Case No.: S 207173

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

TUOLUMNE JOBS & SMALL BUSINESS ALLIANCE,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF TUOLUMNE,

Respondent,

WAL-MART STORES, INC., JAMES GRINNELL, AND THE CITY OF SONORA,

Real Parties in Interest.

After a Decision By the Court of Appeal,
Fifth Appellate District
Case No. F063849

REPLY OF WAL-MART STORES, INC. TO ANSWER TO PETITION FOR REVIEW

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OTHER AUTHORITIES

Real Party in Interest Wal-Mart Stores, Inc. ("Walmart") hereby submits the following Reply to the Answer to Petition for Review filed by Tuolumne Jobs & Small Business Alliance ("TJSBA").

INTRODUCTION

TJSBA has not disputed any of the facts or procedural history presented in the petitions for review. TJSBA also concedes that the decision of the Court of Appeal in *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2012) 210 Cal.App.4th 1006 (the "Opinion") creates a split of authority on the question of whether local governments must comply with the California Environmental Quality Act (Pub. Res. Code sections 21000-21177) ("CEQA") prior to enacting voter initiatives that might affect the environment. Despite the explicit split of authority, TJSBA makes four arguments in opposition to review. None is meritorious.

TJSBA first argues that this Court should deny Walmart's Petition for Review because the circumstances presented by this case are unusual and unlikely to recur, except in cases involving Walmart. The opposite is true. The first published opinion concerning this issue, *Native American Sacred Site and Environmental Protection Association v. City of San Juan Capistrano* ("*Native American Sacred Site*") (2004) 120 Cal.App.4th 961, involved a non-profit religious school, not Walmart. In addition, local voter initiatives are numerous and frequently involve land use and development issues that may be deemed to be "projects" within the meaning of CEQA. Without resolution of the conflict created by the Opinion, each such initiative would subject local governments to uncertain obligations and powers. Even ignoring the frequency with with local governments will face uncertain statutory duties until the

conflict of authority is resolved, TJSBA's argument incorrectly trivializes the importance of establishing uniformity of decision for the two other cases currently pending in lower courts that present the identical issue.

TJSBA's argument that this Court should deny review because the Opinion is well reasoned and "fully addressed Walmart's claims" is more appropriate for a brief on the merits, should this Court grant review. To the extent that the Court wishes to consider the merits of the Opinion at this stage, however, TJSBA has failed to respond to *any* of Walmart's arguments showing how the Court of Appeal departed from several lines of Supreme Court and appellate court precedent in order to create the conflict with *Native American Sacred Site*.

TJSBA next argues that the this Court should deny review because resolving the conflict among courts of appeal would require this Court to act in a "Legislative capacity." On the contrary, the resolution of conflicts among courts of appeal is a core function delegated to this Court by the state Constitution. The resolution of the conflict created by the Opinion would not require any legislative act by this Court.

Finally, TJSBA argues that the Court should defer review until after entry of a final judgment by the trial court. The time limitations within which Walmart can petition for review, or within which this Court can grant review, of the Opinion do not permit deferral of review until after entry of a final judgment by the trial court. Furthermore, even if it were possible to do so, deferring review would leave intact a split of authority that will affect local governments faced with numerous voter initiatives.

LEGAL DISCUSSION

A. The Split of Authority Justifies Review Because the Opinion Creates Uncertainty Regarding Numerous Local Voter Initiatives and There are Other Cases Pending in the Lower Courts that Raise Precisely the Same Issue

Despite acknowledging the conflict of authority created by the Opinion, TJSBA nevertheless argues that this Court should deny review because "the split is factually limited and unlikely to be repeated in any case except those involving Walmart or its supporters circulating similar initiative petitions." (Answer at p. 2). TJSBA's unsubstantiated argument is just plain wrong.

Native American Sacred Site was the first published opinion that addressed the question of whether CEQA applies to enactment of a voter initiative by a city council. *Native American Sacred Site* concerned a voter initiative to permit the construction of a private Catholic high school. *Native American Sacred Site, supra,* 120 Cal.App.4th at 964-65. It did not involve "Walmart or its supporters."

Furthermore, city and county governments will frequently face the question of whether they can enact voter initiatives pursuant to Elections Code section 9214. More than 730 voter initiatives were presented to city and county governments between 1990 and 2000.[1] Of those, approximately 80% of the initiatives presented to county

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[1] Gordon, *The Local Initiative in California* (2004) Public Policy Institute of California, p. v, *available at* http://www.ppic.org/content/pubs/report/R_904TGR.pdf.

governments involved issues that would likely affect the environment to such an extent that CEQA would apply.[2] Nearly 40% of voter initiatives presented to cities bear classifications suggesting that CEQA could apply.[3]

It is undisputed that there are at least two cases currently pending in the lower courts that raise precisely the same issue as is raised by the petitions for review in this case,[4] and local governments will frequently face uncertainty concerning their rights and obligations when presented with voter initiatives affecting the environment. Thus, the issue presented by these Petitions is neither factually limited nor unique to Walmart. It must be resolved.

B. TJSBA Has Failed to Rebut Walmart's Argument that the Opinion Departs from Several Lines of Supreme Court and Appellate Court Precedent; A Discussion of the Merits of the Opinion Should Be Deferred Until After the Court Grants Review

TJSBA argues that this Court should deny review because the Opinion is well-reasoned and and thoroughly responds to "objections raised by Walmart and the City during the appellate court proceedings..." (Answer at p. 9). Even if the Opinion were "well-reasoned," that would

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[2] *Id.* at p. 25 (data for initiatives classified as "growth cap or boundary," "zoning," "open space," and "private projects").

[3] *Id.* at 24-26 (data for "land use," "environment," and "housing" initiatives).

[4] *Milpitas Coalition for a Better Community v. City of Milpitas* (No. H038380, app. pending); *Rodriguez v. Town of Apple Valley* (Super. Ct. San Bernardino County, 2011, No. CIVVS 1103746).

not be a basis for denying review when the decision explicitly conflicts with other appellate court authority. It remains important that the Supreme Court maintain a uniformity of decision among the courts of appeal.

In any event, an argument that the Opinion is "well-reasoned" should be reserved to full briefs on the merits following a decision to grant review. Cal. Rules of Court, rule 8.520, subd. (a). "The briefs at [the merits briefing] stage present an opportunity to argue the correctness of the appealed disposition (as distinguished from the petition for review, which should focus primarily on the *grounds* for granting review)." Eisenberg, Horvitz & Weiner, *Cal. Prac. Guide: Civil Appeals & Writs* (The Rutter Group 2011), para. 13.130, emphasis in original, internal citations omitted.

To the extent that this Court wishes to consider the merits of the Opinion at this point, it is noteworthy that TJSBA failed to respond to Walmart's arguments that the Opinion departed from:

- Supreme Court precedent holding that statutory procedural requirements such as CEQA do not apply to the electorate when exercising its reserved right of initiative. *DeVita v. County of Napa* ("*DeVita*") (1993) 9 Cal.4th 763, 785.
- Supreme Court and appellate court precedent defining "ministerial" decisions, within the meaning of CEQA, as those which do not permit an agency to "shape" the project. *Mountain Lion Foundation v. Fish & Game Com.* ("*Mountain Lion Foundation*") (1997) 16 Cal.4th

105, 117; *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 267, 272.

- Supreme Court and other appellate precedent characterizing the "either/or" decision of a city council presented with a voter initiative as "mandatory" or "mandatory and ministerial." *Citizens Against a New Jail v. Board of Supervisors* (1976) 63 Cal.App.3d 559, 561, (*citing Blotter v. Farrell* (1954) 42 Cal.2d 804).

TJSBA never explains why the Legislature would have required environmental review pursuant to CEQA that would be a "meaningless exercise,"[5] because a city council can only adopt an initiative "without alteration." Elections Code sec. 9214, subd. (a). Nor has TJSBA articulated a coherent reason why the Court should require CEQA compliance in a situation where local governments cannot use the environmental review shape a project.

Instead of addressing Walmart's arguments head on, TJSBA argues that the Opinion is well-reasoned because it is longer and more detailed than the decision in *Native American Sacred Site* (Answer at p. 9), it "protects rather than hinders reserved initiative rights" by mandating elections (*id.* at 10), and it is consistent with the definition of "ministerial" in CEQA Guidelines, section 15369[6] (*id.* at 11-13). Rather than explain *why* the Opinion was well-reasoned (or, at least, better reasoned than *Native American Sacred Site*), TJBSA's argument does

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[5] *Mountain Lion Foundation, supra,* 16 Cal.4th at 117.

[6] Cal. Code Regs., tit. 14, sec. 15369.

little more than paraphrase and summarize the Opinion. None of TJBSA's arguments justify denial of review.

C. The Interpretation of Statutes, and the Resolution of Conflicting Interpretations of Statutes, are Judicial Functions

TJSBA asks the Court to deny review to afford the Legislature an opportunity to "cure the legislative imperfections." (Answer at p. 13.) TJSBA's argument suffers from two basic flaws. First, the conflict of authority arises from conflicting interpretations of statutes. The interpretation of statutes is a judicial function, not a legislative one. Second, the Supreme Court's core function is to maintain statewide harmony and uniformity of decision. The resolution of conflicting interpretations of statutes by different courts of appeal therefore falls squarely within the Supreme Court's role, not that of the Legislature.

1. The Interpretation of Statutes is a Judicial Function

TJSBA misinterprets the separation of powers outlined in California's Constitution. As this Court explicitly stated:

> [u]nder fundamental principles of separation of powers, the legislative branch of government enacts laws. Subject to constitutional constraints, it may *change* the law. But *interpreting* the law is a judicial function. After the judiciary definitively and finally interprets a statute...the Legislature may amend the statute to say something different. But if it does so, it *changes* the law; it does not merely state what the law always was. Any statement to the contrary is beyond the Legislature's power.

McClung v. Employment Development Department ("*McClung*") (2004) 34 Cal.4th 467, 470, emphasis in original.

Inexplicably, Petitioner argues that although it was appropriate for the Court of Appeal to "attempt[] to best harmonize both statutes without doing violence to either," this Court should be precluded from doing the same. (Answer at p. 14.) However, "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *McClung, supra*, 34 Cal.4th at 469-470, (*quoting Marbury v. Madison* (1803) 5 U.S. 137, 177).

In addition, proceeding in the manner suggested by Petitioner, and allowing the Legislature to address any "imperfections" in the current law, would not dispose of this case. Even if the Legislature subsequently changed the law to resolve any disharmony between CEQA and Elections Code section 9214, there is no guarantee that the new legislation would or could be retroactively applied to the Initiative at issue in this case. It is judicial decisions -- not legislative actions -- that generally apply retroactively. *McClung, supra*, 34 Cal.4th at 473-474. "[A] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Id.* (*quoting Rivers v. Roadway Express, Inc.* (1994) 511 U.S. 298, 312-313). The presumption against retroactive legislation, however, is "deeply rooted in our jurisprudence." *McClung, supra*, 34 Cal.4th at 475 (*quoting Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265). In sum, there is no basis in law for Petitioner's argument that this Court should decline review and defer its constitutional power of statutory interpretation to the Legislature.

2. The Resolution of Conflicting Appellate Court Decisions is One of This Court's Core Functions

TJSBA's suggestion that this Court defer to the Legislature to resolve a split of authority among courts of appeal deserves short shrift. The California Constitution empowers the Supreme Court

> to supervise and control the opinions of the several district courts of appeal, each of which is acting concurrently and independently of the others, and by such supervision to endeavor to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law, a uniform rule of decision throughout the state, a correct and uniform construction of the constitution, statutes, and charters, and, in some instances, a final decision by the court of last resort of some doubtful or disputed question of law.

People v. Davis (1905) 147 Cal. 346, 348. Thus, this Court can, and should, resolve the split of authority created by the Opinion. It is this Court's core function to do so, not that of the Legislature.

D. The Court Should Not Deny Review Pending Entry of a Final Judgment

TJSBA concludes its Answer by arguing that, because the Court of Appeal merely directed that the trial court overrule the demurrers, review of the Opinion should be delayed until after entry of final judgment by the trial court. (Answer at p. 15). That argument is meritless for three reasons. First, the Rules of Court limit the time for parties to seek, and this Court to grant, review. Those limitations would preclude review of

the Opinion following entry of a final judgment. Second, the Opinion was based on undisputed facts and fully resolved the question presented by these petitions for review – namely, whether CEQA applies when a local government enacts a voter initiative that would impact the environment pursuant to Elections Code section 9214. Further litigation in the trial court would not enhance the record or alter the issue to be reviewed in any way. Third, even if it were possible to delay review until after entry of a final judgment, such delay would leave the troublesome split of authority among the appellate courts unresolved.

1. The Time Limits for Seeking and Granting Review Would Preclude Review of the Opinion Following Entry of a Final Judgment

A petition for review must be filed and served within 10 days after the Court of Appeal decision is final in that court. The time to file a petition for review may not be extended. Cal. Rules of Court, rule 8.500(e), subdivisions (1) and (2). This Court may not extend the time to determine whether to grant a petition for review beyond 90 days from the day the last petition for review is filed. Cal. Rules of Court, rule 8.512, subd. (b)(1). A decision to grant review based on the Court's own motion must be made not later than 90 days after the decision is final in the Court of Appeal. Cal. Rules of Court, rule 8.512 (c). Thus, the Court cannot wait to review the Opinion until after the trial court has entered final judgment.

2. Further Litigation in the Trial Court Will Not Clarify the Record Because the Relevant Facts Were Undisputed and Fully Developed, and the Opinion Fully Resolved All Issues Relating to the Requirement to Comply with CEQA

As the Court of Appeal noted in the Opinion, the essential facts were undisputed. Opinion, 210 Cal.4th at 1013-14. The City enacted the initiative as an ordinance without first complying with CEQA. Because the Court of Appeal held that a city cannot enact an initiative affecting the environment pursuant to Elections Code section 9214, subdivision(a) without first complying with CEQA, it has fully and conclusively resolved the issue. No further development of the record by the trial court would assist this Court in evaluating the correctness of the rule adopted by the Court of Appeal.

TJSBA supports its request for delayed review by constrasting the standard of review of an order sustaining a demurrer with the standard of review "regarding a CEQA challenge." (Answer at pp. 15-16). TJSBA never explains how the different standards of review would be relevant here, however. The CEQA standard of review cited by TJSBA applies when evaluating an agency's compliance with CEQA. Because it is undisputed that the City did not comply with CEQA prior to enacting the initiative, the standard of review TJBSA cites is not relevant.

3. Delaying Review Until After Entry of a Final Judgment Would Impair Uniformity of Decision

Even if it were possible to delay review until after entry of a final judgment, the Court should decline TJSBA's invitation to do so.

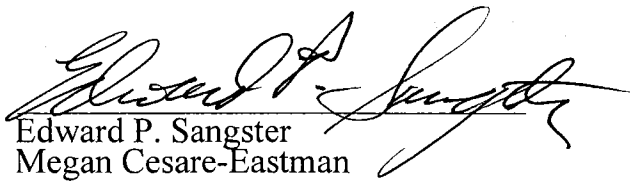
Delaying review would leave the split of authority created by the Opinion intact, thereby protracting the uncertainty regarding the rights and obligations of local governments when presented with voter initiatives affecting the environment.

CONCLUSION

TJSBA's Answer fails to dispute any of the facts or procedural history upon which Walmart based its Petition for Review. It is likewise undisputed that an explicit conflict exists between the Opinion and *Native American Sacred Site.* None of TJSBA's arguments justify denial of review. This Court should therefore perform its core function of ensuring harmony and uniformity of decision by granting review.

Respectfully submitted,

K&L GATES LLP

Dated: January 3, 2013 By: 

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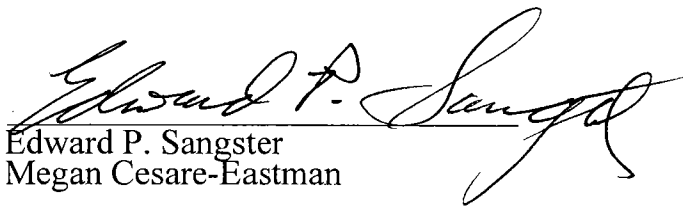
Dated: January 3, 2013 By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am employed in the county of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is **K&L Gates, Four Embarcadero Center, Suite 1200, San Francisco, CA 94111**.

On **January 3, 2013**, I served the foregoing document(s):

REPLY OF WAL-MART STORES, INC. TO ANSWER TO PETITION FOR REVIEW

together with an unsigned copy of this declaration, on all interested parties in this action addressed and sent as follows:

SEE ATTACHED LIST

[XX] **BY MAIL (By Following Office Business Practice):** By placing a true copy thereof enclosed in a sealed envelope(s). I am readily familiar with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I placed such envelope(s) for collection and mailing on that date following ordinary business practice.

[ ] **BY ELECTRONIC MAIL:** I am personally and readily familiar with the business practice of the firm for the preparation and processing of documents in portable document format (PDF) for e-mailing. I prepared said document(s) in PDF and then caused such documents to be served by electronic mail to the above addressees.

[ ] **BY FEDERAL EXPRESS**: I deposited such envelope in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents in an envelope designated by the said express service carrier, addressed as above, with delivery fees paid or provided for, to be transmitted by Federal Express.

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

Executed on January 3, 2013, at San Francisco, California.

Rosalind Cook

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