

No.A163369

In the Court of Appeal, State of California

FIRST APPELLATE DISTRICT

CSHV 1999 HARRISON, LLC and CSHV 1956 WEBSTER, LLC,
Appellants

vs.

COUNTY OF ALAMEDA and CITY OF OAKLAND,
Respondents.

Appeal from a Judgment of the Superior Court of the State of California
for the County of Alameda. Case No. RG20060588
The Honorable Frank Roesch, Judge Presiding

**APPLICATION TO FILE AMICUS CURIAE BRIEF AND
BRIEF OF AMICI LEAGUE OF CALIFORNIA CITIES AND
CALIFORNIA STATE ASSOCIATION OF COUNTIES
IN SUPPORT OF RESPONDENTS**

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**CERTIFICATE OF INTERESTED ENTITIES OR
PERSONS**

These entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves:

None.

DATED: June 22, 2022

**COLANTUONO, HIGHSMITH &
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**APPLICATION FOR PERMISSION
TO FILE AMICUS CURIAE BRIEF**

**To the Honorable Administrative Presiding Justice Humes and
Associate Justices of the Court of Appeal for the First Appellate
District:**

Pursuant to California Rules of Court, rule 8.200(c), the League of California Cities (“Cal Cities”) and California State Association of Counties (“Counties Assn.”) respectfully request permission to file the attached amicus curiae brief in support of Respondents County of Alameda and City of Oakland.

Cal Cities is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Cal Cities and its member cities have a substantial interest in the outcome of this case because it raises important questions concerning exemptions from documentary transfer, real property transfer, and other local taxes, which cities rely upon to fund essential services like police, fire prevention, parks, and libraries. Cal Cities desires to provide points and authorities to explain its views

regarding these issues and the implications of the arguments the parties present, and to assist the Court in evaluating these issues.

The California State Association of Counties is a non-profit corporation. The membership consists of the 58 California counties. The Counties Assn. sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Counties Assn.'s Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

In compliance with rule 8.200(c)(3) of the California Rules of Court, the undersigned counsel represents that he authored Cal Cities' and the Counties Assn.'s brief in its entirety on a pro bono basis; that his firm is paying for the cost to do so; and that no party to this action, nor any other person, authored the brief or made any monetary contribution to fund its preparation and filing.

Accordingly, Cal Cities and the Counties Assn. respectfully request leave to file the brief attached to this application.

DATED: June 22, 2022

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INTRODUCTION

With this brief, Amici Curiae League of California Cities (“Cal Cities”) and California State Association of Counties (“Counties Assn.”) seek to place this dispute in its proper context. The documentary transfer and real property transfer taxes Appellants seek to avoid are important pieces of the revenue puzzle for California cities and counties. These taxes are not property taxes; they are excise taxes on the privilege of owning and transferring property. Public entities may avoid property taxes under our Constitution (Cal. Const., art. XI, § 3); they may not avoid other types of taxes public agencies collect to fund the many services they provide all organizations, public and private alike.

CalSTRS seeks to enjoy certain benefits of corporate ownership by holding real property in Appellants’ names, rather than its own, but then also attempts to skirt documentary transfer and real property transfer taxes by alleging Appellants are public entities. It cannot have it both ways. Moreover, Oakland adopted the real property transfer tax ordinances at issue here not under State statutes, but under the authority of its voter-approved charter, raising additional issues specific to the 108 charter cities in California. Neither the statutes under which Alameda County collects its documentary transfer tax nor Oakland’s real property transfer tax ordinances have an exemption for CalSTRS-created LLCs and the Court should not imply one.

In sum, Cal Cities and the Counties Assn. respectfully request the Court to respect the importance of the challenged taxes to Cal Cities, the Counties Assn., and their members, and affirm.

ARGUMENT

I. TRANSFER TAXES REPRESENT A SIGNIFICANT REVENUE SOURCE FOR CITIES AND COUNTIES

Real property transfer taxes and documentary transfer taxes provide essential revenues to California cities and counties. As the City of Oakland notes, all cities and counties may collect a documentary transfer tax under Revenue and Taxation Code section 11911 et seq., with these statutes authorizing counties to levy at a rate of 55 cents per \$500 of property value and cities to levy half of that, which is credited against the county tax due. (City RB at p. 14.) Charter cities like Oakland may also levy and collect a real property transfer tax under their “home rule” authority in any amount voters approve. (Cal. Const., art. XI, § 5, subd. (a); *Fisher v. County of Alameda* (1993) 20 Cal.App.4th 120, 124.)

At least 26 charter cities have adopted real property transfer taxes under their home rule authority, with the City of El Cerrito becoming the latest city to adopt one in November 2018 when its voters adopted a city charter. (Coleman, *The California Municipal Revenue Sources Handbook* (5th ed. 2019) § 2.07, p. 56.) Most cities with real property transfer taxes assess those taxes using a flat rate — for example, the City of Hayward charges \$8.50 for each \$1000 of

the transferred real property's value — while other cities, including Oakland, use variable rates, which increase with the value of the real property transferred. (*Ibid.*)¹

In the 26 charter cities with real property transfer taxes, the transfer tax provides on average 6 percent of general fund revenues — a significant source of funding for essential city services. (Coleman, *supra*, p. 57.) As of fiscal year 2016–2017, documentary and real property transfer taxes provided over \$1 billion in revenue for cities — more than \$33.00 on a per capita basis in those cities — and over \$300 million for counties. (*Ibid.*)

CalSTRS is responsible for hundreds of billions of dollars in investments, and recognizing the exemption Appellants propose may provide further incentive for it to invest in real property using LLCs, robbing local communities of needed revenue. (See City RB, p. 48.) A strategy report posted on CalSTRS's website suggests it seeks to increase the proportion of real estate holdings in its portfolio; the 1 percent allocation change that report forecasts suggests CalSTRS will add more than \$3 billion in real estate to its

¹ A list of all cities and their real property transfer and documentary transfer tax rates is here:

<http://www.californiacityfinance.com/PropTransfTaxRates.pdf>.

portfolio in the coming years.² Should CalSTRS choose to use the benefits of corporations to transact and hold these properties, it must take the bitter with the sweet and pay the taxes corporations owe when transacting real property.

Given the importance of documentary and real property transfer taxes to cities and counties in California, courts should view this attempt to avoid their application and create exemptions skeptically.

II. CALSTRS AVOIDS PUBLIC SCRUTINY OF INVESTMENTS BY INVESTING THROUGH LLCs

Left unexplained in the Appellants' briefs is why CalSTRS invested in the Oakland properties through Appellants and not in its own name. (E.g., AOB at pp. 11–12.) Given the benefits provided to members of LLCs not provided to other types of ownership — avoidance of certain liabilities and so forth (see City RB at pp. 32–33, County RB at pp. 12–13) — the Court should assume that CalSTRS's decision to form Appellants and use them to invest in real estate was purposeful and intended to provide a better rate of return for its members. The Legislature, too, has recognized the benefits inherent in investing through LLCs, expressly allowing single-member corporate entities like the Appellants to avoid “income and/or

² The strategy report is available here:

<https://www.calstrs.com/files/f5300ab11/RealEstateStrategyReport-3q2021.pdf>.

franchise” taxes — but not others local public entities collect. (Rev. & Tax. Code, §§ 17941; 17942; 23038, subd. (b)(2)(B)(iii).)

Another benefit of investing through LLCs is these corporate forms may not be subject to the same scrutiny and oversight public entities face. Public entities like CalSTRS, Alameda County, and the City of Oakland must post meeting agendas before their meetings and hold their meetings in public under the Bagley-Keene Act (Gov. Code, § 11120 et seq.) or Brown Act (Gov. Code, § 54950 et seq.); LLCs formed by public agencies may not be subject to such requirements. These LLCs also may not be required to comply with the Public Records Act, which requires many public entities to produce all non-privileged, non-exempt records promptly upon demand. (Gov. Code, § 6250 et seq.)

Because LLCs are not subject to the same public scrutiny that public agencies face, courts and public agencies are justified in treating them differently. Though the Court need not imply or create an exemption for State-agency-controlled LLCs for the reasons Respondents explain, the relative lack of oversight LLCs enjoy justifies different treatment by taxing authorities, too. By choosing to invest through LLCs rather than in its own name, CalSTRS must take the bitter with the sweet — it cannot simultaneously claim to be a corporation for the lack of public entity oversight but then claim to be a public entity for purposes of tax exemptions.

III. THE COURT SHOULD CLOSELY EXAMINE APPELLANTS' PURPORTED EXEMPTION FROM LOCAL ORDINANCES, AS IT DOES ALL OTHER CLAIMED LOCAL TAX EXEMPTIONS

Appellants cite *San Marcos Water Dist. v. San Marcos Sch. Dist.* (1986) 42 Cal.3d 154, 161, superseded by statute as stated in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 353, to argue that the Court should extend exemptions to avoid one tax-supported entity collecting from another. In *San Marcos*, the Supreme Court disallowed a water district's special assessment of property owned by a school district for lack of "positive legislative authority" for the assessment, characterizing the water agency's attempt to assess another public entity without legislative authority as "siphoning" revenue. (*San Marcos, supra*, 42 Cal.3d at p. 161.) The Legislature promptly enabled water districts to assess public entities, including school districts, their fair share of utilities' capital costs, mooted this holding. (*City of Marina, supra*, 39 Cal.4th at pp. 358–359.)

San Marcos is unpersuasive because Alameda County and the City of Oakland already have power to collect the taxes at issue here: Alameda County by statute and Oakland by its home rule charter powers over municipal affairs — they have the "positive legislative authority" the water district lacked in *San Marcos*. Moreover, *San Marcos* itself acknowledges the limits of its holding against "siphoning"; the sentence following its recitation of that general rule

states “when one tax-supported entity provides goods or services to another, neither the California Constitution nor decisional law exempts the public entity from paying for these goods or services.” (*San Marcos, supra*, 42 Cal.3d at p. 161.) Alameda County and the City of Oakland provide myriad services to the buildings Appellants own — police, fire protection, etc. — which the taxes Appellants challenge help fund.

The documentary transfer tax and real property transfer tax at issue here are not special assessments as discussed in *San Marcos* or property taxes; they are excise taxes — a different type of tax not barred by article XIII A, section 4 of our Constitution. Excise taxes are taxes on the exercise of one privilege of property ownership and for that reason are distinct from property taxes. (*City of Oakland v. Digre* (1988) 205 Cal.App.3d 99, 105–106; *Brunton v. Superior Court* (1942) 20 Cal.2d 202, 207 [“It is settled that a privilege tax is not a property tax within the meaning of ... the Constitution.”].) Transferring property is such a privilege. (*Fielder v. City of Los Angeles* (1993) 14 Cal.App.4th 137, 145.)

In *Sacramento Mun. Utility Dist. v. County of Sonoma* (1991) 235 Cal.App.3d 726, 733 (“*SMUD*”), a county’s tax on a municipal utility was found invalid, but only after the court examined the tax and concluded that it was “an impermissible substitute for a property tax on publicly owned property” because it was collected only from entities which generated electricity, all of which were public. In

rejecting the County's argument that the tax was an excise tax because it applied generally to all power-generating entities, *SMUD* cited the *San Marcos* court's discussion of excise taxes, then looked to whether the tax's incidence turned on whether the property was owned by a public entity, concluding it did. (*Id.* at pp. 735–736.) Alameda County and Oakland collect their transfer taxes from thousands of people and entities transferring real property each year, meaning the incidence of their transfer taxes turn on the exercise of a privilege of ownership, not the identity of the owner as in *SMUD*, and that these are excise taxes, not property taxes.

Indeed, entities of the State, like CalSTRS, are expected to pay many types of taxes and reimbursements to innumerable collecting agencies — local sales taxes on purchases of office supplies (Rev. & Tax. Code, § 7200 et seq.; Alameda Co. Mun. Code, ch. 2.08); local utility user taxes when office staff use power, water, telephones, and other utilities (Oakland Mun. Code, § 4.28.010 et seq.); and parking taxes when employees driving State-owned vehicles use parking lots (Gov. Code, § 37100.5; e.g., Oakland Mun. Code, § 4.16.010 et seq.). There is no blanket exemption for State entities from all taxation as Appellants suggest; *San Marcos*, *SMUD*, and other authorities show that public agencies may collect taxes other than property taxes from State entities like CalSTRS unless a specific exemption applies.

IV. COURTS NEED NOT LOOK TO STATE STATUTES TO INTERPRET ORDINANCES OF CHARTER CITIES LIKE OAKLAND

Cities in California may be characterized as general law cities, which must exercise their power within the confines of State law, and charter cities, which are organized under voter-approved charters — akin to city constitutions — and enjoy much greater freedom to legislate. (Cal. Const., art. XI, § 5, subd. (a).) As a charter city, Oakland may adopt any law governing municipal affairs, subject only to constitutional limitations. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 12; *City of Glendale v. Trondsen* (1957) 48 Cal.2d 93, 98 [taxation is a municipal affair].) All cities — general law and charter — may rely on State statutes for authority to levy taxes, but charter cities may also adopt taxes under their charters where general law cities may not. For example, our Constitution and statutes bar general law cities from collecting a real property transfer tax (Cal. Const., art. XIII A, § 4; Gov. Code, § 53725), but this constitutional provision and statute do not prohibit Oakland’s tax, which limit only special taxes — not general taxes like Oakland’s real property transfer tax — and which Oakland levies under its charter powers (*Fielder, supra*, 14 Cal.App.3d at p. 142).

Though statutes authorize cities and counties to collect documentary transfer taxes (Rev. & Tax. Code, §§ 11901–11935) — these statutes lack an exemption for state-controlled LLCs as the

County’s brief explains. (County RB at pp. 16–20.) Oakland expressly did not act under these statutes in adopting the real property transfer tax Appellants challenge; it acted under its power as a charter city organized under article XI of our Constitution. (See City RB at pp. 15–18.) This is an important distinction, as State statutes do not control interpretation of charter city ordinances and charters; charters reflect a city’s “privilege of autonomous rule” and are construed independently of statutes and in favor of a city’s exercise of power over municipal affairs. (*Don’t Cell Our Parks v. City of San Diego* (2018) 21 Cal.App.5th 338, 349.) When a city acts under its home rule charter authority and not State statute, statutes on similar topics are no more persuasive than another city’s ordinance. (Cf. *Schofield v. City of Los Angeles* (1932) 120 Cal.App. 240, 245 [city charter provision “free from ambiguity and uncertainty needs no interpretation”].)

The legislative history is clear that Oakland’s voters, when they readopted the city’s real property transfer tax under its home rule powers — not State statute — in 2009, intended for the tax to stand on its own, untethered from statute. (City RB, pp. 17–18.) As such, to remain consistent with controlling authority and the Constitution’s treatment of city charters as an independent basis for charter cities to act, the Court must focus on the text of Oakland’s charter and real estate transfer tax ordinances and the intent of its voters. The Court should ignore inapplicable authorities analyzing

other taxes adopted under State law when considering Oakland's transfer ordinances.

CONCLUSION

Cal Cities and the Counties Assn. respectfully request the Court affirm the judgment below for the reasons stated above and those in the briefs Respondents filed.

DATED: June 22, 2022

COLANTUONO, HIGHSMITH &
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**CERTIFICATE OF COMPLIANCE WITH
CALIFORNIA RULES OF COURT, RULE 8.204**

I certify that, under rule 8.204(c)(1) of the California Rules of Court, this Amicus Brief is produced using 13-point type and contains 2,352 words including footnotes, but excluding the application for leave to file, tables, and this Certificate, fewer than the 14,000 words permitted by the rule. In preparing this Certification, I relied upon the word count generated by Microsoft Word 365 MSO.

DATED: June 22, 2022

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PROOF OF SERVICE

CSHV 1999 Harrison, LLC, et al. v. County of Alameda
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I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. My email address is: ALloyd@chwlaw.us. On June 22, 2022, I served the document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS** on the interested parties in this action addressed as follows:

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