No. 23-3694

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF HUNTINGTON BEACH, et al.,
Plaintiffs and Appellants,

v.

GAVIN NEWSOM, et al.,
Defendants and Appellees,

On Appeal from the United States District Court for the
Central District of California
Case No. 8:23-CV-00421-FWS-ADSx
Honorable Fred W. Slaughter

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs and Appellants City of Huntington Beach, *Huntington Beach City Council, Mayor of Huntington Beach, Tony Strickland, and Mayor Pro Tempore of Huntington Beach, Gracey Van Der Mark* state that no parent corporation or publicly held corporation exists that owns 10% or more of any of their stock.

January 11, 2024 MICHAEL E. GATES, CITY ATTORNEY

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INTRODUCTION

This case presents an issue of first impression. While it is plain that citizens of the United States may petition federal courts for redress when the State violates their constitutional rights, the district court here held that, when those same citizens are organized as a Charter City authorized by the California Constitution, they lose standing. This Court has never addressed that issue.

Appellants and plaintiffs are the Charter City of Huntington Beach, its City Council, and its Mayor and Mayor Pro Tempore in their individual capacities. The City is also a Municipal Corporation. As explained later, the City's status, as both a Charter City and a Municipal Corporation, is essential to the issue of standing.

In their lawsuit, Plaintiffs challenge a novel State-compelled speech regime that is part of the State's high-density housing statutory scheme in its Regional Housing Needs Allocation laws, called "RHNA Laws" in Plaintiffs' lawsuit. The RHNA Laws require the City, with a protected coastline of unique wetlands, to increase its 81,000 units of housing stock by approximately 50%—or 40,000 new units—

in just the next few years as a direct result of the State-mandated 13,368 quota of new high-density housing units.[1]

Addressing the environmental impacts of the State's quota, at a Council Meeting on April 4, 2023, Plaintiffs considered the advice from an official environmental report (EIR) prepared by outside experts, including a discrete "Statement of Overriding Considerations" concerning the "significant and unavoidable impacts" to the City's "Air Quality," "Greenhouse Gas Emissions," "Hydrology and Water Quality," "Noise," and "Utilities and Service Systems." (3-ER-346—49.)

Exercising their discretion as democratically-accountable elected officials, Plaintiffs concluded they could not support that the State mandate of 13,368 new units of high-density development justified the significant environmental harms they presented to the City. But their sincere and expert-backed conclusion that the mandate was *not* justified meant Plaintiffs could not make the State-law-required public statement that it was—and that public Statement of Overriding Considerations is a necessary precondition to adopting a RHNA Laws compliant housing

[1] For context, the 13,368 units (developed at a 20% inclusionary rate, as the State expects), would result in approximately 40,000 new units of new high-density housing in the City in just the next few years. This is a massive 50% increase in the City's current housing inventory of approximately 81,000 existing units of housing.

element.[2] The Statement of Overriding Considerations found in the record at 3-ER-346—49[3] is hereinafter referred to as "Statement." Simply put, Plaintiffs could not truthfully make that required Statement.

The State's requirement that the Plaintiffs make that public Statement is the heart of Plaintiffs' First Amendment claim.

Any State action that purports to *mandate* a Charter City—constitutionally authorized over Municipal Affairs independent of the State—to increase its housing stock by 50% in just the next few years, would be objectionable enough. But here, the State's RHNA Laws compel Plaintiffs to *publicly declare*, by way of the written Statement, that the State-mandated high-density housing development is more important than the City's air quality, water supply, and greenhouse emissions. Plaintiffs disagree that these environmental concerns, fundamental to a well-functioning City, are less important than the State's high-density

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[2] When a proposed project or zoning change—such as a housing element—negatively impacts the environment, as the State's 13,368 units quota does here, a "Statement of Overriding Considerations" must be prepared and adopted to justify the proposed project or zoning change over environmental concerns. (See Cal. Code Regs., tit. 14, § 15093)

[3] The record contains duplicate copies of the Statement of Overriding Considerations, proposed City Resolution 2023-15, and Environmental Impact Report. For ease of reference, Appellants will refer to these documents as they appear in 3-ER-317—49.

housing quota. So long as Plaintiffs persist in their sincere and expert-backed opinion and refuse to make the State-mandated public Statement, the State has subjected Plaintiffs to, as the State alleges, severe penalties. To that end, the State has filed a separate suit against Plaintiffs. (3-ER-528—44.)

Separate from the State-compelled speech, Council Members of a Charter City and Municipal Corporation should not be expected to breach their fiduciary duties by sacrificing the City's precious environment for the sake of achieving the State's high-density housing development goals. The City's protected wetlands, coastline, and other unique environmental features are among the Municipal Affairs that the state constitution authorizes the Charter City, and its City Council, to defend—independent of the State.

Plaintiffs appeal the district court's ruling granting Defendants' motions to dismiss. The district court concluded, incorrectly, that Plaintiffs' First Amendment and other challenges were nothing more than "'private constitutional predilections.'" (1-ER-11.) The district court concluded that none of the four Plaintiffs had standing to seek any constitutional protections. Ruling without a hearing, the district court dismissed each of the four Plaintiffs' eleven causes of action, without leave to amend.

The sole basis for the district court's ruling on standing is that a Charter City is a ""political subdivision" of the state," and thus cannot sue the State. (1-ER-11—13.) For this conclusion, the district court relied on *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231 (9th Cir. 1980).

The district court's understanding and application of *South Lake Tahoe* to this case was wrong. As this Court later explained in *City of San Juan Capistrano v. Cal. Pub. Utils. Comm'n*, 937 F.3d 1278, 1280 (9th Cir. 2019), the holding of *South Lake Tahoe*—applied to a *general law* city and not a Charter City as here—was based on the observation that general-law cities are "'creature[s]' and states [are] their 'creators,'" and creatures may not sue their creators in federal court.

That analysis does not apply at all to a Charter City like Huntington Beach because Charter Cities "are distinct individual entities and are not connected political subdivisions of the state." *Haytasingh v. City of San Diego*, 66 Cal.App.5th 429, 459 (2021). "It is the free consent of the persons composing them that brings into existence municipal corporations." *Id.* For this reason, then, Charter Cities, far from being creatures of the State, enjoy constitutionally recognized autonomy (Cal. Const., art. XI) and municipal authority over certain areas of governance

that is "'supreme and beyond the reach of legislative enactment.'" *City of Redondo Beach v. Padilla*, 46 Cal.App.5th. 902, 910 (2020), relying on Cal. Const., art. XI.

The district court's ruling is wrong. Charter Cities are not "political subdivisions" of the State. And individuals may not be denied standing to resist compelled speech—or to vindicate their other constitutional rights—regardless of whether they are affiliated with a "political subdivision."

STATEMENT OF JURISDICTION

Plaintiffs brought this action pursuant to the First Amendment, the Fourteenth Amendment, and the Commerce Clause enumerated in the Federal Constitution, and also brought deeply intertwined State claims under Article XI of the California Constitution; California Government Codes, California Constitution's separation of powers and bill of attainder, the California Environmental Quality Act, Public Resources Code §§ 21000 *et seq.*, Article IV, Section 16 of the California Constitution, and fraud.

A Minute Order was entered on November 13, 2023, in favor of Defendants on their Motion to Dismiss all claims. Plaintiffs timely filed their Notice of Appeal on November 15, 2023. Therefore, this Court of Appeal has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Do California Charter Cities, their City Councils, their Mayors, and their Mayors Pro Tempore have standing in federal court to bring violations of their federal rights, including First Amendment, Fourteenth Amendment, and violations of the Commerce Clause, against the State of California?

STATEMENT OF FACTS

A. In 2018, the State applied its high-density housing regime, the "RHNA Laws," to Charter Cities.

For decades, California law has maintained a statutory scheme that creates high-density housing quotas. Cal. Gov. Code §§ 65000 *et seq*. (4-ER-623.) This statutory regime is known as the "RHNA Laws." Until relatively recently, the RHNA Laws applied only to general-law cities, not Charter Cities.

In 2018, however, the State passed SB 1333, which purported to extend the RHNA Laws' high-density housing mandates to Charter Cities. Plaintiffs have maintained that SB 1333 violates the California Constitution by depriving Charter Cities of their historical local, "Home Rule" authority to conduct municipal affairs, over zoning and land use, and by punishing the City of Huntington Beach for non-compliance with State housing mandates, merely because

the City protects its environment by following environmental laws. (4-ER-624; 4-ER-640.)

While the City always follows clear laws, it objects to the *peculiar*, unconstitutional mechanics of the RHNA Laws. These laws attempt to commandeer the local legislative power and authority of City Councils to *compel local legislatures to take additional local legislative action* to implement the State's high-density housing goals. (4-ER-670—71.) In other words, the State, through its RHNA Laws, commands and controls City Councils to fulfill State-mandated, very particular, pre-determined legislative outcomes, which in this case, requires State-compelled speech components related to local legislative activity.

B. After threatening the City with punitive enforcement of the RHNA Laws, Defendants issued a flawed and onerous housing quota.

At a 2019 Press Conference, Governor Gavin Newsom proclaimed that as part of his new housing effort, he sought to punish cities like Huntington Beach, stating the "the State's vision [for housing] will be realized at the local level," and suggesting that one should "ask the folks down in Huntington Beach." (4-ER-631.) This comment suggests that Governor Newsom intended to punish the City for not conforming to his housing policy. (*Id.*)

In 2020, the Department of Housing the Community Development (HCD) assigned to the City's governing regional body, defendant Southern California Association of Governments (SCAG), high-density RHNA units totaling over 1.34 million. (4-ER-644.) Under State law, regional boards, like SCAG, are duty-bound to follow HCD in the fulfillment of the State's goals. As such, SCAG is viewed as an extension of HCD.

From this regional high-density housing quota, SCAG allotted a 13,368 unit quota to the City. (4-ER-628.) As the State's Independent Auditor later determined, in imposing this quota, HCD "could not demonstrate that it adequately considered all of the factors that state law requires..." (4-ER-629; 4-ER-646.) And in October 2021, the California State Joint Legislative Audit Committee approved an emergency audit to examine HCD's RHNA methodology and quotas determination process. (4-ER-646.)

In other words, due to their failure to follow the RHNA Laws, the State Defendants improperly imposed more than twice as much high-density development as the laws require. (4-ER-644.) Plaintiffs further contend this quota of 13,368 was the result of a purely political last-minute move at a SCAG meeting to "dump" thousands more housing units into the City than the RHNA Laws' methodology would prescribe. (4-ER-674.)

Based on the flawed quota, in 2021 HCD and SCAG decided that the City would have to rezone to provide for a massive allocation of 13,368 units of high-density RHNA housing. (4-ER-628.) At a 20% inclusionary rate of development that HCD expects, this quota would produce a sudden massive 50% increase to the City's current 81,000 dwelling units. (*See* 4-ER-628—29.) It does not take more than common sense for one to see that such a dramatic increase in development would have a substantial negative impact on the City's environment.

Notably, the State mandate of 13,368 units of high-density development is "pre-determined" by State Defendants (4-ER-628) – decided before it ever comes to City Council for approval – and as "pre-determined," it deprives the City of its normal legislative process under the Brown Act. Under that Act, local legislative bodies may not take any action on policy or land use until *after* the matter has been properly agendized, so the public is notified, and the public has an opportunity to attend the City Council meeting and provide public comments. This is to ensure that the public is afforded an opportunity to participate in the legislative process at the local level before any decision affecting the public is ever made by a City Council. Not so here.

C. After Defendants issue more threats, Plaintiffs file this lawsuit, and the State files its own state court action.

At its December 20, 2022 meeting, the City Council directed the City Attorney to explore a potential legal challenge to the State's RHNA mandate of 13,368 units for the City, HCD's flawed and misguided actions in furthering the mandates, various constitutional violations, and the RHNA Laws themselves. (3-ER-538; 4-ER-621—84.)

On February 15, 2023, the Office of the Governor of California continued publicly threatening the City. (4-ER-631.) Taking to social media, the Governor's Office tweeted that "Huntington Beach is playing chicken with housing. The state will hold them accountable. California law lets judges appoint a state agent to do their housing planning for them – HB can do it themselves or the court will take control." (*Id.*)

On March 8, 2023, the State sued the City and City Council. (*See* 3-ER-411; 3-ER-480—98.)

On March 9, 2023, Plaintiffs filed their initial Complaint (4-ER-685—743), and on March 23, 2023, filed their first amended Complaint. (4-ER-621—84.)

D. Plaintiffs refuse to make the required Statement of Overriding Considerations.

At the April 4, 2023 meeting, the City Council considered the proposed Resolution 2023-15, which included a staff-proposed housing element consistent with the State's high-density housing quota of 13,368 new units of development. (*See* 3-ER-317—20; 3-ER-541.) The proposed Resolution also included the environmental impact report (EIR) prepared by Plaintiffs' outside expert. (*See* 3-ER-321—45). Some of the EIR findings are reflected in the Statement of Overriding Considerations. (3-ER-346—49.)

That Statement of Overriding Considerations (3-ER-346—49), again, referred as the "Statement," is at the core of this Appeal. The Statement concludes that in reality, the State-mandated quota of 13,368 new units of high-density housing development in the City would impose the following "significant and unavoidable impacts" on the City's environment:

- Air-quality impacts from "construction and operational emissions" (3-ER-346);
- Increase in greenhouse gas emissions that "could conflict with applicable plans for reducing [such] emissions" (3-ER-346—47);
- Water-quality and supply impacts by "decreas[ing] groundwater supplies," in turn impacting "sustainable management of the Basin," as well as strain on the City's currently impacted water supply (3-ER-347); and

- Noise impacts from "construction-related noise and vibration," and increased traffic and ambient noise levels. (3-ER-347.)

In order to move forward with implementation of the State's high-density mandate of 13,368 units for the City, which the Statement of Overriding Considerations refers to as the "Project," the City Council Members must expressly ignore or simply accept "significant and unavoidable impacts" to "Air Quality," "Greenhouse Gas Emissions," "Hydrology and Water Quality," "Noise," and "Utilities and Service Systems" of the proposed Project. (3-ER-346–49.) Council Members are required by the State Defendants like HCD, the Governor, and the RHNA Laws to adopt this Statement, which lays out known, detailed adverse harms to the City's environment, thereby knowingly sacrificing the City's precious environment in favor of the State's 13,368 unit high-density development scheme.

Apparently, the State expects City Council Members to sign on to the Statement that *expressly agrees to harm* the City's Air Quality, i.e., "significant and unavoidable impacts concerning construction-related and operational emissions. In addition, sites over two acres could expose sensitive receptors to significant impacts by exceeding construction LST thresholds. The... daily construction and operational emissions associated... are considered cumulatively significant and unavoidable." (*Id.*)

Shockingly, City Council Members are expected to *expressly agree to* a known "*substantial decrease*" to the City's ground water supply! According to the environmental expert's "Hydrology and Water Quality" analysis, the zoning change for the 13,368 units of high-density housing would "substantially decrease groundwater supplies resulting in a significant and unavoidable impact concerning sustainable management of the Basin... impact concerning groundwater supplies would be cumulatively considerable and a significant and unavoidable impact would occur." (3-ER-347.) And, under the "Utilities and Service Systems" analysis, the Council Members are apparently supposed to simply accept that "until the water supply situation improves, the water demands from future development pursuant to the HEU would result in a significant and unavoidable impact concerning water supplies... the Project's impacts concerning water supplies to serve future development would be cumulatively considerable." (*Id.*)

City Council Members are also expected to endorse the Statement that *expressly agrees to* damage to the City's environment by the anticipated increase in "Greenhouse Gas Emissions" as a result of the Project (again, the proposed zoning change to accommodate the State-mandated 13,368 units of high-density housing). The Statement states "Despite the recommendation of Greenhouse Gas Reduction program GHG reduction strategies, the Project would

generate GHG emissions that may have a significant impact on the environment and could conflict with applicable plans for reducing GHG emissions." (3-ER-346—47.) In a social and political environment that seeks to be *more* environmentally conscious, to the extent society is actively looking for ways to transition abruptly away from fossil fuels, the State's expectation that the City accept this known environmental harm is particularly hypocritical and offensive.

Lastly, but not finally, the State expects the City Council Members to *expressly agree to* a complete disruption to the City's quiet enjoyment of its current environment. Accordingly, under the environmental expert's "Noise" analysis, "the Project would result in significant and unavoidable impacts concerning construction-related noise and vibration levels and operational noise level associated with traffic... [and] permanent increase of ambient noise levels would be cumulatively considerable." (3-ER-347.)

Notably, based on these harmful impacts, the environmental expert recommended that *rejecting* the State's high-density development quota of 13,368 new units is "the environmentally superior alternative." (3-ER-347.)

To adopt the State's quota of 13,368 new units, then, Plaintiffs would be required to adopt a list of "overriding considerations" based on the *supposed* benefits of adopting

the quota. (3-ER-347—49.) Those considerations include creating "a wide range of housing types"; "increas[ing] the supply of affordable housing"; "provid[ing] a comprehensive system of support and... expand[ing] housing options aimed to prevent and end homelessness"; "reduc[ing] constraints to the development of housing"; "address[ing] planning and monitoring goals for long-term affordability"; "facilitat[ing] the development of an accessible housing supply for all persons without discrimination"; and other general goals like revitalization and transportation. (*Id.*)

Knowing the City well, Plaintiffs disagree with these "overriding considerations." (3-ER-312—16; 3-ER-353—55.) The adoption of this Statement would necessarily include the other part, i.e., that those considerations "outweigh the significant and unavoidable impacts" to the City's environment. (3-ER-347.)

The City Council concluded at the April 4, 2023 meeting that the State's high-density housing mandate of 13,368 units that caused specific "significant and unavoidable" environmental harms—*could not be supported by a genuine, lawful* Statement. (3-ER-316; 3-ER-355.) And because the excessive State mandate of 13,368 units prevented a *truthful and lawful* Statement, the City was not permitted under the RHNA Laws to move forward on April

4th to adopt a compliant housing element for the sixth cycle. (3-ER-541.)

STATEMENT OF THE CASE

A. Plaintiffs' Complaint

Plaintiffs filed the initial Complaint on March 9, 2023, and a first amended Complaint on March 23, 2023. Plaintiffs allege violations of the First Amendment, the Fourteenth Amendment, and the Commerce Clause under the United States Constitution. (4-ER-652—63.) Plaintiffs also assert state claims for violating Article XI of the California Constitution (4-ER-663—67); violations of California Government Code §§ 65583 *et seq.*, relating to the housing-element process (4-ER-667—70); violations of separation of powers and bill of attainder under the California Constitution (4-ER-670—76); violations of the California Environmental Quality Act (4-ER-676—77); violations of Article IV, Section 16 of the California Constitution relating to the State's creation of various "Special Statutes" (4-ER-677—78); and fraud (4-ER-678—80).

Supporting their First Amendment claims, Plaintiffs allege that the housing-allocation statutes—RHNA Laws—amount to a State-compelled local legislating regime and a State compelled-speech regime because they do not have the freedom either (a) to speak truthfully when making the Statement to approve the City's housing element; or (b) to

choose how they vote on these high-density housing mandates. (4-ER-626.) The RHNA Laws would require Plaintiffs to vote against their own knowledge and good judgment—against their expert-backed discretion, against their duties of environmental stewardship attending, against their own thoughts and own voice—and in favor of the State's high-density housing mandates. The State compels Plaintiffs to publicly declare that the City and the State needs more high-density housing, and that the benefits of high-density development in the City outweigh the development's negative impacts on the environment. (4-ER-627—28.)

According to the State Defendants like HCD, the Governor, and the RHNA Laws, voting "no" on the State-mandated high-density housing development for the City is not an option available to the Council Members. Also, refusing to adopt the Statement—falsely stating that "the benefit of the proposed high-density housing outweighs the [known significant and unavoidable] impacts to the City's environment"—is not an option according to the State Defendants like HCD, the Governor, and the State's RHNA Laws mandating high-density housing development.

Supporting their equal-protection claims, Plaintiffs allege that the State's housing-need calculations for the City are disproportionate with other cities. (4-ER-630.)

Defendant Newsom has publicly stated that "the State's vision [for housing] will be realized at the local level" and "ask the folks down in Huntington Beach." (4-ER-631.) Yet, other cities are either exempted from the standards imposed on Huntington Beach, or they receive special treatment to not have to follow the RHNA Laws requirements in the same way the State is demanding of Huntington Beach. (4-ER-632—34.) In fact, the State Legislature and HCD have *reduced* the housing-unit requirements for dozens of other cities. (4-ER-647.)

Plaintiffs also claim that the State Defendants, and the RHNA Laws, violate the Commerce Clause by providing for the State to enter, and interfere with, the free market of housing and its development. First, the State actively manipulates the demand for housing by incentivizing and rewarding individuals from out of state to migrate to California, thereby causing a need of the arrivals for shelter. Then, the State actively interferes in the housing market by imposing ever-increasing cost burdens on development by way of onerous regulations on the one hand, then mandates cities to increase zoning specifications for high-density development in order to, as the State proudly says, impact the pricing in the housing market on the other. (4-ER-662—63.) The direct effect of such manipulation in the building market too is the substantial impact on the intrastate market of building materials.

B. Defendants' Motions to Dismiss

On May 1, 2023, Defendants SCAG and State Defendants each moved to dismiss on all claims. (3-ER-548—82; 4-ER-584—620.) The principal argument in both motions is that a City, and its Council and Council Members, are mere creatures of the State, and creatures may not sue their creators. This is clear error of law.

As relevant to this Appeal, the State argued that a city "has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." (3-ER-567.) The State argued that cities lack standing to sue states in federal court for constitutional violations. (3-ER-560.)

SCAG likewise argued that "political subdivisions of a state are categorically precluded from challenging state laws on federal constitutional grounds." (4-ER-596.) And "city officials' interests are deemed the same as, or derivative of, the interests of the city for which they serve." (4-ER-601.) SCAG was wrong.

Notably, however, Defendants did not argue that any Plaintiff status as a city or city official deprived them of standing to challenge compelled speech. Instead, Defendants never seriously addressed Plaintiffs' compelled-speech claims. (*See* 3-ER-572—74; 4-ER-601—02.)

C. Plaintiffs' Opposition

Plaintiffs filed an Opposition (3-ER-390—429) supported by Declarations of Mayor Tony Strickland (3-ER-351—89) and Mayor Pro Tem Gracey Van Der Mark (3-ER-311—50) and a Request for Judicial Notice on June 6, 2023. (2-ER-76—309.)

Plaintiffs argued that the City has standing because it is a Charter City and thus is neither a general-law city nor one "created by State law," and as such, is not a political subdivision of the State. (3-ER-404—05.)

Establishing the claims of compelled speech, the individual Plaintiffs submitted declarations explaining that the RHNA Laws and the State Defendants required the City Council to adopt an untruthful "Statement of Overriding Considerations," stating that each Council Member "believe[s] the benefits of the high-density housing projects override the negative impact they cause to the environment." (3-ER-315—16; 3-ER-353—55.) Council Member Plaintiffs, including the Mayor and Mayor Pro Tempore, declared that they "could not say that, or accept that statement." (3-ER-316; 3-ER-354—55.)

The State did not dispute that the Plaintiffs are required to make a "Statement of Overriding Considerations" (under Title 14, Cal. Code of Regs. § 15093 and Cal. Pub. Res. Code § 21081(b)) to satisfy the

requirements of the RHNA Laws and approve the zoning change to support the State's high-density housing mandate of 13,368 new units despite its unmitigated environmental impacts. (2-ER-44.)

D. The District Court's Order Granting the Motions to Dismiss

The district court, ruling without a hearing, granted the motions to dismiss all claims, without leave to amend. The district court also denied the City's request for judicial notice. (1-ER-16.) The district court erroneously ruled that Ninth Circuit precedent precluded standing as to all Plaintiffs. This was clear error.

Specifically, as to the City, the district court ruled that (1) *South Lake Tahoe*, 625 F.2d 231 barred standing to political subdivisions suing the State; (2) the City, even though it is a Charter City, is a political subdivision of the State; and (3) therefore, the City lacked standing.

When the district court relied on *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998), it missed this Court's reliance in *Burbank* on California law to see whether a city was a political subdivision. But while subsequent California appellate courts hold that Charter Cities are *not* political subdivisions of the State, the district court here ignored Plaintiffs' alert to those state cases and dismissed the

authorities altogether. Indeed, the district court decided, without full explanation, that the on-point state court cases did not apply to the case at bar and did not follow their holdings, like the one in *Haytasingh*, 66 Cal.App.5th at 429.

Turning to the other Plaintiffs, the district court ruled that, again under *South Lake Tahoe*, Mayor Strickland, Mayor Pro Tempore Van Der Mark, and the City Council all lacked standing. The district court reasoned that the individuals' constitutional challenges, including challenges to State-compelled speech, merely "seek to redress 'private constitutional predilections.'" (1-ER-11.) As discussed below, this could not be more incorrect.

Ultimately, the district court entered the order dismissing Plaintiffs' entire case on November 13, 2023. Plaintiffs then timely filed their Notice of Appeal on November 15, 2023. (4-ER-744—61.)

SUMMARY OF ARGUMENT

The district court erred when it dismissed the Plaintiffs' entire case, which included eleven causes of action, many of which involved important questions of federal law. Fidelity to the State's RHNA Laws compels speech by leveraging an existing State environmental statute, Cal. Code Regs., tit. 14, § 15093, which requires Council Members authorizing any zoning change or proposed development project that may even slightly impact the

environment—including the instant high-density housing zoning changes—to conduct an environmental review and if there are known negative impacts to the environment as a result of that review, then to issue a written statement, a "Statement of Overriding Considerations." Again, the Statement of Overriding Considerations is referred to herein as the "Statement."

Here, making that Statement would require Plaintiffs to publicly praise the State-mandated 13,368 units of high-density housing development in the City, while publicly disregarding any concern for the known "significant and unavoidable" negative impacts to the environment. Unless and until Plaintiffs make the State's content-specific public Statement, the City cannot comply with the State's high-density RHNA Laws thereby subjecting Plaintiffs, according to the State, to severe penalties. The State has already begun penalizing Plaintiffs, having sued them in a separate lawsuit in State court.

The district court dismissed all Plaintiffs' eleven claims, citing *South Lake Tahoe*, 625 F.2d 231 and its near-half-century-old per se standing bar. This was error. *South Lake Tahoe* applies only to general-law cities as "political subdivisions" of the State. The City of Huntington Beach, in contrast, is a Charter City and a Municipal Corporation. As this Court has noted, *South Lake Tahoe* cited authorities

reasoning that general-law cities are "'creature[s]' and states [are] their 'creators,'" and creatures may not sue their creators in federal court. *City of San Juan Capistrano v. Cal. Pub. Utils. Comm'n*, 937 F.3d at 1280 (citing *South Lake Tahoe*, 625 F.2d at 233-34, and cited authorities).

That observation by this Court in *San Juan Capistrano* is dispositive of this case. The holding of *South Lake Tahoe* is limited to "creatures" of the State. But Charter Cities, as the California Court of Appeal observed in both *Haytasingh*, 66 Cal.App.5th at 459 and *City of Redondo Beach v. Padilla*, 46 Cal.App.5th at 910, are not creatures of the State—they are creatures of the state constitution, formed by the authority of the people. Cal. Const., art. XI. "[Charter] cities, therefore, are distinct individual entities, and are not connected political subdivisions of the state. As a matter of fact, municipalities, and particularly charter cities, are in a sense independent political organizations and do not pretend to exercise any functions of the state. They exist in the main for the purposes of local government." *Haytasingh*, 66 Cal.App.5th at 459. Concluding that Charter Cities are mere "political subdivisions" of the State, the district court misapplied *Burbank*, 136 F.3d at 1364.

Rather than look to recent California law on point, the district court relied on the *Burbank* panel's 25-year-old analysis (an analysis that was, at best, cursory). Had the

district court considered the California Court of Appeal's more recent and robust analyses in the 2021 *Haytasingh* case and the 2020 *Redondo Beach* case, the district court would have concluded that California law holds—and rather emphatically—that Charter Cities are not "political subdivisions" of the State.

As for the individual Plaintiffs, the district court's conclusion that they lack standing, again relying on *South Lake Tahoe*, was wrong. Unlike the individuals in *South Lake Tahoe*, the individual Plaintiffs here are subject to a State-compelled speech regime. Individuals have standing to challenge compelled speech, and that does not change when the same individuals are compelled to speak in their official capacities.

Further distinguishing *South Lake Tahoe*, the individuals there were Council Members of a general-law city and thus under no duty to do anything but follow State law. It could be argued that general-law council members owe certain obligations to the State. But not for a Charter City. Here, the individual Plaintiffs are agents of an independent constitutional Charter City and a Municipal Corporation, and thus charged with unique constitutional and fiduciary duties. Those fiduciary duties not only include to do what is best for the City by fulfilling duties of public trust, Council Members have a duty to do what is best for

the City's environment. The State may not dictate a Charter City's local affairs by putting words in the mouths of its Council Members.

This Court should hold that the per se standing bar of *South Lake Tahoe* does not apply to a Charter City, and that Plaintiffs—as a Charter City, its City Council, and its individual Mayor and Mayor Pro Tempore—have standing to bring their federal claims against the State.

This Court should also take this opportunity to clarify the holdings of *South Lake Tahoe* and *Burbank* to the extent they apply to Charter Cities and Municipal Corporations like the City of Huntington Beach. On the specific question of whether a law that applies to "political subdivisions" includes Charter Cities, the *South Lake Tahoe* and *Burbank* decisions contain only *cursory* treatment and abrupt responses. And, as this Court will see in discussion below, the per se standing bar of *South Lake Tahoe*—without any supporting analysis—is now the sole outlier among all other Circuits. This Circuit would benefit from a clear decision that, because of the distinct, autonomous nature of a Charter City, Charter Cities have standing to bring constitutional challenges against the State.

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss *de novo*. *South Ferry LP v. Killinger*, 542 F.3d 776, 782 (9th Cir. 2008). In reviewing an order granting a motion to dismiss, an appellate court must accept as true all well-pleaded allegations in the complaint, construing the factual allegations in favor of plaintiffs. *Id.*; *see also Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 979 (9th Cir. 2013); *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Similarly, standing determinations are reviewed *de novo*. *Shulman v. Kaplan*, 58 F.4th 404, 407 (9th Cir. 2023).

DISCUSSION

The district court dismissed this compelled-speech case because, it reasoned, a "political subdivision" of the State, as a creature, may not sue the State, its creator. And as concerning the individual Plaintiffs' challenge to the State's compelled-speech regime, the district court ruled that their "personal objections are insufficient to confer standing." (1-ER-11.)

The central flaw in the district court's ruling is its misapprehension of Plaintiffs as "political subdivisions." The City is not a "political subdivision" of the State of California because it is not a general-law city, it is a Charter City.

As for the individual Plaintiffs, free citizens may seek redress for State violations of their Constitutional rights in federal court, full stop. Holding elected office does not degrade one's Constitutional rights.

I. Defendants are violating important Constitutional rights, and Plaintiffs have standing to seek redress for the resulting concrete harm.

Plaintiffs properly allege violations of the First Amendment, the Fourteenth Amendment, and the Commerce Clause enumerated in the Federal Constitution. (4-ER-652—63.) Civil actions arising under the Constitution of the United States present federal question jurisdiction. 28 U.S.C. § 1331; *Stillaguamish Tribe of Indians v. Washington*, 913 F.3d 1116, 1118 (9th Cir. 2019).

The district court did not suggest that Plaintiffs failed to assert a federal claim. Instead, its ruling was based entirely on standing. And Defendants never meaningfully argued that any Plaintiff's status—whether as a city or city official—defeats standing to challenge compelled speech. (*See* 3-ER-572—74; 4-ER-601—02.)

To maintain an action in federal court, plaintiffs must allege facts showing they have Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III standing consists of three elements: "injury in fact, causation, and a likelihood that a favorable decision will

redress the plaintiff's alleged injury." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'") (citations omitted).

Focusing on the First Amendment violations, Defendants have already demanded that Plaintiffs make the required Statement. (4-ER-626—27.) And the State has already sued Plaintiffs for refusing to make the required Statement, subjecting Plaintiffs to as the State claims, to millions of dollars in fines. (3-ER-544.) Plaintiffs allege in their complaint that the State requires Plaintiffs to "adopt its Housing Element by necessarily making findings (speech)" with which Plaintiffs disagree. (4-ER-627.)

Cities are required to adopt a housing element. But the State now requires the City's housing element to include 13,368 new units of environmentally harmful high-density housing. At the same time, preexisting law requires that Plaintiffs (a) consider the environmental harms occasioned by the proposed high-density development; and then (b) conclude, as democratically-accountable officeholders, whether the harms are justified. But here, the State insists that Plaintiffs forgo any discretionary review and simply proceed to make the required Statement that the State's

high-density housing regime is worth the known "substantial and unavoidable" environmental harms to the City. (3-ER-346—49.)

As Plaintiffs allege in their complaint, the RHNA Laws "force the City Council to 'say' . . . that the benefits of the proposed high-density housing outweigh the negative impacts on the City's environment," and force Plaintiffs to say, in effect, that "protecting its environment is not a priority–completely contrary to the spirit and strictures of CEQA itself."[4] (4-ER-628.)

Injury for purposes of standing to enforce First Amendment rights is established merely by a threat of violation. "Because '[c]onstitutional challenges based on the First Amendment present unique standing considerations,' plaintiffs may establish an injury in fact without first suffering a direct injury from the challenged restriction." *Lopez*, 630 F.3d at 785 (quoting *Ariz. Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)). "When an individual is subject to [a threat of enforcement], an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citations omitted).

[4] CEQA is the acronym for the "California Environmental Quality Act."

Here, the State has not only made threats, but has already sued to require Plaintiffs to make the Statement. The State sued Plaintiffs in state court because Plaintiffs "ha[ve] not adopted a current housing element that is substantially in compliance with state law." (3-ER-530.) As explained above, Plaintiffs cannot adopt a housing element without making the objectionable Statement. So by seeking to compel Plaintiffs to adopt the housing element consistent with the high-density housing quota, the State compels Plaintiffs to make that Statement.

According to the State, the punishment for Plaintiffs' failure to comply with the State's high-density mandates is a minimum fine of $10,000 a month. Cal. Gov. Code § 65585(j)(1-3). Also, according to the State, failure to pay these fines triggers the authority of the State Controller to intercept any available state and local funds. Cal. Gov. Code § 65585(l)(1). After three months, unpaid fines may be trebled. Cal. Gov. Code § 65585 (l)(2). And after six months, sextupled. Cal. Gov. Code § 65585 (l)(3)(A). According to the State, the City faces a maximum penalty of $600,000 per month, plus the loss of millions of dollars in State and local funds.

Plaintiffs are further harmed because the compelled-speech regime deprives the City of a housing element. A housing element, a part of a city's general plan, is vital for

planning for the City's future growth, policy, and management. *See Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo*, 68 Cal.App.5th 820, 834 (2021). The State's actions deny Plaintiffs and their residents this important municipal function. The federal courts have the ability to redress this.

In *Cultiva La Salud v. State of California*, 89 Cal.App.5th 868 (2023), the state enacted a statute prohibiting Charter Cities from imposing tax, fees, or assessments on groceries. When the Charter City nonetheless exercised its authority to impose a grocery tax, the state threatened to deprive the city all its revenues. The court redressed this dragooning of local authority and found the statute unconstitutional as applied to Charter City. The Court of Appeal concluded that the State "improperly uses the threat of crippling penalties to chill Charter Cities from exercising their constitutional rights. As our Supreme Court has explained, "[i]f a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' [Citation.]" *Id.* at 882. This is, among other things, precisely what is happening here.

II. Plaintiffs are recognized by federal courts, including the U.S. Supreme Court, to have protected federal rights.

A. Individuals, regardless of their status as political officeholders, have constitutional rights.

Individual Plaintiffs, as Americans and free citizens, have Constitutional rights. *303 Creative LLC v. Elenis*, 600 U.S. 570, 143 S.Ct. 2298, 2312 (2023). Mayor Tony Strickland and Mayor Pro Tempore Gracey Van Der Mark were individual freedom-loving Americans as they ran for office of City Council. They did not agree to forfeit or curtail their constitutional rights when running for office. Their election to City Council by the electorate in Huntington Beach did not degrade their federally protected rights—or their ability to seek redress in federal courts.

In fact, each of the seven-member City Council in Huntington Beach was elected by the people to exercise his or her good and independent judgment in making decisions *for the City*, which necessarily involves free thought and free speech, and each of them was vested by the people of the City to exercise discretion in considering and making policy in its local affairs, including land use and zoning decisions. On the other side of the coin, none of the seven-member City Council, including the Mayor and Mayor Pro Tempore, was

elected as an agent of the State of California, nor are any of them beholden to the State.

The Mayor, Mayor Pro Tempore, and the City Council Members have free speech rights, enforceable in federal court.

B. Municipal Corporations have constitutional rights.

The City is a Municipal Corporation, and corporations, like individual Americans, have constitutionally protected rights. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 312 (2010). The creation, structure, and function of a Municipal Corporation is similar to other non-profit, for-profit, charitable, or political Corporations. The City of Huntington Beach, as a Municipal Corporation, should enjoy the same protections of its First Amendment rights. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *C & C Plywood Corp. v. Hanson*, 583 F.2d 421, 425 (9th Cir. 1978). Just like an individual's First Amendment free speech and association rights, these rights may be limited only when there are constitutionally permissible grounds for doing so. *See Buckley v. Valeo*, 424 U.S. 1, 25-29 (1976); *Pac. Gas & Elec. Co. v. City of Berkeley*, 131 Cal. Rptr. 350, 353 (Cal.Ct.App. 1976).

The City as a Municipal Corporation has speech rights, enforceable in federal court.

C. City Councils have constitutional rights.

City Councils have rights, including First Amendment speech rights. For example, the State of California has codified the concept of legislator's free speech, defining an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" to include a statements made in a legislative or official proceeding, and statements in any other public forum on a public interest. Cal. Code Civ. Proc. § 425.16, subd. (e)(1)-(4); *Scott v. McDonnell Douglas Corp.,* 37 Cal.App.3d 277, 288 (1974).

The City Council has speech rights, so it has standing to seek redress for speech violations in federal court.

City governments, too, have speech rights. *Shurtleff v. City of Boston, Mass.*, 596 U.S. 243, 142 S.Ct. 1583, 1587 (2022) (a city government "must be able to 'promote a program' or 'espouse a policy' in order to function"). Plaintiff City Council, as the government of the City of Huntington Beach, has speech rights enforceable in federal court.

The City of Huntington Beach is a Chartered City under the California Constitution, Article XI as well as a Municipal Corporation. According to the State Court of

Appeal, "[charter] cities, therefore, are distinct individual entities, and are not connected political subdivisions of the state. As a matter of fact, municipalities, and particularly charter cities, are in a sense independent political organizations and do not pretend to exercise any functions of the state. They exist in the main for the purposes of local government." *Haytasingh*, 66 Cal.App.5th at 459.

III. California law treats Charter Cities as creatures of the people under the Constitution, and not "political subdivisions" or creations of the State.

A. Charter Cities, according to California's Constitution, are "emancipated" from the Legislature.

Under the California Constitution of 1849, cities were "but subordinate subdivisions of the State Government," and the Legislature had power to "enlarge or restrict" city powers. *Johnson v. Bradley*, 4 Cal.4th 389, 394-98 (1992), quoting *San Francisco v. Canavan*, 42 Cal. 541, 557 (1872). But after the Constitution of 1879 was adopted, the Supreme Court of California declared it was "manifestly the intent" of the drafters "to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature." *Johnson*, 4 Cal.4th at 395, quoting *People v. Hoge*, 55 Cal. 612, 618 (1880).

As a practical matter, however, for several years Charter Cities remained subject to general State laws. *See*

Davies v. City of Los Angeles, 86 Cal. 37, 41-42 (1890). To confirm the intent that Charter Cities are creatures of the Constitution and not of the State, in 1896 article XI of the State Constitution was amended "to prevent existing provisions of charters from being frittered away by general laws," and "to enable municipalities to conduct their own business and control their own affairs to the fullest possible extent in their own way." *Fragley v. Phelan,* 126 Cal. 383, 387 (1899). The *Fragley* Court then stated the Charter City authority "was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws…" *Id.* at 387.

A question arose whether Charter City authority extended only to matters explicitly enumerated in the charter. Answering in the negative and affirming Charter City's broad authority, Article XI was amended again in 1914 to give Charter Cities the power "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." *Johnson,* 4 Cal.4th at 397. The Charter City powers remained essentially unaltered for the next half-century. In 1968, as part of the general overhaul of the state Constitution, the California Constitution Revision Commission recommended to the Legislature that the above sections be retained in

substance but rewritten and renumbered as new Article XI, Section 5, approved by the voters in 1970. *Johnson*, 4 Cal.4th at 397.

B. Recent California Court of Appeal decisions specifically confirm that Charter Cities are not "political subdivisions" of the State.

Despite the long constitutional history of the autonomy of Charter Cities, the specific question whether they are "political subdivisions" of the State appears not to have arisen until relatively recently. But in the 2020 decision in *City of Redondo Beach*, 46 Cal.App.5th 902 and the 2021 decision in *Haytasingh*, 66 Cal.App.5th 429, the California Court of Appeal concluded that Charter Cities *are not political subdivisions of the State*.

In *Redondo Beach*, a Charter City sued the Secretary of State challenging enforcement of the Voter Participation Rights Act. The voting statute required "political subdivisions" to align their local elections with on-cycle elections. The Charter City challenged the voting statute, arguing that it only applied to "political subdivisions" (i.e., general-law cities) and that a Charter City was not a "political subdivision." *Redondo Beach*, 46 Cal.App.5th at 906-07.

The California Court of Appeal agreed. The *Redondo Beach* Court began by observing that "California law

recognizes two types of cities." *Redondo Beach*, 46 Cal.App.5th at 909. While general-law cities are political subdivisions of the State, "Charter Cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs." *Id.* That Court then noted that "the term 'political subdivision of the state' has been construed to distinguish counties from 'municipal corporations' with separate and distinct powers and purposes." *Id.* at 913, n. 7.

The *Redondo Beach* Court in 2020 concluded a Charter City is not a "political subdivision," and thus had broad authority over its own elections. *Redondo Beach*, 46 Cal.App.5th at 913, 918.

Along with broader local authority, Charter Cities also fall outside the umbrella of State immunity statutes. The 2021 case of *Haytasingh*, 66 Cal.App.5th 429, highlighted the increased liability exposure faced by Charter Cities and their Council Members. There, a Charter City initially won a defense verdict when the judge ruled that the city was exempt from the Harbors & Navigation Code's water-vessel speed limit. But the Court of Appeal reversed, noting that the statutory exemption applied only where the vessel's owner "is a state or subdivision thereof." A Charter City thus may not avail itself of the immunities that the State affords to itself and its subdivisions.

The *Haytasingh* Court observed that the "'contention that the legal status of a municipal corporation is akin to that of a county cannot be sustained either upon reason or authority.'" *Haytasingh*, 66 Cal.App.5th at 459 (quoting *Otis v. City of Los Angeles*, 52 Cal.App.2d 605 (1942)). The reason is that "[i]t is the free consent of the persons composing them that brings into existence municipal corporations… while it is the sovereign will [of the state] which brings into being counties as local subdivisions of the state…." *Otis*, 52 Cal.App.2d at 612.

Contrasting the establishment of Charter Cities by the free consent of their residents, political subdivisions—such as general-law cities—are established "without the solicitation, consent or concurrent action of the people residing within them." *Haytasingh*, 66 Cal.App.5th at 459 (quoting *Otis,* 52 Cal.App.2d at 611-12). The upshot is that "[charter] cities, therefore, are distinct individual entities, and are not connected political subdivisions of the state. As a matter of fact, municipalities, and particularly charter cities, are in a sense independent political organizations and do not pretend to exercise any functions of the state." *Id.*

Just as the Court of Appeal did in *Redondo Beach*, the *Haytasingh* Court concluded that when the Legislature uses the term "political subdivision," it does not mean a Charter City. *Haytasingh*, 66 Cal.App.5th at 462.

IV. A Charter City is *not* a political subdivision, so *South Lake Tahoe* does not apply.

Under *South Lake Tahoe*, a "political subdivision" of the State lacks standing to assert federal rights against the State. The district court employed that singular basis to dismiss the Plaintiffs' entire case. The district court erred in three ways.

First, *South Lake Tahoe*, concluding the city there was a political subdivision, dealt with a *general-law* city. But subsequent decisions of the California Court of Appeal, upon lengthy analysis, have held that Charter Cities are created by the people by authority of the State Constitution, and thus are not "political subdivisions" of the State. So maintaining a lawsuit against the State by a Charter City is not the "creature" suing the "creator," as the authorities cited in *South Lake Tahoe* reasoned. Instead, Charter Cities are distinct with constitutional independence and autonomy, and not creatures of the State.

Second, *South Lake Tahoe*'s standing analysis has been called into doubt by the U.S. Supreme Court and other Circuits. While the district court here was bound by the holding of *South Lake Tahoe* as it applied to general-law

cities, the district court erred when it extended its questionable analysis to reach a Charter City.[5]

Third, the only case in this Circuit following *South Lake Tahoe* that mentions a Charter City is *Burbank*. But *Burbank* did not actually involve the standing of a Charter City and its brief discussion is clearly dicta.

A. The per se standing bar in *South Lake Tahoe* applies only to "political subdivisions," such as counties and general-law cities—not Charter Cities.

South Lake Tahoe, 625 F.2d 231, involved a challenge by a city and its council members to a regional planning agency, claiming that the agency's land use restrictions amounted to unconstitutional takings, arbitrary

[5] Plaintiffs note that, since it was issued, *South Lake Tahoe* has become an outlier, with this Ninth Circuit standing alone in denying standing to "political subdivisions." *Branson School District Re-82 v. Romer*, 161 F.3d 619, 630 (10th Cir. 1998) (noting that the Ninth Circuit is the only circuit to bar political subdivision against suing the state); *Cty. of Ocean v. Grewal*, 475 F.Supp.3d 355, 369 (3d Cir. 2020) (Ninth Circuit is the only circuit holding political subdivisions lack standing to sue state under Supremacy Clause). *See also Rogers v. Brockette*, 588 F.2d 1057, 1065 (5th Cir. 1979) (a political subdivision has standing being "legally and practically independent" from the state); *Tweed-New Haven Airport Authority v. Tong*, 930 F.3d 65, 73 (2nd Cir. 2019) (joining Fifth and Tenth Circuits holding a subdivision may sue state under Supremacy Clause, relying on *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 252-253 (2011) and *Nixon v. Mo. Mun. League*, 541 U.S. 125, 130-31 (2004)).

discrimination, and an infringement on the right to travel. The district court dismissed for lack of standing.

The three-judge panel affirmed. As to the city, the panel held that "[i]t is well established that '[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment.'" *South Lake Tahoe*, 625 F.2d at 233 (quoting *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973).) As explored below, this holding does not apply here because a Charter City is not a "political subdivision" of the State.

As to the individual Plaintiff Council Members, the panel in *South Lake Tahoe* held that their role in the challenged land use regime was only "enforcing the [agency's] ordinances," and thus their objections amounted to a mere "abstract measure of constitutional principle." *South Lake Tahoe*, 625 F.2d at 237. As detailed below, the analysis is different here because the individual Plaintiffs are Council Members of a Charter City and a Municipal Corporation with constitutional and fiduciary duties not present in *South Lake Tahoe*.

And the Council Member Plaintiffs here are required to go beyond mere "enforcement" of the mandatory high-density housing regime and must make a public written Statement that achieving the State Defendants' housing quota of 13,368 new units of high-density development is more important

than protecting the City from known "significant and unavoidable" harms to the environment.

Again, while the City always follows clear laws, it objects to the *peculiar*, unconstitutional mechanics of the RHNA Laws. These laws attempt to commandeer the local legislative power and authority of City Councils to *compel local legislatures to take additional local legislative action* to implement the State's high-density housing goals. (4-ER-670—71.) In other words, the State, through its RHNA Laws, commands and controls City Councils to fulfill State-mandated, very particular, pre-determined legislative outcomes, which in this case, requires State-compelled speech components related to local legislative activity.

B. *Burbank*'s discussion of Charter Cities is dicta and not binding.

A panel of this Court in *Burbank*, 136 F.3d 1360 concluded that an agency may not sue a Charter City because, citing two California statutes, the panel concluded that California law treated the Charter City as a "political subdivision." The span of the analysis there was insufficient for the case at bar and the conclusion not reliable for a case like this.

Here, the district court failed to follow *Burbank*'s example by looking to recent applicable California law,

which clearly holds that Charter Cities are *not* "political subdivisions" of the State.

In *Burbank*, 136 F.3d 1360, a tri-city authority tasked with expanding a local airport filed suit to block Burbank's review of the agency's acquisition request. The authority argued that the city's assertion of a state statute contradicted federal law and thus violated the Supremacy Clause. But the district court dismissed for lack of standing under *South Lake Tahoe*, reasoning that the authority was a political subdivision.

On appeal, the distinction between general-law and Charter Cities appears not to have been a central focus, and therefore, did not receive full analysis. Instead, the authority urged that the Supreme Court in *Washington v. Seattle Sch. District*, 458 U.S. 457 (1982) overruled *South Lake Tahoe*. But the Court disagreed, reasoning that *Washington v. Seattle Sch. District* did not reach standing.

The authority next urged a claim-based exception, urging this Court to find an exception from *South Lake Tahoe*'s per se rule for claims based on the Supremacy Clause. But the panel refused to deviate from the per se rule that political subdivisions lack standing to sue the State.

Last—and in terms of wordcount, least—this Court addressed the argument that *South Lake Tahoe*'s standing

bar did not apply to claims against a Charter City. But the panel rejected that argument. These 15 words constitute the entire analysis: "charter cities in California generally are defined as political subdivisions along with other governmental entities." *Burbank*, 136 F.3d at 1364.

This Court then cited two California statutes, California Public Utilities Code sections 21010 and 21690.6. Section 21010 references "political subdivision," though it does *not* include Charter Cities. *See City of Redondo Beach*, 46 Cal.App.5th at 913 (courts demand a clear indication before concluding a statute is intended to apply to charter cities). Section 21690.6 does expressly refer to Charter Cities: "[t]he provisions of this article"—which includes just six statutes, sections 21690.5 through 2190.10—"shall apply to any airport owned or operated by a political subdivision, including a charter city." Cal. Pub. Util. Code § 21690.6.

Beyond section 21690.6 concerning disputes over local airport operations, however, nothing supports the broader proposition that Charter Cities generally may be treated as "political subdivisions" of the State. As it appears the broader proposition was both cursory and unnecessary to decide the issues in *Burbank*, it was dicta. "[W]ell-reasoned dicta is the law of the circuit, but we are not bound by a prior panel's comments made casually and without analysis, uttered in passing without due consideration of the

alternatives, or done as a prelude to another legal issue that commands the panel's full attention." *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019) (citations and alterations omitted).

C. Recent California cases, post-*Burbank,* hold that Charter Cities are *not* "political subdivisions" of the State.

Even if *Burbank*'s analysis about "political subdivisions" is not dicta, that analysis begins by applying State law. *Burbank*, 136 F.3d at 1364 (looking to the meaning of "political subdivisions" as defined by California law). To the extent *Burbank*'s conclusion rested on California law, a change in the law permits this Court to reconsider the issues. *Visness v. Contra Costa Cty.*, 57 F.3d 775, 778 (9th Cir. 1995) ("[T]o the extent the [prior] decision rests on state law, a change in California statutory and common law also would permit this panel to reconsider the issues decided by the [prior decision].").

And in fact, since this Court decided *Burbank* in 1998, the California Court of Appeal issued *Haytasingh* and *Redondo Beach*, each fully analyzed and concluding that Charter Cities are not "political subdivisions" of the State.

Here, the district court erroneously concluded that "charter cities in California generally are defined as political subdivisions along with other governmental entities,"

quoting *Burbank*. (1-ER-10.) The district court erred when it relied on *Burbank*'s 25-year-old reference to political subdivisions, without considering the more recent holdings of *Redondo Beach* and *Haytasingh*.

Consistent with *Burbank*, this Court should look to *Redondo Beach* and *Haytasingh*, issued after *Burbank*, to conclude that Plaintiff City, as a Charter City, is not a "political subdivision" of California.

V. The individual Council Member Plaintiffs have standing to assert their First Amendment right to make genuine, truthful written statements of findings.

The district court ruled that the Council Members lack standing because they are public officials, and public officials may not assert the First Amendment merely because they "wish not to enforce a statute due to private constitutional predilections." (1-ER-11, quoting *South Lake Tahoe*, 625 F.2d at 238.) According to the district court, the Council Members "argu[e] that they are being forced to implement the [high-density housing] RHNA Laws over their personal objections." (1-ER-11.) The district court concluded that this is not enough to confer standing.

The district court erred for two reasons.

First, the district court ignored Plaintiffs' State-compelled speech challenge. The State requires Plaintiffs to

issue a public statement—once again, a Statement of Overriding Considerations—whenever they approve a zoning change that impacts the environment like the instant one accommodating the State-mandated 13,368 new units of high-density development. Cal. Code Regs., tit. 14, § 15093. Prior to the 2018 update to State RHNA Laws by SB 1333, Plaintiffs were not required to comply with RHNA Laws quotas because such compliance was not necessary for a Charter City to maintain a valid housing element.

This democratic autonomy, incident to what used to be the free exercise of local control by local decision-makers, was part of the "grand design" behind requiring the Statement of Overriding Considerations to satisfy the strict legal requirements of CEQA. As the California Court of Appeal has observed, "Projects which significantly affect the environment can go forward, but only after the elected decision-makers have their noses rubbed in those environmental effects and vote to go forward anyway." *Tiburon Open Space Comm. v. Cnty. Of Marin*, 78 Cal.App.5th 700, 735 (2022) (quoting *Vedanta Society of So. California v. California Quartet, Ltd.*, 84 Cal.App.4th 517, 530 (2000)).

But with recent updates, the current incarnation of the RHNA Laws, and Defendants' improper (and flawed) application of them, dash this "grand design" to pieces and

essentially render decades of CEQA laws meant to protect precious environments in cities and throughout the State, meaningless. The State now demands that Plaintiffs are no longer free to make a genuine choice of whether to approve massive high-density housing development. Instead, the State insists that Plaintiffs make the Statement, stating (dishonestly) that Council Members not only support the State's high-density housing quota for development, and also stating (again dishonestly) that they believe that the State-mandated high-density development is *more important* than protecting the City from the known "significant and unavoidable" negative impacts to the City's environment. (4-ER-628.)

According to Plaintiffs, these statements simply are not true. The City, reluctantly, through consultation with environmental experts at the insistence of HCD, prepared a draft housing element reflecting the State's 13,368 unit high-density housing quota. (3-ER-321—45.) The City's environmental expert consultants also prepared an environmental impact report (EIR), which showed that meeting the State's high-density housing quota of 13,368 new units of high-density development would impose "significant and unavoidable" negative environmental impacts. (3-ER-346.)

Plaintiff Council Members, exercising their independent judgment, concluded that the benefits of meeting the State's high-density housing quota *did not* outweigh the many significant and unavoidable environmental impacts and the Council Members therefore refused to subject their free speech to the State-mandated speech in favor of the high-density housing quota in the Statement. (3-ER-312—16; 3-ER-352—55.)

Plaintiff Council Members, in finding that the implementation of the State's mandatory high-density quota could not justify the significant environmental impacts, did nothing more than to exercise their First Amendment rights and to discharge the duties of their office. But because the exercise of Plaintiffs' rights and democratic responsibilities resulted in an opinion contrary to the State, the State and its high-density RHNA Laws prevent the City from certifying its housing element. The State may not "force an individual to utter what is not in her mind" about questions of political significance. *303 Creative LLC v. Elenis*, 143 S.Ct. at 2318.

Second, the Council Members of a Charter City have different and expanded duties than the general-law city council members in *South Lake Tahoe*. The individual plaintiffs in *South Lake Tahoe* were agents of a State creature, and thus their duties did not go beyond enforcing

the laws of their principal, the State. But the individual Plaintiffs here, Council Members of a Charter City, are agents of the people's creature, exercising constitutional authority independent of the State. *See* Cal. Const., art. XI "Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest." *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999); *United States v. Nelson*, 712 F.3d 498, 509 (11th Cir. 2013);

The Council Members in *South Lake Tahoe* may be further distinguished because those Council Members "ha[d] available a course of action which subjects them to no concrete adverse consequences—they can enforce the [challenged] ordinances." *South Lake Tahoe*, 625 F.2d at 238. Not so here. The Statement of Overriding Considerations that the State requires Plaintiffs to make is false. (4-ER-654—55.) Plaintiffs would be exposed to legal action for approving a project based on serious misrepresentations. *See Woodward Park Homeowners Ass'n, Inc. v. City of Fresno*, 150 Cal.App.4th 683, 691, (2007).

Put another way, Plaintiffs cannot enforce the high-density RHNA Laws without *abdicating* environmental CEQA laws and the constitutional and fiduciary duties they owe to the Charter City and Municipal Corporation. Plaintiffs' First Amendment rights are at the heart of

CEQA's "grand design" that subjects projects with environmental impacts to the democratic process. *Tiburon Open Space Comm. v. Cnty. Of Marin*, 78 Cal.App.5th at 735. The State's high-density RHNA Laws still leaves Plaintiffs democratically accountable to fulfill their duties to protect the City's environment and comply with CEQA, obligated to exercise genuine discretion and state their conclusions about competing considerations honestly. And to do this, Plaintiffs may not be subject to compelled speech and predetermined outcomes. Subjecting local legislative findings to State-compelled speech violates principles of democratic self-government as well as the First Amendment.

The district court erred. Stated most simply, unlike *South Lake Tahoe* and its progeny, the harm faced by Plaintiff Council Members is not their "abstract outrage" of enforcing a State-mandated high-density housing quota. *South Lake Tahoe*, 625 F.2d at 237. Instead, the State Defendants harm the individual Plaintiffs' by compelling them to engage in State speech, *303 Creative LLC v. Elenis*, 143 S.Ct. at 2312 ("the government may not compel a person to speak its own preferred messages"), and by putting Plaintiffs in a no-win situation in which either of their two available choices leads to violating the law.

VI. If any Plaintiff has standing, this Court should remand to allow the action to proceed as to all Plaintiffs.

Assuming any Plaintiff has standing, this Court should reverse and reinstate the complaint as to all Plaintiffs, as this Court did in *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 918 (9th Cir. 2004). In that abortion case involving a challenge to a parental-consent statute, this Court noted that one of the plaintiffs, Planned Parenthood of Idaho, did not actually perform abortions and so was unaffected by the statute. But once one of the plaintiffs had established standing, this Court concluded "there is no reason to address Planned Parenthood's standing" because "the legal issues on appeal are fairly raised" by the plaintiff with standing. *Id.* at 918.

VII. The district court erred in refusing to take judicial notice of the State's pending state court action against Plaintiffs.

In opposing Defendants' motions, Plaintiffs also filed a request for judicial notice. (2-ER-76—309.) The same request attached the State's Petition in which the State sued the City and City Council in the California Superior Court. (2-ER-100-18) The State then filed a First Amended Petition against the City and City Council. (3-ER-528—44.) This evidence of the State's aggressive and punitive enforcement establishes the concrete and ongoing injuries Plaintiffs

suffer. Plaintiffs cited and relied on the State's lawsuit in their opposition. (3-ER-407.)

But the district court declined to take judicial notice, finding that "these materials are not relevant to deciding the Motions." (1-ER-3.) This was error; they were responsive and relevant. Evidence of concrete injury is central to the standing analysis. *Lopez*, 630 F.3d at 785; *see* Part I above. The district court's failure to consider this harm underscores its ruling on standing was not fully considered.

This Court should take judicial notice of the State's lawsuit.

VIII. If there was any question, the district court should have granted leave to amend.

"Denial of leave to amend is reviewed for an abuse of discretion." *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002). "'Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.'" *Id.* (quoting *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991)). A district court acts within its discretion to deny leave to amend as a result of "'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of Amendment.'" *Leadsinger, Inc.*

v. BMG Music Publ'g., 512 F.3d 522, 532 (9th Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). But "'outright refusal to grant leave to amend without a justifying reason is, however, an abuse of discretion.'" *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034 (9th Cir. 2008) (quoting *Leadsinger, Inc. v. BMG Music Publ'g.*, 512 F.3d at 532).

Here, the district court denied leave to amend, reasoning that any amendment would be "futile" in light of the district court's misunderstanding and misapplication of *South Lake Tahoe*. But, as detailed above, the district court misapprehended the nature of Plaintiffs' compelled-speech claim, and further misunderstood the nature of the City's separateness from the State as a Charter City. And as a result, the district court did not consider the concrete harm Plaintiffs suffered through the State's pending state court action, which the district court refused to consider. *See* Part VII above.

The district court never gave Plaintiffs a chance to address these analytical errors because the district court ruled without a hearing.

In sum, the district court abused its discretion. This Court concluded in *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d at 1034 that the district court abused its discretion in refusing to grant leave to amend where the

district court "never allowed [plaintiffs] a chance to explain how they could amend the complaint if allowed to do so," and "did not even consider the viability of any potential amendments to the complaint before dismissing the complaint with prejudice."

CONCLUSION

This appeal is about just one issue: Do Plaintiffs have standing in federal court to bring federal claims against the State? Those claims prompt discussion on important issues about the environment and State-mandated high-density housing. The claims also raise the question, a difficult and perennial question in the system of overlapping governments, about "who decides?" And, as is central here, they raise the question (an easy one, in Plaintiffs' view) whether one government body may dictate what other government bodies must do and say about these questions.

The issue in this Appeal however is simply whether those questions may be asked – rather than being stopped short, at the pleadings stage, and shut out of federal court, entirely.

The district court's ruling that Plaintiffs' lack standing should be reversed. Pursuant to the foregoing laws, California Charter Cities, their City Councils, their Mayors, and their Mayors Pro Tempore, each of them, have standing in federal court to bring violations of their federal rights,

including First Amendment, Fourteenth Amendment, and violations of the Commerce Clause, against the State of California. Thus, the matter should be remanded, where an appropriate record may be developed, and the aforementioned questions answered.

Respectfully submitted,

January 11, 2024 MICHAEL E. GATES, CITY ATTORNEY

By: /s/ Michael E. Gates
Michael E. Gates
Nadin S. Said

Attorneys for Plaintiffs and Appellants City of Huntington Beach, Huntington Beach City Council, Mayor of Huntington Beach, Tony Strickland, and Mayor Pro Tempore of Huntington Beach, Gracey Van Der Mark

STATEMENT OF RELATED CASES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

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9th Cir. Case Number(s) 8:23-CV-00421-FWS-ADSx

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Form 17 *New 12/01/18*

Addendum of Pertinent Statutes
(Ninth Circuit Rule 28-2.7)

Pursuant to Ninth Circuit Rule 28-2.7, Plaintiffs-Appellants set forth the following statutes pertinent to this appeal:

Cal. Code Regs., tit. 14, § 15093

Cal. Const. art. XI

Cal. Const. art. IV, section 16

CEQA Public Resources Code §§ 21000 et seq.

RHNA laws: Cal. Gov. Code §§ 65000 et seq.

Senate Bill 1333

Cal. Gov. Code §§ 65583 et seq

Cal. Gov. Code § 65585

U.S. Const. First Amendment

U.S. Const. Fourteenth Amendment

U.S. Const. Commerce Clause

Cal. Const. Separation of Powers

Cal. Const. Bill of Attainder

28 U.S.C. § 1331

U.S. Const. Art. III

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9th Cir. Case Number(s) 23-3694

I am the attorney or self-represented party.

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CERTIFICATE OF SERVICE

City of Huntington Beach v. Newsom

Case No.
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I certify that on January 11, 2024, a copy of the document above, titled **APPELLANT'S OPENING BRIEF**, filed in the court referenced above, was served by Notice of Electronic Filing automatically generated by that Court's electronic filing and service facilities.

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