



ANDREW L. FABER
PEGGY L. SPRINGGAY
SAMUEL L. FARB
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JEROLD A. REITON
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JAMES F. LANDRUM, JR.
MICHAEL J. CHENG
C. DAVID SPENCE
JOSHUA BORGER

TEN ALMADEN BOULEVARD
ELEVENTH FLOOR
SAN JOSE, CALIFORNIA 95113-2233

TELEPHONE: (408) 286-5800
FACSIMILE: (408) 998-5388

www.berliner.com
Branch Offices
Merced, CA • Modesto, CA

THOMAS P. MURPHY
ALESHIA M. WHITE
EILEEN P. KENNEDY
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FOUNDERS

SANFORD A. BERLINER (d. 2020)
SAMUEL J. COHEN

OF COUNSEL

STEVEN L. HALLGRIMSON
FRANK R. UBHAUS
RALPH J. SWANSON

NANCY L. BRANDT
LESLIE KALIM MCHUGH
BRADLEY HEBERT

July 30, 2021

VIA TRUEFILING

Acting Presiding Justice Elizabeth A. Grimes
Associate Justice Maria E. Stratton
Associate Justice John Shepard Wiley, Jr.
Court of Appeal, Second Appellate District,
Division 8
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Re: *Austin v. City of Burbank*, Case No. B307677
Request for Publication

Dear Justices Grimes, Stratton, and Wiley:

Our firm represents amicus curiae League of California Cities (Cal Cities) with respect to the above-referenced appeal. We write to request that the Court certify for publication its order dismissing the appeal filed July 12, 2021.

California Rules of Court Rule 8.1105, subd. (c) provides that opinions of the courts of appeal “should” be certified for publication in the Official Reports if they meet any of the standards listed in that subdivision.

As a threshold point, it appears that a dismissal order containing reasons constitutes an “opinion” within the meaning of the publication provisions of the Rules of Court. As Witkin

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states, “[t]he opinion is basically a discussion of the facts, issues, and law necessary to the determination of the appeal, but its content is not necessarily limited to those essentials.” (5 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §782, p. 751.) The July 12, 2021 order contains such a discussion. Moreover, as Witkin also states, a court is not required to dismiss an appeal by opinion, but it may do so: “[T]he following do not require written opinions: . . . An order dismissing an appeal or original proceeding. The order may be accompanied by a written opinion but often is merely a minute order.” But irrespective of whether the publication provisions of the Rules of Court apply to orders dismissing appeals with reasons given, the courts may choose to publish dismissal and similar orders. (See, e.g., *Niederer v. Ferreira* (1983) 150 Cal.App.3d 219 [order specifying issues to be without substantial controversy not appealable]; cf. *People v. Brown* (1957) 149 Cal.App.2d 175, 176 [opinion on denial of rehearing of order dismissing appeal].)

In considering whether to publish its dismissal order, Cal Cities submits that the Court should look to the standards of publication contained in California Rules of Court, rule 8.1105, subdivision (c). Cal Cities believes that the Court’s July 12, 2021 dismissal order meets at least two of those standards for publication: (1) The order applies an existing rule of law to a set of facts significantly different from those stated in published opinions (Cal.Rules of Court, rule 8.1105(c)(2)), and (2) the order involves issues of continuing public interest. (Cal.Rules of Court, rule 8.1105(c)(6).)

First, the July 12, 2021 dismissal order applies the rule requiring that there be extraordinary circumstances for a reviewing court to exercise its discretion to treat an appeal as a writ petition to a set of facts significantly different from those stated in published opinions of which Cal Cities is aware. (Cal.Rules of Court, rules 8.1105(c)(1) & (2).) In its order, the Court reaffirms that Government Code section 6259, subdivision (c) authorizes a writ as the sole and exclusive means to challenge a trial court ruling as to disclosure of material requested under the Public Records Act (the Act; Government Code section 6250 et seq.), and (2) if a writ petition is not filed within the time limit provided by Government Code section 6259, the court lacks the power to review the merits of a trial court ruling under the Act. (See *MinCal Consumer Law Group v. Carlsbad Police Department* (2013) 214 Cal.App.4th, 263, 265-266 [one-day delay is fatal because time limit for writ review is jurisdictional].) Under this authority, the Court holds that Mr. Austin’s appeal, even if treated as a writ petition, is untimely.

But the court also points to Mr. Austin’s familiarity with litigation under the Act (having filed over 30 similar trial court petitions) as a factor relevant to the question of whether there are extraordinary circumstances allowing the Court to exercise its discretion to entertain an appeal as a writ. (See *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 745-747 [court may treat appeal from a nonappealable order as a petition for writ relief where the briefs and record contain in substance all required elements for an original mandate proceeding and there are extraordinary circumstances justifying the exercise of that discretionary power].) For that reason, and because Mr. Austin had not otherwise shown extraordinary circumstances, the Court declined to exercise its discretion to treat Mr. Austin’s appeal as a writ petition. This point—that

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the familiarity of a litigant and his or her counsel with litigation under the Act is relevant to whether a court should exercise its discretion to treat an appeal from an order that is not appealable under the Act as a writ petition—does not appear to have been addressed in any published opinion. Because it therefore applies an existing rule of law to a set of facts significantly different from those stated in published opinions, the dismissal order meets the standard for publication under California Rules of Court 8.1105, subdivision (c)(2).

Second, the dismissal order involves legal issues of widespread and continuing interest to the public, as well as to the bench, bar, and litigants generally. (Cal.Rules of Court, rule 8.1105(c)(6).) Publication of the dismissal order would alert litigants to the important point that a reviewing court may consider a litigant's familiarity with litigation under the Act in determining whether to exercise its discretion to treat an appeal from an order under the Act as a writ petition. More generally, it would serve to remind litigants and counsel pursuing claims under the Act of the need to seek review of trial court orders by authorized means. In fact, such considerations would apply not simply to claims under the Act but also to purported appeals from other nonappealable orders, such as orders granting summary judgment. The dismissal order thus involves legal issues of broad public interest.

For the foregoing reasons, the Court's July 12, 2021 order dismissing this appeal meets the California Rules of Court, rule 8.1105(c) standards for publication. Accordingly, Cal Cities respectfully requests that this Court should certify it for publication in the Official Reports.

Respectfully submitted,

BERLINER COHEN, LLP



THOMAS P. MURPHY

E-Mail: Thomas.Murphy@berliner.com

TPM/tpm
Cc: All counsel (via Truefiling)