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

DEFENDANT-APPELLANT CITY OF OAKLAND'S PETITION FOR REHEARING OR REHEARING EN BANC

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Pursuant to Fed. R. App. P. 35 and 40, Defendant-Appellant City of Oakland ("Oakland") requests rehearing or rehearing en banc to rectify the panel's errors. The panel's divided decision wrongly resolved at least two exceptionally important California law issues of first impression concerning the deference afforded to a local government's determination that a developer's plans would threaten public health and safety. This Court should certify those issues to the California Supreme Court, to allow it to resolve these important state law issues. In the alternative, the Court could correct the panel's errors itself on rehearing or rehearing en banc.

The panel's resolution of these issues and sheer breadth of its holding (which Oakland could not have anticipated) will, unless corrected, severely compromise municipalities' authority to protect residents' safety and health, invite private developers to "sand-bag" local governments by withholding evidence during administrative processes, and encourage forum shopping to take advantage of this federal court ruling. Indeed, the implications will extend beyond California, as the panel ruled that federal courts will *never* enforce a provision of a government contract that affords deference to government determinations.

This case arises out of a Development Agreement ("DA") between Oakland and Plaintiff-Appellee Oakland Bulk and Oversized Terminal, LLC ("OBOT"), governing OBOT's development of a rail-to-ship terminal adjacent to the San Francisco Bay. The DA expressly reserved Oakland's authority to impose new

regulations that the "City determines based on substantial evidence" are necessary to protect residents' health and safety. After learning of OBOT's secret plans to handle coal at the terminal, Oakland held a nearly year-long process of hearings, public comment, and expert analysis. Oakland then adopted a resolution prohibiting coal handling at the terminal based on its determination that the activity posed significant health and safety risks to nearby residents.

Under ordinary California law principles, Oakland's factual determinations regarding public health and safety are entitled to great deference in court. And the DA made that explicit, by specifying that Oakland could adopt future public health and safety regulations if the "City determines based on substantial evidence" that they were necessary. When government decisions are reviewed under this "substantial evidence" standard, they must be affirmed if reasonable and supported by some evidence, and courts cannot consider evidence that was not presented to the government decisionmaker.

The panel disregarded these settled state law principles and held the City's findings were "owed no deference" in court. Op. 18. Even more troubling, the panel ruled that federal courts will *never* give effect to a contract provision allowing cities to retain their full police power authority to decide, subject only to deferential judicial review, what regulation is necessary to protect residents' health and safety. The panel decision thus deprives Oakland of the benefit of its

agreement, erodes cities' inherent police power authority, and undermines the power of *all* cities in the Circuit to protect their residents.

The panel answered what it recognized were two unaddressed questions of California law. Oakland seeks rehearing or rehearing en banc on these two issues of first impression:

1. Does California's substantial evidence standard apply to judicial review of a decision by a local government's legislative body, after a mandated public hearing, that a potential development activity will be dangerous to its populace, if the decision is alleged to be a breach of contract?
2. Even if the substantial evidence standard does not apply as a matter of law, should a provision of a development agreement (a regulatory agreement with special status under California law) allowing application of new regulations to a development project so long as the "City determines based on substantial evidence" that new regulations are necessary be construed to incorporate California's substantial evidence standard?

The Court should withdraw the panel decision and certify these two unresolved state law issues to the California Supreme Court or, in the alternative, issue a new merits decision that correctly applies California law. These are questions of exceptional importance that affect the ability of every city in California (and, given the panel's reasoning, other states) to enter into agreements

governing economic development while retaining their ability to respond to new challenges by acting to protect residents' health and safety. If left standing, the decision will have far-reaching negative consequences, making it impossible for cities to retain their inherent police power authority while entering into contracts and encouraging a flood of federal litigation that would ordinarily be left to state courts more familiar with these California law issues.

BACKGROUND

DAs are statutorily authorized California law contracts between government entities and private developers that provide a tailored means for government entities to lock into place certain laws while retaining constitutionally required police power authority. In line with state constitutional and statutory limitations on cities' divestment of police powers, the DA here *expressly* preserved Oakland's police power by stating that Oakland could apply new regulations to OBOT if the "*City determines based on substantial evidence* and after a public hearing" that new regulations are necessary to avert substantial danger to health and safety. ER1970 ("§3.4.2") (emphasis added).

By using the phrase "substantial evidence," a state law term of art, the parties incorporated California's "substantial evidence" standard of judicial review of administrative and municipal decisions. Under that "extremely deferential" standard, *M.N. v. Morgan Hill Unified Sch. Dist.*, 20 Cal.App.5th 607, 616 (2018),

reviewing courts must affirm government determinations that are reasonable and supported by *some* record evidence, and cannot consider evidence not presented to the government entity. *See, e.g.*, *Kutzke v. City of San Diego*, 11 Cal.App.5th 1034, 1042 (2017).[1]

In 2015, after learning that OBOT (despite its express contrary representations) was pursuing development of a *coal* export terminal, ER1168-74,[2] the Oakland City Council ("Council") held a nearly year-long public hearing process, during which it received thousands of pages of evidence, heard from dozens of public health professionals, and considered several expert reports analyzing OBOT's proposed operations. ER0809-2055. OBOT declined to participate meaningfully in this process and did not present evidence it would later rely on in court, instead threatening to "pursue all legal remedies" if the Council adopted new regulation. ER1198.

After considering the evidence before it, the Council adopted an ordinance prohibiting the storage and handling of coal in Oakland and a resolution applying

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[1] Federal law employs a similar deferential approach to reviewing administrative agencies' determinations. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602-04 (9th Cir. 2014).

[2] The panel opinion erroneously concludes that, prior to the DA's execution, Oakland "had some indication that coal was one of the potential commodities that might be handled" (Op. 9), ignoring OBOT's pre-2015 *categorical* denials that it was considering coal as "simply untrue. … [OBOT] is publicly on record as having no interest or involvement in the pursuit of coal-related operations …." ER0407.

that ordinance to OBOT, based on the Council's determination that failure to do so would result in substantial danger to Oakland residents. ER0818, 829. OBOT filed suit in federal court, asserting federal claims and, as relevant here, breach of contract. The District Court held a three-day trial and, based on *extra-record evidence never presented to the Council*, held that Oakland breached the DA. ER0012. In so holding, the District Court made its own credibility determinations, resolved conflicts in the evidence (including competing expert opinions) in OBOT's favor, and made its own factual findings that contradicted the Council's (as well as credible evidence in the Council record). ER013-36.

A divided panel of this Court affirmed, holding that the DA had not incorporated the substantial evidence standard and, even if it had, "lacked the authority to do so." Op. 13-14. Judge Piersol (D.S.D., sitting by designation) dissented, concluding that "whether the City breached the Development Agreement depends on whether there was substantial evidence before the City in its proceedings." Op. 44. Because "'a reasonable mind might accept as adequate,' … the City's conclusion that coal handling and storage at the terminal would pose a substantially dangerous threat to … health and safety," Judge Piersol would have reversed. Op. 46 (citation omitted).

ARGUMENT

Rehearing is required to correct the panel's errors in deciding exceptionally important state law issues of first impression. To ensure that this Court interprets and applies California law correctly, this Court should grant rehearing and certify both of these outcome-determinative, exceptionally important issues of first impression to the California Supreme Court. *See Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1071-72 (9th Cir. 2019) (en banc); *accord Vazquez v. Jan-Pro Franchising Int'l*, 939 F.3d 1045, 1048-49 (9th Cir. 2019) (on panel rehearing).

I. The panel majority answered an unsettled California law question in a manner that disregards bedrock state law principles and ignores important limitations on Development Agreements.

As the panel recognized, the California Supreme Court has never addressed whether "administrative law review principles apply to a breach of contract action challenging an administrative decision." Op. 15. The majority held that such principles do *not* apply and that a government entity's factual determinations that are alleged to breach a contract are "owed no deference." Op. 18. That is an implausible prediction of the California Supreme Court's views, so rehearing and/or certification is warranted to answer this exceptionally important, unanswered state law question. *See* Fed. R. App. P. 35 (en banc rehearing warranted for questions "of exceptional importance"); *Vazquez*, 939 F.3d at 1048 (certification appropriate if "issue is new, substantial, and of broad application").

Absent the DA, there is no question that the Council's decision would be subject to deferential substantial evidence review. OBOT challenges the Council's factual finding of substantial danger, Op. 11-12, which California law makes reviewable under substantial evidence principles. *See Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal.4th 1086, 1116 (2015) (when "agency serves as 'the finder of fact' … a reviewing court should apply the traditional substantial evidence standard"). Under the majority decision, however, once a government entity enters into *a contract*, any administrative decision that a plaintiff claims breaches that contract is no longer subject to judicial deference but is reviewed de novo in court.

It is inconceivable that the California Supreme Court would come to the same conclusion. That Court has held that if an "administrative decision does not involve, or substantially affect, any *fundamental* vested right," the substantial evidence standard applies. *Bixby v. Pierno*, 4 Cal.3d 130, 144 (1971) (emphasis added). Vested rights affecting "purely economic privileges" are not fundamental. *Id*. at 144-45.[3] By affirming the District Court's de novo review of OBOT's "purely economic" contract, the majority ignores this crucial California law distinction. Under the majority opinion, regulation affecting *any* contractual right,

[3] The difference between fundamental and non-fundamental rights parallels the "dichotomy in applying the equal protection clause to the area of economic regulation" and "cases involving 'fundamental interests[.]'" *Id.* at 146 n.13.

no matter how trivial, is reviewed de novo in federal court—in direct contrast to California law's application of substantial evidence review to claims of impairment of all but the most fundamental rights.

The substantial evidence standard is grounded in the California Constitution's separation of powers concerns. *See Western States Petroleum Ass'n v. Superior Court*, 9 Cal.4th 559, 572 (1995) ("The propriety … of a … decision is a matter for the Legislature and the administrative agencies to which it has lawfully delegated quasi-legislative authority … [not] the judiciary."); *S.F. Tomorrow v. City and Cnty. of S.F.*, 229 Cal.App.4th 498, 515-16 (2014) (applying principle to municipal decision). The California Supreme Court is highly unlikely to conclude that a simple contract could abrogate those principles. Such a rule would contravene the baseline principle that only in circumscribed instances may a government entity contract away its police power (an especially unlikely conclusion here, when California law *limits* DAs' constraints of cities' police powers, *see infra* at 11-12).

The majority relied on inapposite lower court cases (mostly not cited by OBOT) to hold that a government decision that would ordinarily be subject to judicial deference is "owed no deference" when a plaintiff asserts it breached a contract. Op. 15-16. The panel misread those decisions, which address whether parties may *bring* breach of contract claims to challenge municipal decisions (or

are limited to administrative law challenges to those decisions), not which *standard of review* applies. *See Shaw v. Regents of University of California*, 58 Cal.App.4th 44, 51-52 (1997); *300 DeHaro Street Investors v. Department of Housing & Community Development*, 161 Cal.App.4th 1240, 1254-55 (2008).[4] The sole Ninth Circuit case cited applies *Arizona* law, and involves the enactment of new legislation (where there are no underlying factual determinations to which the judiciary must defer), not a challenge to a municipal *factual* determination. Op. 16 (citing *Pure Wafer Inc. v. City of Prescott*, 845 F.3d 943, 949 (9th Cir. 2017)).

II. The panel decision negates Oakland's reservation of its inherent police power, and makes it impossible for cities to contractually preserve their authority to protect residents' health and safety.

If it were not clear enough that the "substantial evidence" standard applies as a matter of California law, the parties made that incontrovertible. Section 3.4.2 *explicitly* incorporates California's deferential "substantial evidence" standard by authorizing Oakland to impose new regulations if the "*City determines based on substantial evidence*" that they are needed. Yet the panel majority held that this provision did *not* incorporate the "judicial standard of review used in administrative law proceedings," and that even if the parties so intended, they

[4] Further, *Shaw* addressed a contract the government entered into in its *proprietary* capacity (i.e., as a purchaser of goods or services)—not a contract like a DA that encumbers (to a limited extent) a city's *regulatory* authority. 58 Cal.App.4th at 48-49; *see also infra* at 12 n.5.

"lacked the authority to do so." Op. 13-14. Rehearing and/or certification is warranted to address the standard of review that applies to a city's reservation of its right to enact future regulations in a contract, a question of exceptional importance that affects every municipality in the Circuit.

The default California rule is that "a government entity may not contract away its right to exercise the police power in the future." *Cotta v. City and Cnty. of S.F.*, 157 Cal.App.4th 1550, 1557 (2007). "[P]arties contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health and morals." *Id*. at 1559.

In entering DAs, therefore, cities must retain their police power authority to protect their residents in light of changed circumstances and new challenges like wildfires, homelessness, or the COVID-19 pandemic. A crucial aspect of that power is the authority to decide in the first instance which regulations are necessary to protect residents' health and safety, and to ensure that judicial review of such determinations will appropriately defer to cities' health and safety findings. *See Kutzke*, 11 Cal.App.5th at 1041 (deferring under substantial evidence standard to city's findings that "project would be detrimental to public health, safety, and welfare").

California's DA Statute (Cal. Gov. Code §§65864 et seq.) authorizes a

narrow mechanism for government entities to lock in certain existing regulations without contracting away essential police powers they are constitutionally required to retain. *See Trancas Prop. Owners Ass'n v. City of Malibu*, 138 Cal.App.4th 172, 182 (2006). DAs are valid and enforceable despite this constitutional restriction *only because of* the "procedural and substantive limitations" the DA Statute imposes. *See id.* The DA must therefore be construed against the backdrop of Oakland's inherent authority to exercise its police power notwithstanding any contractual obligations.[5]

In this case, moreover, §3.4.2 *expressly* reserved Oakland's police powers, authorizing Oakland to apply new regulations if the "City determines based on substantial evidence" that they are needed. The DA is governed by California law, ER2000, under which a "legal term of art" like "substantial evidence" appearing in a contract "must be understood in [its] technical sense," *Mundy v. Lenc*, 203 Cal.App.4th 1401, 1410 (2012)—i.e. its established California law meaning in the context of reviewing municipalities' factual determinations. Given this rule of construction, §3.4.2's express incorporation of a term of art, *and* the rule requiring

[5] The panel cited *Tonkin Construction Co. v. County of Humboldt*, for the proposition that courts construe government contracts under "the same rules which apply to the construction of contracts between private persons." Op. 17 (quoting 188 Cal.App.3d 828, 831-32 (1987)). But *Tonkin Construction* addresses a contract the government entered in its *proprietary* capacity. 188 Cal.App.3d at 830-31. Under California law, contracts that affect *regulatory* authority must be read to preserve government's inherent police power. *See Trancas Prop. Owners Ass'n*, 138 Cal.App.4th at 182.

cities to preserve their police powers, §3.4.2 must be read to contract for judicial review under "substantial evidence" principles.[6]

Even more troubling, the decision makes it *impossible* for cities to retain meaningful police power authority in contracts. The majority held that even if the parties *intended* to incorporate substantial evidence review into §3.4.2 "they lacked the authority to do so," because "contracting parties cannot dictate to a federal court the standard of review." Op. 14.

The single decision the majority cited fails to support its sweeping holding (which extends beyond DAs and indeed California). *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc*., 341 F.3d 987, 994 (9th Cir. 2003) (en banc), addressed whether an arbitration agreement could authorize additional bases for judicial review beyond the "limited grounds" authorized by the Federal Arbitration Act. It held that "private parties may not contractually impose their own standard on the courts" because "Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision." *Id*. Here, federal law imposes no such

[6] The panel majority strained to read the DA in a manner directly *at odds* with its plain language and the presumption that police powers are preserved, concluding that §3.4.2 "refers to 'substantial evidence,' not 'substantial evidence review,'" inventing a distinction with no basis in California law. Op. 13. In fact, §3.4.2's language is indistinguishable from laws California courts uniformly construe to require substantial evidence *judicial* review. *See, e.g.*, *Friends of College of San Mateo Gardens v. San Mateo Cnty. Comm. College Dist.*, 1 Cal.5th 937, 957 (2016) (regulation authorizing agency to "determine[], on the basis of substantial evidence," requires deferential substantial evidence judicial review); *Western States Petroleum Ass'n*, 9 Cal.4th at 565 (similar).

substantive limitation upon judicial review of Oakland's compliance with its contract, so *Kyocera* is inapposite.

The majority also reasoned that reading §3.4.2 to require substantial evidence review would "unfairly tilt the scales towards the government." Op. 17. In fact, the *majority's* decision creates patent unfairness by incentivizing parties to withhold evidence from government decisionmakers and then deploy that evidence in court. *See* Op. 45 (Piersol, J., dissenting) (majority decision "subverts the public proceedings of governmental entities and makes their hearings a mere warm-up for when the heavy artillery is brought out in a trial"). Under the substantial evidence standard, OBOT would be required to "produce *all* existing evidence on [its] behalf at the administrative hearing." *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.*, 188 Cal.App.3d 872, 881 (1987) (emphasis added). This rule, grounded in policy considerations, ensures that government entities have all relevant evidence when making decisions, which promotes informed decision-making and dispute resolution at the administrative level (thereby reducing the judiciary's burden). *Id*. The majority eviscerates this crucial aspect of substantial evidence review by freeing OBOT from this requirement and rewarding it for sand-bagging Oakland with new evidence in its subsequent lawsuit. Cities in the Circuit will no longer be able to enter contracts without forfeiting their police power authority and subjecting their decisions to excessive judicial scrutiny based on evidence they

were never given the opportunity to consider.

III. The panel decision's far-reaching, negative effects make it exceptionally important and deserving of rehearing or rehearing en banc.

The panel decision will have profoundly negative effects across the Circuit. California law, including the DA Statute, strikes a careful balance between providing regulatory certainty to developers and preserving cities' authority to act, unhampered by excessive judicial scrutiny, to protect residents' health and safety. The panel upsets this balance by tipping the scales *dramatically* in developers' favor.

While the panel decision extols the importance of giving developers regulatory certainty (Op. 17), it creates powerful *disincentives* for cities to enter into such contracts. Cities' decisions about how to protect their residents will now be subject to full-scale judicial second-guessing if developers assert those decisions breach contractual obligations and can find a way into federal court. The majority undermines its own stated interest in regulatory certainty by holding that any administrative decision that infringes on a contractual right (no matter how trivial) is subject to the heightened standard of judicial review that California courts apply only to fundamental rights. This will affect municipalities across California, which rely on contracts with private parties for municipal planning, the provision of public services, and day-to-day operations.

To make matters worse, cities throughout the Circuit will have no recourse

to protect themselves from the panel's determination that cities *cannot* retain full police power authority in a contract (short of not contracting at all). Oakland's DA struck a reasonable balance between regulatory certainty and preserving Oakland's police power authority. Under the majority opinion, Oakland must forfeit *its* benefit of that bargain, as any contract provision retaining Oakland's traditional police power authority will be deemed unenforceable. In the future, if cities must forfeit their full regulatory authority upon contracting, many cities may decide not to contractually provide regulatory certainty at all.

Finally, the decision encourages forum shopping. Rather than participating in the administrative process and challenging any resulting determination in state court (where substantial evidence review would apply), a private party with a contractual right can simply sit out that process and append a federal law claim, no matter how frivolous, to their state breach of contract claim to get into federal court, where no substantial evidence deference applies. *See* Op. 45 n.2 (Piersol, J., dissenting). There is no basis for the panel's decision to upset the established California law process of deferential judicial review of administrative determinations.

IV. Upon rehearing, the California Supreme Court should have the opportunity to answer the important unresolved questions of California law decided by the panel.

Although the en banc court could correct the majority's errors, it would be

more appropriate to certify the state law issues to the California Supreme Court. Certification is appropriate if an issue is outcome determinative and there is no controlling precedent. Cal. Rule of Court 8.548(a). The panel recognized that each requirement is satisfied for *both* exceptionally important issues. Op. 12 ("[s]tandard of review is pivotal to the outcome"); Op. 15 (noting lack of applicable California Supreme Court authority).

This Court's factors governing whether certification is warranted are also satisfied in this case: "(1) whether the question presents 'important public policy ramifications' yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) 'the spirit of comity and federalism.'" *Vazquez*, 939 F.3d at 1048 (quoting *Murray*, 924 F.3d at 1072).

Here, as in closely analogous cases, the panel's resolution of novel state law issues and the serious ramifications of that resolution in California, warrant a grant of rehearing and then certification. In both *Vazquez*, 939 F.3d at 1048-49, and *Murray*, 924 F.3d at 1072, panels initially issued decisions resolving unanswered state law questions. On rehearing, this Court recognized that the relevant state's highest court should decide those state law issues. In *Murray*, the Montana Supreme Court subsequently decided the state law issue in a manner directly *opposite* the panel's holding. *Compare Murray v. BEJ Minerals, LLC*, 908 F.3d

437, 450 (9th Cir. 2018) ("fossils are minerals" under Montana law), *with Murray v. BEJ Minerals LLC*, 464 P.3d 80, 90 (Mont. 2020) ("dinosaur fossils … are *not* minerals") (emphasis added).[7]

As in those cases, the California Supreme Court should have the opportunity to decide the public policy question of how to balance regulatory certainty and cities' inherent police power rights, a substantial issue that affects *all* California municipalities. In fact, this case implicates *weightier* policy considerations than *Vazquez* and *Murray*, which involved questions of purely *retroactive* application. *See Vazquez*, 939 F.3d at 1048 (certifying question whether *Dynamex Operations West Inc. v. Superior Court*, 4 Cal.5th 903 (2018), applies retroactively); *Murray*, 924 F.3d at 1073 (noting recently enacted Montana legislation, which did not apply to pending cases like *Murray*, establishing that fossils were not minerals). Here, by contrast, the panel's resolution of these important state law issues will apply *prospectively* to prevent federal courts from granting municipal fact-findings appropriate deference, and from giving effect to municipalities' reservation of their police powers while contracting with developers. The California Supreme Court should be given the chance to decide the rules that apply to cities' factual findings and contractual police-powers reservations.

Finally, this Court has not yet certified a question to the California Supreme

[7] The California Supreme Court has yet to issue a decision in *Vazquez*.

Court in 2020. The factors regarding that court's caseload and comity therefore favor certification.

CONCLUSION

The Court should grant this petition, withdraw the panel's opinion, and certify these controlling questions of California law to the California Supreme Court, or reverse them.

Dated: July 9, 2020

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 18-16105; 18-16141

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