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Supreme Court of California
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S279242

IN THE SUPREME COURT OF CALIFORNIA

MAKE UC A GOOD NEIGHBOR et al.,
Petitioners and Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,
Defendants and Respondents,

RESOURCES FOR COMMUNITY DEVELOPMENT
Real Party in Interest.

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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REPLY SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITY

INTRODUCTION

Project opponents concede that AB 1307 resolves the appeal in favor of UC Berkeley with respect to the portion of the challenged EIR relating to the People's Park project itself. Given the concession, the enactment of AB 1307, and the law before passage of AB 1307 which generally barred stereotyping groups as part of a CEQA analysis, this Court should reverse the Court of Appeal's judgment. The EIR adequately analyzed potential alternatives to, and noise impacts from, the People's Park project. Construction should be permitted to resume.

The only issue remaining in dispute is the portion of the EIR for UC Berkeley's Long Range Development Plan (LRDP), which proposed increasing student housing by 11,731 beds by 2036–2037. (AR 57-58, 9558, 9580.) Project opponents claim the EIR is defective because it ignores increases in student population. They are wrong for two reasons.

First, the issue of increasing population at UC Berkeley is not properly before the Court. The Court of Appeal held that UC Berkeley "made a reasoned decision to exclude the enrollment process from the scope of the project." (*Make UC A Good Neighbor v. Regents of University of California* (2023) 88 Cal.App.5th 656, 673 (*MUCGN*).) Project opponents sought review of that adverse holding and this Court denied their petition. Accordingly, this Court should reject their attempt at this late stage to resurrect

their rejected challenge to the EIR based on student population increases.

Second, to the extent that the project opponents' challenge to the LRDP addresses student housing, AB 1307 likewise resolves that portion of the dispute over the EIR. And beyond housing, CEQA should never require stereotyping students and treating people as pollution. That has always been the law until the Court of Appeal erroneously concluded otherwise. The Legislature has now made clear in AB 1307 its strong disapproval of the use of bias and stereotyping as a feature of CEQA review. Accordingly, this Court should likewise reverse the Court of Appeal's judgment that UC Berkeley's EIR inadequately addressed noise impacts from the LRDP.

LEGAL ARGUMENT

I. Project opponents concede that the People's Park portion of the EIR is valid. Reversal of the Court of Appeal's contrary holding is required.

A. This Court applies the law in effect when it renders its decision, which includes AB 1307.

The law to be applied is " 'the law in effect when the appellate court renders its opinion.' " (*Complete Service Bureau v. San Diego County Medical Soc.* (1954) 43 Cal.2d 201, 207.) An appellate court thus " 'has a duty to apply the law as it exists when the appellate court renders its decision.' " (*People v. Fuentes* (2016) 1 Cal.5th 218, 231, quoting *People v. Jones* (2016) 246 Cal.App.4th 92, 96; *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 14 ["the validity of the [judgment] is

governed by the law in effect at the time the appellate court renders its decision"].)

Consistent with this settled law, appellate courts deciding land use cases apply the law in existence at the time of their decision rather than the law effective at the time of the decision being challenged. (See *Russian Hill Imp. Ass'n v. Board of Permit Appeals of City and County of San Francisco* (1967) 66 Cal.2d 34, 38–39, 45 (*Russian Hill*); see also Supp. Br. 8–9, fn. 1; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 125 ["It is the prevailing rule that a reviewing court will apply the law in existence at the time of its decision rather than at the time the permit was denied"].) This rule prevents appellate courts from issuing orders that contradict current legislative provisions, and requires them to enforce "existing legislation." (*Russian Hill*, at p. 38, fn. 9.) Accordingly, this Court should apply AB 1307 to decide this appeal.[1]

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[1] Project opponents suggest that AB 1307 is not retroactive. (E.g., Supp. Ans. Br. 19.) But, the retroactivity cases they cite involve inapposite situations involving fully completed acts where it would potentially be unfair to change what law is applied. (See, e.g., *J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1571.) Here, by contrast, the governing rule is that the appellate court applies the law analyzing the EIR that is current at the time of its decision. This is fair to all sides. Project opponents also quibble with whether or not AB 1307 is declarative of existing law. (E.g., Supp. Ans. Br. 10.) As explained above and in UC Berkeley's supplemental opening brief (Supp. Br. 8–9, fn. 1), AB 1307 is currently in effect and thus applies here whether or not it represents a change in the law. But, AB 1307 is intended to be declarative of existing law. The author explained that AB 1307 "would also reestablish existing

B. Under AB 1307, the People's Park EIR did not need to analyze students' propensity to be noisy.

"Good Neighbor concedes that new CEQA section 21085 prevents the court from requiring project-level CEQA analysis of the effects of 'social noise' associated with Housing Project #2 as sited in People's Park." (Supp. Ans. Br. 8–9, footnote omitted.) Accordingly, this Court should reverse the Court of Appeal's erroneous decision concluding that UC Berkeley's EIR for the People's Park project was deficient for not considering the potential noisiness of students who will live there. (See OBOM 28–34; RBOM 12–36; Supp. Br. 7–8.)

C. Under AB 1307, the People's Park EIR did not need to re-analyze alternatives discussed in the LRDP.

"Good Neighbor concedes that its claim arising . . . from the EIR's failure to analyze alternative locations for Housing Project #2 is moot . . . [b]ecause the project meets the criteria specified in new CEQA section 21085.2 for exemptions from further CEQA review." (Supp. Ans. Br. 20.) Accordingly, this Court should likewise reverse the Court of Appeal's erroneous decision

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precedent that minor and intermittent noise nuisances, such as from unamplified human voices, be addressed through local nuisance ordinances and not via CEQA. As such, no longer could CEQA consider 'people as pollution.' " (UC Berkeley Second MJN 32.)

concluding that UC Berkeley's EIR for the People's Park project was deficient. (See OBOM 45–59; RBOM 37–42; Supp. Br. 9–10.)[2]

Project opponents then raise theoretical and speculative questions about future housing projects that UC Berkeley might construct consistent with the LRDP and ask the Court to advise now how it would decide those questions. (Supp. Ans. Br. 20–26.) This Court should decline the request to issue a purely advisory opinion. (See *Vandermost v. Bowen* (2012) 53 Cal.4th 421, 452 [The prohibition on advisory opinions " 'is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion' "]; *People v. Slayton* (2001) 26 Cal.4th 1076, 1084 ["As a general rule, we do not issue advisory opinions indicating ' "what the law would be upon a hypothetical state of facts" ' "].)

If and when those projects are approved for construction, any legitimate challenges to them can be raised in connection with the CEQA process UC Berkeley will undertake for each housing project—not now.

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[2] See *Yerba Buena Neighborhood Consortium, LLC v. Regents of University of California* (Sept. 20, 2023, A166091) ___ Cal.App.5th ___ [p. 19]) [" '[A]n EIR need not study in detail an alternative that . . . the lead agency has reasonably determined cannot achieve the project's underlying fundamental purpose' "].

II. Project opponents' arguments against the LRDP portion of UC Berkeley's EIR also lack merit. The Court of Appeal's contrary decision should be reversed.

A. Project opponents' continued hostility toward new student enrollment seeks to reintroduce an issue this Court already declined to review.

Project opponents now focus their "social noise" argument exclusively on an argument that the LRDP will somehow cause enrollment increases at UC Berkeley and those additional students will engage in noisy behavior. (E.g., Supp. Ans. Br. 11–13.) Project opponents made this argument below and lost in the Court of Appeal.

The Court of Appeal recognized the "problem with Good Neighbor's argument is that it ignores the plan's limited purpose and scope. The plan deliberately keeps separate the complex annual process for setting student enrollment levels." (*MUCGN*, *supra*, 88 Cal.App.5th at p. 672.) The Court of Appeal thus concluded that "nothing in CEQA section 21080.09 indicates that the Legislature intended to force the Regents to consider alternatives to its process for setting enrollment levels whenever they adopt a new development plan. Indeed, in a recent amendment to the statute, the Legislature exempted enrollment and enrollment increases from the definition of a project under CEQA."[3] (*MUCGN*, *supra*, 88 Cal.App.5th at p. 676.)

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[3] In their Supplemental Answer Brief, project opponents ignore the Legislative amendments that exempted enrollment increases from the scope of CEQA projects. They improperly rely on a

Project opponents then petitioned for review asking this Court to decide whether the LRDP portion of UC Berkeley's EIR could "omit analysis of a lower enrollment and population growth alternative." (Make UC a Good Neighbor PFR 9.) Project opponents challenged the Court of Appeal's "conclusion that the LRDP's campus enrollment and population plan is not part of the LRDP 'project.' " (Make UC a Good Neighbor PFR 24.) In short, they urged this Court to grant review and decide whether UC Berkeley's enrollment was too high as part of its review of the LRDP. (See Make UC a Good Neighbor PFR 24–44.)

This Court denied project opponents' petition for review. (May 17, 2023 Order (S279242).) At the same time, this Court granted UC Berkeley's petition for review to address: (1) whether CEQA requires public agencies to consider as an environmental impact the general behavioral noise certain people, in this case students, might bring to a community, and (2) whether an agency is required to revisit alternative locations for a proposed site-specific project that has already been analyzed within a programmatic EIR. (*Ibid.*; see UC Berkeley PFR 8.)

"[T]he parties must limit their briefs and arguments" to the issues this Court has specified and those "fairly included in them." (Cal. Rules of Court, rule 8.516(a); see *Southern Cal. Ch.*

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former version of CEQA section 21080.09, which the Legislature has since amended, and case authority construing the now-amended provision. (Supp. Ans. Br. 11, citing *Save Berkeley's Neighborhoods v. Regents of University of California* (2020) 51 Cal.App.5th 226, 239 [interpreting former version of section 21080.09 that did not expressly exclude enrollment increases from the definition of "project" as it does now].)

of Associated Builders etc. Com. v. California Apprenticeship Council (1992) 4 Cal.4th 422, 434 & fn. 10 [declining to address issue not included with those on which the Court had limited review].) The Court "may decide any issues that are raised or fairly included in the petition or answer." (Cal. Rules of Court, rule 8.516(b)(1).) An issue on which the Court has expressly *denied* review can by no stretch be fairly included within other issues on which the court granted review.

Accordingly, the question of whether the LRDP will increase student population is not before this Court, cannot properly be briefed, and should not be decided here.

B. The Court of Appeal erroneously invalidated the portion of the EIR related to the LRDP by importing stereotyping and bias into CEQA.

As the Court of Appeal explained, a significant part of project opponents' complaint about social noise as it relates to the EIR's analysis of the LRDP is also tied directly to student housing because of "loud student parties in residential areas near the campus." (*MUCGN*, *supra*, 88 Cal.App.5th at p. 685.) Project opponents complain about the effect of more students placed in university housing as contemplated by the various housing projects in the LRDP. (See *id.* at p. 687 [analyzing "the effect of increasing the student population in those neighborhoods" under LRDP plan to "triple the number of undergraduates living at the Clark Kerr campus without studying the potential noise impacts on the surrounding neighborhoods"].)

As to those housing-related challenges to EIR's analysis of the LRDP, AB 1307 bars consideration of the effects of noise by project occupants as part of that analysis. (Supp. Br. 7–8.) AB 1307 is intended to " 'remove the potential for litigants to challenge residential development based on the speculation that the new residents will create unwanted noises.' " (UC Berkeley Second MJN 42.) Accordingly, the Court of Appeal erred in concluding that UC Berkeley's EIR was deficient for failing to engage in such a speculative and stereotypical analysis of its students.

But even for any non-housing components of the EIR's analysis of the LRDP, the Court of Appeal still erred in requiring UC Berkeley to engage in speculative stereotyping of its future students' behavior to comply with CEQA. (See OBOM 28–34; RBOM 12–36.) Project opponents' basic argument appears to be that since AB 1307 addresses housing, then the Legislature must be endorsing the use of stereotyping and bias in the rest of CEQA. (See, e.g., Supp. Ans. Br. 14–16, 18–19.) This is absurd. To the contrary, AB 1307 is persuasive authority this Court should rely on to conclude that the Court of Appeal erred in more broadly endorsing the use of stereotyping by requiring consideration and analysis of "social noise" in CEQA generally.

Indeed, the legislative history of AB 1307 confirms that the Legislature rejected the broader analysis employed by the Court of Appeal's opinion: "Potentially more alarming, the [Court of Appeal's] ruling specifically notes that noise impacts should be considered because *students* are noisy and more likely to party

than other people. Assuming the behavior of residents, and the resultant impact of their behaviors on the environment, based on their identity sets a precedent to introduce identity-based discrimination into CEQA review." (UC Berkeley Second MJN 32; see 54 [same].)

Project opponents criticize the use of legislative history here. (E.g., Supp. Ans. Br. 18.) But, "[t]he wider historical circumstances of a law's enactment may assist in ascertaining legislative intent" by providing courts with relevant context. (*Busker v. Wabtec Corp.* (2021) 11 Cal.5th 1147, 1157–1158; accord, *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844.) The "legislative history makes even clearer what can be inferred from a close analysis of the statute's text and structure." (*People v. Rodriguez* (2016) 1 Cal.5th 676, 690.) An analysis of relevant legislative history "further bolsters the case for interpreting the statute in a manner that gives some effect" to a specific term, statutory language, scheme, and purpose. (*Id.* at p. 688.) Legislative history aids courts in interpreting a statute, " ' " 'while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose.' " ' " (*Pulliam v. HNL Automotive Inc.* (2022) 13 Cal.5th 127, 137.)

Moreover, " '[t]he rationale for considering committee reports when interpreting statutes is similar to the rationale for considering voter materials when construing an initiative measure. In both cases it is reasonable to infer that those who

actually voted on the proposed measure read and considered the materials presented in explanation of it, and that the materials therefore provide some indication of how the measure was understood at the time by those who voted to enact it.' " (*People v. Cruz* (1996) 13 Cal.4th 764, 795 & fn. 5.) Project opponents argue that the view of a single legislator is not relevant (Supp. Ans. Br. 15), but they cite inapposite cases involving random letters regarding legislation sent by single legislators rather than the formal committee reports UC Berkeley relies on. (See, e.g., *Quintano v. Mercury Casualty Co*. (1995) 11 Cal.4th 1049, 1062–1063 & fn. 5).

Moreover, the Court of Appeal was correct to find that the LRDP does not affect the number of students on campus. (See *MUCGN*, *supra*, 88 Cal.App.5th at pp. 671–674.) Indeed, the 2021 LRDP for UC Berkeley projects that student population could grow from 39,710 in 2018–2019 to about 48,200 by 2036–2037, a one percent annual increase. (AR 57, 9494–9495, 9571–9572.) But the LRDP itself does not determine future enrollment or set future enrollment limits. (AR 9571.)

III. The case is not moot. This Court can and should grant the relief UC Berkeley requests—reversal of the Court of Appeal's judgment.

Project opponents suggest at various places that UC Berkeley's appeal might be moot. (E.g., Supp. Ans. Br. 8–10, 20–21.) It is not. Project opponents seem to confuse the fact that a new law has been passed validating UC Berkeley's argument

that the Court of Appeal's decision should be reversed with the doctrine of mootness.

"[E]nactment of subsequent legislation does not automatically render a matter moot." (*Davis v. Superior Court* (1985) 169 Cal.App.3d 1054, 1057.) Instead, the main question remains whether it is still possible for a court to grant effective relief in a case. (See *In re D.P.* (2023) 14 Cal.5th 266, 276.) For relief to be " 'effective,' " there must be a continuous harm that is redressable or capable of being remedied by the outcome sought. (*Ibid.*, citing *Consolidated Vultee Air. Corp. v. United Automobile* (1946) 27 Cal.2d 859, 865.) Relief is effective when it will have " 'a practical, tangible impact on the parties' conduct or legal status.' " (*Id.* at p. 277, quoting *In re I.A.* (2011) 201 Cal.App.4th 1484, 1490.)

Here, relief in the form of reversal of the Court of Appeal's opinion will affect the parties' conduct, by enabling UC Berkeley to resume construction, and their legal status, by restoring the EIR that the Court of Appeal erroneously invalidated.

Moreover, an appeal should not be dismissed as moot when dismissal would leave intact a lower court's erroneous decision.

For example, in *San Bernardino Valley Audubon Soc. v. Metro. Water Dist*. (1999) 71 Cal.App.4th 382, 403–404, the court did not dismiss the appeal as moot because that "would allow the erroneous trial court decision in favor of Audubon on this issue to stand." (*Id.* at p. 404.) "Such a result would be improper" because when a reviewing court refuses to decide the merits and dismisses an appeal as moot, it would uphold "the judgment

[that] was therefore improperly rendered below." (*Ibid.*) In fact, " 'dismissal of the appeal operates as an affirmance of the judgment [citation], the exact opposite of the reviewing court's intention.' " (*Ibid.*, quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 654, p. 690.)

Likewise here, this Court should reverse the erroneous Court of Appeal decision and validate UC Berkeley's EIR. And it should do so quickly so that the construction on the urgently needed People's Park project can resume.

CONCLUSION

For the reasons set forth in the briefing on the merits and the supplemental briefs, this Court should reverse the Court of Appeal and affirm the validity of UC Berkeley's EIR.

October 9, 2023

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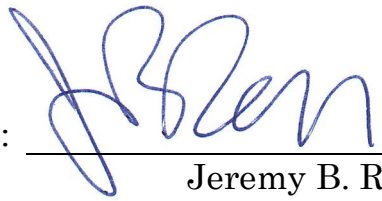

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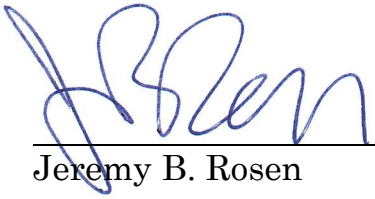

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Make UC A Good Neighbor v. UC Regents
Case No. S279242

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Supreme Court of California
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Supreme Court of California

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Case Name: **MAKE UC A GOOD NEIGHBOR v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (RESOURCES FOR COMMUNITY DEVELOPMENT)**
Case Number: **S279242**
Lower Court Case Number: **A165451**

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10/9/2023

Date

/s/Jeremy Rosen

Signature

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Last Name, First Name (PNum)

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