

July 20, 2018

Chief Justice Tani Cantil-Sakauye and the
Associate Justices of the California Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Dear Chief Justice Tani Cantil-Sakauye and Associate Justices:

Pursuant to California Rules of Court, rule 8.500(g), the League of California Cities ("League") and the California Special Districts Association ("CSDA") respectfully submit this letter in support of the Petition for Review filed by Defendants and Respondents, Governor Edmund G. Brown Jr., California Department of General Services, and Daniel Kim in *Epstein v. Schwarzenegger*, California Supreme Court S249456; First District Court of Appeal (May 10, 2018) (A147092; A147366); Superior Court for the County of San Francisco (CGC-10-243042). Amici submit that review of the decision in this case is necessary to settle important questions of law and policy and secure uniformity of decision. (California Rules of Court, rule 8.500, subd. (b)(1).)

I. Interest of the League and CSDA

The League of California Cities 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, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as having such significance.

The California Special Districts Association ("CSDA") is a California non-profit corporation consisting of over 800 special district members that provide a wide variety of public services to urban, suburban and rural communities. CSDA is advised by its Legal Advisory Working Group, comprised of attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies those cases that are of statewide or

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nationwide significance. CSDA has identified this case as having statewide significance for special districts.

The reason amici have determined to weigh in on this case is simple. The Court of Appeal's decision conflicts with other appellate districts' decisions on catalyst-fee motions. Additionally, the decision begets important policy questions which will force city and special district public officials to waive privileges in order to appropriately object to fee motions.

The League and CSDA have a clear interest in asking the Court to review and provide guidance on this issue.

II. The Court Should Grant Review In Order to Facilitate Uniformity of Decision

The Court of Appeal's implicit holding that trial courts *must* presume causation supporting a catalyst-fee decision conflicts with the decision of other districts, and of at least one published decision of the First Appellate District. The Court of Appeal's decision shifts part of the burden of proof to defendants in every catalyst motion, thereby diverging from standards of review applied in other decisions on catalyst-fee motions.

For nearly thirty years, amici and their members and officials have been guided by the rule that when a defendant voluntarily provides the primary relief sought by a plaintiff after plaintiff files suit, "the chronology of events *may* raise an inference that the litigation was the catalyst for the relief." (*Hogar v. Community Development Com. Of City of Escondido* (2007) 157 Cal.App.4th 1358, 1366; accord *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2015) 238 Cal.App.4th 513, 522; *Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 968.) Prior to the Court of Appeal's decision, the First and Fourth Appellate Districts considered that inference to be *permissible* not *mandatory*.

The Court of Appeal's decision attempted to distinguish those cases on the grounds that the evidence of chronology was undisputed. However, that misses the point. The question in this case is not whether a trial court *may* decline to grant an inference that the litigation was the catalyst for relief where a chronology is inadequately proven. Rather, the question is whether courts *may* decline such an inference where a chronology is proven or whether courts *must* grant that inference. The Court of Appeal's holding that trial courts *must* grant that inference diverges from other districts, and past decisions of the First Appellate District.

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The presumption articulated by the Court of Appeal also conflicts with other districts' decisions because it shifts the burden of proof to defendants in every catalyst-fee motion by holding that trial courts *must* infer causation from the chronology.

The Court of Appeal's disagreement with other districts leaves amici without clear direction as to the required analysis to support an inference that litigation was the catalyst for relief in a catalyst-fee claim. Cities and special districts are left with the impossible task of reconciling two competing rules. As such, amici urge this Court to accept review and provide clear guidance on the applicable analysis required in catalyst-fee claims and the appropriate burden of proof.

III. The Court Should Grant Review in Order to Consider the Important Policy Implications of the Court of Appeal's Decision, Namely That the Decision Forces Public Officials to Waive Privileges in Order to Appropriately Object to a Fee Motion

The Court of Appeal's decision implicates important policy considerations for amici by compelling public officials to choose between providing what the Court has characterized as direct and credible evidence, and waiving critical privileges.

The Court of Appeal determined that certain evidence in the record regarding causation (including declarations of DGS employees and deposition testimony of California First's investment banker) failed to qualify as "substantial evidence" to support the trial court's judgment, and that the Court of Appeal preferred something more direct than the Governor's press release regarding the Golden State Portfolio. However, the Court did not articulate what evidence would have been sufficiently direct and credible for purposes of establishing causation. In doing so, the Court of Appeal signaled that it would have preferred direct evidence, arguably requiring the Governor's own testimony.

This new standard for direct and credible evidence differs from other districts' prior determinations on what constitutes credible evidence. Furthermore, and perhaps even more problematic, is that testimony of public officials' deliberative processes is generally inadmissible and protected by privilege. Public officials are afforded certain protections against inquiry into their motivation or mental processes which underlie official actions. The Court of Appeal's decision thus leaves public officials in the untenable position of choosing between their right to a deliberative process free of interference from litigants and their desire to provide sufficient direct and credible evidence under the standard furthered by the Court of Appeal.

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IV. Conclusion

The Court of Appeal's decision conflicts with other districts, and thereby unsettles an important point of law establishing that a chronology of events which is proven *may*, rather than *must*, raise an inference that litigation was a catalyst for relief. This new conflict leaves cities and special districts without clear direction as to the appropriate analysis required in a catalyst-fee claim. The decision also leaves cities and special districts with the impossible task of guessing as to what kind of evidence will be deemed direct and credible for purposes of establishing causation and forces amici to choose between a meritorious defense to a catalyst-fee claim and applicable privileges.

Amici respectfully request that the Court grant review and provide guidance on these important issues.

Sincerely,



Nira F. Doherty
Partner

NFD

PROOF OF SERVICE

I, Monet Garrett, declare:

I am a citizen of the United States and employed in Alameda County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1901 Harrison Street, Suite 900, Oakland, California 94612-3501. On July 20, 2018, I served a copy of the within document(s):

AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Oakland, California addressed as set forth below.
- by placing the document listed above in a sealed GSO envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a GSO agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via electronic service (*TrueFiling*) the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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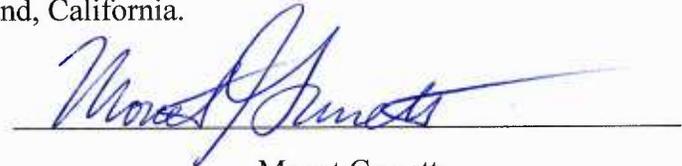
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(Via Overnight Mail)

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 20, 2018, at Oakland, California.



Monet Garrett