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September 5, 2023

Via TrueFiling

Honorable Chief Justice Patricia Guerrero and
Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

Re: *South Lake Tahoe Property Owners Group v. City of South Lake Tahoe* (2023) 92 Cal.App.5th 735 (Case Nos. S281205 / C093603)

Amicus Curiae Letter of League of California Cities (Cal Cities) Supporting City of South Lake Tahoe's Petition for Review

Dear Chief Justice Guerrero and Associate Justices:

I. INTRODUCTION

The League of California Cities (Cal Cities) submits this letter as *amicus curiae* in support of the Petition for Review filed by the City of South Lake Tahoe ("City"), pursuant to Rule 8.500, subd. (g) of the Rules of Court. Cal Cities urges the Court to review the Third District Court of Appeal's opinion in *South Lake Tahoe Property Owners Group v. City of South Lake Tahoe* (2023) 92 Cal.App.5th 735 ("Opinion")[1] with respect to Section III, entitled "Exception for Residents." Cal Cities supports the City's Petition for Review pursuant to Rule 8.500, subd. (b)(1) of the Rules of Court on the grounds that it is "necessary to secure uniformity of decision," and "to settle an important question of law."

In Section III, the Court of Appeal vastly and improperly expanded the reach of the dormant Commerce Clause into local land use regulations that reasonably permit resident owners of property to rent their homes for up to 30 days per year. By holding that these land use regulations constitute *per se* facial discrimination against non-resident owners under the dormant Commerce Clause, the Court erroneously applied the dormant Commerce Clause to purely local legislation and failed to recognize that resident and non-resident owners are not similarly situated.

[1] When citing to the Opinion below, we cite to the pages in the official reporter.

As discussed in Section IV-A, whether such land use regulations constitute *per se* facial discrimination under the dormant Commerce Clause is an important question of law that affects how cities regulate land uses, particularly for cities like South Lake Tahoe whose popularity as vacation destinations brings both benefits and challenges—including housing-price inflation and housing-supply pressure exacerbated by the vacation rental and sales market.

In addition, as discussed in Section IV-B, the Court of Appeal's Opinion is inconsistent with Ninth Circuit Court of Appeals' precedents, including both longstanding dormant Commerce Clause cases and a recent decision holding that the City of Santa Monica's short-term rentals ordinance did not violate the dormant Commerce Clause. First, the Opinion conflicts with cases explaining that the Commerce Clause does not apply to legislation that only regulates local conduct (as Measure T does). Second, the Opinion conflicts with a recent Ninth Circuit case holding that resident and non-resident owners are not similarly situated with respect to the rental market. By granting review, this Court can ensure that the case law governing California cities is consistent.

II. STATEMENT OF INTEREST

Cal Cities is an association of 477 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.

III. BACKGROUND

A. Measure T

This case involves a citizen's initiative, Measure T, which amended the City of South Lake Tahoe's land use regulations pertaining to short-term vacation rental permits.

As described in the Opinion, Measure T prohibits short-term rentals in the City's residential zones. (Opinion at 742.)[2] However, Measure T creates a limited exemption for owners who use their homes as their primary residence, authorizing them to apply

[2] A short-term rental is for less than 30 days. (*Ibid.*)

for an annual permit to rent their home on a short-term basis, for not more than 30 days annually. (*Id.* at 742-43, 744, 754.) This limited exemption is not available to owners who, rather than reside on their property, use their property for vacationing themselves, revenue generation by renting to third parties for long-term or seasonal use, or anticipated appreciation while the property remains vacant. (See *ibid.*)

Legislative policies and purposes underlying the voters' enactment of this citizen-initiative include addressing the impacts of short-term rental uses in the City, such as negative effects on (i) the City's housing-supply (particularly the local workforce), (ii) the character of the City's residential neighborhoods, and (iii) noise, traffic, parking, and other secondary impacts. (*Id.* at 743.)

B. The Third District Court of Appeal's Opinion

The Court of Appeal held that the Measure T "discriminates on its face against interstate commerce" by "mandat[ing] differential treatment of similarly situated in-state and out-of-state economic interests in a way that wrongfully benefits the former and burdens the latter based solely on the latter's out-of-state domicile." (Opinion at 761.) The Court concluded that "Measure T's permanent resident exception facially discriminates against interstate commerce," and is thus "*per se* invalid unless [on remand] the City can justify the discrimination by showing that the resident exception advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." (*Id.* at 766-67.)

IV. Analysis

A. The Petition raises an important question that affects how cities regulate land uses, particularly cities that are popular vacation destinations.

In enacting Measure T, the City's voters exercised their reserved, inherent, and constitutional power of initiative[3] to enact legislation to address their policy concerns—through regulation of land uses to promote the public welfare—pursuant to Article XI, section 7 of the California Constitution. (See also *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 455, 461, *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 603-07, and other cases discussing cities' broad authority to regulate land uses to promote the public welfare.)

[3] *Rossi v. Brown* (1995) 9 Cal.4th 688, 695-97.

In cities such as the City of South Lake Tahoe whose popularity as a vacation destination brings both benefits and challenges—including housing-price inflation and housing-supply pressure exacerbated by the vacation rental and sales market—cities' regulatory authority to legislate to support retention of their residential housing stock is deserving of continued deference and respect.

But in Section III of its Opinion, the Court of Appeal gave a green light to challenges to such reasonable land use regulation through the dormant Commerce Clause, ruling that Measure T "discriminate[s] against interstate commerce on its face, [] virtually a per se rule of invalidity." (Opinion at 760, internal quotation marks, citation, and italics omitted.) This novel use of the Commerce Clause to challenge land use regulation raises important issues of first impression in this Court with respect to cities' uses of their police power to advance the general welfare, and to preserve and promote residential uses.

Just as this Court has granted review to determine if the Takings Clauses of the federal and state Constitutions apply to land use regulations that require developers to include affordable housing in their projects or to pay in-lieu fees for local governments to do so,[4] this Court should grant review in this case. Indeed, given the ongoing housing crisis and ever-increasing number of state statutes pushing cities to support the development and retention of housing, coupled with the housing-related challenges facing cities that are popular as vacation destinations, addressing this issue of law is of great legal and practical importance.

B. The Opinion is inconsistent with Ninth Circuit precedents.

1. The Opinion is inconsistent with case law explaining that the Commerce Clause does not apply to legislation that only regulates local conduct.

The Court of Appeal acknowledged that the purpose of the Commerce Clause is to restrict state or local laws that "that 'imped[e] free private trade in the national marketplace,' " and that "it accomplishes this purpose by prohibiting a state [or local government] from enacting laws that discriminate against or unduly burden interstate commerce." (*Opinion* at 759, quoting *Reeves, Inc. v. Stake* (1980) 447 U.S. 429, 437, and citing *South Dakota v. Wayfair, Inc.* (2018) 138 S.Ct. 2080, 2090-91.)

[4] *California Building Industry Assn. v. City of San Jose, supra.*

However, the Court failed to consider that Measure T only directly regulates local commerce (short-term rentals in the City), and thus does not directly regulate or facially discriminate under the dormant Commerce Clause. As the Ninth Circuit has explained, even when state law has extraterritorial effects, it passes Commerce Clause muster when, as here, those effects result from the regulation of in-state conduct." (*Chinatown Neighborhood Ass'n v. Harris* (9th Cir. 2015) 794 F.3d 1136, 1145.) Thus, a state law that prohibits a commercial product from merely being transported through the state does not violate the Commerce Clause, despite the extra-territorial effects, because the law only regulates in-state conduct. (*Id.* at 1145-46 [district court properly dismissed complaint challenging California's "Shark Fin Law," which prohibits sale, trade, or distribution of shark fins within the State]; see also *Rocky Mountain Farmers Union v. Corey* (9th Cir. 2013) 730 F.3d 1070, 1077-78, 1101-04 [California's Low Carbon Fuel Standard does not facially discriminate against out-of-state ethanol producers because the law only applies to fuels consumed in California].)

The Opinion is inconsistent with the Ninth Circuit's opinions in *Chinatown Neighborhood Ass'n* and *Rocky Mountain Farmers Union, supra*. In those cases, the court held the intra-state regulations had substantial extra-territorial impacts but did not violate the dormant Commerce Clause. Here, Measure T only directly regulates short-term rentals of property within the City. Any owner can rent their residential property for long-term and seasonal use. For example, an owner whose primary residence is elsewhere in California may rent the property for months at a time to persons who wish to enjoy the summer or winter recreational opportunities in and around South Lake Tahoe. But only if an owner uses their property as a primary residence may the owner rent the property on a short-term basis (upon issuance of a permit), for up to 30 days annually, while out of town for work or pleasure. These regulations on rental activity thus only apply directly to commercial activity within the City, with limited—and irrelevant—extra-territorial impacts.

2. The Opinion is inconsistent with case law regarding similarly-situated persons.

The Court of Appeal recognized that the Commerce Clause prohibits discrimination only as to similarly situated persons engaging in commercial activity, which " 'preserve[s] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.' " (Opinion at 760, quoting *General Motors Corp. v. Tracy* (1997) 519 U.S. 278, 298-99.)

However, the Court of Appeal's conclusion that the resident and non-resident owners are similarly situated conflicts with other precedents. In *Rosenblatt v. City of*

Santa Monica, the Ninth Circuit considered whether Santa Monica's short-term rental regulations violated the dormant Commerce Clause. There, the regulations permitted short-term rentals only where a primary resident, whether an owner or tenant, remained in the home while it was rented out. (*Rosenblatt v. City of Santa Monica* (9th Cir. 2019) 940 F.3d 439, 442, 451.) Under these conditions, a non-resident owner who used the property as a vacation home, instead of their primary residence, could not rent the property on a short-term basis to generate revenue, whereas a resident-owner could, including by renting a room or rooms while residing there. For a non-resident owner to extract value from short-term renting, they would need to have a tenant-resident be the host. The Ninth Circuit rejected the claim that resident and non-resident owners were similarly situated, finding that an owner who resides in the subject property is not similarly situated to one who does not. (*Ibid.*)

Here too, resident and non-resident owners are not similarly situated. Non-resident owners have options to rent their properties for long-term or seasonal rentals—options not similarly available to resident owners—which rental income the non-resident owners can use to offset the costs of owning a second home. Further, resident owners' more limited ability to rent their property—up to 30 days per year upon issuance of a permit—provides an opportunity for the resident owners to offset the costs of their primary residence while they are away from the City for work or pleasure.

Accordingly, the Court of Appeal's decision is inconsistent with the Ninth Circuit opinion in *Rosenblatt*.

Rather than apply the dormant Commerce Clause consistent with *Rosenblatt*, the Court of Appeal opted to follow the Fifth Circuit Court of Appeals' decision in *Hignell-Stark v. City of New Orleans* (5th Cir. 2022) 46 F.4th 317. (See Opinion at 766.) Thus, unless this Court grants review, precedent arising out the Fifth Circuit Court of Appeals will have become California law, even though that precedent is not consistent with the Court of Appeals that adjudicates issues of federal law that arise within California.

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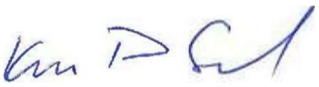
V. CONCLUSION

Amicus curiae Cal Cities urges this Court to grant the City of South Lake Tahoe's Petition for Review.

Sincerely,

BURKE, WILLIAMS & SORENSEN, LLP



Kevin D. Siegel

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to this action. My business address is 1 California Street, Suite 3050, San Francisco, CA 94111. My Email is THenry@bwslaw.com.

On September 5, 2023, I served the document described as ***AMICUS CURIAE*** **LETTER OF LEAGUE OF CALIFORNIA CITIES (CAL CITIES) SUPPORTING CITY OF SOUTH LAKE TAHOE'S PETITION FOR REVIEW**

on the following parties in this action as designated below and in the following manners:

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By First Class Mail: By

By First Class Mail: By placing the envelope for collection and mailing on the date and at my address shown above following our ordinary business practices. I am completely familiar with Burke, Williams & Sorensen, LLP for collecting and processing correspondence for mailing pursuant to which the envelope would be deposited with the United States Postal Service the same day in the ordinary course of business.

The Honorable Judge Dylan Sullivan
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 5, 2023, at San Francisco, California.

/s/ Theresa V. Henry