

Case No. G065816

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

NEWPORT BEACH STEWARDSHIP ASSOCIATION,

Plaintiff and Appellant,

v.

CITY OF NEWPORT BEACH,

Defendant and Respondent.

On Appeal from the Superior Court of Orange County

Case No. 30-2024-01428295

Hon. Melissa R. McCormick

**BRIEF OF AMICI CURIAE THE ATTORNEY GENERAL OF
CALIFORNIA AND THE CALIFORNIA DEPARTMENT OF
HOUSING AND COMMUNITY DEVELOPMENT IN SUPPORT
OF RESPONDENT; APPLICATION FOR LEAVE TO FILE**

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July 13, 2026

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APPELLANT/ PETITIONER: Newport Beach Stewardship Association RESPONDENT/ REAL PARTY IN INTEREST: City of Newport Beach	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	
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1. This form is being submitted on behalf of the following party (name): Amici curiae AG Rob Bonta and CA HCD

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(5)	

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Date: July 13, 2026

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**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF**

TO THE HONORABLE PRESIDING JUSTICE JOANNE
MOTOIKE:

The California Department of Housing and Community Development (HCD) respectfully requests permission to file the accompanying brief as amicus curiae, to assist this Court as it considers whether, and to what extent, the Housing Element Law (Gov. Code, § 65580 et seq.) preempts local greenlight measures adopted by initiative.¹ The proposed brief is jointly filed with the Attorney General of California, who is also submitting the accompanying brief in his independent capacity.²

HCD's statutory mission is to preserve and expand safe and affordable housing and promote strong communities for all Californians.³ In addition, HCD develops policies to increase the

¹ This proposed amicus brief was authored by Kevin J. Kelly and Matthew T. Struhar, Deputy Attorneys General, on behalf of HCD and the Attorney General of California. No party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the proposed amicus brief.

² See Rules of Court, Rule 8.882, subd. (d)(5), permitting the filing of amicus curiae briefs, submitted on the Attorney General's own behalf, without leave of court.

³ See generally Gov. Code, § 65585 [requiring HCD to adopt guidelines and issue findings regarding compliance with the Housing Element Law], and *A Home for Every Californian: 2022 Statewide Housing Plan*, at pg. 6.
<<https://www.hcd.ca.gov/docs/statewide-housing-plan.pdf>> (as of July 13, 2026).

supply of affordable housing.⁴ HCD also oversees local land use planning to ensure that those local governments plan for the development of housing for every income level.⁵

The amicus brief of the Attorney General and HCD supports the superior court's decision denying relief to appellant. To provide such relief right now would require the City to violate the Housing Element Law.

Date: July 13, 2026

Respectfully submitted,

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⁴ *Ibid.*, and HCD's Policy and Research webpage, <<https://www.hcd.ca.gov/policy-and-research>> (as of July 13, 2026).

⁵ HCD's Housing Element online portal, <<https://www.hcd.ca.gov/planning-and-community-development/housing-elements>> (as of July 13, 2026).

INTRODUCTION AND STATEMENT OF INTEREST

The Attorney General has a strong interest in ensuring the appropriate construction of California laws. (Cal. Const., art. V, § 13; Gov. Code, § 12511.)⁶ And the Legislature has declared that “[t]he availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian, including farmworkers, is a priority of the highest order.” (§ 65580, subd. (a).) Thus, along with HCD, the Attorney General has a statutory obligation to enforce over 27 specific state housing laws related to planning and zoning, including the Housing Element Law. (§§ 65585, subds. (j), (n).) The Attorney General submits this brief jointly with HCD to assist the Court in determining whether and to what extent the Housing Element Law preempts locally imposed greenlight measures, which are local measures that require local voter approval before a locality can make certain land use decisions.

This Court should affirm the judgment for a simple reason. At this point in the planning period, providing relief to appellant Newport Beach Stewardship Association (“NBSA”) would require ordering the City to violate state law. NBSA asks this Court to issue a writ of mandate compelling the City to vacate several planning and zoning actions—referred to herein collectively as the “Program Action”—that the City undertook to implement its duly adopted sixth cycle housing element update. The City’s

⁶ All statutory references are to the Government Code unless otherwise indicated.

statutory deadline to undertake those actions was February 12, 2025. (See § 65583.4, subd. (a).) For the City to vacate the Program Action now would violate the Housing Element Law. (See § 65585, subds. (i)(1)(A).) Under these particular circumstances, state law plainly precludes the City from subjecting the Program Action to its local greenlight measure. The Court can affirm the judgment on this basis alone.

The trial court also correctly concluded that the City's greenlight measure contradicted, and was thus preempted by, the Housing Element Law. The Housing Element Law requires the mutual cooperation of governments at the local, regional, and state level, to advance the State's interest in promoting the development of sufficient housing to meet the needs of all economic segments of society. When applied to the housing element process, greenlight measures vest local electorates with the discretion to veto state-mandated local efforts to accommodate these housing needs. For that reason, these measures cannot apply to the housing element adoption and implementation process.

The argument advanced by NBSA would, if adopted, critically undermine the effective operation of the Housing Element Law. According to NBSA, if land use changes within a locality are subject to a greenlight measure, its local government cannot take certain actions required by the Housing Element Law without the approval of the local electorate. NBSA rests this argument on the mere possibility that a local government *could*

obtain approval from the electorate before implementing its housing element.

That argument misses this point. The Housing Element Law preempts the application of greenlight measures to the housing element process because greenlight measures make compliance with a mandatory law contingent on the discretionary judgment of the local electorate. That inimical conflict, on its own, shows that the Legislature clearly intended to preclude the application of greenlight measures to the entire housing element process.

The Housing Element Law, moreover, exclusively delegates the tasks of preparing, adopting, and implementing housing elements, which help advance a statewide and regional program, to discrete local agencies—namely, the local planning agency and the legislative body. Because the entire statutory scheme is designed to address a collective action problem and a clear matter of statewide concern, the Housing Element Law creates a pervasive system of state regulation that makes local governments directly accountable to HCD in the performance of their statutory duties. The Housing Element Law expressly states that one of its central goals is to assure that localities will prepare and implement housing element updates at predetermined planning periods. (§ 65580, subd. (b).) That indicates that the Legislature did not intend to allow localities, whether through their local legislative bodies or through their electorates, to forego complying with these mandatory duties. Taken together, these components of the statute demonstrate

that the Legislature intended to preempt the application of greenlight measures to the housing element process.

While amici take seriously the importance of protecting the people’s right to initiative and referendum, the use of these local powers to restrict new housing development can ultimately nullify the Legislature’s considered policy judgment. The City of Newport Beach, therefore, properly determined that it could not subject the legislative action at issue here to its greenlight measure, and the trial court correctly ruled in the City’s favor.

LEGAL BACKGROUND

I. THE STATE SUFFERS FROM A CRISIS-LEVEL HOUSING SHORTAGE BECAUSE LOCAL GOVERNMENTS HAVE COLLECTIVELY FAILED TO PERMIT SUFFICIENT HOUSING

California’s statewide housing shortage is a crisis. (Stats. 2024, ch. 293 (S.B. 1037), § 1, subd. (a), eff. Jan. 1, 2025.) This crisis inhibits economic growth, exacerbates homelessness, and makes living here less affordable, and thus less feasible, for millions of Californians. (*Id.*, subd. (b).) To solve this problem, the State needs more housing. (*Ibid.*)

Unfortunately, restrictive local land use policies have long limited the development of housing in the State. (*Id.*, subd. (c).) Recognizing that local governments, if left unaccountable, often use their land use authority to thwart the development of new and desperately needed housing for all income levels, the Legislature declared that “the availability of housing is of vital statewide importance,” thus necessitating the mutual cooperation of local governments to accommodate the State’s housing needs. (§ 65580, subds. (a), (b).) For that reason, local governments must

use their land use authority to foster the development of sufficient housing to meet the needs of all economic segments of society. (*Id.*, subd. (d).)

California's local governments have for decades neglected to use their land use authority for this purpose. As a result, California's housing needs have significantly outpaced the production of new housing units. (See HCD's Housing Assessment Report, available at https://www.hcd.ca.gov/policy-research/plans-reports/docs/sha_final_combined.pdf (as of July 12, 2026).)

The Legislature has attributed certain aspects of the crisis to the behaviors of local governments. For example, local governments have often subverted the State's housing needs by appeasing local opposition to new housing. (*AIDS Healthcare Foundation v. Bonta* (2024) 101 Cal.App.5th 73, 85.) That collective failure has made housing more expensive for people at all income levels across the State, making state intervention necessary. (*Ibid.*)

II. TO ADDRESS THIS COLLECTIVE ACTION PROBLEM, THE LEGISLATURE ADOPTED THE HOUSING ELEMENT LAW

A. Under the Housing Element Law, Local Governments Must Plan for the Development of Sufficient Housing for All Income Levels

The Legislature has enacted many reforms to rectify local governments' chronic thwarting of California's housing needs so that they can plan for and permit new housing. (See § 65582.1.) Among the most significant is the Housing Element Law, which creates a comprehensive framework for statewide and regional coordination to ensure that each local government accommodates

its fair share of new housing. (*Committee for Responsible Housing v. City of Indian Wells* (1989) 209 Cal.App.3d 1005, 1013.) Local governments must adopt general plans, and those general plans must include housing elements that substantially comply with the Housing Element Law. (§ 65302, subd. (c).) Those housing elements must accommodate the housing “needs of all economic segments of the community.” (§ 65583.) Housing elements accomplish this goal primarily by requiring rezoning actions “that allow sufficient opportunities to construct multifamily residences.” (*Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 219.)

The statute treats “the early attainment of decent housing and a suitable living environment for every Californian” as “a priority of the highest order.” (§ 65580, subd. (a).) That priority requires “the cooperation of all levels of government” to designate and maintain “a supply of land and adequate sites suitable, feasible, and available for the development of housing sufficient to meet the locality’s housing need for all income levels.” (§ 65580, subs. (c), (f).)

The Legislature intended for municipalities to “recognize their responsibilities in contributing to the attainment of the state housing goal”—which is the availability of housing for every Californian regardless of income level. (§ 65581, subd. (a).) That requires local governments to prepare, adopt, and implement housing elements that help the State attain its housing goal. (§ 65581, subd. (b).) Local efforts to comply with the law must be

“compatible with the state housing goal and regional housing needs.” (§ 65581, subd. (c).)

B. The Housing Element Law Obligates Local Governments to Adopt and Implement Housing Elements by Legally Enforceable Deadlines

Due to the “vital statewide importance” of housing, the housing element plays a “preeminent role” in the general plan. (*City of Indian Wells, supra*, 209 Cal.App.3d at p. 1013, quoting § 65580, subd. (a).) Unlike other general plan elements, housing elements must be updated in accordance with a statutory schedule. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 793, fn. 11.) That schedule requires local governments to update their housing elements by the first date of each planning period. (*Martinez, supra*, 90 Cal.App.5th at p. 222.) That obligation is judicially enforceable. (§ 65587, subds. (a), (b).)

1. Local Governments Must Adopt Their Housing Elements by the Start of the Planning Period

A planning period (or planning cycle) typically lasts eight years. (*Martinez, supra*, 90 Cal.App.5th at p. 222.) The statute requires periodic updates to the housing element to ensure that housing elements continuously accommodate each locality’s regional housing needs allocation (RHNA), which is “the locality’s proportionate share of regional housing needs for each income level.” (*Id.* at p. 223.) A locality’s housing needs include, and can exceed, its RHNA. (See *ibid.*) HCD sets the housing need for each region, and the regional council of governments (the “COG”) allocates that housing need among its constituent jurisdictions through an intergovernmental compact called the RHNA

allocation plan. (*Ibid.*) A locality's RHNA allocation is not subject to judicial review. (*City of Coronado v. San Diego Assn. of Governments* (2022) 80 Cal.App.5th 21, 43.)

Two years before the start of the planning period, the COG publishes a proposed methodology in distributing the regional housing need among its constituent jurisdictions. (§ 65584.04, subd. (a).) The COG develops the methodology with input from HCD, the COG's constituent jurisdictions, and the public. (*Id.*, subds. (a), (b), & (d).) From there, the COG prepares a draft RHNA allocation plan, which it must submit to its constituent jurisdictions at least 18 months before the start of the planning period. (§ 65584.05, subd. (a).) The statute provides time for administrative appeals, which can take months. (See *id.*, subds. (b)-(e).) Once those processes are exhausted, the COG prepares a proposed final RHNA allocation plan, which "shall adjust allocations to local governments based upon the results of the appeals process." (*Id.*, subd. (f).) The COG, within 45 days, then adopts the final RHNA allocation and submits it to HCD for approval. (*Id.*, subd. (g).)

Over the years, the Legislature has adjusted the COG's substantive obligations with the goal of enabling the production of more and denser housing. For instance, beginning in 2019, prior underproduction of housing and stable populations could no longer justify a reduction in a locality's RHNA allocation. (See Stats. 2018, ch. 974 (S.B. 828), § 3.) That same year, COGs had to start considering overcrowding data and other additional factors in developing their RHNA allocation plans. (See Stats. 2018, ch.

206 (A.B. 1086), § 2.) In making these changes, the Legislature sought to foster denser housing in job centers. (See *id.*, § 1, enacting § 65584, subd. (a)(3) [“The Legislature finds and declares that insufficient housing in job centers hinders the state's environmental quality and runs counter to the state's environmental goals. In particular, when Californians seeking affordable housing are forced to drive longer distances to work, an increased amount of greenhouse gases and other pollutants is released and puts in jeopardy the achievement of the state's climate goals, as established pursuant to Section 38566 of the Health and Safety Code, and clean air goals.”].)

After the RHNA is assigned, the local government must update its housing element by the first date of the planning period. (See § 65587, subd. (a).) The housing element has three core components: (1) an assessment of housing needs, for which the RHNA is the “centerpiece”; (2) an inventory of sites suitable to meet those needs; and (3) a program to accommodate those housing needs. (*Martinez, supra*, 90 Cal.App.5th at pp. 223-225.) The program sets forth a schedule of actions, and that schedule forms the “substantive heart” of the housing element. (*Id.* at p. 225.)

2. Local Governments Must Implement Their Housing Elements Through Program Actions

The actions identified in a program are called “program actions,” which are legally binding and judicially enforceable. (See §§ 65583, subds. (c)(1)(A), (h), 65585, subd. (i)(1)(A), 65587, subd. (d)(2).) Program actions include the rezoning actions

necessary to accommodate identified housing needs. (See *Martinez, supra*, 90 Cal.App.5th at p. 225.)

State law fixes the deadlines to undertake those program actions, although the statute has in the past set different deadlines based on the circumstances facing each locality. (See, e.g., § 65583.4, subd. (a).) Going forward, local governments only have a year from the beginning of the planning period to rezone in accordance with their program actions. (§ 65583, subd. (c)(1)(A)(ii).) That deadline is judicially enforceable. (See *id.*, subd. (h); see also § 65587, subd. (d)(2).)

C. Local Governments Prepare, Adopt, and Implement Their Housing Elements in Accordance with a Uniform Process and Under State Supervision

The Housing Element Law establishes a uniform procedure that local governments must follow in updating their housing elements. Upon receiving their RHNA allocations, local governments prepare their draft housing element updates through a public process and then submit those draft updates to HCD so that HCD can review and provide findings on the draft. (§ 65585, subd. (b)(1)(A).) After considering HCD's findings, the local legislative body adopts the draft, which is then submitted to HCD so that HCD can determine whether the update substantially complies with the Housing Element Law. (§ 65585, subds. (e), (f), (g)(1), & (h).)

Since 2018, the Housing Element Law conferred on HCD the oversight authority to review the actions of the local government to determine whether they substantially comply with the locality's adopted housing element or the Housing Element Law.

(Stats. 2017, ch. 370 (A.B. 72), adding subdivisions (i) and (j) to the Section 65585, eff. Jan. 1, 2018.) If HCD determines that “any action or failure to act” by the locality “is inconsistent with an adopted housing element or Section 65583,” then it shall notify the local government of its noncompliance with the law. (§ 65585, subd. (i)(1)(A), italics added.) The action or failure to act giving rise to liability can include “any failure to implement any program actions included in the housing element pursuant to Section 65583.” (*Ibid.*) If HCD makes these findings, “there shall be a rebuttable presumption of invalidity in any legal action challenging that action or failure to act.” (*Id.*, (i)(1)(B).)

After giving the locality a reasonable time to respond to its written findings, HCD may revoke any previous findings that the locality’s housing element substantially complies with the Housing Element Law. (*Id.*, subd. (i)(1)(C).) It can also refer any violation of the Housing Element Law or an adopted housing element to the Attorney General for civil enforcement. (*Id.*, subd. (j).) The statute, in summary, makes local governments directly accountable to the State for the performance of all actions that are necessary to comply with the Housing Element Law, and specifically identifies program actions (like rezoning) among those required actions.

III. LOCAL GOVERNMENTS THAT VIOLATE THE HOUSING ELEMENT LAW FACE SIGNIFICANT LEGAL CONSEQUENCES

The State treats violations of the Housing Element Law with the utmost seriousness. If, for example, a local government fails to adopt a housing element for a particular planning period altogether, a court must impose a monetary penalty that accrues

monthly until the locality cures the violation. (§ 65009.1, subd. (a)(1), eff. Jan. 1, 2025.)

Persistent failure to cure a violation of the Housing Element Law, including any failure to implement a program action under Section 65583, can result in fines and penalties. (§65585, subd. (l)(1)-(3)(A).) Eventually, the court may appoint a receiver who is empowered to “take all governmental actions necessary to bring the local jurisdiction’s housing element into substantial compliance pursuant to [the Housing Element Law] in order to remedy identified deficiencies.” (§ 65585, subd. (l)(3)(B).) State law also includes certain provisional, nonjudicial remedies, like the Builder’s Remedy. (§ 65589.5, subds. (d)(5), (f)(6), & (h)(11).) Under the Builder’s Remedy, a local government whose housing element does not substantially comply with the Housing Element Law cannot use its planning or zoning policies to deny new affordable housing opportunities. (*Ibid.*) Nowhere does the Housing Element Law provide, however, that the Builder’s Remedy excuses local jurisdictions from complying with Housing Element Law obligations. These remedies, in other words, are cumulative, not elective.

FACTUAL AND PROCEDURAL BACKGROUND

I. THE CITY’S GREENLIGHT MEASURE

In 2000, the City’s voters adopted Measure S, which added Section 423, titled “Protection from Traffic Density,” to the City’s charter. Under Section 423, “[v]oter approval is required for any major amendment to the Newport Beach General Plan.” (Newport Beach City Charter, article IV, section 423, cited herein as Section 423.) A “major amendment” includes any amendment

increasing housing density by over 100 units. (*Ibid.*) Section 423 includes a savings clause, which specifies that Section 423 “shall not apply if state or federal law precludes a vote of the voters on the amendment.” (*Ibid.*)

II. THE CITY’S HOUSING ELEMENT AND PROGRAM ACTION

The City belongs to the Southern California Association of Governments (“SCAG”), which is the COG charged with creating the RHNA allocation plan for SCAG jurisdictions. (RB at p. 22.) As part of its RHNA allocation plan for the sixth and current planning period,⁷ SCAG allocated 4,845 units to the City, which is the City’s RHNA allocation. (*Id.* at pp. 22-23.) Although the City administratively appealed its RHNA allocation to SCAG, SCAG denied the appeal. (*Id.* at p. 23.) On March 22, 2021, HCD approved SCAG’s final RHNA allocation plan for the sixth cycle. (See SCAG 6th Cycle RHNA Allocation Plan, available at [https://scag.ca.gov/sites/default/files/2024-05/6th cycle final rhna allocation plan 070121.pdf](https://scag.ca.gov/sites/default/files/2024-05/6th%20cycle%20final%20rhna%20allocation%20plan%20070121.pdf) (as of July 12, 2026).)

Accordingly, the City prepared and, on September 13, 2022, adopted a sixth cycle housing element within one year of its statutory deadline to do so. (RB at p. 23.) As is common, the City’s housing element included a significant upzoning program that theoretically enabled development of new units above the numeric RHNA allocation to ensure that adequate sites would remain available for new housing development throughout the

⁷ The sixth planning period for SCAG jurisdictions lasts from October 2021 to October 2029.

planning period. (*Ibid.*) After the City adopted its housing element, HCD determined that the housing element substantially complied with the Housing Element Law due, in part, to the City's commitment to rezone sufficient sites to accommodate a minimum of 8,174 new housing units. (RB at p. 24.)

To remain in compliance with the Housing Element Law, the City was required to implement that rezoning program by February 12, 2025. (See §§ 65583, subd. (c)(1)(A), 65583.4, subd. (a).) That rezoning program consisted of amendments to the City's General Plan Land Use Element, Coastal Land Use Plan, and its municipal code. (RB at p. 11, fn. 1.) Amici will refer to these actions together as the "Program Action," because they are program actions within the meaning of the Housing Element Law. (See § 65583, subd. (c)(1)(A).) The City adopted the Program Action on September 24, 2024. (RB at p. 26.) Although the Program Action included a "major amendment" within the meaning of Section 423, the City did not submit the Program Action to its voters after the City Council determined that the Housing Element Law precluded the application of the greenlight measure to the Program Action. (See AOB at p. 9.)

NBSA and another organization, Still Protecting Our Newport ("SPON"), filed suits against the City for its adoption of the Program Action. Following a hearing on June 17, 2025, the superior court rejected NBSA's and SPON's challenges to the Program Action and entered judgment in favor of the City. (RB at p. 29.)

LEGAL STANDARD

The California Constitution vests local governments with the power to adopt and enforce, within their territories, “all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const., art. XI, § 7.) But state law may preempt local law “either expressly or by implication.” (*AIDS Healthcare, supra*, 101 Cal.App.5th at p. 86.) “If otherwise valid local legislation conflicts with state law,” then such law preempts local law, rendering the local law void. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897, internal quotation omitted.) A conflict will arise where local law duplicates, contradicts, or enters an area fully occupied by state law. (*Chevron U.S.A. Inc. v. County of Monterey* (2023) 15 Cal.5th 135, 142.)

“A local ordinance contradicts state law when it is inimical to or cannot be reconciled with state law.” (*O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068.) This can happen when a local law prohibits what state law either demands or allows. (*Chevron U.S.A., supra*, 15 Cal.5th at p. 149.) Furthermore, to avoid preemption, compliance with both state and local law must be *reasonably* possible. (*Id.* at. 150.)

ARGUMENT

I. IT IS NOT REASONABLY POSSIBLE FOR THE CITY TO COMPLY WITH BOTH SECTION 423 AND THE HOUSING ELEMENT LAW AT THIS POINT IN THE PLANNING PERIOD

The Court should affirm the judgment because, under present circumstances, the City cannot vacate the Program Action to hold a Section 423 vote without in turn violating the Housing Element Law. “Mandamus will not lie to compel the

performance of any act which would be void, illegal or contrary to public policy.” (*Duff v. City of Gardena* (1980) 108 Cal.App.3d 930, 936.) To vacate the Program Action would be inconsistent with the City’s duly adopted housing element and thus violate the Housing Element Law. (See §§ 65583, subd. (c)(1)(A), 65585, subd. (i)(1)(A).) The superior court properly declined to provide NBSA with this relief.

Both the City and NBSA agree that the Housing Element Law required the City to adopt the Program by February 12, 2025. (See § 65583.4; AOB at p. 40.) For the City to vacate the Program Action *now* would constitute a failure to implement its housing element, and the City lacks the discretion to refuse to do implement its housing element. (See §§ 65583, subds. (g)(1), (h), 65585, subd. (i)(1)(A), 65587, subd. (d)(2).) Accordingly, it is not reasonably possible for the City to comply with the Housing Element Law and also vacate the Program Action to hold a Section 423 under the circumstances presented here. (See *Chevron U.S.A., supra*, 15 Cal.5th at p. 150.)

A. State Law May Preclude Ballot Measures When They Call for Legally Infeasible Outcomes

NBSA expounds at length on the importance of the people’s reserved powers of initiative and referendum. But even the cases that NBSA relies on recognize that state law may preclude holding a referendum, which is what Section 423 functionally requires, under case-specific circumstances. (See *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1091; *Yost v. Thomas* (1984) 36 Cal.3d 561, 574.) In *City of Morgan Hill*, for instance, the Supreme Court held that referendum sponsors could challenge an

ordinance to conform local zoning to an updated general plan, as required by Section 65860(c), “where the local government has other means available to make the zoning ordinance and general plan consistent.” (*City of Morgan Hill, supra*, at p. 1076.) Since Section 65860(c)’s consistency requirement afforded local jurisdictions a “reasonable time” to comply with it, the statute left open the possibility that local governments could comply with the statute, hold a referendum, and then comply with a successful referendum without ever violating Section 65860. (*Ibid.*) The Supreme Court left it for the lower courts to determine whether the City, under the particular circumstances of the case, could feasibly comply with both a successful referendum and Section 65860(c). (*Id.* at p. 1091.)

Yost involved the Coastal Act, which left “wide discretion to a local government not only to determine the contents of its land use plans, but to choose how to implement these plans.” (36 Cal.3d at p. 573.) That discretion made it feasible to comply with both a successful referendum and the Coastal Act, but the Court observed that “if down the road the people exercise their referendum power in such a way as to frustrate any feasible implementation of the LUP, some way out of the impasse will have to be found.” (*Id.* at p. 574.)

Both *City of Morgan Hill* and *Yost* thus contemplate that, even where state law does not facially preclude ballot measures in all circumstances, state law may preclude them when their case-specific application would make it legally infeasible to comply with state law. That is in keeping with the principle that

compliance with state and local law must be reasonably possible to avoid preemption. (See *Chevron U.S.A., supra*, 15 Cal.5th at p. 150.)

B. It Is Legally Infeasible for the City to Vacate the Program Action to Hold a Vote on the Program Action

Holding a Section 423-mandated referendum—a binary up-or-down vote—on the Program Action *after* the deadline to adopt the Program Action has passed would impede the feasible implementation of the City’s housing element. (See *Yost, supra*, 36 Cal.3d at p. 574.) Under the Housing Element Law, localities cannot take “any action” inconsistent with their housing elements. (§ 65585, subd. (i)(1)(A).) Otherwise, they will face consequences detailed in Section III of the Legal Background, *infra*.

The City adopted the Program Action to implement its housing element’s mandatory rezoning, and, as all parties acknowledge, the City’s deadline to complete that rezoning was February 12, 2025. (See § 65583.4, subd. (a).) To vacate the Program Action now, with no legally sufficient alternative in its place, would accordingly violate the City’s housing element, which the City must implement by undertaking the housing element’s program actions. (See *Martinez, supra*, 90 Cal.App.5th at p. 225.) Under these circumstances, the City Council lacks the discretion to vacate the Program Action, and so does the City’s electorate. (See *DeVita, supra*, 9 Cal.4th at p. 775 “[T]he local electorate’s right to initiative and referendum ... is generally co-

extensive with the legislative power of the local governing body.”].)

NBSA’s authorities are not to the contrary. *DeVita* expressly declined to address whether housing elements were subject to the initiative or referendum power, and so it provides limited, if any, support for NBSA’s position. (*Id.* at p. 793, fn. 11.) And unlike the Housing Element Law, the statutes in *Yost* and *City of Morgan Hill* left local governments with discretion in determining the timing of compliance. (See *City of Morgan Hill*, *supra*, 5 Cal.5th at p. 1076; *Yost*, *supra*, 36 Cal.3d at p. 573.) Under the Housing Element Law, however, local governments must comply the law’s implementation deadlines, which are enforceable by writ. (See, e.g., §§ 65583, subd. (h), 65587, subd. (d)(2).)

At this point in the planning period, when the City’s rezoning deadline has passed, the City lacks discretion to vacate the Program Action. Should the City vacate the Program Action, then the City’s zoning will no longer accommodate its housing needs, including its RHNA, in violation of the Housing Element Law. (See § 65583.) The City, in summary, cannot vacate, or place on hold, the Program Action without in turn violating state law.

For that reason, NBSA is not entitled to a writ of mandate. A writ of mandate operates prospectively, which means present legal obligations must govern the Court’s review of the judgment. (See *New Commune DTLA, LLC v. City of Redondo Beach* (2025) 115 Cal.App.5th 111, 128.) Mandate, moreover, cannot compel the performance of any that would violate the law or public

policy. (*Torres v. City of Montebello* (2015) 234 Cal.App.4th 382, 403.) If the Court were to instruct the superior court to issue a writ of mandate as requested by NBSA, then the City would have to violate the Housing Element Law in order to comply with the superior court's writ, thereby subjecting itself to the monetary and injunctive penalties for violating the Housing Element Law. (See, e.g., §§ 65583, subd. (h), 65585, subds. (i), (l), 65587, subd. (d)(1), 65589.5, subd. (d)(5), 65754, 65755, subd. (a).)

NBSA handwaves these consequences away, noting that some depend on HCD and the Attorney General exercising their enforcement discretion. (See ARB at pp. 22-23.) But the possibility of enforcement discretion does not relieve the City from its duty to adopt and implement compliant housing elements. The Legislature enacted the Housing Element Law to *assure* that all California localities will adopt and implement housing elements that help the State achieve its statewide policy objectives. (See § 65581, subd. (b).) The prospect of judicial enforcement, not the certainty of it, helps assure local compliance with the Housing Element Law.

The City has must implement its housing element, which means it must keep the Program Action in effect. (See §§ 65583, subds. (c)(1)(A), (h), 65587, subd. (d).) To order otherwise would require the City to violate the letter and spirit of the Housing Element Law. For that simple reason, the Court should affirm the judgment. (See *Cook v. Noble* (1919) 181 Cal. 720, 721 ["[I]t is well settled that mandamus will not lie to compel the

performance of acts which are illegal, contrary to public policy, or which tend to aid an unlawful purpose.”].)

II. THE HOUSING ELEMENT LAW PREEMPTS THE APPLICATION OF GREENLIGHT MEASURES TO THE LAW’S MANDATORY PLANNING AND ZONING ACTIONS

The trial court held that the Housing Element Law preempted Section 423’s application to the Program Action. According to the trial court, because Section 423 confers the City with the discretion to forego complying with a mandatory statute, it is not reasonably possible for the City to comply with Section 423 and the Housing Element Law. (AA1440-1441.) That holding is correct.⁸

A. Greenlight Measures Conflict with State Law Because They Empower Local Electorates to Prevent Local Governments from Complying with the Housing Element Law

In *Chevron U.S.A.*, the Supreme Court provided clarity on the scope of the preemption inquiry. That case addressed whether Public Resources Code section 3106 preempted a Monterey County measure, called Measure Z, adopted by initiative. (*Chevron U.S.A.*, 15 Cal.5th at p. 140.) The Public Resources Code provided that the State Oil and Gas Supervisor “‘shall supervise’ oil production ‘so as to permit’ well owners and operators to ‘utilize all methods and practices’ that, ‘in the opinion of the supervisor, are suitable for th[e] purpose’ of

⁸ This is not to say that the Housing Element Law preempts greenlight measures in all their applications. Amici only argue that the Housing Element Law prevents localities from applying greenlight measures to the processes of preparing, adopting, and implementing housing elements.

‘increasing the ultimate recovery of underground hydrocarbons ... in each proposed case.’” (*Id.* at p. 145, quoting Pub. Resources Code, § 3106, subd. (b).) Measure Z, meanwhile, banned “oil and gas wastewater injection and impoundment and the drilling of new oil and gas wells throughout the County’s unincorporated areas.” (*Id.* at p. 139.)

By prohibiting these oil production methods in Monterey County, Measure Z had the effect of nullifying, and thus contradicting, the Public Resources Code’s mandate that the State “‘shall’ supervise oil operation in a way that permits well operators to ‘utilize all methods and practices’ the supervisor has approved.” (*Id.* at p. 145.) That presented a genuine conflict between state and local law, as “the state and local laws provide[d] conflicting instructions as to which entity”—the County or the State Oil and Gas Supervisor—“ha[d] the authority to decide what production methods [were] permissible.” (*Ibid.*, quoting Pub. Resources Code, subd. (b).) That conflict meant that the Public Resources Code preempted Measure Z.

Likewise, the Housing Element Law and greenlight measures provide contrary instructions. The Housing Element Law instructs local governments to undertake certain planning and zoning actions at the State’s behest, which is why the statute empowers HCD to supervise the preparation, adoption, and implementation of housing elements. (See § 65585, subds. (b)-(i).) To follow those instructions, local governments must prepare, adopt, and implement housing elements in accordance with the Housing Element Law’s statutory schedule and procedure, which

entails obtaining HCD's input. (See *Martinez, supra*, 90 Cal.App.5th at pp. 222-225.) Those housing elements must accommodate the housing needs of all economic segments of society. (*The Kennedy Com. v. Superior Court* (2025) 114 Cal.App.5th 385, 401.) That, in turn, requires housing elements to allow for the sufficient construction of denser, multifamily housing. (See *Martinez*, at p. 219.) Housing density creates housing supply, and increasing housing supply in turn makes housing more affordable. (*AIDS Healthcare, supra*, 101 Cal.App.5th at pp. 84-85.)

Greenlight measures, however, allow local electorates to prevent their local governments from completing actions that state law specifically mandates. In short, they instruct local governments to *wait* until they have the electorate's permission, which the electorate can withhold for whatever reason it wants, when state law commands local governments to proceed.

For purposes of the preemption analysis, that constitutes a genuine conflict. (See *Chevron U.S.A., supra*, 15 Cal.5th at p. 145.) By empowering local electorates to prevent their housing elements or program actions from taking effect, greenlight measures authorize what state law forbids, which is to indefinitely retain restrictive land use policies that fail to accommodate the housing needs for all economic segments of society. (See §§ 65583, 65587, subd. (a).) For that reason, the Housing Element Law preempts the use of these measures in the housing element adoption or implementation process. (See *Chevron U.S.A.*, at p. 145.)

Furthermore, as the trial court observed with respect to Section 423, greenlight measures confer local electorates with the discretion to veto local legislation specifically required by state law. Local governments that have not accommodated their RHNA's must adopt rezoning legislation in accordance with their duly adopted housing elements. (§ 65583, subd. (c)(1)(A).) This duty is ministerial, which means it is not subject to a discretionary veto, whether by the local legislative body or the local electorate. (See *ibid.*; see also *People v. Picklesimer* (2010) 48 Cal.4th 330, 340 ["A ministerial duty is an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists, without regard to any personal judgment as to the propriety of the act."].) To comply with this duty at all is not subject to debate, otherwise the Legislature would not have made the adoption of housing element program actions judicially enforceable. (See §§ 65583, subd. (h), 65587, subd. (d)(2).) Accordingly, when applied to the housing element implementation process, greenlight measures impermissibly confer the locality with the discretion to prevent local governments from undertaking actions specifically mandated by state law.

B. That the Local Electorate Could Timely Approve State-Mandated Local Actions Does Not Cure the Conflict

NBSA argues that compliance with the Housing Element Law and Section 423 is reasonably possible because the electorate might have approved the Program Action. That mere

possibility cannot save greenlight measures from preemption under *Chevron U.S.A.*

In *Chevron U.S.A.*, the Public Resources Code entitled operators to construct and manage their wells in accordance with the supervisor's instructions, not the electorate's. (*Chevron U.S.A.*, *supra*, 15 Cal.5th at p. 145.) And because Measure Z prohibited operators from relying on the supervisor's express authorization, it posed an inimical conflict with the Public Resources Code. (*Ibid.*) That oil operators could have complied with Measure Z without violating the Public Resources Code was irrelevant. It was not reasonably possible for operators to comply with both laws "by requiring them to curb their conduct" in accordance with Measure Z "without regard to what the state law *permits*." (*Ibid.*, italics added.)

Whereas the Public Resources Code merely permitted operators to use State-approved production methods, the Housing Element Law requires local governments to adopt certain enactments—all subject to oversight by HCD. (See §§ 65583, 65585, subd. (i)(1)(A), 65587, subd. (a), 65588, subd. (e).) Greenlight measures, however, empower local electorates to prevent those enactments from taking effect until, as NBSA phrases it, those policies conform to local preferences. (See ARB at p. 27.) Put another way, greenlight measures force local governments to "curb their conduct" without regard to what state law commands. (See *Chevron U.S.A.*, *supra*, 15 Cal.5th at p. 150.)

For that reason, the theoretical possibility that local governments can obtain local authorization to comply with the

Housing Element Law does not cure the conflict. As *Chevron U.S.A.* teaches, that a regulated entity could comply with both state and local law will not save the local law from the preemptive effect of state law. (*Ibid.*) Here, state law seeks to assure that local *governments*—specifically, the local planning agency and the local legislative body acting under HCD’s supervision—will adopt and implement compliant housing elements on a fixed schedule. (See §§ 65581, subd. (b), 65583, subd. (c)(1)(A), 65588, subd. (e).) Greenlight measures undermine that assurance by empowering local electorates to veto the state-mandated rezoning policies that local governments crafted in consultation with HCD. Local governments should not have to “curb their conduct” to satisfy unspecified community preferences when state law requires them to prioritize state and regional interests. After all, the statute confers HCD, not local electorates, with supervisory authority over the housing element adoption and implementation process. (See *Chevron U.S.A.*, at p. 145 [finding that a genuine conflict existed where “state and local laws provide conflicting instructions as to which entity”—the supervisor or the locality—“has the authority to decide what production methods are permissible”].)

As a practical matter, the Housing Element Law’s timeframes cannot likely accommodate an electorate’s rejection of a housing element or program action. The Housing Element Law imposes a one-year implementation deadline from the start of the planning period. (§ 65583, subd. (c)(1)(A)(ii).) Given the lengthy and intricate process for assigning the RHNA allocation (see

Legal Background section II.B.1, *infra*), a locality might not even have its final RHNA allocation until, as happened here, mere months before the planning period starts, which is the deadline to adopt the housing element. (See § 65588, subd. (f)(1).)

As NBSA would have it, in each locality with a greenlight measure, the local government would have to prepare a housing element (and complete associated environmental review), revise it in accordance with HCD’s findings, adopt it, then prepare general plan and zoning code amendments to implement the program actions—which form the “substantive heart” of the housing element (*Martinez, supra*, 90 Cal.App.5th at p. 225)—for both adoption by the local legislative body and approval by the local electorate within that statutory time period. A failure to obtain the electorate’s approval would force the local government to revise the housing element’s substantive heart to satisfy, on one hand, the demands of state law and HCD and, on the other hand, the local electorate’s unspecified preferences. The local government must then perform that feat on a far shorter time period than initially allowed under the Housing Element Law, assuming the deadline has not already passed. Worse yet, the local electorate could still reject the revised program action for any reason it wants, without regard to state and regional housing needs. (See § 65581, subd. (c) [recognizing “that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, *provided such a determination is compatible with the state housing goal and regional housing needs*”], italics added.)

Greenlight measures accordingly impede the accommodation of state and regional housing needs, thereby conflicting with the Housing Element Law. (See *Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 770 [invalidating a growth control measure for impeding the construction of low-income housing in contravention of state policy].) The Legislature sought to assure that local governments would accommodate the housing needs of all economic segments of the community. (§ 65581, subd. (b).) When applied to the housing element process, greenlight measures make the accommodation of those housing needs contingent on the outcome of a local plebiscite, thereby placing that assurance in doubt. For that reason, the conflict between state and local law is not cured simply because the local electorate could timely approve the local government's efforts to follow the law.

C. The Inimical Conflict Between the Housing Element Law and Greenlight Measures Sufficiently Demonstrates the Legislature's Intent to Preempt Greenlight Measures Here

Caselaw has recognized that state law will only preempt ballot measures "if there is a 'clear showing' or 'definite indication' of legislative intent to do so." (*AIDS Healthcare, supra*, 101 Cal.App.5th at p. 89 [citing *City of Morgan Hill, supra*, 5 Cal.5th at p. 1079; *DeVita, supra*, 9 Cal.4th at pp. 775-776]; but see *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501 (*COST*) [finding that the Legislature's "intent to exclude ballot measures is more readily inferred if the statute addresses a matter of statewide concern rather than a purely municipal affair"].) *Chevron U.S.A.*, however, involved a

measure adopted by initiative, and the Supreme Court invalidated Measure Z under a straightforward application of the contrary-and-inimical standard. (15 Cal.5th at p. 140.) Thus, as a matter of logic, the Legislature can definitively indicate its intent to preempt local voter measures whenever those measures pose an inimical conflict with state law. Given the inimical conflict between local greenlight measures and the Housing Element Law, that clear showing has been made.

In addition, the Supreme Court held that the Legislature indicates its intent to preempt ballot measures by exclusively delegating to local legislative bodies the responsibility to adopt policies on matters of statewide concern. (*COST*, *supra*, 45 Cal.3d at p. 501.) *COST* teaches that the Legislature does not need to employ “unmistakenly clear” language to preempt ballot measures when it is deputizing local legislative bodies to carry out the State’s policy objectives. (*Id.* at p. 509.)

NBSA’s authorities on this point are not to the contrary. In *AIDS Healthcare*, for instance, the Court of Appeal upheld a state law (called Senate Bill 10) that granted localities “some discretion, on a parcel-by-parcel basis, to supersede local housing density caps, even if those caps had been adopted by voter initiative.” (*AIDS Healthcare*, *supra*, 101 Cal.App.5th at p. 78.) Senate Bill 10 included express language that allowed localities to supersede “restrictions enacted by initiative.” (*Id.* at p. 90 [quoting § 65915.3, subd. (a)(1)].) It also imposed a “higher procedural requirement” for a local legislative body that wanted to supersede “an initiative-based housing density cap than for

superseding a legislatively enacted cap—namely, a two-thirds vote rather than a simple majority.” (*Ibid.*) Those provisions left the Court of Appeal with “no doubt that our Legislature explicitly contemplated that Senate Bill 10 would be used to supersede local voter initiatives.” (*Ibid.*) At no point, however, did the *AIDS Healthcare* court hold that language to this effect was *necessary* to reach that holding. These provisions simply ended the court’s inquiry. (See *ibid.*)

In *COST* moreover, the Supreme Court concluded that a specific statutory delegation of power to a county board of supervisors and city councils in that county supported “a strong inference that the Legislature intended to preclude exercise of the statutory authority by the electorate.” (45 Cal.3d at p. 505.) NBSA misstates the import of this discussion when it argues that “[a]bsent such specificity, ... courts cannot presume that the Legislature intended to preempt local voter initiatives.” (AOB at p. 37.) *COST* went on to hold that the State’s “plenary power over matters of statewide concern is sufficient authorization for legislation barring local exercise of initiative and referendum as to matters which have been specifically and exclusively delegated to a local legislative body.” (*COST*, at pp. 511-512.) And earlier, *COST* made clear that, when state laws address matters of statewide concern, courts will more readily infer that the Legislature intended to preempt measures adopted by initiative. (*Id.* at p. 505.)

All told, neither *AIDS Healthcare* nor *COST* demand the level of linguistic precision insisted upon by NBSA. As in any

case involving statutory interpretation, the Court must review the whole enactment to give effect to the Legislature’s purpose in passing the law. (See, e.g., *City of Irvine v. S. Cal. Assn. of Governments* (2009) 175 Cal.App.4th 506, 516-517, 522 [holding that, based various aspects of the RHNA statutes, the Legislature clearly intended to divest courts of jurisdiction to hear legal challenges to the RHNA allocation].) Here, the Legislature clearly intended to preempt the use of ballot measures in the housing element process by deputizing local legislative bodies to adopt and implement housing elements in accordance with the policies and procedures set forth in the Housing Element Law. (See *COST*, *supra*, 45 Cal.3d at p. 505 [setting forth the indicia of legislative intent to delegate matters to local legislative bodies to the exclusion of the local electorate].)

D. The Housing Element Law Includes Definitive Indicia of Legislative Intent to Preempt the Application of Greenlight Measures in the Housing Element Process

COST recognized three “paramount factors” for determining whether the Legislature intended to “exclusively delegate authority to the local governing bodies”: (1) statutory language; (2) whether the statute addresses a matter of statewide concern; and (3) any other indicia of legislative intent. (*Coalition of County Unions v. Los Angeles Bd. of Supervisors* (2023) 93 Cal.App.5th 1367, 1395.) Applying these factors here shows that the Legislature intended prevent ballot measures from interfering with the local planning necessary to accommodate state and regional housing needs. (See *City of Irvine*, *supra*, 175 Cal.App.4th at p. 522 [holding, under a clear indication standard,

that the Legislature intended to preclude judicial review of the RHNA allocation despite the absence of express statutory language to that effect].)

First, the statutory language shows that the Legislature delegated the discrete tasks of preparing, adopting, and implementing housing elements to local planning agencies and local legislative bodies, which are discrete local government entities. (See *COST*, *supra*, 45 Cal.3d at p. 501 (“[A] statutory reference to action by a local legislative body [will] support an inference that the [Legislature’s] intent was to preclude action by initiative or referendum.”].) Second, the Housing Element Law delegates these tasks to local governments to address a matter of statewide concern. (See *ibid.* “[A]n intent to exclude ballot measures is more readily inferred if the statute addresses a matter of statewide concern rather than a purely municipal affair.”].) And third, the Housing Element Law creates a pervasive system of state regulation that deputizes local governments to implement state policy. (See *id.* at p. 512 [“The existence of a pervasive system of regulation is significant as evidence of a legislative intent to delegate exclusively to a local legislative body and as evidence that the matter is indeed one of statewide concern....”].) Taken together, these statutory characteristics show that the Legislature did not want greenlight measures or similar ballot actions to interfere with the local planning essential to achieve the objectives of the Housing Element Law.

**1. The Legislature Delegated the Tasks of
Preparing, Adopting, and Implementing
Housing Elements to Specific Local Agencies**

When a statute references an “action by a local legislative body,” that suggests that the Legislature intended “to preclude action on the same subject by the electorate.” (*COST*, *supra*, 45 Cal.3d at p. 501.) Although “such references are generally not conclusive as to legislative intent, they do support an inference that the intent was to preclude action by initiative or referendum.” (*Ibid.*) That inference becomes weaker if the statute uses a generic term like “legislative” or “governing body.” (*Ibid.*)

But even a generic reference to a local legislative or governing body, when combined with a regional or statewide scope of an overall statutory scheme, can be read to preclude ballot measures. (*Ibid.*, discussing *Riedman v. Brison* (1933) 217 Cal. 383, 387.) In *Riedman*, for instance, the Supreme Court held that the Metropolitan Water District Act’s “governing body” reference “does not include the electorate of the municipality.” (*Riedman*, at p. 388.) To support that reading, *Riedman* noted that the Metropolitan Water District Act advanced objectives that transcended municipal concerns, and thus only the governing body of the municipality could initiate a withdrawal from a water district. (See *id.* at pp. 386-387.) As the Supreme Court later observed, “exclusive delegation has been inferred as a means of promoting a particular regional project or intergovernmental relationship.” (*DeVita*, *supra*, 9 Cal.4th at p. 781 [citing *COST*, 45 Cal.3d at p. 506 and *Riedman*, at pp. 387-388].)

Here, the Legislature expressly tasked local legislative bodies with the responsibility to adopt housing elements, which are prepared by local planning agencies with input from HCD. (See § 65585, subd. (e) [directing the “legislative body” to consider HCD’s findings before adopting the “draft element or draft amendment”].) And it required local legislative bodies to implement those housing elements through rezoning programs. (See *Martinez, supra*, 90 Cal.App.5th at p. 225.) These requirements apply to all local governments throughout California because the Legislature has found, and the Court of Appeal has agreed, that local governments would not act to address the housing shortage without state intervention. (See *AIDS Healthcare, supra*, 101 Cal.App.5th at p. 85.) That supports an inference that the Legislature intended to preclude the use of greenlight measures in the housing element process.

The Legislature intended for the term “legislative body” to mean the principal lawmaking body of elected representatives at the local level. (See § 65585, subds. (e) [requiring the local “legislative body” to consider HCD’s findings on the draft housing element update before adopting it], (f) [compelling the local “legislative body” to take one of two actions if HCD finds that the draft housing element update does not comply with the Housing Element Law].) This is clear for two reasons. First, the Housing Element Law requires the local legislative body to follow a defined interagency and intergovernmental process that includes the local planning agency and HCD. (See *DeVita, supra*, 9 Cal.4th at p. 793, fn. 11 [citing § 65585]; *City of Indian Wells, supra*, 209

Cal.App.3d at p. 1013.) Second, the legislative body helps implement an intergovernmental and regional plan—the RHNA allocation plan—by adopting and implementing the housing element update. These two factors show that the Housing Element Law’s reference to “local legislative body” does not include the local electorate.

a. The Housing Element Law Requires the Legislative Body to Follow a Defined Process that Includes the Local Planning Agency and HCD

The Housing Element Law creates a uniform process for preparing, adopting, and implementing housing elements that is not compatible with ballot measures. For that reason, the Legislature’s use of the generic term “legislative body” in Section 65585 implies a strong legislative intent to preclude the application of ballot measures to this particular local legislative process.

Section 65585 establishes the process by which all local governments prepare and adopt housing elements. The process begins when the local planning agency prepares the draft housing element, makes it available for public review and comment, and submits the draft to HCD. (§ 65585, subd. (b)(1)(A).) After HCD reviews the draft and provides findings, and after the local planning agency makes any revisions in accordance with HCD’s findings, the local planning agency then submits the draft to the local legislative body for adoption. (See *id.*, subds. (e)-(f).) Before adopting the draft, the local legislative body must consider any findings by HCD. (*Id.*, subd. (e).) If HCD finds that the draft would not comply with the Housing Element Law, and if the local

planning agency did not revise the draft before presenting it to the local planning agency, then the local legislative body has a choice. It may direct the planning agency to revise the draft in accordance with HCD's findings. (*Id.*, subd. (f)(1)(A).)

Alternatively, it may adopt the draft as-is and make its own substantial compliance findings, which are subject to review by HCD. (*Id.*, subds. (f)(2), (g)-(h).) The process culminates with HCD providing its findings on whether the adopted housing element substantially complies with the Housing Element Law. (*Id.*, subd. (h).)

By designing the process like this, and by requiring every local government to adhere to this process, the Legislature clearly intended to preclude ballot measures from interfering with the local government's work. The statute deputizes the local government's planning agency to initiate this process by preparing the housing element, and it requires that the planning agency do so with input from HCD. The statute likewise deputizes the local legislative body to adopt the housing element as part of the general plan. Just as the planning agency has no discretion but to prepare a housing element and to submit to HCD, the legislative body has no discretion to refuse to adopt a housing element.

The only circumstance in which a local legislative body may postpone adopting a housing element is when it determines that the local planning agency gave short shrift to HCD's compliance findings. (See § 65585, subd. (f)(1)(A).) In other words, a local legislative body may only decline to adopt a duly presented draft

housing element if it concludes that the housing element does not conform to HCD's substantial compliance findings. (*Ibid.*) Even then, it must direct the planning agency to revise the draft housing element in accordance with HCD's findings and to submit the updated draft to HCD for review. (*Id.*, subd. (f)(2)(B).)

When it comes to implementation, the local government cannot refuse to implement the housing element's program actions. The housing element commits the local government to undertake the program actions for the purpose of "implement[ing] the policies and achiev[ing] the goals and objectives of the housing element..." (§ 65583, subd. (c); see *Martinez, supra*, 90 Cal.App.5th at p. 222.) Those program actions include the necessary rezoning to accommodate the housing element's identified housing needs. (*Ibid.*) And the Housing Element Law makes those program actions judicially enforceable by ordinary mandate, meaning the local government has a clear, present, and ministerial duty to implement the program action. (§ 65583, subd. (h).) If a local government wants to reconsider implementing a program action, then it has to amend its housing element. Just as Section 65585 governs the adoption of housing elements, it also governs amendments to the housing element. (See § 65585, subds. (b)-(h).) Thus, only the local planning agency can propose an amendment to the housing element that repeals a program action, and adoption of that amendment ultimately rests with the local legislative body, subject to HCD oversight.

This process cannot operate as designed unless the term “legislative body” refers exclusively to the deliberative lawmaking body of the local government. To hold otherwise would create an anomaly, where most jurisdictions would follow the orderly processes set forth in the Housing Element Law, but those with greenlight measures in their charters would have to overcome additional hurdles to accommodate state and regional housing needs. That bolsters the inference that the Legislature intended to preempt the application of greenlight measures to the housing element process.

b. In Adopting and Implementing Housing Elements, the Local Legislative Body Implements a Regional Program and State Policy

When a local legislative body adopts and implements a compliant housing element, it acts in accordance with the RHNA allocation plan, which is a regional program. That further indicates that the Legislature’s use of the term “legislative body” implies an intent to preclude the application of greenlight measures to the housing element process. (See *COST*, *supra*, 45 Cal.3d at p. 502 [finding that, in *Riedman*, *supra*, 217 Cal. at p. 387, “the statutory reference to the ‘governing body’ and the regional scope of the statute combined to persuade [the Supreme Court] that action by initiative is barred”].)

Local compliance with the RHNA allocation plan plays a critical role in fulfilling the Legislature’s intent in enacting the Housing Element Law. The Legislature enacted the Housing Element Law to assure that local governments “recognize their responsibilities in contributing to the attainment of the state

housing goal.” (§ 65581, subd. (a).) By creating a system of intergovernmental coordination and shared responsibility, the Legislature sought to solve a collective action problem created by local prioritization of discrete parochial interests over the State’s overriding interest in ensuring an adequate housing supply. (See *AIDS Healthcare, supra*, 101 Cal.App.5th at p. 85 “[B]ecause local governments would not address the housing shortage if left to their own devices, state intervention is sensible—if not outright necessary[.]”.)

To that end, the Legislature intended to “assure” that local governments “will prepare *and implement* housing elements” for the express purpose of moving “toward attainment of the state housing goal.” (§ 65581, subd. (b), italics added.) Although “each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal,” those determinations must be “compatible with the state housing goal and regional housing needs.” (*Id.*, subd. (c).)

Importantly, the Legislature wants local governments to work together “to address regional housing needs.” (*Id.*, subd. (d).) For that reason, local governments—through their local planning agency and local legislative body—must cooperate with one another at the regional level, in consultation with HCD, to assess the region’s housing needs. (§ 65584, subds. (b), (d).) Regional cooperation helps address the State’s housing needs while also advancing other state interests, like “reducing adverse environmental effects in the form of increased greenhouse gas emissions due to insufficient low- and moderate-income housing

in job centers.” (*Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 711.)

That system of cooperation ultimately results in the RHNA allocation plan, an intergovernmental compact that assigns each locality its RHNA allocation. (§ 65584, subd. (d).) But the need for cooperation does not end there. It extends into the local planning necessary to accommodate the entire regional housing need. (*Id.*, subd. (a)(2) [expressing the Legislature’s intent for local governments to “undertake all necessary actions to encourage, promote, and facilitate the development of housing to accommodate the entire regional housing need”].)

For that reason, when a local government complies with its duties under the Housing Element Law, it is doing its part to advance the RHNA allocation plan, a regional program. That strongly supports reading the term “legislative body” as excluding any ability by the local electorate to impede state housing laws or to enact contrary programs. (See *DeVita, supra*, 9 Cal.4th at p. 781 [citing *COST*, at p. 506 and *Riedman*, at pp. 387-388].)

2. The Housing Element Law Addresses a Matter of Statewide Concern

With the Housing Element Law, the Legislature made clear that it was attempting to solve a statewide problem and to advance the important state interest in promoting the development of new housing. (See §§ 65580, 65581.) That further indicates that the Legislature intended to prevent ballot measures from interfering with the housing element process. (See *COST, supra*, 45 Cal.3d at pp. 505-507; see also *City of Oxnard v. Starr* (2023) 88 Cal.App.5th 313, 325 [holding that *COST*

requires lower courts to determine whether a statute addresses a matter of statewide concern].)

There can be no serious dispute that the Housing Element Law addresses an issue of statewide concern. (See *Buena Vista Gardens Apartments Assn. v. San Diego Planning Dept.* (1985) 175 Cal.App.3d 289, 306-307.) This is self-evident. “Compliant housing elements ... *obviously* advance the state’s goal of facilitating and promoting housing for all segments of society.” (*Kennedy Com.*, *supra*, 114 Cal.App.5th at p. 421, italics added.)

Noncompliant housing elements, particularly those that remain noncompliant well past the applicable adoption and implementation deadlines, have the equally obvious effect of undermining that goal. The Legislature has found that the “absence of updated housing elements that are substantially compliant with state law causes unnecessary uncertainty and delay in approving housing development applications.” (See S.B. 1037, § 1, subd. (c).) That “cumulative delay causes many local governments to fall behind in meeting their share of the regional housing need.” (*Ibid.*) The statewide importance of this issue squarely supports holding that localities cannot use greenlight measures to frustrate their compliance with state law. (See *COST*, at pp. 511-512.) Beyond meekly trivializing the Legislature’s findings in adopting the Housing Element Law (see AOB at p. 53), NBSA provides no serious argument to the contrary.

3. The Housing Element Law Creates a Pervasive System of Statewide Regulation

Finally, *COST* recognized that “a pervasive system of regulation[,]” while not *necessary* to preempt ballot measures, is “significant as evidence of a legislative intent to delegate exclusively to a local legislative body and as evidence that the matter is indeed one of statewide concern....” (*COST, supra*, 45 Cal.3d at p. 512.) The Housing Element Law creates a pervasive system of state regulation, which constitutes “significant evidence” that the Legislature intended to preempt the application of ballot measures to the housing element process. (*Ibid.*) With the Housing Element Law, the Legislature made local governments directly accountable to HCD, which is the state regulatory agency charged with overseeing the statewide implementation of the Housing Element Law. (See § 65585, subd. (i).)

HCD’s regulatory oversight pervades the entire housing element adoption and implementation process. As noted, HCD reviews draft housing elements before their adoption, and it also reviews and provides compliance findings on adopted housing elements. (See § *id.*, subds. (b)-(h).) In performing that role, HCD determines whether a locality’s housing element substantially complies with the requirements of Section 65583 and other statutory provisions that govern the substantive content of the housing element. (*Id.*, subd. (h).)

HCD continues to provide regulatory oversight after adoption. HCD reviews local actions to assess their compliance with state law, and that oversight authority extends to

monitoring “any local failure to implement *any* program actions included in the housing element.” (§ 65585, subd. (i)(1)(A), italics added.) If a local government violates the Housing Element Law by, for instance, failing to implement or later repealing a program action, then HCD may refer the violation to the Attorney General for civil enforcement. (*Id.*, subd. (j).)

The Attorney General can then bring an enforcement action. That would subject the local jurisdiction to, among other remedies, civil penalties, a court-ordered suspension of its land use authority, and—if necessary—a court-appointed receiver empowered to take all actions necessary to bring the jurisdiction into compliance with the Housing Element Law. (See *Kennedy Com.*, *supra*, 114 Cal.App.5th at pp. 402-403 [detailing the Attorney General’s available remedies].) So, if a greenlight measure prevents a local legislative body from complying with the Housing Element Law, that would ultimately empower a court to remove *both* the local government and the local electorate from the housing element process.

Astonishingly, NBSA argues that this pervasive system of regulation undercuts the City’s preemption argument. NBSA notes, correctly, that “the Housing Element Law includes mechanisms to incentivize or mandate compliance, such as potential regulatory action or the builder’s remedy.” (AOB at p. 43 [citing §§ 65585, subd. (j), 65589.5].) “The Housing Element Law,” NBSA continues, “is rife with mandatory procedures and consequences for municipalities’ noncompliance.” (*Ibid.* [citing *Kennedy Com.*, *supra*, 114 Cal.App.5th at p. 402].) Based on those

points, NBSA then asserts that this “comprehensive system would make little sense if municipal processes that presented a risk of noncompliance were preempted from the outset.” (*Ibid.*)

But this comprehensive and pervasive system of state regulation *supports* the argument that the Housing Element Law preempts the application of greenlight measures to the housing element process. (See *COST*, *supra*, 45 Cal.3d at p. 512.) And for good reason. That system shows that the Legislature intended to make local *governments* accountable to the State in meeting the Housing Element Law’s benchmarks. In making local governments accountable to the State, the Legislature vested the local governments’ relevant constituent agencies—specifically, the local planning agency and legislative body—with the judicially enforceable duty to prepare, adopt, and implement compliant housing elements. (See §§ 65583, 65585, 65587.)

The performance of these duties cannot hinge on the outcome of a local plebiscite. For those reasons, the Housing Element Law preempts the application of greenlight measures to the housing element process.

III. THIS IS NOT A VOTING RIGHTS CASE

Finally, NBSA argues that the trial court’s ruling, if left undisturbed, will disenfranchise voters who live in jurisdictions with greenlight measures. (AOB at pp. 53-55.) The Court should pay this argument no heed. The Legislature—the assemblymembers and senators from across the State who are elected to represent *all* Californians—has plenary authority to legislate on matters of statewide concern. (See *COST*, *supra*, 45

Cal.3d at pp. 511-512.) That authority allows the Legislature to preempt local ballot measures. (See *AIDS Healthcare*, *supra*, 101 Cal.App.5th at p. 89; *Bruce v. City of Alameda* (1985) 166 Cal.App.3d 18, 22 [invalidating, under Section 65008, a voter approval requirement for the development of subsidized housing because the “locally unrestricted development of low cost housing is a matter of vital state concern”].) If the voters of this State object to the Legislature’s enactments, they can elect new legislators—or use their statewide initiative power to change the law. The electorate of a local jurisdiction should not, however, have the power to thwart the will of the people of California by refusing to allow its local government to perform its statutory obligations.

CONCLUSION

The State suffers from a housing shortage because local governments have long failed “to undertake required actions to encourage, promote, and facilitate the development of housing to accommodate the established regional housing need.” (S.B. 1037, § 1, subd. (c).) The City should not face legal sanction for simply doing its part to address this problem, which affects everyone in the State. Amici thus respectfully request that the Court affirm the judgment.

Date: July 13, 2026

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF OF AMICI CURIAE OF THE ATTORNEY GENERAL OF CALIFORNIA AND THE CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT uses a 13 point Century Schoolbook font and contains 11,291 words.

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