**No. E069070**
(Consolidated with Nos. E069074, E069100 & E069108)

**Exempt from Filing Fees**
**Government Code § 6103**

In the Court of Appeal, State of California

FOURTH APPELLATE DISTRICT, DIVISION TWO

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**TESORO LOGISTIC OPERATIONS, LLC**,
*Plaintiff and Appellant*

vs.

**CITY OF RIALTO**,
*Defendant and Respondent*

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Appeals From the Superior Court of the State of California
County of San Bernardino, Case Nos. CIVDS1516839, CIVDS1602980,
CIVDS1603260 and CIVDS1603163
Honorable David Cohn, Judge Presiding

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# APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT; BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT CITY OF RIALTO

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# CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

No entities or persons need be listed in this certificate under California Rules of Court, rule 8.488.

DATED: July 27, 2018

**COLANTUONO, HIGHSMITH & WHATLEY, PC**

*/s/ Holly O. Whatley*
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## APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Under California Rules of Court, rule 8.200(c), the League of California Cities (the "League"), respectfully requests permission to file the attached amicus curiae brief. This application is timely made within 14 days of the filing of the reply brief on the merits.

Counsel for the League have reviewed the parties' briefs and believe additional briefing would assist the Court. The League has a substantial interest in this case because the cities it represents are beneficiaries of business license taxes. Although local government revenue streams vary, business license taxes constitute a significant fraction of city discretionary revenue, funding essential services for city residents, businesses and property owners. Of the 482 cities in the State, approximately 452 impose business license taxes. The League therefore has an interest in the enactment and orderly administration of local business license taxes.

The League writes to urge the Court to affirm the lower court decision to uphold the City of Rialto's business license tax on those operating wholesale liquid fuel storage facilities and affirm the City's power to interpret its own tax ordinances. The League believes the brief will aid this Court and respectfully requests leave to file it.

## IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The League is an association of 474 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. The League 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 cases of state or national significance. The Committee has identified this case as of such significance.

The League is interested because the majority of its members impose business license taxes, which are an important revenue source for the general funds of those cities. Although local government revenue streams vary, local business license tax revenues constitute an important percentage of city and county discretionary revenue, funding essential services for city residents, businesses and property owners.

Cities have an interest in maintaining the long-standing judicial deference to the legislative decisions cities make in designing, interpreting and enforcing their local tax schemes, including business license taxes. So long as a tax complies with constitutional requirements, courts should not allow disgruntled tax payers to second guess or otherwise redesign the taxing scheme to one they would prefer. The League therefore has an interest in the enactment and orderly administration of local business license taxes

to ensure cities retain the flexibility to make policy decisions on how to generate revenue to fund critical public services to their residents.

DATED: July 27, 2018

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# INTRODUCTION

For as long as governments have imposed taxes, those taxed have resisted, often resorting to courts to argue the fault in the imposed levy. Appellants here are no different. But for over one hundred years, California courts have refused to disturb a city's taxing scheme provided it otherwise met constitutional requirements. It is this backdrop that prompts the League to write to emphasize the broader policy context in which this Court must evaluate whether the City of Rialto's ("Rialto") business license tax imposed on those who operate wholesale liquid fuel storage facilities within its boundaries is valid.

The League urges this Court to affirm the trial court's ruling in which it declined to substitute its judgment in place of Rialto's. That deference to the City's creation, implementation and construction of its business license tax ordinance has roots deep in this state's jurisprudence related to local taxes, business license and otherwise. Appellants present no reason to depart from it.

# STATEMENT OF FACTS AND THE CASE, AND STANDARD OF REVIEW

Amicus adopts by reference these portions of the City's Respondent Brief.

# ARGUMENT

## I. THE CONSTITUTION AND STATUTES GRANT CITIES POWER TO DESIGN AND IMPOSE BUSINESS LICENSE TAXES, WHICH TAXES FORM A VITAL LOCAL REVENUE SOURCE

Municipal powers to impose business license taxes to raise revenue have long been a feature of our state's constitution and statutes. For charter cities, Article XI, section 5 of the California Constitution authorizes them to "make and enforce all ordinances and regulations in respect to municipal affairs. . .." (Cal. Const., art. XI, § 5.) Taxation to generate revenue is a municipal affair within the meaning of Article XI. (E.g., *Times Mirror Co. v. City of Los Angeles* ("*Times Mirror*") (1989) 192 Cal.App.3d 170, 178.) For general law cities such as the Rialto, the power comes from Government Code section 37101, first adopted in 1949, where the Legislature expressly authorized cities to "license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city. . .." (Gov. Code § 37101, subd. (a).) Long available to generate revenue, business license taxes form a significant funding source for municipalities throughout the state. For example, in Fiscal Year 2014-15, for those cities that imposed such taxes, they made up on average about three percent of a cities' general fund revenue.[1] For

[1] Business License Tax by City, Revenues as a Percentage of General Revenues (as of April 2017)

Rialto that year, business license taxes made up four percent of its general fund revenue.[2] About 452 of the state's 482 cities impose such taxes.[3] And in Fiscal Year 2016, the most recent date for which the State Controller's Office has published data, municipal business license tax proceeds statewide were just over $1.46 billion.[4]

For those cities that utilize business license taxes, the revenue stream they generate is key. The demands on cities to provide essential municipal services, such as police and fire protection, continue to grow in proportion to their population. Rialto provides a prime example. In 1964, one year before Rialto first adopted a comprehensive business licensing scheme, its population was 23,290.[5] By 1994, the population had almost quadrupled to 91,873 and as of the 2010 census, it was 99,171.[6] Today its population is estimated at 103,132.[7] Courts have long recognized the discretion allowed cities to craft taxes to generate revenue necessary to service their growing populations and to protect the government fisc

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<http://www.californiacityfinance.com/index.php>

[2] (*Ibid*.)

[3] (*Ibid*.)

[4] California State Controller's Office, City Data, Revenues Broken Down by Subcategory, 2016 <https://cities.bythenumbers.sco.ca.gov/#!/year/2016/revenue/0/subcategory_1?vis=pieChart>

[5] City of Rialto Official Website, About Rialto <http://yourrialto.com/city-hall/about-rialto/>

[6] (*Ibid*.)

[7] (*Ibid*.)

through inevitable economic cycles. As set forth below, Appellants offer no theories to support departing from such entrenched jurisprudence here.

## II. COURTS REFUSE TO DISTURB LOCAL BUSINESS LICENSE SCHEMES PROVIDED THE TAXES OTHERWISE COMPLY WITH CONSTITUTIONAL REQUIREMENTS

Courts have long deferred to cities' broad powers on how to design, impose and enforce business license fees. This makes sense. City councils are best situated to make the policy decisions needed when deciding whether to impose a business license tax, and if so, what that tax will look like and how it will be implemented. As the Supreme Court recognized over seventy-five years ago in *Sivertsen v. City of Menlo Park* ("*Sivertsen*") (1941) 17 Cal.2d 197:

> [I]t is not incumbent upon an appellate court, in determining the constitutionality of a license fee or ordinance, to do more than inquire into the reasonableness of such legislation. Each locality has its own individual tax problems and there can never be an absolute equality of taxation. Because of the familiarity of the local legislative bodies with such local problems, their ultimate decisions as expressed by the taxing ordinances should not be easily disturbed.

(*Id.* at p. 203.)

The Supreme Court further explained the bounds of such taxing power in *Fox Bakersfield Theatre Corp. v. City of Bakersfield* ("*Fox*") (1950) 36 Cal.2d 136, where two taxpayer theater operators challenged a business license tax imposed based on the number of tickets sold above a certain price. The court quickly dispensed with the theater owners' complaint that the tax was faulty because, under it, the owners paid a large proportion of the business license taxes collected by the city. (*Id.* at p. 138-39.) The court noted:

> The law is not, as plaintiffs suggest, that there is a requirement of reasonableness of amount of excise taxes levied for revenue by a municipal corporation in addition to the restrictions imposed by the uniformity and equal protection provisions of the Constitution. Assuming there is power to impose the tax (such power is not questioned here) under the charter, if it is a charter city, or under the statutes, if it is not, the only restrictions on the exercise of that power are the constitution, charter, or statutes, as the case may be . . .. [citation] It follows, therefore, that short of being confiscatory or prohibitory, there is no rule of law that requires that a tax be reasonable in amount, for the power of taxation is a vital legislative function, [citation] **and there can be no basis for a court to invalidate an exercise of that power other than the constitutions, state or federal.** It has been so held.

(*Fox, supra,* 36 Cal.2d at p. 139 (emphasis supplied).) The court rejected the theater owners' claim that the distinctions the city made among various entertainment businesses within the city were unfounded, including the exemptions the city crafted. "We cannot substitute our judgment for that of the city's legislative power. . .." (*Id.* at p. 144.)

The cases deferring to cities to craft their local business license tax schemes number in the several dozen. (E.g. *Web Service Co. v. Spencer* (1967) 252 Cal.App.2d 827, 833-35 (listing cases approving various methods of license tax calculations.) Analyzing them all would be duplicative and far outstrip the space available here. Still, a few deserve discussion to illustrate how far-reaching a municipality's discretion extends in this arena.

In *City of Berkeley v. Cukierman* (1993) 14 Cal.App.4th 1331, the court of appeal examined an ordinance that increased business license taxes for hotels six fold in response to Proposition 13. A hotel operator balked at the jump in taxes and resisted the city's collection efforts. He challenged the tax arguing, among other theories, that the ordinance was unconstitutional as no rational basis supported taxing hotels at a higher rate than other businesses and also that the six fold increase on his tax rate was unreasonable. (*Id*. at p. 1341.) The court rejected both arguments. It held that tax classifications are presumed constitutional and "must be upheld if any reasonable basis can be conceived in support. . .." (*Id*. at p. 1342.) Further, "tax

statutes are generally not subjected to close scrutiny, and distinctions therein can be justified on the basis of administrative convenience and promotion of legitimate state interests." (*Id.* at p. 1343.) The court had no trouble concluding that the license tax increase was justified to "remedy the detrimental effect of Proposition 13." (*Ibid*.)

Similarly in *Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes* ("*Westfield*") (1977) 73 Cal.App.3d 486, the court deferred to both the city's decision on how to raise money to address some of the environmental problems created by the developer's project and also when and how to administer the tax. In *Westfield,* the City of Rancho Palos Verdes adopted a business license tax on residential builders and developers based on the number of units in construction or finished during the tax year. (*Id*. at p. 494.) The plaintiff developer argued, among other theories, that the license tax was a "pernicious" scheme designed to halt development in the city and, thus, invalid. (*Id*. at p. 497.) The court rejected the ploy, finding that although the fee was adopted in part to generate revenue to address the environmental problems the extensive development created, "the question of how money should be generated for this purpose is strictly a legislative judgment." (*Ibid*.) The court also rejected the developer's argument that because part of the tax was collected before a certificate of occupancy could issue, it amounted to an improper business regulation. Again, deferring to

the city's discretion to establish its taxing scheme, the court held that collecting the tax at the time the certificate of occupancy was issued "represents a choice of a reasonable time for collection of a tax fixed by the number of bedrooms." (*Id.* at p. 498.)

Even in the face of First Amendment rights claimed by the press, a court deferred to a city's discretion to craft business license taxes on news outlets. (*Times Mirror, supra,* 192 Cal.App.3d 170.) There, the City of Los Angeles amended its business license tax to end a long-standing exemption for publication of certain newspapers and magazines. (*Id.* at p. 175.) Newspapers and magazine were then subject to a gross receipts tax, as had been manufacturers all along. As is common in challenges to business license taxes, the taxpayer argued to limit the city's taxation power to the method the taxpayer thought best. They argued the city must use the same method to tax different businesses unless it can show a compelling reason for different treatment. (*Id.* at p. 182.) And especially so, they argued, if the tax unjustifiably imposed different tax burdens on a variety of First Amendment activities. (*Id.* at p. 178.) The court didn't buy it. Instead, it deferred to the city's discretion to craft its own taxing scheme: "The power of a municipality to classify for the purpose of taxation is very broad. Neither due process nor equal protection impose a rigid rule of equality in tax legislation." (*Id*. at p. 183.) The court extended that deference to the city's decision to delegate to its city clerk the duty to

apportion the tax as necessary to meet constitutional requirements, which was accomplished via issuance of administrative tax rulings describing the apportionment process, which the court left undisturbed. (*Id*. at p. 188-89.)

One final example is particularly instructive. *City of Los Angeles v. Tannahill* (1951) 105 Cal.App.2d 233 involved a license tax on delivery trucks operating within the City of Los Angeles. The city assessed the license fee based on the unladen weight of the truck—their capacity, not the actual amount carried in the streets of the city. (*Id.* at p. 543.) Defendant Tannahill argued that basing the assessment on the unladen weight of the truck was unlawfully discriminatory because "a truck weighing 4,000 pounds can, and often does, handle more business than an 8,000 pound truck." (*Id*. at p. 544.) The court refused to be taken in. "It is an inherent quality of a state to possess the power to tax and to select its subjects of taxation" and "[a]n ordinance must be clearly obnoxious as unreasonable and oppressive to justify nullifying it by judicial decree." (*Id.* at p. 546.) Far from obnoxious, the court held that setting the tax based on the unladen weight was an "excellent" method to gauge the amount of business done or the capital employed. (*Id.* at p. 545-46.)

The same deference applies here to preserve Rialto's tax on those operating wholesale liquid fuel storage facilities measured by the capacity of the storage facilities. Cities have leeway to set such

taxes within constitutional bounds, and Appellants fail to establish an unconstitutional infirmity.

## CONCLUSION

The League urges this Court to affirm the trial court's ruling in Rialto's favor. As courts have repeatedly confirmed, cities' discretion to design, impose and construe business license taxes is wide-ranging, and also extends to the administrative implementation of such tax. Consistent with that case law, assessing a tax on operating wholesale liquid fuel storage facilities based on the capacity of such facilities is rational and within the City's power, both statutorily and constitutionally. It also reflects a decision to measure the tax liability on an easily determined metric, making administration of the tax easier. With gross receipts taxes, the city's recourse to verify such receipts is an intrusive and expensive audit, the cost of which could exceed any benefit the city achieves from the audit. That other cities might choose a different approach does not make Rialto's less valid. Nor does the law compel it to adopt the tax approach preferred by the taxpayer. The trial court correctly rejected Appellants' efforts to rewrite the City's tax, and an affirmance is warranted.

DATED: July 27, 2018

**COLANTUONO, HIGHSMITH & WHATLEY, PC**
*/s/ Holly O. Whatley*
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## CERTIFICATE OF COMPLIANCE

Under California Rules of Court, rule 8.204(c), the foregoing Brief of Amicus Curiae contains 2,522 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000-word limit set by rules 8.204(c). In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

DATED: July 27, 2018

**COLANTUONO, HIGHSMITH & WHATLEY, PC**

*/s/ Holly O. Whatley*
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# CERTIFICATE OF SERVICE

*Tesoro Logistic Operations, LLC v. City of Rialto*
Court Of Appeals Case No. E069070

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