IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LUIS J. CACHO, LUIS A. CACHO, ELIZABETH CACHO, DANIEL A. CACHO, et al.,

Plaintiffs and Appellants,

v.

LOUIS J. BOUDREAU, et al.,

Defendants and Respondents.
_____/

Case no. S_____

Fourth District, Division One
Case no. D043396

San Diego County Superior
Court No. GIS 007670

Hon. Luis R. Vargas

PETITION FOR REVIEW

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Plaintiffs and appellants Luis J. Cacho, et al. ("the Cachos"), respectfully petition for a review of the published decision in this matter issued on March 17, 2005, by the California Court of Appeal, Fourth Appellate District, Division One. The current Westlaw version of the opinion is appended. (*Cacho v. Boudreau* (2005) 127 Cal.App.4th 707 [25 Cal.Rptr.3d 892]) The Court of Appeal denied the Cachos' March 25, 2005 rehearing petition on March 28, 2005.

QUESTIONS PRESENTED FOR REVIEW

1.

Although this Court's precedents confer broad discretion on local governments in the design and administration of rent controls, did the Legislature intend to restrict that discretion as the Court of Appeal held below? Does either section 798.31 or 798.49 of the Civil Code (Mobilehome Residency Law) prohibit local governments from treating different components of rent differently for legitimate reasons?

2.

When the Legislature authorized civil penalties for "willful violation" of the Mobilehome Residency Law (Civil Code § 798.86) and a host of other regulatory statutes, did it intend to require only an intentional *act* — like billing rent a certain way — or must the *violation* be "willful" as this Court has defined that term in other contexts, requiring knowledge that the act is unlawful or dangerous to health or safety?

3.

Even if the Legislature intended to require only an intentional act, as the Court of Appeal held below, is it consistent with due process to penalize a mobilehome park owner for separately billing an increase in its real property taxes when a local ordinance appeared to permit that, the owner first sought the opinion of local rent control authorities, and the latter, after consulting with the city attorney, repeatedly advised the owner in writing that the proposed billing was consistent with both local and state law and even instructed the owner how the billing should be implemented?

SUMMARY OF REASONS FOR REVIEW

Conflicting Court of Appeal precedents on the foregoing issues have created widespread uncertainty for local governments, legal and economic jeopardy for an important sector of California's housing market, and an unconscionable threat to innumerable businesses and individuals subject to regulatory statutes authorizing "civil" but nonetheless heavy penalties for a "willful violation." This case well warrants a review under California Rules of Court, Rule 28(b)(1), to "secure uniformity of decision or to settle an important question of law."

ISSUE 1

Over one hundred cities and counties in California impose rent control on mobilehome parks.[1] Thus, the legal status of those

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[1] Alameda County, American Canyon, Azusa, Beaumont, Benicia, Buellton, Calimesa, Calistoga, Camarillo, Capitola, Carson, Carpinteria, Cathedral City, Chino, Chula Vista, Cloverdale, Clovis, Colton, Concord, Contra Costa County, Cotati, Daly City, East Palo Alto, Escondido, Fairfield, Fontana, Fremont, Fresno, Gardena, Gilroy, Glendora, Goleta, Grover Beach, Hayward, Healdsburg, Hemet, Indio, Jackson, La Verne, Lancaster, Lompoc, Los Angeles, Los Gatos, Malibu, Milpitas, Montclair, Moorpark, Moreno Valley, Morgan Hill, Morro Bay, Novato, Oakland, Oceanside, Oxnard, Pacifica, Palm Desert, Palm Springs, Palmdale, Petaluma, Pismo Beach, Pleasanton, Pomona, Rancho Mirage, Redlands, Rialto, Riverside, Riverside County, Rocklin, Rohnert Park, Salinas, San Bernardino, San Jose, San Juan Capistrano, San Luis Obispo, San Luis Obispo County, San Marcos, San Mateo County, San Rafael, Santa

(continued...)

regulations affects thousands of park owners — often families or small businesses as in the present case — and the much larger number of people for whom they provide housing. In Chula Vista alone, the city involved here, there were 32 mobilehome parks as of 2002. (Vol. 7 of Clerk's Transcript ["7 CT"] at 525)

On top of local rent control, California's Mobilehome Residency Law, Civil Code §§ 798 *et seq*. ("MRL"), imposes an exhaustive set of regulations for the management of *all* mobilehome parks, whether rent-controlled or not. However, as even the Court of Appeal below acknowledged, "[i]t is well established that the MRL is not a rent control scheme, but leaves that determination to local entities." (Appendix at 13, 25 Cal.Rptr.3d 899-900) (*Accord*, *Vance v. Villa Park Mobilehome Estates* (1995) 36 Cal.App.4th 698, 702 ["the state Mobilehome Residency Law . . . is not a rent control law"]; *Robinson v. City of Yucaipa* (1994) 28 Cal.App.4th 1506, 1513))

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[1](...continued)
Barbara, Santa Barbara County, Santa Clarita, Santa Cruz, Santa Cruz County, Santa Monica, Santa Paula, Santa Rosa, Santee, Scotts Valley, Sebastopol, Simi Valley, Sonoma, Sonoma County, Thousand Oaks, Tuolumne County, Union City, Upland, Vacaville, Vallejo, Ventura, Ventura County, Watsonville, West Covina, Windsor, Woodland, Yucaipa

Indeed, this Court's seminal decisions on rent control — *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, *Carson Mobilehome Park Owners Ass'n. v. City of Carson* (1984) 35 Cal.3d 184, and *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644 — all emphasized that local jurisdictions enjoy broad discretion in designing and administering rent control schemes. Moreover, the Court found such discretion subject only to *constitutional* limitations, not any state statutory limitations.

Nevertheless, the Court of Appeal's published decision below followed *Karrin v. Ocean-Aire Mobile Home Estates* (1991) 1 Cal.App.4th 1066 in holding that local governments' discretion over rent control is significantly curtailed by the MRL. Both of those decisions find in Civil Code § 798.31 a statewide prohibition against the separate billing or "pass-through" of such traditional components of rent as capital costs and real property taxes — a practice authorized by a number of other local jurisdictions including Los Angeles.[2] And the Court of Appeal

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[2] *E.g.*, Azusa M.C. § 18-772 (c); Contra Costa County Code § 540-2.408; East Palo Alto M.C. § 14.12.020 (C); Fremont M.C. § 3-13104 (d); Los Angeles M.C. § 151.07 (A)(1)a); Malibu M.C. § 5.16.020 (5); Moreno Valley M.C. § 13.01.080 (B); Novato M.C. § 20-9 (a)(4)(c); Riverside County Code § 5.36.040 (7); Santa Barbara County Code § 11A-6 (c); Santa Cruz County Code § 13.32.030 (d)(5); Santa Rosa M.C. § 6-66.040 (C) & (G); Vallejo M.C. § 5.64.076 (B); Watsonville M.C. §§ 11-3.300 (a) & 11-3.310.

below found a similar prohibition in Civil Code § 798.49, subd. (d), as to property taxes in particular.

Other courts disagree, however. Indeed, *Dills v. The Redwood Associates, Ltd.* (1994) 28 Cal.App.4th 888 (*review denied*), expressly "parted company" with *Karrin* on its construction of Civil Code § 798.31. As the *Dills* opinion concluded:

> the inevitable implication of [*Karrin*'s] ruling is that *any* effort to recover capital costs explicitly as opposed to an implicit component of rent runs afoul of the statute. In light of our analysis above, we respectfully part company from *Karrin* to the extent it so holds. (*Id*. at 893, original italics)

Other decisions in accord with *Dills* include *Robinson v. City of Yucaipa, supra*, 28 Cal.App.4th 1506 and *Vance v. Villa Park Mobilehome Estates*, *supra*, 36 Cal.App.4th 698. (See discussion *post*, pp. 24-27.)

The separate billing or "pass-through" of traditional components of rent can advance legitimate governmental purposes. Here, for example, the City of Chula Vista was expressly seeking not to apply its automatic cost-of-living escalator to the owner's increased real property taxes. (*Post*, pp. 14-15) Other jurisdictions manifest the same purpose.[3]

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[3] *E.g.*, Fremont M.C. § 3-13104 (d); Los Angeles M.C. § 151.07 (continued...)

Separate billing can also avoid the public and private expense of administrative rent adjustment proceedings.[4]

This case therefore presents a question of considerable importance statewide: whether the Legislature truly intended to prohibit any local discretion to allow pass-throughs of this kind. The question amply deserves this Court's attention.

ISSUES 2 AND 3

This Court has issued a number of decisions in recent years on the meaning of "willful violation" as used in a variety of penal statutes. (*People v. Simon* (1995) 9 Cal.4th 493, *People v. Hagen* (1999) 19 Cal.4th 652, *In re Jorge M.* (2000) 23 Cal.4th 866, *People v. Garcia* (2001) 25 Cal.4th 744, and *People v. Barker* (2004) 34 Cal.4th 345)) Another recent decision construed "willful misconduct" as used for tort purposes. (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, construing Civil Code § 847(f) [exception to landowners' immunity]

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[3](...continued)
(A)(1)(a); Novato M.C. § 20-7 (a); Oceanside County Code § 16B.9 (e); Oakland M.C. § 8.22.070 (B); Vallejo M.C. § 5.64.076 (B).

[4] For example, the Contra Costa County Code, § 540-2.408, states that "capital improvement rent increases" are designed "to provide the park owner a streamlined procedure for recovering capital improvement dollars invested in the mobilehome park."

(disapproved on unrelated issue in *Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826)) All of those decisions held that "willful" requires scienter of a relevant kind — not merely an intentional act.

Hagen held that "willfully" filing a false tax return requires proof of an "intentional violation of a known legal duty." (19 Cal.4th at 666) *Barker* and *Garcia* held that a "willful violation" of the sex offender registration statute (Penal Code § 290, subd. (g)(2)) "requires actual knowledge of the duty to register." (*Barker* at 34 Cal.4th 351) *Calvillo-Silva* held that, "[w]hile the word 'willful' implies an intent, the intention must relate to the misconduct and not merely to the fact that some act was intentionally done." (19 Cal.4th 729) *Jorge M.* held that, "despite the absence of any express scienter language in the statute itself" (23 Cal.4th 869), the Assault Weapons Control Act (Penal Code § 12280(b)) requires proof that "the defendant *knew or reasonably should have known* the firearm possessed the characteristics bringing it within the [Act]." (23 Cal.4th 887, original italics)

Notably, the Court reached a similar conclusion in *Simon* in part to avoid a due process infirmity in the relevant statute. The *Simon* Court "continue[d] to express concern about the due process implications of regulatory or public welfare offenses which impose strict liability regardless of fault or awareness that the conduct is prohibited." (9

Cal.4th at 520) And it is settled that "civil" punishment is likewise subject to due process constraints. (*E.g.*, *De Anza Santa Cruz Mobile Estates Homeowners Ass'n. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 912 ["fair notice of the penalty available"], *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218) [overlapping awards]), *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [excessiveness of amount], *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424 [*de novo* appellate review]) Moreover, *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 182, observed that "[c]ivil cases show much the same line of analysis" on the willfulness issue as criminal cases.

Despite the foregoing precedents and due process concerns, the Court of Appeal below followed *Patarak v. Williams* (2001) 91 Cal.App.4th 826 in holding that a "willful violation" of the Mobilehome Residency Law requires no more than an intentional act.[5] The opinion expressly rejects any requirement of "intentional infliction of harm or knowing violation of law." (Appendix at 17, 25 Cal.Rptr.3d 909) Similarly, *Patarak* approved a construction of the same penalty statute (Civil Code § 798.86) whereby "[t]he word 'willfully' does not require

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[5] Given factual differences, however, the Court of Appeal below went even further than *Patarak* in dispensing with any scienter requirement for civil penalties. (*Post*, pp. 35-36)

any intent to violate the law, or to injure another, or to acquire any advantage." (91 Cal.App.4th at 830, quoting CALJIC No. 1.20)

Other Courts of Appeal disagree. *Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878 held that the "willful violation" requirement for civil penalties under the Song-Beverly Act (Civil Code § 1794(c)) requires proof that the defendant "knew of its obligations but intentionally declined to fulfill them." (*Id*. at 894) To like effect is Justice Werdegar's opinion in *Kwan v. Mercedes-Benz of North America, Inc., supra*, 23 Cal.App.4th 174, following *Ibrahim* in holding that a Song-Beverly violation "is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present." (*Id*. at 185) *Kwan* expressly rejected the position subsequently adopted in *Patarak* and the Court of Appeal below — "a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund." (23 Cal.App.4th at 185)

This Court appears to have settled the meaning of "willful violation" for penal and tort law, rejecting a definition of that term as mere volition, requiring only the act to be intentional. But did the Legislature intend that very definition when authorizing civil penalties for a "willful violation"? The Courts of Appeal are in direct conflict on that

question; this Court has not spoken on it; and the resulting uncertainty affects thousands of mobilehome park owners and the many more individuals and businesses in California subject to similar civil penalty statutes. (*Post*, p. 34)

This question, too, well warrants resolution by this Court, whether as a matter of statutory construction or due process.

SUMMARY OF THE CASE

A.

THE MATERIAL FACTS

The basic facts material to this petition are not in dispute and can be summarized briefly. The mobilehome park in question, known as Don Luis Estates, was owned at all relevant times by a single family: appellants Luis J. Cacho and three of his children, appellants Luis A. Cacho, Daniel Cacho and Elizabeth Cacho. (7 CT 1521 & 1524) Appellant Don Luis Estates LLC had no other members. (7 CT 1528) Moreover, the Cachos owned and managed only this one mobilehome park. (7 CT 1530-1531) Elizabeth and her brother Luis handled business operations (7 CT 1525 & 1527) while Daniel was responsible for maintenance. (7 CT 1526)

Prior to 1994 Luis Cacho senior owned the park with his mother, Herminia Cacho, as partners. (7 CT 1535) When Ms. Cacho passed away in 1994 the property was reassessed for that reason (*id*. at 1536) and the Cachos' county property taxes rose over $18,000. (Cachos' lodged exhibit no. 1 [6 CT 1222]) (hereafter, "Cachos' lodged exhibit —") However, they sought no relief for that increase until 1998. (7 CT 1536) As Daniel Cacho testified in deposition, "[w]e tried to, as a business, continue to pay but it was a financial hardship to just all of a sudden have this government tax be placed on us especially since we're under rent control and the city controls what we can charge for space." (7 CT 1563)

The Cachos began by asking the local rent control authorities if it was *permissible* to obtain any relief for their increased tax. (The residents' leases provided that "[t]he amount of rent and any increases in rent are governed by the City of Chula Vista." (*E.g.*, 1 CT 11, ¶ 2) The Cachos wanted "to make sure we were following the correct procedure, and we weren't in violation of any City ordinance." (7 CT 1542) So they "decided to contact the City. . . ." (*Id*.) They had never previously passed through "any governmental tax" to their tenants. (*Id*.)

In April 1998, Elizabeth Cacho called Mr. Juan Arroyo, a senior official with the Housing Division of the Chula Vista Community

Development Department, to explore this subject. (7 CT 1515-1516) She followed up with a letter to Mr. Arroyo on April 22, 1998, confirming that the Cachos wanted "to be certain that we are following the correct procedure" under the ordinance. (Cachos' lodged exhibit 1) The letter asked Mr. Arroyo to "[p]lease contact us as soon as possible with any suggestions on this matter." (*Id*.)

Repeatedly thereafter, Mr. Arroyo and another official at the Housing Division, Ms. Leilani Hines, advised the Cachos in writing that a pass-through of their property tax increase was consistent with the local ordinance *and state law*. First, Mr. Arroyo wrote that the pass-through "does not appear to violate" the local ordinance. (Cachos' lodged exhibit 2) By October 26, 1998, however, Mr. Arroyo was definite on that point. He wrote the Cachos that the pass-through "does not violate" the ordinance. (Cachos' lodged exhibit 6; text also appears at 7 CT 1515-1516). Similarly, Ms. Hines' letter of December 3, 1998 to the Cachos stated that the pass-through "is consistent with" the ordinance. (Cachos' lodged exhibit 10)[6]

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[6] Mr. Arroyo and Ms. Leilani testified in deposition below that they did not consider their letters to the Cachos to constitute an "approval" of the property tax pass-through. (*Id*. at 1567-1569, 1571-1572) The letters speak for themselves, however. Also, Ms. Leilani wrote to the homeowners on November 20, 2000 (Cachos' lodged exhibit 18), that technically "no approval of this increase or any other

(continued...)

But Mr. Arroyo's October 26 letter added that the pass-through was consistent with state law, too, and gave the Cachos specific instructions about how to implement it. The importance of this letter warrants a full quotation of its relevant portions:

> Your proposal to pass-through the increase in property tax for Don Luis Estates to each space does not violate Chapter 9.50 of the City of Chula Vista Mobilehome Park Space-Rent Review Ordinance. As you have referenced in the Notice of Adjustment of Rental Rate, Chula Vista Municipal Code Section 9.50.030(H) defines "Other Allowable Pass-Throughs" including increase in governmental assessments such as real property taxes.
>
> It should be noted, however, that several interested parties have pointed out to us that the California Mobilehome Residency Law, in Section 798.49, contains language which could preclude the automatic pass-through of increased property taxes as a separately stated amount. However, we have reviewed Section 798.49 and concluded, with the City Attorney's office, that, where a City's rent control ordinance specifically allows the pass-through of increased property taxes, such pass-through does not violate the State law. [¶]
>
> . . . The City requests that this pass-through not be included in the space rent [but] . . . billed as a separate line item to avoid confusion and to ensure that such pass-

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[6](...continued)
annual increase in real property taxes was deemed necessary *since such increase is consistent with the Municipal Code*." (Italics added)

> through is not included in any calculation of the increase in rent. [¶] [¶]
>
> The City requests that the Notice of Rent Increase be revised to show the property tax pass-through as a separate cost on the rent statement . . . . A copy of this revised notice must be sent to the City's Community Development Department. (Cachos' lodged exhibit 6; 7 CT 1515-1516)

It is undisputed that the Cachos fully complied with Mr. Arroyo's instructions. For 36 months — until local officials directed them otherwise (10 CT 2173) — they billed for their increased property taxes as Mr. Arroyo instructed, "as a separate cost on the rent statement." That is the very act later penalized as a "willful violation" of the Mobilehome Residency Law.

The residents and the Court of Appeal (Appendix at 15, 25 Cal.Rptr.3d 909) emphasized the caveat in Mr. Arroyo's October 26 letter that "the City Attorney cannot be your legal counsel. . . . You should consult with your own attorney regarding the legal interpretation of Section 798.49." (7 CT 1515) However, the Cachos' understandable desire was to comply with the *city's* interpretation of the law. (See record quotations *ante*, pp. 12-13.) So when the city officials rendered the opinion they did, and the Cachos were happy to comply with it, it made no sense to pursue the matter any further.

B.

CHULA VISTA'S ORDINANCE

Nor does the city's opinion appear doubtful or strained. At all relevant times, section 9.50.30(H) of the Chula Vista Municipal Code (Chap. 9.50, "Mobilehome Park Space-Rent Review") provided for "Other Allowable Pass-Throughs" including "increases in rates of . . . governmental assessments such as real property taxes. . . ." (Appendix at 11, 25 Cal.Rptr.3d 905) Similarly, the MRL section cited by Mr. Arroyo, Civil Code § 798.49, contains no language appearing to prohibit or preempt the Chula Vista provisions. (*Post*, pp. 28-29)

Chula Vista's ordinance also excluded property tax pass-throughs from the definition of "space rent" (C.V.M.C. § 9.50.030(A)), such that they would not be subject to the automatic cost-of-living escalator. (C.V.M.C. § 9.50.050(A)) (*Id*.) That is why Mr. Arroyo, the responsible official, explained that billing a tax increase separately would "ensure that such pass-through is not included in any calculation of the increase in rent." (Cachos' lodged exhibit 6; 7 CT 1515-1516)

In 2001, however, the Cachos' tenants started filing small claims actions attacking the property tax pass-through as a violation of the state MRL. (Appendix at 4, 25 Cal.Rptr.3d 896) Whether for that reason or others, in January 2002 the Chula Vista City Council considered

repealing the pass-through provisions but deferred any action. (3 CT 521, ¶ 4; 3 CT 531, 534 & 537) On April 12, 2002, however, Superior Court Judge Luis R. Vargas issued an interlocutory ruling in this case that Chula Vista's pass-through provisions were preempted by Civil Code §§ 798.31 and 798.49(d)(4). (3 CT 606-607) Shortly thereafter, on July 23, 2002, the Chula Vista City Council adopted the changes it had considered in January 2002, effectively repealing the former pass-through provisions.[7]

The replacement, however, permitted "any separate charge for those fees, assessments or costs which may be charged to mobilehome residents pursuant to the California Civil Code." (C.V.M.C. § 9.50.010 (G)) (See footnote 7 below.) Accordingly, the new provision had the same net legal effect as the former ones. The right to bill separately under the former version was necessarily limited by any MRL preemption; the new version simply made that explicit. So the dispositive legal question remained unchanged: whether the MRL prohibits separate billing of increased real property taxes.

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[7] The Cachos respectfully request judicial notice of the relevant Ordinance, No. 2862, § 1, 2002. It appears on the city's website at http://www.mrsc.org/nxt/gateway.dll/cvstpdfmc?f=templates&fn=cvstpdfpage.htm$vid=municodes:ChulaVistaPDF.

Even if the change had been substantive, however, it would hardly moot the issues of this case. The former provisions were, and remain, the sole predicate for the penalties and every other remedy assessed against the Cachos. And in the unlikely event the Court believes the change renders this case technically moot, the many other cities and counties affected by the relevant MRL provisions — not to mention the "willful violation" issue — bring the case squarely within the public interest exception to the mootness doctrine. (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 172)[8]

C.

THE MATERIAL PROCEEDINGS

When this dispute passed from the small claims division to the superior court proper, the Cachos' operative pleading was a complaint for declaratory and other relief filed on September 6, 2001. (1 CT 1-6) A number of residents filed a cross-complaint on November 21, 2001 (2 CT 373 *et seq*.), seeking damages, statutory penalties and attorneys' fees under Civil Code §§ 798.86 & 798.85, respectively, plus other relief.

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[8] If the Court concludes otherwise, the proper disposition for mootness of this kind is to grant review under Rule of Court 28(b)(4) for the sole purpose of ordering the trial and appellate court judgments vacated and the underlying action dismissed. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134) That disposition is necessary to avoid the practical effect of approving the lower court's decision on the moot issue.

As noted previously, Judge Vargas issued an interlocutory decision on April 12, 2002, on a demurrer to the residents' cross-complaint, holding that Chula Vista's pass-through provisions were preempted by the MRL. (3 CT 606-607) Cross motions for summary judgment or summary adjudication followed, and Judge Vargas adhered to his earlier ruling by a decision filed on July 28, 2003. (9 CT 1930-1934)

In addition, citing *Patarak v. Williams, supra*, 91 Cal.App.4th 826, the court found there was "ample evidence of 'willful' conduct in [the Cachos'] act of initiating the pass-throughs for property taxes. [The residents] need not show that in so doing, [the Cachos] intended to violate the law, but rather that their conduct . . . was neither negligent nor accidental and was violative of the MRL." (9 CT 1933)

The residents subsequently moved for an award of civil penalties in the amount of $1,728,000 (9 CT 1986), later reducing the request to a mere $1,656,000. (10 CT 2162, 2171) Judge Vargas eventually awarded them $23,000 (10 CT 2179, 2210) — $1000 for each mobilehome site in question — a penalty still heavy by any measure other than the residents' astronomical demand. And the Cachos were also ordered to pay the residents' attorneys' fees in the amount of $87,321. (10 CT 2179) All this for a grand total of $10,067 in billings

over a 36 month period (10 CT 2220) in the manner instructed by the Chula Vista authorities.

Notably, though, the court's rationale for "reducing" the penalty to $23,000 appears to bar any finding that the Cachos willfully violated the MRL. The court observed that the lawfulness of the pass-through was "a matter of legal opinion" (10 CT 2179), and "the fact that the City Attorney's office opined that the pass-through does not violate CC § 798.49 should be considered a mitigating factor." (10 CT2179) In addition, the court held it improper to "penaliz[e] a landlord for seeking a judicial determination that its interpretation is correct" (10 CT 2180) and continuing the disputed practice in the interim.

Finally, there is no finding or evidence that the residents were harmed in any way by the property tax billing in question. On the contrary, when the Chula Vista authorities changed their minds in 2002 and asked the Cachos to stop the separate billing, they simultaneously allowed an increase in the "rent" line item to "take[] into account the increase in real property tax previously passed through and paid as a separate charge." (10 CT 2173-2174) The inference is inescapable, therefore, that the residents would have paid the same total amount for property tax had the authorities not sanctioned the separate billing arrangement in 1998.

The final judgment, as amended, was entered on February 2, 2004. (10 CT 2219) The Cachos timely filed and served their amended notice of appeal on February 9, 2004. (10 CT 2228-2229) The Court of Appeal issued its published decision, affirming the amended judgment in full, on March 17, 2005.

LEGAL DISCUSSION

I.

REVIEW IS WARRANTED TO RESOLVE CONFLICTING COURT OF APPEAL DECISIONS ON THE LEGISLATURE'S PURPORTED INTENT TO RESTRICT LOCAL DISCRETION OVER MOBILEHOME RENT CONTROL

A.

INTRODUCTION

The Court of Appeal below held that, insofar as Chula Vista's ordinance permitted park owners to "pass on 'governmental assessments such as real property taxes' to residents, in addition to charging the space rent as defined in the Ordinance," it was "preempted by the MRL (specifically [Civil Code] §§ 798.31 & 798.49)." (Appendix at 12-13, 25 Cal.Rptr.3d 908) That holding stands flatly in conflict with prior Court of Appeal decisions, and the uncertainty affects a large number of cities and counties across California.

The opinion below treats §§ 798.31 and 798.49[9] as interlocking provisions with a common intent. The key holding reads as follows:

> a plain reading of sections 798.31 and 798.49 together does not support the position taken by Owners. Section 798.49, subdivision (a) allows only certain enumerated charges and fees to be passed through to Residents, over and above the terms of section 798.31. The express exemption in section 798.49, subdivision (d)(4) of property taxes from the coverage of this section cannot be interpreted, alternatively, as an enabling section to the local entity to allow an additional pass-through for property taxes. (Appendix at 13, 25 Cal.Rptr.3d 907)

B.

DOES CIVIL CODE § 798.31 RESTRICT LOCAL DISCRETION AS TO THE BILLING OF "RENT"?

We begin with § 798.31, the major premise of the opinion below. That statute provides, in pertinent part: "[a] homeowner shall not be charged a fee for other than rent, utilities, and incidental reasonable charges for services actually rendered."

While the MRL contains no definition of "rent," the opinion below deems that term analogous to "a local assessment for local purposes." (Appendix at 12, 25 Cal.Rptr.3d 905) It holds, accordingly,

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[9] These and all further statutory references will be to the Civil Code unless otherwise noted.

that "rent" cannot include a pro-rata share of real property taxes because they are "assessed upon the park as a whole. . . ." (*Id*.) "[T]he obligations of the Residents to pay rent are traceable to their individual local occupancy interests, not to any collective ownership interests." (Appendix at 13, 25 Cal.Rptr.3d 907) That reasoning, of course, would likewise exclude payroll, benefits, insurance, common area maintenance, capital improvements, legal, accounting, or any other cost of owning or managing a mobilehome park that is not strictly limited to a particular site.

The opinion also holds, following *Karrin v. Ocean-Aire Mobile Home Estates*, *supra*, 1 Cal.App.4th 1066, that the term "rent" as used in § 798.31 — a statewide regulation — means whatever that term might be defined to mean in a local ordinance. Accurately summarizing *Karrin*, the opinion states that "the subject rent control ordinance [in Oxnard] defined rent as excluding operating expenses. . . . It was therefore improper under section 798.31 for those owners to create a pass-through charge for capital assessments (as operating expenses) as part of the rent charge." (Appendix at 13, 25 Cal.Rptr.3d 906) Thus, the opinion below holds that Chula Vista's definition of "space rent" — excluding "allowable pass-throughs" like property tax increases — means that the pass-through cannot be considered rent for the purposes of § 798.31. That conclusion, of course, makes no allowance

for the possibility that § 798.31 and a myriad of local ordinances might have different purposes in mind when speaking of "rent."

Other Courts of Appeal differ in their interpretation of § 798.31. Indeed, a published decision analyzing the legislative history of that statute, *Dills v. The Redwood Associates, Ltd.*, *supra*, 28 Cal.App.4th 888 ("*Dills*"), reached a diametrically different conclusion. Its central holding was as follows:

> At issue in this case is whether a mobilehome-park owner may charge resident mobilehome owners for the cost of capital improvements as a variable-expense item supplemental to a fixed base rent. We hold that nothing in Civil Code section 798.31 . . . precludes this practice, capital expenses being a traditional component of rent and there being nothing in the statutory language expressing a concern with the way rent itself is structured. (28 Cal.App.4th at 889)

Dills based that holding in large part on "the historical context of the current statute." (*Id*. at 892) Citing a series of amendments, *Dills* concluded that "the focus of the Legislature was the prevention of a proliferation of service charges above and beyond rent or utilities." (*Id*. at 893) Continuing:

> Neither the original enactment nor its amendments signaled in any way a concern with limiting a mobilehome

> park owner's recovery of capital expenditures. Since capital expenditures have otherwise been a traditionally recoverable component of rent, even under rent control ordinances, there is nothing in the statute which precludes a park owner from structuring its rent in the manner of the defendants. (*Id.*, emphasis added)

The court also admonished, however, that "park owners cannot attempt to avoid regulation by recharacterizing various *service charges* — which the Legislature has in fact expressed concern in section 798.31 and its related statutes — as rent." (*Id.*, fn. 5; original italics)

Not surprisingly, then, *Dills* "parted company" with *Karrin, supra*, to the extent it construed § 798.31 differently. (*Ante*, p. 6) And the present case is indistinguishable from *Dills*. Here, too, the increase in property taxes was billed "as a variable-expense item supplemental to a fixed base rent." (28 Cal.App.4th 889) Moreover, real property taxes are no less traditional a component of rent — as *Dills* uses that term, at least — than capital expenses. In Chula Vista, in fact, as well as the great majority of other rent control jurisdictions in California surveyed in preparing this petition, the ordinance specifies real property taxes as a mandatory or proper factor to consider when determining what rent may properly be charged.[10]

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[10] *E.g.*, Alameda County Code § 3.32.070; Chula Vista M.C. § 9.- (continued...)

After all, a constitutional requirement for any valid rent control regulation is a level of rent sufficient to secure the landlord a fair return considering all relevant factors. Nothing in *Birkenfeld* or like cases excludes from that fundamental rent calculus any expenses associated with "the park as a whole" as opposed to "individual local occupancy interests." (Appendix at 12, 25 Cal.Rptr.3d 905)

Robinson v. City of Yucaipa, supra, 28 Cal.App.4th 1506, likewise conflicts with the opinion below in broadly construing the term "rent" as used in the MRL. *Robinson* held:

> The Mobilehome Residency Law does not specifically define rent. It does, however, define tenancy as "the right of a homeowner to the use of a site within a mobilehome park on which to locate, maintain, and occupy a mobilehome, site improvements, and accessory structures for human habitation, *including the use of the services and facilities of the park."* (Civ.Code, § 798.12, emphasis added.) Rent is commonly understood to be payment for tenancy. Thus, under the Mobilehome Residency Law,

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[10](...continued)
50.073 (A)(1)(b); Concord M.C. § 58-119 (a)(6); Contra Costa County Code § 540-2.1006 (3)(A); East Palo Alto M.C. § 14.04.280 (B)(6); Fremont M.C. § 3-13110 (c); Hemet M.C. § 2-204(j); Indio County Code § 99.04 (A)(1)(a)(1); Malibu M.C. § 5.16.020; Novato M.C. § 20-12 (a)(3)(c)(1); Riverside County Code § 5.36.230 (A); Santa Barbara M.C. § 11A-5 (f)(1); Santa Cruz County Code § 13.32.040 (b)(3)(A); Santa Rosa M.C. § 6-66.120 (7)(a) ; Sonoma County Code § 2-200 (c)(1); Vallejo M.C. § 5.64.130; Windsor M.C. § 8-1-240 (1)(c) (1).

> rent may be based in part on use of common areas of a mobile home park. (*Id*. at 1513; original italics)

That holding conflicts with the opinion below not only in general approach, but also on the specific point of allowing rent to "be based in part on use of common areas. . . ." (*Id*.) The opinion below insists the entire concept of rent is strictly tied to "individual local occupancy interests." (Appendix at 12, 25 Cal.Rptr.3d 905)

Finally, *Vance v. Villa Park Mobilehome Estates, supra*, 36 Cal.App.4th 698, conflicts with the opinion below, as well as *Karrin*, in its treatment of § 798.31. *Vance* not only quotes *Dills'* analysis at length and with approval (*id*. at 705-706), but buttresses that analysis with a similar definition of "rent" in related legislation: "The term 'rent' is not specifically defined in the Mobilehome Residency Law. In the Mobilehome Parks Act, rent is defined as 'money or other consideration given for the right of use, possession, and occupation of property.' (Health & Saf. Code, § 18216.) " (*Id*. at 705) Again, no restriction to "individual local occupancy interests" (Appendix at 12, 25 Cal.Rptr.3d 905) or the definitions in local ordinances.

Suffice it to say that the Court of Appeal below, by following *Karrin*, has created a sharp conflict in published decisions as to the proper interpretation of § 798.31. And the resulting uncertainty affects

a large number of local governments and the park owners and residents subject to their ordinances.

C.

DOES § 798.49 RESTRICT LOCAL DISCRETION AS TO THE TREATMENT OF PROPERTY TAXES IN PARTICULAR?

The second prong of the Court of Appeal's decision below is its holding that § 798.49 interacts with § 798.31 in such a way as to prohibit separate billing of real property taxes in particular. The opinion reasons:

> Section 798.49, subdivision (a) allows only certain enumerated charges and fees to be passed through to Residents, over and above the terms of section 798.31. The express exemption in section 798.49, subdivision (d)(4) of property taxes from the coverage of this section cannot be interpreted, alternatively, as an enabling section to the local entity to allow an additional pass-through for property taxes. (Appendix at 13, 25 Cal.Rptr.3d 907)

Here is the relevant language of § 798.49:

> (a) Except as provided in subdivision (d), the local agency of any [rent control jurisdiction] . . . shall permit the management to separately charge a homeowner for any of the following: (1) The amount of any fee, assessment or other charge first imposed by a city, including a charter city, a county, a city and county, the state, or the federal government on or after January 1, 1995, upon the space

rented by the homeowner. (2) The amount of any increase [of such charges] . . . . (3) The amount of any fee, assessment or other charge upon the space first imposed or increased on or after January 1, 1993, pursuant to any state or locally mandated program relating to housing contained in the Health and Safety Code.

* * *

(d) This section shall not apply to any of the following:

(1) Those fees, assessments, or charges imposed pursuant to the Mobilehome Parks Act . . . .

(2) Those costs that are imposed on management by a court pursuant to Section 798.42.

(3) Any fee or other exaction imposed upon management for the specific purpose of defraying the cost of administration of any ordinance, rule, regulation, or initiative measure that establishes a maximum amount that management may charge a tenant for rent.

(4) Any tax imposed upon the property by a city, including a charter city, county, or city and county.

The thrust of § 798.49 appears straightforward. Subdivision (a) requires local governments to permit separate billing of certain enumerated costs. To avoid any doubt, subdivision (d) provides that the requirement of subdivision (a) does not apply to other enumerated costs including county taxes, the immediate subject here. Subdivision (d) neither "enable[s]" those costs (Appendix at 13, 25 Cal.Rptr.3d 907) nor

prohibits them. Its only apparent intent is to preserve the legal *status quo ante* as to those costs. To the extent § 798.31 or any other authority affects them, so be it.

As a general proposition, moreover, the opposite of "shall," a legislative mandate, is not "shall not," a prohibition. The opposite of "shall" is "may," a grant of permission or discretion. Had the Legislature wished to *prohibit* separate charges for real property taxes or anything else, it could easily have said so. Instead, it simply provided that the mandate of subdivision (a) "shall not apply" to the costs enumerated in subdivision (d). That does not read like a prohibition.

Nor does the legislative history (6 CT 1120-1211) suggest otherwise. The Senate Judiciary Committee report described the straightforward purpose of the bill, SB 1365, as originally set forth by its sponsor, the Western Mobilehome Association or "WMA." The report stated:

> WMA asserts that several rent control ordinances in California contain provisions which place an unfair burden on mobilehome park owners. One of the most onerous requirements is the imposition of additional government mandated costs without the ability to offset or pass through those new costs in rent control jurisdictions. . . . SB 1365 would enable the park owner to separate[ly] bill and charge the park tenant for any new or increased fees imposed by

> the local government or by a state or locally mandated program relating to housing health and safety standards. (6 CT 1145-1146)

The ultimate text of § 798.49, subd. (a), plainly implemented that purpose. It relieved park owners of their "most onerous" problem by compelling localities to allow separate billing of the kinds of governmental costs described in the Senate committee report.

And as for subdivision (d), the Court of Appeal cited a comment by the bill's author that § 798.49 "was not intended to allow park owners to pass through increased local taxes." (Appendix at 13, 25 Cal.Rptr.3d 907-908) However, that comment does not imply an intent to *prohibit* such pass-throughs, but rather an intent *not to affect* them. Subdivision (d) is simply a list of costs not covered by the mandate imposed by subdivision (a).

In short, this second prong of the Court of Appeal's analysis of the MRL creates as much uncertainty as the first prong. And the second prong has equally widespread repercussions. Along with real property taxes, subdivision (d) lists three other types of costs including local government fees for administering rent control. However, a number of localities permit or even compel park owners to pass through a portion

of such fees to their residents.[11] Does the mere exclusion of such fees from the mandate of subdivision (a) mean the Legislature intended to bar local discretion on that subject, too?

The proper interpretation of these MRL provisions amply warrants this Court's attention. The opinion below represents a troubling challenge to the broad local discretion over rent control that this Court has long envisioned.

II.

REVIEW IS WARRANTED TO RESOLVE CONFLICTING COURT OF APPEAL DECISIONS ON THE MEANING OF "WILLFUL VIOLATION" IN THE MANY STATUTES AUTHORIZING CIVIL PENALTIES

The MRL's threat of substantial penalties for "willful violation" presents an independent and compelling reason to grant review. The MRL is surely one of California's most extensive, pervasive, intricate, complicated, and frequently litigated regulatory statutes. The possibility

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[11] *E.g.*, Chino M.C. § 2.68.050 (A); Concord M.C. § 58-128 (c); Contra Costa County Code § 540-2.406; Cotati M.C. § 19.14.070; East Palo Alto M.C. § 14.04.220 (K) (50% pass-through compulsory); Fremont M.C. § 3-13115 (a); Los Angeles M.C. § 151.05 (D)-(F); Montclair M.C. § 4.- 60.140 (B); Novato M.C. § 20-14 (a); Oakland M.C. § 8.22.070 (B); Palm Springs M.C. § 4.08.110 (h); Rialto M.C. § 4.01.130 (B); Rocklin M.C. § 2.46.580 (D); Santee M.C. § 2-204; Santa Cruz County Code § 13.32.110 (c); Santa Rosa M.C. § 6-66.160; Sonoma County Code § 2-204; Windsor M.C. § 8-1-205 (b).

of a court or local agency finding a violation of some nook, cranny, or unexpected interpretation of the MRL therefore looms much larger than average.

That elevated risk is aggravated by the nature of this industry. As the present case well illustrates, it is possible to argue that any number of MRL provisions would be "violated," for civil penalty purposes, for every single resident and every day, week, or month that a challenged practice continues. Thus, the $2000 maximum penalty on the books today (§ 798.86) — which the Legislature has increased before and can increase again — can quickly escalate into a multi-million dollar penalty. In this case, it was only by the grace of a superior court judge that the Cachos avoided bankruptcy, and probable inability to prosecute this appeal, because of the "civil" penalty demanded by their tenants. And the Cachos typify the individuals, families and small business that most often own and operate mobilehome parks.

For all the foregoing reasons, the "willful" requirement in the MRL's civil penalty statute, § 798.86, represents an important bulwark against miscarriages of justice — and, conversely, an appropriate way to single out egregious violations for maximum deterrence and punishment. As this Court explained in *Simon*, discussing the "three tiered system of regulation" in Corp. Code § 25401 (9 Cal.4th 493), laws

typically authorize increasingly harsh remedies, whether civil or criminal, for increasing degrees of scienter or mens rea.

In the MRL, for example, § 798.86 authorizes simple damages if a homeowner prevails in an action to "enforce his or her rights under this chapter. . . ." But the section goes on to authorize civil penalties for a "willful" violation of the corresponding statute. The Legislature's evident intent was to reserve the harsher remedy for more egregious conduct. That intent would be frustrated if a mental state justifying a simple damages award were also sufficient to justify penalties.

For similar reasons, presumably, a host of other statutes likewise condition civil penalties on a "willful violation." The Civil Code alone insists on willfulness in such wide-ranging contexts as land sale contracts (886.020), floating home marinas (§ 800.200), weight loss services (§ 1694.9), repossession of sold goods (§ 1812.6 & 1812.9), consumer credit reporting (§ 1785.30), the Song-Beverly Act (Civil Code § 1794 (c)), video renting or sales (§ 1799.3), and employment agencies, counselors, and job listers (§ 1812.523). We have not yet searched California's 27 other non-penal codes, but we would hardly be surprised to see a great many more occasions on which the Legislature has insisted on a "willful violation" before civil penalties may be imposed.

As previously shown, however, published Courts of Appeal decisions are in direct conflict on the meaning of "willful violation" in the civil penalty context, and this Court has not yet spoken on that issue. It is squarely presented here and the Court should now resolve it.

There is no need to elongate this petition with a further discussion of *Simon* and this Court's other decisions cited previously. (*Ante*, pp. 7-8) Suffice it to say that they weigh heavily against the decision below and the one it relied on, *Patarak v. Williams, supra*, 91 Cal.App.4th 826, while strongly supporting the conflicting line of Court of Appeal decisions represented by *Ibrahim v. Ford Motor Co.*, *supra*, 14 Cal.App.3d 878, and *Kwan v. Mercedes-Benz of North America, Inc.*, *supra*, 23 Cal.App.4th 174.

Indeed, the Court of Appeal below went even further than *Patarak* in rejecting any scienter requirement for civil penalties. *Patarak* at least observed that the landlord in question, charged with failing to maintain a septic system, had "knowledge or consciousness that it would probably fail with malodorous and unsanitary consequences." (91 Cal App.4th 830) In the present case, however, there is neither a finding nor any evidence that the Cachos had a similar state of mind. On the contrary, local officials repeatedly assured them of the legality of the disputed billing practice before they initiated it. Nor is there any

suggestion of danger to residents' health or safety. Thus, the Court of Appeal below went well beyond *Patarak* in construing the "willful violation" provision to require no more than volitional conduct.

Notably, though, even *Patarak*'s status has been weakened by recent case authority and legislative action. *Patarak*'s treatment of "willful" may have relied in part on its emphatic holding that civil penalties are fundamentally distinct from the traditional punitive damages remedy authorized by § 3294. (91 Cal. App.4th 831) However, *De Anza Santa Cruz Mobile Estates Homeowners Ass'n. v. De Anza Santa Cruz Mobile Estates, supra*, 94 Cal.App.4th 890, subsequently held that civil penalties are the constitutional equivalent of punitive damages, such that imposing both for the same conduct would violate due process. (94 Cal.App.4th 912, following *Troensegaard v. Silvercrest Industries, Inc., supra*, 175 Cal.App.3d 218) For that reason and others, *De Anza* held that § 798.86 did not impliedly authorize punitive damages.

Not long after *De Anza* came down, the Legislature evidenced agreement with its last stated holding. In 2003 the Legislature expressly authorized claims for punitive damages by residents prevailing in an action under the MRL. (§ 798.86, subd. (b), added by Stats.2003, c. 98 [A.B.693]) However, the Legislature specified that civil penalties and

punitive damages are *alternate* remedies — that only one could be pursued for the same conduct.[12] The latter provision further weakens *Patarak*'s point that civil penalties differ fundamentally from punitive damages.

Finally, legislation is presumed, whenever possible, to be consistent with due process. Here, due process prohibits penalties of any kind for several reasons. First, given "the slipperiness of the term 'willfulness'" (*Kwan*, *supra*, 23 Cal.App.4th 174, 183), the MRL did not provide fair notice that penalties could be imposed for merely volitional conduct. (*De Anza Santa Cruz, supra*, 94 Cal.App.4th 890, 912)

Second, responsible local officials repeatedly assured the Cachos their conduct was lawful, and only afterwards was there a contrary adjudication. *La Societe Francaise De Bienfaisance Mutuelle v. California Employment Comm*. (1943) 56 Cal.App.2d 534 (*hearing denied*) held that reliance on erroneous advice of tax officials barred collection of penalties, though not the tax itself. Similarly, *Olszewski v. Scripps Health*

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[12] The new subdivision (b) provides: "A homeowner or former homeowner of a park who is the prevailing party in a civil action against management to enforce his or her rights under this chapter may be awarded either punitive damages pursuant to Section 3294 of the Civil Code or the statutory penalty provided by subdivision (a)." (Emphasis added)

(2003) 30 Cal.4th 798, 829, held due process prohibits even non-penal remedies when the conduct in question was permitted at the time by state statutes later held preempted by federal law. It follows, *a fortiori*, that due process prohibits *penal* remedies for conduct relying on local ordinances later held preempted by state law.

Finally, the lawfulness of the Cachos' conduct was a complex and in part novel issue subject to conflicting precedents at the time, and generated many pages of analysis in the published Court of Appeal opinion below. *BMW of North America, Inc. v. Gore, supra*, 517 U.S. 559, held due process barred a "reprehensibility" finding for punitive damages when "no state court had explicitly addressed" the statutory issue involved, and the Court's own "review of the text of the statutes . . . persuades us that in the absence of a state-court determination to the contrary, a corporate executive could reasonably interpret the disclosure requirements" in the manner that BMW had. (*Id*. at 577-578) It mattered not that "[p]erhaps the statutes may also be interpreted in another way." (*Id*. at 578) (*See also*, *Opsal v. United Services Auto. Assn*. (1991) 2 Cal.App.4th 1197, and *Dalrymple v. United Services Auto. Assoc.* (1995) 40 Cal.App.4th 497 (*review denied*), reversing punitive damages awards because the insurers' coverage positions involved unresolved questions of statutory interpretation or case law.)

For all the foregoing reasons, the proper interpretation of "willful violation" as used in § 798.86 (and many similar statutes) presents an important and unsettled question well warranting a grant of review.

CONCLUSION

For all the reasons stated in this petition, the Cachos respectfully request the Court to grant review and reverse the decision of the Court of Appeal. The Court should hold, instead, that the Cachos' separate billing of an increase in their real property taxes was not a violation of the Mobilehome Residency Law at all, let alone a "willful" violation. It was a practice authorized by local rent control authorities and well within their discretion to do so — a discretion conferred by this Court expressly and the Legislature implicitly, by nowhere interfering with that discretion.

DATED: April 26, 2005

Respectfully submitted,

BIEN & SUMMERS LLP

By: _____

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CERTIFICATE OF LENGTH OF PETITION

The undersigned, counsel for the plaintiffs and appellants, hereby certifies pursuant to Rule 14(c)(1), California Rules of Court, that the foregoing petition is proportionately spaced, has a 13-point typeface, and contains 8,258 words as computed by the word processing program (WordPerfect 11) used to prepare the petition.

DATED: April 26, 2005

ELLIOT L. BIEN

CERTIFICATE OF SERVICE BY MAIL

The undersigned declares:

I am over the age of 18 years and am not a party to the above entitled cause. I caused to be served --

PETITION FOR REVIEW

by enclosing true copies of said document in envelopes with proper postage prepaid and addressed to --

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and placing same for delivery by the United States Postal Service in my usual manner on the date stated below.

The foregoing is true and correct. Executed under penalty of perjury at Novato, California.

DATED: April 26, 2005

_____

ELLIOT L. BIEN