Nos. 18-16105, 18-16141

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAKLAND BULK & OVERSIZED TERMINAL, LLC,
Plaintiff-Appellee,

v.

CITY OF OAKLAND,
Defendant-Appellant,

and

SIERRA CLUB; SAN FRANCISCO BAYKEEPER,
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court
For the Northern District of California

AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF REVERSAL

OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
JAMES R. WILLIAMS, County Counsel (271253)
GRETA S. HANSEN, Chief Assistant County Counsel (251471)
SUSAN P. GREENBERG, Deputy County Counsel (318055)
70 W. Hedding St., 9th Floor, East Wing
San José, CA 95110
Telephone: 408-299-5900

Attorneys for *Amicus Curiae*
California State Association of Counties

TABLE OF CONTENTS

Page

RULE 26.1 CORPORATE DISCLOSURE STATEMENT 1

I. INTERESTS OF AMICI AND INTRODUCTION 2

II. ARGUMENT 6

A. The District Court Erred in Displacing Public Safety Judgments Made by Oakland in the Exercise of Sovereign Police Power 6

B. The District Court Deepened its Error by Failing to Recognize that the "Substantial Evidence" Standard Allocated Fact-Finding and Policy-Making to a Different Branch of Government 10

C. The District Court's Lopsided Consideration of Extra-Record Evidence Further Skewed its Determination and, in the Process, Undermined the Conventions Underpinning Legislative and Administrative Proceedings 13

III. CONCLUSION 15

TABLE OF AUTHORITIES

Page

108 Holdings, Ltd. v. City of Rohnert Park
136 Cal. App. 4th 186 (2006).....7, 10

Am. Tower Corp. v. City of San Diego
763 F.3d 1035 (9th Cir. 2014).....11

City of Los Angeles v. Alameda Books, Inc.
535 U.S. 425 (2002).....12

Cotta v. City & Cty. of San Francisco
157 Cal. App. 4th 1550 (2007).....7

Davidson v. Cty. of San Diego
49 Cal. App. 4th 639 (1996).....9

Fourcade v. City & Cty. of San Francisco
196 Cal. 655, 662 (1925).....6, 7

Friends of Lagoon Valley v. City of Vacaville
154 Cal. App. 4th 807 (2007).....12

Harriman v. City of Beverly Hills
275 Cal. App. 2d 918 (1969).....6

Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.
471 U.S. 707 (1985).....6

Joint Council of Interns & Residents v. Bd. of Supervisors
210 Cal. App. 3d 1202 (1989).....12

Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes
191 Cal. App. 4th 435 (2010).....8

Medtronic, Inc. v. Lohr
518 U.S. 470 (1996).....6

Orange Citizens for Parks & Recreation v. Superior Court
2 Cal. 5th 141 (2016).....14

Prof'l Eng's v. Dep't of Transp.
13 Cal. App. 4th 585 (1993).....10

Ryan v. California Interscholastic Fed'n-San Diego Section
94 Cal. App. 4th 1048 (2001).....5, 11

San Francisco Tomorrow v. City & Cty. of San Francisco
229 Cal. App. 4th 498, 515-16 (2014).....7

Santa Margarita Area Residents Together v. San Luis Obispo Cty.
84 Cal. App. 4th 221 (2000) 8

Stewart Enterprises, Inc. v. City of Oakland
248 Cal. App. 4th 410, 422-23 (2016) 9

Turner Broad. Sys., Inc. v. F.C.C.
520 U.S. 180 (1997) 12, 13

United States v. Morrison
529 U.S. 598 (2000) 6

W. States Petroleum Assn. v. Superior Court
9 Cal. 4th 559 (1995) 11, 14

California Constitution
Cal. Const. Art. XI, § 7 6

California Government Code
Section 65865.2 8

Section 65866 9

Section 65867.5(a) 8

Oak. Municipal Code
Section 8.60.020 4

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the California State Association of Counties represents that it is a non-profit mutual benefit corporation, which does not offer stock and which is not a subsidiary or affiliate of any publicly owned corporation.

I. INTERESTS OF AMICI AND INTRODUCTION

The California State Association of Counties (CSAC) is a non-profit corporation whose membership is comprised of all 58 California counties. Together with local governments such as the City of Oakland, CSAC's member counties bear primary responsibility for responding to the immediate issues affecting communities' public health and safety, operating emergency and fire protection services, patrolling the streets and prosecuting crimes, and providing critical health services. CSAC submits this amicus brief in support of Oakland's appeal from the district court's judgment, which improperly blocked the City from applying a public safety ordinance to a planned development, based on the district court's erroneous conclusion that imposing the new local law on the project would breach a development agreement with the plaintiff developer.[1]

As Oakland explains in its brief, by independently reconsidering the merits of Oakland's actions, the district court misapplied the parties' contract, leading to a string of errors, each of which requires reversal. CSAC writes to highlight the

[1] Filing of this brief was authorized by CSAC's Litigation Overview Committee, which is comprised of County Counsels throughout the state. All parties have consented in writing to the filing of this amicus brief. No counsel for a party authorized the brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to this brief's preparation or submission.

related point that the court's contractual analysis also gave short shrift to a number of interconnected state law doctrines and constitutional provisions of particular import for all California local governments. These legal principles afford heightened deference to local governments' public safety judgments as a core exercise of California's sovereign police power.

California sweeps across territory of marked geographic and economic diversity—from rural and sparsely populated northern mountain ranges and eastern forests to densely populated coastal counties with urban centers—resulting in steep variation in the local conditions confronted by its local governments. The long-standing authority of cities and counties to regulate in the areas of public health and safety, and the attendant local variation contemplated by that allocation of the State's sovereign police power, are key planks in California's system for protecting public welfare.

California's system of delegated sovereignty also recognizes that smaller governments closest to those governed are often best positioned to take into account idiosyncrasy in the concentration or distribution of acute health or safety problems within a particular county or city. Oakland's ordinance and the accompanying resolution are a case study in these basic points: the Oakland City Council determined via ordinance that bulk storage and handling of coal within city confines would be "substantially dangerous" to the health and safety of

vulnerable constituents, taking into account the prevalence of acute health problems and respiratory ailments in communities hardest hit by a constellation of local circumstances, including soaring Bay Area housing prices, prolonged decline in manufacturing and transportation jobs, and disproportionate pollution exposure. Oak. Municipal Code §8.60.020.

Although framed as a breach of contract claim, the state law challenge to the prohibition by Oakland Bulk & Oversized Terminal, LLC (OBOT) is predicated on attacking that public safety judgment by Oakland's elected officials. Constituent concerns about OBOT's planned coal operations were, the administrative record showed, the starting point for what became a broader public examination of whether to prohibit any such bulk coal operations, with OBOT's concept-stage design serving a central data point in the wider discussion. ER0886. The council's resolution confirming the ordinance's application to OBOT was thus contingent on, and subordinate to, the ordinance. And the district court's bench trial in turn unfolded in large measure as a test of the ordinance's fundamental safety judgment, which should instead have been afforded particular deference because it had surmounted the gauntlet of the local legislative process.

Similar principles of deference should also have sharply circumscribed the district court's review of the Oakland's application of the ordinance to OBOT under the "substantial evidence" standard—an administrative law standard

regularly utilized under California law to review local determinations touching everything from zoning and rent regulation to regulation of local businesses. The California substantial evidence standard recognizes that "it is for the administrative agency to weigh the preponderance of conflicting evidence" so that the court's role is confined to determining whether "no reasonable person" could have reached the challenged finding. *Ryan v. California Interscholastic Fed'n-San Diego Section*, 94 Cal. App. 4th 1048, 1077 (2001). That review standard should also have foreclosed the court's substitution of a new, very different factual record for the administrative record before the city council. *See Id.*

California's diverse counties may hold a range of viewpoints on the wisdom of the particular ordinance challenged here, were it to be considered by their governing bodies. But of common concern to all counties is the district court's displacement of core state law doctrines affording localities necessary latitude in making the needed predictive and empirical judgments embodied in local legislation designed to safeguard the populace. The district court ignored these principles and instead conducted a deeply distorted proceeding, out of step with state law that, properly applied, should have made this case a straightforward one to be resolved as a matter of law. This Court should accordingly reverse and remand so that judgment is entered for Oakland on OBOT's contract claim.

II. ARGUMENT

A. The District Court Erred in Displacing Public Safety Judgments Made by Oakland in the Exercise of Sovereign Police Power

The district court's contractual analysis bypassed key guideposts that should have informed its approach and, in doing so, neglected to interpret the development agreement in accordance with provisions of state and federal law regarding local governments' responsibility for protecting public health and safety. Both the Federal and California Constitutions embody the principle of subsidiarity, aligning discretion over matters of health and safety in the layers of government bearing the corresponding burdens of meeting the public's most immediate needs. Recognizing that protecting health and safety is first and foremost a matter of state and local concern and an arena of historic state primacy, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) and *Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985), the Nation's founders reposed police power in states and their political subdivisions, *see United States v. Morrison*, 529 U.S. 598, 617–19 (2000). California's constitution in turn allocates its sovereign police power to counties and charter cities, *see* Cal. Const. Art. XI, § 7 and *Harriman v. City of Beverly Hills*, 275 Cal. App. 2d 918, 926 (1969), anticipating the need for local variation across the state's vast and markedly diverse territory.

Oakland's resulting plenary authority to regulate health and safety risks is one of the most "necessary" and "elastic" powers of government, *Fourcade v. City*

& Cty. of San Francisco, 196 Cal. 655, 662 (1925) and *Miller v. Bd. of Pub. Works of City of Los Angeles*, 195 Cal. 477, 485 (1925), affording latitude to make the needed empirical and predictive policy judgments about how to best protect health and safety to the government closest and most directly accountable to the people, *San Francisco Tomorrow v. City & Cty. of San Francisco*, 229 Cal. App. 4th 498, 515-16 (2014). California law, too, grants particular deference to a local legislative body in applying its own ordinance, *see Id.*, as Oakland did when it determined that OBOT's planned project fell squarely within the dangers targeted by the ordinance.

The district court's singular focus on the contract ultimately led it to overlook these points, revisiting and second-guessing public safety judgments vested in the City and wrongly finding that the development agreement gave OBOT contractual immunity from local health and safety laws. But California's local governments lack capacity to surrender their constitutional authority to protect public health and safety by contract, so that parties to a public contract take their rights subject to a presumption that the sovereign reserved to itself the ability to exercise police power. *See Cotta v. City & Cty. of San Francisco*, 157 Cal. App. 4th 1550, 1559 (2007); *108 Holdings, Ltd. v. City of Rohnert Park*, 136 Cal. App. 4th 186, 196-97 (2006). The court should therefore have presumed, as Oakland and the intervening parties urged, that the City reserved to itself the prerogative to

legislate in the future regarding matters of health or safety, and then deferred to the judgments of Oakland's council about whether bulk storage and handling of one commodity subcategory within city limits posed such a danger or nuisance, upholding the ordinance and resolution as a matter of law.

The district court's reliance on the development agreement to override Oakland's safety judgments was also particularly misplaced because that agreement did not address coal operations. Development agreements are a special form of exercise of the police power, in which a locality stipulates to the *zoning* and *land-use* requirements that will apply to specified projects for a limited duration, subject to several important substantive and procedural limitations. *See Santa Margarita Area Residents Together v. San Luis Obispo Cty.*, 84 Cal. App. 4th 221, 227-33 (2000). Adopted via ordinance, development agreements are legislative acts. Cal. Gov't Code § 65867.5(a). The agreements must specify the permitted land uses authorized by the agreement, alerting the public to the scope of the commitment to hold in place existing rules. *See* Cal. Gov't Code § 65865.2. While development agreements can include a range of contractual promises by the parties, *see Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435, 444 (2010), they may not violate the baseline prohibition against surrendering the locality's authority to exercise police power in the future, *see Santa Margarita Area Residents Together*, 84 Cal. App. 4th at 227. Such

agreements do not, therefore, operate to preclude a municipality from enacting new requirements, applicable during the agreement's term, which do not conflict with the zoning rules and permitted uses specified in the contract. *See* Cal. Gov't Code § 65866.

Here, an addendum to the agreement specified that the relevant permitted use was a "ship-to-rail terminal designed for the export of non-containerized bulk goods and the import of oversized or overweight cargo"—*i.e.*, a bulk commodities terminal. ER2054. There are over 10,000 such bulk commodities and OBOT has explained that the facility is designed and intended to be used as a multi-commodity facility. Dist. Ct. Dkt. 228 at 41, 51, 68. The challenged ordinance and resolution leave that permitted use in place: OBOT may still develop a multi-commodity bulk goods terminal and does not contend that it has been blocked from developing or making profitable use of the parcel.[2]

The district court agreed that the agreement did not cover coal. Dist. Ct. Dkt. 221 at 28-29. But it interpreted the agreement as a blanket promise to freeze

[2] Even where a new local law operates to block development approval—circumstances not presented here—a development agreement affords no immunity from the new law so long as there is a reasonable basis for the local legislative body's determination that the change was needed to prevent a nuisance or danger to the populace. *See Stewart Enterprises, Inc. v. City of Oakland*, 248 Cal. App. 4th 410, 422-23 (2016); *Davidson v. Cty. of San Diego*, 49 Cal. App. 4th 639, 649 (1996).

any and all regulation for a 66-year term, granting OBOT rights to keep the entirety of the unaltered local legal regime in place—a "blank check" theory of the contract that, the court itself repeatedly acknowledged, would raise serious questions about the agreement's validity under state law. *See, e.g.*, ER0320-23, ER0586. As Oakland and the intervenors urged, the court should instead have avoided these constitutional and statutory concerns and construed the contract consistent with the presumption that Oakland appropriately preserved the "crucial control element" of the police power on behalf of its residents and, accordingly, determined that in enacting the challenged prohibition Oakland did not breach a recognized contractual right. *108 Holdings, Ltd.*, 136 Cal. App. 4th at 196-97 (citations omitted); *see also Prof'l Eng's v. Dep't of Transp.*, 13 Cal. App. 4th 585, 591 (1993).

B. The District Court Deepened its Error by Failing to Recognize that the "Substantial Evidence" Standard Allocated Fact-Finding and Policy-Making to a Different Branch of Government

After mistakenly concluding that OBOT held a broad contractual right to be weighed against the merits of Oakland's exercise of police power, the district court magnified its error by applying the "substantial evidence" standard in name only, without confining its review of Oakland's determinations to that standard's hallmark limitations. One of the most well-worn tools of California administrative law, the substantial evidence standard is used to demarcate boundaries between

coordinate branches of government. *See generally W. States Petroleum Assn. v. Superior Court*, 9 Cal. 4th 559, 570-78 (1995). Across its various iterations, a defining feature is that it carefully allocates fact-finding and policy-making responsibility, foreclosing a reviewing court from fragmenting functions that are, by design, vested in a particular governmental body. *See Id*.

In reviewing factual determinations under the substantial evidence standard, a court does not reweigh the evidence or substitute its own judgment for that of the legislative body, but instead acts only as a check on the arbitrary exercise of power by confirming that the record evidence supporting the determination meets a minimal threshold of reasonableness, drawing all inferences in the legislative body's favor. *See* Oakland Br. at 39-42; *Ryan*, 94 Cal. App. 4th at 1077-87; *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1053 (9th Cir. 2014). Like appellate review of trial-court fact-finding, the court's task does not include entertaining new evidence or resolving conflicting evidence. *See W. States Petroleum Assn.*, 9 Cal. 4th at 570-71. The district court misapplied these bounds from the get-go, when it allowed the case to proceed to a bench trial with new evidence.

The trial so conducted became the forum for the court's own misplaced, searching factual inquiry into just "how big a deal" the anticipated health hazards from the facility would be, Dist. Ct. Dkt. 221 at 77, with OBOT's trial presentation

focused on whether Oakland's council should have undertaken other, additional study aimed at measuring whether OBOT's reliance on previously unused technology would result in pollution exceeding federal and state thresholds of significance. The inquiry was thus predicated on a structural error: it is a legislative, rather than a judicial, function to consider data, opinion, and arguments and then to exercise discretion in enacting rules of general application guided by considerations of public welfare and value judgments. *See Joint Council of Interns & Residents v. Bd. of Supervisors*, 210 Cal. App. 3d 1202, 1210 (1989). Review of Oakland's application of its own ordinance is similarly intended to be "highly deferential" to the City, precluding the court from reweighing policy choices and instead confining judicial analysis to determining whether the statutory policy choices were rationally applied. *See Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 816 (2007). Even in applying far less deferential legal frameworks applicable to constitutional claims, courts have emphasized the need to afford localities discretion in sifting through anecdotal and empirical data about local problems, particularly when confronting scientific evidence that is inconclusive or regulating an industry undergoing rapid change. *See, e.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (deferring to a locality's choice of study under intermediate scrutiny analysis); *Turner Broad.*

Sys., Inc. v. F.C.C., 520 U.S. 180, 196 (1997) (deferring to a federal agency's predictive judgments under intermediate scrutiny).

But, in ruling on OBOT's claim, the court disregarded those strictures in favor of resolving credibility questions after concluding that it "was not obvious" which side was correct, ER0024, making offhand remarks about the City's policy preferences, ER0033, and speculating about the motives of the local city council, Op. at 33. It also faulted Oakland for taking action rather than waiting to see whether other local regulators would step in to protect its constituents, even though the State confirmed in a submission to the court that the challenged ordinance was a valid exercise of local authority. Brief for the state of California as Amicus Curiae, Dkt. 170-1 at 1, 11. Had the court appropriately deferred to Oakland's judgment that bulk storage and handling of coal in a key urban transportation corridor with concentrated health issues posed unacceptably high risks, the court's analysis of the accompanying resolution would have been correctly confined to concluding that it was self-evidently a rational application of the ordinance.

C. The District Court's Lopsided Consideration of Extra-Record Evidence Further Skewed its Determination and, in the Process, Undermined the Conventions Underpinning Legislative and Administrative Proceedings

The district court further usurped functions vested in a different branch of government when it allowed OBOT to present trial witnesses and evidence that were not part of the administrative record. *See* Oakland Br. at 34-36. The public

hearing process, used by local governments across a range of proceedings affecting residents, is "structured to transcend the provincial" by amassing an array of viewpoints and facilitating public involvement and transparency. *Orange Citizens for Parks & Recreation v. Superior Court*, 2 Cal. 5th 141, 154 (2016) (citations omitted). Requiring a party seeking review under the substantial evidence standard to first present its best case as part of the administrative proceedings ensures that the decision-makers vested with discretion have the most complete available information in making decisions affecting the public interest and affords all stakeholders the opportunity respond as part of the public hearing process. The requirement also conserves public resources, by designating a singular fact-finding proceeding in which the locality reviews and responds to relevant evidence.

If OBOT wished to rely on evidence addressing the projected health impacts of its proposed design, it should have submitted that information as part of the public hearing process. That way, the pivotal public safety analysis could include OBOT's information, as well as any response by other stakeholders and members of the public. OBOT was aware, too, that the development agreement allocated responsibility for making the public safety determination to Oakland and identified "substantial evidence" as the standard. That choice of words had "established legal meaning" triggering a form of judicial review in which only evidence submitted to Oakland is relevant. *See W. States Petroleum Assn.*, 9 Cal. 4th at 570-71. In

allowing OBOT to introduce new material in a *post hoc* challenge, the district court supplanted the normal process with one that was intrinsically skewed, placing the City's elected governing body at a distinct and categorical disadvantage in defending its public safety judgments and, in turn, markedly undermining the City's governing process, to its electorate's detriment.

III. CONCLUSION

For all of the foregoing reasons, this Court should reverse the district court's judgment granting OBOT's breach of contract claim and remand for entry of judgment in Oakland's favor on that claim.

Respectfully submitted,

JAMES R. WILLIAMS
County Counsel

Dated: December 17, 2018

By: /S/
Susan P. Greenberg
Deputy County Counsel

Attorneys for *Amicus Curiae*
California State Association
of Counties

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit set forth in Federal Rules of Appellate Procedure 29(a)(5) because it contains 3,154 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Time New Roman 14-point font, a proportionally spaced typeface.

Respectfully submitted,

JAMES R. WILLIAMS
County Counsel

Dated: December 17, 2018

By: /S/
Susan P. Greenberg
Deputy County Counsel

Attorneys for *Amicus Curiae*
California State Association
of Counties

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

JAMES R. WILLIAMS
County Counsel

Date: December 17, 2018

By: /S/
Susan P. Greenberg
Deputy County Counsel

Attorneys for *Amicus Curiae* California State Association of Counties