KEITH M. FROMM (SBN 73529)
keithfromm@aol.com
LAW OFFICES OF KEITH M. FROMM
907 Westwood Blvd., Suite 442
Los Angeles, CA 90024
Telephone: (310) 500-9960

JEFFREY LEE COSTELL (SBN 93688)
jlcostell@costell-law.com
LEWIS B. ADELSON (SBN 185075)
ladelson@costell-law.com
COSTELL & ADELSON LAW CORPORATION
100 Wilshire Blvd., Suite 700
Santa Monica, CA 90401
Telephone: (310) 458-5959

Attorneys for Plaintiffs and Petitioners Newcastle Courtyards, LLC, and Jonathan Benabou, as Trustee on behalf of The Mani Benabou Family Trust

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

HOWARD JARVIS TAXPAYERS ASSOCIATION and APARTMENT ASSOCIATION OF GREATER LOS ANGELES,

Plaintiffs,

v.

CITY OF LOS ANGELES, and ALL PERSONS INTERESTED IN THE MATTER OF MEASURE ULA of the November 8, 2022 ballot, a real property transfer tax,

Defendants.

NEWCASTLE COURTYARDS, LLC, a California limited liability company; JONATHAN BENABOU, as Trustee on behalf of THE MANI BENABOU FAMILY TRUST; and ROES 1 through 500,

Plaintiffs and Petitioners,

v.

CITY OF LOS ANGELES; COUNTY OF LOS ANGELES; COUNTY OF LOS

Case No. 22STCV39662
(Consolidated with No. 23STCV00352)

[*Assigned for all purposes to Hon. Joseph Lipner, Dept. 72*]

AMENDED OPPOSITION OF PLAINTIFFS AND PETITIONERS NEWCASTLE COURTYARDS, LLC AND JONATHAN BENABOU TO MOTION FOR JUDGMENT ON THE PLEADINGS BY DEFENDANT CITY OF LOS ANGELES AND INTERESTED PARTIES (Vol I)

Date: September 26, 2023
Time: 8:30 a.m.
Dept: 72

Complaint Filed: Dec. 21, 2022/Jan. 6, 2023
Trial Date: Not Set

ANGELES RECORDER'S OFFICE; ROES 1 through 500, and ALL PERSONS INTERESTED IN THE MATTER of the ULA and all proceedings related thereto,

Defendants and Respondents.

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Plaintiffs and Petitioners Newcastle Courtyards, LLC, and Jonathan Benabou, as Trustee on behalf of the Mani Benabou Family Trust (collectively, "Plaintiffs"), hereby submit their Oppositions to the Motion for Judgment on the Pleadings filed by the City of Los Angeles and Interested Parties as follows[1]:

I. STANDARD OF REVIEW

It is well-settled that pleadings "must be liberally construed, with a view to substantial justice between the parties." *Code Civ. Proc.* §452. A motion for judgment on the pleadings has the same function as a general demurrer but is made after the time for demurrer has expired. Except as provided by *Code Civ. Proc*. § 438, the rules governing demurrers apply, that is, under the state of the pleadings, together with matters that may be judicially noticed, it appears a party is entitled to judgment as a matter of law. The court must accept as true the factual allegations the plaintiff makes, and give all factual allegations a liberal construction. *Gerwan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515-16. All properly pleaded material facts are deemed to be true, as well as all "facts that may be implied or inferred from those expressly alleged." *Treweek v. City of Napa* (2000) 85 Cal.App.4th 221, 233, *citing Lazar v. Hertz* Corp. (1999) 69 Cal.App.4th 1494, 1501.

> A motion for judgment on the pleadings is analogous to a general demurrer. [Citation.] The task of this court is to determine whether the complaint states a cause of action. All facts alleged in the complaint are deemed admitted, and we give the complaint a reasonable interpretation by reading it as a whole and all of its parts in their context. [Citations.] We are not concerned with a plaintiff's possible inability to prove the claims made in the complaint, the allegations of which are accepted as true and liberally construed with a view toward attaining substantial justice.

Inter–Modal Rail Employees Assn. v. Burlington Northern & Santa Fe Ry. Co., (1999) 73 Cal.App.4th 918, 924.

Moreover, judgment on the pleadings "must be denied where there are material factual issues that require evidentiary resolution." *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216; *Southern California Edison Co. v. City of Victorville* (2013) 217 Cal.App.4th 218, 227. In addition,

[1] Due to the substantial overlap between the two Motions, Plaintiffs have "split" their brief into two volumes, each comprising less than 35 pages and together addressing all arguments as to both Motions.

consideration of statutes is "necessarily guided" by Legislative pronouncements" as the "primary task is to effectuate the Legislature's intent." *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 297; *see also Busker v. Wabtec Corp*. (2021) 11 Cal.5th 1147, 492 P.3d 963, 969.

As with demurrers, courts are bound to apply a liberal policy of permitting plaintiff leave to amend pleadings. *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227. It is an abuse of discretion for the court to deny plaintiff leave to amend if there is any reasonable possibility that the pleading defects can be corrected by amendment. *Goodman v. Kennedy* (1976) 18 Cal.3d 442, 460.

II. THE FIRST, SECOND AND FOURTEENTH CAUSES OF ACTION ARE SUFFICIENTLY PLEADED. DEFENDANTS' ARGUMENTS FAIL IN RESPECT TO CAUSES OF ACTION 1, 2 AND 14; THE EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS RIGHTS ALLEGED IN THE VERIFIED COMPLAINT ("VC" HEREIN) TO HAVE BEEN INFRINGED ARE "FUNDAMENTAL RIGHTS" AND THE ULA PROCEEDS ALONG "SUSPECT LINES" FOR WHICH THE "STRICT SCRUTINY" STANDARD APPLIES; "ANIMUS" AND "THE RATIONAL BASIS TEST" ARE QUESTIONS OF FACT WHICH CANNOT BE DETERMINED ON A MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants' arguments fail in respect to Claims 1, 2 and 14, on multiple grounds: (a) in California **the right to sell property IS a fundamental right guaranteed by the 14th Amendment of the U.S. Constitution (***People v. Beach* (1983) 147 Cal.App.3d 612, 622; *People v. Leon* (2010) 181 Cal.App.4th 943, 951) [2] **requiring "strict scrutiny"** (*Harper* v. *Virginia Bd. of Elections* (1966) 383 U.S. 663, 672; [3], (b) **the right to free speech**, also infringed by the ULA, is also a **fundamental right** requiring **"strict scrutiny"** (*Turner Broad. Sys., Inc. v. FCC* (1994) 512 U.S. 622, 640–41)[4] (c) the ULA proceeds along

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[2] *People v. Beach*, *supra* (see also The right to acquire, own, enjoy and dispose of property is . . . a basic fundamental right guaranteed by the Fourteenth Amendment to the United States Constitution.].) *People v. Leon*, *supra*; *Harper* v. *Virginia Bd. of Elections* (1966) 383 U.S. 663, 668

[3] *Harper* v. *Virginia Bd. of Elections* (1966) 383 U.S. 663, 672; *Clark v. Jeter* (1988) 486 U.S. 456, 461 (1988)

[4] When, however, the legislation burdens a fundamental right, such as the right to free speech, we must examine the legislation with more exacting or heightened scrutiny. *Turner Broad. Sys, supra,* at, 640–41; *Scheer v. Kelly* 817 (9th Cir. 2016).F.3d 1183, 1189.

Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer (9th Cir. 2020) 961 F.3d 1062, 1067-68.

suspect lines including that it is based on "**wealth" which is a suspect classification** (*Serrano v. Priest* (1971) 5 Cal.3d 584, 598, 602-604, 608-609; People *v. Cowan*, (2020) 47 Cal.App.5th 32, 60)[5] which also requires "**strict scrutiny**" and also, as alleged in the VC the adverse impact on a disfavored class is an apparent aim of the legislative body which makes its impartiality "suspect" (*Romer v. Evans* (1996) 517 U.S. 620, 632-33)[6], requiring the "strict scrutiny" standard (*Harper* v. *Virginia Bd. of Elections,* supra, at 672; (d) the VC alleges "animus" (VC ¶229) and animus cannot constitute a legitimate state interest for legislation (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 446-47); *Department of Agriculture* v. *Moreno* (1973) 413 U.S. 528, 534[7], (e) a "judgment on the pleadings must be denied where there are material factual issues that require evidentiary resolution." (*Bach* v. *McNelis* (1989) 207 Cal.App.3d 852, 865-866; *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216); (f) *animus* is a question of fact that cannot be determined on a motion for judgment on the pleadings (*Mondero v. Salt River Project* (9th Cir. 2005) 400 F.3d 1207, 1213; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 874);[8], (g) "A finding that governmental conduct is arbitrary and capricious is essentially one of fact". (*Madonna* v. *County of San Luis Obispo* (1974) 39 Cal.App.3d 57, 62; *Midstate Theatres, Inc. v. Board of Supervisors* (1975) 46 Cal.App.3d 204, 212) [9]; (h) the rational basis test is a material question of fact which requires evidentiary resolution (*Borden's*

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[5] *Serrano v. Priest* (1971) 5 Cal.3d 584, 598, 602-604, 608-609, (*Serrano I*) **[relying on *Griffin* to support the holding that wealth is a suspect classification, while recognizing education as a fundamental interest[ )]** *People v. Cowan* (2020) 47 Cal.App.5th 32, 60.

[6] If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be **suspect**. *Romer v. Evans* (1996) 517 U.S. 620, 632-33.

[7] *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 446-47; [I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that **a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.** *Department of Agriculture* v. *Moreno* (1973) 413 U.S. 528, 534.

[8] *Mondero v. Salt River Project* (9th Cir. 2005) 400 F.3d 1207, 1213; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 874; In light of **the substantial direct and circumstantial evidence of discriminatory animus** by SAG management, which made the decision to audit Metoyer, we conclude that Metoyer has raised a **genuine issue of fact as to whether SAG was more likely than not motivated by discrimination** in its decision to terminate her. *Metoyer v. Chassman* 248 F. App'x 832 (9th Cir. 2007)

[9] *Madonna* v. *County of San Luis Obispo, supra,* 39 Cal.App.3d at p. 62; *Midstate Theatres, Inc. v. Board of Supervisors* (1975) 46 Cal.App.3d 204, 212.

Co. v. Baldwin (1934) 293 U.S. 194, 209-10 [10]; (i) where, as here, an alleged rational basis for the legislation is predicated upon the particular economic facts of a given trade or industry (i.e. the real estate industry) are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings, which, therefore, cannot be resolved in a judgment on the pleadings (*Borden's*, *supra,* at 209-210).

A. In California the Right to Sell Property IS a Fundamental Right guaranteed by the Fourteenth Amendment to the United States Constitution, Thus Requiring the "Strict Scrutiny" Standard

Firstly, in California the right to sell property (upon which the ULA infringes by preventing the recordation of a deed for $5,000,000+ properties unless an exorbitant fee of at least $200,000 is paid), is a "fundamental right" guaranteed by the 14th amendment.

> "The right to acquire, own, enjoy and dispose of property is also a basic fundamental right guaranteed by the Fourteenth Amendment to the United States Constitution. (See 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 273, p. 3563.)"

People v. Beach,(1983) 147 Cal.App.3d 612, 622, *see also People v. Leon*, (2010) 181 Cal.App.4th 943, 951. ("The right to acquire, own, enjoy and dispose of property is . . . a basic fundamental right guaranteed by the Fourteenth Amendment to the United States Constitution.").

Such fundamental right may not be infringed, as here, in the ULA voters' initiative, because a majority of the people choose that it be:

> As stated by this Court in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, `One's right to life, liberty, and property . . . and **other fundamental rights may not be submitted to vote;** they depend on the outcome of no elections.' **A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."**

Lucas v. Colorado Gen. Assembly (1964) 377 U.S. 713, 736-737, fns. omitted [emph. added] Plaintiffs' Verified Complaint ("VC") alleges that the ULA infringes such fundamental right (e.g. VC ¶¶83-94). **The proper test is, therefore, the "strict scrutiny" test** and not, as Defendants mistakenly contend (e.g. Int. Parties MJOP, p.17:26-21:13), the "rational basis" test.

[10] **after a full showing of facts, or opportunity to show them,** it may be found that the burden of *Borden's* (supra) 209-10, establishing that the classification is without rational basis has not been sustained.

> In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); cf. Lyng v. Automobile Workers, 485 U.S. 360, 370 (1988). Classifications based on race or national origin, e. g., Loving v. Virginia, 388 U.S. 1, 11 (1967), and **classifications affecting fundamental rights, e. g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 672 (1966), are given the most exacting scrutiny.** Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

Clark v. Jeter (1988) 486 U.S. 456, 461 [emph. added]

Under **"strict scrutiny"** the state (in this case the City and the County) bears the burden of establishing not only that (1) it has a compelling interest which justifies the law, but (2) that the distinctions drawn by the law are necessary to further its purpose. (Because the burden of persuasion is upon the Defendants, it cannot be established in Defendants' motion for judgment on the pleadings because nothing in Plaintiff's VC seeks to satisfy Defendants' burden.)

> "On the other hand, in cases involving `suspect classifications' or touching on `fundamental interests,' [fns. omitted] the court has adopted an attitude of active and critical analysis, subjecting **the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.**" [Citiations]

Serrano v. Priest (1971) 5 Cal.3d 584, 597 [overruled by statute on other grounds] but still cited as of 2020 for this principle (*e.g. People v. Cowan* (2020) 47 Cal.App.5th 32, 60).

Nothing in the pleadings or any materials presented for judicial notice evidences any satisfaction by the City or County that the distinctions drawn by the ULA between sellers of properties for more than $5,000,000 and sellers of properties for $5,000,000 or less are necessary to further the purpose of the ULA, nor can they on this motion for judgment on the pleadings.[11]

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[11] Defendants rely essentially upon *Ashford Hospitality v. City and County of San Francisco* (2021) 61 Cal.App.5th 498, for the proposition that a rational basis test applies and that the classifications made by the brightline threshold of $5,000,001 in value are justified. City MJOP, at p. 32, Int. Parties' MPA at p. 20. Firstly, *Ashford* did not consider the fact that the sale of property is a fundamental right, subject to strict scrutiny and not rational basis.

Secondly, *Ashford*, despite Defendants' claims, is not strikingly similar. *Ashford* was decided after a bench trial, after discovery and after factual evidence was submitted to support the City of San Francisco's claims supposedly giving the rational basis for its actions. Here, the Defendants merely

assume that some rational basis exists and posit administrative costs and other such, factually proven in *Ashford*, that do not exist here.

Additionally, Defendants claim the tiers are nondiscriminatory and constitutional, citing *Jensen v. Franchise Tax Board* (2009) 178 Cal.App.4th 426. In *Jensen*, plaintiffs make an argument about perceiv[ing] themselves as victims of a populist movement to soak the rich. Here, there is no perception, the ULA Measure voter materials provide clear evidence of such animus and targeting of a particular class over an arbitrary value price. In addition, *Jensen* involved an income tax and ability to pay a higher rate, rather than the alleged issues with property valuation, financing, encumbrances, leverage financing and foreclosures at issue here.

Measure ULA creates an arbitrary and capricious threshold over a certain transactional value, there is no evidence of any additional costs or expenses to process documentation or otherwise provide any basis for the additional cost like in Defendants' analysis and, as a disputed question of fact that cannot be determined on a MJOP, the VC expressly denies such costs (e.g. VC¶ 90) . In fact, all of the cases cited by Defendants involved factual determinations and findings made by the legislature to provide some basis for the actions. Here, there is no finding by the legislature, the only basis provided is by the self-interested proponents of the ULA in the guise of the voters and it is the stated animus against millionaires and billionaires. Unlike all the cases cited by Defendants, this case has no factual, evidentiary underpinning of actual additional costs, expenses or work to stamp a deed over $5 million, and Defendants may not be allowed to assume such given the allegations of the VC which are deemed to be true for the purposes of this motion.

In fact, even assuming, *arguendo*, a rational basis standard, which as stated above is not the applicable standard, [i]f the challenged classification is based on natural, intrinsic or fundamental distinctions that are reasonable in their relation to the object of the legislation, then it will be deemed to be valid and binding. *Borikas v. Alameda Unified School Dist.* (2013) 214 Cal.App.4th 135, 149. Defendants offer no distinction whatsoever between the property sale of $5 million and a sale of $5 million and one dollar to justify the additional $200,000 in assessment for the latter sale other than millionaires and billionaires can afford it. Again, this Court cannot assume the costs and expense proven in *Ashford*. This is particularly true as the VC expressly alleges. See VC, ¶¶ 72, 90.

It seems the Defendants desire to use the validation process to rubber stamp the money grab of Measure ULA before any of the impacts on finance, lending, ownership or foreclosures began to emerge and all of which would be triable issues of fact at trial.

B. The ULA DOES also Proceed Along Suspect Lines. "Wealth" is a Highly Suspect Classification Also Requiring "Strict Scrutiny"

Additionally, in California, "wealth" is a factor which renders a classification highly suspect and therefore demands a more exacting judicial scrutiny:

One factor which has repeatedly come under the close scrutiny of the high court is wealth. "**Lines drawn on the basis of wealth or property, like those of race [citation], are traditionally disfavored**." (*Harper v. Virginia Bd. of Elections* (1966) 383 U.S. 663, 668 [16 L.Ed.2d 169, 173, 86 S.Ct. 1079].) Invalidating the Virginia poll tax in Harper, the court stated: "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." (Id.) (6) **"[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . . [a] factor which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.** [Citations.]" (*McDonald v. Board of Elections* (1969) 394 U.S. 802, 807 [22 L.Ed.2d 739, 744, 89 S.Ct. 1404

Serrano v. Priest (1971) 5 Cal.3d 584, 598, 602-604, 608-609 (relying on Griffin to support the holding that **wealth is a suspect classification…).**

People v. Cowan, (2020) 47 Cal.App.5th 32, 60

As alleged in the VC, the entire premise of the ULA is "class warfare" with the aim of punishing "millionaires and billionaires" who, the VIP for the ULA alleges do not pay their "fair share". This is blatant discrimination based on the suspect classification of "wealth", and the ULA is, therefore, for that additional reason subject to strict scrutiny.

> VC ¶93…The VIP demonstrates that the imposition of the entire burden of the ULA taxes upon those few persons in the $5,000,001 sub-class, comprising approximately 3% of all property owners, was, by design, an intentional act of "class warfare" against what the ULA proponents intentionally and falsely characterized as comprising only "billionaires" and "millionaires." This resulted in such a small group of persons comprising the $5,000,001 sub-class being unfairly saddled with the entirety of the burden of the societal problem of reducing homelessness.
>
> ¶143 Rather, the ULA is very intentionally targeted to be limited to an extremely few, perhaps a few hundred identifiable persons, whom the proponents of the ULA falsely and deceptively characterized as all being "millionaires or billionaires."
>
> ¶229. As a proximate result of the foregoing, Defendants have sought to exact a certain measure of punishment (under the guise of acting under state law) against Plaintiffs all in violation of

Plaintiffs' constitutionally protected rights. Being motivated by improper animus, comprising "class warfare" against persons many of whom were falsely, derisively and discriminatorily labeled "millionaires and billionaires," in derogation of Plaintiffs' constitutional rights, the illegal imposition, collective, use and/or diversion of the unlawful ULA taxes are actionable under 42 U.S.C. § 1983. Plaintiffs have also incurred and/or will incur attorneys' fees and other fees and costs because of this proceeding, which Plaintiffs are entitled to recover pursuant to 42 U.S.C. § 1988.

¶44. The proponents of the ULA state in the Voter Information Pamphlet: "***It will be paid for by millionaires and billionaires.*** Unlike past measures, ***the majority of people in LA will not pay a single penny."*** (VIP, p. 39.)

¶45. The proponents also state in the Voter Information Pamphlet: "**The bottom line is this: Millionaires and billionaires cashing in on mega properties can afford to pay the 'mansion tax' and we'll all benefit from reduced homelessness when they chip in and pay their fair share."** (VIP, p. 32.)

¶46. The Voter Information Pamphlet emphasizes that the ULA impacts only a small fraction of properties and states that: "It would have applied to only 3% of all real estate sales in 2019 (those selling for more than $5 million). **Let's be clear: Only people selling real estate for more than $5 million will pay this tax. No one else will."** (VIP, p. 32.) The Voter Information Pamphlet further states that of the many thousands of sales of homes and condos in Los Angeles: "… this tax would have applied to only 2.5% of home and condo sales in 2021-2022. **The millionaires and billionaires cashing in can afford to pay their taxes."** (VIP, p. 39.)

C. Where, As Here, the Adverse Impact on a Disfavored Class Is an Apparent Aim of the Legislative Body Its Impartiality is "Suspect"

Additionally: "If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect". *Romer v. Evans* (1996) 517 U.S. 620, 632-33. The VC, whose allegations of fact are deemed to be true, alleges (e.g. VC ¶¶ 44-49, 93, 143, 229) that it is the apparent aim of the ULA to impose an adverse impact on the disfavored class i.e. supposed "millionaires and billionaires" (see B. above).

""[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas Elec. Co. v. Coleman* (1928) 277 U.S. 32, 37-38." *Romer,* supra, at 633.

Therefore, contrary to Defendants' mistaken assertions, for this additional reason, the "rational basis" standard is not the proper standard for determining compliance with the Equal Protection clause. Rather, it is the "strict scrutiny" standard.

D. The Verified Complaint Alleges "Animus". Animus Cannot Constitute a Legitimate State Interest for Legislation.

Further, the VC (¶229) alleges that the ULA is motivated by personal **animus** i.e. "class warfare" against the politically unpopular group of supposed "millionaires and billionaires":

> ¶229. As a proximate result of the foregoing, Defendants have sought to exact a certain measure of punishment (under the guise of acting under state law) against Plaintiffs all in violation of Plaintiffs' constitutionally protected rights. **Being motivated by improper animus, comprising "class warfare" against persons many of whom were falsely, derisively and discriminatorily labeled "millionaires and billionaires," in derogation of Plaintiffs' constitutional rights.** [emph. added]

"[S]ome objectives — such as "a bare . . . desire to harm a politically unpopular group," — are not legitimate state interests." *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 446-47 [Cite omitted].

In the very recent case of *Olson v. California*, the 9th Circuit refused to grant a motion to dismiss because the plaintiff plausibly alleged in its complaint "animus" which cannot constitute a legitimate governmental interest. [A] legislative "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest". *Olson v. California* (9th Cir. 2023) 62 F.4th 1206, 1220.[12]

> A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.

Department of Agriculture v. Moreno (1973) 413 U.S. 528, 534.

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[12] Even under this fairly forgiving standard of review, we conclude that, considering the particular facts of this case, Plaintiffs plausibly alleged that A.B. 5, as amended, violates the Equal Protection Clause for those engaged in app-based ride-hailing and delivery services. *Olson v. California*, *supra*, at 1219.

We therefore hold that the district court erred by dismissing Plaintiffs' equal protection claim. *See United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 538 (1973) (commenting that a legislative desire to harm a politically unpopular group cannot constitute a legitimate governmental interest). *Olson v. California*, *supra*.

E. Judgment on the Pleadings Must Be Denied, Where, as Here, there are Material Factual Issues that Require Evidentiary Resolution

A ""**judgment on the pleadings must be denied where there are material factual issues that require evidentiary resolution**." (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865-866) *Schabarum v. California Legislature*, (1998) 60 Cal.App.4th 1205, 1216. [emph. added]

F. "Animus" Is a Question of Fact that Cannot Be Determined on a Motion for Judgment on the Pleadings

The existence of **animus is a material factual issue that requires evidentiary resolution to be determined by a jury.** *Mondero v. Salt River Project* (9th Cir. 2005) 400 F.3d 1207, 1213. "[T]he defendant's motivation is a question of fact to be determined by the jury." *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 874. "In light of the substantial direct and circumstantial evidence of discriminatory **animus** by SAG management, which made the decision to audit Metoyer, we conclude that Metoyer has raised a genuine issue of fact as to whether SAG was more likely than not motivated by discrimination in its decision to terminate her." *Metoyer v. Chassman* 248 F. App'x 832 (9th Cir. 2007) [emph. added]

G. Even the Rational Basis Test Is a Question of Fact that Cannot Be Decided on a Motion for Judgment on the Pleadings. (Borden)

Though it has been thoroughly demonstrated above that Defendants are mistaken in contending that the *rational basis* test applies to Plaintiffs' equal protection and substantive due process claims, when, in fact it is the "strict scrutiny" test that applies, assuming, *arguendo*, the rational basis test *were* applicable to the equal protection claims, (which it is not) such test *still* also involves the resolution of a *question of fact that requires evidentiary resolution*:

> `"A finding that governmental conduct is arbitrary and capricious is essentially one of fact. *Madonna v. County of San Luis Obispo, supra*, 39 Cal.App.3d at p. 62; *Midstate Theatres, Inc. v. Board of Supervisors,* (1975) 46 Cal.App.3d 204, 212.
>
> Respondents invoke the presumption which attaches to the legislative action. **But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption.** Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-80; Hammond v. Schappi Bus Line, 275 U.S. 164, 170-172; O'Gorman Young v. Hartford Insurance Co., 282 U.S. 251, 256-258**. It is not a conclusive presumption, or a rule of law which**

> **makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack.** When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. Lindsley v. Natural Carbonic Gas Co., supra; Clarke v. Deckebach, 274 U.S. 392, 397; Lawrence v. State Tax Comm'n, 286 U.S. 276, 283. The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court. Still, the statute may show on its face that the classification is arbitrary (Smith v. Cahoon, 283 U.S. 553, 567) or that may appear by facts admitted or proved. Southern Ry. Co. v. Greene, 216 U.S. 400, 417; Air-Way Electric Corp. v. Day, 266 U.S. 71, 85; Concordia Insurance Co. v. Illinois, 292 U.S. 535, 549. **Or, after a full showing of facts, or opportunity to show them, it may be found that the burden of establishing that the classification is without rational basis has not been sustained.** Lindsley v. Natural Carbonic Gas Co., supra; Rast v. Van Deman Lewis Co., 240 U.S. 342; Radice v. New York, 264 U.S. 292; Clarke v. Deckebach, supra; Ohio Oil Co. v. Conway, 281 U.S. 146; Tax Commissioners v. Jackson, 283 U.S. 527.

Borden's, supra, at 209-10.

Similarly, in Plaintiffs' Second Cause of Action (VC ¶¶83-94) (Equal Protection – Unfair Apportionment) the issue of **whether the ULA "tax" is not fairly apportioned is also a question of fact which must be proved by "clear and cogent evidence", which means that it cannot be decided on a MJOP.**

Second, the tax is fairly apportioned… Respondents claim the formula established by the Legislation is unconstitutional because it does not account for the time their aircraft are actually on the ground within California. We conclude the formula based on Respondents' arrivals and departures is reasonable and rational; Respondents have failed to meet their burden of ***proving by clear and cogent evidence that it is not.*** *Netjets Aviation, Inc. v. Guillory,* (2012) 207 Cal.App.4th 26, 49-50

H. Where The "Rational Basis" for the Legislative Action is Predicated as Here Upon the Particular Economic Facts of a Given Industry, such as the Real Estate

Industry, Which Is Outside the Sphere of Judicial Notice, Such Facts are Properly the Subject of Evidence and Findings for Adequate Factual Support

As has been established above, the "strict scrutiny" test is the one applicable to Plaintiffs' equal protection and substantive due process claims and not, as Defendants summarily assert, the "rational basis" test. Nevertheless, under the circumstances of this case, even if, *arguendo*, it *were* the "rational basis" test, ***it would still be a question of fact that could not be decided on a MJOP*** but, rather, would have to await the exposition of evidence and findings at trial, for yet another reason.

As set forth in great detail in the VC (*e.g.* VC¶¶ 44-53, 63-82, 84-94, 193-205), the disparate effect of the ULA as an assessment on gross sales proceeds affects different real property owners in disparate ways that are peculiar to the real estate industry (see, particularly VC ¶¶ 193-205). The disparate effects upon the various participants in real estate as set forth in e.g. VC¶¶ 193-205, e.g. builders, bankers, investors, etc., are beyond "facts of common knowledge or otherwise plainly subject to judicial notice".

The U.S. Supreme Court in *Borden's* stated that where "the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry which are outside the sphere of judicial notice, ***these facts are properly the subject of evidence and findings***."

The court found in that case that the complaint should not have been dismissed for insufficiency upon its face and that plaintiff is entitled to have the case heard and decided with appropriate findings by the trial court:

> **But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings.** With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that **when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support.**

Borden's, supra, at 210 [emph. added]

I. The ULA Intent to Target "Millionaires and Billionaires" Violates the Constitutional Provision Against Special Legislation and Denying Property Sellers Equal Protection.

Plaintiffs also contend that Measure ULA is an unconstitutional "special legislation" in violation of the California Constitution. Legislation is "special" when it applies only to particular members of a class, in contrast to "general" legislation, which applies uniformly to all members of a class:

> [A] law is a general one when it applies equally to all persons embraced in a class founded upon some natural, intrinsic, or constitutional distinction; on the other hand, it is special legislation if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. [Citations.] Under this rule, it is apparent that the constitutional prohibition of special legislation does not preclude legislative classification but only requires that the classification be reasonable. [Citations.]

Law School Admission Council, Inc. v. State of California (2014) 222 Cal.App.4th 1265, 1297-98; *see City of Malibu v. California Coastal Comm'n*. (2004) 121 Cal.App.4th 989, 993-94; *Serve Yourself Gasoline Stations Ass'n. v. Brock* (1952) 39 Cal.2d 813, 820-21; Cal. Const. art. IV, section 16.

Here, Measure ULA is unquestionably "special" legislation depriving the targets of Measure ULA equal protection under the law. It confers peculiar disabilities and burdensome conditions simply in the exercise of a common right, (which, in California is a "fundamental right" for 14th Amendment purposes) the transfer of real property above an arbitrary monetary threshold. While a legislature (or initiative) may rely upon classification, any such classification must, under the lowest standard of scrutiny, still be "reasonable" to be constitutional. Whether a statute is general, or special, turns on the reasonableness of the classification used to pull out certain members from the "general" group for "special" treatment. *City of Malibu, supra*, 121 Cal.App.4th at 994.

In addition, and as argued *infra*:

> Principles of equal protection require "that persons who are similarly situated receive like treatment under the law and that statutes may single out a class for distinctive treatment only if that classification bears a rational relationship to the purposes of the statute. Thus, if a law provides that one subclass receives different treatment than another class, it is not enough that persons within that subclass be treated the same. Rather, there must be some rationality in the separation of the classes." [. . .] The persons who are to pay the tax must be a 'reasonably justifiable subclassification' of persons; otherwise, 'the operation of the tax must be such as to place liability therefor equally on all members of the class.' "

Kumar v. Superior Court (2007) 149 Cal.App.4th 543, 549-50.

Other than decrying "millionaires and billionaires" (which is not a rational basis) Measure ULA offers no rational basis for the brightline distinction between property transfers of $4,999,999 and $5,000,001 having the latter taxed an additional $200,000. Nothing in the pleadings or any materials presented for judicial notice establishes that the distinctions drawn by the ULA between the sub-class comprising sellers of properties for more than $5,000,000 and the sub-class comprising sellers of properties for $5,000,000 or less are necessary to further the purpose of the ULA and they certainly do not meet the standards of strict scrutiny applicable to the ULA. No rationality exists as to the class separations. The $5 million sale threshold is arbitrary and capricious, as alleged in the Verified Complaint. A motion for judgment on the pleadings may not challenge these allegations accepted as true. As set forth above, the rational basis test is a question of fact for trial. And, in any event, in this case, the standard of scrutiny is "strict scrutiny" and not rational basis. Accordingly, for all these reasons the motion must be denied.

III. THE FIFTH CAUSE OF ACTION IS SUFFICIENTLY PLEADED: MEASURE ULA IS AN UNCONSTITUTIONAL GOVERNMENTAL EXACTION

The MJOPs as to the Fifth Cause of Action fail to address the fundamental allegations in the VC. The MJOPs fail to address, and thereby waive, the argument that the ULA, by its very terms, applies to only a few supposed "millionaires and billionaires" and is thus not a tax of general applicability. (VC ¶¶ 136-142). The VC also properly alleges, and Defendants fail to address, the allegations that imposition of the ULA exaction is discretionary by the City, as there are absolutely no criteria for such discretion under the regulations that do not exist and may or may not exempt transactions based upon yet-to-be-written procedures that also do not exist. (VC ¶¶ 144-146).

As stated in *Ballinger v. City of Oakland* (9th Cir. 2022) 24 F.4th 1287, *cert. denied sub nom. Ballinger v. City of Oakland, California* (2022) ___ U.S.___,142 S.Ct. 2777 ***ANY* government action that conditionally grants a benefit**, such as a "**registration**" (i.e., of a deed), can supply the basis for an exaction claim:

> In Cedar Point Nursery, the Court highlighted that **"[t]he essential question is not ... whether the government action at issue comes garbed as** regulation (or statute, or **ordinance,** or miscellaneous decree**)**." 141 S. Ct. at 2072. Yet the Court still limited the exactions context to "[w]hen the government conditions the grant of a benefit such as a permit, license, or ***registration***" on giving up a property right. Id. at 2079. Thus, the Supreme Court has suggested that any government action,

including administrative and legislative, **that conditionally grants a benefit, such as a permit, can supply the basis for an exaction claim rather than a basic takings claim.**

As alleged, the City has reserved the right to assess, or not to assess, the ULA exaction based upon some unstated and undefined discretionary determination. (VC, ¶¶ 150, 151). Defendants casually discard the holdings of *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*). However, the California Supreme Court, in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 876; *cert. denied*, 519 U.S. 929, stated:

> Nonetheless, we reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed—as in this case—neither generally nor ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered.

Because the City maintains the discretion, on an individual, not ministerial basis, to either impose the ULA "tax" or waive it by imposing any conditions upon the registration of the deed where the property falls within the $5,000,001 sub-class, it is a monetary exaction and not a tax. Even Defendants expressly refer to the ULA as exactly what it is, a "land use regulation" and, thereby, concede the point (Int. Parties MJOP, p. 23:14-17).

Monetary exactions are subject to the nexus and rough proportionality requirements of *Nollan* and *Dolan*. The United States Supreme Court stated:

For that reason and those that follow, we reject respondent's argument and hold that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of Nollan and Dolan *Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595, 612 [emph. added].

As alleged in the VC (e.g. ¶¶157-160), Measure ULA, in all cases, as a facial matter, fails to meet the nexus and proportionality requirements of *Nollan* and *Dolan*: (i) There is no nexus, reasonable or otherwise, between (a) the registration of a deed of transfer of title for a property in the $5,000,001 sub-class and (b) causation of homelessness in the City of Los Angeles, (ii) there is no nexus, reasonable or otherwise, between the sale of a property in Los Angeles for more than $5,000,000 and either the causation or reduction of homelessness in the City of Los Angeles; (c) there is no rough proportionality or, indeed, any proportionality, in the true cost of registering a deed for a property in the $5,000,001 sub-class and the minimum exaction of $200,000 for registering such deed; and (iv) here is no rough proportionality between the causation or reduction of homelessness in imposing an exaction of $200,000

for the sale of a property for $5,000,001, while there would be zero ($0) exaction for the sale of a property for $5,000,000.

Accordingly, the VC, the allegations of which are taken as true for purposes of a motion for judgment on the pleadings, properly alleges a claim for an unconstitutional exaction and because the ULA's application in all cases would result in an unconstitutional exaction and taking, it is challenged on a facial basis and, inter alia, Plaintiffs seek a declaration and determination that it is invalid on that basis.

IV. THE SIXTH CAUSE OF ACTION IS SUFFICIENTLY PLEADED: MEASURE ULA IS AN UNCONSTITUTIONAL GOVERNMENTAL EXACTION

As alleged in the VC, Measure ULA is an illegal taking without just compensation as a special assessment because it lacks both an essential nexus to the creation or reduction of homelessness and lacks any rough proportionality to the creation of homelessness by the sale of either a property for more than $5,000,000 or the registration of a deed for such sale. As alleged, despite its label as a "tax," Measure ULA is really a special assessment to build public improvements that the proponents of the tax claim will benefit, by reducing homelessness, the properties charged with funding it, to wit: "The Affordable Housing Program would fund the development of affordable housing to serve acutely low, very low, and low-income households." (VIP, p. 29.) "ULA will go to work quickly *by purchasing existing buildings* and cutting red tape to create more affordable housing." (VIP, p. 32.) (VC, ¶¶ 164-167). Indeed, even Defendants refer to the ULA as exactly what it is, a "land use regulation" (Int. Parties MJOP, p. 23:14-17), thus conceding this point as well.

> The Court of Appeal has stated that ad valorem taxes and special assessments overlap: In practical application, the two types of taxation, general ad valorem taxes and special assessments, to some extent overlap, and we cannot always differentiate between them with precision. **A tax to pay the cost of a particular improvement may be crafted as a special assessment levied against particular real property within a local district on the theory that this property is the primary beneficiary of the improvement, or it may be structured as a general ad valorem tax levied on property in a larger area on the theory that all property within the larger area benefits to some extent from the improvement**.

Solvang Mun. Improvement Dist. v. Board of Supervisors (1980) 112 Cal.App.3d 545, 553–554 [emph. added].

As alleged, and as shown in the ULA sections quoted in the VC (¶166), ULA is clearly an assessment against only certain properties (i.e., those that sell for more than $5,000,000), to pay for public improvements (i.e., low-cost housing for homeless persons), for the benefit of all of society, and not merely the benefit of the property owners who pay the ULA taxes. However, the only members of society who are responsible to pay the ULA tax are the $5,000,001 sub-class (sellers of properties that sell for $5,000,000 or more). The rest of the members of society, who receive the same benefit from the reduction of homelessness, pay nothing under the ULA. There is no proportionality, either approximate or any at all between the hundreds of thousands of dollars in assessments that must be paid by each of the $5,000,001 sub-class, while each of the property owners in the $4,999,999 sub-class pays nothing.

In the Interested Parties' MJOP they also argue that, if Measure ULA is a special assessment, the Court should ***not*** consider constitutional limitations on special assessments. *See* Interested Parties MJOP, at 24 fn. 9. Of course, this is because Measure ULA fails to meet the limitations – it is ***not*** proportional, as alleged, and the benefits (as Defendants admit) do inure to the public. Defendants also argue that Cal. Const. article XIII D does not apply to voter initiatives, but again ignore the "substance vs. procedural" distinction in that argument. (see HJTA MPA, at Section 4(B), p. 10; *see, e.g.*, *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 942-43 (as modified on denial of reh'g (Nov. 1, 2017) (discussing procedural limitations on voter initiatives).

While the constitutional requirements of uniformity and fair apportionment do not require a precise measurement of "benefit" flowing to the property owner affected, the courts have said that the cost of the improvement must be spread among the benefited property owners in some equitable manner. While an assessment levied against a particular parcel need not be exactly proportional to the benefit received by such parcel, a disparity, as here, of 100% between the assessment and benefit is unacceptable. In the case of the ULA, the $5,000,001 sub-class pays 100% of the ULA while all other property owners in Los Angeles pay zero (0) even though all parcels benefit, roughly equally, by the public improvements funded by such special assessment.

The provisions of the ULA "inevitably force the $5,000,001 sub-class of property owners "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Murr v. Wisconsin* (2017) ___ U.S. ___, 137 S.Ct. 1933, 1943. Because the members of the $5,000,001 sub-class

of property owners are, by the terms of the law, in all cases, afforded no compensation, the ULA is facially invalid, under the Takings Clause of the United States Constitution and article XIII D of the California Constitution.

Accordingly, the VC, the allegations of which are taken as true for purposes of a motion for judgment on the pleadings, properly alleges a claim for an unconstitutional exaction and because the ULA's application in all cases would result in an unconstitutional exaction and taking, it is challenged on a facial basis and, inter alia, Plaintiffs seek a declaration and determination that it is invalid on that basis.

V. THE SEVENTH CAUSE OF ACTION IS SUFFICIENTLY PLEADED: MEASURE ULA IS AN UNCONSTITUTIONAL GOVERNMENTAL CONFISCATION OF PROPERTY

The takings clause of the Fifth Amendment to the United States Constitution provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." The analogous provision of the California Constitution, Article I, Section 19, reads in pertinent part: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." The California Supreme Court has held that this provision of the California Constitution is more protective of private property than the federal Constitution. *See, e.g, Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 296-298.

Even a tax can constitute a taking under the United States Constitution and the California Constitution. The ULA's obligation to pay money rather than real or personal property does not mean that it cannot be an unconstitutional taking even though money is generally considered fungible. *See United States v. Sperry Corp*. (1989) 493 U.S. 52, 62 n.9 (money may still be subject to a per se taking if it is a specific, identifiable pool of money); *see also Phillips v. Wash. Legal Found*. (1998) 524 U.S. 156, 169–170. Indeed, the Supreme Court has held multiple times that money can be subject to a taking, based on the United States Supreme Court's "long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain." *Koontz v. St. Johns River Water Mgmt. Dist*. (2013) 570 U.S. 595, 616.

When the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a "per se [takings] approach" is the proper mode of analysis under the Court's precedent. *See Brown v. Legal Foundation of Wash.* (2003) 538 U.S. 216, 235; *Koontz, supra*, 570 U.S. at 613.

As pleaded in the VC (*e.g.* VC ¶184), the monies being taken by Measure ULA are, in every case, from a completely identifiable pool of money. Upon the sale of each property, identified by its legal description and/or assessor's parcel number and/or its municipal address, a wholly identifiable escrow agent is required to pay from a wholly identified escrow account a wholly identifiable amount of money (i.e. 4% of the gross proceeds for sales of $5,000,001 to $9,999,999, and 5.5% of sales of $10,000,000 or more), from the wholly identifiable bank account of such escrow agent to the County Recorder as a pre-condition to recording the wholly identifiable deed of transfer for the sale of the property. The amount of money being taken by the ULA is wholly identifiable and unique in every respect and is not, in the slightest respect, a tax of general applicability.

Taxes could constitute a taking if the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property. *See Koontz, supra*, 570 U.S. at 615 (collecting cases distinguishing taxes and user fees from money that can be taken.) Thus, when it comes to takings "[t]he Constitution…is concerned with means as well as ends." *Horne v. Department of Agriculture* (2015) 576 U.S. 350, 362; *see also Dickman v. Comm'r of Internal Rev*. (1984) 465 U.S. 330, 336 ("We have little difficulty accepting the theory that the use of valuable property—in this case money—is itself a legally protectible property interest." [emph. added]).

Thus, even if the ULA "tax" is considered to be a true tax, it can still constitute a taking if, as alleged here, "the act complained of was so arbitrary as to constrain the conclusion that it was not the exertion of taxation, but a confiscation of property." *Brushaber v. Union Pac. R. Co*. (1916) 240 U.S. 1, 24-25.

The ULA applies to only a small group of property owners comprising the $5,000,001 sub-class, leaving unregulated all of the many thousands of other commercial and residential properties in the City comprising the $4,999,999 sub-class. The 4.0% or 5.5% ULA taxes are obviously not imposed on every other property in the City. Consequently, a heightened level of scrutiny is proper because this is the type

of particularized governmental exaction imposed upon a property owner which was seen in *Ehrlich*, *supra*, 12 Cal.4th at 876.

In this case, the confiscation, touted falsely and with intentional discriminatory animus as directed to "millionaires and billionaires," of 4% or 5.5% of the gross value of any real property in Los Angeles upon its transfer, without regard to whether such transfer results in a profit or loss, without regard to any distinction between the type of real estate, the time during which such property was held, and the fact that zero dollars are being taken from other similarly situated property owners is so arbitrary as to constrain the conclusion that it was not the exertion of taxation, but a confiscation of property. It therefore violates both the United States Constitution and the California Constitution. In any event, however, whether it is arbitrary and/or capricious is a question of fact that must be deferred to trial and cannot be decided on a MJOP. "A finding that governmental conduct is arbitrary and capricious is essentially one of fact". (*Madonna* v. *County of San Luis Obispo, supra,* 39 Cal.App.3d 57, 62; *Midstate Theatres, Inc. v. Board of Supervisors*, (1975) 46 Cal.App.3d 204, 212) Accordingly, the VC, the allegations of which are taken as true for purposes of a motion for judgment on the pleadings, properly alleges a claim for an unconstitutional taking and because the ULA's application in all cases would result in an unconstitutional taking, it is challenged on a facial basis and, inter alia, Plaintiffs seek a declaration and determination that it is invalid on that basis.

VI. THE EIGHTH CAUSE OF ACTION WAS SUFFICIENTLY PLEADED MEASURE ULA IS UNCONSTITUTIONAL RETROACTIVE LEGISLATION

Defendants attempt to mislead the Court in characterizing the Eighth Cause of Action as one solely for "ex post facto" law, arguing this claim can only regard criminal law. (Interested Parties MJOP 26:19-25). The very face page of the VC discloses otherwise: "8. Violation of Article 1, Section 10, U.S. Constitution – ULA is Unconstitutional Retroactive Legislation".

This is an intentional ploy on the part of Defendants. They clearly know that the crux of the claim is not a criminal matter but that it is an unconstitutional retroactive impairment of contracts and property rights. But by "playing dumb" in their moving brief, they intend to address the "contracts clause" and retroactive impairment of property rights claims only in their Reply when Plaintiffs will have no opportunity to refute their arguments. This is a lawyer's trick that should not be condoned herein. By

intentionally choosing not to make their arguments in their moving papers concerning the "retroactive legislation" and "contracts clause" claim, respectfully, this court should deem they have waived them and shut the door to them as to those arguments in their Reply. This rule applies to both Opening Briefs in appeals and moving briefs in the trial court:

> We refuse to consider the new issues raised by defendant in his reply brief. **(2)** "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc.* v. *Stroh* (1992) 10 Cal.App.4th 1446, 1453 [13 Cal.Rptr.2d 432].) "Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant." (*Varjabedian* v. *City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 [142 Cal.Rptr. 429, 572 P.2d 43].) "'Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.'" (*Neighbours* v. *Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 [265 Cal.Rptr. 788].)

Reichardt v. Hoffman (1997) 52 Cal.App.4th 754, 764

This rule is based on the same solid logic applied in the appellate courts, specifically, that "[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores v. Stroh* (1992) 10 Cal.App.4th 1446, 1453, 13 Cal.Rptr.2d 432; see also *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704, 720, fn.10, 153 Cal.Rptr.3d 62.) *Jay v. Mahaffey*, (2013) 218 Cal.App.4th 1522, 1538.

Without in any way waiving Defendants' "sandbagging" or consenting to Defendants attacking Plaintiff's' pleadings of unconstitutional retroactive impairment of contracts and property rights for the first time in their Reply, Plaintiffs nevertheless demonstrate to the Court that their 8th Cause of Action for Unconstitutional Retroactive legislation is sufficiently pleaded.

The VC, at ¶204 quoted the law against retroactivity from *Covey v. Hollydale Mobilehome Estates* (9th Cir. 1997) 116 F.3d 830, *opinion amended on denial of reh'g* (9th Cir. 1997) 125 F.3d 1281. *Covey*, involving senior housing (hardly a criminal matter), stated:

> In general, the courts disfavor retroactivity. "[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988). **Fairness concerns dictate that courts must not lightly disrupt settled expectations or alter the**

> **legal consequences of past actions.** *See Landgraf v. USI Film Products,* 511 U.S. 244, 265–66, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 (1994); *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 855, 110 S.Ct. 1570, 1586, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring) ("**The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."**)
>
> …
>
> **Cases involving settled contract and property rights, for example, require predictability and stability and are generally inappropriate candidates for statutory retroactivity**. *Id.* at 270–72, 114 S.Ct. at 1500. **Similarly, the courts presumptively should not apply "statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment."** *Id.* at 278, 114 S.Ct. at 1504.
>
> Accordingly, the Court provided a framework for approaching retroactivity questions:
>
> When a case implicates a federal statute enacted after the events in suit, the court's **first task is to determine whether Congress has expressly prescribed the statute's proper reach.** If Congress has done so, of course, there is no need to resort to judicial default rules. **When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.** If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Covey, supra, 116 F.3d at 835. *See, e.g*., VC ¶ 204.

The ULA does not say that it applies only to properties acquired after its effective date of April 1, 2023. Rather, it says that it applies to all properties that are **sold** on or after April 1, 2023, **whenever they may have been acquired**. Therefore, in applying a tax upon the entire value of such property that had accumulated since the property had been acquired by the seller until the date it was sold after the effective date of the ULA, the ULA is retroactive legislation impacting settled contract and property rights (VC ¶192).

When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Products (1994) 511 U.S. 244, 280; s*ee also Valiente v. Swift Transportation Co. of Arizona, LLC* (9th Cir. 2022) 54 F.4th 581, 585.

In *K. M. v. Grossmont Union School District* (2022) 84 Cal.App.5th 717, the Court stated:

> " 'In deciding whether the application of a law is prospective or retroactive, we look to function, not form.... Does the law "change[ ] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct[?]" [Citation.] Does it "substantially affect[ ] existing rights and obligations[?]" [Citation.] If so, then application to a trial of preenactment conduct is forbidden, absent an express legislative intent to permit such retroactive application. If not, then application to a trial of preenactment conduct is permitted, because the application is prospective.' [citations].
> . . . .
> We focus on "whether the statutory change in question significantly alters settled expectations...." [citation]."Ambiguous statutory language will not suffice to dispel the presumption against retroactivity; rather ' "a statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective." ' [citation].

Grossmont, supra, at 767-37.

In *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1193-1194, the California Supreme Court held that liability under Proposition 51 did not apply to causes of action which accrued before the measure's effective date, but only prospectively; *see also Cal. Civ. Code* § 3 (no part retroactive unless expressly declared). As stated in *Evangelatos*:

> Thus, the fact that the electorate chose to adopt a new remedial rule for the future does not necessarily demonstrate an intent to apply the new rule retroactively to defeat the reasonable expectations of those who have changed their position in reliance on the old law. The presumption of prospectivity assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance.

Evangelatos, *supra*, 44 Cal.3d at 1214 [emph. added]; *see also Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 231-232 (impermissible retroactive rules included "subject[ing] tobacco sellers to tort liability for acts performed" when "protect[ed] [by] an immunity statute"); *McHugh v. Protective Life Ins. Co.* (2021) 12 Cal.5th 213, 229 ("We apply the presumption in the absence of explicit legislative indications of retroactivity, doing so based on the fundamental fairness considerations raised by ' "imposing new burdens on persons after the fact." ' "), *see also Medical Finance Assn. v. Wood* (1936) 20 Cal.App.2d Supp. 749, 750–751 (statute limiting property by which a debt could be satisfied did not apply to debts incurred prior to statute's enactment).

Prior to the passage of the ULA (and, in some cases, decades prior), Plaintiffs and other members of the $5,000,001 sub-class reasonably relied, in their formation of contracts for acquisition, financing, leasing, improvement and ownership of properties in Los Angeles, upon reasonable investment backed expectations that the laws of the state of California, and particularly its Constitutional provisions,

including, without limitation, Proposition 13, Proposition 128, Proposition 26 and Government Code section 53725, which prohibited the imposition of a transaction tax or sales tax on the sale of real property within such City, would not be impaired by the application of an ordinance such as the ULA. (VC¶193)

The owners of such properties in Los Angeles had relied upon the value of such properties without regard to an unforeseeable **tenfold increase**[13] in a transfer tax subtraction (as a ULA tax) from the gross value of their properties in planning their business affairs and reasonable investment backed expectations such as (a) whether to even buy the property in Los Angeles, (b) whether to pay monies to improve it, and (c) whether and how much to borrow against it to either acquire it or improve it. Buyers might have decided to purchase comparable properties in areas such as Beverly Hills, which are unaffected by the ULA, rather than the City of Los Angeles (VC ¶ 194).

Lenders also relied upon the value of such properties without regard to an unforeseeable subtraction of 4% or 5.5% as the case may be, of their gross values, in planning their business affairs and reasonable investment backed expectations such as (a) whether to loan any money against the security of such Property and/or its gross sales proceeds, (b) at what interest rate to lend, (c) how much the lender could lend with the reasonable expectation the borrower could sell and the gross proceeds would be sufficient to repay the loan, and (d) the risk the borrower may not be able to repay the loan (VC ¶ 195).

For example, a merchant builder may buy a piece of land upon which to build a house at a price that will yield him a net profit of 12% of the gross sales proceeds, after the payment of all costs to acquire, improve and sell such house, but he would not purchase the land at the same price if his net profit was only 8% or 6.5% due to the application of the unforeseen ULA taxes (VC ¶ 196).

All of the builders who purchased land in the City of Los Angeles before the passage of the ULA have suffered an impairment of the rights that they possessed when they acted to purchase the property. The ULA increased those builders' liability for the past conduct of buying such property and paying money to improve the value of the property, because they will now, upon sale, have to come up with more money to pay off their loans (i.e., incur additional liabilities to borrow more money), where previously they relied upon having sufficient net proceeds of sale with which to do so. The ULA imposes

[13] For a $5,000,000 property, the base transfer tax would be $22,500. For a $5,000,001 property subject to Measure ULA, the charge is $225,000, or a tenfold increase.

the new duty of paying the 4.0% or 5.5% ULA taxes upon the sale, which did not previously exist (VC ¶ 197).

All of the lenders who advanced monies to such builders both calculated the amounts they were willing to advance and the interest rates they would charge on such loans based on their risk adjusted expectations that the properties securing their loans would be able to be sold without regard to a deduction of 4.0% or 5.5% of the gross proceeds for an unanticipated ULA tax. Indeed, the ULA taxes on the "gross proceeds" of sale, may prevent such loans from being able to be paid off at all. At the very least, the loan amounts of these contracts would likely have been reduced and the interest rates might have been raised to adjust for the increased risk of having less available net proceeds of sales to secure the loans. Such borrowers and lenders had settled expectations as to the expected net proceeds of sales. The imposition of the ULA taxes alters the legal consequences of the past actions of such borrowers and lenders in entering into the contractual loan transactions. Their pre-existing contractual relations have also been impaired by the retroactive effect of the ULA taxes (VC ¶ 198).

Plaintiffs and other members of the $5,000,001 sub-class entered into settled contract and property rights, and even selected the locations of their properties based on the reasonable investment backed expectation that no such transfer tax much less a large transfer tax, such as the ULA taxes, of 4% or 5.5% of the gross sales proceeds from such a property would be imposed (VC ¶ 199).

Lenders also advanced long-term loans based on the security of such properties and upon the reasonable investment backed expectation that the values of such properties would not be suddenly and unforeseeably diminished by the imposition of a transaction tax or sales tax on the sale of real property within such City (VC ¶ 200).

Borrowers in the $5,000,001 sub-class may not have entered into loan agreements and borrowed on specified terms, and lenders may not have lent such monies, in the same amounts and same terms such as interest rates and maturity dates, against the security of properties now covered by the $5,000,001 sub-class if they had known when they entered into such loan contracts that, sometime after such loans had been made, the net proceeds of sale from such properties available to repay such loans would be reduced by 4% or 5.5% of the gross sales proceeds from the sales of such properties (VC ¶ 201).

Purchasers of income properties make projections as to their eventual net proceeds of sale in order to determine the purchase prices that they are willing to pay for particular properties. Investors and financiers, such as retirement and pension funds, in such purchases, make similar calculations in determining whether or not to invest and/or what investment return they are willing to accept for such an investment and they make their contracts based on such reasonable projections of the net proceeds of sale as well (VC ¶ 202). Federal Government chartered lenders (e.g. Wells Fargo, Chase, Bank of America) and sponsored agencies, such as Fannie Mae, Freddie Mac, FHA and the VA also make such calculations and relied upon the pre-ULA state of their contract and property rights, and the ULA directly interferes with and impairs their mortgage and other rights in the national banking system and home financing system governed by federal law.

Property owners raised monies in the public securities markets and issued securities based on good faith projections to investors of the net sales proceeds to be expected from their properties without regard to the deduction of the 4.0% or 5.5% of the gross proceeds of sale that were unforeseeable to them at the time of such projections. The rights of such investors, including public and private pension and retirement funds, have been greatly impaired by the retroactive effect of the ULA taxes in that the value of their investments has been reduced by the future liability for the ULA taxes that was not anticipated at the time of their investment (VC ¶ 203).

In addition, the retroactive application of Measure ULA to Plaintiffs is also an "as applied" action for which the facts must be litigated and determined at trial. The existence of contract(s), how Measure ULA adversely impacted Plaintiffs' settled contract and property rights, and Plaintiffs' damages are all questions of fact for which a motion for judgment on the pleadings is not appropriate.

There can be no doubt that Plaintiffs' Verified Complaint properly alleges the issue that Measure ULA unfairly imposes "new burdens on persons after the fact." (*See* VC, ¶¶ 189-205). Measure ULA is devoid of any statement of intent for the measure to apply to contractual obligations, financing and property rights retroactively; nor can such an impact be presumed or inferred. Cal Civ. Code § 3; *Evangelatos, supra*, at 1214.

Measure ULA clearly impairs the rights which the property owners comprising the $5,000,001 sub-class possessed when they entered into the contracts that they did prior to the passage of the ULA.

The ULA unconstitutionally impairs existing and settled contract and property rights and is, therefore, invalid. The VC sufficiently pleads all of such facts to support such cause of action. The motions for judgment on the pleadings must be denied.

VII. PLAINTIFFS' CLAIMS UNDER THE 10TH CAUSE OF ACTION FOR 42 U.S.C. § 1983 DAMAGES CANNOT BE PRECLUDED IN A MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE "ADEQUACY OF REMEDY" IS A QUESTION OF FACT THAT CANNOT BE DECIDED ON SUCH A MOTION. DEFENDANTS ALREADY STIPULATED THAT PLAINTIFFS HAVE NO SUCH ADEQUATE REMEDY AND ARE JUDICIALLY ESTOPPED FROM NOW CLAIMING OTHERWISE

Defendants claim that, under the authority of *General Motors Corp. v. City & County of San Francisco* (1999) 69 Cal.App.4th 448, Plaintiffs' § 1983 claims are foreclosed as a matter of law because, even if Measure ULA were found to be invalid, there is an adequate remedy in state law.

There are two fatal flaws in Defendants' argument:

(1) The "adequacy of a remedy" is a question of fact, which cannot be decided in a motion for judgment on the pleadings (*Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1564; *see also People v. Monterey Fish Products Co*. (1925) 195 Cal. 548, 564), and,

(2) Defendants already filed a stipulation with this Court that Plaintiffs cannot assert any "*in personam remedies*" in this action, which are the only kinds of remedies that would have provided Plaintiffs redress for their injuries at the hands of the invalid ULA. Defendants, having succeeded in obtaining the judicial relief that they sought with such Stipulation, are now judicially estopped from arguing to the contrary, i.e. that Plaintiffs have an adequate remedy to obtain the relief that they would have received under their §1983 claims. See RJN 27, Exhibit 27.

The 10th Cause of Action for §1983 damages **depends upon a jury's determination** of the factual question as to whether Plaintiff's have an "adequate remedy" under state law for the ULA violating the U.S. Constitution. "**The adequacy of a particular remedy is a question of fact for the trial court**." *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1564; *see also People v. Monterey Fish Products Co*. (1925) 195 Cal. 548, 564.

""Whether there is a 'plain, speedy and adequate remedy, in the ordinary course of law' within the meaning of the statute usually ***is regarded as a question of fact that requires an evaluation of the circumstances of each particular case*.**" (*Villery v. Department of Corrections &Rehabilitation* (2016) 246 Cal.App.4th 407, 414.) [emph. added]

Moreover, the Court may take judicial notice that on May 2, 2023, Defendants filed a stipulation with this court (see Pl. RJN 27, Ex. 27) by which Defendants argued that Plaintiffs may not assert any "in personam" remedies due to Defendants' interpretation of the California Supreme Court case, *Davis v. Fresno Unified School District* (Cal., April 27, 2023, No. S266344 __Cal.5th ____ WL 3107288*5). The purpose of such Stipulation was to persuade Judge Kin to retain this action in Dept. 72 and not transfer it to the Writs Department. Defendants were successful in achieving that goal. While Plaintiffs disagree with Defendants' interpretation of *Davis* and its effect on Plaintiffs' available remedies, assuming, arguendo, for the purposes of this Motion for Judgment on the Pleadings that Defendants were correct, this Court would have to find that Plaintiffs do **not** have an adequate remedy for their § 1983 claims under state law, because, according to Defendants, such remedies are precluded by *Davis.* Having succeeded with such argument in persuading Judge Kin not to transfer this case out of Dept. 72 and into the writs department, Defendants are judicially estopped from now claiming the contrary, i.e. that Plaintiffs have such an "adequate remedy".

> Judicial estoppel applies to a litigant who takes inconsistent positions in judicial proceedings even if the opposing parties in [the] proceedings are different." (*Pacific Merchant Shipping Assn. v. Board of Pilot Commissioners etc.* (2015) 242 Cal.App.4th 1043, 1055, 195 Cal.Rptr.3d 358.) " '[J]udicial estoppel focuses on "the relationship between the litigant and the judicial system," and is designed "to protect the integrity of the judicial process." ... The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather, it is the intentional assertion of an inconsistent position that perverts the judicial machinery.' [Citations.]" [. . .] The doctrine of judicial estoppel precludes a litigant playing " ' "fast and loose" with the courts' " by asserting inconsistent positions. (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 119, 102 Cal.Rptr.2d 28.) That is a fair description of what is going on here.

Nist v. Hall, (2018) 24 Cal.App.5th 40, 48-49

> In accordance with the purpose of judicial estoppel, we conclude that the doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations].

Jackson v. County of Los Angeles, (1997) 60 Cal.App.4th 171, 183

All five (5) of the Judicial Estoppel factors are present here: (1) Defendants have taken two totally inconsistent positions, i.e. (a) that Plaintiffs are precluded from all in personam remedies e.g. writ, injunction and 1983 damages, and (b) Plaintiffs have adequate remedies in state court for their § 1983 damages claims. (2) Such totally inconsistent positions were taken in this very judicial proceeding, (3) Defendants were successful in using that argument to get their desired relief, i.e. for Judge Kin to refrain from transferring this case out of Dept. 72 and into the Writs Department, (4) the two positions are totally inconsistent, and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Finally, and dispositively, Plaintiffs have expressly alleged in the VC ¶231 that they do not have an adequate remedy at law, ***which, itself is an allegation of fact which must be deemed herein to be true***:

"VC ¶231. Plaintiffs do not have an adequate remedy at law."

Further, Plaintiffs have a constitutional right, under the Seventh Amendment, to have their § 1983 claims tried by a jury, (including, but not limited to their inverse condemnation claims) because the U.S. Supreme Court has held that §1983 claims are entitled to jury trial under the Seventh Amendment of the U.S. Constitution because they are actions at law that sound in tort and are predominantly "factual" in nature to be allocated to a jury. The U.S. Supreme Court has said "**As is often true in § 1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages. These were questions for the jury."** *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 723 (1999):

> As JUSTICE SCALIA explains, see *post*, at 727-731, there can be no doubt that claims brought pursuant to § 1983 sound in tort. Just as common-law tort actions provide redress for interference with protected personal or property interests, § 1983 provides relief for invasions of rights protected under federal law. Recognizing the essential character of the statute, "'[w]e have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability,'[citations].Our settled understanding of § 1983 and the Seventh Amendment thus compel the conclusion that a suit for legal relief brought under the statute is an action at law…
>
> **Damages for a constitutional violation are a legal remedy. See, *e. g.*, *Teamsters* v. *Terry*,** 494 U. S. 558, 570 **(1990) ("Generally, an action for money damages was 'the traditional form of relief offered in the courts of law'") (quoting *Curtis*,** 415 U. S., at 196).
>
> *Monterrey* at p. 707-11
>
> In actions at law otherwise within the purview of the Seventh Amendment, ***the issue whether a landowner has been deprived of all economically viable use of his property is for the jury. The***

issue is predominantly factual, *e. g., Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413***, and in actions at law such issues are in most cases allocated to the jury,*** see, *e. g., Baltimore Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 657. Pp. 720-721.

Monterrey at p. 690

As is often true in § 1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages. These were questions for the jury.

Monterrey at p. 723

In short, respectfully, this Court cannot decide, in this motion, the necessary questions of fact such as "adequacy of remedy" and/or disputed questions as to whether Defendants have denied Plaintiffs' constitutional rights in acting outside the bounds of their authority, and, if so, the extent of any resulting damages because these are all questions of fact for the jury, not questions of law for a motion for judgment on the pleadings.

VIII. THE SIXTEENTH CAUSE OF ACTION FOR UNCONSTITUTIONAL VAGUENESS IS SUFFICIENTLY PLEADED

"[A] statute will be deemed void for vagueness if it either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to what is required." *Nisei Farmers League v. Labor & Workforce Development Agency*, (2019) 30 Cal.App.5th 997, 1013.

The procedure and criteria for issuing exemptions from the ULA tax is admittedly completely undefined and, indeed, non-existent. The exemptions are to be issued "according to a procedure ***that will be promulgated*** by the Los Angeles Housing Department, ***or its successor agency***." In other words, the procedure and criteria, and perhaps even the agency, for issuing such exemptions ***does not even exist*** though the ULA has been in effect since April 1, 2023.

As shown *supra*, the language of Measure ULA cited at VC, ¶¶ 144-146, is unconstitutionally vague. Defendant City has yet to define what is or is not an exemption, so certainly "persons of common intelligence must ***necessarily*** guess as to its meaning and differ as to what is required." *Nisei (supra).* They could not do otherwise.

In fact, no one knows who will be subjected to Measure ULA and who will be exempted at this point, and certainly at the point where the VC was filed. The ULA has been in effect for over four (4)

months and nobody has yet received an exemption because it is absolutely impossible to know what one needs to get one since that information depends entirely upon the content of regulations that do not even exist. It is impossible for an ordinance to be any more vague than to be entirely dependent upon the content of regulations that do not even exist. The ULA is unconstitutionally vague and, thus, this Court should declare it unconstitutional and void.

IX. PLAINTIFFS' WRIT OF MANDATE CLAIM (ELEVENTH CAUSE OF ACTION) IS SUFFICIENTLY PLEADED AND IS NOT PRECLUDED BY DAVIS v. FRESNO. PLAINTIFFS DECLARATORY RELIEF (TWELFTH CAUSE OF ACTION) AND DETERMINATION OF INVALIDITY (THIRTEENTH CAUSE OF ACTION) ARE ALSO SUFFICIENTLY PLEADED

Defendants claim that Plaintiffs cannot assert their twelfth (12th) cause of action for declaratory relief or their thirteenth (13th) cause of action for a determination of invalidity because they claim that Plaintiffs have not asserted any valid substantive claims.

Defendants (City MJOP p. 48; Int. Parties p. 30) claim that Plaintiffs cannot assert their Writ of Mandate claim (eleventh (11th) cause of action) because: (1) they claim that Plaintiffs have not asserted any valid substantive claims, and (2) Defendant, City, mistakenly claims (City MJOP, p. 48:4-5) that Plaintiffs cannot assert *any in personam* claims in this reverse validation case, while, simultaneously claiming that Plaintiffs have an adequate remedy for all of such *in personam* claims (City MJOP, p.47:23-24), which, according to City, is apparently "none". Defendants' positions are absurd.

As demonstrated herein, Plaintiffs claims are sufficiently pleaded in the VC and many of them require the resolution of triable issues of fact at trial, such that they cannot even be ruled out in a MJOP.

City's misguided interpretation of *Davis v. Fresno Unified School District* (2023) 14 Cal.5th 671, 685, citing Code Civ. Proc. § 860, for the proposition that in personam relief by writ of mandate is not available in this action is just plain wrong. City misconstrues the **dicta** in *Davis* which City cites.

In fact, the paragraph cited by City is the beginning of a multi-paragraph discussion of other claims brought in connection with a validation action. The paragraph they cite is about timing, as explained in the following paragraph from *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335. In that

case, the Supreme Court specifically stated the "taxpayers' remedy" under CCP 526a was allowed to be joined with a validation action:

> To the extent plaintiffs ask for injunctive relief unrelated to the performance of the terms of the Motor Stadium Agreement, no reason appears to deny them their normal and long-standing taxpayers' remedy. The Legislature obviously does not believe that chapter 9 [the validation statutes] somehow repealed section 526a by implication, for it recently took action on that very section.
>
> The courts have continued, of course, to entertain taxpayers' suits; and in at least one case postdating the enactment of chapter 9, injunctive relief was authorized to prevent illegal expenditures under a contract entered into by the defendant public agency which was unrelated to bonds, assessments, or other financial matters. (City of Hermosa Beach v. Superior Court (1964) 231 Cal.App.2d 295, 300, 41 Cal.Rptr. 796.)

City of Ontario, supra, 2 Cal.3d at 344-345.

As discussed in *City of Ontario, Davis* acknowledges in the cited prefatory paragraph that IF a party fails to bring a validation action if required by statute, then after 60 days the action being challenged is "validated" and immune from the other *in personam* claims.

But, two paragraphs later in *Davis*, the Court affirms its holding in *City of Ontario* and confirms that if there is a "*timely* validation action" (emphasis original) then other claims may be joined.

If the Supreme Court was adopting the view asserted by Defendants, it would have specifically overruled or disapproved of *City of Ontario* and the other cases the Supreme Court listed where validation actions were in fact joined with other claims. The Court did not do so. The language cited in by City must be seen as *dicta* as the Court eventually determined that the case in *Davis* was not a proper validation action. *Davis, supra*, at 700.

The *Davis* Court thus acknowledged a writ of mandate may be issued in a reverse validation action that is timely brought under the validation statutes, and that the better reasoned decisions are the ones that allow for a writ to issue under such circumstances.

In this regard, this Court has the power to and should stay and hold in abeyance the writ aspects of Plaintiffs' case until after the underlying legal and factual issues have been determined in the context of the other causes of action in Plaintiffs' complaint. At that point, the Court can determine whether a writ of mandate should be issued. The writ of mandate in the context of this case is merely a form of

relief and any judgment that this Court might issue can and should direct the Court clerk to engage in the ministerial act of issuing a writ of mandate consistent with the Court's judgment at the time. No additional factual or legal determinations will need to be made after the Court has issued its judgment on the merits (including the ministerial direction to issue the writ of mandate).

Plaintiffs' research did not reveal any state, local or other rule that would prevent this Court from issuing a writ of mandate. Therefore, Defendants are simply wrong about this as well and Plaintiffs' claims are sufficiently pleaded to survive these MJOPs.

Plaintiffs have filed three (3) briefs in connection with the pending Motions – two briefs in Opposition to the Motions filed by Defendants, and one filed in joinder of the Motion filed by HJTA. Due to the voluminous moving papers and the substantial overlap between Defendants' Motions, Plaintiffs have attempted to respond to all arguments across the two Opposition briefs, and incorporate by reference all arguments made in all three briefs in connection with the Motions.

Respectfully submitted,

Dated: August 11, 2023

LAW OFFICES OF KEITH M. FROMM

By_____

Keith M. Fromm
Co-Counsel for Plaintiffs and Petitioners Newcastle Courtyards, LLC, and Jonathan Benabou, as Trustee on behalf of The Mani Benabou Family Trust

COSTELL & ADELSON LAW CORPORATION

By_____

Jeffrey L. Costell
Co-Counsel for Plaintiffs and Petitioners Newcastle Courtyards, LLC, and Jonathan Benabou, as Trustee on behalf of The Mani Benabou Family Trust

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 20969 Ventura Boulevard, Suite 230, Woodland Hills, CA 91364. My email address is kcech@costell-law.com.

On August 13, 2023, I served the foregoing document(s) described as **AMENDED OPPOSITION OF PLAINTIFFS AND PETITIONERS NEWCASTLE COURTYARDS, LLC AND JONATHAN BENABOU TO MOTION FOR JUDGMENT ON THE PLEADINGS BY DEFENDANT CITY OF LOS ANGELES AND INTERESTED PARTIES (Vol I)** on the interested parties to this action by delivering a true and correct copy thereof addressed to each of said interested parties at the following address(es):

SEE ATTACHED SERVICE LIST

( ) **BY FIRST CLASS MAIL POSTAGE PREPAID**: I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our Firm's office address in Santa Monica, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

( ) **BY ELECTRONIC SERVICE:** By causing the foregoing document(s) to be electronically filed using the court's Electronic Filing System which constitutes service of the filed document(s) on the individual(s) listed on the attached mailing list.

(X) BY EMAIL SERVICE: I caused such document(s) to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth in the attached service list.

( ) **BY OVERNIGHT DELIVERY**: I served the foregoing document(s) by an express service carrier which provides overnight delivery, as follows: I placed copies of the foregoing document(s) in a sealed envelope or package designated by the express service carrier, addressed to each interested party as set forth above, with fees for overnight delivery paid or provided for.

(X) ONLY BY ELECTRONIC TRANSMISSION: I electronically served the document(s) listed above by emailing the document(s) to the email address of each addressee on the attached service list. Only electronic service was provided. This is necessitated during the declared National Emergency due to the Coronavirus (COVID-19) pandemic because this office will be working remotely, is not able to send physical mail as usual, and we are therefore using only electronic mail. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission. We will provide a physical copy, upon request only, when we return to the office at the conclusion of the national emergency.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 13, 2023, at Woodland Hills, CA.

/s/ Karen Cech
Karen Cech

SERVICE LIST- CONSOLIDATED CASE

Howard Jarvis Taxpayers Association v. City of Los Angeles, et. al.
LASC Case No. 22STCV39662

Keith M. Fromm, Esq. Law Offices of Keith M. Fromm 907 Westwood Blvd., Suite 442 Los Angeles, CA 90024 Telephone: (310) 500-9960 Email: keithfromm@aol.com *Co-Counsel for Plaintiffs*	Daniel M. Whitley, Esq. Deputy City Attorney Scott Marcus, Esq. Valerie Flores, Esq. Hydee F. Soto, Esq. Office of the City Attorney 200 North Main Street, 920 City Hall East Los Angeles, CA 90012 Tel: (213) 978-7786 email: daniel.whitley@lacity.org Valerie.flores@lacity.org Scott.marcus@lacity.org *Attorneys for Defendant City of Los Angeles*
Jonathan M. Coupal, Esq. Timothy A. Bittle, Esq. Laura E. Dougherty, Esq. Howard Jarvis Taxpayers Foundation 1201 K Street, Suite 1030 Sacramento, CA 95814 Tel: (916) 444-9950 Fax: (916) 444-9823 Email: laura@hjta.org *Attorneys for Plaintiffs Howard Jarvis Taxpayers Association and Apartment Association of Greater Los Angeles*	Kevin D. Siegel, Esq. J. Leah Castella, Esq. Tamar M. Burke, Esq. Eileen Ollivier, Esq. BURKE, WILLIAMS & SORENSEN, LLP 1 California Street, Suite 3050 San Francisco, CA 94111-5432 Tel: (415) 655-8100 Fax: 415-655-8099 Email ksiegel@bwslaw.com lcastella@bwslaw.com tburke@bwslaw.com eollivier@bwslaw.com cc: Paola Mendez-Ruiz, Assistant pmruiz@bwslaw.com *Attorneys for Defendant City of Los Angeles*
Gregory Bonett, Esq. Faizah Malik, Esq. Brandon Payette, Esq. Kathryn Eidmann, Esq. PUBLIC COUNSEL 610 S. Ardmore Avenue Los Angeles, California 90005 Tel.: (213) 385-2977 Fax: (213) 385-9089 Email: gbonett@publiccounsel.org fmalik@publiccounsel.org bpayette@publiccounsel.org keidmann@publiccounsel.org *Attorneys for Defendants as Persons Interested in the Matter: Southern California Association of Non-Profit Housing, Inc.; Korean Immigrant Workers Advocates of Southern California DBA Koreatown Immigrant Workers Alliance; Service Employees International Union Local 2015*	Bart Alan Seemen, Esq. WILLIAMS & SEEMEN 5900 Sepulveda Blvd., Suite 432 Sherman Oaks, CA 91411 Tel. (818) 898-8300 Email bas@latrialteam.com *Attorney for Interested Person Shama Enterprises, LLC*

Morgan Chu, Esq. Nicole Miller, Esq. Emily Grant, Esq. Jared Looper, Esq. Kyle McGuire, Esq. Michael Gniwisch IRELL & MANELLA, LLP 1800 Avenue of the Stars, Ste 900 Los Angeles, CA 90067 Tel.: (310) 203-7000 Email: mchu@irell.com nmiller@irell.com egrant@irell.com jlooper@irell.com kmcguire@irell.com mgniwisch@irell.com *Attorneys for Defendants as Persons Interested in the Matter:* *Southern California Association of Non-Profit Housing, Inc.; Korean Immigrant Workers Advocates of Southern California DBA Koreatown Immigrant Workers Alliance; Service Employees International Union Local 2015*	Brian K. Stewart, Esq. Nicholas R. Colletti, Esq. COLLINS + COLLINS LLP 790 E. Colorado Boulevard, Suite 600 Pasadena, CA 91101 Tel: (626) 243-1100 Fax (626) 243-1111 Email: bstewart@ccllp.law ncolletti@ccllp.law cc: Natalie Urbino, Assistant nurbino@bwslaw.com *Attorneys for Defendant County of Los Angeles and Los Angeles County Recorder's Office*

SERVICE LIST – CONSOLIDATED CASE

Newcastle Courtyards, LLC., et.al. v. City of Los Angeles, et al.

LASC Case No. 23STCV00352

Keith M. Fromm, Esq. Law Offices of Keith M. Fromm 907 Westwood Blvd., Suite 442 Los Angeles, CA 90024 Telephone: (310) 500-9960 Email: keithfromm@aol.com *Co-Counsel for Plaintiffs*	Daniel M. Whitley, Esq. Valerie Flores, Esq. Scott D. Marcus, Esq. Hydee F. Soto, Esq. Deputy City Attorney Office of the City Attorney 200 North Main Street, 920 City Hall East Los Angeles, CA 90012 Tel: (213) 978-7786 email: daniel.whitley@lacity.org Valerie.flores@lacity.org Scott.marcus@lacity.org *Attorneys for Defendant City of Los Angeles*
Jonathan M. Coupal, Esq. Timothy A. Bittle, Esq. Laura E. Dougherty, Esq. Howard Jarvis Taxpayers Foundation 1201 K Street, Suite 1030 Sacramento, CA 95814 Tel: (916) 444-9950 Fax: (916) 444-9823 Email: laura@hjta.org *Attorneys for Plaintiffs Howard Jarvis Taxpayers Association and Apartment Association of Greater Los Angeles*	Kevin D. Siegel, Esq. J. Leah Castella, Esq. Tamar M. Burke, Esq. Eileen Ollivier, Esq. BURKE, WILLIAMS & SORENSEN, LLP 1 California Street, Suite 3050 San Francisco, CA 94111-5432 Tel: (415) 655-8100 Fax: 415-655-8099 Email ksiegel@bwslaw.com lcastella@bwslaw.com tburke@bwslaw.com eollivier@bwslaw.com cc: Paola Mendez-Ruiz, Assistant pmruiz@bwslaw.com

	Attorneys for Defendant City of Los Angeles
Gregory Bonett, Esq. Faizah Malik, Esq. Brandon Payette, Esq. Kathryn Eidmann, Esq. PUBLIC COUNSEL 610 S. Ardmore Avenue Los Angeles, California 90005 Tel.: (213) 385-2977 Fax: (213) 385-9089 Email: gbonett@publiccounsel.org fmalik@publiccounsel.org bpayette@publiccounsel.org keidmann@publiccounsel.org *Attorneys for Defendants as Persons Interested in the Matter: Southern California Association of Non-Profit Housing, Inc.; Korean Immigrant Workers Advocates of Southern California DBA Koreatown Immigrant Workers Alliance; Service Employees International Union Local 2015*	Bart Alan Seemen, Esq. WILLIAMS & SEEMEN 5900 Sepulveda Blvd., Suite 432 Sherman Oaks, CA 91411 Tel. (818) 898-8300 Email bas@latrialteam.com *Attorney for Interested Person Shama Enterprises, LLC*
Morgan Chu, Esq. Nicole Miller, Esq. Emily Grant, Esq. Jared Looper, Esq. Kyle McGuire, Esq. Michael Gniwisch IRELL & MANELLA, LLP 1800 Avenue of the Stars, Ste 900 Los Angeles, CA 90067 Tel.: (310) 203-7000 Email: mchu@irell.com nmiller@irell.com egrant@irell.com jlooper@irell.com kmcguire@irell.com mgniwisch@irell.com *Attorneys for Defendants as Persons Interested in the Matter: Southern California Association of Non-Profit Housing, Inc.; Korean Immigrant Workers Advocates of Southern California DBA Koreatown Immigrant Workers Alliance; Service Employees International Union Local 2015*	Brian K. Stewart, Esq. Nicholas R. Colletti, Esq. COLLINS + COLLINS LLP 790 E. Colorado Boulevard, Suite 600 Pasadena, CA 91101 Tel: (626) 243-1100 Fax (626) 243-1111 Email: bstewart@ccllp.law ncolletti@ccllp.law cc: Natalie Urbino, Assistant nurbino@bwslaw.com *Attorneys for Defendant County of Los Angeles and Los Angeles County Recorder's Office*