S217738

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PROPERTY RESERVE, INC., Defendant and Respondent, v. **STATE OF CALIFORNIA, BY AND THROUGH DEPARTMENT OF WATER RESOURCES,** Plaintiff and Appellant.
THE CAROLYN NICHOLAS REVOCABLE LIVING TRUST, etc., et al., Defendant and Respondent, v. **DEPARTMENT OF WATER RESOURCES,** Plaintiff and Appellant.

After a Decision by the Court of Appeal,
Third Appellate District, Case Nos. C067758, C067765, C068469

San Joaquin County Superior Court, Case No. JCCP4594
Honorable John P. Farrell, Judge

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND OTHERS TO FILE *AMICUS* BRIEF IN SUPPORT OF APPELLANT; PROPOSED BRIEF OF *AMICI CURIAE*

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APPLICATION FOR PERMISSION TO FILE *AMICUS* BRIEF

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rules of Court, Rule 8.520(f), *amici curiae* League of California Cities; California State Association of Counties; and Association of California Water Agencies (collectively, the "*amici*") respectfully request leave to file the accompanying brief of *amicus curiae* in support of the State of California, by and through Department to Water Resources. This application is timely made within 30 days after the filing of the reply brief on the merits.

THE *AMICI CURIAE*

The League of California Cities ("League") is an association of 474 California cities united in promoting the general welfare of cities and their residents. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the matter at hand, that are of statewide or nationwide significance.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association'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.

ACWA is a non-profit public benefit corporation organized and existing under the laws of the state of California since 1910. ACWA is comprised of over 450 water agencies, including cities, municipal water

districts, irrigation districts, county water districts, California water districts and special purpose agencies. ACWA's Legal Affairs Committee, comprised of attorneys from each of ACWA's regional divisions throughout the State, monitors litigation and has determined that this case involves issues of significance to ACWA's member agencies. ACWA's public agency members are charged with responsibility to manage California's water resources. Pursuant to that responsibility, they routinely have used the procedures specified in the precondemnation entry statutes in connection with the planning, engineering, design, and construction of California's essential facilities for water management, supply, production, storage treatment, conveyance, and distribution. In many instances, the testing methods historically used were the same as those at issue in this case.

THE INTERESTS OF *AMICI CURIAE*

Amici have a substantial interest in the outcome of this eminent domain case.

Code of Civil Procedure Sections 1245.010 – 1245.060 are referred to as the "precondemnation entry statues" under the California Eminent Domain Law. They provide a procedure by which (as stated in Section 1245.010) "any person authorized to acquire property for a particular use by eminent domain may enter upon property to make photographs, studies, surveys, examination, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use."

These activities are often essential *before* a public entity considers whether to exercise its eminent domain authority to acquire private property for a public use. The Law Revision Commission Comment, 1975 Addition, to Section 1245.010 refers to "appraisal and *suitability studies*." (Emphasis added.) A public entity's understanding of the "suitability" of property for

a public project is of critical importance. In fact, a public entity's compliance with the California Environmental Quality Act ("CEQA") relating to a public project (analyzing both the environmental impacts of, and mitigation measures to, a public project) is a legal prerequisite to the public entity's ability to acquire private property by eminent domain for that public project. The precondemnation activities referenced in Section 1245.010 allow public entities to (among other things) undertake necessary testing and analysis to comply with CEQA and assess the suitability of property for a particular project.

In this case, the legality of the precondemnation entry statutes have been put at issue. A divided panel of the Court of Appeal has held that, under *Jacobsen v. Superior Court* (1923) 192 Cal.319, the procedure set forth in the precondemnation entry statues can only be utilized if the requested precondemnation activities involve "innocuous entry and superficial examination."[1]

The issues presented in this case have significant implications on the ability of public entities to timely plan and construct public projects. For this reason, *amici* have a substantial interest in the outcome of this case.

THE NEED FOR FURTHER BRIEFING

The League and the other *amici* believe their members' perspective on this matter is worthy of the Court's consideration and will assist the Court in deciding this matter. Representing the interests of California public entities, *amici* are uniquely positioned to explain the practical ramifications on public entities and public projects if this Court affirms the analysis adopted by the Court of Appeal.

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[1] *Jacobsen* was decided approximately 43 years before the legislative revision of the California Eminent Domain Law (added by statute in 1975, and operative July 1, 1976).

Counsel for *amici* has examined the briefs on file in this case and is familiar with the issues involved and the scope of their presentation and does not seek to duplicate that briefing. We believe there is a need for additional briefing on this issue, and hereby request that leave be granted to allow the filing of the accompanying *amici curiae* brief.

CONCLUSION

In compliance with subdivision (c)(3) of Rule 8.200, the undersigned counsel represent that they wrote this brief in its entirety in a pro bono capacity. Their firm is paying for the entire cost of preparing and submitting this brief, and that no party to this action or any other person either wrote this brief or made any monetary contribution to fund the preparation or submission this brief. For the foregoing reasons, the *amici curiae* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: March 25, 2015

MEYERS NAVE RIBACK SILVER & WILSON

By: _____
David W. Skinner
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I. INTRODUCTION

Amici curiae the League of California Cities ("the "League"), California State Association of Counties ("CSAC"), and the Association of California Water Agencies (ACWA") (collectively, "*Amici*") support the arguments of the State of California, by and through Department of Water Resources. We urge this Court to affirm the constitutionality of the Eminent Domain Law's precondemnation entry statutes.

We write to emphasize the importance of precondemnation activities on private property as part of the environmental review process, project-planning process, and eminent domain acquisition process. Further, we write to emphasize that requiring public entities to commence separate eminent domain proceedings for these precondemnation activities would result in significantly more delays for public projects, and significantly higher costs to the public.

II. ARGUMENT

A. There is a Strong Presumption in Favor of the Legislature's Interpretation of the Constitution

For over 35 years, public entities in California have relied on the California Legislature's statutory authorization to conduct precondemnation examinations, tests, borings, samplings, and other similar activities reasonably related to acquisition or use of the property for a potential public project. The Legislature's determination that the precondemnation entry statues are in compliance with Article I, Section 19 of the California Constitution must be accorded a strong presumption of validity.

Of course, under Article I, Section 19(a) of the California Constitution, "[p]rivate property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." The just compensation

clause "is primarily aimed at making a landowner whole for any governmental taking or damage to his or her property." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 715.)

It is well-settled that a statute cannot defeat the constitutional requirement of just compensation. (*Escondido Union School Dist. v. Casa Suenos De Oro, Inc.* (2005) 129 Cal.App.4th 944, 969, citing *Redevelopment Agency v. Gilmore* (1985) 38 Cal.3d 790, 797. It has also been held that "[s]tatutory language defining eminent domain powers is strictly construed and any reasonable doubt concerning the existence of the power is resolved against the entity." (*Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276, 282-283.)

At the same time, there is a *strong presumption* in favor of the Legislature's "interpretation" of a provision in the Constitution. (*Mt. San Jacinto Community College District v. The Superior Court of Riverside* (2007) 40 Cal.4th 648, 757-758, citing *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 692.) In fact, the California Legislature undertook an interpretation of Article I, Section 19 of the California Constitution in enacting the California Eminent Domain Law in 1975. As the Court of Appeal stated in *Escondido Union School District v. Casa Suenos De Oro, Inc.*, *supra*, 129 Cal.App.4th 944, 959:

> In California, eminent domain proceedings are governed by a comprehensive statutory scheme, known as the Eminent Domain Law. (§ 1230.010 *et seq.*) The Legislature adopted the Eminent Domain Law in 1975, to become effective July 1, 1976, as part of a comprehensive recodification of condemnation law proposed by the California Law Revision Commission. (Stats.1975, ch. 1275, § 2, pp. 3409–3465; *see also* 13 Cal. Law Revision Com. Rep. (1975) pp. 1007, 1009–1012.) Pursuant to legislative direction, the Law Revision Commission studied existing eminent domain law in California and reviewed similar laws of every jurisdiction in

> the United States. (*See* 13 Cal. Law Revision Com. Rep., *supra*, pp. 1009–1011.) The new Eminent Domain Law was intended "to cover, in a comprehensive manner, all aspects of condemnation law and procedure" and to produce "a modern Eminent Domain Law within the existing California statutory framework." (*Id.*, pp. 1010–1011.)[1]

The Court of Appeal in *Casa Suenos* further noted that "the Legislature clearly intended the Eminent Domain Law to be self-contained," and that the "major purpose" of the Eminent Domain Law "is to cover, in a comprehensive manner, all aspects of condemnation law and procedure," citing 13 Cal. Law Revision Com. Rep. (1975) p. 1011. (129 Cal.App.4th at 976.)

This is significant. In enacting the precondemnation entry statutes, the Legislature's expressly considered that certain activities might go beyond "innocuous entry and superficial examination" as referenced in *Jacobsen v. Superior Court* (1923) 192 Cal. 319, 328-329.) The Law Revision Commission Comment, 1975 Addition, to Section 1245.020 addresses this as follows:

> In many cases, the entry and activities upon the property will involve no more than trivial injuries to the property and inconsequential interference with the owner's possession and use. In such cases, neither the owner's permission nor the court order is required. *See* Comment to Section 1245.060. *However, where there will be compensable damage, Section 1245.020 applies.* (Emphasis added.)

Public entities' ability to obtain precondemnation access to property under the precondemnation entry statutes has been a critical part of the

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[1] *See also, City of Stockton v. Marina Towers, LLC* (200) 171 Cal.App.4th 93, 104: "In 1975, following an intensive study by the California Law Revision Commission, the Legislature adopted a comprehensive statutory scheme (§ 1230.010 *et seq.*) covering virtually every aspect of eminent domain law."

planning and property acquisition process for public projects. Disallowing precondemnation access would create major problems for public entities charged with carrying out these projects.

B. Planning for Large-Scale Public Projects Can Be Extremely Complex and Take Years to Complete

Courts have repeatedly recognized that the planning for and approval of public projects often take many years. For example, in *Golden Gate Bridge, Highway and Transportation District v. Muzzi* (1978) 83 Cal.App.3d 707, 712-713, involving the acquisition of private property for the construction of a ferry terminal, the Court of Appeal noted:

> As the present record indicates, condemnation of property and the construction of facilities for water transportation involve the approval and acquisition of permits from numerous governmental agencies. Approval and permit requirements are especially strict where the planned facilities front on a body of water. In the present case there was testimony that respondent's terminal project required the approval of dozens of different agencies, including the State Lands Commission, Army Corps of Engineers, and Bay Conservation and Development Commission. Several of these agencies required as a condition of their approval that environmental mitigation measures be taken.

In *Johnson v. State of California* (1979) 90 Cal.App.3d 195, 198, involving the acquisition of private property for a highway project, the Court of Appeal stated:

> The actions described in the pleadings are part of the legitimate planning process for a public improvement.... Throughout the design phase of a highway project, alterations and modifications of the proposed project may occur; in recent years, with considerable frequency, route location adoptions have been rescinded by the highway commission as a result of public disapproval of a project, environmental problems, or fiscal constraints. In some cases, routes have been deleted from the state highway system by the Legislature after considerable design work has been done on a

proposed project and substantial amounts of right-of-way have been acquired.

In *Contra Costa Water District v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 896, involving the acquisition of private property for a reservoir project, the Court of Appeal addressed the issue of whether the condemning agency engaged in unreasonable precondemnation delay under *Klopping v. City of Whittier* (1972) 8 Cal.3d 39. The court stated: "The Water District's evidence revealed that it was engaged in a project of immense proportions, totaling roughly the square mileage of San Francisco, requiring acquisition of property from many separate ownerships and obtaining numerous permits and approvals legally required to implement such a project. Water District personnel testified that the acquisition of Vaquero's property was the most difficult and complex property acquisition for the entire project."

The same is true for other large transportation and infrastructure projects, including subway and light rail projects; heavy rail projects; rail terminal projects; bus terminal projects; freeway and overcrossing projects; roadway projects; subsurface pipeline and utility projects; and water projects. A ruling that the Eminent Domain Law's precondemnation entry statutes are unconstitutional will be a "game-changer" in terms of public entities' ability to plan for and complete large infrastructure projects on a timely basis.

C. Timing is Everything: Public Agencies Must Plan Carefully to Ensure Properties Needed for Public Projects Can be Acquired by Eminent Domain in a Timely Manner

Public entities must engage in extensive and costly planning and preparation to acquire property by eminent domain for public projects. Amici's member public agencies have historically relied upon the precondemnation entry statues, in the absence of property owner

agreement, to gain access necessary to perform exploratory studies early in the planning, design, and engineering phase of a project and as part of the evaluation of a project's potential environmental impacts. These exploratory studies often include soil borings to aid the evaluation of subsurface conditions to determine the suitability of property for a particular project. By conducting precondemnation testing, an agency can determine whether a particular location is suitable, and can plan and design a project to avoid adverse impacts. For example, adequate subsurface testing during the environmental review stage can help identify economically feasible alternatives for a pipeline location to avoid tunneling through a water table or unsuitable rock formation, or for an infill housing project to determine the presence of contaminated soil.

Some of the actions which must be taken are summarized below.

1. Determination of the Public "Project" and Compliance With the California Environmental Quality Act

The California Environmental Quality Act ("CEQA") was enacted in 1970, and is set forth in Public Resources Code sections 21000-21189.3. Under CEQA, the Legislature has declared that it is the policy of this state to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." (Pub. Res. Code section 21001(a); *Laurel Heights Improvement Association of San Francisco, Inc. v. The Regents of the University of California* (1988) 47 Cal. 3d 376, 391-392 – "*Laurel Heights I*".)

In *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, the court of appeal reiterated the importance of an environmental impact report ("EIR") in analyzing the potential environmental impacts of a "project," the potential mitigation measures to those impacts, and potential project alternatives. The court of appeal stated in pertinent part:

> The EIR is the heart of the environmental control process. [Citation omitted.] CEQA describes the report's purpose – to provide the public and governmental decision-makers … with detailed information of the project's likely effect on the environment; to describe ways of minimizing significant effects; to point out alternative to the project. [Citations omitted.] (71 Cal.App.3d at 192-193.)

The court of appeal in *County of Inyo* also referred to the CEQA Guidelines (Cal. Admin. Cod, tit. 14, § 15037, subd. (c)) as fleshing out the "project" concept by referring to a project as "the whole of an action" which has a potential for resulting in a physical change in the environment, directly or ultimately. (71 Cal.App.3d at 192.) As further reiterated in *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 98, CEQA forbids piecemeal review of significant environmental impacts of a "project." Rather, CEQA mandates "that environmental considerations do not become submerged by chopping a large project into many little ones – each with minimal potential impact on the environment – which cumulatively may have disastrous consequences." (Citing *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.)

With regard to the "timing" of CEQA compliance, moreover, the Supreme Court of California explained in *Laurel Heights I*: "CEQA requires that an agency determine whether a project may have a significant environmental impact, and thus whether an EIR is required, *before* it approves that project." (47 Cal.3d 376, 394, citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79.) The Supreme Court in *Laurel Heights I* further acknowledged that "environmental resources and the public fisc may be ill served if the environmental review is too early. On the other hand, the later the environmental review process begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that

could be dealt with more easily at an early stage of the project... for that reason, 'EIRs should be prepared as early in the planning process as possible to enable environmental considerations to influence project, program or design.'" (47 Cal.3d at 395; *see also Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 130.)

Also, with regard to "timing," a well-established line of appellate court published decisions have held that a public entity must comply with CEQA on a public project *before* acquiring property by eminent domain for that project. For example, in *City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, the court of appeal held that the trial court did not err in dismissing the city's eminent domain proceedings on the ground that the city violated CEQA. In *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Ca.App.3d 577, moreover, the court of appeal held that a landowner in an eminent domain proceeding could properly challenge the airport authority's "right to take" the property by eminent domain by alleging CEQA non-compliance as an affirmative defense in the landowner's answer to the airport authority's complaint in eminent domain.

In effect, public entities are generally precluded from acquiring private property by eminent domain for a public project unless there has first been CEQA compliance with regard to the project. Significantly, the very types of activities permitted under the precondemnation entry statues are used by public entities in order to conduct environmental review for CEQA purposes.

2. Appraisal and Negotiation Requirements

Government Code §7267.2(a)(1) requires that the public entity make an offer to purchase the property at its full approved appraised value. To do this, the public entity must first retain a real estate appraiser to value the property and/or property interests needed for the proposed public project.

After the property needed has been appraised, the public entity must make a written offer to the owner of record for the full-appraised value of the property to be acquired. (Government Code §7267.2(a)(1), (b).) At the time of making the offer, the public entity must also provide the property owner with an Informational Pamphlet "detailing the process of eminent domain and the property owner's rights under the Eminent Domain Law." (Government Code §7267.2(b).) A public entity must "offer to pay the reasonable costs, not to exceed five thousand dollars ($5,000), of an independent appraisal ordered by the owner of the property that the public entity offers to purchase under the threat of eminent domain...." (Code of Civ. Proc. §1263.025.)

Further, Government Code sections 7267 and 7267.1 provide that a public entity shall make every reasonable effort to expeditiously acquire property by negotiation and agreement. For this reason, the public entity will typically allow for some period of time to try and negotiate a mutually acceptable purchase and sale before going forward with eminent domain proceedings.

3. Notice and Hearing on Resolution of Necessity

If the negotiations are unsuccessful, the public entity must give notice of its intent to adopt a resolution of necessity at a public hearing of it governing body. (Code of Civ. Proc. §1245.235(a).)[2] The public entity must plan in advance to make sure the notice of intent is sent by first-class

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[2] Under Code Civil Procedure section 1240.040, "[a] public entity may exercise the power of eminent domain only if it has adopted a resolution of necessity that meets the requirements of Article 2 (commencing with Section 1245.210.)" Under Code of Civil Procedure section 1245.220, moreover, "[a] public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article."

mail to each person whose property is to be acquired and whose name and address appears on the last equalized county assessment roll notice. (Code of Civ. Proc. §1245.235(a).) Failure by the landowner to file a written request to appear and be heard within 15 days after the notice of intention was mailed will result in waiver of the right to appear and be heard. (Code of Civ. Proc. §1245.235(b)(3).) For this reason, most eminent domain practitioners on behalf of public entities take the position that the notice of intent must be mailed at least 15 days before the hearing on the resolution. (Code of Civ. Proc. §1245.235(b)(3).)

In order to adopt a resolution of necessity, the public entity must make certain factual findings and set those forth in its resolution of necessity. (Code of Civ. Proc. §§1245.030, 1245.230(c).) Specifically, the resolution of necessity must include a declaration that the governing body of the public entity has found and determined each of the following:

(1) The public interest and necessity require the proposed project;

(2) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and

(3) The property described in the resolution is necessary for the proposed project.

As a practical matter, in order to ensure that these findings are properly considered, staff for the public entity will spend a substantial amount of time and effort preparing a "staff report" which sets forth the facts supporting the findings. Such staff report is particularly important where a landowner objects to a public entity's resolution of necessity on grounds that the resolution's adoption or contents were allegedly influenced or affected by "gross abuse of discretion" by the governing body. (Code of Civ. Proc. § 1245.255(b).) In that case, the trial court's review of whether

adoption of the resolution of necessity was arbitrary, capricious, or entirely lacking in evidentiary support will be "based on the record at the hearing on the resolution." (*Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141, 148-151.)

4. Complaint in Eminent Domain

Assuming the public entity adopts a resolution of necessity, it may then file a complaint in eminent domain. Under Code of Civil Procedure section 1250.110, an eminent domain proceeding is commenced by filing a complaint with the court.

5. Motion for, and Hearing on, Order for Prejudgment Possession

In 2006, the California Legislature made significant changes to the process by which public entities can obtain "prejudgment possession" of property in an eminent domain case. If the public entity requires prejudgment possession of the property for its project, it must file a formal motion for an order for possession. (Code Civ. Proc. §1255.410(a).) If the property is "unoccupied," the hearing on a motion for possession cannot be "less than 60 days after service of the motion on the record owner." If the property is "lawfully occupied by a person dwelling thereon or by a farm or business operation," the hearing on the motion cannot be less than 90 days" after service of the motion. (Code Civ. Proc. §1255.410(b).)

If the motion for the order for possession is not opposed within 30 days of service of the motion, the court may grant the order if the public entity is entitled to take the property by eminent domain and has made a deposit of the probable amount of just compensation. (Code Civ. Proc. §1255.410(d)(1).) In that case, the effective date of the order for possession is "not less than 30 days" for property that is "lawfully occupied by a person dwelling thereon or by a farm or business." (Code Civ. Proc. §1255.450(b).) In "all other cases," the order for possession can become

effective in "not less than 10 days" after service of the order. (Code Civ. Proc. §1255.450(b).)

If, on the other hand, the motion for the order for possession is opposed within 30 days of service of the motion, the court may grant the motion only if it makes the following additional findings: (1) "There is an overriding need for the plaintiff to possess the property prior to the issuance of the final judgment in the case, and the plaintiff will suffer substantial hardship if the application for possession is denied or limited, and (2) "The hardship that the plaintiff will suffer if possession is denied or limited outweighs any hardship on the defendant or the occupant that would be caused by the granting of the order for possession." (Code Civ. Proc. § 1245.410(d)(2).)

If the public entity can support these additional findings, the general rule is that the effective date of the order for possession is the same as for an "unopposed motion," *i.e.*, "not less than 30 days" for property that is unlawfully occupied by a person dwelling thereon or by a farm or business;" and "not less than 10 days" in "all other cases."

This means that, for property which is "lawfully occupied" and for which the owner files an opposition to a public entity's motion for prejudgment possession, the public entity cannot take possession of the property until *120 days* (or, effectively, 4 months) after it filed the motion.

As a practical matter, as a result of the legislative changes to motions for possession, a public entity must engage in extensive and costly planning prior to filing a motion for prejudgment possession. The public entity must not only determine *when* it needs possession, but must also now carefully choreograph this need with section 1255.410(b)'s timing requirements. Moreover, if the motion is opposed, the public entity must assess the relative "hardship" to the public entity and the landowner, and explain to the trial court why the hardship that the public entity will suffer, if

possession is denied or limited, "outweighs" any hardship on the landowner or occupant if possession is granted. This assessment can involve significant analysis, discovery, briefing, time, effort, and cost.

6. Trial Preparation and Trial

If the parties are unable to settle, it could take one year from the date of the complaint to get to trial. While eminent domain cases are entitled to statutory precedence over all other civil actions (Code Civ. Proc. §1260.010), it is not uncommon for a trial in an eminent domain case to start approximately one year (and sometimes more) after the Complaint in Eminent Domain is filed.

If a landowner properly asserts, and does not waive, right to take objections, the trial will be bifurcated. Pursuant to Code of Civil Procedure section 1260.110, the Court shall hear and determine all objections to the right to take prior to the determination of the issue of compensation. If the right to take objections are overruled, a jury will determine the value of the property. (*People v. Ricciardi* (1943) 23 Cal.2d 390, 402.) Assuming a public entity need not address any potential right to take objections, it can focus on the jury trial regarding valuation.

D. Requiring Public Entities to File One Eminent Domain Action to Acquire Property for Precondemnation Activities, and a Subsequent Eminent Domain Action to Acquire Property for the Public Project, Would Result in Significant and Hopelessly Unpredictable Delays and Costs for Public Projects

The suggestion that public entities should be compelled to commence eminent domain proceedings in order to secure possession of property for "precondemnation activities" is utterly untenable.

First, as previously explained, a public entity generally cannot commence eminent domain proceedings prior to compliance with the environmental review process of a public project under CEQA. Moreover,

because CEQA precludes "chopping a large project into many little ones" (*Bozung v. Local Agency Formation Com.*, *supra*, 13 Cal.3d 263, 283-284), a public entity cannot simply segregate a public project for eminent domain purposes. In other words, a public entity cannot properly advocate that the precondemnation activities are "one project" for purposes of an eminent domain action, and that the actual public project for which the activities are necessary is a different project for which the power of eminent domain can be exercised. There can only be one project, and a public entity generally cannot commence eminent domain proceedings to acquire private property for that project absent CEQA compliance.

Second, requiring public entities to commence two separate eminent domain proceedings (one for the precondemnation activities, and another for the actual public project) would result in significant delays and dramatically higher costs for public project. *Amici* have attempted herein to set forth the general eminent domain process and timeline which public entities must plan for in considering property acquisition for public projects. As previously stated, for properties which are "lawfully occupied," it could take 120 days (or 4 months) for a public entity to take prejudgment possession of property from the time it files a motion for prejudgment possession. It is difficult, if not impossible, to comprehend requiring public entities to engage in this process *two times* for every property on every public project requiring precondemnation activities.

Public entities would not just have to potentially file two separate eminent domain actions – at different times – on the same property. They would also need two separate appraisals and negotiation processes; two separate motions for prejudgment possession (one to obtain possession of the property rights needed to conduct the precondemnation testing, and the other to obtain possession of the property rights needed for the public

project itself); and two separate eminent domain trials. This is simply not realistic, efficient, or feasible.

The delays and costs associated with having to do this would not just be significant, but hopelessly unpredictable.

III. CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this court reject the flawed analysis of the court of appeal, and uphold the constitutionality of the Eminent Domain Law's precondemnation entry statutes.

Respectfully submitted,

Dated: March 25, 2015

MEYERS NAVE RIBACK SILVER & WILSON

By: _____

David W. Skinner
Attorneys for *Amici Curiae*
League of California Cities
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CERTIFICATE OF COMPLIANCE
California Rules of Court, 8.204(c)(1)
For Case Number S217738

I hereby certify that the *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT STATE OF CALIFORNIA, BY AND THROUGH DEPARTMENT OF WATER RESOURCES has been prepared using proportionately one-and-a-half-spaced 13 point times roman style. According to the "word count" feature in Word software, this brief contains 4,277 words up to and including the signature lines that follow the Brief's Conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 25, 2015.

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In compliance with California Rule of Court 8.208(d) and (e), *Amici Curiae*, League of California Cities, California State Association of Counties, Association of California Water Agencies know of no persons or entities that must be listed in this certificate under subdivisions (d)(1) and (2)(2) of California Rules of Court, Rule 8.208.

Dated: March 25, 2015 MEYERS NAVE RIBACK SILVER & WILSON

By: _____
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CERTIFICATE OF SERVICE
Declaration of Service by Mail

I, the undersigned, declare that I am and was at the time of service of the papers herein referred to over the age of 18 years and not a party to the action, and I am employed in the County of Alameda, California, within which county the subject mailing occurred. My business address is 555 12th Street, Suite 1500, Oakland, California. I am familiar with Meyers Nave Riback Silver & Wilson's practice for collection and processing correspondence for mailing with the United States Postal Service and that the correspondence shall be deposited with the United States Postal Service the same day in the ordinary course of business.

On January 16, 2013, I caused to be served:

by placing a true copy of each document in a separate envelope addressed to each addressee as follows:

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I then sealed each envelope and, with postage thereon fully pre-paid, placed each for collection and mailing on March 25, 2015, at my business address shown above, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 25, 2015.

Duyen Truong