S279242

IN THE SUPREME COURT OF CALIFORNIA

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

v.

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

RESOURCES FOR COMMUNITY DEVELOPMENT et al.,
Real Party in Interest.

AFTER A PUBLISHED OPINION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FIVE,
CASE NO. A165451

APPEAL FROM JULY 29, 2022, ORDER AND AUGUST 2, 2022 ORDER AND JUDGMENT OF THE ALAMEDA SUPERIOR COURT; HON. FRANK ROESCH, DEPT. 17, CASE NO. RG21110142 (CONSOLIDATED FOR PURPOSES OF TRIAL ONLY WITH CASE NOS. RG21109910, RG21110157, 21CV000995 AND 21CV001919)

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

INTRODUCTION

Of the 48 cases and 34 statutes and regulations cited in the answer brief, not one requires a public agency under CEQA to (1) analyze the potential rowdiness of future residents of a project as they socialize with other members of the community away from the project or (2) make stereotypical assumptions about the potential noisiness of those future project residents based solely on their status as members of a particular social group. The Court of Appeal's opinion here was the first to impose these extrastatutory requirements. But CEQA should not be interpreted to "impose[ ] procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines." (Pub. Resources Code, § 21083.1.) CEQA may be broad, but it is not unlimited. This Court should reverse the Court of Appeal because it erroneously expanded CEQA beyond its statutory terms.

First, CEQA only requires agencies to address the environmental impacts of projects. It does not require agencies to address the broader behavioral activities of project residents in communities away from the project. Here, for example, the Court of Appeal faulted UC Berkeley's EIR for failing to address the possibility that students might be rowdy after they leave the project site, enter neighboring communities, and socialize with other unidentified students and community members. Nothing in CEQA's text or case law requires such an analysis.

Second, CEQA should not be construed to require or permit agencies to indulge in bias and stereotypes when analyzing potential environmental impacts from a project. The project opponent's noise consultant Derek Watry, for example, cites to the 1978 comedy film *Animal House* as "evidence" that a "rite of passage of undergraduate college years is partying." (AR 1596.) No public agency should be required by CEQA or any other state law to make categorical assumptions about how persons will act based on their membership in a social group. That students are not a protected class for purposes of equal protection analysis, as the answer brief repeats many times, does not make it right for an agency to base its decisions on bias and stereotyping of students or any other social group. And this Court should not, for the first time, add bias and stereotyping as a CEQA requirement. To the contrary, judges must ensure that their rulings are "not influenced by stereotypes or bias." (Cal. Stds. Jud. Admin., § 10.20(b)(3).)

Finally, the Court of Appeal also erred in holding that UC Berkeley did not adequately consider project alternatives. In doing so, the Court of Appeal ignored this Court's decision in *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566 (*Goleta II*). There, this Court made clear that when an agency studied project alternatives at a programmatic level, as UC Berkeley did here in the LRDP, it need not reconsider the analysis in the project-level EIR.

The answer brief makes light of the serious issues UC Berkeley has raised, calling them simply "sound bites" seeking

exemptions from CEQA for "social noise." The project opponents miss the point. They are trying to force public agencies to do what CEQA does not textually require and what no case has ever imposed—to evaluate purported impacts based on stereotyping a social group and speculating about the noise that individual members of that social group might generate in their social interactions away from the proposed project. A recent article in CalMatters[1] explains what is at stake in this appeal: The Court of Appeal's opinion created a "new interpretation and an expansion of [CEQA]." (Zinshteyn & Christopher, *As One More Housing Project Stalls On Noise Concerns, Another Head Sprouts From 'CEQA Hydra'* (Aug. 17, 2023) CalMatters <https://tinyurl.com/calmatters0823> [as of Aug. 22, 2023].) If affirmed by this Court, it " 'could be used as a tool to keep communities of color out, to keep multifamily housing out, to keep young people locked out of housing' " because " ' "they're going to be too loud [and we] can't have them in our neighborhood." ' " (*Ibid.*)

UC Berkeley, a beacon of California's public education system, faces a student housing crisis. Responsible environmental planning requires a focus on dense urban housing built close to work and school. The People's Park project meets that challenge. The answer brief acknowledges that many UC

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[1] "CalMatters is a nonpartisan and nonprofit news organization bringing Californians stories that probe, explain and explore solutions to quality of life issues while holding our leaders accountable." (See *About Us*, CalMatters <https://tinyurl.com/calmatter2023> [as of Aug. 22, 2023].)

Berkeley students have experienced homelessness while attending the university because of a combination of a decades-long regional housing crisis and a serious student housing shortfall on campus. (ABOM 17.) A true good neighbor would embrace and support a much-needed housing project designed to alleviate this crisis rather than further exacerbate the crisis by seeking to block the remedy.

LEGAL ARGUMENT

I. The Court of Appeal erred in concluding the EIR was inadequate because it failed to evaluate students' social interactions away from the project and to assume students will be too noisy.

A. CEQA should be given a practical construction and not expanded beyond its text.

"The Legislature has expressly forbidden courts to interpret CEQA or the regulatory guidelines to impose 'procedural or substantive requirements beyond those explicitly stated' in the act or in the guidelines." (*South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1617; see *Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416, 1430 ["to the extent a party . . . advances an interpretation of CEQA that is beyond the explicit terms of the act and that imposes requirements not otherwise compelled by the face of the act, we are constrained to reject that interpretation"]; *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 899 ["When interpreting CEQA, courts are not authorized to

impose requirements not present in the statute"]; see also Pub. Resources Code, § 21083.1 [same].)

"According to the legislative history [of Public Resources Code section 21083.1], the purpose of this statute was to 'limit judicial expansion of CEQA requirements' and to ' "reduce the uncertainty and litigation risks facing local governments and project applicants by providing a 'safe harbor' to local entities and developers who comply with the explicit requirements of the law." ' " (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1107.) In addition, "[l]ike all laws . . . , CEQA should be given a reasonable and practical construction." (*Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 593.)

B. CEQA is concerned only with environmental impacts of projects.

"Whether an activity is regulated by CEQA is a question of law that may be decided on undisputed facts. [Citation.] When it enacted CEQA, the Legislature imposed certain limitations on its scope. CEQA applies only to activities that meet the definition of a 'project' under the statute and its implementing administrative regulations." (*Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 907.)

A "project" is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Pub. Resources Code, § 21065; see also Guidelines, § 15358, subd. (b) ["Effects

analyzed under CEQA must be related to physical change"].)[2] " 'Environment' means the physical conditions which exist within the area which will be affected by a proposed project." (Pub. Resources Code, § 21060.5.) "[A]ny significant effect on the environment shall be limited to substantial, or potentially substantial, adverse changes in physical conditions which exist within the area." (*Id.*, § 21151, subd. (b).)

The Court of Appeal's opinion assumes the possibility of rowdy student parties in the broader community as an environmental impact that must be analyzed under CEQA. (See *Make UC A Good Neighbor v. Regents of University of California* (2023) 88 Cal.App.5th 656, 687–690 (*Good Neighbor*).) No previous case had so held and the opinion points to no specific textual requirement in the statute to compel the decision. As we detail below, no action by the Legislature indicates any intention to expand CEQA to require an analysis of the everyday socializing of future project residents in the broader community whether rowdy or not.

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[2] All references to "CEQA" are to the California Environmental Quality Act. (Pub. Resources Code, § 21000 et seq.) All references to "Guidelines" are to the state CEQA Guidelines, which implement the provisions of CEQA. (Cal. Code Regs., tit. 14, § 15000 et seq.)

C. CEQA does not require UC Berkeley to consider the potential rowdiness of future students and how they might interact socially.

1. CEQA does not regulate everyday social behavior.

"California does not define 'environment' to include social or economic effects on community character. [Citation.] Indeed, CEQA expressly excludes social or economic impacts as environmental impacts." (*Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 581 (*Preserve Poway*); see Guidelines, § 15064, subd. (e) ["Economic and social changes resulting from a project shall not be treated as significant effects on the environment"]; *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1020 [same]; see also Guidelines, §§ 15131, subd. (a) ["Economic or social effects of a project shall not be treated as significant effects on the environment"], 15384 [same]; OBOM 29–34 [collecting cases holding that antisocial behavior is not an environmental impact of a project].)

The EIR for the People's Park project addressed the potential noise from the project's construction and identified mitigation for that noise. (See AR 14067–14073, 14109–14113, 14115–14118, 14135–14136.) The EIR also addressed potential noise from people congregating and talking in the open space and park area of the project and from traffic going into and out of the fully built project itself. (AR 10080, 14118–14121, 14198.) Under established CEQA precedent, such noises are environmental impacts from the project, and they were adequately addressed.

But as we explained in our opening brief, the social behavior of student residents while out in communities—the supposed propensity of students to be too rowdy or noisy—is not an environmental impact of the project cognizable under CEQA. (OBOM 28–34.) The answer brief's inadequate response to this argument is addressed below.

2. The possibility that students might leave their housing, congregate in groups at parties or other events in other parts of the city, and engage in rowdy or noisy socializing is a social change not covered by CEQA.

Petitioners and appellants Make UC A Good Neighbor and The People's Park Historic District Advocacy Group (project opponents) argue that noise is noise. (ABOM 38–39.) They claim that since students as a social group have a tendency to be noisy in the City of Berkeley, CEQA requires UC Berkeley to address the possible noise its student population may make while out and about socializing during their everyday lives. (*Ibid.*) They also argue that UC Berkeley cites no cases supporting its argument that the perceived rowdiness of students is not an environmental impact. (ABOM 36.) The project opponents have it backward. With no cases or textual authority supporting their novel theory to expand CEQA, project opponents have no convincing legal argument that the potential noise of students socializing in the community constitutes an environmental impact rather than a social condition not cognizable under CEQA. (See *ante*, Part I.A.)

Jensen v. City of Santa Rosa (2018) 23 Cal.App.5th 877 is instructive as to what kind of noise counts as environmental noise resulting from a project. There, the city planned to turn a defunct hospital into a center to house young adults and provide them with counseling, education, and job training. (*Id.* at pp. 880–881.) The EIR needed to examine potential noise impacts resulting from traffic in and out of the parking lot at the project and noise from the residents' outdoor activities while living at the project. (*Id.* at p. 881, 898–899; cf. *id.* at pp. 895–896 [analysis of noise generated by cars and trucks at a different site was not substantial evidence of potential noise at the project site].) The city was not required to consider where the center's residents might travel while away from the project or to consider their propensity for rowdiness while socially interacting with members of neighboring communities.

Indeed, the project opponents acknowledge that the potential noise that they complain about is "social," i.e., generated by human interactions in the broader community where students may gather to socialize, not by the project itself. (See, e.g., ABOM 21 [discussing "The EIR's five sentence treatment of potential social noise impacts"], 22 [EIR "does not address social noise"], 24 ["documentation of significant social noise impacts"], 29 ["social noise impacts would be significant"], 32 ["applying CEQA to 'social noise' "], 45 ["social noise impacts"], 49 ["no justification for excluding social noise"], 71 ["arguments regarding social noise"].)

Since the potential rowdiness of students is not an environmental impact of the project, no amount of evidence could ever support a fair argument that it should have been considered by the EIR. (See *Preserve Poway*, *supra*, 245 Cal.App.4th at p. 576 ["Evidence supporting a fair argument may consist of facts, reasonable assumptions based on fact, or expert opinions supported by fact but not 'argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment' "]; *Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129, 1139 [" 'mere argument, speculation, and unsubstantiated opinion, even expert opinion, is not substantial evidence for a fair argument' "].)

The only "evidence" supporting the project opponents' social noise theory is improper speculation and conjecture that, since some students in the past have been noisy when they socialize, many new students, including the students who will live at People's Park, will be noisy, too, when they leave the project site. (See OBOM 35–37; see also *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770 [An " 'expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors" ' "]; Guidelines, §§ 15064, subd. (d)(3) ["A change which is speculative . . . is not reasonably foreseeable"], 15384 ["Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate . . . does not

constitute substantial evidence"]; see *Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 446 [same].)

As explained in the EIR, there is no way to know who will live in the People's Park project in the future and where each resident will decide to socialize while living there. Thus, the EIR properly noted that it is inherently speculative and outside the purview of CEQA to examine where future residents of the housing project might wander to late at night and to speculate about their propensity for rowdiness. (See AR 14540, 14545–14546, 14566.)

In sum, the mere fact that some "noise" can be a physical harm to the environment under CEQA (see ABOM 36) does not mean that antisocial behavior that some students might engage in away from the project site constitutes the kind of noise covered by CEQA. The rowdy behavior of students and other routine day-to-day social interactions between people going about their daily lives are simply not activity appropriate for review by CEQA. CEQA is limited to the physical noise generated by a project, which the EIR here addressed.

3. The cases cited in the answer brief confirm that the EIR properly did not consider the potential rowdiness of students away from the project site.

To support their novel argument that the EIR had to consider the potential noise from students socially interacting in the community, project opponents rely on *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714 (*Keep*

Our Mountains Quiet), a case supposedly holding that "CEQA applies to noise generated by a particular group of people." (ABOM 39.) The case actually supports UC Berkeley's position. In *Keep Our Mountains Quiet*, neighbors challenged a permit for an event venue project that would allow weddings and other parties with live music. (*Keep Our Mountains Quiet*, at pp. 719–720.)

In evaluating the challenge to the project, the court examined noise that might be generated by parties and other events the permit would allow at the project site itself. (See *Keep Our Mountains Quiet, supra*, 236 Cal.App.4th at p. 734.) The court looked to "crowd noise associated with prior events *at the* [*p*]*roperty.*" (*Ibid.*, emphasis added.) The court did not look to the conduct and behavior of party-goers after leaving the project site and traveling miles into the community. The court also did not look to the perceived rowdiness of any particular social group. The court instead looked solely to the noise generated by the actual use of the project site no matter what social groups attended events.

The same is true of another case relied on by project opponents, *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929 (*Concerned Citizens*). (ABOM 39.) In that case, plaintiffs challenged the planned construction of an outdoor amphitheater because it would have negative acoustic effects on the homes directly facing the proposed theater and sound system. (*Concerned Citizens*, at pp. 933–937.) Again, the noise issues analyzed arose from the project

itself on an identifiable property, not from the speculative behavior of people who might travel some distance from the project into other neighborhoods. And the court did not look at the perceived rowdiness of any particular social group.

Project opponents also quibble with the cases cited in the opening brief holding that people are not pollution. (ABOM 40.) But they are not, and it is improper to analyze a project by speculating about the project residents' stereotyped propensity for rowdiness and whether and where they might spend their free time socializing. (See, e.g., *Olmsted Citizens for a Better Community v. U.S.* (8th Cir. 1986) 793 F.2d 201, 205 [difference between "physical changes connected with the conversion" and "social changes reflected in the nature of the use of the facility and in the types of people that will be present"]; *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service* (D.C. Cir. 1973) 487 F.2d 1029, 1037 [rejecting concept of "people pollution"].)

In short, the project opponents cite no authority supporting the broad claim that CEQA requires study of the potential noisiness of future project residents. That is simply not a potential environmental impact of this project. It is a purely social one.

D. CEQA does not require UC Berkeley to rely on bias and stereotypes concerning how groups of people typically behave when evaluating the environmental impact of a project.

1. Project opponents' expert's opinion about how future students, as a group, will act rests on biased stereotypes of students.

In the opening brief we explained that CEQA should not be interpreted to require an agency to analyze whether a project's residents have a propensity for rowdiness because such a requirement would allow stereotyping, prejudice and bias to infect decisionmaking. (OBOM 34–39.) Despite the protestations of project opponents, their argument is founded on stereotypes or bias about students (along with speculation and conjecture, as discussed above). (ABOM 30–35.) The answer brief is transparent about what they are doing: "[t]he record shows that UC Berkeley students have created a lot of noise in the past and it is reasonable to expect they will do so in the future." (ABOM 33.) As we explain, that is the textbook definition of stereotyping.

Merriam-Webster Dictionary defines "stereotype" as "something conforming to a fixed or general pattern," "especially: a standardized mental picture that is held in common by members of a group and that represents an oversimplified opinion, prejudiced attitude, or uncritical judgment." (Merriam-Webster <https://tinyurl.com/mwstereotype> [as of Aug. 22, 2023], original formatting omitted.)

Watry's report confirms that stereotyping infects the project opponent's entire challenge to the EIR. The report says that "part of the rite of passage of undergraduate college years is

partying" and Watry refers to the 1978 comedy film *National Lampoon's Animal House* as "evidence" to support this stereotype. (AR 1596.) He concludes that "it is self-evident based on common knowledge and experience that given a large population of undergraduate students, some will engage in partying with alcohol and make noise." (AR 1598.) Watry looks to complaints about some past students and predicts that future students will behave the same way. (AR 1596–1598.) In an ironic twist, he speculates that since the proposed housing project itself will have strict rules regulating noise and partying on the premises, to mitigate actual noise from the project, students will simply go elsewhere in the community to socialize and party. (AR 1599–1600.) He notes that there are already "drunk partyers" in Berkeley, so adding more student housing will increase the numbers. (AR 1600.)

Watry also bases his opinion on the speculative gender-stereotype assumption that "[a]lthough undergraduate women are capable of drinking alcohol to excess and yelling, I think it is reasonable to assert that the vast majority of loud and unruly drunk college students are male." (AR 1601, fn. 10.) He does not purport to be an expert qualified to opine on what percentage of new students "will party and make noise" compared to the existing student body. (AR 1602.) Ultimately, Watry's conclusion—that "[f]or many college students, the desire to have the quintessential college experience so-often depicted in movies and on television coupled with the freedom of being away from parents for the first time, entices them to experience partying

with alcohol and drugs"—is nothing but an old trope, not legitimate expert opinion. (AR 1603.)

Of course, as with many stereotypes, there is some "evidence" that can be pointed to that confirms parts of the stereotype. Past examples of student partying and drinking is one of them. (See AR 1596–1598, 1616–1619.) But the fact that some students drink and party doesn't mean that future students will drink and party or that CEQA requires stereotyping as part of the EIR process.

Unfortunately, the Court of Appeal's opinion expressly embraced this stereotyping. Indeed, the opinion castigated UC Berkeley for pointing out that future "new students might instead 'socializ[e] quietly on the internet,' " which the court characterized as nothing but "conjecture." (*Good Neighbor*, *supra*, 88 Cal.App.5th at p. 689.) But the opinion had no problem concluding that "[g]iven the long track record of loud student parties that violate the city's noise ordinances . . . there is a reasonable possibility that adding thousands more students to these same residential neighborhoods would make the problem worse." (*Ibid.*) Thus, without knowing anything about the people who will live in the People's Park dorms, the Court of Appeal stereotypes them as loud party animals and cannot conceive that they might be quiet and studious.[3] This is stereotyping—and "conjecture"—run amok.

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[3] The project also provides supportive housing for 125 extremely low income persons. (OBOM 18.)

Watry likewise reduces unknown future students to *Animal House* caricatures. Because some students today drink and party, that means the people who will live in this student housing will drink and party. That is what it means to stereotype. CEQA does not require that UC Berkeley stereotype its future students and base its housing decisions on biased and negative views about students.

2. An opinion founded on stereotyping, even for nonprotected classes, is inherently speculative and cannot constitute a "fair argument."

The Court of Appeal's decision is the only opinion we can locate that requires public agencies to engage in stereotyping in order to comply with CEQA. That is a troubling development that this Court should reverse.

Under our rules of court, "Each judicial officer should ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests and are *not influenced by stereotypes or biases*." (Cal. Stds. Jud. Admin., § 10.20(b)(3), emphasis added; see *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30, 47, fn. 15 ["abhorring the application of generalized stereotypes to real, live, flesh-and-blood human beings"], superseded on another ground in Gov. Code, § 12941.)

The rule against judicial endorsement of stereotyping and bias is well founded. (See, e.g., Mahoney, *Judicial Bias: The Ongoing Challenge* (2015) 2015 J. Dispute Res. 43, 46 ["when judges rely on traditional, limit[ed], and inaccurate

stereotypes . . . the equality rights of entire disadvantaged groups can be compromised"]; Eisenberg, *Power and Powerlessness in Local Government: A Response to Professor Swan* (2022) 135 Harv. L.Rev. F. 173, 179 ["when courts apply law to localities based in stereotypes, courts reify and cement those stereotypes"]; see generally Pruitt, *Rural Rhetoric* (2006) 39 Conn. L.Rev. 159 [describing problems of courts' use of stereotypes of people who live in rural communities]; Leonard, *Expecting the Unattainable: Caseworker Use of the "Ideal" Mother Stereotype Against the Nonoffending Mother for Failure to Protect From Child Sexual Abuse Cases* (2013) 69 N.Y.U. Ann. Surv. Am. L. 311, 313–314 [criticizing courts' and caseworkers' reliance on stereotypes in the child protection context].)

Enshrining stereotyping in the law could doom—among other things—multigenerational housing, housing for immigrant families, or any housing with large families or many children. Opponents of such projects will be able to point to stereotypes that such families might make more noise because they have more people living in a home or have more children and children are noisier than adults. Courts should not permit or require agencies to look to the social group they believe will be resident in the proposed housing project and then speculate about how much noise they might make or anything else based on stereotypes about the group, even if there is expert testimony relying on the stereotype.

Project opponents complain that UC Berkeley's argument about no valid method for assessing the off-site effects of students

was not discussed in the EIR. (ABOM 44.) Not true. (See AR 14545–14546 [noting that arguments about students leaving project to head to community and engage in loud partying is highly speculative].) Stereotyping is not a valid methodology and certainly not one that should be enshrined in law.

That students are not a protected class, as the answer brief repeats (see, e.g., ABOM 34–35), does not somehow make stereotyping and bias a permissible basis for a public agency's important decisions. Nor is it a basis that a judicial officer should endorse. It is also no answer to suggest that "careful judicial oversight" (see, e.g., ABOM 13) can solve the problem after the damage has already been done. The stereotype will have already been applied and incorporated into the reviewing agency's process for determining whether a project will have significant environmental effects, requiring the problematic determination of a group's behavior and whether that type of people and their social behavior can and should be mitigated. There is nothing careful or judicious about enshrining stereotyping into CEQA.

Project opponents also suggest that agencies can somehow fix any harms from relying on stereotypes to identify purported adverse environmental impacts by issuing a statement of overriding considerations at the end. (See, e.g., ABOM 14.) But a public agency should never have to formally and publicly stereotype and attribute projected social behavior upon certain groups of people in the first instance even if they can avoid acting on the stereotype later. The damage has already been done. Indeed, project opponents can point to no CEQA case that has

required public agencies to engage in stereotyping to determine whether substantial evidence exists to support even a fair argument that a project may significantly effect the environment. No such authority exists.

Joshua Tree Downtown Business Alliance v. County of San Bernardino (2016) 1 Cal.App.5th 677, 690–691, cited by project opponents (see ABOM 31), actually reinforces the limits of CEQA review by explaining what kind of evidence cannot support a fair argument requiring analysis of the claimed environmental impact. There, the Court of Appeal reversed the trial court's writ directing the county to set aside approval of the project: " '[s]ubstantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. [Citations.] It does not include "[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly inaccurate or erroneous." ' " (*Joshua Tree*, at p. 690.) In particular the court noted that "[c]ommon sense alone tells us nothing" absent actual evidence. (*Id.* at pp. 691–692.) Stereotyping and bias are always based on speculative and unsubstantiated assumptions about groups of people and are an impermissible basis for agency decisions.

Project opponents seek to avoid the consequences of their foray into stereotyping by likening their argument to those made about event noise in *Keep our Mountains Quiet* and *Concerned Citizens*. (ABOM 39–40.) The arguments are materially different. Here, project opponents argue that, since some current UC Berkeley students party in the City of Berkeley, UC Berkeley

must assume that all future students including residents at People's Park will leave campus and attend parties in neighboring communities where they will be loud. In the event-noise cases, the courts did not look at whether people belonged to a defined social group or make assumptions about a particular group's propensity for rowdiness. Instead, the courts unremarkably looked to the nature of the events held at the actual project sites and evaluated how loud the events were. That is not stereotyping people based on a social group. It is looking at evidence from the project in order to determine its actual physical effect on the environment.

The difference here is that the opponents do not challenge the potential noise from the project itself but focus on the perceived propensity for rowdiness of the specific type of people who might live there when they leave the project and socialize in the community. And the only "evidence" of that propensity for rowdiness is their membership in a social group and stereotyping based on how other members of that same social group have acted before.

As an example, if a public agency planned to build an elementary school, would CEQA require the agency to consider evidence that parents who drop their kids off at school as a group have a propensity for meeting up at the local coffee shop after school drop-off, as evidence that construction of the elementary school will increase travel between the school and the coffee shop resulting in increased vehicle emissions and noise? Of course not.

Even though opponents of the school project could introduce "evidence" that many parents have in fact driven to coffee shops after drop-off, causing more vehicle emissions or noise, the agency would not need to consider such evidence. CEQA does not apply to social behavior expected of members of a particular group, such as parents. Thus, any evidence of parental travel patterns after school drop-off would not support even a fair argument that the school is creating an environmental harm from supposedly "known" parental behavior. CEQA is not designed to address the social impulses of people or to speculate what social or environmental effects the users may cause in the broader community based on social stereotypes. (See OBOM 31–33 [collecting cases on social effects of projects].)

E. As originally contemplated, CEQA was not designed to address day-to-day antisocial behavior but was designed to encourage projects like People's Park, which benefit the environment.

CEQA's legislative history also underscores that the Legislature was concerned about noise from projects—specifically, noise from new technologies developed in the 20th century—and not with the perceived propensity of people to be noisy in their day-to-day social interactions in the community. (Motion for Judicial Notice (MJN), exh. 1, pp. 104 [noting motor vehicles as cause of "growing amount of noise"], 105 ["The cacophony of the air conditioner, jet engine and diesel truck form a constant accompaniment to 20th Century living"], 105 ["Airport noise alone has provoked billions of dollars in lawsuits and

massive disruptions of property values"], 326 ["Vacuum cleaners, jet aircraft and even typewriters which have become a part of progress, necessary progress, have that noisy nuisance element"], 327 ["aircraft noise" is a problem created by airports], 351 ["vehicular traffic" is critical issue of "noise pollution"], 385 [noting noise as "environmental pollutant[ ]" caused by "air conditioner, jet engine and diesel truck"], 414 [discussing historical environmental noise laws: Julius Caesar outlawed chariots on certain Roman streets].)

The Legislature was concerned about "environmental quality" and directed "agencies to prepare environmental impact reports, containing specified information on projects which may have significant effect on the environment." (MJN, exh. 1, p. 287.) The legislative history makes clear that when the Legislature included noise as an environmental impact, it was concerned about the harm of noise from technology resulting from a project, but not about the day-to-day social interactions among people that have existed for thousands of years. In other words, the Legislature was concerned with noise from machines related to projects or from the project itself, not people engaged in day-to-day living away from the project site in the greater community. That is the difference between physical noise that is cognizable under CEQA resulting from a project and this type of antisocial behavior that is beyond the reach of CEQA.

The answer brief also fails to acknowledge that the People's Park project enhances the environment. It is a high-density, mixed-use project in an urban environment close to the campus,

which will make it easier for students to travel to school. (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].) The project is also consistent with the Legislature's determination in the Housing Accountability Act that a lack of urban housing "undermin[es] the [S]tate's environmental and climate objectives." (Gov. Code, § 65589.5, subd. (a)(2)(A); OBOM 42–45.)

The Court should reject attempts to weaponize CEQA by making it easier to block important, socially beneficial, and environmentally conscious projects from being constructed. (See OBOM 39–45.) Instead, the Court should clarify that the fair argument standard can be applied contextually and pragmatically by focusing on the big picture of what is best for the environment. (See *ante*, Part I.A.) And the Court certainly should not expand CEQA beyond its statutory limits by requiring public agencies to treat stereotypes as evidence of a fair argument that students or other social groups who will live in or use a project may cause environmental impacts. (*Ibid.*)

F. Local noise ordinances, not CEQA, provide the remedy for excessive social noise.

Project opponents incorrectly accuse UC Berkeley of advancing an improper "new argument" by focusing on local noise ordinances. (ABOM 41.) While the perceived propensity for

rowdiness of students in the community is not a significant environmental impact the EIR needed to address,[4] the EIR did in fact address comments raising that concern by noting the existence of local noise ordinances as the proper mechanism for addressing any such social problems. (See, e.g., AR 14546.)

Generally, cities adopt local ordinances to deal with the problems associated with excessive social noise. (See *Haggerty v. Associated Farmers of Cal.* (1955) 44 Cal.2d 60, 70 [in enacting and enforcing an antinoise ordinance, the county "ha[d] a legitimate interest in the preservation of the safety and tranquility of its citizens"]; see also *Kovacs v. Cooper* (1949) 336 U.S. 77, 86–87 [69 S.Ct. 448, 93 L.Ed. 513] [municipalities protect the public from "loud and raucous" noise].)

The EIR properly noted that social noise is not a CEQA issue even though it may be a social problem. The EIR explained that (1) the Advisory Council on Student-Neighbor Relations is set up to address concerns neighbors have with students, (2) initiatives such as Happy Neighbors and CalGreeks Alcohol Taskforce provide services to neighbors and students to address any problems between them, and (3) the Berkeley City Municipal Code can be enforced by its officers to address noise complaints as they occur. (AR 14545–14546.)

Project opponents rely on *Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 957. (ABOM 41.) But *Ebbetts* simply holds that

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[4] See Guidelines, § 15126.4, subd.(a)(3) ["Mitigation measures are not required for effects which are not found to be significant"].

environmental harms as defined under CEQA must be mitigated. (*Ebbetts*, at p. 957.) Since the social interactions of college students in the Berkeley community are not CEQA environmental impacts, there is nothing for UC Berkeley to mitigate under CEQA. Of course, UC Berkeley recognizes that college students can engage in antisocial behavior that cities and universities must address. But CEQA is not the one-size-fits-all social problem-solver for all that ails society. Like any statute, it applies only to situations covered by its text. There are many other laws to address the many problems faced by society, including the problems some cities might face with loud parties. UC Berkeley does take legitimate complaints about its students seriously and has policies in place to address them in cooperation with the City of Berkeley. (See AR 14545–14546.)[5] That does not make this a CEQA issue. Indeed, given the nature of rowdy partiers in a city, the only effective way to address that social ill is through a city ordinance and enforcement of that ordinance.

Project opponents also complain that local ordinances are insufficient because they punish past violations rather than mitigate future ones. (ABOM 42.) Not so. All penal laws and ordinances have deterrent, rehabilitative, and retributive effects. (E.g., *Ingraham v. Wright* (1977) 430 U.S. 651, 670 [97 S.Ct. 1401, 51 L.Ed.2d 711]; *Powell v. State of Tex.* (1968) 392 U.S. 514,

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[5] *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 (see ABOM 41–42) also does not apply. It simply says when there is a challenge to using a specific pesticide the agency must independently assess the pesticide and cannot simply rely on a different agency's data.

535–536 [88 S.Ct. 2145, 20 L.Ed.2d 1254].) A city ordinance seeks both to prevent anti-social behavior and to mitigate and govern future behavior with an enforcement mechanism if there is a violation. In any event, as project opponents admit, there is no way to bar students (or anyone else) from late night socializing. (See ABOM 23-25.) A local ordinance is the appropriate solution to the problem of rowdy students in the community. And even if unsuccessful, that does not mean that it is a problem that CEQA can or should solve.

G. The LRDP does not affect the number of students admitted to campus.

The answer brief argues that the LRDP increases student enrollment. (ABOM 46–49.) It does not. "The California Master Plan for Higher Education guarantees access to a UC campus for the top 12.5 percent of the state's public high school graduates and qualified transfer students from California community colleges." (AR 9548, 14175.)

In November 2015, the Regents approved a UC systemwide enrollment plan to increase the number of undergraduate students by 5,000 for the 2016–2017 academic year and by 2,500 students in each of the two succeeding academic year's. (AR 57.) The UC Berkeley student population increase results primarily from statewide population growth and the corresponding increase in high school graduation rates and college-aged Californians. (*Ibid.*) The 2021 LRDP for UC Berkeley projects that student population could grow from 39,710 in 2018–2019 to about 48,200 by 2036–2037, a 1 percent annual increase. (AR 57, 9494–9495,

9571–9572.) But the LRDP itself does not determine future enrollment or set future enrollment limits. (AR 9571.)[6]

Indeed, the Court of Appeal agreed that neither the project EIR nor the LRDP required an increase in enrollment or otherwise addressed enrollment. (*Good Neighbor*, *supra*, 88 Cal.App.5th at pp. 671–674.) The project opponents sought review of the Court of Appeal's opinion on that point. This court denied review. Accordingly, challenges to the student population at UC Berkeley are not appropriately part of this appeal. (See Cal. Rules of Court, rule 8.516.)

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[6] In any event, the Legislature has made clear in amending Public Resources Code section 21080.09, subdivision (d), that "[e]nrollment or changes in enrollment, by themselves, do not constitute a project" under CEQA. (See OBOM 41.) Thus, project opponents cannot challenge the LRDP or the People's Park project on the ground that it increases student population, as the answer brief and Watry's report repeatedly and improperly do. (See OBOM 39–42.) And this is true whether they candidly admit that their aim is impermissibly to use CEQA to reduce student population growth or whether they instead camouflage their arguments using the rhetoric of "social noise" to conceal their true objective.

II. The Court of Appeal erred in concluding that the EIR did not adequately consider project alternatives.

A. CEQA only requires the agency to consider potentially feasible alternatives and grants the agency broad discretion in the matter.

"CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose." (*Goleta II, supra,* 52 Cal.3d at p. 566.) An EIR will only be set aside if it " 'preclude[s] informed decisionmaking [and] informed public participation' " and therefore " 'constitute[s] a prejudicial abuse of discretion.' " (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 995; see *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 491 [same].)

B. Consistent with *Goleta II*, the EIR for the People's Park project did not need to revisit the LRDP as a whole or to consider as alternatives all the housing plans that, along with People's Park, must be constructed as part of the LRDP.

The answer brief does little to respond to UC Berkeley's primary argument that under *Goleta II*, it was not required to reanalyze alternatives in its project level EIR because it has already considered them in in its programmatic EIR for the LRDP. (See OBOM 54–57.)

Project opponents' primary argument is that the EIR did not consider as alternatives to the People's Park site other potential sites identified in the LRDP. (ABOM 51–62.) They are wrong because the other housing sites that UC Berkeley also

plans to develop are not alternatives to People's Park. They are simply next in line. The EIR considered all potentially feasible housing alternatives at a programmatic level and determined that all of them need to be developed to meet UC Berkeley's student housing needs of 11,731 total new beds. (AR 9573–9576, 9580, 9650.) As the EIR 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." (AR 9558-9560; see OBOM 17 & fn 4.) This is consistent with the LRDP's land use objectives of making the highest and best use of each site to employ limited land resources most efficiently. (AR 62–63, 70, 73–74, 99.)

Project opponents contend that this process was somehow secret. (ABOM 16, 68–71.) It was not. The LRDP identifies the proposed housing locations. (AR 71–72.) UC Berkeley circulated the LRDP for public review and made it available for public comment and input. (AR 9466 ["The Draft 2021 LRDP was released for public review on February 23, 2021"].) The EIR also specifically identifies these sites, including a table and map of all potential areas of new development and redevelopment, noting the sixteen sites proposed for residential uses. (AR 9574-9576.)

The answer brief argues that the LRDP does not require that all of the projects be built. (ABOM 55.) It is unclear exactly how such a requirement could be made. Indeed, the inherent inability to guarantee development and construction of all housing proposed in the LRDP reinforces why UC Berkeley must

have discretion to prioritize the People's Park site, where construction can begin immediately, over other sites that would require relocation of existing facilities. (AR 28326-28329.) In any event, the LRDP critically sets out the goal to build all of the residential projects as that is the only way to meet the university's urgent housing needs by 2036–2037. (AR 9571-9580.)

And contrary to project opponents' erroneous claim that the EIR "failed to analyze any" of the sites commenters characterized as alternatives to People's Park (ABOM 68), the EIR programmatically analyzes all of them. (See e.g., AR 9649–9650 [analyzing aesthetic impacts of all future development proposed under the LRDP], 9802–9805 [identifying historic resources in all areas of potential redevelopment or renovation], 9956 [identifying specific hazardous material sites in and near the entire 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.

UC Berkeley determined for many logistical and practical reasons that the People's Park and Anchor House projects should be built first, but also determined, in an exercise of the broad discretion afforded to it under CEQA, that all of the proposed projects need to be built. (AR 28306–28336.) In the opening brief, we explained that in *Goleta II*, this Court made clear that it would be inappropriate to require the lead agency to engage in a case-by-case reconsideration of its long-term planning goals as part of its alternatives analysis, when that effort has already

been undertaken in a programmatic planning document. (OBOM 55–57.)

"The general plan has been aptly described as the 'constitution for all future developments' within the city or county." (*Goleta II*, *supra*, 52 Cal.3d at p. 570.) As this Court explained, "[i]dentification and analysis of suitable alternative sites for the development" is the task of the general plan not the EIR. (*Id.* at p. 572.) Indeed, in response to an argument demanding more EIR focus on alternatives, this Court noted, "such ad hoc reconsideration of basic planning policy was not only unnecessary, but would have been in contravention of the legislative goal of long-term, comprehensive planning." (*Ibid.*, emphasis omitted.)

The answer brief claims that *Goleta II* somehow is different from our case. (ABOM 63–65.) Not so. There, the "County's general plan and local coastal program address the very issues which [project opponent] claims should have been addressed in the . . . EIR. Identification 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. A review of that document amply justifies the County's reliance on its findings and conclusions in assessing the feasibility of alternative sites." (*Goleta II*, *supra*, 52 Cal.3d at p. 572.) That is what happened here.

As described above, the LRDP identified the sites suitable for housing, and the EIR programmatically studied those sites. (AR 9580; OBOM 52–53.) Because development of all these sites

is necessary to meet UC Berkeley's ambitious housing goals, the EIR properly rejected an alternative of foregoing the People's Park site in favor of any one of the sixteen other properties "designated for future student housing," because it would reduce the number of student beds in the LRDP development program. (AR 10356–10357*;* see also OBOM 48.)

The draft EIR also expressly considered a reduced development program alternative that would build 25 percent fewer student beds.(See AR 10352–10432; 10380–10395; OBOM 48.) The Regents soundly rejected this alternative as "unrealistic and infeasible" because it would substantially reduce UC Berkeley's LRDP objective "to provide student housing to help meet the student housing needs." (AR 1266–1267.) Given that UC Berkeley and the Regents considered reducing the number of proposed housing sites and beds at the programmatic level, and rejected that idea, they did not need to reconsider it again at the project level as an "alternative" for People's Park.

As we explained in our opening brief, another reason the People's Park Project could not be built on any other site is that the proposed project is designed to address the specific issues at People's Park. (OBOM 50–51.) Project opponents contend that nothing in the record explains why People's Park is a unique site. (ABOM 16.) They also suggest that the project goals for People's Park are somehow suspect and not to be credited. (ABOM 57–58.) There is no basis for this attack. Among other reasons, People's Park was prioritized because it could be constructed more quickly

than other sites and it offered unique qualities other sites did not have. (OBOM 53–54.)

The administrative record is filled with discussions of the many benefits of the People's Park project. Given the unique project benefits and objectives of adding needed student housing, providing housing for formerly unhoused members of the community, providing a historical monument to honor the unique nature of the site, and rehabilitating People's Park, there simply is no other suitable location for this project. (See AR 1206–1208, 24602, 24605; OBOM 50–54.) UC Berkeley is entitled to great deference in its choice in how to prioritize the needs of its university and students. (See OBOM 51–52.)

CONCLUSION

For all these reasons, the Court of Appeal's decision should be reversed and the trial court's decision to uphold the Regents' certification of the EIR and approval of the LRDP and People's Park project should be affirmed.

August 24, 2023

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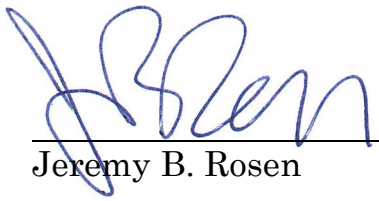

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Make UC A Good Neighbor v. UC Regents
Case No. S279242

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Supreme Court of California

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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)**
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8/24/2023

Date

/s/Jeremy Rosen

Signature

Rosen, Jeremy (192473)

Last Name, First Name (PNum)

Horvitz & Levy LLP

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