LIU, J.

CASE NO. S202828

IN THE SUPREME COURT
STATE OF CALIFORNIA

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

vs.

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

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

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

Affirming a Judgment and Order by the Superior Court of the State of California for the County of Los Angeles (No. BS125233)
Honorable Thomas I. McKnew, Jr.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION.

Respondents Exposition Metro Line Construction Authority and the Exposition Metro Line Construction Authority Board ("Expo Authority"), and real parties in interest Los Angeles County Metropolitan Transportation Authority and Los Angeles County Metropolitan Transportation Authority Board ("Metro") jointly submit this Answer to the Petition for Review.

Supreme Court review is not required here because the Courts of Appeal are not divided, and neither of Petitioner's issues presents an important question of law. (Cal. Rules of Court, rule 8.500(b)(1); *People v. Davis* (1905) 147 Cal. 346, 348-350 ["There is no abstract or inherent right in every citizen to take every case to the highest court. The district courts must be deemed competent to the task of correctly ascertaining the facts from the records before them in each case decided therein, and they should be held solely responsible to that extent for their judgments"]) Instead, review in this instance would merely provide Petitioner with a second appeal, further delaying the completion of the $ 1.5 billion rail transit project connecting downtown Los Angeles with Santa Monica to relieve the epic gridlock in west Los Angeles.

A. There Is No Split of Authority on the Environmental Baseline Issue, and the Second District's Holding Comports with CEQA, the CEQA Guidelines, and this Court's Precedent.

Both the trial court and the Second Appellate District of the Court of Appeal ("Second District") upheld the Expo Authority's use of projected future traffic and air quality conditions to determine the significance of traffic, air quality, and greenhouse gas impacts of the extension of the Exposition Transit Line Project ("Expo Line Phase 2 Project" or "Project"). The trial court concluded it would not serve to inform decision makers or the public "[t]o analyze the project's effects on

transportation assuming that the project's operation is the only change that will occur . . . ." (3 Joint Appendix 000718.)

The Second District reasoned:

> As a major transportation infrastructure project that will not even begin to operate until 2015 at the earliest, its impact on *presently existing* traffic and air quality conditions will yield no practical information to decision makers or the public. . . . An analysis of the project's impacts on anachronistic 2009 traffic and air quality conditions would rest on the false hypothesis that everything will be the same 20 years later.

((*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2012) 205 Cal.App.4th 552, 569; Opinion ("Op.") at 15,[1] original italics.)

The Second District demonstrated that the Expo Authority's use of a projected future conditions environmental baseline comports with the purpose and requirements of the California Environmental Quality Act ("CEQA"), the plain language of the CEQA Guidelines,[2] and this Court's conclusion in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 (*CBE*) that CEQA lead agencies enjoy the discretion to select the environmental baseline so long as substantial evidence supports the selected baseline. (Op. at pp. 14-20.)

While the Second District disagreed with *Sunnyvale*, a careful review of the cases reveals that there is no split of authority or confusion among the Appellate Districts of the Court of Appeal calling for this Court's review. In *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351 (*Sunnyvale*), the

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[1] All references to "Op." are to the Opinion below, Petitioner's Exhibit A.

[2] All references to "Guidelines" are to the State CEQA Guidelines, California Code of Regulations, Title 14, sections 15000-15387.

Sixth Appellate District ("Sixth District") held that, as a matter of law, CEQA lead agencies do not have the discretion to analyze the significance of a project's impacts based solely on *hypothetical* future conditions. But less than a year later, the Sixth District published *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552 (*Pfeiffer*), holding that under CEQA, the CEQA Guidelines, and *CBE*, a lead agency *does* have the discretion to use future *predicted* traffic conditions to analyze a project's traffic impacts, so long as the agency's choice of future baseline is supported by substantial evidence.

Thus, contrary to Petitioner's claim, the Second and Sixth District are in agreement because in *Pfeiffer*, the Sixth District backed away from its prior decision in *Sunnyvale*. Now, both the Sixth District (in *Pfeiffer*) and the Second District (in the opinion below) have held that it is not a *per se* abuse of discretion to use a future predicted conditions baseline so long as the predicted conditions baseline is supported by substantial evidence in the administrative record.

Petitioner also mischaracterizes the Second District's disagreement with the Fifth Appellate District's ("Fifth District's") opinion in *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48 ("*Madera*") as a split of authority. The *Madera* court did not hold that the lead agency had used an improper baseline. Instead, the court held that "the EIR . . . fails to clearly identify the baseline that is being used to quantify the project's impacts on traffic." (*Id.* at p. 96.) As controlling authority for that holding, the *Madera* court relied on *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 673, not *Sunnyvale*. (*Madera, supra*, 199 Cal.App.4th at p. 96.)

Thus, the Second District's holding below is not in conflict with the Fifth District's holding in *Madera*. Moreover, the chance that *Madera* could create confusion in the courts of appeal in the wake of the carefully

reasoned opinions of the Sixth District in *Pfeiffer* and the Second District in the opinion below is remote. *Madera* relied upon the reasoning in *Sunnyvale*. (*Madera, supra*, 199 Cal.App.4th at pp. 90-92.) But, as demonstrated below, in *Pfeiffer*, the Sixth District backed away from *Sunnyvale*, and followed this Court's binding determination in *CBE* that an agency's selection of a baseline is subject to the substantial evidence standard of review.

Thus, there is no split of authority between the Second District and Fifth District that requires this Court's review. To the extent that the opinions diverged, the Sixth District's holding in *Pfeiffer* and the Second District's holding below are now in agreement.

Even if there were a split, the Petition presents a particularly poor candidate for review because the Petitioner never challenged the sufficiency of the substantial evidence in the administrative record that supports the Expo Authority's decision to use projected traffic and air quality conditions to determine the significance of traffic, air quality, and greenhouse gas impacts.

Thus, Petitioner long ago waived any argument that the Expo Authority's use of a projected conditions baseline constitutes a prejudicial abuse of discretion. (*People v. Peevy* (1998) 17 Cal.4th 1194, 1205.)

B. The Question Whether the Second District Correctly Applied the Substantial Evidence Standard of Review to the Spillover Parking Mitigation Measure Does Not Merit this Court's Review.

The Second District held that substantial evidence supports the Expo Authority's finding that a mitigation measure adopted to address potentially significant spillover parking impacts will substantially lessen the impact to on-street parking. (Op. at pp. 33-34.) The mitigation measure requires monitoring of on-street parking within a quarter-mile radius of each station for the first six months of operation. If spillover

parking causes usage of available public parking to reach 100%, Metro is required to work with local jurisdictions to implement a permit parking program to reserve neighborhood parking to local residents. (3 AR 00054, 11 AR 00413-414.)

Petitioner attempts to manufacture a split of authority between the Second District's holding, and prior precedent. But in reality, it argues that the three justices on the Second District panel and the superior court judge simply "got it wrong" by not assuming that if spillover parking causes a significant impact, the affected local jurisdictions would refuse to work with Metro to implement the parking permit program, or other effective programs such as metering. Even if the Second District had misapplied the substantial evidence standard of review to the facts of this case, which it did not, it would not justify Supreme Court review. (See *Magnum Co. v. Coty* (1923) 262 U.S. 159, 163 [the jurisdiction of the Supreme Court to review cases by way of certiorari "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing"].)

The Petitioner simply seeks to use CEQA to further delay a $1.5 billion investment in transportation – a delay that could increase the cost of the Expo Line Phase 2 Project by at least $40 million to $70 million dollars per year and put on hold jobs for thousands of Californians. (See Attachment 1 at ¶¶ 3-6.) Expo Authority and Metro respectfully request that the Court reject the Petition and avoid any further delays to this badly needed extension of rail transit to West Los Angeles and Santa Monica.

II. BACKGROUND.

A. Factual Background.

Los Angeles suffers from the worst traffic congestion and air quality in the nation. For that reason, over three decades ago, the citizens of Los Angeles County overwhelmingly voted for a sales tax to finance

and build a comprehensive rail transit system. (30 AR 00888.) The rail transit system is the linchpin of the region's strategy to improve air quality through transit mobility, a strategy essential to the region's continued economic vitality and environmental health.

Over the next 20 years, the population of the Los Angeles Westside is projected to grow from 1.5 to 1.8 million persons. (736 AR 48078.) The number of jobs is also projected to increase by over 200,000. (*Ibid.*) The Expo Line Phase 2 Project implements the regional and local transportation plans that address this projected growth and increase in employment. It is a component of the Southern California Regional Transportation Plan (439 AR 30061, 30069), the County-wide Long-Range Transportation Plan (3 AR 00022, 509 AR 33232), and the regional Air Quality Management Plan (3 AR 00022-23; 13 AR 00495-496).

Based on the projected regional growth in population and traffic that will occur whether or not the Project is built, and because the Project is a major infrastructure project designed to alleviate congestion and improve air quality over time, the Expo Authority exercised its discretion to use traffic and air quality conditions projected to occur at the planning horizon of 2030 as the environmental baseline for analyzing the potential significance of Phase 2's impact on traffic, air quality, and greenhouse gas emissions. (3 AR 000017.)

The Authority developed the baseline using Metro's regional travel demand forecasting model, which took into account existing traffic conditions, as well as projected future local and regional growth and changes in population and traffic. (11 AR 00346-00348.) Metro's travel demand forecasting model uses the official population and employment projections adopted by the metropolitan planning organization for Southern California. (*Ibid.*)

The Expo Line EIR disclosed traffic and air quality conditions existing at the start of the environmental review process in 2007. (11 AR 00336-340, 11 AR 00353-354 [traffic in 2005, 2007-2008], 13 AR 00498-499 [ambient air quality 2006-2008].) The EIR also disclosed the predicted changes in the traffic and air quality conditions at the project's planning horizon of 2030 with and without the Project. (11 AR 383-410 [traffic], 13 AR 00506-519 [air quality], 14 AR 00527-529 [GHG emissions].) As the trial court found, the EIR "discussed *both* the existing and future conditions when analyzing traffic impacts." (3 Joint Appendix 000719, italics in original.)

At trial and on appeal, Petitioner never challenged the validity of the data or models used to project traffic, air quality, and GHG emissions in 2030, but instead argued that, as a matter of law, projected future conditions cannot serve as the proper baseline to determine whether project impacts are significant. Both the trial court and Court of Appeal rejected Petitioner's argument.

B. Procedural Background.

In 1999, Metro evaluated transportation alternatives for the Mid-City/Westside Study Area in its Mid-City/Westside Major Investment Re-Evaluation Study. Metro completed a Draft Environmental Impact Statement/Environmental Impact Report for transit alternatives in the Mid-City/Westside Study Area that evaluated seven alternatives for providing transit service from downtown Los Angeles to Santa Monica.

In 2005, Metro approved a modified light rail transit alternative ("Expo Phase 1 Project") from downtown Los Angeles to Culver City along Exposition Boulevard, but postponed additional environmental study of the extension of the Expo Line from Culver City to Santa Monica.

On February 12, 2007, the Authority issued a notice of its intent to prepare an EIR for Phase 2 of the Expo Line to extend the line from Culver City to Santa Monica. On January 28, 2009, the Authority circulated the Draft EIR for Phase 2 of the Expo Line. Agencies, individuals and interest groups submitted nearly 9,000 oral and written comments on the Draft EIR. The comments overwhelmingly supported extension of the light rail line to Santa Monica. On February 4, 2010, the Authority held a public hearing on the project, certified the Final EIR, and approved the Project.

Petitioner filed a petition for writ of mandate against the Expo Authority, Metro, and the Federal Transit Administration ("FTA"), challenging the agencies' compliance with CEQA and the National Environmental Policy Act ("NEPA"). FTA removed the action to federal court, and FTA, Expo Authority, and Metro moved to dismiss the NEPA claim for relief. In response, Petitioner amended its pleadings to exclude its NEPA cause of action, the parties stipulated to dismiss FTA, and the court remanded the action to the Superior Court of California.

In response to the Expo Authority's demurrer, Petitioner dismissed its third cause of action concerning a challenge to the Expo Phase 1 Project. Following briefing, the trial court held the hearing on December 21, 2010. Five days before the trial court hearing, the Sixth District filed the *Sunnyvale* decision, which Petitioner immediately filed with the trial court. After oral argument, the trial court denied Petitioner's writ of mandate on all grounds, including its challenge to the baseline based on *Sunnyvale*. (3 Joint Appendix 716-25.) The trial court entered final judgment on March 4, 2011 (*id.* 745-46), and Petitioner filed a notice of appeal on April 25, 2011 (*id.* 806-09).

During briefing of the appeal in the fall of 2011, the Sixth District filed and certified for publication its decision in *Pfeiffer*, which the parties

and amici curiae addressed. On April 17, 2012, the Court of Appeal filed its opinion affirming the trial court's judgment. The court certified the baseline portion of the opinion for partial publication in light of its disagreement with *Sunnyvale* and *Madera*. Subsequently, on May 9, 2012, the Second District certified several additional sections of the opinion for publication without changing its holding.

III. THERE IS NO BASIS FOR THIS COURT'S REVIEW.

A. The Holdings of the Appellate Districts Are Not in Conflict.

1. In Light of *Pfeiffer*, There Is No Split of Authority Between the Second and Sixth District Courts of Appeal.

In *Sunnyvale*, the city used as a traffic baseline a model that accounted for "both existing traffic as well as future traffic based on the buildout of the land uses identified in the adopted Sunnyvale General Plan[,]" projected growth in neighboring communities, and assumed "numerous roadway improvements in the project area to be in place by the year 2020 . . . ." (*Sunnyvale*, *supra*, 190 Cal.App.4th at p. 1361.) The court concluded that use of such a post-approval environmental baseline to evaluate traffic and traffic-related project impacts to noise and air quality "contravenes CEQA regardless of whether the agency's choice of methodology for projecting those future conditions is supported by substantial evidence." (*Id.* at p. 1381.) In other words, *Sunnyvale* held that CEQA lead agencies do not have the discretion to select a future baseline to evaluate project impacts on the environment, even if the agencies' choice is supported by substantial evidence. (*Id.* at p. 1379.)

However, within the year, the same District Court of Appeal decided *Pfeiffer*, and reversed itself on this aspect of the holding in *Sunnyvale*. In *Pfeiffer*, the Sixth District confirmed that an agency's

choice of environmental baseline is a factual determination within the agency's discretion subject to the substantial evidence standard of review. (*Pfeiffer*, *supra*, 200 Cal.App.4th at pp. 1572-1573.)

In *Pfeiffer*, appellants argued that the respondent city's EIR for the expansion of medical offices was inadequate as a matter of law because the city had used projected future traffic volumes to identify a baseline against which to measure traffic impacts of the proposed project. (*Pfeiffer*, *supra*, 200 Cal.App.4th at pp. 1569, 1571.) Specifically, the city used as its baseline raw peak one-hour traffic data for morning and evening commute periods collected in 2007, multiplied by a growth factor, and combined the added traffic expected from approved but not-yet-constructed development projects in the area surrounding the proposed medical offices. (*Id.* at p. 1571.) "Using this raw data for existing conditions *and the predictions for traffic conditions generated by factors other than the . . . project*, including already-approved developments, the draft EIR's traffic analysis concluded that the . . . project would not result in 'significant near-term impacts'" to freeways, roadways, or intersections. (*Id.* at p. 1572, italics added.)

Quoting *CBE*, *supra*, 48 Cal.4th at p. 328, the *Pfeiffer* court rejected the appellants' argument, holding that

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

(*Pfeiffer*, *supra*, 200 Cal.App.4th at p. 1570, citation and quotation marks omitted.) The court concluded that the city's predicted future conditions

baseline for traffic was supported by "substantial evidence, undisputed by appellants, that traffic conditions in the vicinity of the . . . project could vary from existing conditions due to a forecast for traffic growth and the construction of already-approved developments." (*Id.* at p. 1572.)

Petitioner mischaracterizes the holding in *Pfeiffer* as "upholding an EIR that used multiple baselines, including both existing conditions and future conditions, in its analysis of the project's traffic impacts." (Pet. at p. 19.) Although the EIR in *Pfeiffer* did develop four different baselines for its traffic analysis, the only one it relied upon to determine that traffic impacts would not be significant was the so-called "background conditions" baseline, which used raw data for existing traffic conditions "*and* the predictions for traffic conditions generated by factors other than the . . . project, including already-approved developments . . . ." (*Pfeiffer*, *supra*, 200 Cal.App.4th at p. 1572, italics added.) It was *that* determination that the court upheld against challenge. (*Ibid.*, italics added.) "Having reviewed the draft EIR, we determine appellants have not met their burden to show that the EIR is legally inadequate *with respect to the baseline used to measure traffic impacts*. [Citation]" (*Ibid.*) "[A]ppellants' contention that a traffic baseline is limited to existing conditions lacks merit because, as we have discussed, the California Supreme Court has instructed that *predicted conditions may serve as an adequate baseline where environmental conditions vary.*" (*Ibid.*, italics added, citing *CBE*, *supra*, 48 Cal.4th at pp. 327-328.)

Thus, contrary to *Sunnyvale*, the *Pfeiffer* court held that an agency's selection of an environmental baseline – even a future projected baseline – is a factual determination subject to the substantial evidence standard of review; thus, an EIR is not invalid simply because it uses a baseline condition (including projected traffic increases) that post-dates project approval. *Pfeiffer* applies the well-established rule that the burden

is on the project opponent to demonstrate that the methodology selected by the agency is not supported by substantial evidence. (*Pfeiffer*, *supra*, 200 Cal.App.4th at pp. 1572-1573.)

The Second District's holding below is in harmony with the most recent pronouncement on the issue from the Sixth District Court of Appeal in *Pfeiffer*: "We agree with Expo Authority and amici curiae that, in a proper case, and when supported by substantial evidence, use of projected conditions may be an appropriate way to measure the environmental impacts that a project will have on traffic, air quality, and greenhouse gas emissions." (Op. at 14-15, footnote omitted.[3]) Indeed, the court held that an analysis of the traffic and air quality impacts of the Project based on conditions existing when the Final EIR was issued in 2009 would thwart the purpose of CEQA because, under the circumstances presented, it would "yield no practical information to decision makers or the public." (Op. at p. 15.)

> An analysis of the environmental impact of the project on conditions existing in 2009, when the final EIR was issued (or at any time from 2007 to 2010 [during CEQA review]), would only enable decision makers and the public to consider the impact of the rail line *if it were here today*. . . . The traffic and air quality conditions of 2009 will no longer exist (with or without the project) when the project is expected to come on line in 2015 or over the course of the 20-year planning horizon for the project.

(*Ibid.*, italics original.)

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[3] Petitioner argues that the Opinion "suggests that in order to evaluate the environmental impacts of a 'major transportation infrastructure project,' predicted future conditions must be used as the baseline and that use of existing conditions would be improper." (Pet. at p. 19.) As can be seen from the quoted text, Petitioner's claim is pure hyperbole.

In summary, the Second District's disagreement with the baseline holding *Sunnyvale* is consistent with the Sixth Appellate District's *own* disagreement with that aspect of its prior decision in *Sunnyvale*.[4] *Pfeiffer* and the Second District below both conclude that use of future projected conditions as an environmental baseline is not an abuse of discretion as a matter of law, but is proper so long as it is supported by substantial evidence. Thus, there is no split of authority between the Second and Sixth District that warrants this Court's review.

2. The Fifth District's Holding in *Madera* Is Not in Conflict with the Second District's Holding Below.

In *Madera*, the Fifth District "adopted" the holding in *Sunnyvale* that "lead agencies do not have the discretion to adopt a baseline that uses conditions predicted to occur on a date subsequent to the certification of the EIR. (*Madera*, *supra*, 199 Cal.App.4th at p. 90.) But the court did not *hold* that the EIR under review used an improper future baseline. It held that "the EIR . . . *fails to identify the baseline* that is being used to quantify the project's impacts on traffic." (*Id.* at p. 96, italics added, citing *San Joaquin Raptor Rescue Center v. County of Merced*, *supra*, 149 Cal.App.4th at p. 673.) Thus, there is no conflict between the Fifth District's holding in *Madera* and the Second District's holding below that requires this Court's review.

In addition, the fact that the *Madera* court "adopted" the holding in *Sunnyvale* without any additional analysis: "We . . . find the extensive analysis undertaken by the *Sunnyvale* court to be persuasive." (*Madera*,

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[4] Between *Sunnyvale* and *Pfeiffer*, *Pfeiffer* provides the controlling authority because it is the most recent of the two. (*Kenney v. Antioch Live Oak School Dist.* (1936) 18 Cal.App.2d 226, 231 [following the latest decision where prior conflict existed]; see also *Hart v. Burnett* (1860) 15 Cal. 530, 600 ["*the mere fact* that an error has been committed is no reason or even apology for repeating it, much less for perpetuating it"].)

supra, 199 Cal.App.4th at p. 89.) As demonstrated above, the Sixth District's own subsequent decision in *Pfeiffer*, and the Second District's reasoning and holding below, leaves no doubt that the "adopted" holding in *Madera* will not be treated as binding or persuasive authority in the Fifth District or elsewhere.

Thus, the Second District's disagreement with *Madera* provides no basis for this Court's review.

B. The Holding Below and the Holding in *Pfeiffer* Comport with the Statute, the Guidelines and this Court's Precedent.

Relying on the reasoning in *Sunnyvale*, Petitioner argues that the Second District's holding conflicts with CEQA, the Guidelines, and *CBE*. Petitioner is mistaken on all counts.

1. The Second District's Holding Below Comports with CEQA.

The Second District's holding below is based on standard canons of construction. "The purpose of an EIR is to give the public and government agencies the information needed to make informed decisions." (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162.) In construing a statute, this court must ascertain the intent of the Legislature with a view to effectuating the legislative purpose. (*Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.) "We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Coronado* (1995) 12 Cal.4th 145, 151, citations omitted; see also *Fields v. Eu* (1976) 18 Cal.3d 322, 328 [statutory constructions that defy common sense or lead to mischief or absurdity are to be avoided].)

Indeed, interpreting CEQA and the Guidelines to require a comparison with conditions existing between the time CEQA review begins and the moment of project approval – even if that would yield no useful information about the project's environmental impacts when it will actually exist – runs headlong into the Legislature's specific admonition "that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret [CEQA or the CEQA Guidelines] in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA or the CEQA Guidelines]." (Pub. Resources Code, § 21083.1; *see also Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 ["The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind"], quoting *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283.)

In an attempt to show that the categorical holding in *Sunnyvale* does not lead to absurd results, Petitioner speculates that "forecasts . . . are subject to substantial error over time and can easily be manipulated by 'experts' to support a desired conclusion." (Pet. at p. 21.) First, Petitioner made no attempt to argue below that the Expo Authority somehow manipulated the growth in population or traffic in Los Angeles. Petitioner could not make such a showing in any event. The population and employment projections used in the EIR are the official demographic projections developed by Metro and the Southern California Association of Governments in accordance with state and federal law. (11 AR 00347). Courts are not at liberty to assume that agencies will systematically abuse their discretion. When conducting review of an agency action, the courts are required to presume that the agency properly carried out its duty. (Evid. Code, § 664; *El Morro Community Assn. v. Cal. Dept. of Parks and Recreation* (2004) 122 Cal.App.4th 1341, 1351

[sheer speculation cannot carry petitioner's burden of proving otherwise].)

Second, there is simply nothing in the text of CEQA that suggests that the Legislature intended to preclude agencies from exercising their discretion to use forecasts of population and employment growth to evaluate project impacts.

To reach its conclusion that CEQA categorically *prohibits* use of a predicted future conditions baseline, the *Sunnyvale* court asserted, without support, that use of a baseline of currently existing conditions "is the only way to identify the environmental effects specific to the project alone." (*Sunnyvale*, *supra*, 199 Cal.App.4th at pp. 1372-1373; see also *Madera*, *supra*, 199 Cal.App.4th at p. 89 [same].) CEQA defines "environment" to mean "the physical conditions which exist within the area *which will be affected* by a proposed project . . . ." (Pub. Resources Code, § 21060.5, italics added.) The plain language of the statute does not expressly answer the question "exists or will be affected *when*?" The court in *Sunnyvale* simply assumed that it must mean "exists between the time CEQA review begins and the date of project approval," i.e., during environmental review. (*Sunnyvale*, *supra*, 190 Cal.App.4th at p. 1380.)

The Second District has demonstrated that such a cramped reading of CEQA is not supported by the plain language, or the purpose, of CEQA, the Guidelines, this Court's holding in *CBE*, or common sense. (Op. at pp. 17-21.) Indeed, the assumption that a comparison with currently existing traffic and air quality conditions is the *only* way to ever provide a useful measure of project-specific traffic and air quality impacts finds no support in the law, and "is erroneous when applied to traffic and air quality impacts of a long-term infrastructure project, the very purpose of which is to improve traffic and air quality conditions over time." (*Id.* at p. 18.)

"The important point . . . is the reliability of the projections and the inevitability of the changes on which those projections are based. The objective is to provide information that is relevant and permits informed decisionmaking." (Op. at pp. 18-19.) "Population growth, with its concomitant effects on traffic and air quality, is not hypothetical in Los Angeles County; it is inevitable." (*Id.* at pp. 19-20.) Thus:

> In a major infrastructure project such as Expo Phase 2, assessment of the significance of environmental effects based on 2009 conditions (or conditions at any point from 2007 to 2010 [i.e., the period of CEQA review]) yields no practical information, and does nothing to promote CEQA's purpose of informed decisionmaking on a project designed to serve a future population.

(*Id.* at p. 20.)

2. The Second District's Holding Below Comports with the Guidelines and this Court's Holding in *CBE*.

An agency's use of discretion in selecting a baseline has been explicitly reserved in the CEQA Guidelines. Section 15125, subdivision (a), states that the baseline will "normally" consist of conditions existing as of the time of the notice of preparation, or, where there is no notice of preparation, at the time environmental review is commenced. In *CBE*, this Court acknowledged the flexibility built explicitly into the Guidelines, stating:

> Where environmental conditions are expected to change quickly during the period of environmental review for reasons other than the proposed project, project effects might reasonably be compared to *predicted conditions* at the expected date of approval, rather than to conditions at the time analysis is begun.

(*CBE*, *supra*, 48 Cal.4th at p. 328, italics added.)

This Court has therefore acknowledged that *predicted* future conditions will in some cases serve as the baseline for assessment of environmental impacts. This Court did not hold that it would be an abuse of discretion to use predicted conditions beyond the date of project approval. (*CBE*, *supra*, 48 Cal.4th at p. 328.) As the Second District observed, that particular point was not at issue in *CBE*. (Op. at p. 17.) Instead, its reference to the expected date of project approval, as the context reveals, is merely illustrative of the Court's broader ruling on the discretion belonging to public agencies in selecting an environmental baseline, so long as the baseline is realistic, and not hypothetical. (*CBE*, *supra*, 48 Cal.4th at p. 322.)

In addition, as the Second District pointed out, the timeline at issue in the approval of a modification of the already existing steam generating facility at issue in *CBE* is much shorter than the timeline involved in the construction and operation of a major new transportation project like Phase 2 of the Expo Line. (Op. at p. 16.) Thus, while predicted conditions as of the anticipated date of project approval may make sense for an upgrade to an existing steam boiler facility, it may not (and in this case, does not) make sense for a major transportation project, the very purpose of which is to improve traffic and air quality in the future. (*Ibid.*)

As the Second District summed up *CBE*'s interpretation of Guidelines section 15125, subdivision (a): "To state the norm is to recognize the possibility of departure from the norm." (Op. at p. 18; accord *Pfeiffer*, *supra*, 200 Cal.App.4th at p. 1570.) Even the *Sunnyvale* court recognized that "projected traffic levels as of the expected date of project approval" may be an appropriate baseline. (*Sunnyvale*, *supra*, 190 Cal.App.4th at p. 1380.) But if projected conditions existing at the expected date of project approval may be appropriate, "then projected

traffic levels as of the expected date the project will come on line, or some later date in the planning horizon, may also be appropriate." (Op. at p. 18.)

As the trial court and Second District demonstrated below, under certain circumstances such as those presented in this case, use of a realistic future projected conditions baseline to assess traffic and air quality impacts of a major transportation project designed to alleviate traffic and its associated air quality impacts achieves the fundamental purpose of CEQA: it provides the public and decision makers with "the information needed to make informed decisions." (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, *supra*, 43 Cal.4th at p. 1162.)

Thus, there is no important question of law that requires this Court's review because the Second District's holding comports with CEQA, the CEQA Guidelines, and this Court's precedent. Petitioner's dissatisfaction with the lower courts' application of standard cannons of interpretation to the facts of this case does not merit Supreme Court review. (See *Magnum Co. v. Coty*, *supra*, 262 U.S. at 163 [discretionary review is not intended to give a losing party another hearing].)

C. The Petition Should Be Denied Because Petitioner Failed to Argue that Expo Authority's Use of a Future Baseline Is Not Supported by Substantial Evidence.

As the Second District pointed out:

> [P]etitioner does not suggest that the methodologies, forecasts, models, and other data are insufficient to support the projections the Expo Authority has used – but rather only that the Expo Authority should not be permitted to use them. Petitioner has made no effort to demonstrate how the use of projected traffic and air quality conditions as a baseline to measure the impact of this project has precluded or could preclude informed

> decisionmaking (or, conversely, how the use of current conditions to measure those impacts would or could contribute to informed decisionmaking).

(Op. at p. 20.) Moreover, "[i]t is only when an EIR 'fails to include relevant information and precludes informed decsionmaking and public participation' that a prejudicial abuse of discretion occurs." (*Id.* at p. 21, quoting *Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 128.)

Petitioner even goes so far as to claim that it "demonstrated" that the level of service at several street intersections along the project "could potentially" fall to an unacceptable level of service between 2015 and 2030. (Pet. at p. 18.) Not only has Petitioner failed to make such a demonstration (see Expo Authority's Opening Brief below at pp. 25-27 [refuting same with citations to the Administrative Record]), Petitioner failed to exhaust its administrative remedies on the issue, and any argument that a 2015 baseline should have been used is flatly at odds with Petitioner's claim that use of *any* future baseline is, as a matter of law, an abuse of discretion.

Petitioner cannot be heard to complain for the first time in this Court that the Expo Authority's use of a future baseline for traffic, air quality and greenhouse gas emissions constitutes an abuse of discretion because, in its view, the Expo Authority should have used a 2015 baseline. (*People v. Peevy*, *supra*, 17 Cal.4th at 1205 [failure to raise issue below bars Supreme Court review]; Cal. Rules of Court, rule 8.500(c)(1) ["As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal"].)

Thus, this case presents a particularly poor candidate for review because Petitioner has waived any right to this Court's review of the

Second District's conclusion that the Expo Authority's use of a future baseline is supported by substantial evidence and does not constitute a prejudicial abuse of discretion.

D. The Question Whether the Expo Authority's Mitigation for Potential Spillover Parking Is Supported by Substantial Evidence Does Not Merit Supreme Court Review.

Petitioner's argument why this Court should review the Second District's holding that a parking mitigation measure is adequate is essentially a summary of one of its losing arguments on the merits below. (Compare Pet. at pp. 22-27 with Pet. Op. Br. at pp. 31-33 and Pet. Reply Br. at pp. 32-36.) Petitioner attempts to cast this as a conflict of authority by characterizing the holding below as standing in "stark departure" from the cases it cited in support of its position in its Petition and in briefing below. (Pet. at p. 5, 24-25.) But at bottom, Petitioner merely disagrees with the Second District's determination that the mitigation measure is supported by substantial evidence.

The Expo Authority determined that designated parking spaces at each station with dedicated parking structures will not be at capacity on opening day. (72 AR 10793-95.) Nevertheless, the Authority adopted mitigation measure "MM TR-4" to minimize the potential for a significant adverse environmental impact if it turns out that there is a shortage of on-street parking near some of the stations where there is no parking permit program or metered, time-restricted parking program in place. (3 AR 00054-55; 11 AR 00413-14.)

Contrary to Petitioner's mischaracterization, MM TR-4 is fully enforceable. It *requires* monitoring of on-street parking activity of transit patrons prior to the opening of light rail service and the availability of on-street parking for six months thereafter. (3 AR 00054-55; 11 AR 00413-14.) If parking availability exceeds an established performance standard

(100% utilization of available on-street parking spaces), Metro, the agency responsible for operation of the Expo Line, *will* work with the appropriate local jurisdiction and affected communities to implement a parking permit program that reserves on street parking for local residents, and Metro will reimburse the cost to develop the parking permit program.[5] (3 AR 00113; see also 34 AR 01063-64.) Thus, if and where spillover parking has a significant impact within a quarter mile of any station, Expo Authority has adopted a fully enforceable mitigation measure to address it.

Petitioner complains that this mitigation measure is inadequate because it amounts to a mere "to-do" list, and there is "great uncertainty" as to whether any local jurisdiction would actually adopt a permit parking program or other alternative program specified in MM-TR4. Petitioner failed to disclose that the administrative record documents that the City of Los Angeles has previously adopted neighborhood parking permit program to minimize potential spillover impacts (72 AR 10795), and a similar mitigation measure was adopted for Phase 1 of the Expo Line (739 AR 48431). Thus, the Court of Appeal correctly concluded that the parking mitigation measure was supported by substantial evidence. (Op. at pp. 33-34.)

In addition, under the substantial evidence standard of review, Petitioner bears the burden to show that the three cities in the Project Area (Los Angeles, Culver City, Santa Monica) will fail to cooperate with the Expo Authority in the implementation of MM TR-4 if the required

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[5] The mitigation measure also includes options such as time-restricted, metered, or shared parking arrangements that will be implemented to achieve the performance standard of reducing on-street parking usage below the 100% usage standard in the event a permit parking program is not possible. (34 AR 01063-64; 3 AR 00113.) To ensure implementation, Metro has agreed to reimburse local jurisdictions for the costs associated with implementing permit programs. (3 AR 00113.)

monitoring reveals a significant impact. (Evid. Code, § 664; *State of Cal. v. Super. Ct.* (1990) 222 Cal.App.3d 1416, 1419; *El Morro Community Assn., supra*, 122 Cal. App. 4th at p. 1351 [the courts must presume that an agency will carry out its obligations in accordance with the law; sheer speculation cannot carry petitioner's burden of proving otherwise].) Given the evidence of approved neighborhood parking permit programs on the Westside, the Second District correctly concluded that MM TR-4 is supported by substantial evidence,[6] and refused to assume "that simply because the Expo Authority cannot *require* a local jurisdiction to adopt a permit program, the mitigation measure is inadequate." (Op. at p. 34, original italics.)

The Second District's holding comports with established law. CEQA authorizes the use of performance standards in establishing mitigation measures based on future studies. (Guidelines, §15126.4; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1029.) Such an approach is especially appropriate when the results of later field studies are used to tailor a mitigation measure to fit actual environmental conditions. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275; *Nat. Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1366.)

The Second District and the trial court correctly applied the law and the applicable substantial evidence standard of review. There is no

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[6] The Guidelines define "substantial evidence" as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, *even though other conclusions might also be reached.*" (Guidelines, §15384, subd. (a), italics added.) A court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable." (*Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, 573-574.)

split of authority requiring the Court's resolution.[7] Only Petitioner's dissatisfaction with the way the Second District Court of Appeal (and trial court) applied the law to the facts of this case.

IV. CONCLUSION.

Petitioner has failed to demonstrate why this Court should grant review. There is no split among the district courts of appeal, and the holdings below on the baseline issue and the adequacy of parking mitigation measure MM TR4 comport with CEQA, the CEQA Guidelines, this Court's decision in *CBE*, and common sense.

Respondents and real parties in interest respectfully request that the Petition for Review be denied to allow this badly needed, time-sensitive project to proceed without further delay.

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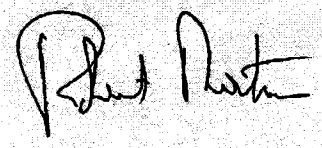
[7] Petitioner asserts, without any argument, that the Second District's holding below conflicts with one of the holdings in a case pending before this Court, namely, *City of San Diego v. Trustees of the Cal. State Univ.* (2011), Case No. S199557, previously published at 201 Cal.App.4th 1134 [135 Cal.Rptr.3d 495]. (Pet. at p. 5.) But since review has been granted in that case, it cannot be cited as precedent. (Cal. Rules of Court, Rule 8.1105(e)(1).) Therefore, any alleged conflict cannot be a basis for this Court's review. In addition, *City of San Diego* is easily distinguished. There, the court held that the mitigation measure contained "no specific mitigation measures to be considered or any specific criteria or performance standards" and merely set "a 'generalized goal' of reducing vehicle trips by, presumably, encouraging alternate modes of travel." (135 Cal.Rptr.3d 495, 533.) By contrast, MM TR-4 specifies four specific mitigation options and includes a standard of performance.

Dated: June 18, 2012

Nossaman LLP

By: 

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Dated: June 18, 2012

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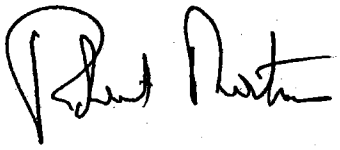
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1))

I certify that the text of this brief consists of 7,128 words as counted by the Microsoft Word version 2003 word processing program used to generate the brief.

Dated: June 18, 2012

Nossaman LLP



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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, SOUTHEAST DISTRICT

NEIGHBORS FOR SMART RAIL, a non-profit California corporation,

Petitioner,

vs.

EXPOSITION METRO LINE CONSTRUCTION AUTHORITY, a public entity; EXPOSITION METRO LINE CONSTRUCTION AUTHORITY BOARD; and DOES 1 through 10, inclusive,

Respondents.

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, a public entity; LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY BOARD; and ROES 1-10, inclusive,

Real Parties in Interest.

Case No: BS125233

Assigned for all purposes to:
Hon. Thomas I. McKnew, Jr.

DECLARATION OF RICHARD THORPE IN SUPPORT OF MOTION FOR ORDER REQUIRING & FIXING AMOUNT OF DISCRETIONARY UNDERTAKING TO STAY ENFORCEMENT ON APPEAL AND REQUEST FOR JUDICIAL NOTICE

Date: July 21, 2011
Time: 9:00 am
Location: Dept. SE H

DECLARATION OF RICHARD THORPE

I, Richard Thorpe, declare as follows:

1. I am Chief Executive Officer of the Exposition Metro Line Construction Authority ("Expo Construction Authority"). With more than 30 years of design and construction experience, I have overseen the completion of major transit systems in San Diego, Salt Lake City and Los Angeles. At the Expo Construction Authority, I am responsible for directing the agency's implementation of the 15-mile, $2.4 billion, Exposition Light Rail Transit Project ("Expo Project"), including both Phases 1 and 2. I have personal knowledge of the facts set forth below and could competently testify to those facts.

Exposition Light Rail Project

2. The Expo Project is a key component of the Los Angeles County Transportation Plan and the Southern California Regional Transportation Plan and Transportation Improvement Program. The Expo Project is critical to meeting the mobility needs for the Westside of Los Angeles County.

3. Phase 1 of the Expo Project ("Phase 1") extends from downtown Los Angeles to Culver City. Phase 1 to La Cienega Boulevard is scheduled to open later this year with the remainder of Phase 1 opening by early 2012. Phase 2 of the Expo Project ("Phase 2") extends approximately 7 miles from the Phase 1 terminus in Culver City to downtown Santa Monica. The estimated total cost of Phase 2 is $1.5 billion including the costs of design and other engineering, construction costs, acquisition of right-of-way and other property, and the cost of acquiring light rail vehicles and other operating equipment.

4. The Expo Construction Authority has approved a contract with Skanska-Rados Expo 2 Joint Venture in an amount of $546,930,200 to prepare final design plans and to construct Phase 2. On March 22, 2011, the Expo Construction Authority issued a Notice of Award of the construction contract. The construction contract provides that construction of Phase 2 will be substantially complete no later than July 10, 2015. The construction contract provides that the Expo Construction Authority is responsible for any costs incurred by the contractor as a result of delays to the substantial completion of Phase 2 attributable to legal challenges to the Expo Construction Authority's approval of Phase 2, including the pending challenge in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*.

5. In the event that the appeal of the April 4, 2011 Judgment of the Superior Court in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* delays the completion of the Phase 2 of the Expo Project, the Expo Construction Authority will incur substantial additional construction costs, as well as other costs and damages. Due in significant part to the economic recession, the Expo Construction Authority was able to obtain a very competitive bid for design and construction of Phase 2. As the regional economy improves, it is likely that the construction cost index will return to index levels in years predating the recent recession. In the event that the increases in the construction cost index returns to the levels experienced before the recession, the costs of delay will be even higher than I have estimated. However, the increase in the costs as a result of a delay in Phase 2 will be very significant and will occur regardless of the state of the economy. Delays to the contractor would result in additional costs due to increases in construction costs. In addition, the Expo Construction Authority would incur other substantial additional costs and other damages in the event that the completion of Phase 2 is delayed as a result of the pending litigation.

6. I estimate that a project delay of one year will increase the construction cost of Phase 2 by $40 million to $70 million. These additional costs include $30 million to $50 million attributable to additional construction costs, and $10 million to $20 million attributable to additional non-construction costs such as costs associated with acquisition of right-of-way, acquisition of light rail vehicles and other operating equipment, and other non-construction costs.

7. In preparing the above estimate I have assumed that the cost of labor and materials will increase by approximately three percent per year as a result of inflationary pressures. This is a reasonable estimate based on historic records, but the rate of inflation in the construction industry has been more than three percent during certain recent periods. For example, the cost of steel and cement increased at an annual rate higher than three percent prior to the recent recession as a result of global demand for construction materials. Thus, there is the potential that the cost of a one year delay in the Project could be higher than that estimated above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 9th day of June 2011, in Los Angeles, California.

Richard D. Thorpe

PROOF OF SERVICE

The undersigned declares:

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action; my business address is c/o Nossaman LLP, 18101 Von Karman Avenue, Suite 1800, Irvine, CA 92612.

On June 10, 2011, I served the foregoing **DECLARATION OF RICHARD THORPE IN SUPPORT OF MOTION FOR ORDER REQUIRING & FIXING AMOUNT OF DISCRETIONARY UNDERTAKING TO STAY ENFORCEMENT ON APPEAL AND REQUEST FOR JUDICIAL NOTICE** on parties to the within action as follows:

☒ (By U.S. Mail) On the same date, at my said place of business, a true copy thereof enclosed in a sealed envelope, addressed as shown on the attached service list was placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Irvine, California.

☐ (By Facsimile) I served a true and correct copy by facsimile pursuant to C.C.P. 1013(e), to the number(s) listed on the attached sheet. Said transmission was reported complete and without error. A transmission report was properly issued by the transmitting facsimile machine, which report states the time and date of sending and the telephone number of the sending facsimile machine. A copy of that transmission report is attached hereto.

☐ (By Overnight Service) I served a true and correct copy by overnight delivery service for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

☐ (By Electronic Service) By emailing true and correct copies to the persons at the electronic notification address(es) shown on the accompanying service list. The document(s) was/were served electronically and the transmission was reported as complete and without error.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 10, 2011.

Nancy Neptune

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PROOF OF SERVICE

The undersigned declares:

I am employed in the County of San Francisco, State of California. I am over the age of 18 and am not a party to the within action; my business address is Nossaman LLP, 50 California Street, 34th Floor, San Francisco, CA 94111.

On June 18, 2012, I served the foregoing **ANSWER TO PETITION FOR REVIEW** on parties to the within action as follows:

☐ (By U.S. Mail) On the same date, at my said place of business, an original enclosed in a sealed envelope, addressed as shown on the attached service list was placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Irvine, California.

☒ **(By Overnight Service)** I served a true and correct copy by common carrier promising overnight delivery as shown on the carrier's receipt for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the common carrier; deposited in a facility regularly maintained by the common carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 18, 2012.

(Signature)

Nancy Torpey

NEIGHBORS FOR SMART RAIL V. EXPOSITION METRO LINE CONSTRUCTION AUTHORITY, ET AL.
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Second Appellate District, Division Eight Case No. B232655
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