CASE NO. S202828

IN THE SUPREME COURT
STATE OF CALIFORNIA

NEIGHBORS FOR SMART RAIL,
a Non-Profit California Corporation
Petitioner and Appellant,

vs.

EXPOSITION METRO LINE CONSTRUCTION AUTHORITY;
EXPOSITION METRO LINE CONSTRUCTION AUTHORITY BOARD,
Respondents,

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY; LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY BOARD,
Real Parties in Interest and Respondents.

Court of Appeal, Second District, Division 8, No. B232655
Certified for Partial Publication

Affirming a Judgment and Order by the
Superior Court of Los Angeles - Case No. BS125122
The Honorable Thomas I. McKnew, Jr.

AMICUS CURIAE BRIEF BY THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, CULVER CITY AND THE CITY OF SANTA MONICA IN SUPPORT OF RESPONDENTS EXPOSITION METRO LINE CONSTRUCTION AUTHORITY; EXPOSITION METRO LINE CONSTRUCTION AUTHORITY BOARD, AND REAL PARTIES IN INTEREST AND RESPONDENTS LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY; LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY BOARD

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I. INTRODUCTION

Amici curiae California State Association of Counties, League of California Cities, and the City of Los Angeles, County of Los Angeles, City of Santa Monica and City of Culver City (collectively "Amici") support the arguments articulated by respondents Exposition Metro Line Construction Authority and Exposition Metro Line Construction Authority Board, and by real parties in interest and respondents Los Angeles County Metropolitan Transportation Authority and Los Angeles County Metropolitan Transportation Authority Board. We urge this Court to uphold the decision of the court of appeal.

We write to emphasize the importance of affirming the proper standard of review applicable to a lead agency's determination of the environmental baseline. Selection of an appropriate environmental baseline is crucial to an agency's ability to meet CEQA's purposes of engaging in meaningful environmental review, ensuring good-faith disclosure, and enabling informed decision-making. See, e.g., CEQA Guidelines, 14 Cal. Code Regs §§ 15002(a) & 15151; *Laurel Heights Improvement Assn. v. Regents of the Univ. of California* (1988) 47 Cal.3d 376, 402 (identifying fostering of informed decision-making as CEQA's "fundamental goal"); *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 232 ("An EIR, when looked at as a whole, must provide a reasonable, good faith disclosure and analysis of the project's environmental impacts."). Lead agencies must be afforded the discretion to choose a baseline that will best inform the decision-making process by identifying the real impacts of a project in its most likely setting.

An agency's discretion to establish the proper baseline to evaluate environmental impacts is captured by CEQA Guideline § 15125(a), which does not mandate any particular point in time that must be captured by an

agency's baseline determination. CEQA Guidelines, 14 Cal. Code Regs § 15125(a). Instead, as this court recognized in *Communities for a Better Environment v. South Coast Air Quality Management District*, courts should respect agency discretion to select an environmental baseline so long as the agency's determination is supported by substantial evidence. *Communities for a Better Env't v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 328 ("*CBE*") (choice of environmental baseline is factual determination subject to review for support by substantial evidence in the record). In this case, both the court of appeal and the trial court followed this rule.

Despite *CBE's* clear statement regarding the appropriate standard of review for environmental baseline determination, recent court of appeal decisions in *Sunnyvale West Neighborhood Association v. Sunnyvale City Council* (2010) 190 Cal.App.4th 1351 ("*Sunnyvale West*"), and *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48 ("*Madera Oversight*") placed unreasonably narrow limits on environmental baseline determinations that are inconsistent with *CBE*. In this case, however, the court of appeal rejected both *Sunnyvale West* and *Madera Oversight* and upheld agency discretion in this context. Specifically, the court of appeal stated:

> [W]e reject the notion that CEQA forbids, as a matter of law, use of projected conditions as a baseline. Nothing in the statute, the CEQA Guidelines, or *CBE* requires that conclusion. To the extent *Sunnyvale* and *Madera* purport to eliminate a lead agency's discretion to adopt a baseline that uses projected future conditions under any circumstances, we disagree with those cases.

Neighbors for Smart Rail v. Exposition Metro Line Const. Auth. (2012)

205 Cal.App.4th 552, 570, rev. granted August 8, 2012. As a result, this case presents the Court with an opportunity the reaffirm and clarify the standard of review applicable to an agency's determination of environmental baseline.

Maintaining the applicability of the substantial evidence standard to factual determinations, such as the choice of an environmental baseline, is critically important to cities and counties. This is particularly true when agencies engage in CEQA review of large infrastructure projects, where the discretion to choose a future baseline is vitally important to ensuring that the environmental review process meets CEQA's fundamental purpose of fostering informed decision-making.

In almost every CEQA case, petitioners seek to characterize the agency's factual determinations as a "failure to comply with the law," in the hope of obtaining de novo or independent review by the courts. As *Madera Oversight* shows, petitioner's efforts are sometimes successful, causing greater uncertainty in the CEQA process for all agencies. This uncertainty burdens agency processing and drives up the costs of projects, including public infrastructure projects paid for with the public's money in at least two ways. First, independent review can lead to reversal of agency decisions that were properly based on agency expertise and discretion. Second, uncertainty about whether an agency's discretion will be deferred to can lead agencies to engage in unnecessary and expensive administrative processes that do not materially improve public disclosure or informed decision-making.

Therefore, we respectfully ask this court to reject *Sunnyvale West* and *Madera Oversight's* incorrect statement of the standard of review for environmental baseline determinations as inconsistent with the standard

announced by this court in *CBE*. *CBE, supra,* 48 Cal.4th at 328. This court should reaffirm applicability of the substantial evidence standard to factual determinations of this sort and should emphatically reject the attempts by petitioners to convert disputes over agency factual determinations into "compliance with law" questions.

II. ARGUMENT

As this court concluded in *CBE,* an agency's environmental baseline determination is a factual question subject to review for support by substantial evidence in the administrative record. *CBE*, 48 Cal.4th at 328. In this case, the court of appeal correctly concluded that nothing in CEQA's statutory language or in the CEQA Guidelines mandates a time at which existing environmental conditions must be measured. *See Neighbors for Smart Rail, supra*, 205 Cal.App.4th at 571-73. By affirming the court of appeal and rejecting *Sunnyvale West* and *Madera Oversight*, this court will ensure that CEQA review meets the statute's fundamental purpose of fostering informed decision-making. A lead agency must have discretion to determine the point in time—including a time in the future—that will most accurately represent the environment to be affected by the project. Foreclosing lead agencies' discretion to do this only does harm to CEQA's purpose of being a genuine tool for informed decision making.

A. In CEQA cases, courts defer to agency determinations on questions of fact.

Courts review agency compliance with CEQA for prejudicial abuse of discretion. *Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426. Abuse of discretion is established if the agency fails to proceed in the manner required by law or if a determination made by the

agency is not supported by substantial evidence. *Id.*; Pub. Resources Code, § 21168.5. Where a question of fact is involved, courts review the agency's decision to determine whether it is supported by substantial evidence in the administrative record. See *Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 393.

The applicable CEQA standard of review is determined based upon the type of deficiency alleged. As explained by this court in *Vineyard Area Citizens*, a reviewing court "determine[s] de novo whether the agency has employed the correct procedures" and "accord[s] greater deference to the agency's substantive factual conclusions." 40 Cal.4th at 435. Factual determinations are reviewed under the substantial evidence standard, and as this court explained in *CBE*, that standard applies to an agency's determination of environmental baseline. *CBE,* 48 Cal.4th at 328.

B. As with all factual determinations, the substantial evidence standard of review applies to a lead agency's choice of environmental baseline.

As in most CEQA cases, appellants here ignore that the Authority's baseline determination is a factual determination subject to deference, and instead argue it should be reviewed de novo to determine whether the Authority proceeded in the manner required by law. *See* Reply Br. at 3-4. This court should emphatically reject any attempt to characterize agency determinations regarding how to evaluate impacts as questions of law. *See, e.g., Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898 (substantial evidence standard applies to challenges to agency's methodology); *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1036 ("A public agency can make reasonable assumptions based on substantial evidence about future

conditions without guaranteeing those assumptions will remain true.") For example, in *Oakland Heritage*, the court held that the substantial evidence standard applies not only to an agency's conclusions, findings, and determinations, but also to challenges regarding the scope of analysis, methodology, and accuracy of data. *Oakland Heritage Alliance*, 95 Cal.App.4th at 897-98. Choosing the correct environmental baseline to use in analyzing a project's environmental impacts is an inherently methodological question and, as such, is a question of fact. *See id.* Indeed, judicial deference to the exercise of discretion by co-equal branches of government is fundamental to our system of separation of powers.

In *CBE,* this court recently vindicated the applicability of the substantial evidence standard to agency determinations of the proper environmental baseline:

> Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence.

48 Cal.4th at 328. Indeed, such an approach is necessary because, as this case exemplifies, "an agency's determination of the proper baseline for a project can be difficult and controversial" and requires consideration of many factual issues, the consideration of which falls squarely within an agency's expertise and role as a CEQA lead agency. *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 337-

38 (citing *CBE* for the proposition that determination of environmental baseline is not governed by an inflexible rule, and is reviewed for support by substantial evidence). In *CBE*, unlike in this case, there was no factual support for the agency's use of a hypothetical baseline. Here, where the project will not come on line until several years after completion of environmental review, the project is designed to alleviate longterm traffic and air quality concerns, and the baseline used by the agency was based on reasonable projections for population growth in the area, the rule announced in *CBE* supports the use of a future baseline, so long as it is supported by substantial evidence in the administrative record.

Appellants urge this court to adopt *Sunnyvale West* and *Madera Oversight*, and therefore disregard its own ruling in *CBE*. In *Sunnyvale West*, the court of appeal concluded that CEQA and its implementing regulations only allow a lead agency to choose an environmental baseline reflecting conditions at the time the agency publishes its Notice of Preparation ("NOP") or at the commencement of environmental review, unless conditions at that time would "not be representative of the generally existing conditions." 190 Cal.App.4th at 1380. In *Madera Oversight,* the court of appeal followed *Sunnyvale West* and concluded that "lead agencies do not have the discretion to adopt a baseline that uses conditions predicted to occur on a date subsequent to the certification of the EIR." 199 Cal.App.4th at 90. As explained below, however, nothing in CEQA or its implementing regulations requires such an artificially narrow range of permissible environmental baselines.

C. Both the CEQA Statute and the CEQA Guidelines recognize that an agency must be afforded discretion to choose the appropriate environmental baseline.

The need for discretion in choosing an environmental baseline stems from a lead agency's duty to carry out the statutory mandate imposed on it by Public Resources Code sections 21100 and 21060.5. Section 21100(b)(1) requires an EIR to set forth "all significant effects on the environment of the proposed project," and section 21060.5 defines "environment" as "the physical conditions which exist within the project area which will be affected by a proposed project." To analyze the effects of a project on the environment, a lead agency must have discretion to determine the point in time that will be most representative of the environment that will be affected by the project. Indeed, section 21060.5 does not specify the time at which conditions must exist to be identified as the affected environment.

As suggested by the court of appeal in this case, if anything, section 21060.5's statement that the environment consists of physical conditions "which will be affected by a proposed project" suggests that a future baseline may be mandatory for accurate assessment of potential impacts of large, long-term projects where inevitable environmental change will result from factors other than project completion. *See Neighbors for Smart Rail*, *supra*, 205 Cal.App.4th at 571-72 (rejecting *Sunnyvale West*'s conclusion that CEQA statutory provisions require use of baseline of current conditions, particularly in the case of long-term infrastructure projects). In such a case, the project may not be built until years after approval, and physical conditions as they exist at the time of NOP publication or the start of environmental review will differ from the physical conditions that "will be affected" by the project. Pub. Resources Code. § 21060.5. In the case of traffic impacts, the conditions existing at the time of project approval may be of little relevance to the impacts of the

project that will not be implemented for years. *See, e.g., Neighbors for Smart Rail v. Exposition Metro Line Const. Auth.* (2012) 205 Cal.App.4th 552, 570 ("Many people who live in neighborhoods near the proposed light rail line may wish things would stay the same, but no one can stop change. ... An analysis of the project's impacts on anachronistic 2009 traffic and air quality condition would rest of the false hypothesis that everything will be the same 20 years later.")

CEQA Guidelines section 15125 recognizes the need for flexibility in making environmental baseline determinations. Determining the appropriate baseline will depend on the specific facts applicable to the project. Accordingly, an environmental baseline determination is a question of fact, and factual questions are subject to the substantial evidence standard of review. 14 Cal. Code Regs § 15125. Section 15125(a) recognizes that, while the environmental setting at the time of notice of preparation publication or the start of environmental analysis might "normally" be the appropriate environmental baseline, that is not always the case:

> An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. *This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.*

14 Cal. Code Regs § 15125(a) (emphasis added). The mandatory language in the first sentence stating that an "EIR must include a description of the physical environment," contrasts with the permissive language in the second sentence, stating that the environmental setting dictated by the first

sentence "will normally constitute" the environmental baseline. *Id.* To give effect to this distinction, section 15125(a) must be interpreted to require an EIR to include a description of physical setting without dictating whether the existing physical condition should serve as the environmental baseline for purposes of review. Consistent with this interpretation, and as noted by the court of appeal in this case, use of the word "normally" acknowledges that agency discretion regarding environmental baseline determinations is necessary in some cases. *See Neighbors for Smart Rail, supra*, 205 Cal.App.4th at 573 ("[A]n agency's use of discretion in selecting a baseline is expressly reserved in the Guidelines by the use of the word 'normally.'")

The principle underlying *CBE* is that projects subject to CEQA review are proposed in areas with widely varying environmental conditions and come in too many shapes and sizes to establish a rigid rule governing environmental baseline determinations. Consistent with the court of appeal's opinion in this case, the Guidelines should be interpreted to recognize that agencies must be able to determine, based on the facts each project presents, how to best analyze a project's environmental impacts. Specifically, section 15125 should be interpreted to allow agencies to select an alternate baseline when environmental conditions as they exist at the time of NOP publication or the start of environmental review do not accurately represent "the physical conditions which exist within the project area *which will be affected by a proposed project.*" Pub. Resources Code, § 21060.5 (emphasis added). Further, agencies should be afforded the discretion to choose an environmental baseline that *will* accurately represent the conditions that will be affected by the project. *See Neighbors for Smart Rail, supra*, 205 Cal.App.4th at 573 ("In a major infrastructure

project such as Expo Phase 2, assessment of the significance of environmental effects based on 2009 conditions (or conditions at any point in from 2007 to 2010) yields no practical information, and does nothing to promote CEQA's purpose of informed decision making on a project designed to serve a future population.").

Affirming the substantial evidence standard of review for factual determinations, like the choice of an environmental baseline, will greatly assist lead agencies in the discharge of their duty to prepare environmental review documents that are useful to decision-makers and the public. By contrast, straight-jacketing lead agencies into choosing a baseline as a matter of law, regardless of its actual relevance to the analysis, serves no useful purpose. Because *Sunnyvale West* and *Madera Oversight* fail to honor the role of an agency's exercise of discretion in environmental review, we respectfully ask this court to reject the holdings in those cases.

III. CONCLUSION

For the foregoing reasons, Amici respectfully request that this court affirm the court of appeal's judgment and reject the flawed analysis in *Sunnyvale West* and *Madera Oversight.* Pursuant to the applicable

statutory, regulatory, and case law, lead agencies must be afforded the discretion to establish a proper baseline for environmental analysis.

DATED: December 3, 2012

Respectfully submitted,

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In compliance with California Rule of Court 8.208(d) and (e), Amici know of no persons or entities that must be listed in this certificate under subdivisions (d)(1) and (2)(2) of California Rules of Court, Rule 8.208.

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CERTIFICATE OF SERVICE

Declaration of Service by Mail

I, the undersigned, declare that I am and was at the time of service of the papers herein referred to over the age of 18 years and not a party to the action, and I am employed in the County of Sonoma, California, within which county the subject mailing occurred. My business address is 555 California Street, San Francisco, California 94104. I am familiar with Cox, Castle & Nicholson, LLP's practice for collection and processing correspondence for mailing with the United States Postal Service and that the correspondence shall be deposited with the United States Postal Service the same day in the ordinary course of business.

On **December 3, 2012**, I caused to be served:

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2) **APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, et al. TO SUBMIT AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS EXPOSITION METRO LINE CONSTRUCTION AUTHORITY, et al.**

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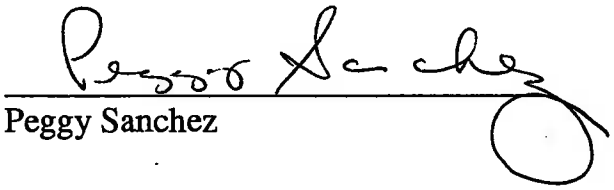

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CERTIFICATE OF WORD COUNT

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