Supreme Court Case No. S279242

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

MAKE UC A GOOD NEIGHBORHOOD, et al.,
Petitioners and Appellants
v.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Respondents,

RESOURCES FOR COMMUNITY DEVELOPMENT,
Real Party in Interest.

COMBINED ANSWER TO BRIEFS OF AMICUS CURIAE

After a published opinion of the Court of Appeal,
First Appellate District, Division 5, 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, tel: 510-267-6933, Case No. RG21110142 (Consolidated for Purposes of Trial Only with Case Nos. RG21109910, RG21110157 and 21CV000995)

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I. INTRODUCTION

Make UC A Good Neighbor and The People's Park Historic District Advocacy Group ("Good Neighbor") hereby answer the amicus curiae briefs filed in this action by City of Berkeley ("Berkeley"), the League of California Cities and the California State Association of Counties ("LCC"), and The Two Hundred for Homeownership ("The 200").

II. ARGUMENT

A. New CEQA Section 21085, Adopted in AB 1307, Is Not Declarative of Existing Law, Nor Does it Moot Good Neighbor's Social Noise Claim.

Like the Regents of the University of California ("UC"), Amici fail to address the relevant questions posed by the adoption of AB 1307, i.e., whether it moots any of Good Neighbor's pending claims by making it impossible for the Court to grant effective relief, and if so, whether the Court should nevertheless decide the claims because they raise issues of broad public interest that are likely to recur. (See Good Neighbor's Supplemental Answer Brief ("SAB"), pp. 8–10.)

Instead, like UC, Amici appears to assume that new CEQA section 21085, adopted in AB 1307, is declarative of existing law regarding noise impacts, but without citing any case law governing this determination and without responding to Good Neighbor's arguments that it is not declarative of existing law. Most conspicuously, Amici's arguments are based entirely on excerpts from the legislative history that are irrelevant because section 21085 is not ambiguous and the excerpts represent only

the views of the bill's author. ("SAB"), pp. 17–20.)

Amici also fail to respond to Good Neighbor's argument that because the Legislature is presumed to be aware of CEQA section 21080.09's requirement that an environmental impact report for a Long Range Development Plan ("LRDP EIR") assess the "environmental impact of academic and campus population plans," the Legislature's refusal to create a CEQA exemption for social noise for all CEQA projects rather than just residential projects shows that the Legislature does not view new section 21085 as declarative of existing law. (Pub. Resources Code, § 21080.09(d).)

"A recognized rule of statutory construction is that the expression of certain things in a statute necessarily involves exclusion of other things not expressed—*expressio unius est exclusio alterius*. (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal. App. 3d 397, 403.) Here, the Legislature expressed an intent to provide an exemption for residential projects, not LRDPs and their population plans. (SAB, 14.) Amici's attempt to obtain from this Court what they failed to obtain from the Legislature, i.e., a CEQA exemption for social noise for all CEQA projects rather than just residential projects. This Court should decline Amici's invitation to legislate

B. Social Noise Is Cognizable Under CEQA.

1. Social noise is a physical environmental effect.

Amici argue that social noise is not cognizable under CEQA because it is merely a social effect and CEQA does not concern social and economic effects. (Berkeley, 9; LCC, 8, 9-11.) Amici are

incorrect.

The EIR defines "sound" as "a disturbance created by a vibrating object, which when transmitted by pressure waves through a medium such as air, is capable of being detected by the human ear or a microphone" and "noise" as "sound that is loud, unpleasant, unexpected, or otherwise undesirable." (AR 10040.) Thus, noise is a "physical change in the environment."(CEQA, § 21065; see also Guidelines, Appendix G, § XII, subds. (a), (d) [noise impacts cognizable]; *Mission Bay Alliance v. Office of Community Inv. & Infrastructure* (2016) 6 Cal.App.5th 160, 192-193 (*Mission Bay*) [upholding Appendix G noise thresholds].) (See AB, 36-40.)

Amici's reliance on *Preserve Poway v. City of Poway* (*Preserve Poway*) (2016) 245 Cal.App.4th 560, 581–582, is misplaced. (LCC, 9.) The holding in that case that a change in "community character" is a social and psychological impact rather than not an impact on the physical environment is inapposite to noise, which is an impact on the physical environment. The same is true of the loss of parking at a state park at issue in *Save Our Access-San Gabriel Mountains v. Watershed Conservation Authority* (2021) 68 Cal.App.5th 8, 26–27; the case has no bearing on whether noise is an impact on the physical environment.

Thus, whether caused directly or indirectly, noise is a physical impact on the environment with recognized health impacts cognizable under CEQA. (AR10042 [EIR identifying health effects], 1594-95 [Watry identifying health effects].) It cannot be dismissed as a mere social or economic effect.

2. Social noise is not a new species of impact.

Amici argue that social noise is an entirely new species of impact, never before recognized by the courts. (The 200, 9 [addition of social noise impact is an" impermissible expansion of CEQA beyond statutory requirements"], 10 [referencing "addition of a new CEQA impact"]; Berkeley, 7 ["entirely new realm of analysis"]; LCC, 9 ["No court has ever required analysis of social noise of project users"].)

In fact, courts recognize social noise impacts. (Good Neighbor's Answer Brief ("AB"), 39, citing *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 733-34 (*Keep Our Mountains Quiet*) [crowd noise from party, including vocal noise, may be significant impact] and *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 937 [event noise]; see also *Mission Bay, supra,* 6 Cal.App.5th at 92 [off-site crowd noise from events may be significant if it exceeds General Plan standards].)

Responding to specific noise issues, Courts have reasonably found that many types of noise impacts may be significant and that new metrics to determine noise significance may be required. (*Berkeley Keep Jets Over the Bay Comm. v Board of Port Comm'rs* (2001) 91 Cal.App.4th 1344, 1377, 1381 (*Berkeley Keep Jets*) [airport expansion EIR may not rely only on a 24-hour average noise where evidence shows potential significant impacts from increase in the number of nighttime flights and episodic increases in noise levels in quiet residential areas]; *King & Gardiner*

Farms, LLC v. County of Kern (2020)45 Cal.App.5th 814, 893-894 [use of single metric for threshold of significance for construction and operational noise insufficient where evidence shows agency relied only on absolute threshold and ignored significance of noise increases to quiet areas]; see also Keep Our Mountains Quiet at 732 [improper reliance on single absolute noise threshold].)

Indeed, courts have recognized new types of impacts that were not previously identified by statute or regulation. (*E.g., Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1205-1207 [reviewing cases from inception regarding obligation to assess urban decay impacts].) Noise is a recognized impact under the CEQA Guidelines, and, even if it were not, reliance on the significance thresholds in the CEQA Guidelines cannot "foreclose consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.)

3. Offsite impacts are cognizable under CEQA.

Amici argue that offsite noise impacts are not cognizable. (The 200, 12 ["social behavior beyond the project boundary" not cognizable]; Berkeley, 12-13 [objecting to consideration of "noise arising from off-campus, unsupervised housing"].)

The issue here is not social noise generated at UC on-campus housing. It is the off-site noise social noise generated by the introduction of thousands of new students into Berkeley, whether housed in on-campus dorms or off-site. CEQA is clear

that an agency may not ignore offsite impacts.

> CEQA requires a public agency to mitigate or avoid its projects' significant effects not just on the agency's own property but "on the environment" (Pub. Resources Code, § 21002.1, subd. (b), italics added), with "environment" defined for these purposes as "the physical conditions which exist within the area which will be affected by a proposed project" (id., § 21060.5, italics added).

(*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 359-360; see also *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369 [EIR cannot ignore off-site effects]; *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1066, 1081-1082 [legal error not "to consider the extraterritorial effects" of indirect urban decay effects "in neighboring cities"]; Guidelines § 15360 ["'Environment' means the physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. The area involved shall be the area in which significant effects would occur either directly or indirectly as a result of the project."]; Slip Op. at 36-37 [geographic area of analysis includes "any area where direct or indirect impacts may occur," citing Guidelines § 15360 and cases].)

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4. The Court of Appeal ruling does not bypass normal legislative and rulemaking processes.

Amici argue that social noise is not recognized in the CEQA Guidelines and that judicial recognition of social noise as a CEQA cognizable impact would bypass "the normal legislative and rulemaking processes" because "there has been no rulemaking, public review or stakeholder engagement process to consider in a public forum the analytical methodologies, significance criteria, and feasible mitigation measures required to adequately address demographically specific CEQA impacts, such social noise impacts caused by loud college students." (The 200, 14, 16-17.)

However, as The 200 admits, the 2018 rulemaking that revised the CEQA guidelines, in which advocates could participate, expressly permits agencies to rely on general plan standards and local ordinances for noise significance thresholds. (CEQA Guidelines Appendix G: Environmental Checklist Form, XII, Noise [identifying exceedance of noise standards in general plan or noise ordinance as threshold of significance]; see also *Mission Bay, supra*, at 193 [upholding use of general plan standards as a threshold of significance]; *King and Gardiner*, *supra*, 883-884, 889.) General Plans, including their noise standards, are also adopted through an open, public process available to participation by housing advocates. (Gov. Code §§ 65350 et seq.)

Here, both the EIR and Good Neighbor's expert relied on the local general plan noise standards as the threshold of significance. (AR10052, 1061-62, [EIR threshold of significance];

AR1601 [Watry].) Good Neighbor's expert demonstrated based on substantial evidence, including unchallenged noise level data, that social noise would exceed those general plan noise standards, and that the intensity and frequency of significant noise impacts would increase with increasing enrollment. (AR1601-1603.)

5. Assessing social noise impacts of non-housing projects does not frustrate other housing policies.

Amici argue that consideration of social noise would violate the rule that requires construing statutes in harmony with other statutes because it "would render all prior CEQA documentation prepared for the millions of new housing units required by RHNA vulnerable to new CEQA lawsuit claims." (200, 15-16.) Amici argue that requiring social noise analysis would "dramatically impact" all housing approvals and chill infill development and CEQA streamlining. (Berkeley, 8, 9-12; 200 at 19-20.)

Amici's argument that requiring assessment and feasible mitigation of social noise from college campus expansion through the LRDP process will frustrate housing plans or housing development is speculation for which they offer no evidence. In fact, as The 200 admits, AB 1307 relieves housing projects of the need to assess social noise. (The 200, 21), The obligation to assess potentially significant social noise impacts therefore only applies to non-residential projects and to adoptions of programs such as general plans and LRDPs. And noise assessment and mitigation has long been a required element of the General Plan process. (Gov. Code § 65302(f).)

CEQA streamlining provisions applicable to residential projects covered by program EIRs will not be impeded by a holding that the LRDP EIR was and is required to assess social noise in light of the substantial evidence that it may be significant in the specific case of the UC Berkeley LRDP. That is because, under AB 1307, project-level CEQA reviews for future residential projects, whether tiering from the LRDP EIR or from a general or specific plan EIR, do not need to assess social noise.

Further, if the obligation to evaluate social noise impacts adds effort to program EIRs for general plans, specific plans, and LRDPs, that was a choice by the Legislature. In particular, the Legislature chose not to exempt programs EIRs for non-residential projects from the obligation to assess social noise in AB 1307, which applies only to residential projects. At most Amici have adduced a policy argument, which is the province of the Legislature, not the courts.

C. The Court of Appeal's Ruling Does Not Invite Prejudice or Bias in the CEQA Process.

Amici continue to raise the unsupported claim that recognizing social noise as a potential impact will inevitably open the way for bias and prejudice in CEQA analysis. (The 200 at 9 [objecting to analysis based on "perceived demographic and behavioral stereotypes"], 10 [objecting to analysis based on a "specific demographic"], 15 [objecting to "differentially assessing the demographics" of housing projects]; Berkeley at 6 [would infect CEQA with bias and fear-mongering based solely on prejudice], 8 [would promote racism, classism, and other

prejudice]; LCC at 8 [objecting to analysis based on membership in a social or cultural group], 11-13 [injects speculation based on prejudice and bias].)

Here "racism, classism, and other prejudice" (Berkeley, at 8) are not at issue. (AB, 30-35.) The substantial evidence in this record is not based on "perceived demographic and behavioral stereotypes" (The 200, 9), but on the documented history of noise disturbances from college parties, which have increased due to increased enrollment. (Slip Op, 34-36.) Neither prejudgment nor biased targeting of a "demographic" was required to adduce substantial evidence of a significant unanalyzed impact. The substantial evidence offered by the public was the observation of the past relation between increased enrollment and significant impacts from noise disturbances. Indeed, the EIR admits that social noise from student parties and alcohol has been a problem; it simply fails to assess it. (AR10067; Slip Op, 34, 35-36 [EIR admissions that loud student parties are a real problem in the residential neighborhoods].)

Inventing hypotheticals to speculate on the possibility of prejudice, Amici identify various types of noise impacts that are not at issue in this case, such as children's birthday parties, "musical choices of teenagers of different races," low-income housing with multi-generational households, and parks "serving certain groups." (The 200, 17-18; LCC, 12-13.) As the Court of Appeal found, this is a "straw man argument" because here the entire record supports the finding that student social noise may be a significant impact. (Slip Op, 35.) As the Court of Appeal

found, this is a "straw man argument" because here the entire record supports the finding that student social noise in Berkeley's residential neighborhoods may be a significant impact made worse by adding thousands more students. (Slip Op, 35, 36.) As the Court of Appeal found, CEQA claims like those hypothesized by Amici have either been found to be "a frivolous CEQA claim under existing case law" or would be barred under CEQA's rule that "stereotypes, prejudice, and biased assumptions" are not substantial evidence. (Slip Op., 37, 34.)

D. The Court of Appeal's Ruling Does Not Invite Speculation in the CEQA Process.

Amici argue that there is no available methodology to assess social noise, therefore, any such assessment would be speculative. (The 200, 10 ["no recognized scientific methodologies of measurement", 17 [referencing "presently unknowable new technical methodologies"], 22 [claiming there may be no "accepted methodology;" Berkeley, 6 [social noise analysis "would infect CEQA's technical and science-based process with bias, speculation, and uncertainty;" LCC, 8 [speculation invites CEQA abuse], 12 [no clear methodology].)

Amici are incorrect, both factually and legally. As noted, the record contains substantial evidence that social noise may be a significant impact, that it increases due to increased enrollment, and that UC's efforts to control it have been ineffective. (AB, 21-25, 31-32; Slip Op, 32-33, 35-36.) The evidence is extensive and well documented. (See e.g., AR1666, 1715-16 [City Council findings regarding "noise disturbances" and

"nuisance conditions," due to "consumption of large amounts of alcoholic beverages," which "have become chronic" due to "heavy demand for student housing" and "numerous loud and unruly parties"]; AR1674 [120 noise warnings in 9 months]; AR1678-1684 [police report compilation]; AR1687-97, 1733-1743 [representative 2020-2021 noise complaints]; AR1618-19 [testimony of member of UC noise abatement group that mitigation was ineffective after 2017].)

Further, expert evidence reasonably projected that the addition of another 12,071 persons to the Berkeley campus, of whom 5,068 would be undergraduates, would increase the incidence and severity of significant social noise impacts. (AR1595-1603 [Watry].) The Court of Appeal found that the evidence of a continuing noise problem cannot "be waved away as speculation, unsubstantiated opinion, or bias." (Slip Op. 36.) To the contrary, this "evidence meets the fair argument standard."

> Given the long track record of loud student parties that violate the city's noise ordinances (the threshold for significance), there is a reasonable probability that adding thousands more students to these same residential neighborhoods would make the problem worse. (See Guidelines, Appendix G, XIII, subd. (a), § 15384. Subd. (b) [substantial evidence includes reasonable assumptions predicated on facts].) The Regents suggestion that new students might instead "socializ[e] quietly on the internet" is conjecture, unsupported by the record. [citation] New students arrive every year, yet the noise problem has persisted since at least 2007.

(Slip Op., 36.)

Amici's claim that there is no available methodology fails. (AB, 44-45.) Here an expert in acoustics using decibel levels of the average male voice taken from the unchallenged reference source, the Handbook of Noise Control, Second Edition, found that vocal noise at social events would exceed the exterior noise limits for residential districts, which the EIR adopted as the relevant threshold of significance. (AR1601 [Watry]; see AR10052, 1061-62, [threshold of significance].)

Also, the lack of a single universally accepted methodology does not excuse an agency from using its best efforts "to do the necessary work to educate itself about the different methodologies that are available." (*Berkeley Keep Jets, supra,* 91 Cal.App.4th at 1370-71, citing Guidelines, § 15144.) If a precise technical analysis of an environmental impact is not practical, the agency must make a reasonable effort to pursue a less exacting analysis. (*Citizens to Preserve the Ojai v County of Ventura* (1985) 176 Cal.App.3d 421, 432.)

Here, Amici's argument that social noise analysis is "speculation" is a *post hoc* justification for the EIR's failure to meet the best efforts standard. (Guidelines, § 15144.) The EIR failed to provide either the required "thorough investigation" or the required explanation why the impact is too speculative for evaluation. (Guidelines, § 15145; see Slip Op, 33 ["the EIR does not analyze the issue"]. 35-36 [EIR's failure of analysis despite UC's concession of noise problem and its own data collection]; AR1595-1598 [Watry re EIR failure of analysis].)

III. CONCLUSION

Amici's arguments for reversal of the Court of Appeal ruling on social noise should be rejected for the reasons set forth above and in Good Neighbor's previous briefing.

DATED: October 25, 2023

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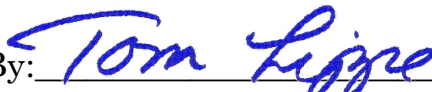
By: 

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Dated: October 25, 2023

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Supreme Court of California

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