Nos. 18-16105, 18-16141

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAKLAND BULK & OVERSIZED TERMINAL, LLC,

Plaintiff-Appellee,

v.

CITY OF OAKLAND,

Defendant-Appellant, and

SIERRA CLUB; SAN FRANCISCO BAYKEEPER,

Intervenor-Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 3:16-cv-07014
Hon. Vince Chhabria

INTERVENOR-DEFENDANTS-APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

Colin C. O'Brien
Adrienne Bloch
Marie E. Logan
EARTHJUSTICE
50 California Street, Suite 500
San Francisco, CA 94111
Tel: (415) 217-2000

Attorneys for Intervenor-Defendants-Appellants

Jessica Yarnall Loarie
Joanne Spalding
SIERRA CLUB
2101 Webster Street, Suite 1300
Oakland, CA 94612
Tel. (415) 977-5636

Attorneys for Intervenor-Defendant-Appellant Sierra Club

Daniel P. Selmi
919 Albany Street
Los Angeles, CA 92662
Tel. (213) 736-1098

Attorney for Intervenor-Defendant-Appellant Sierra Club

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INTRODUCTION

Intervenor-Defendants-Appellants Sierra Club and San Francisco Baykeeper (collectively, "Environmental Groups") respectfully petition for rehearing and rehearing en banc to review the panel's opinion in this case, which is erroneous on two exceptionally important issues.

The panel's first error was to impose a new and nearly impossible-to-meet standard for intervention as of right under Federal Rule of Civil Procedure 24(a)(2) that conflicts with the Court's prior decisions. The panel ruled that a prospective intervenor's showing of a "narrower interest" than existing parties "is insufficient" to merit intervention—insisting that a proposed intervenor must "offer persuasive evidence, at the time of their motion to intervene," that an existing party's broader interests "*would* lead it to stake out an undesirable legal position." Op. at 34 (emphasis added). This newly-minted requirement conflicts with this Court's precedent: the Court routinely grants intervention as of right based on a showing of narrower interests, and does not require proof that existing parties will take specific legal positions that will diverge from those of the would-be intervenor. The Court's consistent interpretation of Rule 24(a)(2) is exemplified by *Allied Concrete & Supply Co. v. Baker*, wherein the Court granted intervention because the prospective intervenor's "interests are potentially more narrow . . . and the State's representation of those interests *may have been* inadequate." 904 F.3d 1053, 1068

(9th Cir. 2018) (citation and internal quotation omitted); *accord Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (stating courts evaluate "whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments") (citation omitted); *see also infra* at 10–12, 14–15.

The panel compounded its first error when, ironically, it refused to consider an argument that Environmental Groups exclusively raised and that lies at the heart of the case—an argument the City of Oakland ("City") did not join because of its broader, divergent interests. After denying Environmental Groups intervention as of right because they failed to possess the perfect foresight to predict the City would withhold this specific argument, the panel declined to address whether California law prohibits cities contracting with developers from bargaining away their police power to protect vulnerable residents from harmful air pollution.

Both of the panel's errors raise issues of exceptional importance the Court should grant rehearing to address. As to intervention, the panel's newly instituted requirement—*i.e.*, that applicants must supply evidence, at the time of intervention, establishing exactly how a case will unfold and precisely how different interests will thereafter manifest as specific legal arguments—asks applicants to prove what is largely unknowable. By doing so, it creates an insurmountable obstacle to intervention as of right except in the rarest of cases, and thereby sharply curtails

the rights that Rule 24(a)(2) was instituted to protect. The Court should grant rehearing and reverse.

This case also poses the exceptionally important issue of the extent of a city's authority under California law to contractually surrender its police power to a developer. Here, the panel upheld a contract that—as interpreted by the panel—granted the developer a "freeze [of] *all* existing regulations, not just land use regulations." Op. at 32. But in so ruling, and further holding that the City could not apply new air quality protections to a development, the panel refused even to consider whether California constitutional and statutory law allows a city to bargain away its police power to this extreme degree. Instead, the Court held that Environmental Groups had no right to raise this issue because, at the time of intervention, they had not specifically proved the issue would arise. The Court should grant rehearing to decide this issue, which bears on the health and safety of millions of Californians. Alternatively, since no definitive state court precedent has addressed this issue, it would be appropriate for the Court to grant rehearing and certify this issue to the California Supreme Court.

FACTUAL BACKGROUND

After federal authorities decided to close the Oakland Army Base located in West Oakland, the City eventually assumed ownership of the property and initiated redevelopment planning. West Oakland community members were cautiously

optimistic, as neighborhood residents have long experienced lower incomes, limited access to health care, higher rates of chronic disease, and a heightened burden of harmful air pollution—all of which contribute to an average life expectancy in West Oakland that is 15 years shorter than other parts of the City. ER1065–82, ER1322–33.[1]

To further its redevelopment plan, the City signed a so-called "development agreement" (the "DA") with a predecessor to Plaintiff-Appellee Oakland Bulk & Oversized Terminal, LLC ("OBOT"). California law authorizes cities and counties to sign such agreements, subject to state constitutional limits and the requirements of California's Development Agreement Statute. Here, the DA memorialized OBOT's right to develop a portion of the former Army Base into "a marine terminal for bulk and oversized cargo and other uses and improvements." ER1955.

When rumors surfaced in late 2013 that OBOT planned to handle and store dirty, dusty coal at its terminal, an OBOT principal specifically denied those plans in a company-sponsored newsletter: "It has come to my attention that there are community concerns about a purported plan to develop a coal plant or coal distribution facility . . . . This is simply untrue." ER1777. He misrepresented OBOT's intentions. Just months later, in April 2014, OBOT signed an agreement

[1] "ER" citations refer to Appellants' Joint Excerpts of Record, Docs. 34-1 to 34-9.

with a wholly-owned subsidiary of a coal company. ER1856. OBOT tried to keep these plans secret, but they were exposed in April 2015 when a Utah newspaper broke the news that several coal-producing counties were seeking state monies to finance OBOT's coal terminal. ER0641, ER0646–50.

When OBOT's misrepresentation came to light, community members and groups like Sierra Club and San Francisco Baykeeper demanded that the City protect West Oakland residents already severely over-burdened by air pollution. Over the next year, the City solicited and received public comments from hundreds of members of the public, held multiple hearings, and received expert evidence from scientists and public health professionals. The evidence revealed that developing a coal terminal in West Oakland would exacerbate poor air quality there and pose other health and safety dangers. Based on this evidence, the City Council adopted an ordinance that bans the storage and handling of coal at bulk material facilities in Oakland, and a resolution applying the ban to OBOT's terminal at the former Army Base.

PROCEDURAL BACKGROUND

OBOT refused to participate in nearly all of the City's almost year-long public process; instead, after its completion, OBOT sued the City in federal court. OBOT alleged breach of a DA provision (§ 3.4.2) that grants OBOT certain development rights. At the same time, however, this provision reserves the City's

authority under the police power to apply new laws when the "City determines based on substantial evidence . . . that a failure to do so would" cause a "condition substantially dangerous" to the health and safety of neighbors. ER1970. OBOT alleged the City lacked substantial evidence of the need for its coal ordinance.

Environmental Groups quickly moved to intervene in the lawsuit as of right under Federal Rule of Civil Procedure 24(a)(2). They demonstrated that their interests—focused on public health and environmental pollution—are narrower than the City's broader interests, which include economic development and tax revenue. Crucially, Environmental Groups showed that the City's and their interests in this particular case potentially conflicted because the City had bound itself to OBOT and other developers as a contractual partner in development agreements. The City thus has specific interests in preserving the hundreds of millions of dollars of associated tax benefits and grants tied to the DA, and in protecting other development agreements with similar contractual and economic implications for the City. *See* ER1169–70, ER1290–1309. Further, Environmental Groups informed the court that they had previously sued the City in state court for noncompliance with California environmental law concerning its redevelopment plans with OBOT.

OBOT opposed the motion to intervene, arguing that the City would adequately represent Environmental Groups. Without any explanation, the district

court denied Environmental Groups intervention as of right. It granted only limited, permissive intervention. ER0042.

At trial on OBOT's breach of contract claim, the court ruled that the "substantial evidence" provision in the DA did not require it to review the City's coal ordinance under the well-known "substantial evidence" test. Instead, at OBOT's urging, the district court admitted voluminous evidence outside of the administrative record compiled by the City before passing the ordinance.

During post-trial briefing, the court refused to hear an important argument that Environmental Groups advanced but the City pointedly did not join—*precisely because the City's distinct interests in the DA and other development agreements diverged from those of the Environmental Groups*. Those groups filed a Rule 52(c) motion for judgment premised on California's Development Agreement Statute (Cal. Gov't Code § 65866), which authorizes and governs the DA. They argued that the court must either harmonize the DA with the statutory limits established for development agreements in section 65866 or, if that proved impossible, deem the DA unenforceable for abdicating the City's police power. However, the district court held that, because it had granted Environmental Groups only limited intervention status, they could not raise this argument, and the court refused to consider it. ER0038.

Ultimately, the district court ruled that the City breached the requirements of section 3.4.2 of the DA. On appeal before this Court, the panel affirmed.

ARGUMENT

Environmental Groups request that the Court rehear the case to correct the panel's imposition of a new, erroneous standard for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). That standard both conflicts with existing Court precedent and threatens to severely undermine the ability of interested persons to protect their rights, as this case directly illustrates.

Further, Environmental Groups request rehearing to correct the panel's failure to address a fundamental underlying issue in this case: whether the DA, as interpreted by the panel, complies with California state constitutional and statutory law. If the DA is not enforceable for reasons of public policy, OBOT cannot prevail on a claim of breach. Consequently, the Court should grant rehearing and address this issue or, alternatively, certify this exceptionally important issue of state law to the California Supreme Court.

I. The panel applied a new and impossible standard for intervention as of right that conflicts with this Court's precedent.

In reviewing Environmental Groups' claim that the district court wrongly denied them intervention as of right pursuant to Federal Rule of Civil Procedure 24(a)(2), the panel begins by citing the Court's well-established requirements but then imposes a new and more stringent—if not impossible—standard that conflicts

with prior decisions of the Court and severely undercuts the very purpose of Rule 24(a)(2).

At the outset, the panel opinion identifies the Court's familiar four-factor test for intervention under Rule 24(a)(2), and correctly states that of the four factors, "[a]dequacy of representation is the sole element at issue here." Op. at 33-34. The panel further states that Environmental Groups "needed to make a 'very compelling showing'" of inadequacy of representation in this case because the City—"a governmental entity" with "the same ultimate objective of upholding the Ordinance"—already was a party. Op. at 34 (citing *Arakaki*, 324 F.3d at 1086).

The panel then errs in its assessment of Environmental Groups' showing that the City does not adequately represent them. The panel appropriately recognizes that Environmental Groups possesses a "narrower interest — a focus on health, safety and environmental protections," that differs from "Oakland's broader concerns that include such matters as the City's finances and its contractual relationship with OBOT." Op. at 34. However, the panel proclaims "this alone is insufficient." *Id*. Rather, according to the panel, Environmental Groups must "*offer persuasive evidence, at the time of their motion to intervene, that Oakland's broader interests would lead it to stake out an undesirable legal position*." Op. at 34 (emphasis added.) The panel further elaborates that, to gain intervention as of

right even with differing interests, Environmental Groups must identify the specific "potential argument[s]" the City would not join. Op. at 35.

This holding is erroneous and must be corrected for several reasons:

First, the panel's insistence that Environmental Groups must offer "evidence" to show that the City's "broader interests *would* lead it to stake out an undesirable legal position" (Op. at 34, emphasis added) directly conflicts with other decisions of the Court addressing Rule 24(a)(2)'s adequacy of representation criterion. For example, in *Citizens for Balanced Use v. Montana Wilderness Association*, the Court "stress[ed] that intervention of right *does not require an absolute certainty*" that existing parties will provide inadequate representation. 647 F.3d 893, 900 (9th Cir. 2011) (emphasis added). Indeed, the two cases relied upon by the panel—*Prete* and *Arakaki*—are also careful to prescribe that certainty is *not* required. In *Prete v. Bradbury*, the Court stated "[t]he burden of showing inadequacy of representation is minimal and 'is satisfied if the applicant shows that representation of its interests *may be* inadequate.'" 438 F.3d 949, 956 (9th Cir. 2006) (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (emphasis added)). Likewise, in *Arakaki*, the Court held that adequacy of representation turns on "whether the interest of a present party is such that it will *undoubtedly* make all of a proposed intervenor's arguments." 324 F.3d at 1086 (emphasis added).

Arakaki is instructive because it reveals how the panel has created a conflict with this Court's other decisions that will sow confusion in the lower courts and undercut Rule 24(a)(2)'s protection of interested persons. *Arakaki* required the panel to ask if the City "undoubtedly" would make all of Environmental Groups' arguments—and to answer that question in light of the City's distinct and conflicting interests in the DA at issue, its concern about how its positions in the litigation would impact similar development agreements it has entered, and its goal of protecting the hundreds of millions of dollars of taxes and grant funding at stake. Instead, the panel changed the question and imposed a new evidentiary burden, demanding that Environmental Groups offer evidence that the City necessarily "would . . . stake out an undesirable legal position." Op. at 34.[2]

Second, the panel's statement that a showing of "narrower interest . . . is insufficient" (Op. at 34) contradicts other decisions of the Court, which have consistently found inadequate representation and granted intervention as of right when the intervenors demonstrated narrower interests. *See, e.g.*, *Allied Concrete*, 904 F.3d at 1068 (intervenor's interests "are potentially more narrow "); *Arakaki*,

[2] In *Arakaki*, the Court found that existing parties would undoubtedly make all of the prospective intervenor's arguments. But that case involved an agency with a narrow purpose that "stated [to the] Court that it will make all arguments necessary to defend" the prospective intervenor's interests, as well as a "similarly situated intervenor"—admitted earlier in the proceedings—that shared the same interests. 324 F.3d at 1087–88.

324 F.3d at 1087-88 (denying intervention but distinguishing case "from those in which we have permitted intervention on the government's side in recognition that the intervenors' interests are narrower than that of the government and therefore may not be adequately represented); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) ("City's range of considerations in development is broader than the profit-motives animating [intervening] developers"); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (intervenors' interests "were potentially more narrow and parochial"); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) *abrogated on other grounds by Wilderness Soc'y. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (en banc) ("Forest Service is required to represent a broader view" than intervenor's "more narrow, parochial interests").

Third, the panel opinion directly conflicts with existing decisions of the Court by refusing to credit the different *interests* of the City and Environmental Groups. Instead, the panel erroneously focused on whether Environmental Groups, at the start of the case, could identify specific discordant *legal arguments*. But as *Arakaki* explains but the panel ignores, the "most important factor" in assessing adequacy of representation is "how the interest [of a potential intervenor] compares with the interests of existing parties." 324 F.3d at 1086; *accord Citizens for Balanced Use*, 647 F.3d at 898 (same).

This analytical emphasis on the nature of a prospective intervenor's and existing parties' respective interests is entirely logical. At the very beginning of litigation, these interests are typically all that the litigants know—and reasonably can be expected to know or show. The panel opinion, however, asks prospective intervenors to peer into the future and identify the specific "potential argument[s]" that would arise. Op. at 35. A prospective intervenor, however, can neither know nor reliably predict, at the outset of litigation, how a case will unfold or, in the face of the inevitable twists and turns of litigation, whether events necessarily will lead other parties "to stake out an undesirable position." Op. at 34. Moreover, even where a prospective intervenor knows about the possibility of divergent positions, it is the rare case in which the intervenor would be able to offer "persuasive evidence" at the earliest stages of a case (Op. at 34) that proves exactly what *other* parties will do in the future. Yet that is precisely the barrier that the panel erects.[3]

Finally, the panel's opinion is erroneous because its new, stricter standard for establishing intervention excludes prospective intervenors that are, in fact, inadequately represented by existing parties, and thereby undermines the rights of interested persons that Rule 24(a)(2) was adopted to protect. This case shows as

[3] The attorney-client privilege and work product doctrine also constrain a prospective intervenor's ability to know, disclose, and offer evidence of potentially divergent positions.

much. Here, after the district court refused full intervention to Environmental Groups, they briefed a legal argument that, if successful, would have defeated OBOT's breach of contract claim. But the City declined to advance the same, potentially dispositive argument—even though the court twice commended it to the City *sua sponte*. ER0586–90, ER0320–25. The City's reasons highlight the importance of the panel's error. The City declined to make the argument because of its distinct interests in the DA and in other development agreements—interests that Environmental Groups' motion for intervention highlighted as differing from their own. Ultimately, both the district court and panel refused to consider Environmental Groups' distinct argument on the grounds that their limited intervention status disallowed it, thus subverting the very purpose of Rule 24(a)(2) and prejudicing the groups.

The panel's new barrier to intervention threatens to make such unjust results the rule. The panel opinion therefore must be reversed, consistent with this Court's "policy" of construing Rule 24(a)(2) "broadly in favor of proposed intervenors," *Wilderness Soc'y*, 630 F.3d at 1179 (citations omitted), and its stated intention to "follow[] the guidance of Rule 24 advisory committee notes that state that 'if an absentee would be substantially affected in a practical sense by the determination

made in an action, he should, as a general rule, be entitled to intervene.'" *Arakaki*, 324 F.3d at 1086 (9th Cir. 2003) (citations omitted).[4]

II. The Court should grant rehearing and address whether the City's Development Agreement is enforceable under California's Development Agreement Statue.

The panel's failure to apply the correct intervention standard and grant intervention to Environmental Groups is inextricably linked to a substantive legal issue of extraordinary importance to California law. That issue is essential to the ultimate outcome of the merits of this case—yet it was never heard by the district court or the panel.

At the center of this case is section 3.4.2 of the DA, which the panel reads as "freez[ing] *all* existing regulations, not just land use regulations" (Op. at 32) that might apply to OBOT's proposed development, unless or until the City makes certain findings—meeting a specific evidentiary standard. In so concluding, the panel *assumed* that California law *allows* the City to adopt a development

[4] The panel opinion suggests in passing that Environmental Groups' additional argument was untimely, citing *Janes v. Wal-Mart Stores Inc.*, 279 F.3d 883, 887 (9th Cir. 2002). Op. at 35. *Janes* is inapposite. *Janes* addressed a Rule 50 motion, 298 F.3d at 887, whereas Environmental Groups moved under Rule 52(c), and "[t]he standards that govern [Rule 50] judgment as a matter of law . . . have no bearing on a decision under Rule 52(c)." Fed. R. Civ. P. 52(c) advisory committee's note to 2007 amendment. Environmental Groups properly filed for judgment after the close of evidence but prior to the court's ruling, during the period allotted for post-trial briefing. In any event, the timing of the motion does not bear on the panel's erroneous finding that the City adequately represented Environmental Groups—which it manifestly did not.

agreement that constrains the full breadth of its regulatory powers, and not just its land use authority. Brushing over this key question, the panel spends much of its opinion interpreting the DA's evidentiary standard ("substantial evidence") and applying it both to the City's administrative record and to the further evidence adduced at trial. Op. at 12–31.

In so focusing, the panel completely ignored a fundamental, underlying question that is likely dispositive of this matter: whether and to what degree California state constitutional law and the state's Development Agreement Statute allow the City to cede its police power over non-land use matters in a contract with developers. In particular, does the interpretation adopted by the panel exceed the City's statutory authority under section 65866 of the Development Agreement Statute (Cal. Gov't Code § 65866), as constrained by California constitutional limits? If the City's authority to contractually circumscribe its exercise of police power is more limited than what the parties and panel assume, then the DA cannot be enforced and OBOT's breach of contract claim necessarily fails.

Although both the district court and panel declined to address the issue based on their erroneous decisions on intervention, authority strongly suggests that the DA—if interpreted to broadly freeze *any and all* City regulatory powers—would not be enforceable. California's Supreme Court has warned that a city's police power is so fundamental that it "cannot be bargained or contracted away."

Laurel Hill Cemetery v. City & Cnty. of San Francisco, 152 Cal. 464, 475 (1907), *aff'd*, 216 U.S. 358 (1910). Consistent with this constitutional parameter, California courts have ruled that "a government entity may not contract away its right to exercise the police power in the future," and "[a] contract that purports to do so is invalid as against public policy." *Cotta v. City & Cnty. of San Francisco*, 157 Cal. App. 4th 1550, 1557–58 (2007).

California's Development Agreement Statute recognizes this fundamental constraint on municipal bargaining powers with developers. The statute allows cities and counties to freeze certain regulations, subject to "procedural and substantive limitations" that prevent "an unconstitutional surrender of the police power." *Trancas Prop. Owners Ass'n v. City of Malibu*, 138 Cal. App. 4th 172, 182 (2006). Government Code section 65866 provides one such substantive limitation; it generally limits a development agreement to freezing only *land-use* regulations such as those "governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications . . . ." Cal. Gov't Code § 65866(a). Outside of this land-use realm, section 65866 recognizes that the police power still governs, specifying that "[a] development agreement shall not prevent a city . . . from applying new rules, regulations, and policies which do not conflict with" frozen land-use provisions. *Id.*

Here, the panel has interpreted the DA to freeze *all* City regulations—including those addressing health and safety issues like air quality. In so ruling, the panel exceeded the lawful bounds of Government Code section 65866.

Whether the DA is lawful and may be enforced is a key question of land use law, as development agreements are increasingly used throughout California. It is consequential not just for this case, but all across California. It affects other cities looking to lawfully promote development, developers seeking regulatory certainty, and community members attempting to avoid harms from unlawfully forfeited police power. Environmental Groups therefore request that the Court grant their petition and address whether the DA is enforceable under California law.

Neither the district court, the panel, nor the parties cited any California decision that interprets the precise contours of Government Code section 65866 and delineates the kinds of regulations a city may lawfully freeze. Therefore, Environmental Groups ask, in the alternative, that the Court grant rehearing and certify this issue to the California Supreme Court.

CONCLUSION

Environmental Groups respectfully request that the Court grant their petition for rehearing or rehearing en banc and withdraw the panel's erroneous decision on intervention as of right. Environmental Groups further request that the Court grant their petition and address whether the DA is enforceable under California law.

Alternatively, they request that the Court certify this exceptionally important but uncertain question of California state law to the California Supreme Court.

DATED: July 9, 2020

Respectfully submitted,

s/ Colin C. O'Brien

Colin C. O'Brien
Adrienne Bloch
Marie E. Logan
EARTHJUSTICE

Attorneys for Intervenor-Defendants-Appellants Sierra Club and San Francisco Baykeeper

Jessica Yarnall Loarie
Joanne Spalding
SIERRA CLUB

Daniel P. Selmi

Attorneys for Intervenor-Defendants-Appellants Sierra Club

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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