IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION FUND, ET AL., Petitioners, **v.** **CITY OF SAN MATEO,** Respondent, **XAVIER BECERRA, ATTORNEY GENERAL**, Intervenor.	Case No. A159658

San Mateo County Superior Court, Case No. 18CIV02105
Hon. George A. Miram, Judge

INTERVENOR'S OPENING BRIEF

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Attorney General Xavier Becerra submits the following Intervenor's brief appealing the November 7, 2019, decision of San Mateo County Superior Court to deny the petition of California Renters Legal Advocacy and Education Fund, et al. (the "Fund"), for a writ of mandate to compel the City of San Mateo to approve a proposal to develop a multi-family housing project within the city.[1]

INTRODUCTION AND STATEMENT OF ISSUES

The availability and cost of housing is one of the most significant challenges facing the State of California. To address this challenge, the State has taken numerous actions to boost the supply of housing, including enacting the Housing Accountability Act (Gov. Code, § 65598.5 et seq.), which removes arbitrary local restraints on building more housing. After the trial court called the Act's constitutionality into question, the Attorney General intervened in this appeal to defend the application of the Act as the Legislature intended.

The Attorney General is concerned with three specific aspects of the trial court's decision.

One, the trial court misapplied the Act, because the trial court declined to conduct the requisite reasonable-

[1] On January 13, 2020, the Attorney General intervened on appeal, under Code of Civil Procedure section 902.1. Neither the Attorney General nor any other State official or agency participated in this case in the trial court.

person/substantial-evidence analysis, and instead expressly deferred to San Mateo's position that its discretionary design guidelines precluded the proposed development. (Jt. Appendix, vol. 2, p. JA434; Administrative Record, p. 6.)[2]

Two, invoking the California Constitution's home-rule doctrine for charter cities (art. XI, § 5), the trial court concluded that the Act could not limit the broad power of San Mateo, as a charter city, to approve or to reject the project. (2 JA436-JA439.) However, application of the Act to San Mateo, and to charter cities generally, does not violate the home-rule doctrine. The Act addresses a matter of statewide concern, the lack of sufficient housing for Californians caused by unduly restrictive city policies and decisions, which matter has reached crisis proportions throughout the State. The Act's measured solution requires cities to adhere to their own housing rules or to provide sufficient evidence justifying deviations. The Act preempts only those municipal laws that allow cities unfettered discretion to limit housing, even when the housing meets predetermined, objective standards. The Act thereby respects local control, while helping to ameliorate the statewide housing crisis.

Three, the trial court also stated or held in the alternative that under the California Constitution's "municipal non-delegation" doctrine (art. XI, § 11), the Act is inapplicable to all

[2] The Attorney General is not taking a position on the ultimate correctness of the trial court's ruling that the proposed project satisfies San Mateo's design guidelines, assuming that they are mandatory.

cities (not just charter cities), because the Act supposedly takes away from cities a municipal function, controlling housing-development decisions within the city, and delegates the function to private parties. (2 JA437-38.) However, the Act does not effectuate a delegation of a municipal function to any private party. Cities retain ultimate decision-making authority in approving housing projects (albeit with court review). Furthermore, it is appropriate and lawful for the Act to remove arbitrary local obstacles to developing more housing for all Californians.

For these reasons, the Attorney General respectfully requests that this Court overturn the trial court's erroneous decision granting undue deference to San Mateo in approving or rejecting proposed housing projects, and declining to apply the requisite analysis. If the Court reaches the constitutional questions in this case, then the Attorney General respectfully requests that the Court uphold the constitutionality of the Act, and confirm that this critical law properly constrains cities from rejecting objectively sound proposals to develop more housing, which is urgently needed across the State.

SUMMARY OF THE HOUSING ACCOUNTABILITY ACT

The Housing Accountability Act, also known as the "anti-NIMBY law," is the primary substantive law at issue in this case. The Act's predecessor statute "was originally enacted in 1982, as part of a statutory scheme to address a critical statewide housing shortage and to facilitate the development of housing adequate

for the needs of all economic segments of the population ([Gov. Code,] § 65580)." (*Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1074 ("*Honchariw*"); see also *North Pacific, LLC v. City of Pacifica* (N.D. Cal. 2002) 234 F.Supp.2d 1053, 1058 [holding that Act applies to all housing, not just affordable housing].) "The statute's purpose was to assure that local governments did not ignore their own housing development policies and general plans when reviewing housing development proposals." (*Honchariw*, *supra*, 200 Cal.App.4th at p. 1075, citation and internal punctuation omitted.) The Act was designed to limit the ability of local governments to reject or to render infeasible proposed housing developments based on their density, without a thorough analysis of "the economic, social, and environmental effects of the action." (*Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, 938.)

Under the nearly 40-year-old Act, as amended, any city denying a proposed housing development project that "complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete" must make written findings that two specific conditions exist. (Gov. Code, § 65589.5, subd. (j)(1).) The city must find that (1) the housing development project "would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density," and that (2) "[t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact …

other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density." (*Id.*, § 65589.5, subd. (j)(1)(A)–(B).)

If the proposed housing development is an emergency shelter or housing intended for people of low or moderate income, the city can deny the development in only specific and narrow circumstances. (Gov. Code, § 65589.5, subd. (d).) A permissible reason for denial would be that the proposed housing development or emergency shelter "would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible." (Gov. Code, § 65589.5, subd. (d)(2).) Another acceptable reason for denial would be that:

> The denial of the housing development project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.

(*Id.*, § 65589.5, subd. (d)(3).)

In 2017, the Act underwent several amendments, effective January 1, 2018. (Sen. Bill No. 167 (2016–2017 Reg. Sess.), § 1.) One amendment, codified in Government Code section 65589.5,

subdivisions (d) and (j), requires a city, in rejecting a proposed housing project, to provide written findings, by "preponderance of the evidence" (not just "substantial evidence," as before), of reasons for denial that are consistent with the Act's limitations. Another amendment, codified in Government Code section 65589.5, subdivision (f)(4), created a "reasonable person" standard for determining if a proposed project would conform with local land-use requirements. The relevant text states that "a housing development project or emergency shelter shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity." (*Id.*, emphasis added).

STATEMENT OF THE CASE

Starting in 2015, there has been a proposal in the works for a four-story, 10-unit, 15,000-plus-square-foot housing complex to be built near the intersection of West Santa Inez Ave. and North El Camino Real in San Mateo. (AR. 1228-30.) For a few years, the city considered the proposal before formally rejecting it in early 2018. (AR 1228-31.)

Later in 2018, the Fund and other petitioners brought the instant litigation, in the form of a petition for a writ of administrative mandate, under Code of Civil Procedure section 1094.5, to reverse San Mateo's decision to disapprove the

proposal. (1 JA0003-10.) The Fund contended that San Mateo's actions violated the Housing Accountability Act. (1JA0008-10.) San Mateo defended its decision on various grounds, mentioning but not focusing on constitutional issues. (1 JA031-32; 1 JA066-080.)

The case progressed like an ordinary writ proceeding, such that, in summer 2019, the Fund and San Mateo submitted voluminous merits briefing to the court below. (1 JA035-156.) The trial court requested additional briefing on a series of specific questions about the scope and meaning of the Act. (1 JA158-59.) The Fund's response did not discuss any constitutional issues. (1 JA160-79, JA221-22.) San Mateo's response, filed a month later, invoked both section 5 (charter city's home rule) and section 11 (municipal non-delegation) of article XI of the California Constitution, in attacking the Act as unconstitutional. (1 JA250-75.)

In November 2019, the trial court denied the petition for a writ of mandate, stating four reasons for the decision. (2 JA432-39.)[3] First, expressly deferring to San Mateo's interpretation of its design guidelines for multi-family housing projects, while also in the alternative treating the question as one of "pure law," the trial court upheld the city's decision that the proposed housing

[3] It is not entirely clear to the Attorney General whether the trial court intended to make holdings based on each of the given reasons. The discussion of the constitutional-law issues, in particular, may have been meant to be just observations, not holdings.

development in question did not comply with the guidelines. (2 JA432-39.) Second, the trial court held that the San Mateo guidelines were "objective" under the Housing Accountability Act, and thus that the guidelines did not conflict with the Act's requirement of objective design standards for housing projects. (2 JA434-35.) Third, the court stated, in what may be dicta,[4] that to the extent that the Act conflicts with the San Mateo guidelines or San Mateo's municipal code provisions regarding review of proposed housing developments, application of the Act to San Mateo would violate the charter city's home-rule autonomy. (2 JA436-39.) Fourth, the trial court went on to state, again in what may be dicta, that the Act violates the municipal non-delegation doctrine, by taking away from cities and—in effect—giving to real-estate developers and city employees the function of approving, approving with modifications, or denying individual proposals to develop housing. (2 JA437-39.)

The Fund moved for a new trial and also moved to vacate the trial court's judgment (the order denying the petition for a writ of mandate) (2 JA454-60, JA479-94), but the trial court denied those motions (2 JA697-704).

In January 2020, the Fund appealed the lower court's final judgment and the denial of the post-trial motions. Almost immediately thereafter, the Attorney General intervened for the first time in the case, on appeal.

[4] See footnote three, *supra*.

STANDARD OF REVIEW

The trial court's decision in this case concerned questions of law about whether and how to apply the Housing Accountability Act and did not concern disputes of facts. Under *Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal.App.4th 630, 635, this Court should conduct de novo or independent review of the case.

ARGUMENT

As indicated above, the Attorney General does not purport to address every reversible error of the court below in this case. Instead, this brief focuses on the trial court's errors in (1) holding that the Housing Accountability Act's reasonable-person/substantial-evidence standard does not apply to a city's determination that a proposed housing project fails to comply with applicable city rules and regulations; (2) stating or holding in the alternative that application of the Act to a charter city would violate the city's constitutional right to home-rule autonomy (art. XI, § 5), and (3) stating or holding in the alternative that application of the Act to any kind of city, charter or general-law, would violate the city's alleged constitutional right to essentially unfettered control over housing development within the city, construed to be part of the municipal non-delegation right (art. XI, § 11).

I. THE TRIAL COURT ERRED BY DEFERRING TO SAN MATEO'S INTERPRETATION OF ITS HOUSING DESIGN GUIDELINES AS BINDING, EVEN THOUGH THEY STATE THAT THEY ARE DISCRETIONARY

As noted above, the Housing Accountability Act addresses a recurring, statewide problem of cities denying proposals to develop code-compliant housing complexes or units within city boundaries for arbitrary or subjective reasons, thereby exacerbating California's housing crisis. (See *Honchariw*, *supra*, 200 Cal.App.4th at p. 1075.) The Act precludes use of subjective criteria and insists on objective criteria and detailed explications of denials. (Gov. Code, § 65589.5, subd. (j).) Moreover, the Act requires the city to approve the proposal if a hypothetical reasonable person would find that there is substantial evidence that the proposal complies with the city's own relevant standards. (*Id.*, § 65589.5, subd. (f)(4).) A trial court reviewing the city's decision must put the burden on the city to substantiate the decision by that standard. (*Id.*, § 65589.6.)

Under *Sabato v. Brooks* (2015) 242 Cal.App.4th 715, 724-25, a trial court's error in resolving a case is a reversible error if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id.*, pp. 724-25, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, the trial court expressly deferred to San Mateo's interpretation of its own design guidelines for multi-family housing complexes—and the trial court also stated that it independently agreed with that interpretation as a matter of "pure law." (2 JA434.) The trial court then disclaimed the need

to apply the relatively demanding reasonable-person/substantial-evidence test set forth in the Act, implying that going through that statutorily required exercise would be a waste of time. (*Ibid.*) Indisputably, the trial court failed to apply the Act, even though, facially, it covers the situation in question.

This misapplication of the Act appears to have been the primary basis for the resolution of the case on the merits in the trial court. Had the court applied the reasonable-person/substantial-evidence test, it easily could have found that the proposed San Mateo housing development complied with the design guidelines. In support of that contrary resolution, the Fund marshaled arguments and evidence (1 JA045-50), including that San Mateo aspires to have multi-family housing developments merely "substantially conform" to the guidelines (1 JA098), and that the guidelines themselves state that "the approving body may approve projects not in compliance with the Guidelines" (AR 6). On that basis, it is reasonably probable that the Fund would have prevailed in this dispute had the trial court applied the Act as required. In other words, a reasonable person very well could have believed that there was substantial evidence that the proposal in question did not need to comply with the expressly discretionary guidelines, or at least that the proposal substantially conformed to the guidelines, and therefore should have been approved. It follows that this Court should reverse the trial court's erroneous decision to bypass the legal analysis required by the Act.

II. THE HOUSING ACCOUNTABILITY ACT DOES NOT VIOLATE CHARTER CITIES' HOME-RULE AUTONOMY

The lower court, in its order denying the petition for a writ of mandate, stated or held in the alternative that any application of the Housing Accountability Act to a charter city would violate the doctrine of home rule, under section 5 of article XI of the California Constitution. (JA436-39.) Although that statement may have been dicta, having been made after the above-described ruling upholding on the merits San Mateo's decision to deny the housing-development proposal in question, the statement was plainly incorrect on the law. To the extent that this Court reaches the constitutional issue raised by the trial court, this Court should reverse the trial court and hold that the Act does not violate the home-rule doctrine for charter cities.

A. The Charter-City Home-Rule Analytical Test

Charter-city home-rule analysis proceeds in four steps, as follows:

First, the court considers whether the subject of regulation in question is a "municipal affair," meaning, in essence, a proper subject of regulation for a city. (*State Building & Construction Trades Council of Cal. v. City of Vista* ("*Vista*") (2012) 54 Cal.4th 547, 556.) Whether a subject of regulation is a municipal affair is determined by reference to both (1) the California Constitution, article XI, section 5, subsection (b), which has an express, non-exhaustive list of municipal affairs (*Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 700 ("*Anderson*")), and (2) "the

historical circumstances presented" (*Cal. Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal. 1, 18 ("*Cal. Fed.*"), which may illuminate the meaning of the undefined term "municipal affair" in the California Constitution, article XI, section 5, subsection (b). (*Vista*, *supra*, 54 Cal.4th at pp. 557-58.) If the subject of regulation is not a municipal affair, then the analysis is over, as the State may regulate in that field without violating home rule. (*Id.* at p. 556.)

But if the subject of regulation is a municipal affair, then, second, the court considers whether there is an actual, "inimical" conflict between the pertinent city charter provision, ordinance, or regulation, on one hand, and the state law in question, on the other hand. (*Vista*, *supra*, 54 Cal.4th at p. 556.) Such a conflict is inimical if it would be impossible to comply with both the local measure and the state law at the same time. (*Lanier v. City of El Centro* (2016) 245 Cal.App.4th 1494, 1505.) If there is no such conflict, then the analysis is over, and the local measure and the state law can lawfully co-exist. (*Vista*, *supra*, 54 Cal.4th at p. 556.)

If there is a conflict, then, third, the court decides whether the state law addresses a "matter of statewide concern." (*Vista*, *supra*, 54 Cal.4th at p. 556.) A subject of regulation can be both a municipal affair and a matter of statewide concern. (*Anderson*, *supra*, 42 Cal.App.5th at p. 702.) Whether a state law addresses a matter of statewide concern can depend, at least in part, on whether the subject of regulation has extraterritorial dimensions or effects, meaning that it does not obey city boundaries but

rather spills over and beyond them, and therefore is appropriately addressed on a statewide basis. (*Vista*, *supra*, 54 Cal. at pp. 557-58.) This determination can be made based on case law, the historical circumstances presented (*Cal. Fed.*, *supra*, 54 Cal. at p. 18), and other relevant factors, such as legislative declarations, findings, and history (which are entitled to "great weight" although are not controlling, per *Vista*, *supra*, 54 Cal.4th at p. 558), reports, and studies (*Cal. Fed.*, *supra*, 54 Cal. at p. 20, fn. 16). If the state law does not address a matter of statewide concern, then the state law does not prevail over the conflicting city measure. (*Id.* at p. 556.)

But if the state law does address a matter of statewide concern, then, fourth, the court determines whether the state law is both "reasonably related" to addressing the matter of statewide concern and "narrowly tailored," meaning that the state law avoids unnecessarily interfering with local control. (*Vista*, *supra*, 54 Cal.4th at p. 556.) If the state law is not reasonably related to addressing a matter of statewide concern, then the state law does not prevail over the conflicting city measure. (*Ibid.*) If the state law is reasonably related to addressing a matter of statewide concern, but the law unduly interferes with local control, then the city measure will prevail over the conflicting state law. (*Ibid.*) If the state law does not unduly interfere with local control, however, then the law will prevail over the conflicting city measure. (*Ibid.*)

In general, if a court "is persuaded that the subject of the state statute is one of statewide concern and that the statute is

reasonably related to its resolution, then the conflicting charter city measure ceases to be a 'municipal affair' pro tanto and the Legislature is not prohibited by article XI, section 5(a), from addressing the statewide dimension by its own tailored enactments." (*Cal. Fed.*, *supra*, 54 Cal.3d at p. 17.)

B. Application of Charter-City Home-Rule Analysis Here Shows that the Housing Accountability Act Binds Charter Cities

Although the trial court's determination at the four-step test's first step—recognizing land-use regulation as a traditionally municipal affair—is unobjectionable, the trial court failed to conduct a full analysis and erred substantively in the final steps. Contrary to the trial court's conclusion, the home-rule doctrine countenances application of the Housing Accountability Act to San Mateo, even though it is a charter city.

1. The Housing Accountability Act and the San Mateo Design Guidelines for Multi-Family Housing Developments Do Not Actually, Inimically Conflict

The trial judge skipped the second analytical step regarding conflicts.[5] If, according to the ordinary construction of both the San Mateo design guidelines for multi-family housing

[5] There can be no legitimate dispute that the Act was meant to apply with full force to charter cities. (Gov. Code, § 65589.5, subd. (g) [expressly applying Act to charter cities].) Accordingly, there should have been an analysis of whether there was a conflicting local measure.

developments and the Act, it would be possible to abide by both the guidelines and the Act, then there is no conflict and no home-rule problem. (*City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 269-70.) Because, as noted above, the San Mateo guidelines are discretionary, it would obviously be possible to abide by both those guidelines and the Act. (See *id.*, at p. 270 [finding no home-rule conflict between local measure giving local police force authority, but not obligation, to enforce all laws and state law limiting local police force authority to participate in civil immigration enforcement].) The trial court therefore should have found a lack of an actual, inimical conflict. On that basis, the home-rule analysis should have been resolved against the claim of home rule, with the Act upheld as applying in the charter city of San Mateo.

2. The Housing Accountability Act Addresses a Matter of Statewide Concern

The trial court also skipped the third analytical step regarding matters of statewide concern. It is notable here that "'statewide' refers to all matters of more than local concern and thus includes matters the impact of which is primarily regional rather than truly statewide." (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 505.) The plain language of the Act itself and relevant case law, as well as empirical evidence, demonstrate unequivocally that the seemingly ubiquitous unavailability and unaffordability of housing, at least partly caused by restrictive local policies and decisions on

individual proposed housing developments, is a matter of statewide concern.

a. According to the Act Itself

Supporting why the Legislature, in Government Code section 65589.5, subdivision (g), "finds that the lack of housing, including emergency shelter, is a critical statewide problem," Government Code section 65589.5, subdivision (a)(1), describes in detail California's housing crisis:

> (A) The lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California.
>
> (B) 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 limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing.
>
> (C) Among the consequences of those actions are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration.

(D) Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing development projects, reduction in density of housing projects, and excessive standards for housing development projects.

Government Code section 65589.5, subdivision (a)(2), adds more facts, as follows:

(A) California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives.

(B) While the causes of this crisis are multiple and complex, the absence of meaningful and effective policy reforms to significantly enhance the approval and supply of housing affordable to Californians of all income levels is a key factor.

(C) The crisis has grown so acute in California that supply, demand, and affordability fundamentals are characterized in the negative: underserved demands, constrained supply, and protracted unaffordability.

(D) According to reports and data, California has accumulated an unmet housing backlog of nearly 2,000,000 units and must provide for at least 180,000 new units annually to keep pace with growth through 2025.

(E) California's overall homeownership rate is at its lowest level since the 1940s. The state ranks 49th out of the 50 states in homeownership rates as well as in the supply of housing per capita. Only one-half of California's households can afford the cost of housing in their local regions.

(F) Lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians.

(G) The majority of California renters, more than 3,000,000 households, pay more than 30 percent of their income toward rent and nearly one-third, more than 1,500,000 households, pay more than 50 percent of their income toward rent.

(H) When Californians have access to safe and affordable housing, they have more money for food and health care; they are less likely to become homeless and in need of government-subsidized services; their children do better in school; and businesses have an easier time recruiting and retaining employees.

(I) An additional consequence of the state's cumulative housing shortage is a significant increase in greenhouse gas emissions caused by the displacement and redirection of populations to states with greater housing opportunities, particularly working- and middle-class households. California's cumulative housing shortfall therefore has not only national but international environmental consequences.

Government Code section 65589.5, subdivision (b), adds, "It is the policy of the state that a local government not reject or make infeasible housing development projects, including emergency shelters, that contribute to meeting [the regional] need [for more housing] without a thorough analysis of the economic, social, and environmental effects of the action…"

These extensive legislative findings and declarations that the Act addresses a matter of statewide concern are entitled to great weight. (See *Vista*, 54 Cal.4th at p. 565; see also *Cal. Fed.*, *supra*, 54 Cal.3d at p. 24 [a court should show "deference to legislative estimates regarding the significance of a given problem and the responsive measures that should be taken toward its resolution"].)

b. According to Case Law

Over the last nearly 50 years, numerous cases have upheld statewide housing and land-use statutes and regulations as overriding conflicting charter-city measures, notwithstanding the

home-rule doctrine for charter cities, because developing a sufficient quantity of affordable housing for Californians is indeed a matter of statewide concern.

Recently, the decision in *Anderson*, *supra,* upheld the Surplus Land Act against a charter city's home-rule challenge. The *Anderson* court held:

> The Surplus Land Act advances state land use policy objectives by mandating a uniform approach to the disposition of local government land that is no longer needed for government use. By requiring municipalities to prioritize surplus land for the development of low- and moderate-income housing, the statute addresses the shortage of sites available for affordable housing development as a matter of statewide concern. …[W]hile a city's process for disposing of surplus city-owned land is typically a municipal affair, San Jose's policy here must yield to the state law.

(*Id.*, 42 Cal.App.5th at p. 693.) *Anderson* quoted the Supreme Court as follows: "[i]t will come as no surprise to anyone familiar with California's current housing market that the significant problems arising from a scarcity of affordable housing have […] become more severe and have reached what might be described as epic proportions in many of the state's localities." (*Id.*, at pp. 708-09, quoting *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.5th 435, 441.) The *Anderson* court further relied on four earlier appellate court opinions holding

unequivocally that the provision of sufficient housing for Californians, not just low-income Californians, is a matter of statewide concern:

> Judicial decisions predating *California Building* have recognized the statewide dimension of the affordable housing shortage in relation to various impositions by the state into the realm of local affairs. (See *Green v. Superior Court* (1974) 10 Cal.3d 616, 625 […] [citing "enormous transformation in the contemporary housing market, creating a scarcity of adequate low cost housing in virtually every urban setting"]; *Buena Vista* [*Gardens Apartments Assn. v. City of San Diego Planning Dept.* (1985) 175 Cal.App.3d 289,] 306 [finding "need to provide adequate housing" is a statewide concern and rejecting home rule challenge to state provision that mandated charter city to include certain actionable components in its "housing element"]; *Bruce v. City of Alameda* (1985) 166 Cal.App.3d 18, 22 […] ["locally unrestricted development of low cost housing is a matter of vital state concern"]; *Coalition Advocating Legal Housing Options v. City of Santa Monica* (2001) 88 Cal.App.4th 451, 458 […] [noting the Legislature and courts have declared housing to be a matter of statewide concern].)

(*Anderson*, *supra*, 42 Cal.App.5th at pp. 709-10.) The *Anderson* court concluded, "Accordingly, we find that as much as the City

has a readily identifiable interest in the disposition of its real property, the well-documented shortage of sites for low- and moderate-income housing and the regional spillover effects of insufficient housing demonstrate 'extramunicipal concerns' justifying statewide application of the Act's affordable housing priorities." (*Id.* at p. 711.)

Another relevant case, *CEEED v. California Coastal Zone Conservation Commission* (1974) 43 Cal.App.3d 306, considered whether application of the Coastal Zone Conservation Act within a charter city violated the home-rule doctrine. (*Id.* at p. 321.) To preserve delicate ecological systems, that Act established regional commissions and a statewide commission with the power to veto developments of buildings and structures near the California coast. (*Id.* at pp. 311-12.) The *CEEED* court held, "Although planning and zoning in the conventional sense have traditionally been deemed municipal affairs, where the ecological and environmental impact of land use affects the people of the entire state, they can no longer remain matters of purely local concern." (*Id.* at p. 323.) "[T]he municipal affairs concept does not preclude the state from regulating land use when necessary to further the state's interest." (*Id.* at p. 324.)

As this authority makes clear, the State has a legitimate role to play in assuring that housing policies, land-use regulations, and the like serve statewide interests, not just local interests. Like other, similar laws, the Housing Accountability Act addresses a matter of statewide concern.

c. According to Empirical Evidence

In the trial court, there was no presentation of empirical evidence, outside the text of the Housing Accountability Act itself, that the lack of enough housing for Californians is a problem of statewide dimension.[6] While the trial court could and should have held that the Act addresses a matter of statewide concern based on the Act and case authority, the Attorney General (who did not participate in the case in the trial court) now proffers some of the abundant, indisputable evidence, worthy of judicial notice, that the lack of enough housing for Californians is a problem of statewide dimension.

The cost of housing in essentially every region of California is much higher than the cost of housing elsewhere in the United States, causing special quality-of-life problems, with racial dimensions, for California as a whole. According to the U.S. Census Bureau, in 2017, the average monthly total cost of housing in the United States was $1,036 per household, which consumed 22 percent of the median U.S. household income.[7] That year in California, the average monthly total cost of housing

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[6] The merits briefing did not address the constitutional-law issues to which empirical evidence is relevant, and the trial judge's request for supplemental briefing also did not ask for submissions of evidence. (See 1 JA035-159.)

[7] *American Housing Survey Table Creator*, available online at <https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=00000&s_year=2017&s_tablename=TABLE10&s_bygroup1=1&s_bygroup2=1&s_filtergroup1=1&s_filtergroup2=1> (last visited June 28, 2020). See Exhibit 1 to the request for judicial notice.

was nearly 50 percent higher, at $1,535 per household, and consumed 27 percent of the median California household income.[8] In February 2020, California Budget and Policy Center, a non-profit organization, issued a short report, *Housing Affordability Is a Problem in All Regions of California*, demonstrating that "[a]cross every region of California, from the high-cost San Francisco Bay Area and Los Angeles and South Coast to the lower-cost Central Valley and Far North, at least a third of households spent more than 30% of their incomes toward housing in 2018, and as many as 1 in 5 spent more than half of their incomes on housing costs."[9] These burdensome housing costs have been the result of the failure to build hundreds of thousands of new housing units to keep up with human population growth in the State.[10] It is imperative to carry out statewide solutions to this problem of such enormous magnitude. Moreover, according to a report by the U.S. Department of Housing and Urban Development, Office of Community Planning and Development,

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[8] *Ibid.* See Exhibit 2 to the request for judicial notice.

[9] See <https://calbudgetcenter.org/resources/housing-affordability-is-a-problem-in-all-regions-of-california/> (last visited Jun. 28, 2020).) See Exhibit 3 to the request for judicial notice.

[10] California Department of Housing and Community Development, *California's Housing Future: Challenges and Opportunities—Final Statewide Housing Assessment 2025* (Feb. 2018) ("*Statewide Assessment*"), p. 5, available online at <https://hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf> (last visited June 28, 2020). See Exhibit 4 to the request for judicial notice.

California has the highest rate of homelessness among U.S. states, and one out of every three homeless people in the United States lives in California.[11] People experience homelessness in all regions of the State.[12] In California, homelessness afflicts Black people more than people of other racial-ethnic backgrounds.[13] This significant, widespread social problem, with its evidential racial dimension, compels statewide, not just local, action.

In California, housing markets are inevitably multi-city or regional markets, not single-city markets, meaning that the availability and affordability of housing are statewide or, at least, regional, phenomena. The U.S. Department of Housing and Urban Development, Office of Policy Development and Research, prepares and publishes *Comprehensive Housing Market Analyses* for metropolitan areas across the United States. The reports treat groups of California cities—not single cities—as single markets. A 2020 report addresses Orange County as a whole.[14]

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[11] *The 2019 Annual Homeless Assessment Report to Congress*, p. 24, available online at <https://files.hudexchange.info/resources/documents/2019-AHAR-Part-1.pdf> (last visited Jun. 28, 2020). See Exhibit 5 to the request for judicial notice.

[12] *Statewide Assessment*, *supra*, p. 10.

[13] Kate Cimini, *Black People Disproportionately Homeless in California*, KQED (Oct. 8, 2019), available online at <https://www.kqed.org/news/11778741/black-people-disproportionately-homeless-in-california> (last visited Jun. 28, 2020). See Exhibit 6 to the request for judicial notice.

[14] See *Anaheim-Santa Ana-Irvine, California* (Jan. 1, 2020), available online at

(continued…)

By 2018 reports, Los Angeles County, which encompasses 88 cities, was considered to have several regional housing markets.[15] In 2017-18, the Santa Clara County Civil Grand Jury studied affordable housing as a countywide issue."[16] While finding disparities in housing prices and housing density from city to city, the Civil Grand Jury suggested organizing coalitions of similar cities—rather than considering each city as its own domain—to address the problem most effectively.[17] Because, in California, a city does not comprise a single, insulated market for housing, housing availability, quality, and pricing are matters of statewide or, at least, regional concern and must be addressed at that level.

(…continued)
<https://www.huduser.gov/portal/publications/pdf/Anaheim-SantaAna-IrvineCA-CHMA-20.pdf> (last visited Jun. 28, 2020). See Exhibit 7 to the request for judicial notice.

[15] See *Los Angeles Metropolitan Division Series Focus on: Central Los Angeles, California* (Jun. 1, 2018), available online at <https://www.huduser.gov/portal/publications/pdf/CentralLosAngelesCA-Comp-CHMA.pdf> (last visited Jun. 28, 2020) (see Exhibit 8 to the request for judicial notice); *Los Angeles Metropolitan Division Series Focus on: San Gabriel Valley, California* (Nov. 1, 2017), available online at <https://www.huduser.gov/portal/publications/pdf/SanGabrielCA-comp.pdf> (last visited Jun. 28, 2020) (see Exhibit 9 to the request for judicial notice).

[16] See *Affordable Housing Crisis–Density Is Our Destiny* (Jun. 21, 2018), p. 2, available online at <http://scscourt.org/court_divisions/civil/cgj/2018/BMRH%20Rpt%202018-06-19%20REVISED%20FINAL.pdf> (last visited Jun. 28, 2020). See Exhibit 10 to the request for judicial notice.

[17] *Id.*, pp. 11-14.

The environmental problems associated with the lack of sufficient housing do not obey city boundaries, but rather spill across city borders. If there is not enough housing available in centers of commercial activity, and people have to live farther away from their jobs, people drive their automobiles more to get to work, generating more greenhouse gases that harm our natural environment.[18] Inevitably, a well-located city's restrictive policies on housing development and housing density boost those unfortunate trends, and cause negative effects well beyond the city's borders.

In sum, abundant empirical evidence demonstrates that the availability and affordability of housing for people in California is a matter of statewide concern, and that a single city's housing policies and decisions about housing development are not only local concerns, but rather have economic and social effects far beyond the city's boundaries.

C. The Housing Accountability Act Both Reasonably Relates to a Matter of Statewide Concern and Does Not Unduly Interfere with Local Control

At the fourth analytical step, regarding reasonable relationship and narrow tailoring, the trial court did not address

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[18] See Fang and Volker, U.C. Davis National Center for Sustainable Transportation, *Cutting Greenhouse Gas Emissions Is Only the Beginning: A Literature Review of the Co-Benefits of Reducing Vehicle Miles Traveled* (2017), available online at <https://escholarship.org/uc/item/4h5494vr> (last visited Jun. 28, 2020). See Exhibit 11 to the request for judicial notice.

whether the Act is reasonably related to addressing a matter of statewide concern. But the Act easily passes the reasonable-relationship prong. The Act makes it simpler for housing developments to get built, by providing for the removal of unjustified obstacles to housing development, and thereby reasonably relates—indeed, directly addresses—the statewide issue of insufficient housing for Californians.

As for the tailoring prong, the trial court considered whether the Act was tailored, or could be more tailored, to only those localities with histories of blocking multi-family housing complexes, or to only large proposed housing developments. (2 JA439.) On this ground, the trial court faulted the Act for not being the least restrictive alternative among choices of similar laws.

However, charter-city/home-rule analysis has no least-restrictive-means test. Instead, the correct test is whether the Act "unduly interferes" with local control over housing developments within city boundaries. (*Vista*, *supra*, 54 Cal.4th at p. 556.) The decision in *Buena Vista*, *supra*, concerning the powers of government agencies at various levels to plan for housing development, underscores that the narrow-tailoring test is not difficult to pass, because that decision was that the Legislature may go so far as to "compel[] cities to take action to address" matters of statewide concern, specifically the pace of housing development, without unduly interfering with charter-city home-rule autonomy. (175 Cal.App.3d at p. 307.)

Proper narrow-tailoring analysis demonstrates the Housing Accountability Act's consistency with home-rule autonomy. Three passages from the *Anderson* opinion should guide this Court to find the Act narrowly tailored. First, the *Anderson* court noted that the Surplus Lands Act, the state law in question in that case, applied broadly to local government entities but was tailored in subject, limiting a local government's decision-making authority over what use to make of only surplus land. (42 Cal.App.5th at p. 717.) The Housing Accountability Act is likewise broad in application, reaching all cities in the State, yet narrowly tailored in subject, limiting a city's discretion only when it would reject a proposed housing development that complies with the city's own objective rules and regulations. Such a narrowly tailored measure to address a matter of urgent statewide concern is consistent with article XI, section 5, of the California Constitution. Second, the *Anderson* court emphasized that the Surplus Lands Act leaves a local government with discretion to deem land "surplus," and thus to decide whether land comes within the scope of that law. (42 Cal.App.5th at p. 717.) Likewise, the Housing Accountability Act lets cities establish and enforce their own plans and regulations for housing developments, intervening to make cities merely adhere to their own rules, or justify with evidence deviations from the rules. So cities retain considerable control over these matters. Third, the *Anderson* court stressed that the Surplus Lands Act's encroachments on local control were most significant for the development of affordable housing, and less for other land uses.

(42 Cal.App.5th at p. 717.) In this regard, it is notable that the Housing Accountability Act does not mandate that a proposed housing project contain any "affordable" units (see also *Sequoyah Hills Homeowners Assn v. City of Oakland* (1993) 23 Cal.App.4th 704, 715-716 [pointing out this limitation of Act]), and the Housing Accountability Act is thus even less constraining on a city than the Surplus Land Act is, with respect to affordable housing. Further, under the Housing Accountability Act, a housing project is reviewed the same way, regardless of whether the project contains affordable housing units. (Gov. Code, § 65589.5, subd. (d).) In sum, the Act was carefully crafted to respect local control to the extent possible, and does not unduly interfere with local control.

III. THE HOUSING ACCOUNTABILITY ACT DOES NOT VIOLATE THE MUNICIPAL NON-DELEGATION DOCTRINE

The trial court erred in critiquing the Act under the municipal non-delegation doctrine because the Act supposedly transfers to a real-estate developer or a city staffer a city's power to reject a proposed housing development, in violation of article XI, section 11, of the California Constitution. (2 JA437-38.)

The California Constitution, article XI, section 11, prohibits the Legislature from delegating to any private person or body power to make, to control, to appropriate, to supervise, or to interfere with municipal or county improvements, money, or property, or to levy taxes or assessments or to perform municipal functions. By plain meaning, section 11 of article XI of the

California Constitution can be violated only if the legislative body delegates authority to an actual private person or body. Additionally, and assuming the requisite private person or body, in this context, the constitutionality of a state statute often turns on whether its provisions divest the local government of "final decision-making authority." (*County of Riverside v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 20, 29 ("*Riverside v. PERB*"). Hence, only if the private person or body makes decisions that are "binding" on the local government has section 11 of article XI of the California Constitution been infringed. (*Ibid.*) Furthermore, a court will consider whether a state statute claims authority to address a matter that no single city could adequately address; in such a case, the state statute should survive scrutiny under the municipal non-delegation doctrine. (See *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 493-94.)

Here, the trial court erred in determining that the Act violates the municipal non-delegation doctrine, because the Act does not delegate any authority to any private person or body, let alone authority to make a binding decision. And, in any case, the Act clearly addresses a matter of statewide dimension that no single city can effectively address.

A. The Act Does Not Delegate Any Authority to a Private Person or Body

Courts construing the municipal non-delegation doctrine have focused on the presence or absence of a specific, identifiable private person or body, such as an arbitration panel (*County of*

Sonoma v. Superior Court (2009) 173 Cal.App.4th 322, 331), a metropolitan projects authority (*Howard Jarvis Taxpayers Assn. v. Fresno Metropolitan Projects Authority* (1995) 40 Cal.App.4th 1359, 1363), or a local agency formation commission (*Simi Valley Recreation & Park Dist. v. Local Agency Formation Com.* (1975) 51 Cal.App.3d 648, 652). (See also *Cal. Assn. of Retail Tobacconists v. State* (2003) 109 Cal.App.4th 792, 828 [holding that California Constitution, article XI, section 11, does not forbid delegation to public body].)

The decision in *City of Torrance v. Superior Court* (1976) 16 Cal.3d 195 illustrates the importance to this constitutional issue of the absence of a specific, identifiable private person or body. That case concerned a state law that afforded a possible court remedy to an owner of property over which a city had exercised eminent domain, if the city abandoned the condemnation proceedings, and the owner had materially relied on the condemnation occurring, and if other circumstances were present. (*Id.* at pp. 200-201.) The City of Torrance challenged the statute for unconstitutionally delegating "to the judiciary and to a private owner of land to dictate" the municipal function of whether the condemnation would be completed. (*Id.* at p. 209.) However, the Supreme Court deemed it "manifest" that there was no such delegation to a private person or body; all that was happening was that cities' conduct was being regulated to avoid causing reliance injuries to private parties. (*Ibid.*; see also *Henshaw v. Foster* (1917) 176 Cal. 507, 512-13 [rejecting argument that voters could constitute private person or body for

purposes of predecessor to Cal. Const., art. XI, § 11]; *In re Pfahler* (1906) 150 Cal. 71, 87 [same].)

While the Act does not expressly designate a private person or body to make any decisions, the trial court here reasoned that, in practical effect, the Act gives too much power to the real-estate developer pursuing a proposed housing development project, or to the city staffer who makes a merely adequate case that a proposed project meets local requirements, to prevail in the end over the city council that would disapprove the proposal. (2 JA438.) On that basis, the trial court concluded that the Act is unconstitutional.

However, *City of Torrance* rejected such reasoning. An unconstitutional delegation of a municipal function to a private person or body does not result from a state law that merely boosts the power of a private party to defeat a city in litigation over a land-use decision. Under the *Torrance* decision, where a state statute does not designate a particular private person or body to make any decisions, it is simply not significant that the Act may alter the odds of success in litigation as between a city and a disappointed real-estate developer or a dissenting city staffer.

B. The Act Does Not Take Away Any Final Decision-Making Authority from a City

Under *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 282, 288-89, a state law does not violate the municipal non-delegation doctrine if the law does not take away a

city's final authority to make the decision in question. It cannot be and has not been disputed that under the Act a city retains full control over whether to approve, to approve with modifications, or to reject a proposed housing project. While that decision may be overturned in court, the municipal non-delegation doctrine does not purport to immunize a city's decision from judicial review. Accordingly, the municipal non-delegation doctrine does not compel the invalidation of the Act on that basis.

C. The Act Addresses a Matter of Statewide Concern that No Single City Could Adequately Address

Case law appears to establish that a state law that addresses an issue that transcends individual city boundaries cannot be invalidated under the municipal non-delegation doctrine. The Supreme Court's decision in *People ex rel. Younger v. County of El Dorado*, a leading non-delegation case, is instructive here. In that case, the Supreme Court, upholding the constitutionality of the Tahoe Regional Planning Compact and the Tahoe Regional Planning Agency, explained:

> that the purpose of the Compact is to conserve the natural resources and control the environment of the Tahoe Basin as a whole through area-wide planning. Lake Tahoe itself is an interstate body of water. […] The water that the Agency is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the

> Agency must preserve from pollution knows no political boundaries. […] Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole.

(5 Cal.3d at pp. 493-94, citations and footnote omitted). The non-applicability of the municipal non-delegation doctrine to state laws tackling regional or statewide concerns is also established in other case authority. (See *ibid.*; see also, e.g., *Sacramento County v. Chambers* (1917) 33 Cal.App. 142, 155 [upholding constitutionality of State Bureau of Tuberculosis, for addressing statewide health concerns, not usurping municipal health-related functions]; *Pixley v. Saunders* (1914) 168 Cal. 152, 160 [holding that regional sanitation district did not unlawfully arrogate municipal function, where sanitation problems extended among multiple cities, unincorporated territory].)

Like the law creating the Lake Tahoe governmental entities in *Younger*, the Act addresses a matter—the lack of enough housing throughout California—that "knows no political boundaries" and that no individual city can address effectively. As has been shown above, housing availability and housing prices are determined in multi-city markets. It is appropriate, and necessary, for the State to enact legislation addressing and influencing the amount of affordable housing in California. That the Act did not create a permanent government body at a higher level than a city, as did the laws in the other cases just cited, only

bolsters the case that the Act did not usurp a municipal function. There is no constitutional problem with that arrangement.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that this Court reverse the trial court's decision granting deference to and upholding San Mateo's decision to disapprove the proposed housing development in question, without conducting the analysis called for by the Housing Accountability Act. If the Court reaches the constitutional questions in this case, then the Attorney General respectfully requests that this Court uphold the constitutionality of the Act, and confirm that the Act properly constrains charter

cities from rejecting objectively sound proposals to develop more housing.

Dated: June 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached INTERVENOR'S OPENING BRIEF uses a 13 point Century Schoolbook font and contains 8,372 words.

Dated: June 29, 2020

XAVIER BECERRA
Attorney General of California

/s/ Jonathan M. Eisenberg

JONATHAN M. EISENBERG
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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY MESSENGER

Case Name: ***Calif. Renters Legal Advocacy and Education Fund v. City of San Mateo***
Case No.: **A159658**

I declare:

I am employed in the Office of the Attorney General (OAG), which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the OAG for collecting and processing electronic correspondence in California state appellate courts. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically through that system. I am familiar with the business practice at ACE Messenger Service for collecting and processing physical correspondence. When an ACE customer remotely submits correspondence to ACE, the transmission is by PDF attachment to electronic mail. After receiving the electronic mail, ACE makes a print-out of the correspondence, puts it in an envelope with postage pre-paid thereon, seals the envelope, and deposits it in the U.S. mail.

On **June 29, 2020**, I electronically served the attached **INTERVENOR'S OPENING BRIEF** by transmitting a true copy to the Court of Appeal, First Appellate District, TrueFiling system.

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Also on **June 29, 2020**, I caused the attached **INTERVENOR'S OPENING BRIEF** to be served by U.S. mail by **ACE Messenger Service** by delivering to ACE by electronic mail, with the correspondence attached in PDF format, with instructions to ACE to mail the correspondence to the following name and address:

Executive Officer/Clerk; San Mateo County Superior Court; 400 County Center, Redwood City, CA 94063

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **June 29, 2020**, at Los Angeles, California.

Cecilia Apodaca	*/s/Cecilia Apodaca*
Declarant	Signature