IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. _____

BUILDING INDUSTRY ASSOCIATION – BAY AREA,
Petitioner,

v.

CITY OF SAN RAMON,
Respondent.

After an Opinion by the Court of Appeal,
First Appellate District, Division Two
(Case No. A145575)

On Appeal from the Superior Court of Contra Costa County
(Case No. MSC1400603, Honorable Jill C. Fannin, Judge)

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Constitutions

Statutes

Regulation

Miscellaneous

Page

ISSUES PRESENTED

The Mello-Roos Community Facilities Act of 1982 authorizes the creation of community facilities districts as a mechanism to finance municipal facilities and services. *See* Gov't Code § 53311.5. To that end, the Act allows for the levying of "special" taxes which, depending on the circumstances, must be approved either by a vote of the landowners or the registered voters residing within the proposed district. *See id.* § 53326. For taxes approved by landowner vote that will be used to pay for municipal services, the Act mandates that the revenue from such taxes be used to pay only for services that are "in addition to" those services already provided to the district's territory. *Id.* § 53313. Further, the Act requires that the funded services "not supplant" pre-existing services. *Id.*

Respondent City of San Ramon has established a community facilities district by landowner vote. But District residents "will receive services that are qualitatively no better than the services received by property [owners] outside the district, even though district property owners are paying an additional tax." Slip op. 10. Further, the District's tax-levying ordinance provides that, if the tax "is repealed by initiative or [any] other action of the district taxpayers," the City will cease providing the relevant services and

facilities, *and* "any obligations undertaken to provide [them] will become the obligations of the . . . district property owners themselves." Slip op. 30.

The issues presented are:

1. (A) If a city's general plan policy requires that all new development (but no existing development) be "fiscally neutral" with respect to its need for police and other standard municipal services, may that requirement be satisfied through an annual special tax if (i) the future taxpayers will not receive a higher level of service than similarly situated existing residents, and (ii) the police and other services funded will redound to the benefit of all city residents equally?

(B) Does such a special tax violate the Mello-Roos Act's limitations specifically intended to protect disenfranchised future residents from unfair double taxation, if the tax is imposed only on new development throughout the city but the occupants of that new development will enjoy merely the same level of service provided to existing development throughout the city?

2. Does a local government violate due process by imposing undue burdens on the exercise of the rights of initiative and judicial redress of grievances, if it adopts an ordinance threatening

potentially enormous financial liability as a consequence of the successful exercise of those rights?

INTRODUCTION

California has long suffered from an affordable housing crisis. *E.g.*, *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 441 (2015) (noting that "the significant problems arising from a scarcity of affordable housing have not been solved over the past three decades" but instead "have become more severe and have reached what might be described as epic proportions in many of the state's localities"). That crisis has produced lamentable social and economic consequences. *See, e.g.*, Mac Taylor, Legislative Analyst's Office, *California's High Housing Costs: Causes and Consequences* 3 (2015)[1] (California's high housing costs: (i) lead "low income [households to] spend much more of their income on housing; (ii) "push homeownership out of reach for many"; (iii) require "workers in California's coastal communities [to] commute 10 percent further each day than commuters elsewhere, largely because limited housing options exist near major job centers"; (iv) result in Californians being "four times more likely to live in

[1] http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf

crowded housing"; and (v) make "California a less attractive place to call home, making it more difficult for companies to hire and retain qualified employees, likely preventing the state's economy from meeting its full potential.").

One important reason for the crisis has been local governments' imposition of taxes, fees, and other costs on new residents, through their authority to act as gatekeeper for the construction of new homes and apartments. *See* Gov't Code § 65589.5(a) ("The Legislature finds and declares all of the following: (1) The lack of housing . . . is a critical problem that threatens the economic, environmental, and social quality of life in California. (2) California housing has become the most expensive in the nation. The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that . . . require that high fees and exactions be paid by producers of housing. (3) Among the consequences of these actions are discrimination against low-income and minority households . . . ."); Cal. Stats. 1983, Ch. 911, § 1 ("The Legislature finds and declares that it is an objective of state government to facilitate the development of more reasonably priced housing in California . . . . ¶ The Legislature further finds that local governments . . . are increasingly requesting

that private developers fund necessary supportive infrastructure in addition to the developers' role in providing the new housing stock. The cost of this infrastructure adds to the cost of the final housing stock associated with the infrastructure, as the developers must pass these increased costs on to consumers."). *See also* Taylor, *supra*, at 14-17 (noting that development fees "are higher in California than the rest of the country," local governments "often require housing projects to go through multiple layers of review prior to approval," and "[r]esearchers have linked additional review time to higher housing costs"); Charles J. Delaney & Marc T. Smith, *Development Exactions: Winners and Losers*, 17 Real Estate L.J. 195, 197 (1989) ("[L]ocal governments may also use impact fees as a method of land use control or growth management."). *Cf.* The White House, *Housing Development Toolkit* 6-7 (2016)[2] (noting that "local barriers to housing development" contribute to the "increasing severity of undersupplied housing markets," thereby "jeopardizing housing affordability for working families" and "exacerbating income inequality"); Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. Ill. L.

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[2] https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf

Rev. 1061, 1064 (arguing that land-use regulation is "a key constraint on African-American entrepreneurship").

The decision below exacerbates the housing crisis by upholding Respondent City of San Ramon's Community Facilities District under the Mello-Roos Act. This District will force its hapless residents—who will dwell in new homes and apartments on parcels within the District's non-contiguous, zigzagging territory—to pay a sizable special tax on their property tax bill each year for the benefit of the entire City. In exchange for paying this burdensome levy—which they have not voted upon—these targeted City residents will receive no special municipal service. Slip op. 10. Rather, they will receive only the same set of standard municipal services that the City always has provided to all parcels within its territory. *See id.* And if the District's property owners succeed in obtaining the repeal of the tax—through initiative or other action, such as a favorable judicial decision—the City promises to cut them off from the funded services and, more importantly, to impose on them an as yet undetermined but potentially catastrophic financial obligation of providing those services. *See* Slip op. 28, 30.

Petitioner Building Industry Association – Bay Area contends that the City's taxing scheme violates the Mello-Roos Act, and that

its enforcement provisions violate due process. The District's tax violates the Mello-Roos Act because it was approved by landowner-developer vote, yet its proceeds will not be used to pay for any service that is "in addition to" services already being provided, as the Act expressly requires. Gov't Code § 53313. The tax's levying ordinance violates due process because it unconstitutionally burdens the rights of District residents to seek redress of their grievances through the initiative and judicial processes. The ordinance does so by threatening District residents with potentially ruinous financial liability in exchange for having exercised their rights.

The court of appeal disagreed. It upheld the District's tax as consistent with the Mello-Roos Act, reasoning that the City provides an additional service simply by meeting an increased demand for a pre-existing service. Slip op. 11. The court of appeal also found no constitutional error in the City's ordinance cutting off municipal services to District residents and requiring them to foot a potentially enormous bill for those services. The court of appeal explained that, in such circumstances, the denial of services and shift in financial burden are not the result of any right having been exercised but instead are the result of the City's no longer having

special tax revenue to pay for the services. Such consequences may not even prove to be adverse, because they "may well be precisely the consequences that are expected and desired by the property owners who take the [triggering] actions." Slip op. 31.

The petition for review should be granted because the court of appeal's decision threatens to worsen substantially the state's affordable housing crisis, and to undercut citizens' rights against abusive local government funding schemes. Community facilities districts are becoming more and more common. Darien Shanske, Note, *Public Tax Dollars for Private Suburban Development: A First Report on a National Phenomenon*, 26 Va. Tax Rev. 709, 721 (2007) ("It is now common for developers in California to encumber their land with obligations to pay Mello-Roos taxes; as many as 90% of new developments now use them . . . ."); Br. of Amicus Curiae League of California Cities in Support of Respondents at 26 (estimating 1,100 districts in the state). The decision below allows these districts to be used to implement a newcomer tax to shift—without electoral mandate—the burden of paying for municipal services from existing residents, while stifling new resident dissent through the threat of financial ruin. Because the specially taxed residents will receive nothing "in addition" for the

additional taxes, the newcomer tax blessed by the court of appeal also will have the perverse effect of keeping out development projects of lower assessed value. That in turn will make lower-cost housing nearly impossible to build without substantial and unsustainable subsidies, thereby disproportionately hurting minority home buyers. *See* Arthur C. Nelson, *et al.*, The Brookings Inst. Ctr. on Urb. & Metro. Pol'y, *The Link Between Growth Management and Housing Affordability: The Academic Evidence* 7 (2002)[3] ("[C]ertain growth control and land use policies . . . . make housing more expensive and thereby exclude lower-income families, who are often people of color."). *Cf. Housing Development Toolkit*, *supra*, at 10 ("[R]ecent research shows that strict land use regulations drive income segregation of wealthy residents [and] that more localized pressure to regulate land use is linked to higher rates of income segregation . . . ." (footnotes omitted)). Moreover, injured residents will be reluctant to vindicate their rights for fear that, having won a paper victory, they will end up financially destroyed. This Court therefore should grant review to ensure that local

[3] https://www.brookings.edu/wp-content/uploads/2016/06/growthmang.pdf

government financing mechanisms remain a help—and not become a hindrance—to solving the state's housing crisis.

LEGAL BACKGROUND

A. The Mello-Roos Act Authorizes Local Governments To Levy Special Taxes To Finance Municipal Facilities and Services

To provide local governments with a mechanism to finance municipal services and facilities consistent with the California Constitution, the Legislature passed the Mello-Roos Act. *See* Gov't Code § 53311.5. Under the Act, a local government may form a "community facilities district." *See* Gov't Code §§ 53313, 53313.5. With a two-thirds approval of qualified voters, *see id.* § 53328, such a district may levy "special taxes," *see id.* § 53325.3, and issue bonds, *see id.* §§ 53345-53365.7. A district's tax can be authorized in two ways. If the district's proposed territory contains at least 12 persons who are registered to vote, then those registered voters comprise the relevant electorate. *See id.* § 53326(b). If, however, there are fewer than 12 such voters, the electorate then comprises the landowners within the district. *Id.* § 53326(c).

With respect to municipal services financed *by landowner-developer vote*, the Act imposes a critical limitation. The proceeds from a tax that is approved by landowner vote "may only

finance the services authorized [by the Act] to the extent that they are **in addition to** those provided in the territory of the district before the district was created." *Id.* § 53313(g) (emphasis added). Further, the Act mandates that these "additional services **shall not supplant** services already available within that territory when the district was created." *Id.* (emphasis added).

B. The Addition of the Mello-Roos Act's Limitation on Certain Types of Services Financing Was Critical to the Act's Passage

One reason for the Mello-Roos Act's passage was to authorize local governments to levy special taxes. Slip. op. 3. Such authorization was needed in the wake of Proposition 13, which "prohibited local governments from levying special taxes in the absence of state enabling legislation." *Id.* But another, equally important, reason for the Mello-Roos Act's passage was to bolster the state's then-flagging housing market. *See* Office of Planning & Research, Enrolled Bill Report 2 (Sept. 16, 1982) ("Both SB 2001 and AB 3564 [the original Mello-Roos Act bills] are part of their respective house's 'Housing Package' . . . . It is anticipated that the new Act will lower housing costs and allow more development to go forward."); Letter of Sen. Henry J. Mello to Hon. Edmund G. Brown, Jr., at 1 (Sept. 7, 1982) ("As you know, the health of our state's

housing industry has been an important issue in this legislative session. [¶] SB 2001 is part of the Senate Housing Package and has the support of the California Chamber of Commerce, . . . , and the California Building Industry Association . . . .").[4] *See also* Letter of David E. Booher, Cal. Council for Envtl.-Econ. Balance, to Members of the Assembly, at 1 (Aug. 17, 1982) (noting that SB 2001 was part of a "meaningful package of legislation which, in combination, will have a significant positive impact on the state's serious housing problem").

Yet lack of taxpayer safeguards in the proposed legislation threatened to derail the housing reform movement. The original version of the proposed Mello-Roos Act would have granted to local governments a special taxing authorization for the financing of municipal services without *any* limitation. *See* S.B. 2001, 1981-1982 Reg. Sess., § 2 (proposed Sts. & High. Code § 7201) (as amended Apr. 12, 1982) ("The legislative body may levy and collect in any year upon and against each parcel of land within the assessment district a special assessment sufficient to raise a sum of money necessary to service the facility."). Such a vast grant of taxing

[4] The court of appeal took judicial notice of the Mello-Roos Act's legislative history. Slip op. 13 n.14.

power caused great concern among the business and home building communities. For example, the California Association of Realtors objected because the proposal would have resulted in unfair double taxation of district residents. The Realtors explained that these residents "would pay twice for police, fire, library, and recreational services: once through the ad valorem tax which they would share with all residents of the community, and secondly through the special benefit assessment levied only on the newly developed area." Letter of Dugald Gillies, Cal. Ass'n of Realtors, to Members of the Sen. Local Gov't Comm., Statement of Opp'n, at 2 (Apr. 12, 1982).

The California Chamber of Commerce voiced similar concerns. Those concerns led to the Chamber's submission of a suggested alternative under which "developers could not vote taxes for ongoing operations and maintenance." Cal. Chamber of Commerce, Draft Suggested Alternative for Infrastructure Financing, at 1 (May 12, 1982). The Chamber observed that "it would be improper for a homebuyer to be saddled forever with new taxes for the same services enjoyed by the rest of the taxpayers within the city." *Id*.

Ultimately, these views prevailed. Added to the bill before its final passage was the limitation that the financed levels of services be "in addition to" those already provided. *See* S.B. 2001, 1981-1982

Reg. Sess., § 1 (proposed Gov't Code § 53313.5) (as amended Aug. 2, 1982). As a result of this important protection for homebuyers, the Chamber could warmly support the enrolled bill. *See* Letter of Fred L. Main, Chamber of Commerce, to Hon. Edmund G. Brown, Jr., at 1 (Sept. 13, 1982) ("The California Chamber of Commerce strongly SUPPORTS SB 2001 . . . .").

C. Financing Limitations on Community Facilities Districts Are Important Given the Mello-Roos Act's Authorization of Landowner Voting

Since 1982, the Legislature has substantially eased the Mello-Roos Act's original restrictions on services and facilities financing. *See* slip op. 14-15. Yet the Legislature has steadfastly maintained the requirement that revenue from landowner-approved taxes may be used to pay only for services "in addition to" pre-existing services. The Legislature's fidelity to this component of the original compromise with the home building industry makes sense in light of how landowner voting operates. Typically, such voting occurs in connection with a project to develop vacant lots. *See City of San Diego v. Shapiro*, 228 Cal. App. 4th 756, 786 (2014) (noting that landowner votes usually occur "in the case of a predominantly uninhabited proposed district"); Mac Taylor, Legislative Analyst's

Office, *Understanding California's Property Taxes* 14 (2012) (explaining that "[l]ocal governments often use Mello-Roos taxes" because "landowners may approve Mello-Roos taxes," so that "a developer who owns a large tract of land could vote to designate it as a Mello-Roos district," resulting in "the new owners pay[ing] the Mello-Roos tax"). Further, such a vote usually follows upon the decision of a developer who, through self-interest or perhaps local government pressure, agrees to establish a community facilities district in order to obtain the necessary local permit approvals. That is precisely what preceded the creation of the District here. *See* Joint Appendix volume 3, at page 365 (City staff rep.) [hereinafter JA 3:365]. Such acquiescence is not difficult to obtain: developers rarely will be subject to the special taxes that they have voted to approve. JA 4:670 (Def. Opp'n Statement ¶ 21).

Hence, the Legislature wisely has preserved the Mello-Roos Act's financing limitations to blunt at least some of the danger that special taxes pose by focusing on a species of tax—namely, a landowner-approved tax—which raises an especially acute risk of misuse. These limitations help to ensure that local governments do not use alternative financing mechanisms to make newcomers pay

for what all residents should contribute to fairly, or to price out certain developments disfavored by existing residents.

FACTUAL BACKGROUND

A. The City's Budget Crunch and Its Dim View of New Development

In April, 2011, the City adopted its General Plan 2030, which sets forth a blueprint for development within the City. The Plan's many co-equal policies include Implementing Policy 2.3-I-20, which directs the City to "[e]valuate the ability of new development to pay for its infrastructure, its share of public and community facilities, and the incremental operating costs it imposes."[5] JA 4:703 (Pltf. Opp'n Statement ¶ 1). It was within this context of straitened municipal circumstances that, at the City Council's July, 2013, meeting, then-City Police Chief Scott Holder gave a presentation to the Council concerning the need to hire additional police officers.

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[5] The City, however, has never comprehensively determined whether or to what extent the City's existing property taxes are inadequate to ensure that new development pays its "fair share," consistent with Implementing Policy 2.3-I-20. Moreover, the provision of current municipal services is not the only draw on the City's General Fund revenues. Perhaps the most significant increasing cost for the City is the payment of City pensions and retiree health expenses. *See* JA 3:353 (City staff rep.) ("Significant factors impacting expenditures include . . . employee benefit costs . . . ."). The recent economic downturn has exacerbated the effect of these draws. JA 3:352 (City staff rep.).

See JA 3:358 (City staff rep.). Chief Holder cited increases in response times, population, and crime as the reasons for this need. *Id*. Following the presentation, the City Council referred the request to the City Finance Committee. *Id*. At its October, 2013, meeting, the Finance Committee approved funding for more police officers and directed the City staff to present the request to the City Council. *Id*. At the latter's November, 2013, meeting, the City Council approved Resolution 2013-101, which authorized the additional hires at an estimated annual cost of $640,820. *Id*. 3:360-61.

B. The City's Plan To Solve Its Budget Problems with a District Created in the Context of a Single Developer's Project Approval

Two further significant events occurred at about the same time that the additional police expenditures were approved. First, the City's Finance Committee began considering the creation of "a public finance mechanism to offset annual impacts to the General Fund." *See* JA 3:364 (City staff rep.). Second, the City approved a development proposal by RASAP Franklin. This proposal, known as the Acre Project, entails the construction of 48 townhomes on two vacant lots within the City. *See* JA 4:703 (Pltf. Opp'n Statement

¶ 2). As a condition of that approval, the City required that the developer provide a funding mechanism to mitigate the project's alleged negative fiscal impacts with respect to the provision of municipal services—the principal focus being police services. *See* JA 4:704 (Pltf. Opp'n Statement ¶ 5); JA 3:406 (City staff rep.). A mere ten days after the Finance Committee's December, 2013, meeting to discuss a "public finance mechanism," the developer submitted a petition to the City to form a community facilities district, JA 3:633-36 (developer petition).

C. Creation of the District and Its Tax Enforcement Mechanism

In early 2014, the City approved the District's creation and conducted the landowner vote to approve the tax. JA 4:666-67 (Def. Opp'n Statement ¶¶ 8, 10, 12). The District's current sole landowner—the Acre Project developer—voted to approve the tax, JA 4:667 (Def. Opp'n Statement ¶ 13), the vast majority of its revenue being earmarked for general police services, *see* JA 3:406 (City staff rep.).

The tax's revenue generation is expected to proceed as follows. Beginning in the first year, owners or residents (or both) of new single-family homes within the District will be subject to the

additional tax in the amount of $743.75 annually, of which $643.75 will be used for services; those of new condominiums or townhomes $595.00, of which $515.00 will be used for services; and those of apartment units $446.25, of which $386.25 will be used for services. JA 3:420. Without need for subsequent City Council action or voter approval, the amount of the tax for facilities will increase automatically 2% per year. *See id.* The amount for services will increase automatically at least 4% per year. *See id.*

Shortly after the District's creation, the City approved the District's tax-levying ordinance. JA 4:664 (Def. Opp'n Statement ¶ 5). The ordinance contains a provision—Section H—under which the City will do two things in the event that the tax is repealed by initiative or other action taken by the District's property owners. First, the City will stop providing the facilities and services for which the tax is levied. Second, the City will transfer the financial burden of "[t]he obligations . . . previously funded by the repealed Special Tax" including, presumably, any bonded debt and other liabilities, onto the District's property owners. *See* JA 3:421 (Rate and Method of Apportionment of Special Tax).

D. The Association's Challenge to the District's Tax and Levying Ordinance

In March, 2014, the Association brought suit in Contra Costa County Superior Court.[6] The action challenged the District's tax under the Mello-Roos Act and the California Constitution, and the levying ordinance under both the State and Federal Constitutions. The superior court denied the Association's motion for summary judgment and granted the City's cross-motion, and the court of appeal affirmed.

With respect to the Association's statutory claim, the court of appeal acknowledged the "undisputed fact" that District residents will pay more in property taxes than non-District residents, but will receive no qualitatively better service. Slip op. 10. Nevertheless, the court of appeal concluded that "the additional services requirement is met by services that meet increased demand for existing services within the district." Slip. op. 11. This reading is consistent, in the court of appeal's estimation, with the Legislature's aim of providing local governments a means to finance services "in

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[6] The lawsuit comprised a reverse validation action, *see* Gov't Code § 53359; Code Civ. Proc. § 863, as well as a declaratory relief action, Code Civ. Proc. § 1060, and a petition for writ of mandate, *id*. § 1085.

developing areas and areas undergoing rehabilitation, precisely the situations that would likely lead to increased demand for . . . services." Slip. op. 12.

With respect to the Association's constitutional claim, the court of appeal correctly understood the City's tax-levying ordinance to require that, if the tax is repealed by initiative or judicial action, "the City . . . will no longer be required to provide the services and facilities funded by the tax, and any obligations undertaken to provide the services and facilities will become the obligations of the district property owners' association or the district property owners themselves." Slip op. 30. Yet the court of appeal found no due process violation in this enforcement scheme, for two reasons. First, the court declared, without citation, that the cut-off of municipal services may in fact be "precisely the consequences that are expected and desired by the property owners who take the actions," and thus presumably would not constitute retaliatory action against the landowners. Slip op. 31. Second, the court of appeal explained that, even if such a cut-off of services and imposition of financial burdens were adverse, the cause would not be the exercise of the

property owners' rights, but rather "the absence of the tax revenue that was to be collected to pay for services and facilities."[7] Slip op. 31. Because the court of appeal's decision accurately recites the relevant facts and issues presented for review, the Association did not seek rehearing.

REASONS FOR GRANTING THE PETITION

I

The Petition Should Be Granted To Settle the Following Important Question of Law: Whether Revenue from a Mello-Roos Act Tax Approved By Landowner Vote May Be Used Merely To Satisfy Increased Demand for Existing Municipal Services

The Mello-Roos Act's limitation on municipal services financing by landowner vote is a critical protection for the state's aspiring occupants of new housing. It acknowledges the electoral reality of landowner voting: those who vote for the tax (developers) will not pay the tax. The process therefore allows a tax's burden to be shifted to non-voting future residents. The Legislature wisely

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[7] The Association also contended that the District's tax violates the prohibition on "general" taxation contained with Article XIIIC, § 2(a), of the California Constitution. The superior court ruled against the Association on this claim, and the court of appeal affirmed. Slip op. 28. The Association no longer presses it.

concluded that these future district residents need protection against the abuse that may arise from landowner voting. The principal guard against such abuse is to be found in the Act's requirement (which applies only to landowner voting) that district residents must receive something extra, *i.e.*, "in addition," for the substantial special taxes that they—and no one else—must pay. *See* Gov't Code § 53313.

In the court of appeal's view, that "something extra" is simply the continued provision of the same service—namely, a service adequate to the meet the demand for the service. Slip op. 11. This construction is appropriate, according to the court of appeal, because it is consistent with the Legislature's desire to facilitate municipal services financing for developing areas. Slip op. 12. But as set forth below, the court of appeal's interpretation effectively eliminates any meaningful safeguard on landowner-approved taxes. The decision thereby impermissibly allows local governments to use the Act's financing mechanisms to frustrate, rather than to solve, the state's affordable housing crisis.

To appreciate these conclusions requires an understanding of how municipal services typically are provided. Take police services as an example. Local governments are mandated to provide such

services to all of their residents. *See City of Hayward v. Bd. of Trustees*, 242 Cal. App. 4th 833, 843 (2015) ("[T]he obligation to provide adequate fire and emergency medical services is the responsibility of the city."). *See also* Cal. Const. art. XIII, § 35(a)(2) ("The protection of the public safety is the first responsibility of local government and local officials have an obligation to give priority to the provision of adequate public safety services."). Traditionally, these services have been provided uniformly, *i.e.*, at the same level throughout a local government's territory.[8] *See* 57 Ops. Cal. Atty. Gen. 423, 428 (1974) (interpreting the County Service Area Law). Also traditionally, uniformity of service has been understood *qualitatively*, not quantitatively. So, to continue the example, police services are deemed to be provided in a uniform manner notwithstanding that patrolling will occur more frequently "in populated areas than in rural areas." *Id*. The service remains qualitatively the same—that is, uniform—even though the *demand* for that service, as well as the efforts required for the demand's satisfaction, may vary throughout a territory. *See id*.

[8] Bolstering this tradition, federal law prohibits many housing-related practices that produce a disparate impact on protected classes. *See* 24 C.F.R. § 100.500(a).

As the court of appeal acknowledged, "the City currently provides [municipal] services at a level that is generally adequate to meet the existing demand," and District residents "will receive services that are qualitatively no better than the services received by property outside the district." Slip op. 10. Thus, the City will use the District's tax revenue to continue to provide the same uniformity of service that the City always has provided. By affirming the City's scheme, the court of appeal's decision therefore equates "continuity of service" with "additional service." Such reasoning renders meaningless the Legislature's mandate that financed services be "in addition to" pre-existing services.

Attempting to defend its ungenerous interpretation of the Act's limitations on services financing, the court of appeal suggested that local governments would still be forbidden to collect special tax revenue while, at the same time, cease providing police services altogether to a district's residents. Slip op. 17 ("[T]he police protection services that were available when the district was created cannot simply disappear."). But that miserly construction provides district residents nothing that they did not previously have, given that local governments are already compelled to provide basic police services. Hence, the court of appeal's reading of the Act's

limitations merely duplicates existing protections, thereby impermissibly rendering those limitations superfluous. *Cf. Kleffman v. Vonage Holdings Corp.*, 49 Cal. 4th 334, 345 (2010) (courts "must avoid interpretations that would render related provisions unnecessary or redundant").

That the court of appeal's decision allows local governments to compel new residents to bear inequitable tax burdens without a vote is a strong reason for this Court's review. But the court of appeal's decision has further odious ramifications meriting this Court's corrective intervention. The developments that are most likely to be deemed by the City as not being able to pay for themselves—and thus needing to be annexed into the District to mitigate their supposed negative fiscal impact—will be those with lower assessed property values. *See* Taylor, *Understanding California's Property Taxes*, *supra*, at 8 (noting that 90% of property tax revenue is based on the assessed value of the taxed property). Such developments include low-income housing and other land-uses that current affluent residents often find undesirable. *See* A. Mechele Dickerson, *Revitalizing Urban Cities: Linking the Past to the Present*, 46 U. Mem. L. Rev. 973, 985 n.43 (2016) ("Homeowners in upper-income neighborhoods also fight attempts

to place socially useful but undesirable properties like half-way housing, homeless shelters, and group homes in their neighborhoods because of concerns that those properties may depress the values of their homes."); Note, *Exclusionary Zoning*, 91 Harv. L. Rev. 1624, 1626 (1978) ("Suburban exclusion of low-cost housing and industrial employment opportunities for unskilled labor traps millions of Americans in deteriorating sections of the central city.").

Hence, the court of appeal's decision unwittingly allows the City and all other local governments to use the Mello-Roos Act to impose a newcomer's tax, one that also will be perniciously effective at placing disproportionately higher taxes on lower-income families. This Court long ago rejected funding schemes that vary the quality of key public services based on the assessed value of property. *See Serrano v. Priest*, 5 Cal. 3d 584, 614-15 (1971) (overturning a system for public education financing based solely on local property values). The District's tax presents an analogous phenomenon: predicating the quality of basic municipal services on the value of the property to be serviced. The petition should be granted to reject that pernicious proposition.

II

The Petition Should Be Granted To Settle the Following Important Question of Law: Whether a Potentially Catastrophic Financial Liability May Be Imposed on Property Owners as a Result of Having Successfully Exercised Their Rights to Initiative and Judicial Redress of Grievances

The government violates due process when it burdens citizens' rights as a consequence of the exercise of those rights. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Tichinin v. City of Morgan Hill*, 177 Cal. App. 4th 1049, 1062-63 (2009). The City's tax-levying ordinance provides that, if the tax is repealed by initiative or other action, the City will, among other things, impose on District property owners whatever financial obligation the District incurred in connection with providing the District's authorized facilities and services. Slip op. 30. The court of appeal found nothing unconstitutional in this enforcement scheme, for two reasons. First, the consequences that the City's ordinance imposes in the wake of the special tax's repeal will not necessarily be adverse. Slip op. 31. Second, even if adverse, they will result from the City's lack of money, not the exercise of any right held by District property owners. Slip op. 31.

The court of appeal's holding—which eviscerates the prohibition against unconstitutional retaliation, while chilling the exercise of the right to seek redress of grievances and, in California, the right of initiative—cannot withstand scrutiny. To begin with, it is implausible to deem the cut-off of municipal services, or the imposition of a potentially catastrophic financial obligation, as something "desired by property owners" merely because those owners' actions resulted in a tax's repeal. That landowners are aware of what a local government threatens to do as a result of the exercise of their rights does not mean that *they invite* that consequence. If it were otherwise, then *no* claim of unconstitutional retaliation could be ever be stated: the government could merely respond with the court of appeal's "I told you so" defense.

Moreover, to say that the City's decision to cut off services or to impose financial obligations is simply a result of the City's no longer having special tax revenue misunderstands the law of municipal services. As noted in the preceding section, local governments are required to provide basic services to their residents, regardless of the Mello-Roos Act. Consistent with this mandate, the City's practice always has been to provide standard municipal services, even if the individual parcels receiving those

services do not adequately pay for the services through property or other taxes. JA 2:323 (Depo. of City Admin. Servs. Dir. Eva Phelps) (observing that areas of the City that do not pay for themselves "still get the same level [of service] as any other neighborhood"). Yet the City's tax-levying ordinance baldly declares that the City *will* deny services adequate to meet their demand if District residents obtain the overturning of the District's tax.[9] That the City will provide services to some but not all parcels ostensibly failing to pay for themselves confirms that the City's ordinance *is* punishing District residents for having overturned the tax.[10] And that punishment is

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[9] It is true, as the court of appeal observed, that the City has not announced an intention to deprive District property owners of *any and all* services. Slip. op. 30 n.23. But even the court of appeal recognized that the tax's repeal would result in the City "no longer be[ing] required to provide the services and facilities funded by the tax." *Id*. at 30. Thus, what District residents will be deprived of are those facilities and services necessary to adequately satisfy District residents' demand. *Cf*. JA 4:648 (City Resp. to Ass'n Mot. Summ. J. at 6:14-16) ("The Mello-Roos financing is what will enable the City to continue to provide standard municipal services at levels commensurate with the increased service level demands of development within the District.").

[10] Moreover, even if the provision of services were entirely gratuitous, it would still be unconstitutional for the City to deny the gratuity in response to District residents' having exercised their rights. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013) ("[W]e have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold

(continued...)

the direct result of District residents' having exercised their rights of petition and initiative,[11] or their rights to seek judicial redress.[12] Either way, the City seeks to retaliate unconstitutionally.

If the decision below stands, enterprising municipalities throughout the state will be able to coerce their residents into not exercising their constitutional and statutory rights to challenge an unfair or unlawful special tax, simply by predicating the provision of municipal services on the foregoing of those rights, or by hanging the specter of unlimited financial liability on them. Such an approach would have a profound chilling effect on the exercise of those rights. *Cf. Padres L.P. v. Henderson*, 114 Cal. App. 4th 495, 510 (2003) (explaining that filing suit is constitutionally protected activity, and that the activity "would be impermissibly chilled if a

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the benefit because someone refuses to give up constitutional rights.").

[11] U.S. Const. amend. I; Cal. Const. art. I, § 3(a); Cal. Const. art. II, § 11; *Rubalcava v. Martinez*, 158 Cal. App. 4th 563, 571 (2007) ("[C]harter cities cannot deny their citizens the referendum powers reserved in the California Constitution . . . .").

[12] *See* Code Civ. Proc. §§ 860, 863 (reverse validation action); § 1060 (declaratory relief); § 1085 (writ of mandate); Gov't Code § 53359 (judicial review of actions under Mello-Roos Act); *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115 (1999) (right to petition includes filing litigation).

governmental agency [were] permitted to file a retaliatory . . . action"). Who would dare challenge the tax's legality if the consequence of success were the obligation to shoulder the District's bonded debt and services financing? Or the accrued pension liability incurred as part of providing the police services? Or the liability that may attach if the District were sued over civil rights violations associated with its police services? These are all plausible financial obligations that the ordinance can fairly be read on its face to impose on future residents should they exercise their constitutional rights to repeal or invalidate the tax.[13]

Thus, using the court of appeal's decision, municipalities can handily escape liability by claiming either that (i) targeted residents are not being adversely affected because they are merely receiving what they asked for; or (ii) the reason for the adverse action is that the government no longer has its preferred funding source—namely, the pocketbooks of targeted resident taxpayers.

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[13] Again, it is low-income households that will be most affected. They are more likely to be unable to afford the annual special tax in time of financial stress, and therefore will more likely have to face the dilemma of scrambling to continue to pay the tax or seeking to repeal it via litigation or the ballot box, knowing that if successful they will face either a cut in police services or a potentially catastrophic financial obligation.

CONCLUSION

The court of appeal's decision converts municipal services financing into an invidious vehicle to keep out the newcomer and the poor, and to discourage residents from exercising their rights. The petition should be granted.

DATED: November 17, 2016.

Respectfully submitted,

PAUL B. CAMPOS
DAMIEN M. SCHIFF

By s/ Damien M. Schiff
DAMIEN M. SCHIFF

Attorneys for Petitioner Building Industry Association – Bay Area

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PETITION FOR REVIEW is proportionately spaced, has a typeface of 13 points or more, and contains 6,534 words.

DATED: November 17, 2016.

s/ Damien M. Schiff
DAMIEN M. SCHIFF

DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On November 17, 2016, true copies of the PETITION FOR REVIEW were placed in envelopes addressed to:

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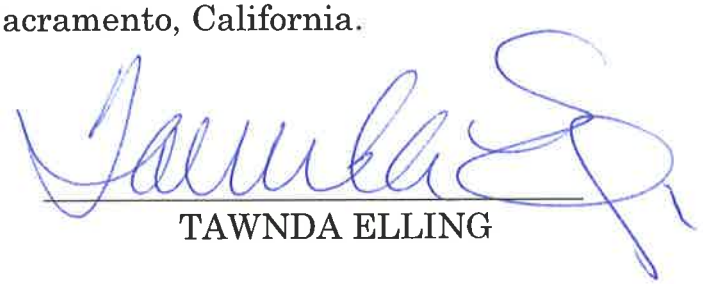
which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 17th day of November, 2016, at Sacramento, California.



TAWNDA ELLING