No. 18-16105

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND,
Defendant-Appellant,

and

SIERRA CLUB AND SAN FRANCISCO BAYKEEPER,
Intervenors-Appellants,

v.

OAKLAND BULK & OVERSIZED TERMINAL, LLC
Plaintiff-Appellee.

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

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE SUPPORTING PETITIONS FOR REHEARING OR REHEARING EN BANC

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INTEREST OF AMICUS CURIAE

California Attorney General Xavier Becerra submits this amicus curiae brief on behalf of the State of California pursuant to Circuit Rule 29-2(a). The State has a substantial interest in the proper interpretation and enforcement of development agreements entered into by government entities pursuant to California law, particularly when the government's constitutional power to protect the health and safety of its citizens is at stake. Development agreements serve important economic and community needs by facilitating collaboration between developers and public agencies. However, despite their value as planning tools, they do not, and cannot, strip governments of their police powers to protect residents' health and safety, or contractually surrender municipalities' legislative fact-finding and policy-making responsibilities, as held here. At the heart of this case lies the City of Oakland's (the City) proper exercise of its police-power authority to protect residents from harmful coal dust emissions by passing its coal-ban ordinance (Ordinance).

California also has a strong interest in the protection of the State's most vulnerable citizens from exposure to pollution that inhibits their ability to thrive in a clean and safe environment. Those citizens include the residents of West Oakland, a community of color that historically has borne the brunt of industrial pollution in the Bay Area, resulting in disproportionate levels of health problems

like asthma and cancer. The City must have the ability to continue to protect its residents while providing for orderly economic growth. The COVID-19 pandemic and its uniquely devastating impact on communities of color and communities exposed to pollution highlights the critical need for the preservation of these powers to protect public health.[1]

Finally, the State has a strong interest in ensuring that the State's highest Court has the opportunity to weigh in on the important state-law issues crucial to this case: the degree of deference owed a municipality's factual findings supporting a health-and-safety regulation that may impact a contract with a private party; and whether a contract may be interpreted to significantly constrain a municipality's use of its constitutionally-derived regulatory authority. Resolution of these issues could impact how government entities throughout California may use their police powers to protect their most vulnerable citizens.

INTRODUCTION

The State of California submits this amicus curiae brief in support of the City and Intervenors' petitions for panel or en banc review. This brief addresses why the State of California believes that the panel or the Court en banc should rehear

[1] *See* Claudia L. Persico & Kathryn R. Johnson, *Deregulation in a Time of Pandemic – Does Pollution Increase Coronavirus Cases or Deaths?* (Institute of Labor Economics, Discussion Paper Series, No. 13231, May 2020), http://ftp.iza.org/dp13231.pdf.

this appeal and, on rehearing, should certify important state-law issues relating to the interpretation of and enforcement of development agreements to the California Supreme Court pursuant to rule 8.548 of the California Rules of Court.

The City and Oakland Bulk & Oversized Terminal (OBOT) entered into the development agreement (Agreement) at issue here in 2013 to develop a bulk export terminal. Section 3.4.2 of the Agreement allows the City to apply new regulations to the development if the "City determines based on substantial evidence and after a public hearing" that such application was necessary to protect neighbors' health or safety. When the City discovered OBOT's previously-hidden intention to ship coal through the terminal, it held public hearings and received what it determined to be substantial evidence that coal posed a danger to West Oakland neighbors. Thus, invoking its right under Section 3.4.2 of the Agreement, the City unanimously passed the Ordinance. When OBOT sued the City for breach of contract, the district court acted as trier-of-fact, giving no deference to the City's factual findings, and determining *de novo* that there was not substantial evidence of a public health and safety risk despite the large volume of expert evidence of that risk. The district court therefore determined that the City's application of the Ordinance to OBOT breached the Agreement.

This Court's divided panel's decision then turned on the important state-law issue of the level of deference owed a municipality's factual findings in support of

a health-and-safety regulation that may impact a contract with a private party, which no California Supreme Court case has resolved. The panel thus was required to "predict how that court would decide this issue." *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 610 (9th Cir. 2020) [hereinafter *OBOT*]. The panel applied a non-deferential contract law standard, upholding the district court's decision to conduct a *de novo* review of Oakland's factual findings. *See id*. at 609-10.

Further, in upholding and enforcing a contract that—as interpreted by the panel—granted OBOT a "freeze [of] *all* existing regulations, not just land use regulations[,]" *OBOT* 960 F.3d at 619, the panel essentially held that the City may bargain away its police power authority for the 66-year duration of the Agreement unless its factual findings meet high *de novo* standard of review by a trial court allowing submission of extra-record evidence. In doing so, the panel did not fully consider the scope of Oakland's police power and contracting authority under California law. The City's unique authority as a municipal government, vested with the authority to protect its citizenry, is key to interpreting the Agreement. Despite the Court's decision to treat Oakland like any other contracting entity, California courts often treat municipalities differently from private parties, particularly when the contracts relate to their quintessential government health-and-safety responsibilities. Such responsibilities include their police power, which

municipalities cannot contractually relinquish except to the limited degree—inapplicable to the Ordinance—permitted Government Code sections 65864 to 65869.5, California's "Development Agreement Legislation."

Thus, amicus State of California requests that the following issues be certified to the California Supreme Court for review: 1) Whether and to what degree a development agreement can be enforced to curtail a municipality's non-land use police power authority under state law; and 2) Whether and to what degree development agreements entered into by California municipalities should be interpreted to afford deference to the municipalities in enacting health-and-safety regulations pursuant to their police powers. Amicus State of California agrees with the City and Intervenors that the requirements for en banc review, under Rule 35 of the Federal Rules of Appellate Procedure, are met for the reasons set forth in the City's and Intervenors' briefs. Because the State's primary interest is in the proper interpretation of state law, we limit our brief to the question of certification of state-law issues to the California Supreme Court, should panel or en banc review be granted.

LEGAL ANALYSIS

Pursuant to California Rules of Court, rule 8.548, the Ninth Circuit may, in its discretion, certify a question of California law to the California Supreme Court if: 1) the decision could determine the outcome of a matter pending in the requesting

court; and 2) there is no controlling precedent. Both of these standards are met here. First, the level of deference owed to the City's factual findings was "pivotal to the outcome of this appeal" and is an issue that no California Supreme Court case has addressed, requiring the panel to "predict how that court would decide this issue." *OBOT*, 960 F.3d at 609-10. Similarly, the issue of whether a contract may be interpreted to curtail a municipality's regulatory health and safety authority, while not confronted explicitly by the panel, is an unresolved legal issue that could be outcome-determinative in this case.

In *Murray v. BEJ Minerals*, this Court articulated four considerations for ordering certification to a state's highest court: (1) the question is unresolved with important public policy consequences, (2) the question is "new, substantial and of broad application," (3) the court must avoid overburdening the state court, and (4) "the spirit of comity and federalism." 924 F.3d 1070, 1072 (9th Cir. 2019). These factors are met here. As to the first two factors, the issues of whether and to what degree a municipality may contractually curtail its non-land use regulatory authority, and the deference owed a municipality in adopting health-and-safety regulations impacting a development agreement, are unresolved questions of state law that may have broadly-applicable public policy consequences. And the decision here impacts the City's ability to use its police power to protect thousands of its most vulnerable residents from pollution. Moreover, the panel's treatment of

these issues to negate the City's use of its police powers could curtail use of such authority throughout California, and could discourage municipalities from entering into development agreements—a commonplace practice that facilitates necessary and beneficial development projects. As to the third and fourth factors, while the California Supreme Court's caseload is no doubt heavy, the spirit of comity and federalism would be served by permitting the state court the opportunity to resolve these important questions of California law.

I. WHETHER A DEVELOPMENT AGREEMENT MAY BE INTERPRETED AND ENFORCED TO CURTAIL A MUNICIPALITY'S REGULATORY AUTHORITY IS AN UNRESOLVED AND BROADLY APPLICABLE QUESTION, WHICH HAS POTENTIALLY CRITICAL PUBLIC POLICY CONSEQUENCES.

Certification is appropriate where, as here, resolving the state-law questions at issue necessitates navigating a complex set of state law issues pertaining to an unresolved question with significant public policy implications. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 294 F.3d 1085, 1092 (9th Cir. 2002). In such cases, the California Supreme Court is often "better qualified" to answer the question. *Id*. Whether the Agreement may be interpreted and enforced to freeze all regulations, thereby significantly curtailing the City's use of its police power authority, is unresolved by California's highest court, and the public policy consequences of this question could be profound.

A. California Law and Public Policy Limit the Abrogation of Police Powers Through Development Agreements.

California law establishes key guideposts—including the bedrock policies favoring local governments' responsibility for protecting public health and safety—that should inform a court's interpretation of development agreements. Recognizing that protecting health and safety is a matter of state and local concern and historic state primacy, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), the Nation's founders vested police power in states and their subdivisions, *see United States v. Morrison*, 529 U.S. 598, 617–19 (2000). Anticipating the need for local variation across the state's large and diverse territory, California's constitution in turn allocates police power to municipalities. *See* Cal. Const. Art. XI, § 7. Oakland's resulting authority to regulate health and safety risks is one of the most "necessary" and "elastic" powers of government, *Fourcade v. City & Cty. of San Francisco*, 196 Cal. 655, 662 (1925), affording discretion to make necessary policy judgments about how to protect health and safety to the government closest and most accountable to the citizens.

Thus, in general California cities may not enter contracts that sign away their police power, including their authority to regulate land use under the California Constitution. Article XI, §7; *see Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 17 Cal. 3d 785, 800 (1976); *see also* Opinion No. 07-506, 91 Ops. Cal. Att'y Gen. 46, 9 (2008) ("[a] contract that purports to do so is invalid and

unenforceable as contrary to public policy."). Thus, California courts have held that contractual abnegation of authority to broadly protect public health and safety violates state law. *City of Glendale v. Super. Ct.*, 18 Cal. App. 4th 1768, 1778-79 (1993) (Governments cannot contractually divest themselves of the right to exert their authority "'in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society[.]'" [Citations omitted]); *see also Cty. Mobilehome Positive Action Comm., Inc. v. Cty. of San Diego*, 62 Cal. App. 4th 727, 736 (1998). Indeed, under California law, private parties contracting with the government do so necessarily "in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves." *Delucchi v. Cty. of Santa Cruz*, 179 Cal. App. 3d 814, 823 (1986).

California's Development Agreement Legislation carves out a narrowly-tailored exception to this fundamental and unyielding police-power authority, allowing contracts between public entities and developers to freeze certain *land use and zoning regulations*, but reserving the right of the government to enact new regulations pertaining to the property not in conflict with those specific regulations. *See* Cal. Gov. Code § 65866; *see also* Opinion No. 07-506, 91 Ops. Cal. Att'y Gen. at 10 (Government Code provides only narrow authority for developers to avoid zoning changes "during the limited period of time during

which a development project is undergoing a required review and permitting process[,]" but does not otherwise impair local governments' ability to exercise police powers). These unique government contracts therefore carve out a narrow exception to the rule against contractual surrender of police powers to provide regulatory certainty for developers in the pre-permit stages of a project while retaining local government discretion in approving project specifics. *Santa Margarita Area Residents Together v. San Luis Obispo Cty.*, 84 Cal. App. 4th 221, 230 (2000). The Agreement here, by its terms, incorporated these limitations on the surrender of the City's police power authority, as it was entered into "pursuant to the authority contained in the Development Agreement Legislation," i.e., "California Government Code Sections 65864 through 65869.5." *See* Agreement Recital L.

B. The Question of Whether and to What Degree a Development Agreement May Be Enforced to Curtail a Municipality's Police-Power Authority is Unresolved and has Important Policy Implications.

Contrary to the principles set forth above, the panel held that the "plain language of the Agreement manifests a clear intent by the parties for Section 3.4.2 to freeze *all* existing regulations, not just land use regulations." *OBOT* 960 F.3d at 619. In so holding, the panel assumed that California law allows municipalities to contractually abnegate their regulatory powers, but such a conclusion does not

align with case law or public policy; development agreements do not, and *cannot*, freeze all future exercises of City authority.

Neither the district court, the panel, nor the parties cited any California decision that specifically interprets the Development Agreement Legislation, or delineates the types of regulations a municipality may lawfully freeze. And until the panel's ruling in this case, a development agreement under California law had never been interpreted to allow a city to freeze all regulations pertaining to a property, beyond zoning and land use, thus surrendering its police power authority to a private developer. *See OBOT*, 960 F.3d at 619. This lack of supporting caselaw is unsurprising given the fundamental importance of police powers, and the limited degree to which development agreements may restrain those powers.

Indeed, the panel's treatment of the Agreement as a standard contract between two private parties, without consideration for Oakland's police power authority, does not comport with existing intermediate appellate California caselaw. *See Cty. Mobilehome*, 62 Cal. App. 4th at 736-37 (evaluating California caselaw on "governmental contract arrangements" and determining that a contract between a municipality and private party was invalid because it impermissibly surrendered police power authority); *see also 108 Holdings, Ltd. v. City of Rohnert Park*, 136 Cal. App. 4th 186, 196 (2006) ("[r]eservation of the police power is implicit in all government contracts"). Notably, the holding relied upon by the panel to justify

treating Oakland as a private party did not involve these police power concerns, but rather involved a contract entered into by a municipality as a market participant, where treatment as a private party in contract disputes is often proper. *See Tonkin Constr. Co. v. Cty. of Humboldt*, 188 Cal. App. 3d 828, 831-32 (1987).

California law requires that a "contract must receive such an interpretation as will make it lawful." Cal. Civ. Code § 1643. But the panel did not consider that California law and policy required an interpretation of the Agreement that preserves the City's police power authority, instead interpreting the Agreement to manifest a "clear intent by the parties for Section 3.4.2 to freeze *all* existing regulations, not just land use regulations." It is unclear, however, that the California Supreme Court would interpret the contract as indicating the parties' intent to freeze *all* existing regulations, particularly since doing so would violate long-standing, well-established principles of California municipal law and policy. This interpretation of the interplay between the California Constitution, California's Development Agreement Legislation, and state public policy, which could have profound implications for municipalities' ability to protect their citizens while furthering economic development, is best left for resolution by the California Supreme Court.

II. THE DEFERENCE DUE TO MUNICIPALITIES' HEALTH AND SAFETY REGULATIONS IMPACTING DEVELOPMENT AGREEMENTS IS AN UNRESOLVED ISSUE WITH BROAD PUBLIC POLICY IMPLICATIONS.

Certification is appropriate as to the question of the deference owed to municipalities' health-and safety findings impacting development agreements because the California Supreme Court is uniquely qualified to resolve this complex state-law issue. As explained above, Section 3.4.2 of the Agreement allows the City to apply new regulations to OBOT where the City determines, based on substantial evidence, that failure to do so would place neighbors in a condition substantially dangerous to their health. The Court's holding invalidating the Ordinance with respect to OBOT turned on whether "substantial evidence," as used in section 3.4.2, should be read as the deferential "substantial evidence" standard of California administrative law, or be viewed under non-deferential contract law standards.

Whether and to what degree a deferential standard of review should be applied to breach-of-contract claims challenging administrative decisions is an issue of state law as yet unresolved by the California Supreme Court, and is an issue with potentially broad public policy implications. Divesting municipalities of deference in making on-the-ground public policy decisions undercuts use of their

police powers to protect residents from harm.[2] Applied broadly, this holding could also discourage municipalities from entering into development agreements that are necessary for economic growth and infrastructure projects.

Yet the panel did not consider important state-law context in predicting how the California Supreme Court would resolve this issue. That Court should therefore have an opportunity to consider this important question in light of the principles of California law raised herein and in the City's and Intervenor's en banc petitions.

A. The Context of California Administrative Case Law Sheds Light on the Proper Interpretation of the Development Agreement's Use of the Term "Substantial Evidence."

The panel interpreted "substantial evidence" as used in Section 3.4.2. of the Agreement under a contract-law framework applicable to contracts between private parties. But OBOT's breach-of-contract claim is predicated on attacking the public safety judgment by Oakland's elected officials acting in their constitutionally-derived, legislative authority. Viewed in this context, applying a non-deferential contract law standard that substitutes judicial for municipal discretion is in tension with state law and basic separation-of-powers principles.

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[2] In addition, as the dissent in this case cogently noted, "[u]nder such precedent, there is little incentive for a party to a development agreement to participate, other than nominally, in the public proceedings. It may as well, as OBOT largely did, wait and sue the City in federal court for a breach of contract and litigate de novo, evidence of health and safety effects which should have been offered in the public proceedings." *OBOT*, 960 F.3d at 625, fn. 2.

The Agreement, in using the term "based on substantial evidence," references the terminology of the California substantial evidence standard of review, a commonly used phrase that is one of the most established tools of California law governing review of governmental decision-making. *See, e.g., Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 62 Cal. 4th 204, 213 (2015), *as modified on denial of reh'g* (Feb. 17, 2016). This standard reserves fact-finding and policy-making decisions to the legislative branch of government, foreclosing reviewing courts from substituting their judgment for that of legislative bodies. *See generally W. States Petrol. Ass'n v. Super. Ct.*, 9 Cal. 4th 559, 570-78 (1995). The Agreement's use of the "based on substantial evidence" terminology suggests that the City's ability to adopt health and safety findings impacting the Agreement should be viewed through this deferential lens.

B. The Caselaw Relied On to Deny Deference to the City Underscores That This Issue Is Unresolved.

The cases relied upon by the panel to predict that the California Supreme Court would apply non-deferential legal principles to a challenge such as OBOT's do not support that prediction, which further underscores that this question remains unresolved. Specifically, the cases relied on are unrelated to the public health and safety concerns, use of development agreements, or police powers at issue here. First, *Shaw v. Regents of University of California*—wherein the court found that a University "policy" reducing the payments owed per a professor's employment

contract was in fact a contract amendment to be evaluated under contract law—was a monetary dispute not touching on police powers.[3] 58 Cal. App. 4th 44, 45 (1997). Second, in *300 DeHaro Street Investors v. Department of Housing & Community Development*, the court merely determined a breach of contract claim was the proper procedural remedy against a public agency, as opposed to administrative writ of mandamus. 161 Cal. App. 4th 1240, 1243 (2008). This case did not address the standard of review for a breach-of-contract claim involving an administrative action or involve development agreements or police powers.

Finally, the Court cites to a Ninth Circuit case, *Pure Wafer Inc. v. Prescott*, interpreting a development agreement that found a breach of contract claim was only viable *because* the contract did not limit the local jurisdictions police power authority. 845 F.3d 943 (9th Cir. 2017). There, the city's development agreement capped a company's effluent discharges. When a city ordinance later reduced those discharge limits, requiring Plaintiffs to make costly improvements, this Court found the city's imposition of more-stringent limitations breached the agreement, but did so noting that the only question at issue was *who* would pay the cost of water system upgrades, not *whether* the company would be subject to the ordinance. *Id*. at 958. Unlike here, the private party did not allege that the

[3] The court in *Shaw* also noted that contract principles should apply to such a dispute only "assuming the contract *is not contrary to public policy*." *Id*. at 46 (emphasis added.)

ordinance was inapplicable to them under the development agreement because, as this Court noted, "'exercise of the police power cannot be limited by contract for reasons of public policy; nor can it be destroyed by compromise,' for 'it is beyond the authority of the state or municipality to abrogate this power so necessary to the public safety.'" *Id.*, *citing N. Pac. Ry. Co. v. Minnesota*, 208 U.S. 583, 598 (1908). Thus, rather than supporting the proposition that the Agreement strips the City of deference in employing its police power authority, *Pure Wafer* suggested that such an interpretation would be invalid as a matter of public policy.

III. THE CALIFORNIA SUPREME COURT SHOULD HAVE THE OPPORTUNITY TO CONSIDER THE IMPORTANT STATE-LAW ISSUES PRESENTED IN THIS CASE IN THE FIRST INSTANCE.

The Ninth Circuit, in requesting certification, must be "[]mindful of the burgeoning caseload of the California Supreme Court," not "presume[ing] to certify a run-of-the mill case" to the California Supreme Court. *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003). But it is not the Ninth Circuit's "role to pass advance judgment on the Court's priorities." *Id.* Thus, in a case such as this one "that raises a new and substantial issue of state law in an arena that will have broad application, the spirit of comity and federalism cause [the Ninth Circuit] to seek certification." *Id.*; *see also*, *e.g.*, *Barnes-Wallace v. City of San Diego*, 607 F.3d 1167, 1170 (9th Cir. 2010) (recognizing California Supreme Court's demanding caseload but nevertheless seeking certification where case raised difficult questions

of state law with broad implications). Here, while the California Supreme Court is undoubtedly busy, it should have the opportunity to consider these state-law issues that are new, substantial, and of potentially broad application.

IV. CERTIFICATION IS FURTHER SUPPORTED BY THE SPIRIT OF "COMITY AND FEDERALISM."

Principles of comity and federalism favor certification of complex state-law issues of first impression such as those presented here.[4] *See BEJ Minerals*, 924 F.3d at 1072; *see also Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 939 F.3d 1045, 1049 (9th Cir. 2019). While the certification tool must be wielded carefully and deliberately, this caution must be balanced with the need to give "deference to the state court on significant state law matters" under our federal system of government. *Kremen*, 325 F.3d at 1037. This is particularly so where, as here, the panel's opinion may "create disarray in federal and state courts in California" by leading to inconsistent interpretation of development agreements and municipalities' police power authority. *See Ileto v. Glock Inc.*, 370 F.3d 860, 867 (9th Cir. 2004).

CONCLUSION

The Court should grant en banc review and should certify the state-law issues pivotal to the panel's decision to the California Supreme Court.

[4] It is worth noting that the federal-law claims once raised in this case, giving rise to federal court jurisdiction, are not currently at issue.

Dated: July 20, 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

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Signature s/Scott J. Lichtig **Date** Jul 20, 2020

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