S254271

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE POST SUSTAINABILITY INSTITUTE, et al.
Plaintiffs and Appellants,

v.

ASSOCIATION OF BAY AREA GOVERNMENTS, et al.,
Defendants and Respondents.

PETITION FOR REVIEW

After an Opinion by the Court of Appeal, First Appellate District
Case No. A144815

On Appeal from the Superior Court of Alameda County,
Case No. RG 13699215, Honorable Evelio Grillo, Judge

Timothy V. Kassouni, SBN 142907
KASSOUNI LAW
621 Capitol Mall, Suite 2025
Sacramento, CA 95814

Telephone: 916-930-0030
Facsimile: 916-930-0033
E-Mail: Timothy@Kassounilaw.com

Attorneys for Petitioners The Post Sustainability Institute,
Rosa Koire, and Michael Shaw

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QUESTIONS PRESENTED FOR REVIEW

This case involves a challenge, on statutory and constitutional grounds, to Respondents' adoption and implementation of Plan Bay Area (the Plan), a comprehensive regional land-use and transportation plan that will dramatically affect the lives and livelihoods of nearly 8 million people in the San Francisco Bay Area. The challenge was dismissed as moot by the Court of Appeal because, while the appeal was pending, Respondents adopted updates to the Plan, as they are required to do every four years. The questions presented for review by this Court are:

1. Does a statutory and constitutional challenge to the implementation of Plan Bay Area become moot merely because minor updates are made to the Plan's demographic projections before an appellate decision can be handed down?

2. Assuming that such a challenge ***is*** mooted by the adoption of minor updates to the Plan, should the Court nevertheless render an opinion on the merits of the litigation because the dispute raises important issues of public interest that are virtually certain to recur, yet will evade judicial review?

3. Assuming that such a challenge ***is*** mooted by the adoption of minor updates to the Plan, should the Court nevertheless render an opinion on the merits of the litigation because dismissal would leave material issues in the declaratory relief action unresolved?

INTRODUCTION

Pursuant to California Rule of Court 8.500(a)(1), Plaintiffs and Appellants The Post Sustainability Institute, et al. (Petitioners) respectfully petition this Court for review of the unpublished decision of the California Court of Appeal, First Appellate District, in Case Number A144815. A true and correct copy of the final appellate court Slip Opinion (Opinion) is attached hereto as Exhibit A.

The court below dismissed as moot a constitutional and statutory challenge to the adoption and implementation of Plan Bay Area by Defendants and Respondents Association of Bay Area Governments and Metropolitan Transportation Commission (Respondents). As alleged in the Complaint in this case and argued on appeal, the Plan calls for the immediate implementation of the most radical and comprehensive land-use and transportation transformation in the history of the Bay Area. (See Appellants' Opening Brief [AOB] at 10.) Among other things, through coercive methods Plan Bay Area replaces local jurisdictional authority over land use decision making to regional control by unelected officials in violation of the State Constitution. The legality of Plan Bay Area will have an immediate domino effect on similar plans prepared by Councils of Government throughout other regional areas of California and in other states, thus review of the merits of this action is of paramount importance.

The sole justification for the Plan is that it supposedly will achieve a reduction of greenhouse gas emissions to target levels determined by the California Air Resources Board (CARB), in compliance with the Sustainable Communities and Climate Protection

Act (S.B. 375). (Id.) Yet, as demonstrated by Respondents' own data and by the only independent, professional study of the Plan's feasibility, there is virtually no possibility that the Plan will actually achieve the objective of a reduction of greenhouse gas emissions to target levels without wildly speculative assumptions that would require a fundamental upheaval in California's political structure. (Id. at 10-11).

Petitioners sought a writ of mandate directing Respondents to set aside certain resolutions relating to the approval of the Plan, an injunction barring enforcement of the Plan, and declaratory relief establishing, inter alia, "the rights and obligations of the Defendants and Respondents with respect to S.B. 375 and state and federal constitutional mandates." (AA 24.) Following final disposition of their complaint in the trial court, Petitioners filed an appeal in the court below.

Almost 18 months after the appeal had been fully briefed and was awaiting hearing, Respondents adopted routine, statutorily-mandated updates to the Plan. (See Respondents' Motion to Dismiss Appeal and Memorandum of Points and Authorities in Support of Motion to Dismiss Appeal [Motion to Dismiss] at 5, 7.) Respondents thereupon moved to dismiss the appeal as moot, and the court below complied. (Opinion at 2).

Although the appellate court recognized that this litigation implicates important public issues that may evade judicial review, it declined to exercise its discretion to address the merits of the appeal. (Opinion at 5, 9.)

REASONS FOR GRANTING REVIEW

Review should be granted under Rule 8.500(b)(1) of the California Rules of Court, to settle important questions of law. The proper interpretation of S.B. 375 is a matter of vital statewide concern. Comprehensive regional land-use and transportation plans like Plan Bay Area will directly impact the lives and livelihoods of tens of millions of Californians statewide, for decades to come. Yet the legislation requires that the Plan be updated every four years. If every quadrennial update moots any ongoing challenge to the Plan's implementation, it is likely that vital questions concerning the requirements of S.B. 375—such as those raised by the present litigation—will forever evade judicial review.

Less than two years ago, this Court considered the impact of S.B. 375 on a regional plan comparable to Plan Bay Area, adopted by the San Diego Association of Governments (SANDAG). (See *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497.) While review was pending before this Court, SANDAG adopted a statutorily-required update to its plan, exactly as Respondents did while this case was pending before the court below. (Id. at 510-511.) Although this Court might have dismissed the SANDAG litigation as moot at that point, both the parties and the Court recognized that the question at issue could recur under each new update to the plan. (Id. at 511.) Therefore, the majority opinion concluded:

> The issue before us presents an important question of law that is likely to recur yet evade review because of the relatively short period between adoption of a RTP and adoption of a successor plan. Accordingly, we

> proceed to decide the issue even though SANDAG's 2010 regional transportation plan has now been superseded.

(Id.)

In the present case, even if this Court agrees with the court below that Respondents' mere adoption of statutorily-required updates moots Petitioners' challenge to the Plan, review should be granted to reverse the decision below and proceed to the merits of the challenge for the reasons enunciated in SANDAG. A definitive interpretation of the Legislature's requirement that Respondents ***shall*** adopt a Plan that ***will*** meet CARB's targets ***if*** there is a ***feasible*** way to do so (Government Code § 65080(b)(2)(B)), will shape land-use and transportation planning in the Bay Area for generations to come. These questions will arise again and again, with each new update to the Plan, unless they are resolved now.

PROCEDURAL HISTORY

On July 18, 2013, Respondents adopted Plan Bay Area, the Regional Transportation Plan and Sustainable Communities Strategy for the San Francisco Bay Area 2013-2040. The Plan is a 150-plus page document covering various aspects of transportation, zoning, and property development within nine Bay Area counties and 101 cities.

Petitioners are an organization and two individual taxpayers who are dedicated to the support of property rights and matters of land use of interest to the general public. (AA 003-004.) Petitioners filed comments to the Draft Plan Bay Area (AR 039453,

039025, 037499), and subsequently commenced this action by filing a timely petition for writ of mandate and complaint for declaratory and injunctive relief in Alameda County Superior Court. The complaint alleged that Respondents' adoption of the Plan violated provisions of the California Constitution, the United States Constitution, and S.B. 375. (AA 002.)

The trial court entered a final judgment disposing of all claims on February 26, 2015 (AA 202.) Petitioners filed a timely notice of appeal of the final judgment on April 10, 2015. (AA 248.) The appeal was fully briefed and pending hearing before the Court of Appeal in February of 2016.

Nearly eighteen months later, in July of 2017, Respondents adopted what they have consistently described as a "limited and focused update" to Plan Bay Area. See *Plan Bay Area 2040*, at vii, 25, 44.[1] Immediately thereafter, Respondents moved to dismiss this appeal on the grounds that the apparently minor and inconsequential updates it had adopted mooted the case. On January 16, 2019, the court below agreed, and issued an unpublished opinion dismissing the appeal as moot. (Opinion at 9.)

Petitioners filed a petition for rehearing on January 31, 2019, calling the appellate panel's attention to errors of fact and law in the Opinion. Specifically, the court was advised that Petitioners had at no time failed to challenge Respondents' contention that the updated projections adopted in 2017 somehow mooted the appeal. (Appellants'

[1] The full text of Plan Bay Area 2040 can be found at http://2040.planbayarea.org/cdn/farfuture/u_7TKELkH2s3AAiOhCyh9Q9QlWEZIdYcJzi2QDCZuIs/1510696833/sites/default/files/2017-11/Final_Plan_Bay_Area_2040.pdf

Petition for Rehearing at pp. 4-6.) The petition for rehearing also objected to the court's shifting of the burden of proof to Petitioners as an error of law. (Id. at pp. 6-9.) This motion was deemed denied on January 31, 2019, when the Opinion became final.

FACTUAL SUMMARY

I. Plan Bay Area

In 2006 the California Legislature enacted A.B. 32, the Global Warming Solutions Act, which among other things articulated the goal of reducing greenhouse gas emissions to 1990 levels by 2020. The following year the legislature enacted S.B. 375, the Sustainable Communities and Climate Protection Act. S.B. 375 required Respondents to adopt a "sustainable communities strategy" to reduce greenhouse gas emissions to target levels determined by the California Air Resources Board (CARB). CARB set targets of 7% reductions by 2020, and 15% percent reductions by 2035.

S.B. 375's mandate is unequivocal. The law provides in part:

> The sustainable communities strategy ***shall*** ... set forth a forecasted development pattern for the region, which, when integrated with the transportation network, and other transportation measures and policies, ***will*** reduce the greenhouse gas emissions from automobiles and light trucks to achieve, ***if*** there is a feasible way to do so, the greenhouse gas emission reduction targets approved by the state board.

(Government Code § 65080(b)(2)(B) [emphasis added]). Government Code § 65080.01(c) in turn defines the term "feasible":

> 'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.

If the sustainable communities strategy is unable to achieve the requisite CARB greenhouse gas reduction targets, an alternative planning strategy is required. If, on the other hand, Respondents develop a strategy that ***will*** achieve the targets, the final requirement for implementation is CARB approval. There are no gray areas; the law provides no authorization for adopting a Plan that simply "aspires" to, "might," or "could" achieve the CARB greenhouse gas emission targets. CARB review is limited to the question of whether the Plan ***will*** or ***will not*** achieve those targets:

> After adoption, a metropolitan planning organization shall submit a sustainable communities strategy or an alternative planning strategy, if one has been adopted, to the state board for review . . . . Review by the state board shall be limited to acceptance or rejection of the metropolitan planning organization's determination that the strategy submitted ***would,*** if implemented, achieve the greenhouse gas emission reduction targets established by the state board.

(Government Code § 65080(b)(2)(J)(ii) [emphasis added].)

On July 18, 2013, in response to this mandate, Respondents adopted Plan Bay Area. The Plan encompasses virtually all aspects of transportation, zoning, and property development within the Bay Area. The Plan purports to achieve CARB's emissions targets by concentrating future land development in designated high density "Priority Development Areas," or "PDAs." (AR 055679.) The Plan unequivocally concludes that it ***will*** achieve CARB's targets: "Plan Bay Area ***not only meets but exceeds*** its greenhouse gas (GHG) emissions reduction target." (AR 55693 [emphasis added].)

II. Petitioners' Challenge to the Adoption of Plan Bay Area

On March 6, 2014, Appellants filed a First Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (Complaint) in Alameda County Superior Court, challenging the constitutionality and statutory adequacy of Plan Bay Area. (See Complaint.) Petitioners alleged that Respondents' adoption of the Plan violated provisions of the California Constitution, the United States Constitution, and SB 375. (AA 2.) The trial court rejected Petitioners' arguments. Perhaps most significantly, the court found that SB. 375's mandate that Respondents ***shall*** adopt a Plan that ***will*** meet CARB's targets is a mere "directory requirement," denoting a "reasonable expectation" that the required outcome may eventually materialize. (Order Denying Petition for Writ of Mandate and Final Statement of Decision, at 8-10.)

III. Petitioner's Appeal Is Dismissed As Moot

Petitioners timely filed a notice of appeal to the Court of Appeals for the First Appellate District. In their opening brief, Petitioners argued that the trial court had impermissibly rewritten the plain language of S.B. 375, and asked for reversal as a matter of statutory interpretation. (AOB at 28-30.) Petitioners also argued that Respondents' implementation of the Plan violated provisions of the state and federal constitutions. (Id. at 33-45.)

Almost eighteen months after the case had been fully briefed and was awaiting oral argument in the Court of Appeal, Respondents, as required by statute, completed a

routine four-year update to Plan Bay Area.(Motion to Dismiss at 5, 7.) Respondents promptly moved for dismissal of the appeal on the ground that the adoption of the updated Plan, in and of itself, rendered the original controversy moot. (Motion to Dismiss at 5.) The court below agreed, and on January 16, 2019, issued an unpublished opinion dismissing the appeal as moot. (Opinion at 9.)

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER RESPONDENTS CAN MOOT A STATUTORY AND CONSTITUTIONAL CHALLENGE TO PLAN BAY AREA BY THE SIMPLE EXPEDIENT OF ADOPTING "LIMITED AND FOCUSED" UPDATES TO THEIR PROJECTIONS BEFORE AN APPELLATE RULING CAN BE HANDED DOWN

On July 26, 2017, nearly 18 months after this case had been fully briefed and was awaiting oral argument in the Court of Appeal, Respondents, pursuant to statutory mandate, completed a routine four-year update to Plan Bay Area, which is now designated "Plan Bay Area 2040." (Motion to Dismiss at 5, 7.) By its own terms, Plan Bay Area 2040 is merely "***a limited and focused update*** of the region's previous integrated transportation and land use plan, Plan Bay Area, adopted in 2013." (Plan Bay Area 2040, Exhibit 2 [1 of 2] to Declaration of Adrienne D. Weil in Support of Respondents' Request for Judicial Notice, at 3) (emphasis added.)

In the court below, Respondents asserted that the limited, focused, 2017 update to Plan Bay Area was "distinct" from the original version of the Plan, but did not identify

with specificity anything in the updated document that could call into question any of the substantive issues raised in the Complaint. (See Motion to Dismiss at 8.) Respondents did not assert, for example, that a new feasibility study had been conducted that superseded the conclusions of the original report. Indeed, the opposite was true. Respondents' new study *confirmed* the conclusions of the original, that the Plan itself could not by itself achieve SB 357's target. Plan Bay Area 2040's Performance Assessment Report concluded that the updated plan, exactly like the original, *cannot* meet the mandatory air quality targets established by S.B. 375, barring "much more aggressive action from multiple levels of government . . . after the adoption of this Plan." (See Petition for Rehearing at p. 8.)

Nor did Respondents assert that anything in the updated Plan renders it capable of meeting CARB' s emission standards without such wildly improbable assumptions as the repeal of Proposition 13 (and the availability of post-repeal funds to finance Plan Bay Area's objectives). (See AOB at 20.) Nor did Respondents contend that the proper statutory construction of the SB 375 "feasibility" mandate is an issue that can somehow be avoided in subsequent plan updates. Nevertheless, the court below granted Respondents' Motion to Dismiss on the ground that the adoption of the 2017 updates, in and of itself, rendered the original controversy moot. (See Opinion at 4 ["Plan Bay Area is no longer in effect; therefore, petitioners cannot obtain any effective relief and the appeal is therefore moot."].)

If the court below is correct, then any government agency could moot a legal challenge to any statute, ordinance, or plan, by the simple expedient of adopting an "updated" version of the same enactment, with superficial changes in language but no substantive alterations, before a legal challenge could finish making its way through the courts. Respondents should not be allowed to evade legal review of their adoption of Plan Bay Area so easily, and this court should grant review and reverse the opinion below on that basis alone.

II. REVIEW SHOULD BE GRANTED BECAUSE THIS CASE RAISES ISSUES OF OVERRIDING PUBLIC IMPORTANCE THAT ARE CERTAIN TO RECUR, YET WILL ESCAPE JUDICIAL REVIEW

It is a well-established principle of California law that:

> "[i]f an action involves a matter of continuing interest and the issue is likely to recur, a court may exercise an inherent discretion to resolve that issue, even though an event occurring during its pendency would normally render the matter moot."

(*Morehart v. County of Santa Barbara* (1994) 7 Cal. 4th 725, 746-47 [citation deleted].) The present case raises issues of overriding public importance that are certain to recur until they are judicially resolved. Yet, under the reasoning of the court below, such resolution will never occur, because challenges to the legality of the Plan will inevitably and repeatedly be dismissed as moot.

A. The Legality and Constitutionality of Respondents' Imposition of Plan Bay Area Is of Overriding Public Importance

The present case raises novel issues concerning Respondents' authority to impose the most extreme and comprehensive scheme of regional land-use control in the history

of the Bay Area. (See Appellants' Opening Brief [AOB] at 10-11.) As Respondents acknowledge, Plan Bay Area prescribes a "development pattern for the nine-county San Francisco Bay Area region," to be "integrated with the transportation network and transportation measures and policies." (Motion to Dismiss at 5.) As such, the resolution of this case will directly impact nearly 8 million people and 4 million jobs – that is, every resident, motorist, employer, employee, and local government in the nine largely urbanized California counties comprising the Bay Area. (See AOB at 10-11; Plan Bay Area 2040 at 6.) It will also have significant indirect impacts by determining the future course of economic development and growth (or stagnation) of local government revenues throughout the region. (See Complaint at 12.)

These realities were acknowledged by the court below: "***Such a challenge undoubtedly raises issues of public interest to the Bay Area community***." (Opinion at 5.) (Emphasis added.)

Moreover, by providing a definitive determination of the statutorily-required degree of "fit" between the predictable outcomes of a regional plan and the requirements of S.B. 375, a decision on the merits of this case will provide guidance to all regional planning agencies throughout California in their efforts to comply with that legislation. Respondents' authority to impose Plan Bay Area, in the face of the seemingly monumental discrepancies between what the Plan can hope to accomplish and what is required by S.B. 375, is a question of compelling public importance that must be resolved.

B. The Issues Involved in This Appeal Are Virtually Certain to Recur Yet Evade Judicial Review

The public interest exception to the mootness doctrine applies most forcefully when there is "great certainty" that the important public issues implicated in the litigation will recur. (*Nat'l Ass'n of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 747.) For example, in *Board of Education of Los Angeles v. Watson* (1966), 63 Cal.2d 829, this Court noted that, although the time had expired for the assessor to provide information demanded by petitioners for the year in which the petition was filed, "the basic issues presented are not moot because the obligation to provide the information . . . recurs annually." (Id. at 832 fn. 1.)

In the present case, the important public issues set forth above are not merely *likely* to recur, they are virtually *certain* to do so, because of the very mechanism that triggered Respondents' motion to dismiss. As Respondents note, they are statutorily required to adopt updates to Plan Bay Area every four years (Motion to Dismiss at 7), even though these updates may be merely "limited and focused" statistical adjustments, rather than substantive revisions.

The court below agreed with Respondents that such regularly scheduled, routine adjustments completely "supersede" the entirety of the Plan every four years, mooting any and all litigation that may be ongoing. (Id. at 9; Opinion at 2.) Unless a plaintiff can achieve what is virtually impossible—fully litigating a challenge to the Plan from initial

filing through a final decision on appeal within 48 months[2]—the decision below dooms litigants to a perpetual cycle of ripening a new challenge, attempting to litigate it, and having it dismissed as moot with quadrennial regularity. (See Motion to Dismiss at 7 [complaining that Appellants did not seek to ripen a challenge to the "2017 Plan" in anticipation of the dismissal of their challenge to the "2013 Plan"]; Opinion at 9 ["We have some sympathy for (Petitioner's) argument, given the time that has been required to review this matter."]) It is hard to envision a scenario in which the important public issues raised by this case would be more certain to recur until they are resolved.

The fundamental issues raised by this action have not been affected by Respondents' adoption of routine, scheduled updates to the Plan. Although Respondents vaguely assert that their 2017 updates include "updated growth projections" and "modified PDAs" (Motion to Dismiss at 8), they do not allege that these admittedly "limited and focused" updates have any direct bearing on the issues raised by the Complaint. They do not, for example, assert that the minor 2017 updates to the Plan Bay Area call into question the results of Respondents' original Priority Development Area Development Feasibility and Readiness Assessment Report, which demonstrated the virtual impossibility that Plan Bay Area could achieve the required reductions in greenhouse gas emissions. (See AOB at 24-29). Indeed, Respondents failed to inform the appellate court that their new, 2017 Performance Assessment Report reached the identical

[2] According to the Judicial Council, civil appeals sometimes take more than 2-1/2 years to proceed from the notice of appeal to a final decision in the California Court of Appeals for the First Appellate District. See Judicial Council of California, *2016 Court Statistics Report* at 28.

conclusion -- that the updated Plan *cannot*, on its face, meet S.B. 375's mandatory targets,

While the Plan's designated Priority Development Areas may have been "modified" by the updates, Respondents have not alleged that these modifications would have any effect whatsoever on the conclusion of the original feasibility report, that only a small fraction of PDAs had the existing or projected capacity to accommodate the housing intensity required for them by the Plan. (See AOB at 27.)

Most importantly, dismissal of this appeal leaves unresolved the proper interpretation of SB 375's requirement that it must be "feasible" for the Plan to achieve the greenhouse gas emission reduction targets approved by the state board. (see AOB at 17); and the legality of implementing a Plan that is statutorily required to "achieve the greenhouse gas emission reduction targets established by the state board" (Government Code § 65080(b)(2)(J)(ii)), when Respondents' own studies conclude that the Plan cannot do so. These are issues that will necessarily be raised again and again until they can be ruled on by an appellate court or by this Court. The controversies set out in Petitioners' Complaint, most especially in the claim for declaratory relief, remain actual, present, and unresolved.

In a similar case challenging the adequacy of a Regional Transportation Plan adopted by the San Diego Association of Governments, this Court noted that the challenge did not become moot simply because, in compliance with statutory requirements, the agency had adopted a 5-year update to the Plan. *Cleveland National*

Forest Foundation v. San Diego Assn. of Governments, 3 Cal.5th at 510-511. As noted earlier in this Petition, the Court observed,

> "[t]he issue before us presents an important question of law that is likely to recur yet evade review ***because of the relatively short period between adoption of a RTP and adoption of a successor plan***. Accordingly, we proceed to decide the issue even though [the] 2010 regional transportation plan has now been superseded."

Id. at 511 (emphasis added). This analysis applies even more strongly to the present case, in which the challenged Plan must be updated every four years, instead of every five.

III. REVIEW SHOULD BE GRANTED TO CLARIFY THAT RESPONDENTS, NOT PETITIONERS, BEAR THE BURDEN OF PROOF IN DETERMINING WHETHER THE "LIMITED AND FOCUSED" UPDATES TO PLAN BAY AREA OVERCOME THE STATUTORY AND CONSTITUTIONAL DEFICIENCIES OF THE PLAN

The court below acknowledged that this case raises important public issues (Opinion at 5), and that these issues may evade judicial review if challenges can be mooted by the mere adoption of regularly scheduled updates to the Plan. (Id. at 9.) Nevertheless, the panel granted the Motion to Dismiss because Petitioners supposedly failed to carry the burden of proving that their statutory and constitutional claims "are likely to recur or implicate important declaratory relief issues." (Id.) This misplacement of the burden of proof was an error of law that determined the outcome of the appeal, to the detriment of the millions of Bay Area residents, commuters, and businesses that have a vital interest in the determination of these issues.

Respondents raised two claims in their Motion to Dismiss. First, they argued that their mere adoption of limited and focused updates to Plan Bay Area in 2017 mooted

Petitioners' challenge to the legality of the plan. (Motion to Dismiss at 9-10.) Second, Respondents claimed that, because of these updates, the important public issues implicated in this appeal were not likely to recur. (Id. at 10-11.) The Court of Appeal agreed with Respondent's first argument, and deemed the appeal to be moot. (Opinion at 3-4.) With respect to Respondents' second claim, however, the Court expressly shifted the burden of proof to Petitioners to prove the negative of Respondents' claim – that is, to prove that the 2017 plan updates would *not* render the issues in this case unlikely to recur, and ruled that Petitioners had supposedly failed to meet this burden. (Id. at 7.) This was a crucial error of law that can only be remedied by this Court.

The burden of proof is normally assigned to the party advancing a claim, in keeping with the Latin maxim, *semper necessitas probandi incumbit ei qui agit* (the necessity of proof always lies with the person who lays charges). Here, Respondents' asserted in their Motion to Dismiss that their adoption of minor, routine updates to Plan Bay Area ensured that the important public issues raised by this litigation will be unlikely to recur. (Motion to Dismiss at 10-11.) Assigning to Petitioners the burden of disproving this claim violates the standard procedure of assigning the burden of proof to the party who advances a claim.

Furthermore, the principle is well established that, "when the true facts relating to [a] disputed issue lie peculiarly within the knowledge of one party, the burden of proof may properly be assigned to that party in the interest of fairness." *ITSI T.V. Productions, Inc. v. Agricultural Associations* (9th Cir. 1993) 3 F.3d 1289, 1292 (quoting *United States*

v. Hayes (9th Cir.1966) 369 F.2d 671, 676. See also *United States v. New York, N.H. & H.R.R. Co.* (1957) 355 U.S. 253, 256 n. 5 ("The ordinary rule, based upon considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.").

Here, Respondents contend that they spent nearly 2-1/2 years preparing the limited and focused updates to Plan Bay Area that were adopted in 2017. (Motion to Dismiss at 7.) If anything in those updates resolved the statutory and constitutional defects in the original Plan sufficiently to ensure that the important public questions raised by this litigation are unlikely to recur, it was incumbent on Respondents to produce that evidence. Instead, Respondents merely pointed to such inconsequential adjustments as a marginal increase in estimated Bay Area population and employment in 2040. (Motion to Dismiss at 8.) Far from mitigating the fatal defects in Plan Bay Area, these adjustments would be expected to *exacerbate* the already intractable difficulty of forcing a burgeoning population into limited and concentrated "development areas" in an effort to meet emissions targets.

If anything, Respondents used their special familiarity with the details of the 2017 updates to conceal relevant information. For example, at the time they filed their motion to dismiss, Respondents were well aware (although Petitioners were not) that their own Performance Assessment Report concluded that the updated Plan, exactly like the original, *cannot* meet the mandatory targets established by S.B. 375, barring "much more aggressive action from multiple levels of government . . . after the adoption of this Plan."

(Plan Bay Area 2040: Final Performance Assessment Report (July, 2017) at 6.)[3] The unspecified "aggressive action" apparently continues to require such extreme and politically unfeasible measures as the repeal of Proposition 13 and the reinstatement of redevelopment agency funding. (See Plan Bay Area 2040 at 10.) Far from carrying their burden of demonstrating that the 2017 updates permanently resolved the important public issues at the heart of this appeal, Respondents failed to disclose information to the Court that would have conclusively demonstrated that those issues were virtually certain to recur.

Finally, the burden of proof should be assigned so as to minimize the relative cost of error. See R. S. Radford, *Statistical Error and Legal Error—Type One and Type Two Errors and the Law*, 21 Loy. L.A. L. Rev. 843 (1988). In the present appeal, erroneously assigning the burden of proof to Respondents may require the court to hear the appeal on the merits, when in fact it should have been dismissed as moot. But on the other hand, erroneously assigning the burden of proof to Petitioners may result in allowing a question of admittedly great public importance to repeatedly recur and yet escape judicial review, when it should have been promptly resolved on the merits. This is precisely the sort of policy consideration that should lead the Court to assign the burden of proof to Respondents. See id. at 880-881; see also *Philadelphia Newspapers, Inc. v. Hepps*, 475 US 767, 776-777 (1986) (constitutional values require assigning burden of proof in

[3] The full text of *Plan Bay Area 2040: Final Performance Assessment Report* can be found at http://2040.planbayarea.org/cdn/farfuture/qOSR1O4FnTwIzG_NIQW2IJ0PIy9Z_Emeuv-knEKcEqE/1499748676/sites/default/files/2017-07/Performance%20Assessment%20Report_PBA2040_7-2017_0.pdf

defamation cases so as to minimize risk of erroneous findings of liability, even at the cost of allowing some instances of defamation to go unremedied).

The misplacement of the burden of proof by the court below determined the outcome of the appeal. This Court should grant review to clarify that Respondents bear the burden of proving that their minor, routine updates to Plan Bay Area somehow resolve the important public issues raised by this case, such that those issues are unlikely to recur in future litigation. Based on the record before the Court of Appeal, it is obvious that Respondents have not carried that burden.

IV. REVIEW SHOULD BE GRANTED BECAUSE DISMISSAL OF THE APPEAL AS MOOT HAS LEFT IMPORTANT MATERIAL ISSUES UNRESOLVED

A second exception to the general rule that courts will not adjudicate moot disputes applies to declaratory relief actions in which material issues would be left unresolved if the case is dismissed as moot.

> This qualification or exception has been applied to actions for declaratory relief upon the ground that the court must do complete justice once jurisdiction has been assumed, and the relief thus granted may encompass future and contingent legal rights.

Eye Dog Foundation for the Blind v. State Bd. of Guide Dogs for the Blind (1967) 67 Cal. 2d 536, 541 (citation omitted). As this Court has noted, the fundamental relief sought in a declaratory judgment is "to have immediate judicial assurance that advantages will be enjoyed or liabilities escaped in the future." (Id. at 541 fn. 2 [citations omitted].) In the case at bar, Petitioners seek

> [a] declaration consistent with Plaintiffs' and Petitioners' claim for declaratory relief that establishes the rights and obligations of the Defendants and Respondents with respect to SB 375 and state and federal constitutional mandates, and avoids a multiplicity of suits and waste of funds based on uncertainty regarding these provisions, including but not limited to, a declaration consistent with Plaintiffs' and Petitioners' claims for declaratory relief.

(AA at 24.) The claims for declaratory relief allege violations of the state and federal constitutions and SB 375. (Id.) Resolution of these claims will affect the rights and responsibilities not just of the immediate parties, and certainly not just under the initial iteration of Plan Bay Area. Rather, the resolution of Petitioners' claims for declaratory relief will impact the rights and obligations of a significant proportion of Bay Area residents, both now and in the future.

This court's guidance in interpreting the language of S.B. 375 regarding the feasibility mandate will be of utmost importance not only for this action, but for the future benefit of Respondents. For example, the question of whether the feasibility language of S.B. 375 is mandatory, and not simply discretionary, is of vital importance with respect to the statutorily mandated future updates of Plan Bay Area. These claims comprise an ongoing controversy, the dismissal of which would leave important material issues unresolved.

Yet despite the fact that Respondents' own Performance Assessment Report established that the updated Plan *cannot*, on its face, meet S.B. 375's requirements (and therefore that the achievement of those goals remains *infeasible*, regardless of the 2017 updates), the court below relied on its misplacement of the burden of proof to conclude that "[Petitioners] make no attempt to show . . . that there are important declaratory relief

issues that should be resolved even though Plan Bay Area has been replaced." (Opinion at 7.) With no evidence whatsoever that the 2017 updates would resolve any of the statutory and constitutional defects of the Plan, and in the face of the Performance Assessment Report's conclusion that those defects have *not* been resolved, dismissing the present appeal as moot ensures that the important material issues raised by Petitioners' declaratory relief action will remain unresolved for the next round (or rounds) of litigation.

This Court should grant review to clarify that the declaratory relief exception to the mootness doctrine should apply in full force to the present case.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court grant this petition for review to resolve the important questions of law presented by this case.

Dated: February 25, 2019 KASSOUNI LAW

By: 
Timothy V. Kassouni
Attorneys for Petitioners

CERTIFICATE OF WORD COUNT

I certify that the foregoing Petition for Review contains 5,893 words based upon the electronic word count of my computer word processing program.

Timothy V. Kassouni

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE POST SUSTAINABILTY INSTITUTE et al., Plaintiffs and Appellants, v. ASSOCIATION OF BAY AREA GOVERNMENTS et al., Defendants and Respondents.	A144815 (Alameda County Super. Ct. No. RG13699215)

This is an appeal by the Post Sustainability Institute, Rosa Koire and Michael Shaw (petitioners) from the Alameda County Superior Court's judgment denying their petition for a writ of mandate and dismissing their complaint for declaratory and injunctive relief. Petitioners challenged the 2013 adoption of "Plan Bay Area," a statutorily required, long-term sustainable community strategy to reduce greenhouse gas emissions in the Bay Area that was prepared by respondents Metropolitan Transportation Commission (MTC) and the Association of Bay Area Governments (ABAG) (together, respondents). Petitioners claim Plan Bay Area was unlawful in several respects.

Respondents have moved to dismiss this appeal as moot because in 2017 they replaced Plan Bay Area with an updated plan entitled "Plan Bay Area 2040," as provided by law. Petitioners argue that even if we determine the adoption of Plan Bay Area 2040 moots their appeal, we should exercise our discretionary authority to decide its merits because they raise issues of continuing public interest that are likely to recur and

important declaratory relief issues. We agree that the adoption of Plan Bay Area 2040 moots this appeal. We decline to exercise our discretion to address the appeal for reasons we will discuss.

BACKGROUND

As we explained in *Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966 (*Bay Area Citizens*), the Legislature enacted the "Sustainable Communities and Climate Protection Act of 2008" (Sen. Bill. No. 375 (2007–2008 Reg. Sess.)), which we refer to as Senate Bill 375. Under Senate Bill 375, the State Air Resources Board (Board) sets targets for each of California's regional planning agencies to reduce emissions from automobiles and light trucks in its region; each regional agency, after engaging in an extensive planning process, develops a sustainable community strategy to meet the Board's targets using regional land use and transportation policies. (*Bay Area Citizens*, at pp. 975–976.) Each regional metropolitan planning organization must consider, among other things, household formation and employment growth in setting forth a forecasted development pattern for the region. This pattern, when integrated with the transportation network and other transportation measures and policies, should be designed to reduce the greenhouse gas emissions from automobiles and light trucks to achieve the Board's targets if there is a feasible way to do so. (Gov. Code, § 65080, subd. (b)(2)(B)(i), (ii), (iv), (vii).[1]) (*Bay Area Citizens*, at pp. 981-982.)

In 2010, the Board called for respondents to develop land use and transportation strategies that would result in regional per capita percentage emissions reductions of 7 percent by 2020 and 15 percent by 2035, as compared to emissions in 2005. In 2013, respondents prepared an update to the Bay Area's regional transportation plan and their first sustainable communities strategy in "Plan Bay Area." (*Bay Area Citizens*, *supra*, 248 Cal.App.4th at pp. 982–993.) Respondents planned for the Bay Area's growth to occur in "Priority Development Areas"—transit-oriented, infill development opportunity areas within existing communities intended to accommodate the majority of future

[1] All statutory references are to the Government Code unless otherwise noted.

development. (*Id.* at p. 983.) Plan Bay Area's final environmental impact statement projected it would reduce light-duty vehicle greenhouse gas emissions from 2005 levels by 10.4 percent per capita by 2020 and 16.2 percent per capita by 2035. (*Bay Area Citizens*, at p. 983 and fn. 8.) The Board accepted respondents' determination that the plan would meet the Board's emission reduction targets for the Bay Area. (*Bay Area Citizens*, at p. 976.)

In March 2014, petitioners filed a first amended verified petition for writ of mandate and complaint for declaratory and injunctive relief. They alleged respondents' adoption of Plan Bay Area violated provisions of the California Constitution, the United States Constitution, and Senate Bill 375. The complaint sought a writ of mandate directing respondents to set aside certain resolutions relating to the approval of the plan, an injunction barring enforcement of the plan, and declaratory relief.

The trial court, after considering briefing and oral argument, rejected petitioners' contentions and issued a final judgment disposing of all claims in February 2015. Petitioners filed a timely notice of appeal from this final judgment. As we have discussed, respondents have moved to dismiss this appeal as moot. Respondents have also requested that we take judicial notice of certain documents related to their approval of Plan Bay Area 2040. Petitioners do not oppose this motion, although they object to certain uses of the documents by respondents. We grant respondents' request for judicial notice.

DISCUSSION

Petitioners claim respondents erred in adopting Plan Bay Area because it could not have "feasibly" met the Board's greenhouse gas emissions reduction targets although this was statutorily required; it violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by permitting the "streamlining" of certain requirements under the California Environmental Quality Act (CEQA) for housing developers who included low-income housing in their plans; and it was replete with coercive mandates that impermissibly usurped local land use autonomy in violation of state statutory and constitutional law.

Respondents oppose these claims and argue this appeal is moot because all of petitioners' claims and contentions relate specifically to Plan Bay Area, adopted in 2013, which respondents replaced in 2017 with an updated plan, Plan Bay Area 2040. " 'It is well settled that an appellate court will decide only actual controversies and that a live appeal may be rendered moot by events occurring after the notice of appeal was filed. [An appellate court] will not render opinions on moot questions or abstract propositions, or declare principles of law which cannot affect the matter at issue on appeal.' " (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 866 (*Building a Better Redondo, Inc.*).) "If the issues on appeal are rendered moot, a reversal would be without practical effect, and the appeal will be dismissed." (*Ibid.*) Petitioners are correct that Plan Bay Area is no longer in effect; therefore, petitioners cannot obtain any effective relief and the appeal is therefore moot.

Petitioners do not challenge this part of respondents' mootness analysis. Instead, they urge us to exercise our discretionary authority to consider their appeal despite Plan Bay Area's replacement. However, as we will now discuss, petitioners have not shown their claims are likely to recur or raise important declaratory relief issues. Therefore, we decline to exercise our discretionary authority to consider this appeal.

Even when a circumstance renders an issue technically moot, a court may exercise its "discretion to decide it because the issue is likely to recur, might otherwise evade appellate review, and is of continuing public interest." (*People v. Morales* (2016) 63 Cal.4th 399, 409.) Also, courts have exercised this discretion when, despite the happening of a subsequent event, material questions of declaratory relief remain for the court's determination in order to do complete justice. (*Building a Better Redondo, Inc.*, *supra*, 203 Cal.App.4th at p. 867.) Courts are disinclined to exercise this discretion when a claim "is a particularly factual determination that must be resolved on a case-by-case basis, dependent upon the specific facts of a given situation." (*Giles v. Horn* (2002) 100 Cal.App.4th 206, 228 [declining to consider an appeal alleging contracts violated a county charter after the contracts had expired].)

Petitioners' first claim is that respondents erred in concluding Plan Bay Area could have feasibly met the Board's greenhouse gas emissions reduction targets.[2] According to petitioners, this conclusion was directly contradicted by indications in an independent feasibility study of Plan Bay Area that the plan's goals would have required many legislative changes, and that most of the Priority Development Areas identified in the plan did not have the capacity to accommodate the plan's housing allocations. Petitioners also assert the statutory language regarding "feasibility" in Senate Bill 375 requires more certainty than respondents assert it requires, but nonetheless argue Plan Bay Area was not feasible under any interpretation.

In other words, although petitioners raise an issue about the meaning of "feasible," they ultimately assert that Plan Bay Area's specified strategies could not have feasibly met the Board's greenhouse gas emissions reduction targets.[3] Such a challenge undoubtedly raises issues of public interest to the Bay Area community. Nonetheless, we are disinclined to consider questions that are dependent on the specific facts of a given situation (*Giles v. Horn*, *supra*, 100 Cal.App.4th at p. 228), and resolution of the petitioners' infeasibility claim depends on Plan Bay Area's specific assumptions and strategies. Petitioners do not establish that their infeasibility claim is likely to recur or that it raises ongoing and material questions of declaratory relief that require our

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[2] "The sustainable communities strategy shall . . . (vii) set forth a forecasted development pattern for the region, which, when integrated with the transportation network, and other transportation measures and policies, will reduce the greenhouse gas emissions from automobiles and light trucks to achieve, *if there is a feasible way to do so*, the greenhouse gas emission reduction targets approved by the state board . . . ." (§ 65080, subd. (b)(2)(B), italics added.) "Feasible" "means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (§ 65080.01, subd. (c).)

[3] We could consider the meaning of "feasible" without consideration of the specific strategies and goals of Plan Bay Area. However, this would be just the kind of advisory opinion on an abstract proposition that the law abhors. (See *Building a Better Redondo, Inc.*, *supra*, 203 Cal.App.4th at p. 866.)

attention. They do not attempt to show their infeasibility claim applies equally to Plan Bay Area 2040 or that any of their infeasibility contentions were raised—by them or anyone else—in public comments during Plan Bay Area 2040's preparation, which would have gone a long way toward establishing that their claims are likely to recur.[4]

We are disinclined to analyze petitioners' infeasibility claim regarding a plan that has been replaced by another that contains meaningful changes without petitioners explaining the impact of these changes on their analyses. For example, petitioners ignore that, however limited and focused the changes in Plan Bay Area 2040 might be, it contains significantly higher regional housing and job growth projections than did Plan Bay Area. These changes are relevant to petitioners' main appellate claim—that Plan Bay Area could not "feasibly" have met the Board's targets as required by Senate Bill 375. As we have discussed, respondents are statutorily required to consider the housing and jobs growth in the Bay Area in developing their sustainable community strategy. (§ 65080, subd. (b)(2)(B)(i), (ii), (iv), (vii).) Plan Bay Area projected the Bay Area would increase by 700,000 households by 2040, but Plan Bay Area 2040 projects the Bay Area will increase by 820,000 households in that time. In other words, Plan Bay Area 2040 projects a household growth of 120,000 units more than Plan Bay Area projected, an increase of over 17 percent. Similarly, Plan Bay Area projected an increase of 1.1 million jobs in the Bay Area by 2040, while Plan Bay Area 2040 projects an increase of 1.3 million jobs by that time, an increase of 200,000 jobs or more than 18 percent. These are not insignificant changes to core assumptions of respondents' strategic planning, and respondents contend that "because of the differences in the assumptions and strategies contained in the two plans, the results, as evaluated by the

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[4] Respondents refer to portions of documents that they included in their request for judicial notice summarizing the public comments received regarding Plan Bay Area 2040 to show neither petitioners nor anyone else raised petitioners' infeasibility challenge to Plan Bay Area 2040. Petitioners object to our consideration of these documents for the truth of the matters asserted therein in the absence of supporting declarations, hearing transcripts and requisite foundational facts. We need not resolve this dispute in light of our conclusions.

performance targets, vary." Petitioners do not meaningfully discuss whether or how their claims about Plan Bay Area remain relevant in light of these changes.

Instead, petitioners argue the negative—that respondents "do not identify with specificity" anything in Plan Bay Area 2040 that could call petitioners' claims into question, do not indicate a new feasibility study was prepared for Plan Bay Area 2040, do not show that Plan Bay Area 2040 is capable of feasibly meeting the Board's targets, do not establish that respondents' statutory construction of "feasibility" "will never arise in subsequent plan updates," and do not show that there were no public comments about Plan Bay Area 2040 relevant to the appeal. Respondents have established that the appeal is moot and it is petitioners who request that we exercise our discretion to decide the appeal. Thus, petitioners have assumed the burden of showing the factors that would support our exercise of discretion. Petitioners fail to meet this burden. Specifically, they do not establish that their infeasibility claim regarding Plan Bay Area is likely to recur. Other than stating unproven generalities about the "routine" nature of the updates in Plan Bay Area 2040, they make no attempt to show that the new plan is infeasible for the reasons they argue the old plan was infeasible, or that there are important declaratory relief issues that should be resolved even though Plan Bay Area has been replaced. Under these circumstances, we will not exercise our discretion to consider this moot claim. (See *Bell v. Board of Supervisors* (1976) 55 Cal.App.3d 629, 636 [dismissing an appeal as moot because the challenged legislation had been repealed and replaced by a new law that was materially different]; *East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 305–306 [adoption of new general plan that eliminated a material condition mooted appellate claim regarding the old general plan that contained this condition]; *La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586 [adoption of an amended neighborhood plan rendered challenge to exceptions that were allowed only in the old plan moot].)

Petitioners also give us no reason to conclude their second and third appellate claims are likely to recur or raise declaratory relief questions that we should address. Petitioners' second claim is that Plan Bay Area violated the Equal Protection Clause of

the Fourteenth Amendment of the United States Constitution by providing CEQA "streamlining" to housing developers that included a certain amount of low-income housing in their development plans. According to petitioners, pursuant to Public Resources Code section 21159.28 and Plan Bay Area, developers whose projects met Plan Bay Area's specified criteria would be exempt from addressing in their environmental impact reports the environmental effects of the growth entailed in their projects or the effects of increased car and light duty truck trips on global warming or the regional transportation network. Nor would they be required to outline a reduced density alternative to their proposed project. Petitioners characterize the question as "whether non-environmental/non-EIR related requirements that [r]espondents chose to adopt as a condition for CEQA streamlining under [Plan Bay Area] violate the Equal Protection Clause."

Petitioners' third claim is that Plan Bay Area was "replete" with coercive mandates that usurped local land use autonomy in violation of state statutory and constitutional law. According to petitioners, "[i]n contravention of the home rule guaranty," Plan Bay Area coerced local governments into adopting land use enactments that were consistent with its goals "in order to establish a regionalist government of non-elected agencies." Any local entity that failed to comply would have lost eligibility for funding through the One Bay Area Grant Program and for CEQA streamlining benefits. Plan Bay Area estimated total One Bay Area Grant Program funding for local governments at $14.6 billion over the course of the plan from federal surface transportation legislation currently known as MAP-21.

These two appellate claims are also specific to Plan Bay Area's goals and strategies. Yet petitioners make no attempt to show they remain relevant after the plan's replacement. Nor do petitioners establish these claims were raised in public comments by them or anyone else during Plan Bay Area 2040's preparation. Again, petitioners give us no reason to conclude these claims, while of obvious public interest, are likely to recur or raise important declaratory relief issues. Therefore, we decline to exercise our discretion to consider them.

Petitioners also argue that we should not dismiss their appeal because the issues they raise are likely to evade judicial review, given that under Senate Bill 375, the Bay Area's regional transportation plan must be updated every four years. (See § 65080, subd. (d).) We have some sympathy for this argument, given the time that has been required to review this matter. (See *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 511 [despite adoption of a successor regional transportation plan, court exercised its discretion to decide whether an environmental impact report for the previous plan should have analyzed the plan's consistency with greenhouse gas emission reduction goals in Executive Order No. S-3-05 in part "because of the relatively short period between adoption of a [plan] and adoption of a successor plan"].) Nonetheless, in the absence of any meaningful indication by petitioners that they have made claims that are likely to recur or implicate important declaratory relief issues, this part of their argument is not persuasive.

DISPOSITION

The appeal is dismissed as moot. The parties shall bear their own costs of appeal.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.

KASSOUNI LAW
621 Capitol Mall, Suite 2025
Sacramento, CA 95814
Tel: (916) 930-0030 ♦ Fax: (916) 930-0033

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 621 Capitol Mall, Suite 2025, Sacramento, CA 95814. On February 25, 2019, a true copy of

PETITION FOR REVIEW

were electronically filed with the California Supreme Court, through Truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's e-filing system.

Tina A. Thomas, SBN 088796 tthomas@thomaslaw.com
Amy R. Higuera, SBN 232876 ahiguera@thomaslaw.com
THOMAS LAW GROUP
455 Capitol Mall, Suite 801
Sacramento, CA 95814

Adrienne D. Weil, SBN 108296
aweil@mtc.ca.gov
General Counsel
METROPOLITAN TRANSPORTATION COMMISSION
375 Beale Street, Suite 800
San Francisco, CA 94105

Kenneth K. Moy, SBN 087914
Kennethm@abag.ca.gov
Legal Counsel
ASSOCIATION OF BAY AREA GOVERNMENTS
375 Beale Street, Suite 700
San Francisco, CA 94105

California Supreme Court
350 McAllister Street
Room 1295
San Francisco, CA 94102-4797

California Court of Appeal
Clerk of Court
First Appellate District
350 McAllister Street
San Francisco, CA 94102

Alameda County Superior Court Clerk of
Court
1221 Oak Street
Oakland, CA 94612
[Via U.S. Mail]

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

Executed at Sacramento, California, on February 25, 2019.

TIMOTHY V. KASSOUNI

KASSOUNI LAW
621 Capitol Mall, Suite 2025
Sacramento, CA 95814
Tel: (916) 930-0030 ♦ Fax: (916) 930-0033