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Case No. S279242

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAKE UC A GOOD NEIGHBOR ET AL.

Petitioners and Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.

Respondents.

RESOURCES FOR COMMUNITY DEVELOPMENT

Real Party in Interest.

After a published opinion by 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)

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION: WHY REVIEW OF THE ISSUES THE PETITION PRESENTS SHOULD BE DENIED

Petitioners and Appellants Make UC a Good Neighbor and The People's Park Historic District Advocacy Group ("Appellants") seek to re-litigate the First District Court of Appeal's correct conclusion that Respondents the Regents of the University of California et al. ("Regents") did not violate the California Environmental Quality Act ("CEQA") by declining to analyze an alternative to the Long Range Development Plan ("LRDP") for the University of California, Berkeley ("UCB") through 2036-37 that would reduce or cap student enrollment.

In addition to grossly misstating the facts, Appellants never explain why the issues they present merit Supreme Court review. Though the Petition mentions the grounds for review established in California Rule of Court ("CRC"), rule 8.500, subdivision (b)(1), Appellants do not demonstrate that Supreme Court review is needed either to resolve a conflict in decision or to settle an important question of law. On the issue of the range of alternatives to the LRDP, the Court of Appeal simply applied well settled CEQA authority to the facts of this case. Moreover, with respect to the "legal error" Appellants allege, Appellants openly concede that in its February 24, 2023 Opinion ("Opinion" or "Slip. Op."), the Court of Appeal declined to reach their arguments. This absence of discussion in the Opinion is inherently of no precedential value and is unworthy of this Court's review.

Unlike the issues the Regents presented in their March 28, 2023 petition for Supreme Court review of the same published Opinion, the

Court of Appeal's ruling on the issue of the appropriate range of alternative to the LRDP is consistent with, and complementary to, CEQA, the CEQA Guidelines, and previous CEQA case law addressing the reasonableness of alternatives analyzed in an Environmental Impact Report ("EIR").[1]

Appellants also ask this Court to blindly accept their self-serving and legally erroneous interpretation of the Legislature's recent amendment of Public Resources Code section 21080.09, which they incorrectly claim "makes adoption of a campus population plan part of an LRDP project." (Petition, p. 11.) As demonstrated below, Section 21080.09 says nothing of the sort. More importantly, the Opinion's holding does not depend on Section 21080.09, nor was interpretation of Section 21080.09 at issue in the case below. This case is, therefore, a premature and inappropriate vehicle for review of Appellants' novel, unsupported, and incongruous theory that Section 21080.09, as a matter of law, incorporates student enrollment into the LRDP.

At this juncture, the public interest is best served by leaving the Court of Appeal's holding on the appropriate range of alternatives to the LRDP undisturbed. There is no sound reason for this Court to review the issues Appellants present. (CRC, rule 8.500, subd. (b)(1).)

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[1] CEQA is codified at Public Resources Code, § 21000 et seq. All statutory references are to CEQA unless otherwise indicated. The CEQA Guidelines are found at Cal. Code Regs., tit. 14, § 15000 et seq. They are cited here as "Guidelines, § _____."

FACTUAL AND PROCEDURAL STATEMENT

The Court of Appeal's Opinion, as modified, accurately discusses the factual and procedural background of this case. (Slip Op., at pp. 3-6.) The brief statement below emphasizes relevant portions of the factual background and corrects and clarifies errors in Appellants' petition.

A. The LRDP does not drive population growth; it responds to population projections.

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

Contrary to Appellants' repeated insistence that the LRDP "drives" campus population growth, the LRDP is, in fact, a planning tool that *responds* to projections of potential future population growth. As the Opinion explains:

[T]he process for setting enrollment levels in the UC system is complicated, with multiple players, interests, and trade-offs. By statute, the UC system (as a whole) must plan for adequate space to accept all eligible California resident students who apply as well as eligible transfer students. (See Ed. Code, §§ 66011, subd. (a), 66202.5, 66741.) The California Master Plan for Higher Education requires the system to accept the top 12.5 percent of the state's public high school graduates and eligible transfer students from community colleges. The Legislature sometimes uses the budget process to inject itself into the enrollment debate, as it did in 2016, prompting the largest annual enrollment increase in resident students since World War II, and in 2017, when the university agreed to cap enrollment of nonresident students.

To find places for these students, the university's Office of the President coordinates enrollment annually in an iterative process with [nine] UC campuses, each of which has different enrollment goals and different demands for its academic programs. UC Berkeley is the second-largest campus in the system. The physical capacity of a campus is just one factor in setting enrollment levels; in recent years, four UC campuses, including UC Berkeley, together exceeded their planned capacity by 12,000 students. The Office of the President tracks existing and projected enrollment data, as well as annual and long-term plans for the numbers and types of students that can be accommodated at each campus. The university prepared its last long-term enrollment plan in 2008 for a 13-year period; it is currently developing a new long-term plan.

(Slip. Op., at pp. 10-11; see also AR10098; AR14209-21; AR14174-78.)

UCB is a 150-year-old urban campus with the lowest percentage of student beds in the UC system, and the high cost of housing in the San Francisco Bay area limits the availability of non-UC housing options near campus. (AR9549; AR38-52.) The lack of campus housing adversely affects the overall student experience, challenges UCB's ability to recruit faculty, graduate students, and postdoctoral scholars, and impacts the local residential housing market. (AR1206.) The LRDP strives to "[i]mprove the existing housing stock and construct new student beds and faculty housing units in support of the Chancellor's Housing Initiative" to provide as many as 11,731 beds to students, faculty and staff, more than doubling existing housing capacity. (AR9558; AR9580; AR58; AR7.)

Recognizing the urgent need to address the shortage of available student housing, the LRDP's Housing Program also includes two site-specific student housing projects known as Anchor House (Housing Project #1) and the People's Park Project (Housing Project #2). (AR9549-50.)

B. Pursuant to Section 21080.09, the LRDP EIR considered effects relating to changes in campus enrollment levels.

Section 21080.09 as originally chaptered, provided, among other things, that approval of LRDPs requires the preparation of an EIR pursuant to CEQA, and that environmental effects relating to changes in enrollment at campuses of higher education were to be considered in the EIR prepared for the LRDP. (§ 21080.09, subd. (b), Stats. 1989, ch. 659.) The originally chaptered version of Section 21080.09 was in effect when UCB prepared the LRDP EIR in March 2021. (AR10097.) Therefore, the EIR analyzed, at

a programmatic level, the physical environmental effects of projected increases in campus enrollment through 2036-37. (AR10109.)

Appellants misrepresent the record in asserting the EIR "failed to mitigate [the] impact" of student population growth, including air quality impacts. (Petition, p. 19.) In fact, the EIR explained that at buildout of the LRDP, despite growth in the UCB population, annual vehicle miles travelled ("VMT") per person (students, faculty, and staff) "is anticipated to decrease by 11 miles per person, or 1 percent compared to existing conditions." (AR9701.) Therefore, the LRDP would not conflict with Bay Area Air Quality Management District's 2017 Clean Air Plan, which requires that VMT increase by less than or equal to the projected population increase (e.g., generate the same or less VMT per population). (*Ibid.*) The EIR acknowledged, however, that student population had grown at a faster rate than anticipated in the prior 2005 LRDP and, therefore, identified a conflict with the population assumptions in the 2017 Clean Air Plan. (AR9702.) The EIR mitigates this conflict with implementation of Mitigation Measure POP-1. (*Ibid.*) This measure requires UCB to, annually, "provide a summary of LRDP enrollment and housing production data, including its LRDP enrollment projections and housing production projections, to the City of Berkeley and the Association of Bay Area Governments ["ABAG"], for the purpose of ensuring that local and regional planning projections account for UC Berkeley-related population changes." (AR10118.)[2] The Regents determined that implementation of

[2] Notably, the Court of Appeal rejected Appellants' attack on Mitigation Measure POP-1, correctly determining the EIR could rely on the City and ABAG to carry out their responsibilities to plan for regionally required

Mitigation Measure POP-1 will ensure "that local and [regional] projections are prepared with knowledge of UC Berkeley enrollment and housing projections. Early coordination with ABAG would ensure that the BAAQMD's Clean Air Plan accounts for UC Berkeley-related population changes." (AR181.) However, because "no additional mitigation measures are available to prevent the potential conflict with the assumptions in *current* 2017 Clean Air Plan from the increase in student population at UC Berkeley," the Regents found the impact significant and unavoidable. (*Ibid.*, emphasis added.)

Throughout the EIR, UCB took seriously its obligation under Section 21080.09 to consider environmental effects related to changes in enrollment. (AR10109 [EIR evaluates population growth impacts on "increased demand on transportation infrastructure, utilities, public services, and recreational facilities, ... increases in ambient noise levels, emissions of criteria air pollutants and toxic air contaminants, and greenhouse gas emissions."].)

C. The Legislature amended Section 21080.09 in March 2022.

On March 14, 2022, approximately nine months after the Board of Regents approved the LRDP, the Legislature passed and the Governor signed SB 118, amending Section 21080.09 effective immediately. (Sen. Bill No. 118 (2021-2022 Reg. Sess.) ["SB 118"] § 1.) For ease of the

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infrastructure. (Slip. Op., pp. 39-41, citing *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 365.) Appellants did not petition the Court of Appeal for rehearing of this (or any other) issue.

Court's reference, and because Appellants present it inaccurately, the entirety of amended Section 20180.09, compared to the law in effect prior to amendment, is reproduced below:[3]

> 21080.09. (a) For purposes of this section, the following definitions apply:
>
> (1) "Public higher education" has the same meaning as specified in Section 66010 of the Education Code.
>
> (2) ~~"Long range~~ "*Long-range* development plan" means a physical development and land use plan to meet the academic and institutional objectives for a particular campus or medical center of public higher education.
>
> (b) The selection of a location for a particular campus and the approval of a ~~long range~~ *long-range* development plan are subject to this division and require the preparation of an environmental impact report. ~~Environmental effects relating to changes in enrollment levels shall be considered for each campus or medical center of public higher education in the environmental impact report prepared for the long range development plan for the campus or medical center.~~
>
> (c) The approval of a project on a particular campus or medical center of public higher education is subject to this division and may be addressed, subject to the other provisions of this division, in a

[3] Also available at: https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220SB118&showamends=true.

tiered environmental analysis based upon a ~~long range~~ *long-range* development plan environmental impact report.

(d) Compliance with this section satisfies the obligations of public higher education pursuant to this division to consider the environmental impact of academic and ~~enrollment~~ *campus population* plans as they affect campuses or medical centers, provided that any such plans shall become effective for a campus or medical center only after the environmental effects of those plans have been analyzed as required by this division in a ~~long range~~ *long-range* development plan environmental impact report or tiered analysis based upon that environmental impact report for that campus or medical center, and addressed as required by this division. *Enrollment or changes in enrollment, by themselves, do not constitute a project as defined in Section 21065.*

(e) (1) If a court determines that increases in campus population exceed the projections adopted in the most recent long-range development plan and analyzed in the supporting environmental impact report, and those increases result in significant environmental impacts, the court may order the campus or medical center to prepare a new, supplemental, or subsequent environmental impact report. Only if a new, supplemental, or subsequent environmental impact report has not been certified within 18 months of that order, the court may, pursuant to Sections 525 and 526 of the Code of Civil Procedure, enjoin increases in campus population that exceed the projections adopted in the most recent long-range

development plan and analyzed in the supporting environmental impact report.

(2) Notwithstanding any other provision of this division, any injunction or judgment in effect as of the effective date of this subdivision suspending or otherwise affecting enrollment shall be unenforceable.

(3) The amendments made to this section by Senate Bill 118 of the 2021–22 Regular Session shall apply retroactively to any decision related to enrollment or changes in enrollment made before the effective date of that bill.

D. The Superior Court upheld the EIR and the Regents' approvals; the Court of Appeal reversed on two grounds.

On October 28, 2021, Appellants filed their First Amended and Supplemental Petition for Writ of Mandate in the Superior Court challenging the LRDP and the People's Park Project. (Joint Appendix ["JA"] 7-25.) Two other organizations also filed petitions, which were consolidated with Appellants' case for purposes of trial only. On August 2, 2022, the trial court entered its order and judgment rejecting all of the petitioners' challenges and denying their petitions for writ of mandate. (JA313-329.) Appellants filed their notice of appeal of the Judgment the same day. (JA331.)

After briefing, a tentative decision, supplemental briefing, and oral argument, the Court of Appeal on February 24, 2023, issued its decision reversing the judgment and remanding the matter to the Superior Court to vacate its order and judgment denying Appellants' petition for writ of mandate and enter a modified judgment consistent with the Court of

Appeal's conclusions. (Slip Op., at pp. 44-45.) Specifically, the Court agreed with Appellants that the EIR did not analyze a reasonable range of alternative locations to one of the two housing projects analyzed in the EIR - the People's Park Project. (Slip Op., at pp. 17-27.) It also agreed with Appellants that—as to both the LRDP and the People's Park Project—the EIR "failed to analyze potential noise impacts from loud student parties in residential areas near the campus, where student parties have been a problem for years." (Slip Op., at pp. 30-38.)

The Court of Appeal disagreed with Appellants, however, that the EIR failed to analyze an alternative to the LRDP that would limit student enrollment, recognizing that the LRDP does not set enrollment levels and an agency "is generally not required to consider alternatives that would change the nature of the project." (Slip Op., at pp. 6-17.) It also rejected Appellants' view that the EIR improperly "piecemealed" the LRDP by limiting the geographic scope of the plan to the campus and nearby properties. (*Id*., at p. 28-30.) Finally, the Court of Appeal rejected Appellants' argument that the EIR failed to properly address the impacts of population growth and the potential "indirect" displacement of existing residents by new residents competing for housing. (*Id*., at pp. 38-44.)

LEGAL DISCUSSION

I. THE OPINION'S HOLDING THAT THE LRDP EIR DID NOT NEED TO CONSIDER AN ALTERNATIVE THAT WOULD

LIMIT STUDENT ENROLLMENT DOES NOT WARRANT REVIEW

This Court's review is appropriate when "necessary to secure uniformity of decision or to settle an important question of law." (CRC, rule 8.500, subd. (b)(1).) Here, Appellants make no attempt to identify what important question of law or conflict in appellate law they believe warrants Supreme Court review. Instead, they focus exclusively on the standard of review applicable to the merits of the underlying case they are trying to relitigate. (Petition, pp. 21-22.) This alone is reason to deny Appellants' petition for review.

Should the Court consider the petition, it will see the Opinion's holding that the LRDP EIR was not required to analyze an alternative that would limit student enrollment does not make "new law" or ignore important precedent. Instead, it applies the existing law to the specific facts of the case. Appellants' disagreement with the holding does not make it incorrect or otherwise subject to review.

A. This case does not squarely present Appellants' new arguments mischaracterizing Section 21080.09, which does not make adoption of a "population plan" part of an LRDP.

Appellants' argument hinges on a misleading, inaccurate, and novel interpretation of law never raised at trial or on appeal. Specifically, Appellants now argue that Section 21080.09, as a matter of law, makes enrollment part of the LRDP. (Petition, pp. 24-28 ["the Legislature has made the adoption of a population plan part of any LRDP EIR's project definition and purpose as a matter of law"].) Because this misguided

argument was never presented below, this case does not squarely present the issue, and the Supreme Court should not consider it. (See CRC, rule 8.500, subd. (c)(1).) To the extent there could, in the future, be questions about the proper interpretation of Section 21080.09, this case is patently not the correct vehicle to address those.

Appellants' interpretation of Section 21080.09 is also, on its face, riddled with errors, defeating this Court's ability to even properly assess Appellants' request.

First, Appellants erroneously claim "[e]ach UC campus is required to periodically adopt an LRDP." (See Petition, pp. 15 and 24, citing Ed. Code, § 67504.) In fact, Education Code section 67504 does not require UC campuses to adopt long range development plans; it only finds and declares that, periodically, they do develop such plans. (Ed. Code, § 67504, subd. (a)(1).) Notably, the Court of Appeal clarified this in its order granting modification. (Petition, Exh. 2, p. 1.)

Second, Appellants are incorrect that, pursuant to subdivision (c)(1) of Section 67504 of the Education Code, an "LRDP must be 'based on academic goals and projected student enrollment levels, for an established time horizon.'" (Petition, p. 25, citing Ed. Code, § 67504, subd. (c)(1).) Subdivision (c)(1) does not apply to LRDPs prepared by UC campuses. It applies exclusively to "physical master plans" prepared by California State University ("CSU") campuses. (Ed. Code, § 67504, subd. (c)(1).)

Third, Appellants inappropriately insert bracketed text within their quotation of the legislative history of the Section 21080.09 that does not appear in the original text. (Petition, p. 25, replacing "constitute compliance with CEQA" with "comply with CEQA".) While the original language

might be ambiguous, Appellants may not unilaterally modify the legislative history to mislead the Court into believing it says what Appellants would like.

Fourth, Appellants incorrectly claim the recent amendments to Section 21080.09 are consistent with an "established mandate to adopt a population plan." (Petition, p. 26.) No such mandate exists. Whereas Section 20180.09, subdivision (d) mentions "campus population plans," neither that section nor any other statutory authority mandates adoption of such plans or even defines the term. Nor do Appellants define what they mean by "population plan" or "campus population plan." Regardless, campus population plans are not part of the LRDP, as discussed below.

Based on these errors, ambiguities, and mischaracterizations of law, Appellants ask this Court to accept, as a matter of law, that "the Legislature has tightly integrated a campus' long-term enrollment or population plan into its LRDP." (Petition, p. 27.) Correctly read, Section 21080.09 does nothing of the kind. In fact, such a reading would directly contradict the Legislature's recent exemption of enrollment and changes in enrollment from the definition of a project under CEQA. (§ 21080.09, subd. (d).) As the Court of Appeal correctly observed, "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." (Slip. Op., at p. 17.)

This Court should not accept review of the issues Appellants present based on an unpreserved, factually inaccurate, and legally erroneous argument.

B. The Opinion is based on the correct factual understanding that the LRDP does not establish or drive student enrollment or campus population.

Appellants next argue the Court of Appeal incorrectly determined that a lower enrollment alternative would change the nature of the LRDP, excusing UCB from having to evaluate it. (Petition, pp. 27-33.) But the Court of Appeal broke no new legal ground in rejecting Appellants' claim that the EIR was required to analyze in detail a "reduced enrollment alternative." The Opinion is based on clear application of well-established law to the facts of this case.

As the Opinion states, Appellants' main argument is that "the EIR's range of alternatives to the LRDP is too narrow without at least one alternative that would limit student enrollment." (Slip. Op., at p. 11.) The Court of Appeal found the problem with this argument "is that it ignores the plan's limited purpose and scope," which does not include "the complex annual process for setting student enrollment levels." (*Ibid*.) The Opinion cites *Marin Mun. Water Dist. v. KG Land California Corp.* (1991) 235 Cal.App.3d 1652 and *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, in support of the rule that an "agency is generally not required to consider alternatives that would change the nature and scope of the project." (Slip. Op., at pp. 11-12.) Appellants do not quarrel with this rule. (Petition, p. 32 ["Even if these cases establish that rule..."].) Instead, they argue it is irrelevant "because a UC campus population plan is an element of its LRDP." (*Id*., pp. 32-33.) As explained above, this argument is based on a faulty interpretation of Section 21080.09. It is also factually incorrect.

In reliance on their misinterpretation of Section 21080.09, Appellants criticize the Opinion for failing to recognize that UCB adopted a "campus population plan" as part of the LRDP. Appellants do not cite the record in support of their claim, nor could they. The record does not include any evidence related to adoption of a "campus population plan" for one simple reason: UCB did not adopt any such plan in connection with approval of the LRDP. Though Appellants refuse to accept it, the LRDP does not determine future UCB enrollment or population, or set a future population limit. (AR14218; see AR14174-78 [Master Response on Population Projections].) Instead, UC enrollment planning is done on a long-range basis, which comprehensively assesses enrollment-related issues such as workforce needs, academic programs, and the ability of UC facilities to meet future needs. (AR10098.) The last Long Range Enrollment Plan was prepared in 2008 and outlined plans for a 13-year period. (*Ibid.*) At the time the Regents approved UCB's LRDP, the UC Office of the President was in the process of developing a new plan, which will examine the physical, academic, and financial capacity to increase enrollment of undergraduate California residents and graduate population at systemwide and individual university levels.[4] (*Ibid.*) Further, as the Board

[4] Without citation to the record or any legal authority, Appellants claim the system-wide enrollment plan "does not determine UC Berkeley's population plan projected in its LRDP." (Petition, p. 31.) Again, there is no "population plan." The enrollment projections identified in the LRDP reflect a reasonable proportion of the increasing enrollment in the UC system as a whole and the demand for a UC Berkeley education in particular, but do not determine future population. Moreover, because Appellants did not petition the Court of Appeal for rehearing on this issue, this Court should not consider it. (See CRC, Rule 8.500, subd. (c)(2), "...as

of Regents found in approving the LRDP, "LRDP population projections are for planning purposes, to establish the LRDP development program, and do not mandate or commit the campus to specific levels of student enrollment or overall growth. In general, enrollment growth is driven by a directive to absorb a reasonable proportion of the increasing enrollment in the UC system as a whole, as mandated by the State of California. Demand for a UC Berkeley education continues to increase. While the Berkeley campus has advocated for low growth, as a conservative approach for analyzing potential environmental impacts, the 2021 LRDP proactively plans for growth that could be required by the State of California in order to increase access to high-quality education. Low or moderate growth would allow the campus to balance growth with physical and financial resource constraints." (AR11-12.)

Based on this record, the Court of Appeal correctly found the LRDP "keeps separate the complex annual process for setting student enrollment levels." (Slip. Op., p. 11.) Accordingly, the Opinion finds no flaw with the range of alternatives to the LRDP evaluated in the EIR, which included alternatives "*managing* the campus population in ways that could lessen or avoid its impacts." (*Id.*, p. 15, emphasis in original.) This holding is consistent with the plain language of the CEQA Guidelines, which provide that an EIR must "describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the

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a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing.")

basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR … . must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation." (Guidelines, § 15126.6, subd. (a).) An EIR "need not consider every conceivable alternative to a project" and "is not required to consider alternatives which are infeasible." (*Ibid*.)

It is also consistent with cases in which Courts of Appeal of have rejected petitioners' claims that planning documents must consider potential increased population growth as part of the project under review. For example, in *San Franciscans for Livable Neighborhoods v. City and County of San Francisco* (2018) 26 Cal.App.5th 596, 619, the First District Court of Appeal found a claim that a proposed housing element would lead to increased population growth "is not a baseline or project description argument. It is a causal argument ... premised on the isolation of the increased-density policies from the causes of population growth, which are a multi-faceted product of births, deaths, migration, household size, labor force participation rates, and job growth." As the Opinion observes, similar multi-faceted, complex factors affect UCB's campus population, and "[t]he physical capacity of a campus is just one factor in setting enrollment levels." (Slip. Op., pp. 10-11.)

Appellants' criticism of the Court of Appeal's reliance on the EIR's statement of objectives is also inappropriate. (Petition, p. 29.) As the Opinion notes, Appellants did "not argue that the objectives themselves are too narrowly drawn." (Slip. Op., p. 14.) Accordingly, Appellants may not make that argument now. Moreover, the Opinion correctly relies on the

CEQA Guidelines and established case law to properly conclude that a reasonable range of alternatives "does not become unreasonable simply because another alternative exists." (*Id*., p. 16, citing *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 345; *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 420-421; Guidelines, § 15126.6, subd. (f).)

There is also no support in fact or law for Appellants' claim that "UC's [sic] made a *decision* to adopt a population plan consisting of 'population projections' ... which are embodied in the LRDP, which must include a population plan." (Petition, p. 30, emphasis in original, citing AR57 and SB 118.) In fact, the record page Appellants cite directly contradicts their assertion, explaining "LRDP population projections are for planning purposes to establish the LRDP's physical development program, and do not mandate or commit UC Berkeley to any specific level of student enrollment or overall growth." (AR57.) Planning for potential growth is manifestly not the same as adopting a "population plan," whatever that term may mean. Similarly, the reference to "population plans" in Section 21080.09 cannot be extrapolated to mean that the LRDP or the EIR included a population plan. They did not. And, again, the Education Code does not "mandate" the contents or basis of an LRDP, as Appellants claim, but merely acknowledges the existence of LRDPs as a UC planning tool. (Ed. Code, § 67504, subd. (a)(1).)

Appellants are also wrong that "the LRDP enables, and thereby indirectly causes" population growth. (Petition, p. 31, citing Ed. Code, § 67504, subd. (c)(1).) As explained above, subdivision (c)(1) of Education

Code section 67504 applies to CSU campuses, not UC campuses. Nor does subdivision (a)(1), which applies to UC campuses, suggest that LRDPs cause population growth. It only acknowledges that LRDPs guide the physical development of UC campuses "for an established time horizon." (Ed. Code, § 67504, subd. (a)(1).) Section 21080.09, subdivisions (d) and (e) also do not require an LRDP "to adopt a practical ceiling on population growth" or require UC campuses to undertake additional environmental review to accommodate additional population as Appellants assert. (Petition, p. 32.) To the contrary, with SB 118, the Legislature expressly provided that "[e]nrollment or changes in enrollment, by themselves, do not constitute a project as defined in [CEQA]." (§ 21080.09, subd. (d).) Moreover, the discussion of additional environmental review in subdivision (e) of Section 21080.09 arises in the limited context of any potential future court order to enjoin campus population growth, which would only be permissible if the court first orders additional environmental review. (*Id*., subd. (e)(1).)

In essence, Appellants base their request for this Court's review on a wholly-invented and completely erroneous legal and factual landscape. Review on these grounds is inappropriate.

C. The holding does not raise important legal issues or conflicts with existing law; it is consistent with this Court's ruling that CEQA is not intended as a population control measure.

Revamping arguments they made, and lost, both at trial and on appeal, Appellants insist that CEQA required the EIR to evaluate a lower enrollment alternative. (Petition, pp. 33-39.) In Appellants' view, because

"*population growth directly or indirectly causes all of the environmental impacts,*" the EIR should have evaluated alternatives that reduce this population growth. (*Id.*, p. 34, emphasis in original.) Appellants do not identify any conflict between the Opinion and existing law, nor do they explain what important legal issue is at stake. The fact is, the Court of Appeal correctly determined that the LRDP does not cause population growth and, therefore, CEQA did not require analysis of an alternative that would cap student enrollment. That holding is consistent with this Court's ruling that "CEQA is not intended as a population control measure." (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 220.) It is also consistent with *Watsonville Pilots Association v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1090 ("*Watsonville*"), on which Appellants rely.

In *Watsonville*, the Sixth District Court of Appeal found an EIR for a general plan should have included a "reduced development alternative" to address environmental impacts related to population growth.[5] (*Watsonville*, *supra*, 183 Cal.App.4th at pp. 1086-90.) In *Watsonville,* the record provided "no justification for the FEIR's failure to include within its alternatives analysis a reduced development alternative that would have satisfied the 10 objectives of the project that did not require the level of development

[5] *Watsonville* uses the terms "reduced development alternative" and "reduced growth alternative" interchangeably to mean an alternative that would result in less *physical* development. (See *Watsonville*, *supra*, 183 Cal.App.4th at pp. 1086-90.) *Watsonville* does not suggest the EIR there should have analyzed an alternative under which the agency would forcibly limit *population* growth, which is what Appellants here want the Regents to do.

contemplated by the project." (*Id.*, at p. 1090.) Thus, *Watsonville* makes clear an EIR may not omit consideration of a reduced development alternative simply because such an alternative would not fully satisfy each and every one of the project objectives. (*Ibid*.)

Here, the LRDP EIR *did* analyze a "Reduced Development Program" alternative (Alternative B). (AR9496.) Under this alternative, UCB would implement an LRDP with a 25% reduction in undergraduate beds and academic life square footage and a reduction of beds at the two student housing projects the EIR examined at a project-level of detail (People's Park Project and Anchor House). (*Ibid.*) The EIR determined that "Alternative B would have the same population growth as the proposed project in the EIR Study Area through 2036-37 but would result in fewer beds to accommodate the growth.... Therefore, potential population growth under Alternative B would occupy more non-UC Berkeley housing when compared to the proposed project. Therefore, impacts under Alternative B would be *greater* when compared to those of the proposed project." (AR10390, emphasis in original.) Alternative B would not reduce enrollment, because, as explained above, the LRDP has no bearing on enrollment. (AR10358-59.)

The EIR also considered Appellants' proposed "Reduced or Capped Enrollment Alternative" raised in a comment to the Draft EIR. (AR14218.) The Final EIR explains the numerous reasons this alternative is not feasible within a "Master Response" on alternatives. (AR14209-21.) Chief among these is the fact the LRDP does not determine future UCB enrollment or population, or set a future population limit. (AR14218; see AR14174-78; AR10098.) Additionally, "reducing nonresident undergraduates (currently

capped at 24.4 percent) would also conflict with UC Berkeley's objective of maintaining, supporting, and enhancing its status as an internationally renowned center for scientific and academic advancement by providing opportunities for highly qualified nonresident students, some of whom may advance into graduate programs and faculty positions." (AR14218.)

Moreover, the Draft EIR had already determined it was infeasible to reduce graduate student enrollment. (AR10355-56.) Specifically, the EIR rejected as infeasible a "Reduced Graduate Program and Research Alternative" that would reduce or cap graduate student enrollment, over which UCB has more control than its undergraduate program. (AR10355-56; AR9548.) The Draft EIR determined this potential alternative would not be feasible because reducing or potentially eliminating UCB's vital graduate and professional schools would conflict sharply with the LRDP's objective of maintaining, supporting, and enhancing UCB's status as an internationally renowned public research-intensive institution and center for scientific and academic advancement. (AR10355-56.) The Board of Regents agreed. (AR196 [Findings]; see Guidelines, § 15091, subd. (a)(3); *Sequoyah Hills Homeowners Ass'n v. City of Oakland* (1993) 23 Cal.App.4th 704, 715 fn3 [if decision-maker correctly determines alternative is infeasible, EIR will not be found inadequate for failing to include detailed analysis of that alternative].)

Despite all this, Appellants insist "CEQA requires more." (Petition, p. 37.) But Appellants' desire to use CEQA to reduce UCB's undergraduate population directly conflicts with the Legislature's clear directive that "[e]nrollment or changes in enrollment, by themselves, do not constitute a project as defined in [CEQA]." (§ 21080.09, subd. (d).) The Court of

Appeal correctly found no flaw with the EIR's range of alternatives to the LRDP.

D. The Opinion's holding is fact-specific with little application to other parties and cases.

Appellants make no attempt to explain how the Opinion's holding could affect other parties or cases, or is of any statewide significance. Absent such an explanation, this Court should deny review. The Opinion's holding on alternatives is limited to the specific facts at issue here, i.e., an LRDP prepared for a 150-year old urban campus at one of the State's premier public universities with limited physical space to accommodate projected demand and limited control over its undergraduate student enrollment. There is no broader issue of concern meriting this Court's review.

II. THERE WAS NO LEGAL ERROR IN THE EIR'S ANALYSIS OF ALTERNATIVES TO THE LRDP THAT WARRANTS REVIEW

In opposition to Appellants' arguments below that CEQA required UCB to analyze a lower enrollment alternative, the Regents argued that such an alternative would be inconsistent with UCB's underlying educational mission and is infeasible because UCB does not have the authority Appellants imagine to limit resident undergraduate enrollment. (Opposition Brief, pp. 25-37.) On reply below, Appellants attacked these arguments on the same bases they repeat in their petition for review. In its Opinion, the Court of Appeal correctly determined it did not need to reach these issues because the EIR already evaluated a reasonable range of alternatives. (Slip. Op., at pp. 15-16.) Based on Appellants' faulty premise

that the LRDP includes adoption of a population plan, Appellants reargue the issues they raised below and ask this Court to (1) ignore UCB's underlying educational mission, and (2) discount the Board of Regents' inherent discretion to weigh the advantages and disadvantages of the proposed LRDP and potential alternatives to the proposed LRDP. In doing so, Appellants again fail to identify any important question of law or conflict in appellate decisions meriting this Court's review. This Court should deny review of these unique, fact-specific issues, which the Opinion did not reach.

A. Evaluating project objectives is a policy decision entrusted to the Board of Regents.

Appellants argue that "because significant impacts are driven by the LRDP's projected population growth," the absence of a lower enrollment alternative in the EIR impermissibly deprived the public and decisionmakers "of comparative information regarding environmental costs and benefits need to evaluate which alternative to adopt." (Petition, p. 41.) Appellants claim this is "legal error." That is not the case.

First, "[t]here is no ironclad rule governing the nature or scope of the alternatives to be discussed [in an EIR] other than the rule of reason." (Guidelines, § 15126.6, subd. (a), (f).) "The 'rule of reason' requires an EIR 'to set forth only those alternatives necessary to permit a reasoned choice.'" (*Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700, 741 ("*Tiburon*"), citing Guidelines, § 15126.6, subd. (f).) "While it is up to the EIR preparer to identify alternatives as potentially feasible, the decisionmaking body 'may or may not reject those alternatives as being infeasible' when it comes to project approval. … Like mitigation measures,

potentially feasible alternatives 'are suggestions which may or may not be adopted by the decisionmakers.'" (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 999 ("*CNPS*"), citations omitted; see Guidelines, § 15091, subd. (a)(3).) Courts "will uphold an agency's choice of alternatives unless they 'are manifestly unreasonable and … do not contribute to a reasonable range of alternatives.'" (*Tiburon*, *supra*, 78 Cal.App.5th at p. 741, citing *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1265.)

Here, as explained above, the EIR *did* consider Appellants' proposed "Reduced or Capped Enrollment Alternative" and explained the numerous reasons this alternative is not feasible within a "Master Response" on alternatives. (AR14218; AR14209-21.) In connection with their approval of the LRDP, the Board of Regents also adopted a finding explaining the many reasons a reduced or capped enrollment alternative is not feasible. Specifically:

> [T]he proposed LRDP Update does not determine future UC Berkeley enrollment or population, or set a future population limit for UC Berkeley, but guides land development and physical infrastructure to support enrollment projections and activities coordinated by the University of California Office of the President. As such, the proposed project accommodates enrollment projections that occur under separate processes. Furthermore, [the EIR's] Reduced Graduate Program and Research Alternative, describes an alternative that would reduce or cap student enrollment under UC Berkeley's graduate program, over which UC Berkeley has more control. However, graduate students are vital elements of UC

> Berkeley's research endeavors and teaching resources; in any given semester, approximately 2,000 graduate student instructors work with UC Berkeley students in studios, laboratories, and discussion sections. Reducing or eliminating UC Berkeley's graduate and professional schools or academic research and policy institutes would conflict with the proposed LRDP Update's project objective of maintaining, supporting, and enhancing UC Berkeley's status as an internationally renowned public research-intensive institution and center for scientific and academic advancement. Therefore, this alternative was considered but rejected because it would not meet a core project objective. Similarly, reducing nonresident undergraduates (currently capped at 24.4 percent, though there is a pending proposal to reduce the cap to 18 percent) would also conflict with UC Berkeley's objective of maintaining, supporting, and enhancing its status as an internationally renowned center for scientific and academic advancement by providing opportunities for highly qualified nonresident students, some of whom may advance into graduate programs and faculty positions.
>
> (AR203.)

Underlying the Board of Regents' decision-making was their recognition of the fact that UCB is a world-renowned public research university that, in the 2018-19 academic year, offered over 350 degree programs for nearly 40,000 students, supported by approximately 15,400 faculty and staff. (AR5.) The Regents also recognized that as an urban campus with limited land resources, the Berkeley campus desires to be a low-growth campus to ensure that it can provide adequate facilities to

support its long-term academic excellence. (AR5-6.) With respect to environmental factors, the Regents acknowledged the campus's compliance with the UC's Sustainable Practices Policy, noting that "UC Berkeley has lower total [greenhouse gas] emissions now than in 2005, despite nearly one million [gross square feet] of net new space and nearly 8,000 net new students." (AR10.) Addressing community concerns about population growth, the Regents explained, "LRDP population projections are for planning purposes, to establish the LRDP development program, and do not mandate or commit the campus to specific levels of student enrollment or overall growth. In general, enrollment growth is driven by a directive to absorb a reasonable proportion of the increasing enrollment in the UC system as a whole, as mandated by the State of California. Demand for a UC Berkeley education continues to increase." (AR11-12.)

Moreover, the Regents, and the EIR, recognized "[t]he overall UC Berkeley population growth (which includes graduate students, faculty, and staff in addition to students) supports UC Berkeley's educational mission and the management and maintenance of UC Berkeley resources and infrastructure." (AR10103.) And the LRDP sets the planning framework "for a level of enrollment necessary to achieve the UC's educational mission." (AR10118.) Thus, the enrollment projections identified in the LRDP, which reflect a reasonable proportion of the increasing enrollment in the UC system as a whole and the demand for a Berkeley education in particular, are essential to achieving UCB's educational mission.

These policy considerations and others (see AR4-25) directly informed the Board of Regents' ultimate finding that a reduced enrollment alternative is not feasible. (AR196; AR14218.) They also informed its

conclusion that the benefits of the LRDP, including advancement of "California's economic, social and cultural development, which depends upon broad access to an educational system that prepares all of the State of California's inhabitants for responsible citizenship and meaningful careers," outweigh its environmental impacts. (AR209.)

In advocating for a reduced or capped enrollment alternative, Appellants invite this Court to find fault with the Regents' policy determination that it would be neither feasible nor desirable, considering all relevant factors, to stifle UCB's educational mission as a world class public university and prohibit it from enrolling a reasonable proportion of the increasing student population of the UC system as a whole. (AR10103.) This Court should decline the invitation. No legitimate public purpose would be served (and Appellants have suggested none) for further consideration of a reduced enrollment alternative even more at odds with the LRDP's objectives. "The purpose of CEQA is not to generate paper," and the reviewing court should not "substitute [its] judgment" for the decision-making body. (*Citizens for a Green San Mateo v. San Mateo County Community College Dist.* (2014) 226 Cal.App.4th 1572, 1586-87.) Feasibility "under CEQA encompasses 'desirability' to the extent that desirability is based on a reasonable balancing of the relevant economic, environmental, social, and technological factors." (*City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 417.) And project opponents' disagreement with a lead agency's policy determinations does not demonstrate a lack of evidentiary support for the agency's conclusions. (*CNPS, supra,* 177 Cal.App.4th at p. 1003.) Further, the "rules regulating the protection of the environment must not be subverted into an instrument

for the oppression and delay of social, economic, or recreational development and advancement." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576; see also *Tiburon*, *supra*, 78 Cal.App.5th at p. 781-782.)

There is no legal error meriting this Court's review.

B. Appellants misrepresent the Regents' ability to limit resident undergraduate enrollment.

As they did below, Appellants overstate and mischaracterize the Regents' authority to limit resident undergraduate enrollment. The EIR does not "admit" or "concede" any of the discretion over enrollment Appellants imagine. In fact, the EIR explains that "the UC conducts long-range enrollment planning to comprehensively assess enrollment-related issues such as workforce needs, academic programs, and the ability of UC facilities to meet future needs." (AR10098.) Further, as discussed above, the California Master Plan for Higher Education guarantees access to UC campuses for the top 12.5 percent of the state's public high school graduates and qualified transfer students from California community colleges. (AR9548; AR14175.) The California Education Code also contains several provisions mandating enrollment access levels. (See AR10096-97.) Specifically, Section 66011, subdivision (a) of the Education Code provides that "all resident applicants to California institutions of public higher education, who are determined to be qualified by law or by admission standards established by the respective governing boards, should be admitted to either (1) a district of the California Community Colleges, in accordance with Section 76000, (2) the California State University, or (3) the University of California." Education Code section 66202.5 states, "The

State of California reaffirms its historic commitment to ensure adequate resources to support enrollment growth, within the systemwide academic and individual campus plans to accommodate eligible California freshmen applicants and eligible California Community College transfer students, as specified in Sections 66202 and 66730. The University of California and the California State University are expected to plan that adequate spaces are available to accommodate all California resident students who are eligible and likely to apply to attend an appropriate place within the system." Section 66741 of the Education Code also requires acceptance of qualified transfer students at the advanced standing level.

The settlement agreements at other UC campuses also do not demonstrate the Regents could have, or should have, capped enrollment at UCB. The agreement with UC Davis does not limit enrollment; rather, it commits the campus to provide on-campus housing for 100 percent of new students over the baseline population identified in its 2018 LRDP EIR and to make a financial payment to the City of Davis if the beds are not constructed by a certain date. (AR1383-84.) Similarly, the agreements involving UC Santa Cruz and UC Santa Barbara, in 2005 and 2010, respectively, tied enrollment growth to providing on-campus housing. (AR1306-11; AR1348-51.) To the extent any of these agreements limit student enrollment growth, the limit is commensurate with the growth projections analyzed in each campus's LRDP EIR. Of note, these agreements significantly predate the substantial enrollment growth experienced system-wide in 2016, which resulted from an agreement with the state Legislature that tied UC's budget to increased undergraduate enrollment. (AR14176.) Such agreements would simply not work at UCB,

a flagship UC campus, in an urban setting, that receives a very high number of freshmen and transfer applications and does not have space for on-campus housing. (AR14533-34.)

The circumstances here are thus readily distinguishable from Appellants' cited cases. In *City of Marina,* the Fort Ord Reuse Authority ("FORA") challenged an EIR prepared by the Board of Trustees of the California State University ("Trustees"). (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341.) The Trustees disclaimed any obligation to mitigate and share costs of infrastructure improvements proposed by FORA on the grounds that the California Constitution prohibited it from making voluntary mitigation payments. (*Id.* at p. 356.) After examining the plain language of the California Constitution, legal precedent, and legislative enactments, this Court concluded it "may easily reject the Trustees' argument that they may not lawfully contribute to FORA as a way of discharging their obligation under CEQA to mitigate the environmental effects of their project." (*Id.* at p. 359.) Likewise, in *City of San Diego*, this Court rejected the Trustees' argument that a state agency may contribute funds for off-site environmental mitigation only through earmarked appropriations, to the exclusion of other possible sources of funding. (*City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945, 950.) By contrast, capping undergraduate enrollment here would substantially conflict with state directives and UCB's fundamental mission. (AR9548; AR14173-74; AR14178; AR30885-86.)

Additionally, reducing the already low projected annual undergraduate growth anticipated at the UCB campus under the LRDP

(AR14177 [one percent annual enrollment growth]) would have ripple effects across the entire UC system, disturbing the Legislative directive for each UC campus to absorb a reasonable proportion of increasing undergraduate enrollment. (AR10096-97; AR14174-77.) This is because UC must offer a seat at one of its nine undergraduate campuses to every California resident undergraduate applicant in the top 12.5 percent of the state's public high school graduates and qualified transfer students from California community colleges. (AR9548-49; AR30885; AR53783.) This growth is spread across all campuses in the system, including UCB. (AR14176.) Thus, pushing enrollment down at one campus may push it up at others, with unintended consequences.

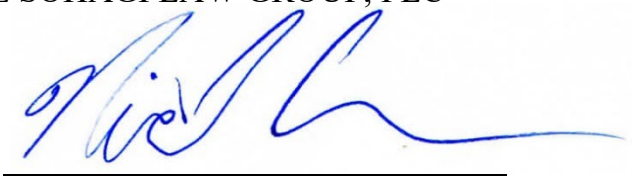
In sum, substantial evidence supported the Regents' determination that it would be infeasible to lower or cap enrollment at UCB through the LRDP process. Moreover, there is nothing about this fact-bound, record-dependent issue that warrants this Court's review.

CONCLUSION

The Regents respectfully request that the Court deny review of the issues Appellants present.

DATED: April 24, 2023

THE SOHAGI LAW GROUP, PLC

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that the total word count of this ANSWER TO PETITION FOR REVIEW, excluding covers, table of contents, table of authorities, and certificate of compliance, is 8,341.

DATED: April 24, 2023

THE SOHAGI LAW GROUP, PLC

By:

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PROOF OF SERVICE

Make UC a Good Neighbor, et al. v. The Regents of the University of California
California Supreme Court Case No. S279242

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

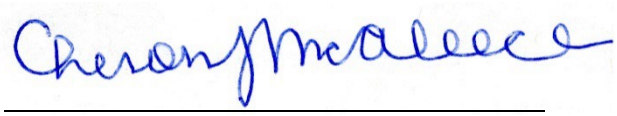
On April 24, 2023, I served true copies of the following document(s) described as **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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

Executed on April 24, 2023, at Los Angeles, California.



Cheron J. McAleece

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California Supreme Court Case No. S279242
Court of Appeal, First District, Division 5, Case No. A165451
Alameda County Superior Court, Case No. RG21110142 (Consolidated for Purposes of Trial Only with Case Nos. RG21109910, RG21110157 and 21CV000995),

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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 4/24/2023 by Karissa Castro, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ngordon@sohagi.com**

3. I served by email a copy of the following document(s) indicated below:

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Date

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