98 U.S. Court of Appeals Docket No. 22-15677
Lower Court Docket No. 3:21-cv-02341-EMC

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AIRLINES FOR AMERICA,
Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant-Appellee.

BRIEF OF AMICI CURIA LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENT THE CITY AND COUNTY OF SAN FRANCISCO

[All Parties Have Consented. FRAP 29(a)]

On Appeal from the United States District Court
for the Northern District of California
No. 3:21-cv-02341-EMC

The Honorable Edward M. Chen

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I. INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

California's cities and counties act not just as regulators but also have extensive commercial and propriety interests that they must preserve and protect. San Francisco International Airport (SFO) is a prime example. The airport is a critically important revenue-generating enterprise for the City and County of San Francisco. In the population-rich San Francisco Bay Area, SFO competes directly with Oakland International Airport and with San Jose International Airport. On the west coast, it is a major gateway hub for millions of domestic and international travelers, competing with Los Angeles International Airport and Seattle-Tacoma Airport, as well as others.

The District Court properly rejected Appellant Airlines for America (A4A)'s argument that San Francisco was not acting as a market participant by enacting the Healthy Airport Ordinance (HAO). To advance its dubious argument that the City is barred from claiming to be a market participant, A4A contends that, in order to ensure compliance with the HAO, the City has the hammer of the criminal law available to it, even

[1] Pursuant to Fed. R. App. P. Rule 29(c)(5), amici certify that no counsel for either party authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person contributed money that was intended to fund preparing or submitting the brief.

though the HAO itself contains no such criminal penalty. Indeed, and incredibly, according to A4A, the violation of any ordinance in any California city or county is criminalized, by default. Appellant Opening Br. (Appellant Br.) 39. That extreme position not only defies common sense, but it is entirely inconsistent with the California Attorney General's reasonable interpretation of the two Government Code sections in question,[2] as well as with the custom and practice of California's cities and counties in enforcing their ordinances.

Further, if adopted, A4A's position would inevitably invade constitutional territory and lead to more litigation. Imposing by default a possible criminal penalty for the violation of any ordinance, no matter how mundane, in the absence of local government intent that such a penalty be imposed, raises serious due process concerns. It would also directly infringe upon the home rule powers of California's charter cities. There is no doubt that under the California Constitution[3] charter cities, not the state of California, are entitled to decide how to enforce their own ordinances.

[2] Cal. Gov't Code §§ 25132, 36900; *see Honorable Ronald L. MacMillen*, 60 Cal. Op. Att'y Gen. 83, 1977 WL 24859 (1977).
[3] Cal. Const., art. XI, § 5(a). All unlabeled statutory references are to the Government Code.

The League of California Cities (Cal Cities) is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhancing the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance.

Cal Cities' Committee has determined that this case raises critical issues affecting cities throughout the state. Specifically, the Appellant's sweeping contentions concerning the availability of criminal penalties to enforce any violation of any local ordinance is unsupported by California law and inconsistent with the practice of California’s cities. The Appellant’s contentions, if adopted, would directly infringe on the home rule power of charter cities in California, who reserve for themselves the decision whether and to what extent to impose a criminal penalty to enforce an ordinance. Adopting the Appellant’s argument would also lead to an infringement of the due process rights of California’s citizens, by endorsing the view that a city or county could seek criminal prosecution for the violation of any ordinance, no matter how inconsequential.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties in California. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case involves an important question affecting all counties: namely, whether and under what circumstances violations of county ordinances implicate criminal penalties.

II. LEGAL ANALYSIS

A. California Cities and Counties Do Not Treat All Violations of All Local Ordinances as Crimes.

A4A contends that California cities and counties cannot encourage compliance with a local ordinance with only civil, not criminal, remedies. Yet it is most definitely not the practice of California cities and counties to treat as a crime any violation of every local ordinance, absent specific language in the local code itself that a violation constitutes a crime. Neither San Francisco's Quality Standards Program nor the Healthy Airport Ordinance contains any such criminal penalty. The absence of a criminal penalty in the QSP and HAO should be determinative.

A4A's sweeping and self-serving argument to the contrary, that Government Code Sections 25132 and 36900 should be read to automatically impose criminal penalties for all ordinance violations, leads to insurmountable due process and home rule concerns. Not only that, but as noted by the District Court, A4A's position, if adopted, would create preposterous consequences:

> In this case, to accept A4A's interpretation would produce absurd results, such as no California city or county could enact any ordinance that would be subject only to civil enforcement. Every municipal ordinance would be criminalized.

Airlines for Am. v. City & Cty. of S.F., No. 21-cv-02341-EMC, 2022 WL 1016574, at *6 (N.D. Cal. Apr. 5, 2022) (citation omitted).

Cal Cities and CSAC agree with the City that the California Attorney General's opinion in *Honorable Ronald L. MacMillen,* 60 Cal. Op. Att'y Gen. 83, 1977 WL 24859 (1977), is persuasive. There, the Attorney General decided that the city or county body may state <u>in the local code itself</u> that an ordinance violation is a misdemeanor or an infraction, but "*[i]n the absence of any such penalty provisions, violation of such ordinances are not crimes*." *Id*. at *1 (emphasis added).

In *MacMillen,* the Attorney General reasoned that the availability of criminal penalties is ultimately a question of local legislative intent:

> Government Code sections 25132 and 36900 makes [*sic*] the violation of a city or county ordinance

> either a misdemeanor or an infraction *only when the violation is declared to be a misdemeanor or infraction by express ordinance language.* In the absence of such criminal penalties[,] violations of a city or county ordinance may be enforced by means of an appropriate civil remedy. To state a crime, a penal ordinance must express by appropriate language both the acts constituting the offense and the penalty imposed for violation thereof. We note that the latter may be set forth in an ordinance different from the one defining the offense.

Id. at 6 (emphasis added) (citations omitted).

In *Honorable David E. Tranberg*, 98 Cal. Op. Att'y. Gen. 68, 2015 WL 7621364 (2015), the Attorney General's approach, consistent with *MacMillen*, was to look for evidence of local legislative intent in determining what penalties could be imposed for violating a local ordinance. In *Tranberg*, the Attorney General considered how a city may enforce dog licensing requirements. The Attorney General noted that Section 36900 "authoriz[es] governing bodies of cities to designate infractions and establish penalties for violating ordinances." *Id*. at *1 n.8. The Attorney General by no means suggested that, absent such a designation, violating a dog licensing requirement could lead to a misdemeanor prosecution. Rather, the clear implication is that determining penalties for ordinance violations is a question of local legislative intent.

The Attorney General's conclusions undeniably represent the correct construction of California law. To begin with, A4A's reliance upon the

supposedly "unambiguous" "plain terms" of Government Code sections 25132 and 36900 depends entirely upon reading the first sentence of those statutes in isolation. Appellant Br. 25. When those "plain terms" are read in context with the second sentence ("[t]he violation of a [city/county] ordinance may be prosecuted by [city/county] authorities in the name of the people of the State of California, or redressed by civil action"), they are easily capable of the Attorney General's construction – i.e., that the statute as a whole sets forth a list of remedial options for local governments, not mandates. Cal. Gov't. Code §§ 25132, 36900. The statutory mandate that A4A would elicit from the single word "is" in the first sentence is plainly belied by the permissive nature of these statutes as a whole, which is manifestly apparent when the entirety of the language of each statute is read in context.

The Attorney General's conclusion also accords perfectly with California law in this area. Article XI, section 7 of the California Constitution grants counties and cities the police power to "make and enforce" local ordinances that are not in conflict with state law. As with the power to enact ordinances in the first place, the power to specify their mode of enforcement "is as broad as that of the Legislature itself," unless some specific conflict with state law can be demonstrated. *Ex parte Isch,*

162 P. 1026, 1026 (1917) (citation omitted); *see also In re Application of Guerrero*, 10 P. 261, 265-266 (1886); *City of Stockton v. Frisbie & Latta*, 270 P. 270 (Cal. Ct. App. 1928). As explained by the *Frisbie* court:

> [I]t is worthy of note, that said provision of our organic law does not expressly limit such city, town, etc., to the adoption of any particular mode for enforcing such regulations. The language of the section in that particular is general. It says that any county, city, town or township may make local, police, sanitary and other regulations, and that such *city or town may enforce* the same, how or by what particular means the section does not declare. Thus it would seem that it is left for such corporation or town or county to determine for itself the particular mode for enforcing such regulations within its limits.

Frisbie, 270 P. at 289 (original emphasis).

In their local ordinances, California's cities and counties have different methods of codifying any intent to impose criminal penalties, or not, for specific ordinance violations. Some codes contain a general criminal penalty provision that expressly states that, unless a different penalty appears in the particular ordinance, a violation is a misdemeanor. *See*, *e.g*., Oakland, Cal., Mun. Code § 1.28.010 ("Unless otherwise provided in this code, any person violating any of the provisions or failing to comply with any of the regulatory requirements of this code shall be guilty of a misdemeanor.") Other codes state in the text of the ordinance

itself that a violation is a misdemeanor. *See*, *e.g*., Santa Rosa City Code § 17-12.190 ("The violation of any provision of this article, or the failure to comply with any of the mandatory requirements of this article shall constitute a misdemeanor.") By contrast, where there is not such a provision, then no criminal penalty is implicated. That is precisely the situation with San Francisco's QSP and HAO. Neither says anything whatsoever about a criminal penalty for a violation. Since, therefore, there is absolutely no evidence of local legislative intent to impose a criminal penalty, no such penalty may be imposed.

City and County codes typically cover an extremely wide variety of subjects, ranging from administration and personnel, revenue and finance, building and zoning, animal registration, and a host of other areas. Local codes are rife with examples of ordinances which no city or county would want to criminalize. The City of Santa Rosa, for instance, has an ordinance governing painting house numbers on curbs:

> No person shall paint, stencil or affix or cause to be painted, stenciled or affixed, any house or street address number on any curb in or adjacent to any public street" without first [obtaining a business tax certificate and solicitors and peddlers and encroachment permits.]

Santa Rosa, Cal., Code § 6-24.010.

It cannot seriously be contended that failing to obtain permits before painting a house number on a curb could lead to criminal consequences.

Santa Rosa also has the standard ordinance governing the presentation of governmental claims:

> All claims for money or damages against the City of Santa Rosa, including claims otherwise excepted by the provisions of Government Code Section 905, shall be presented in accordance with the provisions of Government Code Sections 900 et seq. All claims shall be made in writing and signed by the claimant or by his or her guardian, conservator, executor or administrator.

Id. at § 3-04.070.

If the claimant does not sign the claim, could the City of Santa Rosa commence a criminal prosecution for the violation? Obviously not—-yet adopting A4A's extreme position would lead to the conclusion that a criminal penalty could be sought.

Likewise, the City of Oakland's municipal code contains the standard provision governing the deadline for submitting candidate papers for municipal elections:

> The period for the filing of nomination documents by candidates in municipal elections consolidated with the regularly scheduled state elections shall commence on the one hundred thirteenth day prior to the election. The nomination document for municipal elections consolidated with regularly scheduled state elections shall be filed in the Office

> of the City Clerk not later than five p.m. on the eighty-eighth day prior to the election.

Oakland, Cal., Mun. Code § 3.08.040.

Here as well, by no stretch of the imagination would the city want to criminalize a violation of the deadline stated in this section.

Other examples of ordinance violations that would never lead to criminal prosecution abound. Ventura County, for example, requires that solar structures on buildings match the color of surrounding buildings:

> Solar structures shall be compatible in scale, materials, color, and character with the surrounding building(s) and background.

Ventura Cty. Mun. Code § 8108-3.5.

Contra Costa County, like many agencies, has specific requirements regarding fences, as well as other structures:

> Fences shall be of the chain-link type, six feet in height, and provided with gates at appropriate locations.

Contra Costa, Cal., Code § 918-2.006.

Indeed, the City of San Francisco itself technically prohibits people from carrying open bread baskets in public:

> It shall be unlawful for any person, company or corporation to carry, transport or convey, or to cause to be carried, transported or conveyed through the public streets in open baskets or exposed containers, or vehicles or otherwise, any bread, cakes or pastry intended for human consumption.

S.F., Cal., Health Code art 8 § 407.

It is safe to say that by no stretch of the imagination would such violations be criminalized.

Local governments may also decline to impose criminal penalties in order to avoid conflict with state law – and the courts have repeatedly upheld these efforts. Under California law, "State Law is 'in conflict with' or preempts local law if the local law duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1280 (9th Cir. 2017) (citation omitted). "Local legislation is 'duplicative' of general law when it is coextensive therewith . . . 'California courts have largely confined the duplication prong of the state preemption test to penal ordinances.' This is because when a local ordinance and a state criminal law are duplicative, 'a conviction under the local ordinance will operate to bar prosecution under state law for the same offense.'" *Id*. (citations omitted). As the limitation to "penal ordinances" suggests, there is another kind – like the one endorsed in *First Resort* for precisely that reason:

> Here, because the Ordinance is civil and contains no criminal provisions or penalties, there is no double-jeopardy bar to a state criminal prosecution for the same false advertising that the Ordinance prohibits, and First Resort has failed to show that enforcing

> the Ordinance would interfere with enforcing state law.

Id.

Similarly, while California state law has "fully occupied" the field of "the criminal aspects of sexual activity, localities remain free to regulate and license such conduct through noncriminal provisions." *Tily B., Inc. v. City of Newport Beach*, 69 Cal. App. 4th 1, 19 (Cal. Ct. App. 1998) (citations omitted). On multiple occasions, California courts have drawn the exact distinction A4A claims to be impossible, and upheld such "noncriminal" ordinances against preemption challenge, on the ground that "[t]he instant ordinance . . . is not a criminal statute." *Brix v. City of San Rafael*, 92 Cal. App. 3d 47, 53 (1979); *see also People v. Katrinak*, 136 Cal. App. 3d 145, 154 n.9 (1982); *Tily B.*, 69 Cal. App. 4th at 19.

A city or county may also elect to forgo criminal penalties in order to take advantage of the wider constitutional latitude allowed in the civil realm. *Garcia v. Four Points Sheraton LAX*, 188 Cal. App. 4th 364 (2010) upheld a Los Angeles ordinance against vagueness challenge, in part on these grounds. Noting that "[t]he Ordinance specifically states that 'no criminal penalties shall attach for violation of this article,'" the court proceeded to apply a more generous due process analysis: "Moreover, because the Ordinance regulates business behavior, constitutional

requirements are more relaxed than they are for statutes that are penal in nature." *Id*. at 386, 386 n.14.)

Kirby v. County of Fresno, 242 Cal. App. 4th 940 (2015) is a telling example of local government's ability – and occasional obligation – to enact ordinances that carry no criminal penalties. That case involved a preemption challenge to Fresno County's ordinance prohibiting the cultivation of marijuana, and enforcing that prohibition with criminal penalties. As above, the court resolved this challenge by drawing precisely the distinction that A4A rejects:

> We conclude the ban on cultivation adopted under County's authority to regulate land use does not conflict with [state law] . . . In contrast, we conclude that the provision in the ordinance that classifies the cultivation of medical marijuana as a misdemeanor is preempted by California's extensive statutory scheme addressing crimes, defenses and immunities relating to marijuana.

Id. at 947-948.

> [State law] manifest[s] the Legislature's intent to fully occupy the area of criminalization and decriminalization of activity directly related to marijuana. As a result, the criminalization provision in County Code . . . is 'in conflict with' and thus preempted . . . As to the scope of this cause of action, we conclude it does not provide a basis for invalidating the entire ordinance . . . Thus, the only provision subject to invalidation under this legal theory is the provision classifying violations of the ordinance as misdemeanors.

Id. at 961 (citations omitted).

Under A4A's approach, *Kirby*'s holding – like those in *First Resort*, *Tily B.*, *Garcia*, and the rest –would be a sheer impossibility. If, as A4A argues, Sections 25132 and 36900 automatically impose criminal penalties for any local ordinance violation, then an ordinance that carries no such penalties – and whose validity depends upon the absence of such penalty – could not exist, and the entire line of cases recognizing such ordinances would go out the window.

In sum, this Court should follow the reasoning of *MacMillen*—that the availability of criminal penalties is ultimately a question of local legislative intent. Since there is no evidence of such intent, violations of the QSP and HAO may not be criminalized.

B. A4A's Argument Trivializes the Prosecution of Misdemeanors and Runs Counter to Modern Criminal Law Trends.

Not only does A4A's argument lead to absurd results, it downplays the seriousness of a misdemeanor charge. Misdemeanor offenses result in six months of imprisonment or a substantial fine, and, for an individual, a stigma that carries post-imprisonment implications such as the deprivation of employment, housing, and educational opportunities. Cal. Penal Code § 19; Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012). As explained by a commentator:

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> [T]he legal, economic, and psychological impact of a misdemeanor conviction can be substantial. First and foremost, the individual acquires a criminal record that can follow him or her for a lifetime. Employers often decline to interview people who have been convicted of any offense; 60 to 70 percent of employers state that they would not hire any ex-offender and the majority of employers perform background checks. Because criminal records are easily accessible to employers, even a misdemeanor arrest can interfere with an applicant's job prospects, let alone an actual conviction.

Natapoff, 85 S. CAL. L. REV. at 1325.

Indeed, California Penal Code Section 17(a) defines misdemeanor offenses broadly, "[e]very other crime or public offense [that is not a felony] is a misdemeanor except those offenses that are classified as infractions." In the instance where no punishment is specifically prescribed, every offense declared "a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1000), or both. Cal. Penal Code § 17(c).

If A4A's disingenuously overbroad reading of Sections 25132 and 36900 were adopted, San Francisco would be allowed to charge as crimes, the conviction of which would involve six months' imprisonment and/or $1,000 fine for each violation, any failure to comply with the HAO. There is no evidence whatsoever of any such local legislative intent. In fact, the

absence of any criminal penalty in the HAO is persuasive evidence that no such criminal sanction was intended.

A4A's argument is also counter to current trends. The Supreme Court previously ordered the state of California to reduce prison overcrowding. *See Brown v. Plata*, 563 U.S. 493 (2011). A sweeping and overbroad reading of Section 25132 and 36900, that any local ordinance violation could carry with it a period of six months incarceration, would potentially frustrate California's efforts, as previously ordered by the U.S. Supreme Court, to reduce, not expand, jail populations.

More broadly, the last several years have witnessed an extensive national debate surrounding the role of criminal law in American society, with significant concerns expressed regarding the effects of over-policing and over-criminalization on marginalized communities. This has led to numerous scholarly and popular appeals to decriminalize many low-level offenses – specifically including local ordinance violations.[4] Local

[4] *See*, *e.g.*, Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637 (2021); Jessica Smith, *Overcriminalization & Ordinance Violations as Crimes*, N.C. CRIM L. (Apr. 29, 2019, 7:37 AM), https://nccriminallaw.sog.unc.edu/overcriminalization-ordinance-violations-as-crimes-a-county-level-breakdown/; Maurice Baynard, *Overcriminalization of Low-Level Offenses: Perpetuating Poverty and Racial Disparities in the Misdemeanor Criminal Justice System*, DUKE UNIV. MASTER'S PROJECT (2021), https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/22840/Overcriminalization%20of%20Low-Level%20Offenses.pdf; Jordan Blair Woods,

governments across the country have responded by repealing (or proposing to repeal) the criminal penalties for, among other things, "quality of life" offenses, noise ordinances, park ordinances, and ordinances addressing various other behaviors associated with homelessness or poverty.[5] A4A's approach would perversely force California in the opposite direction, making every ordinance violation, no matter how minor, an automatic criminal offense – presumptively a jailable misdemeanor – regardless of the wishes of the local community and its elected leaders. A clearer conflict with this state's public policy is difficult to imagine.

Decriminalization, Police Authority, and Routine Traffic Stops 62 UCLA L. REV. 672 (2015).

[5] Brad Devereaux, *Kalamazoo decriminalizes public urination, defecation despite downtown business owners' concerns*, MLIVE (Jul. 19, 2022), https://www.mlive.com/news/kalamazoo/2022/07/kalamazoo-decriminalizes-public-urination-defecation-despite-downtown-business-owners-concerns.html (last visited Nov. 17, 2022); Benjamin Rappaport, *Chapel Hill Decriminalizes Noise Ordinance Violations, Establishes New Fine System*, CHAPELBORO.COM (Aug. 10, 2021), https://chapelboro.com/news/local-government/chapel-hill-decriminalizes-noise-ordinance-violations-establishes-new-fine-system (last visited Nov. 17, 2022); s*ee also* Rachel Moran, *Doing Away With Disorderly Conduct*, 63 B.C. L. REV. 65, 120 (2022) ("In the past decade, some jurisdictions have embraced [the] suggestion to "shrink the codes" by decriminalizing certain conduct"); Lindsay Nash, *Expression by Ordinance: Preemption and Proxy in Local Legislation* 25 GEO. IMMIGR. L.J. 243, 266 (2011) ("Even within the limited scope of this article's research, at least two cities appear to have recognized the threat of nuisance-based regulation allowing for troubling enforcement practices--and legislated to alleviate such concerns by minimizing harsh penalties resulting from nuisance enforcement").)

C. A4A's Argument, that the Violation of Every Local Ordinance is Criminalized by Operation of the Government Code, Directly Infringes Upon the Home Rule Powers of California's Charter Cities and Raises Due Process Concerns.

Charter cities are authorized to "make and enforce all ordinances and regulations in respect to municipal affairs." Cal. Const., art. XI, § 5(a). They are specifically authorized by the California Constitution "to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs." *State Bldg. & Constr. Trades Council Cal. v. City of Vista,* 279 P.3d 1022, 1026 (Cal. 2012) ("*City of Vista"*). "City charters … with respect to municipal affairs shall supersede all laws inconsistent therewith." Cal Const., art. XI, § 5(a). The provision is "'an affirmative constitutional grant to charter cities of "all powers appropriate for a municipality to possess'." *City of Vista*, 279 P.3d at 1027 (citing *California Fed. Sav. & Loan Assn. v. City of L.A.*, 812 P.2d 916, 921-922 (1991) (*California Fed. Savings*) (quoting *Ex Parte Braun*, 74 P. 780, 781 (1903)).

San Francisco is a charter city, and the City's charter incorporates the home rule doctrine:

> The City and County of San Francisco may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to the restrictions and limitations in [its] Charter.

San Francisco Charter, art. I § 1.101.

A four-part test applies to determine whether a state law impermissibly infringes upon a charter city's home rule. "First, a court must determine whether the city ordinance at issue regulates an activity that can be characterized as a 'municipal affair.' Second, the court 'must satisfy itself that the case presents an actual conflict between local and state law.' Third, the court must decide whether the state law addresses a matter of 'statewide concern.' Finally, the court must determine whether the law is reasonably related to resolution of that concern and narrowly tailored to avoid unnecessary interference in local governance.' " *City of Vista,* 279 P.3d at 1027 (quoting *California Fed. Savings,* 812 P.2d 916 at 916).

Thus, state law supersedes the law of a charter city only in instances where the state law is (1) in an area of statewide concern, (2) is reasonably related to resolution of the statewide concern, and (3) is narrowly tailored to limit the incursion into legitimate municipal interests. Interpreting Sections 25132 and 36900 so broadly that they automatically implicate criminal penalties, regardless of local legislative intent to the contrary, meets none of these three prongs.

The HAO undeniably relates to classic municipal affairs involving the operation of land owned by the City and from which the City receives a critically important revenue stream. As argued persuasively in the Respondent's Brief, municipal contracting and leasing public property are undeniably classic municipal affairs. Respondent Br. 23; *see*, *e.g.*, *MCM Constr*. v. *City & Cty. of S.F.,* 66 Cal. App. 4th 359, 371-372 (1998) (bids on construction at SFO); *First Street Plaza Partners v. City of L.A.*, 65 Cal. App. 4th 650, 660-661 (1998) (municipal contracts); *see generally* 8 Witkin, Summary of California Law - Constitutional Law § 1122(1)-(3) (11th ed. 2017).

A4A's sweepingly overbroad reading of Sections 25132 and 36900 would also directly invade a charter city's inherent home rule power to decide how ordinance violations should be treated, and whether violations of particular ordinances should reasonably implicate a criminal penalty, or not. Most city and county codes in the state contain specific provisions governing penalties for violations. *See e.g.*, Oakland Mun. Code § 1.28.010; Santa Rosa City Code § 17-12.190. If A4A's position were adopted, any of those myriad provisions that contained a different penalty from the criminal ones referred to in Sections 25132 and 36900 could potentially be subject to challenge as inconsistent with state law. And,

nowhere in its briefing does A4A identify any overriding state concern that would justify such an overbroad and messy incursion into municipal affairs.

Further, imposing a potential criminal penalty for any ordinance violation is most definitely not a "narrowly tailored" infringement upon legitimate municipal interests. Indeed, such a sweeping reading of state law is the exact opposite of "narrowly tailored." On that basis alone, this Court should reject A4A's argument as infringing upon the City of San Francisco's constitutionally guaranteed home rule powers.

As the California Attorney General noted in the *MacMillen* Opinion, "*To state a crime, a penal ordinance must express by appropriate language both the acts constituting the offense and the penalty imposed for violation thereof.*" (*MacMillen*, 60 Cal. Op. Att'y Gen. at *6) (emphasis added). If the language of the ordinance in question, interpreted using the ordinary tools of statutory construction, objectively imposes criminal penalties for a particular violation, then there is arguably adequate notice for due process purposes – and if not, then there should be no criminal penalty in the first place. Due process requires no less. *See Kolender v. Lawson*, 561 U.S. 358, 402-403 (2010) (Due process principles require that a penal statute "define [a] criminal offense with [1] sufficient definiteness

that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.")

A4A's reading would undoubtedly cross the line in creating arbitrary and discriminatory criminal enforcement, as citizens would not be on notice that violations of particular municipal ordinances, no matter how seemingly inconsequential, could result in misdemeanor charges.

A4A argues that *Sahab v. Baca*, No. CV 11-7061-CJC (PLA), 2014 WL 102410 (C.D. Cal. Jan. 8, 2014), supports its interpretation of Sections 25132 and 36900. A4A, however, misrepresents a crucial takeaway from Sahab: <u>the significance of local legislative intent</u>. In *Sahab,* Los Angeles, unlike San Francisco in the present case, had an ordinance in effect imposing a criminal penalty for a violation of the ordinance in question. Los Angeles Municipal Code (LAMC) Section 11.00(m). *Sahab*, 2014 WL 102410, at * 8. Both San Francisco and Los Angeles are charter cities authorized to govern themselves with respect to municipal affairs. *City of Vista*, 279 P.3d at 555. In *Sahab,* by virtue of language in the Los Angeles municipal code itself, a violation of the ordinance in question was a misdemeanor. With respect to the QSP and HAO, however, San Francisco made a different legislative decision: no such criminal penalty is

authorized under local law. For that fundamental reason, *Sahab* is perfectly consistent with the position of the City and the *amici* in this case: that a criminal penalty will not be imposed, absent local legislative intent to impose one.

Indeed, rejecting A4A's reading avoids implicating constitutional issues such as a potential deprivation of due process, and infringement upon a charter city's home rule powers. Conversely, reading Sections 25132 and 36900 in the manner urged by A4A inevitably enters constitutional territory. "[I]f reasonably possible, statutory provisions should be interpreted in a manner that avoids serious constitutional questions." *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 350-351(1999). Cal Cities and CSAC request that this Court affirm the District Court's decision. Any other interpretation impermissibly raises constitutional questions.

Finally, if there is any uncertainty about the correct interpretation of Sections 25132 and 36900, Cal Cities and CSAC join in the City's suggestion that the question be certified to the California Supreme Court. The issue of whether any ordinance violation in California can be criminalized is a critically important one, not just for the City of San Francisco, but for every city and county in the state.

III. CONCLUSION

The District Court correctly concluded that San Francisco acted as a market participant in enacting the HAO. It cannot seriously be contended that the violation of any city or county ordinance in California is automatically criminalized by operation of the Government Code—or that the HAO should be read to include a criminal penalty in case of a violation. For these reasons, Cal Cities and CSAC respectfully request that this Court affirm the District Court's decision.

DATED: November 18, 2022

GOLDFARB & LIPMAN LLP

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IV. STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, amici curiae are not aware of any related cases pending in this Court.

V. CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

I am an attorney for *Amici Curiae* League of California Cities and the California State Association of Counties. This brief contains 4,996

words excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and it complies with the word limit of Fed. R. App. P. 29(a)(5).

The brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

VI. CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the digital submission has been scanned for viruses with Webroot, and according to the program is free of viruses.

DATED: November 18, 2022 GOLDFARB & LIPMAN LLP

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2022, I electronically filed the foregoing BRIEF OF AMICI CURIA LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENT THE CITY AND COUNTY OF SAN FRANCISCO with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all the participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I declare that I am employed in the offices of a member of the State Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on November 18, 2022, at Oakland, California.

/s/ Laura L. Luz

Laura L. Luz