in California, the "one final judgment rule" generally requires *both* finality *and* the entry of a separate formal document adjudicating the final rights of the parties in the action.

II.
The Court of Appeal Misconstrued a Discretionary Exception to the Separate Entry Requirement and Created a Rule Making Separate Entry of Judgment "Irrelevant" in Administrative Mandate Cases

Despite that a finality-plus-separate-entry rule has long been implicit in the nature a final judgment, California has also recognized a "well-established policy, based upon the remedial character of the right of appeal, of according that right in doubtful cases when such can be accomplished without doing violence to applicable rules." (*Alan, supra* 40 Cal. 4th at p. 901, cleaned up (*Hollister*).) Based on that policy, the Court has carved out equitable exceptions to the requirement of the entry a separate formal judgment. It has done so where a rigid adherence to the rule might otherwise result in dismissal of appeals as unperfected or waste time by sending the appellant back to await final judgment to take the same appeal.

In the application of this rule, certain sufficiently final prejudgment orders have been "treated" as judgments by the Court to preserve the right to appeal. (*Ibid.* ["Reviewing courts have discretion to treat statements of decision as appealable when they must, as when a statement of decision is signed and filed and does, in fact, constitute the court's final decision on the merits."].) And in other cases where a "trial court's rulings were not formally entered as a judgment," sufficiently final orders have been amended to be

"converted" into judgments, in order to preserve—rather than extinguish—the right to appeal. (*Griset v. Fair Pol. Pracs. Comm'n* (2001) 25 Cal.4th 688, 694 (*Griset*) ["When, as here, a trial court's order from which an appeal has been taken disposes of the entire action, the order may be amended so as to convert it into a judgment…." cleaned up]; see also *Sullivan*, *supra*, 15 Cal.4th at pp. 307–08; *Molien*, *supra*, 27 Cal.3d at p. 920.) It is in this context, in particular, where the adage that "[i]t is not the form of the decree but the substance and effect of the adjudication which is determinative" comes into play. (*See Griset*, *supra,* 25 Cal.4th at p. 698.)[3]

These exceptions often apply in special proceedings that are atypical of ordinary civil actions, where a trial court might neglect to issue a formal final judgment. (See, e.g., *Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 11 [order enforcing administrative subpoena against non-party was an appealable final judgment].) Given the parsimony of the statutes addressed to

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[3] The point is also sometimes invoked in the opposite situation—where a document called a judgment is not appealable because it is "interlocutory"—i.e., insufficiently final. (See, e.g., *Lyon v. Goss* (1942) 19 Cal.2d 659, 670.) But other than in the Court of Appeal's decision—which quotes it *five* times (Slip. Op. at pp. 2, 13, 15, 22, 24 fn. 16)—the "substance over form" concept has never been employed to cut off the right to appeal taken from a separately entered judgment following an order that resolves all the issues in an action. (Accord *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 ["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered."].)

administrative mandate procedure and the local variety that engenders,[4] application of exceptions to the requirement to enter a formal final judgment in administrative mandate cases is not particularly unusual. (See *Griset*, *supra,* 25 Cal.4th at p. 698; *J. Arthur Properties, II, LLC v. City of San Jose* (2018) 21 Cal.App.5th 480, 485 fn.2 [writ of administrative mandate; exercising discretion to treat statement of decision denying petition as appealable; citing *Alan*].) Regardless, when a final, formal judgment has been entered, *that* is the appealable event and the exceptions are unnecessary and inapplicable. (*Alan*, *supra*, 40 Cal.4th at p. 901 ["[A] statement of decision is not treated as appealable when a formal order or judgment does follow, as in this case."].)

The discretionary exceptions apply uniformly to *preserve* the right to appeal. Indeed, this Court has emphatically held that "the desire to *cut off* a litigant's right to appeal cannot justify creating an exception to the general rule." (*Ibid.*)

III.
Contrary to the Court of Appeal's Reasoning, the Same Finality-Plus-Separate-Entry Rule Applies in Administrative Mandate Cases

Nothing in the Code of Civil Procedure or this Court's cases interpreting it suggests a different rule in administrative mandate

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[4] "[T]he far less developed procedures in the Code of Civil Procedure and Rules of Court for civil writs than for civil litigation generally, and the writ judges' relative experience with writs often results in differing processes depending upon the court, and even the judge." (Asimow, *et al.*, C*alifornia Practice Guide: Administrative Law* (2022 online ed.) § 21.22.1.)

cases. "In general, an adverse ruling in a judicial proceeding is appealable once the trial court renders a final judgment. This general rule applies equally in administrative mandamus proceedings." (*Dhillon*, *supra*, 2 Cal.5th at 1115, citations omitted.)

The subdivision of the administrative mandate statute addressed to entry of judgment says, in relevant part: "The *court shall enter judgment* either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in light of the court's *opinion* and *judgment*." (§ 1094.5, subd. (f), emphasis added.) The Legislature's deliberate use of "shall"—language construed as mandatory, (see *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 443 (*Common Cause*))—emphasizes the importance of a "judgment" being "entered."

Indeed, § 1094.5, subdivision (f) distinguishes between a trial court's "judgment," which is "entered," and its "order or decision" implying that they are two separate documents. That is entirely consistent with the rule for entry of judgment in ordinary civil actions. The "judgment" is "entered"; a "decision is "filed." (See § 664 ["If the trial has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision."].) Other statutory and rule provisions recognize a similar distinction between the rendering of a decision, however final, and the entry of a judgment. (See §§ 581, subd. (f) [separate judgment of dismissal after demurrer or motion to strike granted]; 437c, subds. (k), (m)(1) [separate entry

of final judgment after grant of summary judgment]; Rule 3.1590(h), (i), (j), (*l*) [separate entry of judgment after court decision in bench trial].) As in § 644, the dual references to both an "opinion" and a "judgment" in §1094.5, subdivsion (f), along with its use of mandatory "shall enter," show that the Legislature contemplated the entry of a separate judgment in administrative writ cases.[5]

A.
This Court's Many Decisions Concerning Appealability in Writ of Mandate Cases Are in Accord.

Although they are generally addressed to finality concerns, none sanction dispensing with the requirement of separate entry (or an exception to it).

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[5] Section 1094.5, subdivision (f)'s direction that a court enter judgment on an administrative mandate petition was included, without meaningful change as subdivision (e), in the Legislature's original 1945 enactment of § 1094.5, enacted as part of a greater effort to rationalize administrate procedure in California. (See 1945 Stats., ch 868.) The Judicial Council drafted the key text and recommended its adoption, as explained in a detailed and voluminous report to the Legislature. (See Judicial Council of California (Dec. 31, 1944) *Tenth Biennial Report to the Governor and the Legislature*. Key excerpts of this report and an appendix— Judicial Council of California, Administrative Agencies Survey, A*ppendix of Statutes, Case Law and Comparative Studies*—are attached to Officer Meinhardt's Request for Judicial Notice ("RJN") as Exhibits 1 and 2. More traditional legislative history materials for the 1945 enactment, as well as related materials, reference the Judicial Council's reports as authoritative. (RJN Exs. 3–x.) None of these materials suggest, in any way, that a court's entry of a judgment in an administrative mandate case should be different, in form or substance, from a court's entry of a judgment in an ordinary civil case.

***Griset*:** *Griset, supra,* 25 Cal.4th at p. 688, held that a prior order that "disposed of all causes of action framed by the pleadings, leaving no substantive issue for future determination" *was* sufficiently final to be appealable. (*Id.* at p. 700.) There was, however, no separately entered "judgment." (Ibid.) In its absence, the Court did *not* do what the Court of Appeal did here—simply declare that order *was* the judgment. Instead, it applied one of the discretionary exceptions discussed, *supra.* It retroactively amended the order "so as to convert it into a judgment," and then treated an appeal as a "premature but valid appeal from the judgment[.]" (*Ibid.*)

***Morehart*:** *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 (*Morehart*) held that a judgment on claims (including a writ of mandate claim) was insufficiently final to be appealable because, although it was separately entered, it did not dispose of all of plaintiff's causes of action. (*Id.* at p. 738.)

***Dhillon*:** *Dhillon*, *supra*, 2 Cal.5th 1109, held that a judgment granting a writ of administrative mandate and remanding to an administrative agency was sufficiently final to be appealable. (*Id.* at 1115.) Admittedly, the Court described an "order" as a "judgment" in the context of deciding whether the result was sufficiently final. (*Id.* at pp. 1116, 1117 fn.3, 1118.) But *Dhillon* had no occasion to address whether an order, not a subsequently entered formal judgment, started the clock to appeal under Rule 8.104(a).[6] "It is

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[6] Although this Court's *Dhillon* opinion does not specify that a judgment was separately entered, the Court of Appeal docket in the case reflects that the appellant timely took its appeal from *both* "(1) the superior court's order—filed on or about 08/06/14 granting

axiomatic that cases are not authority for propositions not considered." (*In re the Marriage of Cornejo* (1996) 13 Cal.4th 381, 388, cleaned up.) Moreover, in suggesting that the appealability rules applicable to civil cases apply "equally in administrative mandamus proceedings"—*Dhillon* is in tension with the special administrative mandate rule adopted by the Court of Appeal. (*Dhillon*, *supra*, 2 Cal.5th at p. 1115.)

***Voices of the Wetlands*:** And although it did not directly address appealability, the Court's decision in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499 (*Voices of the Wetlands*) is also consistent with a finality-plus-separate-entry construction of § 1094.5, subdivision (f). The question presented was whether a trial court had the authority to order a limited interlocutory remand to the agency for additional fact finding. (*Id.* at p. 507.) After the remand, the trial court resolved all remaining issues in a statement of decision denying the petition. (*Id.* at p. 514.) Roughly a month later, it entered a separate formal judgment. (*Ibid.*)

Among other things, the plaintiff argued that a limited remand was not authorized because it was not among the remedies expressly set out in § 1094.5 subdivision (f). (*Id.* at p. 525.) But the Court rejected that argument. In so doing, the Court explained that "[o]n its face, subdivision (f) of section 1094.5 indicates the

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in part petitioner Jatinder Dhillon's motion for peremptory administrative writ [and] (2) the superior court's judgment on writ of mandate, filed on or about 09/08/14." (*Dhillon v. John Muir Health et al.*, No. A143195, docket entry dated October 6, 2014, *available at https://tinyurl.com/e8mjz3eb*.)

form of *final judgment* the court may issue in an administrative mandamus action." (*Id.* at p. 526.) "Unremarkably, subdivision (f) states that the last step the trial court shall take in the proceeding is either to command the agency to set aside its decision, or to deny the writ." (*Ibid.*) "The trial court here followed that mandate; *it issued a final judgment denying a writ of mandamus*." (*Ibid.*, emphasis added.)

As the Court's recitation of the procedural history sets out "On July 21, 2004, acting on the petition at issue here . . . the court issued a statement of decision resolving the post remand issues the parties had agreed remained open." (*Id.* at p. 514.) Then, "[o]n August 17, 2004, the court entered judgment denying a peremptory writ of mandate…." (*Ibid.*) The notice of appeal in *Voices of the Wetlands* was not filed until October 12, 2004—well over 60 days after the trial court's July 21 order, but within 60 days of the entry of a separate judgment. (*Voices of the Wetlands v. State Water Resources Control Bd.*, No H028021, docket entry dated October 10, 2004, *available at* https://tinyurl.com/5n92vrft.) Yet, neither this Court nor the Court of Appeal raised any timeliness concerns. The Court thus understood, at least implicitly, that the separate final judgment entered by the trial was in fact the "judgment" subject to appeal.[7]

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[7] The Court also considered § 1094.5 subdivision (f) in *Dhillon* but the issue there was whether the substance of the trial court's decision afforded one of the categories of relief set out therein. (*Dhillon*, *supra*, 2 Cal.5th at p. 1117, fn.3.) For the purposes of that analysis, the court simply assumed "that subdivision (f) of Code of Civil Procedure section 1094.5 defines a 'judgment' for the purposes of de-

B.
The Court of Appeal's Decision Adopts the Minority Rule Among a Handful of Inapposite Cases, Without Explaining Why a Different Rule Should Apply in Administrative Mandate Cases

The Court of Appeal relied on a number of prior court of appeal decisions it asserted justified its finality-only rule in administrative mandate cases. (Slip Op. at pp. 15–16.) Only two, however—*Laraway* and *City of Calexico*—stand for the full proposition that a separately entered final judgment is not the judgment for the purpose of taking appeal if it is proceeded by a substantive order that fully resolves the issues in the case.[8] As noted, several others stand for the opposite proposition.[9] And many others cited in the Court Appeal opinion are either ambiguous about whether a formal judgment had been entered or, most frequently, applying one of the exceptions to separate entry such as those in *Alan* and *Griset* noted above.[10]

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termining whether an order in an administrative mandamus proceeding is an appealable final judgment[.]" (*Ibid*.) Although the Court of Appeal considered this language convincing, (Slip. Op. at 14–15), its only apparent significance is that it referred to the "order" as a judgment, an issue that is addressed, *infra* § II.

[8] (See *City of Calexico*, *supra*, 64 Cal. App. 5th at p. 190; *Laraway*, *supra*, 98 Cal.App.4th at p. 583.)

[9] (See *Protect Our Water*, 110 Cal.App.4th at p. 368, fn. 2; *MCM,* supra, 66 Cal.App.4th at p. 367, fn. 3; *Catalina, supra*, 98 Cal.App.4th at p. 5; *Hadley*, 29 Cal. App. 3d 389.)

[10] (See *Nelson Sons, Inc., v. Lynx* (2009) 167 Cal. App. 4th 67, 75 [applying *Griset* exception]; *Sandlin v. McLaughlin* (2020) 50 Cal.App.5th 805, 820 ["Although the trial court never entered a formal judgment on the petition for writ of mandate, its order denying the petition in its entirety constitutes a final judgment for purposes of an appeal," quotations omitted]; *Molloy v. Vu* (2019) 42

But, no case, including in particular the Court Appeal's opinion, offers any cogent reason why a special finality-only rule should define a judgment in an administrative mandate case, when it doesn't anywhere else in civil litigation.

IV.
A Finality-Plus-Separate-Entry Rule Fosters the Remedial Purposes of Appeals

Historical practicalities once dictated the entry of a separate document that simply lays out the decree in a civil action. Prior to the advent of modern docketing and recordkeeping, a judgment would be hand-entered into a "judgment book" by the clerk of the superior court. (See § 668.) "Originally the clerk laboriously entered judgments by copying them in longhand with pen and ink." (*Wilson v. Los Angeles County Emp. Ass'n* (1954) 127 Cal.App.2d 285, 291.) That labor was lessened by a judgment being a discrete document of minimal length.

The keeping of judgment books was rendered obsolete by microfilm, and later, modern electronic docketing. (See 668.5.) A separate entry of judgment, however, continues to be required by statutes and case law because it is manifestly the superior rule. Indeed, a rule preferring the entry of a separate formal judgment creates a bright-line that recognizes the jurisdictional significance of the event.

Cal.App.5th 746, 753 [same]; *Tomra Pacific, Inc. v. Chiang* (2011) 199 Cal.App.4th 463, 481-482[same]; *Public Defenders' Organization v. County of Riverside* (2003) 106 Cal.App.4th 1403, 1409 [same].)

After all, once judgment is entered, the trial court loses aspects of its subject matter jurisdiction. "It may correct judicial error only through certain limited procedures such as motions for new trial and motions to vacate the judgment." (*Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1606.) Entry of judgment thus triggers "the statutory periods for making and determining posttrial motions…." (*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1280.) It permits the prevailing party to begin enforcement. (§ 683.010.) It marks the accrual of post-judgment interest. (§ 685.020, subd. (b).) And, of course, it starts the clock on the time to file a notice of appeal. (Rule 8.104(a).)

Given the jurisdictional significance of the entry of a judgment, the rules surrounding it "should above all be clear." (*Budinich v. Becton Dickinson & Co.* (1988) 486 U.S. 196, 202.) "Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important." (*United States v. Sisson* (1970) 399 U.S. 267, 307.) The court should not formulate rules that require litigants "to guess, at their peril" what "trigger[s] the duty to file a notice of appeal." (*Alan*, *supra*, 40 Cal.4th at p. 905).

The benefits of an express rule bright-line requiring separate entry of judgment are manifest. There should be no uncertainty that, even if a bright-line rule is not *required* by statute (cf. § 1094.5, subd. (f)), this Court has the supervisory authority to declare one. The value of a generally applicable bright-line rule is apparent in the experiences of the federal courts. On the other hand, the policy concerns raised by earlier Court of Appeal decisions like *Laraway* and *City of Calexico*—principally delay—are

avoidable through the diligent efforts of trial courts or prevailing parties, and, in any event, fail to outweigh the fundamental principal that cases should get resolved on their merits.

A.
This Court Has the Authority to Create a Bright-Line Rule Requiring Separate Entry.

As discussed above, § 1094.5, subdivision (f) calls for the separate entry of judgment. And even if it is somehow ambiguous on that point, it "does not do violence to the rule's language" to interpret it that way. (*Alan*, *supra*, 40 Cal.4th at p. 903.) But even were there no statute directly on point, in the absence of a *prohibition* this Court has the supervisory power to declare a bright-line rule requiring separate entry to apply in all cases.

The Court encountered a similar issue in *Van Beurden Insurance Services, Inc. v. Customized Worldwide Weather Insurance Agency, Inc.* (1997) 15 Cal.4th 51 (*Van Beurden*). In *Van Beurden*, the timeliness of an appeal depended on a whether the clerk had mailed a file-stamped copy of the judgment "pursuant to section 664.5." (*Id.* at pp. 56–58.) Under a 1982 amendment to § 664.5, the clerk does so by giving "notice of entry of judgment" "[u]pon order of the court." (*Id.* at p. 59, citing § 664.5 (1982).) It was unclear what kind of evidence would suffice to show that the mailing of a notice of entry was court-ordered, and the Court could not "conclude with any certainty that the court actually ordered the clerk to mail 'notice of entry' of judgment pursuant to Code of Civil Procedure section 664.5." (*Id.* at pp. 61, 67.) Recognizing, however, that "[n]either parties nor appellate courts should be required to speculate about jurisdictional time limits," the Court declared a

bright line rule that did not appear directly in the text of § 664.5: "to qualify as a notice of entry of judgment under Code of Civil Procedure section 664.5, the clerk's mailed notice must affirmatively state that it was given 'upon order by the court' or 'under section 664.5' and a certificate of mailing the notice must be executed and placed in the file." (*Id.* at p. 64.)

The Court has the authority to do the same thing here.

B.
The Experience of the Federal Courts Has Shown the Overwhelming Benefit of a Bright-Line Separate Entry Rule.

More than half a century ago, the federal courts encountered the same problem presented here—a lack of clarity in what counted as a judgment to take an appeal from—and solved it by requiring entry on a separate document.

Under the Federal Rules of Civil Procedure, a judgment is not effective until the clerk has entered it on the civil docket. (Fed. Rules Civ.Proc., 79, subd. (b).) It is this entry that starts the clock for filing notice of appeal and for other important post-trial purposes. (Fed. Rules Civ.Proc. 50(b); 59; 60; Fed. Rules App.Proc. 4.) As originally drafted, however, rule 58 did not provide clarity as to what constituted a "judgment" which led to confusion amongst the trial courts.

"Practice under the rule was quite unsatisfactory. A number of matters regarding the entry of judgment were not clearly resolved by the rule and differing views were taken in the lower courts. There was particular difficulty if the court had written an opinion or memorandum containing some apparently directive or

dispositive words. Was this opinion a direction for entry of judgment or did the judgment come only with some later and more formal document?" (11 Wright & Miller, Federal Practice & Procedure (2022 online ed.) Civil, § 2782 ("*FP&P*").)

In light of the "asserted conflict among the circuits and the public importance of the proper interpretation and uniform application of the provisions of the Federal Rules governing the time within which appeals may be taken from judgments," the Supreme Court addressed the issue in 1958. (See *United States v. F. & M. Schaefer Brewing Co.* (1958) 356 U.S. 227, 230-31 (*Schaefer*)). The Court explained that because no statute or rule specifying the essential elements of a final judgment, it must look to the intent of the judge and other circumstantial evidence. (*Id.* at p. 232.) It held—much like the Court of Appeal did here—that an opinion is a judgment if it "embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case." (*Ibid.*)

Chaos ensued. "Even this Supreme Court decision was not enough to settle the questions the rule posed, for the intention of the judge was too subjective a criterion." (*FP&P* § 2782, footnote omitted.) "*Schaefer* did not solve a problem inasmuch as it simply redefined the boundaries of the problem." (Goodwin, *The Separate Document Rule of Fed. R. Civ. P. 58: The History, the Mystery, and the Future* (2015) 22 Widener L.Rev. 71, 82 (*Goodwin*).) Essentially, despite its attempts, *Schaefer* failed to answer the "old, old question of when is a judgment a judgment." (See *Cedar Creek Oil & Gas Co. v. Fidelity Gas Co.* (9th Cir. 1956) 238 F.2d 298.)

As commentators recognized "[a] point so fundamental and recurrent" as to what constitutes a judgment "should be clearly settled by rule if possible." (Kaplan, *Amendments of the Federal Rules of Civil Procedure*, 1961-1963 (II) (1964) 77 Harv. L.Rev. 801, 831.) Accordingly, Rule 58 was amended in 1963 to read "every judgment and amended judgment to be set forth on a separate document…." (See *FP&P* § 2782.) The purpose of the rule was to "eliminate the[ ] uncertainties" created by the entry of seemingly final orders "by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment." (See Committee Comment on 1963 Amend. to Fed. Rules Civ.Proc. 58.)

The Supreme Court in a later opinion noted "[t[he separate-document requirement was thus intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely." (*Bankers Trust Co. v. Mallis* (1978) 435 U.S. 381, 385.) The Rule was further amended in 2002 to enact a practical solution for non-compliance—failure to enter a judgment as a separate document effectively would "result in a 150-day delay in the entry of judgment." (*Goodwin*, *supra*, 22 Widener L.Rev. at p. 89, discussing Fed. Rules Civ.Proc. 58(c)(2)(B); Fed. Rules App.Proc. 4(a)(7)(A)(ii).)

Although compliance in the decades since has not been perfect, one commentator—a former staff attorney and law clerk in a

federal appellate court—described Rule 58's separate document rule as "more important than ever in the twenty-first century, the age of electronic filing." (*Goodwin, supra,* 22 Widener L.Rev. at p. 74.) As he explained, "recognition of a single 'this is it' moment remains paramount. Further, the existence of the [separate document rule] forces trial judges to think about the content of their judgments, because the proper separate document eschews all but what matters to the parties: who won what. At the same time, the ongoing buzz of electronic dockets amplifies the need for an obvious moment where litigation draws to a close. (*Id.* at pp. 121–122.)

C.

The Court of Appeal's Special Exception for Writ Cases Causes More Policy Problems than It Solves.

Finally, the Court of Appeal's rule will lead to jurisdictional confusion without any countervailing benefit. The sheer volume of decisions of this Court regarding questions of finality shows it is not always an easy one to answer. And while the Court of Appeal's decision here is in an administrative mandate case, its logic—that anything that looks final enough *is* a judgment—is not so limited. Careful litigants will worry that their case could be the one where a court extends the rule to some other aspect of civil practice.

Particularly given the exceptions that save unripe appeals from non-appealable orders, risk-averse lawyers will have every incentive to notice an appeal whenever the question is close. These protective appeals will strain the dockets of the Court of Appeal, which has on several occasions over the years, expressed its frustration that "attempts to appeal from nonappealable orders" "continue unabated in substantial numbers." (*Modica*, *supra,* 234

Cal.App.3d at p. 1074; see also *Shpiller v. Harry C's Redlands* (1993) 13 Cal.App.4th 1177, 1179; *Jordan v. Malone* (1992) 5 Cal.App.4th 18, 21; *Cohen v. Equitable Life Assurance Society* (1987) 196 Cal.App.3d 669, 671.)

What's more, the Court of Appeal's decision will encourage wasteful litigation over jurisdiction. Strategic appellees will press motions to dismiss appeals on timeliness grounds for a shot at windfall results divorced from the merits. Such "[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." (*Grupo Dataflux v. Atlas Global Group, L.P.* (2004) 541 U.S. 567, 582.)

That confusion will be magnified if trial judges continue to enter separate formal judgments in writ cases—a practice *required* by the local rules of several large superior courts. (See, e.g., Super. Ct. L.A. County, Local Rules, rule 3.231(n) ["After trial, the prevailing party will be ordered to prepare a proposed judgment and any writ of mandate, serve them on the opposing parties for approval as to form . . ."]; Super. Ct. Sacramento Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 11 [providing procedures for entry of separate judgment].) If parties cannot take a trial judge or the superior court's rules at face value on jurisdictional questions or if they have their appeals dismissed as untimely because they followed court rules, public confidence in the fairness of judicial process will be undermined. (Accord *Bowles v. Russell* (2007) 551 U.S. 205, 215 (dis. opn. of Souter, J.) ["It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait

and switch."].)

On the other side of the ledger, without doubt, cases like *Laraway* present the courts with a different problem: long out of time, the parties sought to manufacture an appeal by arranging the entry of judgments months after the trial court had taken its last meaningful action. (*Laraway*, *supra*, 98 Cal.App.4th at p. 583.) But prevailing parties, who have every incentive to start the appellate clock running, can readily avoid those risks by expeditiously seeking the entry of a final appealable judgment (see § 664) and giving notice of its entry. (See § 664.5, subds. (a), (b); Rule 8.104(a)(1); accord Fed. Rules Civ.Proc. 58(d) [permitting parties to request entry of judgment as a separate document].) If the trial courts fail in their obligation, there is relief in the Court of Appeal. (See *Hadley*, *supra*, 29 Cal.App.3d at p. 395.) Or an appellant can take a technically premature appeal and argue that a discretionary exception to the separate entry rule applies. (See *Alan*, *supra*, 40 Cal.4th at p. 901; *Griset*, *supra*, 25 Cal.4th at p. 700.)

To the extent there is any remaining tension between, on one hand, a rule that dismisses otherwise timely appeals, invites protective premature ones from nonappealable orders, and leads generally to litigation over jurisdiction, and, on the other hand, a rule that preserves the right appeal but occasionally permits a delayed appeal because a trial court failed to timely properly enter a judgment, the choice has long been clear. It is a "well-established policy, based on the remedial character of the right of appeal, of according that right in doubtful cases 'when such can be accomplished without doing violence to applicable rules." (*Alan*, *supra*,

40 Cal.4th at p. 901, cleaned up.) Accordingly in doubtful cases the right to appeal should be granted.

So to here.

* * *

For these reasons, the Court should reverse the Court of Appeal's judgment and hold that Officer Meinhardt's notice of appeal was timely and thus that the Court of Appeal should have reached the merits of his appeal.

Dated: August 30, 2022

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

I, Michael J. Shipley, counsel for Petition and Appellant, hereby certify that the text of this brief contains 7390 words as counted by the Microsoft Word word-processing program used to generate this Petition for Review.

Dated: August 30, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, I electronically filed the foregoing document titled **APPELLANTS OPENING BRIEF ON THE MERITS** through the Court's electronic filing system.

Furthermore a copy of the **APPELLANTS OPENING BRIEF ON THE MERITS** was mailed to the interested parties below:

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