

Case No. S219567

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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CHERRITY WHEATHERFORD,

Plaintiff/Appellant/Petitioner,

vs.

CITY OF SANTA RAFAEL, et al.,

Defendants/Respondents.

SUPREME COURT  
FILED

AUG 25 2014

Frank A. McGuire Clerk

Deputy

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**APPELLANT'S REPLY BRIEF IN  
SUPPORT OF PETITION FOR REVIEW**

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On Review of the Published Decision of the Court of Appeal, First District,  
Division One, *Weatherford v. City of San Rafael* (May 22, 2014) 226  
Cal.App.4th 460 [Petition for Rehearing Denied June 16, 2012]  
Appellate Case No. A138949

On Appeal from the Judgement of the Superior Court of the State of  
California, County of Marin, the Honorable Roy Chernus, Judge, Presiding  
Superior Court Case No. CIV 1300112

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**TABLE OF CONTENTS**

| <b><u>Topic</u></b>  | <b><u>Page</u></b> |
|--|--------------------|
| INTRODUCTION .....   | 1                  |
| ARGUMENT .....   | 3                  |
| I. <u>THE COMPLAINT BROADLY ALLEGES PLAINTIFF’S<br/>PAYMENT OF ALL FORMS OF TAXES EXCEPT REAL<br/>PROPERTY TAXES– AND THUS INCLUDES INCOME<br/>TAXES</u> .....   | 4                  |
| II. <u>THE TYPE OF TAXES WHICH SATISFY<br/>SECTION 526a, AND THE RELATED QUESTION<br/>WHETHER A REAL PROPERTY AND RETAIL BUSINESS<br/>TAX LIMITATION CONSTITUTES WEALTH-BASED<br/>DISCRIMINATION, ARE HIGHLY IMPORTANT<br/>ISSUES WHICH DESERVE REVIEW IN THIS COURT</u> ..... | 5                  |
| CONCLUSION .....   | 9                  |
| CERTIFICATE OF WORD COUNT .....  | 9                  |

**TABLE OF AUTHORITIES**

| <b><u>Cases</u></b>  | <b><u>Page(s)</u></b> |
|--|-----------------------|
| <i>Adams v. DMV</i><br>(1974) 11 Cal.3d 146 .....  | 5                     |
| <i>Arrieta v. Mahon</i><br>(1982) 31 Cal.3d 381 .....  | 1, 6                  |
| <i>Blair v. Pitchess</i><br>(1971) 5 Cal.3d 258 .....  | 1, 2, 8               |
| <i>City of Ontario v. Superior Court</i><br>(1970) 2 Cal.3d 335 .....  | 5                     |
| <i>Church of Scientology v. Wollersheim</i><br>(1996) 42 Cal.App.4th 628 .....   | 6                     |
| <i>Cornelius v. Los Angeles County etc. Authority</i><br>(2 <sup>nd</sup> Dist., Div. 4, 1996) 49 Cal.App.4th 1761 ..... | 3                     |
| <i>C.R. Drake v. City of Los Angeles</i><br>(1952) 38 Cal.2d 872 .....   | 5                     |
| <i>Dibb v. County of San Diego</i><br>(1994) 8 Cal.4th 1200 .....  | 6                     |
| <i>Earl v. Sup. Ct.</i><br>(1978) 6 Cal.3d 109 .....   | 5                     |
| <i>Folsom v. Butte County Assn. of Govts.</i><br>(1982) 32 Cal.3d 668 .....  | 5                     |
| <i>Harbor v. Deukmejian</i><br>(1987) 43 Cal.3d 1078 .....   | 5                     |
| <i>Harman v. City and County of San Francisco</i><br>(1972) 7 Cal.3d 150 .....   | 5                     |
| <i>Irwin v. City of Manhattan Beach</i>  |                       |

|  |      |
|--|------|
| (1966) 65 Cal.2d 13 .....  | 1    |
| <i>Knoll v. Davidson</i>   |      |
| (1974) 12 Cal.3d 335 .....                                       | 5    |
| <i>Love v. Keays</i>   |      |
| (1971) 6 Cal.3d 339 .....  | 5    |
| <i>Lundberg v. County of Alameda</i>                             |      |
| (1956) 46 Cal.2d 644 .....                                       | 5    |
| <i>McKinny v. Board of Trustees</i>                              |      |
| (1982) 31 Cal.3d 79 .....  | 5    |
| <i>O'Connell v. City of Stockton</i>                             |      |
| (2007) 41 Cal.4th 1061 .....                                     | 1, 7 |
| <i>Sands v. Morongo Unified School Dist.</i>                     |      |
| (1991) 53 Cal.3d 863 .....                                       | 5    |
| <i>Santa Barbara Co. Coalition Against Automobile Subsidies</i>  |      |
| <i>v. Santa Barbara Co. Assn. of Governments</i>                 |      |
| (2 <sup>nd</sup> Dist., Div. 6, 2008) 167 Cal.App.4th 1229 ..... | 6    |
| <i>Serrano v. Priest</i>   |      |
| (1971) 5 Cal.3d 584 .....  | 1    |
| <i>Simpson v. City of Los Angeles</i>                            |      |
| (1953) 40 Cal.2d 271 .....                                       | 5    |
| <i>Stanson v. Mott</i>   |      |
| (1976) 17 Cal.3d 206 .....                                       | 5    |
| <i>Sundance v. Municipal Court</i>                               |      |
| (1986) 42 Cal.3d 1101 .....                                      | 5    |
| <i>Tobe v. City of Santa Ana</i>                                 |      |
| (1995) 9 Cal.4th 1069 .....                                      | 1, 6 |
| <i>Torres v. City of Yorba Linda</i>                             |      |

(4<sup>th</sup> Dis., Div. 3, 1993) 13 Cal.App.4th 1035 ..... 5, 6, 7

*Van Atta v. Scott*  
(1980) 27 Cal. 3d 424 ..... 5

*Vasquez v. State of California*  
(2008) 45 Cal.4th 243 ..... 7

*White v. Davis*  
(1975) 13 Cal.3d 757 ..... 5

*Williams v. Garcetti*  
(1993) 5 Cal.4th 561 ..... 5

*Wirin v. Parker*  
(1957) 48 Cal.2d 890 [313 P.2d 844] ..... 5

**Statutes**

Code of Civil Procedure Section 526a ..... passim

## **INTRODUCTION AND SUMMARY OF GROUNDS FOR REVIEW**

Taxpayer standing under Code of Civil Procedure section 526a (section 526a) enjoys a long-standing tradition in this Court as grounds by which highly important legal issues may be addressed on the merits by members of the “general citizenry” in cases which might otherwise be dismissed based on the generally applicable direct standing requirement. (See, e.g., *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268 (*Blair*).) In the 105 years since the enactment of section 526a in 1909, at least 31 cases have reached the Court based on claims of taxpayer standing. The vast majority of those cases produced decisions on the substantive merits of the parties’ claims. Many of those cases would never have gotten out of the trial court if the cases had been allowed to proceed only upon proof of the plaintiff’s payment of real property or retail business taxes. The death of such cases is now the result compelled by existing appellate authority so limiting section 526a. If taxpayer standing is to be so limited to the smaller sub-set of the general citizenry which is wealthy enough or otherwise fortunate enough to own real property or a retail business and pay taxes assessed thereon, that pronouncement should come from this Court in conjunction with its detailed assessment of the highly important statutory and constitutional implications of such a profound limitation on the reach of section 526a.

This highly important issue has great significance to the citizens of this state, particularly those who, like plaintiff at bar, have been *excluded* from taxpayer standing based on lack of wealth because they do not own and cannot afford to buy real property or a retail business and thus do not pay taxes assessed thereon. This exclusion carries a strong odor of unconstitutional wealth-based discrimination under which the right to

petition the government for redress of grievances is greatly expanded for the wealthy under section 526a but not so for virtually all of the poor.

The Court should grant review to decide which forms of taxes provide standing under section 526a and to determine whether a decision limited to payment of real property and retail business taxes runs afoul of equal protection and due process guarantees by discriminating against the poor who are far less likely than the rich to own real property or a retail business.

## ARGUMENT

### I.

#### THE COMPLAINT BROADLY ALLEGES PLAINTIFF'S PAYMENT OF ALL FORMS OF TAXES EXCEPT REAL PROPERTY TAXES— AND THUS INCLUDES INCOME TAXES

Respondents are incorrect to argue that plaintiff waived the right to claim income tax payment as grounds for taxpayer standing by failing to expressly allege payment of income tax in the body of the Complaint. (City's Answer at page 21, fn. 6; County's Answer at page 2, fn. 3.)

Paragraph 2 of the Complaint states: “The taxes paid by plaintiff in and to the City of San Rafael, County of Marin and State of California include sales tax, gasoline tax, water and sewage fees, *and other taxes, charges and fees routinely imposed by municipalities, counties and the State*, with the exception of property taxes. ... Plaintiff has not paid property taxes because, like millions of others, she does not own and cannot afford to buy real property in California, particularly in the County of Marin, one of the most expensive real estate markets in California— indeed, the entire United States.” (CT 1-2, underlining in the original, italics added.) While in retrospect it would have been better for plaintiff to have expressly alleged

payment of income taxes to the State, such is necessarily included in the complaint under the general averment of payment of “other taxes” “routinely imposed by ...the State.”

The parties recognized this below and in their respective appellate briefs they each addressed the question whether payment of income taxes qualifies for taxpayer standing under section 526a. (See *Cornelius v. Los Angeles County etc. Authority* (2<sup>nd</sup> Dist., Div. 4, 1996) 49 Cal.App.4th 1761, 1774-1780 (*Cornelius*) [answering the question in the negative].) The Court of Appeal recognized it as well and agreed with *Cornelius* that payment of real property taxes is required for standing under section 526a; “payment of sales, gasoline, *and income taxes* will not suffice.” (Italics added.) It now falls to this Court to decide whether the Court of Appeal correctly decided the limitations of taxpayer standing by *excluding* from section 526a the payment of income, sales and gasoline taxes and other forms of taxes not assessed directly on the taxpayer-plaintiff.

## II.

**THE TYPE OF TAXES WHICH SATISFY  
SECTION 526a, AND THE RELATED QUESTION  
WHETHER A REAL PROPERTY AND RETAIL BUSINESS  
TAX LIMITATION CONSTITUTES WEALTH-BASED  
DISCRIMINATION, ARE HIGHLY IMPORTANT  
ISSUES WHICH DESERVE REVIEW IN THIS COURT**

On three occasions the Court has found taxpayer standing based on the plaintiff’s payment of real property taxes (see *Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13 (*Irwin*); *Blair v. Pitchess* (1971) 5 Cal.3d 258 (*Blair*); *Serrano v. Priest* (1971) 5 Cal.3d 584 (*Serrano*)), and, of equal and opposite weight, on at least two occasions the Court has found taxpayer standing on the part of plaintiffs who plainly had not paid real



property taxes, nor retail business taxes or any other tax assessed directly on the plaintiffs. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069 (*Tobe*) [homeless plaintiffs]; *Arrieta v. Mahon* (1982) 31 Cal.3d 381 (*Arrieta*) [renter evicted from her apartment].) In the twenty-eight other taxpayer standing cases which have produced decisions from the Court, no mention was made of the type of taxes the plaintiffs had paid, despite that many of those cases were decided on their merits in favor of the plaintiffs— including one brought by plaintiff’s counsel at bar, which, like this one, presented a challenge to local vehicle seizure practices. (See *O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061 (*O’Connell*) [taxpayer standing used to invalidate a local vehicle forfeiture ordinance which was preempted by state law].)<sup>1</sup> While consistently noting the intent of section 526a “is to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement” (*Blair, supra*, 5 Cal.3d 258, 267-268, italics added), the Court has failed to consider and decide whether the body of the citizenry covered by section 526a is limited to those individuals who pay real property or retail business taxes, as the Court of Appeal found in this case, or extends more broadly to those citizens who pay other forms of taxes, such as

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1

The Court also granted review in 2 other taxpayer cases brought by plaintiff’s counsel at bar, presenting claims identical to those in *O’Connell*, brought by plaintiffs who had not alleged payment of real property or retail business taxes. The Court held those cases pending its decision in *O’Connell*, then dismissed or retransferred the cases to the Court of Appeal as appropriate. (See *Hernandez v. City of Sacramento*, formerly (3<sup>rd</sup> Dist. 2007) 147 Cal.App.4th 891, S151356, affirmed *sub nom* based on *O’Connell*, appeal dismissed; *Sohigian v. City of Oakland* (1<sup>st</sup> Dist., Mar. 24, 2006, A103031) [nonpub. opn.], S142957, retransferred to Court of Appeal for rehearing in light of the decision in *O’Connell*].)

income, sales and gasoline taxes.<sup>2</sup>

Respondents disingenuously argue that these issues are well-settled by decisions of the Court of Appeal and are therefore not deserving of review in this Court. The few Court of Appeal decisions which favor respondents' position are not well-settled law and have never been expressly or implicitly sanctioned by this Court.

*Torres v. City of Yorba Linda* (4<sup>th</sup> Dist., Div. 3, 1993) 13 Cal.App.4th 1035 (*Torres*) was the first appellate case to address the question of the type of taxes one must pay to have taxpayer standing under section 526a. *Torres* was decided nearly **100 years** after the enactment of section 526a, during which time this Court had found taxpayer standing, or presumed its existence, in dozens of cases without suggesting, much less expressly holding that taxpayer standing is limited to payment of real property and retail business taxes. (See, e.g., *C.R. Drake v. City of Los Angeles* (1952) 38 Cal.2d 872, 873; *Simpson v. City of Los Angeles* (1953) 40 Cal.2d 271, 276; *Lundberg v. County of Alameda* (1956) 46 Cal.2d 644, 647; *Wirin v. Parker* (1957) 48 Cal.2d 890; *Regents of University of California v. Superior Court (Karst)* (1970) 3 Cal.3d 529, 533, 542; *City of*

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2

Respondents have noted correctly that decisions are not precedent for issues not squarely addressed and decided; and therefore no precedential value may be gleaned from the many taxpayer standing cases in which this Court did *not* consider and address the type of taxes which must be paid to satisfy section 526a. Respondents, however, have hypocritically applied this rule only in their favor. The rule applies just as forcefully against respondents by rendering without precedential force on the specific issue presented here the cases of *Irwin, supra*, 65 Cal.2d 13,; *Blair, supra*, 5 Cal.3d 258, and *Serrano, supra*, 5 Cal.3d 584— each of which found taxpayer standing based on payment of real property taxes, without suggesting that payment of such taxes is the only way to satisfy section 526a.

*Ontario v. Superior Court* (1970) 2 Cal.3d 335; *Love v. Keays* (1971) 6 Cal.3d 339, 343; *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150; *Adams v. DMV* (1974) 11 Cal.3d 146, 151; *White v. Davis* (1975) 13 Cal.3d 757; *Stanson v. Mott* (1976) 17 Cal.3d 206, 209, 223; *Van Atta v. Scott* (1980) 27 Cal. 3d 424; *Folsom v. Butte County Assn. of Govts.* (1982) 32 Cal.3d 668, 671-672 and fn. 2; *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 91; *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1137; *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1083 at fn. 4; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 566-567 and fn. 2; *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 869; *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1205; *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 856.) The existence of these decisions was not noted and certainly was not explained by the *Torres* court, which also omitted mention of *Arrieta, supra*, 31 Cal.3d 381, in which the Court found taxpayer standing on the part of a former renter who had been evicted from her apartment and thus had plainly not paid real property taxes and logically had also not paid retail business taxes.

The year following *Torres*, this Court decided *Tobe, supra*, 9 Cal.4th 1069, and granted taxpayer standing to two homeless plaintiffs who had plainly not paid real property taxes or retail business taxes, and logically had paid only sales or gasoline taxes. Yet, just one year later, when the Court of Appeal decided *Cornelius, supra*, 49 Cal.App.4th 1761, and elected to follow *Torres*, the appellate court failed to cite *Tobe* or any of the many other prior decisions of the Court finding taxpayer standing, or presuming its existence, in cases which did not describe the type of taxes the plaintiffs had paid and thus did not state that real property or retail business taxes provided the grounds for standing under section 526a.

Another twelve years passed before the Court of Appeal issued its decision in *Santa Barbara Co. Coalition Against Automobile Subsidies v. Santa Barbara Co. Assn. of Governments* (2<sup>nd</sup> Dist., Div. 6, 2008) 167 Cal.App.4th 1229 (*Santa Barbara Co.*) and found that a retailer's payment of sales tax provides standing under section 526a because sale tax is technically assessed on retailers, though the consumer actually pays the tax at the time of purchase. In the interim, this Court decided several more taxpayer standing cases in favor of the plaintiffs without describing the taxes they had paid or suggesting that only real property and retail business taxes satisfy section 526a. (See *O'Connell, supra*, 41 Cal.4th 1061 [taxpayer standing used to invalidate local vehicle forfeiture ordinance which was preempted by state law]; *Vasquez v. State* (2008) 45 Cal.4th 243, 248-249 [noting that in the underlying litigation on the merits of Vasquez's claims, from which later arose the attorney's fee issue before this Court, "Vasquez [had] ... asserted standing as a taxpayer to prevent the waste of state property (Code Civ. Proc., § 526a)".])

This jurisprudential history hardly suggests the Court of Appeal decisions limiting taxpayer standing to payment of real property and business taxes enjoy support from this Court. To the contrary, the Court has had 105 years since the enactment of section 526a to state that the statute's reach is limited to payment of real property and business taxes, but the Court has never done so. It is plain, then, that the type of taxes which satisfy section 526a is an open question in this Court.

It is equally plain that the constitutionality of a real property and retail business tax payment limitation is not a settled question in the Court of Appeal, and has never been passed on by this Court. *Torres* passingly mentioned the issue in its final footnote stating: "Plaintiffs also claim that

denying standing to them under [section] 526a violates their constitutional right to equal protection of the law. The argument is without merit. The case law clearly establishes plaintiffs are not similarly situated with others determined to have standing under these circumstances." (*Torres, supra*, 13 Cal.App.4th at p. 1048, fn. 7.) The *Torres* court did not cite *any* authority on the issue, much less authority which "clearly establishes" that those who pay real property taxes are not similarly situated to those that do not but do pay other forms of taxes, such as gasoline, sales and income taxes. The constitutional claim was not addressed again by the Court of Appeal until this case was decided in May 2014. Two appellate decisions (with one involving a passing final footnote) do not equate to "well-settled" authority which is so generally accepted that review in this Court is not necessary.

In sum, the question whether section 526a is limited to payment of real property and retail business taxes, and the related question whether such a limitation constitutes unconstitutional wealth-based discrimination, are issues of great significance which the Court has not passed on before and should be addressed in this case on grant of review.

### CONCLUSION

Based on the foregoing, the Court should grant review in accordance with Rule 8.500 of the California Rules of Court to determine which type of taxes satisfy section 526a, whether a real property and retail business tax limitation violates constitutional guarantees based on wealth-based discrimination, and ultimately whether plaintiff's complaint was properly dismissed based on lack of taxpayer standing for failure to allege payment of real property or retail business taxes assessed directly on plaintiff.

Respectfully Submitted,

Date: August 16, 2014

By: \_\_\_\_\_

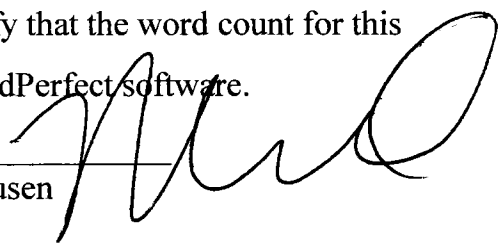
/s/ 

Mark T. Clausen,  
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**CERTIFICATE OF WORD COUNT**

I, Mark T. Clausen, do hereby certify that the word count for this  
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\_\_\_\_\_/s/\_\_\_\_\_  
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**PROOF OF SERVICE**

I, Mark T. Clausen, do hereby declare:

I am over the age of 18 and not a party to the above-entitled action.

My business address is 769 Carr Avenue, Santa Rosa, California, 95404.

On the date indicated below true copies of the attached document  
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