Case No. S279242

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAKE UC A GOOD NEIGHBOR, ET AL.,

Petitioners and Appellants,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,

Respondents,

RESOURCES FOR COMMUNITY DEVELOPMENT,
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)

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS; PROPOSED BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

DOWNEY BRAND LLP
Kathryn Oehlschlager, SBN 226817
Breana M. Inoshita SBN 341821
455 Market Street, Suite 1500
San Francisco, California 94105
Telephone: (415) 848-4800
Facsimile: (415) 848-4831
koehlschlager@downeybrand.com
binoshita@downeybrand.com
Attorneys for Amici Curiae THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

This Application is hereby submitted by the League of California Cities ("Cal Cities") and the California State Association of Counties ("CSAC") (collectively "Amici"). Pursuant to Rule 8.520(f) of the California Rules of Court, Amici respectfully request leave to file the attached brief in support of Respondents, the Regents of the University of California ("Regents"), et al.

I. AUTHORSHIP AND FUNDING

This brief was drafted by Kathryn L. Oehlschlager and Breana M. Inoshita of Downey Brand LLP on behalf of Cal Cities and CSAC. No party nor counsel for a party in this proceeding authored the proposed amicus brief in whole or in part, or made any monetary contribution intended to fund its preparation or submission. (See C.R.C., Rule 8.520(f)(4)(A).) Although Downey Brand LLP serves as counsel for the Regents on other unrelated matters, the firm did not represent the Regents in this proceeding. No persons or entities other than Amici made monetary contributions intended to fund the preparation or submission of the proposed amicus brief. (See C.R.C., Rule 8.520(f)(4)(B).)

II. STATEMENT OF INTEREST

Cal Cities is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance.

CSAC is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California, and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide.

Cal Cities' and CSAC's respective committees monitoring litigation have determined that this case raises important issues that affect all cities and counties. Specifically, the Court of Appeal's recognition of "social noise" as an environmental impact may hinder the ability of cities and counties to facilitate development of critical projects intended for use by vulnerable populations that could be perceived as "noisy."

As public agencies responsible for conducting environmental review under CEQA, cities and counties have particular insight into the implications of recognizing "social noise" as an environmental impact. By addressing those implications, Amici may help this Court resolve the present dispute with an eye toward the burden on local governments.

AMICUS CURIAE BRIEF

INTRODUCTION

Amici Curiae the League of California Cities ("Cal Cities") and the California State Association of Counties ("CSAC") (collectively, "Amici") support the arguments advanced by Respondent the Regents of the University of California ("Regents"). We urge this Court to uphold the California Environmental Quality Act's ("CEQA") charge of analyzing and mitigating environmental impacts, not social impacts, in order to prevent the law from being weaponized by opponents to delay or block important projects on the basis that they are intended to serve "noisy" populations in cities and counties across the State.

Assembly Bill 1307, signed into law by Governor Newsom on September 7, 2023, clarifies that noise generated by project occupants and users is not a significant effect on the environment under CEQA, and that CEQA does not require public agencies to analyze and mitigate for the noisiness of future project users. Consistent with this clear mandate, Amici respectfully request that the Court reverse the Court of Appeal decision and hold that noise generated by future project users is not an environmental impact under CEQA.

ARGUMENT

CEQA requires that public agencies analyze the physical environmental impacts of their projects—social impacts are distinct from environmental impacts under CEQA and need not be considered. The Court of Appeal's addition of social noise as an entirely new environmental impact is contrary to the plain language and legislative intent of CEQA, and runs afoul of a significant body of case law. Requiring public agencies to analyze the noisiness of intended project inhabitants would necessarily require agencies to speculate about the future behavior of project users

based on broad-brush assumptions and stereotypes, and offer "evidence" to support the determination of how noisy a certain population might be. This creates a very slippery slope with dangerous implications. Speculative assumptions about how people will act based on their membership in a social or cultural group has no place in the environmental review process, and requiring agencies to conduct such analysis only invites CEQA abuse.

I. CEQA Does Not Require Analysis of Social Noise as an Environmental Impact.

CEQA requires analysis and disclosure of physical impacts to the environment. (See Pub. Resources Code, § 21065.) The statutory definition of "environment" focuses on the physical conditions that exist within an area affected by a proposed project. (Pub. Resources Code, § 21060.5.) To determine what is a significant effect on the environment, agencies consider whether the project causes "direct physical changes in the environment" or "reasonably foreseeable indirect physical changes in the environment." (Guidelines[1], § 15064(d).) Indeed, CEQA expressly prohibits analysis of economic and social effects that do not relate to physical impacts. (Guidelines, § 15131(a) ["[e]conomic or social effects of a project shall not be treated as significant effects on the environment"].)

Contrary to these well-established principles, the Court of Appeal's opinion finds that the EIR for a housing project should have studied the potential actions of future residents of the project, based on broad-brush generalizations about how those residents might behave. Expanding the reach of CEQA analysis, the Court of Appeal opinion faults the EIR for not analyzing student "social noise" or "party noise" impacts to Berkeley's neighborhoods, even though the project would not increase the student

[1] All references to the "Guidelines" refer to the CEQA Guidelines in the California Code of Regulations, Title 14, Division 6, Chapter 3, Sections 15000–15387.

population. To support this holding, the Court of Appeal found that because there was a record of student parties violating the city's noise ordinance, there was a reasonable possibility that adding more students to residential neighborhoods would make the problem worse. (See *Make UC A Good Neighbor* (2023) 88 Cal.App.5th 656, 687–690 ("*Good Neighbor*").)

The Court of Appeal decision is unprecedented. No court has ever required CEQA analysis of the "social noise" of future project users. (See Respondent's Reply Brief ("RRB"), p. 9.) This would be a new, judicially created CEQA "impact" that is contrary to well-established precedent.

A long line of cases affirms CEQA's focus on physical impacts, rejecting opponents' efforts to insert purely social or other types of effects into environmental analysis. (See Respondent's Opening Brief ("ROB"), pp. 29–33; see also, *Save Our Access-San Gabriel Mountains v. Watershed Conservation Authority* (2021) 68 Cal.App.5th 8, 26–27 [displacement of park users due to parking reduction is a social impact] ("*Save Our Access*"); *Goleta Union School Dist. v. Regents of University of California* (1995) 37 Cal.App.4th 1025, 1032 [classroom overcrowding, in itself, is not an environmental impact]; *Saltonstall v City of Sacramento* (2015) 234 Cal.App.4th 549, 585 [allegations that proposed basketball stadium would result in post-event impacts to safety by event crowds raises a social, not environmental, impact]; *Preserve Poway v. City of Poway* ("*Preserve Poway"*) (2016) 245 Cal.App.4th 560, 581–582 [change in "community character" due to change in use from horse farm to housing development is a social and psychological impact, not an impact on the physical environment].)

Preserve Poway provides a particularly persuasive example. There, neighbors of a horse boarding facility filed suit to challenge a project that would close the facility and replace it with an equestrian-oriented housing development. (*Preserve Poway, supra,* 245 Cal.App.4th at 560.) The

neighbors argued that the court should overturn the project based on the agency's failure to analyze changes in "community character" that they feared would accompany the conversion. (*Ibid.*) Noting that "CEQA's overriding and primary goal is to protect the physical environment," the court determined that the impacts at issue were "psychological and social" and therefore fell beyond CEQA's charge to analyze physical impacts on the environment. (*Id*. at 579–581.) The court emphasized that "[i]f the Legislature wanted to define 'environment' to include such psychological, social, or economic impacts on community character, it could have so provided." (*Ibid*.)

In *Save Our Access*, the court found that a claim of physical impact was in fact "unsubstantiated speculation" about social impacts. (*Save Our Access*, *supra*, 68 Cal.App.5th at 29.) There, petitioners claimed that a reduction in parking would lead to idling and displacement of park users, and that these impacts were physical environmental impacts that should have been analyzed under CEQA. The court, however, found that while the reduction would perhaps "have an adverse social impact for those who must recreate elsewhere," it would actually "prevent further adverse physical impacts on the environment." (*Id.* at 27.) The court expressly questioned the petitioners' motives, querying why they "attack[ed] the EIR for not converting more wilderness open space to parking or, alternatively, for not continuing to permit parking in fragile natural areas that have become degraded by erosion, trash, and habitat trampling." (*Id.* at 24–25.) The court asked, "Since when was environmental protection focused on promoting and expanding parking in protected wilderness monuments?" (*Ibid.*) The court also emphasized that "it is not the project's 'impacts on parking' that matter; it is the impact of the project's reduced parking on the environment that matters." (*Id.* at 28.)

These cases are instructive here. Requiring analysis of "social noise" would impermissibly expand the scope of CEQA to reach an impact that is clearly social in nature. Proscribing judicial expansion of the law's scope, CEQA mandates that courts "shall not interpret [CEQA] or the [Guidelines] in a manner which imposes procedural or substantive requirements beyond those explicitly stated" in CEQA or the Guidelines. (Pub. Resources Code, § 21083.1; see ROB, pp. 33–34.) This case provides the Court an opportunity to uphold precedent and follow the clear guidance of AB 1307, affirming that social noise is a social impact outside of the scope of environmental review under CEQA.

II. Requiring Agencies to Analyze the Noisiness of Future Project Users Will Inject Speculation Based on Prejudice and Bias into the Environmental Review Process.

Requiring public agencies to analyze social impacts invites into the CEQA process speculation about how future users of a project might behave—speculation that can only be based on potentially harmful generalizations and stereotypes. This is contrary to CEQA's mandate and could seriously hinder the ability of cities and counties to approve critically important projects.

Under CEQA, speculation does not constitute substantial evidence and cannot be used to support a finding that a significant impact may occur. (See e.g., *Dunning v. Clews* (2021) 64 Cal.App.5th 156, 174.) The Guidelines caution that only reasonably foreseeable physical impacts need to be analyzed. (Guidelines, § 15064(d)(3).) "A change which is speculative . . . is not reasonably foreseeable." (Guidelines, § 15064(d)(3).) Further, "[s]ubstantial evidence is not argument, speculation, unsubstantiated opinion or narrative." (Pub. Resources Code, § 21080(e)(2).)

Yet the Court of Appeal's opinion, if upheld, would necessarily require agencies to speculate as to whether future project users would be noisy. The opinion mandates that the Regents analyze the propensity of future residents of a housing development to attend off-campus parties and generate social noise without specifying how they should do so. (See *Good Neighbor*, *supra*, 88 Cal.App.5th at 690.) Agencies would be required to determine whether a proposed project's users are the type of people who, based on evidence about "people like them," are likely to engage in noisy behavior. (See ROB, pp. 37–38.) This type of analysis is inevitably problematic and could only be informed by social biases. Not only is this type of stereotyping abhorrent on its face, but it also requires the employment of speculation as substantial evidence in a manner the Guidelines directly prohibit. (See Pub. Resources Code, § 21082.2(c); Guidelines, § 15384(a).)

In fact, no clear methodology for analyzing social noise exists, and it is difficult to imagine what substantial evidence agencies could produce to support a determination about just how noisy a particular group might be. Public agencies will bear the burden of conjuring a methodology for analyzing social noise and developing supporting evidence. This is precisely the type of speculation CEQA cautions against, and will create yet another avenue for opponents to challenge CEQA documents.

It is easy to imagine how problematic this will be for California's cities and counties. Here, the Court of Appeal focused on evidence that students are noisy, but such generalizations could be extended to the occupants and users of all manner of projects, both residential and non-residential. Agencies will inevitably face "evidence" that future occupants of low-income housing are noisy because they are more likely to be densely populated or occupied by multi-generational households. Similar evidence could be presented regarding users of supportive services, domestic

violence shelters, residence hotels, commercial shopping centers intended to serve low-income populations, or even public parks and town squares serving certain groups.

As the Regents pointed out, if the Court of Appeal's decision stands, what will stop project opponents from raising the specter of "any other perceived anti-social predilection to attack not just student housing, but also . . . any other project designed for persons who, as a group, could be considered noisy or otherwise undesirable, whether undergraduate students, families with children, multi-generational families, low-income people, the formerly homeless, or the formerly incarcerated?" (See ROB, p. 33.) Any indication that "other people with the same social identity as future project residents or users have participated in noisy or other anti-social behavior" could require public agencies to prepare an otherwise unnecessary, costly EIR. (See ROB, p. 36.) The Court of Appeal's decision creates a dangerous slippery slope that is contrary to the letter and spirit of CEQA.

III. Upholding the Court of Appeal's Decision Would Invite Further CEQA Abuse.

The Court of Appeal decision invites increased abuse of CEQA, infringing on the ability of cities and counties to facilitate development of projects intended for populations who could be perceived as "noisy." This Court has explicitly cautioned that such abuse will not be tolerated. (See, e.g., *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576 ["[R]ules 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."].)

In enacting CEQA, the legislature explicitly called for balance between minimizing significant impacts on the physical environment and other policy concerns. (See, e.g., Pub. Resources Code, § 21001(d).) CEQA ensures that "major consideration is given to preventing environmental

damage, while providing a decent home and satisfying environment for every Californian." (*Ibid*.) The law's objectives include the creation of conditions that "fulfill the social and economic requirements of present and future generations." (Pub. Resources Code, § 21001(e).)

Appellants' opposition is rooted in a desire to stop UC Berkeley from increasing its student population. As the Appellants' "noise consultant" commented: "[t]he only practical means to avoid an increase in noise from parties and partiers is to not add more partiers to the area." (See ROB, pp. 23–24, quoting AR 1603.) This is a familiar argument positing that people themselves can constitute pollution, an argument that this court has rejected. (See ROB, pp. 41–42, citing *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 220). State Senator Nancy Skinner stated in a press release responding to the appellate decision, "[i]t was never the intent of the Legislature for students to be viewed as environmental pollutants." (See ROB, p. 41.)

No person should be viewed as an environmental pollutant, particularly not as a result of affiliation with a certain social or cultural group. Requiring analysis of "social noise" would create a significant obstacle for cities, counties, and other public agencies to facilitate development of projects intended for populations who could be perceived as "noisy" or otherwise undesirable, inviting CEQA abuse. Cities and counties need the ability to approve projects, both residential and non-residential, to serve all California communities and populations without unnecessary expense and opposition.

CONCLUSION

For the foregoing reasons, Cal Cities and CSAC respectfully request that the Court find CEQA does not require public agencies to analyze the noisiness of intended project inhabitants and reverse the Court of Appeal's decision.

DATED: October 16, 2023

DOWNEY BRAND LLP

By: 

KATHRYN OEHLSCHLAGER
Attorneys for Amici Curiae
CALIFORNIA STATE
ASSOCIATION OF COUNTIES
LEAGUE OF CALIFORNIA
CITIES

CERTIFICATION OF WORD COUNT

Counsel of record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the brief of Amici Curiae the League of California Cities and the California State Association of Counties was produced using 13-point Roman type, including footnotes, and contains approximately 2,311 words according to the word count of the computer program used to prepare the brief.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 16, 2023.

DATED: October 16, 2023

DOWNEY BRAND LLP

By: _____

KATHRYN OEHLSCHLAGER
Attorneys for Amici Curiae
THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES