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IN THE SUPREME COURT OF CALIFORNIA

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

v.

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

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

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Does a state university satisfy its California Environmental Quality Act (CEQA) obligation to mitigate a project's off-site environmental impacts when feasible by requesting mitigation funds from the Legislature? Or, must the university also address in its Environmental Impact Report (EIR) the availability of potential sources of funding other than appropriations from the Legislature and provide compelling reasons why those sources cannot be used to pay for mitigation in the event the Legislature denies the requested appropriation?

2. Did the Court of Appeal improperly reject a state university's factual findings regarding the feasibility of mitigation and the significance of off-site impacts by disregarding the substantial evidence standard of review and instead engaging in a de novo review of the university's factual determinations, scrutinizing the supporting evidence anew and speculating based on matters outside the appellate record?

INTRODUCTION

This case presents the question of who decides how the Legislature and a state university must allocate limited funds between a state-mandated educational program to expand enrollment to accommodate the state's increased demand for higher education and mitigation of potential environmental impacts on area traffic and transit congestion under CEQA. In *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 367 (*Marina*), this Court explained that it is the Legislature that must decide the proper allocation of funds between these competing goals: while CEQA requires the Board of Trustees of the California State University (CSU) to ask the Legislature to appropriate funds to pay for mitigation of off-site traffic congestion expected to result, in part, from a planned campus expansion, "a state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." (*Ibid.*)

CSU relied on and followed this Court's instruction in *Marina* when preparing and certifying the EIR for the expansion of San Diego State University (SDSU) challenged in this appeal. CSU noted that it had requested the Legislature to appropriate funds for the mitigation of off-site environmental impacts but, if those funds were not appropriated, CSU still certified the plan on the basis that mitigation was infeasible and that the plan's substantial public benefits outweighed its environmental costs.

Respondents the City of San Diego and other municipal agencies (collectively, the local agencies) challenged CSU's EIR certification. They contend that if the Legislature refuses to fund off-site mitigation in the form of local traffic infrastructure improvements, CSU may not certify the EIR unless it first demonstrates to the satisfaction of all participants in the EIR approval process that it would be infeasible to use other sources of revenue to fund local infrastructure improvements. The local agencies thus claim that CEQA bestows on anyone involved in the EIR approval process—local governments, other state agencies, or private citizens—the right to second-guess how the Legislature and CSU choose to allocate limited funds.

The trial court agreed with CSU and denied the local agencies' petition for a writ of mandate seeking to set aside the EIR. The Court of Appeal disagreed with the trial court, rejecting *Marina*'s holding and ruling instead that CSU must prove the infeasibility of using any alternative source of funding to pay for off-site mitigation *as a matter of law*. This Court should reverse the Court of Appeal and clarify that it meant what it said in *Marina*.

CEQA requires that state agencies identify the significant environmental impacts of their projects and mitigate those impacts when feasible. But CEQA does not abrogate the Legislature's prerogative to make the difficult choices to set funding priorities among critical state needs, such as higher education and environmental protection. Rather, CEQA preserves this prerogative by authorizing state agencies to determine that mitigation of a project's environmental impacts is economically infeasible but that the project's benefits outweigh those impacts. The Court of Appeal's contrary ruling would transform CEQA's EIR approval process into a boundless university budget review process subject to judicial fiat, thereby violating the constitutional separation of powers doctrine.

Moreover, contrary to the view of the Court of Appeal, CSU cannot simply allocate its limited non-state funding sources to accomplish off-site mitigation in the event that the Legislature opts not to appropriate funds for that purpose. CSU's non-state funding sources are already committed for educational and related purposes; reallocating those funds to pay for traffic infrastructure improvements would come directly at the expense of the express purposes for those funds, and in many instances, would be largely impermissible due to statutory and other restrictions.

Converting the EIR approval process into an ad hoc budgetary review also would threaten to place state university budgets at the mercy of local government agencies, and risk improperly diverting funds contributed by all taxpayers statewide for limited local purposes. The potential for chaos in such an approach is vividly presented here, where the local agencies' claim would effectively

obligate CSU, a state agency, to present its budget to *them* and satisfy *them* that CSU's funds would not be better spent on regional transportation than on CSU's statewide educational mission.

If the Legislature chooses to spend more on higher education and less on transportation, CEQA should not provide local agencies with a mechanism to nullify this choice and reallocate those funds to other local uses whenever a local agency or a court feels it is "feasible" to do so. The Court of Appeal's ruling should be reversed.

Finally, this Court should reverse the Court of Appeal's rejection of CSU's factual findings and reaffirm CEQA's deferential standard of review. In the EIR, CSU found it was infeasible to mitigate off-site traffic impacts without state funding, but that the plan's benefits outweigh those impacts and the plan should proceed. CSU also found that its plan would have no significant impact on the local trolley system, and that CSU's proposed Transportation Demand Management program was a valid mitigation measure in combination with the numerous others aimed at reducing traffic congestion. The Court of Appeal rejected each of these findings by speculating, reweighing evidence (both in and outside the record), and second-guessing CSU. None of this is permissible on review of a lead agency's determinations in an EIR. This Court should reverse those holdings.

STATEMENT OF THE CASE

A. CSU approves a plan to increase SDSU enrollment capacity to facilitate access to an affordable higher education for a growing population.

CSU is a 23-campus public university system, with approximately 450,000 students and 23,000 faculty members. (AR-20:20069, 20075, 20077.)[1] The Legislature charges CSU with the mission to provide quality, affordable higher education to every qualified Californian, and to prepare them to positively contribute to California's economy, culture, and future. (AR-15:14217; 20:20070; see also Ed. Code, § 66050.)

SDSU is the oldest and largest higher education institution in the San Diego region and has become a nationally and internationally recognized emerging research university. (AR-15:14232; 18:18212; 20:20236.) SDSU served approximately 34,000 students during the 2006/2007 academic year with students of color representing 45 percent of admitted first-time freshmen, part of SDSU's commitment to create opportunities for underrepresented populations.[2] (AR-15:14232; 18:18206, 18211, 18246.) SDSU cannot serve the current demand for educational opportunity: it

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[1] This brief uses the following citation formats: "AR-[volume]:[page]" (Administrative Record), "CT-[volume]:[page]" (Clerk's Transcript), "AOB [page]" (Appellant's Opening Brief in the Court of Appeal).

[2] These facts reflect data from 2007, the year CSU certified the EIR.

received 57,600 applications for 9,000 available undergraduate spots for fall of 2007. (AR-16:15041; 19:18347; 22:S20925.)

SDSU also contributes $2.4 billion annually throughout the San Diego regional economy through university and student spending, generating approximately $308 million in tax revenue. (AR-18:18207.) The university is the eighth largest employer in San Diego, and provides education to support the industries that drive San Diego's economy, such as bioscience, information technology, and international business. (AR-18:18207-18208, 18210, 18212, 18251-18255; 26:S22225.) SDSU educates workers for careers in many fields, including those with critical workforce shortages, such as nursing and teaching. (AR-9:07506; 18:18242-18243.) The university offers athletic events and facilities, art galleries, theater performances, music and dance concerts, and special events to San Diego residents and visitors. (AR-18:18262-18265.) SDSU students provide 175,000 hours of community service in the San Diego region each year. (AR-18:18214.)

CSU's mission to provide an affordable, quality education to qualified Californians has required its campuses, including SDSU, to grow as the population of the state has grown. (AR-15:14217; 17:16822; 19:18454-18456.) When SDSU was founded in 1897, it occupied a single building. (AR-6:05128; 15:14216.) In the decades after World War II, there was a tidal wave in eligible students, and CSU—including SDSU—expanded to accommodate that surge. (AR-15:14217, 14228-14229.)

Today, the state recognizes that CSU will again need to expand to accommodate a new growth spurt in college-aged

individuals, known as Tidal Wave II, which has increased demand for affordable education on an order of magnitude not seen since the post-War years. (AR-15:14228-14229, 14702; 17:16228, 16822-16825; 19:18454-6, 18523; see also AR-9:07500.) CSU must also grow to accommodate the state's need for an expanded college-educated workforce. (See AR-9:07506; 15:14713; 17:16208.)

Of course, San Diego has grown, too, into a major city with a large population. (AR-15:14703, 14937; 17:16208; 18:18210.) When SDSU first moved to its current location on the Montezuma Mesa, the campus was on the far outskirts of the city. (AR-6:05131.) But, in the post-War years, San Diego expanded so much that it encircled the SDSU campus. (AR-6:05135.) Although this development has created some traffic congestion challenges over the years (AR-6:05136), most area residents feel that SDSU is an asset to the region and the local community, and has been a good neighbor and worked with the community to resolve issues of mutual concern. (AR-10:08547.)

Over the next few decades, the San Diego region is projected to undergo substantial population growth. (AR-15:14703, 14714; 17:16221, 16282, 16844, 16848.) Because of this growth, even if SDSU were not to expand, San Diego's growth would lead to unacceptable future levels of traffic congestion in the region. (AR-4:03963; 15:14900; 17:16282; 18:17586-17590; 30:S23545.)

Indeed, the City has determined that, with or without any SDSU expansion, it needs significant upgrades in transportation facilities and public transit over the coming decades due to this growth and has resolved to "[a]ggressively pursue all potential

sources of funding." (AR-11:09320, 09324, 09327-09328, 09348-09351, 09354-09355.) Similarly, the San Diego Association of Governments (SANDAG) has recognized that regional population growth would require significant investment—perhaps $58 billion—in transit infrastructure through the year 2030, regardless of SDSU's plans. (AR-18:17159, 20:19738-19747, 19775-19779, 19786-19788.) And, like the City, SANDAG is facing funding gaps of its own and has vowed to "[m]aximize opportunities to secure unique funding sources for the region." (AR-20:19786-19788; see AR-19:18758 ["It's kind of helping ourselves"]; 20:19913-19918.)

In 2003, CSU adopted a resolution directing each campus to take the steps necessary to accommodate projected growth in enrollments. (AR-15:14225-14228; see AR-17:16814; 19:18454-18457, 18523.) For SDSU, this required that the campus expand to accommodate an additional 10,000 full-time equivalent students (FTES) over the next 20 years. (AR-15:14157, 14209; 19:18452-5, 18523.) This is estimated to result in a gradual increase in total student headcount enrollment from the current 33,441 to 44,826 by 2024-2025, as well as 1,282 additional faculty and staff to accommodate them. (*Ibid.*; see also AR-15:14233, 14714.)

By virtue of this expansion, by 2025, SDSU will contribute approximately $4.5 billion in annual spending and about $587 million to the regional tax base, while adding 22,800 jobs to the regional economy. (AR-18:17174-17175, 18208-18209; 19:18523-18524.)

B. CSU begins the EIR process for SDSU's expansion and revises its EIR, in light of *Marina*, to address its mitigation obligations.

In 2005, CSU certified an EIR and approved the SDSU 20-year Master Plan. (AR-5:04401, 04403-04405; 15:14156.) During the ensuing superior court litigation over that EIR, this Court issued its *Marina* opinion, providing guidance on the nature and extent of CSU's obligations under CEQA. (AR-15:14156; *Marina*, *supra*, 39 Cal.4th at p. 345.) Accordingly, CSU set aside its prior certification of the 2005 EIR and approval of the 2005 plan. (AR-15:14156.) The trial court issued a writ of mandate setting aside the 2005 EIR, and retained jurisdiction pending CSU's revision of the plan and preparation of a new EIR consistent with *Marina*. (CT-3:753-756.)

In 2007, CSU substantially revised its 20-year Master Plan and prepared a new EIR. (AR-15:14149.) The 2007 plan proposed a variety of near-term and anticipated future projects designed to accommodate the planned increased enrollment: more on-campus student housing; on-campus affordable housing to improve recruitment of faculty and staff; new space for academic, research, and medical activities; a hotel to train hospitality students and serve university guests; an expansion of the student union; and a new conference center. (AR-15:14156-14160.) The revised plan took into consideration the community concerns expressed over the 2005 plan by increasing the amount of new student housing to reduce the impact of students living off campus (AR-1:00105-00109; 15:14257,

14723; 18:17147; 19:18731-18733, 18737-18738, 18742-18743), and decreasing the number of planned faculty/staff housing units (AR-1:00096; 15:14247; 19:18695-18703).

CSU's EIR committed to numerous mitigation measures to address identified environmental impacts ranging broadly from air and water quality to cultural resources to endangered species. (AR-15:14167-14207; 18:17487-17514; 19:18461-18516.)

As relevant to this appeal, the draft EIR determined that the plan would result in significant impacts to traffic congestion on certain roadways and intersections in the vicinity of the SDSU campus. (AR-15:14807, 14816-14848, 14864-14865.) CSU also determined that even though the SDSU expansion would contribute to traffic congestion, the area roads would experience unacceptable levels of service in the future regardless of whether SDSU expanded, due to the region's predicted growth in population and development. (E.g., AR-4:03963; 18:17578-17583, 17586-17591.)

CSU identified roadway improvements as the primary means to mitigate the off-campus traffic impacts. (AR-15:14863-14872; 18:17593-17602.) Heeding the instructions in *Marina*, CSU calculated its fair-share contribution percentages for each of these mitigation measures according to a formula used by the City. (AR-18:17593-17604; see also AR-17:16753-16754; 18:17169-17172.) Because the impacts of SDSU's expansion were cumulative of the projected increased traffic congestion due to unrelated development projects and San Diego's growing population (AR-15:14807-14827, 14838, 14863), CSU's fair-share percentages averaged 12 percent. (AR-17:16985; 18:17603-17604.)

C. Local agencies and neighborhood residents comment on the EIR. CSU's negotiations with plan opponents over its mitigation obligations fail.

CSU released the draft EIR and held numerous meetings to solicit public comment on the Master Plan and EIR from interested parties. (AR-15:14163; 17:16916-16921, 16922-17138; 18:17151-17159, 17179-17182; 19:18303-18344, 18295-18358, 18359-18383, 18572-18733; 21:20334-20340, 20470, 20489, 20501-20502, 20540-20541.)

The plan received support from local residents, elected representatives, and organizations including the Asian Business Association of San Diego, the San Diego Regional Chamber of Commerce, the San Diego Regional Economic Development Corporation, the San Diego Convention & Visitors Bureau, the Chicano Federation of San Diego County, the Urban League, the MAAC Project (which promotes self-sufficiency for low and moderate income families), and Sweetwater Union High School District (California's largest and most diverse seventh-to-twelfth-grade system, which has partnered with SDSU in a transformative outreach program that produced a 104 percent increase in university enrollment from Sweetwater's high schools). (AR-17:17111,17119; 18:18211; 19:18360, 18589-18590, 18594-18596, 18605-18606, 18668-18673; 26:S22225; 27:S22442, S22445-S22475.)

The plan also received criticism from residents of the adjoining neighborhoods, many of whom did not necessarily oppose the goals of the plan, but demanded that any CSU expansion occur

somewhere else. (AR-14:13298; 17:16960, 17011-17012, 17014, 17026, 17038-17045, 17058, 17091-17092, 17110; see generally AR-17:16922-17138.)

The City of San Diego and its Redevelopment Agency (collectively, City) also objected to numerous aspects of the EIR and CSU's proposal for fair-share contribution of funds for traffic mitigation. (See, e.g., AR-17:16961-16976.) CSU proposed to the City that, based on the City's own formulas for calculating fair-share percentages, CSU would request $6,437,860 from the Legislature to fund its share of off-site mitigation. (AR-18:17152-17154; 20:20052, 20064-20065.) The City initially demanded that CSU pay 100 percent of certain area roadway improvement costs. (AR-18:17152-3, 17262.) After further negotiations, the City demanded that CSU pay approximately $20 million. (AR-18:17153; see AR-21:20334-20340, 20472.)

SANDAG was also critical of CSU's EIR, claiming that CSU should pay its fair share of mitigation costs for regional transit upgrades including, in particular, the trolley line operated by the San Diego Metropolitan Transit System (MTS) that serves SDSU and its environs. (AR-17:16950-16954; 18:17229-17231.) SANDAG asserted that, as a result of the plan, CSU was responsible for approximately $193 million in regional transportation improvements.[3] (AR-18:17158-17159, 17191-17192; AR 21:20540-

[3] SANDAG arrived at this figure by starting with the $58 billion figure it had determined was required for meeting normal population growth needs with or without any SDSU expansion, attributing one third of that to "new development," and then (continued...)

20541.) Although it demanded $193 million, SANDAG offered no documentation that the plan would have significant transit impacts, nor criteria by which to assess the physical impact of increased ridership on trolley service, which is usually evaluated for frequency and speed of service. (AR-18:17159, 17229-17230, 17563, 17797; 27:S22435.)

In response to SANDAG's request to address plan impacts on the trolley system's supposed "capacity limitations," CSU consulted SANDAG's own published data and concluded that the plan would result in no significant impacts on transit. (AR-18:17220-17232, 17563-17564; 19:18517.) The on-campus trolley station was a brand new, state-of-the-art facility. (AR-18:18267; 19:18649, 18653; 20:19682; 24:S21665.) SANDAG, who collaborated with SDSU on the design and construction of the station, had predicted increased trolley ridership at the SDSU station of approximately 14,714 daily boardings by 2024-25, with 11,624 attributable to SDSU. (AR-15:14797; 17:16556-16557; 21:20674; 24:S21665.) There was no reason to believe that SANDAG would design a trolley station that, at the time it opened, was already incapable of accommodating

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(...continued)
apportioning a percentage of the resulting $19 billion on a per capita basis to SDSU's students as a percentage of the future regional population growth. (AR-18:17158-17159, 17192; 27:S22435.) SANDAG admitted it was "breaking new ground" with this approach. (AR-18:17192.)

SANDAG's own predicted ridership.[4] (AR-18:17229-17231, 17816; 19:18653, 24:S21662.)

MTS was silent regarding transit impacts until the day before CSU's hearing to consider final plan approval, when it submitted written comments. (AR-27:22577-22578.) In those comments, MTS opined, without citation to specific documentation or evidence, that it was "unlikely" MTS could expand service to support the draft EIR's transit assumptions, and that an additional $27 million would be needed to serve future campus ridership.[5] (*Ibid.*)

In response to SANDAG's and MTS's comments, CSU added a mitigation measure, TCP-27, to help reduce vehicle traffic by providing for the preparation of a Transportation Demand Management (TDM) program (including such measures as the promotion of rideshare programs, transit use, vanpools and bicycles) in collaboration with SANDAG and MTS. (AR-18:17159, 17237-17239, 17514, 17602.) Because trolley ridership had not yet achieved its full potential, the EIR noted a comprehensive program was unnecessary in the near term. The EIR required that the TDM program be implemented by the 2012/2013 academic year, "with the

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4 Furthermore, the station could accommodate an estimated 12,000 students, faculty, and staff per day. (AR-18:18215, 18267; 24:S21665; CT-3:585 [SANDAG admission]), and SDSU's traffic engineer, working with SANDAG to obtain the data, calculated that by 2024-2025 the plan would only bring total SDSU-related daily ridership from the current baseline of 5,982 up to 11,624. (AR-15:14797; 17:16343; 18:17231.)

5 MTS informed SDSU that it was seeking funding from CSU because the Legislature had just made significant cuts to the transit budget. (AR-21:20557; 27:S22561; CT-1:22.)

ultimate goal of reducing vehicle trips to campus in favor of alternate modes of travel." (AR-18:17514, 17602; 19:18473, 18563.)

EIR participants also disputed CSU's obligation under *Marina* with respect to off-site traffic mitigations. Relying on *Marina*, CSU contended that it satisfied its CEQA mitigation obligations by committing to ask the Legislature for money, but that if the Legislature denied the request, CSU could determine that such mitigation was infeasible. (AR-18:17149-17160; *Marina, supra*, 39 Cal.4th at p. 367.) The plan opponents contended that CSU was required to *guarantee* that it would pay fair-share contributions, even if the Legislature denied CSU's request. (AR-16:15058-15059; 17:16961-16964, 16984, 17036; 18:17153, 17249-17253, 17354, 17370-17371, 17468; 21:20374-20375; 23:S21445; 26:S22043; 27:S22385-S22386, S22430-S22432, S22498.)

D. CSU certifies the final EIR, determining that the plan should continue, even if the Legislature were to deny its request for funds, because its benefits will outweigh its unmitigated impacts.

In November 2007, after a hearing and public testimony, CSU certified the final EIR as adequate under CEQA, approved the Master Plan, and approved a request to the Legislature for $6,484,000 to mitigate off-site roadway improvements. (AR-17:16908-16914; 19:18612-18620.)

CSU found that the plan would cause significant unavoidable impacts on off-campus traffic, and proposed fair-share contributions

toward the cost of constructing the necessary roadway improvements as mitigation. (AR-19:18465.) CSU stated that, under *Marina*, it was "obligated to request funding from the state Legislature to pay its fair-share of the mitigation costs," and "[p]ursuant to that obligation, CSU will, following the normal state budget timelines and process, submit a budget request to the state Legislature and Governor" for those funds. (AR-19:18465.)

CSU then made a finding as to the feasibility of the proposed mitigation:

> Because CSU's request . . . for the necessary mitigation funding may not be approved in whole or in part, . . ., and, because the local public agencies may not fund the mitigation improvements that are within their responsibility and jurisdiction, even if state funding is obtained, the Board of Trustees finds there are no feasible mitigation measures that would reduce the identified significant impacts to a level below significant. Therefore, these impacts must be considered unavoidably significant even after implementation of all feasible transportation/ circulation and parking mitigation measures.

(AR-19:18473-18474; accord, AR-19:18466-18467, 18617.) CSU found, accordingly, that "specific economic, legal, social, technological, or other considerations make infeasible the alternatives identified in the EIR." (AR-19:18474.)

CSU then found that the plan's many benefits outweigh the unavoidable adverse environmental impacts just identified. (AR-19:18474.) These benefits include:

- accommodating the projected increase in student enrollment demand, providing educational

opportunities to an increasing number of students, and providing a well-educated work force for the economic well-being of California;

- enhancing academic, research, and housing facilities, including moderate-income housing for faculty/staff;
- supporting the educational, cultural, and recreational SDSU facilities which serve the citizens of the region, including underrepresented groups; and
- providing positive humanistic, educational, and cultural influences on the region.

(AR-19:18523-18525.)

E. CSU repeatedly requests the designated mitigation funding from the Governor and Legislature.

In September 2007, prior to certification of the EIR, CSU approved a request to the Governor and Legislature for its fair-share contribution of funds for off-site mitigations, including those identified in SDSU's EIR, as part of CSU's five-year capital improvement program. (AR-20:20051-20057, 20059-20070, 20074, 20079, 20241-20247.) CSU emphasized its mitigation funding request by ranking it third on the state-funded priority list. (AR-20:20053-20055.)

In each of the next two years, CSU again approved a request for legislative appropriations to fund off-site traffic mitigation improvements in its capital improvement program. (CT-4:895-905.)

F. The local agencies challenge the final EIR. The Superior Court upholds CSU's certification, but the Court of Appeal reverses.

In December 2007, the City, SANDAG, and MTS filed petitions for writs of mandate in the trial court, challenging CSU's certification of the final EIR and approval of the revised plan. (CT-1:1-50.) The trial court upheld the final EIR, finding CSU had complied with its CEQA obligations as clarified in *Marina.* (CT-7:1622-1653, 1662-1664.)

In an 83-page published opinion, the Court of Appeal reversed and directed the trial court to order CSU to void its certification of the final EIR and its approval of the Master Plan. (Typed opn., 83.)

The Court of Appeal rejected CSU's argument that under this Court's opinion in *Marina*, "a state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." (*Marina, supra*, 39 Cal.4th at p. 367.) The court concluded that statement is "dictum because it was not necessary for the holding or disposition" and need not be followed. (Typed opn., 29.) The court also opined that this Court's statement "is not supported by any statute, regulation, case, or other authority," and that "had the California Supreme Court extensively addressed or analyzed the issue, *Marina* would have modified or qualified its dictum." (Typed opn., 32.)

Instead, according to the Court of Appeal, CSU was required to address "[t]he availability of potential sources of funding other

than the Legislature" in its EIR. (Typed opn., 33.) The court held that "those potential sources should not be deemed 'infeasible' sources for CSU's 'fair-share' funding . . . without a *comprehensive discussion of those sources and compelling reasons showing those sources cannot, as a matter of law, be used to pay for mitigation.*" (*Ibid.*, emphasis added.) The Court of Appeal invalidated both CSU's feasibility findings and CSU's statement of overriding considerations. (Typed opn., 35-36.)

The Court of Appeal also reversed the trial court's ruling that substantial evidence supports certain of CSU's factual findings regarding transit impacts and a traffic mitigation measure. (Typed opn., 58, 62-63.)

This Court granted CSU's petition for review.

LEGAL ARGUMENT

I. CSU FULFILLED ITS OBLIGATIONS UNDER CEQA BY REQUESTING MITIGATION FUNDS FROM THE LEGISLATURE. ONLY THE LEGISLATURE MAY DECIDE HOW TO ALLOCATE THE STATE'S LIMITED FUNDS AMONG COMPETING PRIORITIES.

A. The Legislature has set many educational goals for CSU and has specified how those goals will be funded. Expanding campuses to accommodate increased demand for higher education is to be paid for by the Legislature.

The California Constitution recognizes that education is essential to the welfare of California, and directs the Legislature to encourage the "promotion of intellectual, scientific, moral, and agricultural improvement."[6] (Cal. Const., art. IX, § 1.) In furtherance of this mandate, the Legislature has directed that "[t]he primary mission of the California State University is undergraduate and graduate instruction through the master's degree." (Ed. Code, § 66010.4, subd. (b).)

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[6] This Court reviews disputed questions of law underlying an agency's factual findings in an EIR de novo. (*Marina, supra*, 39 Cal.4th at p. 355.) "[F]actual and environmental conclusions in the EIR based on conflicting evidence," however, "command much deference" from the Court under the abuse of discretion and substantial evidence standards. (*Ibid.*; see Part II.C.1, *post.*)

In particular, the Legislature has declared that "[c]urrent estimates indicate that California will need to prepare more than one million additional graduates by the year 2025 in public higher education institutions to meet our workforce needs." (Ed. Code, § 66002, subd. (f)(2).) "California must support an educational system that prepares all Californians for responsible citizenship and meaningful careers in a multicultural society; this requires a commitment from all to make high-quality education available and affordable for every Californian." (*Id.* § 66002, subd. (f)(3).) "To accomplish these goals, California's system of higher education will need to expand." (*Id.* § 66002, subd. (f)(4).)

Aside from necessary expansion, the Legislature has also identified a host of other goals subsumed within CSU's primary mission. For example, the Legislature has directed CSU to: oversee and ensure quality teaching (Ed. Code, §§ 66051-66052); enroll a diverse student body (Ed. Code, § 66205, subd. (b)); ensure educational access for persons with disabilities (Ed. Code, § 67310, subds. (a)-(b)); participate in loan assumption and financial aid programs for teaching students (Ed. Code, §§ 69612, 66021.4); implement sexual assault prevention programs (Ed. Code, § 67390, subds. (d), (l)); encourage enrollment by foster care children (Ed. Code, § 66019.3, subd. (a)); and ensure multicultural learning environments free from discrimination (Ed. Code, § 66030).

The Education Code also sets forth explicit instructions regarding how CSU's different initiatives must be funded. For CSU's enrollment expansion (see Ed. Code, § 66002), the Legislature states that CSU is "expected to plan that adequate

spaces are available to accommodate all California resident students who are eligible and likely to apply," that the Legislature "shall commit resources to ensure that students from [the primary enrollment categories] are accommodated," and that "it is the intent of the Legislature to fund programs designed to accomplish the purposes of this subdivision through *appropriations made in the Budget Act* to the public institutions of higher education, *and the annual Budget shall contain appropriations necessary to accommodate all students*" from the primary enrollment categories. (Ed. Code, § 66202.5, emphases added.) The statute does not suggest or provide that the Legislature intends for CSU to use any sources of funding other than Budget Act appropriations for the expansion.

Moreover, in response to *Marina,* the Legislature ordered CSU to negotiate with local agencies over fair-share mitigation payments in connection with the EIR process and to report on the status of those negotiations to the Legislature. (Ed. Code, § 67504, subd. (d).) However, the Legislature did *not* require CSU to use any non-state funding sources in the event the Legislature refused to appropriate off-site mitigation funds. (*Ibid.*)

By contrast, when the Legislature intends CSU to use non-state funding or a mixture of state and non-state sources to accomplish statutory objectives, the Legislature expressly states that intention. (See, e.g., Ed. Code, §§ 66016 [to ensure equal athletic opportunities for male and female students, "additional sources of revenue should be determined to provide additional funds for these equal opportunity programs"], 67310, subds. (d)-(e) [for

programs for disabled students, CSU must "request, and the state provide, funds to cover the actual cost of providing services and instruction," but CSU "shall continue to utilize other available resources to support [such] programs and services"]; see also Ed. Code §§ 66040.5, 66205.8, subd. (f), 67311, subds. (a)(8), (b)(13), (c), 69564, 69566.)

Had the Legislature intended CSU to use non-state funding for off-site mitigation in the wake of its refusal to appropriate those funds, "it unquestionably knew the words to employ," and the fact that the Legislature did not include such instructions indicates that it did not so intend. (*Association for Retarded Citizens v. Department of Developmental Services* (1988) 38 Cal.3d 384, 393 (*ARC*) [Legislature's choice not to use terms used in other statutes indicates intent that those terms not apply].)

B. CEQA preserves the Legislature's power to balance CSU's educational goals and their funding. It confers on CSU the discretion to determine when mitigation is infeasible due to a lack of legislative funding and to determine that overriding benefits outweigh unavoidable harms.

CEQA adds environmental responsibility to CSU's obligations. (Pub. Resources Code, § 21000, subd. (g); Ed. Code, §

67504, subd. (d); Cal. Code Regs., tit. 5, §§ 43850 et seq.; cf. Ed. Code, § 66010.5.)[7]

CEQA makes the EIR the "focus of the environmental review process," and the primary means of ensuring that state agencies take action with environmental consequences in mind. (*Marina, supra*, 39 Cal.4th at p. 348; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 (*Laurel Heights I*); Pub. Resources Code, § 21000, subd. (a).) In planning SDSU's expansion, "[t]he Trustees necessarily serve as the 'lead agency' ([Pub. Resources Code], § 21067) responsible for preparing and certifying the EIR (*id.*, § 21100, subd. (a)) because they possess 'full power and responsibility in the construction and development of any state university campus' (Ed. Code, § 66606) and thus final authority to approve or disapprove [SDSU's] Master Plan." (*Marina,* at p. 349.) CEQA requires each public agency to mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so, and to discuss feasible methods of mitigation in the EIR. (*Ibid.*; Pub. Resources Code, §§ 21002.1, subd. (b), 21100, subd. (b)(3).) "More specifically, the agency must find that the project's significant environmental effects have been mitigated or avoided ([Pub.

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[7] Education Code section 66010.5 charges CSU with a "broad responsibility to the public interest," but lists only one example illustrating the meaning of this term, which is participating in "programs of public service." (See *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 960 [a term's meaning may be ascertained by reference to the other terms associated with it in the same provision].)

Resources Code], § 21081, subd. (a)(1)), that the measures necessary for mitigation 'are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency' (*id.*, subd. (a)(2)), and/or that 'specific economic, legal, social, technological, or other considerations' render mitigation 'infeasible' (*id.*, subd. (a)(3))." (*Marina,* at p. 350.)

As lead agency, CSU has the sole discretion to determine that a particular mitigation measure is not "feasible," meaning "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Guidelines,[8] § 15364; Pub. Resources Code, § 21061.1; *Marina, supra,* 39 Cal.4th at p. 356.) Evidence supporting a determination of infeasibility includes lack of funding or other economic non-viability (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1269 (*Defend the Bay*); *Concerned Citizens of South Central L.A. v. Los Angeles Unified School District* (1994) 24 Cal.App.4th 826, 842-843 (*Concerned Citizens*) [school district not required to discuss locating funding to replace low-income housing demolished by school expansion because it was infeasible]), or the fact that the Legislature has previously rejected the proposed measure (*Laurel Heights II, supra,* 6 Cal.4th at pp. 1141-1142 [agency properly found alternative location for

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[8] All references to 'Guidelines' are to the CEQA Guidelines. (Cal. Code Regs., tit. 14, §§ 15000 et seq.) " '[C]ourts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA.' " (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123 fn. 4 (*Laurel Heights II*).)

proposed university expansion infeasible because Legislature urged against further expansion in that location]).

If the agency determines that mitigation would be infeasible, "the project may nonetheless be carried out or approved at the discretion of a public agency" (Pub. Resources Code, § 21002.1, subd. (c); see also *id.*, § 21002) when "the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." (Pub. Resources Code, § 21081, subd. (b); *Marina, supra*, 39 Cal.4th at p. 350; Guidelines, §§ 15021, subd. (d), 15043, 15093, subd. (a) ["CEQA requires the decision-making agency to balance . . . region-wide or statewide environmental benefits, of a proposed project against its unavoidable environmental risks . . ."].) This determination, like the feasibility determination, is entrusted to the lead agency's discretion, and reviewed under the deferential substantial evidence standard. (Pub. Resources Code, §§ 21002.1, subd. (c), 21081.5.)

Accordingly, although the purpose of CEQA is " 'to compel government at all levels to make decisions with environmental consequences in mind[,] CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.' " (*Laurel Heights I, supra*, 47 Cal.3d at p. 393; accord, *Concerned Citizens, supra*, 24 Cal.App.4th at pp. 842-843 [upholding determination to build new school to accommodate overcrowding even though it would reduce available low-income housing stock]; *Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, 1037 [upholding determination to demolish

building that was historical resource to facilitate redevelopment of blighted area]; *San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal.App.3d 584, 589, 596-597 [upholding determination that airport expansion's benefits outweighed unavoidable impacts on traffic, energy consumption, and growth inducement].)

C. CSU satisfies its mitigation obligations under CEQA by asking the Legislature to appropriate money for off-site mitigation.

1. CSU's request to the Legislature to fund the identified mitigation measures satisfies its obligations under CEQA.

CEQA provides that state agencies "*shall request in their budgets* the funds necessary to protect the environment in relation to problems caused by their activities." (Pub. Resources Code, § 21106, emphasis added; *Marina, supra,* 39 Cal.4th at p. 367.) CEQA also cautions that "courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines . . . *in a manner which imposes procedural or substantive requirements beyond those explicitly stated* in this division or in the state guidelines." (Pub. Resources Code, § 21083.1, emphasis added.) Thus, CEQA creates a duty to ask the Legislature for money but does not create a duty to explore other

funding alternatives in the event the Legislature denies that request.

Furthermore, CEQA does not create any independent power to mitigate environmental impacts, and directs that an agency "may exercise only those express or implied powers" found in other statutes. (Pub. Resources Code, § 21004.) The *Marina* decision instructs CSU to seek funding for off-site mitigation of impacts of a campus expansion plan from the Legislature, not from alternative sources. (*Marina, supra*, 39 Cal.4th at p. 367.) And, *no* provision in the Education Code requires any such funding. (See, e.g., Ed. Code, § 66202.5.)

2. To allow the EIR approval process to be used to second-guess the Legislature's appropriations and CSU's budget allocations would violate the separation of powers doctrine.

Without citing to the comprehensive legislative framework set forth in the Education Code and CEQA, the Court of Appeal below held that CSU should not be permitted to determine that a funding appropriation expressly denied by the Legislature is infeasible "without a comprehensive discussion of [nonstate] sources and compelling reasons showing those sources cannot, as a matter of law, be used to pay for mitigation of the significant off-site environmental effects of the Project." (Typed opn., 33.) Such a requirement violates the constitutional separation of powers.

"Article III, section 3 of the California Constitution provides that '[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.' " (*Butt v. State of California* (1992) 4 Cal.4th 668, 698.) "It has long been clear that these separation-of-powers principles limit judicial authority over appropriations." (*Ibid.* [court lacked authority to review Legislature's appropriations among various educational goals and order application of funds allocated for different educational purposes to prevent emergency closure of bankrupt school district].)

Thus, "when the Legislature fails to make an appropriation, [the courts] cannot remedy that evil." (*Myers v. English* (1858) 9 Cal. 341, 349 (*Myers*); see *California School Bds. Assn. v. State of California* (2011) 192 Cal.App.4th 770, 797 (*California School Boards*) [court lacked authority to order Legislature to either fund educational mandates or affirmatively excuse school districts' compliance because "the determination as to how and whether to spend public funds is within the Legislature's broad discretion"]; *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 594 (*County of San Diego*) [writ of mandate ordering Legislature to reimburse counties for monies spent executing educational mandates "violates the separation of powers doctrine because it effectively orders the Legislature to appropriate funds in future state budget acts"]; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 820.)

In enacting CEQA, the Legislature was cognizant of the potential for separation of powers issues to arise. CEQA provides: "It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret [CEQA] . . . in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [the CEQA statutes and guidelines]." (Pub. Resources Code, § 21083.1.) CEQA does not "authorize[] a court to direct any public agency to exercise its discretion in any particular way." (Pub. Resources Code, § 21168.9, subd. (c); see *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576 (*Citizens of Goleta Valley*) ["The wisdom of approving this or any other development project, a delicate task which requires a balancing of interests, is necessarily left to the sound discretion of the local officials and their constituents who are responsible for such decisions"]; *Laurel Heights I, supra*, 47 Cal.3d at p. 393 [CEQA does not empower courts to guarantee that agency's decision will always favor environmental considerations]; *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1265-1266 (*Schellinger Bros.*) [court may not order agency to complete EIR process faster than agency desires]; *Defend the Bay, supra*, 119 Cal.App.4th at p. 1269 [CEQA does not permit court to "arrogate to [itself] a policy decision which is properly the mandate of [the lead agency]"].)

Thus, once CSU complies with its obligation to ask the Legislature for money to fund off-site mitigation, if the Legislature grants the requested funds to complete the enrollment expansion but denies the request for off-site mitigation funds, this represents

the Legislature's considered choice to fund CSU's core educational mission but not upgrades to local transit infrastructure. (See *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 300 (*Carmel Valley*) ["[t]he power of appropriation includes the power to withhold appropriations"].) This is a choice the courts may not second-guess. (*Myers, supra,* 9 Cal. at p. 349 ["[W]hen the Legislature fails to make an appropriation, [the courts] cannot remedy that evil"]; *County of San Diego, supra,* 164 Cal.App.4th at p. 597 [" '[A] court's authority to second-guess the legislative determinations of a legislative body is extremely limited' "].)

Nor can the Court avoid the separation of powers problem by holding that CSU must "merely discuss" adequate funding sources in the EIR, even though it may ultimately determine that those sources are infeasible. The EIR requires a thorough and detailed discussion of its topics, including considered responses to all questions raised by individuals, organizations, and state and local agencies. (See *Laurel Heights I, supra,* 47 Cal.3d at p. 388; Pub. Resources Code, § 21005, subd. (a).) As explained below (*see* Part II.A, *post*), the allocation of non-state funding sources is a policy decision governed and restricted by complex statutes and political limitations. Requiring an EIR to discuss non-state funding sources would be an invitation to each court to impose on CSU its particular views about how funds should be spent.

The EIR approval process should not be used to compel CSU to demonstrate to the satisfaction of judges that its budget has adequately balanced competing educational and environmental

demands. There is simply no objective legal standard by which to adjudicate whether CSU's revenues would be better spent on more classrooms or more traffic lights. *California School Boards, supra,* 192 Cal.App.4th at page 803 is instructive in this regard. There, the court held a trial court properly denied the request of school districts seeking state reimbursement of educational mandate costs to "engage in a wide-ranging discovery investigation in an attempt to identify [state] funds to pay prior mandate costs." (*Ibid.*) The court explained that "[c]urrently our state is experiencing an extreme budget crisis with a budget deficit estimated to be more than $20 billion." (*Ibid.*) Thus, "[a]ny money a court would direct to the School Districts would reduce funds available for other obligations and implicate funding priorities and policy making decisions. These decisions are for the Legislature." (*Ibid.*; see also *County of San Diego, supra,* 164 Cal.App.4th at p. 600 ["the wholesale dismemberment of agency budgets" would result if counties were allowed to scrutinize budgets of state agencies and decide which funds the court should order to pay county claims].) The effect of the Court of Appeal's decision in this case would be the same: Money would be taken from other priorities to fund the local mitigation efforts that the Legislature has decided not to fund. That is improper.

D. The EIR approval process cannot be used to force CSU to act beyond its legislative mandate.

In addition to violating the separation of powers, the Court of Appeal's holding that CSU must explore non-state funding to pay for off-site mitigation if the Legislature expressly denies CSU's request to fund those mitigation efforts places CSU in an impossible position. This Court has long held, in a variety of contexts, that an agency's power begins and ends with its Legislative mandate, and that an agency's capacity for action is dependent on the Legislature's appropriation.

In *Carmel Valley, supra*, 25 Cal.4th at page 300, this Court unanimously held that "an administrative agency is subject to the legislative power of the purse and 'may spend no more money to provide services than the Legislature has appropriated.' " This is because "it is settled that " 'the power to collect and appropriate the revenue of the state is one peculiarly within the discretion of the Legislature,' " and the "power of appropriation includes the power to withhold appropriations." (*Ibid*. [holding that Legislature could suspend operation of state-mandated local programs, and thus deny funding for firefighter agencies to provide much-needed fire safety gear for firefighters].)

Carmel Valley recognized the importance of preserving the Legislature's exclusive prerogative to appropriate funds because "the Legislature is the branch of government that must, on a yearly basis, fit the needs of the state into the funds available." (*Carmel Valley, supra*, 25 Cal.4th at p. 302.) This Court explained that "

'[e]nactment of a state budget is a legislative function, involving 'interdependent political, social and economic judgments which cannot be left to individual officers acting in isolation; rather, it is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available.' " (*Ibid.*) Accordingly, the Legislature could deny funds for an interest as important as firefighter safety because, "[i]n determining what funds to expend in a given year, the Legislature must consider many legitimate and pressing calls on the state's resources—in addition to the safety of firefighters." (*Ibid.*)

For similar reasons, this Court has repeatedly held that an agency is not empowered to re-allocate or spend a legislative appropriation contrary to the Legislature's intent. (E.g., *ARC, supra,* 38 Cal.3d at pp. 390-392 [agency not empowered to demand spending cuts in service delivery in a manner inconsistent with enabling statute]; *Assembly v. Public Utilities Com.* (1995) 12 Cal.4th 87, 103-104 [agency not permitted to divert portion of revenue for purpose entirely different from purpose of statute under which revenue raised]; see also *California State Employees' Assn. v. Flournoy* (1973) 32 Cal.App.3d 219, 234-236 [where Legislature expressly denied funds for faculty salary increase, university lacked power to compel Legislature to grant increase, because "the capacity to provide funds carries with it the power to deny them"]; see also Gov. Code, § 13332.15 ["No appropriation may be combined or used in any manner . . . to achieve any purpose which has been denied by any formal action of the Legislature"].)

Thus, even in times of fiscal crisis, where an agency is obligated to oversee the implementation of a statutory scheme but is not given sufficient funds to implement the scheme, " '[the] solution . . . should be sought from the Legislature which may either provide supplemental specific appropriations for the program or if need be may authorize [a reduction in entitlement] in order to accommodate fiscal realities.' " (*ARC, supra*, 38 Cal.3d at p. 395.)

These principles apply here. CSU has not disclaimed its responsibility to contribute its fair-share of funds for mitigation of traffic impacts caused by its expansion—on the contrary, CSU has identified this expense as the third most important priority statewide in its request to the Legislature. (AR-20:20051-20057; 20059-20070, 20074, 20079, 20241-20247; CT-4:895-905.) However, if the Legislature grants funding requested for the Master Plan but denies the requested appropriation for off-site mitigation, that decision represents the Legislature's determination as to how to apportion scarce state funds to meet the many "legitimate and pressing" statewide challenges. (See *Carmel Valley, supra*, 25 Cal.4th at pp. 301-302.)

This is particularly true because the transportation infrastructure improvements for which CSU has requested funds are themselves the subjects of other legislative appropriations and managed by other local and state agencies. (See, e.g., AR-2:09355; 20:19768-19776, 19787-19788, 19918; 23:S21220; 30:S23528, S23537, S23545; 31:S23966, S23969-S23970, S23975-S23976.) The Legislature must balance the state's needs for both higher education and traffic mitigation, and make a political decision

regarding how much to appropriate for each, as well as to which agency such appropriations should be made.

Requiring CSU to use educational funds for traffic and transit improvements after the Legislature has refused to appropriate funds for the same purpose thus would be tantamount to requiring CSU to spend monies for purposes at odds with CSU's legislative mandate and the will of the Legislature as expressed in its annual appropriations—the very problem that *Carmel Valley*, *ARC*, and other authorities prohibit. (See Gov. Code, § 13332.15 ["No appropriation may be combined or used in any manner . . . to achieve any purpose which has been denied by any formal action of the Legislature"].)

E. *Marina*'s interpretation of CSU's statutory obligations properly harmonized the many laws and principles governing CSU's actions. CSU fully satisfied those obligations here.

This Court's decision in *Marina* carefully balances CEQA requirements with CSU's many other duties and the Legislature's prerogative to prioritize them. In *Marina*, this Court held that "CEQA requires the Trustees to avoid or mitigate, if feasible, the significant environmental effects of their project (Pub. Resources Code, § 21002.1, subd. (b)) and . . . payments to [another government entity] may represent a feasible form of mitigation." (*Marina, supra*, 39 Cal.4th at p. 359.) Accordingly, the Court held that CSU has "the duty to ask the Legislature for money" to

mitigate significant off-site impacts. (*Id.* at p. 367, citing Pub. Resources Code, § 21106.) Recognizing the considerations discussed above, the Court then crafted a limitation on the scope of an agency's off-site mitigation obligations under CEQA: "[A] state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." (*Ibid.*) Contrary to the suggestions made by the Court of Appeal (Typed opn., 31-32), this Court's limitation was clear and specific and grounded in CEQA, the Education Code, and the principles discussed above.

In this case, CSU complied with all of its obligations in certifying the EIR and approving the plan when it requested off-site mitigation funds from the Legislature. CSU's final EIR identified significant environmental impacts and committed to approximately one hundred mitigation measures to address a broad range of environmental concerns. (AR-15:14167-14207; 18:17487-17514; 19:18461-18516.) With respect to traffic impacts, CSU followed this court's instructions in *Marina* and negotiated with local agencies for voluntary payments of CSU's fair-share contribution to mitigate the plan's identified significant effects. (*Marina, supra,* 39 Cal.4th at pp. 361-362; AR-18:17151-17160.)

CSU acknowledged its obligation to request funding from the Legislature for its fair-share mitigation costs. (*Marina, supra,* 39 Cal.4th at p. 367; Ed. Code, § 66202.5; AR-18:17159-17160.) The Trustees passed a resolution directing CSU's staff to include environmental mitigation funding in CSU's annual budgetary

request, and included a request identifying off-site mitigation funds as a high priority in its five-year capital outlay proposal every year that the plan languished in litigation. (AR-18:17159-17160; AR-20:20051-20057; 20059-20070, 20074, 20079, 20241-20247; CT-4:895-905.) CSU also determined, however, that in the event the Legislature denied its funding request, mitigation of off-site impacts would necessarily be economically infeasible. (AR-18:17160; 19:18466-18467, 18473-18474.)

CSU then determined that significant overriding considerations warranted approving the plan because its many benefits outweigh the traffic problems that could result if the Legislature were to deny off-site mitigation funds. (AR-19:18474, 18522-18525.) These benefits include satisfying statewide educational demand, improving educational opportunities for under-represented populations, creating jobs, and fueling economic growth. (AR-18:17174-17175, 18208-18209; 19:18523-18525.)

This court should reverse the Court of Appeal's contrary conclusion and hold that CSU has satisfied its obligations under CEQA.

II. CEQA DOES NOT REQUIRE CSU TO CONSIDER THEORETICALLY AVAILABLE ALTERNATIVE FUNDING SOURCES.

A. The notion of readily available "alternative funding" is a fallacy.

The Court of Appeal theorized that if the Legislature denies CSU's appropriation request, there must be "myriad" other sources of funds that CSU can tap to finance off-site mitigation efforts. (Typed opn., 33.) However, the notion that because CSU is a large institution, it can simply dip into a reservoir of educational revenues and ladle them out for roadway improvements is no more than wishful thinking by the local agencies. CSU's non-state funding sources are tightly controlled by a complex set of statutes and Trustee regulations that commit those funds to specific purposes. What little funds—if any—might be reallocated to pay for off-site mitigation could only result in the equivalent underfunding of the important educational purposes for which those funds first became available.

When CSU submits its annual capital outlay funding request to the Legislature as part of the Budget Act process, it informs lawmakers about projects for which state funding will not be required because complete or partial non-state funding has been located for those projects. (AR-20:20074, 20078-20079, 20241-20247.) Thus, the Legislature's determination whether to grant or deny particular funding requests necessarily takes into

consideration that CSU has committed to using non-state funding sources in conjunction with the Legislature's appropriation; the amount the Legislature grants is thus *already* reduced to less than the full cost of the approved capital projects and assumes the deficit will be made up by identified non-state funding sources. (See *ante*, Part I.A.) Once the Legislature appropriates state funds for the capital outlay plan, CSU is, of course, prohibited from spending those funds for a different purpose than the Legislature intends. (See *Carmel Valley, supra*, 25 Cal.4th at pp. 291-292, 299; *ARC, supra*, 38 Cal.3d at p. 391, 395; Gov. Code, § 13332.15.) The Legislature's appropriation of state funds is dependent on its expectation that CSU will complete the plan as approved. It therefore makes no sense to suggest, as the Court of Appeal did, that CSU can reallocate the non-state-funded portion of its capital outlay plan for other purposes.

The Legislature also appropriates in the Budget Act an annual support budget for CSU to cover the costs of educating students. (See Gov. Code, §§ 13320 et seq., 13335.) CSU's flexibility regarding how to spend this money is also limited by restrictions set forth in the Budget Act and to allocations made in the fiscal year during which the action is taken. (Ed. Code, §§ 89753, 89755, 89756.) CSU's support proposal is for the cost of educating students and does not include capital improvements or renovations (which are funded separately in the Budget Act, see Gov. Code, § 13332.11; AR-6:05120-05122), or other "extra" funds to be used for miscellany such as off-site traffic improvements. (See Gov. Code, § 13335 [budget must reflect agency's activities and goals].)

Aside from the Legislature's will expressed in the Budget Act, there are many other restrictions on CSU's raising and spending of funds:

Tuition Fees. Student tuition fees, also governed by statutes (Ed. Code, §§ 89301, 89700, 89705-89709), make up the difference between what CSU receives from the Legislature in the annual support budget and the actual cost to educate students; they represent what has been determined as the "fair share" of the cost of education that is borne by students and their families. (See CSU, Exec. Order No. 1054, p. 2 (Jan. 14, 2011) <http://www.calstate.edu/eo/EO-1054.html> [as of June 26, 2012]; see also CSU, Quality and Affordability: Policies for Pricing and Strategies for Paying (Mar. 17, 1993) <http://www.calstate.edu/budget/student-fees/documents/1993-csu-state-university-fee-policy.pdf> [as of June 26, 2012].)[9] At one time,

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[9] The administrative record concerning sources of non-state funding is unfortunately light because, although participants during the EIR proceedings contended that CSU must "guarantee" mitigation funding in the event of legislative refusal, until the local agencies sued in superior court, no participant demanded that CSU engage public comment in the EIR on the feasibility of tapping particular non-state funding sources. (See AR-16:15058-15059; 17:16961-16964, 16984, 17036; 18:17153, 17249-17253, 17354, 17370-17371, 17468; 21:20374-S20375; 23:S21445; 26:S22043, 27:S22385-S22386, S22430-S22432, S22498.) This late evolution of the local agencies' position caused the superior court to conclude that the issue had not been properly exhausted (CT-7:1633-1634) and also facilitated the unfounded speculation, adopted by the Court of Appeal (see Typed opn., 32-33), that CSU has ample sources of non-state funding readily available for transportation infrastructure improvements. Whether or not it was exhausted,

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CSU fees were capped by statute at just twenty-five dollars per year. (See *id.* at p. 3, discussing Former Ed. Code, § 89703, repealed by Stats. 1995, ch. 758, § 267.) As the amount of funding that comes from the Legislature has dwindled (and the cost of education has climbed), student tuition fees have gone up, to the objection of students and the public. (See, e.g., *id.*; AR-3:02006; 10:08085, 08087, 08091, 08096 ["please don't raise tuition, if it gets too high, [I] will not be able to enroll next semester"]; 11:10400; 17:16384; 31:S24109.) Raising tuition fees still further to cover off-site mitigation costs of an enrollment expansion is antithetical to CSU's mission to provide affordable higher education to a broad segment of the population, and would result in making current students pay not just for the actual gap in the cost of funding their own education but also for the costs of expanding access to other future students. (See Order 1054, *supra,* at pp. 2-3; AR-3:02006; 31:S24109.)

Bonds. CSU has the authority to issue revenue bonds, but only to pay for specific projects for which there is an associated income stream. That income stream must repay the bond

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multiple rounds of litigation have by now developed the record, and the Court should reach the merits of this critical issue of statewide importance which will undoubtedly arise again as CSU and other state universities continue to expand. (See *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1216; cf. *Atwater Elementary School Dist. v. California Dept. Of General Services* (2007) 41 Cal.4th 227, 231 [court should reach continuing issues of statewide importance]; *State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 61 [same].)

indebtedness and generally comes from those who benefit from the funded projects (e.g., dormitory fees are pledged to repay the bonds used to fund the construction/renovation of the dorms). There is no revenue stream to pay for environmental mitigation. (See, e.g., Ed. Code, §§ 90011, subd. (a)(7)-(8), 90012, subd. (e), 90059, 90068; see also Ed. Code, §§ 90027-90030.) Furthermore, the total value of bonds CSU can issue is limited by CSU's debt capacity, so that any bonds used to pay for off-site mitigation would diminish CSU's capacity to take on debt to fund its educational support functions. (CSU, Exec. Order No. 994 (Oct. 23, 2006) <http://www.calstate.edu/EO/EO-994.html> [as of June 26, 2012].)

Fees for Services. The Legislature has provided that fees for educational support services, such as student housing, student health centers, and parking, are to be used to pay for the costs of these fee-generating projects, and if there is any surplus, it is to be devoted only to educational purposes. (See Ed. Code, §§ 89700, subd. (a) [authorizes fees], 89701 [parking fees], 89701.5 [parking fines], 89702 [student health center fees], 89703 [housing fees], 89704 [self-supporting instructional programs], 89708 [self-supporting instructional programs], 89721, subds. (g)-(l); Cal. Code Regs., tit. 5, §§ 41800, 41800.2 [instructionally related activities fee].) The prospect of increasing student service fees sufficiently to force already cash-strapped students to cover the high costs of local traffic and transit infrastructure improvements would be squarely at odds with CSU's mission to provide an affordable education to broad segments of the population.

Auxiliaries. The Legislature created auxiliaries to perform certain functions for CSU that the state cannot. The permissible functions, however, are expressly limited by law and funding of offsite capital improvements is not one of them. (See Ed. Code, §§ 89904, subd. (c) [auxiliary organizations must act "within the educational mission of the state colleges"]; 89904.6 [auxiliary must expend funds "in a manner consistent with the educational mission" of the university], §§ 89901, 89904, 89905; Cal. Code Regs., tit. 5, §§ 42400 et seq., 42500 et seq. ["Auxiliary organizations are formed to provide essential functions which are an integral part of the educational mission of [CSU]"].) Auxiliary funds are not legally available to pay for local traffic improvement costs. (Cal. Code Regs., tit. 5, § 42500, subd. (e).)

Donations. The Legislature permits CSU to accept donations whenever the "terms and conditions thereof will aid in carrying out the *primary functions* of [CSU]," defined as "*undergraduate and graduate instruction.*" (Ed. Code, §§ 89720, 66010.4, subd. (b), emphases added.) Donors often specify the way in which they want their gifts to further the academic goals of the university and the educational experience of the students. Some major donors request anonymity. Understandably, donors do not expect that their funds will be used to pay for off-campus traffic lights and highway on-ramps. (See *L.B. Research & Education Foundation v. UCLA Foundation* (2005) 130 Cal.App.4th 171, 181 [university donor has protectable interest in ensuring gifts are used only for donor's specified purpose].)

If CSU must state in an EIR, as a basis for finding "infeasibility," which donated gifts are not available for off-site mitigation, then project opponents will demand as much information as possible about the university's donated funds. (See Pub. Resources Code, § 21005, subd. (a) [noncompliance with CEQA's information disclosure provisions may constitute a prejudicial abuse of discretion "regardless of whether a different outcome would have resulted if the public agency had complied with those provisions"]; *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 328 [same].) This probing may be sufficient to deter or change the nature of the university's already scarce donations. Donated funds are a unique and delicate supplement to educational funding in this state and should be protected from the reach of local jurisdictions that seize upon CEQA as a way to bridge their own funding gaps for local projects.

B. Local agencies should not be permitted to second-guess a state agency's determination that it is infeasible to spend its funds to support local agencies' priorities.

Cities and local agencies are generally prohibited from second-guessing the policy decisions of state agencies. (Cal. Const., art. XI, § 7; *Abbott v. City of Los Angeles* (1960) 53 Cal.2d 674, 681 [this constitutional provision "is not only a delegation of power by the people to the local body, but it is also a limitation upon the local body [citations] . . ."].) Indeed, a city can never "have a superior

authority to the state over the latter's own property, or in its control and management[.]" (*Hall v. City of Taft* (1956) 47 Cal.2d 177, 183-184 [cities may not use local zoning laws or regulations to extract money from state agencies as a condition of performing their state mandate]; see *Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 135-136 [city may not impose building and inspection fees on state university expansion project].)

Here, although they have not passed laws or regulations from which the state would otherwise be exempt, the local agencies are trying to use CEQA to force CSU to justify the availability of each of its revenue sources under the guise of "feasibility" in an effort to redirect CSU's revenues to satisfy the local agencies' transportation infrastructure needs. (See City's AOB 37 [complaining that "City was not given the opportunity to challenge CSU's statewide budget process, nor did [CSU] present any of its budget choices and process as part of the administrative proceedings . . . giving City the opportunity to comment"].) Indeed, in this case, the City has even litigated CSU's decisions to list off-site mitigation funds as a separate line item in the system-wide capital funding request rather than lump them in with the on-campus capital expansion, and to seek such funds on a statewide basis rather than separately for each campus. (AR-20:20055; CT-3:798, 800, 802-803; CT-5:1321; City's AOB 24-25, 27.) CEQA was never intended to enable this level of municipal micromanagement of state agency budgeting.

CEQA has tremendous potential to be hijacked by project opponents who may have any number of reasons for their opposition, and this Court has repeatedly "caution[ed] that rules

regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Citizens of Goleta Valley, supra,* 52 Cal.3d at p. 568; accord, *Laurel Heights II, supra,* 6 Cal.4th at p. 1132; see also *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1039 (*Sacramento*); *Schellinger Bros., supra,* 179 Cal.App.4th at p. 1270.) The prospect of local agencies commenting upon, litigating, appealing, and seeking Supreme Court review of CSU's statewide budget process until they are satisfied with its reallocation of funds for local projects presents great potential for oppression and delay.

Ultimately, the local agencies' focus on the EIR process obscures the larger truth that CSU and the local agencies are all government agencies serving the public. CSU serves all of the taxpayers statewide; the local agencies here are responsible only to a much more limited constituency. CSU's expansion is not the project of a private developer pursuing its own financial gain while leaving city agencies "holding the bag" for associated traffic congestion. Just as the local agencies are charged with managing traffic congestion for their residents, CSU is meeting a statewide need identified as critical by the Legislature: the increasing demand for affordable higher education in California. (Ed. Code, §§ 66002, 66202.5; AR-9:07500; 15:14228-14229, 14702; 17:16228, 16822-16825; 19:18454-18456, 18523.) CSU also takes on expenses to satisfy the City's needs—for example, CSU has dedicated significant resources to teacher and nursing training to meet a critical demand for those workers (AR-9:07506; 18:18242-18243)—yet CSU does not

attempt to charge the City (or its schools or hospitals, for that matter) for its "fair share" of the costs to train those workers, because they are both serving the public. CEQA was passed to make agencies work together to serve the public (e.g., Pub. Resources Code, §§ 20180.4, 21081.6, subd. (c)), not to help them to take from each other—a process that generates no new funds—nor to subordinate state agencies' missions to the parochial objectives of local agencies.

In this case, the unacceptable levels of service on area roads identified in the EIR *will occur whether or not SDSU undertakes the expansion plan*, because San Diego is a rapidly growing community. (E.g., AR-4:03963; 18:17578-17583, 17586-17591.) SDSU's contribution to traffic is merely cumulative, and its fair-share contribution percentages are on average only 12 percent—indeed, many are in the three to six percent range. (AR-15:14807-14827, 14838, 14863; 17:16984-16985; 18:17603-17604.) This point is underscored by the fact that, outside of this EIR process, the local agencies had *already* determined that they would need to implement significant transit infrastructure upgrades. (AR-11:09320, 09324, 09327-09328, 09348-09351, 09354-09355; 18:17159; 20:19738-19747, 19775-19779, 19786-19788.) The local agencies had *already* identified their own funding gaps, and resolved to become more "aggressive[]" in filling these gaps with funds from other sources. (AR-11:09320, 09324, 09327-09328, 09348-09351, 09354-09355; 19:18758 ["It's kind of helping ourselves"]; 20:19786-19788, 19913-19918; 21:20557; 27:S22561, S22577-S22578; CT-1:00022.) These local agencies thus want to

exploit CEQA as a means to access what are perceived to be CSU's "vast" revenues to provide services to local residents that they must provide regardless of whether SDSU expands.

Fundamentally, the Legislature has the right to determine how much of the state's dollars will be devoted to education and how much to transportation. If it has voted to fund only the capital budget request for the on-campus facility improvements but not the off-site mitigation, requiring CSU to reallocate those funds after the fact to fund transportation improvements would deny the Legislature the power to spend the state's money as it deems best. Using CEQA to obfuscate the Legislature's appropriation decisions by claiming that funds appropriated for "education" can later be just as easily spent on transportation decreases transparency and, with it, political accountability. (See *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-330 ["Openness in government is essential to the functioning of a democracy"].) Thus, for those unhappy with the Legislature's funding allocation, the proper remedy is the use of the political process, not exploitation of the CEQA EIR process to commandeer funds committed for a different purpose. (See *Myers, supra*, 9 Cal. at p. 349 [if Legislature uses appropriation power improperly "at one session, the people will be certain to send to the next more discreet and faithful servants"].) The Legislature intended CEQA to encourage state agencies to make informed decisions that take into account environmental responsibility (*Citizens of Goleta Valley, supra*, 52 Cal.3d at p. 564),

not to enable local agencies to subvert the Legislature's considered funding decisions.

C. This Court should defer to CSU's factual determination that it was not feasible to pay for the mitigation.

1. CSU's decision to approve the EIR is reviewed under the deferential abuse of discretion standard.

CEQA requires appellate courts to review a lead agency's decision to certify an EIR, like CSU's decision here, under the deferential abuse of discretion standard. (Pub. Resources Code, § 21168.5; *Marina*, *supra*, 39 Cal.4th at p. 355.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.) Substantial evidence "includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub. Resources Code, § 21080, subd. (e)(1).) It need only be "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).)

The abuse of discretion standard commands courts to afford "much deference" to the lead agency's factual and environmental conclusions. (*Marina*, *supra*, 39 Cal.4th at p. 355.) "In reviewing

for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, [its] task 'is not to weigh conflicting evidence and determine who has the better argument.' " (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard Area Citizens*).) Indeed, "'[t]he reviewing court must resolve reasonable doubts in favor of the administrative finding and decision'" (*Laurel Heights I, supra,* 47 Cal.3d at p. 393) and "uphold an EIR if there is any substantial evidence in the record to support the agency's decision that the EIR is adequate and complies with CEQA." (*Defend the Bay, supra,* 119 Cal.App.4th at p. 1265; *Sacramento, supra,* 229 Cal.App.3d at p. 1019, 1027.)

Laurel Heights II demonstrates this Court's adherence to CEQA's deferential standard of review. In *Laurel Heights II,* the lone dissenting justice engaged in a lengthy analysis of the EIR, and disagreed with several of the agency's factual determinations as lacking substantial evidence. (See *Laurel Heights II, supra,* 6 Cal.4th at pp. 1143-1151 (conc. & dis. opn. of George, J.).) The six-justice majority rejected this approach: "While giving lip service to applying the substantial evidence standard, the concurring and dissenting opinion in effect discards it, fails to give proper weight to the public agency's decision, and proceeds to reweigh the evidence, engaging in rank speculation and failing to 'resolve reasonable doubts in favor of the administrative finding and decision.' [Citation] By so doing, the concurring and dissenting opinion

abandons the proper role of an appellate court." (*Id.* at p. 1136, fn 23.)

Here, too, as discussed next, the Court of Appeal gave mere "lip service" to the substantial evidence standard and "abandoned [its] proper role," engaging in a searching 83-page review of CSU's EIR, and repeatedly second guessing CSU's factual determinations. (*Laurel Heights II, supra,* 6 Cal.4th at p. 1136, fn 23.) This Court should therefore reaffirm CEQA's deferential standard of review and affirm CSU's factual determinations.

2. CSU did not abuse its discretion in determining that it would be infeasible to fund off-site mitigation absent a legislative appropriation but that overriding considerations warranted approval.

The lead agency's factual determinations on feasibility of mitigation and overriding considerations, like other findings, are reviewed for substantial evidence. (Pub. Resources Code, §§ 20181, 21081.5; see *Sacramento, supra,* 229 Cal.App.3d at p. 1034; *Concerned Citizens, supra,* 24 Cal.App.4th at p. 847.) In its EIR, CSU committed to "submit a budget request to the state Legislature and Governor" that will include CSU's fair-share contribution for off-site mitigation, but found that "because CSU cannot guarantee that . . . the necessary mitigation funding will be approved [by the Legislature], . . . the identified significant impacts are determined to be significant and unavoidable." (See AR-19:18465-18466.) CSU

nevertheless found that overriding considerations warranted approval. (See *ante*, p. 17; AR-19:18525.) Substantial evidence supports these findings because, as explained above, CSU may not spend state funds inconsistently with its Legislative appropriation, and CSU's non-state funding sources are already committed to educational support purposes. (See *ante*, Parts I.D, II.A.)

The Court of Appeal, however, went outside the record to speculate that SDSU might "receive revenues or other funds from a myriad of sources," such as fees or bonds, and on that basis rejected both of these factual findings. (Typed opn., 33.) This type of "rank speculation" is not a permissible basis for a reviewing court to disregard CSU's findings (*Laurel Heights II, supra*, 6 Cal.4th at p. 1136, fn 23), and certainly did not reflect the complexity of CSU's budgeting restrictions (see *ante*, Part II.A). This Court should affirm CSU's findings on feasibility and overriding considerations.

III. THE COURT OF APPEAL IMPROPERLY SECOND-GUESSED CSU'S FACTUAL FINDINGS REGARDING TRANSIT IMPACTS AND THE TDM MITIGATION MEASURE.

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

After reviewing available evidence and taking public comment, CSU determined that the proposed expansion of SDSU

would not have a significant effect on the local transit network, particularly the trolley that services the campus.[10] (E.g., AR-18:17229-17231, 17563; 19:18517.) "Significant effect on the environment" means a substantial, or potentially substantial, adverse change in the environment. (Pub. Resources Code, § 21068; see also Guidelines, § 15382.) A lead agency's determination whether an environmental impact is "significant" is reviewed only for substantial evidence. (*Laurel Heights II*, 6 Cal.4th at p. 1133, 1140.) Several reasons supported CSU's factual finding that any impacts on the trolley would be less than significant:

First, based on SANDAG's own data, the forecasted increase in SDSU-related trolley riders over the coming 18-year period amounts to 383 additional riders per year at the station (6,898/18 = 383). (AR-15:14797; 17:16343, 18:17231, 17257-17258.) This amounts to a mere 6.4 percent annual increase over the existing total ridership (383/5,982 = 6.4%). (AR-15:14797; 17:16343, 16557.) CSU could reasonably determine that adding 383 riders per year to the system will not create significant environmental impacts. (Pub. Resources Code, § 21080, subd. (e); Guidelines, § 15384, subd. (b).)

Second, the SDSU trolley station was a new, award-winning facility. (AR-18:17231, 18267; 19:18649, 18653; 24:S21665.) SANDAG collaborated with SDSU on the station's design and construction, and SANDAG was predicting total trolley ridership at

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[10] The local agencies do not challenge the Court of Appeal's ruling that substantial evidence supported CSU's calculations for increased vehicle traffic. (Typed opn., 50-57.) Therefore, that issue is not before this Court.

the SDSU station, including transfers and non-SDSU passengers, of approximately 14,714 daily riders by 2024-25, with 11,624 of these attributed to SDSU. (AR-15:14797; 17:16556-16557; 21:20674; 24:S21665.) CSU used this projection for daily riders in its EIR. (AR-15:14797-14800.) CSU was entitled to rely on SANDAG's own forecast for future ridership, and CSU reasonably assumed that SANDAG designed a trolley station capable of accommodating SANDAG's own forecast when the station opened. (AR-18:17229-17231, 17816; 19:18653, 24:S21662; Pub. Resources Code, § 21080, subd. (e) [substantial evidence includes *reasonable assumptions based on fact*]; Guidelines, § 15384, subd. (b).)

Third, SANDAG's data indicated that the trolley line serving SDSU was not operating at or near capacity due to SDSU ridership, and there was no evidence to the contrary. (AR-18:17231; 24:S21662.)

Fourth, the station can accommodate an estimated 12,000 students, faculty, and staff per day. (AR-18:18215, 18267; CT-3:585 [SANDAG admission].) SDSU's traffic engineer, working with SANDAG to obtain the data, calculated that by 2024-2025, the SDSU expansion would increase total SDSU-related ridership to 11,624 riders. (AR-15:14797; 17:16343, 16556-16557; 18:17231.) Thus, the total number of new riders attributable to SDSU falls within the station capacity.

Fifth, CEQA requires SANDAG and MTS to provide "specific documentation" in support of their claims that the plan would have a significant impact on transit. (Pub. Resources Code, § 21104, subd. (c).) No local agency provided criteria by which CSU could

evaluate whether the increased *ridership* caused by the SDSU expansion would cause significant *environmental impacts* on the trolley. (AR-18:17229-17230; 20:19956-19964.) Notably, SANDAG's own guidelines evaluate transit service by considering the frequency of trips, the average travel time, and the utilization of service. (AR-18:17230.) In other words, the agencies responsible for public transportation measure it in terms of the speed and quality of service, not how crowded the station platform is. (Cf. *Goleta Union School Dist. v. Regents of University of California* (1995) 37 Cal.App.4th 1025, 1032-1033 [increased overcrowding at local school caused by university expansion is not necessarily a physical impact requiring mitigation].)

Notwithstanding the evidence above, the Court of Appeal rejected CSU's factual finding that the plan would not have significant impacts on the trolley. (Typed opn., 80-82 & fn. 25.) The court focused on a single footnote in an underlying report, and, after erroneously complaining that the material cited therein was not contained in the administrative record (it was, see AR-24:S21665), located the material online; it then faulted both the material (a citation praising the station for excellence in "Proactive Planning and Innovative Transportation Planning"), and the expert report (AR-18:18215, 18267) for being insufficiently convincing. (Typed opn., 80-82 & fn. 25.) This was error because CSU is entitled to determine the reliability of evidence and expert reports, and to make inferences from that material, even if the Court of Appeal would have weighed and interpreted those materials differently. (*Vineyard Area Citizens*, *supra*, 40 Cal.4th at p. 435.) "Where a

petitioner's challenge in a mandamus action rests on the sufficiency of the evidence, 'the court does not have the power to judge the intrinsic value of the evidence or weigh it.' " (*California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 247.)

Aside from discrediting this evidence, the Court of Appeal rejected CSU's finding because it felt that, in light of the increase in the raw number of daily boardings, CSU had to provide substantial evidence that the plan's impacts on the trolley would *not* be significant. (Typed opn., 80-82.) This turns CEQA upside down. CEQA requires CSU to determine whether the plan *will* cause significant environmental impacts, and limit the discussion of impacts found to be insignificant. (Pub. Resources Code, §§ 21100, subd. (c), 21002.1, subd. (e); see *Laurel Heights II, supra*, 6 Cal.4th at p. 1140.) CSU is not required, as the Court of Appeal held here, to *presume* that the plan will have significant impacts merely because it will increase trolley ridership and then demonstrate why that increase will *not* have a significant effect on the transit system.

B. Substantial evidence supports the propriety of the TDM program as a mitigation measure.

In addition to numerous other near-term and long-term traffic mitigation measures, CSU adopted measure TCP-27, which provides for the preparation of a TDM program in consultation with SANDAG and MTS to "facilitate a balanced approach to mobility" (including rideshare programs, transit use, vanpools and bicycles)

"with the ultimate goal of reducing vehicle trips to campus in favor of alternate modes of travel." (AR-18:17159, 17237-17239, 17514, 17602; 19:18466-18472.) The Court of Appeal determined that TCP-27 was an improper deferral of mitigation. (Typed opn., 60-62; see Guidelines, § 15126.4(a)(1)(B).) This too is error because it fails to afford CSU the appropriate deference.

CEQA recognizes that sometimes the formulation of precise means of mitigating an impact is infeasible or impracticable at the time of plan approval. (See *Sacramento, supra*, 229 Cal.App.3d at p. 1028.) The approval may come so early in the planning stage (such as here, where the SDSU Master Plan has a 20-year horizon), that it is more practical for "the agency [to] commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval." (*Id.* at p. 1029.) The SDSU expansion is expected to increase at a gradual rate through 2024-25; there are limits on CSU's ability to predict exactly how traffic congestion can best be mitigated twenty years in the future. Many of the individual "projects" within this plan will have their own project EIR's when they are ready for construction. "Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated." (*Ibid.*; *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 621; *Defend the Bay, supra*, 119 Cal.App.4th at pp. 1275-1276.) TCP-27 represents this type of commitment. TCP-27 includes a fixed deadline (five years from the plan start date), a responsible entity, and specific

performance criteria—the reduction of vehicle trips. (AR-18:17514, 17602.) TCP-27 must be applied to all plan components, monitored by the Campus Project Manager, and documented and reported to ensure compliance. (AR-19:18527, 18563.)

Furthermore, CSU found that if the Legislature were to deny CSU's request for off-site mitigation funding, traffic impacts would remain significant and unavoidable *even with* the adoption of TCP-27, but that overriding benefits warranted approval. (AR-19:18465-18474, 18522-18525.) No prejudicial abuse of discretion could have resulted from the discussion and adoption of TCP-27 because it was not relied upon to make a less-than-significant finding. (See *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119; *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391 ["Noncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown"].)

It is more than reasonable to include this type of commitment to explore the use of TDM strategies in the future as one of the EIR's many mitigation measures. (See *Laurel Heights I*, *supra*, 47 Cal.3d at p. 418 [approving mitigation promising " 'to promote ongoing campus transportation systems, management programs, including promotion of transit, carpooling, vanpooling, and related activities' "]; *Sacramento*, *supra*, 229 Cal.App.3d at p. 1028-1030 [approving parking mitigation to explore "satellite parking locations; public transit, carpooling; and construction of new parking or expanded use of existing parking"].) Indeed, it is surprising that the local agencies challenge CSU's adoption of TCP-27, because these agencies *also* support the use of TDM programs to

facilitate transit mitigation in their *own* plans. (See AR-20:19759, 19879, 19882, 19898, 19901, 19905, 19912.)

CONCLUSION

This Court made clear in *Marina* that CSU's power to mitigate the environmental effects of plans such as the SDSU Master Plan through voluntary payments is limited by the Legislature's appropriations decisions. The Court of Appeal's rejection of that doctrine led to the unworkable requirement that CSU should invite local agencies and others to scrutinize its budget and litigate over whether they agree that it is "infeasible" to use CSU's statewide education funds to bankroll local traffic improvements. This Court should reverse that ruling and hold that CSU complied with its CEQA obligations. This Court should also reverse the Court of Appeal's rejection of CSU's factual findings on feasibility, overriding considerations, transit impacts, and the TDM program, so that the trial court can discharge the peremptory writ issued in the 2005 plan litigation and deny the writ petitions challenging the 2007 EIR.

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CERTIFICATE OF WORD COUNT

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

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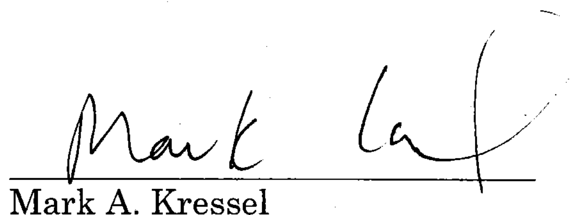

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On June 28, 2012, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

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

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

Executed on June 28, 2012, at Encino, California.

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