No. B342211

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

DISNEY PLATFORM DISTRIBUTION INC.,
BAMTECH, LLC, AND HULU, LLC,
Petitioners-Appellants,

vs.

CITY OF SANTA BARBARA,
Respondent.

Appeal From the Superior Court of the State of California
for the County of Santa Barbara,
Case No. 24CV02313, Honorable Donna D. Geck

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

and

BRIEF OF *AMICI CURIAE* MOTION PICTURE ASSOCIATION, INC. AND STREAMING INNOVATION ALLIANCE IN SUPPORT OF PETITIONERS-APPELLANTS

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APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 8.200(c) of the California Rules of Court, the Motion Picture Association, Inc. ("MPA") and the Streaming Innovation Alliance ("SIA") respectfully request permission to file the accompanying *amici curiae* brief in support of granting the Petition for Writ of Administrative Mandate filed by Disney Platform Distribution, Inc., BAMTech, LLC, and Hulu, LLC (collectively, "Appellants").

I. Interest of *Amici Curiae* and Statement of How the Proposed *Amici Curiae* Brief Will Assist the Court in Deciding the Matter

The MPA is a not-for-profit trade association founded in 1922. The MPA serves as the voice and advocate of the film and television industry, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and bringing entertainment and inspiration to audiences worldwide. The MPA's members are Amazon Studios LLC, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.. These entities and their affiliates are the leading producers and distributors—including through video streaming services similar to those operated by Appellants—of filmed entertainment in the United States.

The SIA is the united voice of the streaming community, working to tell streaming's story to policymakers. Founded in 2023, SIA seeks to drive forward a new era of creativity, opportunity, value, and choice in home and mobile entertainment on behalf of its members, which include AfroLandTV, America Nu Network, BET+, discovery+, For Us By Us Network, Max, MPA, MotorTrend+, Netflix, Paramount+, Peacock, PlutoTV, Telemundo, Televisa Univision, VAULT, and Vix.

MPA's and SIA's members provide streaming video services to customers throughout the United States. MPA's and SIA's members, as well as their customers, rely on fair and consistent interpretation of the tax laws that apply to streaming services. Such consistency is necessary for tax compliance, including the proper collection (or not) of tax from customers. Inconsistent and unclear interpretations of streaming video taxation have a material impact on the MPA and SIA members' ability to provide their services.

Because of the inherently interstate aspects of streaming video services, MPA and SIA regularly evaluate the national framework that states and localities have developed over the previous two decades to impose taxes on their services. Accordingly, MPA and SIA are well-positioned to: (i) provide this Court a national perspective on the issues presented in this case, and (ii) inform this Court of outlier interpretations of highly technical tax laws applicable to their members' streaming video services. MPA and SIA, therefore, have a substantial interest in the outcome of this case, the correct application of California's tax laws, and the significance of this case in national tax policy matters affecting electronic commerce.

II. Statement Regarding Preparation of the Brief

No party or counsel for any party in the pending appeal authored the proposed *amici curiae* brief in whole or in part. Neither a party, nor any counsel for a party, in the pending appeal made any monetary contribution intended directly or indirectly to fund the preparation or submission of this brief. Other than the *amici curiae* and its members, no person or entity

made a monetary contribution intended to fund the preparation or submission of this brief.[1]

III. Conclusion

For the reasons set forth above, leave to file the attached *Amici Curiae* Brief is respectfully requested.

Dated: June 30, 2025

Eversheds Sutherland (US) LLP

By: */s/ Jeffrey A. Friedman*
Jeffrey A. Friedman

Attorney for *Amici Curiae*
Motion Picture Association, Inc. &
Streaming Innovation Alliance

[1] MPA member Walt Disney Studios Motion Pictures and SIA member The Walt Disney Company, corporate affiliates of Appellants, did not contribute money to fund the preparation or submission of this *amici curiae* brief.

BRIEF OF *AMICI CURIAE* MOTION PICTURE ASSOCIATION, INC. AND STREAMING INNOVATION ALLIANCE IN SUPPORT OF PETITIONER-APPELLANTS

I. INTRODUCTION

The Superior Court's decision below should be reversed because it is unsupported by law and based on a results-oriented analysis. The imposition of the Video Users' Tax ("VUT") on Appellants' streaming video services is illegal because it is not authorized by the Santa Barbara Municipal Code §§ 4.26.010 et seq. (the "Ordinance"). The City Council purposefully limited its 2008 "modernization" amendments to "video programming" provided over "channels," which reflects the body's intent to expand the VUT base only to those facilities-based video providers that transmit content to subscribers over infrastructure the providers own and operate. In addition to the plain language of the Ordinance, the City Council did *not* impose the VUT on over-the-top streaming video services, like Appellants', which can only be accessed by a subscriber through a third-party's Internet access service.

The term "channels" is defined by federal law, as well as customary usage within the video service industry. As reflected by the City Council during its consideration in 2007 of the VUT amendments, the Ordinance incorporates the term "channel" to limit the VUT to only a specific type of video programming – that which is distributed over an end-to-end (or "closed") transmission path. Streaming video content, like Appellants', accessed over the public Internet is not provided via "channels." Under the Superior Court's incorrect interpretation of the Ordinance, the amended VUT is applied in an unrestricted way and could reach video content offered through YouTube, Spotify, and the Wall Street Journal online platforms. This reading of the amendments is inconsistent with the letter and spirit of the amendments enacted by the City Council in 2008.

The Superior Court's analysis not only is at odds with the Ordinance and customary industry usage, but it also directly contradicts decisions considered by state and federal courts, as well as state legislatures, throughout the country. If the Superior Court's decision were to stand, the City of Santa Barbara (the "City") would be the first jurisdiction within California – and, further, the nation – to successfully tax streaming video services under a statute that limits its scope to "channels." Indeed, throughout the United States' subnational tax system, state and local legislative bodies have developed a national framework for imposing transaction-based taxes on streaming video services, such as those provided by the Appellants. If the Superior Court's decision is left standing, the application of the VUT to streaming video service would depart from that national framework.

The Appellants' reading of the Ordinance is consistent with the national framework for taxing video services developed over the prior two decades. Regimes that reference federal regulatory concepts, like the Ordinance, limit those taxes to facilities-based video services, i.e., cable service, direct-to-home satellite service,[2] and Internet protocol television ("IPTV"). To be sure, some taxing jurisdictions have attempted to impose state or local taxes on streaming video services under theories similar to the City's—but none have succeeded. The City's attempt to do so here should also be rejected.

For these reasons, the City's expansive position should be rejected because it runs directly contrary to the language of the Ordinance – as informed by its federal legal basis, customary industry usage, and legislative intent – and the national framework for taxing video service.

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[2] Federal law preempts local – but not state – taxation of direct-to-home satellite service.

II. STATEMENT OF FACTS

MPA and SIA adopt the Statement of the Case presented in Appellants Disney Platform Distribution, Inc.'s BAMTech, LLC's, and Hulu, LLC's Opening Brief ("Appellants' Brief").

III. ARGUMENT

A. The City's Ordinance is Based on Federal Law and Industry Practice That Exclude Streaming Video.

The Ordinance incorporates well-established terms used in the video service industry that are based on the federal regulatory regime. (Appellants' Brief at pp. 22-24.) The Superior Court, however, repeatedly ignored the City Council's intent to adopt "technical" terms, such as "video programming" and "channel," in a manner consistent with federal law and industry usage when "modernizing" the Ordinance in 2008. (*Id*. at pp. 24-25.) In fact, the City Council told Santa Barbara voters in 2008 that the Ordinance was to enact "modernized technical definitions." (*Id*. at p. 25.) Moreover, consistent with the usage of the technical definitions based on federal law, the City Council made clear that it did not intend to tax internet streaming services. (*Id*. at pp. 28-32.)[3] Thus, not only is the decision below contrary to legislative intent, but the Superior Court's reading of "channel" is entirely inconsistent with: (i) the Cable Communications Policy Act of

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[3] California courts have given weight to legislators' statements when analyzing legislative intent. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 700 ["A legislator's statement is entitled to consideration, however, when it is a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion."]; *California Teachers Assn. v. Governing Board* (1983) 144 Cal.App.3d 27, 35 ["A legislator's statement is evidence of legislative intent only if it provides the history of the legislation—events which occurred or arguments made during its passage."].)

1984 (47 U.S.C. ch. 5, subch. V–A (the "Cable Act") and related guidance issued by the Federal Communications Commission (the "Commission"), and (ii) the video service industry's customary usage of such terms.

1. The Ordinance's Use of Federal Legal Terms Excludes Appellants' Streaming Video Service.

Reflective of its clear intent to adopt "technical" and "modern" terminology understood by the industry, the City Council's use of "video programming" provided over "channels" expressly limits the VUT to facilities-based providers. (Appellants' Brief at p. 21.) As explained in Appellants' Brief, a "channel" must include an end-to-end transmission path that the provider uses to distribute video content, not mere access through the public Internet. Specifically, the Cable Act defines "channel" as "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel." (47 U.S.C. § 522(4) (defining "channel"); 47 C.F.R. § 76.5(r)-(u) (defining "cable television channel" as a "*signaling path* provided by a cable television system") (italics added).) This is the "technical" terminology intended by the City Council when it modernized the Ordinance in 2008.

The Commission has rejected attempts to adopt a non-technical meaning of "channel" when Congress includes the term in a statute, ruling that the term "appear[s] to include a transmission path as a necessary element . . . ." (*In re Sky Angel U.S., LLC* (2010) 25 FCC Rcd. 3879, 3883.) Because the City Council used "channel" in the Ordinance in the same manner as used by Congress in the Cable Act, the VUT applies only to those persons that provide video programming over a "channel" – a closed transmission path, not the public Internet.

2. Customary Usage of "Channels" by the Video Service Industry Excludes Appellants' Streaming Video.

The City Council's use of "channels" in the Ordinance also limits its scope to facilities-based providers based on customary usage of the term within the video service industry. When undefined terms take on special meaning within an industry, California courts look to "customary usage" within the industry, in conjunction with dictionary definitions. (See, e.g., *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1357 [applying the customary usage rule to the entertainment industry]; see also, *Kiessig v. County of San Diego* (1942) 51 Cal.App.2d 47, 48, citations omitted ["'Technical words are interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense'"].)

The leading communications industry dictionary defines "channel" as "[a] path of communication, either electrical or electromagnetic, between two or more points . . . . Sometimes called a circuit, facility, line, link or path." (Newton's Telecom Dict. (30th ed. 2016) p. 301.) Consistent with federal concepts, therefore, industry usage also dictates a technical meaning of "channel" – to not merely the non-technical definition of the Oxford English Dictionary, as erroneously stated by the Superior Court. (See AA175[4].) As a result, the Superior Court was wrong twice over.

B. The City Council's 2008 Modernization Amendments Were Part of a Larger Trend to Tax (and Regulate) IPTV, Not Video Streamed Over the Internet.

To put additional gloss on the City Council's intent when it enacted the 2008 "modernization" amendments to the Ordinance, it is important for

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[4] "AA" citations are to the Appellants' Appendix Record lodged with this Court on January 13, 2025.

this Court to consider the video services market at that time. The City Council's 2008 amendments were part of a larger national debate over whether IPTV providers – *not streaming video providers* – should be regulated and taxed like cable operators, thereby generating new revenues and furthering tax parity between functionally-equivalent competitors.

For background, the primary target of the City's 2008 VUT base expansion, "IPTV" – as used in the context of the amendments at issue here – included only facilities-based services, such as Verizon FiOS and AT&T U-verse, which involve provision of services over fiber-optic cables owned and operated by those companies. As evidenced by the technical terms used in the Ordinance and reflected in the City Council's public statements during the 2007 debate, video service delivered over the public Internet was not – and to this day, is not – "programming using Internet protocol" or "IPTV," as referenced in the Ordinance at § 4.26.020. (*See* Appellants' Brief at p. 13, citing *Fox Television Stations, Inc. v. FilmOn X LLC* (D.D.C. 2015) 150 F.Supp.3d 1, 28 fn.21, citations omitted [explaining, "IPTV technology is not the same as the Internet . . . . 'IPTV video is typically delivered through a closed, 'end-to-end system' in which the distributor controls the wires and routers right up until the subscriber's home'"].) In fact, industry reports published before adoption of the Ordinance distinguished IPTV – i.e., video distributed over closed-end transmission systems like Verizon FiOS and AT&T U-verse – from "video services originating from the public Internet." (Alliance for Telecomms. Indus. Solutions*, ATIS IPTV Exploratory Group Report and Recommendation to the TOPS Council* (July 2005) at p. 9; *see id.* at pp. 4, 7, and 28 ["In contrast to video over the public Internet, with [Internet protocol] deployments, [IPTV] network security and performance are tightly managed to ensure a superior entertainment experience . . . ."].)

Around the same time as the 2008 amendments to the Ordinance were adopted, IPTV providers, state legislators, and local authorities agreed to regulate the new IPTV service, along with cable service, at the state-level to reduce compliance obligations and locality-by-locality franchise negotiations.[5] As explained by the Connecticut General Assembly's Office of Legislative Research: "[s]ince 2005, at least 17 states including Connecticut have passed legislation to promote competition in video services by allowing telecommunications companies to enter the cable TV market on a statewide basis without being subject to traditional franchising requirements or rate regulation." (Kevin E. McCarthy, Connecticut General Assembly, Office of Legislative Research, Cable TV Competition, Research Report 2008-R-0458 (Aug. 19, 2008) <https://www.cga.ct.gov/2008/rpt/2008-R-0458.htm>.) Ultimately, similar to the 2008 amendments to the Ordinance, many state legislatures largely incorporated the federal facilities-based framework contained in the Cable Act into their respective statewide franchising statutes in the mid-2000s. (See, e.g., Cal. Pub. Util. Code §§ 5800 et seq.; Ga. Code Ann. §§ 36-76-1 et seq.; Ind. Code Ann. §§ 8-1-34-1 et seq.; Kan. Stat. Ann. §§ 12-2022 et seq.; Mo. Rev. Stat. §§ 67.2677 et seq.; N.J. Stat. Ann. §§ 48:5A-1 et seq.; N.C. Gen. Stat. §§ 66-350 et seq.; Tex. Util. Code Ann. §§ 66.001 et seq.)

California was among those initial states adopting statewide franchising, which facilitated IPTV deployment throughout the state, including the City. In 2006, the California State Legislature passed the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"). The

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[5] It is widely understood that the leading IPTV providers, like AT&T and Verizon, advocated for state-level franchising to streamline the licensing process and promote competition in the industry. (Thomas W. Hazlett, *Cable TV Franchises as Barriers to Video Competition* (2007) 12 Va. J.L. & Tech. 2, 223–25.)

DIVCA requires those "who seek[] to provide video service" in California to have a state-issued franchise. (Cal. Pub. Util. Code § 5840(c).) For DIVCA purposes, "video service" means "video programming services, cable service, or OVS [Open Video System] service provided through facilities located at least in part in public rights-of-way without regard to delivery technology, including Internet protocol or other technology." (Cal. Pub. Util. Code § 5830(s).) "Video programming," in turn, means:

> [P]rogramming provided by, or generally considered comparable to programming provided by, a television broadcast station, as set forth in Section 522(20) of Title 47 of the United States Code.

(Cal. Pub. Util. Code § 5830(r).) Thus, DIVCA is on its face not limited by the type of transmission technology ("without regard to delivery technology, including Internet protocol or other technology"). (*Id.* § 5830(s).) But, for a streaming video provider to be subject to DIVCA, its streaming video service must be: (1) "provided through facilities located at least in part in public rights-of-way"; and (2) "provided by, or generally considered comparable to programming provided by, a television broadcast station," as defined by federal law. (*Id.* § 5830(r)-(s).)

In a case closely watched by the video service industry, the City of Lancaster, California sued Netflix, Inc. and Hulu, LLC, asserting that they must obtain a state franchise under the DIVCA and pay the franchise fee to the City on a retroactive basis. (*City of Lancaster v. Netflix, Inc.* (2024) 99 Cal.App.5th 1093.) As most relevant here, the *City of Lancaster* trial court concluded that Netflix's and Hulu's content did not meet the DIVCA

definition of "video programming."[6] (See *City of Lancaster v. Netflix, Inc.* (Super. Ct. L.A. County, May 3, 2022, No. 21STCV01881) 2022 Cal.Super.LEXIS 25515.) This holding was premised, in part, on the fact that the streaming video providers did not "include the concept of channels." (*Id.* at *30.) In summary, because their services are "'on demand,' they are not live, linear, channelized, scheduled, or programmed." (*Id.* at *31.)

The analysis followed by the trial court in *City of Lancaster* is relevant here. The Superior Court focuses on broad transmission language ("regardless of the technology used to deliver, store, or provide" videos), but neglects to give effect to the requirement that the taxpayer provide or sell "one or more channels" of video programming. (AA178, AA189-190) And, in fact, the Superior Court completely reads the phrase "one or more channels" out of the "video programming" definition (*see* Ordinance § 4.26.020), giving the phrase no effect. In *City of Lancaster*, however, the Superior Court acknowledged the broad transmission language, but still

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[6] Ultimately, the California Court of Appeal held that Lancaster did not have a private right of action under DIVCA against non-franchise holders, such as Netflix and Hulu. (*City of Lancaster v. Netflix, Inc.*, *supra*, 99 Cal.App.5th at 1113.) The court did not opine on the merits of the case. The trial court, the Superior Court of California, County of Los Angeles, determined the case on the merits, as well, though. The Superior Court held that the DIVCA did not apply to Netflix and Hulu because they did not themselves construct or operate any facilities in the public rights-of-way. Their use of ISP networks was not a "use" under the DIVCA necessitating that they obtain a franchise. The court was concerned that the locality would follow this logic and "presumably seek to require Disney Plus, Peacock, HBO Max, and Amazon Prime Video to obtain DIVCA franchises." The locality's interpretation would be an end-run around DIVCA and "result in a financial windfall for local entities that the Legislature did not intend." (See *City of Lancaster v. Netflix, Inc.*, *supra*, 2022 Cal.Super.LEXIS 25515, at *22.)

gave effect to the DIVCA facilities provision. In addition, the Superior Court analyzed whether streaming video providers such as the Appellants provide or sell "channels" – they don't.

If the Superior Court's decision were upheld, the municipalities would have a road map to circumvent DIVCA and, against the Superior Court's wishes, "result in a financial windfall for local entities that the Legislature did not intend." (See *City of Lancaster v. Netflix, Inc., supra,* 2022 Cal.Super.LEXIS 25515, at *22.) Under *City of Lancaster*, the localities are barred from exacting franchise fees from streaming video providers. The Superior Court's analysis would pave the way to allow the California localities to target these same companies, but this time under the VUT. Ignoring the "channels" requirement from the VUT would undermine the legislature, just as the City of Lancaster had attempted.

C. The City's Ordinance Should Be Construed Consistently with the National Framework for State Taxation of Streaming Video Services.

In addition to diverging from the federal and California video regulatory regimes, the City's attempt to tax streaming video services is not in line with the general practice and tax legislation adopted by most – if not all – jurisdictions in the country. The Superior Court suggests that the City Council intended the Ordinance to be apply the VUT to "expand the scope of video services subject to the tax" to include technologies "whether then existing or later developed." (AA189.) This perfunctory conclusion can easily be disproven for two reasons. First, the City Council made clear it did not intend to tax "the Internet" or streaming video content, as described above and in the Appellants' Brief. Second, if the City Council wanted to tax over-the-top streaming video services – and not just facilities-based video service like IPTV and cable – there are established examples in other state statutes to do that.

Most notable among the streaming video tax "models" was the version developed by the Streamlined Sales and Use Tax Governing Board ("Streamlined") – an organization formed to reduce multistate sales tax compliance burdens through uniform definitions and administrative simplifications. After years of discussion on how its over twenty member states[7] should define digital or streaming video and other electronically transferred products, on September 20, 2007 Streamlined amended the Streamlined Sales and Use Tax Agreement ("SSUTA")[8] to include, among other "digital products," a multistate uniform definition of "digital audio-visual works" – digital video content – without referring to "programming" or "channels": "a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." (SSUTA App. C, Product Definitions ("Digital Products")). The SSUTA further explained how its member states may tax various forms of digital audio-visual works (whether downloaded, streamed, purchased,

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[7] California is not a Streamlined member state but participated in initial discussions. (Cal. Rev. & Tax Code §§ 6025 et seq. [establishing a Board of Governance to represent California in Streamlined meetings and recommend to the Assembly and Senate Revenue and Taxation Committees changes to California's tax laws to substantially comply with the SSUTA].) The Full Member States are Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Tennessee is an Associate Member State. Information on the Streamlined member states is available at https://www.streamlinedsalestax.org/Shared-Pages/State-Detail.

[8] 44 States – including California – the District of Columbia, local governments, and the business community worked together to draft the SSUTA. The SSUTA is available at https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-through-05-16-24-with-hyperlinks-and-compiler-notes-at-end-markup-final-8-23-24.pdf?sfvrsn=a0c9326b_6.

rented, or subscribed) by providing "toggles" that a legislature could enact: (i) sold "with the right of less than permanent use granted by the seller"; or (ii) "conditioned upon continued payment from the purchaser." (*Id*.)

While development of the SSUTA "digital products" definitions was significant, states were not merely engaging in academic exercises related to taxing streaming video in the mid-2000s. In 2006, well before the adoption of the modernized Ordinance, New Jersey was the first state to adopt a statutory definition of "digital property," including digital video content. (See N.J. Stat. Ann. § 54:32B-2(vv) (eff. Oct. 1, 2006) ["electronically delivered music, ringtones, movies, books, audio and video works and similar products, where the customer is granted a right or license to use, retain or make a copy of such item. Digital property does not include video programming services, including video on demand television services, and broadcasting services, including content to provide such services"].)

Not every sales tax imposition adopts the SSUTA model definitions, although they do constitute a strong majority of approaches. But *no* state includes the City's "channel" requirement in its operative definition used to tax streaming video content. For example, Texas imposes sales and use tax on streaming video by including it within the definition of a taxable cable television service. (Tex. Tax Code Ann. § 151.0033 [defining "cable television service" as "the distribution of video programming with or without use of wires to subscribing or paying customers"]; 34 Tex. Admin. Code § 3.313(a)(4) [defining "cable television service" to include "[t]he digital distribution of video programming to purchasers by any means now in existence or that may be developed. The term includes, but is not limited to, . . . streaming video programming provided via the Internet or other technology, regardless of the type of device used by the purchaser to receive the service"].) While both the Ordinance and Texas law address

"video programming" and use expansive language regarding the transmission technology, the City's imposition is limited to the video programming distributed "using one or more channels."

Like the VUT, a few states – notably Florida and Kentucky – impose taxes on traditional communications services other than sales and use taxes. But, unlike the VUT, Florida's and Kentucky's respective communications taxes had to be amended to tax streaming video. Prior to those amendments, and much like the City attempts to do here, Florida and Kentucky attempted to tax streaming video under tax regimes that relied heavily on the federal regulatory concepts applicable to the communications industry, including provisions within the Cable Act. In Florida's case, following efforts by the state's tax agency to impose the communications services tax on streaming video service as a taxable "video service," the state legislature deemed it necessary to amend the "video service" definition to expressly include "digital video." (Compare Fla. Stat. § 202.11(24) with Fla. Stat. § 202.11(24) (2024); see 2012 Fla. Sess. Law Serv. Ch. 2012-70 (C.S.H.B. 809)) (2012) <https://laws.flrules.org/files/Ch_2012-070.pdf>.)

After the Kentucky tax agency's initial attempt to tax streaming video resulted in litigation, resulting legislative action was necessary to expressly expand the state's video service tax. Like Florida, the Kentucky tax agency assessed various communications taxes – the Gross Revenues Tax (Ky. Rev. Stat. § 136.616), the Excise Tax (Ky. Rev. Stat. § 136.604), and the Utility Gross Receipts License Tax for Schools (Ky. Rev. Stat. § 160.614(6)) – on providers of streaming video services. These taxes were imposed on the sale of a "multichannel video programming service," which was incorporated from the Cable Act. (See Ky. Rev. Stat. § 136.602(8) and 47 U.S.C. § 522(13), -(20).) Following a challenge to the assessments brought by a streaming video service provider, a Kentucky circuit court ruled against the state tax agency, holding that the taxable "multichannel

video programming service" did not include streaming video service. (*Finance & Admin. Cabinet Ky. Dept. of Revenue v. Netflix, Inc.* (Franklin, Ky. Cir. Ct., Aug. 23, 2016, No. 15-CI-01117) 2016 Ky.Cir.LEXIS 6, at *2.) The circuit court concluded that "Netflix's streaming service does not provide content in a multichannel format; Netflix's streaming service does not include the concept of channels." (*Id.* at *19.) Accordingly, the circuit court then found that video streaming service was not "generally considered comparable to programming provided by a television broadcast station," as required by the "multichannel video programming service" definition. The Kentucky legislature subsequently amended their laws to specifically tax "video streaming services" as an example of a multichannel video programming service. (*See* Ky. Rev. Stat. § 136.602(8); 2019 Kentucky Acts Ch. 151 (HB 354) <https://apps.legislature.ky.gov/law/acts/19RS/documents/0151.pdf>.)

D. The City's Nearly Fourteen-Year Retroactive Application of the VUT Violates Due Process.[9]

More egregious than incorrectly interpreting the Ordinance *ab initio*, the City changed its interpretation of the Ordinance *after nearly 14 years* of

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[9] This *amici curiae* brief argues, in part, that the City's application of the VUT to the Appellants violates the U.S. Constitution's Due Process Clause and California Constitution's Equal Protection Clause claims. The Appellants do not make these arguments in the Appellants' Brief. In general, an amicus curiae "must limit its argument to the issues raised by the parties on appeal." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 572.) However, California courts allow *amici* to brief "new theories on appeal when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, fn.3 (en banc), underscoring added.) The Court of Appeal for the Second District

not applying the VUT to the Appellants' streaming video services. If this court were to conclude that the VUT applies to the Appellants' video streaming services, the City's retroactive application of its changed interpretation would violate the Fourteenth Amendment to the United States Constitution's Due Process Clause.

In 2008, the City introduced the Telecommunications and Video Users' Tax Reduction and Modernization Ordinance, which first imposed the City's VUT. The VUT went into effect on December 19, 2008. Because no agency or court has ever before concluded that streaming video is provided via "channels," streaming video providers and users could not have been aware that the VUT would apply.

The City did not assess streaming video providers. Instead, it was not until August 10, 2022, that the Appellants received deficiency letters asserting that their video streaming services were taxable. *Amici* are unaware of the City issuing deficiency letters to any other entities during the intervening period. During this nearly 14-year time span, the City

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has also "recognize[d] that [it] may consider new issues raised by an amicus curiae on appeal," citing *Fisher*. *Rubin v. City of Burbank* (2002) 101 Cal.App.4th 1194, 1208, n. 11. Here, the Superior Court has recognized that "[t]he principal underlying facts in this matter are essentially undisputed." (AA169.) As explained further in the substantive arguments, the Due Process and Equal Protection claims involve important questions of public policy. These arguments relate to whether a locality may: (1) impose a 14-year retroactive tax without previously providing warning to the taxpayers; and (2) single out certain businesses for punitive taxation.

If this Court, in its discretion, opts to not address *amici*'s Due Process and Equal Protection arguments, *amici* respectfully request that this Court sever such sections from this *amici curiae* brief and allow the remainder to stand.

apparently decided to voluntarily ignore revenue for which it now claims it is entitled.

The City had opportunities to inform streaming video service providers of the alleged VUT obligations.[10] For example, MuniServices – an organization that "assists its UUT client cities in developing consensus approaches on many UUT matters" – issued a Policy Update on November 15, 2016, by which it stated that "a number of [its] UUT client cities with similar modern UUT ordinances that apply to 'video services' have discussed the need to issue an administrative ruling to providers of OTT, clarifying the application of the City's UUT to 'video programming services' (e.g., Sling TV, DirecTV Now, Xfinity Stream, Hulu, Netflix)." (https://perma.cc/BYR6-VPNJ.) MuniServices stated that the cities were working to "develop an appropriate ruling . . . to interpret the existing language of the UUT ordinance, and to apply it prospectively to OTT sometime in 2017." The City neglected to issue such administrative ruling or any other guidance and waited another nearly six years to issue its first deficiency letters.

The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend., § 1.) "Due process centrally concerns the

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[10] With respect to taxes imposed on the customers of service suppliers and collected and remitted to the local jurisdiction by the service suppliers, the California Public Utilities Code requires that the local jurisdiction notify the service suppliers by writing if: (1) the local jurisdiction changes the tax base or makes any other change to the tax that would affect its collection and remittance; or (2) the local jurisdiction adopts a new tax. (Cal. Pub. Util. Code § 799(a)(5) – (6).) The service supplier is not required to implement the changes or otherwise begin collecting the tax until after receiving such written notification. (*Id.*) The City did not provide the written notice required under Cal. Pub. Util. Code § 799.

fundamental fairness of governmental activity." (*Quill Corp. v. North Dakota* (1992) 504 U.S. 298, 312 [112 S.Ct. 1904, 119 L.Ed.2d 91], overruled on other grounds by *South Dakota v. Wayfair, Inc.* (2018) 585 US 162 [138 S.Ct. 2080, 201 L.Ed.2d 403].) Retroactive laws "raise particular concerns" about "sweep[ing] away settled expectations suddenly and without individualized consideration." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 266 [114 S.Ct. 1483, 128 L.Ed.2d 229].) The U.S. Supreme Court has observed that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." (*Id.* at 265). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." (*Ibid.*)

State and local tax authorities that decide to change interpretations of taxing statutes and apply them retroactively may violate the Due Process Clause. In *Texas Entertainment Association, Inc. v. Hegar* (5th Cir. 2021) 10 F.4th 495, the U.S. Court of Appeals for the Fifth Circuit held that the Comptroller could not impose a fee on a retroactive basis 8 years after it was first enacted when the Comptroller had failed to place the relevant businesses on notice. Effective January 1, 2008, the Texas legislature enacted a "sexually oriented business" fee ("SOBF"), which imposed a "charge on businesses that serve alcohol in the presence of 'nude' entertainment." (*Id.* at 501.) In January 2017, the Texas Comptroller of Public Accounts "promulgated a rule that clarified the definition of 'nude' under the SOBF statute" to apply to latex clubs. (*Ibid.*) Regardless, "the Comptroller instituted proceedings to collect the fee both prospectively, and retroactively to 2008." (*Id.* at 502.)

The Fifth Circuit held that the retroactive application of the fee was "so harsh and oppressive as to transgress . . . constitutional limitation[s]."

(*Id.* at 513, citing *United States v. Hemm* (1986) 476 U.S. 558, 568-69 [106 S.Ct. 2071, 90 L.Ed.2d 536]).) The Clothing Rule "'without notice, . . . [gave] a different and more oppressive legal effect to conduct undertaken before enactment of the [rule].'" (*Ibid.*) The court was particularly troubled by the Comptroller "[knowing] of the latex clubs' existence for over eight years" without taking any "enforcement action, even to the point of assuring at least one latex club that 'everything was good.'" (*Ibid.*) Further, the latex clubs were not put on notice of the Comptroller's interpretation until the Comptroller noticed the rule change in the Texas Register on October 28, 2016. "Before then, as the district court found, the latex clubs had a settled expectation that they would not be subject to the SOBF." (*Ibid.*) Thus, the Fifth Circuit concluded that the retroactive imposition of the SOBF upon the latex clubs violated their Fourteenth Amendment due process rights.

The City's application of the VUT to streaming video providers is no different from the Comptroller's application of the SOBF. In both cases, the relevant taxing agency changed its position on whether the underlying statute allowed it to impose the tax or fee on certain parties. The parties in both cases had the settled expectation that they would not be subject to assessment, in part because the taxing agency offered no guidance whatsoever to put the taxpayer on notice and the agency's refusal to enforce its alleged tax law interpretation. In fact, this case is far more egregious, as it took the City over 13 years (compared with 8 years in *Texas Entertainment Association*) to first put streaming video providers on notice of a potential liability.

California courts have also addressed retroactivity. Here, "a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment." (*Western Security Bank, N.A. v. Superior Court* (1997) 15 Cal.4th 232,

243.) California courts may consider "surrounding circumstances" for whether "the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning." (*Ibid.*) Such legislation is treated as having "no retrospective effect because the true meaning of the statute remains the same." (*Ibid.*)

In *NetJets Aviation, Inc. v. Guillory*, the Court of Appeal held that the retroactive application of a clarifying tax statute amendment was unconstitutional. ((2012) 207 Cal.App.4th 26.) Prior to 2007, aircraft – including fractionally owned aircrafts – were valued and assessed for personal property tax purposes "only in the county in which it is habitually situated." (*Id.* at 36.) In 2007, the California Legislature passed a bill to amend the personal property tax to instead apportion the assessed value of fleets of fractionally owned aircrafts among counties. Prior to the enactment of the bill, "taxes were not assessed against any party for fractionally owned aircraft." (*Id.* at 54.) After the bill's enactment, local tax assessors began to issue assessments – for the first time – on a retroactive basis to January 1, 2002. (*Id.* at 37.)

The bill's legislative history indicated that it was a new tax. For example, the staff legislative bill analysis "assumed it was a new law creating assessment rules for fractionally owned aircraft." (*Id.* at 55.) Additional comments from the Board's employees and representatives indicated that they believed the bill was creating "an entire new body of law to address how, when, where, etc. to tax" fractional aircraft ownerships. (*Id.* at 56.) Reviewing the legislation's language, its legislative history, and the affected agencies' analysis and interpretation, the court concluded that the legislation was "a new law that creates a new method for assessing taxes on a specific type of personal property—fractionally owned aircraft." (*Ibid*.) The law thus had retroactive effect, and the assessments could not constitutionally be applied retroactively. (*Id.* at 58.)

Here, much like in *NetJets*, a court would view the City's new application of the VUT to streaming video providers as a new tax. In both cases, the taxing agencies – according to their interpretation of the underlying statute – could have taxed the fractionally owned aircrafts and video streaming services from the outset, but only began to do so at a much later point in time. The City's extensive delay in issuing deficiency letters, coupled with it never before claiming video streaming providers were taxable, indicate that the VUT is a new tax that may not be imposed retroactively.

In this case, the City thus violated the Due Process Clause by imposing the VUT on streaming video providers on a nearly 14-year retroactive basis without any prior notice.

E. The City's Unequal Application of the VUT to the Appellants Violates Equal Protection.

Finally, because the Superior Court's decision arbitrarily picks winners and losers in terms of VUT applicability, there are serious Equal Protection concerns relating to the City's VUT assessment of the Appellants. The California Supreme Court forbids unequal treatment on the basis of "intentional or purposeful discrimination":

> [u]nequal treatment which results simply from laxity of enforcement or which reflects a nonarbitrary basis for selective enforcement of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement. . . . However, the unlawful administration by state officers of a state statute that is fair on its face, which results in unequal application to persons who are entitled to be treated alike, denies equal protection if it is the product of intentional or purposeful discrimination.

(*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 832, internal citations omitted.)

If this Court concludes that the VUT applies to streaming video services, the City's application of the VUT is nonetheless the result of impermissible intentional or purposeful discrimination.

To the best of *Amici*'s knowledge, the City has not issued deficiency letters to any other streaming video providers. However, the Appellants are not the only internet streamers that provide these types of services that are used by residents of the City. Residents of the City stream video on YouTube, Spotify, Peloton, and news sites including the Los Angeles Times and the Wall Street Journal every day. If the City had now decided to enforce the VUT on internet streamers in a nonarbitrary manner, it would have done so on all such internet streamers.

In contrast, there are no reasonable grounds for the City enforcing the VUT against the Appellants and not other video streaming services. This difference in treatment is arbitrary and denies the Appellants equal protection under the law.

IV. CONCLUSION

Amici respectfully request that this Court reverse the Superior Court's decision because the: (i) decision incorrectly ignored the plain meaning of the Ordinance and the Councilmembers' intent to tax only facilities-based video services; (ii) application of the VUT to Appellants' services violates the Due Process of the U.S. Constitution; and (iii) application of the VUT to Appellants' services violates the Equal Protection Clause of the California Constitution.

* * *

Dated: June 30, 2025

Respectfully submitted,

Eversheds Sutherland (US) LLP

By: */s/ Jeffrey A. Friedman*
Jeffrey A. Friedman

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Motion Picture Association, Inc. &
Streaming Innovation Alliance

CERTIFICATE OF COMPLIANCE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, and in reliance on the word count function within the Microsoft Word software by which this *amici curiae* brief was prepared, I hereby certify that this brief was produced using 13-point type and contains 6,181 words (including footnotes).

Dated: June 30, 2025

/s/ Jeffrey A. Friedman
Jeffrey A. Friedman

PROOF OF SERVICE

I, Jaime Lane, declare that I am a resident of the State of Missouri, over the age of 18 years, and not a party to this action. My business address is Eversheds Sutherland (US) LLP, 700 Sixth Street, NW, Suite 700, Washington, DC 20001.

On June 30, 2025, I served the foregoing:

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* MOTION PICTURE ASSOCIATION, INC. AND STREAMING INNOVATION ALLIANCE IN SUPPORT OF PETITIONER-APPELLANTS

(X) By forwarding the documents by electronic transmission via the TrueFiling interface on this date to the listed below:

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(X) By causing the documents to be placed in a sealed envelope for collection and mailing with the United States Postal Service on this date to the following persons:

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Superior Court of California
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Santa Barbara County Courthouse, Dept. 4
Santa Barbara, CA 93101

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed at St. Charles, Missouri, this 30th day of June, 2025.

Jaime Lane