APPELLATE NO. 157551

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION 5

SAVE BERKELEY'S NEIGHBORHOODS
Petitioner and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; et al.,
Respondents.

ALAMEDA COUNTY SUPERIOR COURT • CASE NO. RG18902751
Hon. Frank Roesch, Dept. 17, Telephone: (510) 267-6933 and
Hon. Noel Wise, Dept. 24, Telephone: (510) 267-6940

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL First APPELLATE DISTRICT, DIVISION 5	COURT OF APPEAL CASE NUMBER: A157551
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APPELLANT/ PETITIONER: Save Berkeley's Neighborhoods RESPONDENT/ REAL PARTY IN INTEREST: The Regents of the University of CA, et al.	

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I. INTRODUCTION

Plaintiff and Appellant Save Berkeley's Neighborhoods (Appellant) seeks a writ of mandate or declaratory relief to compel Respondent The Regents of the University of California to conduct subsequent environmental review, as required by the California Environmental Quality Act (CEQA),[1] of their enrollment plans for the University of California, Berkeley (UCB) campus. The Superior Court sustained Respondents' demurrer to Appellant's CEQA claims without leave to amend. (AA 598, 600, 624.) The Superior Court also denied Appellant's motion to compel the production of documentary evidence related to these claims. (AA 397.) Appellant seeks review of both rulings.

This case presents an important issue for all communities that host a public college campus in California. Here, The Regents would have the public and the courts believe that by increasing enrollment in increments, in an informal process with no notice to the public, they are exempt from CEQA's requirement that they study the environmental impacts of increasing enrollment on their neighboring communities. The trial court accepted The Regents' argument, ignoring thirty years of settled CEQA case law, frustrating the express intent of the legislature, and contradicting California Supreme Court decisions requiring that public colleges avoid or mitigate their off-campus environmental effects. By accepting The Regents argument, the trial court also allowed The Regents to hide documents from the public that would reveal how they came to increase enrollment with no public notice.

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[1] CEQA is codified at Public Resources Code section 21000 et seq. The provisions of CEQA cited herein are referred to as "CEQA section #."

The Legislature directly addressed Respondents obligation to conduct CEQA review of enrollment plans in two statutes: Education Code section 67504, which requires that UCB conduct CEQA review of the off-campus effects of expansion in campus enrollment, and CEQA section 21080.09, which details how The Regents must conduct this review.

In 2005, consistent with the enrollment provisions of CEQA section 21080.09, The Regents adopted a Long Range Development Plan (2020 LRDP) for UC Berkeley to achieve a number of objectives through the year 2020, including stabilizing enrollment. At that time, The Regents certified an Environmental Impact Report for the 2020 LRDP (2005 EIR) pursuant to CEQA. The 2020 LRDP projected that by the year 2020 student enrollment at UCB would increase by 1,650 students, and the 2005 EIR based its environmental impact analysis on this number. (AA 351-52.)

According to information The Regents made available in 2017, it appears that beginning in or about 2007, The Regents made informal, discretionary decisions to increase enrollment over and above the 1,650 additional students projected by the 2020 LRDP such that by the time this case was filed in April of 2018, the actual increase in student enrollment was 8,302 students. This represents a five-fold increase compared to the 1,650 enrollment increase projected in the 2020 LRDP and 2005 EIR. (AA 352.) These informal decisions were made without CEQA review and without regard to Education Code requirements concerning the effects of enrollment increases on the surrounding community.

These excess increases in student enrollment above the original projected increase of 1,650 students caused and continue to cause significant impacts on the environment and quality of life in the Berkeley community, including increased use of off-campus housing for and by UCB

students, leading to increases in off-campus noise and trash, and increased burdens on the City of Berkeley's public safety services, including police, fire, ambulance, and Emergency Medical Technician services. (AA 352-54.)

The Regents initially complied with the directive in subdivision (b) of section 21080.09 by including the 2020 LRDP's original projected increase of 1,650 students in the 2005 EIR's analysis. (AA 351-54.) But after certifying the 2005 EIR for the 2020 LRDP, The Regents never conducted subsequent environmental review of the excess increase above 1,650 students that occurred between 2005 and 2018.

The Regents contended below that CEQA section 21080.09 exempts The Regents from any requirement to conduct subsequent environmental review of post-LRDP increases in enrollment. (AA 412-16, 461-64, 519-20.) The trial court agreed. (AA 601-603.)

The Regents' construction of this statute is inconsistent with the plain language of subdivisions (b) and (d) of section 21080.09, which require CEQA review of enrollment plans, not only at the inception of a 15-year LRDP, but subsequently by way of a CEQA analysis "tiered" to the LRDP EIR. The Regents' construction of this statute also conflicts with long-standing CEQA principles governing subsequent environmental review. Section 21080.09 must be read in the context of "the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1099–1100 (*Berkeley Hillside I*).

The legislature's use of the word "tiered" refers to CEQA's requirements for subsequent environmental review because tiered analyses are allowed *only* in the context of subsequent environmental review.

(*Friends of College of San Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937, 959 (*Friends of College I*); *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1170 (*In re Bay-Delta*); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 429-30, 440 (*Vineyard*); *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 934, 936–937 (*Concerned Citizens*); CEQA sections 21093, 21151, 21160, CEQA Guidelines 15152, 15161, 15168, 15385.)

The Regents position is also inconsistent with two recent California Supreme Court decisions holding that The Regents must avoid or mitigate the off-campus environmental effects of campus development as required by CEQA. (*City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945, 966 (*City of San Diego*); *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 360 (*City of Marina*).)

Since the text of section 21080.09 is not ambiguous, legislative history is not required. However, to the extent the Court may find ambiguity in the statute, the legislative history strongly supports Appellant's construction of the statute. (See section IV.A2, below.)[2] The Regents position is also inconsistent with its own prior interpretation of section 21080.09. (See section IV.A.3-4, below.)[3]

The Regents interpretation of section 21080.09 violates the cardinal

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[2] The legislative history of section 21080.09 is attached to Appellant's Request for Judicial Notice (App RJN) as Exhibit 1, pp. RJN 6-234.

[3] See App RJN Ex 2, p. RJN 236.

rule governing the interpretation of CEQA that CEQA is "to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390 (*Laurel Heights I*).) Indeed, their interpretation renders the statute meaningless with respect to enrollment increases that The Regents refuse to study.

When Appellant filed this case, it elected to prepare the record of proceedings pursuant to CEQA section 21167.6(b)(2). Appellant subsequently tried every legal method available to obtain documents from The Regents to prepare the record, including the Civil Discovery Act, the Public Records Act, and the Local Rules of Court. The Regents stonewalled all of these efforts. (AA 231-233.) This appeal includes one of these efforts: Petitioners' Request for Production of Documents to The Regents of the University of California, et al., Set One. (AA 218, 238.)

Appellant requested documents relating to The Regents' decision-making regarding increasing enrollment over and above the 1,650 additional students projected in the 2020 LRDP. (AA 239-40.) For example, Request No. 5 seeks: "All writings, including internal staff memoranda and emails, that refer or relate to increases in student enrollment at UC Berkeley that were prepared since the adoption of UC Berkeley's 2020 Long Range Development Plan by The Regents of the University of California." (AA 240.)

The Regents opposed Appellant's motion to compel production of these documents by contending that discovery is not available in a CEQA mandamus action. The Regents also opposed Appellant's motion to compel on the same grounds raised in its demurrer regarding the validity of

Appellant's CEQA cause of action. These include contentions that: (1) enrollment plans are not part of the 2020 LRDP CEQA project and annual enrollment increases are not "CEQA projects;" (2) the Third Amended Petition fails to allege noncompliance with CEQA's standards that trigger subsequent environmental review; (3) Appellant's claim that The Regents failed to conduct additional CEQA review of substantial increases in student enrollment above the 1,650 student increase disclosed in the 2005 EIR is barred by CEQA's statutes of limitations; (4) any claim that The Regents failed to conduct CEQA review of enrollment increases above the 1,650 student disclosed in the 2005 in past academic years are EIR are moot. (AA 330-337). The trial court expressed similar concern about the validity of Appellant's CEQA claim, implying this is the reason the trial court denied the motion (RT 12/6/18 3:21-6:1 [AA 661:21-664:1), even though the order denying the motion does not mention these concerns (AA 397).

In Section IV.A below, Appellant demonstrates the validity of its CEQA claim. In Section IV.B. below, Appellant refutes the remainder of Respondents objections to its discovery requests.

Appellant has a statutory right under CEQA section 21167(b)(2) to prepare the record in this case. (*Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3rd 433, 447.) The Regents position would nullify this right, violating the rule of statutory interpretation that requires courts to give effect and significance to every word and phrase of a statute. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.) The trial court order leaves Appellant in the untenable position of having an ongoing CEQA case, but no record of proceedings and no non-record evidence to prove its case.

II. STATEMENT OF FACTS

A. Procedural History in the Administrative Process.

The facts relating to the procedural history of this matter in the administrative process are stated in Appellant's Third Amended Petition for Writ of Mandate an Complaint for Declaratory Relief (Third Amended Petition). (AA 350.) In 2005, The Regents adopted their 2020 LRDP for the UC Berkeley campus to achieve a number of objectives through the year 2020, including stabilizing enrollment. In or about 2005, Respondent Regents certified the 2005 EIR for the 2020 LRDP pursuant to CEQA. (AA 351 ¶ 3.)

The 2020 LRDP is a discretionary project as defined in CEQA Guidelines, sections 15357 and 15378 and as provided in Public Resources Code section 21080.09. The 2020 LRDP is a "program" type of CEQA project and the 2005 EIR is a "program EIR" as defined in CEQA Guidelines, section 15168(a)(1).[4] (AA 351 ¶ 4.)

The 2020 LRDP project commenced immediately after its adoption in 2005. The 2020 LRDP and 2005 EIR projected that by 2020 student enrollment at UCB would increase by 1,650 students, from the 2001-2002 two-semester average headcount of 31,800 to 33,450 students. This projected increase in enrollment of 1,650 students was a component of the 2020 LRDP's "project description," as this term is used in CEQA. (See e.g., *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193 (*County of Inyo*) ["An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR"].) The 2020

[4] The CEQA Guidelines are codified at Title 14, Cal. Code Regs., § 15000 et seq.

LRDP and 2005 EIR also projected that by 2020 UCB would add 2,500 beds for students. (AA 351 ¶ 5.)

Beginning in or about 2007, The Regents made informal, discretionary decisions to change the 2020 LRDP project to increase enrollment at UCB over and above the 1,650 additional students projected by the 2020 LRDP and disclosed in the 2005 EIR. The Regents effected these changes in the 2020 LRDP project "without a formal decision," as this phrase is used in Public Resources Code section 21167(a) and without public notice of this change. (AA 352 ¶ 6.)

The Regents have continued to make informal, discretionary decisions to change the 2020 LRDP project by continuing to enroll more students, in virtually every two-semester period since 2007, over and above the 1,650 additional students projected by the 2020 LRDP and disclosed in the 2005 EIR. The Regents have effected these continuing changes in the 2020 LRDP project without formal decisions and without public notice. (AA 352 ¶ 7.)

The 2005 EIR and 2020 LRDP indicate that UCB counts campus population in two ways: "by actual headcounts and by full time equivalents, or FTE." According to the 2020 LRDP, "while budgets are calculated in terms of FTE, for the purpose of environmental analysis actual headcount is the better measure, since FTE tends to under-represent peak impacts. For example, two students taking six units each are likely to have a greater impact than one student taking 12 units. The 2020 LRDP therefore uses two-semester average headcount as the measure of campus population." (AA 352 ¶ 8.)

In March and April 2017, Appellant worked with City of Berkeley officials to determine the current level of UCB enrollment in terms of

"two-semester average headcount" because at that time there was no publicly available enrollment information expressed in terms of "two-semester average headcount" that could be used to compare current enrollment with the enrollment disclosed in the 2005 EIR. The City of Berkeley then sent a written request dated April 14, 2017, to The Regents requesting the information. (AA 352 ¶ 9, 375.) On October 30, 2017, The Regents sent to the City of Berkeley its response to the City's request for information. (AA 352 ¶ 9, 378.) On or about October 31, 2017, the City of Berkeley provided Appellant with a copy of this response. (AA 352 ¶ 9.)

The Regents' October 30, 2017, letter to the City of Berkeley reveals that starting in about 2007 Respondent Regents and UCB changed the 2020 LRDP project by increasing enrollment at UCB over and above the 1,650 additional students projected by the 2020 LRDP and disclosed in the 2005 EIR. The letter also disclosed that since 2007 The Regents have continued to change the 2020 LRDP by continuing to enroll more students than the 1,650 additional students projected by the 2020 LRDP and disclosed in the 2005 EIR. (AA 353 ¶ 10.) By the time this case was filed in April of 2018, the actual increase in student enrollment was 8,302 students. This represents a five-fold increase compared to the 1,650 enrollment increase projected in the 2020 LRDP and 2005 EIR. (AA 378-80.)

Appellant did not know and could not, in the exercise of reasonable diligence, have known of Respondent Regents' and UCB's informal, discretionary decisions to increase student enrollment at UCB above the increase of 1,650 students projected in the 2020 LRDP and disclosed in the 2005 EIR until October 30, 2017. At that time, The Regents responded to the City of Berkeley's request for information regarding enrollment increases by providing to the City the document attached to the Third

Amended Petition as Exhibit 4. (AA 353 ¶ 11, 378-380.)

The increase in student enrollment over and above the 1,650 additional students projected by the 2020 LRDP and disclosed in the 2005 EIR (the "excess increase in student enrollment") has caused and continues to cause significant adverse environmental impacts that were not analyzed in the 2005 EIR, including, without limitation, increased use of off-campus housing for and by UCB students, leading to increases in off-campus noise and trash, and increased burdens on the City of Berkeley's public safety services, including police, fire, ambulance, and Emergency Medical Technician services. Appellant is also informed and believes and on that basis alleges that these impacts include, without limitation, displacement of tenants resulting in more homeless individuals living on public streets and in local parks; increases in the number of UCB students who are homeless; and increases in traffic and transportation related congestion and safety risks. (AA 353 ¶ 12.)

On August 15, 2018, The Regents issued a Notice of Preparation of a Draft Supplemental Environmental Impact Report for the "Upper Hearst Development for the Goldman School of Public Policy and Minor Amendment to the 2020 Long Range Development Plan." (Upper Hearst NOP.) The NOP states that: "At this time, UC Berkeley estimates an overall campus population headcount growth of about 1.5 percent annually, on an average, in the near-term." (AA 146, 232 ¶ 15.)

B. Procedural History in the Superior Court.

When Appellant filed this action, it elected to prepare the record of proceedings pursuant to Public Resources Code section 21167.6(b)(2). (AA 38, 238.) The Regents then engaged in a pattern of obstruction that made it impossible for Appellant to prepare the record. (AA 231-33.) To effectuate

its election, Appellant served on The Regents a request for documents that relate to "increases in student enrollment at UC Berkeley" that were prepared in connection with the preparation and adoption of UCB's 2020 LRDP and subsequent to adoption of the 2020 LRDP. (AA 231, 238.)

The Regents objected and refused to produce a single document. (AA 231-33, 244.) The Regents' primary objection is that the Civil Discovery Act does not authorize discovery for purposes of preparing the record in a CEQA case, and even if it does, Appellant must seek a prior court order before engaging in such discovery. (AA 245-51.) The Regents also refused to provide a privilege log of documents it intended to withhold from production based on claims of privilege. (AA 245-51, 264.)

When this case was filed, Local Rules 3.320(a) and (d)(1) (since repealed as of August 1, 2018) required that The Regents provide Appellant with costs estimates for preparing the record and the location and custodian of all documents to be included in the record. The Regents responded to these rules by declining to provide this information on the ground that "Petitioner has not challenged any Project or any action subject to CEQA or any Project approval by Respondents in the Petition." (AA 84, 231 ¶ 9.)

Appellant responded that: "CEQA defines the term 'Project' to mean 'an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) An activity directly undertaken by any public agency.'" (PRC § 21065.) The petition identifies such an 'activity:' namely, increasing the number of students enrolled at UC Berkeley and requested The Regents immediately comply with the local rule of court. (AA 353 ¶ 10.)

On June 13, 2018, pursuant to Local Rule 3.320(d)(2) (since

repealed as of August 1, 2018), Appellant sent to The Regents a provisional proposed index of the record of proceedings in this matter. The proposed index was "provisional" because The Regents had not complied with the local rules requiring disclosure of documents to be included in the record of proceedings. The provisional proposed index listed documents that Appellant was able to find on and download from UC Berkeley's "Capital Strategies" website. In this letter, Appellant again asked The Regents to comply with Local Rule 3.320(d)(1). (AA 231 ¶ 11, 266-268.) On June 20, 2018, The Regents responded by reiterating that it would not comply with this rule based on its position that the Petition does not challenge a CEQA project. (AA 232 ¶ 12.)

On July 24, 2018, Appellant submitted a written request to The Regents pursuant to the California Public Records Act requesting all records showing actual and projected Registered Student Headcount at UC Berkeley for the academic terms: Spring 2018, Fall 2018, Spring 2019, Fall 2019, Spring 2020, Fall 2020, Spring 2021, Fall 2021, Spring 2022. The Regents ignored this request. (AA 232 ¶¶ 13, 14.) On September 26, 2018, Appellant notified The Regents in writing that their failure to respond violates the Public Records Act (at Gov. Code§ 6253(c)) and requested the same records. (AA 233 ¶ 16.)

On October 19, 2018, The Regents demurred to Appellant's Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief. (AA 115.) The court (Judge Roesch) heard this demurrer on November 15, 2018, sustaining it with leave to amend. (RT 11/15/18 [AA 653]), AA 348.)

On November 5, 2018, Appellant filed a motion to compel production of documents responsive to its first set of requests. (AA 210,

218, 220, 230.) On December 6, 2018, the court (Judge Roesch) heard and denied the motion to compel. (RT 12/6/18 3:21-6:1 [AA 661:21-664:1], AA 397).

The Superior Court issued this discovery ruling after Appellant filed its Third Amended Petition on November 28, 2018 (AA 350), but before The Regents filed their demurrer to the Third Amended Petition (AA 420). The trial court (Judge Wise) heard this demurrer on January 24, 2019. (RT 1/24/19 [AA 698].) During this hearing the trial court requested supplemental briefing (RT 1/24/19 21:1 [AA 718:1]), which the parties submitted on February 4, 2019 (AA 511, 518). The court issued a tentative ruling sustaining the demurrer and scheduled a new hearing for argument on April 18, 2019. (AA 524.)

On April 5, 2019, Appellant filed an Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief. (AA 528.) This application sought to bring to the court's attention Respondents' position, outlined in The Regents' 2005 EIR for the 2020 LRDP, which states: "However, if the 2020 LRDP is adopted by The Regents, any further increase beyond the maximum stated in the plan would require an amendment of the plan, including CEQA review." (AA 540.) (See Sections IV.A.3-4, below; Appellant's Request for Judicial Notice, Ex 2.) The trial court (Judge Roesch in Department 17) called this application for hearing on April 8, 2019 (AA 553), but dropped the matter (AA 555) because the demurrer was pending in Department 24 before Judge Noel Wise (AA 582:9). Appellant then re-filed this application in Department 24 on April 17, 2019 (AA 562), but Judge Wise refused to rule on the application because the case was assigned to Judge Roesch. (RT

4/18/19 16:1-11 [AA 741:1-11].)

C. Procedural History in the Court of Appeal.

On February 4, 2019, Appellant sought appellate review of the trial court's order denying plaintiff's motion to compel production of documents by petition for extraordinary writ in Appellate No. A156379. This Court denied the petition by Order dated March 8, 2019, stating: "the court found it inappropriate to analyze whether petitioner's superior court petition/complaint contains actionable claims."

III. STANDARD OF REVIEW

A. Standard of Review of Order Sustaining Demurrer Without Leave to Amend.

The function of a demurrer is to test the sufficiency of a pleading by raising questions of law. (*Buford v. State of California* (1980) 104 Cal.App.3d 811.) The demurrer admits the truth of all material facts pleaded. (*Aubry v. Tri-City Hosp. Dist*. (1992) 2 Cal.4th 962, 966–967.)

The allegations in a complaint must be liberally construed. (Code Civ. Proc., § 452; *Stevens v. Sup. Ct.* (1999) 75 Cal.App.4th 594, 601.) On review of an order sustaining a demurrer without leave to amend, the Court exercises its independent judgment about whether the complaint states a cause of action as a matter of law. (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 274.)

It is an abuse of discretion to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Salenga v. Mitsubishi Motors Credit of Am., Inc.* (2010) 183 Cal.App.4th 986, 994–95 (*Salenga*) (disapproved on other grounds in *Aryeh v. Canon Bus. Solutions, Inc.* (2013) 55 Cal.4th 1185, 1196–1197); *Okun v. Sup.Ct.*

(Maple Properties) (1981) 29 Cal.3d 442, 460.)

A request to amend in the trial court is not required; the requisite showing can be made first on appeal. (*Salenga, supra*; *City of Stockton v. Super. Ct*. (*Civic Partners Stockton, LLC*) (2007) 42 Cal.4th 730, 746–747; Cal. Prac. Guide Civ. App. & Writs Ch. 8-C, § 8:136.3a.)

For purposes of pleading, California law has long recognized the difference between ultimate and evidentiary facts. "The 'facts' to be pleaded are those upon which liability depends, i.e., the facts constituting the cause of action. These are commonly referred to as 'ultimate facts.'" (Cal. Prac. Guide Civ. Pro. Before Trial Ch. 6-B, § 6:123, citing *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550.) Thus,"[a] complaint must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts." (*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 CA3d 1371, 1390). Further, "The complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, 872.)

B. Standard of Review of Order Denying Motion to Compel.

Some types of discovery rulings are reviewed for abuse of discretion. Examples include whether a particular matter is discoverable because it is "relevant to the subject matter" (*National Steel Products Co. v. Sup.Ct.* (*Rosen*) (1985) 164 Cal. App.3d 476, 492) and discovery management. (*In re Insurance Installment Fee Cases* (2012) 211 Cal. App.4th 1395, 1425-1426.) However, appellate review of discovery rulings is de novo where the trial court's ruling is based on incorrect legal assumptions (*In re*

Insurance Installment Fee Cases, supra) or the relevant facts are undisputed (*Toshiba America Electronic Components, Inc. v. Sup.Ct.* (*Lexar Media, Inc*.) (2004) 124 Cal.App.4th 762, 768.) Here, the facts are undisputed, and the challenged ruling is based on law. Therefore, review is de novo.

In addition, "[D]iscovery of all relevant material during the time of preparation is the aim of the [Discovery Act]...." [Citation] Relevancy is a broader concept than relevancy to the issues, the standard is relevancy to the subject matter, which is determined by potential, not actual, issues in the case. [Citation] ... In accordance with the liberal policies underlying the discovery procedures, doubts as to relevance should be resolved in favor of permitting discovery." (*National Steel Products Co. v. Superior Court, supra*, 164 Cal.App.3d at 492–493.) "Appellate courts must keep liberal policies of discovery statutes in mind when reviewing decisions denying or granting discovery … Absent a showing that substantial interests will be impaired by allowing discovery, liberal policies of discovery rules will generally counsel against overturning a trial court's decision granting discovery … and militate in favor of overturning a decision to deny discovery." (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 988.)

IV. ARGUMENT

A. CEQA Requires That Respondent Conduct Subsequent Environmental Review of Substantial Increases in Enrollment Occurring after the 2005 EIR.

The Regents argue that LRDPs, as defined in CEQA section 21080.09(a)(2), do not include enrollment; and, therefore, there is no valid CEQA claim for The Regents' failure to conduct subsequent CEQA review based on enrollment increases above the 2020 LRDP's projected increase. (AA 412-16, 461-64, 519-20.) The trial court agreed. (AA 601-603.) The

Regents' current construction of section 21080.09 violates the plain language of the statute, conflicts with long-standing CEQA principles, and is contradicted by the legislative history of section 21080.09 and The Regents' own prior interpretation of the statute. "The court's "primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose. [citation] We begin with the language of the statutes as the most reliable indicator of intent. We construe terms in context, harmonizing the statutes both internally and with each other to the extent possible." (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1135.)

1. The Regents' current construction of section 21080.09 violates its plain language and conflicts with long-standing CEQA principles.

Education Code section 67504 provides: "The Legislature further finds and declares that the expansion of campus enrollment and facilities may negatively affect the surrounding environment. Consistent with the requirements of the California Environmental Quality Act (CEQA), it is the intent of the Legislature that the University of California sufficiently mitigate significant off-campus impacts related to campus growth and development."

CEQA section 21080.09, subdivsion (b), provides: "Environmental effects relating to changes in enrollment levels shall be considered for each campus or medical center of public higher education in the environmental impact report prepared for the long range development plan for the campus or medical center." Subdivsion (d) provides: "Compliance with this section satisfies the obligations of public higher education pursuant to this division to consider the environmental impact of academic and enrollment plans as they affect campuses or medical centers, provided that any such plans shall

become effective for a campus or medical center only after the environmental effects of those plans have been analyzed as required by this division in a long range development plan environmental impact report or tiered analysis based upon that environmental impact report for that campus or medical center, and addressed as required by this division."

The Regents' construction of section 21080.09 violates its plain language and conflicts with long-standing CEQA principles governing subsequent environmental review. Section 21080.09 must be read in the context of "the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*Berkeley Hillside I, supra.)* "One should seek to consider the statutes not as antagonistic laws but as parts of the whole system which must be harmonized and effect given to every section [citations]. Accordingly, statutes which are *in pari materia* should be read together and harmonized if possible." (*Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416, 1428; quoting *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.* (1976) 59 Cal.App.3d 959, 965.)

The plain language of subdivsion (b) and (d) require CEQA review of enrollment plans, not only at the inception of a 15-year LRDP, but subsequently by way of a CEQA analysis "tiered" to the LRDP EIR.

Here, the Legislature's use of the word "tiered" in subdivision (d) of section 21080.09 invokes CEQA requirements for subsequent environmental review because tiered analyses are allowed *only* in the context of subsequent environmental review. (*Friends of College I, supra,* 1 Cal.5th at 959 ["Unlike project EIRs, which examine the environmental impacts of a specific development project, the CEQA provisions governing tiered EIRs permit the environmental analysis for long-term, multipart

projects to be 'tiered,' so that the broad overall impacts analyzed in an EIR at the first-tier programmatic level need not be reassessed as each of the project's subsequent, narrower phases is approved" (internal quotes and citations omitted);[5] *In re Bay-Delta, supra,* 43 Cal.4th at 1170 ["Tiering is proper 'when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports' "]; *Vineyard, supra,* 40 Cal.4th at 429-30, 440 ["'Tiering' refers to using the analysis of general matters contained in a broader EIR (such as one prepared for a general plan or policy statement) with later EIRs and negative declarations on narrower projects; incorporating by reference the general discussions from the broader EIR; and concentrating the later EIR or negative declaration solely on the issues specific to the later project"]; *Concerned Citizens, supra,* 42 Cal.3d at 934, 936–937; CEQA sections 21093, 21151, 21160, CEQA Guidelines 15152, 15161, 15168, 15385.)

The Regents initially complied with the directive in subdivision (b) by including the 2020 LRDP's original projected increase of 1,650 students

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[5] In *Friends of College I*, *supra*, the Court clarified the two paths by which "subsequent review" may proceed under CEQA where a project changes after initial or previous CEQA review. When a project previously subject to CEQA review changes in a way that requires a new analysis of environmental impacts, the agency may only apply CEQA's subsequent review provisions at section 21166 "if the original environmental document retains some informational value despite the proposed changes." (*Id*. at 952.) If the original environmental document does not "retain some informational value," the project changes are treated as a "new" project requiring an initial study pursuant to CEQA section 21151 followed by preparation of either a negative declaration or, if the changes "may have a significant effect on the environment," an EIR. (*Id*. at 945, 951.)

in the 2005 EIR's analysis. But after certifying the 2005 EIR for the 2020 LRDP, The Regents never conducted subsequent environmental review of the excess increase above 1,650 students that occurred between 2005 and 2018.

The Regents' construction of this statute is also inconsistent with long-standing CEQA principles governing what constitutes a CEQA "project." "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo, supra,* 71 Cal.App.3d at 192–193.) The term "project" is broadly construed to ensure that environmental review under CEQA includes all components of the activity that may harm the environment, to avoid "the fallacy of division," which is "overlooking [a project's] cumulative impact by separately focusing on isolated parts of the whole." (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1144.) Environmental considerations may not be submerged by chopping a single CEQA project into smaller parts for piecemeal assessment. (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283–284.) Rather, "the whole of an action" or the entire activity for which the approvals are being sought must be considered by the agency. (Guidelines § 15378(a), (c).) Also, EIRs must evaluate the environmental impacts of reasonably foreseeable future activities associated with the project where these activities may contribute to significant environmental effects. (*Laurel Heights I, supra,* 47 Cal.3d at 395-396.)

The Regents' construction of section 21080.09 imputes to the Legislature an intent to require that an LRDP EIR evaluate the significance of impacts caused by its projected enrollment increases, but not consider such projected enrollment increases to be "part" of the LRDP "project" or a

reasonably foreseeable future activity, and to exempt subsequent additional enrollment increases from subsequent CEQA review! This is inconsistent with the case law cited above, which was well-established before the Legislature adopted section 21080.09 in 1989. Thus, The Regents' view violates the principle that courts "presume the Legislature was aware of existing judicial decisions directly bearing on the legislation it enacted" and "do not presume it meant to overthrow long-established principles of law, unless such an intention is clearly expressed or necessarily implied." (*Leider v. Lewis*, *supra*, 2 Cal.5th at 1135; *Big Creek Lumber v. County of Santa Cruz* (2006) 38 Cal.4th 1139.)

The Regents' construction of section 21080.09 is also inconsistent with decades of CEQA case law after 1989. CEQA's conception of the term "project" remains broad (*Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 653) to maximize protection of the environment (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730). "This big picture approach to the definition of a project (i.e., including "the whole of an action") prevents a proponent or a public agency from avoiding CEQA requirements by dividing a project into smaller components which, when considered separately, may not have a significant environmental effect." (*Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 270–271.).

Under CEQA, a "program" may be a "CEQA Project." (*Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 195; CEQA Guidelines, section 15168.) Here, The Regents are carrying out a *program* of increasing student enrollment above the 1,650 student increase disclosed in the 2005 EIR. (AA 351-359; AA 146 ["At this time, UC Berkeley estimates an overall campus population headcount

growth of about 1.5 percent annually, on an average, in the near-term"].) CEQA section 21080.09 contemplates that The Regents will make long-term programmatic decisions regarding enrollment and analyze these decisions using programmatic EIRs or analyses "tiered" to a programmatic EIR. (CEQA § 21080.09, subds. (b), (d).)

CEQA applies to "discretionary projects" as defined in CEQA Guidelines, section 15357. "Project" includes "an activity directly undertaken by any public agency" that "has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Guidelines, § 15378.) Here, The Regents pattern and practice of increasing student enrollment is "an activity directly undertaken by any public agency." It also "has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."

The Regents' decision to increase enrollment at UCB is also "discretionary" because The Regents had to "use its judgment in deciding whether and how to carry out or approve" its 2020 LRDP project. (Guidelines, § § 15002(i); 15357; see *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 273 (*Friends of Westwood*). In contrast, "[T]he term 'ministerial' is limited to those *approvals which can be legally compelled* without substantial modification or change." (*Friends of Westwood, supra,* 191 Cal.App.3d at p. 269 (emphasis added).) Since The Regents are not legally compelled to increase enrollment, The Regents decisions to increase student enrollment are discretionary.

The Regents do not, and cannot, contest the allegation that the 2020 LRDP is a "CEQA project" because The Regents certified the 2005 EIR for the 2020 LRDP pursuant to CEQA. (AA 351 ¶ 3.) Also, the 2020 LRDP is

a 'program' type of CEQA project and the 2005 EIR is a 'program EIR' as defined in CEQA Guidelines, section 15168(a)(1). (AA 351 ¶ 4.)

Further, CEQA lists many exemptions. (See e.g., CEQA§§ 21080(b), 21080.01-21080.46.) It is well-settled that additional exemptions from CEQA are not to be implied. (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195.)

Moreover, The Regents interpretation of section 21080.09 violates the cardinal rule that CEQA is "to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Laurel Heights I, supra,* 47 Cal.3d at 390.)

In sum, The Regents' position is foreclosed by section 21080.09, subd. (d), which requires subsequent environmental review of post-LRDP enrollment increases by preparing a new CEQA document "tiered" to the LRDP EIR. After including enrollment increases in the 2020 LRDP/2005 EIR, section 21080.09 allows subsequent CEQA review of further increases to "tier" to the 2005 EIR; but it does not authorize entirely dispensing with subsequent CEQA review.

2. The Regents' current construction of section 21080.09 is contradicted by its legislative history.

Since the text of section 21080.09 is not ambiguous, legislative history is not required. (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 250 Cal.Rptr.3d 818, 825.) However, to the extent this Court may find some ambiguity in the statute, the legislative history strongly supports Appellant's construction of the statute. The court's "primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.)

Enacted in 1989, Senate Bill 896 added section 21080.90 to CEQA. (App RJN, Ex 1, p. RJN 22.) Senate Bill 896 was introduced on March 6, 1989, by Senator Henry J. Mello at the request of the University of California to clarify the application of CEQA to long-range planning for higher education. (App RJN, Ex 1, RJN 8, 144, 163, 196.) Four amendments were made to Senate Bill 896. (App RJN, Ex 1, RJN 10, 13, 15, 17, 23.)[6]

The State Resources Agency's Enrolled Bill Report to the Governor indicates that "the intent behind the bill is solely to avoid a potential argument that changes in student enrollment levels, and any environmental impacts therefrom, must be addressed on a statewide or system-wide basis, rather than at each campus or other location individually," stating:

> The bill is supported by the University of California (U.C. or University) and was apparently introduced to allay U.C. concerns over threatened litigation. The University asserts that the intent behind the bill is solely to avoid a potential argument that changes in student enrollment levels, and any environmental impacts therefrom, must be addressed on a statewide or system-wide basis, rather than at each campus or other location individually. *The University indicates that it does not seek to be excused from the ordinary requirements of CEQA*. Rather, the bill is being sought in order to avoid threatened litigation asserting that in considering increased enrollment at one campus, the University's environmental analysis must consider enrollment in the system as a whole and alternatives such as expansion at other campuses. A matter of concern and sensitivity to communities adjacent to

[6] The Governor signed the bill on September 21, 1989, and it was recorded by the Secretary of State on September 22, 1989, as Chapter 659 of the Statutes of 1989. (App RJN, Ex 1, RJN 22.)

> university campus or medical centers, however, would be the manner in which these enrollment decisions would be made.

(App RJN, Ex 1, RJN 199 (underline in original, italics added).)

The Senate Rules Committee report on the third reading of the bill is in accord with the Resources Agency's Bill Report, stating:

> Existing law requires state and local lead agencies to prepare an environmental impact report under CEQA on any project they propose to carry out or approve which may have a significant effect on the environment unless the project has been exempted from the act.
>
> The Regents of the University of California currently approve Long-range Development Plans and, consistent with existing law, certify environmental impact reports (EIRs) under CEQA. A Long-range Development Plan is the actual physical development and land use plan for a particular campus, and separate EIR is prepared for each such physical plan . There is currently some concern that an argument might be made that the University and the other public higher education segments might be required, in addition, to undertake an EIR under CEQA on a statewide basis.

(App RJN, Ex 1, RJN 163.)

In his letter to Governor Deukmejian urging his approval of Senate Bill 896, Senator Mello summarized the purpose behind the bill as follows:

> SB 896 clarifies the intent of existing law that the appropriate place for environmental review of the impact of academic and enrollment plans under CEQA is a Long Range Development Plan EIR (or in a tiered analysis based upon that EIR) for the particular campus or medical center where the environmental impact actually takes place.

(App RJN, Ex 1, RJN 196.)

These legislative history materials demonstrate that the purpose of

section 21080.09 is not to exempt The Regents from conducting subsequent environmental review of post-LRDP enrollment increases, it is simply to require such review on a campus-by-campus, rather than statewide, basis.

3. The Regents' current construction of section 21080.09 is contradicted by its own prior interpretation.

Respondents' current construction of section 21080.09 is also directly contrary to The Regents' position outlined in the 2005 EIR for the 2020 LRDP that "if the 2020 LRDP is adopted by The Regents, any further increase beyond the maximum stated in the plan would require an amendment of the plan, including CEQA review. " (See AA 575; App RJN Ex 2, RJN 236.) The Regents elaborated on this position as follows:

> The growth in the number of college-age Californians is projected to level off around 2010, and the 2020 LRDP recommends UC Berkeley enrollment stabilize at this point. The writer correctly notes The Regents can direct any campus to absorb more growth if conditions make it necessary to do so. However, if the 2020 LRDP is adopted by The Regents, any further increase beyond the maximum stated in the plan would require an amendment of the plan, including CEQA review.
>
> CEQA expressly provides that the environmental impacts of changes in enrollment levels are to be assessed at the campus level as part of the LRDP process for each campus. See Public Resources Code Section 21080.09(b). The Enrolled Bill Report for the legislation enacting Public Resources Code Section 21080.09 (Senate Bill 896, Mello) clarifies that the intent of the bill was to ensure that CEQA evaluation of student enrollment changes should be addressed at each campus individually as part of the LRDP process, and not on a statewide or systemwide basis. The bill's author stated that the bill "clarifies the intent of existing law that the appropriate

> place for environmental review of the impact of academic and enrollment plans under CEQA is in a Long Range Development Plan EIR...for the particular campus or medical center where the environmental impact actually takes place" and not on a "statewide, systemwide basis." See letter dated September 12, 1989, from State Senator Henry J. Mello to Governor George Deukmejian.

(AA 575; App RJN Ex 2, RJN 236.)

The Regents' previous position is relevant because The Regents are tasked, in the first instance, with interpreting and complying with their legal obligations under CEQA section 21080.09. (*City of San Diego, supra,* 61 Cal.4th at 966 ["while education may be CSU's core function, to avoid or mitigate the environmental effects of its projects is also one of CSU's functions. This is the plain import of CEQA...."], quoting *City of Marina, supra,* 39 Cal.4th at 360 ["the Legislature has commanded that '[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so'"].)

Moreover, while courts determine the meaning of statutes using their independent judgment, The Regents interpretation of a statute it is charged with enforcing is one of "several interpretive tools" that may help a court independently judge the meaning of a statute. (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 951; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 322; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*).)

Thus, The Regents interpretation of their legal obligations under CEQA in 2005 is relevant to the Court's ruling on this appeal. Based on the analysis set forth in this brief, The Regents view of section 21080.09 in

2005 was correct and their current view is incorrect.

a. This Court should grant judicial notice of the document attached to Appellant's Request for Judicial Notice as Exhibit 2.

The Court should grant judicial notice of this document (attached to Appellant's Request for Judicial Notice as Exhibit 2 at RJN 236.) because the Responses to Comments portion of the Final Environmental Impact Report for UC Berkeley's 2020 Long Range Development Plan certified in 2005 is an official act of the executive department of the state of California as described in Evidence Code section 452, subd. (c).

Further, as discussed in the previous section, this document is relevant to the Court's construction of section 21080.09 because it shows that The Regents' admitted—before this litigation—that they have an obligation under CEQA to conduct subsequent environmental review of the excess increases in student enrollment over and above the increase in student enrollment projected in the 2020 LRDP adopted in 2005, yet they deny this obligation in this litigation.

4. The trial court erred by not granting Appellant's ex parte application for judicial notice of The Regents' prior position.

Appellant submitted an ex parte application to the trial court for judicial notice of the excerpt from the 2005 EIR attached to Appellant's Request for Judicial Notice as Exhibit 2 at RJN 236. In this application, Appellant explained that The Regents failed to notify the trial court that they previously shared Plaintiff's view of their legal obligations under section 21080.09, that Plaintiff did not learn of The Regents' previous admission on this point until The Regents disclosed its existence in a new

Draft Supplemental Environmental Impact Report published on February 20, 2019, well after the trial court took the demurrer to the Third Amended Petition under submission on February 4, 2019. (AA 563:7-564:26; 581-582 ¶¶ 2-4, 596) and that Plaintiff would suffer irreparable injury (as provided in CRC 3.1202(c)) because ruling on the demurrer without this evidence would represent a miscarriage of justice. (AA 564:18.)

At that time, the trial court's tentative ruling reflected agreement with The Regents construction of CEQA section 21080.09. (AA 526 ["any discrepancies between the estimated changes in enrollment levels and the actual enrollment levels in subsequent years are not themselves project or program changes that require subsequent CEQA review"].)

Further, Appellant had previously submitted this ex parte application to Judge Roesch, in Department 17 (AA 528), but Judge Roesch dropped the application because the demurrer was pending in Department 24 before Judge Wise (AA 553, 555, 582:9). Appellant then re-filed this application in Department 24 on April 17, 2019. (AA 562.) But Judge Wise never ruled on the application because the case was assigned to Judge Roesch. (RT 4/18/19 16:1-11 [AA 741:1-11].)

B. THE ORDER DENYING PLAINTIFF'S MOTION TO COMPEL IS ERRONEOUS AS A MATTER OF LAW.

Appellant seeks documents from The Regents that evidence its decisions to increase enrollment above the level projected in the 2020 LRDP. (See AA 239-240, Requests 1-6.) These decisions relate to its projection in the 2020 LRDP that UC Berkeley would increase enrollment by 1,650 students, and its later decisions to increase enrollment by more than fives times as much without conducting additional review of the enrollment increases pursuant to CEQA.

Appellant needs these documents to prosecute its claims. The trial

court's order denying the motion prejudices Appellant because it blocks access to documents that constitute the record of the agency's decision-making process, and are therefore, the evidence that Appellant must use to prove its claims and to prepare for trial. (*Union Mut. Life Ins. Co. v. Sup.Ct.* (*Scott*) (1978) 80 Cal.App.3d 1.)

1. The Regents' Objection that the Civil Discovery Act is Not Available to CEQA Litigants is Without Merit.

The Regents argued below that the Civil Discovery Act (Act) does not authorize a CEQA plaintiff who has elected to prepare the record of proceeding to utilize a document request under Code of Civil Procedure section 2031.010 to obtain documents in the possession of the public agency for the purpose of preparing the record. The Regents also argued that, to the extent the Act may be available in a CEQA case, the plaintiff must obtain leave of court *before* propounding document requests. (AA 331-335.)

Both contentions are wrong. The Act authorizes "any party" to conduct discovery in any "pending action" (CCP § 2017.040), which includes civil actions and "special proceedings of a civil nature" (CCP § 2017.020(a)), and "special proceedings" include mandate petitions (CCP §§ 23, 1063 *et seq*.) Moreover, case law has rejected The Regents' contention. (See *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, 713 ["City's contention that discovery is not allowed in a CEQA case is wrong. The CEQA provision that establishes the briefing schedule authorizes the trial court to extend the schedule for 'good cause,' which explicitly includes 'the conduct of discovery.' (§ 21167.4, subd. (c).) This statutory reference to discovery establishes, without ambiguity, that discovery is possible in a CEQA proceeding"].)

The applicable standard for discovery in all civil actions is whether

the discovery is reasonably calculated to lead to the discovery of admissible evidence. (CCP § 2017.040.) In CEQA mandate cases, "admissible" evidence includes the record of proceedings, which includes the documents described in CEQA section 21167.6, subdivision (e). This statute "contemplates that the administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development." (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 8.) Moreover, the Courts have recognized the critical importance of having a complete record of the agency's decision-making proceedings in CEQA cases. (*County of Orange, supra*; *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362.) Here, Appellant's requests for documents are carefully drafted to and likely to lead to the discovery of documents that must be included in the record of proceedings.

The Regents rely on several cases to support their contention that discovery is not available in this case, or if it is, Appellant must obtain prior leave of court before propounding discovery requests, including *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 570, 576 (*Western States*) and *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 102 (*Pomona Valley*). These cases are inapposite because they address efforts by parties in mandate cases to introduce into evidence (*Western States*) or to discover evidence (*Pomona Valley*) that is *outside* the record of proceedings.

Both cases recognize the general rule that the evidence in administrative mandate cases is usually limited to the administrative record, subject to the exceptions listed in Code of Civil Procedure section 1094.5(e). (*Western States, supra,* 9 Cal.4th at 570, 576; *Fort Mojave*

Indian Tribe v. Department of Health Services (1995) 38 Cal.App.4th 1574, 1593-95; Code Civ. Proc. § 1094.5(c).) Also, non-record evidence is admissible to challenge informal agency decisions where there is a dispute of fact. (*Western States*, *supra*, at 576.)

Pomona Valley further recognizes that discovery of *extra-record* evidence must be justified by showing it is reasonably calculated to lead to the discovery of evidence that meets one of the exceptions listed in Code Civ Proc. section 1094.5(e). Therefore, neither case provides authority relating to discovery efforts undertaken—as here—for the purpose of obtaining documents to include in the record of proceedings.

Also, no case holds that a mandate or CEQA plaintiff must obtain prior leave of court to propound discovery. The Regents reliance on *City of Fairfield v. Superior Court* (1975) 14 Ca1.3d 768 is misplaced. This case recognizes that discovery in administrative mandamus cases is available as long as it meets the test that all discovery must meet, i.e., that "such discovery is reasonably calculated to lead to admissible evidence." (Id. at 774–775.) Like *Pomona Valley*, the plaintiff in *City of Fairfield* also sought to obtain discovery of information that was *outside* the administrative record, pursuant to subdivsion (e) of CCP section 1094.5. In this context, the Court held that "This section limits the admission of evidence *additional to the administrative record* to 'relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing....'" (*Id*. (italics added).) Thus, *City of Fairfield* is directed only to evidence *additional to the administrative record*, not to evidence that must be *included in the administrative record*.

Moreover, the rule generally restricting evidence in a mandamus

case to the administrative record is not absolute. Extra-record evidence may be admissible "in traditional mandamus actions challenging ... informal administrative actions if the facts are in dispute." (*Western States, supra*, at 576.) Here, The Regents made *informal* decisions to increase enrollment over and above the 1,650 additional students projected by the 2020 LRDP and disclosed in the 2005 EIR. (AA 351-353 ¶¶ 3-12.)

Also, The Regents' objections based on the general restriction of evidence to the administrative record regarding the merits of a mandamus action do not apply to Appellant's second cause of action for declaratory relief. (*East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1122.)

There are cases where a party has elected to file a request for leave of court to propound discovery. (See e.g., *Consolidated Irrigation District v. City of Selma* (2012) 204 Cal.App.4th 187, 195; *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 1, 4.) But the fact that parties in these cases voluntarily elected to file such a motion does not establish that a motion is required.

Indeed, discovery is common in mandamus cases, including CEQA cases. In *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, the agency prepared a privilege log to support its exclusion from the administrative record of allegedly privileged documents. (Id. at 304.) In that case, the court overruled the agency's deliberative process objections based on the contents of the privilege log. (Id. at 307; see also, *State of California v. Superior Court* (1974) 12 Cal.3d 237, 257 ["to the extent that [requesting party] can justify the interrogatories under that provision [section 1094.5 (e)], the Commission must file answers to them"].)

Another instructive case is *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889 (*Citizens for Ceres*). In that case, the Court held that a City agency could not exclude documents from the administrative record in a CEQA case just by claiming the documents are privileged. The Court held that the agency must make a specific "showing of preliminary facts supporting the privilege." (*Id*. at 898.)

The Court in *Citizens for Ceres* also held that an agency waives the attorney-client privilege when it shares otherwise privileged communications with third parties who do not share a "common interest." (*Id*. at 919.) In order to apply this rule to any given document, the responding party must identify all recipients of allegedly privileged documents, which is information provided by a privilege log. (*Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1130 (*Catalina Island*). The Court in *Catalina Island* also held that where a responding party asserts boilerplate objections based on privilege, the remedy is a court order requiring a privilege log. (Id at 1129–1130.)

Thus, mandamus cases and CEQA cases are no different than other cases when it comes to the procedures by which the right to discovery is exercised and enforced.

2. The Regents' Objection That Appellant Has Not Identified "Disputed Facts" Should Be Overruled.

The Regents object to Appellant's documents requests on grounds that Appellant has not cited any "disputed facts" to which the discovery relates, citing *Digital Music News LLC v. Superior Court* (2014) 226 Cal.App.4th 216, 224, disapproved of on other grounds by *Williams v. Superior Court* (2017) 3 Cal.5th 531. (AA 336.)

The Regents waived this objection by failing to state the objection in their response to Appellant's request for production of documents. (See AA

244-251; *Stadish v. Sup.Ct.* (*Southern Calif. Gas Co.*) (1999) 71 Cal.App.4th 1130, 1141.)

Also, this objection is inapplicable at this stage of the case because, unlike the defendant in *Digital Music News LLC v. Superior Court*, The Regents have not filed an answer. Therefore, The Regents have not identified the facts that are in dispute. (*Id*. at 224 ["The facts of consequence in the New York lawsuit between UMG and Escape may be found in UMG's complaint and Escape's affirmative defenses and counterclaims"].)

In addition, this objection does not generally apply to mandamus causes of action because mandate claims raises issue of law to be decided on undisputed facts in the agency's record of proceedings. (*Western States, supra*, 9 Cal.4th at 570.) However, as noted above, because The Regents made *informal* decisions to increase enrollment over and above the 1,650 additional students projected by the 2020 LRDP and disclosed in the 2005 EIR, extra-record evidence may be admissible to resolve disputed issues of fact. (*Id*. at 575.) But until The Regents produce the documents that will comprise the record of proceedings and file their answer, Appellant cannot know what facts may be disputed.

3. The Regents' Objection That The Requests For Documents Do Not Specify a "Time Period" Should be Overruled.

The Regents' separate statement mentions its objection that the requests are not specific as to "time period," (AA 341-344) though its opposition memorandum does not brief this objection (AA 324).

In any case, each of the six requests is specific as to time. Request 1 seeks documents "prepared in connection with the *preparation* of" the 2020 LRDP while Request 2 seeks documents "prepared in connection with

preparing any environmental document" the 2020 LRDP pursuant to CEQA." Request 3 seeks documents "prepared in connection with the *adoption* of" the 2020 LRDP while Request 4 seeks documents "prepared in connection with the *adoption* of any environmental document" prepared for the 2020 LRDP pursuant to CEQA. (Italics added.) Request 5 seeks documents that "refer or relate to increases in student enrollment at UC Berkeley that were prepared *since the adoption* of" the 2020 LRDP and Request 6 seeks documents "prepared *after certification* of" the 2005 EIR for the 2020 LRDP. (AA 240, 228-229.)

4. The Regents' General Objections 2-10 Should be Overruled Because They are Boilerplate and The Regents Have Not Complied with the Civil Discovery Act.

The Regents' General Objections 2 though 10 fail to explain how they apply to the document requests. (AA 246-247.) Also, The Regents' response fails to "Identify with particularity any document ... or electronically stored information falling within any category of item in the demand to which an objection is being made" as required by Cal. Code Civ. Proc., section 2031.240(b)(1).

General Objection 4, based on assertion of privilege, fails to include a privilege log as required by Cal. Code Civ. Proc., section 2031.240(c)(1), (2). General Objection 7, based on lack of "particularity" response does not explain why any request lacks "particularity." General Objection 8, that Appellant already possesses or has access to requested documents, is invalid. Appellant provided The Regents with a provisional index of the record of proceedings, showing which documents Appellant was able to download from UC's web site that should be in the record. (AA 232 ¶ 11; 266-268.) The Regents have not produced responsive documents that Appellant does not possess or does not have access to.

General Objection 10, based on needing more time, is not valid because The Regents never asked for an extension of time to produce the requested documents and they still have not produced the requested documents.

5. The Regents' Specific Objection to Requests 1-6 Based on Privilege Should be Overruled Because The Objection is Boilerplate and The Regents Have Not Complied with the Civil Discovery Act.

The Regents's objections to the document requests on grounds of privilege are insufficient. Code of Civil Procedure, section 2031.240, subdivision (c), requires that privilege or work product objections must "provide sufficient factual information for other parties to evaluate the merits of that claim [of privilege], including, if necessary, a privilege log." (*Catalina Island, supra*.) The Regents' failed to comply with this requirement.

6. The Regents' objections to the legal sufficiency of Plaintiff's CEQA claim is without merit.

The Regents contended below, in opposition to Appellant's motion to compel production of documents, that Appellant's first request for production of documents is improper because Appellant does not allege a valid CEQA cause of action. The Regents argued that: (1) enrollment plans are not part of the 2020 LRDP CEQA project and annual enrollment increases are not "CEQA projects;" (2) Appellant does not allege noncompliance with CEQA's standards that trigger subsequent environmental review; (3) Appellant's CEQA claim is barred by the statute of limitations; (4) Appellant's CEQA claims are moot. (AA 330-337.) The Regents also made these arguments in their demurrer to the Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief (Second Amended Petition) (AA 119-129) and later in their demurrer

to the Third Amended Petition (AA 404-419.) At the hearing on Appellant's motion to compel, the trial court expressed concerns about the validity of Appellant's CEQA claim, implying that this is the reason the trial court denied the motion to compel (RT 12/6/18 3:21-6:1 [AA 661:21-664:1), even though the order denying the motion does not mention these concerns (AA 397).

Appellant anticipates The Regents will make these arguments in opposition to this appeal. Therefore, Appellant addresses them here.

a. The Third Amended Petition alleges a legally sufficient CEQA claim.

The trial court sustained The Regents demurrer to the Second Amended Petition with leave to amend to "clearly identify the project that is being challenged in this action, as well as the date the discretionary approval for that project was granted and when that project was commenced." (AA 348.)

In response to this order, the Third Amended Petition identifies The Regents' CEQA project as the 2020 Long Range Development Plan (2020 LRDP) that The Regents adopted in 2005 and commenced in 2005. (AA 351 ¶¶ 3-5.) The Third Amended Petition also describes the nature of Appellant's CEQA claim. The 2020 LRDP included, as a project component, a plan to increase student enrollment by 1,650 students during the 15 year life of the 2020 LRDP. (AA 351 ¶ 5.) Appellant's legal claim under CEQA is that The Regents made a decision or decisions to increase student enrollment over the 1,650 student increase projected in the 2020 LRDP and 2005 EIR but failed to subject these project changes to environmental review under CEQA. (AA 351-354 ¶¶ 5-7, 357 ¶ 31.)

This is the same type of CEQA claim that plaintiffs alleged in *Concerned Citizens, supra,* 42 Cal.3d 929, 934, 936–937, and *Ventura*

Foothill Neighbors v. County of Ventura (2014) 232 Cal.App.4th 429, 435 (*Ventura Foothill Neighbors*).

Appellant demonstrates the legal sufficiency of its CEQA claim in section IV.A above.

b. The Regents' argument that Appellant cannot prove, on the facts, that CEQA's standards for subsequent review are triggered is premature.

To the extent The Regents argue that its obligation to conduct additional CEQA review of changes in enrollment will be judged by the standards for subsequent review provided by CEQA section 21166 rather than CEQA section 21151, the argument is premature. This distinction requires that the Court determine if the EIR "retains some informational value." (*Friends of College I*, *supra*, 1 Cal.5th at 945, 951.) But the 2005 EIR was not before the trial court and is not before this Court.

To the extent The Regents argue that the facts of this case do not meet the standards in section 21166, the argument is premature because the action was dismissed on a demurrer, and Appellant has not had the opportunity to prove its claims with either record or non-record evidence.

c. The Third Amended Petition Sufficiently Alleges Compliance with CEQA's Statute of Limitations.

Appellant's CEQA claim arises from The Regents' decision or decisions to substantially increase student enrollment over the 1,650 student increase projected in the 2020 LRDP and 2005 EIR and failure to conduct CEQA review of this change. As noted above, this is the same type of CEQA claim that plaintiff alleged in *Concerned Citizens*, *supra*, and *Ventura Foothill Neighbors*, *supra*. The limitations period for this claim is provided by applying the "discovery rule" to subdivision (a) of CEQA, section 21167, which provides: "180 days from the date of the public

agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project." (*Concerned Citizens, supra,* 42 Cal.3d at 932-33, 936-37, 939.) This is true even where the project commenced more than 180 days before the lawsuit is filed. (See *Concerned Citizens*, *supra*, at 933 [limitations period for a claim that agency substantially changed a project after formal approval but without notice of the change to the public is 180 days after the plaintiff knew or reasonably should have known that the project under way differs substantially from the one described in the initial EIR"]; *Ventura Foothill Neighbors*, *supra*, at 436 "filing of an NOD triggers a 30–day statute of limitations for all CEQA challenges to *the decision announced in the notice*." [citation] ... Because both the NOD and addendum were silent on this issue, a 180–day statute of limitations began to run from May 22, 2008, when respondent's members were informed that the Clinic was going to be 90 feet high"].) Consequently, in the instant case the limitations period is 180 days after Appellant knew or reasonably should have known of substantial increases in student enrollment above the 1,650 student increase disclosed in the 2005 EIR.

Here, The Regents never "formally approved" the increases in enrollment above the 1,650 student increase disclosed in the 2005 EIR, and The Regents do not contend otherwise. (AA 352 ¶¶ 6-7].) Formal action requires formal notice and action by a legislative body. (*Citizens for a Green San Mateo v. San Mateo County Community College Dist.* (2014) 116 Cal.App.4th 1572, 1596 [formal approval occurred upon Board's public action, noticed under Brown Act, approving contract or improvements described in agenda packet linked to contract documents];

Cumming v. City of San Bernardino Redevelopment Agency (2002) 101 Cal.App.4th 1229, 1231-1232 [notice was sufficient to trigger the statute of limitations because there was a noticed public hearing].)

The Petition alleges that Appellant did not know and could not, in the exercise of reasonable diligence, have known of Respondent Regents' and UCB's informal, discretionary decisions to increase student enrollment at UCB above the increase of 1,650 students projected in the 2020 LRDP and disclosed in the 2005 EIR until October 30, 2017...." (AA 353 ¶ 11), i.e., less than 180 days before this action was filed on April 27, 2018. The Supreme Court held this allegation of ultimate fact was sufficient to withstand demurrer in *Concerned Citizens*, where the Court held that when a CEQA plaintiff knew or should have known of substantial project changes is a question of fact that cannot be resolved on demurrer. (*Id*., at 939–40.)

The Regents argue the Court of Appeal decision in *Communities for a Better Environment v. Bay Area Air Quality Management District* (2016) 1 Cal.App.5th 715 (*CBE v BAAQMD*) compels a finding that "The statute of limitations, therefore, required any challenge to UC's alleged adoption of changes to the LRDP in 2007, or any challenge to the alleged adoption of a policy in 2007, to be filed within 180 days of those alleged decisions or if without formal decision, when the project commenced." (AA 409:27.)

The Regents are incorrect because Appellant's CEQA claim is not the same type of CEQA claim the plaintiff alleged in *CBE v BAAQMD*. In that case, plaintiffs challenged the agency's formal decision to approve a project (a permit to refine Bakken crude oil) using the CEQA exemption for ministerial approvals and filed the suit more than more than 180 days after the decision and more than 180 days after the commencement of the project. (*Id*. at 719-720.) The applicable limitations period was subdivision (d) of

section 21167. Plaintiffs argued the "discovery rule" should apply because it had not learned that the permit allowed refining Bakken crude oil until January 2014. *Crucially, plaintiffs in that case did not contend that the agency substantially changed the project after its formal approval without public notice of the change.* (*Id*. at 723.)

The chronology of events in *CBE v. BAAQMD* is important. In July of 2013, upon determining that the project was "ministerial" and not subject to CEQA review, the agency issued an Authority to Construct permit. The agency did not file a Notice of Exemption pursuant to CEQA section 21167, subd (d). The agency later modified two conditions of the Authority to Construct: once in October of 2013 to modify emissions-monitoring requirements, and once in December of 2013 to require that the crude oil be transloaded to a different type of tanker truck. Then, in February of 2014, the agency issued a Permit to Operate that incorporated the modified conditions. The plaintiff filed its lawsuit on March 27, 2014.

Unlike *Concerned Citizens*, *Ventura Foothill Neighbors*, or the present case, plaintiffs' CEQA claim in *CBE v. BAAQMD* did not arise from the agency's failure to conduct CEQA review of the changes in the project that were made in October 2013 or December 2013, or from incorporating these changes into the Permit to Operate issued in February of 2014. Instead, plaintiffs' CEQA claim arose from the agency's exemption determination in July of 2013, more than 180 days before plaintiff filed the lawsuit. (*Id*. at 723.)

On these facts, the Court held that the discovery rule does not extend the date on which a limitation period commenced after it has already run under one of the three statutory triggers (i.e., notice of determination, formal approval, or project commencement), all of which provide

constructive notice. (Id. at 723-725.) The Court explained that this result is compelled by the holding in *Concerned Citizens*, stating: "the court determined that an action accrues on the date a plaintiff knew or reasonably should have known of the project only if no statutory triggering date has occurred." (Id. at 724 (italics added).)

Here, none of the statutory triggering dates occurred because the rule applied in *CBE v. BAAQMD* does not apply to the CEQA claim alleged in *Concerned Citizens, Ventura Foothill Neighbors*, or this case, which is that the project substantially changed after its formal approval and without public notice or further CEQA review. As noted above, for this type of claim, the limitations period is 180 days after the plaintiff knew or reasonably should have known that the project under way differs substantially from the one described in the initial EIR." (*Concerned Citizens*, *supra*, at 933.) *CBE v. BAAQMD* did not and cannot change this rule.

Statutes of limitations begin to run when the cause of action "accrues." (Code Civ. Proc. § 312.) A cause of action does not accrue—and the limitations period does not begin to run—until the plaintiff suffers "infliction of appreciable and actual harm." (*Davies v. Krasna* (1975) 14 Cal.3d 502, 513-14.) As the Court noted in *CBE v. BAAQMD*, where the discovery rule applies, "'the limitations period does not accrue until the aggrieved party has notice,' either actual or constructive, 'of the facts constituting the injury.'" (*Id*., 1 Cal.App.5th at 722.) Here, the "facts constituting the injury" are UC's "substantial increases" in enrollment over the 2020 LRDP level without CEQA review.

Here, The Regents October 30, 2017, letter shows that UC Berkeley gradually increased enrollment at UC Berkeley after Spring 2007 and then

dramatically so in the Spring of 2017. The total two-semester enrollment exceeded 1,650 student increase (i.e., 33,450 students) projected in the 2020 LRDP EIR by 947 in Spring of 2008; by 1,346 in Spring of 2009; by 1,969 in Spring of 2010; by 1,848 in Spring of 2011; by 2,141 in Spring of 2012; by 1,895 in Spring of 2013; by 2,305 in Spring of 2014; 3,324 in Spring of 2015; by 3,838 in Spring of 2016; by 5,783 in Spring of 2017; and by 6,652 in Spring of 2017. (AA 364-365.)

The trier of fact in this case must determine when the change in enrollment became "substantial" and when Appellant discovered or should have discovered the substantial change. Both of these determinations require proof of facts, and cannot be made by ruling on a demurrer.

If additional allegations regarding Appellant's diligence are required, Appellant requested leave to amend to allege that "After Respondent Regents adopted the 2020 LRDP in 2005, Appellant exercised reasonable diligence in discovering that Respondent Regents' changed the 2020 LRDP by substantially increasing student enrollment at UCB above the increase of 1,650 students projected in the 2020 LRDP and disclosed in the 2005 EIR." (AA 445:5.) If additional *evidentiary* allegations regarding Appellant's diligence are required, Appellant requested leave to amend to allege the specific evidentiary facts. (AA 445:9.)[7]

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[7] These requests were supported by the Declaration of Phillip Bokovoy in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief at AA 450-453. This declaration was and is not offered to prove facts, it was and is an offer of proof to show how the Petition could be amended to include more detailed allegations of plaintiff's exercise of reasonable diligence in discovering if and when UC engaged in substantial changes to the LRDP project by substantially increasing enrollment. Mr. Bokovoy's declaration is properly considered for this limited purpose, because on a demurrer the court must allow any amendment that would cure any deficiency in the petition to state a valid

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d. The Third Amended Petition states a valid cause of action for declaratory relief.

Appellant's declaratory relief cause of action is valid and not duplicative of its mandamus cause of action. Declaratory relief under Code of Civil Procedure section 1060 is an appropriate remedy for challenging an agency policy of violating applicable laws. (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal. App. 4th 1547, 1565-1566; *Californians for Native Salmon and Steelhead Association v. Department of Forestry* (1991) 221 Cal. App.3d 1419, 1428-29.) "Declaratory relief is a cumulative remedy (Code Civ. Proc., § 1062), and a proper complaint for declaratory relief cannot be dismissed by the trial court because the plaintiff could have filed another form of action." (*Id*. at 1429.) "Any doubt should be resolved in favor of granting declaratory relief." (*Id*. at 1427.)

Declaratory relief is particularly appropriate when a plaintiff challenges a policy that will likely be repeatedly applied in an unlawful manner. (*Id.* at 1430-1431 ("[p]iecemeal litigation of the issues in scores of individual proceedings would be an immense waste of time and resources."). The existence of a policy can be proved by showing the agency's "pattern and practice" of engaging in specific conduct. (*Id*. at 1424.) Here, The Regents disclosure, on October 30, 2017, of all increases in student enrollment that have occurred since 2007 disclosed its pattern and practice, and thus its policy, of increasing student enrollment.

Appellant's declaratory relief claim is not duplicative of Appellant's mandamus claim because it challenges a policy. Generally, declaratory relief is not appropriate to review a specific administrative decision but is

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cause of action. (See section III.A above.)

appropriate to challenge an illegal agency policy. (*Id*. at 1428-29.) Indeed, The Regents argue in their demurrer that there is no specific administrative decision to increase enrollment above the level set in the 2020 LRDP and therefore, there is no "CEQA project." (AA 418:5.)

Appellant's declaratory relief claim is also not duplicative of Appellant's mandamus claim because it is prospective in effect. (*Kirkwood v. California State Automobile Assn. Inter–Ins. Bureau* (2011) 193 Cal.App.4th 49, 59 ["Declaratory relief operates prospectively, serving to set controversies at rest before obligations are repudiated, rights are invaded or wrongs are committed]; *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403.) The Regents have admitted they intend to continue increasing enrollment by 1.5 percent per year. (AA 146.)

e. Appellant's Causes of Action Are Not Moot.

"[A] trial court must proceed with caution when presented with a mootness claim. Granting the motion results in dismissal and deprivation of the plaintiff's day in court. Judicial consideration of the merits is precluded." (*Davis v. Superior Court* (1985) 169 Cal.App.3d 1054, 1057.)

There are three discretionary exceptions to the rules regarding mootness: (1) when the case presents an issue of broad public interest that is likely to recur; (2) when there may be a recurrence of the controversy between the parties; and (3) when a material question remains for the court's determination. (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479–480.) Appellant's claims are not moot, and even if they were, all of these exceptions apply.

Appellant's CEQA claim is that The Regents' long-term program, currently underway, has substantially changed such that The Regents must

conduct subsequent CEQA review of the program. The Regents argue this claim is moot because many years of increased enrollment have come and gone. (AA 416.) But a case is not moot if the Court can grant effective relief. (*Woodward Park Homeowners Assn. v. Garreks, Inc*. (2000) 77 Cal.App.4th 880, 888.) Here, a court order requiring The Regents to conduct CEQA review of their enrollment increases or prepare an EIR to identify and mitigate the adverse effects of enrollment increases would be effective relief. While some academic years of The Regents program have been completed, the entire program is ongoing. Actions seeking mandamus relief that may ultimately result in additional CEQA review are not mooted by project completion because CEQA review may result in additional mitigation to reduce significant impacts revealed in any mandated CEQA review. (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1626; *Association for a Cleaner Environment v. Yosemite Community College Dist*., (2004) 116 Cal.App.4th 629, 640; *Woodward Park Homeowners Assn. v. Garreks, Inc*., *supra*.)

This case also presents an issue of broad public interest that is likely to recur. The decision in *Californians for Alternatives to Toxics v. California Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069-1070 (*Californians for Alternatives*) is directly applicable. There, petitioners challenged the Department of Pesticide Regulation's annual decision to renew several pesticide registrations for 2002. The trial court found that the petition was moot because the Department's 2003 renewal of the pesticides effectively replaced, and thus mooted, any legal challenge to the previous year's renewal decision. The Court of Appeal reversed, finding that "the timing of renewals creates an impossible burden for those seeking to challenge the Department's decisions. The annual

nature of the pesticide renewal program virtually ensures that litigation seeking mandamus relief against a registration renewal will not be resolved before the next annual renewal occurs." (*Id.* at 1069; accord, *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 524, fn. 1.)

Californians for Alternatives requires rejecting The Regents' attempt to frame Appellant's CEQA claim as individual challenges to a series of annual enrollment increases where the harm caused by each annual enrollment ends when the year ends. This view is not realistic, because UC Berkeley is permanent and its students have ongoing impacts on the City's quality of life and environment. Chopping UC Berkeley's long-term program of enrolling students into a number of separate individual years commits the "fallacy of division" that California courts have consistently rejected. (See section IV.A.1, above.)

V. CONCLUSION

The Superior Court erred as a matter of law when it dismissed the action and denied Appellant's motion to compel. These orders should be reversed.

Date: October 9, 2019 LAW OFFICES OF THOMAS N. LIPPE, APC

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WORD COUNT CERTIFICATION

I, Thomas N. Lippe, counsel for Appellant's, hereby certify that the word count of this Petition is 13,556 words according to the word processing program (i.e., Corel Wordperfect) used to prepare the brief.

Dated: October 9, 2019 LAW OFFICES OF THOMAS N. LIPPE, APC

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