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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12 EASTERN DIVISION

14 **PRIME HEALTHCARE SERVICES,
 15 INC., and PRIME HEALTHCARE
 16 FOUNDATION, INC.,**

17 Plaintiffs,

18 v.

19 **KAMALA D. HARRIS, in her
 20 personal capacity and in her official
 capacity as the Attorney General of
 the State of California,**

21 Defendant.

5:15-cv-01934

**DEFENDANT KAMALA D.
 HARRIS'S MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF MOTION TO
 DISMISS FIRST AMENDED
 COMPLAINT PURSUANT TO
 FED. R. CIV. P. 12(b)(1) and
 12(b)(6)**

Date: February 29, 2016
 Time: 9:30 a.m.
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 Judge: Honorable George H. King
 Trial Date: None Set
 Action Filed: September 21, 2015

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INTRODUCTION

1
2 This action is brought by Prime Healthcare Services, Inc., and Prime
3 Healthcare Foundation, Inc. (“Prime”), to challenge the California Attorney
4 General’s supervisory authority over charitable corporations operating in California.
5 The law suit is designed more for headlines than judicial relief. Without including
6 any facts that involve her, Prime accuses the Attorney General of *corruption*: that
7 she accepted a bribe from the Service Employees International Union, United
8 Healthcare Workers (“UHW”) in exchange for a promise to render a negative
9 decision on Prime’s controversial attempt to acquire six nonprofit healthcare
10 facilities from the Daughters of Charity Health System. This claim is outrageous,
11 and the lawsuit is meritless and irresponsible.

12 The Attorney General’s Office (“AGO”) thoroughly investigated the proposed
13 transaction. Consent to it was made subject to conditions designed to protect the
14 public interest. Among them was a sound requirement that Prime keep emergency
15 and essential medical services open for ten years at all but one medical facility to
16 ensure continuity of services to the affected communities. The Attorney General
17 imposed the ten-year conditions after six meetings for public comment, and after
18 consideration of an independent consultant’s opinion that the conditions were
19 necessary to maintain the availability or accessibility of healthcare services in the
20 affected service areas. The First Amended Complaint alleges that the ten-year
21 conditions violated Prime’s due process and equal protection rights secured by the
22 Fourteenth Amendment to the United States Constitution and the National Labor
23 Relations Act (“NLRA”). The complaint also challenges the constitutionality of the
24 Attorney General’s statutory authority over transfers of nonprofit healthcare
25 facilities to for-profit Prime Healthcare Services, Inc., under the United States and
26 California Constitutions.

1 Even accepting the complaint's allegations of corruption as true, as this
2 motion must, the complaint's claims are subject to dismissal. First, the complaint's
3 allegations of corruption lack adequate factual allegations, fail to meet the
4 plausibility pleading standard, and the complaint's allegations of injury are
5 insufficient to confer standing. Second, the claims of denial of due process, equal
6 protection and NLRA rights are technically defective on seven grounds, and the
7 Attorney General is qualifiedly immune from suit. Finally, the constitutional
8 challenges to California Corporations Code sections 5914-5925 under the
9 Fourteenth Amendment to the United States Constitution and the California
10 Constitution are not viable as a matter of law. And if the Court determines that
11 some claims are sufficiently pled to avoid dismissal at this early stage, the Attorney
12 General alternatively urges the Court to abstain from adjudicating those claims to
13 avoid unnecessary constitutional adjudication of a state sovereign matter.

14 The Court should dismiss the complaint without leave to amend.

15 **STATEMENT OF FACTS**

16 **I. THE ATTORNEY GENERAL SUPERVISES CHARITIES**

17 The Attorney General has general supervision over all charitable organizations
18 and enforces the obligations of trustees, nonprofits, and fiduciaries that hold or
19 control property in trust for charitable purposes.¹ In 1996, Corporations Code
20 sections were enacted to impose more scrutiny over transfers of nonprofit charitable
21 health facility assets. 1996 Cal. Stat., ch 1105, 1-5. The Legislature intended to
22 preserve access to uncompensated healthcare for the poor, elderly, and disabled. *Id.*
23 § 1(c)-(d) at 2. The statutes do this, in part, by requiring nonprofit corporations to

24
25 ¹ Supervisory and enforcement authority is granted under the Supervision of
26 Trustees and Fundraisers for Charitable Purposes Act (Cal. Gov't Code §§ 12580-
27 12599.8), the Nonprofit Corporation Law (Cal. Corp. Code §§ 5000-6216), the
28 Solicitations for Charitable Purposes Law (Cal. Bus. & Prof. Code §§ 17510-
17510.95), and provisions of the California Business and Professions Code
that prohibit unlawful, unfair, or fraudulent business acts or practices within this
State (*id.* §§17200-17210).

1 seek consent from the Attorney General before transferring a material amount of a
2 nonprofit healthcare facility's assets. Cal. Corp. Code² §§ 5914-19 (to for-profit
3 entity); §§ 5920-23 (to nonprofit entity).³

4 The Attorney General is required to review proposed nonprofit hospital
5 facility transactions and to exercise her "discretion to consent to, give conditional
6 consent to, or not to consent to any agreement or transaction" based on *any* factor
7 she deems relevant, including nine factors specified by statute. §§ 5917(a)-(i),
8 5923(a)-(i). These factors include whether the transaction would have "significant
9 effect on the availability or accessibility of healthcare services to the affected
10 community," § 5917(h), 5923(h); Cal. Code Regs. tit. 11, § 999.5(f)(8)-(9), and
11 whether it is in the "public interest," §§ 5917(i), 5923(i); Cal. Code Regs. tit. 11, §
12 999.5(f)(12). When consent is granted, the Attorney General's policy is to require
13 continuation of essential services for at least five years, including for emergency
14 room services. Cal. Code Regs. tit 11, § 999.5(f)(8)(C). But the Attorney General
15 retains "complete discretion to determine whether this policy shall be applied in any
16 specific transaction under review." *Id.*

17 The AGO may request that an applicant (the nonprofit corporate seller)
18 provide any information beyond the applicant's initial written submission that it
19 deems reasonably necessary to review the proposed agreement or transaction. Cal.
20 Code Regs. tit. 11, § 999.5(c)(2), (d). The AGO may consider relevant information
21 from any person, and conducts public meetings to receive comments from
22 interested parties. §§ 5916, 5922; Cal. Code Regs tit. 11, § 999.5(e)(7). The AGO
23 typically contracts with a consultant to prepare an independent healthcare impact
24 statement that assesses the transaction's possible impacts on the availability or

25 _____
26 ² Subsequent statutory references are to the California Corporations Code,
unless specified otherwise.

27 ³ The transaction here is a transfer of nonprofit assets to a for-profit
28 corporation.

1 accessibility of services to the affected community. *Id.* § 999.5(e)(6). This
 2 statement is public. *Id.*, § 999.5(e)(3)(D). The Attorney General must then notify
 3 the applicant of her decision. §§ 5915, 5921. The decision is reviewable in state
 4 court for an “abuse of discretion” in an administrative mandamus proceeding. Cal.
 5 Civ. Proc. Code § 1085.

6 **II. THE ALLEGATIONS OF THE FIRST AMENDED COMPLAINT**

7 **A. The Attorney General Conditionally Approved the Sale of** 8 **Daughters of Charity Health System To Prime**

9 In early 2014, the Daughters of Charity Health System (“DCHS”) decided to
 10 transfer DCHS and its affiliated entities, including five nonprofit hospitals and one
 11 skilled nursing facility (collectively, “Hospitals”). *See* FAC ¶ 3.⁴ On October 10,
 12 2014, DCHS selected Prime’s bid to purchase the Hospitals. *Id.* ¶¶ 4, 7, 78. The
 13 agreement required Prime to keep the Hospitals open, maintaining “all existing
 14 healthcare services, including emergency rooms and trauma centers, for *at least* five
 15 years.” *Id.* ¶ 78.

16 Two weeks later, DCHS submitted the notice of the transaction to the AGO.
 17 *Id.* ¶¶ 8, 81. Two months after that, the AGO posted on its website all five
 18 healthcare impact reports assessing the effects of the transaction on the availability
 19 of healthcare services. Defendant’s Request for Judicial Notice (“RJN”) Exhs 1-5.⁵
 20 The healthcare consultant’s impact statements recommended that four of the five
 21 hospitals and the skilled nursing facility be required to maintain emergency and
 22 some essential services for ten years to minimize the transaction’s potential

23 ⁴ Four facilities were located in Northern California: Seton Medical Center in
 24 Daly City, Seton Coastside in Moss Beach, O’Conner Hospital in San Jose and St.
 25 Louise Regional Hospital in Gilroy. Two facilities were located in Southern
 California: St. Francis Medical Center in Lynwood and St. Vincent Medical Center
 in Los Angeles. FAC ¶ 3.

26 ⁵ The complaint’s allegations are considered with judicially-noticeable facts.
 27 The impact statements document that each hospital, and the communities they
 28 serve, are unique. There is one report for each hospital. Seton Coastside, the skilled
 nursing facility, is considered in the Seton Medical Center report.

1 negative healthcare impacts. *Id.* Exh 1 at 94-104 (St. Francis Medical Center), Exh
2 3 at 90-98 (Seton Medical Center & Seton Medical Center Coastside), Exh 4 at 86-
3 94 (O’Conner Hospital), Exh 5 at 81-88 (Saint Louise Regional Hospital). In
4 January 2015, the AGO conducted six public meetings. FAC ¶ 84. On February 20,
5 2015, the Attorney General conditionally consented to the transaction. RJN Exh 6
6 at 1. The complaint characterizes the decision as a “77-page list of over 300
7 approval conditions.”⁶ FAC ¶¶ 14, 89.

8 With respect to continuity of services, a key issue in this case, the decision
9 imposed the following conditions: (1) for St. Francis Medical Center, emergency
10 services including a Level II Trauma Center with on-call trauma services and other
11 essential medical services (ten years), RJN Exh 6 at 3-5, conditions IV-VI; (2)
12 Seton Medical Center Coastside, skilled nursing services and stand-by emergency
13 services (ten years), *id.* at 36, condition VI; (3) Seton Medical Center, O’Conner
14 Hospital and Saint Louise Regional Hospital, emergency and other essential
15 medical services (ten years) and other medical services (five years), *id.* at 35-36,
16 conditions IV-V (Seton), 50-51, conditions IV-V (O’Connor), 65-66, conditions
17 IV-V (Saint Louise); and (4) St. Vincent Medical Center, emergency and other
18 essential medical services (five years), *id.* at 19-20, condition IV; *see* FAC ¶ 96.⁷

19 On March 10, 2015, Prime withdrew its bid, claiming that the ten-year
20 conditions make the Hospitals financially unviable. FAC ¶¶ 18, 92, 94. The
21 complaint acknowledges the Attorney General has previously required women’s
22 healthcare services be continued for ten years, but not for other services. *Id.* ¶ 96.
23

24 ⁶ As conditions were imposed on each hospital, the decision contained five
25 separate sets of conditions with many of the same conditions being imposed at each
26 of the hospitals. *See, e.g.*, RJN Exh 6 at 2, 18, 34, 49, 64, condition I. The decision
imposed no more than 23 conditions on any one hospital. *Id.* at 13, 29, 44, 59, 74.

27 ⁷ The complaint’s list of required ten-year services is exaggerated by Prime’s
28 splitting services into component parts, and listing other services that the decision
required for only five years. FAC ¶ 96 at 43:19-45:19.

1 On July 31, 2015, DCHS noticed a second transaction, this time to transfer the
2 Hospitals to Blue Mountain Capital Management, LLC. FAC ¶ 99. The complaint
3 alleges the Attorney General would approve this transaction with five-year
4 conditions. FAC ¶ 98. However, the healthcare consultant's impact statements
5 posted on the AGO's website on October 2, 2015, make essentially the same
6 recommendations to the Attorney General that were made on the Prime transaction:
7 that emergency and some essential services remain in place for ten years. RJN
8 Exhs 7 at 104-105, 9 at 101-102, 10 at 99-100, 11 at 90-91. The Attorney
9 General's decision has not yet been issued.

10 **B. Prime's Dispute With the United Healthcare Workers**

11 Since 2009 Prime has apparently had a long-running and bitter dispute
12 concerning UHW's efforts to organize Prime's labor force. FAC ¶¶ 10, 72
13 (alleging UHW was intent on killing the Prime deal because of their long standing
14 feud). The complaint alleges the Attorney General derailed the Prime Hospitals'
15 transaction in return for "up to \$25 million" in campaign contributions from UHW.
16 *Id.* ¶¶ 17, 41, 102, 93-94; *see* ¶ 85. However, there are no facts explaining the
17 alleged bribe, the Attorney General's supposed acceptance of it, or how it came
18 about.

19 The complaint's main focus is on Dave Regan, and UHW. It alleges that
20 UHW created a website to oppose Prime's bid, and to support an alternative bidder.
21 FAC ¶ 68. UHW also passed a resolution calling on the Attorney General to stop
22 the sale to Prime until investigations of Prime for Medicare fraud were resolved. *Id.*
23 ¶ 73. Later, UHW issued a press release announcing that 27 state legislators had
24 signed a letter to the Attorney General demanding that she stop the sale to Prime.
25 *Id.* ¶ 74. UHW also announced that 38 state legislators, two U.S. Representatives,
26 and other elected officials had signed the letter to the Attorney General opposing
27 the sale. *Id.* UHW aired television ads and mounted a calling campaign urging the
28 Attorney General to deny consent to the sale. *Id.* ¶ 79. Following the Attorney

1 General's decision on February 20, 2015, UHW took credit for the Attorney
2 General's decision. *Id.* ¶ 91.

3 Prime also alleges that during labor negotiations that preceded the Attorney
4 General's decision, Regan repeatedly informed Prime, and DCHS, that the Attorney
5 General would scuttle the transaction if no labor deal was reached. FAC ¶¶ 9-10,
6 11, 42-43, 44, 64, 71-72, 85.⁸ Regan boasted that "he has the influence with Harris
7 to either make or break Prime with respect to the Prime-DCHS sale," the Attorney
8 General "would do what she was told and nothing more," and he "controls Harris
9 and the political process in California." *Id.* ¶¶ 42, 71, 85.

10 **C. The Attorney General Denied an Earlier Sale of Victor Valley** 11 **Community Hospital to Prime**

12 The complaint includes allegations concerning the Attorney General's 2011
13 denial of consent to Prime's nonprofit foundation purchase of Victor Valley
14 Community Hospital ("VVCH"), a nonprofit hospital corporation located in San
15 Bernardino County. FAC ¶¶ 45, 52. The Attorney General denied consent to this
16 sale on public interest grounds, and due to its likely significant effect on the
17 availability or accessibility of healthcare services to the community. RJN Exh 14.⁹
18 The complaint seeks *no* relief related to the VVCH transaction, but alleges that
19 UHW influenced the Attorney General's denial, and that the denial was a "mistake"
20 caused by the Attorney General's inexperience. FAC ¶¶ 45, 48, 53-54. The
21 complaint alleges that a UHW attorney told a bankruptcy judge that the Attorney
22 General would not approve the VVCH transaction, that UHW planned to oppose
23 the sale at a public meeting, and the AGO arranged for a larger meeting venue. *Id.*

24 ⁸ Conway Collis, a DCHS representative, attempted to mediate the labor
25 negotiations. He is alleged to be a lobbyist and friend of the Attorney General.
26 Former Attorney General Bill Lockyer, was brought in to help mediate. He is
alleged to be a confidant of the Attorney General. Both are alleged to have urged
Prime to enter an agreement with UHW. FAC ¶¶ 12-13, 44.

27 ⁹ Former Attorney General Edmund G. Brown Jr. had previously denied
28 consent to the sale of Anaheim Memorial Medical Center to Prime. RJN Exh 15.

1 ¶¶ 47, 50. After the Attorney General made her decision, UHW took credit. *Id.* ¶
2 45. Prime alleges that the Attorney General received campaign contributions from
3 UHW in support of her 2010 and 2014 campaigns for Attorney General. *Id.* ¶ 40.

4 **III. LEGAL CLAIMS ALLEGED IN THE FIRST AMENDED COMPLAINT**

5 The complaint consists of five “counts,” all flowing from the decision to
6 impose the ten-year conditions on the Hospitals transaction. The first and second
7 counts allege violation of Prime’s Due Process and Equal Protection rights under
8 the Fourteenth Amendment. FAC ¶¶ 106-115. The third count alleges violation of
9 Prime’s right to bargain collectively under the NLRA. *Id.* ¶¶ 116-121. All of these
10 first three counts seek compensatory damages under 42 U.S.C. § 1983. The fourth
11 count, for declaratory relief, challenges the constitutionality of California
12 Corporations Code section 5914-5925 under the Fourteenth Amendment and the
13 California Constitution. *Id.* ¶¶ 122-131. This count alleges vagueness, violations
14 of Due Process and Equal Protection rights, infringement on Prime’s right to
15 acquire property, and an unlawful delegation of legislative power in violation of
16 article I, section 1, and article III, section 3, of the California Constitution. *Id.* ¶¶
17 127-129. The fifth count seeks injunctive relief.

18 **STANDARD OF REVIEW**

19 A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil
20 Procedure seeks dismissal for lack of subject matter jurisdiction.¹⁰ Fed. R. Civ. P.
21 12(b)(1). The party seeking to invoke the jurisdiction of the federal court bears the
22 burden of proving all jurisdictional prerequisites have been met. *Kokkonen v.*
23 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The court is not limited
24 to the complaint’s allegations but may consider other extrinsic evidence. *Hornsby v.*
25 *Lufthansa German Airlines*, 593 F. Supp. 2d 1132, 1135 (C.D. Cal. 2009). A
26 motion to dismiss under Rule 12(b)(6) challenges the sufficiency of a complaint. *N.*

27 ¹⁰ Subsequent references to federal rules are to Federal Rules of Civil
28 Procedure unless otherwise stated.

1 *Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When
2 reviewing a complaint under Rule 12(b)(6), the court must accept all allegations of
3 material fact as true and construe those facts in the light most favorable to the
4 plaintiff, *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir 1994), but
5 may consider facts outside the complaint that are subject to judicial notice, *Mullis v.*
6 *U.S. Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).

7 ARGUMENT

8 I. THE FIRST AMENDED COMPLAINT'S FACTUAL ALLEGATIONS ARE 9 INSUFFICIENT

10 The complaint is peppered with accusations against the Attorney General,
11 most made “on information and belief,” of *quid pro quo* corruption, ranging from
12 bribery, and extortion, to mail fraud and wire fraud. FAC ¶¶ 28-31, 41, 64, 70, 83,
13 102, 108, 119, 129. The complaint alleges a corrupt agreement between the
14 Attorney General and UHW for an approval of the Hospitals transaction with
15 conditions so onerous they amount to a *de facto* denial of the transaction in
16 exchange for campaign contributions. *Id.* The alleged misconduct lies at the heart
17 of the Section 1983 claims (*id.* ¶¶ 102, 108, 119), and is incorporated by reference
18 into the remaining state law claims (*id.* ¶¶ 122, 128). None of these allegations is
19 set forth in sufficient detail to survive a motion to dismiss under Rule 12(b)(6).

20 A. Federal Pleadings Require Plausible Factual Allegations

21 A complaint must allege facts sufficient to establish the allegations are
22 plausible, not merely possible. “Rule 12(b)(6) is read in conjunction with Rule 8(a),
23 which requires not only ‘fair notice of the nature of the claim, but also grounds on
24 which the claim rests.’” *Li v. Kerry*, 710 F.3d 995, 998 (9th Cir. 2013) (quoting
25 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 n.3 (2007)). “A pleading that
26 offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause
27 of action’” does not satisfy Rule 8’s pleading requirements. *Ashcroft v. Iqbal*, 556
28 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

1 While a high level of factual detail is not required, Rule 8 “demands more than
2 an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S.
3 at 678. Rather, “a complaint must contain sufficient factual matter, accepted as true,
4 to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550
5 U.S. at 570) (holding that a pleading’s “[f]actual allegations must be enough to
6 raise a right to relief above the speculative level”). “Plaintiffs must include
7 sufficient ‘factual enhancement’ to cross ‘the line between possibility and
8 plausibility’” to show their entitlement to relief. *Eclectic Props. E., LLC v. Marcus*
9 *& Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014) (quoting *Twombly*, 550 U.S. at
10 557). Finally, allegations made “upon information and belief” are inadequate,
11 except “where the facts are peculiarly within the possession and control of the
12 defendant [citation omitted], or where the belief is based on factual information that
13 makes the inference of culpability plausible.” *Arista Records, LLC v. Doe 3*, 604
14 F.3d 110, 120 (2d Cir. 2010).

15 For example, the *Twombly* complaint alleged that an agreement between
16 regional telephone systems was a restraint of trade and violated the Sherman Act.
17 First, the Supreme Court held that the allegation that defendants “ha[d] entered into
18 a contract, combination or conspiracy to prevent competitive entry . . . and ha[d]
19 agreed not compete with one another” was a mere legal conclusion not entitled to
20 an assumption of truth. *Twombly*, 550 U.S. at 551, 555. Next, the Court held that
21 allegations that the companies consciously engaged in parallel conduct, while
22 consistent with the possibility of an illegal agreement, did not satisfy the
23 plausibility requirement. *Id.* 550 U.S. at 556. “Without more, parallel conduct
24 does not suggest conspiracy, and a conclusory allegation of agreement at some
25 unidentified point does not supply facts adequate to show illegality.” *Id.* at 556-57.
26 The Court concluded that the complaint allowed “an obvious alternate explanation”
27 that did not depend on an unlawful agreement or conspiracy. *Id.* at 566-69.
28

1 After *Iqbal*, it is clear the plausibility standard applies to all civil actions. The
2 Supreme Court will reject pleadings that do not show “more than a sheer possibility
3 that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 668. *Iqbal* was a Muslim,
4 arrested and detained in the aftermath of the 2001 terrorist attacks. He filed a
5 *Bivens* complaint against federal officials and corrections officers alleging
6 deprivation of many constitutional protections while in custody. The complaint
7 alleged that former Attorney General John Ashcroft, and former FBI Director
8 Robert Mueller subjected *Iqbal* to harsh conditions of confinement based on his
9 race, religion, or national origin. *Id.* at 666-69.

10 The Court declined to give a presumption of truth to the complaint’s “bare
11 assertions” that Ashcroft was the “principal architect” of this policy and Mueller
12 was “instrumental” in adopting and executing it. *Iqbal*, at 680-81. “These bare
13 assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing
14 more than a ‘formulaic recitation of the elements’ of a constitutional discrimination
15 claim” *Id.* at 681. The Court considered the complaint’s factual allegations
16 that thousands of Arab Muslim men were arrested and detained under Mueller’s
17 direction, and held in restrictive conditions of confinement until “cleared” by the
18 FBI pursuant to a policy approved by Ashcroft and Mueller. “Taken as true,” the
19 Court held, “these allegations are consistent with petitioners’ purposefully
20 designating detainees ‘of high interest’ because of their race, religion, or national
21 origin. But given more likely explanations, they do not plausibly establish this
22 purpose.” *Id.* The Court noted that the September 11 attackers were Arab Muslims,
23 members of al Qaeda, a group composed mostly of Arab Muslims and led by
24 Osama bin Laden, an Arab Muslim. *Id.* at 682. A legitimate policy of arrests and
25 detentions “would produce a disparate, incidental impact on Arab Muslims, even
26 though the purpose of the policy was to target neither Arabs nor Muslims. . . . As
27 between that ‘obvious alternative explanation for the arrests, *Twombly*, *supra*, at
28

1 567 [], and the purposeful, invidious discrimination respondent asks us to infer,
2 discrimination is not a plausible conclusion.” *Id.*

3 **B. The First Amended Complaint Does Not Contain Plausible**
4 **Allegations of Fact**

5 Prime’s complaint fails the plausibility requirement established by the
6 *Twombly* and *Iqbal* decisions. It contains no specific, non-conclusory factual
7 allegations that suggest more than the theoretical possibility of *quid pro quo*
8 misconduct. Most of the illegal corruption allegations are made “on information
9 and belief;” yet nothing suggests that underlying facts are “peculiarly within the
10 possession and control of the defendant,” *Boykin*, at 215, and therefore nothing
11 allows Prime to rely upon “information and belief” to allege the corrupt conduct
12 that is asserted to be at the bottom of all the claims. When the complaint’s
13 conclusory and “information and belief” allegations are disregarded, there remains
14 no plausible inference of the Attorney General’s culpability.

15 Count I claims a violation of due process rights “based on Plaintiffs’ rejection
16 of UHW’s unionization demands and in *quid pro quo* exchange for the continuing
17 political and financial support of UHW and Regan.” FAC ¶ 108. This conclusory
18 allegation underlies all the other counts. It is, in turn, based on an allegation that
19 “Prime is informed and believes that UHW promised Harris up to \$25 million
20 dollars [sic] by way of political contributions through SEIU COPE, the national
21 Political Action Committee for SEIU and UHW, if she denied or imposed
22 conditions on the Prime-DCHS sale which would constitute a *de facto* denial.” *Id.*
23 ¶ 41. The campaign money allegation simply does not withstand scrutiny.

24 First, the allegation is made on information and belief, although there is no
25 reason to believe that the facts are peculiarly within the Attorney General’s
26 possession and control. Moreover, the very specific promise of “up to \$25 million”
27 in campaign contributions cannot be squared with the notion that Prime does not
28 know the information’s source.

1 Second, *no* “factual enhancement to cross the line between possibility and
2 probability” is provided. There is no information providing the date, time, or place
3 of the alleged promise, or by which UHW representative it was made.

4 Third, only a promise by UHW is alleged – but UHW is not a defendant. As
5 for the Attorney General, there is no allegation that she received or agreed to accept
6 future political contributions, much less that she did so as part of a *quid pro quo*
7 exchange.

8 Fourth, each of the remaining allegations that might support a claim of
9 culpable conduct falls short of providing the specific “factual enhancement” and
10 grounding in personal knowledge necessary to state a plausible claim to relief.
11 Again, most allegations are made on information and belief. FAC ¶¶ 64, 70, 83, 85.

12 The complaint’s failure to cross “the line between possibility and plausibility”
13 is particularly clear in light of the obvious alternative explanation for the Attorney
14 General’s decision – that the conditional consent with ten-year conditions met the
15 requirements of section 5917, and the Attorney General in the exercise of sound
16 discretion concluded that the conditions were required to minimize potential
17 healthcare impacts that might result from the transaction in affected communities.

18 **II. THE COMPLAINT’S ALLEGATIONS ARE INSUFFICIENT TO CONFER** 19 **STANDING ON ANY COUNT**

20 **A. Hypothetical Injuries are Insufficient to Confer Standing**

21 The standing doctrine identifies disputes that are “appropriately resolved
22 through the judicial process.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560
23 (1992). To establish standing, Prime must show that: (1) it suffered an injury in
24 fact – an invasion of a legally protected interest that is (a) concrete and
25 particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there
26 is a causal connection between the injury and the conduct complained of; and (3) it
27 is likely, as opposed to merely speculative, that the injury will be redressed by a
28 favorable decision. *Id.* at 560-61 (citations and quotations marks omitted). Where

1 an allegation of injury is conjectural or hypothetical and not clean-cut and concrete,
2 concepts of standing and ripeness overlap and provide additional ground for
3 dismissing a complaint. *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010).

4 **B. Prime's Alleged Injuries Are Insufficient to Confer Standing**

5 Prime alleges as injury, that it is: (1) prevented from lawfully acquiring and
6 operating the Hospitals pursuant to the agreement, (2) potentially subject to an
7 action by DCHS for breach of the agreement, and (3) unlawfully prevented by the
8 Attorney General from acquiring other California nonprofit hospitals because of
9 Prime's "continuing rejection of UHW's unreasonable unionization demands."
10 FAC ¶ 134. These allegations are insufficient to confer standing, even at this early
11 stage, for three reasons.

12 First, allegations that Prime will potentially be subject to an action for breach
13 of the agreement, or will potentially be prevented from acquiring other hospitals in
14 the future, are insufficient to confer standing because these purported injuries did
15 not exist at the time the complaint was filed. And the facts as they existed at the
16 time the complaint was filed are the only relevant facts. *Lujan*, 504 U.S. at 569, n 4;
17 *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008).
18 Further, these allegations of injury are speculative and hypothetical, providing no
19 possibility that they could be redressed by a court.

20 Second, even if an action by DCHS against Prime for breach of the contract
21 were not speculative, allegations that Prime will be sued by DCHS for breach of the
22 agreement do not confer standing because there would be no "causal connection"
23 between an action by DCHS against Prime for breach of the agreement and the ten-
24 year conditions. *Lujan*, 504 U.S. at 560-61 (requiring "causal connection between
25 the injury and the conduct complained of"). The complaint alleges that Prime
26 "abandoned" or "withdrew" from the agreement because the ten-year conditions
27 would not have allowed Prime to acquire the failing Hospitals on acceptable terms.
28 FAC ¶¶ 18, 92, 94. Prime and DCHS knew that conditions would be imposed on

1 the transaction should the Attorney General consent, and they negotiated a contract
2 term defining “Acceptable AG Conditions.” RJN Exh 12 at 2. Under the
3 agreement, Prime could terminate if the Attorney General imposed a condition that
4 was not among “Acceptable AG Conditions.” *Id.* at 46 (article 10.1(e)). Thus,
5 whether Prime’s withdrawal was a breach of contract will be determined by the
6 contract’s definition of acceptable conditions, not by the conditions themselves.
7 Stated otherwise, any causal connection between the ten-year conditions and an
8 action by DCHS against Prime is severed by the contract definition of acceptable
9 conditions. If Prime’s withdrawal was a breach, the injury is self-inflicted.

10 Third, the fact of injury based on the complaint’s allegation that the ten-year
11 conditions prevented Prime from “acquiring and operating the DCHS Hospitals” is
12 insufficient to confer standing. FAC ¶ 134. The complaint alleges that the ten-year
13 conditions would not have allowed Prime to acquire the “failing” Hospitals and
14 make them “profitable.” *Id.* ¶¶ 18, 92, 94, see 65 (alleging Hospitals “financially
15 failing in epic proportions”). But a lost opportunity to acquire hospitals that were
16 “financially failing in epic proportions,” and to make them profitable, is not a
17 concrete injury that a court could ever redress. *Lujan*, 504 U.S. at 560-61.

18 **III. THE COMPLAINT’S COUNTS I, II, III AND IV FOR VIOLATION OF CIVIL**
19 **RIGHTS FAIL BECAUSE THEY ARE SUBSTANTIVELY INADEQUATE AND**
20 **BECAUSE QUALIFIED IMMUNITY PROTECTS THE ATTORNEY GENERAL**
FROM SUIT

21 Counts I, II, III and IV for violation of due process, equal protection, the
22 NLRA, and state constitutional provisions, brought under 42 U.S.C. § 1983, fail to
23 state claims for relief. In addition, the Attorney General is qualifiedly immune
24 from the claims. FAC ¶¶ 106-131. Prime brings Counts I, II and III against the
25 Attorney General in her personal capacity for compensatory damages. *Id.* Count
26 IV is brought against the Attorney General in her official capacity. Each of these
27 count’s failings is addressed, in turn, below.

28

1 **A. Count I: A Due Process Claim Requires a Protected Liberty or**
2 **Property Interest**

3 Count I fails to plead any deprivation of liberty or property to support a
4 violation of due process rights. A threshold requirement of a due process claim is
5 the showing of a liberty or property interest protected by the Fourteenth
6 Amendment of the United States Constitution. *Bd. of Regents of State Colls. v.*
7 *Roth*, 408 U.S. 564, 569 (1972); *Wedges/Ledges, Inc. v. City of Phoenix, Ariz.*, 24
8 F.3d 56, 62 (9th Cir. 1994). Prime does not possess either interest.

9 **1. Prime Has Not Alleged a Protected Liberty Interest.**

10 Prime has no protected “liberty interest in freedom from arbitrary government
11 action.” FAC ¶ 107. Liberty interests protected by due process “include most of
12 the rights enumerated in the Bill of Rights . . . [and] extend to certain *personal*
13 *choices central to individual dignity and autonomy*, including intimate choices that
14 define personal identity and beliefs.” *Obergefell v. Hodges*, ___ U.S. ___, 135 S.Ct.
15 2584, 2598 (2015) (emphasis added). “Only those aspects of liberty that we as a
16 society traditionally have protected as fundamental are included within the
17 substantive protection of the Due Process Clause.” *Mullins v. State of Or.*, 57 F.3d
18 789, 793 (9th Cir. 1995). Acquiring the Hospitals on terms Prime finds acceptable
19 is not a personal choice central to human dignity and autonomy. It is a business
20 calculation.

21 **2. Prime Has Not Alleged a Protected Property Interest**

22 Prime also has no protected property right to consummate the transaction on
23 conditions it finds acceptable, because the Corporations Code grants the Attorney
24 General broad discretion over hospital transactions. To have a property interest
25 entitling a person to due process, a person must have a legitimate claim of
26 entitlement to a particular government benefit. *Gerhart v. Lake County*, 637 F.3d
27 1013, 1019 (9th Cir. 2011) (citing *Roth*, 408 U.S. at 577). Such property rights are
28 not created by the federal Constitution, but must arise from an independent source,

1 such as state law, or understandings that secure certain benefits. *Id.*; *Roth*, 408 U.S.
2 at 577. A legitimate claim of entitlement is determined when the language of the
3 statute couches an entitlement in mandatory terms. *Johnson v. Rancho Santiago*
4 *Cnty Coll. Dist.*, 623 F.3d 1011,1030 (9th Cir. 2010). State law creates a
5 legitimate claim of entitlement only “when it ‘imposes significant limitations on the
6 discretion of the decision maker.’” *Gerhart*, 637 F.3d at 1019 (quoting *Braswell v.*
7 *Shoreline Fire Dep’t*, 622 F.3d 1099, 1102 (9th Cir. 2010)). There is no property
8 interest where, as here, the decision maker is given broad discretion. *Id.*

9 Section 5917 gives the Attorney General discretion to consent to a transaction
10 conditionally. § 5917(a)-(i). If consent is granted, she has “complete discretion” to
11 determine the period of time the buyer should continue existing levels of healthcare
12 services. Cal. Code Regs. tit 11, § 999.5(f)(8)(C). Therefore, the complaint fails to
13 allege an entitlement to a benefit that could be recognized by the federal
14 Constitution. Nor can an entitlement be assumed based on the Attorney General’s
15 approvals of other transactions alleged in the complaint. A past practice of granting
16 a benefit is not sufficient to establish a legal future entitlement. *Conn. Bd. of*
17 *Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (“A constitutional entitlement
18 cannot be created—as if by estoppel—merely because a wholly and *expressly*
19 discretionary state privilege has been granted generously in the past”); *Gerhart v.*
20 *Lake County*, 637 F.3d at 1020-21.

21 **B. Count II: Prime Has No Viable Equal Protection Claim**

22 Count II fails to plead a viable equal protection claim under Section 1983.
23 The complaint alleges that Prime was treated differently from other similarly-
24 situated buyers of nonprofit hospitals because unprecedented conditions were
25 imposed due to the rejection of unionization demands. FAC ¶¶ 112-113. This is a
26 “class of one” equal protection claim. Prime does not allege that it is a member of a
27 class; it alleges that it was intentionally treated differently than others similarly
28 situated, and no rational basis exists for the different treatment. *SeaRiver Maritime*

1 *Fin. Holdings, Inc. v. Mineta* 309 F.3d 662, 679 (9th Cir. 2002). The doctrine
2 cannot be applied here because it does not apply to discretionary decisions, because
3 the complaint does not plead facts showing that others were similarly situated, and
4 because there are plausible reasons for the conditions.

5 **1. The “Class of One” Doctrine Does Not Apply to**
6 **Discretionary Decisions**

7 The “class of one” doctrine has no application to state actions that “by their
8 very nature involve discretionary decisionmaking based on . . . individualized
9 assessments.” *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 603 (2008)
10 (holding that the doctrine did not apply to employment decisions); *Towery v.*
11 *Brewer*, 672 F.3d 650, 660 (9th Cir. 2012) (holding doctrine does not apply to
12 Arizona’s execution protocol). Where discretion is exercised, “the rule that people
13 should be ‘treated alike, under like circumstances and conditions’ is not violated
14 when one person is treated differently from others, because treating like individuals
15 differently is an accepted consequence of the discretion granted.” *Engquist*, 553
16 U.S. at 603. Section 5917 affords the Attorney General broad discretion to impose
17 conditions based on many individualized considerations including different
18 community needs. § 5917; Cal. Code Regs. tit. 11 § 999.5. The consultant’s
19 reports attest to the many individualized factors the Attorney General considers.
20 RJN Exhs 1-5.

21 **2. Prime Has Not Satisfied the “Similarly Situated”**
22 **Requirement for “Class of One” Claims**

23 The complaint also fails to allege facts showing that the ten-year conditions
24 were different from conditions imposed on similarly-situated buyers of nonprofit
25 hospitals. Prime must show a *high* degree of similarity between it and those
26 claimed to have received better treatment. *United States v. Moore*, 543 F.3d 891,
27 896 (7th Cir. 2008); *Clubsides, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006);
28 *Garden City, Inc. v. San Jose*, 2013 WL 4766748, at *4 (N.D. Cal. 2013). To be

1 similarly situated, “the class-of-one challenger and his comparators must be ‘*prima*
2 *facie* identical in all relevant respects or directly comparable . . . in all material
3 respects.’” *Moore*, at 896. Prime has utterly failed to allege facts – not bare
4 conclusions, but *facts* – that other buyers were similarly situated. Prime fails to
5 allege facts concerning these other purchasers’ own circumstances, including but
6 not limited to whether each of these other entities were for-profit buyers, like Prime,
7 as the Attorney General may well approach hospital acquisitions by a for-profit
8 buyer differently than for a nonprofit buyer, or whether these other sellers were
9 smaller, community hospital facilities providing fewer essential medical services.
10 FAC ¶¶ 96-97, *see* 88 (acknowledging the Attorney General’s decision to impose a
11 ten-year requirement on transfers to for-profit entities). More importantly, Prime
12 ignores the unique circumstances the Hospitals and communities they serve, such as
13 size, location, availability of alternative medical services, and other factors that are
14 documented in the healthcare consultant’s impact statements. RJN Exhs 1-5.

15 3. Plausible Reasons Support the Ten-Year Conditions

16 The equal protection claim also fails because there are plausible reasons for
17 the ten-year conditions. When a “case involves ‘social and economic policy’ and
18 neither targets a suspect class nor impinges upon a fundamental right,” a court
19 “must determine whether there is ‘any reasonably conceivable state of facts that
20 could provide a basis for the classification.’” *RUI One Corp. v. City of Berkeley*,
21 371 F.3d 1137, 1154 (9th Cir. 2004) (quoting *F.C.C. v. Beach Commc’ns, Inc.*, 508
22 U.S. 307, 315 (1993)). “[J]udicial review is ‘at an end’ once the court identifies a
23 plausible basis on which the legislature may have relied.” *Fitzgerald v. Racing*
24 *Ass’n*, 539 U.S. 103, 108-09 (2003); *RUI One Corp.*, 371 F.3d at 1155. Here,
25 plausible reasons exist for the ten-year conditions.

26 The statute’s legislative findings stress the important role nonprofit health
27 facilities have in providing care to the needy, poor and disabled and acknowledge
28 that transfers to for-profit corporations could affect the availability of community

1 healthcare services. 1996 Stats., ch. 1105. Section 5917 guides the Attorney
2 General’s decision, requiring her to consider whether the proposed transaction may
3 create a significant effect on the availability or accessibility of healthcare services
4 to the affected community, and is in the public interest. This oversight authority is
5 intended to prevent the loss of community assets and benefits provided by the
6 hospital historically. *See California Attorney General Antitrust Enforcement in*
7 *Health Care*, § 8.13 Cal. Anti. & Unfair Comp. L. (Updated Dec. 2014); Phill Kline
8 et al., *Protecting Charitable Assets in Hospital Conversions: An Important Role for*
9 *the Attorney General*, 13–SPG Kan. J.L. & Pub. Pol’y 351, 372-73 (Spring, 2014)
10 [hereinafter “Kline”].

11 The ten-year conditions serve the statute’s purposes by assuring that the
12 Hospitals will continue to provide services to their communities. The complaint
13 tacitly acknowledges this reason for the ten-year conditions. FAC § 88 (during
14 February 2015 meeting, AGO told Prime that Attorney General would be requiring
15 ten-year conditions “for any future sale of a non-profit to a *for profit operator* in
16 California” to prevent loss of community assets and benefits). A party attacking a
17 legislative or quasi-legislative decision has “the burden to negative every
18 conceivable basis which might support it.” *F.C.C. v. Beach Commc’ns, Inc.*, 508
19 U.S. at 315. The complaint fails to suggest a factual basis for meeting this burden.

20 The complaint’s claim that the ten-year conditions were motivated by a
21 promise of political support does not overcome these failures. In *RUI One Corp.*, a
22 closely analogous Ninth Circuit case, plaintiff challenged on equal protection
23 grounds a living wage ordinance imposed by the City of Berkeley on employers
24 who received certain benefits from the City. Plaintiff argued that the reasons the
25 City proffered for the amendment were untrue, and the City’s true motive for the
26 amended ordinance was to aid a unionization campaign at one of the hotels affected
27 by the ordinance. *RUI One Corp*, 371 F.3d at 1155. The court held that, if this was
28

1 the City's motive, it was irrelevant. *Id.* Judicial review ends when the court finds
2 that a plausible basis for the decision exists. *Id.*

3 C. Count III: The NLRA Claim Is Not Viable

4 Count III fails to plead a viable NLRA claim under Section 1983. The
5 complaint alleges that the ten-year conditions were imposed in response to Prime's
6 refusal to accede to UHW's unionization demands, interfering with labor
7 negotiations between Prime and UHW (*see, e.g.*, FAC ¶¶ 117-120), a subject
8 covered in section 8(d) of the NLRA. 29 U.S.C. § 158(d). Section 8(d) imposes on
9 employers and employee representatives certain duties with respect to collective
10 bargaining, but does not compel either to enter into a collective bargaining
11 agreement. By its terms, section 8(d) applies only to employers, employees and
12 employee representatives, so State action affecting collective bargaining usually
13 would not constitute a violation of the NLRA. *Golden State Transit Corp. v. City*
14 *of Los Angeles*, 493 U.S. 103, 105 n.2 (1989) ("*Golden State II*").

15 The Supreme Court, however, has held that certain state action may be
16 preempted by the NLRA, and therefore violate the Act. *Id.* at 110-13; *Golden State*
17 *Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 617-19 (1985) ("*Golden*
18 *State I*"). There are two types of NLRA preemption. The first, established in *San*
19 *Diego Building Trades Council v. Garmon*, known as *Garmon* preemption,
20 prohibits a state from regulating conduct that is arguably protected or prohibited by
21 the NLRA, because that falls within the primary jurisdiction of the National Labor
22 Relations Board. 359 U.S. 236, 244-245 (1959). The second type of NLRA
23 preemption, known as *Machinists* preemption, bars state regulation of areas that
24 have been "left to be controlled by the free play of economic forces." *Lodge 76,*
25 *Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n,*
26 427 U.S. 132, 140 (1976). In its complaint, in purported reliance on *Golden State II*,
27 Prime alleges that the Attorney General's decision violates the NLRA because
28

1 *Machinists* preemption bars the Attorney General from interfering in the collective
2 bargaining process. FAC ¶¶ 117-119.

3 Here, the ten-year conditions do not regulate collective bargaining at all, and
4 therefore there is no NLRA preemption. But even if the conditions are deemed to
5 implicate the collective bargaining process, there is no preemption because the
6 Attorney General is acting on behalf of the members of the public who would be
7 affected by the sale of health care facilities to Prime.

8 **1. The Ten-Year Conditions Do Not Regulate Conduct Within**
9 **the NLRA**

10 The ten-year conditions do not regulate conduct governed by the NLRA. The
11 complaint does not allege that the ten-year conditions interfere with collective
12 bargaining or require Prime to accommodate UHW. FAC ¶¶ 96-97. The
13 conditions themselves do not include any requirement that Prime engage in
14 collective bargaining. Therefore, the ten-year conditions do not regulate conduct
15 within the ambit of the NLRA, and the complaint's recitation of *Golden State II*,
16 *see* FAC ¶¶ 117, 119, as support for the claim is inapposite. *See Golden State I*,
17 475 U.S. at 611 (emphasizing that city's sole basis for refusing to extend taxi
18 franchise was the company's failure to settle labor dispute).

19 The allegation that the conditions constituted punishment for failing to resolve
20 labor disputes also does not implicate NLRA preemption – even if it were true.
21 FAC ¶¶ 117, 119. Courts do not delve into the motives or improper intent in
22 determining whether state action is preempted by the NLRA, even when the
23 improper intent is to influence labor negotiations. *Johnson v. Rancho Santiago*
24 *Cnty Coll. Dist.*, 623 F.3d at 1026 (9th Cir. 2010) (in determining federal
25 preemption, courts will not delve into alleged improper motives); *N. Ill. Chapter of*
26 *Assoc'd Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005)
27 (whether state officials were motivated to assist organized labor irrelevant to federal
28

1 preemption determination). *Accord RUI One Corp. v. City of Berkeley*, 371 F.3d at
2 1155 (motive to assist unionization efforts irrelevant to equal protection analysis).

3 **2. There Is No NLRA Preemption Where the Attorney**
4 **General Acts in Parens Patriae**

5 There is also no NLRA preemption where the Attorney General acts in *parens*
6 *patriae* for the state residents who have a beneficial interest in having healthcare
7 services, and where her supervisory authority touches interests deeply rooted in
8 local feeling and responsibility.

9 The Attorney General's supervisory authority over California's charitable
10 trusts is in *parens patriae* for the State's residents. *Patton v. Sherwood*, 152 Cal.
11 App. 4th 339, 342 (2007); Kline, *supra* at 369. When a state acts in *parens patriae*,
12 it furthers its quasi-sovereign interests. Quasi-sovereign interests are "a set of
13 interests the State has in the well-being of its populace," in which the State acts in
14 *parens patriae*, as distinct from its *sovereign* interests, which includes the power to
15 regulate – to create and enforce laws. *Alfred L. Snapp & Son, Inc. v. P.R. ex rel.*
16 *Barez*, 458 U.S. 592, 602 (1982). A state acts in *parens patriae* to protect the
17 state's interest in "the health and well-being – both physical and economic – of its
18 residents." *Id.* at 607. Here, the ten-year conditions prevent closure of essential
19 services for the poor, elderly and disabled that a for-profit entity might more
20 quickly eliminate for profit-based reasons. They ensure that essential services
21 remain available to serve communities that may prevent an expectant mother from
22 having to travel over 30 miles to reach a hospital with obstetrical services (as is the
23 case for the ten-year services requirement for delivery services at St. Louise
24 Regional Hospital in Gilroy), RJN Exh 5 at 92, or enable a trauma victim to get to a
25 hospital that provides trauma services in time to prevent death (as is the case for the
26 ten-year requirement for Level II trauma services at St. Francis Medical Center in
27 Lynwood), *id.* Exh 1 at 95-96, or medically fragile patients needing sub-acute,
28 ventilated dialysis services to continue to have these services available (as is the

1 case for the ten-year requirement for sub-acute care services at Seton Medical
2 Center in Daly City that is the *only* provider of ventilated dialysis services in San
3 Mateo County), *id.* Exh 3 at 91-92.

4 There is also no NLRA preemption where the State’s authority touches
5 interests deeply rooted in local feeling and responsibility. In *Garmon*, the Supreme
6 Court stated that the NLRA does not withdraw from the states the “power to
7 regulate . . . where the regulated conduct touched interests so deeply rooted in local
8 feeling and responsibility that, in the absence of compelling congressional direction,
9 we could not infer that Congress had deprived the States of the power to act.” 359
10 U.S. at 243-44. In *Retail Property Trust v. United Broth. of Carpenters & Joiners*
11 *of America*, the Ninth Circuit held that state law claims for trespass and nuisance
12 that could constitute secondary boycott activity under the NLRA were not
13 preempted because those claims “touch[] interests deeply rooted in local feeling and
14 responsibility.” 768 F.3d 938, 942 (2014). The Ninth Court reasoned: “The NLRA
15 did not displace those areas where the ‘States traditionally have had great latitude
16 under their police powers to legislate as to the protection of the lives, limbs, health,
17 comfort, and quiet of all persons.’” *Id.* at 951 (quoting *Metro. Life Ins. Co. v. Mass.*,
18 471 U.S. 724, 756 (1985)). The ten-year conditions would ensure that a buyer of a
19 nonprofit hospital would be answerable to the public, and not merely to investors,
20 and that essential medical services would continue to be provided. These are
21 matters inherently deeply rooted in local feeling and responsibility.

22 **D. Count IV: Because No Violation of a Federally-Protected Right**
23 **Is Alleged, There Is No Viable Claim Under 42 U.S.C. § 1983**

24 Count IV, entitled: “Declaratory Relief (28 U.S.C. § 2201 and 42 U.S.C. §
25 1983),” appears to allege that sections 5914-5925 are unconstitutional under three
26 distinct approaches. Each is faulty. First, if Count IV is premised on alleged
27 violations of state constitutional rights, it is outside the scope of Section 1983’s
28 protection, and should be dismissed. Second, if Count IV alleges that violations of

1 state constitutional rights constitute a denial of due process under the Fourteenth
2 Amendment, this approach also fails to state a claim under Section 1983 because
3 neither of the state constitutional provisions at issue can trigger Fourteenth
4 Amendment protections. Third, Count IV alleges that the nonprofit hospital
5 transfer provisions are vague, depriving them of due process. This claim fails
6 because the Attorney General’s decision does not implicate First Amendment rights
7 or criminal sanctions.

8 **1. Section 1983 Applies Only to Violations of Federal Rights,**
9 **Not Violations of the State Constitution**

10 Claims based on alleged violations of state law are not cognizable under
11 Section 1983. *See California v. LaRue*, 409 U.S. 109, 110 n.1 (1972) (claim that,
12 as a matter of state law, regulations exceed authority conferred upon state agency is
13 not cognizable under Section 1983). *Capogrosso v. The Supreme Court of New*
14 *Jersey*, 588 F.3d 180, 185-86 (3d Cir. 2009) (claim that state court rule violates
15 state constitution properly dismissed for failure to state a claim cognizable under §
16 1983). Therefore, Prime cannot “pursue a violation of the California Constitution
17 under the guise of a federal civil rights claim,” but instead such a claim “must be
18 treated as a supplemental state law claim.”¹¹ *Easter v. CDC*, 694 F.Supp.2d 1177,
19 1184 (S.D. Cal. 2010) (citing *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir.
20 2003)).

21 Count IV of the complaint contends that an actual controversy exists “over
22 whether the Non-Profit Hospital Transfer Statute violates Section 1 of the
23 Fourteenth Amendment to the U.S. Constitution, and/or Article I, Section 1 and
24 Article III, Section 3 of the California Constitution.” FAC ¶ 130. To the extent
25 plaintiffs seek to rely directly on an alleged state constitutional violation, their

26 _____
27 ¹¹ Section V of the Argument, post, explains why the state constitutional
28 claims in Count IV fail to state a claim to relief, even when viewed as supplemental
state law claims.

1 claims fail because Section 1983 does not apply to non-federal claims. Instead,
2 these claims must be treated as supplemental state law claims.

3 **2. No Fourteenth Amendment Rights are Conferred by the**
4 **State Constitutional Provisions on Which Prime Relies**

5 **a. The Fourteenth Amendment Does Not Guarantee**
6 **Adherence to the State Separations of Power**

7 Count IV also contains an as-applied challenge to the Corporations Code
8 brought under the Fourteenth Amendment and California Constitution, article III,
9 section 3. Plaintiffs contend that the Act is an impermissible delegation of
10 legislative power, violating state separation of powers principles and depriving
11 them of due process under the Fourteenth Amendment. FAC ¶¶ 124, 129.

12 This separation of powers theory fails to state a claim under Section 1983.
13 “The principle of separation of powers is not enforceable against the states as a
14 matter of federal constitutional law.” *May v. Supreme Court of State of Colo.*, 508
15 F.2d 136, 139 (10th Cir. 1974) (Fourteenth Amendment’s guarantees of due process
16 and equal protection do not apply to alleged violation of state constitution’s
17 separation of powers provisions); *see Sweezy v. State of N.H. by Wyman*, 354 U.S.
18 234, 255 (1957) (“[T]he concept of separation of powers embodied in the United
19 States Constitution is not mandatory in state governments.”).

20 **b. Prime Lacks Standing Under California Constitution**
21 **Article I, Section 1, Which Is Not a Source of**
22 **Fourteenth Amendment Rights**

23 Prime claims that the Nonprofit Hospital Transfer Statute is facially invalid
24 and unconstitutionally vague under the Fourteenth Amendment, and under
25 California Constitution, article I, section 1. FAC ¶¶ 124, 127, 129. It contends the
26 law gives the Attorney General “unfettered discretion to deny, or impose unlimited
27 conditions on approving,” a buyer's acquisition of a non-profit hospital, thereby
28 placing “an arbitrary, irrational and unreasonable restriction on the buyer's
constitutional right to acquire property.” FAC ¶ 127. This claim fails to state a
claim to relief under Section 1983 for two reasons.

1 First, there is no federal property interest in acquiring property that would
2 entitle plaintiffs to procedural due process under the Fourteenth Amendment. *See*
3 *Bd. of Regents of State Colls. v. Roth*, 408 U.S. at 569; *Wedges/Ledges, Inc. v. City*
4 *of Phoenix, Ariz.*, 24 F.3d at 62.

5 Second, California Constitution, article I, section 1, does not protect to
6 corporations. It protect individual “people.” *Roberts v. Gulf Oil Corp.*, 147 Cal.
7 App. 3d 770, 791-93 (1983); *accord Ameri-Medical Corp. v. Workers’ Comp.*
8 *Appeals Bd.*, 42 Cal. App. 4th 1260, 1287 (1996). As corporations, the two Prime
9 plaintiffs lack standing to assert a claim under article I, section 1. *Roberts*, at 79-93.

10 **3. Plaintiffs’ Fail to Plead a Viable Vagueness Claim Under** 11 **the Fourteenth Amendment**

12 A statute’s alleged vagueness is typically challenged under either the First or
13 Fourteenth Amendments. Only the latter is raised by Prime, but it does not apply to
14 this case. Under Fourteenth Amendment vagueness jurisprudence, due process is
15 denied when a criminal statute subjects a person to a deprivation of liberty but is
16 framed in terms that fail “to provide a person of ordinary intelligence fair notice of
17 what is prohibited, or is so standardless that it authorizes or encourages seriously
18 discriminatory enforcement.” *U.S. v. Williams*, 553 U.S. 285, 304 (2008) (citations
19 omitted); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1032 (9th Cir. 2013). No
20 criminal statute, and no liberty or property interest, is implicated here.

21 For the foregoing reasons, Count IV fails to plead a viable claim under 42
22 U.S.C. § 1983. Its allegations under article I, section 1 and article III, section 3 of
23 the California Constitution must be treated as supplemental state law claims. These
24 claims are also subject to dismissal under Rule 12(b)(6), as discussed in Section V
25 of this Argument, *post*.

26 **E. Qualified Immunity Also Protects the Attorney General from** 27 **the Claims Brought Under 42 U.S.C. § 1983**

28 Qualified immunity protects the Attorney General from the section 1983
claims, even accepting the allegations of wrongful motivation as true. Qualified

1 immunity shields an official from civil-damages liability unless the conduct
2 violated a clearly-established law which a reasonable official would have been
3 aware of. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, officials are
4 afforded “ample room for mistaken judgments by protecting all but the plainly
5 incompetent or those who knowingly violate the law.” *Hunter v. Bryant*, 502 U.S.
6 224, 229 (1991) (internal quotes and citation omitted).

7 These principles are applicable to each of Prime’s section 1983 claims.
8 Qualified immunity applies to shield the Attorney General from Count I for
9 violation of due process rights as the complaint fails to establish a protected liberty
10 or property right. Qualified immunity also applies to shield the Attorney General
11 from Counts II and III as the complaint fails to allege facts that show a violation of
12 equal protection (Count II) or NLRA rights (Count III), and facts alleging wrongful
13 motive are *not* relevant to either claim, even if wrongful motive were sufficiently
14 pled. *Supra* at 24; *Jeffers*, 267 F.3d at 906 (where defendant’s mental state is not a
15 critical element of constitutional claim, a defendant’s subjective intent is not
16 relevant to qualified-immunity defense).

17 The application of qualified immunity is also supported by policy principles.
18 The policy basis of the qualified immunity doctrine is two-fold; it holds public
19 officials accountable when they exercise power irresponsibly, but protects them
20 from harassment, distraction, and liability when they perform their duties well.
21 *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). It allows public officials to use
22 their expertise – based on years of observation and practice – to maintain order
23 without fear of liability for doing what seemed reasonable at the time. *See Jeffers v.*
24 *Gomez*, 267 F.3d 895, 917 (9th Cir. 2001). In *Pearson*, the Supreme Court held
25 that a state official is entitled to qualified immunity unless: (1) plaintiff alleges facts
26 that show a constitutional violation; and (2) it is clearly established at the time that
27 the conduct was unconstitutional. 555 U.S. at 232.

28

1 Applying to this case the policy underlying qualified immunity, the contours
2 of the law governing the constitutional rights set forth above are not clear, and
3 would not be clear to a reasonable public official. Taking Prime's core allegation
4 as true, it would not have been reasonable for the Attorney General to impose ten-
5 year conditions in exchange for campaign contributions. However, it would have
6 been reasonable for her to conclude that doing so would not constitute a violation of
7 Prime's constitutional rights. In such circumstances, to allow the suit to proceed to
8 discovery on woefully insufficient allegations of wrongful motive, and on
9 allegations that do not establish a constitutional right would have the effect of
10 stripping the Attorney General of the qualified immunity to which she entitled. She
11 should not be subjected to burdensome litigation on the thinnest allegations of
12 wrongdoing, related to claims that are themselves not sufficient to state claims for
13 relief – this is precisely the type of suit that qualified immunity was meant to
14 prevent. *See Ashcroft v. Iqbal*, 556 U.S. at 685-86; *Trotter, Inc. v. Watkins*, 869
15 F.2d 1312, 1316 (9th Cir. 1989).

16 **IV. TO THE EXTENT THAT COUNT IV'S CLAIMS UNDER THE CALIFORNIA**
17 **CONSTITUTION ARE BROUGHT AS SUPPLEMENTAL STATE LAW CLAIMS,**
18 **THEY ARE BARRED BY THE ELEVENTH AMENDMENT**

19 If Count IV's claims challenging the constitutionality of California
20 Corporations Code sections 5914-5925 are brought directly under the California
21 Constitution as supplemental state law claims, they are barred by the Eleventh
22 Amendment. Count IV's state constitutional claims are brought against the
23 Attorney General in her official capacity. FAC ¶¶ 124-125, 127-130. Count IV
24 alleges that the state statutes violate California Constitution, article I, section 1, and
25 article III, section 3. *Id.* The Eleventh Amendment prohibits federal lawsuits by
26 private parties against a state or a state agency, unless the State has consented to the
27 suit or Congress has abrogated Eleventh Amendment immunity. *Pennhurst State*
28 *Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984). California has not waived
its Eleventh Amendment immunity allowing the suit on the state constitutional

1 claims, nor has Congress abrogated the immunity where an action is brought under
2 42 U.S.C. § 1983. *Id.* at 99 (citing *Quern v. Jordon*, 440 U.S. 332, 342 (1979)).

3 A suit against a state official is barred under the Eleventh Amendment when
4 the state is the real, substantial party in interest. *Pennhurst State Sch. & Hosp.*, 465
5 U.S. at 110. “[A] federal suit against state officials on the basis of state law
6 contravenes the Eleventh Amendment when . . . the relief sought and ordered has an
7 impact directly on the State itself.” *Id.* at 117. The bar applies regardless of the
8 relief sought. *Id.* at 101-02. On Count IV, the State is the real, substantial party in
9 interest to the count challenging the ten-year conditions under the California
10 Constitution. *See id.* at 92, 101. “[A] suit is against the sovereign if ‘the judgment
11 sought would expend itself on the public treasury or domain, or interfere with the
12 public administration,’ or if the effect of the judgment would be ‘to restrain the
13 Government from acting, or to compel it to act.’ ” *Id.* at 101 n.11 (quoting *Dugan v.*
14 *Rank*, 372 U.S. 609, 620 (1963)).

15 If declaratory relief were granted on Count IV declaring that California
16 Corporations Code sections 5914-5925 violate the California Constitution, the relief
17 would restrain the State from enforcing the California Corporations Code,
18 implicating the Eleventh Amendment. The court’s pendent jurisdiction would
19 therefore not extend to these state law claims allowing them to be heard as
20 supplemental state claims. *Id.* at 118-121. In the case of state law claims brought
21 into federal court under pendent jurisdiction, the Court in *Pennhurst* commented
22 that “[i]t is difficult to think of a greater intrusion on state sovereignty than when a
23 federal court instructs state officials on how to conform their conduct to state law.”
24 *Id.* at 106.

25 **V. CALIFORNIA CORPORATIONS CODE SECTIONS 5914-5925 ARE NOT**
26 **UNCONSTITUTIONAL UNDER THE CALIFORNIA CONSTITUTION**

27 Even if Count IV’s challenge to the constitutionality of California
28 Corporations Code section 5914-5925 could be heard as supplemental state claims

1 without violating the Eleventh Amendment, the claims fail on their merits. The
2 statutory scheme is not an unconstitutional delegation of legislative power to the
3 Attorney General, either facially or as applied to Prime. FAC ¶¶ 125, 128, 129.
4 Prime contends that section 5917 gives the Attorney General “unfettered
5 discretion” over nonprofit hospital transactions. *Id.* ¶ 128. Article III, section 3
6 provides: “The powers of state government are legislative, executive, and judicial.
7 Persons charged with the exercise of one power may not exercise either of the
8 others except as permitted by this Constitution.” Cal. Const., art. III, § 3.

9 **A. Section 5917 Is Facially Constitutional**

10 Section 5917 is facially constitutional because there is a strong presumption of
11 constitutionality that Prime cannot overcome, and because the Legislature
12 established appropriate standards to govern the Attorney General’s action.

13 Prime bears the very heavy burden of overcoming a presumption of
14 constitutionality. A statute is presumed constitutional, and the burden is on the one
15 attacking the legislative arrangement to negate every conceivable basis which might
16 support it, whether or not the basis has a foundation in the record. *Heller v. Doe*,
17 509 U.S. 312, 320 (1993). All presumptions support the validity of a statute, and a
18 court may not declare a statute invalid unless it clearly is so. *Tobe v. City of Santa*
19 *Ana*, 9 Cal. 4th 1069, 1102 (1995).

20 California courts applying article III, section 3, are particularly reluctant to
21 invalidate a statute as an unconstitutional delegation, because taking such drastic
22 action itself carries the risk of a violation of the separation of powers by the
23 judiciary. Thus, “[o]nly in the event of a total abdication of [legislative] power,
24 through failure either to render basic policy decisions or to assure that they are
25 implemented as made, will this court intrude on legislative enactment because it is
26 an unlawful delegation, and then only to preserve the representative character of the
27 process of reaching legislative decision.” *Kugler v. Yocum*, 69 Cal.2d 371, 383-84
28 (1968).

1 No unconstitutional delegation occurs where the Legislature resolves the
2 “truly fundamental” policy issues, “establish[es] an effective mechanism to assure
3 the proper implementation of its policy decisions,” and accompanies the grant of
4 authority with “safeguards adequate to prevent its abuse.” *Kugler*, 69 Cal.2d at
5 376-77, 381-82. The Legislature is not required to establish explicit constraints
6 governing the exercise of the quasi-legislative authority. The standards to guide
7 discretionary authority may be implied from the statutory purpose, *People v. Wright*,
8 30 Cal.3d 705, 713 (1982), or related statutes, *Cal. State Auto., etc., Bureau v.*
9 *Downey*, 96 Cal. App. 2d 876, 906–907 (1950). *See also State Bd. of Educ. v.*
10 *Honig*, 13 Cal. App. 4th 720, 751 (1993).

11 Here, the Legislature has properly delegated discretionary authority to the
12 Attorney General. The Legislature resolved the fundamental policy at issue by
13 including in section 5917 a set of standards the Attorney General must consider in
14 evaluating a transaction. The standards include whether the transaction would have
15 a significant effect on the availability or accessibility of healthcare services to the
16 affected community, § 5917(h); Cal. Code Regs. tit. 11, § 999.5(f)(8)-(9), and
17 whether the transaction is in the public interest, § 5917(i); Cal. Code Regs. tit. 11,
18 § 999.5(f)(12). A requirement that the decision be grounded in those factors and
19 other relevant factors is implied. *See Honig*, 13 Cal. App. 4th at 750-51 (legislative
20 bodies have neither resources nor expertise to deal with every minor question
21 potentially within jurisdiction). These standards provide more than sufficient
22 guidance for the exercise of discretion.

23 California courts have routinely upheld delegating legislation that establishes
24 standards framed in terms far more broad and general. For example, in *People v.*
25 *Wright*, the California Supreme Court held that a statute authorizing the state
26 Judicial Council to adopt rules establishing aggravating or mitigating sentencing
27 factors in order to promote “uniformity” provided a sufficiently precise standard to
28 satisfy the nondelegation doctrine. 30 Cal. 3d at 712-13; see *S. Pac. Transp. Co. v.*

1 *Public Util. Comm'n*, 18 Cal. 3d 308, 313 (1976) (“public convenience and
2 necessity” was a sufficient standard for promulgation of railroad regulations, and
3 inclusion of that standard in one section of statutory scheme required reading it into
4 adjacent section being challenged).

5 Section 5917 also establishes an effective mechanism to assure the proper
6 implementation of the Legislature’s policy decisions. See *Kugler*, 69 Cal. 2d at
7 376-77, 381-82. The Attorney General must obtain written notice and review
8 documentation relating to the transaction and conduct one or more noticed public
9 meetings to receive comment from interested parties. Section 5917 and
10 implementing regulations establish procedural safeguards to protect against
11 exercise of the delegated power in an arbitrary manner. *Id.* at 381. The applicant
12 must be notified of the decision in writing, and the decision is reviewable in state
13 court for abuse of discretion.

14 The preceding analysis is consistent with longstanding legislation and
15 historical practice. The Attorney General’s constitutional powers over charities
16 pre-date and co-exist with section 5917 and are unique. Section 5917, enacted in
17 1996, is only the most recent example of legislation conferring authority over
18 charitable organizations on the Attorney General. She has general supervisory
19 authority over all charitable organizations under many statutes. *Supra* at note 1.
20 She also has common law authority over charitable trusts to ensure that charities
21 operate in the public interest. The decision in *Brown v. Memorial National Home*
22 *Foundation*, 162 Cal. App. 2d 513 (1958) contains an extensive account of the
23 history of common law powers of attorneys general and their relationship to
24 modern grants of legislative authority. *Id.* at 536-37; see *Kline, supra* at 356-57.
25 The unique historical role of attorneys general with respect to charitable trusts
26 underscores a deeply-rooted legal principle: in the oversight of charitable
27 organizations, the Attorney General is properly entrusted with the responsible
28 exercise of broad discretion to act in the public interest.

1 **B. Section 5917 Is a Constitutional Delegation as Applied to Prime**

2 Prime also contends that section 5917’s grant of “unfettered discretion” is an
3 unconstitutional delegation of legislative power as applied to its proposed purchase.
4 FAC ¶ 129. This claim fails for the same reason the facial challenge fails. An as-
5 applied claim of unconstitutional legislative delegation adds nothing to, and is
6 indistinguishable from, a facial challenge. All of the tests discussed above are
7 different ways of getting at the same question: has the Legislature abdicated its
8 responsibility to establish policy or has it conferred unbridled discretion on an
9 executive official? The answer to this question is either yes or no. It does not turn
10 on the facts of a particular case or plaintiff.

11 If the statute’s delegation of quasi-legislative power is constitutional but a
12 party claims it has been wronged by the decision in a particular case, the remedy
13 lies in conventional judicial review of that decision for abuse of discretion.
14 *Samples v. Brown*, 146 Cal.App.4th 787, 806 (2007) (where there has been no
15 unconstitutional delegation, individuals who believe this statute has been
16 improperly or illegally applied to them may seek redress in the courts).

17 **C. Prime Lacks Standing to Challenge Section 5917’s**
18 **Constitutionality Under Article I, Section I of the California**
19 **Constitution**

20 Prime also contends in Count V that section 5917 is an unconstitutional grant
21 of authority violating Prime’s right to acquire property as guaranteed by California
22 Constitution, article I, section 1. FAC ¶¶ 124, 127, 129. But as corporations, the
23 Prime plaintiffs lack standing. As noted above, article I, section 1 applies by its
24 terms only to “people.” Corporations such as the Prime plaintiffs therefore have no
25 standing to invoke its guarantee of the right to acquire property or any of the other
26 “inalienable rights” it secures for human beings. *Roberts v. Gulf Oil Corp.*, 147
27 Cal. App. 3d at 791-93; *accord Ameri-Medical Corp. v. Workers’ Comp. Appeals*
28 *Bd.*, 42 Cal. App. 4th at 1287.

1 **VI. ALTERNATIVELY, THE COURT SHOULD ABSTAIN**

2 If the Court nonetheless finds that any of the counts have been adequately pled,
3 the Court should in any event abstain from hearing the dispute under the *Pullman*
4 abstention doctrine. Abstention is appropriate “if constitutional adjudication could
5 be avoided or if the constitutional issue could be narrowed by a ruling on an
6 uncertain question of state law.” *Pearl Inv. Co. v. City & Cnty. of San Francisco*,
7 774 F.2d 1460, 1462 (9th Cir. 1985); *Harman v. Forssenius*, 380 U.S. 528, 534
8 (1965); *R. Comm’n v. Pullman Co.*, 312 U.S. 498 (1941). “[A]bstention may be
9 proper in order to avoid unnecessary friction in federal-state relations, interference
10 with important state functions, tentative decisions on questions of state law, and
11 premature constitutional adjudication.” *Harman*, 380 U.S. at 534.

12 In *Pearl*, a building owner challenged on constitutional grounds a city
13 planning commission’s decision to condition issuance of a building permit on
14 provision of relocation services and replacement housing. *Pearl*, 774 F.2d at 1462.
15 The decision was made under an ordinance that gave the commission “discretionary
16 review” powers, which the plaintiff alleged had been exercised in an arbitrary
17 manner. *Id.* at 1464. The Ninth Circuit upheld the district court’s decision to
18 abstain, agreeing that federal constitutional issues could be avoided if a state court
19 were to rule the commission had abused its discretion by acting arbitrarily, and
20 order the building permit application approved as filed. *Id.* The complaint in this
21 case follows a similar pattern, alleging the Attorney General abused statutory
22 discretion and that section 5914-5925 is unconstitutional. The Court should decline
23 to proceed on Prime’s claims unless and until there is review of the ten-year
24 conditions in state court. As in *Pearl*, *Pullman* abstention is appropriate here to
25 avoid an unnecessary constitutional adjudication.

26 **CONCLUSION**

27 For these reasons, the Attorney General respectfully requests that the Court
28 grant the motion to dismiss without leave to amend.

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Respectfully submitted,

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