S199557

IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN DIEGO et al.,
Plaintiffs and Appellants,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D057446

REPLY TO ANSWER BRIEFS ON THE MERITS

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INTRODUCTION

CSU's opening brief and the local agencies'[1] answer briefs are like ships passing in the night. In its opening brief, CSU demonstrated that the California Constitution, the Education Code, and the California Environmental Quality Act (CEQA) all require that the Legislature and CSU, even as they consider environmental

[1] The local agencies are the City of San Diego and Redevelopment Agency of the City of San Diego (collectively, the City), the San Diego Metropolitan Transit System (MTS) and the San Diego Association of Governments (collectively, SANDAG).

impacts from a campus master plan and student enrollment increase, must have the sole discretion to decide whether the limited funds available for that plan will be devoted to educational support purposes or to the improvement of local roadways and transit systems. The local agencies barely respond to these arguments. Instead, they insist that CEQA mandates that CSU commit to funding the local agencies' demands to contribute to off-site transportation infrastructure upgrades before any Environmental Impact Report (EIR) may be certified.

The local agencies claim further that they must be permitted to engage in an ad-hoc administrative review of CSU's entire budget to determine from which educational purposes it is "feasible" to redirect these funds. The local agencies also argue that this Court must not have meant what it said when it explained that "a state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist" (*City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 367 (*Marina*)) and that CSU was wrong to believe otherwise. In short, the local agencies assume CEQA requires that no public project can be adopted unless the funds necessary for all identified mitigation measures are both sourced and guaranteed, regardless of feasibility or overriding considerations. They further assume that CSU possesses unrestricted resources available to pay for off-site mitigation. As demonstrated in CSU's opening brief, both of these assumptions are

false; CSU is not required to satisfy the local agencies' demands for mitigation where it is not feasible to do so.

The present difficult economic climate serves to underscore the infirmity of the local agencies' position. The state presently faces an unprecedented budget shortfall at the same time that it confronts a surge in college-eligible population not seen since the post-World War II era. Just as courts, social services providers, park services, and other entities must continue to meet their commitments to providing access to justice, child care, health care, and environmental protection with fewer resources, so too, CSU is working with a shrinking budget to meet its obligation to provide critical educational access to hundreds of thousands of California students. But instead of recognizing the need for shared sacrifice, the local agencies would have the courts second-guess the sound discretion of CSU and the legislature in determining how to allocate the state's limited resources among competing priorities. Such a result would not only violate principles of separation of powers, but permit local demands to trump those of the state.

This Court should find that CSU satisfied its duties under CEQA and affirm CSU's approval of the EIR.

LEGAL ARGUMENT

I. THE LOCAL AGENCIES SHOULD NOT BE PERMITTED TO SECOND GUESS HOW CSU AND THE LEGISLATURE ALLOCATE SPENDING AMONG COMPETING PRIORITIES.

A. Separation of powers principles prevent courts from second-guessing legislative appropriations.

The Court of Appeal held that CSU could not deem off-site mitigation that the Legislature refused to fund " 'infeasible' . . . without a comprehensive discussion of [other] sources and compelling reasons showing [why] those sources cannot, *as a matter of law*, be used to pay for mitigation." (Typed opn., 33, emphasis added.) In its opening brief, CSU demonstrated that the constitutional separation of powers doctrine precludes expanding CEQA's EIR process into a public budget review, in which local agencies ask the courts to decide whether, "as a matter of law," they agree with a state university's determination whether dollars spent on educational facilities would be better spent upgrading regional transit and transportation facilities. (OBOM[2] 29-33.) Here, the

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[2] This brief uses the following citation formats: AR-[volume]:[page]" (Administrative Record), "CT- [volume]:[page]" (Clerk's Transcript), "OBOM" (CSU's Opening Brief on the Merits), "City ABOM" (City's Answer Brief on the Merits), "SANDAG ABOM" (SANDAG's Answer Brief on the Merits).

Legislature denied CSU's specific appropriation requests for off-site mitigation funding, and separation of powers principles do not permit courts to second-guess that legislative determination by ordering CSU to fund that same mitigation, thereby diverting funds earmarked for educational support purposes. (OBOM 33; see *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 600 (*County of San Diego*).)

SANDAG dismisses the entire issue as "a red herring" (SANDAG ABOM 22-23) while the City claims it "is not requesting the Court to require the Legislature to fund off-site mitigation," but only that the "City is seeking an order requiring CSU to comply with CEQA." (City ABOM 39; see also SANDAG ABOM 23 [same].) Their arguments miss the point. The question is not CSU's obligation to comply with CEQA, but whether compliance with CEQA requires CSU and the Legislature to submit the state university's budget to local agencies for review and oversight whenever mitigation is not otherwise funded. This question was answered in *Marina*; there is no mandate under CEQA to guarantee mitigation funding. The mandate for CSU is to: identify the cumulative traffic impacts; consider fair-share payment mitigation measures (which it did); and either adopt feasible mitigation measures or reject mitigation measures considered to be infeasible. In this case, CSU properly rejected as infeasible the funding of off-campus mitigation measures in light of the Legislature's potential refusal to appropriate the necessary funding. (AR-18:17159-17160, 17261, 17262; 19:18466-67, 18473-18474.) CSU's findings are

consistent with the law and supported by substantial evidence. Nothing further is required under CEQA.

Nonetheless, the City suggests that separation of powers concerns are not implicated because any court order would be directed at *CSU*, and not at the Legislature. (City ABOM 39-40.) But once the Legislature has denied an appropriation request, the separation of powers doctrine bars courts from disregarding the Legislature's prerogative by ordering a state university to redirect funds designated for other purposes to fund that appropriation request. (OBOM 33; *California School Bds. Assn. v. State of California* (2011) 192 Cal.App.4th 770, 803; *County of San Diego, supra*, 164 Cal.App.4th at p. 600.)

The City attempts to distinguish CSU's authorities on the basis they only consider the problem of unfunded state mandates. (City ABOM 40.) But CSU's authorities are nonetheless persuasive because the Legislature's decision to fund a CSU enrollment expansion while refusing to pay for off-campus mitigation is analogous to an unfunded mandate.[3] These resource allocation

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[3] In this case, of course, the infrastructure upgrades for which the local agencies demand payment will be necessary *regardless* of whether SDSU expands, so the Legislature's refusal to contribute to those upgrades will not result in the imposition of an "unfunded mandate" here. (See OBOM 8-9, 11, 49-50; AR-4:03963; 18:17578-17583, 17586-17591.) Furthermore, CSU's certification of the EIR and approval of the plan would never result in a true unfunded "mandate" even if the traffic mitigation measures go unfunded, because these actions do not create any legal "mandate" for the local agencies to complete the identified mitigation measures. The local agencies are free to decide whether to allocate *their* limited resources for this or other purposes.

decisions are difficult political determinations for the Legislature to make; whether or not the state is receiving adequate revenues, not all funding requests are approved by the Legislature. The California Constitution prevents the courts from interfering with these decisions on behalf of the local agencies or others unhappy with the Legislature's and CSU's determinations. (See *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 302 (*Carmel Valley*) ["the Legislature is the branch of government that must, on a yearly basis, fit the needs of the state into the funds available"]; *Myers v. English* (1858) 9 Cal. 341, 349, disapproved on other grounds in *Mandel v. Myers* (1981) 29 Cal.3d 531, 551, fn. 9 ["when the Legislature fails to make an appropriation, [the courts] cannot remedy that evil"].)

B. The Legislature has provided in the Education Code that it intends to fund CSU's expansion through its appropriations. It has not required that CSU re-allocate non-state funding sources for this purpose.

In its opening brief, CSU demonstrated that the Legislature commanded CSU to expand enrollment to accommodate a historical increase in demand for affordable education and educated workers, and stated that "[i]t is the intent of the Legislature to fund programs designed to accomplish [the expansion] through *appropriations made in the Budget Act . . . and the annual Budget Act shall contain appropriations necessary to accommodate all students*" in the primary enrollment categories. (Ed. Code, §

66202.5, emphasis added; see Ed. Code, § 66002, subd. (f)(2); OBOM 21-24.)

In addition, when the Legislature intends for CSU to utilize non-state funding to support specific objectives it issues precise statutory directions. (OBOM 23-24.) But when the Legislature amended the Education Code to incorporate this Court's holding in *Marina*, the Legislature did not direct that CSU use non-state funds to pay for off-campus mitigations. (See OBOM 23-24; see Ed. Code, §§ 66016, 66040.5, 66205.8, subd. (f), 67310, subds. (d), (e), 67311, subds. (a)(8), (b)(13), (c), 69564, 69566.) Education Code section 67504, subdivision (d), shows that the Legislature was well-aware of *Marina*'s statement that "a state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." (*Marina, supra*, 39 Cal.4th at p. 367.) Yet the Legislature did not overrule or otherwise alter that statement. Had the Legislature disagreed with this aspect of *Marina*, or sought to limit it in some way, presumably it would have done so when amending the Code in response to *Marina*. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721.)

For the most part, neither the City nor SANDAG addresses these provisions other than to dismiss them as "random Education Code funding requirements." (See, e.g., City ABOM 38.) The City asserts that Education Code section 66003 gives CSU " 'ample discretion in implementing policies and programs necessary to attain those goals.' " (City ABOM 37-38.) The City is wrong. This provision supports CSU's argument because the Legislature gave

CSU numerous goals as well as the discretion to determine how to prioritize funding to meet "those goals," meaning the educational goals enumerated in the Education Code. (Ed. Code, § 66003.) The discretion conferred by Education Code section 66003 is not so broad as to permit CSU to take funds restricted or otherwise designated for particular educational purposes and reallocate them to satisfy local agencies' demands. Furthermore, nothing in this provision suggests that the Legislature gave local agencies the authority under CEQA to alter CSU's exercise of its discretion.

C. The local agencies should not be permitted to use the EIR review process as an administrative review of CSU's budget, subject only to judicial approval.

The local agencies claim that when the Legislature denies a request to appropriate funds for off-site mitigation, they do not seek to use CEQA to force CSU to subject its budget to a public administrative review in which CSU must justify its economic infeasibility determinations to the satisfaction of local agencies, neighborhood associations, members of the public, and ultimately the courts. (City ABOM 14, 29-33; SANDAG ABOM 15, 28-29.) But they do.

For example, both the City and SANDAG criticize CSU for deciding to list "off-campus mitigations" as a separate item in CSU's system-wide capital funding request. (SANDAG ABOM 23-24; City ABOM 2, 26-28; see OBOM 47.) This is precisely the sort of budget micro-management that CSU rightly fears will become the norm if

this Court were to accept the local agencies' arguments. No statute or case law gives local agencies the right to dictate to CSU how it itemizes its appropriation requests. And CEQA itself disclaims any authorization to courts "to direct any public agency to exercise its discretion in any particular way." (Pub. Resources Code, § 21168.9, subd. (c).) Furthermore, the Legislature, responding to *Marina*, has now *ordered* CSU to report on the status of negotiations with local agencies over off-campus mitigation payments. (Ed. Code, § 67504, subd. (d).)

Also telling is the fact that the City felt it necessary to seek judicial notice of six volumes of budgeting documents, on the theory that they are necessary to determine the "feasibility" of using CSU funds for off-site mitigation.[4] Thus, the City is already purporting to undertake a detailed budget review within this very appeal.

Under the local agencies' theory, the EIR would invite public discussion—and ultimately judicial review—of such questions as:

- Whether it is "feasible" to raise student tuition an additional 2 percent statewide to pay a share of the cost to construct a retention wall to grade a highway expansion in San Diego;
- Whether it is "feasible" to stop funding SDSU's outreach programs that increase the qualified applicant

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[4] Concurrently with this brief, CSU has filed an opposition to the City's request for judicial notice. The City claims that CSU waived opposition because CSU "has not challenged the Court of Appeal's ruling granting City's Request for Judicial Notice." (City ABOM 27, fn. 6.) But, the Court of Appeal never granted the City's request for judicial notice and the trial court denied it. (See typed opn., 49-50.)

pool from underrepresented and low-income populations, such as the groundbreaking Compact for Success partnership with Sweetwater Union High School District, which has generated a 104 percent increase in enrollment to SDSU from the most diverse 7 to 12 system in California, to pay a share of the cost to widen 10 street intersections in San Diego;

- Whether it is "feasible" to reduce the size of the faculty in SDSU's Women's Studies department to pay a share of the cost to widen six highway on-ramps;
- Whether it is "feasible" to reduce the number of scholarships for the Mixtec and Zapotec summer language programs in the Center for Latin American Studies in order to pay a share of the cost to install more traffic lights in San Diego—or to use that money instead to pay to upgrade public busses serving California State University Dominguez Hills.

Nothing in CEQA suggests that the EIR was intended to be the vehicle to debate these types of difficult, multi-faceted policy questions. Certainly, CEQA does not provide any independent power for CSU to engage in this type of public budget review. (See Pub. Resources Code, § 21004.) And CEQA does not provide any meaningful standard by which local agencies can challenge—or courts can review—these decisions.[5] (OBOM 33.)

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[5] The local agencies detail the plan's various non-state funded projects, eyeing their funding and suggesting that some projects, like the proposed hotel, are "far" enough from CSU's educational (continued...)

The City claims that using the EIR as a budget review would not be unduly burdensome because some projects will require no extensive discussion. (City ABOM 33.) However, common sense suggests that when the stakes are high, public review of CSU's budget will be searching. In any event, CEQA does not permit this use of the EIR even when the funding discussion is less contentious.

The City also claims that the fact that CSU was able to summarize the restrictions on its non-state funding sources in a few pages of its opening brief shows that the proposed budget review will not be burdensome. (City ABOM 33, 42.) Nonsense. The purpose of the discussion in CSU's opening brief is to show why this Court should not issue a ruling requiring that CSU's EIR include a full justification of the "infeasibility" of reallocating its funding, not to engage in that discussion at this time in this forum. (OBOM 40-46.) CSU would not suggest that the short discussion in its opening brief would satisfy the local agencies' proposed new CEQA mandate. To the contrary, the EIR's exacting standards for an "informational document" that facilitates meaningful public discussion would require CSU to produce documentation of each funding source and

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(...continued)
mission to show that off-site roadway improvements should receive these projects' potential funds, too. (SANDAG ABOM 29-30; City ABOM 1, 17, 29-30 & fn. 7.) This only further proves CSU's point. The hotel, for example, will provide educational opportunities for SDSU's School of Hospitality and Tourism Management, and accommodate visiting scholars and educational conferences. (AR-15:14262.) The student union expansion will provide meeting rooms and office space for student organizations. (AR-15:14255-14257.) CEQA does not require CSU to demonstrate to local agencies that these projects are "sufficiently educational" to justify their expense.

potential expenditure—possibly for every campus statewide, e.g., if funds to mitigate one project's impacts could "feasibly" be spent elsewhere.[6] (OBOM 32.)

Finally, SANDAG claims that "CSU cannot use its own self-imposed budget decisions and constraints" to justify its actions. (SANDAG ABOM 28.) Conversely, then, SANDAG believes that only those "budget decisions and constraints" imposed on CSU by local agencies are sufficient to justify a plan approval under CEQA.

D. Individual cities are not empowered under the California Constitution to compete with CSU and each other for the use of CSU's funds.

CSU's opening brief explained that the California Constitution also prevents local agencies from second-guessing the budgeting and policy decisions of state agencies, yet the local agencies wish to make the EIR their vehicle for that purpose. (OBOM 46-51.) In fact, the local agencies admit that a primary motivation for their challenge here is that the state has cut transit spending. (OBOM 8-9, 15 fn. 5, 47-51; AR-19:18758; 20:19786-19788, 19913-19918; 21:20557; 27:S22561; CT-1:22-23.)

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[6] Requiring each lead agency or project applicant to submit to an ad hoc public budget review also raises federal constitutional issues because there is no essential nexus between reviewing the agency's finances and mitigating environmental impacts, and the burden is not roughly proportional to the project's impacts. (See *Nollan v. California Coastal Com'n* (1987) 483 U.S. 825 [107 S.Ct. 3141, 97 L.Ed.2d 677]; *Dolan v. City of Tigard* (1994) 512 U.S. 374 [114 S.Ct. 2309, 129 L.Ed.2d 304]; Cal Code Regs., tit. 14, § 15126.4.)

SANDAG suggests this Court need not worry about the constitutional prohibition against making the state subservient to parochial interests because it is not just San Diego who will demand to review CSU's budget; *every* city where CSU expands its enrollment will insist on reviewing and second-guessing that budget. (SANDAG ABOM 24.) But this admission simply underscores the importance of upholding the state government's constitutional supremacy: under the local agencies' proposal, CSU will have to justify its funding allocations on an ongoing basis to cities all over the state. What is more, under the chaotic system the local agencies envision, CSU could be required to defend its funding allocations to one local agency against criticisms leveled against those allocations by other local agencies in other cities and in other CEQA proceedings. Thus, for example, an EIR might have to justify to the satisfaction of several local agencies whether it is "infeasible" to spend CSU funds for three traffic lights in Fresno because those funds have been allocated to widen two intersections in San Diego.

SANDAG also suggests there is no constitutional conflict between the state and local agencies because funds spent on local off-site mitigation will also benefit CSU students, faculty, and staff. (SANDAG ABOM 24, 32.) This begs the question. The determination whether CSU's students, faculty, and staff would benefit *more* from an expenditure on traffic mitigation rather than an equivalent expenditure on, for example, avoiding a tuition hike, enrolling more transfer students from community colleges, or increasing staff salaries, is a policy determination that the

California Constitution commits to the sound discretion of the Legislature and CSU, not to local agencies.

II. CEQA DOES NOT GUARANTEE MITIGATION REGARDLESS OF FEASIBILITY.

A. CEQA does not require as a condition of project approval a guarantee that all identified mitigation will occur.

The local agencies claim CEQA requires that all identified environmental impacts be mitigated in all circumstances. By implication, the local agencies contend further that any ruling permitting CSU to approve a plan while finding that off-campus mitigation is financially infeasible if the Legislature refuses to fund them amounts to a complete nullification of CEQA. (City ABOM 11-14, 18-21, 38-39; SANDAG ABOM 5-8, 12-13, 16-19.) The local agencies are wrong. (See *Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 846 (*Concerned Citizens*) ["appellants appear 'to be laboring under the misconception that the identification of adverse environmental impacts is the equivalent of a legal mandate to refuse to approve and certify the EIR' "].)

To support the premise that CEQA always results in mitigation, the local agencies ignore the words in CEQA: "whenever it is feasible to do so." But, as recognized in *Marina*, that phrase requires only that "the Trustees . . . avoid or mitigate, *if feasible*, the

significant environmental effects of their project." (*Marina, supra*, 39 Cal.4th at pp. 349, 359, emphasis added; Pub. Resources Code, §§ 21002.1, subd. (b) ["Each public agency shall mitigate . . . whenever it is feasible to do so"], 21100, subd. (b)(3); OBOM 24-28.)

The City seeks to obscure the feasibility requirement by re-wording the statute as follows: "CEQA *prohibits project approval* before a reasonable plan to *implement feasible mitigation* is established by CSU." (City ABOM 11, capitalization omitted, boldface and underline omitted, emphases added; see also City ABOM 14, 15-16, 23, 33.) This semantic revision, however, impermissibly alters the statute's meaning by removing the conditional nature of the Legislature's directive. (See, e.g., *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 (*Laurel Heights*) [" 'CEQA does not, indeed cannot, guarantee that [a lead agency's] decisions will always be those which favor environmental considerations' "]; OBOM 31.)

For its part, SANDAG supports its claim that CEQA requires mitigation regardless of economic infeasibility by conflating "mitigation" with "funding." Thus, SANDAG contends that because CEQA requires that the EIR explore multiple forms of "mitigation," it necessarily requires that the EIR explore multiple sources of "funding" for that mitigation. (SANDAG ABOM 9-10, 32.) This claim fails because an environmental mitigation measure is not the same thing as the funding for that mitigation measure. SANDAG's claim is belied by the text of CEQA itself. The Public Resources Code does not use the term "funding" interchangeably with

"mitigation." To the contrary, the Legislature uses the words "fund" or "funding" where it intends to refer to financing, such as where it directs that "[a]ll state agencies, boards, and commissions *shall request in their budgets the funds necessary to protect the environment* in relation to problems caused by their activities."[7] (Pub. Resources Code, § 21106, emphasis added; see also *id.* §§ 21095, 21102, 21106, 21150, 21083.2, subd. (c).)[8]

That environmental mitigation measures are distinct from the funding for those measures is further confirmed by a review of the

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[7] Public Resources Code section 21083.4 lists contribution of funds to a specific nature conservation fund as one of several permissible mitigations for impacts to oak woodlands. Even this provision, however, does not suggest that the promise to donate the funds is synonymous with the determination of where to obtain the funds for donation.

[8] SANDAG's parade of horribles includes the claim that, if CSU is correct, CSU could "punt[ ]" whether to "pay for archaeological studies to mitigate cultural impacts" to the Legislature. (SANDAG ABOM 17.) The fact that Public Resources Code section 21083.2, subdivision (c), specifically addresses payment for mitigation of archaeological impacts and expressly requires the lead agency to "reduce the specified mitigation measures to those which can be funded with the money guaranteed by the project applicant plus the money voluntarily guaranteed by any other person" shows that SANDAG's concerns are speculative exaggerations. Section 21083.2, subdivision (c), also demonstrates that, contrary to SANDAG's overall claim that CEQA requires that mitigation be completed regardless of funding constraints, the Legislature knows how to issue specific directives about funding sources if it chooses. No similar action was taken with respect to traffic mitigation. In any event, a state university's request to the Legislature for funding can hardly be called "punting" its responsibility. (See Part III.A, *post*.)

CEQA guidelines. (See Guidelines,[9] § 15370 [examples defining "mitigation" do not include funding for that mitigation]; see also *id.* §§ 15364 [whether mitigation is "feasible" takes into account economic factors], 15130 [distinguishing "a mitigation measure" from the requirement to "fund" a fair share of that mitigation].) SANDAG's proposed interpretation of "mitigation" would take CEQA far beyond its purpose, which is to "compel government at all levels to make decisions with environmental consequences in mind" (*Laurel Heights, supra*, 47 Cal.3d at p. 393) and turn it into an all-purpose regulation for oversight of how CSU obtains and uses funds.

Had the Legislature intended to make a lead agency's duty to explore funding sources within the EIR coterminous with its duty to explore forms of "mitigation," it knew how to do so, and the local agencies may not ask this Court to interpret the statute to create such a duty where the Legislature did not. (See *Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 412 [" 'An intent that finds no expression in the words of the statute cannot be found to exist. The courts may not speculate that the legislature meant something other than what it said' "]; *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 475 [court "may not rewrite the statute to conform to an assumed intention which does not appear from its language"]; see also OBOM 22-24].)

Further seeking to promulgate the myth that CEQA always requires mitigation—and mitigation funding—for all projects, both

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[9] All references to Guidelines are to the CEQA Guidelines. (Cal. Code Regs., tit. 14, §§ 15000 et seq.)

local agencies quote *Marina* as saying that " 'a commitment to pay fees without any evidence that mitigation will actually occur is inadequate.' " (*Marina, supra*, 39 Cal.4th at p. 365; City ABOM 13, 37; SANDAG ABOM 22.) This quote is taken out of context. This Court made the quoted observation while explaining why the mere fact that CSU could not guarantee that the local agency would complete the mitigation was not a legal basis for determining that the mitigation was infeasible. (*Marina,* at p. 364.) Thus, the court observed, while " 'a commitment to pay fees without any evidence that mitigation will actually occur is inadequate' " there was no reason for concern in that case because there was "no reason to doubt that [the local agency] will meet its statutory obligation" to complete the mitigations. (*Id.* at p. 365.) This Court was not discussing CSU's duty to explore alternative funding sources in the event the Legislature were to deny an appropriation request.

B. CSU properly determined that "overriding considerations" justify this project.

CSU's opening brief showed that if the lead agency determines that certain mitigation would be infeasible, "the project may nonetheless be carried out or approved at the discretion of a public agency" when "the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." (Pub. Resources Code, §§ 21002.1, subd. (c), 21081, subd. (b); see *Marina, supra*, 39 Cal.4th at p. 350.) In other words, CEQA

expressly gives CSU the discretion to approve a plan whose significant environmental impacts will not be mitigated. Neither the City nor SANDAG addresses this critical point.

While CEQA " ' "compel[s] government at all levels to make decisions with environmental consequences in mind[,] CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations." ' " (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights, supra*, 47 Cal.3d at p. 393; *Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, 1037; *San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal.App.3d 584, 589, 596-597; see *Concerned Citizens, supra*, 24 Cal.App.4th at pp. 842-843.) The local agencies' failure to address these portions of CEQA is fatal to their claims.

C. The fact that some projects may proceed without all mitigation funding guaranteed does not render CEQA a nullity.

Imagining a parade of horribles, the local agencies assert that permitting CSU to approve its plan here on the basis that some mitigation is infeasible amounts to nothing less than an invalidation or repeal of CEQA. (City ABOM 13-14, 18-21, 38-39; SANDAG ABOM 16-18.) Indeed, SANDAG imagines that, if this Court agrees with CSU, every state or local lead agency and every private project applicant will be able to avoid its environmental responsibilities under CEQA due to the unavailability or

uncertainty of a funding source. (SANDAG ABOM 16-18; see also City ABOM 14.)

The local agencies are wrong because CEQA plainly contemplates exactly what occurred here. Far from seeking an exemption or repeal of the statute, CSU complied with CEQA in good faith, twice preparing an EIR, meeting numerous times with members of the public, responding to hundreds of public comments, and negotiating with local agencies regarding the fair-share payments required under *Marina*. (OBOM 10-18.) Thus, a holding in favor of CSU simply would reflect the fundamental truth that the Legislature really *does* have the power to decide how to allocate limited funds to serve the varied needs of the state.[10] It also would mean that everyone, including the local agencies here, must accept the reality that sometimes worthy public services will go unfunded. (See *Carmel Valley, supra*, 25 Cal.4th at p. 302.)[11]

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[10] A holding in CSU's favor also would not result in the invalidation or repeal of CEQA because the holding would not necessarily apply to other state entities, lead agencies, or private project applicants. CSU is a unique state entity—indeed, unique even among California's higher education institutions—and both its mission and funding directives are set forth in unique statutes and regulations. (See Ed. Code §§ 66600 et seq.; Cal. Code Regs., tit. 5, §§ 40000 et seq.) Even CSU's non-state funding sources, such as donations, tuition, dorm fees, and Revenue Act bonds are unique to CSU or at least to public universities. (See OBOM 42-45.)

[11] Ironically, SANDAG claims that one of the worst of its imagined horribles is the possibility that funding for off-site mitigation might be left to voters to decide in a referendum, a supposedly insufferable possibility because, SANDAG says sarcastically: "tax and assessment measures are always popular." (SANDAG ABOM 18.) But the Court may take judicial notice of the fact that the Governor

(continued...)

The City argues "CSU's position . . . makes the mitigation illusory." (City ABOM 13.) But there is nothing "illusory" about a state university committing to pay for mitigation efforts with state funds, even though state funding is always contingent on Legislative approval. This is how the Legislature directed CSU to obtain funding for the enrollment expansion. (Ed. Code, § 66202.5; see OBOM 22-23.) There was also nothing "illusory" about CSU's duly approved resolution directing the Chancellor to request the funds, and to apply those funds towards off-campus mitigation efforts to the full extent of the amount appropriated. (19:AR-18618.) Nor was it "illusory" for CSU to approve similar resolutions in each of the next two years. (CT-4:895-905.)

The City also claims CSU's determination that the mitigation efforts would be infeasible if the Legislature denies funding amounts to an "improper deferral" of mitigation. (City ABOM 14.) Not so. The doctrine of "deferred mitigation" refers to improper

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(...continued)
has put a significant portion of California's budget up for decision as a ballot referendum in the election in November. (See California Attorney General, California Secretary of State Web site, "Qualified Statewide Ballot Measures" <http://vig.cdn.sos.ca.gov/2012/general/pdf/30-title-summ-analysis.pdf> [as of Oct. 17, 2012].) That voters might be permitted to decide whether they wish to pay more taxes for education or for environmental mitigation is hardly a vision of environmental apocalypse; it is democracy. Moreover, SANDAG's hypothetical begs the question. If California's citizens were to approve taxes to increase university enrollment but to vote *against* funding corresponding traffic infrastructure upgrades, why should CEQA give SANDAG or any other local agency the right to demand that the tax funds allocated for the approved purpose be diverted to accomplish the rejected purpose?

deferral of " 'the *formulation of mitigation measures* until after project approval' " (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906, emphasis added; Guidelines, § 15126.4), and is thus inapplicable when analyzing CSU's determination of the economic infeasibility of formulated measures. "[C]oncerns about whether it is 'realistically foreseeable that [a mitigation] measure will actually be carried out as outlined' do not raise an issue of improper deferral." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 622-623 (*CNPS*) [explaining that "improper deferral" should not be analytically confused with feasibility].) In any event, mitigation is not "improperly deferred" merely because it is contingent on a future occurrence, so long as the lead agency commits to that mitigation in the EIR. (See, e.g., *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275-1277.) CSU committed to the mitigation measures in the EIR, and, far from "deferring" anything, found when it approved the EIR that if the Legislature were to deny the requested mitigation funding, not only would the mitigation measures be infeasible but that overriding considerations warranted plan approval. (AR-19:18466-18467, 18473-18474, 18523-18525, 18617.)

In sum, the Legislature carefully crafted CEQA to permit a lead agency to approve a project even where significant impacts will go unmitigated if overriding considerations outweigh the environmental costs. (OBOM 24-28; see *ante*, Part I.B.) That CSU has invoked that option here to expand affordable educational

opportunities does not mean that CEQA has been repealed, it means that CEQA is functioning as the Legislature intended.

III. CSU ALONE IS RESPONSIBLE FOR BALANCING ITS MANY COMPETING FUNDING OBLIGATIONS.

A. CSU properly requested a state appropriation to pay for the project's proposed mitigation.

SANDAG accuses CSU of "ducking mitigation responsibilities," taking only "token measures," or "pass[ing] the buck." (SANDAG ABOM 13, 16, 18, 23.) However, a state university's budget request to the Legislature asking for funds to fulfill its statutory directives is hardly passing the buck—it is how government functions. (See Ed. Code, § 66002; Pub. Resources Code, § 21106 [state agencies "shall request in their budgets the funds necessary to protect the environment"].)

SANDAG suggests that CSU is somehow avoiding responsibility by requesting funds from a "funding source" that is "uncertain and contingent." (SANDAG ABOM 9, 13 ["another funding source that is actually unavailable, highly contingent upon factors beyond the lead agency's own control, or otherwise of uncertain reliability"], 16, 18 ["one potential source of funding" that is "uncertain or contingent"], 19, 25). But the California State Legislature is not just any "funding source," it is the branch of government entrusted by the California Constitution with the sole power of appropriation. (Cal. Const., art. IV, § 12; *Carmel Valley,*

supra, 25 Cal.4th at p. 299.) Reliance on legislative appropriations though they may be uncertain or contingent, is *not* "insufficient" under CEQA. (Pub. Resources Code, § 21106.) Rather, such reliance underscores the difficult decisions the Legislature faces as it "fit[s] the needs of the state into the funds available." (*Carmel Valley*, at p. 302.) The local agencies may wish to pretend the Legislature is just "another funding source," or ignore the existence of the Legislature altogether and use the EIR to make their own "appropriation requests" directly to CSU, but that is not the constitutional design.[12]

CSU does not, as the local agencies argue, "disclaim" its duty to mitigate or "exclude[ ] protection of the environment" from CSU's mission. (City ABOM 16, 42; SANDAG ABOM 15-16, 30.) CSU has committed to approximately 100 environmental mitigation measures in its EIR, including the off-campus traffic mitigations at issue here.[13] (AR-15:14167-14207; 18:17151-17160, 17487-17514;

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[12] SANDAG also speculates that CSU acted improperly in allowing the Legislature to decide whether to fund off-site mitigations because "[i]t is impossible to believe that the Legislature ever intended to establish itself as the case-by-base arbiter" of which mitigations would receive state funding. (SANDAG ABOM 23.) However, the Legislature has ordered CSU to report in detail on *Marina* negotiations, evidencing a keen legislative interest in these details. (Ed. Code, § 67504, subds. (c), (d).) Furthermore, the Legislature and the Governor regularly exercise their power to determine, with great specificity, which appropriations to deny. (See, e.g., *California State Employees' Assn. v. Flournoy* (1973) 32 Cal.App.3d 219, 223-224 (*Flournoy*).)

[13] The local agencies' reliance on *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 103-104, is misplaced. (SANDAG ABOM 7, 29, 31; (continued...)

19:18461-18516.) There is a difference, which the local agencies ignore, between disclaiming a duty and finding it is economically infeasible to fulfill that duty if the Legislature denies the necessary appropriation. Surely when schools reduce classroom hours, courts close courtrooms, or subsidized child-care programs reduce available spaces, the responsible state entities are not disclaiming their duty to provide education, access to justice, or child-care for the needy; they are, like CSU, doing their best to provide for the people of the state with the resources available. Protection of the environment is one of *many* aspects of CSU's educational mission (*Marina, supra,* 39 Cal.4th at p. 360), and while the EIR offers a process by which CSU and local agencies can agree on the necessary mitigation for significant environmental impacts of a proposed campus enrollment expansion, ultimately only CSU may decide, in the wake of a Legislative refusal to fund that mitigation, how to prioritize its funds to further that mission.

(...continued)
City ABOM 28.) In that case, a community college argued that it was legally prohibited from making fair-share mitigation payments to local agencies for reasons similar to those advanced in *Marina.* (*Grossmont,* at p. 101-107.) The prescient appellate court rejected the community college's claims for reasons similar to those later announced in *Marina.* (*Ibid.*) Here, by contrast, it is CSU's position that CEQA confers on local agencies no right to decide how CSU prioritizes its funds—a claim not raised by the community colleges in *Grossmont.*

B. The "off-campus" versus "on-campus" distinction is irrelevant.

The local agencies focus on the fact that CSU distinguished "off-campus" mitigations from "on-campus" mitigations or the construction project as a whole in its EIR and budget plans, claiming that this represents some kind of "artifice[ ]" or is otherwise "[un]principled." (SANDAG ABOM 18, 23-24, 30; City ABOM 26-28.) These accusations of impropriety lack merit because, in response to *Marina*, the Legislature has required CSU to report with separate information about the cost of "mitigation measures for significant off-campus impacts." (Ed. Code, § 67504, subd. (d)(2).)

Even putting aside that CSU has a *duty* to report separately on the amount of off-campus mitigation payments, the local agencies' focus on this issue is a distraction from the real issues. (See *ante*, Part I.)

How CSU itemizes its appropriations request is irrelevant. If the Legislature wants to fund off-campus mitigation as part of CSU's enrollment expansion, it will do so, regardless of whether the mitigation is itemized separately. If the Legislature decides to fund the on-campus portions of CSU's enrollment expansion but not the off-campus mitigations, it can deny the latter appropriation regardless of whether the mitigation is itemized separately. Even if CSU were permitted to present the Legislature with a single lump sum appropriation request, this would not, as the local agencies imagine, require that the Legislature grant the request in full. The

Legislature frequently grants appropriation requests only in part, making political decisions to delete items as needed or simply to appropriate a lesser amount than requested. (See, e.g., *Flournoy, supra*, 32 Cal.App.3d at p. 223-224.)

Thus, it is understood that ultimately all of CSU's mitigation efforts, whether on-campus or off-campus, are contingent on the Legislature's provision of funding. However, the local agencies are not concerned with whether the rest of the plan as a whole is funded, only with their fair-share mitigation payments, and the separate categorization provides them with the information they seek. That the EIR separates out off-campus mitigations does not suggest that they are less likely to be funded—or less deserving of funding—than the plan as a whole.

The EIR's distinction between on-campus and off-campus mitigation efforts reflects other distinctions relevant to the EIR process but not to the primary issue in this case. For example, on-campus mitigation can be more difficult to break out from on-campus construction because the "mitigation" may be a budget-neutral alteration of the design or a major revision to core plan elements. (E.g., AR-15:14168 [to mitigate visual quality impacts, requirement that hotel sign must be at a 90 degree angle to freeway and may not incorporate flashing lights], 14173 [to protect nesting migratory birds, requirement to construct faculty housing outside of the migratory bird nesting season], 14723 [to mitigate student nuisance rentals in adjacent residential neighborhoods, addition of on-campus student beds].) Off-campus mitigation in the form of paying a share toward road improvements in San Diego, in contrast,

is easily itemized as payments made from CSU to a local agency to accomplish an activity over which CSU lacks control.

For similar reasons, also irrelevant are the local agencies' claims that CSU has not sufficiently addressed "on-campus" mitigation as an alternative to off-campus mitigation payments in the event the Legislature denies the necessary appropriations. (SANDAG ABOM 15; City ABOM 15, 23, 32.) As SANDAG concedes, even if CSU was able to substitute *some* on-campus mitigation to reduce area traffic, CSU could not completely mitigate area traffic without making some contributions to off-campus infrastructure improvements, and thus the question of who decides how to fund those fair-share mitigation payments would still be presented here. (See SANDAG ABOM 25 ["SANDAG/MTS does not believe that [on-campus] measures could fully mitigate traffic impacts to less than significant levels and absolve CSU from considering alternative funding for off-site mitigation"].)

In any event, and importantly, CSU *did* consider and adopt on-campus mitigation that would reduce off-campus significant impacts. CSU increased the number of on-campus student beds by almost 1,000 percent to reduce the impact of off-campus student nuisance rentals (AR-1:00105; 15:14257, 14723; 18:17147; 19:18731-18732, 18737-18738, 18742-18743), and CSU greatly reduced the number of faculty/staff housing units to reduce traffic congestion in adjacent neighborhoods (AR-1:00096; 15:14247; 19:18695-18703). CSU also analyzed a reasonable range of potentially feasible plan alternatives that might lessen environmental impacts (AR-15:14886-14934; see Guidelines, § 15126.6, subd. (a)), and

considered "institutional alternatives" such as alternate campus locations, satellite campuses, or more online learning options. (AR-15:14909-14917.) These alternatives did not meet the plan objectives and frequently could not eliminate or reduce the plan's potentially significant environmental impacts. (AR-15:14886-14934.)

C. This Court was correct to observe in *Marina* that mitigation is infeasible if the Legislature refuses to appropriate the necessary funds.

CSU's opening brief explained that this Court's statement in *Marina* regarding the limits on an agency's power to mitigate environmental impacts absent Legislative funding was a proper harmonization of the governing constitutional and statutory directives and a correct statement of the law. (*Marina, supra*, 39 Cal.4th at p. 367; OBOM 37-39.)

The local agencies claim that CSU's interpretation of *Marina* is "fanciful," "semantic," "ridiculously overbroad," "play[ing] [a] game," or lacking any "legal or factual support." (SANDAG ABOM 15, 21, 22; City ABOM 39.) The local agencies are wrong. CSU did nothing more than quote this Court's statement that " 'a state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist.' " (OBOM 2, 38; *Marina, supra*, 39 Cal.4th at p. 367.)

SANDAG claims that CSU's concise discussion of *Marina* suggests CSU now considers that statement a "thin reed" for a "bold theory," or that CSU agrees with the appellate court below that the passages are "non-binding dictum." (SANDAG ABOM 19, 22.) Not so. The brevity of CSU's discussion of *Marina* reflects nothing more than its belief that there is limited benefit in telling the Court what it meant. Instead, CSU provided arguments showing why what this Court said in *Marina* is correct.

SANDAG takes the opposite approach. First, SANDAG claims that it "would actually go a bit further than the Court of Appeal in assessing the weight" of this passage and, like the Court of Appeal, posits that this Court must not have intended what it said in *Marina*. (SANDAG ABOM 19; see typed opn., 29-33 [holding that this Court's statement "did not involve extensive analysis"].) Aside from the problems inherent in this assumption (see *Bunch v. Coachella Valley Water Dist.* (1989) 214 Cal.App.3d 203, 212 ["Supreme Court dicta is not to be blithely ignored"]), the fact that the concurring opinion specifically challenged this statement—and indeed advanced a position similar to the one the local agencies champion here—makes it difficult to believe this point did not receive the Court's considered attention. (See *Marina, supra*, 39 Cal.4th at p. 372 [conc. opn. of Chin, J.].)

Next, SANDAG reasons that "the far more logical interpretation of this phrase is that if state agencies such as CSU desire to limit their obligations to identify and adopt otherwise feasible mitigation measures, they must obtain a special legislative exemption to do so." (SANDAG ABOM 20.) But the Court's

language states nothing about state agencies seeking special legislative exemptions to limit their CEQA obligations; the Court stated that "a state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." (*Marina, supra,* 39 Cal.4th at p. 367.) CSU sees no "logic" in telling this Court that it meant the opposite of what it said in *Marina.*

D. This Court should also reverse the Court of Appeal because substantial evidence supports CSU's factual findings that the identified off-campus mitigations will be financially infeasible if the Legislature appropriates no funding, and that overriding considerations warrant plan approval.

CSU's determination should also be affirmed as a factual finding supported by substantial evidence. CSU has found that if the Legislature denies CSU funding for off-campus mitigation efforts, those measures will be infeasible, and the plan's many significant benefits for the students of SDSU and the San Diego region outweigh the plan's unmitigated environmental impacts. (OBOM 9, 17-18, 53-54; see AR-19:18465-18466, 18473-18474, 18522-18525.)

The EIR showed that the planned expansion will have numerous qualitative and cultural benefits, and will also permit SDSU to (1) offer affordable educational opportunities to an

additional 10,000 full-time equivalent students, and (2) contribute approximately *$4.5 billion* in annual spending and about *$587 million* to the regional tax base, while adding *22,800 jobs* to the regional economy. (AR-18:17174-17175, 18208-18209; 19:18523-18524.) In comparison, the amount of CSU's fair-share mitigation payments that would be infeasible if the Legislature denies funding—and hence the "cost" of CSU's failure to mitigate—is only approximately $6.5 million.[14] (AR-18:17152-17154; 20:20052, 20064-20065.)

The local agencies claim that CSU made no findings concerning economic infeasibility. (City ABOM 33-37; SANDAG ABOM 32.) Not so. CSU found that, inter alia, "[b]ecause CSU's request to the Governor and the Legislature, made pursuant to [*Marina*], for the necessary mitigation funding may not be approved in whole or in part," (AR-19:18465-18466) to the extent the Legislature denies the requested funding, "there are no feasible mitigation measures that would reduce the identified significant impacts to a level below significance." (AR-19:18473-18474.) Substantial evidence supports this finding because the cost of CSU's fair-share contribution is $6.5 million but, in the event the

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[14] CSU's determination of the amount of its fair-share contributions is supported by substantial evidence and the issue is not before this Court. (SANDAG ABOM 14, fn. 4; OBOM 13-14; *Marina, supra,* 39 Cal.4th at p. 361-362.) However, it is notable that even compared to the local agencies' significantly greater estimations of the amount CSU would owe—approximately $193 million for SANDAG and approximately $20 million for City (both of which are unsupported in the record)—the plan's anticipated benefits far outweigh those costs.

Legislature denies the request, CSU would have no funds available to pay these costs without diverting funds away from their educational purposes.

The City's claim that CSU's determination does not constitute a factual finding concerning the economic infeasibility of off-campus mitigation measures relies improperly on the CEQA provisions that require the lead agency to consider and analyze a reasonable range of "[a]lternatives to the proposed project" that "could feasibly accomplish most of the basic objectives of the project" while potentially lessening environmental impacts. (Pub. Resources Code, § 21100, subd. (b)(4); Guidelines, § 15126.6, subd. (c); City ABOM 34.) These provisions play a different role in the EIR process than CEQA's mitigation requirements, and say nothing suggesting that CSU has a duty to submit its budget to local agency review in the event the Legislature denies an appropriation for the off-site mitigations required by the plan once the plan alternatives have been considered and rejected.[15]

The City's reliance on *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, (*Uphold Our Heritage*) Preservation *Action Counsel v. City of San Jose* (2006) 141 Cal.App.4th 1336 (*PAC*), and *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383 (*AIR*) is similarly misplaced. (City ABOM 34-35.) The issue in those cases was whether the lead agency had sufficiently explored alternatives to a *private* applicant's proposed project and had properly determined

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[15] CSU properly explored and rejected plan alternatives and those determinations are not before this Court. (AR-15:14886-14934.)

that certain *alternatives to the entire project* were "economically infeasible." In *PAC* and *AIR*, "economically infeasible" meant that the project alternatives could not offer the private applicants, a Lowe's home improvement store and a dairy farmer, respectively, the return on their investment necessary to justify project investment. (*PAC*, at pp. 1355-1357; *AIR*, at pp. 1398-1401.) In *Uphold Our Heritage*, Steve Jobs sought to demolish a historic mansion to build a new family home, and "economic feasibility" turned on whether the proposed alternatives to demolition represented a financial burden reasonably proportional to building a new private home. (*Uphold Our Heritage*, at pp. 598-600.) The reviewing courts required the lead agencies to support their determinations with substantial evidence related to the profitability or unreasonable financial burden of the proposed project alternative related to the original project's goals; they did not hold that the lead agency must make the project applicant throw open its financial books to public scrutiny to demonstrate its ability to shoulder the costs of the project's required mitigation measures. (*Id.* at pp. 598-600; *PAC*, at pp. 1355-1357; *AIR*, at pp. 1398-1401.)

Moreover, those cases all concern *private* project applicants. With private applicants, the courts "assume[ ] in a capitalistic society that one is motivated by a desire for economic return on one's labor and investment," and therefore the economic feasibility of proposed project alternatives can be measured objectively with evidence of profitability. (*AIR, supra*, 107 Cal.App.4th at p. 1401.) By contrast, the Legislature does not decide whether to expand student enrollment at CSU based on the return on investment.

Thus, the determination of economic feasibility of mitigation cannot be made simply by measuring a profit on a balance sheet, it is a political determination of how to use limited tax dollars to provide affordable educational opportunities for a growing population. Furthermore, if the private applicant does not believe the project with its required mitigations is worth the investment, the applicant can reject the project and take its business elsewhere. Lowe's can build a home improvement store somewhere else; Steve Jobs could simply have kept the mansion he had. CSU does not have this luxury; California's population and demand for an educated workforce are growing and CSU must perform its statutory duty to expand enrollment to serve these needs. (Ed. Code, § 66002.)

E. CSU does not possess unlimited resources and limitless discretion to re-allocate those resources for off-site mitigation.

The local agencies also claim that CSU has "vast resources and numerous options" to re-allocate funding for transportation upgrades. (SANDAG ABOM 28-29; City ABOM 27-28.) In support, the local agencies cite the fact that CSU has budgeted for $5.9 billion in state funds and $4 billion in non-state funds for statewide capital improvement over the next five years. (*Ibid.*) But this shows nothing more than CSU's total *request* for its budget for its entire state-wide capital improvements for five years distributed among 23 campuses. A large figure on an appropriation request does not mean that the request will be *granted*, much less that the

funds will be freely available for redistribution to a particular campus. Furthermore, these large figures represent CSU's budget *statewide*, but the local agencies have not shown that CEQA confers on local agencies any right to divert for their use CSU's funds budgeted for capital improvements at campuses elsewhere in the state.

The local agencies also lack support for their claim that CSU's Chancellor has "complete discretion" to re-allocate CSU's funds from the educational purposes for which they were raised to pay for off-site traffic mitigation. (City ABOM 27-28.) Statutes and case law prohibit CSU from using state funds for a purpose for which the Legislature has denied an appropriation request. (OBOM 34-37, 40-41; see Gov. Code, § 13332.15.) Regarding non-state funds, CSU's discretion is limited by restrictions germane to each source of funds: non-state projects depend on the fees they will generate to repay their costs, and donations are sensitive sources unique to education and not amenable to re-allocation through the EIR process. (OBOM 40-46.)

The City claims that CSU has unfettered discretion to use bonds to fund off-campus mitigation (City ABOM 30-31), but fails to address CSU's showing that its discretion to issue bonds is limited by (1) its debt capacity and (2) the restraint that bond-funded projects must generate revenue to be used for the bonds' repayment (OBOM 43-44).

The City lays claim to CSU's student tuition revenues as potential sources to fund its transportation needs. (City ABOM 30 & fn. 7.) But as CSU has explained, students' fees do not even

cover the cost of the students' own education and raising tuition further is antithetical to CSU's mission. (OBOM 43.) Furthermore, on September 27, the Governor signed into law the "Working Families Student Fee Transparency and Accountability Act," which recognizes the wrenching nature of decisions regarding tuition increases and the devastating impact tuition increases have on students and their families. (Ed. Code, §§ 66028 et seq., available at <http://leginfo.public.ca.gov/pub/11-12/bill/asm/ab_0951-1000/ab_970_bill_20120927_chaptered.pdf> [as of Oct. 17, 2012].) The Act creates an entirely new administrative procedure to facilitate public discussion of potential fee increases. (*Ibid.*) It requires public notice of the proposed purpose for any fee increase, and introduces its own concept of "mitigation" for, and "alternative proposals" to, potential fee increases. (Ed. Code, § 66028.3.) The passage of this statute indicates both that the Legislature did *not* contemplate that student fee increases would be discussed as part of an ad hoc budget review during CEQA proceedings, and that the Legislature believes tuition increases are themselves so politically difficult that they require their *own* procedure. (See Assem. Bill 970 (2011-2012 Reg. Sess.) §1) [detailing historical recognition that "a tuition-free higher education is in the best interest of the state" and impacts of the past decades' tuition hikes].)

The local agencies' reliance on the Education Code provisions cited in their answer briefs are similarly misplaced. (City ABOM 25-26; SANDAG ABOM 27-28.) Education Code section 66606 merely authorizes CSU to develop university campuses and physical buildings or other facilities "connected with" CSU campuses; it also

enables CSU to enter into contracts and receive donations for this purpose. Section 66606 does not address CSU's budgeting, nor does it authorize CSU to construct improvements to off-campus roadways as mitigation for campus plan impacts.[16] Education Code section 89750 requires CSU to "control and expend" state appropriations and donations, but does not expand CSU's discretion to re-allocate state funds beyond the purposes for which the Legislature appropriates them or suggest that donations should be subject to CEQA review. (See OBOM 34-37, 40-41, 45-46.) Education Code sections 89753 and 89754 apply only to Legislative appropriations in the annual support budget, which is distinct from the capital budget (OBOM 41), and permit only minor transfers of funds from one category to another that CSU must report to the Legislature. The contemplated transfers are in the nature of travel expenses, employee relocation costs, and payroll changes, and are limited to the fiscal year in which the action is taken. (Ed. Code, §§ 89753,

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[16] Although the concurrence in *Marina* observed that Education Code section 66606 indicates that CSU has "responsibility and jurisdiction" under CEQA to contribute fair-share payments for off-campus mitigation measures, the *Marina* majority rejected the concurrence's suggestion that this "responsibility and jurisdiction" necessarily requires CSU to guarantee the funding for fair-share mitigation payments through diversion of non-state funds previously devoted to educational purposes in the event that the Legislature denies an appropriation request for those funds. (See *Marina, supra*, 39 Cal.4th at pp. 367 (majority opn.), 371-372 (con. opn. of Chin, J.).)

subds. (b), (c), 89755.) Education Code section 89036, subdivision (a) merely authorizes CSU to enter into procurement contracts.[17]

In any event, CSU has never claimed that it lacks *all* discretion to prioritize the use of its non-state funds. The issue here is not whether CSU has *any* discretion over the use of its funds, but whether, when implementing a Legislative directive to expand campus enrollment, CSU maintains the discretion to prioritize the use of its funds absent further legislative appropriations, or whether CEQA gives local agencies the right to make that determination.

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[17] Nor do the City's administrative record citations support its claim that CSU has unfettered discretion to re-allocate funds. Those documents reflect CSU's concern that "any dollars that are used for off-site mitigation will not fund classrooms and support programs." (AR-20:20054, 20059-61; see City ABOM 27.) The additional documents the City cites are not part of the administrative record and in any event fail to show that the "Chancellor is given complete discretion," as the City claims.

IV. SUBSTANTIAL EVIDENCE SUPPORTS CSU'S FACTUAL FINDINGS ON TRANSIT IMPACTS AND THE TDM MITIGATION MEASURE.

A. Substantial evidence supports CSU's factual finding that the approved plan will not have significant transit impacts.

In its opening brief, CSU explained that substantial evidence supported its determination that the SDSU plan will not have a significant environmental impact on the trolley that serves SDSU's campus. (OBOM 54-58.) The Court of Appeal improperly second-guessed this factual determination by re-weighing CSU's supporting evidence and disagreeing with CSU's reasonable assumptions based on facts. The Court of Appeal essentially turned CEQA on its head by reasoning that once CSU had identified that the trolley system would experience an increase in ridership, CSU had to prove that this would *not* create a significant environmental impact. (*Ibid.*)

Under CEQA, the lead agency must *first* determine whether an identified environmental effect is significant or potentially significant, and *then* "[o]nce the agency has determined that a particular effect will not be significant, . . . the EIR need not address that effect in detail." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 (*Amador*).) If the effect is not significant, "the EIR need only 'contain a statement briefly indicating the reasons for determining that various effects on the environment of a project are not

significant and consequently have not been discussed in detail in the environmental impact report.' " (*Ibid.*, quoting Pub. Resources Code, § 21100, subd. (c).)

CSU determined that the plan will not have a significant impact on the local trolley for several reasons, including: (1) SANDAG's own data showed that the forecasted increase in SDSU-related trolley riders over the coming 18-year period amounts to no more than 383 additional daily riders per year at the station; (2) the station was new and thus presumably built to accommodate SANDAG's own projected increases in ridership; (3) SANDAG's own data indicated that the trolley was not operating at or near capacity; (4) the station can accommodate more students, faculty, and staff per day than SDSU's traffic engineer, working with SANDAG to obtain the data, calculated the plan would create; and (5) no local agency provided criteria by which CSU could evaluate whether increased *ridership* would cause significant *physical* impacts on the trolley and the only available guidelines suggest that trolley service is evaluated by speed and quality of service, not volume of ridership. (OBOM 55-57.)

SANDAG claims it is not second-guessing CSU's evidence but proceeds to do exactly that. (See SANDAG ABOM 46-48.) SANDAG admits CSU's determination was based in part on information in an economic report and the trolley station's design award, but dismisses this as puffery. (SANDAG ABOM 46-47.) The reviewing court, however, " 'does not have the power to judge the intrinsic value of the evidence or weigh it.' " (*California Oak Foundation v.*

Regents of University of California (2010) 188 Cal.App.4th 227, 247.)

SANDAG also admits that CSU found that the increase in transit ridership would be a mere 6.4 percent annually (only 383 additional daily riders per year), but states subjective disagreement with CSU's determination that a 6.4 percent annual increase in trolley ridership on a trolley line operating well below capacity will not cause significant physical impacts to the trolley system. (SANDAG ABOM 46-48.) That SANDAG may have reached a different conclusion about the meaning of this statistic does not mean the statistic is not substantial evidence. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard Area Citizens*) [court may not set aside EIR approval " 'on the ground that an opposite conclusion would have been equally or more reasonable' "]; Guidelines, § 15384, subd. (a).)

SANDAG also disagrees with CSU's factual assumption that SANDAG must have planned and built the SDSU trolley station to handle the capacity that SANDAG told SDSU's traffic engineer it anticipated in the future. (SANDAG ABOM 48) Yet, this is a "reasonable assumption predicated upon fact," because CSU is entitled to assume that SANDAG functions efficiently and would not build a trolley station that could not handle the capacity it was already predicting for the near future. (Pub. Resources Code, § 21080, subd. (e)(1).)

SANDAG states that there is "other evidence in the record indicating that the transit system *cannot* handle this ridership

without substantial improvements." (SANDAG ABOM 48.) SANDAG's brief, however, merely cites to a large portion of its own briefing without indicating what actual evidence it relies on for this claim. (*Ibid.*) The only items of "evidence" SANDAG presented during the EIR discussions with CSU were the letters by SANDAG and MTS, stating—without any supporting documentation—their vague fears that the project would impact the trolley system and complaining that the trolley system was already suffering from state funding cuts. (E.g., AR-17:16951 ["[w]e are skeptical"]; 27:S22577-S22578 [existing services "cannot possibly meet this demand" and "current state funding for transit makes this investment impossible"]; see also AR-18:17191-17192, 19:18584-18586.) However, "[u]nsubstantiated fears and desires of project opponents do not constitute substantial evidence" that a project will have a significant or potentially significant impact on the environment. (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 901.) Tellingly, SANDAG's claim for a fair-share mitigation payment was *not* based on a methodology that purported to make *any* connection between the increased number of trolley riders caused by SDSU's expansion and *any actual physical impacts* to the trolley system. (AR-18:17158-17159, 17191-17192; 21:20540-20541; 27:S22435; OBOM 13-14 & fn. 3.) Rather, it was simply a per capita figure that attempted to impose upon CSU a proportional share of SANDAG's existing $58 billion plan for area transit and transportation improvements. (AR-21:20540-20541.) This was not evidence of a significant impact—it was a shakedown.

B. The local agencies' claimed procedural errors are nothing more than backdoor attempts to dispute CSU's factual determinations made in its role as lead agency.

The three claimed "procedural errors" that the Court of Appeal identified, and which SANDAG urges should be affirmed here, were also premised on the same improper second-guessing of CSU's factual determination that the plan would not cause significant impacts on the trolley—and the same improper reasoning that, once CSU noted there would be increased ridership, CSU had to prove there would *not* be a significant environmental impact. (SANDAG ABOM 33-43; typed opn., 71-82.)

First, the Court of Appeal held that CSU failed to sufficiently investigate the potential impacts on the trolley system. (Typed opn., 71-77; SANDAG ABOM 40-42.) But, CSU did investigate, although its efforts were hampered by the local agencies' failure to provide any meaningful guidelines or criteria to use in the analysis. (AR-18:17229-17230; 20:19956-19964.) CSU's traffic engineer worked with SANDAG to obtain existing and projected daily passenger trolley boardings at the SDSU station (AR-18:17231; see AR-17:16951) and analyzed the transit service's ability to accommodate the additional riders based on available information (AR-18:17229-17232). SANDAG claims that CSU's investigation failed as a matter of law because once CSU acknowledged that the plan would cause an increase in trolley ridership, it had to prove that this increase would *not* cause a substantial environmental impact. (SANDAG ABOM 40-42.) As explained above, however,

this merely amounts to a subjective disagreement with CSU's factual conclusion—or, as SANDAG describes it, with CSU's "faulty rationalizations"—that there would be no significant impact on the trolley. Once CSU determined that the effect on the trolley would not be significant, CSU was not required to investigate that effect in further detail.

Second, the Court of Appeal held that CSU's statement of the *reasons* it deemed any environmental impact on the trolley system to be insignificant was inadequate as a matter of law. (Typed opn., 78-79; SANDAG 43.) This holding was also premised solely on the Court of Appeal's dissatisfaction with CSU's factual determination that there would be no significant impacts; because the court disagreed with CSU's factual determination, it found the explanation of the determination "legally deficient." (Typed opn., 79.) SANDAG's claim is similarly derivative: it admits CSU provided a statement but dismisses it as "legally indefensible rationalizations." (SANDAG 43.) However, "when an agency determines a particular environmental effect of a project is not significant, . . . all the EIR must contain is a 'statement briefly indicating the reasons for' that determination" (*Amador, supra*, 116 Cal.App.4th at pp. 1112-1113 [lead agency's single sentence explanation that riparian habitat would continue to thrive if project proceeded was legally sufficient]; Pub. Resources Code, § 21100, subd. (c); Guidelines, § 15128.) Here, CSU made a finding that the impact would not be significant and referred to the administrative record for support of that finding. (AR-19:18516-18517.) The record included CSU's more detailed explanation. (E.g., AR-18:17229-

17232, 17563.) Thus, the EIR sufficiently presented " 'the analytic route the administrative agency traveled from evidence to action.' " (*Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 517.)

Third, the Court of Appeal held that CSU failed as a matter of law to adequately respond to SANDAG's comments about the transit system. (Typed opn., 77, fn. 24; SANDAG ABOM 42-43.) CEQA does not require that responses to comments be exhaustive; rather they only need to demonstrate a " 'good faith, reasoned analysis.' " (*Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 378 (*Eureka*); Guidelines, § 15088, subd. (c).) "[W]here a general comment is made, a general response is sufficient." (*Eureka*, at p. 378.) CSU responded in earnest and in good faith to SANDAG's general comments. (AR-18:17229-17240.) SANDAG's claim that CSU's comments were insufficient as "rationalization and legally invalid excuses" is, like the Court of Appeal's holding, based solely on subjective disagreement with CSU's analysis and factual conclusions regarding the trolley. (SANDAG ABOM 42-43.)

In sum, the claimed "procedural errors" are merely expressions of the Court of Appeal's and SANDAG's disagreement with CSU's factual conclusion regarding the potential significant impacts on the trolley. However, a reviewing court " 'does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document.' " (*Laurel Heights, supra*, 47 Cal.3d at p. 392; *Eureka, supra*, 147 Cal.App.4th at p. 372.) Here, CSU's analysis, comments, and written

conclusions were sufficient to "allow for an informed decision" (*Eureka,* at p. 378) and " 'did not preclude informed decisionmaking or informed public participation and thus did not constitute a prejudicial abuse of discretion.' " (*CNPS, supra,* 177 Cal.App.4th at p. 995.)

C. The TDM program is not an improper deferral of mitigation.

SANDAG also takes issue with mitigation measure number TCP-27. SANDAG argues this commitment to institute a formal Transportation Demand Management (TDM) program within five years of the original plan date, managed and monitored by a designated "Campus Project Manager" working in consultation with SANDAG and MTS, constitutes an " 'improper deferral of mitigation.' " (SANDAG ABOM 48-51; AR-18:17514, 17602; 19:18563.) This argument, too, lacks merit.

SANDAG claims that the appellate court's holding that TCP-27 constituted "improper deferral" of mitigation was a legal ruling reviewable de novo. (SANDAG ABOM 50.) However, the holding of "improper deferral" was actually a failure by the Court of Appeal to defer to CSU's factual finding on the efficacy of the TDM program. The appellate court simply reframed its fact-finding as a legal holding that CSU failed to proceed as required by CEQA. (Typed opn., 61-62.) "In evaluating an EIR for CEQA compliance, then, a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of

improper procedure or a dispute over the facts." (*Vineyard Area Citizens, supra*, 40 Cal.4th at p. 435.) Here, whether reviewed deferentially for substantial evidence or with the higher scrutiny accorded for claims of "failing to proceed in the manner CEQA provides," CSU's adoption of TCP-27 was proper.

SANDAG claims TCP-27 is "by several lengths, the most extreme example of unlawfully deferred mitigation yet to be addressed in published case law," because "[n]either the EIR nor anything else in the record further describes just precisely what types of measures the TDM program might include." (SANDAG ABOM 4, 50.) Not so. In CSU's written responses to SANDAG's concerns, CSU listed the TDM activities SDSU currently supports, including among other activities:

- subsidizing the "College Pass," which entitles students to unlimited transit rides for the semester;
- publishing and distributing to all students an annual campus map with transit and carpool information;
- conducting a rideshare program free to all students, faculty, and staff;
- promoting bus and trolley usage through www.sdcommute.com and 1-800-COMMUTE;
- providing vanpool vehicles and preferred parking for carpoolers and vanpoolers;
- promoting bicycling through provision of bike racks, storage sheds, and bike paths.

(AR 18:17237-17238.) In the same comment, CSU explained that it was adding mitigation measure TCP-27, a commitment to develop a

TDM program in consultation with SANDAG and MTS. (AR-18:17238.) Thus, contrary to SANDAG's claims, the EIR provided a detailed and comprehensive list of TDM activities likely to be considered in measure TCP-27, and SANDAG and the general public knew exactly what CSU meant by the measure.

Furthermore, SANDAG's claim that it has no idea what CSU's TDM contemplates is belied by the fact that both SANDAG and MTS rely on TDM programs in their own planning. MTS collaborates on providing semester transit passes to students, and proposed the introduction of a "universal transit pass." (AR-27:S22577-S22578.) SANDAG's regional transportation plan endorses a "congestion management program" that would, inter alia, promote rideshare programs, transit pass subsidies, and bike paths, and require "working with local jurisdictions and transportation operators to monitor implementation of the [program] and to fine tune the [program] in response to evolving local needs." (AR:20-19882.) SANDAG has adopted another TDM program called "RideLink," that lists "vanpool subsidies, and carpool and biking incentives [as] examples of current and future TDM strategies." (AR-20:19898.) SANDAG touts that, among its TDM program's activities is promoting the "1-800-COMMUTE" telephone line, "cost-saving [transit] pass options," providing bike racks and bike sheds, and a free rideshare program. (AR-20:19899-19912.) These options are the *exact same options* described in CSU's EIR—down to the same telephone hotline. (AR 18:17237-17238.) SANDAG's claim that it has no idea what CSU could have in mind in adopting TCP-27 is simply not credible.

SANDAG also claims that the terse wording of TCP-27 itself indicates that CSU intended it to be a "meaningless," and "maybe-we'll-do-something mitigation measure." (SANDAG ABOM 51.) Again, this claim is unfounded. In addition to the extensive list of potential activities described above, the EIR contains a clear statement assigning a person responsible for the TDM program, and requiring ongoing reporting to that person through the first five years. (AR-19:18563.) This statement, part of the Mitigation Monitoring and Reporting Program that CEQA requires, "establishes the framework [SDSU] and others will use to implement the mitigation measures adopted in connection with project approval, and the monitoring/reporting of such implementation," and explains that CSU "adopted those mitigation measures within its responsibility to implement as binding conditions of approval, fully enforceable by the Board [of Trustees]".) (AR-19:18527; see Pub. Resources Code, § 21081.6; Guidelines, § 15097.)

SANDAG claims the fact that CSU found traffic impacts would remain significant and unavoidable makes any purported "error" relating to TCP-27 even more prejudicial than otherwise. (SANDAG ABOM 51.) However, SANDAG's claim is nothing more than wishful thinking; the fact remains that TCP-27 was not relied upon to make a less-than-significant finding and, therefore, no prejudicial abuse of discretion could have resulted from its adoption. (OBOM 60; *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119; *AIR, supra*, 107 Cal.App.4th at p. 1391.)

The authorities SANDAG relies on do not support its claim. (SANDAG ABOM 49.) In those cases, the court found deferred mitigation because the lead agency had identified a significant impact but then proposed as mitigation only that the agency would, after certification of the EIR, obtain an expert report on that impact and comply with whatever recommendations were in that report. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92-94 (*Communities*); *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 669-671 (*San Joaquin*); *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396-1397 (*Gentry*)). Here, CSU has not deferred formulation of mitigation pending the results of some report to be obtained in the future. It has committed to developing a TDM program, a form of mitigation that has been upheld by courts and recognized by qualified agencies as a successful approach to long term regional transportation management. (*Laurel Heights, supra*, 47 Cal.3d at p. 418; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1030.)

Also, in the cases cited by SANDAG, the projects at issue were single projects whose total environmental impact could be more easily estimated and would be felt immediately; thus, there was "no reason" to delay formulation of mitigation. (*Communities, supra*, 184 Cal.App.4th at pp. 76-77; *San Joaquin, supra*, 149 Cal.App.4th at pp. 650, 671; *Gentry, supra*, 36 Cal.App.4th at p. 1396.) Here, CSU's plan will materialize over a 20 year horizon, with the effects on traffic increasing slowly and gradually over that time. In these circumstances, it is appropriate that at least one mitigation

measure out of the many CSU adopted is the maintenance of an ongoing TDM program that will "facilitate a balanced approach to mobility, with the ultimate goal of reducing vehicle trips to campus in favor of alternate modes of travel" as the enrollment approaches its peak. (AR-18:17602, boldface and underline omitted.)

CONCLUSION

The local agencies may wish to believe that CEQA prohibits any state university expansion unless the local agencies get paid for the traffic impacts caused by those plans, but CEQA does not guarantee this result. Similarly, the local agencies may wish that CSU has unlimited funds and want CSU to use its budgeted funds in a particular way. Ultimately, however, the Legislature is the branch of government entrusted by the people of California with the responsibility to manage the state's funds to serve them. CSU is a state university operating through Legislative appropriations and tasked with meeting the demand for educated workers and affordable educational access in a growing state.

CSU complied with all procedural and substantive requirements of CEQA, adopted nearly one hundred mitigation measures, and committed to complete them. CSU properly determined that if the Legislature refused to fund off-site traffic mitigation measures, those mitigation measures would be infeasible but that the plan's benefits outweighed the plan's unmitigated impacts. CEQA does not require CSU to justify this determination through an ad hoc public budget review within the EIR approval

process. This Court should reverse the Court of Appeal's ruling to the contrary along with the Court of Appeal's rejection of CSU's factual findings and order that the trial court permit CSU to certify the EIR and approve the plan.

October 22, 2012

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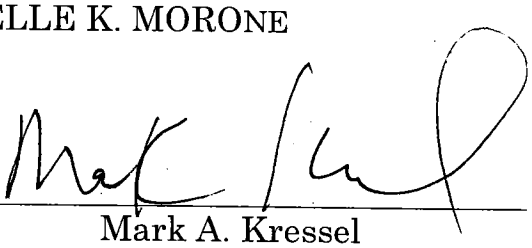
By: 
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1).)

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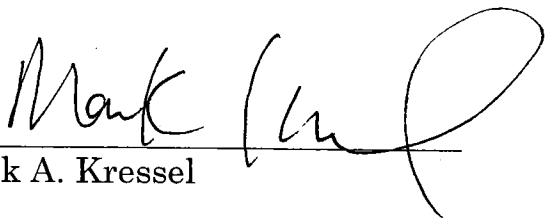

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PROOF OF SERVICE

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 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

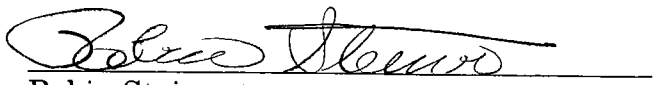
On October 22, 2012, I served true copies of the following document(s) described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on October 22, 2012, at Encino, California.



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