No. S218400

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re TRANSIENT OCCUPANCY TAX CASES

CITY OF SAN DIEGO, CALIFORNIA,
Petitioner

vs.

HOTELS.COM, L.P., et al.,
Respondent

After an Opinion by the Court of Appeal, Second Appellate District, Division Two
Case No. B243800

On Appeal from the Superior Court of the State of California
County of Los Angeles, Case No. JCCP 4472
Honorable Elihu M. Berle, Judge Presiding

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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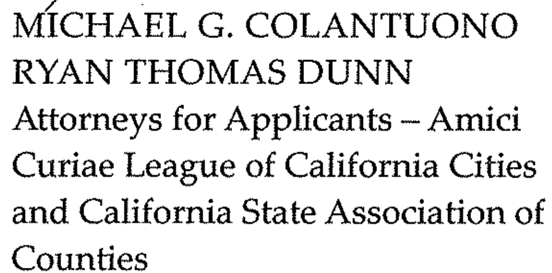
CERTIFICATE OF
INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.488.

DATED: June 16, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC



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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Tani Cantil-Sakauye:

Pursuant to California Rules of Court, rule 8.520(f), the League of California Cities ("League") and the California State Association of Counties ("CSAC") respectfully request permission to file an amicus curiae brief in support of Petitioner City of San Diego in this case. This application is timely made within 30 days of filing of the reply brief on the merits.

The League and CSAC represent local governments that have a substantial interest in this case because of its implications for the hundreds of cities and counties in California with transient occupancy tax ("TOT") ordinances. These local governments rely on TOT revenues to fund essential services to their residents, businesses, and property owners.

The lower courts' conclusions here are contrary to the language and legislative intent of San **Diego's** TOT ordinance, which match those of the hundreds of cities and counties that have adopted similar ordinances based on a common model. San Diego's ordinance — like most in California — was drafted decades ago, before internet entrepreneurs teamed with hotels to create new ways to market hotel rooms to customers. However, San Diego, like every city or county with a TOT ordinance, has always intended to tax the entire room rent paid by the customer. The League and CSAC

believe they can aid this Court's review by putting the issues in appropriate context in light of the history of California TOT ordinances, the importance of TOT revenues to the public fisc, the similarities among TOT ordinances, and case law regarding the application of precedent to technological innovations. The parties do not brief these topics.

Counsel for the League and CSAC have examined the parties' briefs and are familiar with the issues and the scope of the presentations. The League and CSAC respectfully submit that the attached amici brief would clarify the legislative intent of San Diego's TOT ordinance and those of the cities and counties that may be affected by this Court's ruling here. The plain language of TOT ordinances requires customers to pay TOT based on the entire room rent they pay, and TOT ordinances have always been intended to tax the entire room rent – no matter to whom it is paid. That San Diego's ordinance does not use the phrase "online travel companies"("OTCs") is no reason to conclude it should not be applied to transactions between hotel customers and OTCs.

Therefore, the League and CSAC respectfully request leave to file the brief combined with this application.

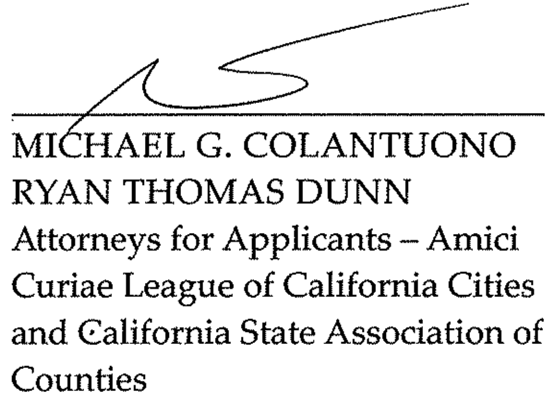
IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

DATED: June 16, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC



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INTRODUCTION

Amici agree with the City of San Diego that the plain language of its transient occupancy tax ("TOT") ordinance compels reversal. If resort to other indicia of legislative intent were needed, the legislative intent of San Diego's ordinance matches that of literally hundreds of similar ordinances adopted by California cities and counties based on a common model with a common goal: to tax the room rent paid by transients. Technological innovation in the marketing of hotel stays does not require a different result.

Reasons of both law and policy support San Diego here. TOT revenues are a significant part of many California cities' and counties' general funds. It is no answer to require these cities and counties to seek voter approval pursuant to Proposition 218 to clarify application of their taxes to new technologies. As the ordinances' language makes clear, they reflect long-standing intent to tax the entire rent a transient must pay for a hotel stay. Cities and counties should not need to seek additional voter approval under article XIII C, section 2[1] or article XIII A, section 4 to maintain their existing tax bases to fund essential services to residents and visitors alike. Ruling otherwise will invite other industries to seek ways to

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[1] Unspecified references in this Brief to articles and sections of articles are to the California Constitution.

contract around their tax obligations, impoverishing vital public services.

Case law is divided as to whether tax ordinances should be construed against the drafter. If any construction is needed in light of the clear language of the ordinances, this Court should clarify that division in the law. Amici urges this Court to hold that tax ordinances are entitled to the same deference as other laws and are interpreted under the usual rules of construction without prejudice for or against taxpayers and the governments which fund essential services by taxes. To do otherwise would hamstring government and ultimately lead to an endless game of electoral cat and mouse. Ruling otherwise will also invite abuse and game playing, as other industries will no doubt view such a ruling as an invitation to seek ways to evade their tax obligations. Any justification there may have been in the mid-20th Century for an interpretive canon favoring the taxpayer has long since passed given the 21st-Century requirement of voter approval — to be had only every two years — for any meaningful change in local tax laws.

Thus, the Court should reverse, enforcing the plain language of San Diego's ordinance basing TOT on the entire rent a guest pays to occupy a room. No local government intended to license private agreements to reduce tax on the lodging industry. Rather, the online travel companies ("OTCs") must collect and remit taxes based on the whole room rent rather than a privately agreed fraction of it.

Factual and procedural History

Amici adopt by reference the Statement of Facts and Procedural History set forth in the Petitioner's Opening Brief on the merits.

ARGUMENT

I. LAW AND POLICY SUPPORT SAN DIEGO'S INTERPRETATION OF ITS TOT ORDINANCE

San Diego contends its TOT ordinance is designed to tax the room rate that customers pay to book a room in a hotel and not a penny less. The language of San Diego's ordinance, as well as that of ordinances across the State, supports this construction.

The language of TOT ordinances around California is remarkably similar: all tax "rent" broadly defined as what hotel customers pay for the privilege of occupancy. All seek to tax all lodging facilities: hotels, motels, campgrounds, hostels, time-share rentals, etc. The plain language of these ordinances and the policy they reflect — as illuminated by subtle differences among them — support San Diego's interpretation of its TOT ordinance.

The same tax base — the defined "rent" charged by the "Operator" to the "Transient" for the "privilege of Occupancy" — is stated by the ordinances of many cities and counties, including San Diego.[2] Ordinances in the State's ten largest cities and three others

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[2] As explained *infra*, in section III, the differences among these

with significant tourism (West Hollywood, Palm Springs, and Monterey)[3] define "operator," "transient," and "rent" in identical or substantially similar terms; all but Bakersfield and Anaheim define "occupancy" alike.[4]

The genesis of many of these ordinances is a "Uniform Transient Occupancy Tax," drafted decades ago. Model ordinances are common in local government finance and allow standardization that is equally helpful to the taxer and the taxed. Los Angeles, Monterey, Oakland, Sacramento, West Hollywood, and many other

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ordinances counsels against a broad holding that no city may tax service fees OTCs charge if San Diego cannot.

[3] These cities are the following: Los Angeles, San Jose, San Francisco, Fresno, Long Beach, Sacramento, Oakland, Bakersfield, Anaheim, West Hollywood, Palm Springs, and Monterey. Amici request judicial notice of these cities' TOT ordinances in the accompanying Motion for Judicial Notice, copies of which the City also provided the Court with its June 9, 2014 request for judicial notice.

[4] Bakersfield needs no definition of "occupancy," charging a tax "equivalent to twelve percent of the total amount paid for room rental by and for any such transient to any hotel[.]" (Bakersfield Mun. Code, § 3.40.020, subd. (A).) Anaheim has no definition for "occupancy" because it bases its tax on "fifteen percent of the rent," defining rent, in part, as "the consideration charged by an operator for accommodations[.]" (Anaheim Mun. Code, §§ 2.12.005, subd. .080; 2.12.010, subd. .010.)

cities title their TOT ordinances the "Uniform Transient Occupancy Tax" in recognition of that common origin.

Mathews Municipal Ordinances, a West publication, includes a sample TOT ordinance with similar definitions titled the "Uniform Transient Occupancy Ordinance." (Mathews Municipal Ordinances (West 2015) Westlaw, § 39:298; see *McCafferty v. Board of Supervisors* (1969) 3 Cal.App.3d 190, 191, fn. 1 [referring to Placer County's 1964 adoption of "Uniform Transient Occupancy Tax Ordinance"]; *Patel v. City of Gilroy* (2002) 97 Cal.App.4th 483, 487 [discussing definitions of "hotel," "occupancy," and "transient" substantially similar to those here]; *City of Santa Cruz v. Patel* (2007) 155 Cal.App.4th 234, 239 [City's adoption of "Uniform Transient Occupancy Tax" in 1984], 246 [noting similarity of Santa Cruz and Gilroy ordinances].)

a. Importance of TOT Revenue to the Public Fisc

TOT is a significant revenue source for many California local governments. Of the state's 482 cities reporting income in fiscal year 2011–2012 ("FY 2011–12"), 404 — 83.8 percent — reported bed tax receipts. (Amicus Motion for Judicial Notice ("MJN"), Exh. B.) Receipts totaled $1.281 billion in FY 2011–12, ranging from $239.6 million in San Francisco to $1 in McFarland. (*Ibid.*) Many cities — large and small, urban and rural — rely heavily on TOT for general fund revenues, including:

- Yountville – 69.9% of general fund from TOT in FY 2011–12
- Avalon – 58.1%

- Calistoga – 56.2%
- Solvang – 53.1%
- Indian Wells – 46.5%
- Pismo Beach – 46.5%
- Mammoth Lakes – 44.4%
- Anaheim – 41.4%
- Angels Camp – 40.4%
- Bishop – 38.2%

(*Ibid.*)

The present fiscal stress on California's local governments is not news to this Court; TOT revenues are an essential source of funding for police, fire, streets, libraries, and parks. Bankruptcies in Vallejo, Mammoth Lakes, and San Bernardino have been reported. Some cities are considering disincorporation, and Jurupa Valley has started the process. Allowing OTCs to reduce TOT revenues by private contract can only worsen this stress.

b. Variations Among TOT Ordinances Illuminate Their Common Intent

Although most TOT ordinances reflect the same uniform ordinance, some use slightly different language for the same concepts — cities collect a percentage of the amount hotels charge "for the privilege of occupancy," subject to certain exceptions:

- Sausalito requires that the tax "shall be paid for every occupancy of a guest room in a hotel" without specifying who must pay it.[5]
- Long Beach taxes a transient based on "rent for his or her occupancy" and not "the privilege of occupancy" but the concept is the same.[6]
- San Francisco taxes "rent for every occupancy[.]"[7]
- Bakersfield and Santa Monica base the tax on "the total amount paid for room rental by and for any such transient to any hotel"[8] while Angels Camp taxes the "amount of rent from the occupant," defining "rent" as "the consideration received for occupancy."[9]

The common theme: TOT is based on the amount paid for a room, no matter who pays or receives it.

Most cities define "rent" to include "the consideration charged, whether or not received" for the "privilege of occupancy"

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[5] Sausalito Mun. Code, § 3.12.030. Amici request judicial notice of the municipal code sections cited in this brief in the accompanying Motion for Judicial Notice ("MJN"). Copies of these municipal code sections are found in the City's request for judicial notice dated June 9, 2014 unless otherwise noted.

[6] Long Beach Mun. Code, § 3.64.030.

[7] S.F. Business & Tax Regulations Code, art. 7, § 502.

[8] Bakersfield Mun. Code, § 3.40.020, subd. (A); Santa Monica Mun. Code, § 6.68.020.

[9] Angels Camp Mun. Code, § 3.12.030.

without regard to who charges that "rent." Most, too, make clear that the entire rent is taxed "without any deduction therefrom whatsoever," indicating an intent to tax at least the room rate, and often any additional charges a transient incurs for services and facilities. This common intent is subject to certain clarifications or exceptions based on the variety of lodging facilities in the state and other local policy concerns:[10]

- **Discounted rooms**. Indian Wells provides "[p]ersons provided rooms at a reduced rate shall be taxed based upon the normal posted room rate;"[11] Santa Clara does not require hotels to tax "complimentary nontaxable rooms" but does require hotels to report such stays on tax returns.[12] Sunnyvale limits "complimentary nontaxable rooms" to 1 percent of room stays; complimentary rooms beyond that limit are taxed at the average rate for the day in question.[13]
- **Employee lodging.** Chico, Paradise, and Bishop clarify that "'rent' shall not include lodging furnished in kind to an employee

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[10] The cities in the following paragraphs are not an exhaustive list of cities with such provisions, but are instead provided as examples of local tailoring of TOT ordinances around the state.

[11] Indian Wells Mun. Code, § 3.12.020.

[12] Santa Clara City Code, § 3.25.020, subd. (f).

[13] Sunnyvale Mun. Code, § 3.16.030, subd. (5).

by an employer solely for the convenience of the employer[.]"[14] Irvine taxes such rooms "based upon the amount the employee is charged for the room."[15]

- **Surcharges and amenities.** San Pablo expressly includes in "rent" "any energy surcharges or other surcharges imposed by the operator upon the transient; charges for use of a safe or other secure storage; charges for pets; charges for banquet rooms and meeting rooms";[16] Garden Grove includes "separate charges for non-optional items or services that are incidental to occupancy" such as "furniture, fixtures ... maid service, Internet connection charges, and parking fees."[17] Similarly, Yountville includes "charges for the redemption of gift certificates or gift cards, whether issued by the operator or a third party" but excludes charges for "[u]se of banquet or meeting rooms," "[c]hildcare services," use of safes, and in-room entertainment.[18] Palm Desert states rent "shall not be reduced by the actual or perceived value of any hotel amenities provided to transients without additional charge, such as complimentary continental breakfasts, cocktails

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[14] Chico Mun. Code, § 3.52.060; Paradise Mun. Code, § 3.24.020, subd. (F); Bishop Mun. Code, § 3.20.020, subd. (E).

[15] Irvine Mun. Code, § 2-9-401.

[16] San Pablo Mun. Code, § 3.28.010.

[17] Garden Grove Mun. Code, § 3.12.020, subd. (7).

[18] Yountville Mun. Code, § 3.16.020.

and newspapers";[19] Brisbane prohibits deducting from taxed rent "[t]he value of complimentary meals or other similar services or inducements[.]"[20] Ripon and Modesto exclude "compensation for services or products."[21]

- **Otherwise taxable goods and services.** Bellflower excludes from "rent" "the consideration charged for the provision of food or other services" taxed by another provision of its code;[22] Anaheim has a similar provision.[23] Victorville similarly excludes "that portion of the consideration charged for food[.]"[24] Escondido includes parking charges in "rent," but excludes charges for other products subject to other sales and use taxes, such as food and beverages.[25]
- **Other assessments.** Mammoth Lakes excludes the amount "representing a tourism business improvement district assessment" from its basis for "rent."[26]

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[19] Palm Desert Mun. Code, § 3.28.020, subd. (D).

[20] Brisbane Mun. Code, § 3.24.020, subd. (E).

[21] Ripon Mun. Code, § 3.16.020, subd. (e); Modesto Mun. Code, § 8-2.602, subd. (e).

[22] Bellflower Mun. Code, § 3.16.020.

[23] Anaheim Mun. Code, § 2.12.005, subd. .080.

[24] Victorville Mun. Code, § 3.12.020, subd. (5).

[25] Escondido Mun. Code, § 25-75.

[26] Mammoth Lakes Mun. Code, § 3.12.020.

Thus, the differences among the TOT ordinances around the state demonstrate their intent to tax, at the very least, the amount a transient pays for the right to occupy a room. The differences are at the margin — whether to tax discounted or free rooms, charges for in-room movies or loyalty discounts — not whether hotels and OTCs may redefine that tax basis by private, secret contract.

II. WERE RESORT TO LEGISLATIVE HISTORY NECESSARY, IT SHOWS INTENT TO APPLY THE TAX BROADLY

Taxing agencies have long understood that hotels have complete freedom to manipulate their occupancy contracts. Therefore they used broad language in their TOT ordinances to capture the entire market for hotel stays without respect to any clever lawyering of hoteliers or form contracts of adhesion with guests. They have amended their ordinances when appropriate to clarify this intent and, in some cases, to broaden the tax base.

The OTC models simply divide the rent for occupancy between hotels and OTCs after the fact, but do not affect the fundamental economic transaction. But, as the City has noted (Reply Brief, pp. 3–5), the tax ordinances are not concerned with how hotels and OTCs divide the customer's rental payment between them. Rather, the tax is assessed when the customer books his room, and is based on the full amount the customer pays to rent that room, not some portion of that amount.

In sum, just as when cities first adopted TOT ordinances, guests who book rooms via OTCs must pay to gain occupancy of a hotel room and what they pay to do so is meant to be taxed.

A few examples suffice to demonstrate the point.

a. San Francisco

San Francisco's 1961 TOT ordinance required "a tax of three (3%) per centum of the rent for every occupancy of a guest room in a hotel."[27] It defined "rent" as "[t]he consideration received for occupancy valued in money or otherwise, including all receipts, cash, credits, and property or services of any kind or nature ... without any deduction therefrom whatsoever[.]"[28] San Francisco defined "operator" as "[a]ny person operating a hotel in the City ... including, but not limited to, the owner or proprietor of such premises, ... licensee or any other person otherwise operating such hotel" — in other words, anybody whom a transient would have paid for a hotel room in 1961.[29] The City provided limited exemptions for permanent residents; non-profit, religious, and charitable organizations; and for rent of less than two dollars per day.[30]

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[27] MJN, Exh. C, § 1 at § 502.

[28] *Id.* at § 1 at § 501, subd. (g).

[29] *Id.* at § 1 at § 501, subd. (b).

[30] *Id.* at § 1 at § 504.

2004 amendments to San Francisco's ordinances specified that the definition of "operator" to "any person conducting or controlling a business subject to the tax on transient occupancy of hotel rooms ... including, but not limited to, the owner or proprietor of such premises, ... licensee or any other person otherwise conducting or controlling such business[.]"[31] 2010 amendments removed the phrase beginning "including, but not limited to," demonstrating the City did not intend to limit the interpretation of those persons who could be "conducting or controlling" the lodging business.[32]

b. San Diego

San Diego's 1964 TOT ordinance imposed "a tax in the amount of four per cent (4%) of the rent charged by the operator[.]"[33] It defined taxable "rent" as "the consideration charged, whether or not received, for the occupancy of space in a hotel ... including all receipts, cash, credits and property and services of any kind or nature, without any deduction therefrom whatsoever[.]"[34] It defined "Operator" as a hotel proprietor and where "the operator performs his functions through a managing agent of any type or character other than an employee, the managing agent shall also be deemed

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[31] MJN, Exh. D, § 3 at § 6.2-13.

[32] MJN, Exh. E, § 1 at § 6.2-13.

[33] MJN, Exh. F, § 1.

[34] *Ibid.*

an operator for the purposes of this Article and shall have the same duties and liabilities as his principal" — another attempt to capture a transient's full room rate, no matter to whom paid.[35]

Reflecting the City's long association with the military, the 1964 San Diego City Council debated a proposed tax exemption for hotel rooms owned by non-profit corporations, specifically the YMCA, indicating a desire to exempt servicemen needing cheap rooms. The City Attorney opined such an exemption would confer a special privilege on a group arbitrarily selected.[36] The City therefore exempted government employees, those whom it could not tax, and rooms rented for less than $2 per day, the final exemption to address concern for men in uniform.[37] San Diego would increase this floor over time, maintaining its intent to relieve from the TOT only those transients least able to pay.

A major revision in 1989 was intended to strengthen San Diego's ability to collect TOT despite hotel bankruptcies.[38] This 1989 amendment expanded "rent" to include "total consideration ... as shown on the guest receipt" and expressly included in-room services such as movies and required other goods and services sold in a package with a room not taxed as "rent," "such as golf, tennis,

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[35] *Ibid.*

[36] MJN, Exh. G.

[37] MJN, Exh. F, § 1.

[38] MJN, Exh. H.

meals, etc." to be "accounted for in accordance with rules and regulations promulgated by the City Treasurer[.]"[39]

c. Anaheim

Anaheim first imposed its TOT in 1963, charging a "business license tax" of "four per cent (4%) of the gross rental receipts" from "hotel or motel operation."[40] Anaheim increased this to 5 percent in 1967 and to 6 percent in 1971.[41]

The 1977 reorganization of Anaheim's TOT ordinances clarified the tax was not a business license tax on hotels but on transients for "the privilege of occupancy," and broadened it beyond hotels and motels. Instead of a tax on "gross rental receipts" of hotels and motels, it imposed "a tax in the amount of six percent (6%) of the rent charged by the operator[.]"[42] The ordinance defined "rent" as "the consideration charged for accommodations" including "separate charges" for furniture, fixtures, appliances, and the like, with a sole exception for uncollectible amounts charged off for income tax purposes, which an operator could deduct from future TOT remittances.[43]

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[39] MJN, Exh. I at § 35.0102, subd. (e).

[40] MJN, Exh. J, § 1.

[41] MJN, Exhs. K, L.

[42] MJN, Exh. M, § 2.

[43] *Ibid.*

Later amendments revealed intent to tax a broad base. In 1984, Anaheim exempted federal and state employees on official business, a common exemption.[44] In 1992 it repealed the government employee exemption as redundant with an exemption for a person or occupancy beyond the City's taxing power.[45] A 1995 amendment expanded Anaheim's TOT to time-share projects, further evidencing its intent to tax all transient lodging revenue.[46]

d. That Some Cities Have Amended Ordinances to Expressly Tax Rent Paid to OTCs Does Not Mean All Must

In response to the protracted litigation of which this case is but a part, a few cities, including Long Beach and Los Angeles, have recently amended their TOT ordinances to clarify their intent to tax rents collected by OTCs. That they did so does not undermine the plain intent to tax the whole amount paid by a guest for the privilege of occupancy that has animated all these ordinances for two generations.

Los Angeles amended its ordinance in 2004 to add reference to "on-line room sellers, on-line room resellers, and on-line travel

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[44] MJN, Exh. N, § 1.

[45] MJN, Exh. O, § 1.

[46] MJN, Exh. P, § 1.

agents", declaring these "secondary operators."[47] Los Angeles now expressly defines such "secondary operators" as "operators" with the same duties to collect and remit TOT as hoteliers.

Other recent ordinances expressly tax the difference between what the OTC's describe as "wholesale" and "retail" rates and OTC service fees. Since 2012, Arcadia has taxed "ten percent (10%) of the rent charged by the operator" including "the total consideration charged to the transient" defined to include "room rates, service charges, parking fees, purchase price, advance registration, block or group registration charges, assessments, retail markup commission, processing fees, cancellation charges, attrition fees, or **online booking fees**[.]"[48] Arcadia also defines "operator" to expressly include "online travel company."[49] Arcadia's voters approved these definitions in 2012 by an ordinance which also extended the limit on the length of stay to which the TOT would be applied from 30 to 90

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[47] MJN, Exh. Q. This "secondary operators" provision is now found at Los Angeles Municipal Code section 21.7.2, subdivision (f). The similar Long Beach provision is found at Long Beach Municipal Code section 3.64.010, subd. (F). Copies of the municipal code sections referenced in this section can be found in the June 9, 2014 request for judicial notice by Petitioner City of San Diego.

[48] Arcadia Mun. Code, § 2661.5, emphasis added.

[49] Arcadia Mun. Code, § 2661.6.

days and stated in this provision, too, intent to tax rent paid to OTCs.[50]

Since 2012, Santee also expressly includes "online booking fees" in its definition of "rent" and "online travel company" in its definition of "operator."[51] It taxes "the rent charged or customarily charged by the operator."[52] These voter-approved amendments stated they were intended to "**clarify** that the [TOT] **applies** ... to online travel companies that perform managing or booking services of any type or character[.]"[53] The bolded language demonstrates that Santee voters understood they were clarifying the intent of that City's existing TOT, not legislating afresh.

South San Francisco calculates rent as "the total amount represented to the transient" when a third party "collects the consideration charged for occupancy on behalf of an operator, or charges a fee for arranging occupancy on behalf of an operator but does not itself collect the consideration charged[.]"[54] South San Francisco voters approved these provisions and increased the tax rate in 2009.[55] Avalon's ordinance states that "where the operator

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[50] RJN, Exh. R.

[51] Santee Mun. Code, § 3.16.020.

[52] *Id.*, subd. (A).

[53] RJN, Exh. S, emphasis added.

[54] South San Francisco Mun. Code, § 4.20.020, subd. (e).

[55] RJN, Exh. T.

blocks a room or rooms at a discounted or wholesale rate to a third party who collects the rent from the transient, then the third party shall pay to the operator the tax on the actual rent paid by the transient to the third party," meaning "[t]he third party shall pay the tax based on the rate which the operator would charge a transient if the operator rented the same room or rooms directly to a transient."[56]

That these cities have recently made express their intent to tax the entire amount transients pay for hotel rooms, whether collected by hotels or by a third party — as a "managing agent" or otherwise, using internet technology or otherwise — is not acknowledgement they intended otherwise earlier. (See *Fahey v. City Council of Sunnyvale* (1962) 208 Cal.App.2d 667, 676 ["where an amendment is only for the purpose of clarification it is merely a restatement of the prior law in a clearer form, the law before the amendment being the same as after it[,]" citing *W.R. Grace & Co. v. California Employment Commission* (1944) 24 Cal.2d 720, 729–730].) Rather, they were rational responses to the uncertainty created by the litigation of which this case is but part.

If the OTCs' view were law — and private contracts can reduce the TOT by reassigning part of the room rent to a third party — hotels could evade the tax entirely. A hotelier might assign a cents-per-room-night charge to its mortgagor, thereby paying the

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[56] Avalon Mun. Code, § 3-3.403.

mortgage and reducing the tax burden on its guests (who bear the legal incidence of TOT). So, too, could a hotelier pay franchise licensing fees on a per-room-night basis and further reduce the TOT base. There is no principled limit to hotels' power to shirk their industry's responsibility to fund a portion of the government services from which they and their guests benefit by identifying its overhead costs as line items and removing them from the TOT base. Thus, the law looks not to private agreement — which may shift the economic burden of a tax and the duties to pay, collect, and remit it — but to the text and intent of tax laws, be they statutes or ordinances.

III. IF SAN DIEGO'S ORDINANCE DOES NOT TAX OTC SERVICE FEES, OTHER CITIES' MAY

As demonstrated above, TOT ordinances in California were intended to tax — at the very least — the room rate paid by transients. This is the thrust of San Diego's position here. (See Opening Brief, pp. 29–46; Respondents' Brief, pp. 19–32; Reply Brief, pp. 3–9.) But the fact that San Diego does not argue its ordinance taxes the OTCs' service fees does not mean, of course, that no city or county's ordinance language reaches such fees. Amici urge this Court to preserve this point for litigation in cases in which it is more plainly raised.

In San Francisco, for example, TOT is based on "consideration received for occupancy" without specifying who must receive it.[57] Fresno defines "rent" in part as "the consideration charged, whether or not received, for the occupancy of space in a hotel" again without regard to who charges or receives it.[58] In cities without "charged by the Operator" ordinance language, there is a strong argument to tax all consideration paid by guests — the room rate, additional service fees above the room rate, and all incidental services and facilities. Because interpretation of ordinances with "consideration received" or "consideration charged" language is not before the Court here, we urge the Court to adopt a disposition that leaves room for variations among the cities' ordinances that may tax service fees as well as room rent.

IV. THE *PIONEER EXPRESS* RULE CONSTRUING TAX ORDINANCES AGAINST THE TAXING AGENCY SHOULD BE OVERRULED

San Diego's tax is easily construed according to the plain meaning of its terms and resort to other canons of construction is unnecessary. Like hundreds of others in California, San Diego's ordinance imposes the TOT on guests and taxes the "total consideration charged to a Transient **as shown on the guest receipt**

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[57] S.F. Business & Tax Regulations Code, art. 7, §§ 501, subd. (f); 502.

[58] Fresno Mun. Code, § 7-602, subd. (f).

for the Occupancy of a room[.]"[59] The ordinance also requires receipts to correctly report the total tax paid.[60] Since the hotels own the rooms and thus necessarily have the right to control the terms, including the rent amounts, that must be satisfied if a privilege of occupancy is to be afforded, it follows that it is the hotels who do the "charging" even if there were no price parity agreements or agency between hotels and OTCs.

Thus, the ordinance focuses on what the guest must pay for occupancy, not on what the hotel chooses to retain. The entire retail amount an OTC posts on its website or lists on customer bills is "rent"; a tourist who purchases a hotel stay through an OTC cannot get a room key unless he or she pays the entire amount charged by the OTC — the hotel will not grant occupancy without that payment.

Were other tools of construction required, however, Amici urge this Court to resolve conflicting cases and overrule those that require construction against the taxing agency. Just as a customer knows she must pay sales tax on the retail price of an item, so too does she expect that a hotel room tax will be based on the room rate paid, not some lesser amount.

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[59] S.D. Mun. Code, § 35.0102, emphasis added.

[60] *Id.* at subd. (c).

a. **The *Pioneer Express* Holding Is Not a "Rule"; Other Canons of Construction Are More Appropriate**

The *Pioneer Express* rule should be abandoned. (See Respondents' Brief, pp. 15–16, citing *Pioneer Express Co. v. Riley* (1930) 208 Cal. 677, 687.) To start, it is no rule at all but instead a tool of statutory construction that does not outweigh others or the clear language of tax statutes and ordinances. (E.g., *Los Angeles v. Belridge Oil* (1954) 42 Cal.2d 823, 827 [*Pioneer Express* rule "does not take precedence over other fundamental rules of statutory construction"]; *Estate of Rath* (1937) 10 Cal.2d 399, 406 [tax laws "are not to be approached with a spirit of hostility and with a purpose of ignoring the intention of the legislature"]; *Estate of Giolitti* (1972) 26 Cal.App.3d 327, 331 ["deductions, exemptions or credits applicable [to taxes] are to be narrowly construed in favor of the state and against the taxpayer"]; *Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 622–623 [collecting cases and describing *Pioneer Express* rule as "by no means hard and fast"].)

As Scalia and Garner (whose work this Court recently cited in *Apple, Inc. v. Superior Court* (2013) 56 Cal.4th 128, 137) point out, the rules of statutory construction ought not to vary from context to context; as the separation of powers, institutional competencies of the branches, and the fundamental order of a democracy are overarching forces in all contexts. (Scalia & Garner, Reading Law:

The Interpretation of Legal Texts (2012) pp. 82–83 [effects of judicial interpretation of laws on democracy and separation of powers], 228–229 [applying definitional statutes], 362 ["Like any other governmental intrusion on property or personal freedom, a tax statute should be given its fair meaning, and this includes a fair interpretation of any exceptions it contains"].)

The *Pioneer Express* rule may have been justified when legislators had complete freedom to amend tax laws in light of each dispute and each court case. However, that rule is no longer persuasive given the voter-approval and super-majority requirements for any change in taxes imposed by 1978's Proposition 13, 1986's Proposition 62, 1996's Proposition 218 and 2010's Proposition 26. Proposition 13 requires two-thirds voter approval of local special taxes (Cal. Const., art. XIII A, § 4) and approval of state taxes by two-thirds of each legislative chamber (Cal. Const., art. XIII A, § 3). Proposition 62, a 1986 statutory initiative applicable to counties and general law cities, requires two-thirds voter approval of local special taxes and majority voter approval of general local taxes. (Gov. Code, §§ 53722, 53723.) It also requires general taxes to be proposed by a two-thirds vote of the local legislative body. (Gov. Code, § 53724, subd. (b).)

Proposition 218 placed most of Proposition 62's statutory rules in the Constitution. (Cal. Const., art. XIII C, § 2, subds. (b) [general taxes], (d) [special taxes].) Moreover, it requires general taxes to

appear on a general election ballot when city council and board of supervisors seats are contested – limiting such elections to every two years, "except in cases of emergency declared by a unanimous vote of the governing body." (Cal. const., art. XIII C, § 2, subd. (b).) Proposition 218 also allows taxes to be reduced or repealed by initiative, with a very low signature requirement to place a measure before voters. (Cal. Const., art. XIII C, § 3.)

Proposition 26 provides an expansive definition of "tax" to be applied by these other, procedural measures. (Cal. Const., art. XIII A, § 3, subd. (b) [state taxes]; art. XIII C, § 1, subd. (e) [local taxes].)

Taxpayers' interests in clear notice of what is to be taxed are not in issue here, as the OTCs are not taxpayers and are sophisticated market participants with ready access to able counsel. Indeed it is those very characteristics which complicate what an ordinary Californian would consider a simple issue: "I pay a tax of X percent on what I spend on a hotel room." The realities of technological change, discussed below, also require ordinances be construed with some sympathy to the challenge of the drafter who cannot account for unforeseeable technological change.

b. Efficient Tax Theory Counsels against the OTCs' Interpretation

An efficient tax is one that minimizes distortion in the marketplace, by which market participants see no difference in the

amount of tax paid depending on who is buying or selling a good or service. To minimize market distortion, optimal tax theory holds that taxes on intermediate goods ought to be zero and only final goods should be taxed. Here, OTCs serve as sales agents and thus sell to hotel customers the same "final good" as hotels, but the tax burden varies because of an agreement between the tax collector (hotels) and third parties seeking commissions for their sales (OTCs). The tax burden should be the same to minimize distortions and maintain an efficient tax. (Diamond and Mirrlees, *Optimal Taxation and Public Production I: Production Efficiency* (Mar. 1971) American Economic Review, p. 24; cf. *General Mills, Inc. v. Franchise Tax Bd.* (2012) 208 Cal.App.4th 1290, 1314 [upholding Franchise Tax Board's alternate formula for taxation of commodity future sales that "helps to deter 'creative' tax accounting that substantially distorts the standard formula's representation of a large company's business activity in California"]; *Estate of Giolitti, supra,* 26 Cal.App.3d at p. 333 ["where two interpretations of the provisions of a statute imposing taxes are urged, that one should, if possible, be adopted which lays the burden of taxation uniformly upon those who bear that burden and who stand in the same degree with relation to the tax," quoting *Estate of Steehler* (1925) 195 Cal. 386, 402].)

Hotels and taxing agencies benefit from a broad application of a tax that does not require local governments to police hotel business models or seek voter approval to amend ordinances to capture every

new economic innovation; consumers benefit from a level playing field and a tax that is based on simple arithmetic, not creative accounting. Let hotels contract with OTCs, mortgagors, and franchisors as they will without interference from a taxing regime that requires taxing agencies to constrain private choices to maintain an efficient public tax base.

V. TECHNOLOGICAL CHANGE IS INEVITABLE, BUT NEED NOT TRIGGER SUPER-MAJORITY LEGISLATIVE AND VOTER APPROVAL TO MAINTAIN GOVERNMENT FUNDING

This Court need only apply San Diego's TOT ordinance as written to tax the full room rate the OTCs collect for the privilege of occupancy. Fundamental legislative intent controls despite technological change. As this Court very recently observed:

> Drafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances they could not possibly envision.

(*Apple, Inc. v. Superior Court* (2013) 56 Cal.4th 128, 137 [quoting Scalia and Garner, Reading Law: The Interpretations of Legal Texts (2012), pp. 85–86].) Justice Marshall put it similarly three decades ago:

> Old laws apply to changed situations. The reach of an act is not sustained or opposed by the fact that it is

> sought to bring new situations under its terms. While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope.

(*Morrison-Knudsen Const. Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor* (1983) 461 U.S. 624, 638 (dis. opn. of Marshall, J.), quoting *Browder v. U.S.* (1941) 312 U.S. 335, 339–340.)

Just as the fundamental economics of the hotel industry have not changed despite the advent of the internet and OTCs, tax principles must be applied practically in light of legislative intent to maintain a constant tax base to meet constant public service and health and safety demands despite technological change.

a. That Cities Can Amend Ordinances to Meet Technological Change Is No Reason They Must

That some cities have obtained voter approval to clarify their TOT ordinances to avoid protracted litigation such as this does not mean all should be obliged to do so, given the duty of courts to apply existing law to changed conditions. That cities can, with time and effort, overcome legal obstacles is not justification to erect them. Arcadia, Santee, and South San Francisco amended their ordinances to further clarify taxation of rents paid to OTCs in conjunction with tax increases which already required voter approval under

Proposition 218. Their counsel recommended use of the occasion to eliminate potential legal uncertainty created by litigation such as this case. That is no basis to conclude voter approval must be required to protect existing tax revenues from private contracts between hotels and their online marketers.

The OTCs' contrary argument citing *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747 (*AB Cellular*) is unconvincing. This Court need only apply San Diego's TOT ordinance as written to tax all the OTCs collect for the privilege of occupancy under the ordinance's terms. *AB Cellular* did not deal with applying decades-old ordinances to changed conditions. Instead, it involved Los Angeles's effort to rescind formal instructions to cell phone carriers not to apply its cellular phone tax to the call-detail portion of bills in violation of federal law. When federal law changed to allow such taxation and Los Angeles rescinded its formal instructions, the carriers claimed a Proposition 218 violation. (*Id.* at p. 757 ["Prior to that time the carriers had, **with the consent of the City**, remitted a cell tax calculated at 10 percent of only that portion of the bill sent to its customers that constituted a fixed monthly charge," emphasis added].)

Here, San Diego never consented to hotels contracting with OTCs to limit the base of the TOT to the "wholesale" price — a term nowhere used in its ordinance. Instead the City audited the OTCs and assessed them for unpaid room tax, penalties, and interest — as

the OTCs admit. (Respondents' Brief at pp. 9–10.) Thus, there is no "increase" here as in *AB Cellular*. (*AB Cellular, supra,* 150 Cal.App.4th at p. 763 [defining "methodology" for purposes of Proposition 218 as "a mathematical equation for calculating taxes that is **officially sanctioned by a local taxing entity**," emphasis added].) Similarly, cities that have recently obtained voter approval to define "operator" to expressly include OTCs, including Los Angeles and Long Beach, did not require voter approval to do so. Those, which also raised tax rates did — including Arcadia, Santee and South San Francisco.

b. The Court Need Only Apply Existing Law to New Facts As It Commonly Does

The application of decades- or centuries-old legal texts to new technologies is not unusual. (See *Ni v. Slocum* (2011) 196 Cal.App.4th 1636, 1652 [holding "[s]tatutory interpretation must be prepared to accommodate technological innovation, if the technology is otherwise consistent with the statutory scheme" but that electronic signature of initiative petitions bypasses purpose of requiring a circulator and not permitted].) Thus the City need not rewrite its TOT ordinance to adapt to the OTCs' new business model. The cat need not obtain voter approval to continue to chase the mouse. Tax policy is not gamesmanship, awarding victory only to those with ample legal services budgets.

Just as the First Amendment prohibits a tax on newsprint (*Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue* (1983) 460 U.S. 575, 591–593), it will be easily read to prohibit a tax on equipment used by those who publish online (*Obsidian Finance Group v. Cox* (9th Cir. 2013) 740 F.3d 1284, 1291 [extending defamation protections to bloggers because "a First Amendment distinction between the institutional press and other speakers is unworkable"]). The Court of Appeal has often used canons of construction to apply existing law to a variety of internet innovations. (E.g., *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1460–1466 [phrase "newspaper, magazine, or other periodical publication" in Constitution's reporter shield applies to websites]; *People v. Franzen* (2012) 210 Cal.App.4th 1193, 1209–1213 [testimony based on online database of telephone numbers did not meet "published compilation" exception to hearsay in prosecution of alleged drug dealer]; *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854, 861 [denying juror's motion to quash subpoena for Facebook postings, applying mid-1980s federal Stored Communications Act].)

That the City's ordinance, written in the 1960s, did not contemplate the OTCs' creation of an alternate marketplace for hotel rooms is no reason not to apply the ordinance as it would be applied to all other hotel transactions.

CONCLUSION

The Court should reverse because the legislative intent of San Diego's TOT ordinance is to require the economic activity of hotel stays to fund a fair share of the cost of government services to hotels, tourists, and society generally, and a fair reading of the ordinance supports this intent. The League and CSAC respectfully urge this Court to write its opinion here mindful of the broad impact it may have on California cities and counties with ordinances similar, but not identical, to San Diego's. The League and CSAC further urge this Court to establish rules suited to a time of disruptive technological change and in which tax legislation cannot easily be amended. The Court should overrule *Pioneer Express* and establish that tax legislation is to be construed as all other, and without a thumb on the scale of justice in favor of those who dispute taxes.

For those reasons, and for the reasons set forth in the Petitioner's briefing, Amici respectfully urges this Court to reverse.

DATED: June 16, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(b) and 8.204(c), the foregoing Brief of Amicus Curiae in Support of Petitioner contains 6,875 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000-word limit set by rules 8.520(b) and 8.204(c). In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

DATED: June 16, 2015

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PROOF OF SERVICE

IN RE TRANSIENT OCCUPANCY TAX CASES
California Supreme Court Case Number S218400

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071.

On June 18, 2015, I served the within document(s):

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

☐ **BY ELECTRONIC MAIL**: By transmitting via electronic mail the document(s) listed above to those identified on the Service List attached.

☒ **BY MAIL**: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth on the Service List attached.

☐ **OVERNIGHT DELIVERY**: By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by United Postal Service for overnight delivery, caused such envelope to be delivered to the office of the addressee(s) on the Service List attached via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on June 18, 2015, at Los Angeles, California

Pamela Jaramillo

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152594.1

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IN RE TRANSIENT OCCUPANCY TAX CASES
California Supreme Court Case Number S218400

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