S201116

IN THE

SUPREME COURT OF CALIFORNIA

BERKELEY HILLSIDE PRESERVATION, ET AL.
Petitioners and Appellants
vs.
CITY OF BERKELEY, ET AL.
Respondents.

MITCHELL D. KAPOR AND FREADA KAPOR-KLEIN
Respondents and Real Parties in Interest.

First Appellate District Court of Appeal,
Division Four, Case No. A131254;
Alameda County Superior Court Case No. RG10517314
Honorable Frank Roesch, Judge Presiding

BRIEF OF AMICI CURIAE CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, AND THE BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, IN SUPPORT OF RESPONDENTS AND REAL PARTIES IN INTEREST

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INTRODUCTION

In this case, the Court of Appeal has rewritten the California Environmental Quality Act ("CEQA") so as to hinder public agencies from relying on categorical exemptions under CEQA and the CEQA Guidelines.[1] The appellate decision forces public agencies to conduct extensive CEQA analysis to determine whether it is necessary to conduct even more extensive CEQA analysis, a circular result that was never intended by the Legislature. *Amici Curiae* California School Boards Association's Education Legal Alliance, The Regents of the University of California ("The Regents" or "University"), and the Board of Trustees of the California State University ("Trustees" or "CSU") (collectively, the "*Amici Curiae*") represent the interests of all levels of California public education, and share the common goal of providing educational opportunity to a broad range of Californians. (Ed. Code, § 66010.2.) The Education Legal Alliance of the California School Boards Association ("CSBA") -- representing the interests of CSBA's membership of nearly all of California's more than 1,000 school districts and county offices of education -- The Regents and Trustees are particularly concerned with the impact of this precedent on California's public schools and universities. The loss of categorical exemptions for minor projects impedes progress, hampers the provision of public services, and arms unhappy citizens with a near foolproof means of elevating every subjective concern to unreasonable heights. The Legislature and the Natural Resources Agency were mindful of the needs of students when they authorized categorical exemptions. In order to protect the interests of those same students, *Amici Curiae*

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[1] References to "CEQA" are to Public Resources Code sections 21000, *et seq.*; references to "Guidelines" or "CEQA Guidelines" are to California Code of Regulations, Title 14, sections 15000, *et seq.*

respectfully urge this Court to reverse the Court of Appeal, restoring the ability to rely on categorical exemptions in appropriate circumstances.

SUMMARY OF ARGUMENT

California's K-12 school districts are faced with two competing considerations. On the one hand, school districts are constitutionally required to provide a free education to all of the state's students. (Cal. Const., art. IX, § 5; *Hartzell v. Connell* (1984) 35 Cal.3d 899, 904-905; *Ward v. Flood* (1874) 48 Cal. 36, 51.) On the other hand, these entities are required to consider the environmental consequences of their actions, which can impede their ability to complete minor alterations and other public school projects. CEQA's categorical exemptions, and the unusual circumstances exception set forth in Guidelines section 15300.2, subdivision (c), establish a balance for these competing considerations. School districts can forego extensive CEQA analysis for projects which have been categorically deemed to have no significant effect on the environment, thereby expeditiously accommodating day-to-day issues such as fluctuating enrollment or safety considerations. This enables school districts to provide a consistent, safe and adequate educational setting to students. The exception satisfies the purposes of CEQA by raising a red flag when unusual circumstances are involved, so that the districts must consider whether those circumstances create a significant impact on the environment. When they do, a project no longer falls into the categorical exemption, and the environmental impacts must be considered.

Specific examples of instances in which school districts rely on categorical exemptions to fulfill their public mission abound. School populations often fluctuate, requiring districts to act within a timeframe that does not allow for preparation of a negative declaration or environmental impact report ("EIR"). Without the ability timely to install a portable

classroom under a Class 14 exemption created particularly for this purpose, classrooms will be overcrowded, and students will be housed in facilities that were never meant to be classrooms, such as gymnasiums or cafeterias, resulting in the temporary loss of those facilities. Data demonstrate that resulting overcrowding disproportionately impacts underprivileged students. Categorical exemptions also allow school districts to act quickly to address safety concerns, including updates to existing schools to provide earthquake resistant structures. Limitation on the use of such exemptions not only creates delay and expense for school districts, it also jeopardizes the safety and welfare of students and faculty.

Similarly, the constitution grants The Regents a unique status as a public trust vested with responsibility for the management and disposition of University property. The Legislature directs The Regents to "plan that adequate spaces are available to accommodate all California resident students who are eligible." (Ed. Code, § 66202.5.) In 2012 alone, The Regents filed 42 Notices of Exemption for necessary projects to meet this obligation. CSU's mission is to provide quality, affordable, higher education to every qualified Californian so that graduating students can positively contribute to California's economy, culture, and future. (*See* Ed. Code, § 66050.) The Trustees are responsible for the physical development of campuses to support CSU's mission and academic programs. During 2012, CSU filed 88 Notices of Exemption for its important public projects. As with school districts, these categorical exemptions provided the balance between educational and environmental interests.

Berkeley Hillside Preservation v. City of Berkeley ("*Berkeley Hillside*") upsets the critical balance between these important legal interests. The approach utilized in prior precedent allowed the unusual circumstances exemption to apply only if there exists atypical circumstances, and those circumstances result in a significant

environmental effect. This two-part approach enables public education facilities to undertake important projects without the burden of CEQA review, absent unusual circumstances, in which case environmental considerations take precedence. *Berkeley Hillside* reduces the well-recognized process under CEQA to a singular consideration of whether a project has significant effects. The Court of Appeal thus removed any meaning to the "unusual circumstances" exception, opening the door to application of that exception in nearly every instance, and effectively doing away with categorical exemptions.

The Court of Appeal also erred by applying a "fair argument" standard to determination of whether the unusual circumstances exception applies. In doing so, the court created a scheme in which an unhappy neighbor can use his or her own subjective feelings about a school or university project to overcome the exemptions and force environmental review, delaying projects and jeopardizing public education facilities. Accordingly, educational agencies will be forced to spend time and money they do not have, while they conduct environmental review of projects that prior to *Berkeley Hillside* would have been deemed exempt. During the intervening months of the CEQA process, students will be faced with increased risk of inadequate or unsafe facilities. Further, since each *Amicus Curiae* represents the interests of schools and campuses throughout California, each has a significant interest in a uniform standard of review across the appellate districts.

The loss of categorical exemptions will have a number of impacts on schools, such as obstructing a school district's ability to update school buildings, to enhance student and employee safety, to accommodate enrollment, and to alleviate overcrowded classrooms as well as the loss of other school facilities. For school districts, also put at risk are state

facilities funding, as well as the statutory exemption for school closures under Public Resources Code section 21080.18.

At the university level, loss of categorical exemptions will interfere with the University's and CSU's abilities to complete minor, but essential, campus projects, including to address safety, maintenance, and accessibility needs; update utility and telecommunications systems in aging structures; and meet the constantly changing needs of students and faculty.

The Court of Appeal's decision is contrary to the intent of the Legislature. CEQA does not require environmental review for an exempt project, and does not require notice to, or review and comment by, the public prior to approval of a project. *Berkeley Hillside* directly contradicts this statutory scheme, as environmental review will now increasingly be needed to determine whether an exemption may apply or not. Additionally, the decision lends itself to precisely the type of uncertainty that the Legislature sought to avoid, leaving educational agencies to guess at when they may rely on an exemption.

Finally, the Court of Appeal erred in ordering the preparation of an EIR, rather than leaving it to the lead agency's discretion to determine what scope of environmental review might be required. This leaves public education facilities exposed to further delays and expense when undertaking important public projects.

For these reasons, *Amici Curiae* request that the Court of Appeal's decision be reversed.

ARGUMENT

I. SCHOOL DISTRICTS AND UNIVERSITIES RELY ON CATGORICAL EXEMPTIONS IN APPROPRIATE CIRCUMSTANCES

The categorical exemptions at issue in this case are those categories of projects which the Natural Resources Agency ("Resources Agency"), by mandate of the California Legislature, has determined not to have significant effects on the environment. (*See Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 112-113, citing Pub. Resources Code § 21084; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74; *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 653-655.) A categorically exempt project is not subject to CEQA, and may be implemented "without any CEQA compliance whatsoever." (*Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372, 380 ("*Muzzy Ranch*"); *Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950, 955, citing *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 688; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1386 ("*San Lorenzo Valley CARE*") [once the determination of threshold exemption is made, none of the additional CEQA requirements or procedures apply]; *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 475 [since a categorical exemption is based on a finding by the Resources Agency that a class of projects does not have a significant effect on the environment, an agency's finding that a particular project comes within one of the exempt classes necessarily includes an implied finding that the project has no significant effect]; *Association for Protection of Environmental Values in Ukiah v.*

City of Ukiah (1991) 2 Cal.App.4th 720, 726 ("*Ukiah*"); *Kennedy v. City of Hayward* (1980) 105 Cal.App.3d 953, 962.)

CEQA and the CEQA Guidelines contain a number of exemptions that relate to educational agencies. Such exemptions are critical since they allow such agencies to act in a timely fashion on their projects, including as necessary to accommodate fluctuations in enrollment, or to preserve the safety of students and staff by performing important facility updates. Without the exemptions, these crucial projects may not be completed in a timely manner, resulting in overcrowded or dangerous conditions, and threatening the ability of educational agencies to provide a quality education to all students.

One of the primary exemptions relied on by school districts is the "Class 14" exemption for minor additions to existing schools within existing school grounds where the addition does not increase original student capacity by more than 25% or ten classrooms, whichever is less. The addition of portable classrooms is expressly included in this exemption. (Guidelines, § 15314.)[2]

Other examples of categorical exemptions commonly relied on by school districts as well as higher education institutions include:

- Class 1, consisting of operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing structures, facilities, mechanical equipment, or topographical features, with no expansion of use. (Guidelines, § 15301.)

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[2] A "portable classroom" is defined in the Education Code as: "[A] classroom building of one or more stories that is designed and constructed to be relocatable and transportable over public streets, and with respect to a single story portable classroom, is designed and constructed for relocation without the separation of the roof or floor from the building and when measured at the most exterior walls, has a floor area not in excess of 2,000 square feet." (Ed. Code § 17070.15.)

- Class 2, consisting of replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site and will have substantially the same purpose and capacity as the structure replaced, including but not limited to replacement or reconstruction of existing schools to provide earthquake resistant structures which do not increase capacity more than 50 percent. (Guidelines, § 15302, subd. (a).)
- Class 3, consisting of construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior. (Guidelines, § 15303.)
- Class 4, consisting of minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry and agricultural purposes. (Guidelines, § 15304.)
- Class 11, consisting of construction or placement of minor structures accessory to existing facilities, including on-premise signs, small parking lots, and seasonal or temporary use items. (Guidelines, § 15311.)
- Class 12, consisting of sales of surplus government property not located in an area of statewide, regional, or areawide concern. (Guidelines, § 15312.)
- Class 22, consisting of adoption, alteration, or termination of educational or training programs which involve no physical alteration in the area affected or which involve physical changes only in the interior of existing school or training structures. (Guidelines, § 15322.)

- Class 23, consisting of normal operations of facilities for public gatherings. (Guidelines, § 15323.)
- Class 32, consisting of projects characterized as in-fill development meeting certain conditions. (Guidelines, § 15332.)

II. THE COURT OF APPEAL IMPROPERLY EVISCERATED CATEGORICAL EXEMPTIONS

A. The Court of Appeal Contorts the "Unusual Circumstances" Exception, Requiring CEQA Review to Determine whether CEQA Review is Required

Under CEQA, a public agency must first determine whether the proposed governmental action is a "project" subject to CEQA. Part of this determination includes deciding whether the project is exempt from CEQA under either a statutory or categorical exemption. If the project is not exempt, then the agency generally must determine whether the project may have a significant effect on the environment, and prepare either a negative declaration or an EIR. (*See* discussion in Respondents' and Real Parties in Interest's Opening Brief on the Merits ("Resp. Opening Brief"), pp. 14-15.)

The Court of Appeals' decision puts all focus on the singular determination of whether a proposed action has a significant impact. The step of determining whether an exemption applies disappears from the equation. The court accomplishes this by contorting the "unusual circumstances" exception found in Guidelines section 15300.2, subdivision (c).

Under the "unusual circumstances" test as written, the categorical exemption no longer applies when "there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (Guidelines, § 15300.2, subd. (c).) A substantial line of cases has interpreted this exception to include two separate inquiries, so

that unusual circumstances exist "where the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects." (*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1350 ("*Wollmer*") (emphasis added). *See also, Banker's Hill, Hillcrest, Park West Community Preservation v. City of San Diego* (2006) 139 Cal.App.4th 249, 278 ("*Banker's Hill*"); *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800 ("*Santa Monica Chamber of Commerce*"); *Turlock Irrigation Dist. v. Zanker* (2006) 140 Cal.App.4th 1047, 1066-1067 ("*Turlock*"); *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1207 ("*Azusa Land Reclamation*").) A negative answer to either question means the exception does not apply, allowing the exemption to stand. (*Banker's Hill, supra,* 139 Cal.App.4th at 278, citing *Santa Monica Chamber of Commerce, supra,* 101 Cal.App.4th at 800.) Like all other public agencies in California, public educational institutions have long relied on this precedent.

The Guidelines do not expressly define the terms "unusual circumstances," but surely the inclusion of that phrase must have *some* meaning. (*See, People v. Hudson* (2006) 38 Cal.4th 1002, 1010 ["interpretations that render statutory terms meaningless as surplusage are to be avoided"], citing *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330; *People v. Loeun* (1997) 17 Cal.4th 1, 9. *See also, Brewer v. Patel* (1993) 20 Cal.App.4th 1017, 1021 [same rule applied to a regulation].) Many cases have applied a common sense, plain meaning interpretation, holding that an unusual circumstance refers to "some feature of the project that distinguishes it" from others in the exempt class. (*San Lorenzo Valley CARE, supra,* 139 Cal.App.4th at 1381, citing *City of Pasadena v. State of*

California (1993) 14 Cal.App.4th 810, 826; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1260 ("*Fairbank*"); *see also, Voices for Rural Living v. El Dorado Irrigation District* (2012) 209 Cal.App.4th 1096, 1109 ("*Voices for Rural Living*"); *Banker's Hill, supra,* 139 Cal.App.4th at 277; *Santa Monica Chamber of Commerce, supra,* 101 Cal.App.4th at 801.) In other words, whether a circumstance is "*unusual*" is judged against what is *typical* for the type of project that is ordinarily exempted. (*Santa Monica Chamber of Commerce, supra* at 801.)

Guidelines section 15300.2(c) strikes a crucial balance between competing policy considerations. On the one hand, it allows educational institutions to complete minor projects in a timely manner as necessary to accommodate the needs of the public school population. At the same time, it also requires these institutions to comply with CEQA by considering the potential impacts of their minor projects where unusual circumstances are present, since those circumstances take the projects outside the realm of the class of exempt projects. Where such unusual circumstances are found, and impacts are found to result from the atypical circumstances, the project no longer qualifies as part of the class of projects deemed exempt by the Resources Agency.

The Appellate Court, diverging from precedent and completely upsetting this balance, turns the express two-part inquiry found in Guidelines section 15300.2 -- which requires a finding of unusual circumstances and consideration of whether those unusual circumstances create a significant environmental impact -- into a singular inquiry. (Opinion, pg. 14.) ("Our conclusion [is] that the unusual circumstances exception applies whenever there is substantial evidence of a fair argument of a significant environmental impact....") This singular inquiry about significant impacts nullifies the "unusual circumstances" requirement: If there is a significant impact, then there is an unusual circumstance.

(Opinion, pg. 13.) As aptly pointed out by the Respondents, this approach entirely, and improperly, rewrites section 15300.2 of the CEQA Guidelines. While Appellants concede that "[the] categorical exemption process remains of great utility" (Appellants' Answer Brief on the Merits ("Appellants' Brief"), p. 7), the Court of Appeal's ruling undoes just that process.

The approach taken by the Court of Appeal is inconsistent with the three-tiered process clearly articulated by this Court (*see, Muzzy Ranch, supra,* 41 Cal.4th at 379-380; *No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at 74), because it requires an agency to make the determination required by "tier three" (whether substantial evidence exists that an aspect of the project may cause a significant effect on the environment) prior to "tier two" (whether the project is exempt from CEQA). (*Muzzy Ranch, supra,* 41 Cal.4th at 380.) This creates a need for public agencies to undertake CEQA analysis for projects that have already been determined to be exempt from exactly such analysis. All projects, whether or not involving atypical or unusual circumstances, will have to be analyzed to determine whether there are any potential significant impacts. This determination is <u>not</u> meant to be required in advance of determining whether a project is exempt. (*See, San Lorenzo Valley CARE, supra,* 139 Cal.App.4th at 1386 ["CEQA does not apply to exemption decisions"].)

Even Appellants recognize that "the very appropriate assumption is that projects subject to categorical exemption do not need any environmental review at all." (Appellants' Brief, p. 42.) How can this be the case if the potential for significant impacts has to be considered to determine whether an exemption applies? While Appellants contend that they and the Court of Appeal "are <u>not</u> proposing that a full-blown pre-environmental-review process of some sort is required for projects before a

categorical exemption may issue" (Appellants' Brief, p. 48), that is precisely the result of *Berkeley Hillside*.

The Court of Appeal also undermined the reasoning behind the preparation of an initial study. Under the Guidelines, the lead agency must conduct an initial study for a non-exempt project to determine if the project may have a significant effect. (Guidelines, § 15063, subd. (a).) The purposes of an initial study, generally, are to provide information regarding whether potentially significant impacts exist, and if so, whether to prepare a negative declaration or an EIR. (Guidelines, § 15063, subd. (c).) This Court, in *Muzzy Ranch, supra,* 41 Cal.4th at 380, explained the proper sequence of these events:

> If a public agency properly finds that a project is exempt from CEQA, no further environmental review is necessary. (*Citations.*) The agency need only prepare and file a notice of exemption (*citations*), citing the relevant statute or section of the CEQA Guidelines and including a brief statement of reasons to support the finding of exemption. (*Citations.*) ***If a project does not fall within an exemption, the agency must "conduct an initial study to determine if the project may have a significant effect on the environment."*** (*Citations.*) (emphasis added.)

Under the *Berkeley Hillside* opinion, the sequence of events is reversed, since the public agency must make the determination of whether the project may have a significant effect before it finds a project to be categorically exempt. The holding is therefore inconsistent with the CEQA Guidelines as previously interpreted and applied by this Court.

The resulting loss of any possibility of relying on a categorical exemption was recognized by the court in *Fairbank*. There, the project at issue was a proposed commercial building. The plaintiff cited to comments

from the administrative record in which project opponents voiced concern about the existing traffic and parking problems in the downtown area, contending that the proposed project would exacerbate those issues. (*Fairbank, supra,* 75 Cal.App.4th at 1260.) The court rejected the opponent's claim that this required a finding of an exception to categorical exemptions, as there was no showing whatsoever of any unusual circumstances surrounding the construction of the commercial building which would give rise to a risk of significant effects upon the environment. (*Ibid.*) The *Fairbank* court expressly recognized the appropriateness of first finding the existence of an unusual circumstance, and also acknowledged the consequence of having to consider significant effects in every circumstance:

> While the addition of any small building to a fully developed downtown commercial area is likely to cause minor adverse changes in the amount and flow of traffic and in parking patterns in the area, such effects cannot be deemed 'significant' without a showing of some feature of the project that distinguishes it from any other small, run-of-the-mill commercial building or use. Otherwise, ***no project that satisfies the criteria set forth in [the applicable categorical exemption] could ever be found to be exempt***.

(*Ibid.* (emphasis added).)

As recognized in *Fairbank*, a finding that there can be no categorical exemption any time there is a potential environmental impact would eviscerate the exemptions and require agencies to revisit a determination already made by the Secretary of the Resources Agency as required by the Legislature. (Pub. Resources Code, §21084 ("[t]he guidelines prepared and adopted [by the Resources Agency] shall include a list of classes of projects

that have been determined not to have a significant effect on the environment and that shall be exempt from this division").)

It is not clear what aspect of the project at issue in *Berkeley Hillside* was deemed to be unusual. The Appellate Court and Appellants place emphasis on the size of the proposed structure, but there is no clear analysis of how that aspect of the project would cause a significant impact. It is possible that the *outcome* of the case could have been correct if the court had simply conducted the proper analysis, that is, by separately determining (1) whether the size of the proposed home, or the alleged geotechnical or seismic issues, constitute unusual circumstances, and (2) if so, whether those unusual circumstances create an environmental impact that does not exist for the general class of exempt projects. There was no need for the Appellate Court to do away with long-standing precedent in order to consider reversing the trial court.

B. Precedent Overwhelmingly Supports A Finding of "Unusual Circumstances" for the Exception to Apply

Appellants resort to incomplete and misleading summaries of the prior cases that have addressed the unusual circumstances exception. For example, Appellants emphasize that in *Fairbank,* a categorical exemption was upheld where comments relating to existing traffic and parking concerns that could be exacerbated by the project were minor and unsubstantiated. Appellants stress that the court could find neither significant effects, nor unusual circumstances, suggesting that a finding of either would defeat the exception. (Appellants' Brief at 60-61.) In fact, the court never had to consider whether there was a significant effect because it found there were no unusual circumstances. "[I]n the absence of any evidence of unusual circumstances nullifying the grant of a categorical exemption, there can be no basis for a claim of exception under Guidelines

section 15300.2(c)." (*Fairbank, supra,* 75 Cal. App.4th at 1260-61.) The decision stands for the proposition that potential environmental effects will not overcome a categorical exemption unless unusual circumstances distinguish the project from the typical projects in its class. The case therefore directly supports the position of Respondents and *Amicus Curiae.*

Notably, *Fairbank* was decided by the same court of appeal that decided the instant matter. The court contradicts its earlier ruling by now holding that "the fact that [a] proposed activity may have an effect on the environment is *itself* an unusual circumstance, because such action would not fall 'within a class of activities that does not normally threaten the environment,' and thus should be subject to further environmental review." (Opinion, at pg. 13.) These two cases cannot be harmonized.

Appellants' brief also includes an oversimplified and misleading summary of *San Lorenzo Valley CARE*, stating that the "Court *upheld* a categorical exemption for a school closure upon insufficient evidence of either potentially significant environmental impacts or unusual circumstances." (Appellants' Brief, p. 63 (emphasis in original).) This again suggests that the court found that there was no evidence of *either* part of the two-part test. In fact, like *Fairbank,* in sustaining application of the categorical exemption to a school closure, the court never reached the issue of whether the alleged traffic impacts were potentially significant, because its finding that there were no unusual circumstances ended the inquiry. (*San Lorenzo Valley CARE, supra,* 139 Cal.App.4th at 1394-95.)

Appellants' Brief cites to the Third District Court of Appeal's recent decision in *Voices for Rural Living.* They correctly describe it as a case in which a categorical exemption was denied "because the amount of water to be provided was large enough to be an unusual circumstance that created a potential for a significant environmental impact." (Appellants' Brief, p. 64 (emphasis added).) Like *San Lorenzo CARE* and *Fairbank* before it, the

case directly supports the positions of Respondents and *Amici Curiae* that a finding of unusual circumstances is a separate inquiry which is a prerequisite to the exception in Guidelines section 15300.2, subdivision (c):

> [Appellant] argues there was no unusual circumstance here because the only possible unusual circumstance was a significant change in demand for municipal services, and it claims the evidence indicates the increase in demand for water...was not significant. ***This argument misunderstands how we are to determine whether an unusual circumstance exists for purposes of applying the unusual circumstance exception to a categorical exemption. We do not look only to the project's possible environmental effects. Rather, we determine as a matter of law whether 'the circumstances of a particular project . . . differ from the general circumstances of the projects covered by a particular categorical exemption . . . .'*** (Citations omitted) (emphasis added).)

(*Voices for Rural Living, supra,* 209 Cal.App.4th at 1109-1110 (emphasis added).)

The *San Lorenzo Valley CARE*, *Fairbank* and *Voices for Rural Living* opinions all correctly applied the law relating to categorical exemptions, along with the many other courts which similarly required a separate finding of unusual circumstances. (*See, e.g., Wollmer, supra,* 193 Cal.App.4th at 1350; *Azusa Land Reclamation, supra,* 52 Cal.App.4th at 1207; *Banker's Hill, supra,* 139 Cal.App.4th at 261, fn. 11, 278; *Santa Monica Chamber of Commerce, supra,* 101 Cal.App.4th at 800; *Turlock, supra,* 140 Cal.App.4th at 1066-1067.)

Contrary to the Court of Appeal's ruling, the holding of *Banker's Hill, supra,* 139 Cal.App.4th 249, further supports Respondents and *Amici Curiae*. There, the court very clearly applied a two-step approach to

application of the unusual circumstances exception to categorical exemptions:

> The application of Guidelines section 15300.2(c) involves ***two distinct inquiries***. ***First***, we inquire whether the Project presents unusual circumstances. ***Second***, we inquire whether there is a reasonable possibility of a significant effect on the environment *due to* the unusual circumstances. (*Citations.*) 'A negative answer to either question means the exception does not apply.' (*Citations.*)

(*Id.* at 278 (emphasis added).) The Court of Appeal's statement that the *Banker's Hill* court "did not actually employ such a two-step procedure" is inaccurate. The *Banker's Hill* court simply answered the second inquiry first so as to "streamline" the process based on the facts before the court. (*Ibid.*) Finding that there were no potential significant effects, it was unnecessary for the court to return to answer the first inquiry (whether unusual circumstances were present), since "a negative answer to either question means the exception does not apply." (*Ibid.* (emphasis added).) As stated by the *Banker's Hill* court:

> Throughout our discussion we will sometimes refer to whether there is a reasonable possibility of a 'significant effect,' without stating 'due to unusual circumstances.' Our use of this shorthand terminology is in no way intended to negate the 'due to unusual circumstances' portion of the exception.

(*Id.* at 261, fn. 11.)

Appellants and the Court of Appeal also attempt to rely heavily on this Court's 36 year-old decision in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190 ("*Wildlife Alive*"). However, both the Court of Appeal and Appellants misconstrue the holding of this case, as correctly recognized by Respondents. (Respondents' and Real Parties in Interests' Reply Brief on

the Merits ("Resp. Reply Brief"), pp. 16-17.) *Wildlife Alive* did not involve the unusual circumstances exception to categorical exemptions. Rather, *Wildlife Alive* involved, *inter alia*, the issue of whether the Fish and Game Commission's activities in setting hunting and fishing seasons was included within one of the categorical exemptions. (*Id.* at 204.) This Court found that the activities did not fit into the exemption, but that even if they did, the exemption, *as a class*, would likely fail because the entire class of activity in general has the potential for significant impacts. (*Id.* at 205-206.) Unlike *Berkeley Hillside*, the Court did not consider whether a particular project which falls into a *properly* exempt class has the potential for impacts, and whether that potential alone would make the project ineligible for the exemption. *Wildlife Alive* simply did not confront the issues in the present case. *Wildlife Alive* also predates the unusual circumstances exception. The Resources Agency was aware of the Court's holding when it enacted the exception to include language requiring that a potential significant environmental impact be "*due to* unusual circumstances" in order for the exception to apply. The sequence of events is important, since the *Wildlife Alive* opinion does not contain any reference to "unusual circumstances". Such terms were crafted after and in response to *Wildlife Alive*.

Finally, the Court of Appeal and Appellants cite to *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98 ("*CBE*"). The context of that case was the validity of various CEQA Guidelines, including whether a whole category of exemption was valid. Unlike the present case, *CBE* was not a matter in which a court was considering application of the unusual circumstances exception to particular facts. To the extent language in the case can in any way be read to support the conclusion that the existence of significant effects necessarily constitutes "unusual circumstances" (*see, id.* at 129), the

court still recognized that the same *Wildlife Alive* language being relied upon by the Court of Appeal and Appellants here "cannot be read so broadly as to defeat the very idea underlying CEQA section 21084 of *classes* or *categories* of projects that *generally* do not have a significant effect on the environment." (*Id.* at 130; *see also, id.* at 127.) To read the unusual circumstances exception as does the Court of Appeal would have precisely such an effect.

III. THE COURT OF APPEAL'S APPLICATION OF THE "FAIR ARGUMENT" STANDARD TO THE UNUSUAL CIRCUMSTANCES TEST HARMS EDUCATION AGENCIES AND THE PUBLIC THEY SERVE

A. A Split Exists Regarding the Correct Standard

In addition to rewriting the unusual circumstance exception, the Court of Appeal also used an unworkable standard of review for determining whether the exception to a categorical exemption set forth in Guidelines section 15300.2, subdivision (c), applies. By applying the "fair argument" standard, the Court of Appeal further undermined the ability of education agencies and others to rely on categorical exemptions under CEQA.

Appellants assert that there is no current conflict among the appellate districts regarding the appropriate standard of review for this determination. (Appellants' Brief, pgs. 30-31.) The Court of Appeal side-stepped the question of whether such a split exists. (*See,* Opinion, pg. 16, fn.10.) However, several courts have expressly recognized the conflict. (*See, e.g., Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830, 855-856 ["[t]here is a split of authority on the appropriate standard of judicial review of a question of fact when the issue is whether a project that would otherwise be found categorically exempt is subject to one of three general exceptions ... to the categorical exemptions ..."]; *Committee to*

Save Hollywoodland Specific Plan v. City of Los Angeles (2008) 161 Cal.App.4th 1168, 1187 ["courts are divided on the question of whether the 'fair argument' standard... or the substantial evidence test applies to the second step of the analysis, namely determination of whether an exception to the exemption exists"]; *Fairbank, supra,* 75 Cal.App.4th at 1259-1260 ["There is a split of authority on the appropriate standard of judicial review for a local agency's decision on the applicability of the Guidelines section 15300.2(c) exception to a project that has been found to fall within a categorical exemption."]; *see also, San Lorenzo Valley CARE, supra,* 139 Cal.App.4th at 1390; *Santa Monica Chamber of Commerce, supra,* 101 Cal.App.4th at 795-797.) A conflict exists between use of the fair argument and the substantial evidence standards that is worthy of resolution by this Court. This is particularly important to the school districts and university systems, each of which includes schools and campuses across the state and therefore within the jurisdiction of all of the appellate districts. The conflict of authority will often result in different outcomes for the very same project undertaken by the very same entity, in different geographical locations.

Under the first possible standard, the agency's finding of categorical exemption, and no exception thereto, is upheld if there is substantial evidence in the record to support the conclusion that there will be no significant effect resulting from unusual circumstances ("substantial evidence test"). (*Banker's Hill, supra,* 139 Cal.App.4th at 262, citing *Ukiah, supra,* 2 Cal.App.4th 720; *Santa Monica Chamber of Commerce, supra,* 101 Cal.App.4th at 796, citing *Centinela Hospital Assn. v. City of Inglewood* (1990) 225 Cal.App.3d 1586, 1601; *Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827, 844-845.) Under the second standard, where there is a fair argument, based on substantial evidence, that the project may have significant impacts resulting from unusual circumstances,

the exception defeats the exemption ("fair argument test"). (*See* discussion in *Banker's Hill, supra,* 139 Cal.App.4th at 262.) This would be true even if the agency is presented with substantial evidence to the contrary. (*Santa Monica Chamber of Commerce, supra,* 101 Cal.App.4th at 796, citing *Azusa Land Reclamation, supra,* 52 Cal.App.4tth at 1202-1204.)

The Court of Appeal in this case adopted the fair argument test. In doing so, the court further eviscerated public agencies' ability to use categorical exemptions, and invited challenges by those opposing important public projects so as to further their own personal agendas.

B. The Regents And Trustees Have A Particularly Strong Interest In A Uniform Standard Of Judicial Review

The Regents and Trustees have a significant interest in establishing a uniform standard of judicial review applicable to the unusual circumstances exception to a categorical exemption. University-approved projects span the state, from the Angelo Coast Range Reserve in Branscomb in Mendocino County, along the South Fork of the Eel River to the Kendall-Frost Mission Bay Marsh Reserve in southern San Diego County. Similarly, CSU has 23 campuses located from Arcata to San Diego, educating approximately 427,000 students and employing 44,000 faculty and staff. As single public entities with decision-making authority over projects throughout the state, The Regents and Trustees may be forced to apply different standards of review when evaluating the applicability of a categorical exemption from CEQA depending on the location of the project. The result is a system full of confusion for the governing boards of California's universities, as well as the reviewing courts.

C. The Fair Argument Standard, Applied to Determinations of Categorical Exemption, Unreasonably Enables Any Opponent of a School or University Project to Prevent Application of the Exemption

Respondents correctly contend that applying the fair argument test to the determination of whether an exception applies to a categorical exemption would border on absurdity, since it would result in two separate standards of review applying to an exemption decision. First, the lead agency would determine whether a categorical exemption applies, which would be reviewed under the substantial evidence test. (Resp. Opening Brief, p. 53, citing *Fairbank, supra,* 75 Cal.App.4th at 1251.) Second, the agency would determine whether the exception applies, which would be reviewed under the more liberal fair argument test. This approach would thwart the purpose of streamlining environmental review for classes of projects determined by the Resources Agency not to have a significant effect on the environment. (Pub. Resources Code § 21084, subd. (a).) As Respondents also correctly note, these various standards then are joined by a third arbitrary and capricious standard when general plan consistency is also considered. (Resp. Reply Brief, p. 39.) It is unworkable for a lead agency to juggle all of these differing standards, and will also make a reviewing court's work overly convoluted.

Appellants concede that "[m]ost CEQA cases reference the fair argument standard vis-à-vis adoption of a negative declaration," and not related to categorical exemptions. (Appellants' Brief, p. 39.) The bulk of cases on which Appellants rely in fact do not relate to categorical exemptions or their exceptions at all. (Appellants' Brief, pp. 39-41, citing *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988 [involving a challenge to the city's adoption of a negative declaration rather

than an EIR]; *No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d 68 [involving an agency determination not to prepare an EIR]; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307 [considering whether the agency improperly adopted a negative declaration rather than preparing an EIR].) These cases address what transpires if a categorical exemption does not apply in the first place.

While applying the fair argument standard serves CEQA's intent of protecting the environment by requiring an EIR rather than a negative declaration when a fair argument of significant impact is presented, there is no compelling reason to apply the same standard to categorical exemptions. A project that is categorically exempt is not subject to CEQA because it has already been determined to be part of a class of projects found not to have impacts. (*San Lorenzo Valley CARE, supra*, 139 Cal.App.4th at 1380-1381.) If substantial evidence demonstrates the existence of unusual circumstances that lead to significant impacts, the exception to the exemption adequately serves to protect the environment and the public. Lowering the standard to a fair argument test invites challenges by those seeking to hold up public projects out of their own self interest.

There are numerous ways that the "fair argument" standard as applied to the unusual circumstances exception will haunt education agencies. Appellants demonstrate that the fair argument standard is at least purported to be a very easy threshold to meet. As Appellants contend, for the fair argument test, "[t]estimony of area residents that are not qualified environmental experts qualifies as substantial evidence when based on relevant personal observations." (Appellants' Brief, pp. 87-88, citing *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 882; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 173; *Arviv Enterprises v. South Valley Planning Commission* (2002) 101 Cal.App.4th 1333; *Ocean View*

Estates Homeowners Assn. v. Montecito Water Dist. (2004) 116 Cal.App.4th 396; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903.) Appellants' Brief is rife with examples of the opinions of neighbors who clearly do not like the project at issue in *Berkeley Hillside*. These local "experts" opine that the house in question is: "out of the scale and spirit of the neighborhood"; "of significantly different aesthetic character"; a "breathtaking and radical departure from the style of the neighborhood;" and a "push . . . to wipe out smallness and individuality." (Appellants' Brief, pp. 89-91.) One "expert" relied upon by Appellants for their opinion about the home in question is a "degreed artist," whatever that might be. (*Id.* at 89.) These citations aptly demonstrate just how subjective the fair argument standard can be (or at least how subjective it is thought to be in the eyes of the CEQA plaintiffs' bar). At one point, Appellants ask "If this is not expert evidence, what is?" (*Id.* at 71.) Perhaps the better question is what isn't expert evidence in Appellants' eyes.

Examining the classes of categorical exemption points to the problem of applying such a highly subjective standard. For example, Class 2 of the categorical exemptions consists of replacement or reconstruction of existing schools to provide earthquake resistant structures which do not increase capacity by more than 50 percent. (Guidelines, § 15302.) Class 2 also includes replacement or reconstruction of existing utility systems and/or facilities involving negligible or no expansion of capacity. Projects falling within this class are virtually certain to result in at least some dust and/or noise from construction. Previously, such impacts would not overcome the categorical exemption since they were typical of this type of project and therefore did not constitute unusual circumstances. Under *Berkeley Hillside*, however, any neighbor's complaint about these minor impacts could potentially defeat the exemption, and a school district or

university would be forced to delay its project to comply with CEQA, prolonging the risk to students.

Another example would be reliance on a Class 14 exemption for a minor addition to a K-12 school, which can be as small as the addition of a single classroom. (Guidelines, § 15314.) Neighbors may take issue with their view of a school being affected by the addition of this one classroom. Although Respondents correctly point out that the "obstruction of a few private views in a project's immediate vicinity is not generally regarded as a significant environmental impact," (Resp. Reply Brief, pg. 42, citing *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 586-587; *Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist., supra,* 116 Cal.App.4th at 402; *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492-493; *Ukiah, supra,* 2 Cal.App.4th at 734), it may now be enough to overcome a categorical exemption following the Court of Appeal's decision, since all that is needed is a "fair argument" of a significant impact, even if that impact is ultimately found to be less than significant.

For school districts, enabling neighbors to defeat categorical exemptions with these types of highly subjective opinions is untenable. Public schools, particularly at the elementary levels, are generally situated in residential neighborhoods, surrounded by homes. Neighbors frequently raise complaints or concerns about school activities ranging from playground noise (the sound of laughing children), the appearance of the schools (a simple stucco façade in a neighborhood of homes with more expensive wood or stone facing), use of school grounds after school hours by the public pursuant to the Civic Center Act (Ed. Code §§ 38130, *et seq.*) (such as Boy Scout meetings), and a host of other issues. Beyond the facilities, education itself is a hot topic in communities, with parents and others developing loyalties to particular schools that are often loudly tested

when school boundaries must be changed or a school closed. While school districts take all such issues seriously, CEQA cannot be allowed to elevate them to a point where they can stop important public works even when only the most predictable and typical circumstances are involved.

IV. LIMITATION OF CATEGORICAL EXEMPTIONS SIGNIFICANTLY INTERFERES WITH SCHOOL DISTRICTS' PROVISION OF PUBLIC SERVICES

A. The Court of Appeal Decision Impacts A Wide Range of Categorical Exemptions Previously Relied Upon By School Districts

The decision below will impede K-12 school districts' ability to rely on categorical exemptions, resulting in consequences that do not appear to have been considered by the Court of Appeal. The types of categorical exemptions that school districts rely upon, as set forth in Section I of this brief, are all impacted.

B. School Districts Will be Hampered in their Ability to Address Student Population Fluctuations, to the Detriment of Students

i. Minor Additions to Schools Are Often Needed to Address Population Changes

Perhaps the most common categorical exemption relied upon by school districts is the "Class 14" exemption for construction of minor additions to schools, including the addition of portable structures, where such additions do not increase the school campus by more than 10 classrooms or 25% of the population, whichever is less. (Guidelines, § 15314; the "Minor Additions Exemption".) Without such an exemption, school districts will face situations where enrollment spikes, yet there is no opportunity to provide additional classroom space for new students in a timely fashion.

School districts are constantly faced with the necessity of accommodating increases and decreases in enrollment in short timeframes, and on ever tighter budgets. According to the State Superintendent, the ongoing financial emergency facing California's schools represents a significant roadblock, and "year after year of diminished resources, difficult circumstances, and shifting policy choices have frayed the very fabric of our most treasured public institutions – our neighborhood schools." (Amicus Curiae California School Boards Association Education Legal Alliance Motion for Judicial Notice ("RJN"), Exh. A, *A Blueprint for Great Schools* (CA Dept. of Education, 2011), p. 3.) Notwithstanding these circumstances, school districts in California are required to continue providing a free public education to all students within the state. (Cal. Const., art. IX, § 5; *Hartzell v. Connell, supra,* 35 Cal.3d at 904-905; *Ward v. Flood, supra,* 48 Cal. at 51.) This includes promptly reacting to fluctuations in enrollment from year to year, regardless of whether or not space or funding is readily available.

The way in which school districts are confronted with these fluctuations is illustrated by districts in Alameda County, the location of the project at issue in this case. Between the 2010-2011 and the 2011-2012 school years, school districts in Alameda County experienced population fluctuations in both directions. In Alameda City Unified School District, total school enrollment from Kindergarten through Grade 12 *increased* by 175 students, or 1.67%; Albany City Unified School District had an overall *decrease* of 76 students, or 1.96%; Newark Unified School District had an overall *decrease* of 94 students, or 1.41%; and San Lorenzo Unified School District had an *increase* of 244 students, or 2.05%. As an even more extreme example, Dublin Unified School District's overall student body increased by 491 students, or 7.85%. (RJN, Exhs. B, C, D, E, F, G, H, I, J, and K, District Enrollment by Grade (CA Dept. of Education).)

These population changes are not uniform across different grade levels of students within the schools. Students don't arrive in neat packages of 20 – 30 students in each grade each year. The addition of even five or 10 students at a single grade in a given year can contribute to the need to add one classroom if all other classrooms available *for that grade level* are full. This is further illustrated by Dublin Unified School District. In the one year time period noted above, class sizes increased by 67 kindergarteners, 41 first graders, 6 second graders, 94 third graders, 26 fourth graders, 66 fifth graders, 56 sixth graders, 7 seventh graders, 21 eighth graders, 40 ninth graders, 27 tenth graders, 18 eleventh graders, and 21 twelfth graders. (RJN, Exhs. F and G, District Enrollment by Grade (CA Dept. of Education).) The 2010-11 ninth grade class for Dublin Unified was 416 students, but that same class increased to 435 for the 2011-2012 school year's tenth grade class. On the other hand, the eleventh grade class for 2010-2011 consisted of 414 students, which decreased to 410 for the following year's twelfth graders. Not only do the overall enrollment numbers change from year to year, class sizes change as well, making it difficult to estimate and anticipate the number of students in a given grade for a given school year. (*See, e.g., San Lorenzo Valley CARE, supra,* 139 Cal.App.4th at 1388-1389 [describing increases in student populations at two elementary schools]; *City of South Gate v. Los Angeles Unified School District* (1986) 184 Cal.App.3d 1416, 1420 ["Factually, the District has over 560,000 students and 600 schools… [and] a severe overcrowding problem, particularly in schools with large Hispanic enrollments. Boundary adjustments are frequently necessary to distribute student population over the District so as to relieve school overcrowding."]; *East Peninsula Education Council, Inc. v. Palos Verdes Peninsula Unified School District* (1989) 210 Cal.App.3d 155, 160 ["From a peak enrollment

of 17,836 students in the 1973 to 1974 school year, enrollment declined steadily and, as of September 21, 1987, enrollment had fallen to 9,826."].)

Because enrollment is in constant flux, the need for minor additions to schools, including portable classrooms, is often experienced on very short notice, requiring school districts to act quickly to accommodate the changes. Portable classrooms allow schools affordably to accommodate rapidly changing enrollment needs due to student population fluctuations, and are commonly used for this purpose. (*See*, RJN, Exh. L, California Air Resources Board and California Department of Health Services, *Report to the California Legislature, Environmental Health Conditions in California's Portable Classrooms* (2004), p. 24 ["[p]ortable classrooms are more quickly constructed and deployed to school sites" and "can be obtained in a period of months rather than years, allowing schools to accommodate rapidly changing enrollment needs due to student population fluctuations"]; Exh. M, California Air Resources Board and California Department of Health Services, *California Portable Classrooms Study Project Executive Summary* (2003), p. 1 ["the demand for classrooms [has] resulted in increased reliance on portable classrooms. Population growth, class-size reduction programs, and fiscal limitations have driven this increase. Schools have primarily met the increased demand for classrooms by using portable classrooms because, relative to traditional classrooms, they are more economical and can be obtained more quickly."]; Exh. N, California Department of Education, *Report on Complete Schools* (2007), p. 10 ["Another common response to budget constraints is using portable classrooms instead of permanent construction"].) Declining enrollment can also lead to a need for portable classrooms. (*See, San Lorenzo Valley CARE, supra*, 139 Cal.App.4th 1356 [declining enrollment and fiscal difficulties resulted in closing of two schools and relocation of students

attending those schools to others within the district, requiring the addition of portables and other modifications at the receptor schools].)

ii. Categorical Exemptions Enable School Districts to Address Population Changes in a Timely Manner

School districts that are annually forced to juggle the obligation to provide free schools to fluctuating numbers of students while complying with all applicable laws, including CEQA, frequently rely on categorical exemptions. The balance between the educational requirements and the obligations of CEQA is upset by the loss of categorical exemptions as a way of accommodating the minor school facility projects necessary to address rapidly occurring population changes.

The proper application of categorical exemptions to projects intended to address school population issues is well illustrated by *San Lorenzo Valley CARE, supra,* 139 Cal.App.4th 1356. There, a school district elected to close two elementary schools as a result of declining enrollment and fiscal difficulties, an unfortunate but common theme among the state's school districts in recent years. (*Ibid.*) A report by the Superintendent's School Closure Committee found that closing the schools and transferring students to other schools within the district would result in an increase in original student capacity of only 2.4% at one school and 5% at another. (*Id.* at 1388-1389.) These increases resulted in the district needing an additional portable classroom plus replacements for two others at the first school, and three additional portables plus three replacements at the second. (*Ibid.*)

The district determined its school closures to be exempt from CEQA under Public Resources Code section 21080.18 (regarding school closure). Because the increases in population at the receiving schools were well under the exemption threshold of 25% or fewer than 10 classrooms at each

site, the district also relied on the Minor Additions Exemption. (Guidelines section 15314.)[3]

School closure can be a highly emotional issue for a community. In *San Lorenzo Valley CARE*, the school closure decision was challenged under CEQA by a group alleging that multiple grounds supported application of the unusual circumstances exception. One of these grounds was the contention that there would be resulting traffic and parking hazards at both receptor schools. (*San Lorenzo Valley CARE, supra,* 139 Cal.App.4th at 1391, 1393-1394.) Evidence of these hazards was in the form of written public comments by parents of students in the schools, as well as information from the Superintendent's School Closure Committee's transportation subcommittee and the fire department. (*Id.* at 1393-1394.) The Court of Appeal found that this data did not support the claimed significant effects exception to the categorical exemption for school consolidation. (*Id.* at 1394.) The court emphasized that the exception only applies "where there is a reasonable possibility that the activity will have a significant effect on the environment *due to unusual circumstances*." (*Ibid.* (emphasis in original).) To sustain the exception, the evidence must show some feature of the project that distinguishes it from others in the exempt class. (*Ibid.*, citing *Fairbank, supra,* 75 Cal.App.4th at 1260; *Santa Monica Chamber of Commerce, supra,* 101 Cal.App.4th at 801.) The project opponents offered no evidence that the traffic, parking, or access problems were unusual circumstances in the context of school consolidations. (*Ibid.*) Thus, the exception to the categorical exemption did not apply. *San Lorenzo Valley CARE* found that even if there was a potential for significant effects relating to traffic, the exemption would still apply since

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[3] The school district in *San Lorenzo Valley CARE* did conduct some limited environmental review in spite of the exemption, however, the holding of the case did not depend on that fact.

those effects would not be caused by unusual circumstances. (*Id.* at 1394-1395.)

Because the school district in *San Lorenzo Valley CARE* was able to rely on the categorical exemption – as intended by the Legislature and the Resources Agency – it was able to move forward with school closure and adding portables to the receiving school sites in a timely fashion, meeting the school district's financial needs, and the educational needs of its students. This case well illustrates the public benefit to avoiding prolonged CEQA review for these types of necessary public actions, when no unusual circumstances are involved.

iii. Students Are Negatively Affected When School Districts Are Unable to Utilize Categorical Exemptions to Address Population Changes

Under the precedent set by the Court of Appeal, a school district like the one in *San Lorenzo Valley CARE*, facing financial crisis and declining enrollment, might be forced to delay its school consolidation while conducting extensive environmental analysis relating to traffic or other impacts, particularly since the project opponents need only present a "fair argument" that such impacts are potentially significant. (*See,* Appellants' Brief, p. 94, citing *Oro Fino Gold Mining Corporation v. County of El Dorado, supra,* 225 Cal.App.3d at 882 ["[a]rea residents may present evidence of current and likely traffic problems based on their personal knowledge."].) This would be true even if the schools at issue presented no unusual circumstances setting them apart from other school projects covered by the exemption. Virtually all school closures are likely to result in some impacts on traffic, since they necessarily involve changed transportation patterns. The condition is thus a typical one. (*See, San Lorenzo Valley CARE, supra,* 139 Cal.App.4th at 1394.) Similarly,

virtually all additions to schools and school buildings will have the potential to be viewed by at least some neighbor or member of the public and can have minor impacts on traffic or parking.

While *San Lorenzo Valley CARE* addressed a situation that resulted from *declining* enrollment, the situation may be even more dire in the case of *increasing* enrollment. Consider a school district having one elementary school with an original student capacity of 600. Between school years, the district experiences a sharp and unexpected increase in enrollment of new students. The district is constitutionally required to accommodate all new enrollees in time for the start of the new school year. The district determines that it must install two portable classrooms, increasing total school capacity by 10% and fewer than 10 classrooms, thereby meeting the requirements of the Minor Additions Exemption. The only place to add these portables is behind the school. Several neighbors of the school currently have a view of the back of the school, but it is partially screened by some minor landscaping which will have to be removed to accommodate the portables. As a result, the neighbors will have a view of the new portable classrooms from their second story rear windows, over a fence.

Continuing with this hypothetical, a handful of neighbors are displeased that they will be able to see the new portable classrooms. These neighbors consider this to be a visual impact, and bring a CEQA challenge. Appellants cite similar factors as are cited by Appellants in the present case as evidence of potential impacts, such as the testimony of various residents that the proposed classrooms are too large, too dissimilar in style from the existing school or surrounding area, or are simply not in the "spirit of the neighborhood." (*See,* Appellants' Brief, pp. 89-90.) Under *Berkeley Hillside*, the neighbors need only make a fair argument, based on their own experience, of a potential significant visual impact and the school district

may be precluded from using an exemption which is designed for precisely this situation.

There are no unusual circumstances present in the hypothetical noted above, but that is irrelevant under the Court of Appeal's decision: the neighbors' "fair argument" of significant impacts is sufficient to overcome a categorical exemption. Similarly, a neighbor's complaint about a school's construction of a fence, restriping of a parking lot, or minor alteration of a playing field, all common occurrences, could force CEQA compliance and delay the projects, inhibiting the ability of the school districts to fulfill their important public mission.

Under *Berkeley Hillside*, public agencies increasingly will have to undertake CEQA analysis of these otherwise exempt projects. In the foregoing hypothetical, the school district may be forced to conduct a complete CEQA analysis (and, as discussed below, according to Appellants and the Court of Appeal, prepare a full EIR) before installing its two portable classrooms. However, the timeline for an initial study and negative declaration or EIR would not be sufficient to allow the work to be completed over a summer, prior to the start of the school year. For example, Public Resources Code section 21091, subdivision (a), requires a public review period of up to 45 days for an EIR, which does not include the time required to prepare an initial study, prepare the EIR, approve the project, and complete the work.

By contrast, consider the circumstances in which the portable classroom would be added to an unpopulated portion of the school grounds immediately adjacent to a creek that is known to be habitat for the California red-legged frog, a species listed as threatened by the United States Fish and Wildlife Service. (61 Fed.Reg. 25813 (May 23, 1996).) Because the presence of this special-status species differs from the typical school project covered by the Minor Additions Exemption, it would likely

constitute an unusual circumstance. If the potential for a significant impact on the species was then found, both prongs of the two-part test would be met, the unusual circumstance exception would be triggered, and some degree of CEQA review would be required. This is the type of atypical scenario that the usual circumstances exemption is intended to address, and will continue to address if *Berkeley Hillside* is overturned.

In cases where there are no unusual circumstances, delaying the addition of classrooms leaves school districts with no choice but to house students in classrooms that are already at or over capacity, or jammed into spaces never intended as classrooms, such as libraries, gymnasiums, laboratories, lunchrooms, and even closets. (RJN, Exh. O, United States Department of Education, *Impact of Inadequate School Facilities on Student Learning* (April 3, 2000), p. 3.)

Similarly, without the benefit of categorical exemptions to address increases in enrollment expeditiously, the likely outcome is increased school overcrowding. According to the California Department of Education, the effects of school facilities on student achievement are well documented in research, which shows that adequate facilities can increase student achievement from 5-17 percentile points. (RJN, Exh. N, *Report on Complete Schools, supra,* p. 5.) According to the U.S. Department of Education, there is evidence, particularly in high-poverty schools, that overcrowding can have an adverse impact on learning. (RJN, Exh. O, *Impact of Inadequate School Facilities on Student Learning, supra,* p. 3.) One study that investigated the effects of school overcrowding on student achievement among New York City public schools reported that students in such schools scored significantly lower on both mathematics and reading exams than did similar students in underutilized schools. (*Ibid.*) The U.S. Department of Education opines that "crowded classroom conditions not only make it difficult for students to concentrate on their lessons, but

inevitably limit the amount of time teachers can spend on innovative teaching methods" including "cooperative learning and group work, or, indeed, on teaching anything beyond the barest minimum of required material." (*Ibid.*) "[B]ecause teachers must constantly struggle to maintain order in an overcrowded classroom, the likelihood increases that they will suffer from burnout earlier than might otherwise be the case." (*Ibid.*) The effects of overcrowding can be severe, and will be exacerbated without the ability to rely on categorical exemptions for minor school projects in typical situations.

A further impact from overcrowding is the disparate effect it has on underprivileged students and protected classes. One review of data from the California Department of Education found that students in overcrowded schools are more likely to be minorities and from low-income families. (RJN, Exh. P, PolicyLink and Mexican American Legal Defense Fund, *Ending School Overcrowding in California: Building Quality Schools for All Children* (2005), p. 11.) Since the inability to rely on categorical exemptions to address enrollment peaks contributes to overcrowded schools, the decision has the potential disproportionately to affect minorities and disadvantaged students.

C. The Loss of Categorical Exemptions Also Threatens Facilities Funding for School Districts

Because of the long-standing ability of school districts to rely on categorical exemptions, other laws and regulations have been developed that rely on the availability of those exemptions. For example, the Education Code, separate and in addition to any CEQA review, requires extensive analysis relating to hazardous substances prior to a school district's acquisition of property for a future school site or expansion of an existing site. (Ed. Code §§ 17213.1 and 17213.2.) Failure to conduct the

requisite analysis jeopardizes a school district's ability to receive State facilities funds. (*Ibid.*) However, such analysis is excused for additions to schools if they are eligible for a categorical or statutory exemption to CEQA. (Educ. Code § 17268, subds. (b), (c).)

The *Berkeley Hillside* decision undermines the ability of school districts to rely on categorical exemptions. If the school districts lose the categorical exemption, they will likewise lose the exemption from school site analysis under Education Code sections 17213.1 and 17213.2. These districts will then have to undertake substantial review regarding hazardous substances, creating a compounded impact of time and expense. This in turn puts the school districts' State facilities funding at risk, and at a minimum delays the time when school districts can access such necessary funds to undertake construction projects.

D. In the Case of School Districts, the Appellate Court Decision also Results in the Loss of A Statutory Exemption

Although the briefing submitted in this case has focused on categorical exemptions, in the case of school districts, a statutory exemption is also affected by the Court of Appeal's decision. Application of the statutory exemption set forth in Public Resources Code section 21080.18 expressly depends on whether or not a categorical exemption applies. Section 21080.18 provides a statutory exemption for closing of any public school in which kindergarten or any of grades 1 through 12 is maintained or the transfer of students from that public school to another school if the only physical changes involved are categorically exempt under the Guidelines. If the categorical exemption is lost, then so is this statutory exemption.

This aspect of the *Berkeley Hillside* decision is important because the statutory exemptions are promulgated by the Legislature, and reflect legislative policy decisions which are not necessarily the same as CEQA's general purposes. (*Sunset Sky Ranch Pilots Association v. County of Sacramento* (2009) 47 Cal.4th 902, 907 ("*Sunset Sky Ranch*"), citing *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 376 ("*Napa Valley Wine Train*").) As this Court recently held, "the very purpose of the statutory CEQA exemptions is to avoid the burden of the environmental review process for an entire class of projects, ***even if there might be significant environmental effects***." (*Sunset Sky Ranch, supra,* 47 Cal.4th at 909, citing *Napa Valley Wine Train, supra,* 50 Cal.3d at 381 (emphasis added).) "The statutory exemptions have in common only this: the *Legislature* determined that each promoted an interest important enough to justify forgoing the benefits of environmental review." (*Napa Valley Wine Train, supra,* 50 Cal.3d at 382 (emphasis in original).) Promoting the ability of school districts to undertake those activities necessary for providing education to children is just such an interest.

The Court of Appeal's decision is inconsistent with this Legislative intent because it creates a situation in which a statutory exemption for a school closure could be overcome simply by a fair argument of a potential significant effect on the environment. By creating a statutory exemption for this type of project, the Legislature intended to eliminate the time and expense of CEQA review, finding that the importance of facilitating school closures outweighs the importance of environmental review as long as the physical changes involved are categorically exempt. Unless the Court of Appeal's decision is overturned, school districts may be forced to conduct CEQA review not only for projects intended to be categorically exempt, but also certain projects which have otherwise been deemed to be *statutorily* exempt by the California Legislature.

V. LIMITATION OF CATEGORICAL EXEMPTIONS SIMILARLY INTERFERES WITH THE ABILITY OF PUBLIC UNIVERSITIES TO MEET THE NEEDS OF THEIR STUDENTS

The governing bodies of California's university systems must also juggle their constitutional and legislative mandates with CEQA. In order to serve its more than 220,000 students and 180,000 faculty and staff in academic year 2011-2012, the University made over one hundred CEQA determinations, including the filing of 42 Notices of Exemption with the Office of Planning and Research in 2012, often relying on categorical exemptions for projects to renovate the interior of existing facilities to upgrade utility and telecommunication systems in aging structures and to meet the changing needs of students and faculty. Other proposals by the University for which a categorical exemption is often invoked include life safety and seismic improvements, leases of privately owned facilities and additions to existing structures.

Similarly, in 2012, the Trustees filed 88 Notices of Exemption with the Office of Planning and Research, enabling them to complete necessary and essential improvements to address safety, maintenance, and accessibility needs in a timely manner. Specific examples include roof repair, road maintenance, interior alterations, fire alarm and smoke detector installation or upgrading, rehabilitation of mechanical equipment, and accessibility improvements under the Americans with Disabilities Act. (42 U.S.C. §§ 12101 *et seq.*)

Like K-12 school districts, The Regents and Trustees are negatively impacted by the *Berkeley Hillside* decision as they too will be limited in their ability to rely on exemptions for the types of projects noted above. Also like school districts, they will be subject to the whim of complaining

neighbors in the vicinity of university campuses and others pursuing personal agendas.

VI. THE COURT OF APPEAL'S DECISION IS CONTRARY TO LEGISLATIVE INTENT

The Court of Appeal's approach is inconsistent with the intent of the Legislature, as evidenced by comparing the statutory process for a negative declaration or EIR with that for a categorical exemption. In connection with a negative declaration or EIR, the Legislature has established specific requirements for review and comment. (*See, e.g.*, Pub. Resources Code §§ 21082.1, 21083, 21091, 21092, 21104, 21153 and 21161.) A lead agency is required to request comments on a draft EIR from specified public agencies (Pub. Resources Code §§ 21004, 21153; Guidelines, § 15086, subd. (a)), and to provide public notice once the draft EIR is available for comment and review. (Pub. Resources Code § 21092; Guidelines, § 15087, subd. (a).) The purpose of these requirements is to provide for public involvement and to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392; *No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at 86; *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344; *Rural Landowners Assn v. City Council* (1983) 143 Cal.App.3d 1013; *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813; *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348; *Residents Ad Hoc Stadium Com. v. Board of Trustees* (1979) 89 Cal.App.3d 274, 286; *People ex rel. Dept. Pub. Wks. v. Bosio* (1975) 47 Cal.App.3d 495, 528; *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842.)

By contrast, the Legislature did not impose any requirements for review or comment by public agencies or the public prior to finding an exemption from CEQA. (*See, Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 289-290; *San Lorenzo Valley CARE, supra,* 139 Cal.App.4th at 1385; *Azusa Land Reclamation, supra,* 52 Cal.App.4th at 1210 ["CEQA provides for public comment on a negative declaration and an EIR. . . . By contrast, CEQA does not provide for a public comment period before an agency decides a project is exempt."].) Whereas project approvals must come after consideration of a negative declaration or certification of an EIR (Guidelines, §§ 15074, 15090(a)), project approval in the context of an exemption determination must come before a Notice of Exemption. (Guidelines, § 15062; *Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408, 423; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931.) This is consistent with the concept that public agencies are not required to consider evidence of potential environmental effects before making an exemption determination, unless unusual circumstances are present. (*See, e.g.,* Guidelines § 15060, subd. (b) ["[T]he lead agency shall begin the formal environmental evaluation of the project after accepting an application as complete and determining that the project is subject to CEQA."].) The Legislature also provided for no public review and/or comment period prior to the exemption determination, and no formal advance notice of the exemption determination prior to project approval.[4] The legislative scheme is inconsistent with the idea of receiving and considering evidence of environmental impacts prior to finding that a project is exempt from CEQA. It is also therefore inconsistent with Appellants' assertion that "[e]xemptions dissolve upon evidence of a

[4] Appellants' brief concedes this point, stating that "no public comment period or public hearing is required before adopting a categorical exemption." (Appellants' Brief, pg. 35.)

specific project's potentially significant environmental impacts." (Appellants' Brief, at p. 7.)[5]

CEQA is also meant to be sensitive to the need for finality and certainty in land use planning decisions. (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 488.) The Guidelines demand that CEQA "must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development or advancement." (Guidelines, § 15003, subd. (j); *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1132 ("*Laurel Heights Improvement Assn.*"); *Citizens of Goleta Valley v. Board of Supervisors, supra,* 52 Cal.3d at 576; *see also, Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, 1037 ["CEQA is not meant to impede development"].) The legislative intent is to avoid a process so complex and prolonged "that the process deters development and advancement." (*Laurel Heights Improvement Assn., supra,* 6 Cal.4th at 1132.) With the objective of ensuring finality and predictability, statutes of limitations governing challenges to such decisions are very short. (*Stockton Citizens for Sensible Planning v. City of Stockton, supra,* 48 Cal.4th at 499, citing *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 27; *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 774-775; *see also,* Pub. Resources Code §21167; Guidelines, § 15112, subd. (a).) For this same reason,

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[5] It is telling that Appellants rely on legislative history of language that was never included as part of the categorical exemption requirement. (See, e.g., Appellants' Brief, at p. 54 (quoting the Attorney General as contemplating "some sort of appellate procedure (with adequate public notice)... so that an individual project... can be taken out of the category on either the initiative of the government agency or on that of members of the public if it has a significant effect on the environment," a concept that was never incorporated into Guidelines section 15300.2, subdivision (c), or anywhere else.)

CEQA cases are to be given priority over all other civil cases. (Pub. Resources Code §21167.1.)

The Court of Appeal's decision lays waste to these precepts, leaving uncertainty in the application of categorical exemptions and prolonging the CEQA process for even minor projects. Although Appellants' Brief goes to great lengths to stress the unique facts of the case at issue (*see,* Appellants' Brief, pp. 8-25, 64-104), the Court of Appeal's holding is not limited to its facts, but would instead be applicable to projects exempt under any categorical exemption. The holding would thus extend far beyond the context of a single-family residence, and would apply to such circumstances as minor alterations in land use limitations (Guidelines, § 15305), actions by regulatory agencies for protection of natural resources (*id.*, §§ 15307, 15308), loans (*id.*, § 15310), acquisition of land for wildlife conservation (*id.*, § 15313), minor additions to schools (*id.*, § 15314), minor land divisions (*id.*, § 15315), changes in organization of local agencies (*id.*, § 15320), acquisition of housing for housing assistance programs (*id.*, § 15326), historical resource restoration/rehabilitation (*id.*, § 15331), and small habitat restoration projects (*id.*, § 15333), to name just some. The holding threatens to impede use of these exemptions for necessary and potentially time-sensitive public projects relating to education as well as fire protection, public safety, public utilities and energy, infrastructure, parks and recreation, and public health.

The loss of certainty is particularly felt by school districts, which must commonly deal with neighbors in the residential neighborhoods where public schools are located. For those school districts, the Court of Appeal's holding will have disparate impacts and lead to different results based on the same or similar facts, depending entirely on the mood of one or more neighbor of a particular school. In one case, the school district may be aware that its project will result in visual changes, but will not consider the

changes to be significant impacts and will move forward, without objection, with a notice of exemption. In the exact same scenario at another school, or even at the same school at another time, a neighbor will complain about the visual changes, and the exemption will be lost because of a "fair argument" of significant impact. The uncertainty is all the greater because the school district is not required to notify neighbors or invite public comment before relying on a categorical exemption and approving a project. As a result, the district may be entirely unaware that anyone believed there to be an impact before it issues construction contracts, removes minor landscaping, or takes other reasonable actions. These examples demonstrate how school districts and all public agencies will be susceptible to uncertainty under the Court of Appeal's new rules.

The same is true for The Regents and Trustees, as they too are susceptible to the whim of unhappy residents. Also, with campuses spanning the State, they may be forced to apply different rules and standards of review when evaluating the applicability of a categorical exemption from CEQA depending on the location of the proposed activity.

VII. THE COURT OF APPEAL IMPROPERLY REQUIRES PREPARATION OF AN EIR, REMOVING NEGATIVE DECLARATIONS FROM THE SCOPE OF CEQA

The confusion created by this case is exacerbated by the Court of Appeal's directive that, where a categorical exemption does not apply, Respondents must prepare an EIR. (*See*, Opinion, pg. 20.) Assuming an exemption does not apply to a public agency's project – as it now rarely, if ever, may – a public agency should still be able to determine that the project will have no significant environmental effect. The agency may then file a negative declaration reciting that determination, excusing further CEQA compliance. (*Stockton Citizens for Sensible Planning v. City of*

Stockton, supra, 48 Cal.4th at 498, citing Pub. Resources Code §§ 21064, 21080, subd. (c); Guidelines, §§ 15063, 15070 *et seq.*; *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 270.) The agency may also file a mitigated negative declaration where the potential effect can be reduced to a level of less-than-significant through project revisions. (Pub. Resources Code, §21080, subd. (f).) Only if the possibility of an unmitigated impact remains must the agency prepare an EIR. (*Stockton Citizens for Sensible Planning v. City of Stockton, supra,* 48 Cal.4th at 498, citing Pub. Resources Code §§ 21000, *et seq.*, and §§ 21151, *et seq.*)

Appellants appear to disregard completely the possibility of a negative declaration, contending that a full EIR must be prepared every time that an exemption does not apply. There is no intermediate step allowing for preparation of a negative declaration where the project is not exempt, but the agency determines after further analysis that the project will have no significant environmental effect, or that the effect can be mitigated. Appellants' all-or-nothing approach is typical of the type of tactical challenges made for purposes of delaying and preventing important public projects, rather than promoting the intent of CEQA.

The Court of Appeal requires the preparation of an EIR after setting aside the categorical exemption determination, rather than allowing for the possibility that if the City were to conduct environmental review, it may determine in its discretion that a negative declaration is proper. (*See,* Resp. Opening Brief, pp. 77-79.) As noted by Respondents, cases such as *Voices for Rural Living, supra,* 209 Cal.App.4th at 1113, have clearly concluded that "how an agency complies with CEQA is a matter first left to the agency's discretion," and that ordering that a lead agency specifically prepare either an EIR or a mitigated negative declaration is not the province of the courts. (*See also* Pub. Resources Code § 21168.9 (c).)

The Court of Appeal erroneously mandated that an EIR be prepared. If for no other reason, the Appellate Court decision should not be allowed to stand, as it will become precedent for an entirely incorrect application of basic CEQA requirements.

CONCLUSION

The Court of Appeal decision threatens significant consequences for public educational facilities and public agencies. These consequences will confront school districts on a daily basis as they juggle the constitutional requirement of free public education with the complex, time-consuming, and costly requirements of CEQA. The same is true for The Regents and Trustees, who must balance their legal obligation to provide adequate facilities to accommodate their students with CEQA's mandates. Before this decision, education agencies achieved the requisite balance through the use of categorical and statutory exemptions for their minor projects, unless unusual circumstances existed which meant that their projects differed from those typical of the exempt class and a significant impact resulted. Through its decision, the Court of Appeal upset the longstanding balance between the need to achieve timely and important public projects, such as school repair, addition or closure, and the need to understand the effects on the environment. *Amici Curiae* urge this Court to restore the previously existing state of the law by requiring a separate finding of unusual circumstances in order for the exception to categorical exemptions to apply, thus simultaneously protecting the interests of both education and the environment. Further, this determination should be made based on the application of the substantial evidence standard, to avoid abuse of the CEQA process.

Based on the foregoing and those reasons set forth in Respondents' briefs, the decision of the Court of Appeal should be reversed.

Dates: January 15, 2013

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204, subdivision (c), of the California Rules of Court, counsel hereby certifies that the word count of the computer program used to prepare this brief (excluding the cover, tables and this certificate) is 13,654 words.

PROOF OF SERVICE

I, Dawn Flanery, am employed in the County of Contra Costa, State of California. I am over the age of eighteen years and not a party to the within entitled cause; my business address is 2001 North Main Street, Suite 650, Walnut Creek, CA, 94596.

On January 16, 2013, I served the attached:

BRIEF OF AMICI CURIAE CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, AND THE BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, IN SUPPORT OF RESPONDENTS AND REAL PARTIES IN INTEREST

on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope addressed as follows and I caused delivery to be made by the mode of service indicated below:

SEE ATTACHED SERVICE LIST

[X] (***Regular U.S. Mail***) on all parties in said action in accordance with Code of Civil Procedure Section 1013, by placing a true and correct copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth above, at Lozano Smith, which mail placed in that designated area is given the correct amount of postage and is deposited at the Post Office that same day, in the ordinary course of business, in a United States mailbox in the County of Contra Costa.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed January 16, 2013, at Walnut Creek, California.

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