No. B329883

In the Court of Appeal of the State of California
Second Appellate District, Division 7

CALIFORNIA APARTMENT ASSOCIATION, AHNI DODGE, SIMON GIBBONS, MARGARET MORGAN, DANIELLE MOSKOWITZ, & TYLER WERRIN,

Petitioners/Plaintiffs and Appellants,

v.

CITY OF PASADENA, PASADENA CITY COUNCIL, and DOES 1-10,

Respondents/Defendants and Respondents,

MICHELLE WHITE, RYAN BELL, and AFFORDABLE PASADENA,

Intervenor-Defendants/Respondents and Respondents

APPELLANTS' OPENING BRIEF

On Appeal from the Superior Court of Los Angeles County
The Honorable Mary H. Strobel, Presiding
Superior Court Case No. 22STCP04376

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

☐ Interested entities or persons are listed below:

	Name of Interested Entity or Person	Nature of Interest
1		
2		
3		
4		

Please attach additional sheets with person or entity information if necessary.

January 31, 2024 NIELSEN MERKSAMER PARRINELLO GROSS & LEONI LLP

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I.

INTRODUCTION

Article XI, section 3, of the California Constitution authorizes cities to adopt a charter for their governance, and in cities that do, the charter "stands in the same relationship to" municipal ordinances as the State's constitution stands to statutes; "charter provisions constitute the organic law or local constitution of the city." *Porter v. Riverside*, 261 Cal. App. 2d 832, 836 (1968).

Accordingly, charters are subject to the same rule that applies to changes to the Constitution itself: the city's voters may propose *amendments* to charters by initiative, but only the city council or charter commission can propose a more far-reaching *revisions* to the charter, *i.e.*, changes that would substantially alter the basic structure of a municipal government.[1] The California Supreme Court has explained the reason for this dichotomy: "the revision provision is based on the principle that 'comprehensive changes' to the Constitution require more formality, discussion and

[1] Cal. Const. art. XI, § 3(b) ("[T]he governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body"). *See also* Elec. Code § 9255(c)(1) (same).

deliberation than is available through the initiative process." *Legislature v. Eu*, 54 Cal. 3d 492, 506 (1991).

The initiative entitled the "Pasadena Fair and Equitable Housing Charter Amendment," narrowly approved by the voters of Pasadena as Measure H in November 2022 and challenged herein,[2] violates this constitutional limitation on the use of the initiative power to revise the City's charter. It does so specifically by creating a new, wholly autonomous and independent Rental Housing Board ("Rent Board" or "Board") to administer the various rent control and just cause provisions of that measure and giving it sweeping powers that heretofore have been exercised exclusively by the City Council and City Manager.

Initially adopted in 1900, Pasadena's charter was comprehensively revised in 1968[3] to establish the fundamental framework for the City's government that remained in effect until Measure H: a "council-manager" form of government, in which *all* of the City's legislative and quasi-

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[2] For a true and correct copy of the full text of Measure H *see* Appellants' Appendix (hereafter "AA"), Vol. 1, pp. 033-076. Subsequent citations to the Appendix herein are in the form "[Vol.]AA[Pages]."

[3] *See* Cal. Stats. 1968, Res. Ch. 167, pp. 3223-3264, *available online at* https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1968/68Vol2_Chapters.pdf#page=1499 (last visited Jan. 18, 2024).

judicial powers reside with a Mayor and seven councilmembers (collectively acting as the City Council), and all the City's executive and administrative powers reside with the Mayor and City Manager.[4] Except where otherwise required by State of federal law, commissions, to the extent they existed, were generally purely advisory, making recommendations to the Council and Mayor, the City Manager, or to departments under the control of those persons. That even includes such common commissions as the Planning Commission, Recreation and Parks Commission, etc. *See, e.g.,* Pasadena Municipal Code ("PMC"), tit. 2, art. III ("Advisory Boards, Commissions, and Committees Created by the Council").

Measure H substantially alters this basic form of government. It creates a new, unelected "Rent Board" to administer the various rent control and just cause provision of that measure, and empowers the Board to operate *entirely independently* of the rest of the City government, including its elected officials. To that end, as discussed in more detail below, the Measure usurps substantial, previously exclusive executive and legislative powers from the Council and City Manager in a host of ways. In sum, Measure H effectively sets up a new, wholly independent "branch" of municipal

[4] *See* 1AA097-103 (Charter §§ 401, 406-410, 601 & 604).

government in Pasadena. The trial court erred in holding that this fundamental shift was a permissible amendment, rather than a forbidden revision-by-initiative.

Nor is that the only defect of Measure H. The Measure also structures that Board to be purposely and intentionally slanted in favor of tenants' interests, even though its actions substantially affect both tenants and landlords. It establishes qualifications for serving on the Board that guarantee tenants a supermajority of the seats: *at least* seven of the eleven members (plus one of the two alternates) must be tenants who, in addition, can have no "material financial interest" in residential rental property anywhere in Los Angeles County (not just Pasadena). The seven seats that must be tenants (called "district" seats) are given special procedural rights and protections in terms of operation of the Board.

Conversely, landlords are not guaranteed any representation on the Board. Tenants can fill *all eleven* seats plus both alternate slots.

This structure violates Article I, section 22, of the California Constitution, which provides, "The right to vote or hold office may not be conditioned by a property qualification." Measure H conditions the right to serve in any of the seven preferential "district" seats on the ownership of a leasehold

interest and the non-ownership of other types of property interests.

This unbalanced structure also violates the U.S. Constitution by depriving an "identifiable political group"—those with a shared "economic status" (rental property-owners)—of the opportunity to be considered for all the seats on the Board on equal terms with non-property-owners. *Anderson v. Celebrezze*, 60 U.S. 780, 793 (1980). Worse still, it does so explicitly based on the viewpoint that those disadvantaged persons are expected to express. *Id*. The trial court erred in refusing to enforce Appellants' constitutional rights.

And finally, several provisions of Measure H conflict with, and are preempted by, state law. The trial court ruled in Appellants' favor with respect to several of them, and neither Respondents nor Intervenors appealed those portions of the judgment in Appellants' favor.

But the court erroneously held that the Costa-Hawkins Rental Housing Act ("Costa-Hawkins"), Civ. Code §§ 1954.50 to 1954.535, which exempts certain rental units from local rent control entirely, does not preempt a requirement that the owners of those exempt units nevertheless make substantial "relocation payments" to tenants who voluntarily vacate the

unit, if the landlord raises the rent past a certain threshold tied to Measure H's rent control caps.

And it erroneously held that a requirement that tenants who fail to timely pay rent be given more notice to cure, before eviction proceedings are commenced, than the notice required by state law is not preempted, despite California Supreme Court case law holding that the Legislature has "occupied the field" with respect to unlawful detainer actions for nonpayment of rent, to the exclusion of local interference.

The writ should have been granted in full, and Appellants respectfully asks this Court to reverse the judgment with instructions to grant judgment in Appellants' favor accordingly.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Background & Key Provisions of Measure H.

On November 8, 2022, the voters of Pasadena narrowly approved Measure H—a charter amendment that was proposed via voter-circulated initiative petition pursuant to Elections Code §§ 9255 *et seq.*, rather than being placed on the ballot by the City Council or a charter review commission. (1AA019, 208 & 222.) The election results were certified on

December 12, 2022 (1AA83-91, 208 & 222), and the measure took effect December 20 (1AA178.)[5]

Among other things, Measure H adopts rent controls, "just cause" eviction protections, a tenant buyout program, a rental registry, relocation-assistance requirements, and various notice requirements.

It also, however, creates an 11-member appointed Rental Housing Board ("Rent Board") with extraordinarily broad powers to regulate on these matters, and it makes the Board wholly independent and autonomous of the Council, City Manager, City Attorney and rest of the City administration:

> Integrity and Autonomy of Rental Board. *The Rental Board shall be an integral part of the government of the City, but shall exercise its powers and duties under this Article independent from the City Council, City Manager, and City Attorney, except by request of the Rental Board.* The Rental Board may request the services of the City Attorney, who shall provide them pursuant to the lawful duties of the office in Article II, Chapter 2.30 of the Pasadena City Charter. The City shall provide infrastructure support on an ongoing basis as it would with any other City department.

(§ 1811(m), 1AA060; italics added.)

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[5] 1AA033-091 (measure text, resolution calling election, ballot label, and election results).

Among the core powers conferred upon the Rent Board to exercise "independently" (which are thereby stripped away from the Council and City Manager) are the powers to:

(1) enact law to administer and enforce the rent control law;

(2) establish its own budget, free from the normal City budgeting process (in which the Mayor and City Manager propose a budget for consideration, revision and adoption by the Council);

(3) set fees, in its discretion, to support its budget and set penalties for violations of its rules;

(4) "request and receive funding… from any available source including the City for its reasonable and necessary expenses";

(5) hire and fire its own staff and consultants;

(6) file or intervene in court actions;

(7) retain its own counsel.

See § 1811(e), (f), (*l*) & (n) (1AA59-60).

Measure H also specifies the required qualifications for members of the Board, which is purposely designed to be hostile to rental housing providers, the very individuals who exclusively fund the Board's work and are chiefly bound by its decisions.

The eleven-member board is made up of seven seats that represent each of the City's council districts, and four "at large" seats drawn from the entire City. All seven of the "district" seats are reserved for "Tenants" (*i.e.*, must have a leasehold interest in a Pasadena rental property). And not just any tenants. They must also show that neither they, nor their *extended family members,* either own or manage rental units *anywhere in LA County* and have not done so in the preceding three years.[6] Your niece worked as a property manager in Torrance two years ago? Disqualified. Your grandmother owns a duplex in Palmdale? Disqualified. This structure all but ensures that a supermajority of the seats on the board are occupied by individuals unlikely to have insight into or appreciation of the realities of operating rental housing.

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[6] To be eligible to serve in a "district" seat, a Tenant must have no other "material interest in rental property" during the three years preceding appointment or during service. §§ 1811(a) & 1803(i), (aa). "Material interest in rental property" is defined *very* broadly, as where the applicant "or any member of their Extended Family, own, manage, or have a 5% or greater ownership stake in Rental Units in the county of Los Angeles [not just in Pasadena], or if they or any member of their Extended Family owned, managed, or had a 5% or greater ownership stake in Rental Units in the county of Los Angeles in the past three (3) years." § 1803(i). "Extended family" is also *very* broadly defined to include grandparents, aunts and uncles, nieces and nephews, grandchildren or cousins. § 1803(g).

On the other hand, while up to four of the members *could* have material interest in rental properties in LA County, there are no guaranteed slots for those who do, like the five individual Appellants. Measure H permits *all eleven* of the Rent Board members, and both alternates, to be tenants without such interests, meaning that tenants are—at minimum—guaranteed a supermajority on the Board and could occupy every seat. § 1811(a).[7]

And it doesn't stop there—the seven guaranteed tenant seats are given special procedural rights and protections. For example, any action of the Board requires the support of at least six members, § 1811(i), and a quorum to take action requires at least four "tenant" members to attend the meeting (*see* § 1811(h)). There is no corresponding requirement that *any* "at-large" members be present. In sum, no vote can even take place unless at least half of the members present are tenants.

B. Proceedings in the Trial Court.

This action was filed December 16, 2022. (1AA015.) Each of the individual Petitioner/Appellants are residents and

[7] In fact, two of the four "at-large" seats are currently held by Tenants, meaning nine of the eleven total seats are. (3AA609-611; Request for Judicial Notice, filed herewith ["RJN"], Exs. A & B.)

registered voters in Pasadena who voted in the November 2022 election, and all paid sales and property taxes within Pasadena in the preceding year. (1AA167-175, 181-182.) Appellants Dodge, Gibbons, Morgan, and Werrin have interests in rental properties in Pasadena that are subject to Measure H's provisions, and Appellant Moskowitz owns a rental property in Los Angeles, meaning all have interests in rental properties in LA County that bar them from serving as "district" representatives on the Board. (*Id.*) Three of the five individual Appellants applied (unsuccessfully) to serve as at-large members, and the other two expressed interest in serving on a validly constituted board (RJN, Ex. B; 1AA173-175).

Appellant California Apartment Association is the largest statewide rental housing trade association in the country, representing more than 50,000 rental property-owners and operators who are responsible for nearly two million rental housing units throughout California. It has many members in Pasadena who are subject to Measure H. (1AA277-278.)

Appellants promptly sought a temporary restraining order to bar the appointment of Board members according to the unconstitutional criteria discussed above. (1AA139-166.) However, based upon the City's representation that no

appointments would be made before late-February 2023 at the earliest, the court denied the request on the ground that no irreparable harm would occur before a preliminary injunction hearing could be held. (1AA186-191.)

At a subsequent status conference, the City respondents stipulated that they would not make any appointments before April 17, 2023, and the Court set an expedited briefing schedule on the merits of the petition. (1AA192-197.) The parties also stipulated to the intervention of Michelle White, Ryan Bell, and Affordable Pasadena—the chief supporters of Measure H on the ballot (hereafter "Intervenors"). (1AA198-205.)

Intervenors and Respondents answered on January 18 and February 3, 2023, respectively. (1AA206-232, 3AA703.)

Petitioners moved for judgment on the writ on February 24, 2023 (1AA258-281); the City and Intervenors filed oppositions on March 13 (2AA296-574); and Petitioners filed reply papers on March 20 and supplemental information regarding the ongoing application process for appointment to the Board on March 24 (3AA589-614).

The superior court heard argument on the merits on March 28, 2023 (Reporter's Tr., filed Oct. 31, 2023), and later that day it issued a final order granting in part and denying in part Petitioners' motion. (3AA615-650.) The court held:

1. Measure H is an amendment to Pasadena's charter rather than a revision.
2. The make-up of the Rent Board, with a mandatory tenant supermajority, does not violate either Article I, section 22, or the U.S. Constitution.
3. Costa-Hawkins does not preempt the requirement that the owners of exempt units make "relocation payments" to tenants who voluntarily vacate the unit if the landlord raises the rent past a certain threshold that is tied to the rent control limits set by Measure H.
4. The requirement that tenants who fail to timely pay rent be given more notice before eviction proceedings are commenced than is required by state law is not preempted.
5. The requirement of Section 1806(a)(9) of Measure H, which requires that a tenant be given six months' notice prior to the termination of a tenancy *is* preempted, by Civil Code § 1946.1.
6. Insofar as Section 1806(a)(10) imposes a one-year notice requirement to evict a "senior" or disabled tenant if the landlord is removing a building from the market pursuant to the Ellis Act, Govt. Code §§ 7060 *et seq.*, that requirement could be enforced

because authorized by the Ellis Act itself, *see* Govt. Code § 7060.4(b), but the court confirmed that the City could not define "senior" in a manner that conflicts with the Ellis Act's requirement that a resident be at least 62 year years old to be covered by this requirement.

7. And finally, as to the requirement of Section 1806(a)(10) that non-senior, non-disabled tenants be given 180 days' notice of an Ellis Act eviction, the court held that requirement *is* preempted by the 120-day notice requirement of Government Code § 7060.4(b).

The trial court entered judgment on April 24, 2023 (3AA651-689), and the clerk issued the writ that same day (3AA690-693).

Petitioners timely appealed the portions of the judgment that are adverse to them (Nos. 1-4 above) on April 26, 2023. (3AA694-695.) Respondents and Intervenors did not cross-appeal from the portions of the judgment in Petitioners' favor (Nos. 5-7).[8]

[8] "A respondent who fails to file a cross-appeal cannot urge error on appeal." *Kardly v. State Farm Mut. Auto. Ins. Co.*, 31 Cal. App. 4th 1746, 1748 n.1 (1995).

III.

STANDARD OF REVIEW

The issues presented by this case are questions of law. *See* *Mission Springs Water Dist. v. Verjil*, 218 Cal. App. 4th 892, 908 & 910 (2013) (whether initiative is an amendment or revision); *Socialist Party v. Uhl*, 155 Cal. 776, 789 (1909) (application of prohibition on property qualifications in voting and office-holding); *Cty. of Tulare v. Nunes*, 215 Cal. App. 4th 1188, 1195 (2013) (preemption by state law). Questions of law are subject to *de novo* review by this Court. *Id*.

IV.

MEASURE H VIOLATES THE RULE THAT THE INITIATIVE POWER CAN ONLY BE USED TO "AMEND" CITY CHARTERS, NOT "REVISE" THEM

The "revision/amendment analysis" as articulated by the Supreme Court "has a dual aspect…." *Raven v. Deukmejian*, 52 Cal. 3d 336, 350 (1990). Courts must consider both the *quantitative* effect of the enactment—measured by its length and/or the number of sections it affects—and the *qualitative* effect—focusing on the degree of impact on the "nature of our basic governmental plan," regardless of length. *Legislature v. Eu*, 54 Cal. 3d at 506 (quoting *Amador Valley Jt. Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal.

3d 208, 223 (1978)). Though "[s]ubstantial changes in either respect could amount to a revision," *Raven*, 52 Cal. 3d at 350, the effect of the changes must be considered "in the aggregate." *Id*. *See also Legislature v. Eu*, 54 Cal. 3d at 508 (considering the "combined effects" of the measure).

Measure H is a "revision" by either a quantitative or qualitative metric, but especially in combination, and the trial court was wrong to hold otherwise.

A. The Trial Court's Analysis Artificially Treats the Measure's Various Alterations Separately, Rather Than Focusing on the Cumulative Effect—It Loses the Forest for the Trees.

Before addressing the discrete points the trial court rejected in concluding that Measure H constitutes an amendment rather than a revision, it is worth noting a flaw that infects the entire analysis: the court improperly segmented its analysis, focusing on each discrete change separately, rather than cumulative impact of the Board's structure, powers, duties, etc., and their effect on the broader framework of Pasadena's municipal government.

As one example, Appellants noted that Board members are entitled to compensation that far exceeds other City commissioners and even substantially exceeds the compensation paid to councilmembers and the Mayor. The

trial court's response was, "it does not necessarily or inevitably appear from Measure H that *this provision* 'will substantially alter the basic governmental framework' set forth in the Charter." (3AA667; emphasis added.) But as discussed above, the impacts on the basic governmental framework must be evaluated "in the aggregate." *Raven*, 52 Cal. 3d at 350.

B. Quantitative Revision: Measure H Nearly Doubles the Length of the Existing Charter.

Quantitatively, Measure H adds 42 pages to the Pasadena Charter, which was previously only 47 pages, thereby almost doubling the length. Measure H consists of 18,362 words, compared to the pre-existing 24,213 words, increasing the total word-count by approximately 75%. It adds 24 new sections, consisting of hundreds of new subsections; the existing charter consists of approximately 166 sections, meaning Measure H increases the total number of sections by about 15%. *Compare* 1AA033-075 (Measure H) *with* 1AA092-138 (existing charter).

On this score, *McFadden v. Jordan*, 32 Cal. 2d 330 (1948), is instructive. In that case, a proposed measure sought to add a new article to the Constitution "to consist of 12 separate sections (actually in the nature of separate articles) divided into some 208 subsections (actually in the nature of

sections) set forth in more than 21,000 words." 32 Cal. 2d at 334. In comparison, the Constitution at that time "contain[ed] 25 articles divided into some 347 sections expressed in approximately 55,000 words." *Id*. In other words, the proposal in that case only increased the word count by about 38% (compared to 75%) and Measure H's increase of 15% in the number of sections exceeds that at issue in *McFadden* (12/347=3.5%). The *McFadden* court found the proposed change to constitute an invalid constitutional revision, and by essentially any quantitative measure the changes wrought by Measure H are more quantitatively substantial.

The trial court nevertheless rejected this argument on the ground that, unlike in *McFadden*, the existing provisions of the Charter were largely left un-amended, and because the measure at issue in *McFadden* dealt with more than one subject matter, whereas Measure H only deals with landlord-tenant relations. (3AA662.) But, as to the former distinction it is no distinction at all: while the measure in *McFadden* "affected" 15 of the 25 articles of the existing Constitution, it did so indirectly and implicitly, rather than directly. *See* 32 Cal. 2d at 346 ("There is in the measure itself no attempt to enumerate the various and many articles and sections of our present Constitution which would be affected, altered, replaced, or repealed. It purports only to *add* one new

article…"). As discussed above and below, Measure H substantially, if indirectly, affects and qualifies a host of existing charter provisions. (*See, e.g.*, note 9, *infra*.)

Moreover, it is not necessary for a measure to address multiple subjects to be a revision. For example, in *Raven v. Deukmejian* the Supreme Court struck down a provision that restricted the state courts' independent authority with respect to the single subject of criminal defendants' rights. That the Court retained full authority with respect to all other issues under the Constitution did not spare it from invalidation. 52 Cal. 3d at 349-55.

Finally, the trial court also held it is "arbitrary" to focus on words and pages, because such a comparison depends on the pre-existing length of the Charter. (3AA622.) But *McFadden* engaged in exactly such a comparison, 32 Cal. 2d at 334, and the trial court's rejection of that approach effectively nullifies the quantitative half of the "dual" revision/amendment analysis. Furthermore, it is not arbitrary—it stands to reason—that an 18,000-word addition is likely to have more significant impact on 24,000-word charter than a 55,000-word charter. It is likely to affect more of the topics covered by the shorter charter and affect them more significantly.

C. Qualitative Revisions: Altering the Basic Structure of Pasadena City Government.

Measure H also substantially alters the basic structure of the City's government in a variety of ways.

1. Measure H confers sweeping powers on the Rent Board that usurp essential legislative and executive functions from the City Council, Mayor, and City Manager.

First, it creates a new, unelected body that is "an integral part of the government of the City," that that "shall exercise its powers and duties under [Measure H] *independent from the City Council, City Manager, and City Attorney*, except by request of the Rental Board." Measure H § 1811(m). And it vests that unelected Board with exclusive powers over one of the most fundamental policy issues facing California—housing costs—which would otherwise be the exclusive purview of the City Council exercising its legislative powers and the City Manager exercising the City's executive function.[9]

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[9] *Compare, e.g.,* Pasadena Charter §§ 408 (1AA099) (vesting powers of the City in the City Council and providing that the "Council is empowered to carry into effect the provisions of this Charter, to execute the powers vested in the City, and to perform all duties and obligations imposed upon the City by State law"), 409 (1AA099) (Council has power over all City departments, agencies, boards, committees, and commissions), 410 (1AA099) (Council given complete power to

Not only is the Board vested with the authority to, in relevant part, set rents, provide for adjustment of rental rates, adjudicate petitions seeking relief from rates, and hold quasi-judicial hearings, Measure H also empowers the Board to: (1) enact law[10] to administer and enforce the rent control law; (2)

"provide for the organization of all city operations and activities," including by creating and abolishing departments, commissions, boards, etc., and specifying their powers and duties), 604 (1AA102) (delegating City's executive and administrative powers to City Manager, including powers to "supervise, coordinate and administer the various functions of the City"; enforce city laws; hire, fire, and supervise employees; prepare the annual budget) *with, e.g.,* Measure H § 1811(e) (specifying powers and duties of Board); § 1811(m) (Board entirely independent from City Council and Council has no authority over same); § 1811(n) (authority to obtain independent legal counsel).

[10] The trial court objected that the Board does not have the power to make "law," but merely the typical power to pass regulations. (3AA664.) But this understates the amount of authority conferred on the Board. Measure H essentially establishes a baseline for many things and then gives the Board the power to change them as it sees fit. As one example, it sets the threshold at which a rent increase can trigger a relocation payment—5% plus the amount that would be authorized under the normal rent control provisions—but it gives the Board full discretion to reduce that amount if it likes. § 1806(b)(C). This conferral of discretion on the Board runs throughout the Measure. *See* §§ 1804(b)(1), 1806(a)(2)(B), 1806(a)(6)(A), 1806(a)(9)(D), 1806(a)(10), 1806(b)(B), 1806(d), 1806(g), 1806(h), 1809(b), 1810(a), 1811(e)(1), 1811(e)(2), 1811(e)(8), 1811(f), 1811(o), 1812, 1812(e)(5), 1812(h), 1813(a), 1814, 1814(*l*). Also, if any provision of the Measure is struck down as invalid, the Board,

establish its own budget, free from the normal City budgeting process, in which the Mayor and City Manager propose a budget for consideration, revision and adoption by the Council;[11] (3) set fees, in its discretion, to support its budget and set penalties for violations of its rules; (4) "request and receive funding… from any available source including the City for its reasonable and necessary expenses"; (5) hire and fire its own staff and consultants; (6) file or intervene in court actions; and (7) retain its own counsel. § 1811(e), (f), (*l*) & (n). In short, with respect to rental housing the Board will act as an *independent branch of government*, answering to no one.

Here again, *McFadden* is instructive. In that case, one of the most significant elements of the proposal that the Court held to be an impermissible revision was the creation of a state "pension commission" with comprehensive governmental powers to be exercised by five commissioners. The Court held that "[t]he delegation of far reaching and mixed powers to the commission, *largely, if not almost entirely in effect, unchecked*, places such commission substantially beyond the system of checks and balances which heretofore has characterized our governmental plan." 32 Cal. 2d at 348.

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and not the City Council is adopt alternative provisions to fill the void. § 1811(o).

[11] *See* Pasadena Charter §§ 901-913 (1AA107-110).

Likewise, here, the Rent Board operates entirely "independent from" the rest of Pasadena municipal government, *see* § 1811(m), with "far reaching and mixed powers" that are "largely, if not almost entirely in effect, unchecked."

The trial court's rejection of this argument, too, largely turns on the fact that Measure H is limited to a single subject—landlord-tenant relations—and that the Council and City Manager retain their traditional powers with respect to all other subjects. (3AA664-665.) But given the importance of residential housing issues in California, this is a *big* exception, and the Board's powers within that sphere are sweeping and autonomous. Moreover, as discussed above, it is not necessary for a measure to address multiple subjects to be a revision.

2. Measure H interferes with the Council's previously exclusive authority over budgeting and fiscal planning.

For evidence that the Rent Board is given powers that are largely unchecked, one need look no further than Measure H's fiscal provisions. The Board is given unfettered power to set its own expenditures and raise its own revenues. *See* § 1811(e)(10), (*l*) & (n)—a power previously conferred exclusively on the Council and Mayor.

Indeed, the Board is even given the power to demand funds from the General Fund without any obligation to restore them. Section 1811(*l*)(2) provides the City "*shall* advance all necessary funds to ensure the effective implementation of this Article, until the Rental Board has collected Rental Housing Fees sufficient to support the implementation of this Article. The City *may* seek reimbursement of any advanced funds from the Rental Board after the Rental Housing Fee has been collected." (Emphasis added.) These initial start-up funds were estimated at approximately $6 million (1AA262-263), and the City Manager and City Attorney advised the Council that while it "may" seek reimbursement of those outlays, the Board need not oblige. (*Id.*)

All the changes discussed above are substantial usurpations of the Council's core legislative and City Manager's core executive powers, but the fact that the Board is given independent authority to raise its own revenues, appropriate its own expenditures, and even demand money from the General Fund is particularly significant, because "neither the initiative nor the referendum may be used in a manner which interferes with a local legislative body's responsibility for fiscal management." *Carlson v. Cory*, 139 Cal. App. 3d 724, 731 (1983). Currently, the City's budget is

proposed by the City Manager and Mayor and approved by the Council. *See* Charter §§ 604(H), 901-908. Measure H sets up an independent, competing center of fiscal power.

The trial court rejected the premise that this change constitutes a revision on the dual grounds that (1) "this fee will be paid by landlords and appears entirely unconnected to City Council's fiscal powers and duties" and (2) the $6 million start-up costs only constitute 0.54% of the City's total FY 2023 budget (though approximately 2% of the unrestricted general fund). (3AA626.)

Regarding the first, the fact it is "unconnected" is a bug, not a feature—the Board is authorized to raise millions of dollars annually without any oversight by the elected, politically-accountable branches of municipal government. That is a substantial alteration to the existing framework of Pasadena municipal government.

The same goes for the second point. The significance of § 1811(*l*)(2) is that the Board is empowered to override the Council's fiscal judgment and determine the spending priorities of the City with respect to 2% of the general fund. That, too, is a substantial alteration.

3. Measure H authorizes greater compensation for Rent Board members, by far, than for the Mayor, Council, or any other appointed Board.

Another significant, related change: members of the Rent Board are entitled to compensation at a rate *far* exceeding any other appointed body in Pasadena. The only city-appointed body that was previously compensated at all was the Planning Commission, and its members only receive a $50/meeting stipend. (1AA273-276; Pas. Muni. Code § 2.105.125.)

In fact, Measure H even authorizes Board compensation (up to $48,981 per year) that is double the maximum permitted a councilmember (maximum of $20,911/year) and one-third higher than the maximum permitted the Mayor ($31,365/year). (1AA264-272.)

As discussed above, the trial court's only treatment of this issue was that this provision—standing alone—did not fundamentally alter the basic framework of municipal government, but, as also discussed, this provision cannot be considered in isolation. Considered in connection with the other changes already discussed, it is surely a significant indicator that, at least within its appointed sphere, the Board is established as branch of government co-equal to the Council and Mayor—again, a significant change to the prior system in which the Council and Mayor held ultimate authority for all

governance in the City. And it marks another significant departure from the previously subsidiary and purely advisory role that commissions have traditionally played in Pasadena governance.

4. Measure H alters the essential powers of recall and removal and allows a small minority of residents to remove Board members without a vote of the people.

With respect to every other appointed commission, the Charter permits the Council to remove members at will, *see* Charter § 410 (1AA099). With respect to the Rent Board, however, Measure H prevents the Council from removing Board members *at all*, even for cause.

Instead, Measure H places the power to remove Board members in the hands of a small fraction of the City's electorate. It does so by expanding the right of recall—which has heretofore been available only for the removal of *elected* officials, to *appointed* Rental Housing Board members, § 1811(d)—while at the same time providing that the successful circulation of a recall petition by a small minority of the Board members' constituency (10% for a district member; 5% for an at-large member) is sufficient *by itself* to remove the member. In other words, unlike a normal recall, removal of a Board member doesn't even require a vote of the people. *Id.*

In short, a disgruntled minority of as little as 1.5% of the City's electorate can unilaterally remove a Board member from office.

The trial court's response was that the Council's power over *other* boards was left unaffected and the recall power relative to elected officials was untouched. (3AA667-668.) But that misses the point, which is that Measure H creates a massive exception to the generally-applicable structure of government for the Board, making its members answerable not to duly elected officials (as is usually the case) or even to the broader electorate, but to a minute fraction of the City's residents. That is a substantial alteration.

V.

THE REQUIREMENTS THAT "DISTRICT" MEMBERS OF THE RENT BOARD (1) BE TENANTS AND (2) NOT HAVE ANY "MATERIAL INTEREST IN RENTAL PROPERTY" IN LOS ANGELES COUNTY VIOLATE THE CALIFORNIA AND UNITED STATES CONSTITUTIONS

Separate and apart from the issue of whether the autonomy of the Rent Board constitutes a revision, the qualifications that Measure H imposes to serve in a

supermajority of seats on that Board violate the California and U.S. Constitutions.

Under Measure H, a mandatory qualification for holding any of the seven "district" seats on the Board is that the applicant be a "Tenant," *i.e.*, a "tenant, subtenant, lessee, sublessee or any other person entitled under the terms of a Rental Housing Agreement or this Article to the use or occupancy of any Rental Unit." *See* §§ 1803(aa), 1811(a).

Measure H also requires that to hold a "district" office the appointee *not* possess another specific property interest—a "Material Interest in Rental Property" within LA County. § 1811(a).[12]

A. These Qualifications Violate Article I, Section 22, of the California Constitution.

Article I, section 22, of the California Constitution (hereafter "section 22") provides that "[t]he right to vote or hold office may not be conditioned by a property qualification."

Measure H violates this provision. Possession of a leasehold interest in a residential unit in Pasadena is a mandatory qualification for holding any of the seven "district"

[12] These two qualifications are not redundant. One could be a tenant in Pasadena while also owning a rental property elsewhere in LA County.

offices on the Board. A leasehold is unquestionably a property interest.[13]

In addition, an appointee to a "district" seat must *not* possess another specific property interest—a "Material Interest in Rental Property" within Los Angeles County. § 1811(a). In other words, ownership of property disqualifies one from serving in these offices. This, too, violates section 22.

1. There is no basis for the trial court's narrowing construction of section 22, to apply only to property qualifications based on fee simple ownership.

The trial court grudgingly acknowledged that "the term 'property' *could* include a leasehold," but at Respondents' and Intervenors' urging it nevertheless concluded that "the phrase 'property qualification' could also suggest ownership of land" and that section 22, is, therefore, ambiguous. (3AA629-630.) The court therefore reviewed the Debates and Proceedings of the 1878 Constitutional Convention, and, citing two passages that made passing references to "property ownership" in connection with the debate over this provision, and a third passage that referred simply to "ha[ving]" property, it

[13] *See Kolstad v. Ghidotty*, 212 Cal. App. 2d 228, 231 (1963) ("A leasehold is an interest in land, and constitutes property, as much so as lands held in fee. This interest is carved out of a greater estate and belongs to the lessee subject to the covenants of his lease…").

accepted the invitation of Respondents and Intervenors to rewrite section 22. That section now effectively reads, "The right to vote or hold office may not be conditioned by a [*fee simple*][14] property [*ownership*] qualification." (3AA630.)

The problems with this approach are abundant.

First, it invents limitations that are unsupported by the plain language of the constitutional provision itself, which makes no distinctions as to the types of property interests that may not be used to qualify the right to hold office. *See* Code Civ. Proc. § 1858 ("In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted…").

If the framers of section 22, meant to limit the types of property interests that would be addressed by that section, they certainly could have done so explicitly. "The [1878-1879] constitutional convention was composed largely of lawyers,

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[14] It's not just "ownership" of a property interest that the trial court insisted upon, but ownership of a particular type of estate. After all, one who holds a leasehold interest "owns" that interest. *See, e.g.*, *Duckworth v. Watsonville Water & Light Co.*, 150 Cal. 520, 523 (1907) ("Plaintiffs are the owners of three hundred and twenty acres of land fronting on Pinto Lake, the plaintiff Flora being the owner of the fee, and the other plaintiff the owner of a leasehold interest.").

who must be presumed to have been familiar" with the law in effect at the time. *S.F. & S.M.E.R. Co. v. Scott*, 142 Cal. 222, 224 (1904).[15] Even in 1878 it was well-established that leaseholds were interests in "property."[16] That they didn't specify such limitations indicates that no such limitations were intended. *Cf. Pac. Gas & Elec. Co. v. Roberts*, 168 Cal. 420, 432 (1914) (the framers of the Constitution "were intelligent men and must be presumed to know what they meant to say... They declared that the state tax should be in lieu of *all* other taxes and licenses. … If they meant that it should be in lieu only of *ad valorem* taxes they could easily and would undoubtedly have said so.").

Second, the plain language of the Constitution being clear, there was no need for the trial court to resort to "legislative history" to construe section 22. *See Bd. of Supervisors v. Lonergan*, 27 Cal. 3d 855, 866 (1980) (extrinsic

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[15] *See also In re W.B.*, 55 Cal. 4th 30, 57 (2012) ("the Legislature is presumed to know about existing case law when it enacts or amends a statute").

[16] Thus, for example, as early as 1859 the Supreme Court held, in *McCauley v. Weller*, 12 Cal. 500 (1859), that the State was required to compensate a leaseholder for the "taking" of a "leasehold interest as property." *Id.* at 528-29. And the following year, the Court held, "[t]he lease-hold interest is as much property for which compensation is to be made before it can be subjected to the uses of the State, as are lands held in fee." *People ex rel. McCauley & Tevis v. Brooks*, 16 Cal. 11, 59 (1860).

evidence of intent should not be considered when the language is clear; in such a case, "there is no need for construction, and courts should not indulge in it."). That is especially the case in light of the well-established rule that with respect to constitutional provisions addressing the right to hold office, "*[a]mbiguities are to be resolved in favor of eligibility to office*." *Carter v. Comm'n on Qualifications of Judicial Appointments*, 14 Cal.2d 179, 182 (1939) (emphasis added).

Third, even if the legislative history *is* consulted, it doesn't support the trial court's limiting construction either. Though two of the three passages cited by the trial court contain generalized references to "owning" land (or some form of that word),[17] none of them express any intention to limit section 22's prohibition solely to ownership interests. Moreover, the same legislative history reflects the fact that Mr. Jacob R. Freud, one of the proponents of section 22—and the speaker of two of the three passages quoted by the trial court—also stated more broadly that "[p]roperty qualifications of *any and every kind* are not in consonance with the spirit of an American State," which is consistent with the actual language adopted. (2AA567, 3AA630 [emphasis added].) Generic references to "ownership," without more, are

[17] The third passage refers merely to "ha[ving] no" property, without any reference to "ownership" or any variation of that term. (2AA567.)

far too thin a reed upon which to rest a conclusion that such a limitation was intended, especially in light of conflicting statements elsewhere. *Cf.* *Rust v. Sullivan*, 500 U.S. 173, 185 (1991) ("At no time did Congress directly address the issues of abortion counseling, referral, or advocacy. The parties' attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing.").

And *fourth*, the mere fact that some of the framers *may* have been inspired to act in response to a particularly common type of property qualification is no warrant for ignoring the plain, broad language that they actually adopted. "'[T]he remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.'" *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008) (quoting J. Bishop, *Commentaries on Written Laws and Their Interpretation* § 51, p. 49 (1882)).[18]

In sum, the plain language of section 22, prohibits the imposition of a "property" qualification for voting or holding

[18] *See also* *Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 496 (6th Cir. 2019) ("To be sure, the Equal Protection Clause's primary target may have been racially discriminatory refusals to protect persons from private violence. [Citation.] But, whatever its *purpose*, the Equal Protection Clause's *text* is not limited to race-based denials of the protection of the laws").

office, without regard to the type of "property" in question. The trial court's refusal to enforce that provision in accordance with its full scope is unwarranted.

2. Even if "ownership" were the appropriate focus, Measure H prohibits those who own residential rental property in LA County from holding certain offices.

As for Measure H's requirement that the holders of "district" seats not have a "material interest" in residential rental property in LA County, the trial court held that the "plain language" of section 22 (no longer ambiguous after all, apparently) does not cover the *lack* of a property interest. (3AA630.) But this is an artificial distinction that, if adopted, could easily defeat the prohibition of section 22: a jurisdiction that was so inclined could simply provide that to serve in an appointed capacity in municipal government one could not be a tenant, including a tenant at sufferance—which would amount, essentially, to a requirement that appointees own their home. Even under the trial court's unduly narrow reading that would violate the core purpose of section 22, though it would be framed in terms of a lack of property interest. (3AA630.)

3. The trial court erred in holding that section 22, is not violated because it doesn't preclude landlords from serving on "the Board"; they are barred from serving in the seven preferred "district" seats.

Finally, the trial court concluded that Measure H's reservation of seven seats on the Board for tenants doesn't violate section 22, because, "While Measure H reserves a greater number of seats on the Board for tenant representatives, every resident of Pasadena may be appointed to serve on the Board." (3AA631.)

But this ignores the fact that each seat on a multi-member board *is a separate office*, and non-tenants are barred—by a property qualification—from holding seven of the eleven "offices." The trial court's only response to this point is that the statute that Appellants cited below as illustrative of this principle[19] "pertains to the nomination process to 'elective offices.' Under Measure H, Board members are appointed, not elected. Thus, section 10220 does not apply." (3AA631.) But other statutes adopt the same rule for

[19] Elec. Code § 10220 ("[e]ach seat on the governing body is a separate office"); *see also* Pub. Util. Code § 15955 ("Each directorship [on the governing board of a public utility district] is a separate office for the purpose of nomination and election, and for the filling of vacancies.").

appointed offices as well,[20] and neither the Respondents, Intervenors, nor the trial court cited any authority to support the premise that a different rule applies to appointed offices.

Moreover, treating all of the seats on the Rent Board as interchangeable would be especially inappropriate since the "district" seats that landlords are barred from holding are given special procedural protections in terms of quorum requirements, vote thresholds, etc., that are not granted to the at-large seats. *See* §§ 1811(h), (i). In other words, though they can serve "on the Board," they do so subject to disabilities that "district" representatives do not face.

B. Measure H's Property Qualifications Also Violate the U.S. Constitution.

Again, "[t]he right to hold public office, either by election *or appointment*, is one of the valuable rights of citizenship," *Lubin v. Wilson*, 232 Cal. App. 3d 1422, 1428 (1991) (emphasis added), and "disqualification from office [is] a significant civil disability," *Helena Rubenstein Int'l v. Younger*, 71 Cal. App. 3d 406, 418 (1977). Accordingly, even where there is no *per se* "right to be appointed to" a given board, there is still a "constitutional right to be considered for public service

[20] *See, e.g.*, Bus. & Prof. Code § 6019 ("Each place upon the board for which a member is to be appointed shall for the purposes of the appointment be deemed a separate office.").

without the burden of invidiously discriminatory disqualifications." *Turner v. Fouche*, 396 U.S. 346, 362-63 (1970).

Measure H violates the foregoing rule by depriving landlords like Appellants of the right to be considered on equal terms for each of the seats on the Board, instead conferring a guaranteed supermajority with preferential voting rights on tenants and placing severe restrictions on the rights of property-owners to serve. What's more, it impermissibly does so based on those residents' economic status *and* the policy views they are expected to espouse on the Board.

As the U.S. Supreme Court has held, in *Anderson v. Celebrezze*, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular *viewpoint*, associational preference, *or economic status*." 460 U.S. at 793 (emphasis added). Thus, laws that disadvantage the ability of an "identifiable class" to participate in the political process relative to others—specifically including those based on property ownership—have been held to violate the Constitution. *See, e.g.*, *Curtis v. Bd. of Supervisors*, 7 Cal. 3d 942, 958 (1972) (statute that gave large property-owners the

disproportionate ability to block an election on annexation violated equal protection).

Likewise, the courts have not hesitated to find a constitutional violation where individuals are precluded from holding appointive public office due to their viewpoints. *See, e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 596-97 (1972) (public employment could not be denied to a particular person based upon his speech or political views); *Starkey v. Cty. of San Diego*, 346 Fed. Appx. 146 (9th Cir. 2009) (reinstating appointee removed from office based on viewpoint); *Iowa Socialist Party v. Slockett*, 604 F. Supp. 1391 (S.D. Iowa 1985) (invalidating statute that barred minor party registrants from being appointed as mobile deputy registrars).

The trial court distinguished *Curtis* and *Anderson* on the basis that those were election cases, and not cases about the right to *hold* office, noting that the latter has been held not to be a fundamental right as such. (3AA636.) But the rule that "[t]he State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees," *Turner*, 396 U.S. at 362-63, applies to appointed positions as well as elected ones:

- In *Turner* itself, the Supreme Court struck down a requirement that an individual be a freeholder to

serve on a non-elected school board, appointed by the grand jury. *Id.* at 361-64.

- Several years later, with only a bare citation to *Turner*, the Court summarily reversed a Louisiana court of appeal decision upholding property-ownership qualifications to serve on an appointive airport commission. *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977).
- And in *Quinn v. Millsap*, 491 U.S. 95 (1989), the Court unanimously struck down a requirement that limited *appointment* (not election) to a municipal "board of freeholders"—tasked with recommending changes to the structure of local government (similar to a LAFCO)—to property-owners. *Id.* at 105-06.

The trial court nevertheless held Measure H's discrimination against landlords to be constitutional on three basic grounds: first, that landlords and tenants are not "similarly situated" for purposes of an equal protection analysis (3AA632-633); second, that only rational basis applies here (3AA633-634, 635-636); and third, the discrimination against landlords is rational (4AA634-635). All three conclusions were error.

1. The trial court erred in holding that landlords and tenants are not similarly situated for purposes of the analysis.

There can be no doubt that property-owners and tenants alike are directly and substantially interested in, and affected by, the Rent Board's decision-making, and the trial court's holding that those two classes are not "similarly situated" because those interests and effects are not *identical* is flawed. (3AA632-633.) In the context of restrictions on political participation, "all residents share a substantial interest in the government of their state, city, county, school district, and other agencies of general governmental power"; they are entitled to participate on an equal basis and are, *ipse dixit*, "similarly situated" for purposes of an equal protection analysis. *See* *Curtis*, 7 Cal. 3d at 960.

Thus, for example, in *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), the City of Phoenix sought to defend Arizona's limitation of the franchise in bond elections to property-owners on the grounds that the bonds in question were general obligation bonds, and might constitute a lien on real property. The Supreme Court rejected this contention, holding "that all residents of Phoenix, property-owners and nonproperty owners alike, have a substantial interest in the public facilities and the services available in the city and will be substantially affected by the ultimate outcome of the bond

election at issue in this case." It concluded that "although owners of real property have interests somewhat different from the interests of nonproperty owners in the issuance of general obligation bonds, *there is no basis for concluding that nonproperty owners are substantially less interested in the issuance of these securities than are property owners*." *Id.* at 212 (emphasis added).

Likewise, in *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969), the Court struck down a statute that limited voting in school board elections to property-owners and parents. Even though the interests of non-property-owners and non-parents were undeniably different, the Court held that the constitutionality of such a restriction depended "on whether all those excluded are in fact substantially less interested or affected than those the statute includes." *Id.* at 632.

And in *Quinn*, the Court held that non-property-owners could not be excluded from service on the board of freeholders because "[t]he work of the board of freeholders thus affects all citizens of the city and county, regardless of land ownership," even while it recognized that they might be affected in different ways. 491 U.S. at 109.

If the trial court's reasoning had been adopted in the foregoing cases, however, they would have been dismissed

because the discriminated-against class was not "similarly situated" to the favored class. Simply put, though landlords and tenants may be affected somewhat differently by the decisions of Pasadena's Rent Board, both are "substantially affected." They are, accordingly, similarly-situated for purposes of constitutional analysis, and the trial court's contrary ruling was error.

2. The trial court erred in not applying heightened scrutiny.

The trial court concluded that heightened scrutiny does not apply here, because landlords are not a protected class and because there is no "fundamental right" to hold office. (3AA634.) But this ignores the fact that Measure H discriminates against property-owners in a manner that is not content-neutral. As the Sixth Circuit recently observed, in considering a challenge to the qualifications to be appointed to Michigan's statewide redistricting commission, "A law would not be content-neutral, and would thus impose a severe burden [triggering strict scrutiny], if it 'limit[ed] political participation by an identifiable political group whose members share a *particular viewpoint*, associational preference, *or economic status*.'" *Daunt v. Benson*, 999 F.3d 299, 311 (6th Cir. 2021) (quoting *Anderson*, 460 U.S. at 793 (emphasis added)).

That Measure H discriminates against property-owners based on their "economic status" is so obvious as to require no elaboration. But it is also the case that this nominally economic discrimination against landlords is a proxy for viewpoint discrimination. Indeed, the trial court acknowledged as much, though it curiously considered this a mark in the Measure's favor:

> The voters of Pasadena had a rational basis for the disparate treatment of tenants and property owners in section 1811(a). The requirement that tenants must hold 7 of the 11 seats has the effect of limiting the number of landlords that can serve on the Board to 4 seats. As noted above, *the voters found, among other things, that landlords are overrepresented on the Council*. The voters … found that "as documented in the video archive of the City Council Meeting on March 25th 2019 during Item 15, the Pasadena Department of Housing and Career Services was instructed by the Council not to consider rent control or just cause for eviction when proposing possible expansions to the City's Tenant Protection Ordinance, *which demonstrates the unwillingness of the Council to legislate any rent control or eviction protections in the City." The voters could rationally conclude that it was necessary to limit the number of landlords on the Board to prevent those who have traditionally controlled the rental market in City from dominating the Board*.

(3AA634.) Put more bluntly: landlords have historically been too successful in persuading Pasadena's voters to elect

members of the City Council who did not favor rent control, and those landlords probably share those same policy views themselves, so their ability to participate in the political process and advance those views must be restricted. Far from being a rational basis, this is invidious viewpoint discrimination, and it triggers strict scrutiny.

Tellingly, neither the trial court itself, nor the City, nor Intervenors have made any effort to suggest that Measure H's discrimination against the political participation of landlords in City government on one of the most significant policy issues of the day could survive strict scrutiny.

3. The trial court erred in holding there is a rational basis for Measure H's discrimination.

Nor could Measure H's discrimination even survive rational basis review, and the trial court was wrong to hold otherwise.

As noted above, in *Quinn v. Millsap* the Court struck down a requirement that precluded non-property-owners from being appointed to a municipal "board of freeholders," tasked with recommending changes to the structure of local government. 491 U.S. at 105-06. As Appellants do here, the plaintiffs in *Quinn* argued that heightened scrutiny applied, but the Court did not reach that issue because it *unanimously*

held even rational basis review was fatal. *Id.* at 107 n.10. Similarly, in *Turner v. Fouche*, the court concluded it need not decide the applicable level of scrutiny because the requirement that an individual own property to be appointed to the local school board by the grand jury could not even survive rational basis review. 396 U.S. at 362.

Those cases held that there was no rational basis for concluding that a person otherwise qualified to participate in municipal affairs should be excluded from a school board or board of reorganization based on the lack of property ownership. Likewise, in this case, there is no rational basis for concluding that a person otherwise qualified to participate in municipal affairs should be excluded from a supermajority of the seats on the Rent Board based on the fact of property ownership. The only purportedly rational basis identified by the City and Intervenors below, and by the trial court, was—as discussed above—a desire to hamstring landlords' ability to advance their interests through the political processes of the City, and that is invidious viewpoint discrimination.

The trial court nevertheless purported to distinguish *Quinn* on the grounds, essentially, that (1) the rule struck down in that case discriminated in favor of property-owners, rather than against them, and (2) the "board of freeholders" in that case was not the same as a rent board. (3AA634-635.)

But the former distinction is immaterial—*Quinn* and *Turner* stand for the proposition that it is irrational to exclude someone otherwise qualified from public service on a board that will affect their interests, simply because they lack a given property interest. As for the latter distinction, to the extent the board of freeholders was not like the rent board that distinction militates *against* Measure H's constitutionality, rather than in its favor.

The primary function of the board in *Quinn* (and the school board in *Turner*) was policy-making—essentially legislative—whereas a substantial component of the Rent Board's duties are adjudicative: deciding landlord and tenant petitions. §§ 1813-1814.

Acting in an adjudicative capacity, Rent Board members are subject to a duty of impartiality that does not apply the same way in the legislative context, *Nasha v. City of L.A.*, 125 Cal. App. 4th 470, 482-83 (2004), and courts have accordingly held that administrative board structures with mandated memberships that are insufficiently counterbalanced with respect to the interests subject to board control are unconstitutional, since such tribunals are "constituted as to slant [their] judicial attitude in favor of one class of litigants over another." *Am. Motors Sales Corp. v. New Motor Vehicle Bd.*, 69 Cal. App. 3d 983, 991 (1977), *rev. denied* (Aug. 4, 1977)

(board created to resolve disputes between car dealers and car manufacturers, which mandated that each nine-member board must have at least four car dealers, and imposed no counterbalancing requirement regarding car manufacturers, unconstitutional because it inherently favored dealers); *see also* *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (Board of Optometry, required by law to consist of members of the Alabama Optometric Association, held unconstitutional due to members' pecuniary interest in proceedings pertaining to optometrists excluded from association membership).

In short, while the Rent Board may be different from *Quinn*'s board of freeholders, those differences further undermine Measure H's constitutionality.

4. Measure H's overly-broad financial disclosure requirements further compound the unconstitutional discrimination.

Finally, Measure H also burdens would-be landlord members' ability to serve by forcing them to comprehensively disclose rental property interests not just of themselves, and not just in Pasadena (*i.e.*, not just properties subject to regulation by the Board), but also the interests of their extended family anywhere in LA County. § 1811(b).

Though narrowly-tailored financial disclosure requirements have been upheld in the past, overly-broad

disclosure requirements that are not rationally related to potential conflicts-of-interest are unconstitutional. *See, e.g.*, *Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 268-69 (1970) (striking down a statute requiring disclosure of financial interests owned by public officials *and their family members*). And since such ownership interests are not disqualifying for the "at-large" positions, the only reasonable conclusion is that the purpose of this requirement is to further discourage non-tenants from seeking to serve on the Board. *See* *Plante v. Gonzalez*, 575 F.2d 1119, 1126-27 (5th Cir. 1978) ("Disclosure requirements may deter some people from seeking office," and may be unconstitutional where they have a disproportionate effect on the ability of a cognizable group to participate in public office).

The trial court rejected this argument, too, because (1) *Carmel-by-the-Sea* was not an equal protection case, and (2) "[t]he disclosure requirements of section 1811(h) apply equally to 'all prospective members of the Rental Board.'" (3AA635 [quoting unknown source].)

Regarding the latter point, the overly-broad disclosure requirements—those that reach beyond properties subject to regulation or those triggering disqualification—do not apply to "district" seats, because those same interests, if they

existed, would preclude an applicant from serving in those seats in the first place.

As to the former point, it too undermines, rather than supports, Measure H. *Carmel-by-the-Sea* held that disclosure requirements may be unconstitutional *even when* they apply to all officeholders equally. That the burden in this case falls exclusively on a single, identifiable group—property-owners—only compounds the constitutional harm.

VI.

STATE LAW PREEMPTS MEASURE H's "RELOCATION ASSISTANCE" AND "NOTICE AND CURE" REQUIREMENTS

Article XI, section 7, of the Constitution provides, "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*." (Emphasis added.) If an otherwise valid local law conflicts with general law, it is preempted and void. *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993).

> A conflict exists if the local legislation duplicates, contradicts, or enters into an area fully occupied by the general law, either expressly or by implication. Local legislation is "duplicative" of general law when it is coextensive therewith. Similarly, local legislation is "contradictory" to

> general law when it is inimical thereto. Finally, local legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to "fully occupy" the area, or when it has impliedly done so …

Id. at 897-98 (internal citations and quotations omitted).

As discussed below, the latter two types of preemption—contradiction and field preemption—are both implicated here.

"A local ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law," whereas "[a] local ordinance *enters a field fully occupied* by state law in either of two situations—when the Legislature 'expressly manifest[s]' its intent to occupy the legal area or when the Legislature 'impliedly' occupies the field." *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1068 (2007) (italics in original).

With respect to "field" preemption, "[a]lthough the adoption of local rules supplementary to state law is proper under some circumstances, it is well settled that local regulation is invalid if it attempts to *impose additional requirements* in a field which is fully occupied by statute." *Tolman v. Underhill*, 39 Cal. 2d 708, 712 (1952) (emphasis added)).

A. The "Relocation Assistance" Requirement Is Preempted by the Costa-Hawkins Rental Housing Act Insofar as It Applies to Tenants Who Voluntarily Vacate a Rental Unit Rather Than Pay a Rent Increase Authorized by That Act.

In 1995, the Legislature enacted Costa-Hawkins "to relieve landlords from some of the burdens of 'strict' and 'extreme' rent control, which the proponents of Costa-Hawkins contended unduly and unfairly interfered with the free market." *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles*, 173 Cal. App. 4th 13, 30 (2009). To that end, as relevant here, it exempted certain rental units from rent control *altogether*—single family homes, separately-alienable condominiums, and newly constructed units. Civ. Code, § 1954.52(a). Owners of these fully "exempt" units may "adjust the rent on such property *at will*, '[n]otwithstanding any other provision of law.'" *DeZerega v. Meggs*, 83 Cal. App. 4th 28, 41 (2000) (emphasis added).[21]

In enacting Costa-Hawkins, the Legislature expressly noted that the bill "would *establish statewide guidelines for any local regulation of rental rates* for residential

[21] As for all other units, Costa-Hawkins established a system of "vacancy decontrol" in which localities could limit annual rent increases for the duration of a single tenancy, but landlords could, upon a vacancy in the unit, raise the rent to whatever level they choose, free of governmental restriction. Civ. Code, § 1954.53(a).

accommodations. It would pre-empt more restrictive controls." *See* Sen. Judiciary Com., Analysis for S.B. 1257 (1995-1996 Reg. Sess.) as introduced Apr. 4, 1995, p. 3 (emphasis added). In so doing, it expressly rejected arguments by opponents that Costa-Hawkins "[wa]s an inappropriate intrusion into the right of local communities to enact housing policy to meet local needs." *Id.* at 7. In other words, the Act is a comprehensive treatment of the field of the setting of residential rental rates, indicating the Legislature's intent to fully occupy the field. *See Apartment Ass'n of L.A. Cty., Inc. v. City of L.A.*, 136 Cal. App. 4th 119, 130 (2006); *Bullard v. S.F. Rent Stabilization Bd.*, 106 Cal. App. 4th 488, 489-91 (2003) ("*Bullard*").

Measure H, however, improperly seeks to regulate in this fully-occupied field, and defeat landlords' legislatively-conferred state law rights, by penalizing the exercise of those rights. Section 1806(b)(C) requires landlords who are subject to the Measure's "just cause" provisions—which is almost all of them—to pay "relocation assistance" to tenants who vacate a unit after being notified of a rent increase of 5 percent plus the annual increase allowed under the measure's rent control provisions (75% of CPI). Furthermore, the (tenant supermajority) Rent Board is authorized to lower the threshold to trigger this penalty "if it determines that the

lower threshold is necessary to further the purposes of this Article." § 1806(b)(C).

As a practical matter, this provision applies almost exclusively to units that are exempt from rent control under Costa-Hawkins, because units that are not exempt could never raise the rents to such a level in the first place.

There is no question that if the City were to adopt an ordinance flatly stating that rents on exempt units could not be increased by more than some specified amount it would be preempted.[22] But the City can no more limit rent increases on exempt units indirectly, by imposing penalties *ex post* to discourage the exercise of landlords' state law rights, than it can directly by barring them *ex ante*. *See* *Am. Fin. Servs. Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 1273 (2005) ("a locality may not impose additional burdensome requirements upon the exercise of state statutory remedies that undermine the very purpose of the state statute"). Measure H attempts to do exactly that.

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[22] *Bullard*, 106 Cal. App. 4th at 489 (city could not impose rent limits on property in violation of Costa-Hawkins as a condition of evicting a tenant so the landlord could occupy the unit); *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009) ("*Palmer*") (city could not enforce affordable housing requirement that was preempted by Costa-Hawkins and could not charge an "in lieu" fee as an alternative to providing such housing).

The trial court nevertheless upheld the relocation assistance provision, chiefly on the ground that "Section 1806(b)(C) does not restrict the ability of a landlord to increase rents for exempt units. The landlord of an exempt unit may raise the rent as much as is allowed under state law. If tenants leave because they are unable to pay that amount, section 1806(b)(C) may result in the rent increase becoming less lucrative, in some cases, due to the payment of relocation assistance. However, the Costa-Hawkins Act only requires that the landlord may impose the rent increase." (3AA640.) In other words, the City *can* penalize the exercise of state law rights *post hoc*, so long as it doesn't bar rent increases *ex ante*. This was error.

Instructive is *San Francisco Apartment Ass'n v. City & Cty. of San Francisco*, 3 Cal. App. 5th 463, 482 (2016) ("*SFAA I*"). In that case, the Court of Appeal was asked to determine whether the Ellis Act, a companion statute to Costa-Hawkins designed to protect landlords' ability to exit the rental business, preempted a local ordinance that allowed landlords to withdraw from the rental business, and evict tenants accordingly, but which imposed a penalty on those landlords for exercising their statutory rights, by imposing a 10-year waiting period after withdrawing a unit from the market before qualifying to apply for approval to merge the

withdrawn unit into one or more other units. San Francisco argued the ordinance did not violate the Ellis Act because landlords were not prevented from exiting the rental business—"it 'd[id] not condition the right to leave the rental market on fulfillment of any prerequisites, payment of any fee, or satisfaction of any pre-condition that could result in a defense to an unlawful detainer action.'" *Id.* at 478 (quoting San Francisco's brief). In other words, San Francisco argued because landlords were not *directly* prohibited from exercising their rights under the Act, no violation occurred.

The Court rejected that contention, holding that "the fact that this 10-year ban on applying for merger approval begins to run when the landlord exits the residential rental business rather than before the landlord exits the business does not make this ban any less of a penalty triggered by the landlord's exercise of Ellis Act rights." *Id.* at 480. In support of this conclusion, the Court cited numerous other cases to the same effect. *Id*.

Of those, *Palmer, supra*, is particularly instructive. In that case, the appeals court invalidated a local measure that regulated rental levels for newly-constructed units that replaced formerly rent-controlled units taken off the market under the Ellis Act. Relying heavily on *Bullard* the court held the ordinance "directly conflict[ed] with the Costa-Hawkins

Act's vacancy decontrol provisions" and struck it down. 175 Cal. App. 4th at 1411. But in addition to invalidating the direct rent ceilings, the court also struck down an alternative by which owners of newly-constructed units could avoid the rent ceilings: paying an "in lieu" replacement fee.

The trial court did not address *SFAA I*, and it distinguished *Palmer* (and *Bullard*, on which *Palmer* relied) on the wholly superficial ground that those two latter cases deal with Civil Code § 1954.5***3***(a), which restricts the application of rent limits to otherwise rent-controlled units when they become vacant—so-called vacancy decontrol—rather than Civil Code § 1954.5***2***(a). (3AA640-641.) But this is a distinction without a difference. For one thing, the wording is largely identical. Moreover, Costa-Hawkins occupies the field with respect to the circumstances in which local governments may regulate rent increases, and these are complementary sections of the same Act; the same principle applies to both—local governments may not frustrate the rights granted by Costa-Hawkins by penalizing their exercise.

Finally, the trial court held that this challenge could not be decided on a facial basis, but must be subject to subsequent as-applied challenges, because (1) some tenants may not vacate in response to a rent increase that would otherwise trigger relocation assistance and, (2) before the Board sets the

relocation amounts by regulation, it is impossible to know if they will be high enough to discourage landlords from imposing rent increases. (3AA640.)

Regarding the first point, in assessing a facial challenge, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Tom v. City and County of San Francisco*, 120 Cal. App. 4th 674, 680 (2004). The fact that Section 1806(b)(C), by its terms, does not apply to some rent increases does not alter the fact that it is facially unconstitutional in those circumstances where it does apply. *See also Palmer*, 175 Cal. App. 4th at 1411 (ordinance preempted by Costa-Hawkins though it did not apply to all units).

Regarding the second point, neither *SFAA I* nor *Palmer* turned on the magnitude of the imposition on state law rights or suggested a different result would have obtained if the "penalties" had been less significant.[23] This is a red herring.

Appellants expect Intervenors will renew their argument that *San Francisco Apartment Ass'n v. City & Cty.*

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[23] Additionally, as Interveners noted (2AA572-574), the City already had relocation assistance provisions for certain types of evictions, and though they differ based on the type of household, they can exceed $8,000 and are adjusted upward annually, so Appellants could reasonably expect the amounts set by the Board to be substantial. (And they are. *See* RJN, Ex. C.)

of San Francisco, 74 Cal. App. 5th 288 (2022) ("*SFAA III*"), authorizes this provision. Not so. At issue in *SFAA III* was an amendment to San Francisco's rent ordinance to "make it unlawful for a landlord to seek to recover possession of a rental unit that is exempt from rent control by means of a rental increase that is *imposed in bad faith to coerce the tenant to vacate the unit* in circumvention of the city's eviction laws." *Id.* at 290-91 (emphasis added). That provision was limited by its express terms to "a rent increase that is imposed in bad faith with an intent to defraud, intimidate, or coerce the tenant into vacating the unit." *Id.* The provision further specified that evidence of bad faith *may include* that "the rent increase was substantially in excess of market rates for comparable units" and "the rent increase was within six months after an attempt to recover possession of the unit." *Id.* The court therefore found the provision was not preempted by Costa-Hawkins as a restriction on rent increases because it "applies only to bad faith, pretextual rent increases designed to avoid local eviction regulations." *Id.* at 292.

Section 1806(b)(C) of Measure H does not require a showing of bad faith or that a rent increase was imposed as a pretext to induce a tenant to vacate the unit. Beyond that, the threshold for triggering "relocation assistance" is so low—5% plus the annual increase allowed under the measure's rent

control provisions (75% of CPI), and potentially subject to further reductions by the Board—that there are myriad good faith, non-pretextual reasons why a landlord might increase rents beyond the amount permitted by Measure H: keeping up with rapidly increasing operating and maintenance costs in a time of rapid inflation, offsetting increases to a landlord's mortgage rates, and bringing rents in line with market rates, for example.

B. The "Notice to Cease" Requirement Is Preempted by State Law Insofar as It Imposes a Prerequisite to Pursuing an Eviction for Nonpayment of Rent under the Unlawful Detainer Statutes.

Over 150 years ago, the Legislature enacted a comprehensive statutory scheme governing unlawful detainer actions, to ensure landlords a speedy and simple remedy for the orderly eviction of tenants for the nonpayment of rent, to supplant the use of self-help remedies. Code Civ. Proc. §§ 1159 *et seq*. To that end, the Code of Civil Procedure currently provides thorough and clearly-defined procedures by which an owner is to file an unlawful detainer action for nonpayment of rent. Specifically, Code of Civil Procedure § 1161(2) (hereafter "Section 1161(2)"), provides that before an owner can file an unlawful detainer action for nonpayment, the owner must provide a tenant three days' notice to pay or quit. If the tenant

does not pay or vacate in that time, the tenant becomes guilty of "unlawful detainer" and may be evicted in a summary judicial proceeding.

Section 1803(cc), however, in conjunction with Section 1806(a)(1), attempts to extend the statutory three-day notice period, purporting to instead require that *before* an owner may serve the three-day notice, the owner must *first* serve the tenant with a "Written Notice to Cease," which includes an additional, "reasonable" opportunity to cure the failure to pay. (1AA042, 044.) By extending the amount of notice that must be given, Measure H conflicts with state law.

California's courts have held that in enacting the unlawful detainer statutes, the Legislature has "occupied the field" with respect to summary state law processes for such an action and local governments accordingly may not interfere with these procedures. Any attempt to do so is preempted.

Thus, in *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129 (1976), the Supreme Court held that Berkeley could not require a landlord to obtain a "certificate of eviction" from the City's rent board before serving a three-day notice. *Id.* at 152. It is at this point well-established that under existing law cities "may not procedurally impair the summary eviction scheme set forth in the unlawful detainer statutes." *San*

Francisco Apartment Assn. v. City & Cty. of San Francisco, 20 Cal. App. 5th 510, 518 (2018) (emphasis added).

Applying this principle, the courts have squarely held more broadly, in language applicable here, that "where a statute has set the amount of notice required, the municipality may not impose further requirements of additional notice." *Mobilepark W. Homeowners Ass'n v. Escondido Mobilepark W.*, 35 Cal. App. 4th 32, 47 (1995).

Thus, for example, in *Tri County Apartment Assn. v. City of Mountain View*, 196 Cal. App. 3d 1283 (1987), the City of Mountain View enacted an ordinance requiring landlords to provide 60 days' notice "before increasing a monthly tenant's rent." *Id.* at 1289. The ordinance conflicted with Civil Code § 827, which provided for 30 days' notice in the same situation. *Id.* at 1297. Section 827 was part of a "statutory scheme which occupies the field of notice between landlords and tenants." *Id.* at 1286–87, 1297–98 (listing more than a dozen statutory timelines pertaining to the landlord–tenant relationship). The *Tri County* court therefore held that the "extensive scheduling provided by the Legislature reveals that the timing of landlord–tenant transactions is a matter of statewide concern not amenable to local variations." *Id.* at 1298. As *Tri County* noted, "[l]andlord-tenant relationships are so much affected by statutory timetables governing the

parties' respective rights and obligations that a "patterned approach" by the Legislature appears clear." *Tri County*, 196 Cal. App. 3d at 1296. Because the ordinance invaded this fully occupied field, it was preempted, *id.* at 1298, just as the "notice to cease" provision is preempted.

Several years later, in *Channing Properties v. City of Berkeley*, 11 Cal. App. 4th 88 (1992), the Court of Appeal similarly struck down an ordinance requiring six months' notice before an Ellis Act eviction as preempted. The Ellis Act had a provision (former Govt. Code § 7060.4(a) ¶3) specifying that the landlord "must give notice to the city 60 days prior to withdrawal of the accommodations." *Channing Properties*, 11 Cal. App. 4th at 96. The Court of Appeal concluded that the 60-day notice requirement was part of the "patterned approach" discussed in *Tri County* and further demonstrated the Legislature's intention to fully occupy the field with respect to the timelines governing the termination of tenancies. *Id.* at 96-97.[24]

In the same vein here, Measure H interferes with the patterned approach adopted by the Legislature. Code of Civil

[24] The Legislature recently reaffirmed its intention to adopt a patterned approach to the unlawful detainer procedures, adopting temporary, limited modifications to the timelines contained in those statutes as part of the COVID-19 Tenant Relief Act of 2020, Code Civ. Proc. §§ 1179.01-1179.07.

Procedure § 1161(2) is controlling with respect to the requirements to begin legal proceedings against a tenant for nonpayment of rent, and it provides that the process is to be initiated via a three-day notice to pay rent or quit. Measure H layers on additional procedural requirements, which are preempted and therefore illegal and unenforceable.

The trial court nevertheless upheld the "Notice to Cease" requirement in this context on two primary grounds. First, it held that Measure H's interference with the timeline is "far less extensive than the procedural requirements discussed in *Birkenfeld* which required landlords to obtain certificates of eviction from the rental control board prior to commencing unlawful detainer proceedings." (3AA647.)

But *Birkenfeld* didn't distinguish between barriers to the unlawful detainer statutes based on how extensive the procedural requirements are, and how much the local requirements extend the timeline set forth by the Legislature. Because the Legislature has fully occupied the field as to these timing and notice requirements, local governments *may not regulate* on this topic, whether a little or a lot.

And second, the trial court cited *Rental Housing Assn. of Northern Alameda County v. City of Oakland*, 171 Cal. App. 4th 741, 762-63 (2009) ("*RHANAC*"), for the proposition that "Petitioners do not show that these notice requirements

cannot coincide with the unlawful detainer process in CCP section 1161." (3AA647.) But *RHANAC* is readily distinguishable.

First, *RHANAC* did not distinguish—or even cite—*Tri County* or *Channing*, which held that local changes to required, state notice periods are preempted.

Second, *RHANAC* did not address § 1161*(2)*, which governs eviction for the failure to pay rent. The ordinance there required that, before a landlord could file an unlawful detainer action based on certain enumerated grounds—those governed by §§ 1161*(3)* and *(4)*, such as nuisance, waste, or breach of a material term of the lease *other than* the requirement to pay rent[25]—the landlord had to provide the tenant with notice of the wrong (bad act or failure to act) and time to cure it. 171 Cal. App. 4th at 762.

Addressing a distinction made in *Birkenfeld*—between interference with the *procedural* scheme set forth in the unlawful detainer statutes, with which local governments may not interfere, and regulation of the *substantive* grounds for eviction, which local governments may address—*RHANAC* held this opportunity-to-cure requirement

[25] The provision of Measure EE applicable to the failure to pay rent, now codified at Oakland Muni. Code § 8.22.360(A)(1), does not impose an additional notice and cure requirement beyond the three days specified by § 1161(2).

regulated the substantive grounds for eviction, because "[i]f the tenant ceases the offending conduct once notified by the landlord, there is no good cause to evict." *Id.* at 762-63. This is consistent with the fact that evictions on grounds other than nonpayment—those under §§ 1161(3) and (4)—must be "material" or "substantial" to justify eviction;[26] the ordinance at issue in *RHANAC* essentially provided that if a breach of lease terms unrelated to payment could be cured within 10 days, it was insufficiently material to warrant eviction. Thus, it altered the substantive basis of eviction.

However, timely payment of rent is *always* material and *always* a substantial breach, because (a) the payment of rent in exchange for (b) exclusive possession are the "essential elements" of a lease. *Santa Monica Rent Control Bd. v. Bluvshtein*, 230 Cal. App. 3d 308, 316 (1991).[27] That is why failure to pay rent (§ 1161(2)) is a separately actionable breach from those under §§ 1161(3), (4). In the context of nonpayment of rent, the "Written Notice to Cease" has no

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[26] *See* *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d 1032, 1051 (1987).

[27] *See also* *Danger Panda, LLC v. Launiu*, 10 Cal. App. 5th 502, 513 (2017) ("Payment of rent is the consideration for this right to exclusive possession."); Civ. Code § 1925 ("Hiring is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time.").

independent function other than extending the required notice prescribed by statute—a purely procedural (and therefore preempted) effect.[28]

VII.

CONCLUSION

For the foregoing reasons the judgment should be vacated and remanded with directions to enter judgment entirely in Appellants' favor.

Respectfully submitted,

January 31, 2024

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[28] *See* *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of *procedural* due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be *notified*.'" (emphasis added)); *In re Carl R.*, 128 Cal. App. 4th 1051, 1068 (2005) ("Procedural due process pertains to notice and the opportunity to be heard.").

CERTIFICATION OF BRIEF LENGTH

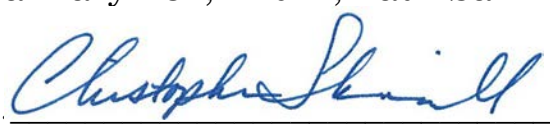
Christopher E. Skinnell, Esq., declares:

1. I am licensed to practice law in the State of California, and I am one of the attorneys of record for Petitioner/Plaintiffs and Appellants CALIFORNIA APARTMENT ASSOCIATION, AHNI DODGE, SIMON GIBBONS, MARGARET MORGAN, DANIELLE MOSKOWITZ, & TYLER WERRIN, in this appeal. I make this declaration to certify the word length of the **Appellant's Opening Brief**.

2. I am familiar with the word count function in Microsoft Word, with which this Appellant's Opening Brief was prepared. Applying the word count function to the Appellant's Opening Brief, I determined and hereby certify pursuant to California Rules of Court, Rule 8.204, that this Appellant's Opening Brief contains **14,000** words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and of my own personal knowledge except for those matters stated on information and belief and, as to those matters, I believe them to be true. If called as a witness, I could competently testify thereto.

Executed on January 31, 2024, at San Rafael, California.



Christopher E. Skinnell, Declarant