No. S129448

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ACTION APARTMENT ASSOCIATION, INC. and DOREEN DENIS,
Plaintiffs, Appellants, and Respondents

v.

CITY OF SANTA MONICA,
Defendant, Respondent, and Petitioner

On Petition for Review of Decision of the Court of Appeal
Second District, Division Five
Case No. BC274036

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
and
AMICUS CURIAE BRIEF
of
LEAGUE OF CALIFORNIA CITIES

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Application of Leave to File Amicus Curiae Brief

To the Honorable Chief Justice Ronald M. George and Associate Justices of the California Supreme Court:

The League of California Cities respectfully seeks this Court's permission to file the attached amicus curiae brief in support of the City of Santa Monica. The League submits its attached *amicus curiae* brief, which is based on the League's experience and perspective, in the hope that it may help the Court evaluate the appellate court's conclusion that the litigation privilege, which heretofore has been held only to bar derivative tort actions, also bars third-party, non-tort, government law-enforcement actions.

That conclusion, which no other court has previously reached, is a new, radically expansive reading of the litigation privilege. If adopted by this Court, that reading would substantially impair local governments' ability to enforce laws intended to ensure the availability of safe, affordable housing—especially for this state's most vulnerable citizens, those who lack the wherewithal to vindicate their rights by filing malicious prosecution actions after being harassed from their homes by sham notices to quit and false threats of baseless eviction actions. And, while this case arises from a specific law related to rent control, the sweeping new interpretation of the litigation privilege advocated by Action Apartment Association and suggested by the appellate court may have unforeseen

ramifications far beyond the context of this case, extending to nearly all areas of local law and cities' law enforcement efforts.

The League files this separate brief as *amicus curiae* in order to raise arguments not addressed in the briefs submitted by the parties. The League believes that this brief will help the Court decide this case by framing the issue in a way that is simpler and narrower than suggested by the parties' briefs.

Accordingly, the League respectfully requests that this Court grant leave to file the attached *amicus curiae* brief.

Dated: October 3, 2005

By: _____
J. Stephen Lewis
For *Amicus Curiae*
League of California Cities

Identification of Amicus Curiae

The League is an association of all 478 California cities created to provide unified advocacy for local government and their constituents. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all parts of California. The Committee monitors appellate litigation affecting municipalities and identifies those that are of statewide significance.

In California, local government plays a primary role in ensuring the availability of safe and affordable housing. That role is specifically recognized in state law; for example, in the requirement that local governments create and adhere to a general plan that includes a defined housing element.[1] It is also recognized more generally in the California Constitution, which gives local government the authority to enact laws to secure the public health, safety, and welfare.[2] That role has never been more apparent to local government and the people alike than in the present state-wide housing shortage.

The League is in a unique position to provide insight to this Court on the effects of expanding the litigation privilege to prevent cities from enforcing their tenant-protection laws. The League urges that the decision of the Court of Appeal in this matter be reversed.

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[1] California Government Code § 65588

[2] California Constitution, Art. XI, § 7

Issue

This appeal presents a single, narrow, and simple question: Does the litigation privilege—which our courts have so far limited to derivative, private-party *tort* actions—preempt local government agencies from initiating *non-tort* enforcement, such as a criminal action, simply because the offending event occurred in connection with litigation? Under this Court's litigation-privilege jurisprudence, the answer to this question is "no." Because the Court of Appeal reached the contrary conclusion in *Action Apartment Association, Inv. v. City of Santa Monica*, that decision should be reversed.

Preliminary Statement

Like many local governments in this state, Santa Monica employs the limited form of rent control known commonly as "vacancy decontrol." Under this system, residential rents are controlled while a tenant remains in place, but may be increased almost without limit when the tenant leaves and the unit is re-rented. In order to make the rent control system work, Santa Monica must necessarily limit the grounds for eviction; otherwise, landlords could completely circumvent any rent limitation by simply evicting tenants with low rents. Thus, as in all local jurisdictions with some form of residential rent control, Santa Monica allows only for-cause evictions. And in order to ensure that landlords do not circumvent eviction

limitations, the city makes it illegal for landlords to induce tenants to leave their rental units through intimidation and harassment. In the decision below, the Court of Appeal concluded for the first time that the litigation privilege preempts local governments from filing criminal or injunctive-relief actions to enforce their ordinances against tenant harassment when the harassment consists of fraudulent claims in baseless notices to quit or frivolous eviction actions.

But the courts of this state have never before held that the litigation privilege prevents a government agency from enforcing the law through traditional law-enforcement actions such as criminal or injunctive proceedings. A judicial expansion of the privilege to reach that result here would be a dramatic departure from precedent, and would undermine local governments' constitutional right and mandate to exercise their police power in the public interest.

Argument

I. The litigation privilege applies only to derivative tort actions brought by private parties

Historically, the litigation privilege allowed parties or witnesses in civil litigation to say anything reasonably related to the prosecution of a lawsuit without fear of later being sued for defamation, and for many years, the privilege barred only derivative defamation actions. In the middle of the last century, however, the privilege was for the first time applied to non-

defamation tort actions, and in subsequent decades, the privilege was expanded to cover a wide array of other specific torts.[3] Since at least 1990, the California courts have held that the privilege bars "all torts," except malicious prosecution, arising from anything said during the course (or in anticipation) of litigation.[4]

But while the courts have expanded the privilege's scope, they have not done so with reckless abandon. Each time the privilege's scope was expanded, the courts looked to the public policy behind the privilege; and while they expanded the privilege to effectuate that policy, they recognized that the public policy also acts as an outer boundary that limits the privilege's reach. They have held, for example, that the public policy

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[3] *Albertson v. Raboff* (1956) 46 Cal. 2d 375, 295 P. 2d 405 (extending the privilege to bar slander of title actions); *Agostini v. Stycula* (1965) 231 Cal. App. 2d 804, 42 Cal. Rptr. 314 (inducing breach of contract); *Pettitt v. Levy* (1972) 28 Cal. App. 3d 484, 104 Cal. Rptr. 650 (intentional infliction of emotional distress); *Brody v. Montalbano* (1978) 87 Cal. App. 3d 725, 151 Cal. Prtr. 206 (tortious interference with prospective economic advantage); *Ribas v. Clark* (1985) 38 Cal. 3d 355, 696 P2d 637, 212 Cal. Rptr. 143 (invasion of privacy)

[4] *Silberg v. Anderson* (1990) 50 Cal. 3d 205, 212, 786 P2d 365, 266 Cal. Rptr. 638

behind the privilege does not bar a derivative suit for abuse of process.[5] This court and the Courts of Appeal have noted that the litigation privilege does not apply in "narrowly circumscribed situations, such as extrinsic fraud," as when, for example, an aggrieved party is kept "away from the court by a false promise of a compromise."[6]

Most fundamentally, the courts have consistently limited the privilege's scope to the prevention of derivative *tort* actions. This Court has explained the public policy behind the litigation privilege as follows: "… the effective administration of justice and the citizen's right of access to the government for redress of grievances would be threatened by permitting *tort liability* for communications connected with judicial or other official proceedings." (Emphasis added.)[7]

And that outer boundary—the limitation of the privilege to derivative tort actions—has been noted by the courts consistently. For example, in one of this Court's leading cases interpreting the litigation privilege provided under California Code of Civil Procedure § 47(b), *Rubin*

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[5] *Drum v. Bleau, Fox & Associates* (2003) 107 Cal. App. 4th 1009

[6] *Silberg v. Anderson*, supra, 50 Cal. 3d 205, 214, 786 P. 2d at 370, 266 Cal. Rptr. at 638; *Kachig v. Boothe* (1971) 22 Cal. App. 3d 626, 633, 99 Cal. Rtpr. 393

[7] *Hagberg v. California Federal Bank FSB* (2004) 32 Cal. 4th 350, 81 P. 3d 244, 7 Cal. Rptr. 3d 803

v. Green, it noted that "[f]or well over a century, communications with 'some relation' to judicial proceedings have been absolutely immune from *tort liability* by the privilege codified as section 47(b)."[8] (Emphasis added.) This Court then went on to quote from an earlier opinion in which it had held that the "principal purpose of section 47(b) is to afford litigants . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative *tort actions*."[9] (Emphasis Added.) The list of published decisions that note the privilege's application only to tort actions goes on and on.

It cannot be the case that this Court and the Courts of Appeal have consistently referred to the privilege's bar to derivative tort liability without meaning to limit the privilege to tort actions; the reference occurs too consistently and far too often for that. But if there were any doubt that the privilege stops at tort liability and does not bar third-party government enforcement action, this Court banished that doubt in *Rubin v. Green*, supra. In that case, the Court held that the litigation privilege barred a tort suit brought by a mobile-home park owner against attorneys who had

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[8] *Rubin v. Green* (1993) 4 Cal. 4th 1187, 1193, 847 P. 2d 1044 at 1047, 17 Cal. Rptr. 2d at 831

[9] *Rubin v. Green*, supra, 4 Cal 4th 1187, 1194, 847 P. 2d at 1047, 17 Cal. Rptr. 2d at 831 (quoting from *Silberg v. Anderson*, supra)

allegedly solicited clients to bring suit against the park. But in so doing, the Court noted that the litigation privilege did not bar criminal or administrative enforcement actions for exactly the same litigation-related communications, if the enforcement actions were brought against the attorneys by the district attorney or the State Bar.[10] In the years since, the notion that the civil litigation privilege does not bar third-party, government enforcement action has become a matter of course in this Court's litigation-privilege jurisprudence, with this Court stating as recently as last year that "of course, [the privilege] does not bar a criminal prosecution that is based on a statement or communication, when the speaker's utterance encompasses the elements of a criminal offense."[11]

The Court in *Rubin* did not stop there. It noted also that, while the litigation privilege barred a tort action brought by the aggrieved mobile-home park owner, it did not bar a non-tort *civil* enforcement action brought by the Attorney General, district attorneys, or city attorneys. Nor did the privilege even bar such a non-tort action by a private citizen who was not acting collaterally to the underlying litigation.[12]

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[10] *Rubin v. Green*, supra, 4 Cal. 4th 1187, 1198, 847 P. 2d at 1050, 17 Cal. Rptr. 2d at 834

[11] *Hagberg*, supra, 32 Cal. 4th 350, 361, 81 P. 3d at 249, 7 Cal. Rptr. 3d at 809

[12] *Id*, 4 Cal. 4th 1187, 1204, 847 P. 2d at 1054, 17 Cal. Rptr. 2d at 838

Nonetheless, against an unbroken line of precedent limiting the litigation privilege's application to derivative, private-party tort actions, the Court of Appeal, below, concluded that the privilege applies not only to those actions, but to any action other than a malicious prosecution action, brought by anyone, arising from a three-day notice or a lawsuit for eviction. This conclusion not only contradicts this Court's litigation privilege jurisprudence, but also the public policy on which the privilege is based.

II. The Santa Monica ordinance does not offend the public policy behind the litigation privilege, which is to allow free access to the courts for the resolution of disputes and the ascertainment of truth

As noted above, the courts have expanded the litigation privilege's reach well beyond the language used by the Legislature. But this judicial expansion has not been wild or haphazard; it has always been guided by the touchstone of the public policy on which the privilege is based. And that policy is to allow access to the courts for "resolution of disputes and the ascertainment of truth."[13] Wisely, the privilege has not been allowed to expand beyond the parameters of that policy.

For example, the privilege cannot be used merely as a shield for fraud. A party who makes statements in threats to sue merely to gain a negotiating advantage, when no litigation is actually in good faith

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[13] *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal. App. 4th 15, 33, 61 Cal. Rptr. 2d at 529.

contemplated, cannot invoke the privilege as a shield to subsequent liability—not even private tort liability.[14] The Court of Appeal explained the reason for this rule in *Fuhrman v. California Satellite Systems*: "no public policy supports extending a privilege to persons who attempt to profit from hollow threats of litigation."[15] In other words, the laws of the State of California confer neither the right to induce people to give up their legal rights through fraud, nor the right to bully people into foregoing those rights by falsely threatening to use the might of the judicial system unless they do so. Thus, there are situations in which even derivative tort actions are not barred by the litigation privilege.

In each case where the courts have determined that the privilege does not apply even to bar private tort liability, there has been a consistent theme: the communication sued on (or, in the case of a malicious prosecution action, the litigation containing the communication itself) was not made in pursuit of access to the courts for the resolution of a genuine dispute or ascertainment of truth, but to perpetrate a fraud.

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[14] *Id*., 53 Cal. App. 4th 15, 35, 61 Cal. Rptr. 2d at 530 ("even a threat to file a lawsuit would be insufficient to activate the privilege if the threat is merely a negotiating tactic and not a serious proposal made in good faith contemplation of going to court.")

[15] *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 422, 231 Cal. Rptr. at 119 (fn. 5)

A. Anti-harassment ordinances like Santa Monica's are not barred by the litigation privilege because they do not deny access to the courts, but prevent harassment and fraud.

The purpose of Santa Monica's ordinance forbidding landlords to serve tenants with baseless notices to quit and wholly baseless eviction actions appears to be undisputed. The City can control rents only during the course of a given tenancy; if a landlord wishes to increase rents beyond the controlled amount, his or her only way to do so is to evict the tenant. In order to prevent landlords from evicting tenants whenever they simply wish to increase the rent—a practice that would make the entire rent control law unenforceable—the city limits the grounds on which a tenant can be evicted. The ordinance at issue here is intended to prevent landlords from doing an end run around those eviction controls, and thus around the rent control law as a whole.

To accomplish this goal, Santa Monica's anti-harassment ordinance prohibits landlords from: "tak[ing] action to terminate any tenancy including service of any notice to quit or other eviction notice for bringing any action to recover possession of a rental housing unit *based upon facts which the landlord had no reasonable cause to believe to be true* or upon a legal theory which is *untenable under the facts known to the landlord*." [16]

[16] Santa Monica Municipal Code § 4.56.010-040 (Emphasis added)

Under that ordinance, it is not illegal for a landlord to serve a tenant with a notice to quit, even if the notice is factually or legally baseless. It is illegal only for a landlord to use a three-day notice to perpetrate a fraud; i.e., to tell the tenant that his or her tenancy is, or will be, terminated when the landlord *knows* that there is no factual or legal basis for a termination. Such a notice is just the sort of bad-faith negotiating tactic that the courts of this state have held does not enjoy the immunity conferred by the litigation privilege.

Nor does the Santa Monica ordinance purport to bar landlords from actually filing an unlawful detainer action, even if the landlord lacks an eviction basis. Rather, it forbids only an eviction that a landlord files *knowing* that it is baseless. The rationale for making such an eviction illegal is exactly the same as the court's rationale for refusing to extend the litigation privilege to malicious prosecution claims: the unlawful detainer action is not brought to resolve an actual dispute, but to fraudulently deprive the defendant of his or her lawful rights. To apply the litigation privilege in this context would involve a radical redefinition of the privilege's purpose.

III. The Court of Appeal erred by finding a *per se* litigation privilege.

The Court of Appeal concluded that "[t]here is no doubt that the statutory notices which are addressed by the ordinance are covered by the

[litigation] privilege." By this short, simple declarative sentence, the Court seemed to conclude that there is a *per se* privilege that bars any action challenging such notices. But this conclusion is contrary to well-settled litigation privilege jurisprudence.

An eviction notice is, by its nature, a pre-litigation document. As long as ten years ago, in *Laffer v. Levinson, etc.*, the courts of this state determined that the privilege, as applied to pre-litigation statements, is qualified, not absolute.[17] Thus, under *Laffler* and other decisions considering the applicability of the privilege to pre-litigation statements, there is no *per se* privilege that attaches to such statements; the party claiming the privilege must show that the statements are related to litigation that is "actually contemplated in good faith and under serious consideration."[18] Whether litigation has been contemplated is therefore a

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[17] *Laffer v. Levinson, Miller, Jacobs & Phillips et al.* (1995) 34 Cal.App.4th 117, 124, 40 Cal. Rptr. 2d 233.

[18] *Id.; Fuhrman v. California Satellite Systems*, supra,179 Cal.App.3d 408, 421-422, 231 Cal. Rptr. at 118 (overruled on other grounds in *Silberg v. Anderson*, supra); *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 392, 182 Cal. Rptr. at 442; *see Rubin v. Green*, supra, 4 Cal.4th 1187, 1194-1195, 17 Cal. Rptr. 2d at 832.

question of fact, to be determined by the trier of fact *before* the privilege is applied.[19]

But in the decision under review, the Court of Appeal held that the litigation privilege applies as a matter of course to eviction notices, no matter for what purpose they are served, and no matter whether they are created and served with the actual intent to subsequently file an eviction action.[20] That holding is contrary to all other published decisions relating to pre-litigation statements.

The court below seemed to attempt to reconcile its outlying conclusion by noting that previous cases have held that the litigation privilege applies even to a statement that is not made in good faith; i.e., to a statement for which the speaker has no genuine factual basis.[21] Thus, the court concluded, the litigation privilege bars an action based on statements contained in the notice. But, again, the question is not simply whether the statements made in a three-day notice are made in good faith, but whether

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[19] *Laffer v. Miller, Jacobs & Phillips*, 34 Cal.App.4th 117, 124 (1995); *Edwards v. Centex Real Estate Corps*, 53 Cal.App.4th 15, 39-40 (1997).

[20] *Action Apartment Assoc. v. Santa Monica* (2005), previously published at 123 Cal. App. 4th 47, 52, 19 Cal. Rptr. 3d at 746 ("There is no doubt that the statutory notices which are addressed by the ordinance are covered by the privilege.")

[21] Id.

the three-day notice itself is served in *good-faith*—i.e., actual—*contemplation of litigation*. Unless the answer to that question is "yes," the litigation privilege does not apply. When a landlord serves a tenant with a notice to quit, it is in the hope that the tenant will vacate with no judicial action whatsoever. And when the landlord knows that the notice has no factual or legal basis, there is no reason to suppose that the landlord serves the notice with the actual intention of using the notice as part of a verified eviction action filed in court—committing perjury—if the tenant fails to succumb to the landlord's bad-faith tactic. Certainly, such an intention cannot be presumed without a factual inquiry. By applying the privilege on a *per se* basis, with no factual inquiry into whether litigation was actually contemplated, the Court below committed clear error. Because the opinion including that error purports, erroneously, to fundamentally change the litigation privilege's nature and scope, that decision should be reversed.

IV. The Court of Appeal's conclusion that the litigation privilege bars actions for injunctive relief was in error.

Below, the Court of Appeal concluded that "the litigation privilege bars a plaintiff from seeking injunctive relief against privileged communications," and that the Santa Monica ordinance is preempted by the litigation privilege because, under the ordinance, a "landlord is subject to

criminal penalties, a civil lawsuit, and an injunction."[22] This conclusion is in error for three reasons. First, as discussed above, the sort of fraudulent notices and actions forbidden by the ordinance are not "privileged communications" under Civil Code § 47(b). Second, the litigation privilege does not bar *all* judicial actions based on litigation communication, even if that communication is subject to the litigation privilege; the privilege bars only most kinds of derivative tort actions, not non-tort enforcement actions such as criminal proceedings or government-initiated civil enforcement actions.

Finally, the conclusion's premise—that injunctive relief is absolutely barred by the litigation privilege—is faulty and directly contradicted by this Court's precedent. In support of the premise, the Court of Appeal cited this Court's opinion in *Rubin v. Green*, supra. But that opinion stated only that a plaintiff could not "plead around" the litigation privilege bar by cleverly recasting *his own* derivative tort action as an unfair competition claim. This Court explicitly stated that the unfair competition claim for injunctive relief was barred only because the party bringing it was also party to the underlying action who was simply trying to achieve his tort objectives through other means, but that a claim for injunctive relief *could be*

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[22] *Action Apartment Association, Inc. v. City of Santa Monica*, supra, 123 Cal. App. 4th 47, 52-53, 19 Cal. Rptr. 3d at 746-747

maintained by public entities or third parties.[23] The Court of Appeal's conclusion that the litigation privilege bars government criminal or civil injunctive-relief action to enforce the Santa Monica ordinance, is therefore, also incorrect.

V. The expansion of the litigation privilege urged by respondents would leave local government impotent to protect the public interest.

Local government interest in limiting the grounds for eviction is not limited to rent-control jurisdictions. Throughout the state, more and more cities have enacted just-cause eviction ordinances or are considering doing so. The cities have done so not out of an idle desire to regulate landlord-tenant relations, but to respond to a real and growing public crisis. As California's population swells, and as the number of lower-income households increases, the supply of available housing becomes tighter and tighter. Coupled with a booming real estate market that has inflated housing costs, renters who are evicted are increasingly likely to be left temporarily or permanently homeless. Local government has not only a moral interest, but also a practical interest, in preventing homelessness within its borders. One effective way to further that interest has been to prevent landlords from evicting tenants without cause.

Under the expanded new interpretation of the litigation privilege urged by the respondents, a landlord could serve a tenant with a baseless notice to quit and see whether the tenant has the wherewithal to stay on in spite of it, notwithstanding the landlord's implied threat to file an equally

[23] *Rubin v. Green*, supra, 4 Cal. 4th 1187, 1203-1204, 847 P. 2d at 1054, 17 Cal. Rptr. 2d at 839

baseless eviction action. If so, the landlord would then be empowered to file the baseless eviction and see whether the tenant has the wherewithal to mount a defense or the courage to do so against the prospect of his or her name appearing on a tenant blacklist if the defense is unsuccessful. It is easy to imagine that many tenants will think that the better choice is to vacate without a fight and hope to find a more amenable landlord elsewhere. In the case of those tenants who are unsophisticated, poor, immigrant, or otherwise disadvantaged, the likelihood of the tenant successfully being driven away is greater still.

It is insufficient to argue, as the Court of Appeal did, that tenants whose landlords illegally attempt to evict them have the remedy of standing and fighting, then suing for malicious prosecution if they win. As Justice Holmes wrote, the life of the law is not logic, but experience. The decision below may be logical, but it flies in the face of bitter experience. When we consider who of our fellow Californians the just-cause eviction laws protect, we have to ask ourselves, "in light of our real-life experience, how realistic are a vigorous defense and a subsequent malicious prosecution action?" The answer is surely, "not very."

The reality is, the interpretation of the litigation privilege urged by respondents makes these public-welfare laws well-nigh unenforceable; for if that interpretation were adopted, the government, although it has both the constitutional authority and the responsibility to secure the public welfare, could do no more in these cases than stand on the sidelines and leave enforcement of the law up to the states' most vulnerable residents. It is

hard to believe that the California's Constitution or Civil Code § 47(b) intend such a result.

Conclusion

The litigation privilege has never before been held to bar third-party, government enforcement actions of any kind, even when the enforcement action is directed against litigation-related communication. Nor has the privilege ever been held to apply to extrinsically fraudulent statements that are disguised as pre-litigation communications but are in fact attempts to fraudulently induce people to give up their rights under the law. In *Action Apartment*, below, the Court of Appeal expanded the privilege's scope to cover any action of any kind, whether tort or non-tort; brought by any party, whether a private individual or the government; and brought for any purpose. Because that expansion is contrary to the public policy behind the litigation privilege as previously described by this Court, and because it is contrary to this Court's previous decisions, the *Action Apartment* decision should be reversed.

Dated: October 3, 2005

By: _____

J. Stephen Lewis
For *Amicus Curiae*
League of California Cities

Certificate of Compliance with California Rule of Court 29.1(c)(1)

I hereby certify that, as counted by our word-processing system, this Amicus Curiae Brief contains 4,468 words, exclusive of the table, signature block, and this Certification.

Executed on the 3rd day of October, 2005 at West Hollywood, California.

By: _____
J. Stephen Lewis
For *Amicus Curiae*
League of California Cities