General Municipal Litigation Update

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GENERAL MUNICIPAL LITIGATION UPDATE FOR LEAGUE OF CALIFORNIA CITIES ANNUAL CONFERENCE FALL 2023

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TABLE OF CONTENTS

Page(s)

I. PUBLIC FINANCE

A. *Palmer v. City of Anaheim*, 90 Cal.App.5th 718 (2023)

Holding: In class action case, the Court of Appeal found that Anaheim did not violate Proposition 218 when it approved a rate modification for city-owned electric utility through which the city continued a voter-approved 4% general fund transfer.

Facts/Background: Anaheim operates an electric utility. Before 1975, the City transferred between 6% and 24% of the utility revenue to the general fund. In 1975, City voters amended the Charter to add section 1221. Section 1221 capped general fund transfers at 4% of revenues after a stepdown period. In 1990, the electorate removed the stepdown and capped transfers at 4%. In 1994, the City Council imposed an additional fee of 1.5% of the utility's revenues for its use of public rights of way.

The utility's base rate has three components: (1) customer charge; (2) energy charge based on use; and (3) demand charge for non-residential customers. The base charge is increased by a rate stabilization adjustment (RSA) to fund a reserve for expenses incurred to mitigate environmental impacts and to fund energy supplies. Anaheim sets utility rates periodically. In 2017, Anaheim modified the rate schedule by decreasing the RSA and increasing the base charges and to modify the demand charges to make them consistent across customer classes.

The Plaintiff sued, arguing the utility's rates *overall* (but not the 2017 changes) include an unconstitutional surcharge in the amount of the section 1221 general fund transfer and the annual right-of-way fee.

Anaheim moved for summary judgment. The Court accepted the parties' stipulation that the utility had sufficient non-rate revenue to fully offset any impact that the 1.5% right-of-way fee had on rates. Plaintiff sought to back out of the stipulation by asking the Court to consider the section 1221 general fund transfer and the annual right-of-way fee together.

The trial court granted summary judgment for Anaheim, holding Plaintiffs to the stipulation. As a result, the trial court upheld the right-of-way fee as sufficiently offset by non-rate revenue. The trial court then found the section 1221 general fund transfer was voter-approved consistently with Article XIII C of the California Constitution.

Analysis: First, relying on *Citizens for Fair REU Rates v. City of Redding*, 6 Cal.5th 1 (2018), the Court held that the right-of-way fee was not a tax under Propositions 218 and 26. The Court agreed that it must review the right-of-way fee and general-fund transfer independently. Therefore, the Court first found that the 1.5% right-of-way charge is legal because Anaheim's utility had sufficient non-rate revenue to fund it.

Next, the Court first rejected the Petitioner's argument that, by approving section 1221, voters adopted only a cost-of-service requirement. The Court characterized Petitioner's argument on this point as "semantical." No matter how construed, the voters approved language allowing a 4% general fund transfer funded by retail rates.

Next, the Court rejected the Plaintiff's argument that section 1221's cost-of-service requirement means that the utility cannot overcharge ratepayers to fund the 4% general fund transfer. The Court concluded section 1221 "absolutely allows" the City to charge rates that fund the transfer, and as a matter of law, a voter-approved charge cannot be an overcharge. Instead, the transfer should be viewed as a cost of service under a rational construction of section 1221.

The case is the third to address whether voters may approve a general fund transfer from a utility as a tax. Two cases now conclude they may – *Palmer* and *Wyatt v. City of Sacramento,* 60 Cal.App.5th 373 (2021). Purporting to distinguish *Wyatt*, but apparently disagreeing with it is *Lejins v. City of Long Beach*, 72 Cal.App.5th 303 (2021). The issue is pending in other cases, too, so further developments on this issue are likely.

B. *Campana v. East Bay Municipal Utility District*, 92 Cal.App.5th 494 (2023)

Holding: The Court of Appeal upheld an order sustaining the utility's demurrer without leave to amend. The Court upheld the 120-day limitations period for a Proposition 218 challenge to water rates in Cal. Pub. Util. Code § 14402, the Municipal Utility District Law.

Facts/Background: EBMUD adopted tiered water rates in 2017 and 2019. In July 2019, Plaintiffs submitted a Government Claims Act claim to EBMUD alleging ongoing violations of Proposition 218 and seeking refunds from July 17, 2018.

EBMUD demurred, arguing the claims were barred by the 120-day statute of limitations of Water Code, section 14402.

Analysis: Plaintiff argued that the gravamen of the complaint was a claim for refund and not a claim to invalidate the tiered-rate structure. Therefore, Plaintiff contended, the action was not an action to invalidate rates covered by section 14402. The Court rejected the argument, reasoning that the complaint's stated claims for refund alleged the rate structure violated the Constitution because the effect of the allegations, if true, would invalidate the tiered-rate fee structure.

The Court further held that Proposition 218 does not authorize a new legal challenge subject to a new statute of limitations every time the utility collects monthly charges as *Howard Jarvis Taxpayers Assn. v. City of La Habra,* 25 Cal. 4th 809 (2001). *La Habra* only applies to revenues that are governed by the three-year statute of Code of Civil Procedure section 338, subdivision (a) and not governed by any other statute of limitations.

Finally, the Court found that any notice requirements imposed by the Government Claims Act do not extend the applicable statute of limitations. Plaintiffs could not rely on their compliance with the Government Claims Act because it did not extend the statute of limitations.

Importantly, *Campana* does not just benefit municipal utility districts that are subject to the validation statutes. SB 323 (Caballero), which added Section 53759 to the Government Code, now requires challenges to water and wastewater rates be brought as reverse validation actions, commenced within 120 days of their effective date, *if* the adopting agency has given notice of that requirement in the notice of its Proposition 218 majority protest proceeding. Under *Campana*, SB 323 appears to eliminate the rolling accrual rule from *La Habra* for any rates adopted pursuant to SB 323.

Campana is the latest in a series of challenges to tiered water rates in the wake of *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano*, 235 Cal.App.4th 1493 (2015). Tiered rates require a careful cost of service analysis prepared by a qualified consultant and reviewed by counsel to withstand judicial review. Flat or uniform rates have been easier to justify. That may soon change if AB 755 (Papan, D-San Mateo) becomes law. That bill, pending in the Senate Appropriations Committee as this paper is written, will require a water rate cost of service analysis to isolate costs associated with

services to the top 10% of the agency's water users by volume. Once that data is published, it will be risky to make no use of it in rate design. The proposal is supported by environmental interests and opposed by the local government associations, including Cal. Cities.

II. GOVERNMENT CLAIMS ACT

A. *Hacala v. Bird Rides, Inc.*, 90 Cal.App.5th 292 (2003)

Holding: The City of Los Angeles is immune under the Government Claims Act from liability arising from a pedestrian's trip and fall on a dockless rental scooter that a rider left behind a sidewalk trash can. The City and its employees are immune from failing to enforce the City's rules and parking standards for dockless scooters, and for related discretionary acts.

Facts/Background: In 2017, Bird Rides, Inc. launched its electric motorized scooter rental business in Los Angeles. To rent scooters, customers must download an app allowing Bird to control and unlock its scooters. The app also allows Bird to monitor its scooters as a "dock-less system" — the scooters can be picked up and left throughout the City without the inconvenience of retrieving and returning the scooters to a designated docking location. Use of Bird scooters have some limits, however. Under its City permit, Bird must comply with standards prohibiting scooter parking within 25 feet of a street corner with a single pedestrian ramp; ensure scooters do not impede sidewalk travel; maintain staff 24-hours-a-day for scooter removal; and remove improperly parked scooters within 2 hours during the day. Bird must also educate its agents and customers about the City's parking standards. Bird maintains smart technology equipment to identify that a scooter is upright and properly parked, as well as GPS tracking.

In November 2019, Sara Hacala and her daughter were walking just after twilight on a crowded City sidewalk. Hacala did not see the back wheel of a Bird scooter sticking out from behind a trash can, tripped, and was seriously injured. Hacala, her daughter, and husband sued the City and Bird for negligence and related claims. They alleged the City was vicariously liable for its employees' failure to monitor Bird's compliance with the City permit terms, and it was foreseeable scooters would be parked improperly and unsafely on sidewalks absent City action.

The trial court dismissed on demurrer, finding neither Bird nor the City owed plaintiffs a

duty of care, and neither committed actionable misfeasance. It reasoned the third-party user — not the City or Bird — negligently parked the scooter. Defendants had no "special relationship" obligating them to protect plaintiffs from third party misconduct. The Hacalas appealed.

Analysis: The Second District affirmed for the City, but reversed as to Bird.

As to the City, because plaintiffs' claims were premised on the City's discretionary authority to enforce Bird's permit, the court found the City immune. The City is not liable for injuries resulting from its employee's acts or omissions, except as provided by statute. Nor is the City liable for its employees' acts or omissions if an employee is otherwise immune.

The Court cited Government Code section 821, which immunizes a public employee for any injury caused by "his failure to enforce an enactment." The Hacalas claimed the City negligently and carelessly increased risk to the public by failing to monitor Bird's compliance with its permit's parking standards. But, the Court said this conduct is within Government Code section 821. City employees are immune from failing to enforce the City's rules and parking standards for dock-less scooters. And where its employees are immune, so too is the City.

The Court, too, rejected plaintiffs' argument these were ministerial, not discretionary, actions, removing them from the scope of immunities. Plaintiffs asserted the permit included specific acts available to the City to ensure Bird's compliance, including ministerial steps for removing scooters and imposing penalties. But the Court found the permit's language undermined plaintiffs' position. The permit "reserves the City's right to amend, modify, or change the terms and conditions [of the dockless scooter pilot program] at its discretion," and it could determine where scooter parking was prohibited. For example, if a scooter was parked improperly for more than 5 days, the City's Bureau of Sanitation "may" under the permit's terms remove and store it at Bird's expense. And if these standards were not met, the City "reserved the right" to revoke the permit.

Nor did the Court find basis to allow Plaintiffs to amend to state a dangerous condition of public property claim against the City. Plaintiffs described at most harmful third-party conduct, unrelated to the property's condition. They could not allege a physical characteristic of the property exposing the Hacalas to increased danger from third party negligence. Absent a physical condition that increased or intensified the risk of harm

from third-party misconduct, the City could not be held liable under Government Code section 835 for failing to make safety changes to its property.

As to Bird, the Court concluded that regardless of the permit's terms, Bird could be held liable for breaching its general duty under Civil Code section 1714 to use "ordinary care or skill" in the management of its property.

While this is not a legally novel case, litigation involving scooters — whether by users, pedestrians, or providers — is abundant. The case is an important reminder for counsel to stay in the loop when cities draft permit requirements, assign provider obligations, and monitor e-scooter policies.

B. *Hernandez v. City of Stockton*, 90 Cal.App.5th 1222 (2023)

Holding: The City properly rejected a government claim for failing to identify the proper "factual basis" for recovery where plaintiff claimed injury from an "uplifted sidewalk", when he had stepped into an empty tree well. This failure to comply with the Government Claims Act precluded him from suing the City for his injuries.

Facts/Background: Manuel Sanchez Hernandez submitted a government claim to the City, alleging it negligently maintained public property by failing to correct a dangerous condition on a sidewalk. He claimed serious injury from tripping and falling due to a "dangerous condition" on a City-owned "sidewalk surface" that he identified as an "uplifted sidewalk." The City investigator could not find an issue with the sidewalk Hernandez identified, so the City rejected his claim for failure to comply with Government Code sections 910 and 910.2. The City requested photographs of the sidewalk, advising Hernandez he could file an amended claim within 6 months of the incident, but he did not respond.

Instead, Hernandez sued. His complaint also failed to identify the specific issue, only saying a "sidewalk surface" harbored a "dangerous condition." However, he testified in deposition that he had stepped into an empty tree well; the fall was not caused by an uplifted sidewalk.

The City moved for summary judgment arguing plaintiff sued on a factual basis not reflected in his government claim. Plaintiff argued that his government claim and complaint both asserted the factual equivalent — that he fell due to an uneven sidewalk,

and this was sufficient since his suit did not alter the nature of the dangerous condition as compared to his claim.

The trial court disagreed, granting judgment to the City, concluding the factual basis for recovery asserted in the lawsuit was not "fairly reflected" in the government claim. An empty tree well is not a raised sidewalk. Nor did the court find substantial compliance. Hernandez appealed.

Analysis: The Third District Court of Appeal affirmed.

The Court first revisited the purpose of the Government Claims Act — to confine potential governmental liability to delineated circumstances. To show liability for a dangerous condition of public property under Government Code section 830, a plaintiff must specifically allege and prove how the physical deficiency of city property constituted a dangerous condition, and foreseeably endangered those using the property.

And the Court reviewed the specific requirements of a claim under Government Code section 910, which requires it to identify the "date, place and other circumstances of the occurrence," and to describe the injury. Enough detail must be included to allow the public entity to investigate and settle the claim, if appropriate, without the expense of litigation. The very purpose of the claims statutes is to provide notice to public entities, to facilitate their fiscal planning for potential liabilities and avoid future, similar liabilities.

The Court found Hernandez's claim did not meet this standard. It failed to "fairly describe" what the City allegedly did wrong. A subsequent lawsuit cannot fundamentally differ or shift positions from the government claim since this defeats the claims statute's purpose. Hernandez's claim "specifically and solely" identified an uplifted sidewalk as the dangerous condition causing his injuries. Yet, this shifted in theory to an empty tree well — according to the Court, "[n]o area of the sidewalk was 'uplifted' by any stretch of the imagination" by the lawsuit's allegations. This type of factual variance is fatal to a later-filed civil action: "Courts have consistently held that a civil action (or a claim alleged therein) is barred when, as here, the complaint premises liability on an entirely different factual basis than that stated in the government claim."

In its analysis, the Court distinguished cases where the allegations of a government claim are broad enough to encompass the complaint's allegations, which elaborate upon or add detail to the foundation of the government claim. Elaborating on the same legal theory is

okay; creating an entirely different factual basis is not. It rejected plaintiff's substantial compliance argument for the same reasons.

This case is a reminder that agencies should carefully review government claims, do appropriate investigation, and consult counsel early on how to respond to the claim and again later on whether to demur when a plaintiff's noncompliance may prejudice the agency's defense. In litigation, defense counsel are always wise to ensure the claims litigated at trial are within the bounds of the operative pleading and the pre-suit claim.

C. *County of Santa Clara v. Superior Court*, 14 Cal.5th 1034 (2023)

Holding: The Government Claims Act does not immunize the County from hospital providers' quantum meruit claims for reimbursement of the full, reasonable, and customary value of emergency medical services provided to individuals enrolled in County-operated health care service plans.

Facts/Background: Private-sector hospitals and other medical providers are legally required to provide emergency medical services regardless of the patient's insurance status or ability to pay. Under the Knox-Keene Health Care Service Plan Act of 1975, a health care service plan must reimburse a medical provider for such emergency care. If the plan does not have a contract with the medical provider addressing the reimbursement rate, the plan must pay the "reasonable and customary value" of the services. If not, the medical provider may sue the plan under a quantum meruit theory.

This case analyzes whether a provider may bring a similar claim for reimbursement of emergency medical services against a public entity that operates the health care service plan, or whether the Government Claims Act immunizes the public entity.

Here, Doctors Medical Center of Modesto, Inc. and Doctors Hospital of Manteca, Inc. provided emergency medical services to three individuals enrolled in a health care plan operated by the County of Santa Clara. The County's health care service plan (Valley Health Plan) is licensed and regulated by the Department of Managed Health Care under the Knox-Keene Act (applicable to both private and public entities). The Hospitals do not contract with the County for compensable rates. Because the County only paid the Hospitals about 20% of the claimed amounts, the Hospitals sued for breach of implied contract seeking the balance under the Knox-Keene Act's reimbursement provision.

The County demurred, arguing the Hospitals' implied contract claim is based on a quantum meruit theory that could not be maintained against a public entity. The trial court overruled the demurrer, finding "the public policy to promote the delivery and quality of health and medical care … outweighs the policy to limit common law, or implied contract claims against public entities."

On petition for writ of mandate, the Sixth District disagreed. It found the County immune from suit under the Government Claims Act, with no applicable exception. While this allowed medical providers greater remedies against private than public health care service plans, it found this was "driven by the Legislature broadly immunizing public entities from common law claims and electing not to abrogate their immunity in the context presented here." The Hospitals obtained Supreme Court review.

Analysis: The California Supreme Court reversed, rejecting the County's proposed two-tier system under which medical providers in some circumstances would have recourse against private, but not public, plans.

It reasoned the immunity provisions of the Government Claims Act section 815 are directed toward tort claims; they do not foreclose liability based on contract or the right to obtain relief other than money or damages. The County reasoned it was immune since (i) immunity applies to all "non-contractual" claims for money or damages and (ii) the Hospitals' quantum meruit claim does not sound in contract. The Hospitals countered (i) the Government Claims Act applies only to torts, and does not bar their cause of action regarding an implied-in-fact contract and (ii) the claim is for reimbursement, not "money or damages" under section 814.

The Court agreed with the Hospitals, "confident" the Act does not immunize the County from the Hospitals' quantum meruit claim to enforce a statutory duty of reimbursement. Relying on the Court's historical characterization of the Government Claims Act, it explained that "it was designed to govern … liabilities and immunities of public entities and public employees for *torts*" — "not with every conceivable claim that might be pressed against a public entity." The Hospitals did not allege a conventional common law tort claim seeking money damages. Instead, they alleged an implied-in-law contract claim based on the reimbursement provision of the Knox-Keene Act, and only sought to compel the County to comply with that statutory duty. The Court also rejected the County's argument that the Hospitals' filing a government claim controlled the nature of the action.

The decision too supports public policy, according to the Court. The requirement to reimburse should apply equally to private and public entities since the prompt and appropriate reimbursement of emergency providers ensures the continued viability of California's health care delivery system, and provides appropriate judicial recourse absent that.

On its face, the case is of little concern to cities which do not offer health care service plans. However, it is likely to be cited widely by plaintiffs seeking to avoid government immunities and to enforce implied contracts. It should be read as enforcing a statutory exception to the rule that no implied contract may be enforced against a public entity, but it may take some litigation to establish that reading as opposed to a wholesale undermining of the non-implied-contracts rule.

III. ELECTIONS

A. *San Bernardino County Board of Supervisors v. Monell*, 91 Cal App.5th 1248 (2003)

Holding: The Court of Appeal reversed an order granting a writ to the Board of Supervisors and remanded with direction to grant a writ prohibiting application of a compensation limit to new supervisors, but to uphold a one-term limit and $5,000 per month compensation cap imposed by initiative.

Facts/Background: On November 3, 2020, San Bernardino County voters approved a charter amendment to limit County Supervisors to a single four-year term and limit their compensation to $5,000 a month. A new supervisor was elected at that election, and two others, elected in the March 2020 primary, were waiting to take office.

The Board petitioned for a writ invalidating the measure and an injunction barring its enforcement. The trial court granted the petition, invalidating the measure entirely. The trial court ruled that the one term limit is unconstitutional. It found the compensation cap constitutional but that the measure is not severable. The trial court also concluded that the compensation cap did not apply to new supervisors. The proponents appealed and the Board cross-appealed.

Analysis: Laws significantly restricting First and Fourteenth Amendment voting rights,

including the right to seek office, must be narrowly drawn to advance a compelling state interest. When a law imposes reasonable, nondiscriminatory restrictions on voter's rights, an important regulatory interest is sufficient. This lesser scrutiny is not rational-basis review. Instead, it is a deferential standard under which a court weighs the burdens imposed on the plaintiff's voting rights against the government's asserted regulatory interests.

Courts will uphold local laws impinging voters' rights as "not severe" if they are "generally applicable, even-handed, politically neutral, and which protect reliability and integrity of election process." A severe restriction significantly impairs access to ballot, stifles core political speech, or dictates electoral outcomes.

One Term Limit: Applying *Legislature v. Eu*, 54 Cal.3d 492, 516 (1991) (*Eu*) and *Bates v. Jones,* 131 F.3d 843, 847(9th Cir. 1997), the Court held that the one term limitation is not a severe restriction requiring strict scrutiny because it is non-discriminatory, neutral, and allows incumbents to run for other offices.

Again, relying on *Eu* and *Bates*, the Court applied the deferential framework set out in *Burdick v. Takushi,* 504 U.S. 428, 433 (1992), to conclude the burden the one-term limit imposed on supervisors is justified by the asserted regulatory interests because: the limit did not restrict the voters' fundamental right to cast their ballots for the candidate of their choice; the limit allowed the incumbent to serve a significant period in office; a term-limited incumbent could seek other offices; and the limit prevented long-term incumbents from obtaining excessive power and an unfair advantage in seeking reelection.

Compensation Cap: A county charter may establish the method for setting the supervisors' compensation' and the charter can be amended by initiative.

The Court held that Government Code section 23500 requiring a board to set the compensation for supervisors in general law counties does not apply to charter counties. The legislative history for section 23500 shows that the Legislature did not intend it to apply to charter counties.

The Board failed to demonstrate that the compensation cap violates minimum wage laws. On this facial challenge, the County was required to show that the measure "will necessarily violate" the minimum wage laws in all circumstances. The Board's math did not show that the $5,000 per month cap would mathematically violate minimum wage

laws. Supervisors could work part-time to allow the Board to comply with minimum wage laws.

Application of Compensation Cap to Concurrently Elected Supervisors: The cap did not apply to the concurrently elected supervisor and the two yet-to-be seated supervisors because 'their terms began December 7, 2020 — before the December 18, 2020 effective date of the measure. The charter states new supervisors take office the first Monday in December. The Court rejected the Board's argument that the California Constitution Article II, section 20, mandates that newly elected supervisors take office the Monday after January 1, concluding that governs only state offices.

The Court extensively analyzed which statute governs the effective date of the initiative charter amendment: Government Code section 23723 making an initiative charter amendment effective when the Secretary of State accepts and files it; or Elections Code sections 9102 and 9122 which establish that measures passed by initiative "shall go into effect 10 days after" the date the Board declares the vote. The Court ruled that the Elections Code provisions most recently adopted in 1990 superseded the Government Code section. Therefore, the measure took effect 10 days after the vote was declared by the Board—December 18, 2020.

Retroactive Application of One Term Limit: The Board argued that, if the measure applies to the supervisors elected in 2020, it violates Government Code section 25000, subdivision (b)'s bar on retroactive term limits. The Court found that the measure is not retroactive because it does not oust incumbent supervisors serving a second or third term. Only that effect would make the measure violate section 25000.

The case's impact on cities is mostly in its application of First and 14th Amendment principles to restrictions on candidacies and ballot access more generally. However, its treatment of the effective date of the county charter amendment may be of interest, too, as the statute governing the effective date of city charter amendments is similar to that found inapplicable here.

B. *Rab v. Weber*, 91 Cal.App.5th 1337 (2023)

Holding: The Court of Appeal affirmed writ denial and held that scanning mail-in ballots before election day does not violate Elections Code section 15101, subdivision (b)'s prohibition on releasing vote tabulation before polls close.

Facts/Background: Pro per Petitioner was an unsuccessful Democratic candidate for the U.S. House of Representatives 30th Congressional District (Schiff, D-Burbank) in the March 2020 primary. (He is also running for Senate in 2024.)

At the time of the March 2020 primary, section 15101, subdivision (b) read: "[a]ny jurisdiction having the necessary computer capability may start to process vote by mail ballots on the 10th business day before the election. Processing vote by mail ballots includes ... machine reading them, ... but under no circumstances may a vote count be accessed or released until 8 p.m. on the day of the election."

The County presented evidence that its software system allows it to scan mail-in and other paper ballots. When a ballot is scanned, the system creates a digital image and a cast vote record (CVR). CVRs reflect the selections a voter made on the scanned ballot. The system can then access the CVR selections to generate a vote count. However, scanning and tabulation do not occur simultaneously.

Petitioner argued that allowing poll workers to scan mail-in ballots into the system used to count votes before the March 2020 primary election concluded violated section 15101, subdivision (b)'s prohibition on accessing and releasing a vote count before 8 p.m. on election day. The vote tabulation does not occur until after that time when County personnel execute a command on equipment other than the scanners. The County's evidence documented that no person executed a system command to count the ballots before 8 p.m. on election night.

Petitioner sought a writ of mandate directing a hand recount. The trial court denied the petition and held that section 15101, subdivision (b), allows the County to start scanning ballots 10 days day before an election.

Analysis: Petitioner argued once ballots are scanned and converted into CVRs, the votes became accessible and tabulation possible. Petitioner argued that this accessibility is a violation of section 15101 because it is equivalent to accessing the vote count.

Applying the rules of statutory interpretation, the Court held that scanning mail-in ballots into the system beginning 10 days before election day did not violate Election Code section 15101, subdivision (b)'s prohibition on releasing vote tabulation before polls close. The Court noted that scanning the ballots and tabulation did not occur

simultaneously, and creation of voting records that made a vote count accessible through secured channels was not the same as creating or accessing a vote count before polls close. The existence of CVRs on a scanner that is only accessible through secure channels and the potential to execute a tabulation on a separate piece of hardware is not the same as creating a vote count.

The case will be of most interest to County elections officials, but may also interest those cities which still run their own elections or occasionally do so. Allowing ballot scanning in the 10 days before the election allows meaningful reporting on election night. Although it takes a long time for close races to be decided in California, in states prohibiting this form of pre-election day work (like Pennsylvania), it takes a long time for any race to be decided, close or not.

C. *Coalition of County Unions v. Los Angeles County Board of Supervisors*, 2023 WL 4862020 (July 31, 2023 Second Dist.)

Holding: The Court of Appeal reversed, upholding a voter-adopted county charter amendment requiring the Board of Supervisors to annually allocate at least 10% of locally generated, unrestricted, general fund revenues to community investment and alternatives to prison and prohibited the Board from using the funds for incarceration or law enforcement purposes.

Facts/Background: In November 2020, Los Angeles County voters approved Measure J to amend the County charter. The measure requires the Board to annually allocate at least 10% of locally generated, unrestricted, general fund revenues to community investment (such as youth programs, job training, rental assistance, and affordable housing) and alternatives to prison (including health, mental health, and substance use disorder programs). The measure also specifically prohibited the Board from using the funds for incarceration or law enforcement purposes.

The Coalition of County Unions (including the Association of Los Angeles Deputy Sheriffs) and two individuals (Coalition) petitioned for writ of mandate to invalidate the measure on the ground that the voters lacked constitutional and statutory authority to require the Board and county officers to take specific budget actions. The trial court (former Santa Monica Assistant City Attorney Mary Strobel) granted the petition, and the Board appealed.

Analysis: The Court of Appeal noted that it must uphold the initiative measure unless it is clearly, positively, and unmistakably unconstitutional. As a facial challenge, the Court may not invalidate the measure simply because it might be unconstitutional in some future hypothetical situation.

A county charter has much less authority than a city charter, and defines the powers and duties of its local officers within the limits of the Constitution. Further, a charter county's electorate may amend the charter by initiative to provide powers and duties to county officers that are different or inconsistent with those provided by statute for general laws counties. However, neither a county charter nor voters can incapacitate the county or its officers from performing public functions delegated by the state.

The Court concluded the measure does not improperly limit the activities of the county or the Board. The Court considered whether the challenged power is an authorized exercise of the county's power. Here, the measure governing the Board's budgeting power is a proper exercise of the voter's authority grounded in article XI, sections 4, subdivisions (d) and (e) of the Constitution stating that county charters shall provide powers and duties of the county and shall provide for the performance of functions required by statute.

The Court rejected the Coalition's argument that because the measure gives the Board something less than full discretion over the budget, it is outside of the County's competence under article XI, section 4, subdivision (e). The Court found that the electorate can amend the charter on any topic that is the proper subject of a charter, including prescribing budgeting activities.

The Court then held that the measure did not improperly incapacitate the county from performing public functions. Instead, the measure increased budgetary stability for expenditures that voters prioritized. Further, the Board was not impermissibly restricted because it could reduce set-aside during a fiscal emergency. The Court also rejected the Coalition's argument that the measure impairs public safety and therefore impairs the county's exercise of essential functions. The voters approved the measure to address the root causes of crime. Therefore, the measure cannot be construed as impairing the county's public safety functions.

Next, the Court ruled that the measure is not preempted. The Court recognized that voters can adopt a charter amendment unless a state statute on the subject provides definite

indication the Legislature intended to restrict the right of initiative and preempt local measures on the subject.

The County Budget Act defines the procedures for preparing a recommended budget and adopting a final budget. The Act does delegate the setting of budget priorities exclusively to the Board. Therefore, the Court of Appeal concluded Measure J's budget priorities do not conflict with the County Budget Act.

Finally, the Court held that the measure does not conflict with statutes governing the Public Safety Augmentation Fund because those statutes do not reflect legislative intent to preclude initiatives regarding counties' public safety budgets.

The case may have limited impact on cities, as the roles of County and City charters are fundamentally different, with County charter much more limited in their authority. However, this decision gives more authority to county charters than previous cases and ballot-box budgeting is not unique to Counties.

IV. OPEN GOVERNMENT

A. *Kennedy v. Warren*, 66 F.4th 1199 (9th Cir. 2023)

Holding: Authors of a book criticizing COVID-19 policies, vaccines, and offering alternative remedies were not entitled to a preliminary injunction regarding Senator Elizabeth Warren's (D-Mass.) letter to Amazon requesting it stop promoting the book's falsehoods through its algorithms and "Best Seller" list. Her letter was deemed persuasive, not coercive, government speech, and therefore did not have a likelihood of infringing plaintiffs' First Amendment rights.

Facts/Background: Plaintiffs wrote *The Truth About COVID-19: Exposing the Great Reset, Lockdowns, Vaccine Passports, and the New Normal*, sold on Amazon. In September 2021, Senator Warren wrote Amazon's CEO raising concerns about the company's search and "Best Seller" algorithms, which she claimed promoted books containing false or misleading information about COVID conspiracy theories and vaccines. Her letter alleged this book "perpetuates dangerous conspiracies about COVID-19" by disputing the safety and efficacy of vaccines, and that the FDA had ordered one of its authors to stop selling unauthorized COVID treatments. She said Amazon should do more to review its algorithms and stop such misinformation, requesting they issue a public report of such efforts within 14 days. She then attached the letter to a press release

posted on her website.

Plaintiffs sued Warren for violating their First Amendment rights by attempting to intimidate Amazon and other booksellers into suppressing their book. They sought an injunction to remove the letter from Warren's website, issue a public retraction, and cease future letters.

The District Court denied the injunction, finding no serious First Amendment question and weighing equities in Warren's favor. Plaintiffs appealed.

Analysis: The Ninth Circuit affirmed.

The Court found plaintiffs had standing to seek a preliminary injunction based on alleged reputational harm. Warren's letter claimed the book contained dangerous falsehoods and impugned one author's professional integrity. The letter was then posted on her website. Such potential reputational harm is a sufficiently concrete injury to confer Article III standing.

Because plaintiffs failed to raise a serious question on the merits of their First Amendment claim, however, the Court affirmed. The crux of plaintiffs' case is that Senator Warren engaged in conduct prohibited under *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), by attempting to coerce Amazon into stifling plaintiffs' protected speech. Following *Bantam Books*, lower courts have distinguished government officials' "attempts to convince and attempts to coerce" intermediaries not to distribute speech. Under that test, an attempt to *persuade* is permissible government speech, but an attempt to *coerce* is unlawful government censorship. Public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction.

The Ninth Circuit applied a Second Circuit four-factor test to distinguish persuasion from coercion — finding Warren's letter persuasion. First, while her word choice and tone were strong rhetoric and publication of the letter was intended to pressure Amazon, the Court said this was simply a request (not command) for change and an exercise of her right to rally support for her own views. Second, Warren (as 1 of 538 federal legislators) had no regulatory authority to penalize Amazon if it continued to promote the book, influencing how a reasonable person would understand her letter. Third, there was no evidence Amazon perceived the letter as a threat — it didn't alter its algorithms or its

"Best Seller" label, nor stop selling the book. Fourth, Senator Warren did not threaten consequences for non-compliance. This, said the Court, supports the view that "she sought to pressure Amazon by calling attention to an important issue and mobilizing public sentiment, not by leveling threats."

This case adds to a growing body of case law making it difficult for plaintiffs to demonstrate that government officials violate the First Amendment when they try to pressure private services to take down or leave up certain content — "jawboning." The Ninth Circuit's application of the Second Circuit's test makes most jawboning cases unwinnable. Most legislators' public statements will not be actionable, even if coupled with an explicit or implied threat that the legislator will introduce punitive legislation. Statements by executive officials could be considered insufficiently backed by the "threat of enforcement" to receive judicial scrutiny unless they are directly from law enforcement or someone with decision-making authority in an enforcement agency. Because the case applies the First Amendment, it has direct application to city officials.

B. *Edais v. Superior Court of San Mateo County*, 87 Cal.App.5th 530 (2023)

Holding: A coroner's investigation files and autopsy photographs are public records within the CPRA, and must be disclosed where the parents of the deceased seek disclosure for an independent forensic review of a deceased police officer's cause of death and of the competency of the coroner's investigation.

Facts/Background: The San Mateo County Coroner's autopsy report concluded police officer Munir Edais died by suicide. His parents, however, distrusted that conclusion due to allegations of Munir's wife's infidelity and a looming divorce. They hired a forensic pathologist, Dr. Melenik, to undertake her own forensic autopsy review. She submitted a broad CPRA request to the coroner, seeking scene and autopsy photographs; all reports, notes and recordings during the coroner's investigation; recuts of tissue samples, etc. She sought production of all documents in these categories and the inspection of physical evidence.

While the Coroner's office produced some documents — the Coroner's, pathology, and toxicology reports — it refused to produce photographs or the full investigation notes and report since Edais' widow — his heir — had not consented.

Edais' parents sought a writ to compel production, as well as declaratory and injunctive relief. The trial court denied relief under the CPRA, finding the photos and unredacted investigative report were either not public records or exempt from disclosure, and the public interest in nondisclosure outweighs any benefit from disclosure. However, the trial judge ordered the photos and report produced to petitioners under Civil Procedure Code section 129, subdivision (a), allowing dissemination of coroner photos taken during the autopsy for use in criminal or civil actions, but limiting disclosure to the parents. The trial court denied attorney fees as it did not order disclosure under the CPRA.

The Edaises sought an appellate writ seeking (i) release of all documents; (ii) reassessment of the CPRA's application; and (iii) fees under the CPRA.

Analysis: The First District issued an order to show cause, and then granted the writ, vacated in part, reversed in part and remanded.

The Court reiterated CPRA principles: broad construction if it furthers the people's right to access, and narrow construction if it limits the right of access. However, the Court also discussed weighing an individual's right to privacy and the catchall exception under Government Code section 7922.000 to weigh the public's interests in disclosure.

First, the Court agreed the scope of the Edaises' request was broader than that the trial court considered. They sought *all* records relating to Munir's death that were received by, generated by, or in the possession of the Coroner's Office. Nothing in their claim nor their conduct during dialog about the request limited it.

Second, the Court found the trial court misapplied CCP section 129(a). It is limited to photos of a body, does not apply to the investigation report, and limits copying or disseminating sensitive images absent a judicial finding of good cause. So, courts are gatekeepers to release of this information.

Third, the Court found the trial court misapplied the CPRA. All the documents in petitioners' request — including the Coroner and autopsy reports — are public records under the CPRA. In evaluating any CPRA exceptions that might prevent disclosure, the Court analyzed three sections (7927.705, 7930.005, and 7930.180) that work together to exclude certain postmortem and autopsy photographs of which CCP section 129(a) prohibits disclosure. So, coroner's photos or video depicting a deceased's body cannot be

released unless a judge finds good cause or another exemption applies. And by its more specific terms, CCP section 129(a) trumps CPRA-mandated disclosure. Because the trial court already ordered the photos produced, and the coroner's office complied, this issue was essentially moot. Plaintiffs already obtained the relief they sought regarding the photos, albeit on a different legal theory than they had invoked.

Regarding the report's disclosure, the Court concluded section 7927.700's exemption for "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" did not prevent disclosure. The public's interest in release of the Coroner's documents was significant — they could reflect whether the investigation was thorough, competent, or a suicide versus a homicide. On balance, privacy interests were more elusive particularly since the parents sought disclosure and these were medical notes / words / numbers, not sensitive images. The Court, too, found the catchall exception did not weigh in favor of nondisclosure. While a coroner's ability to gain cooperation from the public is undoubtedly a significant public interest, the Court found this was outweighed by the public interest in disclosure to ensure a fulsome review by plaintiffs' pathologist. The matter was remanded, too, to determine attorney fees.

The case is problematic because release of records under the CPRA is not limited to a given requestor or to a person with a particular motive. If these reports are, indeed, CPRA records, they must be released to the media as well as to the bereaved. However, the rule should be manageable because application of the general balancing exception is factually specific and future courts might weigh the equities in other cases very differently than those here.

V. MISCELLANEOUS

A. *Davis v. Fresno Unified School District*, 14 Cal.5th 671 (2023)

Holding: The Supreme Court affirmed the Court of Appeal's decision declining to apply the validation statutes (Civ. Proc. Code, § 860 et seq.) to a lease-leaseback funding arrangement which was not inextricably bound to government indebtedness or debt financing; disapproving *McGee v. Balfour Beatty Construction, LLC*, 247 Cal.App.4th 235 (2016).

Facts/Background: Challenges to lease-leaseback financing and design-build

construction of school facilities have been common in recent years, with counsel for challengers seeking to invalidate transactions and win substantial attorney fees. And, the role of some contractors in both assisting in design of a project and then building it does raise substantial questions under Government Code section 1090. This case is the latest chapter in that running battle.

In 2011, the District sold general obligation bonds supported by property tax receipts. In September 2012, the District and the contractor reached an agreement to build a new middle school on District land. The deal was structured as a lease-leaseback arrangement under Education Code section 17406 but without a genuine financing component; available bond proceeds would fund the work. The parties made two contracts: (1) the District leased its land to the contractor for $1 (the site lease); and (2) the contractor then constructed the new school facilities on the land and leased the land and the new facilities (still under construction) back to the District (the facilities lease). The leases were executed September 27, 2012, and the District recorded its notice of completion on December 4, 2014.

Plaintiff sued the District and the contractor alleging that lease-leaseback agreement violated conflict-of-interest laws, including Government Code section 1090 and the common law conflict-of-interest doctrine. The lawsuit's lengthy procedural history is not relevant to or discussed in the opinion.

This second appeal contests whether plaintiff's suit became moot when the leases terminated in 2014. The trial court agreed with the District that the lawsuit was exclusively a reverse validation action. As a result, it held the action is moot when the contracts are fully performed. The trial court held that when the validation statutes apply, they are a party's exclusive remedy.

The Court of Appeal reversed. On appeal, plaintiff argued that the amended petition stated "both an in rem validation action and an in personam disgorgement action." Therefore, the Court of Appeal held that the action was not moot as to plaintiff's disgorgement claims subject to in personam jurisdiction. The District sought Supreme Court review.

The Supreme Court granted review to address a single question: "Is a lease-leaseback arrangement in which construction is financed through bond proceeds rather than by or through the builder a 'contract' within the meaning of Government Code section 53511?"

It did not reach the question whether a validation claim can be joined with other claims, a point for which the Court of Appeal decision remains good authority.

Analysis: Under the constitutional debt limit, the District cannot incur debt that exceeds its total annual revenue without voter approval. Cal. Const., art. XVI, § 18, subd. (a). That rather impractical rule is subject to several common law limits. Under Education Code section 17406, the District avoided the debt limitation using the lease-leaseback funding structure. The lease-leaseback financing mechanism does not implicate the debt limitation because, from a legal perspective, its payments are lease payments and not debt service. Here, the lease-leaseback arrangement was independently financed by the District. The Supreme Court noted that the Courts of Appeal have reached conflicting decisions as to whether this manner of structuring a lease-leaseback arrangement is consistent with section 17406, but did not reach that question.

A public agency can sue under the validation statutes for a judgment validating its action. The validation statutes have short 60- (sometimes 30-) day statute of limitations. However, if no statute authorizes use of the validation statutes to test the public action, they do not apply. When the validation statutes do apply, they supersede other types of action to challenge the agency action subject to the appellate court's conclusion in *Davis* that so-called "hybrid claims" are possible, which raise validation and other claims against government. Such claims are permitted if they are filed in the time required for validation. *Davis v. Fresno Unified School Dist*., 57 Cal.App.5th 911, 933 (2020).

The District argued Government Code section 53511 mandates that any challenge to a lease-leaseback arrangement arises under the validation statutes. The Supreme Court rejected a broad interpretation of section 53511 as applying to all local agency "contracts" funded by bonds. Instead, the Supreme Court ruled section 53511 applies only to a contract that is "inextricably bound up with government indebtedness or with debt financing guaranteed by the agency. To satisfy this standard, the contract must be one on which the debt financing of the project directly depends." In short, if the contract must be valid for the debt to be repaid, it is subject to validation, but not otherwise.

The District's lease-leaseback contracts do not satisfy this standard because the underlying project was fully funded by a general obligation bonds issued earlier, and payment of the debt service on the bonds was from property taxes. Therefore, section 53511 did not apply because the debt payment did not depend on the lease-leaseback contracts. Therefore, the action is not subject to the validation statutes' shortened 120-day

limitation period and may therefore proceed on plaintiff's theory of Code of Civil Procedure Section 526a standing.

The case is of relatively limited interest outside its specific context. The litigation of which it is part, especially the appellate court's conclusion that hybrid validation and refund claim actions are possible will be of continued concern to a broad range of local governments.

B. *California Restaurant Assoc v. City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023)

Holding: The federal Energy Policy and Conservation Act (EPCA) preempts a city ordinance prohibiting natural gas piping in newly constructed buildings.

Facts/Background: In July 2019, Berkeley adopted an ordinance prohibiting natural gas infrastructure in new buildings. The legislative purpose was to "eliminate obsolete natural gas infrastructure and associated greenhouse gas emissions in new buildings where all-electric infrastructure can be most practicably integrated, thereby reducing the environmental and health hazards produced by the consumption and transportation of natural gas." In an attempt to avoid preemption by EPCA, the Ordinance stated that it "shall in no way be construed ... as requiring the use or installation of any specific appliance or system as a condition of approval."

The California Restaurant Association sued alleging federal preemption. The district court dismissed the suit, agreeing with the City that the ECPA's preemptive effect is limited and does not "sweep into areas" historically governed by state and local regulation.

Analysis: Circuit Judge Bumatay prepared the opinion. Circuit Judge O'Scannlain and Court of International Trade Judge M. Miller Baker filed concurring opinions. Judges Bumatay and O'Scannlain are among the 9th Circuit's more conservative members. President Trump appointed Judges Bumatay and Baker.

First, the Ninth Circuit determined the Association had standing because it properly alleged imminent harm to its member chefs and restaurants who rely on gas stoves.

Then the Court turned to preemption. The Court began with the plain meaning of the

ECPA, which states: "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product," unless the regulation meets one of several categories that are not relevant here. 42 U.S.C. § 6297(c). The Court then sought to determine what constitutes a "regulation concerning the ... energy use" of a covered product.

The Court held that the Ordinance's prohibition on installing natural gas facilities is a "regulation concerning the ... energy use" preempted by the ECPA because the Ordinance relates to the quantity of natural gas consumed by customer's appliances in new buildings, reducing the amount to zero. The Ninth Circuit rejected Berkely's proposed constructions because they "defied the ordinary meaning" of the ECPA's terms.

Next, the Court ruled that ECPA preemption is not limited to regulations of consumer appliances. Instead, it is to be given a broad interpretation. First, a narrow interpretation ignores the fact that the ECPA governs use of those appliances including their use of natural gas. Further, the Court of Appeal explained that the use of the term "concerning" in the preemption statute requires the preemption language to be interpreted broadly – broadly enough to preempt Berkley's ordinance.

The federal government, supporting Berkeley's regulation as amicus, argued that EPCA only preempts "energy conservation standards" directly regulating covered products. The Court rejected the federal government's textual argument. The language, the Court concluded, does not narrow preemption in that way. "Energy conservation standards" does not limit "energy use" so as to limit ECPA preemption.

Finally, the Court rejected Berkeley's non-textual arguments. First, the Court rejected the argument that preemption would work to repeal the Natural Gas Act by holding that there is nothing irreconcilable about EPCA preemption and the Natural Gas Act. Further, the Court rejected Berkeley's argument that preemption would force the City to make natural gas available everywhere.

Circuit Judge O'Scannlain's concurring opinion set out an extensive analysis of Ninth Circuit and Supreme Court preemption precedent to demonstrate a conflicting strain in this area of the law. Judge O'Scannlain stated that he "write[s] separately to indicate the need for further guidance."

The City and its amici are considering petitions for rehearing, rehearing en banc and

certiorari. If those are not pursued or successful, a legislative remedy may be possible, particularly if the next Congress is not so narrowly divided as the present one. In the meantime, however, the case is a significant setback for climate change activism in local government, a significant loss of local control and a significant expansion of federal authority — a perhaps unexpected result from a conservative panel.

C. *Discovery Builders, Inc. v. City of Oakland*, 92 Cal.App.5th 799 (2023)

Holding: A contract with a city cannot be interpreted to infringe the city's police power to protect public health and safety.

Facts/Background: In 2005, developers of a multi-phase residential project in Oakland contracted with the city to pay fees to fund the city's project oversight. The agreement provided that the agreed fees paid satisfied "all of the Developer's obligations for fees due to Oakland for the Project." The parties estimated the city's fees and charges in exhibits to the agreement.

The developers constructed the project in phases over many years, seeking building permits for each new building.

In 2016, Oakland adopted new impact fees to raise funds to mitigate development impacts on affordable housing, transportation, and capital improvements. The city assessed the new fees on the project's subsequent building permits.

The developers paid the new fees under protest and petitioned for a writ of mandate, alleging the 2005 agreement precluded the fees. The trial court granted the writ, barring Oakland from assessing any fees on the project not specified in the agreement. The trial court rejected the city's police power defense, noting the city could o impose new fees on other developers.

Analysis: Oakland argued on appeal that the trial court's interpretation improperly allowed an ordinary contract (no statutory development agreement was involved) to infringe the city's police power.

The Court of Appeal refused to interpret the 2005 agreement as barring the city to impose the new fees because that interpretation infringes Oakland's police power to protect

public health and safety. The Court rejected the developers' argument that city's police power was not surrendered because it could still regulate others.

The California Constitution vests cities and counties with the police power to set "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const., art. XI, § 7. That authorizes a city or county to enact comprehensive land use and zoning laws. A city cannot contract away police power conferred by the Constitution. This is true even if the city maintains the ability to impose laws on others.

Accordingly, any agreement that divests the city of its police power is invalid. Therefore, the provision of the 2005 agreement that purports to prevent the city from imposing the fees infringes on the City's police power and cannot be enforced.

Discovery Builders has broad implications beyond the land use context. As the Court explained, a "city can carry out municipal functions by contract, and such contracts are valid and enforceable provided they apply existing law or carry out existing policies." Under *Discovery Builders*, these city contracts cannot be interpreted as waiving the city's police power to protect public health and safety as to the contracting party. This includes franchise agreements with utility companies; a utility company cannot resist a generally applicable public health and safety regulation (such as a standard for road repairs) by arguing that it conflicts with the franchise agreement.

In the land use context, it may have less significance. Development agreements routinely do restrict future fees on development, are recorded, and run with title to the land. It may now be possible, however, to argue that the statute authorizing development agreements exceeds the Legislature's authority. Stay tuned.

D. *Coalition on Homelessness v. City and County of San Francisco*, 93 Cal.App.5th 928 (2023)

Holding: A city may not tow legally parked cars to enforce unpaid parking tickets. The City failed to show that warrantless tows are necessary to enforce its parking scheme. The Fourth Amendment's "community caretaking" exception is limited to tows to address present, obstacles to public safety or convenience; the Court declined to expand the exception to embrace tows that serve less immediate public needs.

Facts/Background: The State has preempted the field of vehicle traffic regulation. A city

has no authority over vehicle traffic control, except as expressly provided by statute. Vehicle Code section 22651 authorizes tows in some situations — for example, for unpaid parking citations where the owner has accrued 5 or more unpaid tickets. The city can impound the car until tickets are paid (so long as the citations warned of such action), or the owner requests a court hearing for an order releasing the vehicle before the tickets are paid.

The Coalition on Homelessness sued the City and the San Francisco Municipal Transportation Authority, challenging its policy of towing safely and lawfully parked vehicles without a warrant based solely on the accrual of unpaid parking tickets. The Coalition alleged the warrantless tows violated article I, section 13 of the California Constitution, the Fourth Amendment, and due process.

During the litigation, and in response to the COVID-19 pandemic, SFMTA amended its policy. It no longer towed vehicles if the amount owed was $2,500 or less, or if a parking enforcement officer could tell the car was being used for shelter regardless of the amount of unpaid citations so long as it wasn't in a tow-away zone or another other hazardous location.

The trial court found for the City and MTA. While it found towing a vehicle is a seizure under the Fourth Amendment that would ordinarily require a warrant, SFMTA's warrantless tows were lawful under the "community caretaking" exception to the warrant requirement. The Coalition appealed.

Analysis: The First District reversed and remanded.

The Court concluded a seizure undisputedly occurs when the city tows a car. A warrantless seizure is per se unreasonable under the Fourth Amendment, absent an exception.

The Court found the "community caretaking" exception inapplicable. SFMTA unsuccessfully argued its interest in deterring parking violations and nonpayment of parking fines justifies warrantless tows. Under *South Dakota v. Opperman*, 428 U.S. 364 (1976), a present public safety concern must justify a warrantless vehicle seizure, such as clearing obstructions to traffic, preserving evidence, eliminating a target for vandalism or theft, or other exigent circumstances. Here, there was no evidence the tows involved cars that threatened public health or convenience when towed. Courts have previously rejected

a deterrence rationale as justification to impound a vehicle that was not impeding traffic or threatening public safety and convenience on the streets.

The Court said the City has other remedies to deal with unpaid parking citations — judicial and administrative processes to collect unpaid parking debts and to deter violations. And the opinion does not foreclose statutorily authorized warrantless tows of illegally parked vehicles, unregistered vehicles, or vehicles presenting some other immediate need to tow.

The decision's impact on cities is immediate and obvious. Unwarranted tows absent exigency must end and cities must find other ways to enforce parking tickets. Legislation may be required but, in the meantime, reliance on the DMV program to withhold vehicle registrations for unpaid tickets may be the most efficient means to enforce parking ticket obligations. Of course, many do not renew their vehicle registrations, making this an imperfect solution.