

No. S241471

SUPREME COURT
FILED

In the Supreme Court of California

APR 20 2018

Jorge Navarrete Clerk

Michael McClain, Avi Feigenblatt, and Gregory Fisher,

Plaintiffs, Appellants and Petitioners,

Deputy

vs.

Sav-On Drugs, et al.,

Defendants and Respondents.

After a Decision of the Court of Appeal
Second Appellate District, Division 2
Case Nos. B265011 and B265029

Affirming a Judgment of Dismissal Following
An Order Sustaining Demurrer Without Leave to Amend
Los Angeles County Superior Court, Case Nos. BC325272 and BC327216
Honorable John Shephard Wiley, Presiding

**MOTION FOR JUDICIAL NOTICE IN SUPPORT OF
APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF
AMICI LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA
STATE ASSOCIATION OF COUNTIES**

*MICHAEL G. COLANTUONO, State Bar No. 143551

MColantuono@chwlaw.us

ANDREW C. RAWCLIFFE, State Bar No. 259224

ARawcliffe@chwlaw.us

COLANTUONO, HIGHSMITH & WHATLEY, PC

420 Sierra College Drive, Suite 140

Grass Valley, California 95945-5091

Telephone: (530) 432-7357

Facsimile: (530) 432-7356

Attorneys for Amici Curiae
League of California Cities and California State Association of Counties

**To the Honorable Chief Justice and Associate Justices of the
Supreme Court of the State of California:**

Pursuant to California Rules of Court, rule 8.252, and Evidence Code sections 452 and 459, the League of California Cities (the "League") and the California State Association of Counties ("CSAC") (collectively, "Amici"), hereby move this Court to take judicial of the documents attached as Exhibits A and B to the Declaration of Michael G. Colantuono in support of their application to file an amicus curiae brief and their amicus brief in *McClain, et al. v. Sav-On, et al.*, case number S241471 ("amicus brief").

- Exhibit A is a copy of the City of San Diego's Municipal Code, chapter 6, article 01, division 25 entitled "San Diego Tourism Marketing District Procedural Ordinance" ("San Diego TMD Ordinance").
- Exhibit B is a copy of the City of Pasadena's Municipal Code, title 4, chapter 4.101, entitled "Pasadena Tourism Business Improvement District" ("Pasadena TBID Ordinance").

Amici do not take a position on the merits of the appeal. Instead, they endeavor to provide a wider policy framework for deciding the case. The materials are local revenue measures that have a similar third-party tax structure to the state sales tax at issue in this appeal. The materials are relevant to the issues presented because a broadly worded decision that either eliminates or elides


the distinction between the legal and economic incidence could affect the stability of these and similar local revenue measure.

It is unlikely that any party to this case presented these materials to the trial court. The matters to be noticed relate to proceedings that occurred both before and after the order or judgment that is the subject of the appeal. For instance, the ordinances were both originally enacted before the order or judgment in this case, but a subsequent amendment to the San Diego TMD Ordinance occurred in 2016.

This Motion is based on the attached Memorandum, which contains the information required by California Rules of Court, rule 8.252(a); a true and correct copy of the documents of which notices is sought; attached here as Exhibits A and B to the Declaration of Michael G. Colantuono; and a proposed order granting this Motion.

DATED: April 12, 2018

**COLANTUONO, HIGHSMITH &
WHATLEY, PC**



MICHAEL G. COLANTUONO
ANDREW C. RAWCLIFFE
Attorneys for Amici Curiae
League of California Cities and
California State Association of
Counties

MEMORANDUM

I. GENERAL PRINCIPLES OF JUDICIAL NOTICE

“Judicial notice is the recognition and acceptance by the court, for use ... by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Lockley v. Law Office of Cantrell, et al.* (2001) 91 Cal.App.4th 875, 882.) “The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is **not reasonably subject to dispute.**” (*Ibid.*, original emphasis; see Evid. Code, § 452, subd. (h).)

A court reviewing an appeal may take judicial notice of any materials that are:

(1) specified in Evidence Code section 452, and

(2) relevant to the dispositive questions before the court.

(Evid. Code, § 459; *Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 266, fn. 13 [only relevant material may be noticed].) The materials specified in Evidence Code section 452 include “legislative enactments issued by or under the authority of ... any public entity in the United States” and “official acts of the legislative ... department[] ... of any state of the United States,” as well as items “that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code, § 452, subds. (b), (c) & (h).)

II. THE MATERIALS ARE NOTICEABLE AND RELEVANT

The exhibits are judicially noticeable as legislative enactments and regulations. (Cal. Rules of Court, rule 8.252(a)(2)(C); Evid. Code, § 452, subd. (b); *City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1077, fn. 5 [noticing city code sections as “legislative enactments of a municipality”].) Moreover, these exhibits are not reasonably subject to dispute, and are therefore capable of immediate determination of accuracy. (Evid. Code, § 452, subd. (h).) Indeed, both exhibits are immediately available on the Cities’ websites.¹

The exhibits to this Motion are relevant because they assist in providing the Court with a broader policy context for deciding the case. The exhibits are local revenue measures that have a similar third-party tax structure to the state sales tax at issue in this appeal. These and other local revenue measures should be considered in

¹ Exhibit A is available on the City of San Diego’s website under the Office of the City Clerk: <<https://www.sandiego.gov/city-clerk/officialdocs/legisdocs/muni>> and also available at <<https://tinyurl.com/y8nryj6f>> (as of April 6, 2018). Exhibit B is available on the City of Pasadena’s website under the Office of the City Clerk: <<http://www.cityofpasadena.net/CityClerk/MunicipalCode/>> and also available at <<https://tinyurl.com/y8nryj6f>> (as of April 6, 2018).

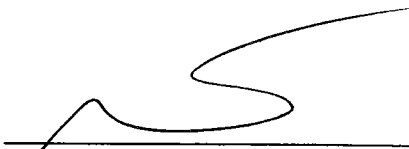
deciding the case because a broadly worded decision that either eliminates or elides the distinction between the legal and economic incidence of revenue measures could affect the financial integrity of local governments. (See *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1252 [consideration given to consequences that will flow from Court's interpretation, quotation omitted].)

III. CONCLUSION

For the foregoing reasons, the Amici respectfully request the Court take judicial notice of Exhibit A and B, listed above and attached to the Declaration of Michael G. Colantuono.

DATED: April 12, 2018

**COLANTUONO, HIGHSMITH &
WHATLEY, PC**



MICHAEL G. COLANTUONO
ANDREW C. RAWCLIFFE
Attorneys for Amici Curiae
League of California Cities and
California State Association of
Counties

**DECLARATION OF
MICHAEL G. COLANTUONO**

(Cal. Rules of Court, rule 8.54(a)(2))

I, MICHAEL G. COLANTUONO, declare as follows:

1. I am an attorney licensed to practice law in the State of California and before this Court. I am a Shareholder in the law firm of Colantuono, Highsmith & Whatley, PC, attorneys of record for Amici League of California Cities and California State Association of Counties. I have personal knowledge of the matters set forth herein and if called upon as a witness, I could competently testify thereto.

2. Attached as **Exhibit A** is a true and correct copy of the City of San Diego's Municipal Code, chapter 6, article 01, division 25 entitled "San Diego Tourism Marketing District Procedural Ordinance," last amended on June 29, 2016. I obtained this copy from the City of San Diego's website at <<https://www.sandiego.gov/city-clerk/officialdocs/legisdocs/muni>>, also available at <<https://tinyurl.com/y8nryj6f>> (last accessed on April 6, 2018) on April 6, 2018.

3. Attached as **Exhibit B** is a true and correct copy of the City of Pasadena's Municipal Code, title 4, chapter 4.101, entitled "Pasadena Tourism Business Improvement District," last amended in 2003. I obtained this copy from the City of Pasadena's website at <<http://www.cityofpasadena.net/CityClerk/MunicipalCode/>>, also

available at <<https://tinyurl.com/y8nryj6f>> (last accessed on April 6, 2018) on April 6, 2018.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 12, 2018 at Grass Valley, California.



MICHAEL G. COLANTUONO

[Proposed]
ORDER TAKING JUDICIAL NOTICE

Good cause appearing, IT IS HEREBY ORDERED that Amici League of California Cities' and California State Association of Counties' Motion for Judicial Notice in support of their application to file an amicus curiae brief and their amicus curiae brief is granted. IT IS ORDERED that this Court shall take judicial notice of the following:

A. City of San Diego's Municipal Code, chapter 6, article 01, division 25 entitled "San Diego Tourism Marketing District Procedural Ordinance," last amended on June 29, 2016.

B. City of Pasadena's Municipal Code, title 4, chapter 4.101, entitled "Pasadena Tourism Business Improvement District," last amended in 2003.

DATED: _____

By: _____

Chief Justice of the California
Supreme Court

PROOF OF SERVICE

*Michael McClain, Avi Feigenblatt, and
Gregory Fisher, v. Sav-On Drugs, et al.,
California Supreme Court Case No. S241471*

I, Ashley A. Lloyd, declare:

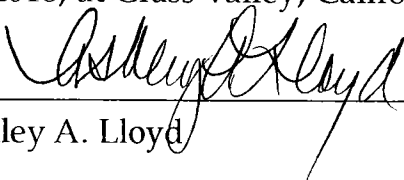
I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. On April 12, 2018, I served the document(s) described as **MOTION FOR JUDICIAL NOTICE IN SUPPORT OF APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES** on the interested parties in this action addressed as follows:

SEE ATTACHED LIST

 ✓ BY MAIL: By placing a true copy thereof enclosed in a sealed envelope. The envelope was mailed with postage thereon fully prepaid. 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 at Grass Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 12, 2018, at Grass Valley, California.



Ashley A. Lloyd

SERVICE LIST

*Michael McClain, Avi Feigenblatt, and
Gregory Fisher, v. Sav-On Drugs, et al.,
California Supreme Court Case No. S241471*

Thomas Alistair Segal Taras Peter Kick Robert James Dart Gerald James Strenio The Kick Law Firm, APC 201 Wilshire Blvd., Suite 350 Santa Monica, CA 90401	<i>Attorneys for Plaintiffs and Appellants, Michael McClain, Avi Feigenblatt, and Gregory Fisher</i>
Bruce Russell MacLeod Shawna Lee Ballard McKool Smith Hennigan, PC 255 Shoreline Drive, Suite 510 Redwood Shores, CA 94065	<i>Attorneys for Plaintiffs and Appellants, Michael McClain, Avi Feigenblatt, and Gregory Fisher</i>
Steven J. Bernheim The Bernheim Law Firm 6220 W. 3 rd Street, Apt. 423 Los Angeles, CA 90036-3173	<i>Attorneys for Plaintiffs and Appellants, Michael McClain, Avi Feigenblatt, and Gregory Fisher</i>
Nhan Thien Vu Office of the Attorney General 300 S. Spring Street, #1702 Los Angeles, CA 90013-1230	<i>Office of the Attorney General</i>
Philip Jon Eskenazi Kirk Austin Hornbeck, Jr. Hunton & Williams LLP 550 S. Hope Street, Suite 2000 Los Angeles, CA 90071	<i>Attorneys for Defendants and Respondents Sav-On Drugs, and Albertson's, Inc.</i>

<p>Robert Paul Berry Carol Michelle Silberberg Berry & Silberberg, LLC 16150 Main Circle Dr., Ste. 120 St. Louis, MO 63017</p>	<p><i>Attorneys for Defendant and Respondent, Wal-Mart Stores, Inc.</i></p>
<p>David F. McDowell Miriam A. Vogel Morrison & Foerster, LLP 707 Wilshire Blvd., Suite 6000 Los Angeles, CA 90017-3543</p>	<p><i>Attorneys for Defendant and Respondent, Target Corporation</i></p>
<p>Joseph Duffy Joseph Henry Bias Morgan Lewis & Bockius, LLP 300 S. Grand Ave., 22nd Floor Los Angeles, CA 90071-3132</p>	<p><i>Attorneys for Defendants and Respondents, Rite Aid Corporation, and Walgreen Co.</i></p>
<p>James C. Martin Douglas C. Rawles Kasey James Curtis Reed Smith LLP 355 S. Grand Ave., Suite 2900 Los Angeles, CA 90071</p>	<p><i>Attorneys for Defendants and Respondents, Rite Aid Corporation, and Walgreen Co.</i></p>
<p>Shelley Gershon Hurwitz Richard Thomas Williams Holland & Knight LLP 400 S. Hope Street, 8th Floor Los Angeles, CA 90071</p>	<p><i>Attorneys for Defendants and Respondents, CVS Caremark Corp., Longs Drug Stores Corp., Longs Drug Store California Inc.</i></p>
<p>Theodore Keith Bell Safeway Inc. 5918 Stoneridge Mall Road Pleasanton, CA 94588-3229</p>	<p><i>Attorneys for Defendants and Respondents, Safeway, Inc., The Vons Companies, and Vons Food Services, Inc.</i></p>

Daniel Berko Law Office of Daniel Berko 819 Eddy Street San Francisco, CA 94109-7701	<i>Attorneys for Pub/Depublication Requestor</i>
Mark A. Chavez Chavez & Gertler, LLP 42 Miller Avenue Mill Valley, CA 94941-1904	<i>Attorneys for Public Citizens, Inc., Amicus Curiae</i>