Case No. S279242

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAKE UC A GOOD NEIGHBOR ET AL.

Petitioners and Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.

Respondents.

RESOURCES FOR COMMUNITY DEVELOPMENT

Real Party in Interest.

After a published opinion By The Court Of Appeal
First Appellate District, Division Five,
Appellate Court Case No. A165451

Appeal from July 29, 2022, Order and August 2, 2022 Order and Judgment of the Alameda Superior Court; Hon. Frank Roesch, Dept. 17, Case No. RG21110142 (Consolidated for Purposes of Trial Only with Case Nos. RG21109910, RG21110157, 21CV000995 and 21CV001919)

REPLY TO ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Federal Cases

Statutes

Regulations

Miscellaneous

INTRODUCTION

The Opinion's holding that loud student parties are environmental impacts does not, as Appellants Make UC a Good Neighbor and The People's Park Historic District Advocacy Group ("Appellants") contend, represent "routine application" of CEQA's fair argument standard of review. Far from it. The holding creates new common law requiring public agencies to accept stereotypes and prejudice as a basis for *environmental* analysis whenever a project opponent presents evidence that individual members of the social or demographic group a project is designed to serve have, in the past, engaged in behavior perceived by some as being too loud. According to the Opinion, when presented with such evidence, a lead agency must elevate its study of a proposed project to the most robust form of review under CEQA – an Environmental Impact Report ("EIR"). Next, the lead agency must identify a methodology by which to analyze whether *the people* the project will serve are the type who, consistent with the evidence in the record about *people like them*, are likely to engage in noisy behavior not at the project site, but rather *off-site* in the course of their everyday lives out in the community. If the analysis shows that people like the project's users or residents are the type of people who are likely to make excessive noise in the surrounding community, then the agency may not approve the project unless it either adopts mitigation measures to reduce those people's off-site noise, or demonstrates, based on substantial evidence, that such measures are infeasible and that the project's benefits outweigh the impacts of the people's noisy off-site behavior. (Pub. Resources Code, § 21002.)

Appellants posit that, because it will not *preclude* approval of housing and education projects, the Opinion's application of CEQA to the new environmental category of "social noise" is run-of-the-mill. Appellants miss the point. The problem is that the analysis itself will impose a troublesome and inappropriate obligation on analysts and agencies to *prejudge the behavioral characteristics of a project's future occupants* based on the characteristics of people who share their same social identity. It will also trigger the need to prepare time-consuming, expensive EIRs that would not otherwise be necessary. And it will open up yet another avenue for litigation since such problematic, socially-biased analysis will almost certainly be challenged by project opponents, members of the stereotyped social/demographic group(s), or both. Moreover, treating unamplified urban human voices as negative "environmental impacts" subject to CEQA, thwarts CEQA's underlying goals of promoting development in urban infill areas to avoid impacts to the natural environment.

These concerns are not "hyperventilated" as Appellants callously assert. Despite the Opinion's attempt to distance itself from condoning CEQA "as a redlining weapon by neighbors who oppose projects based on prejudice rather than environmental concerns," that is precisely what it condones. (Slip. Op., p. 34.) This Court should step in to confirm that evidence of the past behavior of a described social group, in this case "undergraduate students," cannot serve as evidence of an *environmental* impact triggering analysis under CEQA whenever a "fair argument" can be made that members of a demographic group a project is designed to serve may make loud noise as they go about their lives in the surrounding community.

Review is also needed to confirm that CEQA does not require a lead agency to analyze "alternative" locations to a site-specific project that is part of a larger program of potential locations, all of which may be necessary to achieve the program's objectives and all of which have been programmatically analyzed in an EIR.

LEGAL DISCUSSION

A. The Answer only underscores why this Court's review is necessary to ensure social prejudices cannot form the basis of "proper evidence" of a fair argument of a significant environmental impact.

Contrary to Appellants' view that CEQA is "elegantly constructed to eliminate" concerns about its abuse as a tool of discrimination, the Opinion demonstrates just the opposite. The Court of Appeal's holding depends entirely on the speculative, preconceived notion that future students will generate substantial late night party noise based on nothing more than evidence that other students, as a group, have done so in the past. (Slip. Op., p. 36 ["Given the long track record of loud student parties that violate the city's noise ordinance (the threshold for significance), there is a reasonable possibility that adding thousands more students to these same residential neighborhoods would make the problem worse."].) Thus, with the Opinion, all that is needed to trigger an EIR is evidence that other people with the *same social identity* as future project users have *previously* participated in noisy activities that could violate applicable noise

standards.[1] Coupled with neighbors' fears and complaints about future project residents and users, like those from the UC Berkeley's neighbors upon which the Opinion relies, this is the dictionary definition of discrimination and prejudice.[2] Despite the Opinion's disclaimer that it should not be interpreted to promote stereotypes, prejudice, and bias, or turn CEQA into a redlining weapon, the Opinion will, unfortunately, do exactly that.

Appellants are also wrong that the Court of Appeal applied "well-developed principles of 'substantial evidence'" and that "careful judicial oversight" is all that is needed to insure against any CEQA abuse. (Answer, p. 11.) In describing the scope of judicial review of an agency's application of the fair argument standard, this Court has stated: "The [reviewing] court's function is to determine whether substantial evidence support[s] the agency's conclusion as to whether the prescribed 'fair argument' could be made. If there [is] substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and

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[1] For example, Appellants argue the Opinion's holding on social noise is uncontroversial because it is based on evidence that "UCB students have created a lot of noise in the past and it is reasonable to expect they will do so in the future." (Answer, pp. 13-14.)

[2] "Discrimination" is "prejudiced or prejudicial outlook, action, or treatment" and "the act, practice, or an instance of discriminating categorically rather than individually." "Prejudice" is "preconceived judgment or opinion," "an adverse opinion or leaning formed without just grounds or before sufficient knowledge," and "an irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics."(Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/. Accessed Apr. 2023.)

adopt a negative declaration, because it [can] be 'fairly argued' that the project might have a significant environmental impact.'" (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1112.) "The fair argument standard thus creates a low threshold for requiring an EIR, reflecting the legislative preference for resolving doubts in favor of environmental review." (*Covina Residents for Responsible Development v. City of Covina* (2018) 21 Cal.App.5th 712, 723.)

Yet even under the fair argument standard's low bar, CEQA does not require an EIR unless the record includes "substantial evidence" that the project may have a significant *environmental* impact. Social changes and impacts to community character do not qualify. "Substantial evidence" means "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).) "Substantial evidence" includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Guidelines, § 15384, subd. (b).) "Substantial evidence" does not include "[a]rgument, speculation, unsubstantiated opinion or narrative [or] evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." (Guidelines, § 15384, subd. (a); Pub. Resources Code, § 21082.2, subd. (c); *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2008) 157 Cal.App.4th 885, 900-901.) Further, purported "common sense" conclusions without any factual basis are not substantial evidence. (*Joshua*

Tree Downtown Business Alliance v. County of San Bernardino (2016) 1 Cal.App.5th 677, 691.)

The Opinion, however, breaks with existing law and allows evidence that *prior* students' noisy behavior has been a "problem" to serve as "proper evidence" of a fair argument that *future* students, by their nature, may reasonably be expected to participate in the same behavior as their predecessors for no other reason than their identity as a student. (Slip. Op., p. 35.) This Court should intervene to prevent the damaging application of this same rationale to other social and demographic groups.

Further, even assuming future courts could and would exercise careful judicial oversight and reject CEQA claims based on veiled prejudice and stereotypes, the Opinion gives fodder to project opponents who "for whatever reasons and with whatever depth of conviction -- are chiefly interested in scuttling a particular project.'" (See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568 ("*Goleta II*"),[3] quoting *Seacoast Anti-Pollution v. Nuclear Regulatory Com'n* (1st Cir. 1979) 598 F.2d 1221, 1230-1231.) Under the Opinion, when presented with evidence that future residents or users of a project share characteristics with other people known to engage in noisy behavior in the surrounding community, agencies will either have to treat such evidence as "proper evidence" of a potential environmental impact, or face the threat of a CEQA lawsuit. Thus, even if future courts ultimately find the evidence inappropriate, projects designed to serve underserved demographic groups about whom "noisy"

[3] The Regents' petition referred to this case as *Goleta I.* In fact, *Citizens for Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167 should be considered "*Goleta I*."

stereotypes exist will be needlessly subject to challenge and delay. As Justice Chin recognized in *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 254 (dis. opn. of Chin, J.), "[g]iven the glacial pace of litigation, [resolving a CEQA case] will easily take years. ... Delay can become its own reward for project opponents. ... All this is a recipe for paralysis. But CEQA is not meant to cause paralysis."

This Court should accept review to quell any notion that allegations that future residents of an urban infill project may make loud noise can serve as substantial evidence of a significant environmental impact.

Notably, *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714 ("*Keep Our Mountains Quiet*"), upon which the Opinion relies, is readily distinguishable. First, the property at issue there was set on almost fifteen acres of rural, agricultural land in the Santa Cruz Mountains, surrounded by open space and single-family residences on lots over two acres in size. (*Id*., at p. 719.) By contrast, UC Berkeley is in the middle of a dense urban environment. Second, the project in *Keep Our Mountains Quiet* was a use permit authorizing weddings and other special events; it was the direct cause of the amplified DJ music and "crowd noise" that would be heard emanating from a specific stationary location at a specific time. (*Id*., at pp. 720, 734.) By contrast, this case is not about noise coming *from* student housing; it is about noise that Appellants contend will be generated by the residents of student housing when they *leave* the building, i.e., how they will behave in public rights of way and at private residences the University does not control.[4] Nothing in *Keep Our*

[4] Appellants' noise expert even opined that given the Residential Code of Conduct that would be enforced at UC Berkeley-controlled housing, "those

Mountains Quiet suggests CEQA requires a public agency to analyze the noise people make on their own time in private settings the agency does not control and away from the project site itself.

Moreover, interpreting CEQA, as the Opinion does, to apply to noise made by residents of housing projects in developed urban areas as they go about their daily lives will have the perverse effect of encouraging greenfield development far away from other people who could be bothered by such noise. This outcome contradicts the fundamental purpose of CEQA, which was obviously enacted to protect the *environment* and, consistent with that purpose, has been modernized in various ways over the years to promote the concentration of development in urban infill areas to reduce vehicle miles travelled and greenhouse gas emissions. (See, e.g., Pub. Resources Code, §§ 21099 [Modernization of Transportation Analysis for Transit-Oriented Infill Projects], 21159.24 [Infill Housing Exemption], 21159.25 [Residential or Mixed Use Housing Projects Exemption]; Guidelines, §§ 15183.3 [Streamlining for Infill Projects], 15195 [Residential Infill Exemption].) It also contradicts the Legislature's determination in the Housing Accountability Act that a lack of urban housing "undermin[es] the State's environmental and climate objectives." (Gov. Code, § 65589.5, subd. (a)(2)(A).) This Court should correct the absurd outcome that will result if the behavioral, social noise that humans make in urban environments can be characterized as a "significant environmental impact" that must be mitigated or overridden before urban

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students ... who do want the quintessential undergraduate partying experience will go elsewhere – foreseeably to non-UCB-controlled residences of other students." (AR1599-1600.)

infill housing can be approved. CEQA case law should not thwart CEQA's own purpose.[5]

B. Review is needed to confirm that CEQA does not require a lead agency to engage in an artificial analysis of "alternative" locations for a site-specific project where the project is part of a larger program of potential locations, all of which have been programmatically analyzed in an EIR.

Contrary to what Appellants contend, the Regents are not asking this Court to give the University *carte blanche* to build what it wants, where it wants, without regard to alternative locations that would avoid impacts to environmental resources. To be clear, the Regents seek this Court's review to clarify that where, as here, an EIR programmatically *identifies and analyzes* numerous sites that could accommodate development under the program (here, the LRDP's Housing Program), and prioritizes one or more of those sites for near-term construction, reserving the others for development in the longer-term, the EIR does not need to evaluate each of the potential sites as "alternatives" to one another. Instead, the agency may exercise its discretion to propose first those sites that, through its planning process, the agency has identified as available to meet its immediate objectives; the agency does not need to re-examine all of the other sites

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[5] "Under the absurdity doctrine, courts are ... permitted to interpret laws in clear contravention of the plain meaning of the text of the law, if a law's 'plain, clear, literal meaning produces an unintended, absurd result.'" (Boone, *Perverse & Irrational* (2022) 16 Harv. L. & Pol'y Rev. 414, available at https://harvardlpr.com/wp-content/uploads/sites/20/2022/08/HLP202.pdf.)

identified for future development as "alternatives" to the immediate-term proposal.

In their Answer, Appellants allege the Regents "misdirect" the Court, claiming that the EIR "omitted analysis of any alternative site for the housing proposed in People's Park." (Answer, pp. 17-20.) As demonstrated in detail below, the EIR in fact considered *sixteen* potentially feasible locations for student and faculty housing and *analyzed every single one of them*. (AR9573-76.)

Critical to this Court's consideration of the Regents' petition is the context of this analysis. The LRDP is the overriding policy document that plans for space to accommodate reasonably foreseeable population growth at UC Berkeley through 2036-37. (AR10390.) The LRDP's Housing Program strives to provide approximately **11,731 new beds** by the 2036-37 horizon year. (AR9580.) To construct the facilities necessary to achieve this ambitious housing goal, UC Berkeley must optimize all sites at its disposal, and it must do so in a thoughtful, phased way that allows for flexibility and adaptation to changing conditions. (See AR9551; AR9575; AR71-72.) Construction of fewer than 11,731 new beds will mean that projected population growth will occupy more non-UC Berkeley housing, resulting in *greater* impacts on population and housing. (AR10390 [EIR analysis of Reduced Development Program Alternative].) It will also result in less infill development near transit and, thus, more vehicle miles travelled and higher greenhouse gas emissions. (AR10386.)

The Opinion's holding that the University should have considered "alternative" locations for housing at sites other than People's Park is based on a fundamental misapprehension of the record. Correctly read, there are

no "alternative" locations for housing – the EIR already considers all potentially feasible housing locations and proposes, at a programmatic level, to develop them all. (AR9573-76.) Put another way, whereas the Opinion asserts that the EIR "analyzes *no* potentially feasible alternatives" for student housing, it actually analyzes *all* potentially feasible locations for student housing, including all the sites Appellants list on page 19 of their Answer and claim were omitted from the EIR's analysis. (Slip. Op., p. 22, emphasis in original; AR9573-76.)

Importantly, this analysis did not take place in "private deliberations" as Appellants claims. (Answer, pp. 17, 19.) It is squarely presented in the EIR's Project Description, which plainly explains, "UC Berkeley has identified potential areas of new development and redevelopment that could accommodate additional housing on the Clark Kerr Campus and the City Environs Properties."[6] (AR9560.) The EIR's Project Description then includes a table and a map of these approximately 58 potential areas of new development and redevelopment, including sixteen (16) sites for potential residential uses. (AR9574-76.) The EIR also explains that it "provides a project-level analysis (i.e., evaluates potential impacts from construction and operation) of two of these potential areas of new development, which are the Helen Diller Anchor House site (Housing Project #1) and People's Park site (Housing Project #2)," and that "[o]ther

[6] The Clark Kerr Campus is located several blocks southeast of the main part of campus, known as Campus Park; the City Environs Properties refers to properties owned or leased by UC Berkeley, mostly located in the high-density area within roughly one-half mile of the Campus Park. (AR9557.)

properties could be developed for housing, including, but not exclusively, those identified in the Chancellor's Housing Initiative." (AR9560.)

It is true, as Appellants state, that some of the potential housing sites the EIR identifies could accommodate more beds than proposed at People's Park. (Answer, p. 19; AR9575.) But that is of no moment. To accomplish its Housing Program, the University needs more than just the beds that any one site could accommodate – it needs them all.[7] (AR9580.)

Appellants are also wrong that the EIR "failed to analyze" the potentially feasible housing sites and "precluded the public from commenting on the environmental merits of alternative locations." (Answer, p. 17.) To the contrary, in addition to the project-level analysis the EIR conducted for the Anchor House site and the People's Park site, the EIR methodically analyzed the environmental impacts of all the other potential sites at a program level. For example, the EIR analyzed whether development at any of the specific locations identified in the Project Description would cause a substantial adverse change in the significance of a historical resource. (AR9802.) That analysis includes a table that specifically identifies 46 potential sites, including the Anchor House site

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[7] The Opinion inappropriately discounts the importance of the University's Housing Program, noting the University does not "commit" to building all of these beds. (Slip. Op., p. 23.) But the University's inability to commit to all 11,731 beds now is yet another reason that prioritizing construction at People's Park is so essential. As the EIR explained, "[t]he location and design of future development would be informed by proximity to existing UC Berkeley campus resources and compatibility with surrounding land uses." (AR9573.) The LRDP Land Use Element also seeks to "[m]ake the highest and best use of *each site* to employ limited land resources most efficiently." (AR63, emphasis added.)

and the People's Park, with eligible or potentially eligible historical resources or features. (AR9803-05.) The EIR did the same for all other environmental resource areas, analyzing site-specific considerations where appropriate. (E.g., AR9649-50 [analyzing aesthetic impacts of development in specific regions]; AR9956 [identifying specific hazardous material sites in and adjacent to EIR study area].) There is no reasonable argument that the public was deprived of an opportunity to review and compare the environmental merits of developing housing on any of the potential sites the EIR identifies. The EIR covers them all.

Appellants' citation to portions of a Housing Capacity Study conducted by the University's consultants also does not show any secret agenda, as Appellants suggest. (Answer, p. 19.) To the contrary, it shows the University engaged in a thoughtful planning process to identify the list of potential housing sites that ultimately made their way into the EIR for full, programmatic analysis where anyone was free to comment on the appropriateness or inappropriateness of these sites as locations for housing. (AR28187-292 [May 6, 2020 Housing Capacity Study].) Subsequent portions of this Housing Capacity Study illustrate some of the complexities associated with many of the sites to be developed in the longer-term, including the need to relocate and consolidate child care, recreational, and other facilities to other locations before embarking on construction. (AR28306-36 [Sept. 15, 2020 Housing Capacity Study].) These considerations informed the University's decision to propose only the Anchor House and People's Park sites for immediate development, reserving the other fourteen potential housing sites for near-term and long-term development.

Thus, factually, the record clearly demonstrates that the EIR identified and analyzed numerous potentially feasible locations for housing. Accordingly, as the Regents explained in their petition, the LRDP EIR is comparable to the EIR the county prepared in *Goleta II*. The LRDP here, like the general plan and Local Coastal Plan ("LCP") in *Goleta II*, "embod[ies] fundamental policy decisions that guide future growth and development." (*Goleta II*, *supra*, 52 Cal.3d at p. 571.) And like the county in *Goleta II*, the University "must confront, evaluate and resolve competing environmental, social and economic interests." (*Ibid.*) More fundamentally, just as "[i]dentification and analysis of suitable alternative sites for the development of new hotels and resorts in the County's coastal zone was precisely the task of the LCP" in *Goleta II*, the task of the LRDP EIR was to identify and analyze potentially feasible sites for development of student and faculty housing, as well as other campus-serving facilities. (*Id.*, at p. 572.) This Court held in *Goleta II* that "[u]nder these circumstances, where the County has already undertaken a study of the environmental suitability of alternative sites for commercial development and has embodied its findings in the LCP, we cannot say that the Board abused its discretion in relying on the LCP to help it assess the feasibility of potential project alternatives." (*Id*., at p. 573.) Similarly, here, the University did not analyze the People's Park project in a vacuum. It analyzed it in the context of the larger proposed Housing Program through 2036-37, which the LRDP EIR programmatically evaluated. And the University recognized that even if other locations might accommodate the same number of, or more, student and faculty beds as those proposed at People's Park, construction at those other locations could not be accomplished as quickly as at People's Park.

Given the urgent need for student and faculty housing, the University's proposal to build housing at People's Park first reflects good planning.

Moreover, it is clear from the EIR's Project Description that the People's Park Project is not a cookie-cutter student housing project that could be dropped into any one of the other potential housing areas. The People's Park Project includes more than student housing; it includes permanent supportive housing for approximately 125 extremely low-income persons, as well as preservation of two-thirds of the site as open green space for the community specifically designed to commemorate the history of People's Park. (AR1206-08.) It is a project designed for People's Park, exclusively.

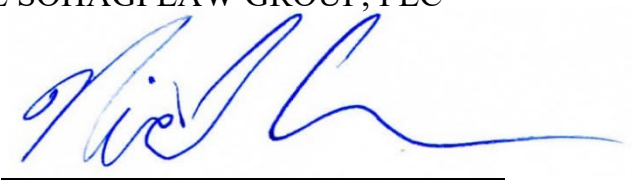
Under these circumstances, the University did not err in declining to evaluate all of the other potential housing locations, case-by-case, as "alternatives" to the People's Park Project. This Court's review is necessary to clarify that where a site-specific project is part of a larger program of potential development locations, all of which have been programmatically analyzed in an EIR, CEQA does not require the lead agency to analyze the other development location as "alternatives" to the project-level proposal.

CONCLUSION

For all the foregoing reasons, and those presented in the Regents' petition, the Regents respectfully request this Court's review.

DATED: April 24, 2023

THE SOHAGI LAW GROUP, PLC

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that the total word count of this REPLY TO ANSWER TO PETITION FOR REVIEW, excluding covers, table of contents, table of authorities, and certificate of compliance, is 4,000.

DATED: April 24, 2023

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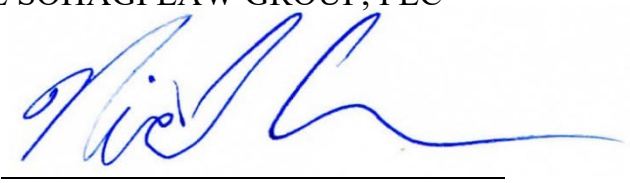
By: 

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PROOF OF SERVICE

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

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

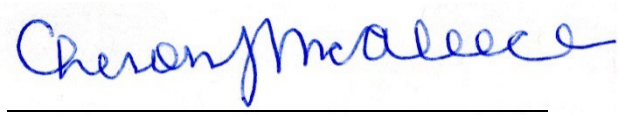
On April 24, 2023, I served true copies of the following document(s) described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

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

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



Cheron J. McAleece

SERVICE LIST

Make UC a Good Neighbor, et al. v. The Regents of the University of California
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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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

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4/24/2023

Date

/s/Cheron McAleece

Signature

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