IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S223603

SAN DIEGO ASSOCIATION OF GOVERNMENTS, et al.,
Appellants and Defendants,

v.

CLEVELAND NATIONAL FOREST FOUNDATION, et al.,
Respondents and Petitioners.

After an Opinion by the Court of Appeal,
Fourth Appellate District, Division One
(Case No. D063288)

On Appeal from the Superior Court of San Diego County
(Case Nos. 37-2011-00101593-CU-TT-CTL,
37-2011-00101660-CU-TT-CTL, Honorable Timothy B. Taylor, Judge)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF SAN DIEGO ASSOCIATION OF GOVERNMENTS, ET AL.

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APPLICATION TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f),[1] Pacific Legal Foundation (PLF) requests leave to file the accompanying brief in support of Respondent San Diego Association of Governments (SANDAG). PLF is familiar with the arguments and believes the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

PLF is the most experienced donor-supported public interest law foundation of its kind. Founded in 1973, PLF provides a voice in the courts for those who believe in limited government, private property rights, balanced environmental regulation, individual freedom, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations nationwide.

PLF attorneys have been regular participants in this Court, including *People v. Rinehart*, No. S222620 (amicus brief filed May 15, 2015); *Property Reserve, Inc. v. Superior Court*, No. S217738 (amicus brief filed Jan. 15, 2015); *Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal.

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[1] Pursuant to California Rule of Court 8.520, PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

4th 1029 (2014); *City of Perris v. Stamper*, No. S213468 (amicus brief filed Apr. 28, 2014); and *Berkeley Hillside Preservation v. City of Berkeley*, No. S201116 (amicus brief filed Jan. 23, 2013).

PLF's brief will provide the Court a useful perspective on the central issue in this case: whether CEQA requires analysis of a regional transportation plan's "consistency" with a vague, nonbinding executive order.

INTRODUCTION AND SUMMARY OF ARGUMENT

CEQA requires state and local agencies to publicly disclose all significant environmental impacts from any project that they approve or carry out and either mitigate those impacts or explain why other considerations warrant allowing the project to proceed despite them. *See* Pub. Res. Code § 21001; Cal. Code Regs. tit. 14, §§ 15002, 15378, 15093. Respondents challenge SANDAG's approval of a regional transportation plan despite the fact that it acknowledged in its environmental analysis that the plan would result in significant greenhouse gas emissions, that these impacts would be mitigated to the extent feasible, and that SANDAG adopted a statement of overriding consideration. Respondents claim that SANDAG's environmental analysis fell short because it did not sufficiently discuss the plan's "consistency" with the state's emission reduction goals, as articulated in a vague, nonbinding executive order. *See* Arnold Schwarzenegger, Executive

Order S-3-05 (2005) (setting nonbinding "targets" for statewide greenhouse gas emission reductions in 2010, 2020, and 2050).

Although Respondents frame their claim as a challenge to SANDAG's disclosure and analysis of environmental impacts, it isn't. Instead, it is more appropriately understood as a policy objection to SANDAG's choice of objectives in preparing and considering the plan. In preparing an environmental impact report, agencies must identify the "basic objectives" of their projects, so that they can determine an appropriate range of alternatives and mitigation measures. Cal. Code Regs. tit. 14, § 15126(d). SANDAG identified compliance with S.B. 375—which requires transportation plans to achieve housing goals and region-specific greenhouse gas emission reductions targets set by the Air Resources Board—as the basic objective of the plan. *See* Gov't Code § 65080; SANDAG's Opening Br. at 12. Although it could have chosen to reduce greenhouse gas emissions more than S.B. 375 requires, along the lines of the executive order as Respondents prefer, nothing required it to do so.

The decision below converts a vague, nonbinding executive order into a CEQA requirement, demanding that all projects be analyzed for "consistency" with the "policy goals reflected in Executive Order S-3-05." *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Governments*, 180 Cal. Rptr. 3d 548, 556 (2014). This is not only contrary to law, but would encourage CEQA abuse. Executive orders are not, on their own, legally

enforceable. *See Professional Engineers in California Gov't v. Schwarzenegger*, 50 Cal. 4th 989, 1015 (2010) ("Under the California Constitution it is *the Legislature*, rather than the Governor, that generally possesses the ultimate authority to establish [law.]"). This case demonstrates why. Executive Order No. S-3-05 sets broad, statewide goals for reducing greenhouse gas emissions across the board, but contains no plan for assigning responsibility for those reductions or meeting the overall goals.

In particular, the executive order provides no basis for SANDAG—an association of regional governments with limited geographic and policy authority—to discern its share of the statewide goal. If projects can be halted with nothing more than a policy objection related to precatory statewide goals, special interest groups will be able to wield CEQA as a sword, perpetuating the existing problem of CEQA litigation abuse. To avoid this result, this Court should reverse the decision below and hold that "consistency" with "policy goals" is not an environmental impact that must be analyzed under CEQA.

ARGUMENT

I

CEQA REQUIRES THE FORTHRIGHT DISCLOSURE OF SIGNIFICANT ENVIRONMENTAL CONSEQUENCES OF A PROJECT

CEQA's disclosure requirements serve its core purpose to promote informed public decision-making regarding projects that significantly affect

the environment. *See In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal. 4th 1143, 1162 (2008). The "heart" of this process is the preparation and circulation of an environmental impact report. *See County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 810 (1973). That report must identify the basic objectives of a project, describe all of the project's significant environmental impacts, propose alternatives to the project that would achieve the basic objectives, and detail measures to mitigate the significant environmental impacts. Pub. Res. Code §§ 21002.1(a), 21061. After making the report available for public comment, the agency must consider and respond to every public comment. Pub. Res. Code §§ 21091, 21092. At the conclusion of this laborious process, the agency can only approve the project if it has identified feasible and enforceable mitigation measures that reduce environmental impacts to insignificance, has adopted an alternative that avoids the impacts, or has found mitigation infeasible and adopted a statement of overriding consideration explaining why the project's benefits outweigh the remaining significant impacts. Pub. Res. Code § 21081.

When an agency has complied with all of these obligations by disclosing all of the significant environmental impacts and either mitigating them or adopting a statement of overriding consideration, courts should not invalidate its decisions. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 435 (2007) (contrasting the "scrupulous" review when an agency fails to perform these steps to the deferential review of its procedurally-compliant policy decisions and factual conclusions). In particular, the agency's policy choices in establishing a plan's basic objectives or adopting a statement of overriding considerations receive substantial deference. Such decisions "lie[] at the core of the lead agency's discretionary responsibility under CEQA and [are], for that reason, not lightly to be overturned." *See City of Marina v. Bd. of Trustees of the Cal. State Univ.*, 39 Cal. 4th 341, 368 (2006). Instead, a court's proper role is to make sure the government's factual conclusions are supported by substantial evidence. *See Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 407 (1988) ("[A] court's proper role . . . is not to determine whether the EIR's ultimate conclusions are correct but only whether they are supported by substantial evidence and whether the EIR is sufficient as an informational document.").

SANDAG satisfied its CEQA obligations. It identified the plan's basic objectives—principally, compliance with S.B. 375. *See* Gov't Code § 65080; SANDAG's Opening Br. at 12. It disclosed the quantity of greenhouse gas

emissions projected to occur in 2050 under the plan, and explained that they are significant. *See* SANDAG's Opening Br. at 13-15. And it mitigated those impacts or, to the extent further mitigation was infeasible in light of the basic objectives, adopted a statement of overriding consideration. *See id*. at 14-15.

Although SANDAG certainly could have exercised its discretion to choose an objective involving more ambitious reductions, nothing in CEQA requires that result. Simply put, whether a project accords with the policy preferences of the former governor or a private party is not a significant environmental impact. *See* Pub. Res. Code § 21060.5 (defining "environment"); *id*. § 21068 (defining "significant effect on the environment"). The relevant significant environmental impact is emission of greenhouse gases, which SANDAG disclosed and acknowledged will be significant. SANDAG's Opening Br. at 13-15. Consequently, the policy dispute underlying this case is precisely the type of issue that CEQA leaves to the lead agency's discretion. *See City of Marina*, 39 Cal. 4th at 368.

An agency's misapplication of law can give rise to a CEQA claim. For instance, mitigation measures that are beyond an agency's power are subject to challenge and invalidation, *see Sierra Club v. California Coastal Comm'n*, 35 Cal. 4th 839, 859 (2005) (CEQA does not give Coastal Commission authority to regulate impacts outside the coastal zone), as are mitigation measures that are regulations under the California Administrative Procedure Act but were not promulgated according to its procedures. *See Center for*

Biological Diversity v. Department of Fish & Wildlife, 234 Cal. App. 4th 214, 259-64 (2015) (regulations adopted in an environmental impact report without complying with Administrative Procedure Act are invalid). And, as this Court recently held in *City of San Diego v. Board of Trustees of Cal. State Univ.*, 190 Cal. Rptr. 3d 319 (2015), a government's errant conclusion that it lacks authority to mitigate an environmental impact can run afoul of CEQA. *Id.* at 328-33. Similarly, if the government attempts to avoid responsibility for trading off one environmental effect for another by incorrectly interpreting a statute to require a particular choice, the environmental impact report fails to satisfy its public information obligations. *See Bay Area Citizens v. Association of Bay Area Governments*, No. A143058 (1st App. Dist. briefing completed Jan. 26, 2015) (plaintiff argues that agency's misinterpretation of S.B. 375 to require project that results in dozens of significant environmental impacts violates CEQA's purpose to promote informed decision-making).

This isn't one of those cases. In fact, the State answers the question on appeal—whether SANDAG must analyze the plan's consistency with the executive order—with a resounding "no." *See* People's Answer Br. at 5-6 (arguing that SANDAG has no obligation "to engage in a strict 'consistency' analysis" with the executive order, but instead analyze whether it furthers the state's "long-term climate stabilization objectives"). This Court should reject this attempt to convert vague policy objections into CEQA violations.

II

ALLOWING CEQA CLAIMS BASED ON "CONSISTENCY" WITH VAGUE POLICY GOALS WOULD ENCOURAGE CEQA ABUSE

CEQA has become the favored tool for nimbies[2] and other special interests to slow or stop projects for any reason, including reasons having *nothing* to do with the environment. *See* John Watts, *Reconciling Environmental Protection with the Need for Certainty: Significance Thresholds for CEQA*, 22 Ecology L.Q. 213, 238-39 (1995) ("CEQA to some degree encourages not-in-my-back-yard (NIMBY) syndrome . . . [its] emphasis on site-specific mitigation measures that accommodate the concerns of neighbors can lead to such environmentally damaging practices as lower density zoning, wide streets, and the banning of buses on residential streets."); *see also* Stephen J. Dubner, *Why Bad Environmentalism Is Such an Easy Sell*, Freakonomics.com (2013) (arguing that CEQA litigation frustrates environmentally beneficial projects),[3] Jennie R. Romer & Shanna Foley, *A Wolf in Sheep's Clothing: The Plastics Industry's "Public Interest" Role in Legislation and Litigation of Plastic Bag Laws in California*, 5 Golden Gate

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[2] NIMBY is the acronym for "not in my backyard." *See Honchariw v. Cnty. of Stanislaus*, 200 Cal. App. 4th 1066, 1068 n.2 (2011); *see also* Garner's Dictionary of Legal Usage 604 (3d ed. 2011) (NIMBY is a pejorative term for people who oppose socially beneficial development for private interests).

[3] *Available at* http://freakonomics.com/2013/10/24/why-bad-environmentalism-is-such-an-easy-sell-a-new-freakonomics-radio-podcast-2/.

U. Envtl. L.J. 377, 416 & n.268 (2012) ("CEQA has been used by labor groups to oppose proposed Wal-Mart developments and by property owners opposing development projects near their land."). In fact, a significant share of CEQA cases are filed by businesses hoping to block would-be competitors from opening shop and by unions seeking to pressure project proponents into unionized labor contracts. *See* Jennifer L. Hernandez, et al., *In the Name of the Environment: How Litigation Abuse Under the California Environmental Quality Act Undermines California's Environmental, Social Equity and Economic Priorities – and Proposed Reforms to Protect the Environment from CEQA Litigation Abuse*, Holland & Knight Report (2015).[4] Many more cases are filed by groups apparently formed for the sole purpose of bringing the CEQA claim without revealing the identity of the individuals behind the challenge. *See id.*; *cf.* Bruce Yandle, *Bootleggers and Baptists–The Education of a Regulatory Economist*, Regulation 12-16 (1983) (explaining that special interests will support expanding regulation for their private interests, but promote it through the rhetoric of public interest).[5]

If this Court holds that project opponents' assertions that a project is merely "inconsistent" with a vague, nonbinding executive order (or any

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[4] *Available at* http://www.hklaw.com/publications/in-the-name-of-the-environment-litigation-abuse-under-ceqa-august-2015/.

[5] *Available at* http://object.cato.org/sites/cato.org/files/serials/files/regulation/1983/5/v7n3-3.pdf.

general policy goal) suffice to block the project, the ruling would encourage even more of this abuse. Anyone could challenge any project based on any policy disagreement, notwithstanding the agency's disclosure of all of the significant impacts of a project and explanation why other considerations justify allowing the project to proceed despite them.

This case highlights how easy it would be to make such arguments. The executive order's legal status in this case is no different from any would-be plaintiff's policy preferences. As this Court has recognized, executive orders have no legal force of their own. *Professional Engineers in California Gov't*, 50 Cal. 4th at 1015. Even if they did, this one would not require SANDAG to adopt any particular policy. No part of it is directed at regional government agencies like SANDAG. *See* Executive Order S-03-05 (directing *state* agencies and officials to prepare a report). Executive Order S-03-05 announces broad goals for reducing greenhouse gas emissions statewide. *See id*. (stating goals of reducing emissions statewide to 1990 levels by 2020 and 80% below 1990 levels by 2050). These goals—to the extent they've been codified by the Legislature—won't be achieved through uniform emissions reductions throughout the state, but instead will vary by region and sector based on the relative costs of reducing particular emissions. *See* Air Resources Board, *First Update to the Climate Change Scoping Plan: Building on the*

Framework Pursuant to AB 32 (May 2014).[6] There is no way for SANDAG—or, for that matter, a court—to convert the executive order's broad goals into an amount of emissions reductions that a particular region's land use and transportation planning must achieve.

Contrast this with the concrete requirements of S.B. 375, which directs the Air Resources Board to set region-specific greenhouse gas emission reduction targets for land-use and transportation planning. *See* Gov't Code § 65080(b)(2)(A). The statute also mandates that regional governments, like SANDAG, create a plan to achieve these targets. *See id*. § 65080(b)(2)(B) ("Each metropolitan planning organization shall prepare a sustainable communities strategy . . . to achieve, if there is a feasible way to do so, the greenhouse gas emission reduction targets approved by the state board."). This statute—which, unlike the executive order is legally binding on SANDAG—results in clear requirements for SANDAG, which courts can easily apply.

Requiring "consistency" with the executive order under CEQA would result in an unadministrable rule. No matter how much a government's plan reduces emissions, anyone could argue that it was nonetheless inconsistent with the executive order because it should have achieved more. *Cf. City of Marina*, 39 Cal. 4th at 368 (agencies' policy judgments should not lightly be

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[6] *Available at* http://www.arb.ca.gov/cc/scopingplan/2013_update/first_update_ climate_change_scoping_plan.pdf.

overturned). Since the executive order is not binding on SANDAG, it would be difficult to limit the consequences of the decision to this context. Instead, anyone would be able to challenge a project by arguing that it's inconsistent with some general policy goal, even if that goal is nothing more than the plaintiff's individual policy preferences.

The incredible fuzziness of this theory distinguishes it from traditional CEQA claims. Determining whether an agency has disclosed an environmental impact is straightforward. Analyzing whether it has met its obligation to mitigate or explain a statement of overriding consideration is less so, because of the vagaries of the substantial evidence standard. But even in those cases, the question the Court is considering—whether an impact has been mitigated or weighed against a project's benefits—is clear. The theory presented in this case, on the other hand, fails even to identify the question the Court (or an agency attempting to comply in the first instance) is supposed to be asking.

CONCLUSION

The decision below should be reversed.

DATED: August 26, 2015.

Respectfully submitted,

M. REED HOPPER
JONATHAN WOOD

By /s/ Jonathan Wood
JONATHAN WOOD

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Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF SAN DIEGO ASSOCIATION OF GOVERNMENTS, ET AL., is proportionately spaced, has a typeface of 13 points or more, and contains 2,821 words.

DATED: August 26, 2015.

/s/ Jonathan Wood
JONATHAN WOOD

DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On August 26, 2015, true copies of APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF SAN DIEGO ASSOCIATION OF GOVERNMENTS, ET AL., were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 26th day of August, 2015, at Sacramento, California.

TAWNDA ELLING