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**Case No. S279242**

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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**MAKE UC A GOOD NEIGHBOR ET AL.**

*Petitioners and Appellants,*

*v.*

**THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.**

*Respondents,*

**RESOURCES FOR COMMUNITY DEVELOPMENT**

*Real Party in Interest.*

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After a published opinion of the Court of Appeal
First Appellate District, Division Five,
Case No. A165451

Appeal from July 29, 2022, Order and August 2, 2022 Order and Judgment of the Alameda Superior Court; Hon. Frank Roesch, Dept. 17, Case No. RG21110142
(Consolidated for Purposes of Trial Only with Case Nos. RG21109910, RG21110157, 21CV000995 and 21CV001919)

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## OPENING BRIEF ON THE MERITS

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## QUESTIONS PRESENTED FOR REVIEW

(1) Does the California Environmental Quality Act ("CEQA") require public agencies to treat the general behavioral noise generated by people of a specific social identity that a project will bring to a community as an environmental impact, or is such human behavioral noise a "social effect" that shall not be treated as a significant effect on the environment?

(2) Under CEQA, when a lead agency has identified potential sites for future development and redevelopment in a programmatic planning document, is the agency required to revisit alternative locations for a proposed site-specific project within the program, or would such a requirement infringe upon the lead agency's discretion to prioritize and propose sites in the manner that best serves the agency's goals?

## INTRODUCTION

This case arises from the Court of Appeal's disagreement with two aspects of the Environmental Impact Report ("EIR") the University of California Berkeley ("UC Berkeley" or "University") prepared for its long-range Housing Program. That program includes a proposal to build student housing, affordable and supportive housing, and commemorative public open space at the site known as "People's Park" in the City of Berkeley. UC Berkeley determined that its long-range Housing Program, including redevelopment of People's Park, is necessary to 1) address a severe shortage of on-campus housing for students and faculty, and 2) support the educational mission of one of the flagship campuses of the State's public university system. The University further determined that development at

People's Park, in particular, is necessary to not only provide student housing, but also to address the homelessness issues at the site while commemorating the site's history. The flaws the Court of Appeal found with the University's determinations in the EIR ignore the University's discretion under CEQA and twist the statute far beyond its purpose.[1]

First, the Court of Appeal erred by concluding that CEQA requires UC Berkeley to consider as an *environmental* impact the excessive noisiness of its future students while they socialize at off-campus parties in Berkeley's urban neighborhoods. In so holding, the Court misinterpreted CEQA to require a lead agency to treat as "substantial evidence" a project opponent's comment that a type of individual — in this case, students — has a tendency for engaging in "anti-social" behavior, here, excessive noisiness—something never before suggested by any published decision. In doing so, the Court of Appeal opened the door to consideration of bias, prejudice, and stereotypes as part of the CEQA process. This demands that public agencies give credence to testimony that the future occupants of a proposed housing project are *the type of people* who will engage in excessively noisy behavior, and consider that social behavior a significant environmental effect. Then, they must analyze the potential for and level of noise impacts from *those type of people's* behavior as they go out into the community in their everyday lives. CEQA cannot reasonably be read to require UC Berkeley and other public agencies to perform this analysis as they seek to comply with the ever-expanding statute that is CEQA.

[1] CEQA is codified at Public Resources Code section 21000 et seq. Further statutory references are to the Public Resources Code unless otherwise indicated.

The danger of the Court of Appeal's rationale is that many people can readily accept the idea that college students, as a matter of "common sense," are noisier and more likely to engage in anti-social behavior than other people. But that is unquestionably a stereotype, and a dangerous one precisely because it may strike some as self-evident. It is wrong to enshrine stereotyping into the law, and if the Court of Appeal's holding stands, it would empower project opponents to introduce their own biases as "substantial evidence" that the particular group of people a project is designed to house or serve are *the type of people* who are assumed, as a group, to engage in excessively noisy or other anti-social behavior.[2] Undoubtedly, the Opinion gives project opponents yet another tool to delay or stop projects, including much-needed urban, in-fill housing projects like those at issue here, to the detriment of educational advancement, housing production, and the climate.

Fortunately, that is not the law. CEQA is clear that social issues, such as how university students might conduct themselves in the neighborhoods surrounding an urban campus, are not environmental impacts. The appropriate tools for addressing such issues are the local regulations and ordinances addressing noisiness and other anti-social behavior. There is no good cause to expand CEQA into this territory. Even the project opponents concede there is no CEQA mitigation that could effectively address such issues, so that any analysis becomes no more than

[2] Such efforts could apply, for example, to undergraduate students, families with children, multi-generational families, low-income people, the formerly unhoused, the formerly incarcerated, etc. One need not only imagine such scenarios, as the cases discussed below make clear.

a meaningless, and perilous, exercise. The presumed excessive noisiness of the type of people a proposed project will bring as they go out into the Berkeley community is simply not a proper subject of CEQA analysis.

Second, the Court of Appeal also erred by concluding that UC Berkeley did not adequately consider alternative locations for the People's Park Project. What the Court failed to recognize is that UC Berkeley determined that it cannot sacrifice any one site in its long-range Housing Program for another. The University identified sixteen sites for development through its long-range planning process, including People's Park. To successfully address its student-housing shortfall, the University proposed *all sixteen sites* for future housing under the long-range plan. At the same time, it proposed the People's Park Project for immediate redevelopment.

Abandoning the People's Park site as a location for student housing would drastically reduce by more than ten percent the total bed count under UC Berkeley's overall Housing Program, inappropriately interfering with the University's discretion to plan and prioritize facilities to accommodate its campus population. Moreover, the People's Park Project is unique. More than just student housing, it was proposed to specifically address crime and safety at People's Park, to offer services and housing for members of the City of Berkeley's unhoused population that have resided at that site, and to commemorate the storied history of People's Park by establishing a large public space. UC Berkeley could not realize these goals at any other site. CEQA does not require UC Berkeley to change or re-analyze the fundamental judgments it made in its immediate and long-range planning policies.

The Court of Appeal's Opinion is in error, and must be reversed.

## FACTUAL AND PROCEDURAL STATEMENT

### A. UC Berkeley's 2021 Long Range Development Plan guides campus development and strives to increase student housing.

Each campus in the UC system periodically prepares a Long Range Development Plan ("LRDP"), which provides a high-level planning framework to guide land use and capital investment in line with its mission, priorities, strategic goals, and population projections. (Administrative Record ["AR"] 9548-49.) Starting in 2019, UC Berkeley engaged in a robust campuswide and community planning process that culminated in the Board of Regents' approval of the LRDP in July 2021, superseding the prior LRDP adopted in 2005. (AR9549-50; AR4-25; AR26-123.) The purpose of the LRDP is to provide adequate planning capacity for potential population growth and physical infrastructure that may be needed to support future population levels on a particular UC campus and to provide a strategic framework for decisions on development projects, including housing. (AR9548-49; AR9571.)

The LRDP does not determine, mandate, or commit the campus to any specific level of growth, future enrollment, or population, nor does it set a future population limit.[3] (AR9494-95; AR57-94.) However, under

[3] The University's campus population increase primarily results from statewide population growth, and the corresponding increase in high school graduate rates and college-aged Californians. (AR57.) The number of additional students admitted by each UC campus is determined by the number of applications received, their overall capacity, and other factors.

Section 21080.09, subdivision (d) of the Public Resources Code, CEQA requires the environmental effects relating to changes in campus population at each campus of public higher education to be considered in the EIR prepared for that campus's LRDP. Therefore, the EIR UC Berkeley prepared for its LRDP analyzed, at a programmatic level, the physical environmental effects of population growth that could be required by the State of California to increase access to high-quality education through the 2036-37 academic year. (AR11; AR24418.)

UC Berkeley is a 150-year-old urban campus with the lowest percentage of student residential beds in the UC system, and the high cost of housing in the San Francisco Bay area limits the availability of non-UC housing options near campus. (AR9549; AR38-52.) This lack of campus housing adversely affects the overall student experience, challenges UC Berkeley's ability to recruit faculty, graduate students, and postdoctoral scholars, and impacts the local residential housing market. (AR1206.)

To address this issue, the LRDP includes a Housing Program to "[i]mprove the existing housing stock and construct new student beds and faculty housing units in support of the Chancellor's Housing Initiative" to provide as many as 11,731 beds to students, faculty, and staff, more than doubling existing housing capacity by 2036-37. (AR9558; AR9580; AR58; AR7.) The Chancellor's Housing Initiative reflects goals to provide two

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(*Ibid.*) Additionally, the California Master Plan for Higher Education guarantees access to UC campuses for the top 12.5 percent of the state's public high school graduates and qualified transfer students from California community colleges. (AR9548; AR14175.) The California Education Code also contains several provisions mandating enrollment access levels. (See AR10096-97.)

years of housing for entering freshmen, one year for entering transfer students, one year for entering graduate students, and up to 6 years of housing for untenured faculty. (AR58.) As the EIR explains, "UC Berkeley has identified potential areas of new development and redevelopment that could accommodate additional housing on the Clark Kerr Campus and the City Environs Properties."[4] (AR9560.) "Improvements to housing facilities includes modernization of existing facilities; redevelopment or renovation of existing buildings or underutilized sites; as well as renovation or redevelopment of existing facilities to address significant seismic and deferred maintenance needs." (*Ibid*.) The EIR's Project Description includes a table and a map of these approximately 58 potential areas of new development and redevelopment, including sixteen sites for potential residential uses.[5] (AR9574-76.) All sixteen of these sites would be needed to complete the Housing Program. (AR9580.)

Recognizing the urgent need to address the shortage of available student housing, the LRDP Housing Program designates two of the sixteen site-specific student housing locations for immediate development. (AR9550.) The Anchor House site ("Housing Project #1" in the EIR) is not

[4] The Clark Kerr Campus is located several blocks southeast of the main part of campus, known as Campus Park; the City Environs Properties refers to properties owned or leased by UC Berkeley, mostly located in the high-density area within roughly one-half mile of Campus Park. (AR9557.)

[5] Sixteen sites listed in Table 3-2 identify "residential" as the proposed use or a component of the proposed use. (AR9575.)

at issue in this appeal.[6] The People's Park Project ("Housing Project #2" in the EIR) is at issue in this appeal. The People's Park Project will provide housing for more than 1,100 undergraduate students at the University-owned site known as People's Park. The People's Park Project will also provide permanent supportive housing for approximately 125 extremely low-income persons, while preserving two-thirds of the site as open green space for the community, including commemoration of the park's history. (AR9597-9612; AR1206-08.)

### B. UC Berkeley prioritized redevelopment of People's Park over other sites in the LRDP's Housing Program to take advantage of the opportunity to provide student housing, while also addressing homelessness, and commemorating the site's history.

The EIR provides both a "program-level" analysis of the LRDP's Housing Program and "provides a project-level analysis (i.e., evaluates potential impacts from construction and operation)" of the Anchor House and People's Park projects. (AR9550; AR9573.) This project-level analysis provided the appropriate level of CEQA review to permit construction of the two site-specific housing projects as soon as the Board of Regents certified the EIR and approved the specific projects.

UC Berkeley first identified the People's Park site for development over 60 years ago. The site is well known as the site of protests and community action in the late 1960s and early 1970s. (AR9798-9800.) In the

[6] The Anchor House site is a gift to the University from a philanthropic non-profit. The project, which focuses on the housing of transfer students, will provide 770 student beds in 244 apartments. (AR9581.)

decades since these events, long-term plans for development at the site were continually met with protests and never materialized. (*Ibid*.) Beginning in 2020, as a result of pandemic conditions, the site was predominantly occupied by transient and underhoused people in multiple encampments—from single sleeping bags and small tents to large tents and makeshift tarps/tents. (AR9800; AR9600; AR37590-91 [photographs of the site].)

Even before the pandemic (as early as 2018), the deteriorating conditions at People's Park and the urgent need for student housing prompted UC Berkeley's Chancellor to characterize the People's Park site as "the only university-owned property that allows the campus to simultaneously address student housing needs; relieve demand-side price pressure on the city's housing market; address crime and safety concerns for the benefit of city and campus communities; revitalize a neighborhood and offer improved safety and services for members of Berkeley's homeless population."[7] The University thus proposed the People's Park Project to "create safer conditions for all, and improve the quality of life in the surrounding neighborhood, as well as the health and well-being of visitors and members of the campus and city communities." (AR1206.) In recognition of the site's unique attributes, the proposal includes permanent supportive housing and commemorative community open space, in addition to the student housing component. (AR1206-08.) As the campus Chancellor explained, "this unique project … is the first proposal since the 1960s that

[7] https://news.berkeley.edu/2018/05/03/new-uc-berkeley-plans-for-peoples-park-call-for-student-homeless-housing/, available through https://chancellor.berkeley.edu/housing-initiative, cited at AR9550.

rises to meet the challenges that face our community today: Lack of housing, homelessness, and commemoration of our shared history." (AR24602, 24605.)

Despite Appellants' objections to altering the site, the plan attracted the support of many community members, including the City of Berkeley's elected leaders. The City's Mayor attested that "the vision for the park over 50 years is no longer reflected in its current condition. But this proposal is an opportunity to make things right. Through years of discussion and outreach, this proposal has been meticulously crafted into a win-win-win situation." (AR1293.) The Vice Mayor agreed it was "the first proposal for the People's Park site to address the shared housing crisis the City and University face and it offers multiple significant benefits." (AR1281-82.)

### C. The EIR appropriately analyzes noise impacts caused by the People's Park Project and the LRDP's other residential uses.

Consistent with CEQA, the EIR includes a traditional noise analysis, which analyzes potential substantial increases in ambient noise levels from construction and operation of LRDP projects, including the People's Park Project.[8] (AR10064-71; AR10078-83.) For residential uses, the analysis examines construction noise, traffic noise, and noise from stationary sources such as landscaping and maintenance activities and HVAC

[8] To determine whether a project may have a significant noise impact, the key question the Guidelines prompt agencies to ask is: "Would the project result in … [g]eneration of a substantial temporary or permanent increase in ambient noise levels in the vicinity of the project in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies?" (Guidelines, Appx. G, XIII (a).)

systems. (AR10064-71; AR10078-83.) The EIR concludes that impacts from these stationary noise sources is generally short and intermittent and would be less than significant. (AR10067, 10081.)

Because the People's Park Project would also include a large public open space/park, the EIR analyzes the noise of people gathering and talking in that immediate area. (AR10080.) The EIR explains that "[n]o amplified sound is proposed at the open space areas, and speech from conversations would quickly dissipate and would not interfere with surrounding outdoor activities and noise-sensitive uses." (AR10080-81.) Additionally, public use of the open space would have to comply with the City of Berkeley Municipal Code exterior noise standards. (AR10081.) Ultimately, the EIR finds that stationary noise impacts from the proposed park would be less than significant. (*Ibid*.)

Relevant to this case, the EIR does not analyze the potential noise-generating behavior of students whenever they depart the campus—such as if they leave campus to attend parties in adjacent neighborhoods. (And as discussed below, CEQA does not require this, and no methodology exists to address that type of generalized "impact.")

UC Berkeley circulated a draft of the EIR for 45 days for public comment and held a public hearing to receive input from agencies and the public. (AR9488; AR159.) A neighborhood group, the Southside Neighborhood Consortium ("SNC"), raised concerns about student noise (AR14540, 14545-53, 14566), as did one individual neighbor (AR15060).

The Final EIR includes written responses to these comments. In response to SNC's question of whether the EIR studied "the negative noise impacts of late-night pedestrian movements between the City Environs and

student housing," the Final EIR explains, "information concerning noise generated by pedestrians … is not germane to the environmental evaluation" and "[i]t would be speculative to assess noise impacts such as those suggested by the commenter." (AR14540.) In response to SNC's comment that the EIR "does not study the noise impacts on surrounding residential neighborhoods even though [UC Berkeley] is aware of the late-night noise impacts generated by the present undergraduates living at this location," the Final EIR points to existing student-neighbor relationship initiatives[9] and explains, "it is speculative to assume that an addition of students would generate substantial late night noise impacts simply because they are students. Individuals are subject to the provisions of the Municipal Code and intermittent community complaints are handled on a case by case basis by enforcement officers." (AR14545-46.) The Final EIR provides the same response to SNC's other comments, which include observations about existing noise from "large groups of students coming and going from parties and other social events" and "undergraduates living in private

[9] "Convened in 2005, the Advisory Council on Student-Neighbor Relations (SNAC) is dedicated to improving the quality of life in the neighborhoods adjacent to UC Berkeley properties within the EIR Study Area. … SNAC's primary aim is to build good student/neighbor relations. … SNAC has launched and supported good-neighbor initiatives, campaigns and programs—such as Happy Neighbors and the CalGreeks Alcohol Taskforce—to engage and serve students and neighbors. … Noise reduction initiatives focus on but are not limited to parties, sports, and rental spaces. The CalGreeks Alcohol Taskforce provides noise data from CalGreeks events. Happy Neighbors educates students and their neighbors about community expectations, relevant policies and laws, and police and student conduct procedures for possible alcohol, party, and noise violations." (AR10046-47.)

housing" (AR14553, 14566), and to the individual commenter who stated, "there are screaming[,] yelling students who return home from 10 pm til midnight" and "noise increases every year that Cal increases its enrollment and has no on campus housing" (AR15060.)

### D. The Board of Regents certified the EIR and approved the LRDP and the People's Park Project.

On July 22, 2021, the Board of Regents certified the EIR and approved the LRDP and the Anchor House project. (AR4-123.)

Two months later, on September 29, 2021, the Board of Regents considered approval of the People's Park Project. (AR1204-1239.) Four days prior, on September 25, 2021, Appellants had submitted a 156-page opposition letter, including a memorandum from a noise consultant Appellants engaged to review the EIR and a letter from a community member active in efforts to address student noise. (AR1587-1743.) The noise consultant opined that undergraduate partying is an American rite of passage "so widespread that it was the subject of the perpetually popular 1978 film *National Lampoon's Animal House*" and asserted that "[a]lthough undergraduate women are capable of drinking alcohol to excess and yelling, … the vast majority of loud and unruly drunk college students are male." (AR1596, 1601.)

The consultant also opined that given the Residential Code of Conduct that would be enforced at the student housing component of the People's Park Project, students who "want the quintessential undergraduate partying experience will go elsewhere – foreseeably to non-UCB-controlled residences of other students." (AR1599-1600.) Based on these beliefs, as well as excerpts from the City of Berkeley's noise ordinance, data

indicating violations of this ordinance, and public comments about existing noise concerns, the consultant opined that vocal noise from student parties and pedestrians in the neighborhood south of the People's Park site would exceed residential exterior noise limits. (AR1594-1604.) He summed up his conclusion: "With people comes noise. The only practical means to avoid an increase in noise from parties and partiers is to not add more partiers to the area." (AR1603.)

After considering these and other comments received on the EIR both before and after its July 2021 certification, the Board of Regents approved the People's Park Project. (AR1240-1272.)

### E. The Superior Court upheld the EIR and the Board's approvals; the Court of Appeal reversed.

Appellants filed their First Amended and Supplemental Petition for Writ of Mandate in the Superior Court challenging the LRDP and the People's Park Project. (Joint Appendix ["JA"] 7-25.) Two other organizations also filed petitions. The Superior Court entered its order and judgment rejecting all of the petitioners' challenges and denying their petitions for writ of mandate. (JA313-329.) Appellants appealed. (JA331-332.)

The Court of Appeal rejected most of Appellants' challenges to the EIR. ("Opinion" or "Op.", at pp. 1-2.) But, the Court agreed with Appellants that, as to both the LRDP and the People's Park Project, the EIR had "failed to analyze potential noise impacts from loud student parties in residential areas near the campus, where student parties have been a problem for years." (Op., at pp. 30-38.) "Given the long track record of loud student parties that violate the city's noise ordinances (the threshold

for significance), there is a reasonable possibility that adding thousands more students to these same residential neighborhoods would make the problem worse." (*Id*., at p. 36.) The Court of Appeal thus concluded that UC Berkeley "must determine whether the potential noise impacts are in fact significant, and, if so, whether mitigation is appropriate." (*Id*., at p. 38.)

The Court of Appeal also agreed with Appellants that the EIR did not analyze a reasonable range of alternative locations to the People's Park Project. (Op., at pp. 17-27.) Although the Court acknowledged "an analysis of alternative sites is not required in all cases," it faulted UC Berkeley for "declin[ing] to analyze any alternative locations" to the People's Park site and "fail[ing] to provide a valid reason for that decision." (*Id*., at p. 18.) The Court rejected evidence that the EIR and the record as a whole demonstrate that People's Park is the only location that can feasibly achieve the University's goals of immediately alleviating the student housing crisis and redeveloping and revitalizing this particular site. (*Id*., at p. 25.)

The Court of Appeal remanded the matter to the Superior Court to vacate its order and judgment denying Appellants' petition for writ of mandate and to enter a modified judgment consistent with the Court of Appeal's conclusions. (Op., at pp. 44-45.)

## LEGAL DISCUSSION

### I. THE COURT ERRED IN FINDING THAT NOISY BEHAVIOR OF STUDENTS ATTENDING OFF-CAMPUS PARTIES IS AN ENVIRONMENTAL IMPACT

#### A. The purpose and process of CEQA review.

CEQA requires public agencies to give "major consideration … to preventing environmental damage" when feasible, "while providing a decent home and satisfying living environment for all California residents" and creating conditions "to fulfill the social and economic requirements of present and future generations," among other objectives. (§§ 21000, subd. (g), 21001, subds. (d), (e); Guidelines, § 15002, subd. (a)[10].)

"CEQA review is undertaken by a lead agency, defined as 'the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.'" (*Friends of Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 712, quoting § 21067, italics omitted.) The CEQA process has three tiers. "First, the agency must determine whether the proposed activity is subject to CEQA at all. Second, assuming CEQA is found to apply, the agency must decide whether the activity qualifies for one of the many exemptions that excuse otherwise covered activities from

[10] The CEQA Guidelines, promulgated by the Secretary of the Natural Resources Agency, are found at Cal. Code Regs., tit. 14, § 15000 et seq. They are cited here as "Guidelines, § _____." Courts "afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, fn. 2.)

CEQA's environmental review. Finally, assuming no applicable exemption, the agency must undertake environmental review of the activity, the third tier." (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1185 ("*Medical Marijuana*").)

Under CEQA and its implementing guidelines, environmental review generally requires the lead agency to undertake an initial study to determine "if the project may have a significant effect on the environment." (Guidelines, § 15063, subd. (a).) "If the initial study finds no substantial evidence that the project may have a significant environmental effect, the lead agency must prepare a negative declaration, and environmental review ends. [Citations.] If the initial study identifies potentially significant environmental effects but (1) those effects can be fully mitigated by changes in the project and (2) the project applicant agrees to incorporate those changes, the agency must prepare a mitigated negative declaration. This too ends CEQA review." (*Medical Marijuana*, *supra*, 7 Cal.5th at pp. 1186-87, citing § 21080, subd. (c)(1)-(2) and *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 945.)

"Finally, if the initial study finds substantial evidence that the project may have a significant environmental impact and a mitigated negative declaration is inappropriate, the lead agency must prepare and certify an EIR before approving or proceeding with the project." (*Medical Marijuana*, *supra*, 7 Cal.5th at p. 1187, citing § 21080, subd. (d) and (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 382 ("*Building Industry*").)

"In any action or proceeding … to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with [CEQA], the inquiry shall extend only to whether there was a prejudicial abuse of discretion." (§ 21168.5.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (*Ibid*.)

### B. CEQA's definition of "environment" should not be stretched to include noisiness and other anti-social behavior.

To be subject to review under CEQA, a project's impacts must relate to a change in the physical environment. (Guidelines, § 15358, subd. (b) ["Effects analyzed under CEQA must be related to a physical change."].) "'Environment' means the physical conditions that exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§ 21060.5.) "'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment." (§ 21068.)

CEQA and the Guidelines distinguish between a project's physical impacts on the environment and the project's economic or social effects. The Guidelines provide that "[e]conomic or social effects of a project shall not be treated as significant effects on the environment."[11] (Guidelines, §

[11] An EIR may, however, "trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic or social changes." (Guidelines, § 15131, subd. (a).)

15131, subd. (a); § 15064, subd. (e).) CEQA also expressly excludes from the definition of "substantial evidence" of a significant environmental effect any "evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (§ 21080, subd. (e)(2).) The Guidelines similarly provide that "[e]vidence of economic and social impacts that do not contribute to or are not caused by physical changes in the environment is not substantial evidence that the project may have a significant effect on the environment." (Guidelines, § 15064, subd. (f)(6).)

This is not the first time a project opponent sought to convert presumed anti-social behavior or other non-environmental effects of a project—including crime and public safety concerns—into an "environmental" impact, requiring an EIR and mitigation, in an attempt to stop a project. The case law is replete with examples. (See, e.g., *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 1469, fn.2 ("*Baird*") [potential increased crime problems resulting from expansion of an addiction treatment facility for male adolescent drug and alcohol users "is not a proper subject of CEQA inquiry"]; *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1206 [CEQA does not look to "propriety of [] dogs, leashed and unleashed"; "these effects are essentially social"]; *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 592 ("*Bowman*") ["[W]e do not believe that our Legislature in enacting CEQA … intended to require an EIR where the sole environmental impact is the aesthetic merit of a building in a highly developed area. [Citations.] To rule otherwise would mean that an EIR would be required for every urban building project that is not exempt under

CEQA if enough people could be marshaled to complain about how it will look."]; *Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 584-587 [fears about impacts to public safety caused by crowds congregating around a proposed downtown sports arena and potential for violence due to inebriated fans does not implicate CEQA]; *Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 577 [CEQA does not require analysis of a project's impacts on "community character," as these issues "go well beyond" the aesthetic impacts within CEQA's scope]; *McCann v. City of San Diego* (2021) 70 Cal.App.5th 51, 86 ["Neighborhood sentiment is not an impact that must be directly considered in the environmental determination process."]; *Pacific Palisades Residents Assn., Inc. v. City of Los Angeles* (2023) 88 Cal.App.5th 1338, 1367-1368 ["Without saying so explicitly," opponents of an eldercare facility suggest that "views of *this* building are uniquely odious" despite substantial evidence that "this typical urban building was compatible with existing views in this urban neighborhood."] *Save Livermore Downtown v. City of Livermore* (2022) 87 Cal.App.5th 1116, 1136-1139 [upholding trial court's ruling that action was brought to delay affordable housing project]; *Jenkins v. Brandt-Hawley* (2022) 86 Cal.App.5th 1357, 1388 ["[T]he petition 'here involved a group of well-off, "NIMBY" neighbors living in one of the most expensive zip codes in the country trying to prevent their fellow neighbor from rebuilding a decrepit and dangerous residence on their property because the neighbors were concerned about privacy and the design aesthetics of the new build. [Citation.] It had nothing to do with significant or negative environmental effects under CEQA …'"].)

There are similar examples from case law interpreting the National Environmental Policy Act ("NEPA") (42 U.S.C. § 4321 et seq.), which "constitutes, in substantial effect, a national counterpart to CEQA." (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 201.) Like CEQA, the NEPA regulations state that "[e]conomic or social effects by themselves do not require preparation of an environmental impact statement [EIS]." (40 C.F.R. § 1502.16, subd. (b).) Federal courts applying these analogous provisions have *rejected the idea that agencies must consider the supposed or even demonstrable characteristics of a project's users or residents* in evaluating impacts caused by a proposed project. (See *Maryland-National Capital Park & Planning. Com'n v. U.S. Postal Service* (D.C. Cir. 1973) 159 U.S. App. D.C. 158 [487 F.2d 1029, 1037] ("*Maryland-National*") [rejecting notion of focusing on the effect of "people pollution," the presence of persons of low income in a more affluent community]; *Olmsted Citizens for A Better Community v. United States* (8th Cir. 1986) 793 F.2d 201, 205-206 [no need to prepare an Environmental Impact Statement—NEPA's equivalent of an EIR—to convert a state hospital into a hospital for federal inmates even though the prison might lead to more crime and drugs in the surrounding neighborhood]; see also, *Nucleus of Chicago Homeowners Association v. Lynn* (7th Cir. 1975) 524 F.2d 225, 231 ("*Nucleus of Chicago*").)

Echoing the concerns raised in *Maryland-National*, in *Nucleus of Chicago* the Seventh Circuit Court of Appeal expressed serious doubt about whether statistical data concerning particular social groups could be used to demonstrate a potential for physical environmental impacts. There, opponents of public housing in the Chicago metropolitan area sought to

enjoin construction on the ground that the Department of Housing and Urban Development ("HUD") failed to prepare an EIS. At trial, plaintiffs introduced testimony "on the basis of statistical studies to show that a substantial percentage of [Chicago Housing Authority ("CHA")] tenants are female-headed multi-problem families." (524 F.2d, at p. 229.) Plaintiff's experts testified that "[s]uch welfare dependent families as a social group … are acutely in need of employment opportunities and particularly dependent upon public programs providing day care facilities, health care, educational services, and youth and family counseling" and predicted that "[i]f these special needs went unsatisfied … CHA tenants would be likely to cause problems for their neighbors, engaging in acts of violence and property destruction." (*Ibid.*) Plaintiffs argued that HUD had therefore breached its duty under NEPA "to weigh the potential environmental traumas associated with the construction of low-income public housing." (*Ibid*.)

Unsurprisingly, the Seventh Circuit in *Nucleus of Chicago* "seriously question[ed]" whether NEPA requires analysis of such impacts. (*Id.* at p. 231.) And as this Court long ago observed, environmental analysis "'may not be turned into a game to be played by persons who—for whatever reasons and with whatever depth of conviction—are chiefly interested in scuttling a particular project.'" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568 ("*Goleta II*"), quoting *Seacoast Anti-Pollution v. Nuclear Regulatory Com'n* (1st Cir. 1979) 598 F.2d 1221, 1230-1231.) "Concerned persons might fashion a claim supported by linguistics and etymology, that there is an impact from people pollution of

'environment,' if the term be stretched to its maximum." (*Maryland-National*, *supra*, 487 F.2d 1029, 1037.)

Although CEQA includes "noise" in its definition of "environment" (§ 21060.5), that term should not be stretched to include the neighbors' concerns about undergraduate students' tendency for *noisiness*, based on their presumed predilection to attend off-campus parties in the community and violate the City's noise ordinance. Expanding CEQA, as the Opinion does, to include this type of "social noise" would provide yet another avenue for project opponents to demand an EIR whenever the project impact is the addition of more people to a highly developed area and a neighbor can be found to express concerns about the alleged anti-social behavior of these future residents. (See *Bowman*, *supra*, 122 Cal.App.4th at p. 592.) Project opponents will invoke "social noise" or any other perceived anti-social predilection to attack not just student housing, but also multi-family housing, affordable housing, supportive housing, and any other project designed for persons who, as a group, could be considered "noisy" or otherwise undesirable, whether undergraduate students, families with children, multi-generational families, low-income people, the formerly homeless, or the formerly incarcerated.

CEQA is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) However, as comprehensive as CEQA is, the Legislature has also mandated that courts "shall not interpret [CEQA] or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in

[CEQA] or in the state guidelines." (§ 21083.1.) By accepting "social noise" from "increased attendance at off-campus parties by increasing numbers of students housed on- and off-campus" as an *environmental* impact, the Court of Appeal violated this mandate. (Op., at p. 35; see Appellants' Opening Brief ["AOB"], p. 45.)

This case provides the Court with a timely opportunity to clarify that CEQA's definition of "environment" does not include the noise the State's citizens may make while engaging in common social behavior in urban settings, even if such behavior can be characterized as excessively noisy. This is particularly true where, as here, the people in question will exist in the urban setting *regardless of the proposed project*.[12] Clarifying this limitation on CEQA will greatly "reduce the uncertainty and litigation risks facing local governments and project applicants … who comply with the explicit requirements of the law" consistent with the Legislature's reason for adding Section 21083.1. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1107.)

### C. Requiring agencies to analyze whether a project's residents have a proclivity for excessive noisiness would inevitably allow prejudice and bias to influence the CEQA process.

Despite the Court of Appeal's rejection of CEQA "as a redlining weapon by neighbors who oppose projects based on prejudice rather than

[12] The LRDP does not determine future campus enrollment or population, and neither the People's Park Project nor the LRDP will increase the population of UC Berkeley students. (AR9571; Op., at pp. 10-11.) And this case is not about noise coming *from* University-controlled housing: it is about noise that Appellants contend students will make off-campus.

environmental concerns" (Op., at p. 34), it still accepted the behavior of past undergraduate students as "proper evidence" of an environmental impact that triggered analysis of how future students would act. (Op. at p. 36.) "Given the long track record of loud student parties that violate the city's noise ordinances (the threshold for significance)," the Court of Appeal opined, "there is a reasonable possibility that adding thousands more students to these same residential neighborhoods would make the problem worse." (*Ibid*.)

Pre-judging the conduct of a project's intended residents based upon their membership in a class that is presumed to have anti-social tendencies is the very definition of "prejudice" and class-based discrimination—and the Opinion endorses it. According to the Opinion, whenever presented with a "fair argument, based on substantial evidence in the record as a whole, that there *may* be significant effects" from noisy parties or other social activities in which a project's residents are the type to engage, a reviewing agency must analyze the issue, resolving all doubts in favor of environmental review. (Op., at p. 31, emphasis in original.)

However, mere speculation or "unsubstantiated opinions, concerns, and suspicions" are not substantial evidence and cannot establish a "fair argument" that a significant impact may occur. (*Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1352 ("*Leonoff*"); *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 756; see, e.g., *Dunning v. Clews* (2021) 64 Cal.App.5th 156, 174 [testimony that "the project likely would cause noise because 'kids are kids,' '[t]hey move fast,' and '[t]hey are loud'" is "precisely the type of

speculative and generalized warnings that do not constitute substantial evidence" under CEQA].)

Further, "in the absence of a specific factual foundation in the record, dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence. [Citations.]" (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1417.) Purported "common sense" conclusions with no factual basis are also not substantial evidence. (*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 691.) Additionally, "lack of study is hardly evidence that there will be a significant impact." (*Leonoff, supra*, 222 Cal.App.3d at p. 1354 [lack of site-specific analysis of a project's impacts on air quality, odor, or noise was not substantial evidence of a significant impact].)

Disregarding these cases, the Opinion not only endorses, but would affirmatively require, elevation of speculation and unsubstantiated opinion to the level of substantial evidence, contrary to CEQA's exclusion of such evidence from the definition of the term. (§ 21082.2, subd. (c); Guidelines, § 15384, subd. (a).) Evidence that other students, as a "type" of people, have generated substantial late night party noise in the past is not "substantial evidence" that future students will do so. If it were, all that would be needed to trigger an EIR is evidence that other people with the same social identity as future project residents or users have participated in noisy social behavior that could violate noise standards. (See *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75 ["[W]henever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact," the agency shall prepare an EIR.].) For

example, evidence that "supportive housing residents have created a lot of noise in the past" coupled with neighbors' fears and complaints about future residents of a proposed supportive housing project would be enough to trigger environmental analysis.

Petitioners and the Court of Appeal argued that the burden on agencies to address such postulations is relatively small, on the ground that an agency can weigh evidence and determine that future project residents will not create significant noise impacts. (§ 21100, subd. (c); Op. at pp. 37-38.) The Court of Appeal also agreed with Petitioners that, even if agency analysis demonstrates a significant impact from "social noise," there is no harm to the agency or the project applicant, on the ground that agencies may approve projects that would result in significant impacts based on a finding of overriding considerations. (§ 21002; Op. at p. 38) The problem, which this Court should correct, is that even the process of resolving the question of whether a project might cause "social noise" would require agencies to inject prejudices concerning the social behaviors and proclivities of diverse groups into what is meant to be a review of changes to the physical environment. Furthermore, the relative burden of studying the impact is irrelevant where the *type* of impact is simply not recognized by CEQA as an "environmental" impact. Agencies should not be required to shoulder burdens that CEQA does not impose whenever a court determines the burden would be "slight."

In addition, because no methodology exists for analyzing alleged anti-social behavior in CEQA, the Opinion would require agencies to find some way to determine whether *the type of people* a proposed project will serve are the type who, consistent with evidence in the record about *people*

*like them*, are likely to engage in noisy behavior—not necessarily while living and participating in activities at the project site, but off-site during their everyday lives out in the community.[13] If such an analysis existed to show that people like the project's residents are the type of people who are known to have a reputation for excessive noisiness in the surrounding community, then the agency may not approve the project unless it either adopts mitigation measures to reduce those people's noisiness, or demonstrates, based on substantial evidence, that such measures are infeasible and that the project's benefits outweigh the impacts of the people's noisy social behavior. (§ 21002.)

Such problematic, socially biased analysis of the behavioral traits of a project's future occupants would itself be subject to challenge by project opponents, members of the stereotyped social/demographic group(s), or both. There is also the troublesome question of how an agency would go about mitigating behavior-based impacts. Other than simply eliminating people from a project, it is hard to imagine any reasonable, legal way an agency could successfully affect, through CEQA mitigation, the way people behave or the social choices they make. (§ 21004 ["In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law."].) That is precisely why human behavior, if it reaches the level of violating a local noise standard or any other provision of law, should be treated as a crime or an infraction under those laws, not an environmental impact under CEQA. (See *Baird*, *supra*, 32 Cal.App.4th at p. 1469, fn.2

[13] See also, Hernandez, *In the Name of the Environment Part III: CEQA, Housing, and the Rule of Law* (2022) 26 Chap. L.Rev. 57, 129.

[potential crime from expansion of addiction treatment facility "not a proper subject of CEQA inquiry"].)

For all of these reasons, CEQA should not require agencies to draw conclusions of environmental significance based on the personal social proclivities of future project residents and users.

### D. CEQA may not be deployed to restrict educational access or as a population control measure.

The true target of the project opponents' attack is evident from their noise consultant's assertion that "[t]he only practical means to avoid an increase in noise from parties and partiers is to not add more partiers to the area." (AR1603.) Indeed, Appellants concede "there is no effective physical or regulatory mitigation to avoid … increased incidences of significant impacts from late night drunken pedestrians or unruly student parties." (AOB, p. 46.) Thus, the only viable solution would presumably be to reduce the number of students themselves or determine such reductions are infeasible. (See § 21002 ["[P]ublic agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects."].) In other words, Appellants seek to regulate the number of students enrolled at UC Berkeley by introducing speculative evidence that future students will behave in a certain way when they leave campus.

As an initial matter, even the Court of Appeal recognized that "[t]he EIR is quite clear that setting enrollment levels is not the plan's purpose. The purpose is to guide future development regardless of the actual amount of future enrollment." (Op at p. 13.) Said another way, UC Berkeley's

LRDP and the People's Park Project do not cause or drive campus population growth; such growth will occur with or without these projects. Regardless, the "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Goleta II*, *supra*, 52 Cal.3d at p. 576.) One intent of the Legislature in adopting CEQA was to "[c]reate and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations." (§ 21001, subd. (e).) The education of eligible students at one of the State's premier public universities reflects this intent.

Further, public universities have a mandate to ensure "adequate spaces are available to accommodate all California resident students who are eligible and likely to apply to attend an appropriate place within the system." (Ed. Code, § 66202.5.) CEQA cannot be used to derail that mission based on concerns about social changes attributable to a growing student body. In any event, CEQA and its environmental mitigation requirements are an ineffective, inefficient, and improper substitute for the existing social interventions that are specifically designed to address excessively noisy or offensive behavior. The University has a process in place for handling complaints about off-campus parties, including facilitating meetings between student and community stakeholders, establishing noise reduction initiatives, and relying on enforcement officers to address intermittent community noise complaints. (See AR10067; AR14545-46.)

Additionally, the City of Berkeley enforces its Municipal Code, which specifically addresses noise violations and operating standards for mini-dorms and group living accommodations in the City. (AR1666-70 [Berkeley Mun. Code, § 13.48.010 et seq.]; AR1715-20 [Berkeley Mun. Code, § 13.42.005 et seq.].) It can be assumed the City will carry out its responsibility under that Code. (See *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 365.) To use an *environmental statute* to address the anti-social behavior of a type of people to whom project opponents object, particularly when there are existing laws designed for this purpose, is tantamount to the "people as pollution" concerns that courts have rejected. Furthermore, it is simply a means to delay or stop student-serving projects, contrary to the Legislative intent of CEQA.

Indeed, the Legislature recently amended Section 21080.09 to clarify that "[e]nrollment or changes in enrollment, by themselves, do not constitute a project as defined in [CEQA]" in direct response to litigation that sought to cap student enrollment. (Sen. Bill No. 118 (2021-2022 Reg. Sess.) § 1; see also *Save Berkeley's Neighborhoods v. The Regents of the Univ. of California* (2023) __ Cal.App.5th __ [2023 Cal. App. LEXIS 401] [confirming validity of SB 118].) The new law forecloses arguments founded on the assumption that "more students means more noise." As State Senator Nancy Skinner observed when putting SB 118 forward in 2022, "It was never the intent of the Legislature for students to be viewed as environmental pollutants."[14] This Court has also made clear that "CEQA

[14] Press Release, Nancy Skinner, Sen., Cal. State S., UC Berkeley May Avoid Enrollment Freeze if New Legislation Passes Quickly (Mar. 12,

is not intended as a population control measure." (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 220 ("*Newhall I*").) The Court of Appeal erred by allowing calls to reduce student noise to serve as a proxy for the reduction of students themselves.

### E. Requiring CEQA analysis of social noise will do environmental harm and conflicts with legislative policy.

UC Berkeley is an urban campus, and the People's Park Project would be "an infill, high-density, mixed-use" project close to the center of campus, "which would allow students who may currently travel to and from campus by car to travel by walking, bicycling, or shuttle to the UC Berkeley campus." (AR10222.) CEQA has been amended over the years to promote the concentration of development in urban infill areas to reduce vehicle miles travelled ("VMT") and greenhouse gas ("GHG") emissions. (See, e.g., §§ 21099 [Modernization of Transportation Analysis for Transit-Oriented Infill Projects], 21159.24 [infill housing exemption], 21159.25 [residential or mixed use housing projects exemption]; Guidelines, §§ 15183.3 [Streamlining for Infill Projects], 15195 [Residential Infill Exemption].) Interpreting "environment" in a manner that encourages infill development in urban areas is consistent with CEQA's overarching mandate to protect environmental resources. A new interpretation of CEQA that discourages residential growth in urban areas is counterproductive to combatting climate change, the most important environmental issue of the current era.

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2022), https://sd09.senate.ca.gov/news/20220312-uc-berkeley-may-avoidenrollment-freeze-if-new-legislation-quickly-passes [https://perma.cc/H2D5-WWAN].

Justice Chin made a similar observation in his dissenting opinion in *Newhall I*, joined by Justice Corrigan in part (62 Cal.4th at p. 244, conc. & dis. opn. of Corrigan, J.), noting that the people who would occupy the housing project in that case "will not just go away. They will be living and working somewhere. And that somewhere will undoubtedly be far less green than this project promises to be." (*Id*., at p. 254 (dis. opn. of Chin, J.).) "Carefully planned green communities are needed to accommodate California's growing population. CEQA ensures the informed planning, but it does not prohibit the planned communities."[15] (*Ibid.*)

In other words, populations grow regardless of any CEQA analysis or project. Concentrating that growth in urban areas reduces VMT and GHG emissions and benefits the natural environmental resources CEQA is designed to protect. For example, under UC's Sustainable Practices Policy, UC Berkeley realized lower total GHG emissions in 2021 than in 2005, despite nearly one million gross square feet of net new space and nearly 8,000 net new students. (AR10.) Similarly, the LRDP's Housing Program would boost the proportion of the population housed on University properties, reducing the number of students and faculty driving to campus. (AR10220.)

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[15] Just last year, the First Appellate District went out of its way in *Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700, 780-783 to conclude that the worst of Justice Chin's fears had been vindicated when private opposition to a project had made CEQA a "fearsome weapon" of delay. The court observed that "CEQA was meant to serve noble purposes, but it can be manipulated to be a formidable tool of obstruction, particularly against proposed projects that will increase housing density." (*Id.*, at p. 782.)

Commentators have aptly observed that "CEQA must evolve to treat population growth differently in urban and rural contexts and to distinguish between infill and greenfield projects." (*E.g.,* Robinson, *When a Statute Loses Its Way: Fulfilling the Original Intent of the California Environmental Quality Act* (2022) 41 Yale L. & Pol'y Rev. 280, 294.) Indeed, the Guidelines already provide that in CEQA analysis, "the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area." (Guidelines, § 15064, subd. (b)(1).)

Requiring analysis of the potentially noisy behavior of an urban housing project's future residents would have a severe chilling effect on construction of affordable urban housing, directly contrary to CEQA's goals (see §§ 21000, subd. (g), 21001, subds. (d), (e)) and the Housing Accountability Act ("HAA") (Gov. Code, § 65589.5). The HAA, "colloquially known as the 'Anti-NIMBY' (Not-In-My-Back-Yard) law," has been amended "repeatedly in an increasing effort to compel local governments to approve more housing." (*California Renters Legal Advocacy v. City of San Mateo* (2021) 68 Cal.App.5th 820, 835, citing Gov. Code, § 65589.5 and *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 295-97.) In amending the HAA, the Legislature found that the "lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California," and "California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling

economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the State's environmental and climate objectives." (Gov. Code, § 65589.5, subds. (a)(1)(A), (a)(2)(A).)

Requiring UC Berkeley to treat the future residents of on-campus student housing as "people pollution" will stymie the creation of needed housing stock. (See *Maryland-National*, *supra*, 487 F.2d 1029, 1037.) Speculation about the possible conduct of students in the surrounding community is a social concern, not substantial evidence of an environmental impact, and it should not be deployed to bar housing projects. Such an approach would push student housing projects to locations far from campus, thus increasing driving, pollution, and similar factors detrimental to the physical environment. It would also give housing project opponents another tool to prevent the kind of dense, affordable housing projects that the people's elected representatives are trying to encourage.

## II. CEQA DID NOT REQUIRE UC BERKELEY TO ENGAGE IN PRO FORMA ANALYSIS OF "ALTERNATIVE" LOCATIONS FOR THE PEOPLE'S PARK PROJECT

Appellants would have UC Berkeley look to anywhere but People's Park to develop housing for its students. In response, the Court of Appeal elevated the CEQA concept of off-site "alternatives" so far as to destroy the University's sound discretion. That was error. UC Berkeley had in fact reasonably identified potentially feasible alternatives in its EIR, but concluded they were infeasible given its objectives. That decision is supported by substantial evidence and cannot amount to an abuse of discretion.

The Court should not lose sight of what the University is attempting to accomplish. UC Berkeley is a 150-year-old urban campus with a severe housing shortage. It is seeking to double its housing capacity by the 2036-37 academic year. To that end, it determined that all sixteen of the sites it identified for residential uses in its programmatic planning document—including People's Park—are necessary to complete its Housing Program. (AR9580.) Furthermore, as set forth in the EIR, UC Berkeley determined it is infeasible to meet that program's objectives if it is forced to abandon housing development at People's Park—even in favor of its other identified sites—because those sites have less capacity. (AR10356-57.) Those remaining sites could not make up for the housing that would be lost if the People's Park site remains undeveloped; as such, the other sites cannot serve as feasible alternatives to People's Park.

Nor does UC Berkeley's prioritization of People's Park for development mean that it must reconsider the other sites it identified. UC Berkeley prioritized two of the sixteen sites, including People's Park, for immediate development. It is all too convenient for an objector to look to the other fourteen sites—tagged and waiting in line for housing development—as "alternatives" to the prioritized People's Park site. Again, however, UC Berkeley has determined that it needs to develop *all* of those sites to meet the objectives of its Housing Program. That many of those sites are waiting in line for development does not make them suitable "alternatives" to the People's Park site. Put another way, it is not reasonable, or required, for UC Berkeley to study one piece of land as an alternative to another, where it has determined that *all* the pieces matter

(and then exercised its discretion to prioritize the order in which they are developed).

Not surprisingly, CEQA permits the lead agency to consider and analyze alternative locations for a proposed project—but does not mandate it. As discussed below, the "*rule of reason*" guides the agencies' consideration of alternatives. (Guidelines, § 15126.6, subd. (a), (f) [emphasis added]; see also discussions in *Goleta II*, *supra*, 52 Cal.3d at p. 566; *Tiburon*, *supra*, 78 Cal.App.5th at p. 741; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1265 ("*Federation Hillside*").)

The LRDP, which contains UC Berkeley's plan to address the decades-old student housing crisis by constructing housing on multiple campus sites, is akin to a puzzle. People's Park is a crucial piece of that puzzle. Indeed, all sites recognized in the LRDP for future housing are pieces of the puzzle, which collectively fit together to form a solution. Neither CEQA, nor the preferences of Appellants, requires UC Berkeley to reconsider its preferred housing plan by analyzing an essential piece as if it were an alternative to any other; each piece is unique, and all are needed to solve the puzzle. Neither the important objectives of UC Berkeley's Housing Program, nor the lofty environmental goals of CEQA, should be jettisoned in favor of slavish adherence to studying or re-studying the purported "alternatives" Appellants have identified. The rule of reason must prevail.

**A. UC Berkeley reasonably exercised its discretion to make fundamental policy decisions and is not obliged to re-**

**analyze them before proceeding with development of People's Park.**

CEQA should not be used as a tool for forcing a lead agency to revisit the fundamental policy judgments it made to pursue its regional goals. Those policy judgments appear in several places in the subject EIR. For example, the EIR includes study of a "Reduced Development Alternative" to the LRDP as a whole, including the People's Park Project. (AR10380-10395.) This Alternative "would result in less residential development to accommodate the residential growth," with roughly 25 percent fewer undergraduate beds overall and 294 fewer beds at People's Park specifically. (AR10380; AR10359; AR10390.) The Reduced Development Alternative would also result in less infill development near transit—and thus generate more vehicle miles travelled and higher greenhouse gas emissions. (AR10386.) The Board of Regents ultimately rejected this Alternative as "unrealistic and infeasible." (AR197.)

Pursuant to Guidelines section 15126.6, subdivision (c), the EIR also briefly discussed alternative locations to the People's Park Project but declined to carry them forward for a full analysis. (AR10356-57.) This was expressly due to the fact the People's Park and Anchor House projects "represent about 17 percent of the planned residential beds proposed under the LRDP Update." (AR10356.) Therefore, "[l]ocating [those two projects] on other UC Berkeley properties in the City Environs Properties or the Clark Kerr Campus that are designated for future student housing could reduce the total projected number of beds within the proposed LRDP Update development program." (AR10356-57.) UC Berkeley concluded that none of those sites were feasible alternatives for the Project because

"the development programs would need to either be reduced, or the housing projects would require multiple sites, further diminishing the total number of beds described in the proposed LRDP development program." (*Ibid*.) Because not developing housing at People's Park would result in an unacceptable cumulative reduction of the LRDP's Housing Program, the EIR deemed an alternative location for the People's Park Project infeasible and it "was not evaluated in the Draft EIR" in detail. (AR10357.) It was entirely reasonable, and certainly not an abuse of discretion, for UC Berkeley to decline in the EIR to proceed with these alternatives, given its clear Housing Program targets.

As a starting point for an alternatives analysis, CEQA requires that an agency select a reasonable range of *potentially* feasible alternatives to the project or its location that would attain most of its basic objectives, but reduce its environmental impacts. (Guidelines, § 15126.6, subd. (a); *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1163.)[16] In choosing potentially feasible alternatives to study, "[t]here is no ironclad rule governing the nature or scope of the alternatives to be discussed [in an EIR] other than the rule of reason. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose." (*Goleta II*, *supra*, 52 Cal.3d at p. 566.) "The 'rule of reason' requires an EIR 'to set forth only those alternatives necessary to permit a reasoned choice.'" (*Tiburon*, *supra*, 78 Cal.App.5th at p. 741, citing Guidelines, § 15126.6, subd. (f).) The courts

[16] For purposes of CEQA, "feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (§ 21061.1; Guidelines, § 15364.)

"will uphold an agency's choice of alternatives unless they 'are manifestly unreasonable … .'" (*Tiburon*, *supra*, 78 Cal.App.5th at p. 741, citing *Federation Hillside, supra,* 83 Cal.App.4th at p. 1265.)

The lead agency may exclude a potential alternative from detailed study in the EIR if it finds it infeasible—as occurred in this case. In that event, the EIR must identify the alternative it found infeasible, "briefly" explain the reasons underlying the lead agency's determination, and "briefly" discuss the rationale for selecting the alternatives to be discussed in more detail in the EIR. (Guidelines, § 15126.6, subd. (c).) Nothing more is required.

Furthermore, an off-site alternative is but one form of alternative. "[T]here is no rule requiring an EIR to explore offsite project alternatives in every case … . '[A]n agency may evaluate on-site alternatives, off-site alternatives, or both.'" (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 993 ("*CNPS*"), citing *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 491 ("*Mira Mar*").) "Nor does any statutory provision in CEQA 'expressly require a discussion of alternative project locations.'" (*Id*. citing *Mira Mar*, *supra*, 119 Cal.App.4th at p. 491, citing §§ 21001, subd. (g), 21002.1, subd. (a), 21061.) Importantly, "the duty of identifying and evaluating potentially feasible project alternatives lies with the proponent and the lead agency, not the public." (*Goleta II*, *supra*, 52 Cal.3d at p. 568; see *Laurel Heights I*, *supra*, 47 Cal.3d at pp. 406-07.)

The Court of Appeal also disregarded evidence in the record demonstrating that the People's Park Project has certain characteristics and objectives that cannot be realized at any other site. In doing so, the Court of

Appeal focused narrowly on the EIR's reference to People's Park as "*a* UC Berkeley property" rather than "*the* UC Berkeley property"—and stated that it had searched the administrative record to "see whether an alternative deserved greater attention in the EIR." (Op., at pp. 25, 27.) Oddly, the Court of Appeal ignored the record evidence that the University specifically proposed the People's Park Project in order to redevelop and revitalize People's Park in particular, by creating student housing, providing permanent supportive housing for approximately 125 extremely low-income persons, and to commemorate the history of People's Park by preserving two-thirds of the site as open green space for the community. (AR9608-09; AR1206-08.) These are the integrated elements of the People's Park Project: these elements cannot be transplanted to any alternative location without fundamentally changing the nature and scope of the Project. CEQA does not require a lead agency to analyze alternatives that would change the underlying nature of the project itself. (See *CNPS*, *supra*, 177 Cal.App.4th at p. 995; *Big Rock Mesas Property Owners Assn. v. Board of Supervisors* (1977) 73 Cal.App.3d 218, 227; *Jones v. Regents of University of California* (2010) 183 Cal.App.4th 818, 828-829.)

As the lead agency, UC Berkeley reasonably identified and then evaluated potentially feasible project alternatives, and ultimately rejected them as infeasible to satisfy its need to develop housing for its students, faculty, and staff.[17] It did not have to consider fundamentally changing the nature and scope of both the LRDP and the People's Park Project merely to

[17] Indeed, CEQA only requires an EIR to study the "No-Project" alternative and any "feasible" alternatives. (Guidelines, § 15126.6, subds. (a)-(e).) The EIR studied a "No-Project" alternative (AR 10358, 10361-379.)

undertake a pro forma analysis of an off-site "alternative." As this Court observed in 1990 in *Goleta II,* "[t]he wisdom of approving [any] development project, a delicate task which requires a balancing of interests, is necessarily left to the sound discretion of the local officials and their constituents who are responsible for such decisions… . [W]e caution that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Goleta II*, *supra*, 52 Cal.3d at p. 576.) CEQA does not require a lead agency to study (or re-study) any alternatives floated by a project's opponents when the agency has already exercised its sound discretion to choose, consider, and reject those alternatives as infeasible.

### B. UC Berkeley was also well within its discretion to identify the development of People's Park as a priority.

The University also did not simply ignore its other sites when it selected People's Park (and Anchor House) as first in line for development. Prioritization of these two sites followed a detailed, months-long housing capacity study to determine the best way to effectively implement the LRDP's ambitious housing goals by 2036-37. (AR28137-185 [April 7, 2020]; AR28294-304 [July 14, 2020]; AR28306-336 [Sept. 15, 2020].) That study also considered the potential near-term development of Channing-Ellsworth, among other sites identified in the LRDP's Housing Program. (AR28327.) The study concluded, however, that construction could not start at Channing-Ellsworth until after several existing facilities—including research units, childcare facilities, and tennis courts—were relocated. People's Park did not require pre-construction removal of

existing facilities. (AR28328-29.) UC Berkeley exercised its discretion to consider the urgent need for student housing in deciding to prioritize development of People's Park rather than another site that would require extra time to relocate multiple facilities. (See *McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 921 [court may not substitute its own findings for that of the agency].)[18]

Nor did the University abuse its discretion in choosing to develop a site it already owns rather than purchase new property, as the Court of Appeal suggested. (Op., at p. 23.) The LRDP naturally contemplates the identification of future sites for development if UC Berkeley is to meet the demands of growing enrollment. It does not follow, however, that UC Berkeley must consider acquiring new sites[19] at the same time it plans to develop the sites it currently owns, or else conduct a new analysis of its EIR. That would result in case-by-case reconsideration of regional planning, which this Court disapproved in *Goleta II*. A lead agency's regional planning cannot be stymied or rewritten based on a challenger's preference for development anywhere other than a particular site.

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[18] To the extent the Opinion ignored this evidence because it was found in the Administrative Record but not the EIR itself (Op. at p. 27), this holding contradicts the CEQA Guidelines and case law. (Guidelines, § 15126.6, subd. (c) ["Additional information explaining the choice of alternatives may be included in the administrative record."]; *Goleta II*, *supra*, 52 Cal.3d at p. 569; see also *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 690 ["[N]owhere does [CEQA] mandate that the EIR *itself* also contain an analysis of the feasibility of the various project alternatives or mitigation measures that it identifies."].)

[19] Notably, neither the Court nor Appellants suggest any potential site the Regents could acquire.

As discussed above, People's Park has unique qualities that UC Berkeley identified and considered as part of its planning: UC Berkeley plans to address the crime and safety concerns at this site, offer improved supportive housing for the homeless population currently there, and revitalize the surrounding neighborhood. (AR24605.) These are all sound policy considerations upon which to select People's Park for near-term development. Again, the LRDP is a puzzle, and the sites identified for future student housing are all non-interchangeable pieces needed to complete that puzzle. The People's Park Project is a corner piece, which the University in its discretion determined was the easiest and most logical place to start. The Court of Appeal disregarded the record evidence of UC Berkeley's policy determinations and substituted its own judgment in place of the agency's.

### C. UC Berkeley's reliance on the LRDP in deciding not to conduct a pro forma analysis of alternative locations for the People's Park Project is consistent with *Goleta II*.

*Goleta II* is apropos to this case, and not only because it cautioned the courts against the subversion of an environmental regulation into an "instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Goleta II*, *supra*, 52 Cal.3d at p. 576.) *Goleta II* also illustrates, in analogous circumstances, how an agency may apply the "rule of reason" in choosing and rejecting alternatives.

*Goleta II* involved a CEQA challenge to the County of Santa Barbara's (the "County") proposal to develop a major new resort hotel. The County planned that project according to the Local Coastal Program or

"LCP," a planning document used by the local governments in the Coastal Zone. (*Id.* at p. 572.) The CEQA challenge focused on the fact that the County had not analyzed whether alternative locations were feasible project alternatives. As this Court found, however, "[i]dentification and analysis of suitable alternative sites for the development of new hotels and resorts in the County's coastal zone was precisely the task of the LCP." (*Id.* at p. 572.)

Thus, this Court agreed with the County that it had justifiably relied on the conclusions and findings of the LCP in assessing the feasibility of alternative sites, and in determining that none of the sites in question was appropriate for a major resort. (*Ibid.*) Nothing required the County, once it had assessed the feasibility of alternative sites in the LCP, to then re-evaluate alternative sites in a project-level EIR. (*Ibid.*) "An EIR is not ordinarily an occasion for the reconsideration or overhaul of fundamental land-use policy" and "[c]ase-by-case reconsideration of regional land-use policies, in the context of a project-specific EIR, is the very antithesis" of "informed and enlightened regional planning." (*Id.* at pp. 572-573.)

The LRDP is UC Berkeley's long-term plan to accommodate reasonably foreseeable population growth at UC Berkeley through 2036-37. (AR10390.) Like the LCP in *Goleta II,* the LRDP "embod[ies] fundamental policy decisions that guide future growth and development." (*Goleta II*, *supra*, 52 Cal.3d at p. 571.) And like the County in *Goleta II*, the University "must confront, evaluate and resolve competing environmental, social and economic interests." (*Ibid.*) As part of the planning process for the LRDP, UC Berkeley "identified potential areas for new development, redevelopment, and renovation that could accommodate the proposed

buildout projections." (AR9573; see also AR71-72 [LRDP Map of Potential Future Building Areas, including People's Park].) The development assumptions analyzed in the EIR "illustrate a land use program that would accommodate the proposed LRDP Update buildout projections." (AR9573.) The sites the EIR identified for development "provide a menu of possible options that UC Berkeley has to accommodate potential growth and changes." (*Ibid*.) The LRDP Land Use Element is meant to "[m]ake the highest and best use of *each site* to employ limited land resources most efficiently." (AR63, emphasis added.) To accomplish its ambitious Housing Program of approximately 11,731 beds, UC Berkeley determined in the EIR that it must optimize all sites at its disposal, and it must do so in a thoughtful, phased way that allows for flexibility and adaptation to changing conditions.[20] (AR9580; see AR9551; AR9575; AR71-72.)

Contrary to the analysis set forth in *Goleta II,* the Court of Appeal's Opinion requires UC Berkeley to reconsider—as "alternatives" to developing housing at People's Park—the other sites it had already considered and identified as independently essential parts of its overall Housing Program. (Op., at pp. 22-25.) That would amount to a "case-by-case reconsideration" of the lead agency's long-term planning goals—a process the *Goleta II* Court cautioned is improper. CEQA does not require agencies to make each site identified as part of an overall development

[20] The Opinion inappropriately discounts the importance of the overall Housing Program, noting the University does not "commit" to building all the beds proposed. (Op., at p. 23.) But the University's inability to commit to all 11,731 beds now is yet another reason that prioritizing construction at People's Park, which represents approximately 10 percent of the overall Housing Program, is so essential.

project an interchangeable off-site "alternative," and by extension revisit its earlier regional planning. As this Court observed, "[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind." (*Goleta II*, *supra*, 52 Cal.3d at p. 564.) Mindful of its obligations to the campus community, especially its students, the housing shortage is one of many puzzles that UC Berkeley seeks to solve. Nothing in CEQA requires UC Berkeley to sacrifice an essential piece of that puzzle: People's Park.

**D. Any error is without prejudice.**

The Court of Appeal ultimately concluded that the EIR failed to present a "viable explanation for declining to consider alternative locations." (Op., at p. 27.) Even if the University abused its discretion, such abuse was not prejudicial.

"A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463 ("*Smart Rail*"), internal citations and quotations omitted.) In *Smart Rail*, this Court found that an EIR prepared for a proposed light-rail transit line was not supported by substantial evidence justifying the agency's "decision to *completely omit* an analysis of the project's impacts on existing traffic congestion and air quality;" the EIR "neglect[ed] to inform the public and decision makers explicitly of any operational impacts that could occur in the project's first 15 years of operation. …"The absence of such due consideration to both the short-term and long-term effects of the project threatens to deprive the EIR's users of

the opportunity to weigh the project's environmental costs and benefits in an informed manner." (*Id.* at p. 461, internal quotations and citations omitted.) Nevertheless, the Court declined to set aside the EIR given that the errors were not prejudicial. "Insubstantial or merely technical omissions are not grounds for relief." (*Id*. at pp. 463, 465, internal citations and quotations omitted.)

If the explanation for rejecting, as infeasible, an off-site alternative to People's Park was an error under CEQA, the defect was insubstantial or merely technical. As an initial matter, it is fair to read the administrative record to conclude that neither the public nor the decision makers misunderstood the purpose of the People's Park Project or the policy rationale for the University's decision to prioritize development of that site. (See, e.g., AR4-25, AR1204-25.) Furthermore, as noted, the pertinent Guideline requires that an EIR do no more than "*briefly* describe the rationale for selecting the alternatives to be discussed" and "*briefly* explain the reasons underlying the Lead Agency's determination" that some alternatives were rejected as infeasible. (Guidelines, § 15126.6, subd. (c), emphasis added.) If the EIR's discussion of alternatives did not meet these criteria, then the remedy would be to add a sentence or two that highlights that none of the sites in the LRDP's Housing Program should be considered alternatives to any other since all of them are necessary to achieve the goal of providing adequate student housing. If that is an omission, it is an insubstantial one. Similarly, if the existing EIR should have referred to People's Park as "*the* UC Berkeley Property" rather than "*a* UC Berkeley Property, that is corrected simply by replacing the indefinite article "a" with

the definite article "the"—a technical change, surely, in light of the entire record. Such omissions cannot be prejudicial errors.

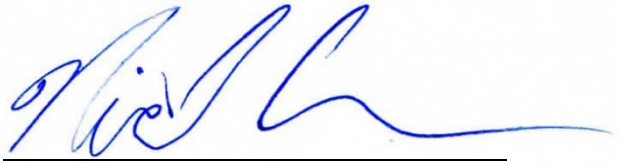
## CONCLUSION

The University appropriately exercised its discretion when it declined to analyze the potential excessive noisiness of future students it enrolls and houses in the neighboring community. Furthermore, the University correctly considered, and rejected, alternatives that would have undermined its long range planning policy choices and limited its ability to provide essential student housing. For these reasons, the Court of Appeal's decision should be reversed.

Respectfully,

DATED: June 16, 2023

THE SOHAGI LAW GROUP, PLC

By: 

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## CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520, subdivision (c)(1), I certify that the total word count of this OPENING BRIEF ON THE MERITS, excluding covers, table of contents, table of authorities, and certificate of compliance, is 12,897.

DATED: June 16, 2023

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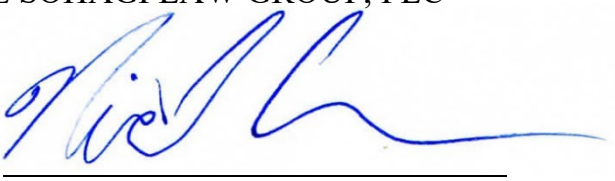
By: 

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## PROOF OF SERVICE

***Make UC a Good Neighbor, et al. v. The Regents of the University of California***
**California Supreme Court Case No. S279242**
**Court of Appeal, First District, Division 5, Case No. A165451**
Alameda County Superior Court, Case No. RG21110142 (Consolidated for Purposes of Trial Only with Case Nos. RG21109910, RG21110157 and 21CV000995)

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 11999 San Vicente Boulevard, Suite 150, Los Angeles, CA 90049-5136.

On June 16, 2023, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

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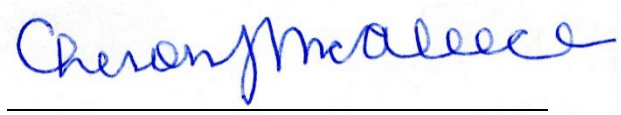
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 16, 2023, at Los Angeles, California.



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