No. S251709

In the Supreme Court of the State of California

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al.,
Plaintiffs and Appellants,

v.

STANISLAUS COUNTY et al.,
Defendants and Respondents.

After a Decision by the Court of Appeal,
Fifth Appellate District, Case No. F073634

Appeal from the Stanislaus County Superior Court
Case No. 2006153
The Honorable Roger M. Beauchesne, Judge, Presiding

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS STANISLAUS COUNTY, ET AL.; AMICUS CURIAE BRIEF OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION

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APPLICATION

Pursuant to Rule 8.520(f)(1) of the California Rules of Court, proposed *Amicus Curiae* California Building Industry Association ("CBIA") respectfully requests permission from the Chief Justice to file a single *amicus curiae* brief in support of Defendants and Respondents Stanislaus County, *et al.* Pursuant to Rule 8.520(f)(5) of the California Rules of Court, the proposed *amicus curiae* brief is combined with this Application. As of the date of this filing, the deadline for the final reply brief on the merits was April 11, 2019. Accordingly, under Rule 8.520(f)(2), this application and brief are timely.

1. Background and Interest of California Building Industry Association

CBIA is a statewide nonprofit trade association comprising approximately 3,000 members involved in the residential development industry. CBIA and member companies directly employ over one hundred thousand people. CBIA is a recognized voice for all aspects of homebuilding, including land use and environmental professionals, general and specialty contractors, lenders, sales agents, and project designers. As such, CBIA has a strong interest in the Supreme Court's decision in this case, which has the potential to dramatically affect the expense and time required to entitle and construct desperately needed new housing in the State of California.

2. How the Proposed *Amicus Curiae* Brief Will Assist the Court

CBIA seeks to provide important legal and factual background on the history and scope of CEQA's non-applicability to ministerial acts, as well as on the State Legislature's recognition that more, rather than less, ministerial permitting is essential to meet the State of California's housing and climate change goals. The proposed *amicus curiae* brief will provide an appropriate context through which the Supreme Court can consider whether to endorse a rule that would effectively compel discretionary review for enormous numbers of projects that are subject to building permits and similar standard ministerial processes. With this background, CBIA also seeks to provide points and authorities for the Court's consideration, demonstrating that words alone do not render a permit process subject to CEQA, and that an entire regulatory regime cannot be deemed "facially discretionary" in the absence of specific evidence about how specific permit applications are treated by the permitting agency.

3. Rule 8.520 Disclosure

In accordance with Rule 8.520(f)(4) of the California Rules of Court, CBIA hereby certifies that no party to this case, and no counsel for any party to this case, authored this brief, in whole or in part. Neither did any party to this case or any counsel to any party to this case make any monetary contribution towards or in support of the preparation of this brief.

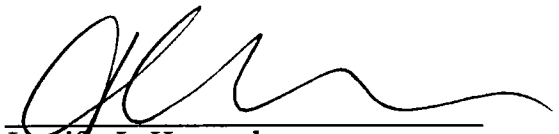
CONCLUSION

On behalf of the California Building Industry Association, we respectfully request that this Court accept the filing of the attached brief.

Dated: May 10, 2019

Respectfully submitted,

HOLLAND & KNIGHT LLP



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AMICUS CURIAE BRIEF

I. INTRODUCTION

Plaintiffs and Appellants Protecting Our Water and Environmental Resources, *et al.*, ("Plaintiffs") ask this Court to hold that Stanislaus County ("County"), which has for decades issued well construction permits on a ministerial basis, must instead conduct cumbersome and futile discretionary review under the California Environmental Quality Act ("CEQA"), Pub. Res. Code § 21000, *et seq.*, for hundreds of permits annually—simply because the word "adequate" is incorporated by reference into the County's permitting ordinance. Plaintiffs' request is deeply inconsistent with CEQA's text, history, Guidelines, and case law.

Although the Supreme Court may have granted review of the Fifth District Court of Appeal's Opinion ("Opinion") in order to resolve a split of authority specifically regarding groundwater well permits, the permits at issue in this case are, as Defendants and Respondents Stanislaus County, *et al.*, ("Defendants") note, "building permits for wells." Defendants' Reply Brief on the Merits ("Reply") at 6. For this among other reasons, the Court's analysis of this issue could profoundly influence other types of building permits—issued in far greater numbers both within the County and elsewhere in the state—in particular, permits to build desperately needed new housing throughout California. *Amicus Curiae* California Building Industry Association ("Amicus" or "CBIA") therefore seeks to provide

important context and legal arguments for the Court's consideration.

Ministerial acts such as issuing building permits have been outside the scope of CEQA since the statute's infancy. California law requires local agencies to comply with CEQA when they make the policy decision to permit a particular use in a particular area. However, once the local agency has made this policy decision, it is up to the local agency to decide whether to conduct further discretionary review when applicants seek to build a development that conforms to the agency's already adopted building and zoning standards. Local governments may choose to allow such permits on a ministerial basis, or may choose to conduct additional discretionary review even over projects that conform to the agency's previously adopted standards.

In recent years, the State Legislature has found and declared that excessive discretionary local review over housing approvals is a key cause of the state's housing crisis. To reverse this trend, the Legislature has begun requiring local governments to begin processing much more housing on a ministerial basis, regardless of whether the local governments might prefer to undertake discretionary review.

It is in this context that Plaintiffs seek a ruling from the Supreme Court that would effectively *compel* local agencies to conduct time-consuming and futile individual discretionary review even when the local agencies have elected to develop streamlined processes intended to be

ministerial. Plaintiffs' request would reverse the clear public policy direction set by the Legislature, and Plaintiffs' arguments are contrary to CEQA.

Plaintiffs claim that a permit process becomes subject to CEQA if a potentially subjective term such as "adequate" is incorporated by reference in a permitting ordinance. If this were true, even everyday routine building permits would be subject to CEQA, since the Uniform Building Code uses language such as "adequate" in numerous places. But the CEQA Guidelines state explicitly that run-of-the-mill building permits are *not* subject to CEQA. Cal. Code Regs., tit. 14, div. 6, Ch. 3 ("CEQA Guidelines"), §§ 15369, 15268(b)(1). Furthermore, case law affirms that words alone do not render a permit process subject to CEQA. Instead, an agency must exercise "substantial," policy-like discretion over an approval before a reviewing court will compel a local agency to conduct CEQA review over an application that the agency considers to be ministerial. Stanislaus County does not exercise this type of discretion over building permits for well construction.

Finally, and independent of the foregoing, Plaintiffs' request for declaratory relief should be rejected. Plaintiffs have not produced any evidence that the allegedly "discretionary" provision in the ordinance is relevant to all or even most of the permits issued by the County. Without such evidence, Plaintiffs have failed to demonstrate that the County

engaged in an unlawful "pattern and practice" that violates CEQA, and so the Opinion erred in granting Plaintiffs' requested relief.

For these reasons, the Supreme Court should reverse the judgment.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus incorporates by reference herein the Statutory Background of and Statement of the Case contained at pages 14-26 of Defendants' Opening Brief on the Merits ("Open. Br.").

III. LEGAL BACKGROUND

A. CEQA, Like NEPA and Similar "Little NEPA" Statutes, Does Not Apply to Ministerial Acts in Which an Agency Is Not Making a Policy Decision But Is Merely Confirming that an Activity Conforms to Previously Adopted Standards.

The process of complying with CEQA is complex, involving multiple steps. Open. Br. at 16-18; see also CEQA Guidelines, Appendix A, "CEQA Process Flow Chart." However, there is a threshold inquiry preceding all of CEQA's steps. To borrow a term from a different area of administrative law, this question could be thought of as "[CEQA] Step Zero – the initial inquiry into whether . . . [CEQA] applies at all." Cf. Cass R. Sunstein, *Chevron* Step Zero, 92 VA. L. REV. 187, 191 (2006) (citing Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 GEO. L.J. 833, 836 (2001)).

Since at least 1973, CEQA has only applied to "discretionary projects," and the Legislature has defined zoning amendments, variances,

conditional use permits, and tentative subdivision map approvals as the statute's examples of "discretionary" projects. Stats. 1972, ch. 1154, § 2.3 (enacting Pub. Res. Code § 21080).[1] At the same time that the Legislature explicitly limited CEQA's scope to "discretionary" projects, it defined "discretionary projects" as distinct from "[m]inisterial projects," to which CEQA does not apply. *Id.* Ministerial acts have been outside of CEQA's scope since the statute's infancy. *Id.*

This same fundamental distinction between discretionary and ministerial acts is reflected in the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, as well as in numerous other states' CEQA-equivalent statutes (referred to as "little NEPAs"). These statutes, like CEQA, only apply to discretionary acts, and not to ministerial activities.[2] CEQA, like NEPA and "little NEPAs" across the country, calls

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[1] Although this list is nonexclusive, "the principle of *ejusdem generis*" applies: "when 'specific words follow general words in a statute or vice versa,' the general words ordinarily are best construed in a manner that underscores their similarity to the specific words." Cal. Cannabis Coal. v. City of Upland (2017) 3 Cal. 5th 924, 939 (quoting Int'l Fed. of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 342). The Legislature's enumerated examples of "discretionary projects" are all legislative or quasi-adjudicatory decisions in which broad public policy discretion is exercised by the local government's legislative body (or a subsidiary policymaking body such a planning commission, subject to appeal to the legislative body). None of the enumerated examples are approvals in which agency staff confirm that an activity complies with previously established standards.

[2] See generally Daniel R. Mandelker, NEPA Law and Litig. § 12:11 (2018); see also, e.g., Alaska Wilderness League v. Jewell (9th Cir. 2015) 788 F.3d 1212, 1225 (quoting Dept. of Transp. v. Public Citizen (2004) 541 U.S.

for environmental review when agencies make policy decisions that may affect the environment but, at the same time, deliberately provides space outside of the scope of the statute in which agencies are permitted to issue approvals that merely confirm that an activity conforms to already adopted standards. See, e.g., CEQA Guidelines, § 15357 (action is not discretionary if an agency "merely has to determine whether there has been conformity with applicable statutes, ordinances, regulations, or other fixed standards").

B. In California, Local Agencies May or May Not Choose to Conduct CEQA-Triggering Discretionary Review, Even Over Housing Developments That Conform to All of the Local Agency's Previously Adopted Objective Zoning and Planning Standards.

In distinguishing between discretionary and ministerial acts, CEQA is much like its sister statutes. However, California's land use and environmental review process is quite different than in other states—not necessarily because of anything in CEQA itself, but rather because of the

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752, 769-70 (NEPA does not apply to nondiscretionary actions "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions"); N.Y. Comp. Codes R. & Regs. tit. 17, § 15.12(g) ["[a]ll ministerial acts" are exempt from the New York State Environmental Quality Review Act]; Ga. Code § 12-16-3 ("activities in which government agency participation is ministerial in nature, involving no exercise of discretion on the part of the government agency" are exempt from the Georgia Environmental Policy Act); Loveless v. Yantis (Wash. 1973) 513 P.2d 1023, 1029 (only a "discretionary act" that is "not mandatory" is subject to Washington's State Environmental Policy Act); Umberger v. Dept. of Land and Natural Resources (Haw. 2017) 403 P.3d 277, 303 (Hawaii Environmental Policy Act only applies to discretionary acts "as distinguished from a ministerial consent").

choices local agencies in California may make about how to design their own permitting processes.

For example, in New York City, the New York State Environmental Quality Act ("SEQRA"), N.Y. Envtl. Conserv. Law § 8-0101, *et seq.*, applies whenever the New York City Planning Commission and City Council make a discretionary legislative decision to rezone part of the city to establish new rules governing development. Before New York City can authorize new development in this manner, the city must first comply with all of SEQRA's environmental review requirements. But once the city has made the policy decision to allow development of a certain size and scope to occur in a particular area, New York City generally does not require *further* SEQRA-triggering review of individual building permits that merely seek to build a development that conforms to the city's already-adopted standards.[3]

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[3] See, e.g., New York City Planning Department, "Glossary of Planning Terms," available at https://www1.nyc.gov/site/planning/zoning/glossary.page ("An as-of-right development complies with all applicable zoning regulations and does not require any discretionary action by the City Planning Commission or Board of Standards and Appeals. Most developments and enlargements in the city are as-of-right"); see also Matter of Neville v. Koch (N.Y. 1992) 593 N.E.2d 256, 260 ("A mainstay of New York City's policy for zoning unimproved land is as-of-right development. What is contemplated by this policy is that, so long as the proposed use is one of the 'Uses Permitted As of Right' in the City's Zoning Resolution, a developer who also satisfies the Building Code can simply file its architectural plans with the Department of Buildings and begin construction upon issuance of a building permit. The advantage of as-of right development is

In California, CEQA similarly applies when a county or city chooses to adopt or revise rules governing where, and under what circumstances, groundwater wells or housing developments are permitted to occur. But once this policy decision is made, a local agency can choose whether or not it wishes, through its own procedures, to conduct further discretionary review over projects that conform to the standards the agency previously established. "[T]he application of CEQA to a local ordinance is dependent upon the scope and interpretation of the ordinance rather than vice versa." Friends of Davis v. City of Davis (2000) 83 Cal. App. 4th 1004, 1014-15; see also CEQA Guidelines, § 15002(i)(2) ("Whether an agency has discretionary or ministerial controls over a project depends on the authority granted by the law providing the controls over the activity.").

California law permits California agencies to follow the approach of New York City. Indeed, CEQA even *presumes* that building permits are ministerial if the local agency declines to adopt a discretionary process to review such permits. Guidelines, § 15258(b)(1), 15369. CEQA applies with full force when the agency decides *whether* to allow a certain use on an "as of right" or ministerial basis, but once this decision has been made, CEQA has no further applicability to activities over which the local agency

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predictability: development can proceed 'in accordance with pre-set regulation rather than with case-by-case exercise of discretion by officials'" (citations omitted).).

has declined to exercise substantial discretion. See, e.g., San Diego Citizenry Grp. v. Cty. of San Diego (2013) 219 Cal. App. 4th 1, 5-10 (affirming Environmental Impact Report which analyzed the impacts of San Diego County's decision to amend its zoning ordinance to permit certain wineries on an "as of right" basis, after which such uses would lawfully occur without further CEQA review).

Stanislaus County similarly has decided to issue building permits for well construction on a ministerial basis, has restricted the scope of its review to confirming that the activity complies with previously adopted standards, and has refrained from requiring a discretionary use permit for such activities. Open. Br. 18-21. In this context, it is critically important to recognize that, although an agency must exercise some appreciable discretion when determining whether an action conforms to the requirements of the zoning and building code, this level of discretion does not trigger CEQA because it is not the type of "substantial discretion" to which CEQA is intended to apply. Prentiss v. City of South Pasadena (1993) 15 Cal. App. 4th 85, 91; see also San Diego Navy Broadway Complex Coal. v. City of San Diego (2010) 185 Cal. App. 4th 924, 933-34 (to trigger CEQA, "the discretion must be of a certain kind," namely the authority to deny or condition approval in a manner "which would mitigate the environmental damage in a significant way").

Some jurisdictions in California have chosen to require discretionary

approvals, such as use permits, even for activities that conform to all objective criteria in the jurisdiction's zoning and building codes.[4] For example, the cities of San Jose, San Francisco, Oakland, Redwood City, Palo Alto, Long Beach, Pasadena and Santa Monica all impose discretionary review processes on any residential developments of five or more units, even if the developments otherwise conform to the objective requirements of the city's zoning ordinance and building code.[5] Except where constrained by the Legislature, the policy decision to adopt an additional, duplicative review process is left to the local agency. However, like many other California counties and cities, Stanislaus County has deliberately refrained from requiring this type of discretionary use permit

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[4] Christopher S. Elmendorf, Beyond the Double Veto: Land Use Plans as Preemptive Intergovernmental Compacts, 71 HASTINGS L. J. (forthcoming 2019) (manuscript at 9) (available at https://ssrn.com/abstract=3256857) ("[W]hile the original theory of zoning presupposed that conforming projects would be approved as of right, development permitting in the high-cost states has become thoroughly discretionary, requiring project-by-project negotiations over design, scale, public benefits, affordable housing set asides, and so much more"); Moira O'Neill et al., Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates, 25 HASTINGS ENVTL. L. J. 1, 9-11 (2019) (reviewing common processes local jurisdictions use to require discretionary review over projects that conform to objective zoning and building code requirements).

[5] O'Neill et al., *supra* note 4, at 49 (Bay Area cities); Moira O'Neill et al., Examining the Local Land Use Entitlement Process in California to Inform Policy and Process 4-5 (Berkley Law Ctr. for Law, Energy & Envt. et al., Working Paper No. 2, May 2019), https://www.law.berkeley.edu/wp-content/uploads/2019/02/Examining-the-Local-Land-Use-Entitlement-Process-in-California.pdf (Southern California cities).

for well construction, and has instead decided to require only a ministerial building permit. Open. Br. 18-21.

C. Local Agencies' Excessive and Redundant Discretionary Review of Housing Approvals is a Key Cause of California's Affordable Housing Supply Crisis, and the California Legislature Has Required Local Governments to Begin Processing More Housing on a Ministerial Basis in Order to Meet the State's Housing and Climate Change Goals.

The Legislature has found and declared that "California has a housing supply and affordability crisis of historic proportions," the consequences of which "are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives." Gov. Code § 65589.5(a)(2)(A). Having long recognized that the "excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing," the Legislature has, for decades, been pursuing a statewide policy of "meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects." Gov. Code § 65589.5(a)(1)(B), (a)(2)(K).

Where local agencies have chosen to subject zoning-conformant

housing developments to discretionary review, "[l]ocal governments and neighborhood NIMBYs[6] use this discretion to kill projects they dislike, and though some projects make it through, the delays and uncertainties can be very costly."[7] The State Legislature has recognized that California cannot meet its housing and climate change goals if this type of process continues to govern housing development statewide. Accordingly, the Legislature has begun *prescribing* ministerial permitting processes upon local governments.

For example, effective in 2005, the Legislature revised the State's Housing Element Law to push local governments to make actual, rather than merely theoretical, progress towards meeting their own adopted plans for housing production. Assem. Bill 2348, Stats. 2004, ch. 724, §§ 1 (revising Gov. Code § 65583), 3 (enacting Gov. Code § 65583.2). The revised Housing Element Law requires local governments that have failed to plan to accommodate their regional housing goals to ensure that some housing development be permitted "of right," without requiring a conditional use permit or triggering CEQA review. Gov. Code §§ 65583(c)(1)(A), 65583.2(h)-(i). Under the revised law, CEQA would apply to the local agency's discretionary policy decision to adopt a zoning amendment that complies with this requirement by allowing housing to

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[6] "Not In My Back Yard" advocates.
[7] Elmendorf, *supra* note 4, at 9.

occur "of right." See San Diego Citizenry Grp., 219 Cal. App. 4th at 5-10. In enacting Government Code section 65583.2(h), however, the Legislature considered it critical that subsequent housing approvals themselves must occur on a "by right" basis, without triggering CEQA's requirements.

More recently, the Legislature adopted Senate Bill 35 of 2017 ("SB 35"), Stats. 2017, ch. 366 (enacting Gov. Code § 65913.4). This law provides that in jurisdictions that fail to permit their required quota of lower-income housing, local governments cannot require a discretionary use permit, and must issue ministerial, CEQA-exempt approvals to lower-income housing developments that meet the agency's objective zoning and planning standards and other specified criteria. Gov. Code § 65913.4(a), (k). For projects that meet SB 35's criteria, local governments must provide a ministerial permit pathway if an applicant seeks to build a development that conforms to the agency's previously adopted planning and zoning standards. Gov. Code § 65913.4(a)(5). SB 35 "advances an important principle: that local governments' prerogative to use cumbersome, discretionary development procedures is conditional on their producing the amount of new housing . . . that the state expects of them."[8] If a local government is not meeting its regional housing goals, State law requires the local government to accept ministerial permitting, even if the

[8] Elmendorf, *supra* note 4, at 48.

local government would prefer to conduct discretionary review.

D. If Accepted, the Opinion's View of "Discretionary" Decision-Making Would Have Dramatic Negative Consequences Upon Housing Production Statewide, and It Would Conflict with the Legislature's Clear Direction that More, Rather than Less, Ministerial Permitting Is Required to Meet California's Housing and Climate Change Goals.

Amicus provides the foregoing legal background to inform the context in which the Supreme Court decides how CEQA applies to activities that local agencies have decided to allow on a ministerial basis. At a time when the State Legislature has directed that local governments must issue ministerial permits even when they prefer to exercise discretionary review, Plaintiffs ask the Supreme Court to endorse a rule that would dramatically shift the land use permitting process in the opposite direction.

The Opinion's holding, and Plaintiffs' arguments, would effectively *compel* local agencies to conduct discretionary review even over projects that the local agencies consider to be ministerial, despite the fact that the relevant local regulations do not grant the local government any "substantial discretion" to mitigate a project's environmental effects. Not only would the Legislature's recent progress towards meeting the State's housing and climate change goals be thwarted—the pendulum would swing in the opposite direction.

As set forth *infra*, CEQA does not compel this result. Indeed,

CEQA does not even permit it.

IV. ARGUMENT

A. The Supreme Court Should Affirm the Well-Established Authority Holding that Words Alone Do Not Render a Permit Process Subject to CEQA, and that CEQA Only Applies to the Extent an Agency Exercises "Substantial Discretion" over an Approval.

The Opinion purports to recognize the principle that an ordinary building permit is presumptively a ministerial act. Opinion 9-11. Plaintiffs also do not dispute—because they cannot dispute—that an ordinary building permit is ministerial and, thus, not subject to CEQA review. This principle is firmly established in the CEQA Guidelines and the case law. See, e.g., Friends of Juana Briones House v. City of Palo Alto (2010) 190 Cal. App. 4th 286, 302 (permits issued "for a project meeting the criteria of the applicable zoning ordinance and Uniform Building Code" are ordinarily ministerial); Prentiss v. City of South Pasadena (1993) 15 Cal. App. 4th 85, 89-91 (same); see also Friends of Westwood, Inc. v. City of Los Angeles (1987) 191 Cal. App. 3d 259, 277 (finding a particular, anomalous Los Angeles permit approval to be discretionary while affirming that "[r]un-of-the mill building permits are 'ministerial' actions not requiring compliance with CEQA"). But there is no way to reconcile the Opinion's analysis, or Plaintiffs' arguments, with the undisputed rule that an every-day building permit is not subject to CEQA.

The Opinion concludes that an approval becomes discretionary if the

relevant regulations contain—or even incorporate by reference—any potentially subjective words such as the word "adequate." Opinion at 13. The Opinion states that the discretionary nature of the approval inheres in the word "adequate" alone. Id. ("[d]etermining whether a particular spacing is 'adequate' *inherently* involves subjective judgment" sufficient to trigger CEQA) (emphasis added). Neither the Opinion nor Plaintiffs cite any specific evidence showing that Stanislaus County officials exercised broad, environmentally-impactful discretion when issuing or conditioning any particular permit or any set of permits. Instead, Plaintiffs submit only the words alone as sufficient to render a groundwater well building permit discretionary and subject to CEQA.

But CEQA explicitly recognizes that a "building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee." CEQA Guidelines, § 15369; see also Guidelines, § 15268(b)(1) (ordinary building permit presumed to be ministerial). When determining whether a building meets the "strength requirements of the Uniform Building Code," building officials must apply numerous provisions with the same type of subjective language that Plaintiffs contend automatically converts a permit approval into a discretionary act. The California Building Code uses the term

"adequate" not once, but hundreds of times.[9] If the word "adequate" rendered a permit approval discretionary, then even run-of-the-mill building permits would be subject to CEQA. Yet CEQA states explicitly that they are not. CEQA Guidelines, §§ 15369, 15268(b)(1).

CEQA recognizes that an ordinary building permit is ministerial despite the fact that there is, inevitably, some appreciable level of discretion involved in determining whether a development conforms to the Uniform Building Code. Some provisions in the Building Code even give building

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[9] See, e.g., Title 24, Cal. Code Regs., California Building Code §§ 909.13 ("Tubing shall be flushed clean and dry prior to final connections and shall be adequately supported and protected from damage."); 1604.3 ("Structural systems and members thereof shall be designed to have adequate stiffness to limit deflections and lateral drift."); 1607.14 ("Interior walls and partitions that exceed 6 feet (1829 mm) in height, including their finish materials, shall have an adequate strength and stiffness to resist the loads to which they are subjected but not less than a horizontal load of 5 psf (0.240 kN/m2)."); 1609.4 ("For each wind direction considered, an exposure category that adequately reflects the characteristics of ground surface irregularities shall be determined for the site at which the building or structure is to be constructed."); 1803.1.1.1 ("The report shall be based upon adequate test borings or excavations, of every subdivision, where a tentative and final map is required pursuant to Section 66426 of the Government Code."); 1806.2 ("A presumptive load-bearing capacity shall be permitted to be used where the building official deems the load-bearing capacity of mud, organic silt or unprepared fill is adequate for the support of lightweight or temporary structures."); 1810.4.7 ("Where a cased shaft is used, the shaft shall be adequately reinforced to resist column action or the annular space around the shaft shall be filled sufficiently to reestablish lateral support by the soil."); 3302 ("Where such required [construction safeguards] are being altered or repaired adequate substitute provisions shall be made."); 3304.1.2 ("Existing footings or foundations that can be affected by any excavation shall be underpinned adequately or otherwise protected against settlement and shall be protected against lateral movement.").

officials limited discretion to shape the project in ways that could relate to environmental effects. For example, when confirming compliance with the Building Code, a building official has authority to determine whether a slope is "adequately protected against erosion" (Title 24, Cal. Code Regs. § J106.1), to require methods he or she deems adequate to protect foundation elements from soil constituents, changing water levels or other factors (Title 24, Cal. Code Regs. § 1810.3.2.5), and to determine whether a residential building lot has an "adequate building area outside the floodway" (Title 24, Cal. Code Regs. § G301.2). And yet, confirming compliance with the Uniform Building Code is not a CEQA-triggering act. CEQA Guidelines, §§ 15369, 15268(b)(1).

Even the most ministerial of procedures give officials *some* level of discretion in determining whether, and how, to approve a project. See Johnson v. State (1968) 69 Cal. 2d 782, 788. Recognizing this, the case law does not require CEQA compliance unless the discretion the agency exercises rises to the level of "substantial discretion." Prentiss, 15 Cal. App. 4th at 91. Furthermore, "the discretion must be of a certain kind," namely the authority to deny or condition approval in a manner "which would mitigate the environmental damage in a *significant* way." San Diego Navy, 185 Cal. App. 4th at 933-34 (emphasis added). Courts have applied CEQA when local agencies have exercised broad, policy-like discretion over approvals. But courts have refused to apply CEQA when, as here, an

agency merely confirms compliance with existing standards—even if those standards contain some potentially subjective language.

In Friends of Westwood, a particular permit triggered CEQA not because the permitting ordinance contained subjective terms, but rather because officials had wide latitude to modify, waive or add completely new standards and conditions to the project. Friends of Westwood, 191 Cal. App. 3d at 280 ("when that discretion is exercised several times . . . with substantial potential effects on the environment the process moves from a ministerial to discretionary decision"). Similarly, in People v. Department of Housing & Community Development ("Department of Housing") (1975) 45 Cal. App. 3d 185, 193, CEQA applied because the agency could "issue a conditional permit which prescribes ongoing conditions on use or occupancy" instead of an unqualified construction permit. As the Court of Appeal explained in Sierra Club v. County of Sonoma ("County of Sonoma") (2017) 11 Cal. App. 5th 11, 21, the Department of Housing decision turned in part on "a provision in the act that permitted a conditional permit" with "relatively broad, relatively general" standards allowing the agency to prescribe ongoing conditions for use or occupancy. In Friends of Westwood and Department of Housing, the agencies wielded broad discretion comparable to the type of policy judgment, discussed in Part III-B, *supra,* that local governments exercise when deciding whether to issue a use permit.

In contrast, when an agency merely confirms an activity's conformance with previously adopted standards, this is insufficient to trigger CEQA, even if there is some subjective language in the standards the agency applies. In County of Sonoma, CEQA did not apply to a permitting ordinance—despite the fact that it used terms such as "practicable" and "wherever possible"—because that ordinance consisted primarily of technical standards and did not confer "meaningful" discretion. Id. at 29-30. The County of Sonoma court distinguished Friends of Westwood and other "older decisions" which do not control when an agency's discretion is "confined by a series of finely detailed and very specific regulations," which are highly "technical," "covering a wide range of circumstances and prescribing specific measures to address them." County of Sonoma, 11 Cal. App. 5th at 28-29.

Similarly, in Sierra Club v. Napa County Board of Supervisors ("Napa County") (2012) 205 Cal. App. 4th 162, 177 n.11, the court held a determination was ministerial even though the regulation authorized the county to consider whether a project would be "suitable" and would "adversely affect" a public utility easement. Finally, and very recently, this Court denied requests to review or depublish McCorkle Eastside Neighborhood Group v. City of St. Helena ("McCorkle") (2018) 31 Cal. App. 5th 80, 92-93. In McCorkle, the ordinance at issue (1) empowered the agency to determine whether a project was "appropriate," "applicable,"

"desirable," and "compatible," (2) directly tied this language to considering effects on transportation and traffic, climate protection and land use, and (3) vested the ultimate decision in the agency's discretionary decision-making bodies rather than staff. Id. Nevertheless, because the agency's discretion was constrained to design issues, the approval did not implicate CEQA. Id. at 94. These precedents cannot be reconciled to Plaintiffs' argument that a single subjective standard in a permitting ordinance inherently renders the project subject to CEQA.

The standard at issue in this case is closely akin to the standards at issue in County of Sonoma, Napa County and McCorkle, all of which gave officials some appreciable discretion to shape the project in ways that could affect the environment. County of Sonoma, 11 Cal. App. 5th at 29-30 (stormwater requirements and erosion prevention with the potential to effect surface water quality); Napa County, 205 Cal. App. 4th at 177 n.11 (suitability for onsite sewage disposal addressing a potential source of contamination); McCorkle, 31 Cal. App. 5th at 92-93 (a wide variety of design-review standards had the potential to effect transportation and traffic, climate protection, and land use). However, none of these regimes triggered CEQA review, because the discretion at issue was limited and would not allow the agency to "mitigate any potential environmental impacts in a meaningful way." County of Sonoma, 11 Cal. App. 5th at 28.

Rather than follow this consistent line of cases, the Opinion

concluded that "if a single standard has the public official exercising subjective judgment as to how the project will be carried out the scheme is discretionary and subject to CEQA." Opinion at 15. This extreme view is not the law. See Friends of Westwood, 191 Cal. App. 3d at 280 ("discretion to modify a single . . . standard . . . does not automatically mean the approval process is a 'discretionary project'"). The Supreme Court should take the opportunity to affirm the well-established authority holding that words alone do not render a permit process subject to CEQA.

B. The Supreme Court Should Affirm the Well-Established Authority Holding that an Agency Approval Can Only Be Deemed to be Discretionary Based on Particularized Facts About How That Particular Approval Is Treated or on Specific Facts About the Agency's Pattern and Practice.

Plaintiffs ask this Court to find that the County's regulatory regime is, based on its words alone, *facially* discretionary, and that *all* approvals under the regime are subject to CEQA review. But Plaintiffs have produced no evidence showing that the single standard they criticize as discretionary has actually been applied to most or all of the permits granted under the ordinance. Plaintiffs cite no CEQA precedent in which any court has, without considering a challenge to a specific approval, granted a facial declaratory judgment that all permits issued under a regulation are always discretionary.[10] In fact, under well-established authority, it is only *specific*

[10] As precedent, Plaintiffs rely on a 1926 decision upholding the denial of permits for bank branches. Bank of Italy v. Johnson (1926) 200 Cal. 1, 15.

approvals that can be held to be "discretionary"—and only on the basis of specific facts about how those particular approvals are treated by the agency. The Supreme Court should affirm this authority and hold that, irrespective of any of Plaintiffs' arguments about the "well separation standard," the Opinion erred in granting Plaintiffs' unprecedented request for a facial declaratory judgment that no permits issued under the County's

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In Bank of Italy, the superintendent had extremely broad statutory discretion to render a decision based on his judgment about the "public convenience," and the court merely noted in dicta that the bank superintendent could not refuse to exercise this discretion. Nothing in Bank of Italy alters the fact that the challenged provision of the County's ordinance does not (on its face) apply to certain permits and, for that reason, the County will not apply that standard to many permits. See Reply 33-35.

Plaintiffs also cite Valley Advocates v. City of Fresno (2008) 160 Cal. App. 4th 1039, 1063, for the proposition that a prejudicial abuse of discretion occurs when an agency does not exercise its discretionary authority. In Valley Advocates, the city believed that its prior decision to exclude a property from its local register of historical resources controlled the question of whether the building was a historic resource for the purpose of CEQA. The court found that the city was "misinformed about the legal effect of its prior denial of the listing application" and that a prejudicial abuse of discretion occurred when the city believed itself to be bound by its prior decision. Id. at 1062-63. This case is inapposite to the issues before this Court. Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal. 4th 1086, 1103 and Muzzy Ranch Co. v. Solano County Airport Land Use Commission (2007) 41 Cal. 4th 372, 386, both describe detailed procedural requirements that apply when an action is categorically exempt from CEQA, which do not apply when an action is outside of CEQA's scope by statute. Venice Town Council, Inc. v. City of Los Angeles (1996) 47 Cal. App. 4th 1547, 1566. concerned an interpretation of the Mello Act—not a CEQA decision—and the petitioners in that case "alleged violations in numerous individual permit applications" as evidence of a much broader problem with the city's interpretation of the statute.

ordinance could ever be ministerial.

Whether a particular activity is ministerial or discretionary turns on the nature of the particular project in question, not on the regulatory regime itself. See, e.g., CEQA Guidelines § 15060(c) ("An activity is not subject to CEQA if: [¶] (1) The activity does not involve the exercise of discretionary powers by a public agency . . . ."). Because CEQA focuses on the individual project, judicial review of ministerial permitting "is directed not to the regulations themselves but to the agency's action in approving the project under those regulations." County of Sonoma, 11 Cal. App. 5th at 26; Prentiss, 15 Cal. App. 4th at 91 ("Whether CEQA applies in the first place depends . . . on whether the *project* is ministerial or discretionary" (emphasis in the original)).

Reflecting this distinction, CEQA case law on ministerial permitting has focused on the facts surrounding specific approvals. In Friends of Westwood, the court found that a particular building permit was discretionary and subject to CEQA, but took pains to "emphasize we are *not* holding in this opinion that all or most building permit approvals in Los Angeles represent 'discretionary projects' within the meaning of section 21080." 191 Cal. App. 3d at 280 (emphasis in the original). Friends of Westwood held that the "vast majority of building permits issued in the city probably [did] not cross the threshold level of discretion required to qualify as 'discretionary projects,'" and therefore the court declined to make any

broader ruling about the nature of the ordinance than was necessary to address the particular approval petitioners contended was made in violation of CEQA. Id.

Prentiss carried this interpretation forward. The regulatory regime at issue in Prentiss allowed the agency to authorize "alternative methods which would not meet the requirements of the otherwise prevailing [Uniform Building] code," but the challenged project in fact met the code. 15 Cal. App. 4th at 97. Prentiss held that, even assuming "that discretion could conceivably be exercised" under this regime, this did "not mean that *respondents'* project was discretionary." Id. (emphasis in original). The Prentiss court refused to make a judgment about whether discretionary provisions appeared in the regulation as a whole, and again limited its review to determining whether the particular activity before the court was properly exempt from CEQA as a ministerial approval.

The County of Sonoma decision most recently and most clearly articulated these same principles. Like Plaintiffs here, the petitioner in County of Sonoma argued that permit issuance "is always a discretionary act" if the governing regulation contains provisions that are subjective "in the abstract." 11 Cal. App. 5th at 24-25. The County of Sonoma court correctly rejected this claim, holding that a petitioner may only challenge the specific criteria applicable to a specific permit. Id. at 25-28. The court went on to hold that "[t]he relevant question in evaluating whether the

approval of a particular project was discretionary is not whether the regulations granted the local agency some discretion in the abstract, but whether the regulations granted the agency discretion regarding the particular project." Id. at 25. The court "decline[d] the petitioners' invitation" to declare a regulatory regime "is always discretionary" when considered "in the abstract." Id. at 27. This Court should similarly decline Plaintiffs' invitation to declare Stanislaus County's regulatory regime to be discretionary "in the abstract."

The issuance of a writ of mandate pursuant to section 21168.9 provides the "sole remedy for violations [of] public agency noncompliance with CEQA." Landgate, Inc. v. Cal. Coastal Comm. (1998) 17 Cal. 4th 1006, 1029; Wilson & Wilson v. City Council of Redwood City (2011) 191 Cal. App. 4th 1559, 1572 n.9 (same). To the extent declaratory relief is authorized in response to CEQA violations at all, it is limited to challenges addressing the facts of an agency's pattern and practice of violating CEQA. One Court of Appeal has found that it *may* be possible to bring a declaratory action against an agency's CEQA "pattern and practice," but only when plaintiffs produce significantly more evidence of CEQA noncompliance than Plaintiffs have.[11] Even assuming *arguendo* that these

[11] In Californians for Native Salmon and Steelhead Association v. Department of Forestry (1990) 221 Cal. App. 3d 1419, 1426-27, the First District held that, by compiling evidence about how the agency had treated 65 different Timber Harvesting Plans, petitioners could survive a demurrer and proceed to challenge the agency's alleged "procedure" of failing to

authorities could be extended to also allow a plaintiff to challenge an agency's "pattern and practice" of issuing ministerial permits, Plaintiffs have not offered any similar evidence showing a pervasive exercise of substantial discretion without CEQA compliance. The sole standard Plaintiffs challenge—"adequate" spacing from sources of contamination—is facially inapplicable in areas where no contamination is present, and Plaintiffs have not demonstrated that the challenged standard is relevant to all or even most of the permits that the County issues. Reply 33-35. Therefore, even if this single standard *did* convey "substantial discretion," Plaintiffs have failed to demonstrate a "pattern and practice" of CEQA noncompliance. Without such evidence, the Opinion erred in granting Plaintiffs' requested relief.

C. The Supreme Court Can Properly Take into Account the Dramatic Practical Consequences that the Opinion Would Have on Housing Development, Because the Supreme Court Has Emphasized on Numerous Occasions that CEQA Must Not be Expanded through Judicial Interpretation "into an Instrument for the Oppression and Delay of Social, Economic, or Recreational Development and Advancement."

The Opinion recognizes that its ruling will compel Stanislaus County, as well numerous other counties, to conduct onerous discretionary

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properly respond to comments and "consistently ignor[ing]" cumulative impacts on a routine basis for a large number of projects. Id. at 1425, 1431. Similarly, in East Bay Municipal Utility District v. Department of Forestry and Fire Protection (1996) 43 Cal. App. 4th 1113, 1121, the First District held that producing evidence related to 39 different Timber Harvesting Plans was sufficient to raise a claim of a pattern and practice of CEQA violations within the agency.

review over hundreds of building permits for groundwater wells annually, despite the fact that "for most well construction permits, the costly, time-consuming environmental review process may commonly prove unnecessary" and that "requiring CEQA review for these relatively small, routine projects may seem unnecessarily burdensome and of little benefit." Opinion at 2, 21. But the Opinion nonetheless concludes that this futile and counterproductive result is what the Legislature has directed in enacting CEQA. Id. at 3.

For their part, Plaintiffs claim that the County's well-supported practical concerns about the Opinion's consequences are "overstated." Answer Brief on the Merits ("Answer") at 56. But Plaintiffs have no basis to opine on the effects that the Opinion will have on local agencies, nor will Plaintiffs bear the costs that the Opinion will impose upon public agencies and those who seek permits. As the representative of those who regularly seek building permits and other approvals to construct housing, Amicus can affirm that any ruling which subjects building permits to discretionary review throughout the state will impose enormous costs and delay upon the development of housing that California desperately needs.[12]

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[12] In the last three years, California's rate of new housing production has ranged from 77,000 to 89,457 new units annually. Javier Panzar & Sarah Parvini, California's Population Growth is the Slowest in Recorded History, L.A. TIMES, May 1, 2019. This pace and scale of new construction must dramatically increase if the State is to come anywhere close to the approximately 500,000 units a year that Governor Newsom

Plaintiffs propose that the negative impacts of the Opinion be addressed by processing building permits for well construction through categorical exemptions. Answer at 56-57. "Since ministerial projects are already exempt [from CEQA's scope by statute,] Categorical Exemptions should be applied only where a project is not ministerial under a public agency's statutes and ordinances." CEQA Guidelines, § 15300.1. Even for the relatively small number of activities that may qualify for such exemptions, documenting and processing categorical exemptions for hundreds of permits annually provides nothing close to the ministerial approval process which CEQA expects for every-day building permits. Moreover, as Plaintiffs themselves emphasize, even if an agency attempts to use a categorical exemption, each of hundreds of permits must be publicly reviewed and subjected to challenge by any project opponents who seek to litigate over whether one of the many "exceptions" to the categorical exemption applies. Answer at 57; CEQA Guidelines, § 15300.2.

In CEQA cases, this Court has long "caution[ed] that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational

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considers necessary to stem the housing crisis. *Id.* In the meantime, experts note that the housing crisis is driving especially younger Californians from the state and leading to a rapidly aging population. *Id.*

development and advancement." Citizens of Goleta Valley v. Bd. of Supervisors (1990) 52 Cal. 3d 553, 576. This Court has emphasized this principle on several occasions and used it as an aid in the proper interpretation of CEQA's requirements. Laurel Heights Improvement Assn. v. Regents of Univ. of California (1993) 6 Cal. 4th 1112, 1132; Berkeley Hillside Pres. v. City of Berkeley (2015) 60 Cal. 4th 1086, 1108.

Here, the Opinion's rationale would subvert CEQA into an instrument for the oppression and delay of development that the Legislature and local agencies have exercised their policy judgment to authorize on a ministerial basis. By allowing project opponents to easily defeat a local agency's careful design and intent to issue building permits on a ministerial basis, the Opinion directly conflicts with CEQA. See, e.g., CEQA Guidelines, §§ 15258 (b)(1), 15369. The Opinion would also contravene the Legislature's clear direction that *more*, rather than less, ministerial permitting is a key element in meeting the State's housing crisis. See Part III-C, *supra*. "CEQA is not intended as a population control measure"; it must be interpreted to facilitate, rather than obstruct, the state's population growth. Ctr. for Biological Diversity v. Dept. of Fish & Wildlife (2015) 62 Cal. 4th 204, 220.

Nothing in CEQA compels—or even permits—the Opinion's dramatic curtailment on ministerial permitting.

V. CONCLUSION

For the reasons explained above, the Court should affirm that words alone in a permitting ordinance are insufficient to make a building permit subject to CEQA, and that Plaintiffs have failed to present sufficient evidence that Defendants have implemented a pattern and practice of CEQA noncompliance. The Court should reverse the Court of Appeal's judgment.

Dated: May 10, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 7,548 words, not including tables of contents and authorities, the cover information, the signature blocks and this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: May 10, 2019.

By: _____

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PROOF OF SERVICE

Protecting Our Water & Environmental Resources et al., v. Stanislaus County et al.
Case No. S251709

I am a citizen of the United States of America and a resident of the County of San Francisco; I am over the age of 18 years and not a part to the within entitled action; my business address is 1202 Howard St San Francisco CA 94103

I hereby certify that on May 10, 2019, I served the following document in this action:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS STANISLAUS COUNTY, ET AL.; AMICUS CURIAE BRIEF OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION

☒ **(BY MAIL)** I caused a true copy of each document(s) to be placed in a sealed envelope with first-class postage affixed and placed the envelope for collection. Mail is collected daily at my office and placed in a United States Postal Service collection box for pickup and delivery that same day.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I executed this document on May 10, 2019, at San Francisco, California.

By: _____
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