General Municipal Litigation Update

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GENERAL MUNICIPAL LITIGATION UPDATE FOR LEAGUE OF CALIFORNIA CITIES ANNUAL CONFERENCE FALL 2022

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I. PUBLIC FINANCE

A. *Padilla v. City of San Jose* (2022) 78 Cal.App.5th 1073, *review denied*

Holding: Residents challenging garbage collection charges must comply with the payment under protest procedures of Health and Safety Code section 5472 before suing for a refund.

Facts/Background: Plaintiffs Thomas Padilla, Sr. and Darlene Padilla brought a class action against the City of San Jose to recover millions of dollars in garbage collection charges. As property owners, the Padillas received City garbage collection services, but failed to pay certain bills. To recover these delinquencies, the City recorded liens on their property. It referred the delinquencies to the Auditor/Controller as special assessments for inclusion on the property tax bill. When the Padillas paid the assessments via property tax bills, the City released the lien on their property — a practice its Municipal Code permitted. The Padillas alleged this violated state law regarding priority of liens, and sought a refund of all special assessments property owners paid the City for delinquent garbage collection charges. The case is one of a line that includes *Kahan v. City of Richmond* (2019) 35 Cal.5th 721 (ordinance authorizing lien for delinquent trash bills not preempted by statute).

The City and County demurred arguing, among other things, the suit was barred because class members voluntarily paid the special assessments without invoking the payment under protest procedure required by Health and Safety Code section 5472.

The trial court agreed, finding payment under protest was a mandatory prefiling requirement, the Padillas failed to comply, and their lawsuit was barred.

Analysis: The Sixth District affirmed, finding the Padillas did not comply with section 5472. Section 5472 governs fees imposed for the services of community "sanitation and sewerage systems" and provides payors of "fees, rates, tolls, rentals, or other charges" covered by the statute may sue for a refund only if fees were first paid under protest.

The Court explained that, to pay under protest, a customer must:

- give written notice to the entity imposing the charges,
- when payment is made,
- indicating the payor believes the charge is invalid, and
- intends to seek a refund.

This protects municipal finance because the ratemaking agency is then "on notice that a refund may eventually be required" before it spends the proceeds of the fee.

Plaintiffs argued section 5472 did not apply to garbage collection fees, and that the fees were imposed under the Municipal Code, not statute. The Court rejected both arguments. First, the Court held section 5472 applies by its terms to "sanitation and sewage system" fees, defined to include municipal garbage collection charges. Section 5470 states the statute encompasses "rates or charges" for "garbage and refuse collection." According to the Court: "the Legislature was clear that the charges described by section 5472 include those for garbage collection."

Second, the Court rejected the Padillas' argument that the disputed fees were not "fixed" pursuant to section 5472, but rather pursuant to the City's code. It mattered not that the ordinance imposing the fees did not reference the Health and Safety Code. So long as the fees were enacted by an "ordinance or resolution approved by a two-thirds vote of the members of the legislative body," they are "fixed pursuant to" Health and Safety Code Article 4 so as to invoke section 5472 — whether or not the local revenue legislation cites that statute.

Because section 5472 applies to garbage collection fees and the City fixed its fees pursuant to Health and Safety Code, plaintiffs were required to pay under protest before suing for a refund. They did not, and their lawsuit was therefore barred.

This ruling has broad implication for lawsuits seeking refund of solid waste and other service fees. Payment under protest is a prerequisite for bringing a further lawsuit for a refund, and ratemaking agencies should be sure to investigate whether this procedural hurdle has been met. Moreover, filing a Government Claims Act claim does not satisfy *Padilla*. Government Code section 905, subdivision (a) makes section 910's claiming requirement inapplicable to "[c]laims under the Revenue and Taxation Code or other statutes prescribing procedures for the refund … of any tax, assessment, fee, or charge". As the California Supreme Court clarified in *Ardon v. City of Los Angeles* (2016) 62

Cal.4th 1176, a taxpayer's class claim for a refund of local taxes and fees is permissible under section 910 only in the absence of another statutory tax refund procedure. Here, section 5472 provides that procedure, so section 910 does not apply.

B. *City of San Buenaventura v. United Water Conservation District* (2022) 79 Cal.App.5th 110, *review denied*

Holding: A statute requiring local agencies to charge municipal and industrial groundwater users (M&I) three to five times more than agricultural users (ag) for groundwater replenishment violates Proposition 26. Proposition 26 (Cal. Const., art. XIII C, § 1, subd. (e)(2)) requires rates to be limited to the reasonable cost of service and fairly or reasonably allocated among customers; efforts to protect agricultural interests and others from high water costs still require a justification based on benefits from or burdens on the service.

Facts/Background: This case decides a decade-long battle over rates for replenishment of groundwater serving the Cities of Ventura and Santa Paula and nearby farmers. The United Water Conservation District manages eight groundwater subbasins in central Ventura County. It imposes groundwater pumping charges to fund its operations and conservation activities such as replenishing groundwater and protecting its quality. These charges are based on the volume of water pumped. A 1966 statute required pumping charges to be "fixed and uniform" for two classes of use: ag and M&I. Water Code section 75594 further required that M&I charges be between three and five times those for ag. The District set its rates at the minimum 3:1 ratio — M&I paid three times what farmers did.

The City first sued in 2011, arguing the statute violated Proposition 218 by requiring the 3:1 ratio of pump charges. The City won at trial, lost in the Court of Appeal, and won review in the California Supreme Court. That Court decided the case was subject to Proposition 26, not Proposition 218 as a property-related fee or charge, overruling *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 on that point. Under Proposition 26, local agency fees and charges are not taxes if (under two of the seven stated exceptions):

(1) the charges are imposed for a specific benefit conferred or privilege granted, or

(2) for a government service or product provided directly to the payor that is not provided to those not charged.

(Cal. Const., art. XIII C, § 1, subd. (e)(1).) These fees and charges must not exceed the reasonable costs to the local government of conferring the benefit or providing the service or product. (*Ibid*.) Additionally, the manner of allocating costs must bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity. (Cal. Const., art. XIII C, § 1, subd. (e) [final par.].)

The Supreme Court remanded to the Court of Appeal to apply Proposition 26 to the District's administrative record. And to apply both prongs of this test – cost justification across all fee-payors and a fair or reasonable apportionment of fees among fee payors (the Court of Appeal had earlier applied only the first.) Rather than do so, the Court of Appeal remanded to the trial court, directing it to remand to the District to conduct another hearing before its own board to try to justify its rates — i.e., to give the District a chance to justify its fees eight years after they were collected and spent. After making that record, the parties returned to the trial court.

The trial court ruled for the City again, finding Water Code section 75594's mandatory, minimum 3:1 rate ratio violated Proposition 26 and that the District could not justify the ratio based on such differences between M&I and Ag water use as the rate by which water returns to groundwater (about half of farm irrigation percolates back into groundwater; Ventura drains its wastewater treatment plants to the Santa Clara River estuary). The District appealed again.

Analysis: The Court of Appeal affirmed in a brief published opinion quoting extensively from the trial court's ruling and Justice Liu's concurring opinion in *Ventura I* concluding the 3:1 ratio statute was facially unconstitutional. First, the Court rejected the District's application of a pre-Proposition 218 standard of review which is deferential to ratemakers. Rather, the Court applied the independent judgment standard of review established under Proposition 218 in *Silicon Valley Taxpayers Association Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431. The Court clarified that, under the substantial evidence standard of review, a judgment is presumed correct on the appeal and the Court will not disturb fact-finding that is supported by substantial evidence.

Second, applying that deferential, substantial evidence review, the Court found the trial court properly concluded the District's rates failed under Proposition 26, which mandates rates not exceed the reasonable cost of service and be fairly or reasonably allocated among customers. The appellate court deferred to the trial court's findings, concluding the 3:1 ratio of rates was unsupported in part because M&I users do not enjoy a more reliable groundwater supply than Ag users, and Ag does not have a preferential right to pump the basins' safe yields. The Court also declined to reweigh expert evidence concerning natural recharge from Ag versus M&I land. Substantial record evidence showed Ag's relatively high recharge rate was "swamped" by its much larger volume of pumping than M&I. Additionally, the Court rejected the District's argument that Proposition 26 conflicts with article X, section 2 of the Constitution (prioritizing conservation and favoring use of water for beneficial public use). Rather, conservation can still be accomplished in a manner that meets Proposition 26's proportionality and cost of service requirements. This, of course, has been the conclusion of other courts asked to use article X, section 2 to limit the reach of articles XIII C and XIII D. E.g., *City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934–935.

Third, the Court found section 75594's 3:1 ratio requirement facially unconstitutional. While it is conceivable that such a ratio might be justified by an agency's costs at one time or another, it would not be based on section 75594, but rather on meeting the Proposition 26 test of a "fair or reasonable relationship to the payor's burdens on, or benefits received from" groundwater service. This is Justice Liu's reasoning, nearly verbatim.

The takeaway here is that rates must be justified by cost of service and efforts to protect agricultural interests and others from high water costs still require a justification based on benefits from or burdens on the service. A statutory preference alone — like the 3:1 ratio here — will not suffice.

C. *Broad Beach Geologic Hazard Abatement District v. 31506 Victoria Point LLC et al.*, (2022) ___Cal.App.5th ___, 2022 WL 3053306

Holding: A special assessment on parcels within the boundaries of the Broad Beach Geologic Hazard Abatement District — formed to protect oceanfront homes from erosion — violates Proposition 218 by failing to exclude general benefits in the form of

recreational benefits from the expected wide sandy public beach from the assessed cost to import sand to protect the homes from the ocean. The District was required to apportion costs to general benefits stemming from creation of the widened beach, regardless of whether those benefits imposed additional costs beyond those necessary to provide special benefits and notwithstanding that public access to the beach was a Coastal Commission condition of permits for the project.

Facts/Background: On the petition of homeowners, the City of Malibu formed Broad Beach Geologic Hazard Abatement District (GHAD) in 2011 under Public Resources Code section 26500 et seq., the Geologic Hazard Abatement District Law. It was formed to protect homes on the one-mile-long Broad Beach, a narrow public beach in front of celebrity-owned properties. Since the 1970's, shoreline erosion has caused the beach to narrow — there is presently little dry beach at high tide. The District developed a project to import sand to widen the beach, and to permit and maintain an existing revetment installed on an emergency permit a homeowners association obtained before the GHAD was formed. The Coastal Commission and State Lands Commission conditioned approval of permits for the project protecting public access to the widened beach and maintenance of sand dunes as a habitat for endangered species.

The improvements were to be funded by a special assessment on parcels in the District. Supported by an engineer's report, the 2017 assessment divided assessed parcels into 3 tiers based on the expected added beach width in front of each parcel (100, 75 or 25 percent of the base rate). For example, parcels on the west end with no added beach width (because the Coastal Commission forbade sand imports there to protect marine habitat) were in the 25% tier. The District did not assess 2 County-owned beach-access-stair parcels, assigning them 2 percent of special benefit (twice their share of foot-frontage) and accounting for that with non-assessment revenues. Nor did the assessment consider the property would be protected by the revetment because the engineers concluded that total beach width was the best measure of protection from the ocean, without respect to whether it is composed of a sand-covered revetment or just sand. The report identified six special benefits to parcels:

- protection from erosion;
- protection from flooding;
- protection from sea-level rise;
- beach access;
- prevention of blight (in the form of destruction of neighboring property); and

- protection of west-end properties because, although sand could not be placed there, wave action would transport sand placed elsewhere to that end of the beach, protecting these homes.

While no precise general benefits were identified, the report acknowledged the project's addition of publicly accessible beach area (though this was "legally compelled to satisfy the Coastal Commission") and assigned this a general benefit value of "no more than 2 percent of the total benefit generated by the Project," including special benefit to the County beach access stair parcels.

While a weighted majority of the voting homeowners approved the assessment (as they had twice before), those who opposed sued claiming it violated Proposition 218. Plaintiffs claimed the assessment:

- failed to consider and exclude general benefits from the project, specifically recreational benefits from the wider public beach;
- improperly allocated special benefits from the privately funded and constructed revetment, which protected only some homes; and
- failed to assess the county-owned parcels.

The trial court invalidated the assessments under Proposition 218, agreeing with the Plaintiffs on all three grounds. The court also found the estimate of up to 2 percent in general benefits arbitrary.

Plaintiffs also sought to recover attorney fees under a catalyst theory, but the trial court concluded that each of the challengers had a sufficient financial incentive to bring the litigation without the expectation of a fee award given the very high value of their oceanfront homes and the very substantial amount of the disputed assessment (which ran into the tens of thousands of dollars per year per home).

Analysis: The Second District affirmed, finding the assessments violated Proposition 218 by failing to adequately identify and distinguish general benefit (Cal Const., art. XIII D, §§ 2(b), 4(a).) Essentially, it viewed the restored beach as a public park which must have meaningful substantial benefit, even though the project was intended to protect homes by piling sand on a beach the public already owned. Citing *Golden Hill Neighborhood Assn, Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416, the Court noted the GHAD must approximate the percentage of the total benefit conferred by the service or improvement

the general public will enjoy, and deduct percentage of the total cost of the service or improvement — even if minimal —from the special assessment levied against specially benefitted property owners. The assessment on any given parcel, too, must be proportional to the special benefit conferred on that parcel. (Cal. Const., art. XIII D, § 4(a).)

Applying these standards, the Court held that Proposition 218 required the District to separate and quantify general benefits from the widened beach: the added recreational benefit of a wider beach to the general public was a general benefit. Accordingly, the District was required to properly quantify it, apportion costs to it, and exclude those costs when determining the allowable assessment.

The Court rejected the District's argument that general benefits need not be considered unless they impose costs above those necessary to achieve the special benefit (i.e., the enhanced public beach was a consequence of protecting homes, not a central purpose of the project). The Court held that "[w]here, as here, an improvement directly confers both special and general benefits, courts have required cost apportionment for general benefits, without asking whether the general benefits impose additional costs. The Court cited *Golden Hill*'s facts involving an assessment to fund street lighting — any benefit to the public of street lighting is general and must be deducted from the special benefit (a reasonable method, according to the court, would be based on the number of car trips on the road by residents as compared to trips by the general public). Applying the District's methodology (ignoring collateral public benefits conferred at no additional cost), according to the Court, would swallow the rule since any special benefit no matter how small would support an assessment of a project's entire cost.

The Court also declined to consider the District's intent in designing the project when considering special versus general benefits. Such a rule would incentivize the assessing agency to narrowly frame the purpose of the project to focus exclusively on special benefits, and to disclaim any benefits to the general public.

Nor did the Court deem regulatory requirements for beach access a factor in the benefit analysis. The District urged the enhanced public beach should be seen as a regulatory cost, not a source of general benefit. The Court disagreed. That state agencies precluded the District from hindering public access to the improved beach did not transform the project's general benefits into costs.

The Court also held the District failed to account for special benefit from the revetment to the parcels behind it, in violation of Proposition 218's proportionality requirement — accepting as supported by substantial evidence the trial court's factual conclusion that the revetment was part of the GHAD's public project even though it reflected preexisting "facts on the ground." And the District's failure to assess the two County-owned parcels protected along with privately owned parcels violated California Constitution, article XIII D, section 4, subdivision (a)'s mandate to assess publicly owned parcels receiving special benefit.

Finally, the Court affirmed the trial court's denial of Plaintiff's request for private attorney general fees. The trial court estimated the homeowners' potential benefit from the suit as the amount of assessments they sought to avoid over the 20-year period of the proposed improvement project, reduced by a 50 percent chance of success. The trial court concluded the benefit as calculated substantially exceeded the attorney fees the homeowners actually incurred. As the Court of Appeal explained, "Section 1021.5 was not intended to award dividends to litigants who, like the challengers here, are motivated to pursue their private financial interests without the need of added incentives and are sufficiently resourced to seek judicial redress without a promise of assistance."

This is an important decision that continues to guide cities and litigators on how to read Proposition 218's substantive requirements for assessments. The imprecise and broad language of Proposition 218 will continue to be the subject of litigation. Indeed, recent legislation amending the Property and Business Improvement District Law (Assembly Bill 2890, Stats. 2022, ch. 129) similarly seeks to clarify the poorly drafted product of California's initiative process. Stay tuned — the remand of *Hill RHF Housing Partners, L.P. V. City of Los Angeles* (2021) 12 Cal.5th 458 (no duty to exhaust Prop. 218 majority protest hearing to challenge PBID assessment) will be argued to the Second District in October and a published decision may be likely there.

D. *Zolly v. City of Oakland* (2002) — Cal.5th — , 2022 WL 3270058

Holding: Oakland could not establish that a franchise fee on waste haulers was not a tax under Proposition 26 because the extent to which haulers benefited from the right to use City streets differently than others was a question of fact which could not be resolved on demurrer.

Facts/Background: Oakland awarded two franchises after a controversial process that led to a critical grand jury report — one for recycling and one for municipal waste services. Apartment owners who pay trash fees for their tenants argued that the $25m franchise fee for solid waste (later reduced to $22m) and the $3m franchise fee for recycling were taxes under Proposition 26. The trial court ruled for Oakland on demurrer, but the Court of Appeal reversed, concluding the fees were adequately alleged to be taxes and that standing was not an obstacle. The Supreme Court agreed with the Court of Appeal.

Analysis: Writing for a five-justice majority, Justice Liu, first notes that *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, which led to a remand trial upholding that city's franchise fees on Southern California Edison, is a Prop. 218 case as the electric franchise predated 2010.

Second, the Court holds that economic incidence is sufficient to confer standing to challenge a fee under Prop. 26. It distinguishes *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, which found no standing to challenge a payroll tax by one who did not allege he paid it, directly or indirectly. It seems to all but overrule *County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354. *Chiatello* it said was limited to Code of Civil Procedure section 526a taxpayer claims for waste. *County Inmates,* the Court ruled, erred to cite a Revenue and Taxation Code section specific to property taxes as applicable more broadly. It also found Oakland's claim that the apartment owners do not actually bear the economic incidence of the franchise fees to raise a factual question not suitable for resolution on demurrer. Charter cities, and perhaps general law cities, may be able to establish procedural ordinances for challenges to their fees modeled on the statutes governing property taxes in an effort to avoid very broad standing to challenge their fees.

Third, the Court rejected Oakland's argument that Prop. 26 does not apply because the fee were not "imposed" because the haulers agreed to pay them in the franchise agreements. The Court adopted the plaintiffs' construction of "impose" to mean only "establish by legal authority." So, this defense will be of limited use. Ratemakers may be able to raise an argument of waiver by contract on appropriate facts, however.

Fourth, as to the scope of Prop. 26's fourth exception for fees for use of government property (Cal. Const. art. 1, subd. (e)(4)), the Court concluded that the franchise itself was not within in this exception for two reasons:

1. it was not "government property" before the City created it by the franchise ordinances, and
2. **"**property" within the fourth exception is limited to tangible goods and real estate**,** not abstract rights.

Justice Jenkins' concurrence for himself and Justice Corrigan criticizes this holding as unnecessary and, as to a fee to license a government's local government property, it seems hard to justify. But this is a very narrow construction of this exception. In particular, the Court is unpersuaded that the right to use city streets for travel, as others use them, is not a property right for which a franchise fee can be conferred. The Court held Oakland's claim that the haulers received specific rights in rights of way that others do not, like the right to place dumpsters there, was a disputed fact which could not be resolved on demurrer. Oakland may litigate the issue on remand. Generally, the Court concludes, a fee within the fourth exception is for use of property not generally open to others, like a park or a bridge. It very likely they had in mind *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority* (2020) 51 Cal.App.5th 435. That case — upholding a recent increase in Bay Area bridge tolls to be within Proposition 26's fourth exception for fees for the use of government property — was the subject of a grant and hold and will be remanded to the Court of Appeal soon, no doubt.

Unhelpfully, the majority notes amici's argument that a trash franchise fee ought to be understood within the first exception to Prop. 218 for a specific fee or benefit – and limited to the cost of conferring it. That theory would essentially eliminate trash franchise fees, limiting cities and counties to AB 939 compliance fees and a fee to administer the franchise. Justice Jenkins' concurrence criticizes inclusion of this point, too, emphasizing it is not a holding.

Along the way, the court notes that fines and penalties are not imposed for a specific benefit**,** which we knew, but it is good to have a cite.

It is interesting that the two Justices generally considered to be the most conservative (Jenkins and Corrigan) are those unwilling to sign Justice Liu's broader-than-necessary ruling. Perhaps they are "small-c" conservatives, too. Interesting that Justice Liu's five-justice majority refused the implicit request to narrow the opinion, as the Chief Justice

recently stated in an interview is this Court's common practice. The Court is making a deliberate point, it seems.

II. GOVERNMENT CLAIMS ACT

A. *Simms v. Bear Valley Community Healthcare District* (2022) 80 Cal.App.5th 391

Holding: Litigation threat letters should be treated as claims under the Government Claims Act. A claimant petitioning for relief from the Claims Act's requirements may assert actual and timely claim presentation, and need not simultaneously sue, alleging compliance with claims requirements, to preserve the issue.

Facts/Background: Plaintiff Simms suffered injuries from a fall and sought treatment at a hospital operated by the Bear Valley Community Healthcare District. In May 2018, he wrote Bear Valley complaining of his treatment and threatening to "file a lawsuit for restitution." Bear Valley did not respond, and he sent another letter in July 2019 titled "90-Day Notice of Intent To Sue as Required by California Code of Civil Procedure § 384." Bear Valley treated this letter as a claim under the Government Claims Act, rejecting it as untimely and notifying Simms. He sought relief for his lateness, which Bear Valley denied. He then petitioned the court for relief from the claim presentation requirement, or in the alternative a finding that he had timely complied by his May 2018 letter.

The trial court denied the petition as untimely. It also found the May 2018 letter was not a claim because it lacked the information the Claims Act required.

Analysis: On appeal, the Fourth District considered whether a petitioner seeking relief from the claim presentation requirement may alternatively argue timely presentment, or whether the claimant must concurrently sue to preserve the claim. The Court also considered whether a letter threatening litigation that does not substantially comply with claim requirements can nevertheless constitute a claim, triggering the entity's duty to notify the claimant of any insufficiencies or risk waiving them.

Considering a split of appellate authority, the Court held that a claimant may assert actual compliance with claim requirements when seeking judicial relief from them, without separate suit. Courts have long disagreed whether a claimant must file a complaint

concurrently with a petition for relief from the claim presentation requirement to preserve the issue. *Ngo v. County of Los Angeles* (1989) 207 Cal.App.3d 946, for example, held a claimant must always file a complaint alleging compliance with the claim presentation requirement, and simultaneously petition for relief from the requirement. *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702 found the contrary — filing a complaint is not necessary, and the issue can be raised only in a petition for relief. *Simms* sided with the latter, rejecting *Ngo*. It explained that requiring both a lawsuit and petition for relief would unnecessarily complicate proceedings: "[W]here the analysis does not rest on disputed issues of fact better postponed for determination by a jury, 'the issue of timely filing a claim may be determined in a claim-relief proceeding." The Court also noted that, if raised in an appeal from denial of relief from untimeliness, actual compliance is properly addressed on appeal from a trial court judgment.

Simms also concluded that when a claimant presents an insufficient claim, it should be treated as a "trigger-claim" requiring a public agency to notify the claimant of the insufficiencies, or risk waiving them. The Court determined the May 2018 letter constituted a deficient claim, complying only with some requirements of Government Code section 910. Because it detailed at some length what Simms regarded as inadequate medical treatment, defamatory statements by Bear Valley providers, and his injuries, and mentioned litigation, the Court found the letter sufficient to be a "trigger-claim". It was enough to give Bear Valley opportunity to investigate and respond to the claim. The relevant inquiry is whether the "claim" puts the public entity on notice both that the claimant is attempting to file a valid claim and that litigation may result.

As a defective claim, the May 2018 letter triggered Bear Valley's duty to notify Simms of its insufficiencies. By failing to do so, Bear Valley waived those insufficiencies, and it was deemed denied by statute. That gave Simms two years from the date his causes of action accrued to sue — and the limitations period was tolled from the trial court's erroneous ruling through the Court of Appeal's remittitur.

The Court advises a "belt-and-suspenders" approach of both filing a complaint alleging timely filing and a petition for relief from the claiming deadline. Public entities, too, should carefully review any form of written grievance to determine whether it might constitute a claim. If in doubt, treat it as a claim.

III. ELECTIONS

A. *County of San Bernardino v. Superior Court* (2022) 77 Cal.App.5th 1100

Holding: A County and its registrar of voters has no mandatory duty under either the Elections Code or California Constitution, article XIII C, section 2 [Prop. 218] to report the requisite number of signatures to an initiative proponent, even upon request. Even where they report the number of signatures incorrectly, they are immune from liability for this misrepresentation under Government Code sections 818.8 and 822.2, barring actual fraud, corruption, or malice.

Facts/Background: In August 2019, the Red Brennan Group asked the County's registrar of voters (ROV) how many signatures would be required for a proposed initiative to repeal a special tax in a fire protection zone. The ROV told the proponent 26,183 signatures were required. Red Brennan collected 32,017, only to later learn it only needed 8,110. Red Brennan estimated that it incurred about $250,000 to gather the superfluous signatures.

Red Brennan sued the County for damages and failure to discharge its duty under Elections Code 9107 to correctly determine the number of required signatures. It also alleged the County breached its duty under Elections Code section 9035 to ensure the signature requirement was consistent with state signature requirements, as California Constitution article XIII C, section 3 [Prop. 218] mandates for tax initiatives.

The County demurred, asserting it had no liability under Elections Code 9107 or article XIII C, section 3, and even if it did, it was immune for misrepresentations under Government Code sections 818.8 and 822.2.

The trial court overruled the demurrer, the County petitioned for an appellate writ. The Court of Appeal issued an order to show cause and the parties briefed the issues.

Analysis: The Fourth District concluded writ review was appropriate, finding issues of first impression "whether the County has a statutory duty under either Elections Code section 9107 or Article XIII C, section 3 of the State Constitution to calculate the number of initiative signatures required and inform an initiative proponent of that number

whenever requested by the initiative proponent before submitting the initiative petition with signatures." So, too, was application of the misrepresentation immunity. The Court issued the writ, directing the trial court to sustain the County's demurrer and dismiss.

The Court found the County did not violate Elections Code section 9107. The County did ultimately determine and report the correct number of signatures — even if it was after Red Brennan submitted its initiative petition. And section 9107 is silent on **when** the ROV is required to calculate the number of signatures an initiative petition requires. The Court also noted that the statute does not require the County or ROV to inform the initiative proponent — even upon request — of the number of signatures required, and does not impose liability on the County for reporting the wrong figure. Because all government tort liability must be based on statute (Gov. Code, § 810, et seq.), this claim failed. The Court declined to establish a requirement for the County to provide an initiative proponent with the correct signature requirement, even upon request, as the Elections Code does not.

Nor did the Court incur County liability under California Constitution, article XIII C, section 3 for failing to impose consistent signature requirements for local initiatives affecting local taxes with state signature requirements under Elections Code section 9035 (or 5 percent of the voters for all candidates for Governor at the last gubernatorial election). The Court also found no mandatory duties under article XIII C, section 3 to report signature requirements to an initiative proponent. And even if there were such a duty, the Court said there was no basis to conclude the constitutional provision was intended to protect against the kind of injury Red Brennan alleged —unnecessary cost to obtain superfluous signatures.

Finally, the Court found the misrepresentation immunity applied. Government Code sections 818.8 and 822.2 immunize public entities and their employees from liability for misrepresentations unless the employees are guilty of actual fraud, corruption, or malice. The immunity distinguishes between a claim of negligent misrepresentation (for which there is immunity) versus negligence (for which there may not be). The Court concluded that, because the County took preliminary steps to ascertain how many voters participated in a previous election, calculated the total based on that negligently acquired sum, and then conveyed that number to Red Brennan, the County and the ROV were immune.

This case illustrates the expansive protections to which all public entities and their employees are entitled. Similar results have followed litigation regarding signature

requirements in the LAFCO context. E.g., *Citizens for Responsible Open Space v. San Mateo County Local Agency Formation Com*. (2008) 159 Cal.App.4th 717 (signatures required to protest LAFCO action based on registration on the date LAFCO acts on petition, not when process initiated). Public officials who are performing their duties faithfully, without fraud, corruption, or malice can rely on the Government Claims Act to shield them.

IV. OPEN GOVERNMENT

A. *Community Action Agency of Butte County v. Superior Court of Butte County* (2022) 79 Cal.App.5th 221, petition for review filed June 28, 2022

Holding: A nonprofit may be an "other local public agency" within Government Code section 6262, subdivision (a) subject to the Public Records Act, but only in exceptional circumstances, such as when, as a practical matter, the nonprofit operates as a local public entity.

Facts/Background: Lynne Bussey filed a California Public Records Act (CPRA) request with The Community Action Agency of Butte County (CAA), seeking 14 categories of records, including check registers, credit card statements, and documentation of travel reimbursements to its chief executive officer. CAA declined to produce documents, responded it was not subject to the state or federal open records acts, and the CPRA did not require it to retain the records sought. Bussey petitioned for writ of mandate, arguing that as a "Community Action Agency," the CAA was a "local agency" within Government Code section 6252. She supported this, in part, through allegations that CAA received federal community block grant funds via the State and City of Chico. CAA agreed it was a Community Action Agency, but said it was private nonprofit not subject to the CPRA.

The trial court agreed with Bussey, ordering CAA to produce most of the records sought. The court found CAA an "other local public agency" within section 6252(a)'s definition of "local agency" because it received federal grant funding and had been delegated authority to carry out public functions in Butte County.

CAA petitioned for an appellate writ, arguing the County and City had not delegated CAA public functions and the CPRA does not encompass private entities, even implicitly. The Court of Appeal issued a stay and an order to show cause and the parties briefed the case. The California Community Action Partnership Association argued as amicus that the superior court's ruling effectively reverses Government Code section 12750(a), which allows for a community action agency such as CAA to establish itself as a public *or* private nonprofit agency.

Analysis: The Court of Appeal reversed. It first noted that the meaning of "other local public agency" under section 6252, subdivision (a) is a question of first impression. While courts have considered this phrase for purposes of the Brown Act, the Brown Act and CPRA have important differences in their texts and legislative histories. And establishing terminological uniformity between the two "is less important than discerning the intent of the Legislature so as to effectuate the purpose" of each.

Looking to legislative history, the Court notes that the CPRA as originally enacted used "other local public agency" in its definition of "local agency," and used this term synonymously with "governmental agency." In 1991, the CPRA's definition of "local agency" was first amended to broaden "local agency" to include "other local public agency; or nonprofit organizations of local government agencies and officials which are supported solely by public funds." The Legislature amended the statute further in 1998 to define "local agency" to include "other local public agency; or nonprofit entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952." The stated purpose of this last amendment was to subject to the CPRA private corporations and other entities created by a government agency to carry out delegated public authority or to receive public funds.

Reading these definitions with the legislative history, the Court found the amendments to section 6262 reflect a concern that the CPRA's definition of "local agency" "not be interpreted to sweep so broadly that it include local nonprofit organizations generally, but rather only those nonprofits that were legislative bodies of a local agency within the meaning of section 54952." And the Legislature clarified this further in 2002 to replace "nonprofits" for "entities" generally — to ensure that all entities that are legislative bodies of local agencies (nonprofit and for-profit) are subject to CPRA. The Court's bottom line: these changes reflect the Legislature's evolving efforts to subject a very limited universe of local nongovernmental entities to the CPRA. Legislative history demonstrates the Legislature intended "other local public agency" to include

governmental entities, not nongovernmental nonprofits.

To determine when a private entity is the functional equivalent of a governmental agency, the Court borrowed a four-factor test from the Supreme Court of Washington:

1. whether the entity performs a government function (something that could not be delegated to private sector);
2. whether government funds the majority of its activities;
3. the extent of government involvement (day-to-day control); and
4. whether the entity was created by the government.

The superior court's test, in contrast, would bring within the CPRA many more local nonprofit entities than the Legislature intended.

Applying these factors, the Court found the CAA was not the functional equivalent of a governmental agency, and thus not subject to the CPRA. Its goal of poverty alleviation is not a core government function that cannot be delegated to the public sector. The majority of its funding was from public sources, but nothing indicated government involvement in its day-to-day activities. While its origin was unclear, it could not be traced to special legislation or other government action. This was not that exceptional case to apply the CPRA to a nonprofit.

B. *Essick v. County of Sonoma* (2022) 80 Cal.App.5th 562

Holding: The sheriff of Sonoma County is not entitled to an injunction barring release to a newspaper of an independent investigator's report of a county supervisor's allegations that he threatened and bullied her. The investigator's report is not within the personnel record exception to the CPRA nor subject to the Public Safety Officers Procedural Bill of Rights and the *Pitchess* statutes because the sheriff is not the Board of Supervisors' County "employee" for purpose of those statutes.

Facts/Background: In August 2020, during a series of wildfires, Sheriff Essick met with the County Board of Supervisors and other local officials in a streamed town hall meeting. When asked if evacuated residents could reenter mandatory evacuation zones to feed pets and other animals, Essick refused for safety reasons. After the meeting, he exchanged texts with a County Supervisor – and in response to questions about this tactic, responded that her preference for local firefighters over sheriff's deputies was

obvious and she should "quit the crap" and "come together for the community." This tension rose in later communications and included finger-pointing and name-calling. The supervisor filed a harassment complaint against Essick; the County retained a law firm to conduct an independent investigation.

The investigator ultimately found Essick made statements to the supervisor that would reasonably have been understood as veiled threats. The County notified Essick of the investigation's outcome, as well as the County Board's findings that his behavior was in willful disregard of his responsibilities as Sheriff. A local paper requested the report under the CPRA, and the County stated its intent to disclose it unless Essick obtained relief from the Superior Court. Essick's attorney claimed the report could not be disclosed under the CPRA as a personnel record and investigative report of a peace officer, both protected from disclosure under Penal Code section 832.7, one of the *Pitchess* statutes. Essick sued for declaratory and injunctive relief against the County.

While the trial court granted a temporary restraining order, it denied Essick's request for a preliminary injunction some months later, finding the investigative materials were not "personnel records." Essick appealed. The Court of Appeal granted a writ of supersedeas, staying release of the report, and the parties briefed the appeal, waiving argument after the June 2022 election in which Essick's Undersheriff was elected to succeed him.

Analysis: The Court of Appeal affirmed.

First, the Court found the investigator's report was not protected from CPRA disclosure as a personnel record nor a complaint against a peace officer subject to Penal Code sections 832.7 and 832.8. "Personnel records" means anything in a file maintained under the officer's name "by his or her employing agency" that relates to a variety of subjects in which an officer may have a privacy interest, including, as pertinent here, the officer's "advancement, appraisal, or discipline" or "complaints, or investigation of complaints" concerning the performance of duty. The Court found the independent report to the Board of Supervisors is a record kept by the Board, but they are not Essick's employing agency. "The county sheriff is a public official elected by Sonoma County voters, and as such, is ultimately responsible to them — not to the Board of Supervisors or anyone else in county government … . Not only does the Board of Supervisors lack power to hire the county sheriff, it lacks power to fire the person in that office as well. … Nor does the Board of Supervisors have disciplinary power over the county sheriff." The Board of Supervisors was simply fulfilling its oversight authority over the sheriff. Nor did their

admonishment of the sheriff's conduct constitute a reprimand or discipline since the Board cannot take personnel actions against him. The Court also noted that any statements of county supervisors approving or disapproving of the sheriff's conduct are protected expressions of the supervisors' own free speech rights, not discipline. As to political speech by elected officials, the CPRA ought to be read in favor of disclosure.

Second, the Court rejected the Sheriff's argument that the report should be confidential under the Public Safety Officers Procedural Bill of Rights Act ("POBRA"). Essick argued estoppel, contending County Counsel promises to conduct its probe in conformity with POBRA. The Court found POBRA neither grants nor even mentions confidentiality from CPRA requests. By voluntarily granting Essick POBRA protections, the County exceeded any obligations it had to ensure the investigation was procedurally fair. For example, Essick had a right to legal representation at his interview and to have the interview conducted under neutral conditions. This did not, however, create any right of confidentiality in the report.

Post-script: Essick did not seek a further stay from the California Supreme Court and the Court of Appeal released the unredacted version of its opinion, mooting the dispute. Essick provided the executive summary of the investigator's report to the paper and the County released the balance after the Court of Appeal's stay expired. However, Essick filed a second suit, demanding the County is obliged to pay his legal fees in his reverse-CPRA case, arguing these are reasonable and necessary expenses of office-holding. We are defending the case and await an amended complaint to reflect the appellate developments in the underlying case.

C. *Kinney v. Superior Court of Kern County* (2022) 77 Cal.App.5th 168, *review denied*

Holding: County need not disclose under the CPRA names of persons Sheriff's Department arrested over 11 months before the request because this is not "contemporaneous" arrestee information within disclosure that Government Code section 6254, subdivision (f)(1) requires as to "contemporaneous" police activity.

Facts/Background: In February 2021, Alisha Kinney made a CPRA request to the County of Kern requesting the names of all persons the Sheriff's Department arrested for driving under the influence (DUI) in March 2020. While the County provided her with

some information about the DUI arrests in that period, it refused to provide arrestees' names. It provided a report reflecting 3 DUI arrests in that month, detailing each arrest, the statute cited, and case status, but redacted the arrestees' names as exempt from disclosure under Government Code section 6254 and other statutory authority.

Kinney sued to compel disclosure. The County demurred, arguing the records were protected under section 6254, subdivision (f), as interpreted in *County of Los Angeles v. Superior Court (Kusar)* (1983) 18 Cal.App.4th 588, because Kinney's request for arrestee information from nearly a year earlier was not a request for "contemporaneous" information subject to disclosure under section 6254, subdivision(f)(1).

Without explanation, the trial court sustained the demurrer without leave to amend. Kinney sought an appellate writ — the only avenue to appellate review under the CPRA. The Court of Appeal issued a *Palma* notice and an order to show cause and the parties briefed the case.

Analysis: The Fifth District concluded the CPRA neither required nor authorized the release of these arrestees' names, denying writ relief.

The Court held the demurrer could be sustained based on *Kusar*'s holding that section 6254, subdivision(f)(1)'s disclosure mandates are limited to information pertaining to "contemporaneous" police activity. *Kusar* found section 6254, subdivision (f)(1)'s mandate for disclosure of certain arrest information (name, occupation, physical description, time and date of the arrest, etc.) to be limited to "current information and records of the matters described in the statute and which pertain to contemporaneous police activity." While section 6254 has been amended many times since *Kusar*, this principle remains. As *Kusar* explained, this rule continues the common law tradition of contemporaneous disclosure of individualized arrest information and to mandate disclosure to the press of basic law enforcement information to prevent secret arrests. The rule was not intended to be used to discover criminal history information or information on arrestees no longer in custody.

While the Legislature has not defined "contemporaneous," the Court concluded the information sought here — 11 to 12 months old when Kinney requested it — was not within *Kusar*'s rationale for disclosure: "After 11 to 12 months, we do not see how releasing the arrestees' names would serve the purpose of preventing clandestine police activity."

The Court made clear, however, this was not a bright-line rule, limiting the case to its facts. The Court noted two competing interests here — that of the public's right to know, and the individual's right to privacy. The Court suggested the Legislature amend section 6254, subdivision (f) to provide clearer guidance on what constitutes "contemporaneous" information available to the public.

V. MISCELLANEOUS

A. *Where Do We Go Berkeley v. California Department of Transportation, et al.* (9th Cir. 2022) 32 F.4th 852

Holding: The Ninth Circuit vacated the district court's order requiring Caltrans to give Plaintiff campers 6 months to find housing before clearing an encampment in a dangerous location because there is no "serious question" the ADA requires such a lengthy delay.

Facts/Background: Caltrans has "full possession and control" over the highways and accompanying ramps to do any act "necessary, convenient or proper" for their maintenance. One unfortunate responsibility is to clear its properties of homeless encampments. Caltrans ranks each encampment based on its threat to the public safety. In July 2020, Caltrans began to clear two Level 1 (or high-risk) camps along Interstate 80 in the East Bay, with assistance from the City of Emeryville and a homeless outreach organization. While they initially imposed a ramp-up period of 6 weeks to contact those in the encampments and advocacy group Where Do We Go Berkeley (WDWG), the need escalated in February 2021 to begin preparations for a housing project there and to clear land leased to the owner of the construction site owner. Caltrans posted notices on June 8, 2021.

Plaintiffs sued the next day, and obtained a temporary restraining order. During the preliminary court proceedings, Plaintiffs were offered housing at a group shelter. They argued this shelter was inaccessible due to their disabilities, and violated their rights under the American with Disabilities Act (ADA). The district court granted a preliminary injunction, limiting Caltrans' clearing to the leased land (i.e., the construction site) and requiring 6 months' delay for the rest. The judge found the harm to Plaintiffs outweighed Caltrans' temporary inability to clear its encampments. The trial court concluded Plaintiffs had established serious questions on the merits:

1. They sufficiently asserted Caltrans had implemented a "program" subject to the ADA regarding removal of encampments and the ADA required that program reasonably accommodate disabled persons who needed more time to relocate, and

2. Plaintiffs stated a plausible claim that clearing the encampments would violate the ADA's prohibition against discrimination against the disabled. While Caltrans was not required to fundamentally alter the nature of its property to provide accommodation, the court found a serious question whether a 6-month injunction would do that.

Caltrans appealed, and the injunction was extended pending the appeal. While it expired during the appeal's pendency, the Court held the dispute was not moot since it is "capable of repetition, yet evading review" — Caltrans would likely be subject to similar injunctions in the future.

Analysis: The Ninth Circuit vacated the injunction, finding the district court erred in finding serious questions as to the merits of Plaintiffs' ADA claim and in balancing the equities.

The Court focused on whether Plaintiffs established a serious question that they were denied the benefits of Caltrans's programs or otherwise discriminated against. First, the Court focused on defining the "program" at issue — finding the district court's definition of a "program regarding the removal of homeless encampments" overly broad. The Court clarified that Caltrans does not offer social services, and its program varies by risk-level of the encampment. For level 1 encampments, the program provides, when possible, 72-hours' notice before clearing and possible coordination with local partners. It does not provide alternative housing, nor does it allow two weeks for coordination with local partners as for level 2 encampments because the risks are too urgent.

As defined, the Court found a 6-month delay in clearing the encampment was a fundamental alteration of this program. The ADA only requires "reasonable modifications" that would not fundamentally alter the service provided. Here, Caltrans requires expedient clearing of level 1 encampments. The Court said precluding it from addressing the immediate threat to public safety — and requiring mitigation by allowing other encampments to remain — essentially required Caltrans to create new programs and provide new services in violation of the ADA: "Caltrans does not provide people

with housing solutions and cannot make clearing level 1 encampments dependent on when the people living there can relocate."

The Court, too, found the district court improperly analyzed the ADA's "subjected to discrimination" prong, and permitted injunctive relief on just a plausible claim by Plaintiffs. Plaintiffs were obligated to make a showing of a "serious question" on the merits when the balance of hardships tips sharply in their favor. And the Court noted that this prong of the ADA is intended to preclude intentional discrimination in programs (as compared to disparate treatment). Thus, the district court erred to premise an injunction on what it deemed a "plausible claim" that Caltrans must delay clearing the encampments, in the absence of a social services program subject to the ADA.

Finally, the Court said the district court weighed improper mitigation factors in the balancing test on injunctive relief. While the district court recognized the public safety risks of allowing campers to stay, it minimized the serious hardships on Caltrans by mitigation factors it deemed available, including moving people to another encampment on a different Caltrans property previously cleared. The Ninth Circuit said "[t]he district court cannot require Caltrans to allow the campers to live on another Caltrans property because such an order goes beyond preserving the status quo."

The prevalence of homeless encampments is a serious issue for California public agencies, worsened by the pandemic, and this opinion offers some guidance on legal parameters to clearing such encampments. There are no easy solutions here, and we can expect to see an abundance of case law on these issues in both State and federal court. Cities which wish to clear homeless encampments should talk to their city attorneys!

B. *Sanchez v. Los Angeles Department of Transportation, et al.* (9th Cir. 2022) 39 F.4th 548

Holding: Los Angeles' regulation of e-scooters does not violate the Fourth Amendment because the City's receipt of the real-time location data e-scooter riders voluntarily give providers is not a search subject to the Fourth Amendment.

Facts/Background: In 2018, the City of Los Angeles created a program (the "Shared Mobility Device Pilot Program") to regulate rentable e-scooters from companies such as Bird, Lime, and Lyft. The purpose was to keep e-scooters from cluttering sidewalks and

blocking streets. The City required companies to obtain permits from the Los Angeles Department of Transportation (LADOT). As part of the application, companies had to share real-time location data for every scooter. E-scooters are internet connected, and are rented through smartphone applications, which charge riders based on the distance and duration of a trip. The permit program used Mobility Data Specification (MDS) — used in conjunction with the smartphone apps, MDS automatically compiles real-time data on each e-scooter's location by collecting the start and end points and times of each ride.

Plaintiff, an e-scooter user, was concerned that collection of this data would allow the City to track individual riders. He sued under the Fourth Amendment, the California Constitution, and the California Electronic Communications Privacy Act (CalECPA).

The district granted LADOT's motion to dismiss without leave to amend, finding the LADOT program is not a search under the Fourth Amendment because Plaintiff has no reasonable expectation of privacy over anonymous MDS location data.

Analysis: The Ninth Circuit affirmed. The Court first addressed standing. LADOT argued that Sanchez lacked standing because he only alleged a speculative injury — that the City might track e-scooter users. The Court disagreed, finding simply collecting location data was a concrete injury for purposes of standing.

On the merits, the Court assessed whether LADOT's collection of location data is a Fourth Amendment search. Following *Kyllo v. United States* (2001) 533 U.S. 27 (use of thermal imaging to identify illegal indoor cannabis grow is a search requiring a warrant or exigency), analysis turns on whether the scooter program violates a "subjective expectation of privacy that society recognizes as reasonable." The Ninth Circuit concluded not, citing the third-party doctrine — individuals have no expectation of privacy when they voluntarily disclose information to third parties, such as banks and telephone companies. The Ninth Circuit distinguished this case from *Carpenter v. United States* (2018) 138 S.Ct. 2206 (government must obtain warrant to obtain cell-phone location data). *Carpenter* held that government collection of historical cellphone location data violated a reasonable expectation of privacy because "mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts." Here, the Ninth Circuit noted an e-scooter rider voluntarily shares location data with the scooter companies, making this case different. "Unlike a cell phone user, whose device provides location information 'by dint of its operation, without any affirmative act on the part of the user' …, Sanchez affirmatively chose to disclose

location data to e-scooter operators each time he rented a device." And scooter provider contracts, like Lyft's, disclose that location data will be collected, stored, and shared with government when necessary.

The Court also found the nature of this location data indicates a diminished expectation of privacy. The data only discloses the location of an e-scooter owned by the operator and typically re-rented to a new user after each trip. "It is thus quite different than the information generated by a cell phone, which identifies the location of a particular user virtually continuously." And the fact that e-scooter users do not continuously use the same scooters — and thus data is more scattered — distinguishes it from the "dragnet, continuous monitoring" of an individual's cell phone location data. So, too, e-scooter use is not indispensable to society as a cell phone has become, functioning as a phone, camera, calendar, computer, tape recorder, map, etc. Because the Court found no search, it did not assess its reasonableness.

The Court also affirmed dismissal of the CalECPA claim, which limits how the state handles "electronic device information," finding the statute's conditions for private suit did not apply.

The Court's ruling is notably narrow. The opinion makes clear that the Court expresses no view on the result if mobile device location data were alleged to have been shared with law enforcement or used to infer individual riders' identities or locations. It is one thing to use collective data to analyze Los Angeles' traffic and transportation needs. It is another to use an individual's data to investigate crime.