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THE TWO HUNDRED, et al.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

THE TWO HUNDRED, an unincorporated association of civil rights leaders, and individuals JASON CORDOVA and LYNN BROWN-SUMMERS,

Plaintiffs/Petitioners,

vs.

GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, CALIFORNIA NATURAL RESOURCES AGENCY, WADE CROWFOOT, in his Official Capacity, KATE GORDON, in her Official Capacity, and DOES 1-50,

Defendants/Respondents.

Case No.: 34-2020-80003447-CU-WM-GDS

SECOND AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[Cal. Code Civ. Proc. §§ 1085, 1094.5, 1060; Gov. Code § 12955 et seq. (FEHA); 42 U.S.C. § 3601 et seq., 24 C.F.R. Part 100 (FHA); Cal. Const. Art. I, § 7; Art. IV, § 16; U.S. Const. Amd. 14, § 1; Cal. Const. Art. III, § 3; Pub. Res. Code § 21000 et seq. (CEQA); H&S Code § 38500 et seq. (GWSA); H&S Code § 39000 et seq. (CCAA); Gov. Code § 65088 et seq. (Congestion Management Plan); Gov. Code §§ 65300 et seq. and § 65584 (General Plan Laws and Regional Housing Needs Assessment Law]

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I. INTRODUCTION AND SUMMARY OF REQUESTED RELIEF

1. This is a civil rights lawsuit. Plaintiff The Two Hundred includes many of California's longstanding civil rights advocates, joined by former leaders in the Legislature and a former Cabinet member responsible for housing (members of the Democratic Party), as well as environmental and housing leaders. The Two Hundred is focused on increasing home ownership for California's minority residents to overcome more than a century of an ever-evolving suite of racially discriminatory "redlining" housing practices implemented by public agencies and private institutions. Homeowners have forty-four times more wealth than renters and homeownership is by far the most successful pathway for American families to create wealth. Homeownership provides multi-generational advantages to families beyond stable housing, such as home equity that can be tapped to support college costs, provide down payment assistance to future generations, and fund households during the income downturns caused by medical conditions, job transitions, and old age.

2. This is not a sprawl lawsuit. This Complaint has been filed on behalf of two named individual residents in San Bernardino county as well as The Two Hundred, and the very detailed factual information in the Complaint focuses on the disparate racial impacts of the agency actions challenged herein within San Bernardino County and the cities in that county where these individuals reside. San Bernardino County and cities continue to permit construction of a major share of the new homes affordable to and actually purchased by new minority homeowners in the six county region where the majority of California's population lives, similar to how the San Joaquin County and cities such as Stockton supply affordable homeownership in the Bay Area. Given the change in venue, however, this Complaint has been amended to describe the racially discriminatory disparate impacts of the challenged agency actions against adding new "infill" housing within existing neighborhoods even in high cost coastal counties nearer jobs and served by transit. Although Defendants Governor's Office of Planning and Research ("OPR") and State Natural Resources Agency ("NRA") claim that an overall goal of the challenged actions is to promote "infill" housing to reduce vehicle miles travelled and associated greenhouse gas emissions ("GHG"), as explained in Part IV, *infra*, the fact is that Defendants' have unlawfully erected new economic and procedural barriers to "infill" housing in the vast majority of California

neighborhoods comprised of primarily of existing single family homes, and have unlawfully targeted poorer, minority, denser neighborhoods for high cost new housing development. These are textbook examples of racially exclusionary government actions to protect whiter and wealthier neighborhoods (including those in Long Beach and elsewhere that were established with racially exclusionary covenants to prohibit minority buyers and occupants, as discussed in Part IV, *infra*), and to prompt a new round of demolition and "redevelopment" displacement of struggling, poorer, higher density minority communities.

3. The Two Hundred supports protection of the environment, and California's commitment to be a global leader in the war on climate change. However, California's power in this war must be made clear: greenhouse gas ("GHG") emissions in California comprise less than 1% of anthropogenic global GHG emissions, and former Governor Jerry Brown recognized that California's own efforts to reduce GHG would be "futile" unless other states and nations were persuaded to follow our lead.

4. The Two Hundred rejects the necessity and legality of Defendants' decision to make California's minority communities the collateral damage in their war on climate change through the promulgation of unlawful regulations adopted in December 2018 that purport to implement the California Environmental Quality Act ("**CEQA**") (Pub. Res. Code § 21000 *et seq.*), which have and will continue to worsen the housing crisis and cause disparate harm to California's minority communities.

5. The Two Hundred hereby challenges three of Defendants' 30 revisions to Title 14, Chapter 3 of the California Code of Regulations, Guidelines for the Implementation of the California Environmental Quality Act (**"CEQA Guidelines"**):[1] sections 15064.3, 15064.4, and 15126.4.[2] The Two Hundred further challenges corresponding anti-housing revisions to Appendix G of the CEQA Guidelines (**"Appendix G"**); specifically, revisions to Appendix G sections I(c)

[1] As recognized in numerous court decisions, and summarized by OPR itself: "The CEQA Guidelines are administrative regulations governing implementation of the California Environmental Quality Act." OPR, *Current CEQA Guidelines Update: What are the CEQA Guidelines?*, http://opr.ca.gov/ceqa/updates/guidelines/ (last visited March 31, 2021).

[2] The three challenged sections of the CEQA Guidelines are sometimes individually referred to herein as "Section 15064.3", "Section 15064.4", and "Section 15126.4".

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(Aesthetics), VIII(a-c) (Greenhouse Gas), XIII(a) (Noise), and XVII(b) (Transportation). Finally, The Two Hundred hereby challenges an unpromulgated regulatory document issued concurrently by Defendant OPR, entitled the *Technical Advisory on Evaluating Transportation Impacts In CEQA*[3] (the **"Underground VMT Regulation"**), which constitutes an unlawful "underground regulation" by requiring minimum Vehicle Miles Traveled ("**VMT**") CEQA compliance requirements in the form of VMT significance criteria and VMT analytical methodologies. The challenged revisions to Section 15064.3, Appendix G section XVII(b) (Transportation), and the Underground VMT Regulation are collectively referred to herein as the **"VMT Redlining Regulations."** The challenged revisions to Section 15064.3, Section 15064.4, and Section 15126.4, along with the Appendix G Revisions, and the Underground VMT Regulation, are collectively referred to herein as the **"Redlining Regulations."**

6. Defendants' Redlining Regulations increase housing costs and anti-housing CEQA litigation risks for the new housing required to meet the state's need for 3.5 million new homes,[4] which are disproportionately needed for minority families who are already the disparate victims of California's housing crisis based on historic and ongoing discriminatory actions by government agencies, including Defendants, to deprive minority families of the same homeownership opportunities as white families. Defendants' Redlining Regulations thereby both create new, and further exacerbate existing, racial segregation and displacement, and racially disparate barriers to the production of housing that can be purchased or rented by minority median income families. Specifically:

7. VMT Redlining Regulations. (Section 15064.3, Appendix G section XVII(b) "transportation" threshold, and the Underground VMT Regulation) The first subset of challenged regulations seek to compel the reduction of VMT by imposing massive new costs, procedural hurdles, and litigation risks on housing. The VMT Redlining Regulations further require high cost exactions of untested efficacy for new home buyers and residents who have access to and use the

[3] OPR, *Technical Advisory on Evaluating Transportation Impacts in CEQA* [hereinafter *Underground VMT Regulation*] (Dec. 2018), http://www.opr.ca.gov/docs/20190122-743_Technical_Advisory.pdf.

[4] *See,* Newsom, *The California Dream Starts at Home,* Medium (Oct. 20, 2017), https://medium.com/@GavinNewsom/the-california-dream-starts-at-home-9dbb38c51cae.

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same transportation system as their pre-existing next-door neighbors – where those burdened with new exactions in need of new housing are disparately members of minority communities, and those who can continue to freely occupy and sell their existing homes are disparately white families enjoying the privileged outcomes of decades of discriminatory lending, insurance, and real estate practices. The VMT Redlining Regulations are intended to, and do, gentrify, displace and "redevelop" working class and lower income minority communities and urban neighborhoods while protecting legacy racially-segregated wealthier and whiter neighborhoods that are already privileged with better schools, parks, and other community amenities. The VMT Redlining Regulations are collectively aimed at undermining state and local laws requiring the production of housing in each city or county, in compliance with federal and state Constitutional and statutory prohibitions of government conduct that causes or exacerbates residential racial segregation.

8. The VMT Redlining Regulations are intended to direct new housing within one-half mile of frequent bus stops, as well as transit stations and ferry stops, which collectively comprise only 1% of California's 100 million acres. **Figure 1** (below) demonstrates how the VMT Redlining Regulations result in displacement in Southern California. The Southern California Association of Governments ("SCAG") is the expert state agency charged with implementing a comprehensive state law known as Senate Bill 375 ("SB 375") which requires regional "sustainable communities strategies" to adopt a plan to accommodate the future housing, employment, and transportation needs of a region while reducing GHG from passenger vehicle use. SCAG divided each of its 197 jurisdictions (191 cities and 6 counties) into thousands of small areas called "Traffic Analysis Zones," identified the average VMT for each TAZ, and identified both existing and planned transit system improvements for the entire region. SCAG then developed a regional "sustainable communities strategy" to reduce VMT from future housing development, which included wholesale rejections of locally-adopted General Plans that had been reviewed and approved as meeting state housing production goals by the state department of Housing and Community Development in compliance with the Regional Housing Needs Assessment ("RHNA") laws, as well as other fair housing and environmental laws. Based on this methodology, SCAG identified the existing high density and frequent transit service neighborhoods where new housing should be located, and

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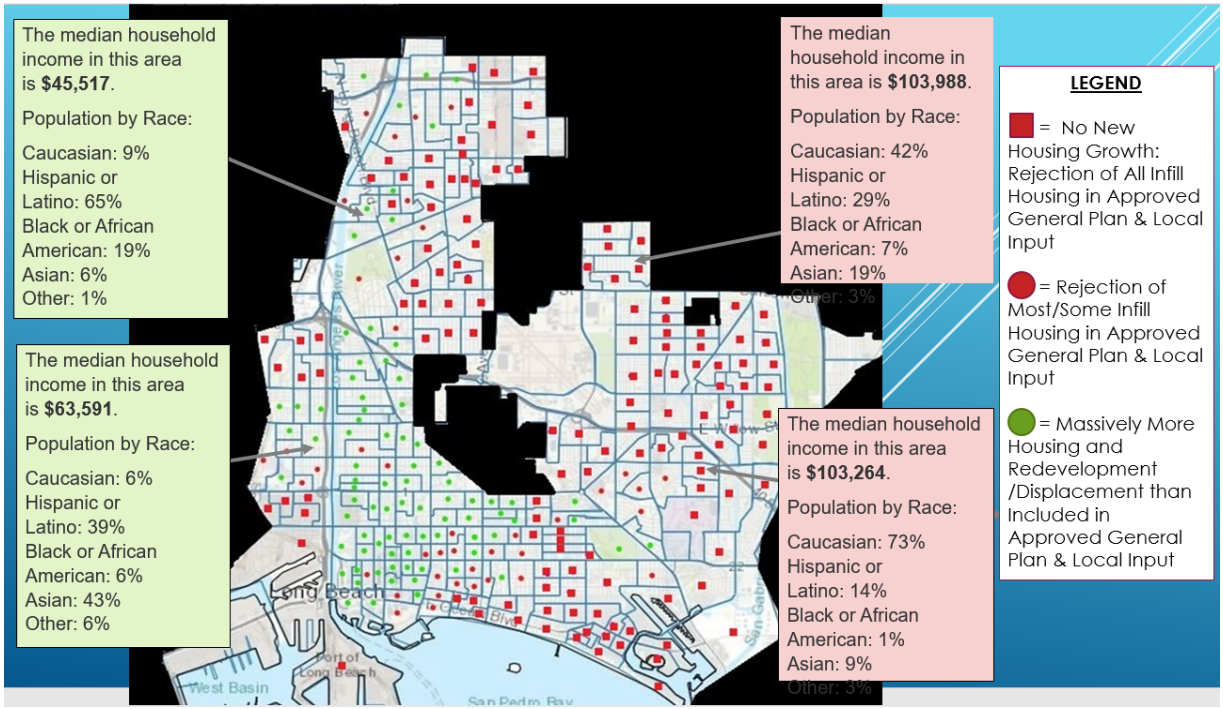
existing lower density neighborhoods without frequent transit service, for each city and for each unincorporated county area. The result was a racial segregationist dream-come-true, and a civil rights nightmare. To take just two examples:

9. **Figure 1** (below) is the SCAG TAZ map for Long Beach, where new housing is to be constructed in neighborhoods with a green dot, some (but not much) new housing is to be constructed in neighborhoods with a red dot, and no new housing at all is to be built in neighborhoods with a red square. As shown in the text boxes, new housing is planned for overwhelmingly minority neighborhoods (where whites account for less than 10% of the population), and no or very little new housing is planned in majority white neighborhoods. Minority neighborhoods slated for high housing production have median incomes that are less than half of the median incomes in white neighborhoods.

Figure 1
Minority Displacement and White Preservation Housing Plan for Long Beach Neighborhoods to Achieve State VMT Reduction Targets[5]



[5] Demonstrative depiction of TAZ boundary maps, local government household production targets for each TAZ, and staff/consultant revisions to local government input provided by SCAG Staff to Jennifer Hernandez (May 2020); data derived from the U.S. Census Bureau, Income and Racial Demographic Data for Long Beach, California, https://www.census.gov/topics/population/race.html (last visited July 2020).

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10. **Figure 2** (below) shows a fraction of the TAZ neighborhoods where SCAG concluded that zero new homes should be built to attain VMT reduction targets. Many of these neighborhoods were established with racial covenants or other exclusionary barriers that prohibited minority family buyers and renters, as described in the definitive study of California's legacy of intentional residential racial segregation in the book, Color of Law.[6] These are "nicer" neighborhoods which still have bigger lots, bigger parks, and better schools. The City of Long Beach had long ago outlawed residential segregation, and had identified scores of properties in these existing neighborhoods which were designated for new homes in the City's adopted General Plan, for example in the Figure 2 excerpt, the City's General Plan allowed 1,300 new homes in infill locations like strip malls and vacant parcels. People in these neighborhoods did not ride the bus, so there were no high frequency (3 times per hour during peak commute hours) bus routes, nor were there any train stations or ferries. Planning the location of new homes for VMT reduction was a racial segregation preservation plan for white neighborhoods, and an invitation for massive development of high cost, high density urban housing in the city's poorest minority neighborhoods – a recipe for gentrification and displacement and adverse impacts which were already documented to be occurring, but were either dismissed as "outside the scope" or ignored entirely by Defendants.

[6] *See,* Rothstein, *Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

Figure 2
Comparison of Long Beach Neighborhoods Slated by SCAG for No New Housing Under VMT Reduction Targets, to Long Beach City Input/Plan to Allow Infill Housing in These Neighborhoods, with Overlay of Racial Redlining Map (Whites-Only Neighborhoods) in Long Beach[7]

11. SCAG developed an even more remarkably exclusionary VMT reduction housing pattern for La Habra, a smaller city in Orange County, as shown below in **Figure 3**. New housing was again to be developed in poorer minority neighborhoods, with zero new housing in whiter wealthier neighborhoods, as shown by the text boxes.

[7] Demonstrative depiction of TAZ boundary maps, local government household production targets for each TAZ, and staff/consultant revisions to local government input provided by SCAG Staff to Jennifer Hernandez (May 2020); University of Richmond Digital Scholarship Lab, Mapping Inequality: Redlining in New Deal America, https://dsl.richmond.edu/panorama/redlining/#loc=10/34.005/-118.617 (last visited Mar. 30, 2021).

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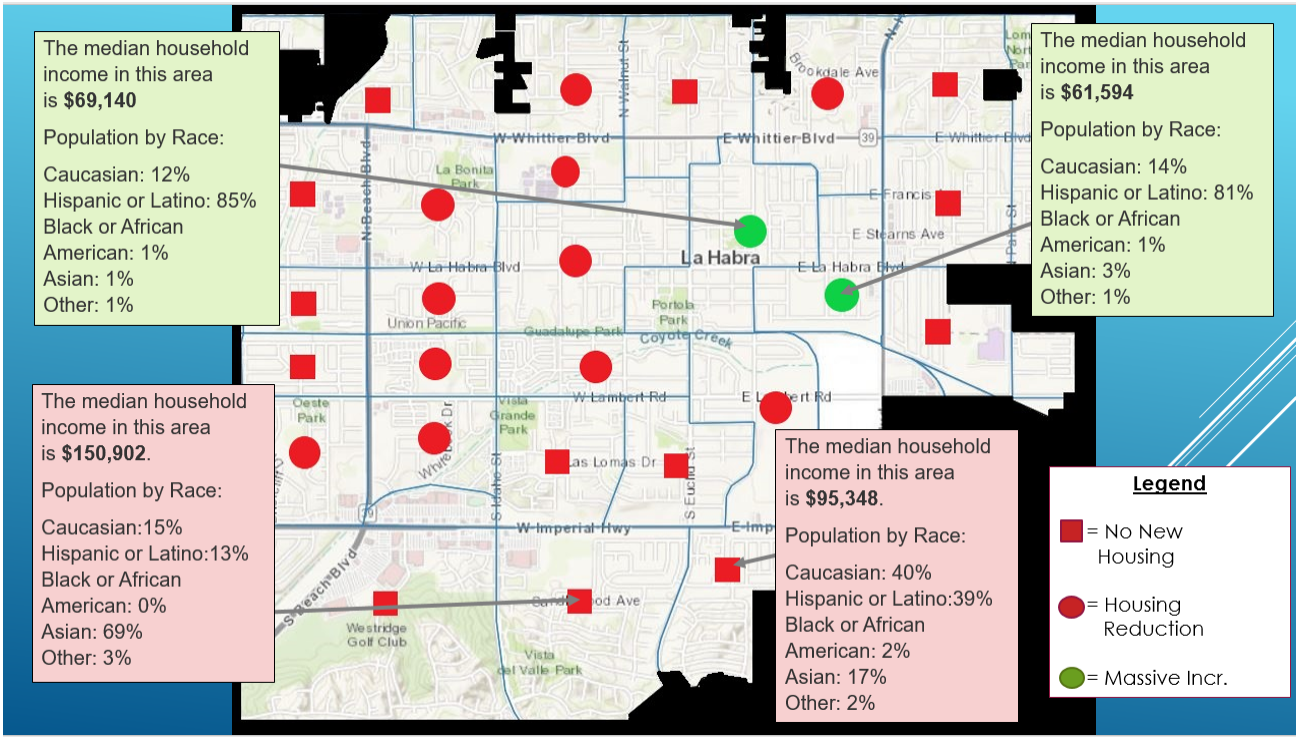
Figure 3
Minority Displacement and White Preservation Housing Plan for La Habra Neighborhoods to Achieve State VMT Reduction Targets[8]



12. Figure 4 (below) shows how SCAG's VMT reduction housing map compared with the housing distribution in the local General Plans of the nine elected local representatives from San Bernardino County serving on the SCAG Regional Council as of July 2020. The SCAG TAZ maps rejected planned housing for every single jurisdiction, and called for zero housing in the majority of these jurisdictions, even though all but one is required to plan for thousands of new homes and collectively they are required to plan for the completion of nearly 60,000 new households over the next eight years under the state's mandatory laws allocating new housing production General Plan Housing Element approval obligations to every single city and county in the state. Gov. Code § 65584(b).

[8] Demonstrative depiction of data of the TAZ boundary maps, local government household production targets for each TA, and staff/consultant revisions to local government input provided by SCAG Staff to Jennifer Hernandez (May 2020); data derived from the U.S. Census Bureau, Income and Racial Demographic Data for La Habra, California, https://www.census.gov/topics/population/race.html (last visited July 2020).

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Figure 4
Rejected Local Input and Housing Elements of San Bernardino City and County Local General Plans to Achieve State VMT Reduction Targets[9]

San Bernardino: SoCal Connect Establishes Zero Household Growth Neighborhoods in 100% of Regional Council Member Cities				
Regional Council Member	Local Jurisdiction	# of TAZ Maps Allowing Zero New Households Through 2045	Six Cycle Regional Housing Needs Assessment (RHNA) 8-Year Housing Allocation	% of TAZ Maps in Cities Allowing Zero New Households Through 2045
Bill Jahn	Big Bear Lake	7	212	35%
Ray Marquez	Chino Hills	16	3,720	57%
Frank Navarro	Colton	25	5,418	49%
Curt Hagman	Uninorp SB County	363	8,824	95%
Alan Wapner	SBCOG/Ontario	34	20,803	22%
Larry McCallon	Highland	20	2,508	54%
Dennis Michael	Rancho Cucamonga	49	10,500	52%
Deborah Robertson	Rialto	45	8,252	64%
Rita Ramirez	Victorville	52	8,146	73%

13. To highlight just one of the cities in San Bernardino County, where homeownership remains affordable to median income minority families, Ontario is required by RHNA to accommodate more than 20,000 new homes over the next eight years. Ontario has long planned for its orderly growth, hosts major regional features such as an interstate commercial passenger airport and large convention center, and has methodically developed infrastructure and public services to complete development within the city. As shown in **Figure 5** (below), SCAG's VMT reduction TAZ maps provide for zero new households in the long-planned southern half of the city where residential development is underway but remains incomplete, and instead redirects almost all new housing to older neighborhoods and major employment hubs in the developed northern sliver of town which had (before the COVID-19 pandemic) planned frequent-interval bus service. The newer areas of town with higher incomes were slated to receive no new housing, while neighborhoods

[9] *See* SCAG, *Sixth Cycle Final RHNA Allocation Plan*, at 5-6 (March 21, 2021), https://scag.ca.gov/sites/main/files/file-attachments/6th-cycle-rhna-final-allocation-plan.pdf?1616462966; SCAG, *Connect SoCal: The 2020-2045 Regional Transportation Plan/Sustainable Communities Strategy of the Southern California Association of Governments* (September 3, 2020), https://scag.ca.gov/sites/main/files/file-attachments/0903fconnectsocal-plan_0.pdf?1606001176.

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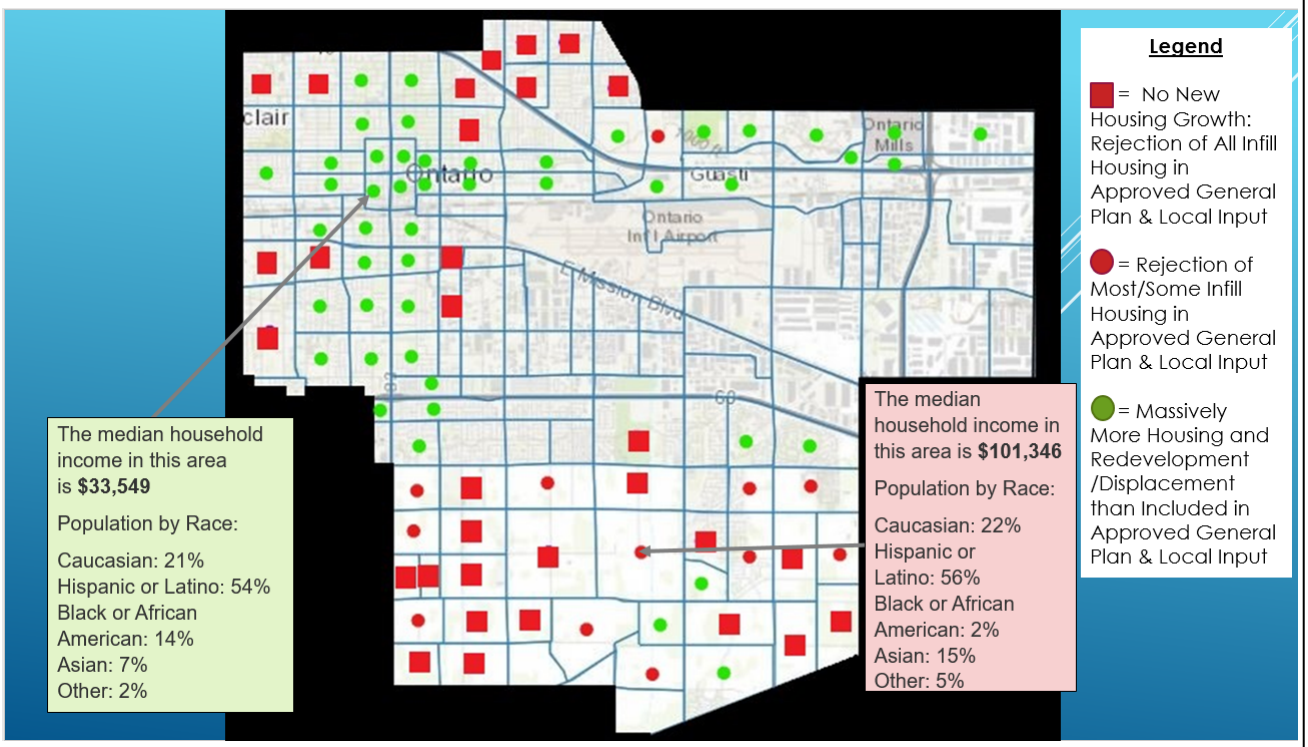
with median incomes that are two-thirds lower are slated for massive (20,000+ homes) new development. **Figure 5** also shows, however, that the majority of residents in higher median income areas where new homes are being developed are Latinos (56%) while whites are only 22%. This pattern of emerging homeownership, by majority minority homeowners, is not "sprawl" – it is existing, General Plan compliant housing to provide attainable homeownership to median-income families which has been found to be in full compliance with state GHG reduction laws, state housing laws, and state and federal laws prohibiting residential segregation.

Figure 5
Minority Displacement and White Preservation Housing Plan for Long Beach Neighborhoods to Achieve State VMT Reduction Targets[10]



14. During an extended public review process during the COVID-19 pandemic over the summer of 2020, SCAG staff received considerable vociferous criticism of its VMT reduction TAZ maps – and the Regional Council ultimately disallowed use of these maps for any purpose in a Resolution identifying the conflict between achieving housing targets and the VMT-centric GHG reduction target supported by SCAG and other agency staff, but never approved (and in fact expressly and repeatedly disallowed) by the Legislature.

[10] Demonstrative Data, *supra* note 5.

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15. While the SCAG VMT reduction maps show the development pattern that Defendants' Redlining Regulations impose, Defendants' actual housing VMT reduction mandates and methodology are in an Underground VMT Regulation, promulgated by Defendant OPR concurrently with the Redlining Regulations. While purportedly not binding, as described in **Part V**, this guidance establishes substantial evidence for CEQA compliance purposes of what is required to comply with the adopted VMT regulation. Any deviation from this purportedly non-binding guidance document that does not achieve the same VMT reduction outcome as the Underground Regulation is, as confirmed in multiple communications with OPR staff and now confirmed by a pending anti-housing lawsuit, indefensible under CEQA.

16. The Underground VMT Regulation directs local agencies to consider housing that is located within one-half mile of an existing high frequency bus stop, or commuter rail station or ferry terminal, as less than significant for VMT purposes. "Affordable" housing projects, which are almost always rentals with rents capped at about one-third of renter incomes, are likewise deemed by the Underground VMT Regulation as less than significant for VMT purposes, as are very small housing projects resulting in fewer than 110 trips per day (projects of approximately 10-14 units).[11] Plaintiffs object to none of these criteria, all of which align precisely with the Legislative directive in Senate Bill 743 ("SB 743") to incentivize more housing near transit, as well as other CEQA streamlining designed to avoid costly and litigious CEQA processing and mitigation requirements for affordable housing projects and very small housing projects. None of these categories, however, comes close to allowing for the timely production of 3.5 million new homes that are affordable in fact to working majority-minority families who make too much to qualify for "affordable" housing (or must play the long odds of winning a lottery for an affordable unit), and who make enough to purchase a home under existing (pre-VMT/Redlining Revision) market conditions.

17. For the housing that is subject to the new VMT regulation, the Underground VMT Regulation prescribes both a standard for when a housing project VMT impact is "significant," a methodology for measuring the impact, and briefly identifies potential mitigation measures to

[11] *Underground VMT Regulation*, *supra* note 3, at 12.

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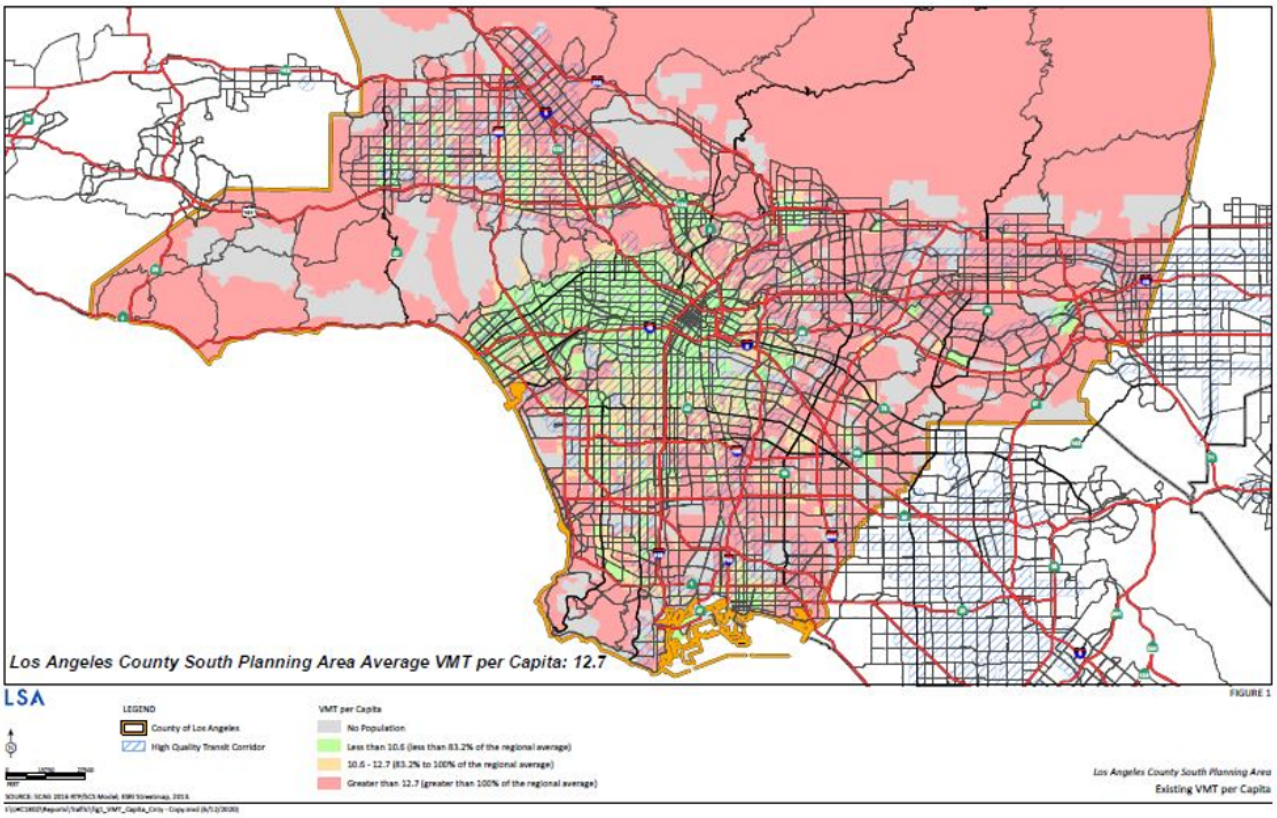
reduce significant VMT impacts to less than significant levels under CEQA.[12] **Figure 6** shows how this VMT Underground Regulation works in fact, in Southern Los Angeles County.

Figure 6
Southern Los Angeles County Cities and Communities With Below- and Above-Average Existing Per Capita VMT Using Underground VMT Regulation VMT Calculation Methodology[13]



18. The prescribed VMT significance criteria is that the new housing should have 15% lower VMT than the average, where the average is calculated as either within a city or region (for a housing project within a city), or within the combined average of the unincorporated areas of a county and all cities within a county (for a project on unincorporated county land).[14] As shown in Figure 7, the majority of "low" VMT areas (depicted in green) are concentrated within the City of Los Angeles and the county's highest cost housing cities west of downtown. In contrast, most of the unincorporated county areas including those adjacent to high cost cities are "high" VMT areas (depicted in pink) where per capita VMT is above the combined county/city average VMT. Existing

[12] *Underground VMT Regulation*, *supra* note 3, at 26-28.
[13] Demonstrative depiction of data from SCAG provided by LSA Associates to Jennifer Hernandez (May 2020).
[14] *Underground VMT Regulation*, *supra* note 3, at 15.

VMT is already above the average in suburban parts of Los Angeles county, and suburban cities south, east and west of downtown – all existing communities with existing housing and schools. New housing proposed on an infill location, such as a shuttered big box store, needs to have 15% lower VMT than the city/county average – but when the house next door to the big box already has VMT that is 25% above the city/county average, the residents of new housing need to drive 40% less than their pre-existing next door neighbor.

19. Defendants knew, and expressly referred to, a manual produced by the California Association of Air Pollution Control Officers Association ("**CAPCOA**") for reducing GHG by VMT reductions and other strategies, as the available expert resource on how to mitigate for significant VMT impacts.[15] That manual, however, expressly concludes that the maximum VMT reduction that can be achieved by a project using any combination of VMT reduction strategies in a suburban community is 15% - and further concludes that there is "limited empirical evidence" that even this 15% reduction is feasible.[16] In an existing "pink" suburban neighborhood or city, average VMT is already some increment above the VMT average for a combined city/county region. Even if the existing VMT in the neighborhood is only 1% above the VMT average, Defendants' knowingly adopted a 15% significance standard and calculation methodology that no new housing project could meet (unless the housing was next to frequent transit, was 100% affordable, or was smaller than about 10 units). A housing project that could not be designed to achieve this 15% lower-than-combined city/county average VMT has a significant adverse VMT impact, requiring preparation of an Environmental Impact Report ("EIR") and adoption of additional "mitigation" to reduce VMT to the required level (or overcome an easily-litigated conclusion that such mitigation could not be "feasibly" required). The additional mitigation identified in the Underground VMT Regulation, and in workshops conducted by Defendant OPR, is to add to the cost of housing the annualized purchase of bus passes for someone else to use somewhere else without any evidence

[15]CAPCOA, *Quantifying Greenhouse Gas Mitigation Measures: A Resource for Local Government to Assess Emission Reductions from Greenhouse Gas Mitigation Measures* (Aug. 2010), [hereinafter *CAPCOA Manual*], http://www.aqmd.gov/docs/default-source/ceqa/handbook/capcoa-quantifying-greenhouse-gas-mitigation-measures.pdf.

[16] *Id.,* at 58.

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that an actual VMT reduction would occur, or pay an unknown amount of a fee into a non-existing (and still non-existent) future VMT mitigation bank.[17]

20. Masked behind Defendants' environmentalist-sounding VMT rhetoric is their profoundly racist residential housing policy mandate. Figure 7 compares the high and low VMT neighborhoods using Defendants' Underground VMT Redlining Regulation in Oakland with the notorious Redlining Map used by prior generations of bureaucrats to protect wealthier white neighborhoods, while showing zero regard for the residents, institutions, and community character of minority neighborhoods.

Figure 7
Oakland VMT Screening Map and Oakland Redlining Map[18]

21. Far from "sprawl," the areas identified as higher VMT neighborhoods Oakland are targeted for more housing production, and housing preservation and tenant protection are among the key city policies applicable to Oakland's lower VMT neighborhoods.[19] Oakland's current eight year RHNA allocation for accommodating new housing requires the city to plan for more than 26,000 new units to meet the needs of all income categories.[20] Defendants' Redlining Regulations use

[17] *See, Underground VMT Regulation*, *supra* note 3, at 27.
[18] University of Richmond Digital Scholarship Lab, *Mapping Inequality: Redlining in New Deal America*, https://dsl.richmond.edu/panorama/redlining/#loc=10/34.005/-118.617 (last visited Mar. 30, 2021); Memorandum from Nelson/Nygaard Team to Sarah Fine, City of Oakland on Task 7A&B Define Thresholds of Significance and Impact Analysis Tools (Sept. 9, 2016).
[19] City of Oakland & Policy Link, *A Roadmap Toward Equity: Housing Solutions for Oakland, California* (2015), https://www.policylink.org/sites/default/files/pl-report-oak-housing-070715.pdf.
[20] Association of Bay Area Governments, *Draft Regional Housing Needs Allocation Proposed Methodology, 2023-2031*, Appendix 4 (February 2021),

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VMT – but also, as described briefly below, other racist CEQA provisions cloaked in environmental rhetoric – to adopt other racially disparate Redlining Regulations that use "the environment" to direct housing away from wealthy white neighborhoods while burying the adverse environmental, equity and civil rights consequences of concentrating new housing in poorer minority neighborhoods.

22. GHG Redlining Regulations. (Section 15064.4, Appendix G, Sections VIII(a) and (b) "GHG" thresholds) The GHG Redlining Regulations unlawfully fail to include the CEQA GHG compliance pathways identified by the Supreme Court in the "*Newhall*" decision (*Center for Biological Diversity v. Cal. Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204), and more specifically the compliance pathway that allows housing that complies with applicable GHG reduction laws and regulations less than significant under CEQA, and the compliance pathway that allows housing that complies with approved regional plans to reduce GHG from land use and transportation development while accommodating planned population and employment growth, and state-mandated housing allocations for each city and state, under SB 375, to have a less than significant GHG impact under CEQA. The GHG Redlining Revisions likewise do not reject these GHG CEQA compliance pathways identified by the Supreme Court. Instead, the GHG Redlining Revisions are intended to, and have, created massive litigation uncertainty about what GHG reductions are required for new housing under CEQA, and have spawned multiple anti-housing CEQA lawsuits alleging inadequate GHG CEQA compliance. The GHG Redlining Revisions accordingly create a potent CEQA litigation vulnerability for new housing projects, thereby exacerbating the housing supply shortage and further victimizing minority communities most harmed by the housing crisis.

23. Aesthetics Redlining Regulation (Appendix G, Section I(c) "aesthetics" threshold) expressly recognizes that a change in view from a public location – like a sidewalk - is presumptively a significant adverse "aesthetic" impact under CEQA as long as that location is in a wealthy suburb or small town such as those in the notoriously anti-growth and racially

https://abag.ca.gov/sites/default/files/documents/2021-02/ABAG_Draft_RHNA_Methodology_Report_2023-2031.pdf.

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discriminatory communities such as many in Marin County (the state's wealthiest and whitest county).[21] In an "urbanized area" consisting of "a central city or group of contiguous cities with a population of 50,000 or more, together with adjacent densely populated areas having a population density of at least 1,000 persons per square mile," (CEQA Regulations § 15387) aesthetic sensibilities of the public are subordinated to the rule of law, in this case a project's compliance with adopted community design standards. The Aesthetics Redlining Regulations honors the delicate, arbitrary, and racially discriminatory aesthetic sensibilities of wealthier, whiter, less densely populated suburbs and small towns – again an intentional government action designed to create CEQA aesthetics barriers to new housing in these whiter, wealthier communities to perpetuate and exacerbate residential racial discrimination.

24. Noise Redlining Regulation (Appendix G, VIII (a)) establishes a noise threshold expressly recognizes that temporary construction noise above pre-construction ambient conditions, even when limited and mitigated by state and local laws to restrict construction hours, equipment, and practices, likewise perpetuates a potent, arbitrary, and unlegislated CEQA cause of action against even new housing that fully complies with all applicable construction noise standards. Wealthier whiter neighborhoods dominated by single family homes are quieter than dense urban neighborhoods, and the Noise Redlining Regulation perpetuates this racial segregation pattern with a CEQA-only noise-above-ambient standard. This is another example of a patently racist use of CEQA to undermine statutes that expressly require cities and counties to adopt and enforce noise standards. Cities and counties are already required to adopt a Noise Element as a part of their General Plan which analyzes and quantifies current and projected noise levels from various sources. Gov. Code § 65302(f)(1). These quantifications are shown as "noise contours" in the Noise Element and serve as "a guide for establishing a pattern of land uses in the land use element that minimizes the exposure of community residents to excessive noise[,]" and must also "include implementation measures and possible solutions to address existing and foreseeable noise problems." Gov. Code §

[21] See Pera, *Marin Cities Top List of Least Diverse in the Bay Area,* The Mercury News (January 27, 2019), https://www.mercurynews.com/2019/01/27/marin-cities-top-list-of-least-diverse-in-region/; see also Miller, *The Richest Counties in America*, SmartAsset (August 21, 2019), https://smartasset.com/financial-advisor/richest-counties-in-america.

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65302(f)(2)-(f)(4).We have yet to invent the silent hammer and nail combination that can build a house; the Noise Redlining Regulation allows those with enough wealth and education to easily challenge new housing (and new people who are likely to be browner) in their neighborhood.

25. The Mitigation Detail Redlining Regulation: (Section 15126.4) overturns decades of judicially-upheld mitigation measures that specify an enforceable environmental protection performance standard, identify a feasible range of actions to comply with this performance standard, and require implementation of such action(s) to achieve the performance standard. These are extremely common for housing and other construction projects, including for example achieving stormwater quality performance standards by the appropriate placement of bales or tubes of hay between construction areas and storm sewers. There is no judicial precedent for requiring precise locations or sizes of these or similar stormwater quality measures as a CEQA mitigation measure, since this a design detail that can and is already required by laws in addition to CEQA, and the precise configuration of these measures will depend on when and what type of project construction actually occurs in relation to forecasted rain.

26. The Mitigation Detail Redlining Regulation demands that level of design specificity in CEQA mitigation measures, which pre-date by months and often years the actual construction of an actual project with an unknown amount of ground disturbance occurring on any given day in relation to any forecasted rain event. Defendants OPR and NRA newly demand this level of detail unless it is "infeasible" – itself a highly litigious term under CEQA – which has the simple and direct consequence of driving up the cost of CEQA compliance without any Legislative authority for rejecting decades of favorable court decisions upholding performance standard mitigation measures. When this Mitigation Detail Redlining Regulation is carried over to the nearly 100 impact topics required to be assessed under CEQA, the result is a massive expansion in CEQA compliance costs which Defendants fail to disclose or analyze. Increased CEQA compliance costs means increased housing project costs, which are either passed along to new owners or renters – or make the project economically infeasible – or drive a project design that is simpler to manage, like a few luxury homes rather than far more starter homes on the same project site. Mandating unlegislated and costly new CEQA practices that contravene established judicial precedent drives

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up housing costs, and imposes new procedural hurdles that serve no legislated or judicially-mandated purpose. The Redlining Regulations are replete with these pointless and unlawful bureaucratic excesses.

27. Defendants were on notice of the racially disparate consequences of their actions, and of the new costs, durations, and litigious consequences of their action. Specifically, each of the agency Defendants OPR and NRA advised in written comments filed by The Two Hundred as well as other public agencies and stakeholders of this fact, yet Defendants' either summarily dismissed such comments as "outside the scope" of their rulemaking or made knowingly false assertions.

28. Defendants' Redlining Regulations violate the federal and state Constitutions, federal and state fair housing laws, and several state environmental and administrative law statutes, as described in the fourteen causes of action set forth herein.

29. By this action, Plaintiffs seek a judgment directing Defendants to (a) rescind the VMT Redlining Regulations except as applicable within Transit Priority Areas, to projects including only income-restricted subsidized affordable housing, to small projects of less than 110 trips per day, and to local jurisdictions that accept VMT as a transportation metric and do not require any analysis, mitigation, or fee for traffic improvements intended to reduce traffic congestion from vehicular delay; (b) revise the GHG Redlining Revisions to recognize that housing that complies with applicable GHG reduction laws and regulations, and are consistent with sustainable communities strategies plans to reduce GHG from future housing, economic and population growth, have a less than significant GHG impact under CEQA; (c) revise the Aesthetic Redlining Regulation to recognize that housing projects that comply with applicable local ordinances governing the appearance of housing have a less than significant aesthetic impact under CEQA; (d) revise the Noise Redlining Regulation to recognize that temporary construction impacts that comply with state-mandated Noise Elements in local General Plans have a less than significant noise impact; and (e) revise the Mitigation Detail Redlining Regulation to expressly recognize that performance standard mitigation measures meeting applicable judicial criteria remain adequate under CEQA and rescinding the "infeasibility" qualifying criteria.

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30. Plaintiffs also seek a judgement that: (a) the *Technical Advisory on Evaluating Transportation Impacts In CEQA* constitutes an unlawful "underground regulation" by requiring minimum VMT CEQA compliance requirements in the form of VMT significance criteria and VMT analytical methodologies, and accordingly must be rescinded until or unless such time as it is adopted as a regulation in compliance with the Administrative Procedure Act ("APA"), (Gov. Code § 11340 *et seq.*); (b) the Redlining Regulations do not meet the mandatory statutory criteria required by the APA; (c) the economic impact analysis completed by Defendants for the Redlining Regulations did not comply with applicable APA criteria; and (d) full enforcement of all provisions of the APA in any further proposal by Defendant OPR to adopt modifications to the CEQA Guidelines.

31. For this Court to retain continuing jurisdiction over this matter until such time as the Court has determined that Defendants have fully and properly complied with its orders.

II. JURISDICTION AND VENUE

32. The Court has jurisdiction over this proceeding pursuant to California Code of Civil Procedure ("CCP") §§ 410.10, 1085, 1094.5, 526, *et seq.* and 1060. The Court has personal jurisdiction over Defendants pursuant to Code Civ. Proc. § 410.10. Venue for this action properly lies with this Court pursuant to Code Civ. Proc. §§ 393(b) and 395. Plaintiffs performed any and all conditions precedent to filing this action and has exhausted any and all available administrative remedies to the extent required by law.

III. PARTIES

33. Plaintiff THE TWO HUNDRED are a California-based unincorporated association of civil rights leaders, community leaders, opinion makers and advocates working in California (including in San Bernardino County) and elsewhere on behalf of low income minorities who are, and have been, affected by California's housing crisis and increasing wealth gap.[22]

34. The Two Hundred is committed to increasing the supply of housing, to reducing the cost of housing to levels that are affordable to California's hard working families, and to restoring

[22] The Two Hundred Project, California Community Builders, https://www.ccbuilders.org/the-two-hundred-project.

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and enhancing home ownership by minorities so that minority communities can also benefit from the family stability, enhanced educational attainment over multiple generations, and improved family and individual health outcomes, that white homeowners have long taken for granted. The Two Hundred includes civil rights advocates who each have four or more decades of experience in protecting the civil rights of our communities against unlawful discrimination by government agencies as well as businesses.

35. The Two Hundred supports the quality of the California environment, and the need to protect and improve public health in our communities.

36. The Two Hundred have for many decades watched with dismay decisions by government bureaucrats that discriminate against and disproportionately harm minority communities. The Two Hundred have battled against this discrimination for entire careers, which for some members means working to combat discrimination for more than 50 years. In litigation and political action, The Two Hundred have worked to force two government bureaucrats to reform policies and programs that included blatant racial discrimination – by for example denying minority veterans college and home loans and benefits that were available to white veterans, and promoting housing segregation as well as preferentially demolishing homes in minority communities.

37. The Two Hundred sued and lobbied and legislated to force federal and state agencies to end redlining practices that denied loans and insurance to aspiring minority home buyers and small businesses. The Two Hundred sued and lobbied to force regulators and private companies to recognize their own civil rights violations, and end discriminatory services and practices, in the banking, telecommunication, electricity, and insurance industries.

38. The Two Hundred have learned, the hard way, that California's purportedly liberal, progressive environmental regulators and environmental advocacy group lobbyists are as oblivious to the needs of minority communities, and are as supportive of ongoing racial discrimination in their policies and practices, as many of their banking, utility and insurance bureaucratic peers.

39. Several years ago, The Two Hundred waged a three year battle in Sacramento to successfully overcome state environmental agency and environmental advocacy group opposition to establishing clear rules for the cleanup of the polluted properties in communities of The Two

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Hundred, and experienced first-hand the harm caused to those communities by the relationships between regulators and environmentalists who financially benefited from cleanup delays and disputes instead of creating the clear, understandable, financeable, insurable, and equitable rules for the cleanup and redevelopment of the polluted properties that blighted these communities.

40. The Two Hundred submitted comment letters to Defendants objecting to the discriminatory anti-housing content of the Redlining Regulations. The Two Hundred included with its comments to Defendants OPR its first civil rights lawsuit, filed against CARB in 2018, which remains pending and challenges four anti-housing discriminatory measures included in CARB's 2017 "Scoping Plan" for reducing GHG emissions, including but not limited to VMT reduction mandates and "net zero" GHG CEQA thresholds.[23] CARB Scoping Plans have been determined to not be regulations. *Newhall,* 62 Cal.4th at 222-23. Noteworthy for evidentiary purposes such as the intentional racial discrimination alleged in this complaint, CARB, represented by then-Attorney General Becerra, unsuccessfully demurred to The Two Hundred's constitutional due process claim by arguing that there is no constitutionally protected right to housing free of discrimination.[24]

41. The Two Hundred's members include, but are not limited to, members of and advocates for minority communities in California as further set forth in **Exhibit A**.

42. Plaintiff Jason Cordova. Jason Cordova is an individual and aspiring homeowner residing in San Bernardino County who is harmed by the increased housing costs and CEQA litigation obstacles created by the Redlining Regulations. Mr. Cordova recently served as the Program Director for the Southern California College Access Network, which is tasked with increasing the college completion rates and career readiness of students in greater Los Angeles County.

43. Plaintiff Lynn Brown-Summers. Lynn Brown-Summers is a retired union organizer, lifetime resident of San Bernardino County, and mother of eight adult children. Because of high

[23] Verified Petition for Writ of Mandate; Complaint for Declaratory and Injunctive Relief, *The Two Hundred v. California Air Resources Board*, No. 18CECG01494 (Fresno Cty. Super. Ct. Apr. 27, 2018).

[24] Order After Hearing on Respondents/Defendants' Demurrer to Complaint/Petition at 12, *The Two Hundred v. California Air Resources Board*, No. 18CECG01494 (Fresno Cty. Super. Ct. Oct. 26, 2018).

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housing costs, two of her adult children have already moved to another state with less costly housing, and two others are planning to do so. Only one of her eight children has been able to afford to become a homeowner. Ms. Summers will suffer from grief and other harms as her children and grandchildren move to other states so they can afford housing. Before retiring, Ms. Summers also often drove 150 miles per day to different work places as part of her union organizing duties. Ms. Summers worked directly on successfully lobbying against legislative proposals to mandate reductions in VMT, given the direct harm she and others in her community would suffer from being unable to get to work, being charged VMT fees, and/or suffering from even higher housing costs, if a VMT reduction mandate was to be imposed by the Legislature. The VMT reduction legislation opposed by Ms. Summers was never adopted.

44. Defendant GOVERNOR'S OFFICE OF PLANNING AND RESEARCH ("OPR") is a state administrative agency responsible for updating and proposing regulations implementing CEQA.

45. Defendant CALIFORNIA NATURAL RESOURCES AGENCY ("NRA") is a state administrative agency of the State of California responsible for adopting regulations implementing CEQA. Defendant Wayne Crowfoot is the current chief executive of NRA.

46. Respondent/Defendant KATE GORDON, sued herein in her official capacity, is Director of the OFFICE OF PLANNING AND RESEARCH.

47. Respondent/Defendant WADE CROWFOOT, sued herein in his official capacity, is Secretary of the CALIFORNIA NATURAL RESOURCES AGENCY.

48. DOES 1 THROUGH 50 are additional state agencies, and employees of state agencies, who violated the civil rights of minority Californians in ignoring or intentionally causing the unlawful and disparate impacts caused by the challenged regulations.

IV. GENERAL ALLEGATIONS

49. ***California's housing crisis is real, is racially discriminatory – and it worsens climate change.*** In legislation approved and signed by the Governor in 2019,[25] the state's elected leaders concluded that California has an "unmet housing backlog of nearly 2,000,000 units" and "at

[25] Stats. 2019, ch. 654 (S.B. 330); Gov. Code § 65589.5. (a) (2)(D); *Id.* at § 65589.5. (a) (2)(A).

least 180,000 new housing units annually" is needed through 2025. California is achieving barely over half of this production goal, and housing production has actually declined rather than increased: less housing was permitted in 2018 than 2017, and less housing was permitted in 2019 than 2018. The housing crisis is getting worse, not better.

50. ***The housing crisis is not simply a shelter problem.*** Our elected leaders concluded that housing "is a critical problem that threatens the economic, environmental and social quality of life in California," that "California housing has become the most expensive in the nation," and that California "has a housing supply and affordability crisis of historic proportions." Further, "[w]hen Californians have access to safe and affordable housing, they have more money for food and health care; they are less likely to become homeless and in need of government-subsidized services; their children do better in school; and businesses have an easier time recruiting and retaining employees."[26]

51. ***The housing crisis is not color blind: minority Californians are the most harmed***. Our elected leaders concluded that the housing crisis has resulted in "discrimination against low-income and minority households."[27] The housing crisis has virtually eviscerated the housing equity progress made by landmark civil rights laws of the 1960s: California's overall homeownership rate is at its lowest level since the 1940s, and the majority of California renters pay too much in rent – nearly one-third pay more than half of their income on rent. The housing crisis has also led to California having the nation's highest poverty and homelessness rates in the nation, and minorities are disproportionately included in the ranks of the state's poor and homeless.

52. ***Our own laws, regulations and other policy choices are a major cause of the housing crisis***. Our elected leaders acknowledged that policy choices are partly to blame for this historic and discriminatory housing crisis: "While the causes of this crisis are multiple and complex, the absence of meaningful and effective policy reforms to significantly enhance the approval and supply of housing affordable to Californians of all income levels is a key factor."[28]

[26] *Id.* at § 65589.5. (a) (2)(H).
[27] *Id.* at § 65589.5. (a) (1)(C).
[28] Gov. Code § 65589.5. (a) (2)(B).

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53. ***The housing crisis actually worsens climate change, undermining California's role as a global climate leader***. Our elected leaders agreed that our ongoing failure to solve the housing crisis was increasing global GHG emissions instead of reducing them, as required by California's climate laws and desired role as a global climate leader:

> An additional consequence of the state's cumulative housing shortage is a significant increase in greenhouse gas emissions caused by the displacement and redirection of populations to states with greater housing opportunities, particularly working- and middle-class households. California's cumulative housing shortfall therefore has not only national but international environmental consequences.[29]

54. ***Entrenched special interest groups, including environmentalists, block meaningful housing policy reforms.*** While Senate Bill 330 ("SB 330") and other enacted legislative housing policy findings present the legal and political truth, in the judgment of our elected representatives and their experts, of the causes, discriminatory consequences, and negative environmental and climate outcomes of the California housing crisis, fierce political battles are continuously waged among California's powerful special interest groups over any reforms to state policies that would actually allow for the more timely construction of less costly housing – the housing that is actually and urgently needed by California's voters and residents. Among the most entrenched, "third rail" housing reform battlegrounds is CEQA, which is used by anonymous groups, business competitors, labor unions, anti-development environmentalists, only-the-most-costly-housing-allowed climate advocates, and residents who have concluded that adding more housing will further worsen stressed public services and aging infrastructure and cause traffic gridlock. Any of these parties can threaten, or file, a CEQA lawsuit against housing – and campaign against any local or state politician that seeks to approve housing over their objections. The fact is that housing remains the top statewide target of all CEQA lawsuits filed over the past decade, and in 2018 60% of all statewide CEQA lawsuits challenging any form of development project targeted new housing.[30]

[29] *Id.*at § 65589.5. (a) (2)(I).

[30] Hernandez, *California Getting In Its Own Way: In 2018, Housing Targeted in 60% of Anti-Development CEQA Lawsuits*, Chapman University Center for Demographics & Policy, 6-7 (Dec. 2019), https://www.chapman.edu/communication/_files/ca-getting-in-its-own-way.pdf (last visited Mar. 30, 2021).

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55. ***Amending CEQA regulations to make housing more expensive and easier to challenge in CEQA lawsuits, is not required for any authorized "environmental" purpose – it is just another of a long list of discriminatory anti-housing "redlining" practices with the intended and actual consequence of depriving minority Californians of homeownership***. CEQA was enacted in 1970, before federal and state environmental laws to protect the coast, endangered species, water, and air quality; to conserve energy and water; and to protect public lands and parks. Environmental laws work – before the federal and state clean air laws were enacted in the early 1970s, smog was so bad that for weeks on end people could see, smell, and taste – and a nasty taste it was – the air in the Los Angeles air basin. Over the next forty years, sweeping new legal mandates to improve the air were implemented, and as of the last year of President Obama's administration the United States Environmental Protection Agency ("U.S. EPA") proudly announced that smog-forming tailpipe emissions from the nation's fleet of cars and pickup trucks had been reduced by 99%. Regulatory action dramatically improved air quality with mandates for cleaner engine technologies and fuels – even as the nation's population, vehicle fleet, and VMT all increased, as did the size of the economy. Progress to end smog-creating tailpipe emissions was made via formal rulemaking procedures that were required to transparently rank different potential regulations based on pollution reduction effectiveness and costs to consumers and other stakeholders. The most effective and least costly measures were undertaken first, and those which were ineffective or more costly were rejected or put on hold. Tailpipe smog reductions also reduced by about 20%, as a non-planned outcome, tailpipe emissions of carbon dioxide ("CO_2") that we now are intent on reducing as a GHG. Now prioritized GHG reductions, including electric and hybrid cars, are well underway. What was never approved as a state statute or regulation, even as we reduced 99% of targeted emissions from cars, were radical "environmental" proposals such as the forced reduction of populations, and mandatory prohibitions on the use of cars. When openly debated and compared with other pollution reduction measures in a transparent rulemaking or legislative context, these proposals never made the cut.

56. ***Reducing GHG emissions by increasing housing costs and litigation obstacles under CEQA is not an effective GHG emission reduction measure.*** Even at the height of the war

against emissions that produced smog, neither the Legislature nor any state agency mandated that buyers and renters pay tens of thousands of dollars in CEQA "mitigation" fees to have someone else, somewhere else, reduce smog to "net zero" and thereby offset the smog caused by the construction and future occupancy of a new house. Similarly, the last war did not suggest that buyers and renters must pay hundreds of thousands of dollars in CEQA "mitigation" fees to have someone else, somewhere else, reduce "vehicle miles traveled" and offset the VMT produced from the construction and occupancy of houses by people who depend on a car for their transportation needs. With our new war on GHG emissions and climate change, but without any authorizing legislation or regulations, the Redlining Regulations have done just this and simply ignored the fact that neither the Legislature, nor any court interpretation of CEQA, allows any agency during today's housing crisis to impose hundreds of thousands of dollars of new cost burdens and litigation obstacles on new housing. In contrast, the Redlining Regulations repeatedly rely on an unlegislated non-regulation "Scoping Plan" approved by the California Air Resources Board ("CARB") in 2017 to stridently and repeatedly assert that significant but unknown quantities of GHG emission reductions and VMT reductions must be extracted from new housing under CEQA – and sternly exhort the hundreds of cities and counties responsible for approving housing to figure the specifics out for themselves, for each project, to avoid approving housing that causes significant impacts to global climate change. Reducing the most potent "black carbon" emissions with serious efforts to prevent catastrophic forest fires, imposing GHG costs on luxury imports or plane flights of the wealthy, and retrofitting older buildings with energy efficient features, will all result in substantial and quantified GHG reductions that do not place yet another racially disparate burden on housing crisis victims. In contrast, no Defendant has agreed to quantify either the effectiveness or the cost of climate change benefits of the Redlining Regulations. Defendants do proudly proclaim their conclusion that the Redlining Regulations will enhance "wellness" by "encouraging walking and biking" – none of which is a statutorily authorized objective of CEQA.

57. ***The Redlining Regulations were intended to end attainable homeownership, and weaponize CEQA to favor million dollar condos and $4000/month apartments.*** Defendants' avowed policy objective is that California's new housing must be built in 6-20+ story buildings at

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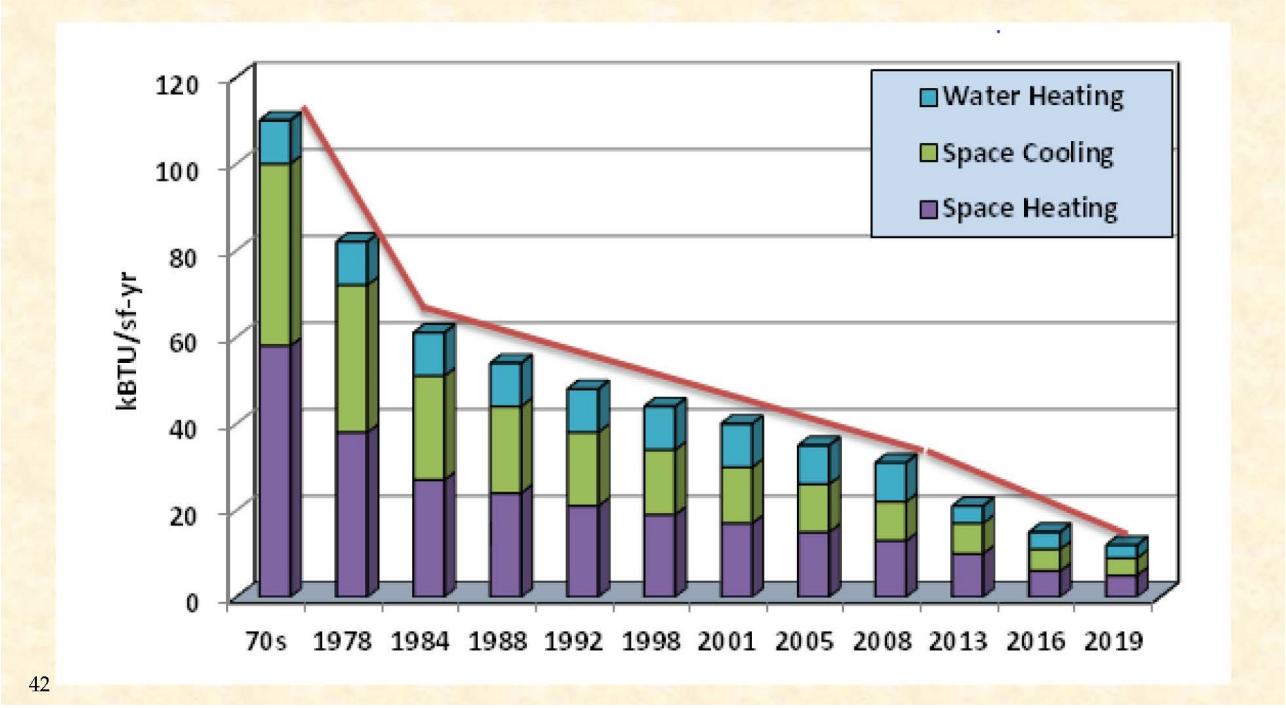
commuter bus stops and metro stations, where extraordinarily complex buildings and the high land costs required to displace existing neighborhood uses mean that even small two bedroom family units already cost $1 million or more. Because small starter homes, duplexes and townhomes can be built and sold to aspiring homeowners at less than half that price, Defendants have weaponized CEQA to impose over $400,000 per unit in new VMT and GHG mitigation fees to discourage what they deride (but likely grew up in, and occupy now) as suburban "sprawl" even when new housing is located entirely within an "infill" property in an existing community, and without regard to the fact that the new housing must comply with dozens of most-stringent-in-the-nation environmental laws and regulations, including for example those that make new housing project 4-5 more efficient than older homes as reported by the California Energy Commission. Figure 8 shows that major energy uses, including heating, cooling and water heating, for new construction homes have decreased 87.5% compared to their pre-1978 counterparts, which were built prior to the adoption of a state energy code. California's elected leaders have already mandated clean energy and clean vehicles to reduce GHG (strategies that are working), but even pre-COVID multi-billion dollar transit investments have not stemmed transit ridership losses, especially among Latino and other minority workers who need to get to their job, on time, to be paid – and must use a car to do so.

Figure 8:
Impacts of Building Standards on Home Energy Use



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Citation: CEC, Public Workshop: 2019 Building Energy Efficiency Standards (April 20, 2017).

58. ***Defendants are "Environmental" Regulators Allied with Overwhelmingly White Environmentalist Allies Opposed to Population Growth, and Support the Fraudulent GHG Reduction Metric of Counting Departing Californians (and Their Jobs) as Reductions of GHG Even Though Per Capita GHG Emissions of Californians Increase When Priced Out of California.*** Defendants simply refuse to acknowledge the housing crisis, or any duty to help solve it – because fewer people means less GHG generated in California, and thus advances their laser focus on meeting California's unlegislated 80% GHG reduction target by 2050, even if the state's future population is limited to the wealthy and what CARB calls "service population." In Defendants' hardened climate policy silo, increasing all future housing prices to $1 million or more and driving "those people" (browner, younger, poorer) to Texas is a dream come true, and cows rather than people can occupy the 94.7 percent of land that remains as non-urbanized California.

59. ***The Redlining Regulations are racially biased, and Defendants had actual knowledge that they would worsen the housing, poverty, and homeless crisis – and cause disparate harm to minorities.*** It is no coincidence that the GHG and VMT Redlining Regulations place zero new cost burdens on California's majority-white existing homeowners, even though far more GHGs are emitted in heating and cooling drafty mansions (and other existing buildings) than the small fraction of GHGs from energy-conserving new homes which must be built with solar roofs and other costly GHG-reducing green building features. It is simply much easier, given this inherent racial bias, for environmentalists (including those leading Defendant agencies during the time the Redlining Regulations were adopted) to enforce redlining policies that cause disparate harm to minorities. As reported by the immediate past president of the Sierra Club Board of Directors, as well as numerous other sources, racism is pervasive in the environmental movement and the Redlining Regulations represent the apex of the climate activism of the Brown Administration.[31]

[31] Mair, *A Deeper Shade of Green*, Sierra Club (Mar. 9, 2017), https://www.sierraclub.org/change/2017/03/deeper-shade-green (last visited Mar. 30, 2021)..

60. ***Radical anti-housing CEQA expansions conflict with enacted pro-housing priorities.*** Any honest or transparent rulemaking process which ranks GHG reduction measures on factors such as effectiveness, fairness, and avoiding racially disparate and economically regressive impacts would confirm the Legislature's own conclusion that imposing more costs on housing, and further exacerbating the weaponization of CEQA, is discriminatory, worsens climate change, and undermines California's climate leadership. The Redlining Regulations underwent no such transparent rulemaking process, nor did CARB's unlegislated, non-regulation Scoping Plan, which requires VMT reductions and "net zero" GHG housing projects. Defendants' purported economic assessment of the Redlining Regulations promised non-existent, fanciful cost reductions over the objections and observations of scores of experts and interested stakeholders including Petitioners. Just under one year after the effective date of the Redlining Regulations, promised CEQA cost increases have occurred, anti-housing CEQA lawsuits continue to proliferate, new housing production is down, and the cost of housing has increased.

61. ***Litigation enforcing civil rights laws is Plaintiffs' only viable remedy to rescind the Redlining Regulations.*** Although Governor Brown called CEQA reform "the Lord's work," by the end of his two terms he acknowledged it was politically impossible.[32] Governor Newsom has made no progress with CEQA in his first year, and housing production has continued to decline. Implementing even one of Defendants' new CEQA expansions - requiring new housing to actually reduce total (not per capita or per household) VMT in the area of the project - would add hundreds of thousands of dollars to the cost of a new home, and disqualify 2,620,616 California households from purchasing a median priced home. Those priced out are the same majority-minority households that are already disproportionately victimized by California's housing crisis. Defendants' Redlining Regulations have converted our housing crisis into a housing conflagration.

62. ***Judicial protection of civil rights against politically powerful extremists is urgently needed to address California's ongoing housing crisis.*** During the closing hours of the Brown

[32] Dillon, *Which California Megaprojects Get Breaks from Complying with Environmental Law? Sometimes, It Depends on the Project,* L.A. Times (Sept. 27, 2017), https://www.latimes.com/politics/la-pol-ca-enviromental-law-breaks-20170925-story.html (last visited Mar. 30, 2021).

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administration, Defendants transformed CEQA from a quirky 1970 environmental statute into a racist, anti-housing, anti-homeownership, civil rights abomination. This complaint provides detailed factual and legal background on Defendants' unlawful hijacking of CEQA, and concludes with fourteen causes of action pursuant to which the Redlining Regulations are unlawful, and should be set aside by this court. Judicial enforcement of civil rights protections, as explained herein, is a critical and ongoing need of California's minority communities notwithstanding the proclaimed "progressive" values of state leaders.

A. CEQA is Used to Blocks Environmentally Beneficial or Benign Housing, and Thereby Cause Disproportionate Harm to California's Minority Communities, and Defendants' Redlining Regulations Perpetuate and Exacerbate Racial Segregation "Redlining" In the Name of the Environment

63. Even before September's enactment of SB 330, Governor Newsom concluded California had a shortfall of 3.5 million homes, and California's acute housing crisis was an "existential" threat to the state.[33] As described in a series of non-partisan reports prepared by the California Legislative Analyst's Office ("LAO"), this severe housing shortage has driven up housing prices, forced departures of long-term residents, prompted the relocation of businesses to other states where housing for employees is more affordable, and caused millions of Californians to move to states with less costly housing led by Texas, Nevada and Arizona.[34]

64. Based on United States Census Bureau data, the housing crisis has also caused California to have the highest poverty rate (and highest number of poor people) in the nation.[35] In 2019, the Public Policy Institute of California and the Stanford Center on Poverty and Inequality

[33] Office of the Governor, *In the Face of Unprecedented Housing Crisis, California Takes Action to Hold Cities Accountable for Standing in the Way of New Housing* (Jan. 25, 2019), https://www.gov.ca.gov/2019/01/25/housing-accountability/ (last visited Mar. 30, 2021).

[34] *See, e.g.,* LAO, *California Losing Residents via Domestic Migration* (Feb. 21, 2018), https://lao.ca.gov/LAOEconTax/Article/Detail/265 (last visited Mar. 30, 2021) ("For many years, more people have been leaving California for other states than have been moving here. According to data from the American Community Survey, from 2007 to 2016, about 5 million people moved to California from other states, while about 6 million left California. On net, the state lost 1 million residents to domestic migration—about 2.5 percent of its total population…..[T]p destinations for those leaving California were Texas, Arizona, Nevada, and Oregon."); *see also* LAO, California's High Housing Costs: Causes and Consequences (Mar. 17, 2015), https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf (hereinafter "California's High Housing Costs") (last visited Mar. 30, 2021).

[35] *See* Downs, *Census Bureau: California has the highest poverty rate in the U.S.* (Sept. 13, 2018), https://www.upi.com/Top_News/US/2018/09/13/Census-Bureau-California-has-highest-poverty-rate-in-US/1611536887413/ (last visited Mar. 30, 2021).

concluded that almost four in ten (36.4 percent) Californians live at or below the poverty line and are unable to pay for routine monthly expenses, even after taking into account social safety net programs to help pay for food, housing and medical care; the same study again confirmed that California's poor were disproportionately likely to be racial minorities, children, and seniors.[36]

65. Notwithstanding commitments of billions of dollars to combat homelessness, California also has the nation's highest homelessness rate, and the highest number of homeless people, who live on streets and in parks, in shelters, or in their vehicles. Homelessness increased substantially, again, in 2019.[37]

66. Our housing crisis has also made homeownership a nearly unattainable objective for most Californians.[38] For example, even experienced union construction workers earning $90,000 – classified as "moderate" or middle income earners because they earn well above California's $80,440 median income level[39] – cannot afford to purchase a median priced home in any Southern California county touching the ocean, or any Bay Area county touching the San Francisco Bay. These same counties collectively have far more jobs – and higher paying jobs – than the rest of the state ("Coastal Job Centers").[40] Homeownership remains generally attainable for even above-median income families like union construction workers only in inland California.[41] Aspiring homeowners who can afford to purchase homes only in these inland locations then face "supercommutes" of more than three hours, with even funded transportation improvements such as commuter rail and carpool lanes bogged down for decades. California has four of the top 10

[36] *See* Bohn et al., *Just the Facts, Poverty in California, Public Policy Institute of California and Stanford Center and Poverty and Inequality* (July 2019), https://www.ppic.org/publication/poverty-in-california/ (last visited Mar. 30, 2021).
[37] Stepman, *California's Homelessness Crisis Is Reaching Epic Proportions*, National Interest (July 15, 2019), https://nationalinterest.org/blog/buzz/california%E2%80%99s-homelessness-crisis-reaching-epic-proportions-67067 (last visited Mar. 30, 2021).
[38] Housing, *Impact of California's Housing Prices on Construction Workers*, Chapman University (Feb. 22, 2019), at 5-9, https://www.newgeography.com/files/HousingConstructionWorkers_FINAL_WEB%20(1).pdf (last visited Mar. 30, 2021).
[39] U.S. Census Bureau, 2019 American Community Survey (ACS) 1- Year Estimates, Median Income in the Past 12 Months (in 2019 Inflation-Adjusted Dollars), Table S1903, https://data.census.gov/cedsci (search "S1903" in topic or table name search field and "California" in state, county or place search field) (last visited March 31, 2021).
[40] Stepman, *supra* note 37.
[41] *Id.*

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metropolitan areas with the largest percentage of "supercommuters" in the nation: Riverside-San Bernardino in Southern California, and Modesto, Stockton and Merced adjacent to the Bay Area.[42]

67. While the state's housing crisis has caused widespread harm, this harm has disproportionately burdened California's minority communities: workers, families, children and seniors. For example, just under 70 percent of construction workers in Southern California are Latinos,[43] who – like other hard working middle income Californians such as teachers, nurses and firefighters – are priced out of housing in Coastal Jobs Centers and must drive ever greater distances to get to homes they can afford to buy. As shown in Figure 8, the median home price in Santa Monica is $1.7 million and the median monthly rent for a two bedroom apartment is over $4,000. Affordability increases with distance, but racial diversity follows the inverse pattern: only 20 percent of Santa Monica residents are Latino or African American, while 76 percent of San Bernardino residents are Latino or African American.[44] Hard working families, disproportionately members of minority communities, can and do still buy homes in California – but mostly outside Coastal Job Centers.

68. Most non-partisan housing experts agree that California needs an "all-of-the-above" strategy for solving the housing crisis: getting to 3.5 million new homes will require cooperation from multiple stakeholders, and will require a mix of housing types in different locations with different prices to serve the needs of all. Similarly, most non-partisan housing experts – as well as the Governor and the California legislature ("Legislature") – have rejected the concept that there is a "one-size-fits-all" housing solution that works everywhere, for everyone.

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[42] Cox, *Increase in Long Commutes Indicates More Residential Dispersion*, New Geography (Aug. 1, 2017), http://www.newgeography.com/content/005704-increase-long-commutes-indicates-more-residential-dispersion (cited in McPhate, *California Today: The Rise of the Super Commuter*, New York Times (Aug. 21, 2017), https://www.nytimes.com/2017/08/21/us/california-today-super-commutes-stockon.html) (last visited March 31, 2021).

[43] Kitroeff, *Immigrants flooded California construction. Worker pay sank. Here's why*, Los Angeles Times (Apr. 22, 2017), https://www.latimes.com/projects/la-fi-construction-trump/ (last visited March 31, 2021).

[44] Zillow, Median home purchase price data for each city, https://www.zillow.com (last visited Mar. 2019); Rent Jungle median apartment price data for each city, https://www.rentjungle.com (last visited Apr. 2019); Statistical Atlas, https://statisticalatlas.com/place/California/Santa-Monica/Race-and-Ethnicity and https://statisticalatlas.com/county/California/San-Bernardino-County/Race-and-Ethnicity.

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A. Residential Racial Segregation Has Grown Much Worse in California Since CEQA Was Determined to Apply to Private Housing Projects that Complied with General Plans, Zoning Codes, and All other Applicable Environmental and Public Health Standards

69. Before 1982, CEQA did not apply to agency approvals of housing that complied with local General Plans, zoning ordinances, and the already robust suite of environmental and public health protection mandates then in effect. In an appellate case involving a high density housing project along the Wilshire Transit corridor in Los Angeles, however, an appellate panel concluded that as long as the local agency had the discretion to impose conditions on the housing project approval – like the location of a driveway interface with a street – then the housing approval was a discretionary action subject to CEQA.[45] Coupled with an ever-more personalized understanding of "the environment" as the view from your kitchen window, the number of children playing in your neighborhood park, or the zero-construction activity "ambient" quiet in your neighborhood, CEQA morphed from a quirky 1970s law to stop clearcutting redwood forests and bisecting neighborhoods with freeways, to an anti-housing rugby scrum employing thousands of agency staff, consultants and lawyers statewide. It is no coincidence that housing production dramatically slowed – and with a growing population and increasingly inadequate supply, housing costs skyrocketed especially in wealthier communities.

70. As shown in Figure 8 the stark housing pricing and racial differences that exist today between Coastal Job Centers and inland communities like San Bernardino include unacceptable (and unlawful) patterns of racial residential segregation, and are undermining decades of civil rights progress against historic government discriminatory practices such as redlining, exclusionary zoning, and mortgage financing programs.[46] What is not acceptable is any housing "solution" that perpetuates racial segregation and further erodes minority homeownership.

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[45] *Friends of Westwood v. City of Los Angeles*, 191 Cal.App.3d 259 (1987).

[46] Although the data provided is for Southern California, it is noteworthy that a similar residential racial segregation pattern holds true for the San Francisco Bay Area "superregion" which now includes Central Valley communities such as Stockton, Modesto and Sacramento. *See, e.g.,* Verma et al, *Rising Housing Costs and Re-Segregation in the San Francisco Bay Area*, U.C. Berkeley Terner Center Urban Displacement Project (Sept. 2018), https://www.urbandisplacement.org/sites/default/files/images/sf_final.pdf (last visited March 31, 2021). Because Asian and Pacific Islander population data, and mixed race data, is less readily available, and less uniformly reported in data compilations, this Complaint focuses on statistical information about California's Latino and African-American data.

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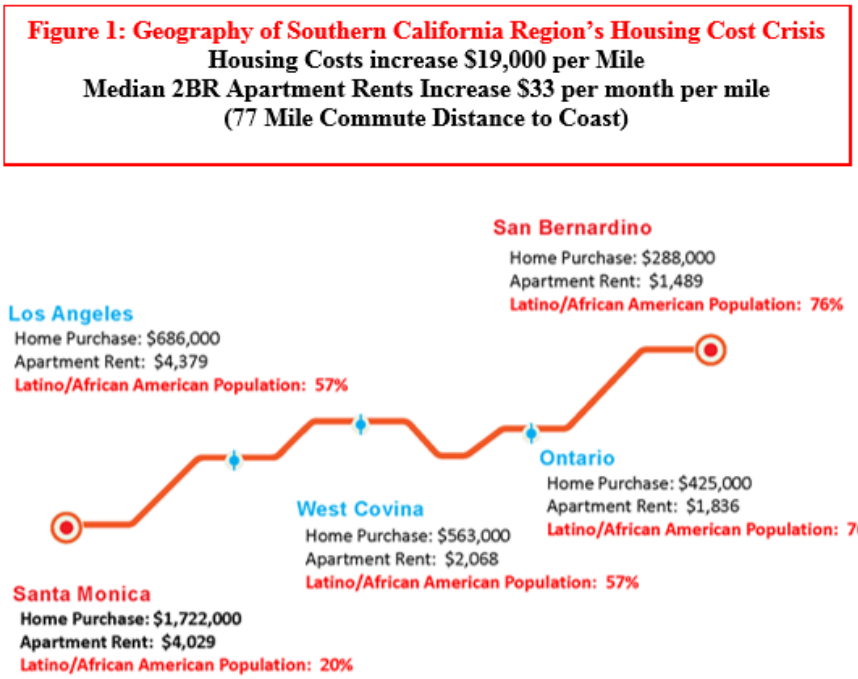
Figure 9: Percent For-Sale Housing with Monthly Payments Affordable to Median Income Households



71. Plaintiffs support increasing the state's housing supply, decreasing the cost of housing, and decreasing the time required to complete housing, in response to the housing emergency. Plaintiffs also support building new homes in existing communities, at higher densities, near transit services – but opposes this housing strategy to the extent it continues the shameful redlining practices of promoting the demolition and displacement of minority communities, excluding minority families from homeownership, and driving already exorbitant housing costs ever higher which disproportionately harms minority residents.

72. More specifically, Plaintiffs do not support undermining federal, state and local civil rights, housing and transportation laws, and does support preserving and enhancing access by California's minorities to attainable homeownership; depriving our families of homes they own does not just harm today's minority workers – it hurts our children, our grandchildren, and their descendants. As explained by the LAO in its report, *California's High Housing Costs: Causes and Consequences:*

> Homeownership helps households build wealth, requiring them to amass assets over time. Among homeowners, saving is automatic: every month, part of the mortgage payment reduces the total amount owed and thus becomes the homeowner's equity. For renters, savings requires voluntarily

> foregoing near–term spending. Due to this and other economic factors, renter median net worth totaled $5,400 in 2013, a small fraction of the $195,400 median homeowner's net worth. For many households in high housing cost areas, though, homeownership's benefits remain out of reach, as higher home prices (relative to area incomes) mean fewer and fewer households can afford to become homeowners.[47]

The Result of Disparate Harms to Minority Communities Caused by California's Chronic Housing Shortage Is that the Status Quo Is Protected by Special Interests, As Aided and Exacerbated by Defendants

73. Entrenched racist behaviors continue indefinitely in the absence of judicial accountability, including enforcement of civil rights laws. California's minority communities have fought civil rights battles for decades to gain equal access to homeownership, and the pathway homeownership creates to achieving better health, educational attainment, income, voter participation, and multi-generational family wealth outcomes to help bridge inevitable income gaps, illnesses, and inter-generational family costs like college tuition and down payment help for kids, and long term health care for seniors.[48]

74. The California housing crisis is getting worse, not better. Notwithstanding congratulatory press conferences for a "Housing Package" of legislation adopted in 2017, the number of single family home permits actually fell by 12 percent and multi-family residential permits fell by 20.1 percent through July 2019 even compared with the historically lackluster number of permits issued in 2018 – the year after the 2017 housing reform laws took effect.[49] Homelessness has also substantially increased throughout California, with Orange County and Alameda County alone experiencing a more than 40 percent increase in homelessness over the last two years, a 17 percent two-year increase in San Francisco, a 50 percent annual increase in Kern

[47] Taylor, Legislative Analyst Office, *California's High Housing Costs: Causes and Consequences*, at 28 (March 17, 2015), https://homeforallsmc.org/wp-content/uploads/2017/05/housing-costs.pdf. Habitat for Humanity, the nation's largest non-profit organization building affordable housing that is owned rather than rented, has compiled a comprehensive description of the scores of health, education, civic participation, and other benefits of homeownership, a true and correct copy of which is attached as **Exhibit B**.

[48] *Redlined, A Legacy of Housing Discrimination*, Plaintiffs, https://www.thetwohundred.org/redlined/ (last visited March 31, 2021).

[49] California Department of Finance, *California Construction Authorized by Building Permits, Seasonally Adjusted Residential Units to July 2019*, http://www.dof.ca.gov/Forecasting/Economics/Indicators/Construction_Permits/documents/Construction%20Residential%20Nonresidential%20SAAR.xlsx (last visited Nov. 2019).

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County, and a 12 percent annual increase in Los Angeles County.[50] The housing crisis just kept getting worse during the pandemic, even as minority residents were far more likely to live in overcrowded conditions, work in front line jobs with higher exposure risks, have no "shelter-in-place" or "quarantine-at-home" option, and live in multi-generational households with higher COVID morbidity risks.

75. As dozens of scholars, elected leaders, and non-partisan experts have explained, California's political leaders have been and remain paralyzed by powerful special interests and contradictory environmental, climate, housing, poverty, and transportation policies that have collectively created the current housing supply, housing cost, and housing-induced poverty and homelessness crisis.[51] Even when voters fund bonds to produce housing for the homeless – a humanitarian, health and environmental emergency in many of our communities – the outcome is years of delay, and policy decisions that balloon the cost of producing each "affordable" new rental apartment for a homeless or low income Californian to more than $500,000 per apartment in both Los Angeles and San Francisco.[52]

76. California's housing crisis disproportionately harms younger families and non-homeowners, the majority of whom are racial minorities including Latinos, African Americans and

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[50] Cowan, *Homeless Populations Are Surging in Los Angeles. Here's Why*, New York Times (June 5, 2019), https://www.nytimes.com/2019/06/05/us/los-angeles-homeless-population.html (last visited March 31, 2021).

[51] *See, e.g.*, Editorial Board, *Amid Political Paralysis, Housing Shortage Poised to Get Worse* (Aug. 2, 2019), https://www.sfchronicle.com/opinion/editorials/article/Editorial-Amid-political-paralysis-housing-14277448.php (last visited March 31, 2021).

[52] *See, e.g,* Letter and report from Ron Galperin, Los Angeles Controller, to Eric Garcetti, Mayor, Michael Feuer, City Attorney, and Members of the Los Angeles City Council, Re: *The High Cost of Homeless Housing: Review of Proposition HHH*, dated Oct. 8, 2019, at 1-2, https://lacontroller.org/wp-content/uploads/2019/10/The-High-Cost-of-Homeless-Housing_Review-of-Prop-HHH_10.8.19.pdf (last visited March 31, 2021) ("Building cost estimates [for homeless housing] skyrocketed from $350,000 for a small studio or one-bedroom unit and $414,000 for a larger unit, as projected in 2016, to a median cost of $531,000 per unit today. More than 1,000 [Los Angeles Measure] HHH units are projected to exceed $600,000, with one project topping $700,000 per unit. The cost of building many of these units exceeds the median sale price of a market-rate condominium in the City of Los Angeles and a single-family home in Los Angeles County"); Daniels, *It would cost $12.7 Billion to End Homelessness in the San Francisco Bay Region, a New Report Says*, CNBC (Apr. 20, 2019), https://www.cnbc.com/2019/04/10/cost-to-end-san-francisco-bay-area-homelessness-would-be-12point7-billion-report.html (last visited March 31, 2021) ("It estimated the average per unit cost of housing each homeless person in the Bay Area region at $450,000 but also noted that housing costs in San Francisco are more than $700,000 per unit when land is factored in").

Asians/Pacific Islanders. Apart from the disproportionately high number of homeless minorities, approximately one in four adult Californians aged 24 to 35 live at home with one or both parents – and these young adults are much more likely to be minorities. In fact, nearly half of California Latinos between 18 and 34 live with a parent. As summarized by a recent news report in CalMatters:

> Stereotypes of unemployed, shiftless man-children playing X-Box in their parents' basement aren't really borne out by the data. More than 40% of California stay-at-homers are enrolled in school of some sort, often community college. The vast majority who aren't in school are working at least part time.[53]

77. The bottom line is that California's housing crisis is real and disproportionately affects minority communities. We do not have enough housing, and the housing we do have costs too much. California's minority communities suffer disparate harms as victims of the housing crisis, losing homes and access to homeownership, as well as being driven into poverty and homelessness by high housing costs.

B. CEQA Provides Unique Advantages to Anti-Housing and Racist Lawsuit Challenges Pursued for Non-Environmental Reasons

78. Racially discriminatory actions by Defendants remains persistent, and harms minority communities. CEQA was enacted 50 years ago to protect California's natural environment and to protect people from environmental hazards like pollution. In practice, and in the context of the housing crisis, CEQA's important purpose has been distorted beyond recognition into an anti-housing "redlining" law to continue historic, racially exclusionary housing policies and practices. Housing is the top target of all CEQA lawsuits filed statewide, and in 2018 alone 60 percent of all CEQA lawsuits challenging construction projects targeted new housing.[54]

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[53] Levin, *Nearly 40 Percent of Young Adult Californians Live with Their Parents. Here's Everything to Know About Them*, CalMatters (Aug. 25, 2019), https://calmatters.org/housing/2019/08/young-adults-californians-living-with-parents-millennials-ddata/ (last visited March 31, 2021).

[54] Hernandez, *California Getting In Its Own Way: In 2018, Housing Targeted in 60% of Anti-Development CEQA Lawsuits*, Chapman University (Dec. 2019), https://www.chapman.edu/communication/_files/ca-getting-in-its-own-way.pdf (last visited March 31, 2021).

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79. As shown in Figures 10-12 below, in the region that houses nearly half of California - the five counties and 191 cities comprising the SCAG, 14,000 housing units were targeted in CEQA lawsuits over three consecutive years (2013-2015).[55] With assistance from the research staff at SCAG, what we know about these challenged 14,000 housing units confirms this racially-discriminatory, non-environmental, exclusionary anti-housing CEQA lawsuit pattern.

80. Virtually none of the anti-housing CEQA lawsuits sought to protect the natural environment. Almost all – 99 percent – of the challenged housing units were in existing urbanized "infill" areas like incorporated cities, or developed unincorporated county areas surrounded by cities, on previously-developed and other infill properties.[56] These infill locations have long been planned and approved for development in city and county General Plans.[57] It is noteworthy that these anti-housing "environmental" lawsuits sought to stop new housing in existing communities, just at the time in the state's history when racial minorities have become the demographic majority of the state's population – and minority communities are the population that is most harmed by California's housing crisis, and housing-induced poverty and homelessness crises. As the California Supreme Court has recognized, CEQA is not a population control statute[58] – but in practice, CEQA litigation is most commonly used to block local agency approvals of new housing that would add to the population of existing communities.

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[55] Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 Hastings Envtl. L.J. 21, 30-31 (2018), https://www.hklaw.com/files/Uploads/Documents/Articles/121317_HELJ_Jennifer_Hernandez.pdf (last visited March 31, 2021) [hereinafter "Hernandez – Hastings"].

[56] *Id.*

[57] The California Supreme Court has held that local general plans are the "constitution for all future development." *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 5 Cal.4d 531, 540. State laws require general plans to accommodate anticipated population growth, and prescribe specific mandates such as a housing element that must designate lands for low income and other housing, and a circulation and transportation element that must provide for transportation infrastructure and policies to match housing and other elements. *See generally* Barclay & Gray, California Land Use & Planning Law (2018) at 9-15.

[58] *Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 220, as modified on denial of reh'g (Feb. 17, 2016) ("*Newhall*").

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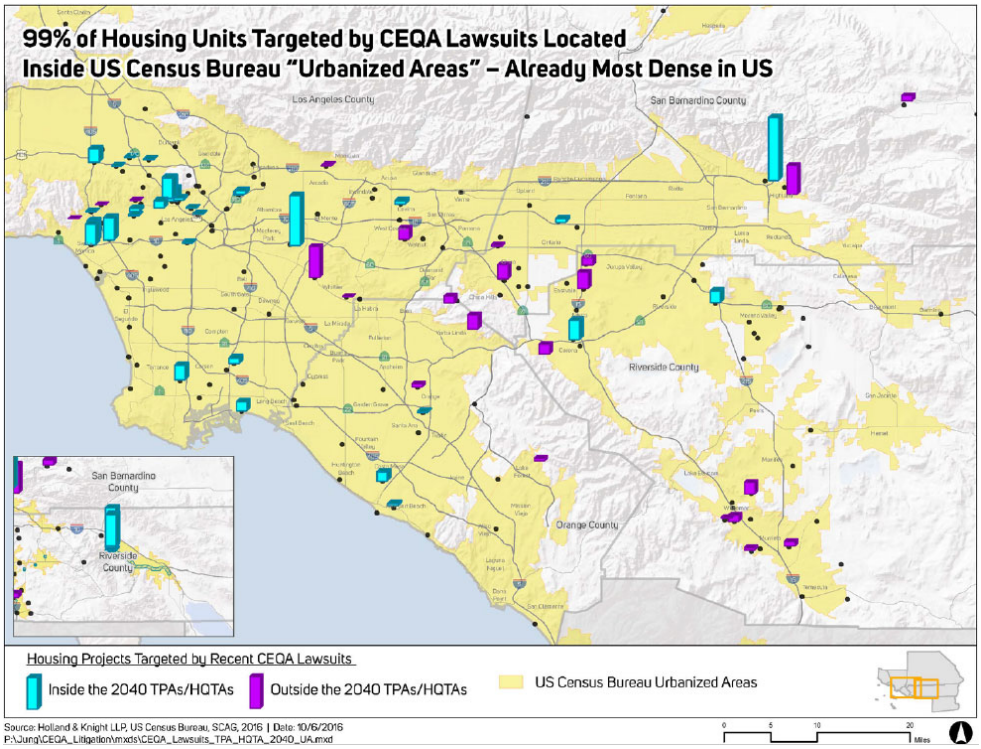
Figure 10: 99% of Housing Targeted by CEQA Lawsuits in Los Angeles Region Were Located in Already Urbanized– Multi-Family Apartments/Condos (Vertical Bars) Most Frequently Challenged[59]

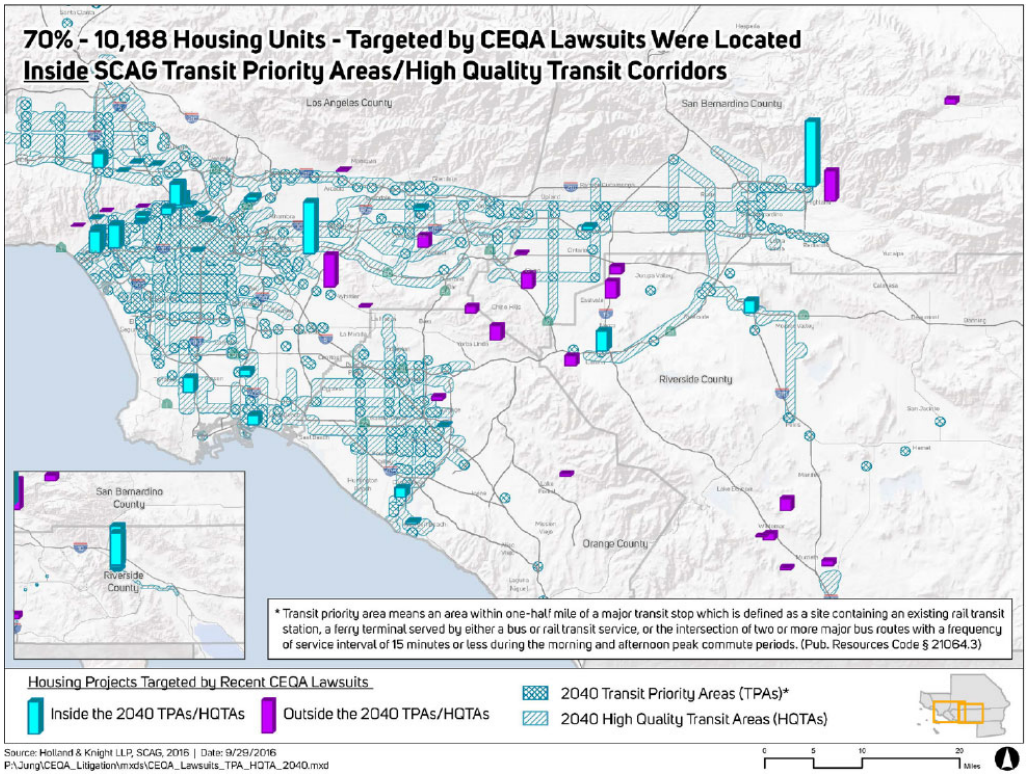


81. Most of the anti-housing CEQA lawsuits targeted midrise and high-rise housing in locations served by public transit. California's environmental and climate agencies, including but not limited to Defendants OPR and NRA, CARB and other state agencies, have repeatedly insisted that local communities accept much higher–density housing in existing neighborhoods located within one-half mile of frequent commuter public transit service like commuter rail stations and bus stops. The environmental policy presumption of this high-density, transit-oriented housing is that residents will use transit more, and drive less, and thereby reduce VMT by personal automobiles and light duty trucks. Notwithstanding this environmental policy presumption, however, residents and special interests target just this type of housing in just these locations far more frequently than other types of housing, as shown in Figure 11. The most frequently challenged type of housing project in CEQA lawsuits was higher density apartment and condominium projects (e.g., midrise buildings of up to six stories, or high–rise buildings of eight stories or more) in neighborhoods

[59] Hernandez – Hastings, *supra* note 56.

served by frequent transit. Approximately 70 percent of the challenged housing units were located in "Transit Priority Areas" and "High Quality Transit Corridor" neighborhoods (collectively, "TPAs") surrounding commuter rail stations and high frequency commuter bus stops.[60]

Figure 11: 78% of Anti-Housing CEQA Lawsuits Targeted Higher Density Housing in Priority Transit Locations[61]



[60] Hernandez – Hastings, *supra* note 56, at 31-32; *see also,* Hernandez et al., *In the Name of the Environment Update: CEQA Litigation Update for SCAG Region* (2013-2015) (July 2016), at 4, https://www.hklaw.com/files/UPloads/Documents/Alerts/Environment/InfillHousingCEQALawsuits.pdf.

[61] "Hernandez – Hastings, *supra* note 56.

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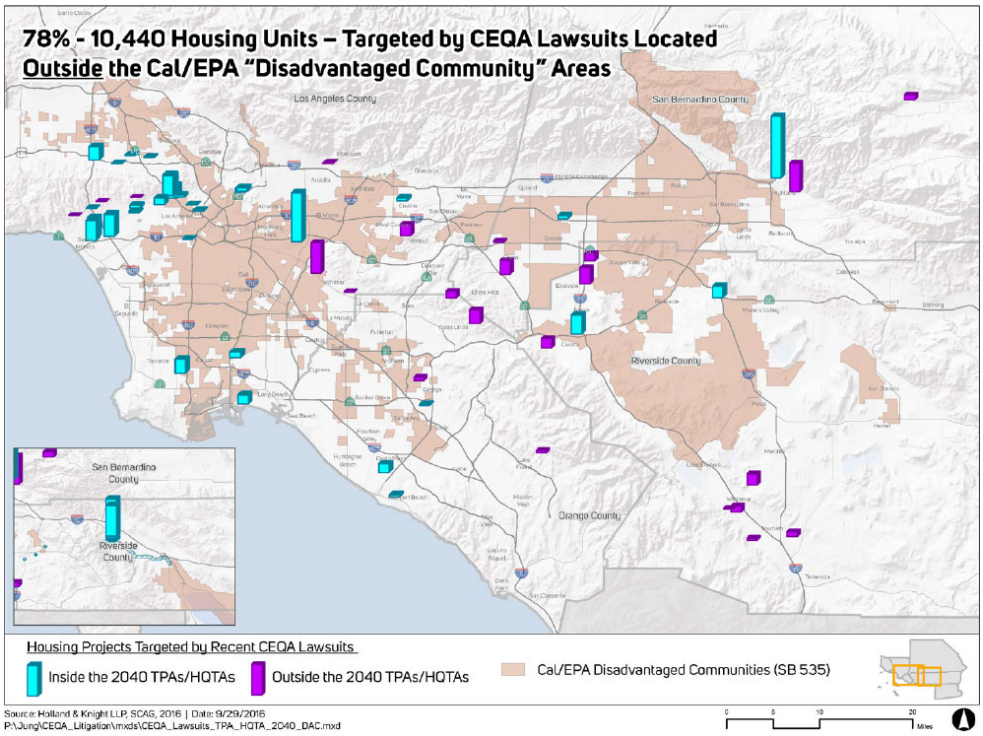
Figure 12: 78% of Anti-Housing CEQA Lawsuits Targeted Higher Density Housing in Priority Transit Locations[62]



82. Anti-housing CEQA lawsuits promote racial segregation. Finally, as shown in Figure 12, most – 70 percent – of these anti-housing CEQA lawsuits attack approved housing in the region's whiter, wealthier and healthier areas.

83. These lawsuits use CEQA as a modern tool for racial discrimination This tool has and continues to be used to reduce, and even eliminate, housing for the disparately-minority victims of the state's massive 3.5 million housing shortfall - with shortfalls for housing in every category from transitional homeless housing to homes that can be bought by California's hard working minority families. Anti-housing CEQA lawsuits, further weaponized by the racial bias of Defendant OPR and NRA evidenced in the Redlining Regulations, is in fact used to deprive the state's poorer, non-white residents from access to an increased housing supply in higher-quality, higher-opportunity neighborhoods. CEQA is almost never used, however, to block new housing in the "environmental justice" communities identified by the California Environmental Protection Agency

[62] "Hernandez – Hastings, *supra* note 56.

as having disparately high levels of poverty and pollution, as well as a higher percentage of minority residents.[63] As a result, when wealthier residents desire additional housing in the state, it is far easier to develop new high-cost units in economically fragile and racially segregated environmental justice communities and to displace poorer residents by driving up housing costs. This process of urban displacement, often call "gentrification," is resegregating the state by forcing lower income and minority residents to move to ever-more distant and less costly communities to find housing they can afford to rent or buy, then enduring longer commutes to get to jobs for which they must be physically present to get paid.[64]

84. In practice, residents and other CEQA litigants in wealthy communities file CEQA to oppose housing – population growth – which is more likely to be occupied by the minority Californians most in need of housing. It is important to recognize that anti-housing CEQA lawsuits can only be filed against approved new housing, i.e., the 3.5 million new homes mostly needed by younger, and middle and lower income, majority-minority Californians. Although there are many other challenges to obtaining approvals for housing, and to reducing the cost of housing so that it is affordable to California's hard working minority (and majority) families, CEQA is unique in the nation in empowering anyone to sue to block housing, for any reason, anonymously, under the purported banner of protecting "the environment."

85. Also alone among the nation's environmental protection statutes, CEQA allows those filing environmental impact lawsuits to conceal both their actual identity and their economic, racist, or other non-environmental interests in filing CEQA lawsuits.[65] CEQA requires no evidence that the party seeking the lawsuit is actually motivated by protecting the environment: the California Supreme Court concluded a national industry trade association organized to protect the

[63] Hernandez – Hastings, *supra* note 56, at 32.
[64] *See, e.g.,* Bay City News, *Waves of Displacement, Resegregation Affect Bay Area Communities of Color* (July 10, 2019), https://sfbay.ca/2019/07/10/waves-of-displacement-resegregation-affect-bay-area-communities-of-color/ (last visited March 31, 2021); Samara et al., *Race, Inequality, and the Resegregation of the Bay Area*, Urban Habitat (Nov. 2016), at 3-5, 13, https://urbanhabitat.org/sites/default/files/UH%20Policy%20Brief2016.pdf (last visited March 31, 2021); ; Verma, *supra* note 46, at 7-8; UCLA Department of Urban and Regional Planning, *Oriented For Whom? The Impacts of TOD on Six Los Angeles Neighborhoods*, 24 (June 2, 2015), http://www.urbandisplacement.org/sites/default/files/images/spring_2015_tod.pdf (last visited March 31, 2021).
[65] Hernandez – Hastings, *supra* note 56, at 22, 24, and 41.

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economic interests of its members was allowed to file a CEQA lawsuit against cities adopting restrictions on plastic bags. Labor unions also use CEQA litigation tactics for economic gain: former Governor Jerry Brown explained that labor unions' use of CEQA litigation (and litigation threats) to "leverage" wage agreements on behalf of their members against housing and other project applicants[66] are routine CEQA tactics deployed "in the name of the environment" against housing. Individual neighbors or anonymous neighborhood groups, as well as contingency fee lawyers representing unincorporated new associations with no known members or history of community involvement, are also frequent CEQA litigants. Actual environmental groups with a past history of environmental advocacy file fewer than 15 percent of CEQA lawsuits.[67]

86. Although courts are generally deferential to agencies in administrative litigation challenges nationally (and uphold the legality of agency decisions in nearly 80 percent of such cases),[68] CEQA litigation outcomes follow a remarkably different path: several studies analyzing CEQA reported appellate court decisions have confirmed that agencies lose in nearly 50 percent of these CEQA lawsuits.[69] Additionally, the most common judicial remedy in CEQA lawsuits is a writ requiring rescission of the challenged agency project approval pending completion of some further prescribed CEQA process, even though the most common legal deficiency in a CEQA lawsuit involves a judicial determination that an agency did not sufficiently consider a detail about a particular environmental impact issue like explanations about why a particular issue was analyzed qualitatively rather than quantitatively.[70] Although what is required may appear to a court to be a "minor" correction, the rescission of the approval requires a project (which was already unpopular

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[66] Dillon, *Labor Unions, Environmentalists Are Biggest Opponents of Gov. Brown's Affordable Housing Plan*, L.A. Times (May 24, 2016), https://www.latimes.com/politics/la-pol-sac-labor-enviro-housing-20160524-snap-story.html (last visited March 31, 2021); Britschgi, *How California Environmental Law Makes It Easy for Labor Unions to Shake Down Developers,* Reason (Aug. 21, 2019), https://reason.com/2019/08/21/how-california-environmental-law-makes-it-easy-for-labor-unions-to-shake-down-developers/(last visited March 31, 2021); Hernandez – Hastings, *supra* note 56, at 58-67. Efforts to end economic abuse of CEQA have to date been futile legislatively and judicially, although two recent federal lawsuits alleging unlawful racketeering practices by labor unions using CEQA remain pending. True and correct copies of these RICO lawsuits are included as **Exhibits C and D**.

[67] Hernandez et al., *In the Name of the Environment: Litigation Abuse Under CEQA* (Aug. 2015), at 24, https://issuu.com/hollandknight/docs/ceqa_litigation_abuseissuu?e=16627326/14197714.

[68] Hernandez – Hastings, *supra* note 56, at 42.

[69] *Id.*

[70] *Id.* at 41-42.

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enough to be sued by someone) to re-run the political gauntlet of re-study and re-approval, often over a period of years.

87. There is no enforceable deadline for completing the CEQA process, so politically unpopular housing can simply be delayed indefinitely at the staff level with ever-more costly studies. In San Francisco, for example, scholars at the University of California, Berkeley ("U.C. Berkeley") surveyed city staff and developers and found that the "only one factor on which all interviewees and focus group participants agreed [was that] the most significant and pointless factor driving up construction costs was the length of time it takes for a project to get through the city permitting and development processes."[71] If, during this extended period of technical studies, multiple public notice and comment/hearing procedures, and political controversy, local political leadership shifts and, for example, is persuaded to oppose new housing, then the challenged project can simply be rejected outright, or "approved" at smaller densities or with more costly CEQA "mitigation measures" that render the housing project economically infeasible – and thus the housing is never built. Housing applicants who lack the financial resources to run this indefinitely lengthy application gauntlet, during which time they are expected to fund all CEQA studies, consultant, attorney and other agency staff costs that can add anywhere from hundreds of thousands to millions of dollars to the housing application process, and several more years for CEQA litigation, also drop out – and so even otherwise lawfully zoned housing that is approved by local government does not get built, or gets built only at substantially higher costs which exclude middle income households.

88. CEQA's indefinite and thus uncertain processing times, unknown CEQA mitigation costs and other regulatory exactions, alongside uncertain CEQA litigation risks, costs and durations, raises housing costs and decreases housing affordability and homeownership opportunities to the vast majority of Californians earning at and near the median income (the majority of whom are

[71] Reid and Raetz, *Perspectives: Practitioners Weigh in on Drivers of Rising Housing Construction Costs in San Francisco*, U.C. Berkeley Terner Center (Jan. 2018), at 2-3, https://ternercenter.berkeley.edu/uploads/San_Francisco_Construction_Cost_Brief_-_Terner_Center_January_2018.pdf (last visited March 31, 2021).

minorities). As explained by the non-partisan LAO in its report *California's High Housing Costs: Causes and Consequences*:

> **Environmental Reviews Can Be Used To Stop or Limit Housing Development**. The California Environmental Quality Act (CEQA) requires local governments to conduct a detailed review of the potential environmental effects of new housing construction (and most other types of development) prior to approving it. The information in these reports sometimes results in the city or county denying proposals to develop housing or approving fewer housing units than the developer proposed. In addition, CEQA's complicated procedural requirements give development opponents significant opportunities to continue challenging housing projects after local governments approve them.[72]

89. Judicial rescission of the housing approval may also result in cascading consequences to third parties. One CEQA lawsuit filed against an approved apartment project on a transit corridor in Los Angeles resulted in a judicial rescission that took effect during the Great Recession: the original applicant was economically unable to proceed and lost the project to a new developer. The new developer completed the second round of CEQA documentation, obtained a new approval, and constructed the apartment tower, but impassioned housing opponents objected to the city's interpretation of a CEQA "mitigation measure" that required "preservation" of a non-historic stucco building façade to allow removal and reconstruction of the façade on the newly-constructed apartment building. Housing opponents did not seek or obtain any injunction, and the apartment building was completed and occupied. The superior court judge later agreed with plaintiffs that the mitigation measure should have been interpreted as requiring the non-historic stucco façade to be "preserved in place" and somehow attached to the new high-rise apartment building, and therefore that the city had violated CEQA in allowing removal and reconstruction of the façade. The judge ordered the city to rescind approvals of the completed, occupied apartment building pending further CEQA processing. Apartment tenants were escorted out, multiple third party lawsuits erupted as insurance and financing conditions, covenants and obligations could not

[72] California's High Housing Costs, *supra* note 47, at 15 (emphasis in original); *see also, e.g.*, Kim, *The Rising Price of Downtown Living,* Los Angeles Downtown News (Apr. 20, 2015), http://www.ladowntownnews.com/news/the-rising-price-of-downtown-living/article_916184de-e54c-11e4-be4e-a766501fbe40.html; Gamboa, Hernandez, & Shellenberger, *Newsom Must Prioritize Affordable Middle-Class Housing,* San Francisco Chronicle (Jan. 7, 2019), https://www.sfchronicle.com/opinion/openforum/article/Newsom-must-prioritize-affordable-middle-class-13515693.php.

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be met for an unpermitted apartment tower, and during the apex of a housing crisis almost three hundred apartments remained vacant for nearly five years before finally opening its doors back to tenants in 2019.[73]

90. Even after a second round of CEQA compliance and project approvals, further CEQA lawsuits can be filed. Two major housing projects in the SCAG region – one an infill redevelopment site, and the other on the edge of an existing community – had the dubious distinction of being sued under CEQA more than 20 times over more than 20 years, resulting in prolonged delays, increased costs (which are passed along to future residents in the form of higher housing prices), and unavailable housing.

91. Given near 50/50 litigation loss rates, and the likelihood that a judicial loss for even a minor study deficiency of even a completed and occupied housing project will result in rescission of project approvals,[74] even those who traditionally defend the CEQA status quo agree that the mere existence of a pending CEQA lawsuit instantaneously stops housing construction by ending the housing applicant's access to project financing (e.g., construction bank loans or government grants) because of the litigation outcome uncertainty that will cloud the project pending resolution of the multi-year superior and appellate court CEQA litigation process.[75]

92. Nor is CEQA's anti-housing consequence limited to litigation: as recently acknowledged by legal and planning scholars from UC Davis, UC Berkeley, and UCLA, a local agency's "discretionary" review and approval process for housing, pursuant to which cities and counties can require modifications to the size, configuration, and required conditions of approval

[73] California News Wire Services, *Vacant Sunset Gordon Tower Approved for Apartments,* Patch Hollywood, https://patch.com/california/hollywood/vacant-sunset-gordon-tower-approved-apartments (last visited March 31, 2021); *see also* Hernandez – Hastings, *supra* note 56, at 42-43.

[74] *See* Hernandez – Hastings, *supra* note 56, at 42 ("When a judge decides that an agency should have conducted its CEQA preapproval review process differently, even if the error is confined to whether the traffic flow at a single intersection was appropriately counted, the most common CEQA judicial remedy is to "vacate" the project approval until more environmental analyses is completed") citing McAfree, *Cali. Appeals Court Affirms SF Win in Waterfront Project Row,* Law 360 (Aug. 27, 2013), https://www.law360.com/appellate/articles/468162/calif-appeals-court-affirms-sf-win-in-waterfront-project-row.

[75] Shute, Jr., *Reprise of Fireside Chat*, Yosemite Environmental Law Conference, 25 Envtl. Law News 3 (2016).

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for new housing, triggers CEQA, which "allows local governments to delay projects indefinitely and impose costly, unexpected conditions."[76]

93. The practical consequence of the existence of a CEQA lawsuit halting a project is well-recognized in California, as the Legislature has created "fast track" CEQA litigation durations of 270-days in total for resolving both superior and appellate court CEQA challenges – but has dispensed these fast-track Legislative solutions only to politically favored projects such as professional sports stadiums and the Legislature's own renovation of its own office building.[77]

94. The act of filing a CEQA lawsuit – regardless of the legal merits, regardless of the potential for irreparable or significant harm to the environment or public safety, and with zero judicial oversight or review – immediately stops completion of an approved housing project pending resolution of a four to five year judicial proceedings. Some projects are held up far longer: one replacement single family home on an existing single family lot, which received unanimous neighbor, Planning Commission, and City Council approvals and complied with all applicable laws and regulations including local General Plan and zoning requirements, was held up for 11 years including Supreme Court review, and was ultimately abandoned by the homeowner who moved his family to a different city.[78]

95. If even a single minor deficiency is found in a city's CEQA analysis or mitigation of more than one hundred ambiguously and inconsistently defined "environmental impacts," the anti-housing plaintiff is eligible to collect attorneys' fees and the equivalent of a bonus from the agency approving the housing, which typically requires the housing applicant to pay all agency costs as

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[76] Elmendorf et al., *Issue Brief: Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework*, U.C. Davis California Environmental Law and Policy Center (Dec. 2019), https://law.ucdavis.edu/centers/environmental/files/Elmendorf-et-al.,-ISSUE-BRIEF-Administering-Californias-Housing-Framework-1.pdf (last visited March 31, 2021).

[77] Hernandez – Hastings, *supra* note 56, at 30-31; *compare* Stats. 2018, ch. 959 (A.B. 734) (approving CEQA fast-tracking for Oakland Athletics baseball stadium); Stats. 2018, ch. 961 (A.B. 987) (approving CEQA fast-tracking for Los Angeles Clippers basketball stadium); Stats. 2018, ch. 40 (A.B. 1826) (approving CEQA fast-tracking for State Capitol Building Annex) *with* Sen. Bill 25 (2019-2020) (proposal for CEQA fast-tracking for housing projects using union labor in "Economic Opportunity Zones" passed the Senate only to be held in the Assembly Natural Resources Committee); Sen. Bill 621 (2019-2020) (proposal for CEQA fast-tracking for affordable housing projects passed the Senate only to be held in the Assembly Natural Resources Committee).

[78] *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943, rehearing denied (Oct 15, 2015), review denied (Feb 03, 2016).

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well as indemnify the agency against the risk of being required to pay attorneys' fees. A housing applicant must pay for the CEQA review process, must pay the legal fees for itself and the approving city, and must pay attorneys' fees and a bonus to an anti-housing CEQA litigant. If the applicant still wants to seek project approvals, the applicant then pays for a second round of CEQA compliance costs, and if challenged again must pay for a second round of its own, the city's, and potentially another round of attorneys' fees. In contrast, an unsuccessful anti-housing litigant is never obligated to pay the attorney fees, delay costs, or other damages incurred by the city that approved the housing, the housing applicant, or the future residents of the housing.

96. All of those costs – compliance processing costs including the cost of studying and "mitigating" or avoiding "environmental impacts" not otherwise regulated by federal, state and local environmental, land use, public health, and labor laws, and then CEQA litigation fees, delays and damages – are aggregated into the cost of the housing project, and must be paid for by future residents in the form of higher housing costs.

97. When housing costs become too high above what market conditions predict that future residents can afford to pay, the housing doesn't get built at all. When housing costs become too high for lower and middle income residents, the housing is occupied by higher income workers, high net worth part-time owners, or real estate investors.

98. Filing CEQA lawsuits against housing for non-environmental reasons has become so widespread that it is routinely recognized by elected leaders such as Governors Brown and Newsom, and has its own infamous name: "greenmail."

C. Defendants Repeatedly Failed to Comply with Their Statutory Obligation to Timely and Comprehensively Update CEQA Regulations to Increase Certainty, and Thereby Reduce Litigation Risks, for Housing (or Other) Projects.

99. Section 21083(a) of the Cal. Pub. Res. Code directs Defendant OPR to: "prepare and develop proposed guidelines for the implementation of this division [CEQA] by public agencies" which shall "include objectives and criteria for the orderly evaluation of projects." Section 21083(b) goes on to require OPR's guidelines "shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a 'significant effect on the

environment." Section 21083(f) further requires that Defendant OPR review these guidelines "at least once every two years" and directs Defendant NRA to "certify and adopt guidelines, and any amendments thereto, at least once every two years" in compliance with the -APA. Defendants OPR and NRA have been, and remain, in blatant violation of this statutory obligation, thereby perpetuating confusion, inconsistencies, and conflicting judicial interpretations in CEQA. By declining to wade into the warring special interests who use CEQA against those who need housing, Defendants OPR and NRA have perpetuated and exacerbated the racist abuse of CEQA for non-environmental reasons. This abuse has derailed, delayed, and increased the cost of desperately needed housing – for decades. When Defendant OPR initiated the current update of the CEQA Guidelines, which include the Redlining Regulations, it promised a "comprehensive" update. Instead, bowing to the dominant anti-population, anti-growth, anti-housing, anti-minority climate imperatives of an administration that could not persuade the Legislature to mandate VMT reductions, or ban housing in disfavored cities and neighborhoods, Defendant OPR and NRA joined the long line of bureaucrats that chose to support racist housing policies. Defendant bureaucrats chose politically expedient politics over civil rights, joining their predecessors who supported separate but equal schools, massive destruction (aka redevelopment) of minority neighborhoods, and protection of the delicate private and construction noise sensitivities of their environmental advocacy Not In My Backyard ("NIMBY") supporters.

100. Anti-housing CEQA greenmail lawsuits are unconstitutional, unlawful, and inherently racist given California's demographics. Greenmail CEQA lawsuits place California as the ongoing leader in our nation's shameful history of de jure housing discrimination: using tools created by the government to achieve racially discriminatory "redlining" outcomes to avoid having "those people" – and the housing "they" can afford to rent or buy – in desirable locations and neighborhoods.

101. Plaintiffs, are "those people" – a coalition of veteran civil rights and community leaders and advocates who have for decades battled housing discrimination caused or exacerbated by government agencies. Civil rights litigation to protect California's hard working minority families has re-emerged as a necessary legal response to decades of policy and political decisions

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that have resulted in the housing crisis, which have in turn reversed decades of progress by minority families in attaining homeownership. California leaders' callous disregard for homeownership and the rights of minority families to buy a home has been repeatedly demonstrated: two successive governors, and the Legislature's leaders over three separate two-year sessions, fought a bitter and ultimately unsuccessful battle – inclusive of two unsuccessful appeals to the California Supreme Court – against civil rights advocates seeking to require the State to comply with its own settlement agreement establishing a $390 million assistance fund for homeowners victimized by the unlawful predatory lending and foreclosure practices during the Great Recession.[79] Only after years of delay did Governor Newsom agree to comply with California's legal obligation to assist victimized homeowners, who unlawfully lost their home – and their home equity, and opportunity to create family wealth for college tuition and other family needs – nearly a decade ago.

102. Civil rights progress in the United States ("U.S.") has always relied on the courts to enforce the law, and the victory lap taken by members of Plaintiffs and other civil rights leaders following enactment of comprehensive civil rights laws and policies in the 1970s was premature. In the intervening years, residential segregation by race in America and California is worse than it was in 1970 – a phenomenon civil rights scholars are calling the "resegregation" of America. Housing policy – what's built where, how much it costs, and what are the barriers to homeownership – is fundamental to desegregation, but California's infamous and byzantine suite of laws and government practices have created the "existential" crisis of 3.5 million too few homes, new home prices that are nearly three times the national average, and litigation delays extending to 20 years and beyond to the completion of approved new housing.[80] As poverty scholar Richard Rothstein noted in a *Los Angeles Times* Op-Ed, "Our entrenched residential segregation exacerbates serious political, social and economic problems . . . . To achieve [integration], politically and legally, we

[79] Bollag, *California Misspent $330 Million that Should Have Helped Homeowners, Court Holds*, The Sacramento Bee (July 18, 2019), https://www.sacbee.com/news/politics-government/capitol-alert/article232847737.html (last visited March 31, 2021).
[80] *See, e.g.,* Samara, *supra* note 65, at 6-12.

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first have to acknowledge that *our government, to a substantial degree, created our racial inequality*. Letting bygones be bygones is not a valid, just or defensible policy" (emphasis added).[81]

D. California's Selective Support of Civil Rights and Housing to Fight the Trump Administration Also Applies to CEQA.

103. Like other regulatory schemes that regulate housing and promote residential racial segregation CEQA, including the Redlining Regulations, is drafted and framed as race-neutral. The implementation of these schemes, however, is demonstrably racist – including the latest novel strategy for promoting residential racial segregation, VMT.

104. Courts have struggled for decades with how to adjudicate civil rights lawsuits against government actions that are facially race-neutral. California's former Attorney General Xavier Becerra led the charge against rulemaking and policy changes by the Trump Administration that sought to make it harder to prove racially disparate impacts in housing, and avoid entirely any duty to take into account the past and ongoing government actions that created – and continues to worsen – residential racial segregation.

105. At the heart of this California v. Trump disparate impact housing dispute was the extent to which statistical information about racially disparate impacts could be used to show causation between a purportedly race-neutral agency action, and a racial segregation outcome, in preventing agencies from perpetuating residential housing segregation. The law on the use of statistical evidence to prove disparate impacts was made in 2015 by the United States Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* 576 U.S. 519 (2015) ("*Inclusive Communities*"). A facially-race neutral practice by a Texas state agency was at issue there. This practice was to allocate tax credits to help finance affordable housing projects for low income residents, where there was no evidence of intentional agency racism and no individualized victim.[82] Instead, the civil rights housing advocacy organization that filed the lawsuit had amassed statistics showing that in the real world, the state agency disparately allocated tax credits to projects in minority neighborhoods, and denied tax credits to projects in

[81] Rothstein, *Op-Ed: Why Los Angeles Is Still a Segregated City After All These Years*, Los Angeles Times (Aug. 20, 2017), https://www.latimes.com/opinion/op-ed/la-oe-rothstein-segregated-housing-20170820-story.html.

[82] *Inclusive Communities,* 576 U.S. at 525.

white neighborhoods, thereby perpetuating a pattern of racial segregation.[83] The Supreme Court held that such statistical analyses of racially disparate outcomes were appropriate, in part because the Fair Housing Act ("FHA") focuses on the consequences of the actions in question rather than the actor's intent.[84] This "disparate impact liability" – based on statutory language that was also in concurrently-adopted anti-discrimination employment laws – was both consistent with the FHA's intent to end racially discriminatory housing practices, and allowed plaintiffs to counteract unconscious prejudiced and disguised discrimination that may be harder to uncover than disparate treatment.[85] The Court also noted that its decision was consistent with statutory interpretation and regulations of the agency charged with implementing the nation's FHA, the Department of Housing and Urban Development (HUD), which recognized disparate impact liability and endorsed the use of racially discriminatory statistical outcomes as an appropriate pathway for proving disparate impact liability.

106. The Trump Administration proposed, and then adopted, changes to HUD's disparate impact rule which were immediately and vociferously challenged by the California Attorney General and other state Attorneys General (and which eventually resulted in a lawsuit and nationwide stay against implementation of the challenged Trump Rule in *Open Communities Alliance v. Carson* (D.D.C. 2017) 286 F.Supp.3d 148).In is joint comment letter to HUD, for example, California and the other states explain the importance of statistical review to find "substantial and significant disparities," and expressly confirmed from their own enforcement experiences the Supreme Court's conclusion in *Inclusive Communities* that disparate impact liability "'permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[86] "In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[87]

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[83] *Id.* at 526.
[84] *Id*. at 520.
[85] *Id.* at 530-38. (engaging in statutory interpretation of the FHA).
[86] Letter to Anna Maria Farías re Docket No. FR-6111-P-02 HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, (October 18, 2019), https://oag.ca.gov/system/files/attachments/press-docs/HUD%20DI%20Proposed%20Rule%20AG%20Comment.pdf.
[87] *Id.* at 2 (quoting *Inclusive Communities,* 576 U.S. at 540).

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107. The portion of the Trump Rule that drew such vociferous objections from California and other states was a "burden-shifting" framework consisting of three steps: First, plaintiffs alleging unlawful conduct could use statistical evidence of disparate impacts to make a prima facie case against the challenged agency action. Second, the agency could respond to that prima facie case with evidence that its decision was a "reasonable approach" to achieving a substantial, legitimate, non-discriminatory impact. Finally, plaintiffs prevail if they can show that these interests could be achieved by a less discriminatory alternative to the challenged approach.[88]

108. California also challenged other HUD actions during the Trump administration, including a rule requiring state and local agencies to use national and local data, and gather community input, to ensure their housing development goals promote balanced and integrated living patterns. In May of 2020, during the pendency of this lawsuit, California joined with 22 other states objecting to this Trump proposal, with Mr. Becerra explaining in his press release that "[T]here's no place for housing policies that turn back the clock on the days of segregation."[89]

E. Using Statistics to Fight Trump's Dilution of Housing Civil Rights Protections But Dismissing the Relevance of Statistics to Protect the CEQA Status Quo May Be A Political Convenience, But It Is Both Illegal and Immoral

VMT Regulation

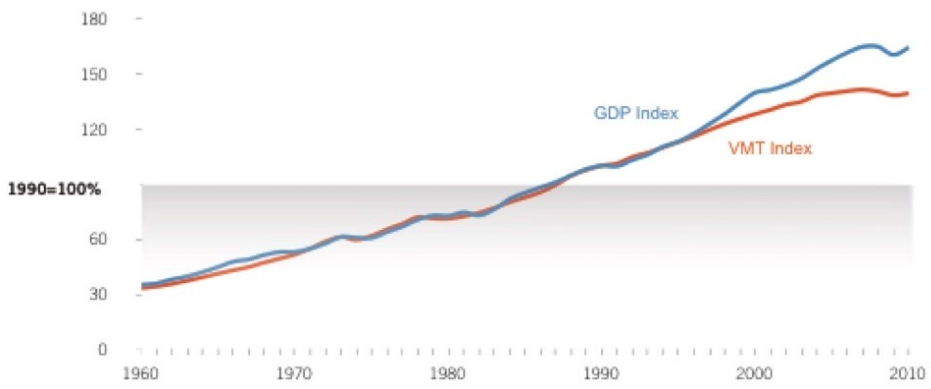
109. In defending their novel attempt to differentially regulate the driving habits of a pre-existing neighbor and his new minority neighbor, Defendant OPR engaged in a breathtaking symphony of "lies, damn lies, and statistics." To pick just one example, in the Underground VMT Regulations, Defendant OPR asserts that using CEQA to actively constrain roadway improvements and the freedom to drive for a population that uses single occupancy vehicles for 80 percent of all commutes to work represents a reasonable strategy: "data from the past two decades shows that

[88] Letter to Regulations Division of the Office of the General Counsel re Comment from the Attorneys General of North Carolina, California, District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington Regarding the Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (Docket No. FR-6111-A-01), 6 (August 20, 2018), https://oag.ca.gov/system/files/attachments/pressreleases/FHA%20AG%20Comment%20final.pdf (last visited March 31, 2021).

[89] Office of the Attorney General, *Attorney General Becerra Slams Trump Administration Rollback of Fair Housing Policies,* (March 16, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-slams-trump-administration-rollback-fair-housing (last visited April 1, 2021).

economic growth is possible without a concomitant increase in VMT."[90] In support of this claim, the Underground VMT Regulation relies on an index (with 1990 equal to 100) of U.S. gross domestic product ("GDP") plotted against national VMT changes from 1960 to 2010. As shown in Figure 13, particularly during the time of the Great Recession, the VMT growth index is lower than the nation's GDP index– which Defendants cite in support of their claim that VMT can drop even as the GDP index increases. As explained below, the Defendants' purported rationale is intentionally false and misleading, and evidence of Defendants' intent to discriminate against California's minority workers and families.

Figure 13: Chart of National VMT and GDP Index in 2018 Underground VMT Regulation[91]



110. The figure used in the Underground VMT Regulation was copied from a 2011 study by an environmental advocacy group, the Center for Clean Air Policy. The group is widely recognized for its self-described "smart growth" advocacy, most notably advocacy for dense urban housing and public transit instead of automobile use.[92] The study was nearly a decade old at the time the Redlining Regulations were finalized in 2018, and shows "facts" only as of 2010. The actual fact, which was brought to the Defendants' attention by numerous commenters, was that

[90] OPR, *Technical Advisory on Evaluating Transportation Impacts in CEQA*, 2 (Dec. 2018), http://www.opr.ca.gov/docs/20190122-743_Technical_Advisory.pdf. (last visited April 1, 2021).
[91] *Id.* at 3-4.
[92] Kooshian and Winkelman, *Growing Wealthier: Smart Growth, Climate Change and Prosperity, Center for Clear Air Policy* (Jan. 2011), http://ccap.org/assets/Growing-Wealthier-Steve-Winkelman-Chuck-Kooshian_CCAP-January-2011.pdf. *Center, Annual Vehicle Miles Traveled in the United States*, https://afdc.energy.gov/data/10315 (last visited March 31, 2021).

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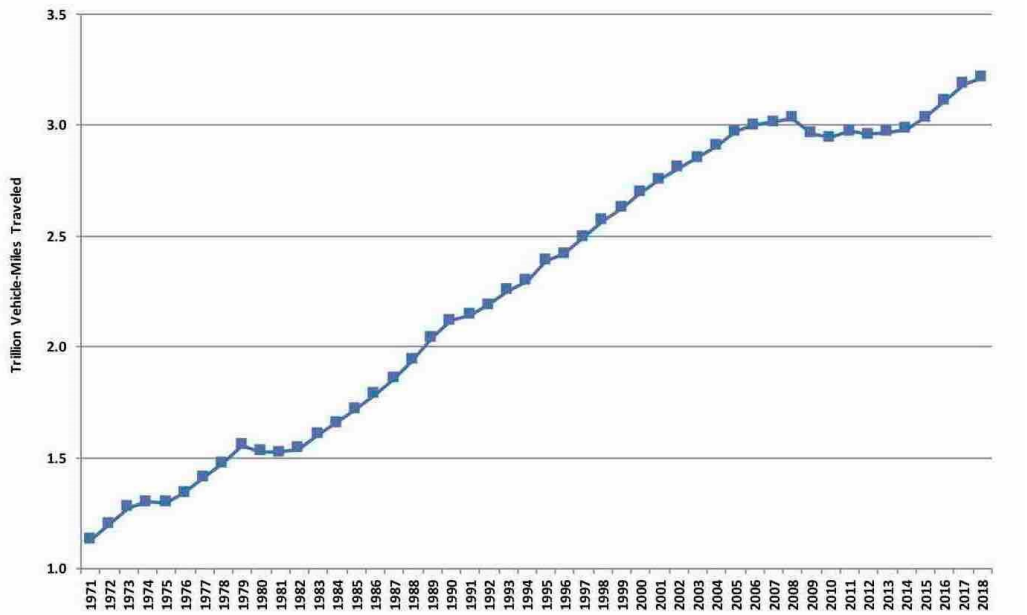
VMT growth increased after 2010 - the years omitted from the analysis. As shown in Figure 14, from 2013 to 2018 U.S. VMT rose at approximately the same rate as before the recession. In 2016 and 2017, national VMT rose more rapidly than GDP. Although the Underground VMT Regulation was published in December 2018, and national VMT data was readily available from multiple sources, the Defendants did not update or acknowledge the dramatic increases in VMT that occurred after 2010– an intentional, and intentionally misleading, omission.

Figure 14: US Total VMT, 1971-2018[93]



111. Defendants also ignored readily available data showing that, since 2011, as the state recovered from the recession, VMT also steadily increased within California. As noted by an influential climate change advocacy group, in 2011, California VMT was nearly five percent higher than in 2000, and rose to 11.2 percent above 2000 levels by 2017. From 2008 to 2017, state VMT increased by over five percent.[94]

112. The Redlining Regulations were based on false and misleading conclusions using data that was years out of date at the time they were adopted. Contrary to the Defendants' assertions, and consistent with the historical record, VMT and GDP both increased in California and in the nation as a whole following the disruptions caused by the Great Recession.

[93] U.S. Department of Energy, *Alternative Fuels Data Center, Annual Vehicle Miles Traveled in the United States*, https://afdc.energy.gov/data/10315 (last visited March 31, 2021).
[94] *California's Green Innovation Index 2019*, Next 10 (Oct. 2019), Figure 29 at 31, https://www.next10.org/sites/default/files/2019-10/2019-california-green-innovation-index-final.pdf (last visited March 31, 2021).

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113. The Defendants further provided additional false and misleading information suggesting that VMT reductions could be feasibly achieved by individual housing projects, referring to a 2010 California Air Pollution Control Officers Association ("CAPCOA") publication concerning the quantification of potential GHG reduction mitigation measures under CEQA (the "CAPCOA Manual").[95]

114. The CAPCOA Manual was not prepared to support, and expressly states that it should not be used for, any regulatory purpose. The CAPCOA Manual also provides little to no support for the proposition that state regulators have identified effective and feasible VMT reduction measures of any kind. One potential measure, adding bike lanes, was estimated to reduce vehicular GHG emissions and VMT by a nearly unmeasurable 0.05 to 0.14 percent. The CAPCOA Manual also suggested that major, unfunded, and as yet unapproved regionalized transit system improvements might result in more substantial VMT reductions.[96]

115. In a 2018 report to the Legislature, the LAO reviewed empirical studies of VMT reduction measures as part of an assessment of California's climate policies. The studies reviewed by the LAO indicated that commonly proposed VMT reduction measures had, at best, variable and in some cases "nonexistent" effects on VMT. Increasing residential density, employment density, and land use mix by one percent was found to decrease VMT "up to 0.2 percent," a comparatively minor reduction. No evidence was found that increased transit service or bicycling infrastructure lowered VMT.[97]

116. The LAO report also observed that there was no available information about the effectiveness of transportation improvements funded by CARB through the cap-and trade program (pursuant to which consumers pay higher fuel costs to fund GHG reduction efforts) at either reducing VMT or providing meaningful transportation improvements. The Co-Chair and some members of the Joint Legislative Audit Committee ("Committee") responded by calling for a non-

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[95] NRA, *Final Statement of Reasons for Regulatory Action, Amendments to the State CEQA Guidelines*, OAL Notice File No. Z-2018-0116-12, at 79-80 (Nov. 2018), [hereinafter *NRA - FSOR*] http://resources.ca.gov/ceqa/docs/2018_CEQA_Final_Statement_of%20Reasons_111218.pdf (last visited March 31, 2021); *CAPCOA Manual, supra* note 15, attached hereto as **Exhibit C.**

[96] *CAPCOA Manual*, *supra* note 15.

[97] Taylor, Legislative Analyst's Office, *Assessing California's Climate Policies - Transportation,* at 38 (Dec. 2018), https://lao.ca.gov/reports/2018/3912/climate-policies-transportation-122118.pdf.

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partisan audit by the State Auditor of CARB's cap-and-trade transportation expenditures which was fiercely opposed by CARB and others.[98] CARB did agree to provide further information to the Committee, but CARB's response failed to quantify either the GHG reductions or transportation improvements of its cap-and-trade expenditures and thus was not responsive to the LAO's findings.[99]

117. Further, the Redlining Regulations do not reflect the fact that, contrary to the Defendants' aversion to previous development "sprawl," California's historic land use patterns have in reality produced the most densely populated state in the country. As noted in a 2011 by the nonpartisan Public Policy Institute of California, "Despite popular conceptions that California – particularly Southern California – is the epitome of sprawl development, residential density in California is well above the national average. Population density in California in 2000 was 49 percent higher than the national average" and increased from 1990 to 2000 while national residential density did not change.[100]

118. From 2000 to 2010, the year of the last full national census, California's population increased by 3.4 million. All of this net growth occurred in urban areas as defined by the U.S. Census Bureau while the population in the state's rural lands remained virtually unchanged (approximately 1.88 million, or 5 percent of the total 2010 population). In 2010, the state's average urban area density was 4,304 residents per square mile, the highest in the nation, denser than New York (4,161 people per square mile) and nearly double the U.S. average urban area density of 2,343 people per square mile.[101] As shown in Figure 15, the state's total urban area increased by about

---

[98] InsideEPA.com, *In Rare Move, Lawmakers Reject Audit Of CARB Transportation GHG Policies*, (Mar. 7, 2019), https://insideepa.com/daily-news/rare-move-lawmakers-reject-audit-carb-transportation-ghg-policies (last visited March 31, 2021).

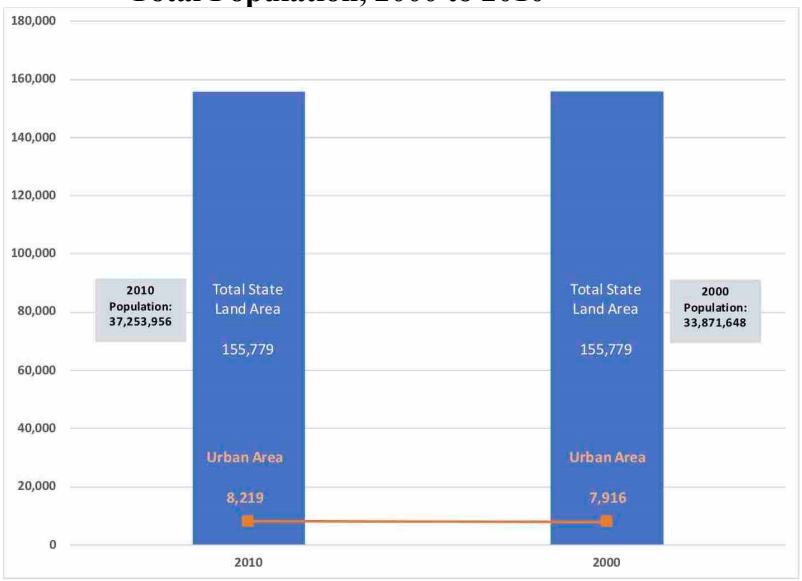
[99] Letter from Richard Corey, Executive Director, CARB to The Honorable Rudy Salas, Chair of Joint Legislative Audit Committee, California State Assembly, (April 23, 2019), https://legaudit.assembly.ca.gov/sites/legaudit.assembly.ca.gov/files/CARB%20Response%20Letter_1.pdf (last visited March 31, 2021).

[100] Kolko, *Making the Most of Transit Density, Employment Growth, and Ridership around New Stations*, Public Policy Institute of California, 10 (Feb. 2011), https://www.ppic.org/content/pubs/report/R_211JKR.pdf (last visited March 31, 2021).

[101] U.S. Census Bureau, *Population, Housing Units, Area, and Density: 2010 – United States – States and Puerto Rico and Population, Housing Units, Area, and Density: 2000 – United States – States and Puerto Rico*, Table GCT-PH1, https://data.census.gov/cedsci/ (search "GCTPH1" in topic or table name search field and select 2010 and 2000 tables)(last visited March 31, 2021); Cox,

303 square miles from 2000 to 2010, approximately 0.195 percent of the state's total land area, and an average density of 11,155 new residents per square mile of new urban land created from 2000 to 2010.

Figure 15: California Land Area (Excluded Water Area), and Urban Area (Square Miles) and Total Population, 2000 to 2010[102]



119. The Redlining Regulations misleadingly suggest that the prior pattern of California development is sprawling, when in fact the state's urban areas have the highest average population density in the country. From 2000 to 2010, the most recent decennial census data available for California, the state population rose by 10 percent, but the total state urban area only increased by 3.8 percent due to the far greater average density of new development. Approximately five percent of the state was urbanized in 2000, and as shown in Figure 13 almost exactly the same percentage of state land was urbanized in 2010 notwithstanding a full decade of growth and a population increase of 3.4 million new residents.

120. The fact that California urban areas have very high population densities has been widely acknowledged by state transportation and housing planners. Figure 16 is a list of California urban areas prepared by the Gateway Cities Council of Governments ("COG") in Southern California based on the 2010 decennial Census. Figure 16 shows that the density of California's major urban areas, including in southern California and San Francisco, is significantly higher than

Built-Up Urban Areas in the United States & DC Totals: 2010, Demographia, http://demographia.com/db-stateuza2010.pdf (last visited March 31, 2021).

[102] *Id.* All land areas are net of water area and total state land area is as reported in the 2010 Census.

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the statewide average for all urban areas. High density is not confined to California's largest cities: in fact, numerous smaller cities in the Gateway Cities COG have far higher densities than the statewide urban area average of 4,304 people per square mile and the national average of 2,343 people per square mile.

Figure 16: California Urban Population Density in 2010[103]

Gateway Cities Ranked by Population Density

http://www.energyatlas.ucla.edu/profiles/BTU

Footnotes:
(1) Cities include for comparison purposes (Population from 2010 Census)
(2) Values obtained from EnergyAtlas (Population from 2010 Census) - EnergyAtlas provides disaggregated energy data developed by the UCLA California Center for Sustainable Communities (CCSC) and funded by the SoCalREN and the County of Los Angeles' Office of Sustainability.

City Name	Population Density per Square Mile [2]
New York [1]	27,016
Maywood	23,257
Huntington Park	19,820
Cudahy	19,371
San Francisco [1]	17,116
Bell Gardens	17,066
Hawaiian Gardens	15,556
Lynwood	14,599
Bell	13,414
South Gate	12,839
Bellflower	12,393
Paramount	11,223
Norwalk	10,896
Artesia	10,190
Compton	9,604
Long Beach	8,995
Downey	8,894
Lakewood	8,325
Los Angeles [1]	8,008
Montebello	7,454
Los Angeles County	7,372
Pico Rivera	7,211
La Mirada	6,183
Whittier	5,866
Cerritos	5,540
Signal Hill	5,039
Santa Fe Springs	2,268
Commerce	2,008
Avalon	1,237
Industry	1,178
Vernon	22

121. The 2010 decennial U.S. Census tabulated the population densities of U.S. communities with total populations greater than 50,000. The data show that California communities such as Huntington Park, San Francisco, East Los Angeles (Census Designated Place), Lynwood,

[103] Gateway Cities Council of Governments Offices, "Gateway Cities Ranked by Population Density," *Meeting of the Gateway Cities Planning Directors* (Mar. 13, 2019), at 62, http://www.gatewaycog.org/media/userfiles/subsite_9/files/rl/Planning/Agenda%2C%20March%2013%2C%202019%20Planning%20Directors%20Committee.pdf (last visited March 31, 2021).

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Hawthorne, Daly City and South Gate are more densely populated than Boston; Bellflower, Inglewood, Santa Ana, and El Monte are more densely populated than Chicago or Philadelphia; Los Angeles, Long Beach, Santa Monica, San Mateo and Berkeley are more densely populated than Baltimore, Seattle or Minneapolis; and the densities of Pasadena, San Jose, Orange, Anaheim, Burbank, Oakland, Alameda, Tustin and Santa Clara are higher than Cleveland, St. Louis or Detroit. Most remarkably, 70 California communities with 50,000 or more residents, including all of the communities listed above and Fresno, Stockton and Santa Barbara, are more densely populated than Portland, a city considered the epitome of "smart growth" and enlightened land planning.[104]

122. The Defendants have illegally concealed and refused to disclose critical information throughout the multi-year public review process for the 2018 CEQA Guidelines amendments, and up to the present day. Remarkably, despite years of requests by multiple parties, including the Petitioners, the Defendants have refused to provide their estimates of the amount of GHG emission reductions that will be achieved by the VMT reductions expected to be achieved from the absence of new CEQA VMT mitigation costs on small rental units in high density apartment buildings in existing urbanized TPAs.

123. The Defendants have also refused to disclose any information concerning the impacts the VMT Redlining Regulations will have on the cost and availability of new housing and on statewide mobility costs, or the disparate impacts and harms that these housing and mobility costs will have on California's minority families.

GHG Redlining Regulations.

124. The legislative authorization for amending the CEQA Guidelines to address VMT and GHG emissions is focused on reducing net global emissions so that by the end of the century the potential global average temperature increase caused by anthropogenic GHG emissions will be minimized. The Defendants continue to willfully conceal basic information about costs, or

[104] U.S. Census Bureau, *Population, Housing Units, Area, and Density: 2010 - United States -- Places and (in selected states) County Subdivisions with 50,000 or More Population; and for Puerto Rico*, Table GCT-PH1, https://data.census.gov/cedsci/ (search "GCTPH1" in topic or table name search field and select 2010 table) (last visited March 31, 2019).

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effectiveness, or equity, or civil rights - and have provided no evidence that the racially disparate impacts to housing and mobility caused by the Redlining Regulations will meaningfully affect global GHG emissions, or have any impact on potential end of the century global average temperature increases caused by anthropogenic GHG emissions.

125. Defendants' omission is particularly heinous given the myriad other strategies for reducing far more harmful forms of GHG, at far lower costs to California taxpayers let alone housing crisis victims struggled to buy or rent a home. For example, replacing cook stoves in Africa and Asia that burn dung or wood and create "black carbon" – a particularly potent form of GHG that is also produced from forests fires – with cleaner cooking fuels was accepted as an appropriate GHG reduction CEQA compliance pathway by CARB and the Attorney General for one large master planned community.

126. This cook stove conversion has also been subsequently lauded by Ken Alex, the Director of Defendant OPR at the time the Redlining Regulations were adopted, as an extremely low cost, highly effective GHG reduction strategy. As recently noted by Mr. Alex, now at UC Berkeley:

> Black carbon is 500 to 1500 times as potent a global warmer as CO_2. [B]y far the largest source of black carbon emissions – 58% - is from open flame heating and cooking by an estimated 3 billion people worldwide, primarily in developing jurisdictions.
>
> [R]educing the black carbon emissions from open flame cooking and heating is likely the cheapest and potentially quickest path to significant GHG reduction, with the additional benefit that, because black carbon's short life in the atmosphere, the reduction will immediately reduce climate forcing (and, of course, health impacts of indoor burning).
>
> The impact would be dramatic, and would give us a bit more time to make progress with other GHG emissions.[105]

127. Throughout his tenure at OPR, however, including in finalizing the Redlining Regulations, Mr. Alex remained adamant that VMT reductions – regardless of whether or to what extent such reductions actually reduced GHG on any meaningful global scale or were required to comply with any adopted California GHG reduction mandate – would be required by regulatory fiat

[105] Alex, *Black Carbon, 3 Billion Strong*, Legal Planet, (Sept. 16, 2019), https://legal-planet.org/2019/09/16/black-carbon-3-billion-strong/ (last visited March 31, 2019).

through the CEQA Guidelines, regardless of whether or to what extent VMT reductions resulted in GHG reductions.

128. The Defendants have further illegally refused to acknowledge or disclose material information and conclusions provided by representatives of Portland State University ("PSU"), hired by Defendant OPR in or before 2018 to conduct workshops for state agencies and metropolitan transportations organizations. Portland's reputed success in promoting "smart growth" strategies to increase housing and transit utilization, notwithstanding the fact that Portland is actually less dense than many California cities as noted above, was emphasized by Defendants in retaining the PSU representatives to help provide substantial evidence of the feasibility and effectiveness of VMT reduction measures for use in California.

129. During public workshops, the PSU experts refused to specifically endorse the effectiveness of any of the potential VMT reduction measures that could be implemented by a particular housing project as set forth in the CAPCOA Manual, such as providing secure bike parking with nearby showers for bike riders or separately pricing automobile parking for rental households. One of the PSU representatives apparently conceded that no form of housing on a project level could significantly reduce VMT by incorporating any such measures because VMT is generated by regional transportation infrastructure and the regional employment and housing base. There was no published final report or work product produced by PSU representatives.

130. The reported reluctance of the PSU representatives to opine on the effectiveness of any of the VMT reduction measures proposed by the Defendants or suggested in the Redlining Regulations is unsurprising given that substantial evidence exists that such measures have not in fact significantly reduced automotive use even in Portland. In 2014, the academic director of the Center for Real Estate at PSU published a report criticizing the Portland area's 2035 growth plan for assuming "large swings in transportation mode share" towards public transit would occur in the region that had "no basis in fact" notwithstanding widely-publicized smart growth policies and billions of dollars of urban transit investments.

131. From 1990 to 2009, census data show that "the mode choice of commuters in the Portland metropolitan area has been remarkably stable" with "roughly 80 percent" of Portland

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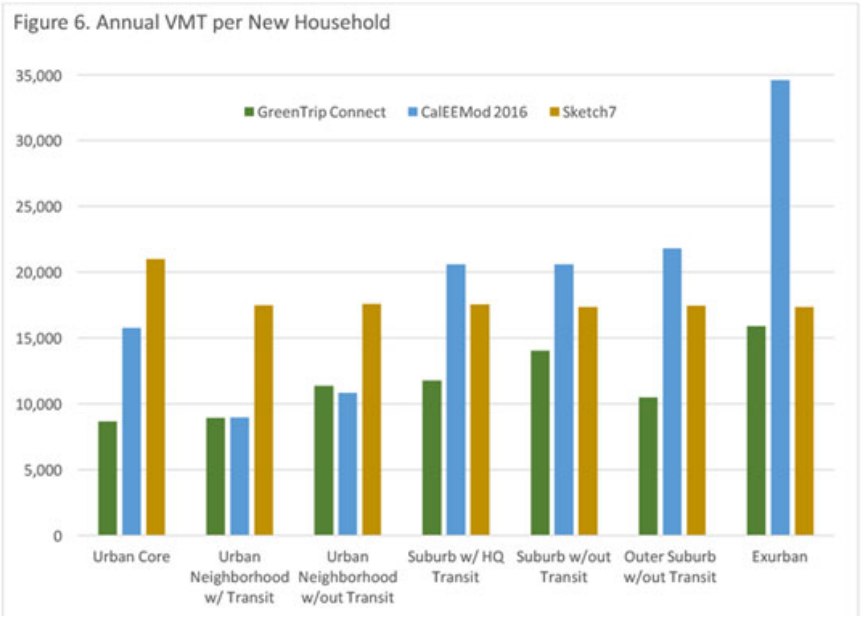
metro area workers continuing to commute by single occupancy or multiple occupancy automobiles, and about six percent by public transit.[106] U.S. Census data for 2017 confirms that automobile use continues to be the dominant commuting mode in the Portland metropolitan area, with 79.3 percent of all commuters using single or multiple occupancy vehicles, and 6.3 percent using public transit.[107]

132. Similar results were reported by UC Davis Transportation Institute researchers, who concluded both that there were no reliable or consistent methodologies for measuring VMT, and that "the differences in output between [VMT model] methods is notable", as shown in the replicated Figure 17 (fig. 6 from their report) below: [108]



Most importantly, as noted by UC Davis:

[106] Mildner, *Density at any Cost*, Center for Real Estate Quarterly Report, Vol. 8, No. 4. (Fall 2014), at 14, https://www.pdx.edu/realestate/sites/www.pdx.edu.realestate/files/01%20UGR%20-%20Mildner.pdf.

[107] U.S. Census Bureau, *2017 American Community Survey (ACS) 1-Year Estimates, Means of Transportation to Work by Selected Characteristics for the Portland-Vancouver-Hillsboro, OR-WA Metro Area*, Table S0802, https://data.census.gov/cedsci/ (search "GCTPH1" in topic or table name search field and search "Portland-Vancouver-Hillsboro, OR-WA Metro Area" in state, county or place search field and select 2017 table)(last visited March 31, 2021).

[108] Lee et al., *Evaluation of Sketch-Level VMT Quantification Tools: A Strategic Growth Council Grant Programs Evaluation Support Project*, UC Davis Institute of Transportation Studies and National Center for Sustainable Transportation (Aug. 2017), Figure 6 at 29, https://escholarship.org/content/qt08k3q8m5/qt08k3q8m5.pdf.

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> The available VMT estimation methods have not been validated as to their accuracy, owing to a lack of data against which to validate them. Actual changes in VMT resulting from land use projects are best measured through before-and-after surveys of residents, employees, and/or customers, but such surveys are rarely done. Without such data, we cannot say which of these quantification methods is most accurate. ***The lack of validation and uncertainties around accuracy may pose challenges for CEQA practitioners when analyzing VMT impacts and their significance.***
>
> Even without validation, however, the existing VMT quantification tools are still useful. The internal consistency of each tool allows for insightful comparison between scenarios that differ with respect to project characteristics and/or location, ***even if their ability to accurately forecast VMT or GHG emissions for a given land use project in a given situation is uncertain.*** (Emphasis added.)[109]

133. The UC Davis study was funded by the Strategic Growth Council, which was also led by Mr. Alex when he led OPR. Notwithstanding the "lack of validation and uncertainties around accuracy" and "uncertain" ability of VMT models to "accurately forecast" either VMT or GHGs, Defendants concluded with certainty in the required economic assessment of the Redlining Regulations that the Regulations would actually reduce CEQA compliance costs based on a single consultant's estimate that an [unreliable] VMT model would cost less to prepare than a traditional traffic model that assessed congestion and not just miles traveled.

134. Defendants further failed to acknowledge any potential increased CEQA VMT mitigation cost, let alone enhanced litigation risk from the "lack of validation" and "uncertain" VMT assessment tools, to the housing projects that are actually subject to and required to comply with CEQA. Defendants wanted to use CEQA to promote high density housing and make driving more costly, without regard to compliance with housing, transportation, and civil rights laws – or California rulemaking requirements.

135. The UC Davis researchers' predictions about the challenges created by the Redlining Regulations were accurate. There is in fact widespread confusion, even by expert CEQA consultants and attorneys, as to how to address VMT and GHGs under the Redlining Regulations. As explained in a comment letter to Defendant OPR by the state's Transportation Corridor Agencies, "[t]he ambiguous language of proposed section 15064.3 will only confound further the material confusion and complexity of state law requirements applicable to [GHG] . . . . The

[109] *Id.* at 39.

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Amendments should not be adding to the complexity and confusion surrounding the ever-evolving standards regarding GHG emissions. . . ."[110] Defendant OPR declined to make any changes based on these and similar comments, and widespread confusion as to both GHGs and VMT remains persistent.[111]

136. Local jurisdictions, for example, have responded to the Underground VMT Regulation's invitation to devise their own VMT significance thresholds with a wide variety of approaches, ranging from the recommended 15 percent, but only based on unique characteristics and assumptions that vary even within cities, to those who have declared any VMT reduction by a particular project to be infeasible, to those who have picked some other number – four percent, 10 percent - for a VMT reduction significance threshold without any explanation as to how any particular threshold actually reduces GHG, or by how much, or otherwise avoids or lessens any other physical impact to the environment.

137. Consultants and lawyers, paid by the hour to mull through options and litigate such issues for a decade or more, benefit from this uncertainty and confusion. People who need housing (disproportionately minorities), and agencies and other stakeholders attempting to comply with

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[110] NRA, *supra* note 96, Exhibit A, at 188.

[111] *Id.* at 189. *See also* Email correspondence among traffic experts, planners, environmental consultants, lawyers, and representatives from state and local agencies, to plan educational presentations for CEQA practitioners. As noted by one commenter: "The [Association of Environmental Planners] Climate Change Committee has been endeavoring through numerous white papers and conference presentations for about 10 years to promote best practices in this [GHG/Climate Change and CEQA] arena. Despite that, the practice remains unsettled on this matter, in particular because of aggressive plaintiffs using GHG as their latest legal cudgel, courts that are sometimes on point and sometimes clueless on the technical matters, and the unpreceded nature[] of the climate change challenge." Email from Rich Walter to Art Coon et al, Re: Recommendations: Topics for AEP Advanced CEQA Workshop (Sept. 27, 2019). A true and correct copy of this email correspondence is attached hereto as **Exhibit D**. *See also* Owen, *Private Facilitators of Public Regulation, A Study of the Environmental Consulting Industry*, Regulation and Governance (2019), at 13, https://www.researchgate.net/publication/336380388_Private_facilitators_of_public_regulation_A_study_of_the_environmental_consulting_industry (last visited march 31, 2021) ("the story of CEQA and climate change illustrates how for-profit consultants can help build a regulatory system that seeks to advance environmental protection"). Note that the referenced CEQA climate change "regulatory system" referenced by Hastings Law Professor Owen was and continues to be invented, adjusted, and implemented on an ad hoc, project-by-project, consultant-by-consultant basis in the context of CEQA review of housing and other projects, and in the complete absence of public review and comment, approval by elected representatives, compliance with the APA, or any other procedural or substantive requirements for agency adoption of plans, policies, or ordinances governing the review and approval of housing applications.

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housing, public health, transportation, and other legal mandates are harmed by the CEQA miasma, instead of required regulatory clarity, created by the Redlining Regulations.

138. The use of false, misleading, concealed, and completely unreliable VMT and GHG information undermines any rational basis for the unlawful Redlining Regulations, and provides no excuse for violations of civil rights, housing, public health, and transportation laws.

F. California Can Achieve Its GHG Reduction Goals Without Engaging In Racially Discriminatory Housing Practices

139. In a separate legal challenge filed against CARB for different, but to some extent overlapping, discriminatory anti-housing GHG reduction mandates, Defendants' attorney unsuccessfully argued that the state's interest in reducing GHG within its borders provided a sufficient rationale to protect CARB's racially discriminatory housing policies.[112] The trial court rejected this shocking argument, but it is illustrative of the extent to which Defendants and their counsel feel justified in asserting that the climate crisis trumps all so as to authorize the evisceration of including civil rights in the arena of housing. The more pertinent facts, which the Demurrer unsuccessfully attempted to feint past, is that California can absolutely comply with its climate change leadership mandates without depriving minority communities of a home they can afford, or the right to use their ever-cleaner and soon to be all-electric car to get to work just like their pre-existing neighbor. The Redlining Regulations will not reduce any (or at best an infinitesimal amount) of GHG, and there are scores of more effective, less costly, non-discriminatory GHG reduction measures that the state can and is on track to continue to implement.

G. There Is No Substantial Evidence that the Redlining Regulations, and Increasing Housing and Mobility Burdens for the State's Aspiring Minority, Working and Middle Class Populations, Will Actually Reduce Global Greenhouse Gas Emissions.

140. As former Governor Brown, a committed climate activist, has repeatedly conceded, since California generates a relatively minute amount of global GHG emissions it cannot by itself significantly affect future climate conditions caused by anthropogenic emissions– and unless other

[112] Notice of Hearing on Defendants Demurrer to Plaintiffs First Amended Verified Petition for Writ of Mandate Etc., *The Two Hundred v. California Air Resources Board et al.*, Case No. 18CEG01494 (filed January 25, 2019)(Cal. Super. Ct.), attached hereto as **Exhibit E.** See also Order after Hearing on Respondents/Defendants' Demurrer to First Amended Complaint/Petition, The Two Hundred v. California Air Resources Board et al., Case No. 18CEG01494 (filed March 29, 2019)(Cal. Super. Ct.), attached hereto as **Exhibit F**.

states and countries follow our lead, California's GHG reduction efforts will be "futile".[113] There are no known states or countries that are tempted to "follow our lead" by weaponizing CEQA – a litigation tool that can anonymously be invoked at almost no cost by any party seeking any outcome to stop any project from changing the state's foundationally racist residential segregation pattern "in the name of the environment" – to end homeownership, worsen commutes, and further exacerbate the income inequality, poverty, and homelessness that California's leaders have disproportionately inflicted on the state's minority residents.

141. In September 2019, the U.S. Energy Information Agency ("EIA") published a projection of global CO_2 emissions from 2010 to 2050. As shown in Figure 15, GHG emissions generated by nations in the Organization of Economic Cooperation and Development ("OECD"), which include 36 of the world's most developed countries such as the U.S., France, the United Kingdom, and Germany, are projected to fall at an average of 0.2 percent per year. Emissions from non-OECD countries, including China, India, Russia, and almost all Southeast Asia, Middle East and African nations, are projected to increase by one percent per year.

142. Global emissions in 2050 will increase from 32.4 billion metric tons in 2010 to 43 billion tons in 2050, with all of the net increase projected to occur in non-OECD, developing countries. California accounted for about one percent or 363 tons of global CO_2 emissions in 2010, and would reduce global emissions by about 290 million tons, or by 0.67 percent of the projected levels by reducing statewide CO_2 output even by the 80 percent mandate rejected by the Legislature as compared with global GHG emissions in 2050. (California's GHG emissions are the almost invisible line of bubbles scraping along the bottom of Figure 18.)

[113] *See, e.g.,* Marinucci, *Top Democrat's Plan: Divest in Coal to Fight Global Warming*, San Francisco Gate (Dec. 16, 2014), http://www.sfgate.com/news/article/Top-state-Democrat-pushes-coal-divestment-to-5959147.php (last visited March 31, 2021); Carroll, *California and Mexico Sign Pact to Fight Climate Change*, Reuters (July 28, 2014), https://www.reuters.com/article/us-climatechange-california-mexico/california-and-mexico-sign-pact-to-fight-climate-change-idUSKBN0FX1XO20140728 (last visited March 31, 2021); Lazo, *Jerry Brown Allies With China to Fight Climate Change*, Wall Street Journal (Sept. 23, 2019), https://www.wsj.com/articles/jerry-brown-allies-with-china-to-fight-climate-change-11569273903 (last visited March 31, 2021).

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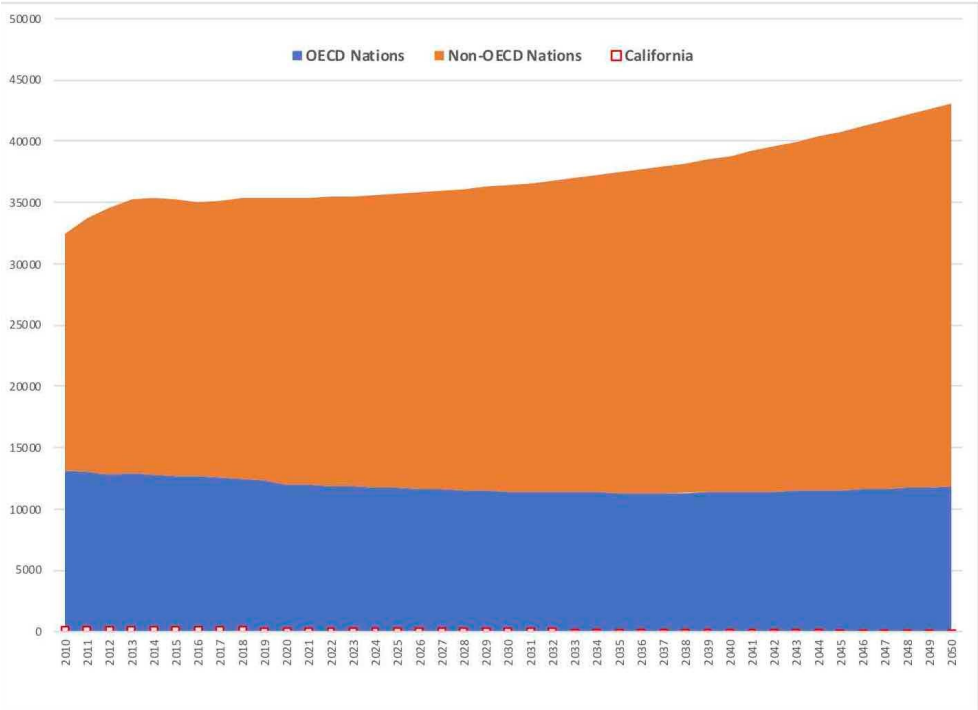
Figure 18: U.S. EIA Global CO_2 Emissions Reference Case, 2010 to 2050, OECD Nations, Non-OECD Nations and California[114]



143. Given the global context of GHG emissions, California, like all progressive regions of the world that are committed to reducing future climate change risks, is focused on measures that: (a) have the greatest likelihood of actually reducing GHG emissions by a significant amount; and (b) do not simply shift in-state GHG emissions to other locations where offsetting or even greater emissions occur (e.g., by inducing Californians to move to higher per capita GHG states like Texas where housing and homeownership remain far more affordable). The housing and mobility outcomes that Defendants are attempting to achieve through the illegal Redlining Regulations fail to satisfy these criteria.

144. There is substantial evidence that the additional CEQA ambiguities and litigation uncertainties and obstacles introduced by the Redlining Regulations significantly decrease the

[114] U.S. EIA, Table 1. *State energy-related carbon dioxide emissions by year, unadjusted (2005-2016)* (Feb. 27, 2019), https://www.eia.gov/environment/emissions/state/analysis/pdf/table1.pdf (last visited April 1, 2021); U.S. EIA, *International Energy Outlook 2019 with projections to 2050* (Sept. 2019), at 151, https://www.eia.gov/outlooks/ieo/pdf/ieo2019.pdf (last visited April 1, 2021).

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likelihood that California will build even a significant portion of the 3.5 new million housing promised by the state's Governor by 2025.

145. In 1987, a landmark CEQA lawsuit resulted in an appellate court decision that a city's ability to impose even the most common sense, site-specific conditions on approval of a project that otherwise complied with all applicable federal, state and local laws – including local General Plan, zoning, building, and other local codes – was required to undergo the CEQA compliance process.[115] If a city or county can require less than maximum height, or decide whether a driveway should be moved three feet to the left or right, then CEQA applies. Since then, approval and production of housing can be delayed, made more costly, or derailed entirely by determined opponents (or those seeking to use CEQA lawsuits for other objectives).

146. In an infamous example, a replacement home on an existing lot which received unanimous support from neighbors, the Planning Commission, and City Council – in Berkeley! – was tied up in court for 11 years, and ultimately abandoned without being constructed, in litigation over whether the home qualified for a fast-track categorical exemption compliance pathway under CEQA (it was exempt).[116]

147. The proportion of CEQA lawsuits filed against housing projects in California has relentlessly increased over the past decade, and in 2018 39 percent of CEQA lawsuits (and 60% of all CEQA lawsuits challenging construction projects) challenged new housing.[117]

148. As shown in Figure 19, the annual number of new California housing permits issued statewide fell dramatically, and has remained much lower after 1987, than in previous periods. The annualized rate of residential building permits through July of 2017, 2018 and 2019 ranged from 127 in 2018 to 106 in 2019, rates that are consistent with the lowest annual levels excepting economic recessions, and 3 times less than peak permit issuance rates prior to 1987.[118]

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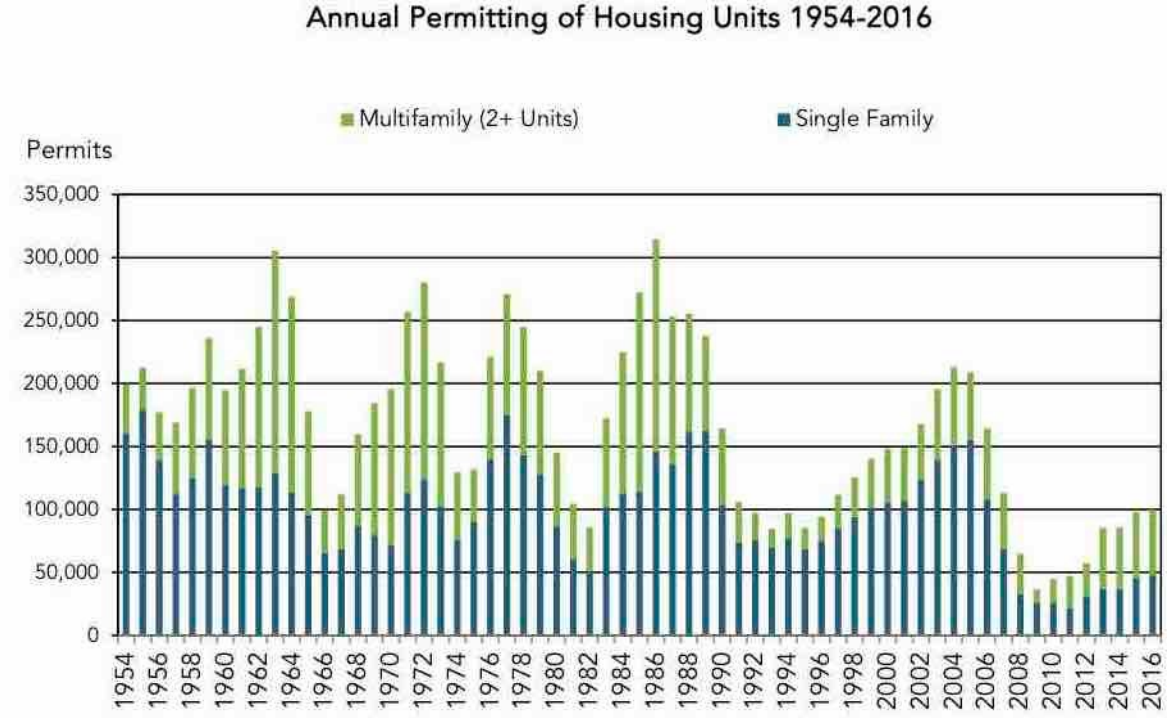
[115] *Friends of Westwood, Inc. v City of Los Angeles* (1987) 191 Cal.App. 3d 259.
[116] *See Berkeley Hillside Preservation,* 60 Cal.4th 1086; *Berkeley Hillside Preservation,* 241 Cal.App.4th 943.
[117] Hernandez, *California Getting In Its Own Way: In 2018, Housing Targeted in 60% of Anti-Development CEQA Lawsuits*, Chapman University (Dec. 2019), https://www.chapman.edu/communication/_files/ca-getting-in-its-own-way.pdf.
[118] California Department of Finance, *California Construction Authorized by Building Permits, Seasonally Adjusted at Annual Rate, Residential Units and Value, Nonresidential Value, to July 2019*,

Figure 19: California Annual Housing Permits 1954-2016[119]



149. While CEQA did not cause all of the decline in California housing development, the costs and legal risks introduced by new project-level review requirements in 1987 unquestionably played a large role. Governor Newsom, former Governor Brown, former state senate pro tem and current Sacramento mayor Daryl Steinberg, and San Jose mayor Sam Liccardo have each publicly acknowledged the adverse effect of CEQA on state housing development. Mayor Liccardo has said that CEQA is "killing" efforts to address the housing crisis.[120]

150. Meanwhile, it is common practice for the Legislature to exempt or minimize the CEQA process for high-profile, politically significant projects, including the state capitol office remodeling project, the Sacramento Kings arena, hotel and high-rise apartment complexes, and the new Apple headquarters in Cupertino.[121] Very limited CEQA statutory exemptions have also been

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http://www.dof.ca.gov/Forecasting/Economics/Indicators/Construction_Permits/documents/Construction%20Residential%20Nonresidential%20SAAR.xlsx (last visited April 1, 2021).

[119] HCD, *California's Housing Future: Challenges and Opportunities, Final Statewide Housing Assessment 2025* (Feb. 2018), at 6, https://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf (last visited April 1, 2021) [hereinafter *California's Housing Future*].

[120] Remarks of Mayor Sam Liccardo on "Gimme Shelter", podcast of CALMatters, https://podcasts.apple.com/gb/podcast/mayors-only-panel-liam-libby-schaaf-sam-liccardo-darrell/id1280087136?i=1000438261365 (last visited April 1, 2021).

[121] *See, e.g.,* SB 743 (Steinberg), (exempting Sacramento Kings arena from CEQA); AB 900 (Buchanan), (certifying Apple Campus as Environmental Leadership Development Project).

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approved for housing – such as Senate Bill No. 1197 (2019), which exempts from CEQA homeless shelters, and affordable housing built with funding from local Measure HHH, but applies solely within the City of Los Angeles. The Legislature has declined to approve any broader CEQA streamlining for housing that complies with all local General Plan and zoning laws, and with Sustainable Communities Strategies, notwithstanding the fact that the adoption of General Plans, zoning, and Sustainable Communities Strategies, each had to complete its own CEQA compliance process.

151. The Redlining Regulations create deliberately new, legally untested and facially ambiguous CEQA analysis requirements for highly controversial impacts, including from automobile use and VMT, and GHG emissions. Section 15064.3 and the illegal Underground VMT Regulation can be read to require that lead agencies must presume that a project outside of a TPA has a significant VMT impact unless (a) it reduces VMT in the project area; (b) it has VMT 15 percent below the regional average; (c) it has VMT ranging from 14 to 16.8 percent below the regional average; or (d) it has VMT below a locally-adopted VMT threshold of significance supported by substantial evidence in the record and lawful for use in the context of that particular project. A lead agency must not only determine which of these potential thresholds applies to a project, it must then consider and require the implementation of all feasible mitigation if the project does not meet the selected threshold.

152. As discussed, above, however, there are no accepted methods for predictably reducing VMT. Consequently, the selection of a VMT impact threshold, the amount of mitigation required to achieve a less than significant impact, and the feasibility and effectiveness of potential VMT mitigation, all provide project opponents with significant new opportunities to contest and delay potential permitting during the CEQA analysis process, and to litigate and further impede development should the project be approved. The adequacy of VMT (with or without corresponding GHG) mitigation is also ripe for litigation challenges, as is the decision to approve any housing project outside a TPA (where "presumptions" attempt to provide a safe harbor). "All feasible" mitigation must be required, and there is no predictable upper boundary on how much more new housing can be forced to pay in additional mitigation costs.

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153. Section 15064.4 presents even more challenges for CEQA lead agencies. Instead of providing clear thresholds for evaluating GHG impacts, this section requires that, somehow with their spare time and resources, lead agencies invent, with substantial evidence, impact thresholds, evaluate, and then somehow identify and implement all feasible mitigation for project impacts that exceed a locally-developed threshold to address a global impact for which the vast majority of housing-related GHG emissions are wholly outside a local jurisdiction's authority and control (e.g., fuel standards for vehicles, energy supplies provided by public utilities regulated by the state, and appliance energy efficiency and related specifications governed by the state and federal governments). In addition, Section 15064.4 contemplates that local city and county planning departments, city councils and boards of supervisors will develop thresholds and identify and implement feasible mitigation for impacts which are a global problem that no nation, or even the United Nations, has as yet been able to fully characterize and solve – on a "case by case" basis. GHG impact thresholds and mitigation under CEQA are already significant litigation targets and the Redlining Regulations greatly expand opportunities to increase the costs and extend the time for completing a project's CEQA review and post-permitting litigation.

154. Additional new requirements added to the CEQA Guidelines by the Redlining Regulations, including greater aesthetic impact criteria for smaller, richer, less diverse communities, reduced mitigation opportunities, and expanded lead agency threshold justification requirements, also greatly increase the probability that CEQA will be used to stop, or the threat of a protracted CEQA process and litigation will further chill, housing development in the state.

155. Grand Terrace is the wealthiest and second least diverse larger community in San Bernardino County. Beverly Hills and Manhattan Beach, which both have an approximately 80 percent white populations, are two of the wealthiest communities in the world. Each of these communities has less than 50,000 residents. The Redlining Regulations unaccountably allow any housing project opponent in these opportunity-rich locations to contest development if it "substantially degrades the visual character or quality of public views from a sidewalk."

156. For other, poorer, and less white communities that have more than 50,000 residents, such as Redlands, Chino, Fontana, Rancho Cucamonga and Chino Hills in San Bernardino, the

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Redlining Regulations prohibit any such CEQA analysis of aesthetic impacts, although there is no reason to believe sidewalk views in Grand Terrace, Beverly Hills or Manhattan Beach are any less affected by aesthetic sensibilities than sidewalk views in Redlands, Chino, Fontana, Rancho Cucamonga and Chino Hills.

157. The Legislature recently amended Section 21081.3 of the Public Resources Code to prevent the abuse of CEQA aesthetics impact claims for new housing projects located on properties with vacant buildings, subject to limited height and light and glare requirements. No laws or regulations of any kind authorize the Defendants to adopt racially disparate aesthetic impact thresholds in the CEQA Guidelines based on a wholly arbitrary 50,000 city population cap.

158. After 1987, CEQA mutated into one of the most significant factors adversely affecting state housing development, which has in fact been reduced far below pre-1987 levels. CEQA has greatly increased the costs, processing time, and litigation and permitting risks for all housing projects in the state. There is substantial evidence that the Redlining Regulations, adopted just as a newly elected state governor promised that 3.5 million new housing units would be built by 2025 to ease an existential housing crisis, significantly increase CEQA risks, costs and delays. The Defendants have provided no evidence whatsoever that dramatically expanding CEQA permitting and litigation risks will allow for the construction of even a fraction of the housing California needs by 2025, if it is ever built at all.

159. There is no substantial evidence that California's housing needs can be met by focusing residential development into the minute portions of the state defined in Section 15064.3 as within "one-half mile of either an existing major transit stop or a stop along an existing high quality transit corridor" that would not be required to address VMT impacts during the permit approval and CEQA review process. In the SCAG region, which contains half of the state's population, approximately three percent of the region meets this criterion.[122]

160. Clustering future housing in existing urban areas has already increased land prices and requires large, multistory, multifamily structures that are five to seven times more expensive to

[122] SCAG, 2016-2040 *Regional Transportation Plan/Sustainable Communities Strategy* (Apr. 2016), Table 2.1 at 25, http://scagrtpscs.net/Documents/2016/final/f2016RTPSCS.pdf (last visited April 1, 2021).

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construct than simple wood-framed one to three story homes in other locations.[123] High-rise multifamily residential housing has been documented, even by infill housing advocates, to cost at least 30 percent more per square foot to build than low- and mid-rise multifamily housing units.[124] In the midst of a housing crisis, the Redlining Regulations unlawfully limit new development to the minute slivers of California in which only the most expensive units can be built.

161. Recent studies conducted for local governments in the Bay Area and Los Angeles have shown that rents for new multifamily housing in urbanized coastal opportunity areas range from approximately $2,500 to about $4,000 per month for 850 to 1,100 square foot apartments in high density buildings like mid- and high-rise apartments.[125] These costly urban infill apartments do not meet the housing needs of California's younger, minority-majority population due to the fact that (i) a large proportion of the California population do not earn the required $100,000 to more than $150,000 annual incomes required to pay these rents, (ii) those needing housing are far more likely to be younger, minority families with lower household and personal incomes than older, primarily white residents, (iii) massive multifamily housing structures with small units and little or outdoor play areas do not meet the needs of many younger families, and (iv) spending $30,000 to nearly $60,000 in rent creates zero family wealth as compared to homeownership. Non-profit housing developers building near transit produce smaller, higher density units as part of the Los

[123] *See, e.g.,* California Center for Jobs & The Economy and California Business Roundtable, *Regulation and Housing: Effects on Housing Supply, Costs and Poverty* (May 2017), at 19, https://centerforjobs.org/wp-content/uploads/center_for_jobs_regulation_and_housing_study_may_2017.pdf (last visited April 1, 2021) (citing Hernandez, et al., *In the Name of the Environment: Litigation Abuse Under CEQA* (Aug. 2015), Table B at 68, https://issuu.com/hollandknight/docs/ceqa_litigation_abuseissuu?e=16627326/14197714).

[124] Decker et al., *Right Type Right Place: Assessing the Environmental and Economic Impacts of Infill Residential Development through 2030*, U.C. Berkeley Terner Center for Housing Innovation and Center for Law, Energy and the Environment (Mar. 2017), at 48, http://ternercenter.berkeley.edu/uploads/right_type_right_place.pdf (last visited April 1, 2021).

[125] Hausrath Economics Group, *Economic Feasibility Study For Oakland Impact Fee Program, Prepared for the City of Oakland* (Apr. 8, 2016), at 9, http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak058107.pdf (last visited April 1, 2021); bae urban economics et al., *Los Angeles Affordable Housing Linkage Fee Nexus Study Prepared for City of Los Angeles* (Sept. 21, 2016), https://planning.lacity.org/ordinances/docs/AHLF/LA_Linkage_Fee_Final_Report_9-21-16.pdf (last visited April 1, 2021); *bae urban economics, Draft City of Berkeley Affordable Housing Nexus Study* (Mar. 25, 2015), http://www.berkeleyside.com/wp-content/uploads/2015/11/2015-07-14-WS-Item-01-Affordable-Housing.pdf (last visited April 1, 2021).

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Angeles effort to house the homeless for $500,000 or more for each unit.[126] In 2017, the state began withholding housing assistance funds because urban development costs are so high that such funding had virtually no effect on housing supplies.[127]

162. In locations where costs are much lower, such as San Bernardino, but not within "one-half mile" of a qualifying transit facilities, all new housing proposals approved by local agencies must first make sense of, then consider and feasibly mitigate for, VMT impacts that the Redlining Regulations make "presumptively" significant. One possible approach suggested by the Underground VMT Regulation is to reduce project VMT by 15 percent below the regional average. In 2019, Fehr & Peers, one of the most respected transportation consultants in California and often used by state agencies, provided the County of San Bernardino with a report concluding that "the 15 percent threshold would not be feasible throughout most majority [*sic*] of the unincorporated county." Feasible transportation and land use measures could, at most, reduce household VMT from 20.5 miles per capita per day to 19.7 miles per capita per day.[128]

163. Because CEQA lawsuits are so inexpensive to file and effective at delaying or blocking development, and VMT reductions are a major focus of environmental regulators and advocacy groups, it is reasonably likely, if not certain, that any project failing to meet the 15 percent criterion in the Underground VMT Regulation will be legally challenged. In an effort to reduce litigation risks, a housing project proponent in San Bernardino County could attempt to reduce household VMT to 17.4 miles per capita per day, 15 percent below the current level of 20.5 miles per capita per day and 2.3 miles per capita per day lower than the four percent reduction the County has determined is feasible to achieve. Based on an average of 3.3 people per household in

[126] Letter from Ron Galperin, Los Angeles Controller, to Eric Garcetti, Mayor, Michael Feuer, City Attorney, and Members of the Los Angeles City Council, Re: The High Cost of Homeless Housing: Review of Proposition HHH, (Oct. 8, 2019), https://lacontroller.org/wp-content/uploads/2019/10/The-High-Cost-of-Homeless-Housing_Review-of-Prop-HHH_10.8.19.pdf (last visited April 1, 2021).

[127] Cortright, *Why Is 'Affordable' Housing So Expensive to Build?,* CityLab (Oct. 19, 2017), https://www.citylab.com/equity/2017/10/why-is-affordable-housing-so-expensive-to-build/543399/ (last visited April 1, 2021).

[128] Pack, Fehr & Peers, *Technical Memorandum on SB 743 Implementation Thresholds – Alternative Threshold Guidance* (Mar. 26, 2019), at 1, 5, http://countywideplan.com/wp-content/uploads/2019/07/Alternative-Reduction-Target-TDM-Memo-03.26.2019.pdf (last visited April 1, 2021).

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unincorporated San Bernardino County, a project proponent seeking to meet the 15 percent reduction target in the Underground VMT Regulation would need to reduce per unit VMT by 2,770 miles per year.

164. Although the Redlining Regulations provide no meaningful guidance regarding feasible VMT mitigation that would satisfy CEQA requirements, one potential approach might be to purchase bus passes for existing automotive users and shift 2,770 miles per year per household of vehicular use to transit for the lifetime of the proposed project, typically 30 years. According to the L.A. Metro, which operates the largest bus transit fleet in the SCAG region, an annual Zone 1 bus pass costs $1,584 per year and an average bus trip is about four miles in length.[129] If the bus pass recipients make an average of two trips, or a total of eight miles, per day per year the project proponent would need to buy about $1,503 worth of bus passes per year for 30 years, or a total of $45,100 per unit assuming no inflation or changes in annual pass costs, to reduce VMT by 2,770 miles per year. Additional expenses would be required to monitor and verify that this bus pass mitigation actually reduced VMT. If actual VMT reductions could not be verified into some perpetuity or even only the 30 years calculated under this example, if for example VMT reductions did not occur because a bus pass recipient got a new job in a location without bus service, or if regional bus ridership continues to drop and fixed route bus service is replaced by door-to-door services like app-based electric vans with higher VMT than buses, or if the holder of the bus pass would have taken the bus anyway and paid either full or discounted fares available to seniors and students – then the validity of this VMT measure could be subsequently challenged, with unknown cost and legal consequences to the San Bernardino homeowner family.

165. It is simply inconceivable, and unlawful, to impose the reverse Robin Hood of robbing housing crisis victims (in the form of imposing gargantuan new housing VMT mitigation costs) to give to the poor (by subsidizing unrelated transit system services with a hoped-for VMT reduction somewhere, by someone). Transit agencies have ample authority to raise funds, and both

[129] *Los Angeles Metro, Interactive Estimated Ridership Stats, annual data for 2018* http://isotp.metro.net/MetroRidership/Index.aspx (last visited April 1, 2021); *Los Angeles Metro, EZ Transit Pass*, https://www.metro.net/riding/fares/ez-transit-pass/ (last visited April 1, 2021) (annual cost based on $132 per month for 12 months).

the Legislature and voters have approved transit funds, but burdening new housing with unknowable VMT CEQA litigation risks and high VMT mitigation costs has zero legislative or regulatory approval, and cannot be wedged into CEQA based on SB 743's directive that traffic congestion be removed as a CEQA impact in the immediate vicinity of high frequency commuter bus stops.

166. In contrast with the Underground VMT Regulation, Section 15064.3 states that projects must be assumed to cause significant VMT impacts under CEQA unless they "decrease vehicle miles traveled in the project area compared to existing conditions." Because CEQA lawsuits are so inexpensive to file and effective at delaying or blocking development, and VMT reductions are a major focus of environmental regulators and advocacy groups, it is reasonably likely, if not certain, that lawsuits will assert that Section 15064.3 requires that VMT for each new housing unit must have net zero VMT plus reduce regional VMT. Under this potential interpretation, a new housing unit in San Bernardino County, would be required to reduce VMT by at least 20.6 miles per day, 0.1 mile per day less than the current county average of 20.5 miles per day, to both achieve net zero VMT for the project and additional regional VMT reductions. If this required mitigation was achieved by using bus passes, a project proponent would need to shift over 24,800 miles per year from vehicular to transit use. If the bus pass recipients make an average of two trips or a total of eight miles, per day per year the project proponent would need to buy about $13,460 worth of bus passes per year for 30 years, or a total of $403,800 per unit assuming no inflation or changes in annual pass costs, to reduce VMT by 24,800 miles per year.

167. When added to home purchase prices, monthly rents, or paid in annual taxes, the addition of VMT mitigation costs required to reduce per unit VMT by 15 percent would substantially increase housing and rental costs for the predominantly minority populations in San Bernardino County, and would keep 19,538 families who could otherwise afford to purchase a home from being able to do so.[130]

[130] Letter from Devala Janardan, Senior Counsel, National Association of Homebuilders to Jennifer Hernandez, Holland & Knight (Dec. 2, 2019), a true and correct copy of which is included as **Exhibit G**. Ms. Janardan also calculated the number of households priced out of homeownership if just this one VMT fee is applied statewide, based on statewide median housing prices and mortgage applicant underwriting requirements. Consistent with the conclusion of California's elected leaders

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168. The potential VMT mitigation costs required to achieve net zero VMT for the project and additional regional VMT reductions would more than double housing costs for the predominantly minority populations in San Bernardino County, and would price out 109,181 households from being able to buy a home – virtually ending attainable homeownership in San Bernardino County. All housing costs in the region, and in any location in California that requires VMT mitigation, will dramatically rise, meaning today's housing crisis victims of aspiring minority buyers and renters are victimized yet again by Defendants' weaponization of CEQA into California's anti-minority housing agency redlining.

169. The number of new housing units will be reduced because it will be economically infeasible to develop additional housing supplies for an increasingly smaller pool of potential buyers and renters – but proving "economic infeasibility" for any specific housing project is itself a fertile target for anti-housing CEQA lawsuits.[131]

170. Section 15064.4 will also require projects to mitigate for potentially significant GHG impacts even though the state's cap-and-trade program has been judicially determined to mitigate for all fossil fuel GHG impacts in California and new buildings, which must have rooftop solar panels and meet the most stringent energy efficiency standards in the country, and are achieving or very close to achieving net zero emissions. The Defendants unlawfully failed to conform the Redlining Regulations to existing law and to provide any clear guidance regarding GHG impact thresholds and acceptable mitigation. Instead, potential GHG impacts for all housing and land use projects, including those within "one-half mile" of qualifying transit facilities that presumptively have no significant VMT impacts under Section 15064.3, are to be analyzed using thresholds that local agencies must develop, potentially on a case by case basis. Merely completing the GHG impact analysis, including providing substantial evidence in support of the adopted threshold, and

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and housing experts that California housing costs far too much, Ms. Janardan calculated that even a small $1000 increase would price out 9,897 median income earners from purchasing a median priced home. A $45,100 VMT mitigation fee to subsidize transit and offset 15% of a new home's VMT would price out 400,049 households, and a $403,800 VMT fee to reduce VMT in the housing project area by the full amount of the new home's VMT would price out 2,620,616 California households.

[131] *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 602-03; *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 714-15; *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 313.

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mitigating a project's impacts with respect to the thresholds, will add substantial cost and significantly delay housing projects.

171. Substantial evidence demonstrates that new housing development in the urban areas favored by the Defendants is extremely expensive and increasingly uneconomic to build even when fully permitted. GHG mitigation requirements will increase housing costs throughout the state, and VMT mitigation requirements will increase housing costs for all new development not within "one-half mile" of qualifying transit facilities. Consequently, the development of new housing in less expensive areas, like San Bernardino County, will also become less economically feasible. The Redlining Regulations thus reduce incentives for developing housing everywhere in the state. The Defendants have not provided, and continue to refuse to disclose, an explanation for how the Redlining Regulations can be implemented without increasing housing costs, reducing housing supply, and exacerbating California's existing, existential housing crisis.

172. Even at current housing and rent levels, the LAO has reported that trillions of dollars of new public funding would be required to reduce housing burdens for the 40 percent of Californians who already pay more than 30 percent of their incomes for housing to sustainable levels. The LAO also found that the cost of subsidizing housing for only the neediest Californians, the homeless, the ill, and special needs populations, would require massive tax increases.[132] The Defendants did not consider and continue to ignore the tax and equity effects of further increasing housing costs on what is already massively deficient housing assistance funding for less affluent Californians.

173. Even if a large number of new housing units can be feasibly built within "one-half mile" of qualifying transit facilities or in other urban infill locations, there is no substantial evidence that increasing the population density of already dense urban environments will result in significant, or even reasonably measurable GHG emission reductions. The Defendants have never provided, and continue to refuse to disclose, the annual amount of state, let alone net global GHG emission

[132] Taylor, *Perspectives on Helping Low-Income Californians Afford Housing*, LAO (Feb. 9, 2016), at 4, https://lao.ca.gov/Reports/2016/3345/Low-Income-Housing-020816.pdf (last visted April 1, 2021) ("Extending housing assistance to low-income Californians who currently do not receive it—either through subsidies for affordable units or housing vouchers—would require an annual funding commitment in the low tens of billions of dollars").

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reductions, which further densifying already dense urban areas consistent with the Redlining Regulations are intended to achieve.

174. In 2017, U.C. Berkeley published a study advocating that 1.92 million new housing units over a 15 year period be built entirely within urban infill locations. According to the study, 100 percent infill development would reduce state GHG emissions by about 1.79 million tons per year.[133] Thus, the massive restructuring of California's historical housing development patterns was found to potentially avoid 0.4 percent of the state's current emissions, and might provide one percent of the reductions required to meet the legislated GHG reduction targets for 2030.

175. These results are consistent with the potential GHG reductions that could occur from implementing the 15 percent reduction in per capita VMT threshold suggested in the Underground VMT Regulation. In August 2019, HCD determined that the entire SCAG region, which accounts for half of the state's population, requires 1,344,740 million new homes to house a total household population of 20,079,000.[134] According to SCAG, per capita VMT is approximately 8,700 miles per year and the region has about 3.1 people per household. Table 1 shows how the SCAG regions' VMT and GHG emissions could change assuming that: (a) all of the new 1,344,740 units housing 4,170,000 people (about 21 percent of the HCD's projected 2029 population in the SCAG region) are built outside of one-half mile from qualifying transit facilities and each must meet 15 per cent per capita VMT reduction threshold; and (b) the most current 2017 rate of emissions per vehicle mile reported by the U.S. EPA does not improve from 2021-2029. Table 1 indicates that, with these assumptions, annual VMT in the SCAG region would be about 5.44 billion lower, and GHG emissions would be reduced by about 1.9 million metric tons.

[133] Decker, *supra* note 125, at 5.

[134] Letter from HCD to Kome Ajise, Executive Director of SCAG, Re: Regional Housing Need Determination SCAG: June 30, 2021 – October 15, 2029, dated Aug. 22, 2019, https://www.scag.ca.gov/Documents/6thCycleRHNA_SCAGDetermination_08222019.pdf. In September 2019, SCAG submitted a formal objection to the HCD determination and contended that the correct housing needs would be in the range of 823,000-920,000. *See* Letter from Kome Ajise, Executive Director of SCAG to Doug McCauley, Acting Director of the HCD, dated Sept. 18, 2019, https://www.scag.ca.gov/programs/Documents/RHNA/SCAG-Objection-Letter-RHNA-Regional-Determination.pdf. A lower level of housing growth would result in lower potential GHG reductions from burdening new housing with new VMT mitigation requirements under the Redlining Regulations.

Table 1: Potential CO_2 Emissions Reductions from Reducing Per Capita VMT by 15 Percent in the Entire SCAG Region for 1,344,740 New Housing Units 2021-2029[135]

	No VMT Reduction for 2029 Population of 20,079,930	15 percent VMT Reduction for 1,344,740 new Households and 4,170,000 of 2029 Population of 20,079,930	Net Change
VMT (total miles)	174,695,391,000	169,255,245,330	5,440,145,670
GHG Emissions (MT CO_2)	62,366,255	60,424,123	1,942,132

176. The potential VMT and emissions reductions shown in Table 1 are highly conservative and unrealistically high because many of the new housing units would be within one-half mile of qualifying transit facilities and not require VMT mitigation under Section 15064.3. GHG emissions per mile in the U.S. have also fallen by over 22 percent, and at an average rate of 1.7 percent per year from 2004 to 2017. [136] It is likely that the historical rate of reducing vehicular GHG emissions per mile reduction will be at least as high or exceed previous rates of improvement through new engine technology and, especially in California, the increased deployment of electric, hydrogen fuel cell and other low- to zero-emission vehicles. If vehicular GHG emission per mile fall by 14 percent, consistent with the reduction rate during 2004 to 2017, by 2029, CO_2 emissions for vehicular use would be 8,800,000 metric tons lower than in 2021 with no change in VMT. The drastic housing and mobility impacts that result from the Redlining Regulations do not generate commensurately large, or even reasonably likely, GHG emission reduction benefits.

[135] Calculated from *SCAG Transportation Safety Regional Existing Conditions* (2017), http://www.scag.ca.gov/programs/Documents/SafetyFactSheet_scagIMP.pdf (last visited April 1, 2021); *SCAG, Profile of the City of Los Angeles* (2019), at 4, https://www.scag.ca.gov/Documents/LosAngeles.pdf (last visited April 1, 2021) *and U.S. EPA, Office of Transportation and Air Quality, 2018 Automotive Trends Report*, Section 3, Table T.3.1, https://www.epa.gov/sites/production/files/2019-03/420r19002-report-tables.xlsx (last visited April 1, 2021) (2017 estimate of 357 grams of CO_2 per mile); *see also* related General Allegations below.

[136] U.S. EPA, Office of Transportation and Air Quality, 2018 Automotive Trends Report, Section 3, Table T.3.1, https://www.epa.gov/sites/production/files/2019-03/420r19002-report-tables.xlsx (last visited April 1, 2021).

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177. Housing and transportation researchers have shown that residential densification is effective only when employment centers and employment density, not population are located near transit.[137] The uniquely high employment density in places like Manhattan, which developed decades ago under economic conditions that have dramatically changed, is why transit use is higher in the borough than in the rest of the U.S.. In California, as in the vast majority of the rest of the nation, employment density has been decentralized. The era of working for a single large company with a massive centralized location ended decades ago, and employment has since fragmented, with most people working in multiple locations, taking on different jobs and working for shorter periods or in multiple "gig" projects that end and renew on a frequent basis. This is particularly true for the state's aspiring minority, working and middle class population which accounts for the majority of construction, agriculture, personal service and similar low density employment that cannot be reached by using transit.

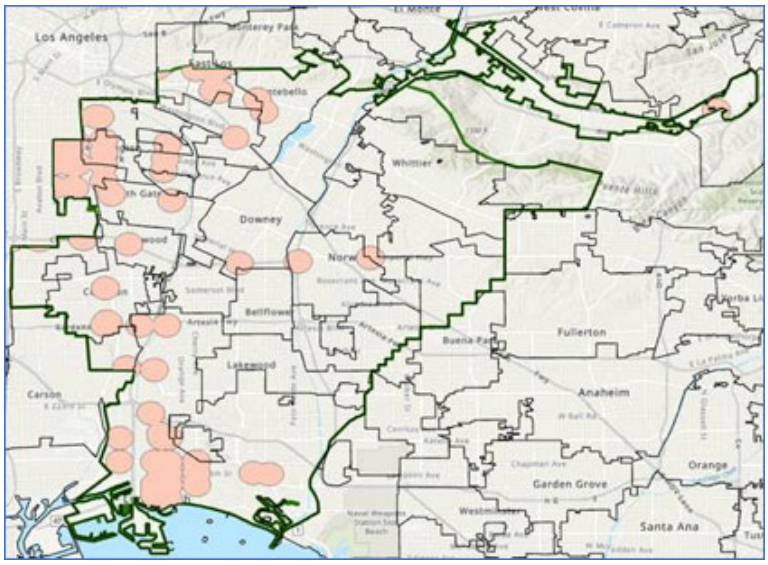
178. The fact that California's most heavily urbanized areas already have much higher population density than the rest of the country but do not use public transit for most trips, including 94 percent of all work commutes, demonstrates that the Redlining Regulations are unlikely to significantly reduce VMT or GHG emissions. Despite billions of dollars' worth of transit improvements, including hundreds of miles of new rail and subway lines throughout the state, transit use has been steadily declining[138] Bus ridership for L.A. Metro, the nation's largest transportation agency (even before the COVID pandemic caused even steeper ridership losses of 70-90%), has fallen by more than 25 percent since 2009.[139] The state's Latino workforce in particular has dramatically shifted from transit to automobile commuting since 2010.

179. As shown in Figure 20, there are multiple locations extending from Long Beach to downtown Los Angeles that are already heavily developed and that have large populations in and

[137] *See, e.g.,* Kolko, *Making the Most of Transit Density, Employment Growth, and Ridership around New Stations*, Public Policy Institute of California (Feb. 2011), https://www.ppic.org/content/pubs/report/R_211JKR.pdf (last visited April 1, 2021)
[138] Manville et al., *Falling Transit Ridership, California and Southern California*, SCAG (Jan. 2018), at 26, https://www.scag.ca.gov/Documents/ITS_SCAG_Transit_Ridership.pdf (last visited April 1, 2021).
[139] Nelson, *L.A. Is Hemorrhaging Bus Riders – Worsening Traffic and Hurting Climate Goals*, Los Angeles Times (June 27, 2019), https://www.latimes.com/local/lanow/la-me-ln-bus-ridership-falling-los-angeles-la-metro-20190627-story.html (last visited April 1, 2021).

near areas within one-half mile of existing transit facilities. These are the locations where the Defendants are attempting to shoehorn all of the state's new housing by means of the unlawful Redlining Revisions.

Figure 20: Designated Transit Priority Areas in the Los Angeles Region[140]



180. Yet, as shown in Figure 21, bus ridership is quite low, with the vast majority of the area having fewer than two bus trip origins per acre per day, and only a very small fraction of locations with over 10 trip origins per acre per day.

[140] Gateway Cities Council of Governments, personal communication, 2019.

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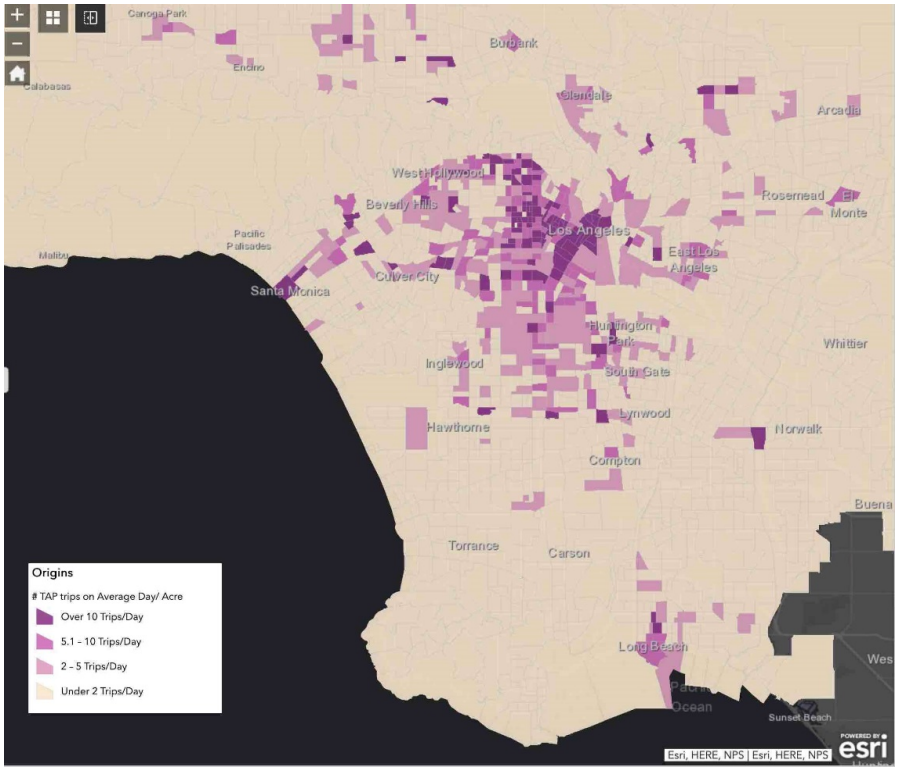
Figure 21: Number of Transit Access Pass Bus Trip Origins per Acre per Day[141]



181. The high cost, small size and lack of open space of the dense multifamily apartments that can be built near transit in the state are likely to attract younger workers, generally without families, who are willing to work for a few years in higher paying "keyboard" economy jobs before relocating to less expensive, more livable areas later in life. As the LAO has noted, many of the future residents in dense urban housing may already have a preference for transit and no net VMT or GHG reductions would occur from locating such residents closer to transit facilities.[142] Wealthier residents also tend to use vehicular travel, including Uber and Lyft, to access work and for other purposes even if they live near transit. Studies of residential density and transit have shown that residential densification alone has at most a minimal effect on vehicular use.[143] This is true even in the portions of New York City, such as Staten Island, that do not have the historically unique

[141] Metro, Origin-Destination Patterns, TAP trips on Average Day/Acre, NextGen Data Center, https://arellano.maps.arcgis.com/apps/webappviewer/index.html?id=4c7b5778da734b9b867c149ebb2492b3 (last visited Nov. 13, 2019).
[142] Taylor, *supra* note 35, at 38.
[143] *See, e.g.,* Brownstone et al., *A Vehicle Ownership and Utilization Choice Model With Endogenous Residential Density*, The Journal Of Transport And Land Use (2014), https://www.jtlu.org/index.php/jtlu/article/view/468/437.

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employment density of Manhattan and resemble the vast majority of the rest of the nation, including most of California.[144]

182. The fact that even temporary, younger workers in short-term internships cannot use transit to reliably access work was highlighted in 2018 testimony to CARB by a representative from the Sacramento Area Council of Governments ("SACOG"). SACOG's representative testified that that participants in summer internship jobs for disadvantaged teenagers were chronically unable to arrive at work on time despite efforts to do so using public transit. SACOG surveyed the interns and commented that irregular transit service, slow transit times from distant locations, and the need for multi-transfer transit commutes, prevented on-time arrivals. A vehicle-based microtransit solution was then implemented by the SACOG to solve the transit-related problems experienced by its interns.[145]

183. The Redlining Regulations do not consider the fact that creating expensive, small and undesirable housing that is not affordable for much of the state's population, including aspiring minority, working and middle class residents, will displace people, jobs, businesses, and the related VMT and GHG emissions, to other, high-emission locations. According to the U.S. EIA, in 2016 California per capita CO_2 emissions were about 9.2 tons per person per year compared with an average of 16 tons per person in the nation as a whole. Per-capita emissions in Texas were 23.4 tons per year.[146] Each person, vehicle trip, or business activity that leaves California for another U.S.

[144] *See, e.g.*, King, et al., *The Poverty of the Carless: Toward Universal Auto Access*, Journal of Planning Education and Research (Feb. 2019), at 11-14, https://www.researchgate.net/profile/Michael_Manville/publication/330813946_The_Poverty_of_the_Carless_Toward_Universal_Auto_Access/links/5c58fe8792851c22a3aa4ea4/The-Poverty-of-the-Carless-Toward-Universal-Auto-Access.pdf?origin=publication_detail (last visited April 1, 2021).

[145] Testimony of SACOG Representative James Corless at California Air Resources Board Meeting, Mar. 22, 2018, at 64-65, available at: https://ww3.arb.ca.gov/board/mt/2018/mt032218.pdf?_ga=2.242134466.1960866577.1573599596-803708540.1559343297; *see also* Sacramento Regional Transit, Microtransit Pilot in Sacramento (May 16, 2018), https://www.sacog.org/sites/main/files/file-attachments/smart_ride_tcc_051618.pdf (last visited April 1, 2021); SACOG, *SACOG Board Kicks Off 'Next Generation Transit' Initiative* (Oct. 31, 2018), https://www.sacog.org/post/sacog-board-kicks-next-generation-transit-initiative (last visited April 1, 2021).

[146] U.S. EIA, *Table 6. Per capita energy-related carbon dioxide emissions by state (2005–2016)* (Sept. 2019), https://www.eia.gov/environment/emissions/state/analysis/excel/table6.xlsx (last visited April 1, 2021).

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destination is, on average, generating nearly twice the GHG emissions that would have occurred in the state.

184. Under California's flawed GHG accounting approach, people, economic activity and VMT that leaves the state count as GHG reductions and a "win" for economic regulators and advocates. In reality, the relocation of people, economic activity and VMT out of state does not eliminate, and in fact increases, global GHG emissions. One million people leaving California reduces the state's CO_2 emission by about 9.2 million metric tons per year but, on average, results in 16 million tons of GHG emissions in the rest of the country. While state emissions are reduced, net global GHG emissions, the cause of climate change, increase by 6.8 million tons per year. If one million Californians were to move to Texas they would generate about 23.4 million tons of CO_2 emissions, a net global GHG emissions increase of 14 million tons over California levels.

185. During 2010 to 2018 alone, California's net domestic migration, excluding international migration, was sharply negative. Over 710,000 more Californians left than moved to the state. Since 2000, California's net domestic migration loss has exceeded 2 million, a trend researchers have called the "Great California Exodus."[147] Due to this outflow of people and jobs, the state has shifted population, economic activity and VMT to higher emission locations. This has resulted in a net increase in global GHG emissions much larger than the potential reductions that could occur from the higher housing and mobility costs and unprecedented constraints produced by the Redlining Regulations.

186. There is substantial evidence that high housing costs and the nation's worst mobility conditions are increasing incentives for people and employers to leave the state, even among the highly paid and younger keyboard economy workforce. In October 2019, CNBC reported that 44 percent of the Bay Area's workforce plans to leave the region within five years, and six percent

[147] U.S. Census Bureau, *State Population Totals and Components of Change: 2010-2018, Population Estimates, Population Change, and Components of Change, Cumulative Estimates of the Components of Resident Population Change for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018* (NST-EST2018-04), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html (last visited April 1, 2021); Gray and Scardamalia, *The Great California Exodus: A Closer Look, Center For State and Local Leadership at the Manhattan Institute* (Sept. 2012), https://media4.manhattan-institute.org/pdf/cr_71.pdf (last visited April 1, 2021).

within 12 months. Nationally, 80 percent of the nation lives in larger urban areas, but only 12 percent want to be located in these areas. About seven of 10 U.S. freelance workers want to relocate from urban areas. While the "technology industry is often perceived as a massive wealth-generating engine, where 20-somethings lounge around, munch avocado toast and cash in stock options," surveys show that "more people today are discontent living and working in the traditional tech hubs" due to "skyrocketing housing costs, pricey child care, the crowds and relentless traffic."[148]

187. Other 2019 surveys have found that 53 percent of state residents are "considering fleeing" to other locations. 47 percent were planning to move within five years, including 55 percent of millennials and 57 percent of Californians with children under 18. The primary reason for relocating was high housing costs, limited housing availability and a declining quality of life.[149]

188. All state climate change policies must, by law, consider emissions "leakage" prior to adoption. At the time the Redlining Regulations were being developed and considered by the Defendants, there was substantial evidence that housing and mobility concerns were shifting an enormous amount of the state's population and other emissions-generating activities to other, higher-emission locations. There is substantial evidence that housing and mobility concerns are causing half of the state's residents to consider leaving California within five years, including the younger, technology-based workforce that is most likely to live in densified, expensive, small rental apartments for at least a short period of time. The Legislature has never authorized Defendants to depopulate the state, create phantom "paper" GHG reductions in California, and increase net global GHG emissions by shifting people and jobs from low-emission California to high-emission Texas and other locations.

H. The Redlining Regulations Will Dramatically Harm the State's Aspiring Minority, Working and Middle Class Populations by Further Reducing the Supply and Cost of Housing, Increasing Mobility Costs, and Requiring Longer Commutes and Travel Times.

[148] Kasriel, *Biggest US Cities Losing Hundreds of Workers Every Day, and Even More Should Be Fleeing*, CNBC (Oct. 16, 2019), https://www.cnbc.com/2019/10/16/biggest-cities-in-us-are-losing-hundreds-of-workers-every-day.html (last visited April 1, 2021).

[149] Daniels, *More Californians Are Considering Fleeing the State as They Blame Sky-High Costs, Survey Finds*, CNBC (Feb. 13 2019), https://www.cnbc.com/2019/02/12/growing-number-of-californians-considering-moving-from-state-survey.html (last visited April 1, 2021).

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189. As detailed above, California's aspiring minority population are currently being disproportionately harmed by the state's housing and mobility crises. The Redlining Regulations will increase and cause additional racially disparate impacts.

190. The Redlining Regulations modify the CEQA Guidelines in a manner that substantially decreases the likelihood that housing can and will be built in the state other than within existing urbanized areas near transit. Even infill housing advocates concede that limiting new housing to existing urban areas of the state will severely impact existing minority populations. U.C. Berkeley's study of building 1.92 million new homes only in dense infill areas also found that this development would require the "demolition and redevelopment of tens and perhaps hundreds of thousands of units….currently rent[ing] for below the median rents for their neighborhoods."[150] Consequently, the researchers recommended the adoption of major new housing subsidy programs – none of which were or are addressed in the Redlining Regulations – to compensate for the inability of displaced, lower income and disproportionately minority populations to purchase or rent newly constructed homes where they once lived.[151]

191. The state's misguided effort to address GHG emissions by further urban population densification has already displaced existing, less affluent minority residents to less expensive peripheral locations in the eastern portions of coastal California counties, or farther to the east in the Central Valley, San Bernardino County, or Riverside County. This process has already transformed about 10 percent of formerly minority and working class neighborhoods in the Bay Area, and measurable displacement is occurring in another 48 percent of all Bay Area neighborhoods. Communities of color and renter neighborhoods, which consist of disproportionately minority residents, have been found to be most acutely at risk of displacement.[152]

192. Other studies show that the "resegregation" of the Bay Area due to high housing costs and the replacement of lower income minority populations by higher income, less diverse residents is driven by income inequality and "a racialized market economy organized around the

[150] Decker, *supra* note 125, at 25.
[151] *Id.* at 9-10.
[152] Verma, *supra* note 46.

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needs of wealthier residents" that is "turning unprecedented prosperity into an engine for new forms of injustice for people of color, women, and immigrants."[153]

193. The same process of displacement is occurring and will be further stimulated by the Redlining Regulations in Southern California. A report commissioned by the Los Angeles County Board of Supervisors found that 89 percent of the housing units that are most at risk of steep escalations in rent are in transit-served neighborhoods with a disproportionate population of minority residents.[154] The state lacks, and the Redlining Regulations take no account of, the need for trillions of dollars of additional state programs that would be necessary for aspiring minority, working and middle class populations to live in new, densified urban housing.

194. For example, the City of Los Angeles recently estimated that if it were to build 35 percent of the low income housing units assigned to it under state RHNA laws, and if the per unit cost was held at $500,000, and if the city maintained its practice of capping its contribution to $120,000 per unit, and if other as-yet unidentified or woefully underfunded federal, state and other funding sources were assumed to be available for the remaining $380,000 per unit, then the city's obligation would be $30 billion dollars (three times higher than its total annual budget).[155] There is zero evidence that the city (or anyone else) can and will pay for these housing units (none of which would even be available to median income families, who would continue to be priced out of coastal communities).

195. This is why the non-partisan LAO concluded that California's regulatory framework and policies – including CEQA – needed to be reformed to restore the housing market so it actually worked for Californians. The LAO further concluded that these regulatory reforms were critical

[153] Bay City News, *Waves of Displacement, Resegregation Affect Bay Area Communities of Color* (July 10, 2019), https://sfbay.ca/2019/07/10/waves-of-displacement-resegregation-affect-bay-area-communities-of-color/ (last visited April 1, 2021).
[154] California Housing Partnership, *Los Angeles County Annual Affordable Housing Outcomes Report,* (Apr. 30, 2019), at 4, http://chpc.net/wp-content/uploads/2019/06/LA-County-Affordable-Housing-Outcome-Report-V3_with-appendix.pdf (last visited April 1, 2021).
[155] City of Los Angeles, Inter-Departmental Correspondence from Rushmore Cervantes, General Manager, Housing and Community Investment Department, Vincent Bertoni, AICP, Director of Planning, and Sharon Tso, Chief Legislative Analyst to Honorable Members of the Planning and Land Use Management Committee, dated Oct. 24, 2019, http://clkrep.lacity.org/onlinedocs/2019/19-0773_misc_10-25-2019.pdf.

since available public funding for housing would be fully absorbed to house the most economically distressed special needs populations.[156]

196. The Redlining Regulations will also greatly increase the transformation of California from a state that has historically afforded homeownership opportunities for the majority of its residents to a renter-dominated society. This shift will deprive the state's growing Latino, African American and other minority populations of the economic and social resources that owning a home provided prior generations, especially the state's declining number of white residents. Not only will the substantial majority of new housing contemplated by the Redlining Regulations be rental units, but the older, largely white population that was able to buy a home are not selling those homes when moving to a new property - thereby increasing the supply for younger buyers – but rather are putting them on the rental market as income properties.

197. As one U.C. Berkeley researcher observed: "Owning a home is the primary mechanism for building wealth and economic mobility…Without wealth, how do you pay for your kids' college education or create a better life for your heirs?"[157] High housing costs have already led what researchers have called the "rise of the renter region" in California. Minority and households of color account for a disproportionate share of the California population that has no choice but to rent rather than own a home.[158] The Redlining Regulations will increase these racially disparate impacts by creating even larger and more severe "renter regions" throughout the state and depriving minority residents of the opportunity to build wealth through homeownership.

198. The state's aspiring minority communities currently account for a disproportionately large share of California households forced to pay 30 percent or more of total household income for housing. The Redlining Regulations will increase the racially disparate impact of the state's high housing costs by creating incentives through the CEQA process to build apartments in extremely expensive and limited urban areas near transit. Minority, working and middle class households will be unable to afford to rent or buy new housing in these areas. In addition, as minority populations

[156] California's High Housing Costs, *supra* note 47, at 35.
[157] Collins, *The New American Dream: Leasing Your House*, Orange County Register (June 29, 2018), https://www.ocregister.com/2018/06/29/the-new-american-dream-leasing-your-house/ (last visited April 1, 2021).
[158] Samara, *supra* note 65, at 7.

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are displaced, demand for housing in peripheral regions, such as San Bernardino or the San Joaquin Valley, will increase. In 2015, the LAO determined that high housing costs in coastal locations increased housing costs in adjacent inland communities due to population displacement.[159]

199. The CEQA Guidelines amendments adopted in the Redlining Regulations, however will constrain or preclude new housing construction in peripheral regions. Consequently, the number of potential home buyers and renters in areas that are now barely affordable for displaced minority populations will increase, but the housing supply will remain static or grow only incrementally over time. Housing prices will rise in these locations and the number of minority as well as working and middle class households burdened by excessive housing costs will increase.

200. The Redlining Regulations will cause racially disparate impacts on commuting and housing costs by further pricing minority communities out of Coastal Job Centers, and forcing the displaced population to pay excessive additional costs for new housing outside of urban transit locations. Displaced minority workers who work in coastal areas, will pay much higher fuel costs than in the rest of the country due to California's cap-and-trade program. New housing outside of urban transit areas will be required to mitigate for VMT impacts under the Redlining Regulations, including the Underground VMT Regulation. If these impacts are mitigated by buying bus passes for current vehicle users over a 30 year occupancy period of a new home, per unit costs, and the associated selling prices or rents, would increase by ten to hundreds of thousands of dollars.

201. Notwithstanding cap-and-trade and VMT mitigation, new housing will also be required to mitigate in some manner for GHG impacts under Section 15064.4. Housing in urban transit centers is already unaffordable for most of the state's aspiring minority households. New housing subject to CEQA review in peripheral areas that are now barely affordable will be subject to multiple new and duplicative climate-related mitigation and fossil fuel cost increases imposed by fuel suppliers to offset the cost of cap-and-trade compliance.

202. The state's minority workforce increasingly depends on automotive mobility and cannot effectively utilize public transit. For the first time in state history, and in violation of several legislated and funded roadway improvement laws, the Redlining Regulations treat roadway

[159] California's High Housing Costs, *supra* note 47, at 35.

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capacity enhancements as a CEQA impact that must be mitigated, rather than as a mitigation requirement for new projects to reduce congestion and travel times for all Californians.

203. Minority and households of color are disproportionately displaced from Coastal Job Centers to peripheral locations and already suffer from "excruciatingly long commutes" on increasingly dysfunctional roadways. Long commutes have adverse effects on health and family stability. As the director of Land Use and Housing at Urban Habitat, a Bay Area non-profit recently noted, long commutes are "very challenging. … Your entire life becomes shaped by your work and your commute to work. Your entire life becomes an appendage to your job."[160] The Redlining Regulations will further increase commute times and erode roadway capacity and cause racially disparate mobility impacts.

204. In a landmark study of American housing supply, Harvard University economist Edward Glaeser found that California's housing market was unaccountably limiting the number of new homes in high opportunity, low GHG emissions communities, and instead displacing people and jobs to lower opportunity, high GHG locations. "If the welfare and output gains from reducing regulation of housing construction are large, then why don't we see more policy interventions to permit more building in markets such as San Francisco?" Glaeser concluded that part of the problem was that existing homeowners, who are disproportionately white in California "do not want more affordable homes: they want the value of their asset to cost more, not less." In addition, they "may not like the idea that new housing will bring in more people, including those from different socio-economic groups."[161]

205. The Redlining Regulations have precisely the same adverse consequences identified in Glaeser's study. They keep home values high for older white Californians who are declining in number but own most of the state's housing stock. They make it even harder for aspiring minority, working and middle class residents to live in the highest opportunity, lowest GHG emission

[160] Bay City News, *Waves of Displacement, Resegregation Affect Bay Area Communities of Color* (July 10, 2019), https://sfbay.ca/2019/07/10/waves-of-displacement-resegregation-affect-bay-area-communities-of-color/ (last visited April 1, 2021).

[161] Glaesar and Gyourko., *The Economic Implications Of Housing Supply, National Bureau Of Economic Research* (Sept. 2017), at 20, https://www.nber.org/papers/w23833.pdf (last visited April 1, 2021).

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communities in the state. The Redlining Regulations unquestionably cause racially disparate housing and mobility impacts.

I. The Redlining Regulations Illegally Fail to Consider Feasible Alternative Measures to Achieve Comparable or Greater Global GHG Reductions Without Causing Racially Disparate Impacts.

206. For decades, courts declined to apply civil rights laws to housing regulations and land use practices that had a blatantly discriminatory effect if they were not facially racist. In 2015, the U. S. Supreme Court found that housing policies and programs with a clear racially disparate impact violate the civil rights of adversely affected minorities.[162] In 2016, the Ninth Circuit, building on the U.S. Supreme Court's decision, invalidated housing and land use policies that had a disparate impact on Latino residents.[163] Housing policies and practices that have a racially disparate impact may not be implemented under state and federal Fair Housing laws if there are feasible, less discriminatory alternatives that meet the legitimate objectives of the proposed agency action. There are far more feasible, non-discriminatory means of reducing GHG emissions than making California housing unaffordable by adding GHG and VMT mitigation costs to reduce emissions – and induce more Californians who cannot afford to live here to move to much higher per capita GHG states like our top out-migration destinations of Texas, Arizona and Nevada.

207. The Redlining Regulations were adopted by the Defendants with no meaningful consideration of less discriminatory alternatives. The Defendants deliberately and willfully attempted to avoid any such assessment by failing and continuing to refuse to disclose the amount of GHG emission reductions that the Redlining Regulations could achieve. This refusal is particularly remarkable given the blatantly discriminatory effects of increasing the cost and reducing the supply of housing in a market already in crisis, displacing aspiring minorities to peripheral areas, and forcing displaced minorities to commute longer on increasingly dysfunctional roadways that the Redlining Regulations will deliberately create. These massively discriminatory effects will have almost no measurable GHG reductions in California, and are highly likely to result

[162] *Inclusive Communities, supra* note 83.
[163] *Avenue 6E Investments, LLC v. City of Yuma Arizona* (9th Cir. 2016) 818 F.3d 493, 512.

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in out of state population and economic activity displacement, among other unintended consequences, that will result in a net global GHG emission increase, not decrease.

208. There are multiple feasible and less discriminatory GHG emission reduction alternatives to the Redlining Regulations. Given the uncertainty that the Redlining Regulations will have any meaningful effect, or a negative effect on global GHG emissions, the most reasonable and practical alternative is to rescind them. None of the legally deficient VMT and GHG amendments to the CEQA Guidelines or any of the unlawful prescriptive VMT thresholds in the Underground VMT Regulation, are required to meet California's most aggressive legislated climate change policy, which requires state emissions to fall by 40 percent from 1990 levels by 2030. Rather than quixotically attempt to reduce transportation-related GHG emissions by implementing racially discriminatory, massively disruptive housing policies, the state should focus on meeting the legislated 2030 objectives by developing and refining new technologies and programs that will have far more likely and significant GHG reduction benefits on a global scale.

209. The Redlining Regulations frequently assert that "early action" to promote densification near transit is necessary to meet potential future state objectives. There are sound reasons, however, for greater caution and careful review of GHG policy results before rushing to implement precipitous, racially discriminatory housing measures.

210. Despite its reputation as a climate leader, California has not contributed significantly to GHG reductions in the U.S., let alone on a global scale. From 2005-2016, the EIA estimated that U.S. CO_2 emissions fell by over 800 million metric tons per year. California accounted for just 22 million tons, or 2.8 percent of this reduction. California has the largest population of any state, but GHG emissions were reduced since 2005 by a greater net volume in 14 other, smaller states, including Pennsylvania, Alabama, Ohio, Kentucky and Missouri.[164] Most of these states have made substantially larger contributions to global GHG emission reductions by implementing practical policies, such as replacing coal fired power plants with natural gas, that have clear and unambiguous benefits. California has focused on speculative and racially discriminatory efforts like

[164] U.S. EIA, *Energy-Related Carbon Dioxide Emissions by State, 2005-2016* (Feb. 2019), Table 1, at 8-9, https://www.eia.gov/environment/emissions/state/analysis/pdf/stateanalysis.pdf (last visted April 1, 2021).

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the Redlining Regulations instead of, for example, converting the state's diesel trucking fleet to natural gas, which would have the dual benefits of reducing GHG emissions while reducing particulate pollution that disproportionately impacts the health of minority communities.

211. The state has also not addressed GHG emissions leakage, either from inducing population and economic activity to move to locations with higher emissions, or that is caused by state energy imports which purportedly are derived from "clean" generation but which many experts believe simply allow dirtier power to be "shuffled" and sold to other users.[165] According to the LAO, and contrary to state law, California environmental policymakers have developed almost no credible information about the magnitude of emissions leakage from the state.[166] Stanford University researchers have estimated that leakage and resource shuffling could currently be offsetting a substantial amount of the state's legislated GHG reduction objectives.[167] California climate policies must address these fundamental and major issues before undertaking housing and mobility experiments with clear racially discriminatory harms but no clear, or potentially any, global GHG emission benefits.

212. The state could also implement automotive GHG emission standards, which currently do not exist but have proven remarkably successful at virtually eliminating other vehicular pollutants without constraining housing or mobility. As shown in Figure 22, total U.S. emissions from highway vehicles were reduced by more than 90 percent for pollutants such as sulfur dioxide ("SO_2"), carbon monoxide ("CO") and volatile organic compounds ("VOC"), and all pollutants discharged from highway vehicles have dramatically fallen since 1970 despite a massive 50 percent increase in total U.S. VMT.

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[165] Green, *Don't Link Carbon Markets*, Nature (Mar. 21, 2017), https://www.nature.com/news/don-t-link-carbon-markets-1.21663 (last visited April 1, 2021).
[166] Taylor, *The 2017-18 Budget: Cap-and-Trade*, LAO (Feb. 2017), at 15, https://lao.ca.gov/reports/2017/3553/cap-and-trade-021317.pdf (last visited April 1, 2021).
[167] Cullenward and Weiskopf, *Resource Shuffling and the California Carbon Market, Environmental and Natural Resources Law & Policy Program Working Paper*, Stanford Law School (July 18, 2013), https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/440262/doc/slspublic/Resource%20Shuffling%20-%20Cullenward%20and%20Weiskopf.pdf (last visited April 1, 2021).

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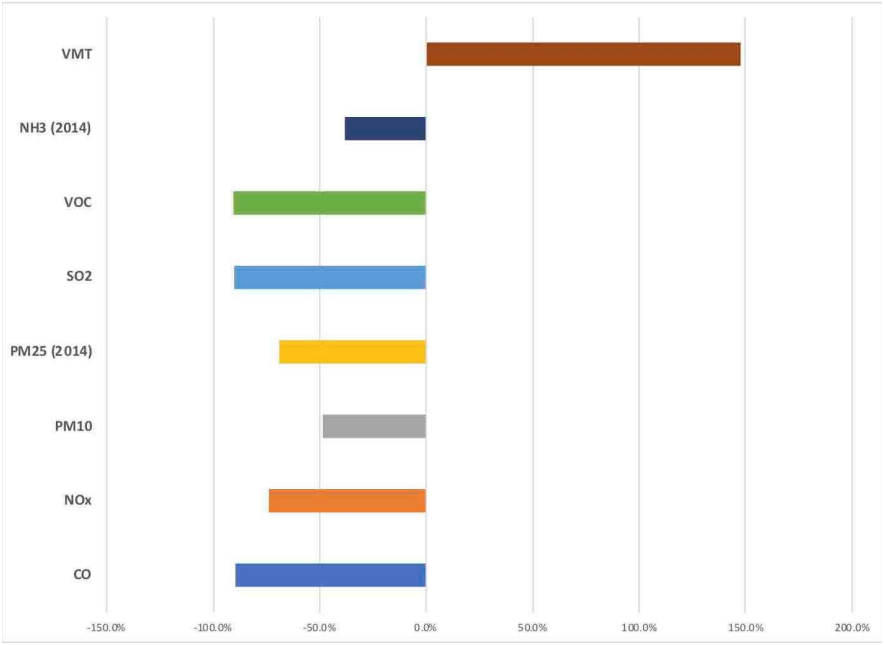
Figure 22: Percent Change in Annual Tons of Pollution by Type from Highway Vehicles and Annual VMT, 1970-2018 (2014 where noted).[168]

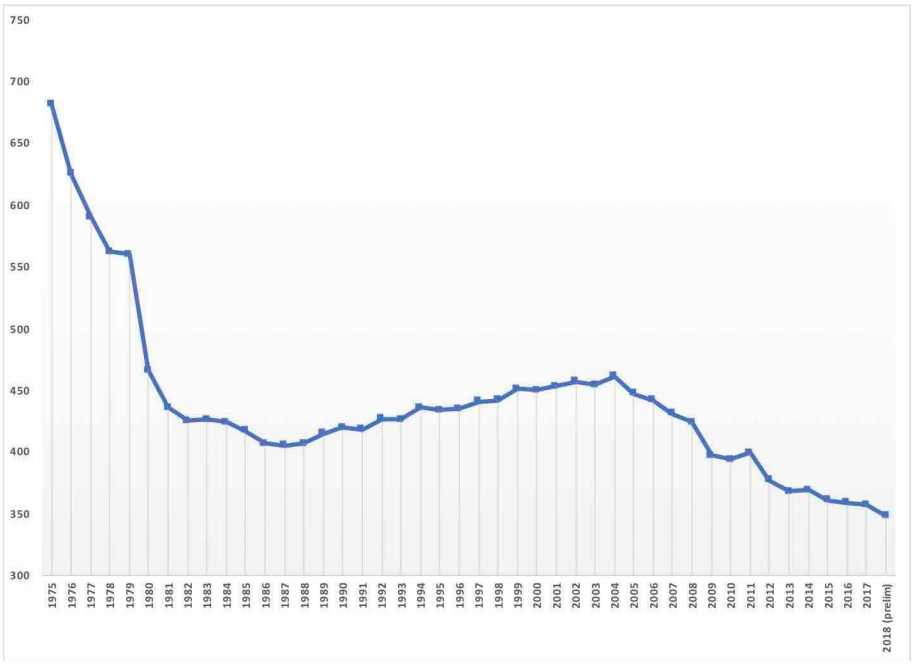


213. California has significant and demonstrable expertise in reducing vehicular emissions, and there is substantial evidence that similar improvements can be made by strengthening the regulation of GHG emissions as well. As shown in Figure 23, average vehicular CO_2 emissions fell from 681 grams per mile in 1975 to 461 grams per mile in 2004. From 2004 to 2017, CO_2 emissions per mile were reduced by 22.6 percent and fell from 461 grams per mile to 357 grams per mile, which the U.S. EPA has stated is the "the lowest level ever measured."[169]

[168] Calculated from U.S. EPA, *Air Pollutant Emissions Trends Data, National Annual Emissions Trend, Criteria pollutants National Tier 1 for 1970 – 2018*, https://www.epa.gov/air-emissions-inventories/air-pollutant-emissions-trends-data (from Highway Vehicles) (last visited April 1, 2021) and U.S. Department of Energy, Alternative Fuels Data Center, *Annual Vehicle Miles Traveled in the United States*, https://afdc.energy.gov/data/10315 (last visited April 1, 2021).

[169] U.S. EPA, Office of Transportation and Air Quality, *The 2018 Automotive Trends Report, Greenhouse Gas Emissions, Fuel Economy, and Technology since 1975*, Executive Summary, at ES3, https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100W3WO.pdf (last visited April 1, 2021).

Figure 23: Real-World CO_2 Emissions per Mile, 1970-2018 (2018 preliminary)[170]



214. The Defendants have never disclosed, and continue to refuse to provide, any substantial evidence that continued reductions in GHG emissions from conventional vehicles, and the deployment of very low- or zero-emission hybrid, electric, hydrogen fuel cell and other vehicular technologies, will allow California to achieve its legislated and even reasonably likely future GHG reduction goals without implementing racially discriminatory housing policies and mobility constraints.

215. The Redlining Regulations fail to consider measures that would achieve comparable or greater net global GHG emission reductions by reducing emissions by the state's wealthiest households merely to the same level as average state household emissions. Defendant OPR's "Discussion Draft" on CEQA and Climate Change provides a list of "climate change tools and resources that a lead agency can use to quantify greenhouse gas emissions and determine the significance of project impacts to climate change." One listed tool and resource is the "Cool California website" which is described as a "State of California supported online resource that hosts

[170] U.S. EPA, *Office of Transportation and Air Quality, 2018 Automotive Trends Report*, Section 3, Table T.3.1, https://www.epa.gov/sites/production/files/2019-03/420r19002-report-tables.xlsx (last visited April 1, 2021).

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links to various tools and case studies."[171] The Cool California website, which is located on the CARB server system, includes an interactive "Calculator for Households & Individuals" that generates estimated annual household GHG emissions by household income level and size.

216. Although the calculator allows users to input state and regional locations, it is primarily configured to adjust household emissions at the level of individual zip codes. Table 2 lists the nine largest zip codes in California, which contain 286,000 households and have an average median income of $67,400, almost exactly the same as the statewide median household income of $64,200.

Table 2: Number of Households and Median Incomes in 10 Largest California Zip Codes[172]

Zip Code	Location	Number of Households	Median Income
94109	San Francisco	33,173	$79,979
90250	Holly Park	32,242	$49,417
90046	West Hollywood	29,180	$65,990
94565	Pittsburg	27,966	$62,255
90044	Los Angeles	27,804	$32,278
94110	San Francisco	27,784	$109,747
92683	Westminister	27,700	$57,546
90650	Norwalk	27,238	$63,669
95630	Folsom	26,810	$106,843
90805	Long Beach	26,783	$47,981

217. Table 3 provides the household emission results for each zip code generated by the CARB calculator for the "average" household and households earning $100,000 options, both assuming three person households, as provided in the calculator. The results show that, in every zip code, households earning more than $100,000 per year generate significantly more GHG emissions than average households. The excess emissions from households earning more than $100,000

[171] OPR, *Discussion Draft: CEQA and Climate Change Advisory* (Dec. 2018), at 18, http://opr.ca.gov/docs/20181228-Discussion_Draft_Climate_Change_Adivsory.pdf (last visited March 31, 2021).

[172] U.S. Census Bureau, *2013-2017 American Community Survey (ACS) 5-Year Estimates, Median Income in the Past 12 Months (in Inflation-Adjusted Dollars)*, Table Series S1903, https://data.census.gov/cedsci/ (search for "S1903" in topic or table name search field and "California" in state, county or place search field) (last visited March 31, 2021).

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ranges from 17 percent to 20 percent higher than the average household in the 10 largest zip codes in California.

Table 3: Average Household Emissions by Source, 10 Largest California Zip Codes, for Average Earning Households and Households Earning $100,000[173]

	94109	90250	90046	94565	90044	94110	92683	90650	95630	90805
Average Income Household, 3 People										
Construction and water	3.12	3.12	3.12	3.12	3.12	3.12	3.12	3.12	3.12	3.12
Clothing	1.94	2.3	1.83	2.78	2.26	2.73	2.87	2.99	3.14	2.49
Natural gas and electricity	3.47	4.5	3.91	5.92	4.91	4.82	5.51	5.01	6.79	4.72
Air Travel	1.96	1.21	1.7	1.74	0.58	2.1	1.79	1.52	2.9	1.03
Furniture	2.12	1.8	1.89	2.38	1.37	2.57	2.43	2.3	3.31	1.77
Car Fuel	5.44	11.28	8.28	16.52	9.15	8.34	15.04	15.55	16.8	11.74
Services	6.83	5.92	6.23	7.44	4.79	7.95	7.57	7.22	9.91	5.84
Total Emissions	**36**	**42**	**39**	**53**	**37**	**44**	**51**	**51**	**60**	**43**
$100,000 Income Household, 3 People										
Construction and water	3.73	3.73	3.73	3.73	3.73	3.73	3.73	3.73	3.73	3.73
Clothing	2.35	2.78	2.21	3.36	2.73	3.3	4.55	3.61	3.79	3.01
Natural gas and electricity	3.93	5.13	4.43	6.68	5.59	5.49	6.05	6.46	7.74	5.35
Air Travel	2.99	1.87	2.59	2.68	0.89	3.17	2.72	2.28	4.46	1.61
Furniture	3	2.54	2.67	3.36	1.94	3.62	3.43	3.25	4.67	2.51
Car Fuel	6.61	13.77	10.16	20.08	11.18	10.16	18.35	18.91	20.53	14.33
Services	9.4	8.15	8.56	10.24	6.58	10.94	10.41	9.94	13.63	8.04
Total Emissions	**45**	**51**	**47**	**65**	**45**	**54**	**63**	**63**	**74**	**52**

218. Table 4 summarizes average emissions by household activity and income group for the 10 largest zip codes in California, the net difference between emissions generated by an average household and households earning $100,000 per year, and potential state GHG reductions that would be achieved by reducing excess emissions of higher income households to average household emissions levels.

[173] Based on emissions estimates for each household category generated by CARB, *Calculator for Households & Individuals*, https://coolcalifornia.arb.ca.gov/calculator-households-individuals (last visited March 31, 2021) for (1) "average" households with 3 persons; and (2) households with $100,000 of income with 3 persons.

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Table 4: Average Household Emissions by Source, 10 Largest California Zip Codes, for Average Earning Households and Households Earning $100,000[174]

	Average Income Household, 3 People	$100,000 Income Household, 3 People	Net Emissions Difference Between Average and $100,000 Households	Excess State Emissions Generated by 4.28 Million Households Earning $100,000+
Construction and water	3.12	3.73	0.61	2,610,104
Clothing	2.53	3.17	0.64	2,738,469
Natural gas and electricity	4.96	5.69	0.73	3,123,567
Air Travel	1.65	2.53	0.87	3,722,607
Furniture	2.19	3.1	0.91	3,893,761
Car Fuel	11.81	14.41	2.59	11,082,244
Services	6.97	9.59	2.62	11,210,609
Total Emissions	45.6	55.9	10.3	44,072,243

219. Approximately 4,280,000, or 33 percent of all California households earn $100,000 or more. Table 4 shows that implementing policies to reduce emissions by the wealthiest California households, the most progressive approach, would reduce state GHG emissions by amounts that substantially exceed the 1,790,000 million ton reduction from 100 percent infill development estimated by U.C. Berkeley researchers and the 1,900,000 million ton potential reductions from reducing VMT in the SCAG area in accordance with the thresholds in the Underground VMT Regulation (see Table 4).

220. Merely taxing or regulating emissions from furniture to achieve average household levels would reduce state GHG emissions by approximately 3,900,000 tons, double the estimated reductions from the Redlining Regulations. Reducing excess clothing emissions to average household levels would achieve a 2,700,000 ton saving per year. Taxing or regulating air travel by the state's wealthiest households would reduce direct emissions by a similar amount and have additional global GHG emission benefits because high altitude emissions have a greater adverse

[174] *See id*. and income estimates from U.S. Census Bureau, *2013-2017 American Community Survey (ACS) 5-Year Estimates, Income in the Past 12 Months (in Inflation-Adjusted Dollars) and Median Income in the Past 12 Months (in Inflation-Adjusted Dollars)*, Table Series S1901 and S1903, https://data.census.gov/cedsci (search for "S1902" and "S1903" in topic or table name search field and "California" in state, county or place search field)(last visited April 1, 2021).

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effect on global climate.[175] The CARB calculator further demonstrates that reducing excess car fuel and household energy consumption by the state's wealthiest households to average household levels would each cut state emissions by over 10,000,000 tons per year, far more than any estimated reduction attributed to housing densification around urban transit, VMT, and deliberately making state roadways more dysfunctional.

221. Focusing state household emission reductions on higher income groups would be more effective and also avoid racially disparate impacts. Such a policy could be readily implemented by such means as taxing the consumption of air travel, furniture, clothing and services to reduce demand, and providing tax credits for lower income households. The state could also develop and implement emission reduction requirements for goods such as furniture and clothing that would not only reduce emissions by wealthy residents, but also spur improvements that would diffuse and reduce emissions nationally and internationally. California has already shown that it can spur such technological improvements by contributing to national and international vehicular pollution reduction standards.

222. Refocusing climate policies from the ineffective and racially disparate Redlining Regulations to reducing GHG emissions by the wealthiest state residents is not only more equitable and progressive, but it also avoids the discriminatory effects caused using the CEQA Guidelines to reduce VMT and GHG emissions. CEQA only applies to new projects. The Redlining Regulations therefore entirely burden new housing in the state, which is most urgently needed by aspiring minority, working and middle class residents, and have no effect on the wealthier, largely white population living in existing owner occupied housing. There is no rational basis for seeking to achieve statewide GHG emission reductions by solely burdening new housing and ignoring the much greater VMT, household consumption, and GHG emissions generated by state residents living in existing housing.

223. State emissions would also be reduced to a much greater extent, and without racially disparate impacts, by policies that cut GHG output from in-state sources that cannot migrate or

[175] Jardine, *Calculating the Carbon Dioxide Emissions of Flight,* Environmental Change Institute (Feb. 2009), https://www.eci.ox.ac.uk/research/energy/downloads/jardine09-carboninflights.pdf (last visited April 1, 2021).

"leak" to other locations. The non-partisan state Little Hoover Commission has conclusively found that decades of mismanagement in California has caused state forests to become unnaturally over-vegetated and prone to hotter and larger wildfires that generate massive amounts of avoidable GHG emissions per year.[176] Properly managing state forests would reduce the magnitude of, and GHG emissions from, in-state wildfires without emissions leakage to other locations. Astonishingly, while the Redlining Regulations would implement racially disparate housing and mobility measures that are highly prone to leakage and have at best speculative net global GHG emission benefits, current California climate policy has no adopted plan or target for reducing emissions from wildfires.

224. As shown in Figure 15, GHG emissions from developing nations over the next several decades will account for all of the world's net emission increases as they increase energy capacity for what are in most cases the world's poorest populations. No meaningful globally significant GHG reductions can be achieved unless developed nations are able to improve living conditions with fewer GHG emissions in the future. A reasonable, socially just and progressive state climate policy would consider whether spending billions of dollars on housing and mobility programs that have racially disparate impacts and few if any globally-significant climate benefits – none of which have been disclosed by the Defendants – would be more effectively spent on assisting cleaner energy and growth in developing nations.

225. Just after he spearheaded Defendants' efforts to adopt the unlawful Redlining Regulations, Mr. Alex left government to head "Project Climate" at UC Berkeley's Center for Law, Energy, & Environment. In September 2019, he wrote that "reducing the black carbon emissions from open flame cooking [by three billion of the world's poorest residents] immediately reduce climate forcing." As a result, he urged that "a multi-billion dollar effort to cut open flame burning in half in five to ten years" be implemented to achieve "dramatic" GHG emissions benefits.[177]

[176] Little Hoover Commission, *Fire on the Mountain: Rethinking Forest Management in the Sierra Nevada, Report #242* (Feb. 2018), at 1-2, https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/242/Report242.pdf (last visited April 1, 2021).
[177] Alex, *supra* note 106.

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226. It is virtually certain that Defendants could have identified scores of similar measures that would cost-effectively reduce global GHG emissions and improve, rather than degrade, the quality of life for the world's less affluent populations. Instead, Defendants opted to pursue the enormously expensive and massively disruptive Redlining Regulations and cause racially disparate impacts to housing and mobility. Unlike the open flame cooking programs the former head of OPR now advocates, the Defendants have, to this very day, never disclosed precisely how Redlining Regulations will achieve any net global climate benefits, let alone benefits commensurate with their cost and racially disparate impacts. There is no substantial evidence of any kind that the Redlining Regulations are necessary to achieve any legislatively adopted climate objective, or that they have a reasonable likelihood of success. In contrast, there is overwhelming evidence that alternative measures could and should have been adopted in lieu of the Redlining Regulations that would have significant and predictable global climate benefits without generating racially disparate impacts.

227. Within the context of California's environmental and climate politics, this lawsuit asks this Court and the Attorney General to recognize the evidentiary value and fundamental civil rights at stake in the Redlining Regulations. It is no coincidence that "environmental" CEQA lawsuits opposed to new housing – especially multi-family housing affordable to minority families in higher income, whiter, and wealthier coastal areas – contribute to the astronomical housing cost increases in those areas, accompanied by an explosion of majority-minority homeless residents, ever-dropping minority homeownership, and the gentrification and displacement of legacy minority residents and communities.[178] While multiple pre-existing government practices caused and contributed to the fact that California's residential communities are more segregated now than they were before the civil rights reforms of the 1960's, what cannot lawfully occur is a new government practice that actually exacerbates and worsens this segregation pattern. The Redlining Regulations do just this by weaponizing CEQA to use the pre-existing travel patterns in California to intentionally force new housing into inherently high cost, high density housing in urban minority

[178] For example, there has been a decrease in San Francisco's Black population from 12% to 5% over the past 20 years. *New Map Shows the Decline of SF's Black Population*, The Bold Italic,(Dec. 2014) https://thebolditalic.com/new-map-shows-the-decline-of-sf-s-black-population-the-bold-italic-san-francisco-651aba4e199a (last visited April 1, 2021).

neighborhoods served by transit – and impose prohibitively expensive procedures, legal risks, and new mitigation fees on housing outside these neighborhoods where residents will use and have the exact same travel patterns as their pre-existing neighbors. Stripped of all CEQA jargon, Defendants have imposed a new legal regime intentionally designed to, and known at the time of approval to result in, the disparate gentrification and displacement of minorities from lower cost housing near transit, and the cessation of housing that is affordable to the now majority-minority families earning median incomes who have until the housing crisis been able to afford to buy a home, and working families earning less than median income who have until the housing crisis been able to rent a home or apartment from California's once ample housing supply. The statistically-demonstrated disparate impact of the Redlining Regulations to California's majority minority family victims of the housing crisis shift the burden of proof to Defendants' to demonstrate how the adverse environmental from allowing housing-deprived minority families from driving (increasingly in an electric car) the same distances as their next door neighbor cannot be accomplished without this racially discriminatory effect. In a separate legal proceeding by The Two Hundred challenging the California Air Resource Board's own VMT-reduction mandate on similar grounds, the state argued that CARB was entitled to impose racially discriminatory housing policies under the Constitution because housing was not a protected class. That warped legal rationale, resoundingly rejected by the judge, demonstrates not just a failure of legal comprehension, it also demonstrates the radical extent to which environmental bureaucrats righteously believe that their environmental agenda reigns supreme – over the federal and state Constitution, Fair Housing Laws, and the legal and moral imperatives of protecting civil rights. Plaintiffs support California's environmental and climate leadership goals. Members of Plaintiffs also want to breathe clean air, drink clean water, protect natural resources, and address global climate change. Plaintiffs do not believe that expanding CEQA regulations to increase CEQA compliance costs and litigation obstacles for housing projects, or to exacerbate already deeply discriminatory obstacles to attainable homeownership for California's minority families, interferes with any of these environmental or climate goals. Plaintiffs also support rental housing and government-financed affordable housing (which is overwhelmingly rental housing), but rental housing does not create the multi-generational wealth and social equity benefits of home ownership.

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For over 100 years, beginning with the Great Depression and the rise of global communism, both the U.S. and California have supported homeownership as a cornerstone of upward mobility – an integral component of the American (and California) Dream.

228. CEQA is California's most venerated environmental statute, and – when not abused – CEQA continues to be important to protecting the environment. However, both CEQA and other important state environmental goals are undermined when our homeless population and poverty rates are the worst in the nation, and when 40 percent of Californians – disproportionately minorities – are at risk of losing their housing because we do not have enough housing, the housing we do have costs too much, and even starter homes are unaffordable to hard-working minority families earning median or even above-median (e.g., union) wages.

229. Plaintiffs do not agree that costly environmental and climate policies targeting housing that incentivize our adult children and grandchildren to leave California to live in higher greenhouse gas emitting states like Texas and Nevada where they can afford to buy a home is a lawful or effective climate policy, or that CEQA's implementing regulations should be expanded to exacerbate historic and existing residential housing discrimination by increasing the cost of new housing most needed by our minority residents. Plaintiffs opposes the economic equivalent of a "CEQA tax" to make new residents pay steep, unauthorized, and unlawful new "mitigation" costs for the same ability to drive to and from work or school as existing residents, or by making it even easier to win CEQA lawsuits aimed at delaying and derailing new housing based on ambiguous, infeasible, contradictory, un-enacted, ineffective, and fundamentally discriminatory and unlawful climate policies.

J. The Redlining Regulations Are Unconstitutional and Unlawful, and Exacerbate the Housing Crisis, and Housing-Induced Poverty and Homelessness Crises

230. The Two Hundred hereby challenges three of Defendants' 30 revisions to Title 14, Chapter 3 of the California Code of Regulations, Guidelines for the Implementation of the California Environmental Quality Act (**"CEQA Guidelines"**):[179] sections 15064.3, 15064.4, and

[179] As recognized in numerous court decisions, and summarized by OPR itself: "The CEQA Guidelines are administrative regulations governing implementation of the California

15126.4.[180] The Two Hundred further challenges corresponding anti-housing revisions to Appendix G of the CEQA Guidelines (**"Appendix G"**); specifically, revisions to Appendix G sections I(c) (Aesthetics), VIII(a-c) (Greenhouse Gas), XIII(a) (Noise), and XVII(b) (Transportation). Finally, The Two Hundred hereby challenges an unpromulgated regulatory document issued concurrently by Defendant OPR, entitled the *Technical Advisory on Evaluating Transportation Impacts In CEQA*[181] (the **"Underground VMT Regulation"**), which constitutes an unlawful "underground regulation" by requiring minimum Vehicle Miles Traveled ("**VMT**") CEQA compliance requirements in the form of VMT significance criteria and VMT analytical methodologies. The challenged revisions to Section 15064.3, Appendix G section XVII(b) (Transportation), and the Underground VMT Regulation are collectively referred to herein as the **"VMT Redlining Regulations."** The challenged revisions to Section 15064.3 (VMT), Section 15064.4 (GHG), and Section 15126.4 (Mitigation Detail), along with the Appendix G Revisions, and the Underground VMT Regulation, are collectively referred to herein as the **"Redlining Regulations."**

K. Defendants Failed to Comply with CEQA and the Administrative Procedures Act

231. In section 21083(a) of the Public Resources Code, the Legislature directed that Defendant OPR shall prepare and develop regulations for the implementation of CEQA "by public agencies."[182] The Legislature further directed that these regulations "shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a 'significant effect on the environment.'" Pub. Res. Code § 21083(b).

Environmental Quality Act." OPR, *Current CEQA Guidelines Update: What are the CEQA Guidelines?*, http://opr.ca.gov/ceqa/updates/guidelines/ (last visited March 31, 2021).

[180] The three challenged sections of the CEQA Guidelines are sometimes individually referred to herein as "Section 15064.3", "Section 15064.4", and "Section 15126.4".

[181] OPR, *Technical Advisory on Evaluating Transportation Impacts in CEQA* [hereinafter *Underground VMT Regulation*] (Dec. 2018), http://www.opr.ca.gov/docs/20190122-743_Technical_Advisory.pdf.

[182] As recognized in numerous court decisions, and summarized by OPR itself: "The CEQA Guidelines are administrative regulations governing implementation of the California Environmental Quality Act." *See*, OPR, *Current CEQA Guidelines Update: "What are the CEQA Guidelines?,* http://opr.ca.gov/ceqa/updates/guidelines/ (last visited April 1, 2021). To avoid confusion between promulgated regulatory "guidelines" and unpromulgated agency guidance documents, the CEQA Guidelines are referred to herein as Regulations.

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232. CEQA regulations are required to be "certified and adopted" by the Defendant NRA in compliance with the California Administrative Procedures Act ("APA"). Pub. Res. Code §21083(e); Gov. Code Chapter 3.5 commencing with section 11340 of Part 1 of Division 3 of Title 2. Government Code sections 11349 and 11349.1 prescribe mandatory criteria for state regulations, which OAL must enforce in its role of reviewing the lawfulness of agency-adopted regulations prior to publication in the California Code of Regulations. Among the mandatory criteria that CEQA regulations must meet to become lawful regulations are:

a. "Necessity," pursuant to which "the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific." Gov. Code § 11349(a);

b. "Authority" means the provision of law which permits the agency to adopt, amend, or repeal a regulation. Gov. Code § 11349(b);

c. "Clarity" means written or displayed so that the meaning of the regulations will be easily understood by those persons affected by them. Gov. Code § 11349(c); and

d. "Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statues, court decisions, or other provisions of law. Gov. Code § 11349(d).

233. Given California's "existential" housing and homelessness crisis, its deep and increasing racial achievement and equity gaps, the global climate change benefits of keeping our families in California instead of migrating to states like Texas where per capita GHG emissions are nearly three times higher than California, Plaintiffs reasonably expected Defendants to amend regulations implementing CEQA to end or at least substantially curtail litigation abuse of CEQA against new housing. Unlike existing housing, new housing must comply with California's many stringent environmental and climate laws and regulations, such as energy and water conservation standards, and a myriad of other "CalGreen Building Code" standards to improve conservation features and reduce energy consumption in new homes, as well as dozens of other laws and

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regulations to protect endangered species, air quality, water quality, water supplies, historic and archeological resources, public health and safety, and the California coast and other special places.[183] Plaintiffs also reasonably expected Defendants to resolve legal ambiguities and comply with the Legislature's express direction that regulations implementing CEQA must provide clear criteria for determining when an environmental impact of a project is "significant" and thus warrants imposition of all feasible "mitigation measures" to avoid or lessen the severity of such an impact. Pub. Res. Code § 21083(b).

234. Defendants failed to comply with their obligations to complete their purported "comprehensive" Guidelines update under CEQA and the APA, summarily dismissed as outside the "scope" of their rulemaking, and otherwise failed to acknowledge or respond to the scores of pages of detailed comments submitted by Plaintiffs or other commenters.

235. OAL began this cascade of agency conduct when it summarily dismissed a 2019 Petition challenging the then-draft Underground VMT Regulation under the APA, declining to review or respond to any of the allegations in the Petition.

236. Defendant OPR then stubbornly and repeatedly insisted that the Redlining Regulations would expedite housing approvals and reduce housing costs, based on one analysis by one consultant that a CEQA compliant VMT study could be completed for $5000 – a lower cost than a traditional vehicular delay study. Defendant OPR ignored all comments that this cost estimate failed to take into account the cost of developing and complying with the VMT methodology demands in their Underground VMT Regulation, or the cost of having to do full EIRs for infill housing projects in suburban locations with pre-existing above-average VMT which could not mitigate to the less than 15% below-average threshold prescribed in the Underground VMT Regulation as necessary to achieve California's climate goals, or the cost or feasibility of adding VMT mitigation obligations to such infill housing projects in the recommended approach of paying someone else somewhere else to reduce their VMT for some unknown but indefinite (e.g., 30 year) period of time. Defendant OPR further refused to acknowledge, disclose, or analyze the additive

[183] 2019 California Green Building Standards Code, California Code of Regulations, Title 24, Part 11, available at: https://codes.iccsafe.org/content/CAGBSC2019/cover (last visited Nov. 11, 2019).

cost of their VMT CEQA regulations to the announced plans, which have now been implemented in the vast majority of jurisdictions, that agencies would continue to require traditional congestion-based traffic studies for housing to assure safe traffic conditions and compliance with General Plan circulation elements requiring evaluation and improvements to intersection and roadway segment performance standards that were dependent on efficient (not excessively delayed) traffic congestion. Defendant OPR further ignored every single environmental impact and economic impact of its avowed intent to force most new housing production into the tiny slivers of the already-occupied even smaller fraction of California's communities that have high frequency commuter bus, train and ferry service. Finally, Defendant OPR ignored the anti-housing and civil rights violations of housing and transportation policies that would perpetuate and exacerbate disparate harms to minority communities, including for example failing to even acknowledge its receipt of The Two Hundred's detailed complaint against the anti-housing (including VMT) measures unlawfully promulgated by the California Air Resources Board.

237. Defendant NRA received and was charged with its own independent review of Defendant OPR's proposed Redlining Regulations, and simply rubber stamped OPR's actions notwithstanding documented and unaddressed civil rights and other violations of law.

238. Instead, in the closing days of the Brown administration, on December 28, 2018, Defendants NRA and OPR knowingly and intentionally approved expansions and amendments to regulations implementing CEQA[184] that perpetuate and exacerbate CEQA's racially disparate impacts and harms to minority communities, further weaponize CEQA to block housing needed by "those people," and further worsen California's housing, homeless and poverty crises.

L. Defendants Unlawfully Adopted Anti-Housing and Anti-Mobility VMT Redlining Regulations

239. The Redlining Regulations impose greater costs on housing and create more barriers and legal ambiguity about CEQA compliance obligations for new housing projects that have further strengthened the use of CEQA litigation as an anti-housing redlining tool.

[184] These regulations are referred to in CEQA as "Guidelines" but have the same legal status as regulations and are required by CEQA to be adopted in compliance with the California Administrative Procedure Act, Gov. Code §§ 11340 *et seq*.

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240. Purportedly racially neutral government conduct becomes unlawful when it has a disparate impact on housing for minority communities.[185] A cluster of government activities that caused California to have an unprecedented housing shortage has already caused disparate impacts on minority communities, and Defendants' expansion of CEQA to increase housing costs and CEQA litigation obstacles unlawfully exacerbates the harms caused by the housing crisis on California's minority communities.

241. To highlight just one example of Defendants' unlawful discrimination in promulgating the Redlining Regulations, expanding CEQA to reduce VMT by occupants of new housing violates the Federal and California constitutions. The practical necessity of having access to a car has been recognized as so fundamental that both the U.S. and California Supreme Courts have held that constitutional due process protections apply to any government attempt to summarily deprive someone of a drivers' license or automobile.[186] The right to travel is also fundamental to the constitutional protection of liberty, and government actions to impose discriminatory restrictions on travel are unconstitutional. As the United States Supreme Court has affirmed:

> [T]he right to remove from one place to another according to inclination…is an attribute of personal liberty, and the right, ordinarily of free transit from or through any territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.[187]
>
> [Freedom of movement] may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.[188]
>
> [A]ll citizens [shall] be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement.[189]

California courts have likewise affirmed that the right to travel is protected under both the federal and state constitutions:

> [T]he right to intrastate travel (which includes the intra-municipal travel) is a basic human right protected by the United States and California Constitutions as a whole. Such a right is implicit in the concept of a

[185] *Inclusive Communities, supra* note 83.
[186] *Berlinghieri v. Dep't of Motor Vehicles* (1983) 33 Cal.3d 392, 398-99; *Bell v. Burson* (1971) 402 U.S. 535, 539.
[187] *Williams v. Fears* (1900) 179 U.S. 270, 274.
[188] *Kent v. Dulles* (1958) 357 U.S. 116, 126.
[189] *Shapirio v. Thompson* (1969) 394 U.S. 618, 629.

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> democratic society and is one of the attributes of personal liberty under common law.[190]
>
> The right of intrastate travel has been recognized as a basic human right protected by Article I, Sections 7 and 24 of the California Constitution.[191]

242. Imposing discriminatory new restraints on travel through CEQA imposes unreasonable new cost burdens and litigation obstacles only on the new housing needed to meet the state's 3.5 million housing shortfall, and on majority-minority residents already harmed by the shortfall who are most in need of prompt completion of new housing supplies. Decades of peer reviewed studies by poverty and equity scholars continue to confirm that car ownership and access is critical to getting and keeping a job, getting and keeping kids in school, and achieving better personal and family health, welfare, and other benefits. As most recently confirmed in a 2019 report by researchers at the University of California in Los Angeles, Rutgers University, and Arizona State University entitled "The Poverty of the Carless," these studies consistently demonstrate that automobile use is essential for lower-income workers and households to achieve upward mobility and escape poverty and near-poverty conditions – and that public transit, which is costly to build, time-consuming to utilize, and generally inaccessible to most lower income workers, cannot realistically meet the needs of disadvantaged populations for the foreseeable future.[192]

243. Bus ridership on Metro, the nation's largest transportation agency, has dropped by more than 25 percent since 2009.[193] New rail lines have not met ridership projections either, and since securing the necessary approvals, funding and actually constructing passenger commuter service on even existing rail lines requires about 20 years – and usually gets challenged in more than one CEQA lawsuit – there is no foreseeable public transit solution to meet the needs of current drivers in the SCAG region. In short, adding more high density housing to very densely populated communities in the SCAG region has not produced, nor is it reasonably foreseeable that it will produce, substantial reductions in per capita VMT for newly constructed housing units.

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[190] *In re White* (1979) 97 Cal.App.3d 141, 148.
[191] *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1100.
[192] King, *supra* at note 145.
[193] Nelson, *L.A. Is Hemorrhaging Bus Riders — Worsening Traffic and Hurting Climate Goals*, Los Angeles Times (June 27, 2019), https://www.latimes.com/local/lanow/la-me-ln-bus-ridership-falling-los-angeles-la-metro-20190627-story.html (last visited April 1, 2021).

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244. The transportation crisis most severely affects the same minority communities harmed by California's housing crisis. As researchers from the University of California, Los Angeles confirmed in 2018, lower and middle income workers – including disproportionately Latino and African American workers – have significantly reduced transit use over the past decade and now rely to a much greater extent on personal automobiles.[194] In the SCAG region, transit takes approximately twice as long as point-to-point automobile commutes even when transit is available for the routes and at the times required. The highest VMT households are those forced, by the housing crisis, to live ever-longer distances from homes they can afford to buy or rent. Four of the nation's 10 metropolitan areas with the largest percentage of "supercommuters", where people drive three hours or more to and from work each day, are in California and include Riverside-San Bernardino in the SCAG region as well as the Central Valley communities of Stockton, Merced and Modesto east of the Bay Area.[195]

245. For decades, VMT has been used in CEQA to measure actual environmental impacts – like air pollution from cars, and safe and effective transportation on roads. Elevating VMT to the status of itself being an environmental impact in order to achieve the state's GHG reduction goals (and achieve co-benefits like reducing vehicular air pollutants) obfuscates the purported actual environmental impacts. The Legislature authorized OPR to consider a CEQA transportation impact other than congestion-related vehicular delay, such as VMT, in the minute portions of California that are within one-half mile of a ferry terminal, a commuter rail station, or a high–frequency commuter bus stop. The Legislature also made clear that vehicular air emissions and safety impacts affected by traffic congestion would remain environmental impacts that must be considered under CEQA, including in the vast majority of the state not located within one-half mile of higher quality transit. OPR could have identified other transportation metrics that would have achieved the

[194] Manville, *supra* note 139.

[195] The percentage of supercommuters is 6.7 percent in Riverside-San Bernardino, ninth highest in the nation, 8 percent in Stockton, second highest in the nation, 7.9 percent in Modesto and 6.4 percent in Merced, tenth highest in the nation. Among 381 communities in the nation, the average number of supercommuters is 2.8 percent based on 2015 Census data. *See* McPhate, *California Today: The Rise of the Super Commuter*, New York Times (Aug. 21, 2017), https://www.nytimes.com/2017/08/21/us/california-today-super-commutes-stockon.html (last visited April 1, 2021); Cox, 90 and Over Commute Shares by Metropolitan Area, http://demographia.com/db-90+commute.pdf (last visited April 1, 2021).

Legislature's goals with much less adverse housing effects and that avoid disparate racial impacts, such as impacts based on the time efficiency of various transportation modes since shorter drive times mean lower emissions (and healthier drivers who can spend more time at home with the kids), occupancy per automobile trip to encourage carpooling and ridesharing, trips avoided by working at home, or economic equity metrics like prioritizing home-to-work trip assistance for people forced by the housing crisis to live greater distances from employment. Instead, the Defendants opted to implement a VMT-based impact threshold for the entire state without demonstrating in any manner that reducing VMT alone, including from zero emission vehicles, can meaningfully reduce GHGs and the risks of climate change.

246. Available evidence indicates that forcing all new state housing into expensive TPA locations, and causing severe and disproportionate impacts to California minority communities, will have, at most, insignificant potential GHG emission benefits. None of the Defendants and state agencies, including CARB, which oversees California's climate change policies, have ever specifically quantified the net GHG emission and associated global temperature reductions that VMT cutbacks would achieve. The most comprehensive analysis currently published of building 1.92 million new units solely in urban infill locations estimated that this construction, which the study conceded would require the demolition of tens to hundreds of thousands of existing, less expensive housing and displace existing residents, could cut state emissions by about 1.79 million tons.[196] This reduction amounts to about 0.4 percent of the state's current GHG emissions and, if realized, would account for approximately 1 percent of the overall reduction required to meet legislatively-enacted goals for 2030.

247. As discussed in more detail below, these estimates are consistent with possible GHG emission reductions that could occur in the SCAG region, which has half of the state's population, from building new housing subject to the Redlining Regulations over the next decade. According to the California Department of Housing and Community Development ("HCD"), which oversees planning and enforcement of California state housing laws, by 2029 the SCAG region will need to

[196] Decker, *supra* note 125, at 5.

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construct 1,344,740 new homes.[197] One potential but by no means clear interpretation of the unlawful Underground VMT Regulation is that all homes located outside of a TPA must have per-capita VMT rates that are 15 percent below the regional average to avoid a significant impact under CEQA. Assuming that all of the new homes identified by the HCD are built in the SCAG region outside of TPAs, and that current levels of per-capita VMT and GHG emissions per mile remain at current levels, forcing each new unit to achieve a 15 percent reduction in per capita VMT could reduce GHG emissions by 1.9 million tons, very close to the levels estimated by U.C. Berkeley researchers for roughly comparable infill development.[198] If the percentage of conventional internal combustion vehicles in the SCAG region remain unchanged by the end of the decade, however, and GHG emission per mile are reduced at the same rate that has occurred in the U.S. since 2005, total emissions would be reduced by 8.8 million tons without any decrease in VMT, or by more than four times the hypothetical reduction that might occur from VMT cutbacks related to the Redlining Regulations.

248. The trivial and practically unmeasurable GHG reductions that might occur from massively disrupting California housing markets in a racially disparate manner under the Redlining Regulations are not required to meet any legislatively-mandated climate change goal for the state. The 2017 Scoping Plan adopted by CARB for reducing GHG from all sectors of the California economy has identified ample GHG reduction measures to achieve Senate Bill No. 32's ("SB 32")

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[197] Letter from HCD to Kome Ajise, Executive Director of SCAG, Re: Regional Housing Need Determination SCAG: June 30, 2021 – October 15, 2029, dated Aug. 22, 2019, https://www.scag.ca.gov/Documents/6thCycleRHNA_SCAGDetermination_08222019.pdf. In September 2019, SCAG submitted a formal objection to the HCD determination and contended that the correct housing needs would be in the range of 823,000-920,000. *See* Letter from Kome Ajise, Executive Director of SCAG to Doug McCauley, Acting Director of HCD, dated Sept. 18, 2019, https://www.scag.ca.gov/programs/Documents/RHNA/SCAG-Objection-Letter-RHNA-Regional-Determination.pdf. A lower level of housing growth would result in lower potential GHG reductions from burdening new housing with new VMT mitigation requirements under the Redlining Regulations.

[198] Calculated from SCAG, *Transportation Safety Regional Existing Conditions* (2017), http://www.scag.ca.gov/programs/Documents/SafetyFactSheet_scagIMP.pdf; SCAG, Profile of the City of Los Angeles (2019), at 4, https://www.scag.ca.gov/Documents/LosAngeles.pdf; U.S. EPA, *Office of Transportation and Air Quality, 2018 Automotive Trends Report, Section 3,* Table T.3.1, https://www.epa.gov/sites/production/files/2019-03/420r19002-report-tables.xlsx (last visited April 1, 2021) (2017 estimate of 357 grams of CO_2 per mile); *see also* Table 9 and related General Allegations below.

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legislated mandate of reducing GHG 40 percent below 1990 levels by 2030.[199] The Scoping Plan does not quantify, nor does it or the public rulemaking record for the Redlining Regulations provide any evidence that, any VMT reductions are required to meet the legislated SB 32 target for 2030. Instead both CARB and Defendants justify the imposition of unprecedented VMT restrictions, including the Redlining Regulations, with reference to potential future targets, such as an 80 percent reduction from 1990 levels by 2050. No reduction goal beyond 2030 has ever been adopted by the Legislature and an 80 percent statewide emissions reduction from 1990 levels by 2050 has been repeatedly considered and rejected by the Legislature, most recently during the approval of SB 32.

249. Another important contextual fact is racial equity. If there is a feasible means of achieving a racially neutral objective without causing or exacerbating disparate impacts to racial minorities, then civil rights law requires agencies to avoid policies that cause disparate impacts. As discussed above, for example, simply ensuring that conventional internal combustion vehicles continue to reduce GHG emissions at the same rate of improvement that occurred since 2005 would reduce GHG emissions by more than four times the amount that could result from implementing the Redlining Regulations in the SCAG region (even with highly favorable, unlikely assumptions) or from building 1.92 million new homes solely in urban infill locations. Even more compelling, household emissions data provided by CARB in an online "Calculator for Households and Individuals," which is explicitly cited in "Discussion Draft CEQA and Climate Change Advisory" shows that higher wealth households generate far more GHG emissions than even average, let alone lower income households.[200] Approximately 4,280,000, or 33 percent of all California households earn $100,000 or more per year. Rather than increasing housing costs and regressively harming lower income, disproportionately minority households, the CARB calculator demonstrates that implementing far more progressive policies to reduce emissions by the wealthiest California households would cut state GHG emissions by much larger amounts. Merely reducing wealthier household emissions to average state household levels from clothing would cause emissions to fall

[199] CARB, *California's 2017 Climate Change Scoping Plan*, 18 (Dec. 2017), https://ww3.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf. (last visited April 1, 2021).
[200] OPR, *Discussion Draft Climate Change Advisory*, https://opr.ca.gov/docs/20181228-Discussion_Draft_Climate_Change_Adivsory.pdf (last visited April 1, 2021).

by 2.7 million tons per year, by 3.9 million tons from furniture, and by over 10 million tons from motor fuel consumption, levels far greater than any estimated reduction ever attributed to housing densification around urban transit and limiting VMT for new homes.[201]

250. Instead of requiring GHG reductions from existing, wealthier and disproportionately white homeowners in California, the Defendants unlawfully elected to use CEQA, which only applies to new housing, to impose regressive and discriminatory GHG reduction obligations on the far greater number of minorities who are not currently homeowners, as well as middle and lower income households, and the homeless, who need new housing that will be adversely affected by the Redlining Regulations.

251. The Redlining Regulations also must be viewed in a global context, because GHG emissions that cause climate change are a global problem. Reducing in-state emissions would have no effect if global emissions did not also fall. At present, the California economy produces less than 1 percent of global anthropogenic GHG emissions. Former Governor Brown acknowledged that state GHG reductions will be "futile" unless others are inspired to follow California's lead.[202] With record high income inequality, and a housing and homelessness crisis that routinely makes national news above and beyond the daily suffering it causes to California residents (and disproportionately to California's minority residents, especially women, children and seniors), there is no known state or country currently seeking to adopt and then weaponize environmental laws like the Redlining Regulations and thus subject needed housing developments within their jurisdictions to potentially years of processing delay, cost increases, and the risk of lawsuits filed for tactical, non-environmental purposes, including thinly disguised efforts to limit opportunities for minority populations in existing, wealthier, non- minority communities. There is substantial evidence,

[201] Estimates are from CARB, *Calculator for Households & Individuals*, https://coolcalifornia.arb.ca.gov/calculator-households-individuals (last visited March 31, 2021); *see also* U.S. Census Bureau, *2013-2017 American Community Survey (ACS) 5-Year Estimates, Median Income in the Past 12 Months (in Inflation-Adjusted Dollars)*, Table Series S1903, https://data.census.gov/cedsci/ (search for "S1903" in topic or table name search field and "California" in state, county or place search field)(last visited March 31, 2021); *see also* Table 12 *and* accompanying General allegations below.

[202] Marinucci, *Top Democrats Plan: Divest in Coal to Fight Global Warming*, S.F. Gate (Dec. 16, 2014), http://www.sfgate.com/news/article/Top-state-Democrat-pushes-coal-divestment-to5959147.php (last visited April 1, 2021).

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however, that California's regressive housing and VMT policies are driving a large number of former state residents to other, higher GHG emission locations. The Redlining Regulations unlawfully fail to take account of potentially adverse effects, including the likelihood that by encouraging massive out-of-state population relocation, regressively raising housing costs and limiting VMT will increase, not decrease, net GHG emissions.

252. Reducing VMT is also not the necessary or exclusive method for reducing GHG from vehicular use. For decades, California and the U.S. have achieved astonishing net total emission reductions from cars and light trucks even though VMT increased significantly over the same period. President Obama's U.S. EPA reported that traditional air emissions from cars decreased 98 percent from pre-Clean Air Act car fleets. Although GHG emissions have only recently become a regulatory focus, there has been a 20 percent decrease in California's fleet-wide GHG emissions in just the past decade. VMT, as promulgated by Defendants, is simply one transportation mode choice among several (e.g., walking, biking, bus or rail transit), but it is by far the dominant transportation mode for California's workforce, especially for the disparately large number of minority workers earning lower and middle income wages. Parents with childcare and/or senior care responsibilities, shift workers who commute at off-peak hours, and workers who must be physically present at their jobsite, such as construction workers, must and do drive. In contrast, the VMT from existing homeowners – who are far more likely to be older, wealthier, and white – is unaffected by expanding CEQA to include VMT, because CEQA applies only to discretionary agency approvals of new housing that existing homeowners don't need – and in fact desire to limit so that property values remain high in their communities.

253. In considering whether VMT is an unlawful and racially discriminatory CEQA regulatory overreach by Defendants, imagine that Defendants decided to adopt a less camouflaged population reduction regime aimed at expelling median income minority families from California, and expressly acknowledged that the policy of the Redlining Regulations was to impose new VMT mitigation costs on housing in non-coastal California's remaining affordable homeownership locations with majority-minority populations like San Bernardino County. Imagine that Defendants

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had actually acknowledged that defining VMT as an "impact" would add either $45,100 or $403,800 (who knows?) of new CEQA mitigation costs to $350,000 homes.[203]

254. Imagine that Defendants had actually admitted their intent to more than double housing costs – and ignite a new firestorm of legal uncertainty and CEQA lawsuit risks and obstacles – within 30 days of the Governor's declaration of the state's "existential" housing crisis and emergency. Imagine that Defendants openly admitted that its Redlining Regulations were intended to use CEQA as a bureaucratic workaround to effectively ban (by making it financially infeasible for prospective homeowners to purchase) housing which local agencies had included in the Housing Elements of their General Plans to accommodate new housing obligations established under RHNA, which the state's housing agency (the Housing and Community Development department) had approved as required by state housing law to verify the local agency's compliance with RHNA, which the regional agency charged under the state's GHG reduction law for future housing and economic development (SB 375) concurred could be implemented while achieving the state's GHG reduction targets, and which the state's climate agency, CARB, had expressly agreed – in the precise process and on the precise schedule expressly prescribed by the Legislature in SB 375 – was appropriate to build while achieving California's GHG reduction targets for land uses in the SCAG region.[204] Imagine further that Defendants actually acknowledged that increasing the cost of a $350,000 home with an EIR processing obligation and VMT mitigation cost that more than doubled the home cost to $753,800 priced out every single overwhelmingly minority home buyer who could afford the $350,000 home. As shown in Figures 1-7, the weaponization of VMT in CEQA in the Redlining Regulations was fully intended to emasculate these state housing laws, as well as the local, regional and state climate agencies charged with implementing housing laws while meeting GHG reduction targets. Defendants' anti-housing putsch has worked: pre- and post-

[203] *See infra*, paragraphs 316-318.

[204] State of California Air Resources Board, Executive Order G-16-066 (June 28, 2016), https://ww3.arb.ca.gov/cc/sb375/scag_executive_order_g_16_066.pdf (last visited April 1, 2021) ("NOW, THEREFORE, BE IT RESOLVED that under California Government Code section 65080, subsection (b)(2)(J)(ii), the Executive Officer hereby accepts SCAG's determination that the SCS [Sustainable Communities Strategy, which identifies locations appropriate for housing and other land uses, and corresponding transportation system features] adopted by SCAG's Regional Council on April 7, 2016, would, if implemented, achieve the 2020 and 2035 GHG emission reduction targets established by ARB").

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pandemic, the number of new housing units has dropped, the purchase price of housing has soared, poverty and homelessness have grown even worse – and the victims have been, and remain, disparately members of minority communities.

255. Stripped of regulatory acronyms like VMT, imagine that Defendants actually announced their policy decision that with extremely rare exceptions, today's non-homeowners and those without inherited family wealth would need to either leave California or accept that they would be lifetime renters, and, as renters, would need to accept the reality of having household wealth that is 44 times lower than homeowner households.[205] Then imagine that Defendants actually acknowledged that CARB measures as a GHG "reduction" the loss of population to other states, since CARB counts GHG from only a very limited slice of in-state activities like fuel and electricity consumption, so fewer Californians means less in-state GHG from fuel and electricity consumption – even though the direct consequence of anti-housing policies force hard working minority families to states where they can still buy a home (primarily Texas, Arizona and Nevada) where their per capita GHG emissions more than double.

256. Imagine that Defendants actually "showed their math" and disclosed that CEQA's contribution to global climate leadership was to effectively expel hard working families and increase global GHG. In fact no imagination is required: the Redlining Regulations were intended to, and do, attempt to increase homeownership costs to unattainable levels in minority-dominated inland counties closest to coastal job centers. The fact that Defendants failed to disclose any of these facts and consequences, or their anti-housing and population reduction policy objectives, and instead hid behind "environmental" rhetoric and acronyms, is another chapter in the shameful racially discriminatory redlining history of California.

[205] The U.S. Census Bureau reported in 2019 that the median net worth of homeowners is 80 times higher than renters. U.S. Census Bureau, *Gaps in the Wealth of Americans by Household Type* (Aug. 27, 2019), https://www.census.gov/library/stories/2019/08/gaps-in-wealth-americans-by-household-type.html?utm_campaign=20190827msacos1ccstors&utm_medium=email&utm_source=govdelivery%20https://www.census.gov/library/stories/2019/08/gaps-in-wealth-americans-by-household-type.html?utm_campaign=20190827msacos1ccstors&utm_medium=email&utm_source=govdelivery (last visited April 1, 2021).

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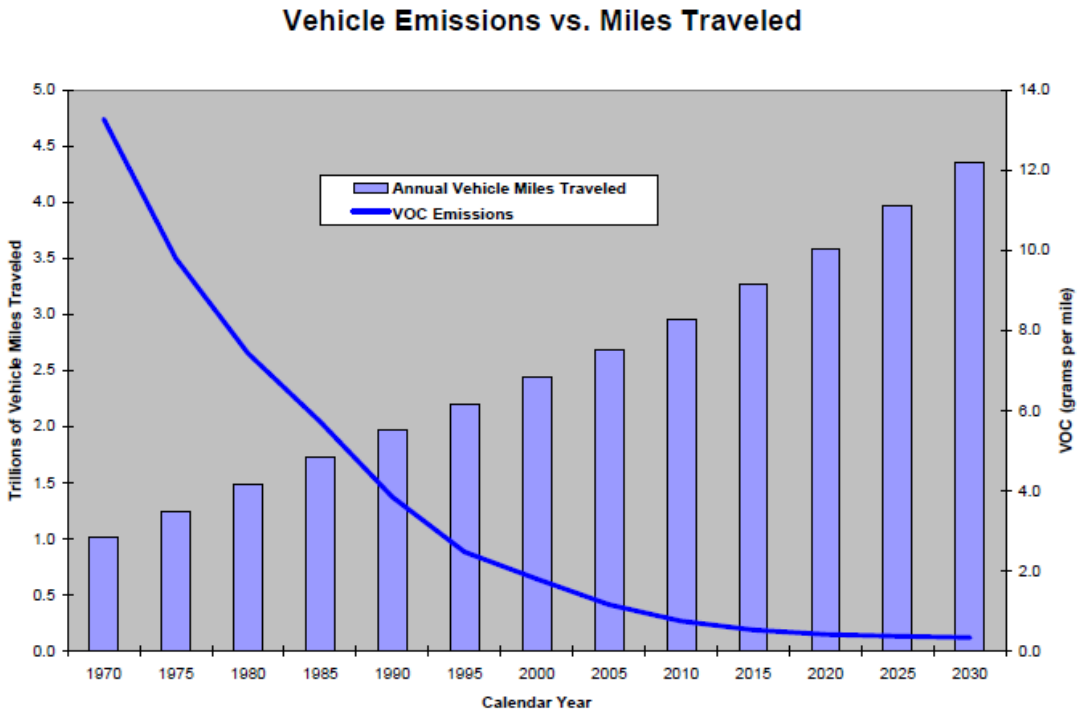
257. Defendants' weaponization of CEQA against lawful housing and the state's own population is a particularly shameful example of shielding racism behind "environmental" rhetoric when we know full well how to reduce (and nearly eliminate) harmful air emissions from cars. When the federal Clean Air Act was adopted in 1972 and the SCAG region was choking with pollution, complex and transparent air quality regulations were proposed at the federal, state and regional air quality protection agencies. These regulations were then compared, analyzed, and adopted – and among other remarkable outcomes resulted in a fleet of cars with tailpipe emissions of smog-forming pollutants that as of 2016 were 99 percent cleaner than the nation's 1969 car fleet: vehicular emissions plummeted even as the nation's VMT increased dramatically as would be expected for a mobility metric resulting from population and economic activity, as shown by U.S. EPA in Figure 24[206]

Figure 24:



[206] US EPA, Clean Air Act Overview, Progress Cleaning the Air and Improving People's Health - New Cars, Trucks, and Nonroad Engines Use State-of-the-Art Emission Control Technologies, https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health (accessed Nov. 16, 2019).

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258. Emissions from cars and pickup trucks were reduced by implementing regulations requiring technology improvements, such as more efficient engine and pollutant removal systems, reformulations of gasoline, such as removal of lead, and incentives for retiring older dirtier cars and increasing utilization of cleaner new cars, including electric cars. What was not proposed, let alone authorized by any elected body or adopted by any regulatory agency, was a regulatory scheme that penalized occupants of new homes – in the form of increasing home costs – for the fact that they, like their neighbors, needed to drive. What was not authorized by any elected body or adopted by any regulatory agency was a regulatory scheme that attempted to prevent construction of homes entirely unless even residents who drove electric cars could be shown to not drive at all, or some substantial but uncertain amount less than their neighbors, or pay unrelated people in distant locations to not drive. Through an *ad hoc* implementation scheme that could differ for each project and each jurisdiction in the state, governed by ambiguous and contradictory CEQA regulations, the Redlining Regulations define a basic human trait in California – mobility – as a *per se* new environmental "impact."

259. If allowed to stand, there is literally no aspect of fundamental human behavior that is not cognizable (and litigable) under CEQA – or susceptible to the racist bias that allowed Defendants to make homeownership unattainable to Californians in the name of climate change. For example, a family's decision to have an elderly relative or child live in their home could easily be characterized as a new "environmental" impact. Families could be required to "mitigate" for the basic "physical impacts" of caring for an elderly relative (more doctor trips), raising a child (more school trips), and more energy consumption for simple chores that increase based on household size such as cooking, cleaning, lighting, washing, and drying.

260. CEQA "impacts" and "mitigation" burdens would be calibrated based on the "substantial evidence" of readily available data showing that minorities are likely to have more kids (non-Hispanic whites now account for a minority of births in the U.S.),[207] and minorities are more

[207] Passel et al, *Explaining Why Minority Births Now Outnumber Whites*, Pew Research Center (May 17, 2012), https://www.pewsocialtrends.org/2012/05/17/explaining-why-minority-births-now-outnumber-white-births/ (last visited April 1, 2021).

likely to have households that include grandparents or other relatives.[208] "Racial profiling" by burdening identical new three bedroom homes with different "impact" and "mitigation" requirements depending on the race of the future occupant is not (yet) used in CEQA, but – as is the case with VMT – could rationally be related to real environmental impacts like air pollution, so why shouldn't minority family households pay more for their house as CEQA mitigation? The answer: imposing higher costs on housing that creates or exacerbate disparate harms to racial minorities – which is precisely what the Redlining Regulations do – is unconstitutional, and unlawful.

261. Likewise, imposing via CEQA a legal regime to reduce or prohibit – as a condition to buying or renting a new home – the transportation mobility of future occupants (who are far more likely to be the minority community members most harmed by the housing crisis) is racially discriminatory given California's overwhelmingly automobile-dependent transportation system. Imposing through CEQA racially discriminatory anti-mobility VMT "mitigation" costs is itself a racially discriminatory unconstitutional and unlawful anti-housing redlining regulation, particularly for new housing in locations in which CARB has already agreed housing can be built in compliance with the region's assigned GHG reduction goals.

262. Access to California's most fundamental means of transportation and mobility, featuring the cleanest car fleet in the nation, is so important that families struggling with poverty convert even small income increases into automobile purchases.[209] Making driving a car a CEQA "impact" for all housing not located in the infinitesimally small (less than three percent of the SCAG region) areas of California not located within one-half mile of four commuter buses operating at 15 minute intervals in the morning/evening commutes (and on weekends) is nothing less than an assault on all victims of California's housing crisis – the majority of whom are

[208] Numerous studies have confirmed that African American, Latino and Asian households are all far more likely than white households to live in extended family households. *See, e.g.*, Kamo, *Racial and Ethnic Differences in Extended Family Households, Sociological Perspectives* Vol. 42, No. 2 (Summer 2000), at 211-229 (concluding in pertinent part that "[e]ven after racial/ethnic differences in demographic and economic variables are accounted for, preferences for downward extension [e.g., adult children of parents in household] among African Americans, upward extension among Asians [e.g., grandparents of parents in household], and horizontal extension among Hispanics [e.g., siblings or cousins of parents in household], suggesting an independent effect of racial/ethnic culture regarding household extension").

[209] Manville, *supra* note 139, at 65.

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minorities. As confirmed by numerous experts, including HCD, the "[h]ousing cost burden is experienced disproportionately by people of color."[210]

263. Further, there is no evidence that GHG reductions from VMT are necessary or even quantified as being necessary to achieve California's legislated 2030 GHG reduction target, and the Legislature expressly declined to adopt a more aggressive 2050 GHG reduction target in SB 32.[211] As CARB calculates it, California is the fifth largest economy in the world but emits less than one percent of global GHG – Defendants' have fallen far short of demonstrating why, given the racially discriminatory harms the Redlining Regulations cause, depriving minority Californians of homeownership is required as part of California's commitment to "lead the world" on climate change. The constitutional, equitable, policy and economic consequences of such a radical redlining expansion of the 1970 "environmental" CEQA law, would be enormous, and certainly not left to the discretion of any government agency in the absence of any express or lawful Legislative authorization.

264. Given these racially disparate impacts, it is not surprising that the Legislature has repeatedly declined over nearly 15 years to mandate any reduction in VMT – in CEQA, in climate laws, or in any other environmental law.[212] Instead, California is on track with the same successful vehicular emission reduction strategy it has deployed for nearly 50 years – with methodical, feasible, and duly enacted laws to reduce vehicular GHG emissions through cleaner cars and cleaner fuels – not by further distorting CEQA to increase housing costs and anti-housing CEQA lawsuits to get to a future with fewer people living in fewer homes with fewer jobs and fewer children.

265. The Redlining Regulations unlawfully hijack CEQA from an environmental protection statute to a tool for increasing housing costs, and continuing to reduce housing supply, by

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[210] California's Housing Future, *supra* note 120, at 38-40.

[211] *Compare* Sen. Bill 32 (2015-2016 Reg. Sess.) as introduced on Dec. 1, 2014 *with* Stats. 2016, ch. 249 (S.B. 32).

[212] *Compare* Sen. Bill 150 (2017-2018 Reg. Sess.) as introduced on Jan. 18, 2017 *with* Stats. 2017, ch. 646 (S.B. 150) (initially requiring regional transportation plans to meet VMT reductions but modified before passage); *compare* Sen. Bill 375 (2007-2008 Reg. Sess.) as amended on Apr. 17, 2017 *with* Stats. 2008, ch. 728 (S.B. 375) (early version stating bill would require regional transportation plan to include preferred growth scenario designed to achieve reductions in VMT but modified before passage).

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placing major new cost and litigation obstacles on all housing except the most costly high–rise housing in TPAs that are the most likely to continue to cause displacement and destruction of historic minority communities. The challenged regulations exacerbate the housing, homelessness, and poverty crisis – and have an unlawful and disparate impact on California's minority communities – by unlawfully increasing housing costs, making it even easier to derail or delay housing in CEQA lawsuits by failing to provide the requisite level of specificity and clarity regarding CEQA compliance obligations, and by exacerbating the legal uncertainties in CEQA and thereby expand the risk that CEQA lawsuits will be filed and won by anti-housing plaintiffs.

266. The Redlining Regulations also violate state housing laws, which apportion responsibility for accommodating new housing at prescribed income levels to cities and counties throughout California, without regard to the existence of effective transit services or TPAs in each city or county. State housing laws further recognize and allow for a broad range of housing types, cognizant of both differences in affordability and differences in community and resident preferences. The Redlining Regulations place new cost burdens and litigation obstacles on housing that has lawfully been planned for by both cities and counties, and recognized as being acceptable for meeting regional GHG reduction goals from the land use sector by CARB following a comprehensive CEQA compliance process completed under Senate Bill 375 (2008) ("SB 375").

267. The Redlining Regulations unlawfully create barriers to interstate commerce and personal mobility. As one prominent former cabinet member and current member of the California Transportation Commission has explained, "housing is where jobs go home to sleep."[213] Federal and state commerce and transportation laws, as well as air pollution protection laws, have long required regions to plan and build transportation systems that actually work for existing and planned population and economic growth. Defendants have no constitutional, statutory, or regulatory authority to interfere with or otherwise limit population growth, transportation mobility, or interstate commerce.

[213] Dunn, *Brian Calle & Lucy Dunn: Wish List for Jerry Brown's Last Term*, The Orange County Register (Nov. 9, 2014), https://www.ocregister.com/2014/11/09/brian-calle-lucy-dunn-wish-list-for-jerry-browns-last-term/.

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268. Petitioners are suffering significant and ongoing harm as a result of Defendants' intentional civil rights and other violations in promulgating the anti-housing and anti-homeownership Redlining Regulations, which increase housing costs through direct new mitigation costs for VMT and GHG impacts, add additional CEQA compliance burdens (and thus result in increased housing application costs and processing delays) for cities and counties that approve new housing who must now justify the appropriateness of each significance threshold for each project.

269. As a direct result of the Redlining Regulations, housing that is critically needed by minority communities is at greater risk of being targeted by CEQA lawsuits, and at greater risk of losing such lawsuits as a result of Defendants' (a) arbitrary, capricious, discriminatory, and unlawful characterization of VMT as an adverse impact to the physical environment; (b) failure to promulgate express significance criteria required by section 210893(b) of the Public Resources Code, (c) uncertain and contradictory significance standards for VMT, (d) uncertain and unreliable assessment methodologies for VMT, (e) infeasible and uncertain mitigation requirements and mitigation measures for VMT, (f) uncertain significance standards for GHG, (g) infeasible and uncertain mitigation requirements and mitigation measures for GHG, (h) arbitrary and discriminatory aesthetic significance criteria for cities with fewer than 50,000 residents, (i) express endorsement of arbitrary and capricious significance standards to be differentially invented and applied to each new project by any representative of a lead agency without any public process and without the knowledge or endorsement of elected or appointed representatives of that lead agency, (h) express imposition of a new obligation that each lead agency explain and thereby justify the use of each significance criteria for each new project, and (i) unauthorized and costly new limitation on performance standard mitigation measures.

270. Mandamus relief is appropriate to require immediate rescission of the challenged Redlining Regulations, and compel Defendants to return to this court in 90 days with lawful alternative amendments to the CEQA Guidelines, which alternative amendments shall (a) eliminate traffic delay as a CEQA impact in TPAs (or transit-served and transit planned equivalents thereto as designated by a city or county) as directed by the Legislature in section 21099 of the Public Resources Code; (b) incorporate judicial decisions inclusive of decisions endorsing the CEQA

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compliance pathways for GHG as identified by the California Supreme Court, upholding the authority of a city through its General Plan to eliminate traffic delay as a CEQA impact, and determinations that design review and approval of housing projects is not independently a discretionary project under CEQA; (c) avoid expanding CEQA to increase housing, transportation, or infrastructure costs for projects that are consistent with housing, transportation or infrastructure plans that have been approved following CEQA review by local, regional, and/or state agencies; and (d) take all such measures as are necessary or appropriate to eliminate ambiguous CEQA Guidelines, and CEQA Guidelines that conflict with, impede implementation of, or fail to acknowledge the mitigation value in complying with, laws, regulations, guidance and judicial decisions relating to housing, transportation, the environment and climate, and health and safety.

271. Injunctive relief is also sought, and appropriate, to preclude implementation of, and CEQA lawsuit claims based on, the Redlining Regulations for housing projects and housing project applications (and the transportation and infrastructure improvements for such housing) pending compliance with the writ. This injunctive relief would not preclude any lead agency from determining that traffic delay, as measured by Level of Service ("LOS"), is not itself an environmental impact under CEQA but instead could, in some circumstances, impede emergency vehicle access or emergency evacuation routes and thus potentially create a public safety impact under CEQA, and would lengthen trip durations and accordingly result in greater emissions of air pollutants which is an impact under CEQA.

A. CAUSES OF ACTION

FIRST CAUSE OF ACTION AGAINST DEFENDANTS OPR AND NRA

(Denial of Equal Protection, Cal. Const., Art. I, § 7, Art. IV, § 16; U.S. Const., Amd. 14, § 1)

272. Plaintiffs hereby re-allege and incorporate herein by reference the allegations contained in paragraphs 1-271, above.

273. Equal Protection and Housing. Non-discriminatory access to ownership and occupancy of housing is a fundamental interest for purposes of evaluating regulations under the equal protection provisions of the California Constitution. Cal. Const., Art. I, § 7 and Art. IV, § 16.

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274. Non-discriminatory access to ownership and occupancy of housing is a fundamental interest for purposes of evaluating regulations under the equal protection clause of the United States Constitution. U.S. Const., Amd. 14, § 1.

275. Defendants received comment letters, and named individual Defendants in their role as agency executives, were on notice before adopting the Redlining Regulations, of the racially disparate harms that the expansion of CEQA to regulate a mile travelled by even an all-electric passenger vehicle would have on minority community access to attainable homeownership. The response of Defendants OPR and NRA demonstrated their knowing racial bias, and intent to create racially disparate impacts.

276. Defendants responded that "affordable" housing – consisting of income-restricted, government subsidized housing which has never comprised more than 5% of California's housing stock and which at all times has remained inadequate even to house high need populations such as those with mental, physical, or other disabilities and the unhoused – was exempt from the new VMT CEQA impact mandates, thereby equating Plaintiffs' mission of restoring attainable homeownership to California's minority families with consigning such families to rental "projects" affordable to only low income Californians, and actually available to almost no one.

277. Defendants responded that directing housing to low VMT neighborhoods would allow new residents to save money by avoiding the cost of a personal vehicle, ignoring uncontested evidence and third party reports confirming that the cost of new housing in low VMT neighborhoods was priced far above what median income minority families could afford to pay to rent or purchase a new home, thereby equating Plaintiff's mission of restoring attainable homeownership with the "solution" of supplying high cost unaffordable new housing.

278. Defendants declined to acknowledge or respond to uncontested facts submitted in comments, including third party reports, that their policy decision to use CEQA to direct housing to low VMT neighborhoods disproportionately targeted minority communities for displacement and gentrification, and would result in scores of documented adverse environmental impacts by agencies including SCAG that had adopted these VMT-centric housing plans under SB 375 and documented the adverse impacts of plan implementation in EIR that evaluated the impacts of

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demolishing and constructing massive amounts of new housing on the tiny fraction of even urban areas located within one-half mile of high frequency commuter and weekend bus service, commuter rail stations, or ferry terminals.

279. Defendants knowingly imposed a public transit transportation policy priority and declined to acknowledge or respond to uncontested facts, submitted in comments including third party reports, that minority utilization of public transit had plummeted even before the pandemic, and that minority family ownership and use of a passenger vehicle was critical for maintaining family incomes, keeping kids in school, having access to food, medical care, schools and sports. Defendants' transit-centric policy is designed to force minority families living in infill housing in existing neighborhoods to "ride the bus" (even where none exist) instead of driving like their white suburban neighbors.

280. Defendants knowingly lied about the infeasibility of forcing infill housing to achieve the VMT reductions mandated by their VMT Redlining Revision, including the Underground VMT Regulation. In one of its "Master Responses," for example, Defendant OPR asserted "Mitigation to Reduce Vehicle Miles Traveled is Feasible" with specific reference to the VMT reduction measures described in the CAPCOA Manual. As described in Paragraphs 19, 113 and 114, however, the CAPCOA Manual placed an absolute maximum VMT reduction of 15% on new infill housing built in suburbs, and the methodology prescribed by the Underground VMT Regulation applies that reduction factor to require far more than 15% VMT reductions in existing suburbs. Defendants consistently refused to adopt a clear or consistent VMT reduction mandate by Regulation, and has – much like the bureaucrats that long used unpromulgated agency practices – thereby knowingly attempted to avoid judicial review of its unattainable VMT reduction mandate for infill housing in existing communities.

281. Notwithstanding comments including uncontested facts, Defendants knowingly selected the VMT metric to promote demolition, displacement and gentrification in minority neighborhoods served by frequent public transit, and to exclude aspiring minority residents including home buyers from white-majority suburbs created or regulated to deny minorities equal access to such neighborhoods.

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282. As set forth in Paragraph 22, in adopting their GHG Redlining Regulation, Defendants knowingly declined to include the CEQA compliance pathways recognized by the California Supreme Court in *Newhall*,[214] or to expressly disavow such pathways for whatever reason, to create a clear CEQA compliance pathway for new housing that complied with GHG reduction laws and regulations, and for new housing that complied with SB 375 regional plans to achieve GHG reduction goals from future land use development. Defendants' knowing and intentional refusal to address this Supreme Court decision was intended to further Defendants' policy support of a "net zero" GHG CEQA significance threshold to allow multi-decade anti-housing CEQA GHG lawsuits to continue, including but not limited to the uncontested facts submitted with comments that GHG CEQA compliance disputes continued to rage, unabated, as do anti-housing CEQA lawsuits.

283. Comment letters filed by The Two Hundred included citations to uncontested facts including but not limited to the attainable affordability of homeownership and pattern of minority home purchases in suburban neighborhoods and cities east of high cost Coastal job centers Comment letters filed by The Two Hundred and other stakeholders in rural, suburban and even coastal jurisdictions that included a mix of urban and non-urban areas, advised Defendants with uncontested facts that high frequency commuter transit services were not available in these communities and accordingly that there were no practical or feasible options for achieving the VMT reduction thresholds based on the Underground VMT Regulation methodology that was issued concurrently with, and adopted simultaneously with, the Redlining Regulations.

284. Defendant OPR, and its executive Kate Gordon, knew before the pre-pandemic planned July 1, 2020 implementation of the VMT Redlining Regulations of the racially disparate harms their anti-housing VMT Redlining Regulations caused in COCs. With the pandemic wreaking disparate harms in COCs, coupled with ever-soaring housing prices and unhoused populations, further exacerbated with the shutdown or massive curtailment in bus, rail, and ferry service, and unprecedented emergency response and pandemic service demands placed on local governments charged with implementing the VMT Redlining Regulations, OPR and Ms. Gordon

[214] 62 Cal.4th 204.

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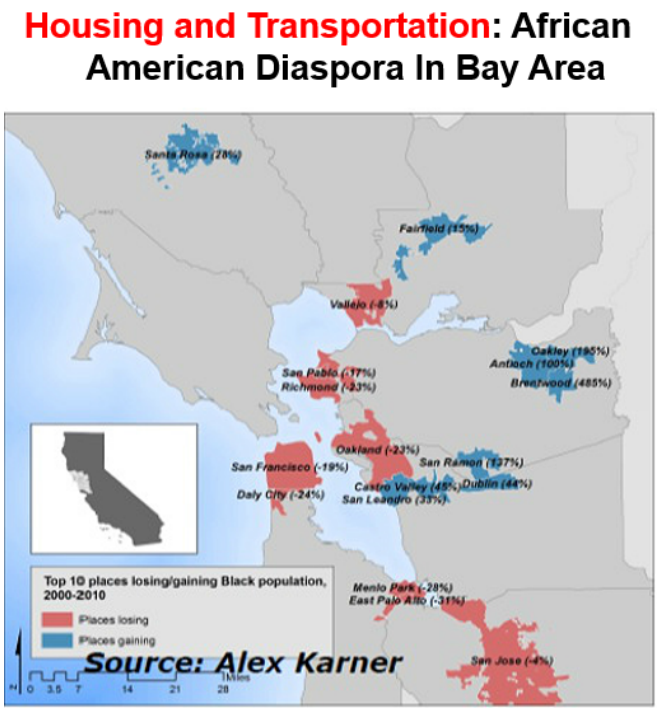
received scores of Resolutions adopted by elected members of city councils and boards of supervisors in suburban and rural areas throughout the state, and in letters submitted by a bi-partisan group of elected state representatives, statewide and regional labor and business advocacy associations, all of which pleaded for a postponement in the VMT effective date given the ongoing absence of even unlawful guidance on how to apply VMT to rural areas, or how to mitigate for VMT in the vast majority of state neighborhoods not served by high frequency existing transit. Legislative supporters of the VMT Redlining Revisions were from only one party, and almost all were from wealthier coastal communities that had pre-existing, pre-pandemic high frequency transit – the same communities that had long since suffered population losses by minority families unable to find housing they could afford to buy (or even rent), as shown in Figure 25.

Figure 25-Outward Migration of Blacks from Historic City Neighborhoods to Affordable Suburbs (Pre-COVID)[215]



285. In contrast, Legislative pleas to postpone the VMT Redlining Regulations until the many unresolved but already-clear obstacles implementing the VMT Regulations came from bi-partisan Legislators representing poorer communities without high frequency public transit service – the communities where displaced minorities had moved, with lower median incomes and high

[215] Hernandez – Hastings, *supra* note 56, at 53.

minority populations. **Exhibit H** includes a table listing those who supported, and those that pled for delays, in the VMT Regulation. **Exhibit I** includes the support letters, and **Exhibit J** includes the delay letters. **Exhibit K** includes a table listing the overwhelmingly suburban and rural communities, and cities where only a tiny fraction of people use public transit, that also pled for a delay during the pandemic catastrophe. Defendant OPR did not issue a written response to the hundreds of elected officials that begged for postponement of a CEQA policy aimed at promoting urban density and public transit to their communities.

286. Defendant OPR, by implementing the VMT Regulation on July 1, 2020 based on the uncontested facts identified in comments, including third party reports, imposed a racially discriminatory housing practice in violation of the equal protection clauses of the California and United States Constitutions.

287. Equal Protection and Vehicular Use. Non-discriminatory access to ownership and use of personal vehicles is a fundamental interest for purposes of evaluating regulations under the equal protection provisions of the California Constitution. Cal. Const., Art. I, § 7 and Art. IV, § 16.

288. Non-discriminatory access to ownership and use of personal vehicles is a fundamental interest for purposes of evaluating regulations under the equal protection clause of the United States Constitution. U.S. Const., Amd. 14, § 1.

289. The VMT Redlining Regulations cause disproportionate harm to members of minority communities, including Plaintiffs, by knowingly and intentionally exacerbating harms already caused by the housing shortage and affordability crisis. These provisions expand the scope of CEQA to define personal vehicular travel by future home occupants as an "environmental impact" requiring "mitigation" even though Defendants had actual knowledge, from their own experts and comments, that the only feasible form of "mitigation" that would reduce VMT in compliance with the Section 15064.3 regulatory significance criteria of causing a net reduction in VMT for the project area would be massive cash payments to transit providers (estimated at $403,800 per housing unit, as discussed in paragraphs 316-318, (*infra)* to pay the transit costs for riders of distant transit systems.

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290. In San Bernardino County, 98% of existing residents use personal vehicles, and are not otherwise required by law to make massive cash payments to fund the transportation of unrelated persons to and from unknown locations. Adding new VMT mitigation would more than double the price of a home in San Bernardino, where as noted, average home sale prices are only $288,000. Assuming a family has saved the approximately $65,000 required to purchase ($57,600 down payment, and $7,400 in closing costs), a family earning $50,000 (less than the average household income of $53,310 but above the median of $41,027), today can afford to become a homeowner of a median priced home in San Bernardino with a monthly mortgage of approximately $1,000.[216] New homes are more expensive (estimated at $350,000), requiring about $70,000 in closing costs and $1,419 in mortgage payments, yet still affordable for a household earning at least $60,000 (slightly above the average income).

291. When a VMT mitigation fee of $403,800 is added to the new home price, however, the cost of that new home more than doubles to $753,800. Given the housing shortage, new homes must be built to meet pent up and future demand. To pay the VMT-burdened home price, a family would need up front savings of $160,000 for a down payment and closing costs, and would then pay over $3,000 per month. The buyer of this VMT-burdened home would need to earn $131,000 per year, which is far out of reach for even above-median union worker households earning $90,000 per year. This VMT mitigation fee effectively eliminates the feasibility of home purchases by middle income families in one of the region's few counties where current housing prices remain affordable and thereby also disproportionately eliminates homeownership opportunities for the 76% of the San Bernardino population comprised of Latinos and African Americans.

292. This is an intended, not accidental, result: Defendants have repeatedly made clear their policy decision that new housing units should be clustered in high density buildings near transit – the highest cost form and location for housing where even rents cost more than the VMT-burdened monthly mortgage payment of $3,000 – but where Defendants have decreed that VMT is

[216] Mortgage and required family income calculations are based on a 20% down payment, 4.5% interest, 30-year fixed rate mortgage per the DollarTimes online mortgage calculator. Closing costs are estimated. *See* DollarTimes, *Income to Afford a $240,000 House*, https://www.dollartimes.com/income-needed-for-house/240000 (last visited Mar. 31, 2021).

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presumptively less than significant under Section 15064.3 and thus no VMT mitigation is required. Defendants' technical-sounding, environmentally-cloaked "VMT" mitigation is nothing less than intentionally erecting racially discriminatory barriers to homeownership by COC families by raising housing costs hundreds of thousands of dollars per home, and thereby eliminating attainable homeownership for the disproportionately minority families harmed by the housing crisis, including middle income union member minority families in San Bernardino.

293. The Underground VMT Regulation also knowingly and intentionally exacerbating harms to COCs by defining personal vehicle travel by future home occupants as an "environmental impact" requiring "mitigation" even though Defendants had actual knowledge from their own experts and comments that the only feasible form of "mitigation" that would reduce VMT in compliance with the threshold requiring new projects to have VMT 15% lower than the prescribed average would be massive cash payments (estimated using the same methodology described in paragraphs 290 and 291 as $45,100 per new home - the impact of which is discussed in paragraphs 164, 253, 294) to unrelated riders of distant transit systems.

294. In San Bernardino County, 98% of existing residents use personal vehicles and are not otherwise required by law to make massive cash payments to fund transportation by unrelated persons to and from unknown locations. Adding a $45,100 VMT mitigation fee to the cost of a new home pushes closing costs to $80,000, and increases the minimum required household income to just under $70,000 – about 40% more than the average household income, and thus likewise imposes a new disparate cost burden and harm on aspiring minority homeowners. Given the inconsistency between the regulatory presumption that VMT is less than significant only if the project results in a net decrease in VMT under Section 15064.3, and the 15% VMT reduction threshold in relation to city or combined city/county averages that are already exceeded in existing suburban neighborhoods, even housing projects that rely on the 15% VMT reduction criteria are also at greater risk of losing a CEQA lawsuit based on the paucity of evidence supporting the effectiveness of VMT Defendant mitigation as expressly recognized in the CAPCOA Manual cited in the Underground VMT Regulation.

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295. Defendant OPR's endorsement in its Underground VMT Regulation of measuring the required increment of VMT reduction for new housing against "either" the city or the "project area" is itself arbitrary and capricious, and provides yet another rationale for rejecting new housing in wealthy no growth cities. For example, a city such as Beverly Hills can select a 15% VMT threshold below its city average, where most residents – to the extent they need to commute at all during peak hours and are not retired, independently wealthy, or work remotely or during off-peak hours as part of the keyboard or entertainment economy – drive only short distances to nearby communities such as Santa Monica, Downtown Los Angeles, and Burbank. Because there is no possibility that new housing in Beverly Hills (except age-restricted and special needs non-working households) can reduce its VMT 15% below the in-city average, Beverly Hills can use CEQA to either deny project approvals based on the significant unavoidable adverse impact caused by excess VMT, or burden new housing units with tens or hundreds of thousands of dollars of VMT mitigation fees.

296. While Defendant OPR does not define the "project area" – itself an ambiguity that violates the APA's clarity requirements – a less anti-housing, transit served city such as Los Angeles can select a regional VMT average, and credit residents of new housing in the city with having lower VMT than higher regional averages that take into account commuters from San Bernardino and other inland cities and counties. Defendants provide neither rhyme nor reason why "either" the city or project area VMT is the appropriate benchmark for a percentage VMT reduction within a city, and provide no limitations whatsoever on the use of the no-growth city-only VMT methodology to deny new housing based on its significant unavoidable VMT impact or to impose exclusionary and economically prohibitive VMT costs to make such housing unaffordable, infeasible, or both.

297. Selecting which VMT percentage is appropriate or defensible – against an unknown and unspecified GHG reduction performance target or otherwise – and then further selecting the city or project area benchmark, and then estimating with unverified models regional, city, and project level VMT, and then inventing, and either imposing or rejecting VMT reduction mitigation measures, must all be determined by the city or county reviewing a new housing project – advised

by costly technical experts, and attacked by anti-housing litigants and their experts. Actual housing approvals, and actual construction of approved housing, are stalled, derailed or abandoned while being held hostage to unknown and uncertain VMT CEQA compliance mandates and VMT CEQA lawsuit outcomes where judges are asked to referee politically charged land use disputes in a regulatory miasma of technical methodologies invented by CEQA consultants.

298. Further exacerbating this CEQA VMT litigation risk is the need for substantial evidence in support of the accuracy of VMT CEQA compliance, when the best available evidence, such as the UC Davis Transportation Institute study commissioned by state agencies, demonstrates both the inconsistency and unreliability of VMT measurement methodologies, as well as the unavailability of evidence demonstrating that various recommended VMT mitigation measures, such as those in the CAPCOA Manual, will result in actual VMT reductions, as further described in paragraphs 132 and 133.

299. When confronted with these inconsistent, contradictory, and infeasible demands for VMT reductions, San Bernardino County – like other jurisdictions – concluded that it was infeasible to require VMT reductions at all for the unincorporated county area, and adopted a CEQA VMT significance threshold pursuant to which a new housing project would be deemed to create a significant VMT impact unless the project's VMT is 4% lower than current per capita VMT.[217] San Bernardino County concluded that it was infeasible to require projects to achieve

[217] San Bernardino County, *Transportation Impact Study Guidelines* (July 9, 2019), at 21, https://cms.sbcounty.gov/Portals/50/transportation/Traffic-Study-Guidelines.pdf?ver=2019-10-03-155637-153 ("A project should be considered to have a significant impact if the project VMT per person/employee is greater than 4% below the existing VMT per person for the unincorporated County".). This threshold was established as part of the General Plan update process, which remains underway. This process includes expert analysis concluding that even with implementation of all feasible VMT reduction measures included in the CAPCOA Manual (*CAPCOA Manual*, *supra* note 15) that for San Bernardino County "the **maximum** achievable" reductions for any given project consisted of Transportation Demand Measures such as encouraging carpooling, and the **maximum** feasible VMT reduction from such measures was just over 4%. *Id.,* at 21. Defendants' repeatedly cited the CAPCOA Manual as substantial evidence of the feasibility of requiring projects to mitigate to achieve 15% VMT reduction. Unlike the GHG/VMT/CEQA war zone in San Diego County, where even "net zero" GHG is insufficient and VMT/climate mandates require all new housing to be built at higher densities in transit served neighborhoods, the San Bernardino VMT threshold has not been litigated – but the updated San Bernardino General Plan has not yet been adopted. San Bernardino County's General Plan was the first California local agency action ever sued under CEQA for failing to adequately address GHG, and the lawsuit was settled before trial. *See, e.g.*, Walker, *Landmark Settlement in Global Warming Case*, Abbot & Kindermann, Inc. Land

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VMT reductions outside the context of longstanding vehicle trip reduction measures such as encouraging carpooling and ridesharing, and did not attempt to impose transit subsidy fees such as those advocated by Defendant OPR and various VMT mitigation workshops.

300. The Redlining Regulations provide no clarity as to the adequacy of San Bernardino's approach, just as they provide no objective environmental impact avoidance outcome for either the no VMT increase in the project area, or the 15% below average VMT criteria. In fact, this San Bernardino county VMT methodology (measuring the significance of VMT against the VMT average of the unincorporated county) was directly challenged in an anti-housing CEQA lawsuit filed in San Diego County ("San Diego VMT Lawsuit").[218] That lawsuit asserts that the Underground VMT Regulation establishes the minimum required VMT reduction under CEQA, and lead agencies are prohibited as a matter of law from adopting an alternate methodology even when supported by substantial evidence of the infeasibility of the methodology prescribed in the Underground VMT Regulation. As dozens of cities and counties have struggled with the Underground VMT Regulation, they – as well as housing advocates – have contacted Defendant OPR to understand the extent to which deviations from the Underground VMT Regulation are lawful under CEQA. Defendant OPR's response has been to affirm the claim made in the San Diego VMT Lawsuit, which is that cities and counties cannot adopt a methodology or significance standard that is less stringent that the Underground VMT Regulation. In the absence of substantial evidence as to any significant adverse environmental harm caused by simply traveling a mile in a car (including an electric car), the threshold for when a VMT impact is "significant" is unknown, unknowable, and accordingly ripe for costly study and debate, uncertain litigation outcomes, and prolonged exacerbation of the housing crisis and harms to minority housing crisis victims. A lawful regulation does not cloak its purpose or include internal contradictions: Defendants' VMT regulations do both.

Use Law Blog (Aug. 27, 2007), https://blog.aklandlaw.com/2007/08/articles/ceqa/landmark-settlement-in-global-warming-case/.

[218] Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, *Cleveland National Forest Found., v. County of San Diego et al.,* (Sept. 4, 2020) Case No. 37-3030-00031320-CU-WM-CTL (S.D. Sup. Ct.) attached hereto as Exhibit B.

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301. In addition to being internally inconsistent and contradictory, the VMT Redlining Regulations are also contrary to judicial precedent confirming that payment by all Californians purchasing transportation fuels subject to CARB's cap-and-trade program is sufficient mitigation for GHG emissions from transportation fuel use under CEQA.[219]

302. The VMT Redlining Regulations also fail to comply with the California Supreme Court's directive that significance criteria for new projects cannot be based on an overall statewide GHG reduction goal for existing and new development absent substantial evidence of the appropriateness of applying the statewide goal to housing of different types and locations.[220]

303. The VMT Redlining Regulations intentionally conceal VMT data and falsely report that VMT can decrease even when population and economic activities such as jobs increase; they also intentionally decline to acknowledge or respond to factual information regarding the disparate increase in VMT by minority families forced to drive longer distances to get to houses they can afford to buy. The VMT Redlining Regulations fail to acknowledge or address CARB's November 2018 report confirming that VMT had increased steadily since the end of the Great Recession,[221] or CARB's resultant conclusion that VMT must be reduced by up to 16.8% instead of 15% to address increased VMT,[222] and fail to acknowledge the fact that VMT reductions are a proxy for GHG reductions and thus GHG reductions in lieu of VMT reductions as a CEQA mitigation strategy should be allowed.

304. Defendants have accordingly knowingly created legal uncertainty verging into chaos, which they acknowledge by taking the unprecedented CEQA regulatory step of delaying implementation of a portion of the challenged VMT regulations by 18 months. These unlawfully incomplete, contradictory, factually false, and knowingly racially discriminatory actions can and already are being exploited by opponents of housing in challenging housing projects in CEQA

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[219] *Assoc. of Irritated Residents v. Kern County Board of Supervisors,* (2017) 17 Cal.App.5th 708, 741-44.

[220] *Newhall*, 62 Cal.4th at 225-26.

[221] CARB, *2018 Progress Report: California's Sustainable Communities and Climate Protection Act* (Nov. 2018), at 4, https://ww2.arb.ca.gov/sites/default/files/2018-11/Final2018Report_SB150_112618_02_Report.pdf.

[222] CARB, *2017 Scoping Plan-Identified VMT Reductions and Relationship to State Climate Goals* (Jan. 2019), Figure 3 at 10, https://ww2.arb.ca.gov/sites/default/files/2019-01/2017_sp_vmt_reductions_jan19.pdf.

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lawsuits, which then has the immediate effect of delaying completion of housing projects, and thereby causes and exacerbates abuse of CEQA to derail or delay approved housing, which further exacerbates the disparate impacts to minority communities harmed by the housing crisis.

305. Defendants offer a suite of other rationales for expanding CEQA to define the act of driving a mile an "environmental impact" that fall well outside the statutory boundaries of CEQA and thus outside Defendants' regulatory authority (e.g., increasing "wellness" by encouraging people to walk or bike to work); and thereby, intentionally ignore and dismiss overwhelming evidence that almost all (approximately 98%) of workers in San Bernardino County must and do drive to work, that the vast majority of such workers are Latinos or members of other minority communities, and that adding massive new transportation mitigation costs under CEQA to new housing causes regressive, racist harms to such workers.

306. Defendants further ignore facts, reports and comments regarding other GHG emission reductions that can be achieved without causing unconstitutionally racist harms, such as clearing dead and dying trees that emit methane gas (a more potent GHG than CO_2 emitted by vehicles) as the trees rot, or clearing dead and dying trees before they explode into catastrophic forest fires emitting black carbon (a far more harmful GHG than either methane or CO_2). Enhanced forest management would have the "co-benefit" not of forcing a parent to commute an hour each way on a bike with a child seat instead of driving 10 minutes, but of saving hundreds of lives and billions of dollars of property damage.

307. Defendants further ignore facts, reports, and comments including CARB's own data showing that even a modest curtailment in the GHG content of furniture bought by the state's highest income households would reduce more GHG than converting a 1970s-era law into a mandate that the housing crisis be solved by overwhelming rental apartments near bus stops in existing communities.

308. Defendants further ignore facts, reports and comments that urbanized neighborhoods with the most extensive transit services (e.g., in Los Angeles and Santa Monica) are either Coastal Job Centers and thus destinations for far-flung residents of regional housing, or have resulted in displacement and gentrification of existing and most often minority neighborhoods with the

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development of the most costly housing typology (high rise) priced at $1 million or more for purchase or about $4,000 or more per month for rent – price points that are inherently unaffordable for median or lower income families, who are most likely to be minorities (and younger than existing homeowners) as discussed in Paragraphs 57 and 67. Intentionally modifying CEQA with regulations designed to promote inherently unaffordable housing products and further exacerbate displacement of minority communities likewise causes and exacerbates housing crisis harms to minority communities.

309. Defendants' exhortation in the Underground VMT Regulation that "affordable housing" should be built in lieu of other housing to reduce VMT is an express endorsement of the historically racist strategy of using public subsidies to create rental "projects" for "those people" (aka minority families). As the LAO and other experts have explained, the need for housing is so vast – and encompasses well over 100,000 homeless Californians, as well as individuals needing supportive housing based on disability or other special needs – that it is fully dependent on public subsidies. With even "affordable" rental units now costing in excess of $500,000 in Coastal Job Centers,[223] both the LAO and former Governor Brown explained that the state wholly lacks the resources to "spend its way" out of the housing crisis. Instead, California must restore market conditions that create sufficient housing supplies and reduce sufficient "soft" costs (costs excluding land, building materials and labor) to allow Californians to again buy a home they can afford. Hard-working families – and in San Bernardino the average working household is Latino, and has two workers per household – want and are entitled to own a home, not wait for a handout lottery ticket win to a rental in an affordable housing "project." Defendants are not charged with, and lack the statutory authority to impose, a regime that favors "affordable" subsidized rental housing to the detriment of housing in locations and at prices that middle income households can afford to buy.

310. Equal Protection and Racially Disparate and Arbitrary CEQA Compliance Standards for Aesthetics, Noise, and Mitigation Detail. Hundreds of election lawsuits, including existing and new voter eligibility and voting practice rules that are rigorously written as racially neutral, provide ample legal authority for the courts to step in to prevent arbitrary, unnecessary, and racially-

[223] Letter and report from Ron Galperin, *supra* note 52, at 1.

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disparate rules designed to suppress minority votes. Defendants' Aesthetics, Construction Noise, and Mitigation Detail Redlining Regulations do not even pretend to be racially neutral or necessary to achieve a state statutory goal.

311. As set forth in the allegations generally and specifically in Paragraphs 23, 24, 155, and 156, Defendants knowingly imposed a disparate CEQA significance threshold in the Aesthetics and Noise Redlining Regulations that perpetuated and exacerbated the ability of majority-white suburban neighborhoods to use CEQA against new housing while adopting, for urban neighborhoods only, clear aesthetics standard to disallow CEQA aesthetics litigation against new urban housing.

312. As set forth in the allegations generally and specifically in Paragraph 25, Redlining Regulation Section 15126.4 expands CEQA compliance costs, and litigation costs and delays, as well as risks of housing project lawsuit derailments, and thereby causes disproportionate harms to Plaintiffs and minority communities, by imposing unlawful new mandates for the content of mitigation measures. Because CEQA is intended to apply as early as feasible to the project application process in order to make the public review and comment process meaningful, and because CEQA only applies to "discretionary" projects that a public agency has the legal authority to deny or condition, the CEQA analysis is generally completed based on application materials that do not include engineering and design details. Numerous cases have held that mitigation measures to minimize or avoid significant impacts may likewise defer final engineering and design details as long as the mitigation measure specifies the performance standard that must be achieved to avoid or reduce the significant impact, and a list of feasible measures is included that will comply with this performance standard.[224]

[224] *See, e.g., Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275-77; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-29. This very common CEQA "performance standard" form of mitigation measure applies, for example, to protecting stormwater quality from urban pollutants such as fertilizer and grease by specifying a water quality performance standard, and then identifying various types of landscaping and stormwater management options that will ultimately be included – if and as the project is fully approved – in an integrated and engineered landscaping design and stormwater management system.

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313. Contrary to this well-established CEQA case law, Section 15126.4 requires all definitive details to be included in the mitigation measure itself, and allows deferral of such engineering details only if it is "impractical or infeasible" to include those details in the proposed mitigation measure completed in the draft environmental studies circulated for public review and comment. There is zero – *zero* – statutory or judicial authority for the imposition of this "impracticable or infeasible" restriction on the use of performance standard mitigation measures, but developing site-specific landscaping design and other engineering details this early in the CEQA process will absolutely increase CEQA compliance costs in a way that disproportionately harms Plaintiffs and other minority community members in need of new, affordable housing.

314. Whether or when absorbing such compliance costs is "impracticable or infeasible" for a housing project that may be substantially revised as a result of the public review and comment process, and then further modified by conditions of approval imposed by the lead agency decision-maker such as a city council, creates a ripe new anti-housing litigation target. Housing for the very wealthy will simply prepare sequentially revised landscaping designs and engineering details. Housing for median and lower income Californians, in contrast, just gets burdened with legally unnecessary and environmentally irrelevant cost burdens, since in all cases stormwater must comply with the designated performance standard, and in all cases a combination of landscaping and other stormwater management features can achieve the standard. This arbitrary and capricious expansion of CEQA increases compliance costs and litigation obstacles on housing, and thereby imposes a disparate harm on minorities most in need of housing.

315. Equal Protection Applies to Racially Disparate Impacts on Housing and Personal Mobility, Noise and Aesthetics, and Unauthorized Mitigation Compliance Mandates. Race and ethnicity are suspect classes for purposes of evaluating regulations under the equal protection provisions of the California Constitution. Cal. Const., Art. I, § 7 and Art. IV, § 16.

316. Race and ethnicity are suspect classes for purposes of evaluating regulations under the equal protection clause of the United States Constitution. U.S. Const., Amd. 14, § 1.

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SECOND CAUSE OF ACTION AGAINST DEFENDANTS OPR AND NRA
(Violation of the Non-Delegation Doctrine, Cal. Const., Art. III, § 3)

317. Plaintiffs hereby re-allege and incorporate paragraphs 1-271, above.

318. Plaintiffs have a right and duty to ensure that the line between legislative and administrative agency authorities are not blurred. Under California law, the Legislature cannot improperly delegate the task of deciding "fundamental policy decisions" to administrative agencies. This is especially true when such policy determinations have detrimental and disparate impacts on minorities.

319. The California Constitution provides that the "powers of the state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by [the] Constitution." Cal. Const., Art. III, § 3. Only after the Legislature has established the law, may it delegate the authority to administer or apply it to administrative agencies.[225]

320. California courts have held that an unconstitutional delegation of authority occurs when the Legislature "(1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy."[226] As Justice Tobriner noted in in *Kugler*: "The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect."[227]

321. The Federal triumvirate system shares these tenets of the nondelegation doctrine. *See*, *e.g.*, *Panama Refining Co. v. Ryan* (1935) 293 U.S. 388, 415 (finding section 9(c) of the National Industrial Recovery Act of 1933 unconstitutional as it did not state "whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission."); *A.L.A. Schechter Poultry Corporation v. U.S.* (1935) 295 U.S. 495, 541-42 ((invalidating section 3 of the

[225] *Wilkinson v. Madera Community Hospital,* (1983) 144 Cal.App.3d 436, 442.
[226] *Carson Mobilehome Park Owners' Assn. v. City of Carson,* (1983) 35 Cal.3d 184, 190 (citing *Kugler v. Yocum,* (1968) 69 Cal.2d 371, 376-77).
[227] 69 Cal.2d 371, 376 (quoting *First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 549).

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Recovery Act, as it "supplie[d] no standards [for the President to evaluate codes of fair competition for slaughterhouses and other industrial activities] aside from *the statement of the general aims* of rehabilitation, correction, and expansion ….") (emphasis added)). These and subsequent decisions assumed that the vesting clauses of the U.S. Constitution would be deemed meaningless if Congress could pass legislative obligations off to executive agencies.[228]

322. Here, Defendants' were directed by the Legislature in SB 743 to eliminate from CEQA the metric of measuring transportation impacts to the environment based on automobile congestion and delay in discretely defined "transit priority areas" (TPAs) within one-half mile of a high frequency bus stop, rail or metro station, or ferry terminal. Far less than 1% of California's 100 million acres are located in TPAs, and California has a documented housing shortage of 3.5 million housing units – many of which should have been built decades ago. The Legislature has adopted scores of laws to spur housing production, protect residents (especially in disadvantaged communities including communities of color) from displacement and gentrification, and preserve older, lower-cost housing units. The Legislature has repeatedly declared housing to be a "crisis," acknowledged that this crisis causes "discrimination against low-income and minority households," and more recently that an "additional consequence of the state's cumulative housing shortage is a significant increase in greenhouse gas emissions caused by the displacement and redirection of populations to states with greater housing opportunities, particularly working- and middle-class housing."[229] The Legislature has also consistently recognized that housing is too expensive, and has resulted in near-bottom rankings of the state in housing supply and homeownership, with housing-burdened households forced to spend more than 30% of their income on housing.

323. California's coastal region neighborhoods are more segregated now than they were before the civil rights reforms of the 1960s. As thoroughly mapped by the UC Berkeley Haas

[228] Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340; see also *Dep't of Transp. v. Ass'n of American Railroads*, (2015) 575 U.S. 43, 61 (Just. Alito, concurring) ("the principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. [omitted]. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints") citing *INS v. Chadha*, (1983) 462 U.S. 919, 959. INS v. Chadha, (1983) 462 U.S. 919, 959.

[229] Stats. 2019, ch. 654 (S.B. 330); Gov. Code §§ 65589.5(a)(1)(C) and (a)(1)(H).

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Institute in 2018 for the California State Treasurer, California's "Opportunity Maps" identify "resource-rich" census tracts for priority development of government subsidized affordable housing for low income and special needs Californians. These maps measure levels of poverty and wealth, educational attainment, access to clean water, and other indices of inclusiveness, which the Treasurer's office is using to prioritize affordable housing development in these neighborhoods.[230] Most of the mapped neighborhoods in California are suburban – the precise neighborhoods where Defendants Redlining Regulations aim to kill new housing for median income minority families, with infeasible VMT mitigation requirements, unknown GHG requirements, racist aesthetic and construction noise requirements, and unauthorized burdensome new mitigation detail requirements.

324. In SB 743, the Legislature directed OPR to develop a different transportation metric in TPAs, which already have lower per capita VMT than the suburban and rural neighborhoods, towns and counties that did not have pre-existing high population densities or high frequency transit service. The Legislature did not, and could not lawfully, authorize Defendants to impose any regulation that caused a disparate impact on the minority community victims of California's housing crisis, nor did SB 743 reverse longstanding and continuing Legislative rejections of VMT mandates as applied for GHG, housing, urban transportation, or other purposes.

325. SB 743 also did not excuse any city or county from planning for its share of new housing growth, and to distribute that housing growth equitably throughout the community in both more and less affluent areas, instead of targeting lower income minority neighborhoods for massive displacement and high density gentrification housing that is entirely unaffordable to even the median income minority households in these neighborhoods. SB 743 did not authorize the creation of more procedural or cost barriers to homeownership, nor did it authorize exacerbation of the racial wealth gap that is overwhelmingly based on high homeownership rates for whites and low ownership rates for Blacks and Latinos.

326. The Legislature likewise did not modify CEQA to reverse the Supreme Court's decision in *Ballona Wetlands Land Trust et al. v. City of Los Angeles* by expanding CEQA to

[230] Haas Institute for a Fair and Inclusive Society et al., *Mapping Opportunity California*, http://mappingopportunityca.org/ (last visited April 1, 2021).

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require an assessment of and mitigation for the existing environment's impact on a project. The transportation system in a community is an existing environmental condition, much as the community's fire and police services are existing environmental conditions.[231] "Average" VMT is a function of this existing transportation system, and as stated in the expert CAPCOA Manual the "maximum" VMT a suburban project can achieve is 15% lower than what would have occurred if no VMT mitigation or design changes are undertaken. The courts have been clear that CEQA does not apply to the environment's impact on a project unless the project "exacerbates" the harms from that existing environmental condition, and in this case VMT's "harms" are retained by SB 743 to include air quality, noise and public safety hazards. SB 743 did not authorize Defendants' to create a scheme that added tens of thousands of dollars in fees to projects based on the housing project's location (in or outside a TPA). SB 743 did not authorize Defendants to create a two-track compliance mandate under CEQA where an apartment building with precisely the same vehicular use patterns as the apartment building next door and no adverse impacts to the physical environment would be required to complete an EIR process costing hundreds of thousands of dollars and spanning more than a year, based on simply on the project's location outside of a TPA. SB 743 did not expand CEQA to require "mitigation" for public services such as transit that did not require physical changes to the environment, or otherwise reverse long-settled precedent that CEQA cannot be used to charge new projects with "mitigation" fees to expand fire and emergency medical services.[232] In fact the City of San Francisco, which had already abolished both parking and vehicular delay as CEQA impacts before SB 743 was enacted, imposes a transit system "sustainability" fee on new development projects as part of its many non-CEQA, not mitigation measure development impact fees.[233]

327. Defendants argue that notwithstanding scores of pro-housing, pro-equity, pro-homeownership laws, and notwithstanding the repeated failure of legislation to mandate VMT or

[231] (2011) 201 Cal.App.4th 455.
[232] https://www.ceqadevelopments.com/2012/07/12/first-district-reaffirms-ceqa-is-concerned-with-physical-impacts-on-the-environment-not-economic-ones-on-government-services/ *City of Hayward v. Trustees of California State University* (2015) 242 Cal.App.4th 833, 843.
[233] *See* San Francisco Planning, *San Francisco Citywide Development Impact Fee Register*, at 6 (Updated Dec. 1, 2020), https://sfplanning.org/sites/default/files/forms/Impact_Fee_Schedule.pdf.

expand CEQA to require mitigation to address existing environmental conditions not caused by a project, the one line in SB 743 – that Defendants "may" adopt a transportation metric other than vehicular delay outside TPAs – is sufficient Legislative authority to turn housing, civil rights, and CEQA itself into a pretzel that achieves through regulatory fiat what the Legislature has expressly declined to adopt by statute.

328. At issue are fundamental policies affecting civil rights, housing, and access to a home that even median income minority communities can afford to rent or buy. SB 743 is simply too thin a reed on which to lean for delegated Legislative authority for adoption of the VMT Redlining Regulations.

329. Weaponizing CEQA, with its clear history and ongoing practice of being used by housing opponents to block higher density housing in urban areas, with internally inconsistent and contradictory directives in the VMT Redlining Regulations to impose massive changes to statewide housing policies by burdening all housing not located in a TPA with unprecedented, costly new mitigation requirements applicable only to new housing residents who, like their neighbors, drive and already pay gas taxes and cap-and-trade fees (and collectively pay the highest gas prices of any state in the continental U.S.), is also knowingly and intentionally discriminatory conduct aimed at minority Californians most in need of new housing and most harmed by the housing crisis.

330. If California's climate leadership commitment requires cramming 1.3 million new homes in the SCAG region, or 3.5 million statewide, into TPAs - less than 3% of the 5% of California that is developed into urbanized areas (i.e., cramming 3.5 million new homes into 0.02 percent of California's existing neighborhoods); that all new housing be so expensive it cannot be afforded by California's middle income and low income families for purchase or event rent; and the massive demolition of "hundreds of thousands of existing single family homes" to make way for these massive new apartment blocks, then this is a fundamental departure from existing housing laws and other existing legal mandates, and it affects fundamental rights of Plaintiffs. These actions must be enacted (if at all) by the Legislature and not inflicted on the non-TPA areas of the state via the bureaucratic acronyms and crevasses of CEQA's regulations and other underground regulations.

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331. Similarly, since the VMT Redlining Regulations are built on the Legislature's policy decision to encourage infill housing as one of the many strategies for reducing GHG, then the GHG Redlining Regulations (Pub. Res. Code § 21083.05) are likewise not a lawful delegation of authority to Defendants. The Legislature directed Defendants to amend the CEQA Guidelines to address GHG emissions under CEQA; however, Defendants have unlawfully failed to update the Guidelines to include directly relevant judicial decisions (e.g., affirming CEQA GHG compliance pathways based on project compliance with GHG reduction laws and regulations including cap-and-trade), and further failed to update the CEQA Guidelines to reject, accept, or otherwise address when (if ever, for what projects where) the "net zero" GHG CEQA project significance threshold approved by CARB in its 2017 Scoping Plan must be used under CEQA.

332. Instead, California's hundreds of cities and counties are expected to invent, adjust, or otherwise create "substantial evidence" in support of whatever CEQA GHG significance threshold is required – which flatly contradicts Defendants' statutory mandate to provide express significance criteria and express GHG direction specifically, under Sections 15064.4 respectively. Further, since California produces less than 1% of the world's GHG emissions, and since even former Governor Brown concluded that California's GHG reductions would be "futile" unless other states and jurisdictions followed the state's lead, the issue of whether GHG emission reductions should be imposed in the most regressive system possible – i.e., by burdening the disproportionately minority Californians who live at the edge or in poverty, who are most harmed by the housing crisis, and who already pay the highest costs for fundamental needs such as electricity, gas, and housing in the continental U.S. – must be decided by the Legislature and cannot lawfully be delegated to, or assumed to have been conferred upon, Defendants to both decide and implement via CEQA.

333. Defendants' have also knowingly exacerbated this unlawfully delegated authority to a shadow army of "for-profit" CEQA consultants. As described by Hastings Law Professor David Owen: "the story of CEQA and climate change illustrates how for-profit consultants can help build a regulatory system that seeks to advance environmental protection." [234]

[234] Owen, *supra* note 112, at 13.

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334. The referenced CEQA climate change "regulatory system" of assessing the global climate change "significance" of building new housing to meet the needs of California's housing crisis victims, and deciding when and to what extent to burden such housing with extraordinary new CEQA "mitigation" costs and constraints which are not found anywhere in any adopted law, regulation or ordinance, to a "less than significant" level to the greatest extent "feasible," is the quintessential unlawful delegation of the fundamental policy decision of whether to solve the California housing crisis and the climate crisis by keeping people in California (where per capita GHG emissions are among the lowest in the nation) or whether to increase housing costs and continue to de-populate California to much higher per capita GHG states where housing is still affordable to working families such as Texas, Arizona and Nevada.

335. Instead of updating the CEQA Guidelines to address these fundamental regulatory questions – when is the GHG impact of housing and other projects "significant", what "mitigation" is "feasible", and how does this GHG issue relate to state housing and land use laws – Defendants mandated the Redlining Regulations in the absence of public review and comment.

336. This fundamental policy decision – is it state policy to solve the housing crisis, or is it state policy to increase CEQA costs and litigation obstacles to continue to force more out-migration of Californians to higher per capita GHG states – was teed up for Defendants OPR and NRA to decide as part of their statutory obligation to update the CEQA Guidelines to include significance criteria generally, and more specifically to, in the CEQA Guidelines GHG provisions, "incorporate new information or criteria established by the State Air Resources Board [aka CARB]."[235]

337. As was brought to Defendants' attention in comments filed by Plaintiffs, a year earlier CARB selected a CEQA GHG significance threshold in its 2017 Scoping Plan that increased both the cost and CEQA litigation obstacles and risks to housing by decreeing that projects subject to CEQA (including new housing) should use a "net zero" GHG threshold of significance: "Achieving no net additional increase in GHG emissions, resulting in no contribution to GHG

[235] Pub. Res. Code § 21083(b); Pub. Res. Code § 21083.05.

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impacts, is an appropriate overall objective for new development."[236] Under this CARB significance threshold, future occupants of housing would be forced to pay the increase in housing prices required to fully "mitigate" to "net zero" all GHG emissions from the electricity, energy and fuel consumption used during both the construction and occupancy of a new housing unit.[237]

338. Since all construction and human occupancy currently requires electricity, energy, and fuel consumption, this "net zero" threshold can only be achieved by paying GHG mitigation fees to have someone else, somewhere else, for some unknown cost, in some unknown or non-existent regulatory context, reduce GHG emissions by the amount required to get to "net zero" GHG emissions for each new housing unit. If that "mitigation" obligation drives up housing costs by $40,000 or more and thereby prices out tens of thousands of aspiring homeowners from the opportunity to own a home, and those most likely to be priced out are hard-working minority households who then continue the current out-migration pattern to states like Texas where owning a home is still affordable but per capita GHG is nearly three times higher than California, then global GHG will increase, the California housing crisis will continue to cause disparate harm to minorities – but California will continue to pursue the unlegislated policy objective of de-population so those wealthy enough to remain can rejoice in the absence of "those people."

339. This unlegislated policy choice was selected by CARB in the name of protecting California's environmental and climate leadership, and while this and three other anti-housing provisions in the 2017 Scoping Plan are the subject of ongoing litigation by Plaintiffs against CARB, this CARB-decreed threshold was neither acknowledged nor "incorporated" by Defendants

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[236] 2017 Scoping Plan, *supra* note 193, at 101.

[237] CARB also notes that net zero "may not be feasible or appropriate for every project" and [l]ead agencies have the discretion to develop evidence-based numeric thresholds" that are "consistent with this Scoping Plan" and other unlegislated criteria, but that "CARB is not endorsing" any alternate thresholds. *Id.* at 102; *Id.* at fn. 256. This is, and continues to be, a recipe for CEQA litigation disputes. *See, e.g.*, Center for Biological Diversity, Letter to Los Angeles County (April 16, 2018), http://planning.lacounty.gov/assets/upl/case/tr073336_correspondence-20180418.pdf (last visted April 1, 2021), which resulted in a lawsuit challenging a Los Angeles County housing project based in part on the claim that the project was required to offset its GHG emissions to "net zero"; *see also* Verified Petition for Writ of Mandate and Complaint for Injunctive Relief, *Center for Biological Diversity et al. v. County of Los Angeles et al.,* (May 1, 2019) Case No. 19STCP01610 (Los Angeles Sup. Ct.), available at https://www.biologicaldiversity.org/programs/urban/pdfs/2019-05-01-Verified-Petition-for-Writ-of-Mandate.pdf (last visited April 1, 2021)

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in their revision of Section 15064.4 (addressing GHG impacts under CEQA) in violation of Pub. Res. Code § 21083.05, and was instead left to the uncertain, unlegislated, and unregulated ad hoc decision-making of private for-profit CEQA consultants.

340. Defendants' similarly declined to provide any regulatory clarity whatsoever in response to the California Supreme Court's identification of "potential pathways" that may (or may not) be appropriate for addressing GHG emissions under CEQA in the context of a now superseded earlier CARB Scoping Plan.[238] Defendants' expressly declined to recognize, cite, or incorporate into its revised Redlining Revision (Section 15064.4) appellate court CEQA GHG decisions that upheld specific CEQA compliance pathways issued after the Supreme Court's decision in *Newhall*.[239]

341. Defendants' VMT Redlining Regulations likewise by regulatory decree use CEQA to achieve VMT reductions, thereby causing disparate interference and harm to the mobility of minority communities most harmed by the housing crisis and most dependent on automobiles to get to work and perform other basic needs. Intentionally interfering with or making more costly the dominant mobility choice of minority workers is a fundamental policy choice that cannot lawfully be delegated to an agency, nor can that agency in turn lawfully further delegate that authority to private sector CEQA consultants on an ad hoc, project-by-project, consultant-by-consultant basis in the context of CEQA review of housing and other projects, and in the complete absence of public review and comment, approval by elected representatives, compliance with the APA, or any other form of compliance with procedural or substantive requirements for agency adoption of plans, policies, or ordinances governing the review and approval of housing applications.

342. By enacting bare-boned statutory mandates, the Legislature has escaped deciding crucial questions under CEQA, leaving Defendants with "unrestricted authority to make fundamental policy determinations" regarding new standards for evaluating GHG emissions and transportation impacts under CEQA.[240] This is exactly the type of misallocation of duties between

[238] *Newhall*, 62 Cal.4th 204, 229.
[239] *See, e.g., Assoc. of Irritated Residents,* 17 Cal.App.5th 708.
[240] *Clean Air Constituency v. California State Air Resources Bd*. (1974) 11 Cal.3d 801, 816 (citing *Kugler*, 69 Cal.2d 371)

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the Legislative and Executive branches of state government that the nondelegation doctrine prohibits.[241]

343. Defendants' further delegation of these fundamental policy determinations, by willfully and expressly declining to provide legislatively mandated significance criteria, and clarity and content in the Redlining Regulations, to private sector CEQA technical consultants hired by city and county staff to determine "significance," mandate "mitigation," and assess "feasibility" of global GHG and related VMT CEQA impacts on an ad hoc, project-by-project basis, whereby similarly-situated persons and projects are differentially treated is an even more egregious delegation of fundamental housing and transportation mobility choices to the private sector.

THIRD CAUSE OF ACTION AGAINST DEFENDANTS OPR AND NRA
(Violation of Federal Fair Housing Act and Housing and Urban Development Regulations, 42 U.S.C., § 3601 *et seq.*; 24 C.F.R. Part 100)

344. Plaintiffs hereby re-allege and incorporate paragraphs 1-271, above.

345. The Federal Housing Act (42 U.S.C. § 3601 *et seq.*) ("FHA") was enacted in 1968 to combat and prevent segregation and discrimination in housing. The FHA's language prohibiting discrimination in housing is broad and inclusive, and the purpose of its reach is to replace segregated neighborhoods with truly integrated and balanced living patterns.

346. In formal adjudications of charges of discrimination under the FHA over the past 20 to 25 years, HUD has consistently concluded that the FHA is violated by facially neutral practices that have an unjustified discriminatory effect on the basis of a protected characteristic, regardless of intent.

347. Pursuant to its authority under the FHA, HUD has duly promulgated and published nationally-applicable federal regulations implementing the FHA's Discriminatory Effects Standard at 24 C.C.R. part 100 (*see* 78 Fed.Reg. 11459-01 (Feb. 15, 2013)), as well as proposed amendments to these regulations designed to strengthen and clarify anti-discrimination enforcement consistent

[241] *See, e.g.*, *Gundy v. United States* (2019) 139 S.Ct. 2116 (Gorsuch, J., dissenting)("by directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow."); *United States v. Horn* (6th Cir. 2012) 679 F.3d 397, 401 ("[A]n administrative agency cannot be granted the power to issue legislative rules … without having any political accountability and without having to follow any procedure whatsoever.").

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with the United States Supreme Court decision in *Inclusive Communities*.[242] Because the proposed regulations simply codify the Court's interpretation of existing law, the existing and proposed amendments are collectively referred to herein as "HUD Regulations". These HUD regulations continue to apply, and have the force and effect of law.

348. The HUD regulations provide, *inter alia*, that liability under the FHA may be established "based on a practice's discriminatory effect . . . even if the practice was not motivated by a discriminatory intent." 24 C.F.R., § 100.500.

349. The HUD regulations further provide that: "A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons, or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, … or national origin." 24 C.F.R., § 100.500(a).

350. The Redlining Regulations actually and predictably result in a disparate impact on members of minority communities, including but not limited to Plaintiffs, and perpetuate the housing shortage, the housing affordability and homelessness crisis, and the shocking and increasing gap in homeownership rates between minority and non-minority households as demonstrated in Figures 1 - 5, and 7. The Redlining Regulations further provide arbitrary and capricious CEQA compliance exceptions for new housing located near certain transit facilities and other urban infill locations, notwithstanding evidence of minority community displacement and evidence that this policy will require the demolition of "tens if not hundreds of thousands" of occupied single family homes. Specifically, the VMT Redlining Revisions promote demolition, displacement and gentrification of minority communities in neighborhoods served by transit, and make "infeasible" under CEQA the construction of the over 3.5 million new homes – including those affordable to median income aspiring minority homeowners and renters – in suburban and rural location, as described in the allegations and specifically in Paragraphs 71, 190, and 246. The Redlining Regulations further perpetuate and exacerbate the weaponized use of CEQA litigation in wealthier white communities to block new housing based on intentionally omitted GHG CEQA compliance pathways, intentionally racially discriminatory aesthetic and noise significance criteria,

[242] *Supra* notes 83-85.

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and unauthorized and intentional new cost and compliance mitigation detail burdens, as in the allegations and specifically in Paragraphs 23, 24, 25, 155, and 156.

351. The Redlining Regulations also increase transportation barriers and transportation costs to residents of new housing (who are disproportionally likely to be minorities) in relation to their already-housed (and less likely to be minority) neighbors, creating disparate transportation harms to minority communities. The Redlining Regulations also directly promote subsidized rental housing in lieu of creating adequate supplies of housing that can be purchased without government subsidies by minority families, and thereby promote racially segregated rental housing and perpetuate the wealth gap by depriving minority families of homeownership, as discussed in Paragraph 309.

352. The Redlining Regulations' promotion of high cost, high rise housing nearest frequent transit ignores, and thus creates and further exacerbates, the displacement of existing (more likely to be minority) residents in these locations to more distant locations with less costly housing, where displaced residents and their families are likely to be harmed by lengthy commutes that cause adverse health impacts for drivers and result in a variety of harms to family welfare by depriving children and the community of the time workers are forced to spend behind the wheel. The Redlining Regulations' further discourage, and maintain white exclusivity and high housing costs, in suburban and rural communities not served by frequent existing commuter bus, rail, or ferry service, thereby denying minorities access to High Opportunity areas as mapped by the Haas Institute and discussed in Paragraph 323.

353. Because of the discriminatory effect of the Redlining Regulations, Defendants have the burden of proving that these regulations do not violate the FHA as interpreted and implemented through HUD regulations.

354. Defendants have not met, and cannot meet, their burden of trying to justify the discriminatory effect of the Redlining Regulations, since imposing higher CEQA compliance costs and greater litigation obstacles on housing is not necessary to achieve the policy goal of addressing the environmental impact of climate change by reducing global GHG emissions, as discussed in Paragraphs 58, 63, 143, 183, 184, 188, 229, 233, and 255, and which instead promotes the

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relocation of California residents and jobs to higher per capita GHG states and countries, thereby increasing global GHG emissions. Defendants likewise cannot meet their burden of justifying the discriminatory effects of the Redlining Regulations by goals falling outside the statutory scope of CEQA such as "promoting wellness and active transportation," as discussed in Paragraphs 56 and 305. Finally, Defendants have not met their burden of showing the necessity of such racially discriminatory Redlining Regulations since GHG emission reductions can and should be pursued through other measures having a less discriminatory effect, such as reducing GHG emissions from forest fires or pursuing less regressive GHG emission reduction measures such as reducing the GHG emissions associated with the manufacturing and shipping practices for the furniture purchased annually by the state's wealthier households, , as discussed in paragraphs 56, 220, 221, 249, 306, and 307.

355. Because Defendants' Redlining Regulations have an unjustified discriminatory effect on members of minority communities, including Plaintiffs, they violate the FHA as implemented though HUD regulations. Consequently, Defendants' Redlining Regulations should be declared unlawful and enjoined, and Plaintiffs are entitled to other and further relief pursuant to 42 U.S.C. § 1983.

FOURTH CAUSE OF ACTION AGAINST DEFENDANTS OPR AND NRA

(Violation of the Fair Employment and Housing Act, Gov. Code, § 12955 *et seq.*)

356. Plaintiffs hereby re-allege and incorporate herein by reference the allegations contained in paragraphs 1-271, above.

357. The Fair Employment and Housing Act (Gov. Code, §12955 *et seq.*) ("FEHA") provides, *inter alia,* that: "It shall be unlawful. . . (l) To discriminate through public or private land use practices, decisions, and authorizations, because of race, color, … national origin, source of income or ancestry." Gov. Code §12955(l)

358. Defendants' Redlining Regulations, on their face and as applied, constitute public land use practices decisions and/or policies subject to the FEHA.

359. Defendants' Redlining Regulations, on their face and as applied, actually and predictably have a disparate negative impact on minority communities and are discriminatory

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against minority communities and their members, including but not limited to Plaintiffs, because they increase the cost of housing and exacerbate anti-housing CEQA litigation obstacles, and litigation-related costs (including but not limited to attorney fees and the taxes, fees, and costs of litigation delays, which increase the cost of the housing project and result in higher purchase price or rents for future occupants). As reflected in Figures 1, 2, 3, 4, 5, 7 and 8, along with the allegations, the disparate impact increased housing costs have on minority communities

360. Defendants' Redlining Regulations and their discriminatory effect have no legally sufficient justification. They are not necessary to achieve (nor do they actually tend to achieve) any substantial, legitimate, nondiscriminatory interest of the state, and in any event such interests can be served by other, properly-enacted standards and regulations having a less discriminatory effect as demonstrated in Figures 11 through 15 above and discussed in detail in Paragraphs 109 through 144.

361. Because of their unjustified disparate negative impact on members of minority communities, including Plaintiffs, Defendants' Redlining Regulations violate the FEHA, and should be declared unlawful and enjoined.

FIFTH CAUSE OF ACTION AGAINST DEFENDANTS NRA AND OPR

(Violation of General Plan Law, Gov. Code §§ 65300 *et seq.* including § 65584 (Regional Housing Needs Assessment Law))

362. Plaintiffs hereby re-allege and incorporate paragraphs 1-271, above.

363. The California Constitution establishes Home Rule doctrine for California cities and counties.[243]

364. The Legislature has enacted specific mandates requiring local governments to plan and zone for sufficient housing and circulation elements to meet, among other goals, the housing and transportation needs of existing and future residents, including, but not limited to, General Plan law, and laws requiring each city and county in California to plan for and approve its share of projected population growth including, but not limited to, the RHNA laws (first adopted in 1969, and substantially strengthened with numerous amendments in subsequent years, including 2019)

[243] Cal. Const., Art. XI, §§ 5, 7, 9, 11.

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(Gov. Code §§ 65580 *et seq.*), Density Bonus Laws (first adopted in 1979, and substantially strengthened with numerous amendments in subsequent years, including 2019) (Gov. Code §§ 65915 *et seq.*), and the Housing Accountability Act (first adopted in 1982, and substantially strengthened with numerous amendments in subsequent years, including 2019) (Gov. Code §§ 65589.5 *et seq*.).

365. The Legislature enacted specific mandates requiring regional transportation agencies to work with local governments, as well as state and federal air quality and transportation agencies, to prepare regionally integrated land use and transportation plans that respect statutorily-mandated General Plans, comply with state and federal transportation laws, state and federal air quality laws, and state GHG reduction laws, while also accommodating a growing population and economy.[244]

366. Defendants' VMT Redlining Regulations mean that housing located in suburban and rural neighborhoods, which is not either government subsidized and restricted to low income residents, includes more than approximately 11 units, has a significant unavoidable impact under CEQA based on the Underground VMT Regulation and Defendant OPR's reliance on the CAPCOA Manual. The Redlining Regulations mean that even such housing that complies with General Plan and zoning requirements, is consistent with the regional SB 375 to achieve GHG reduction targets from future housing development, and is required to be approved to meet a city's RHNA obligation, cannot be approved without costly and time-consuming EIR, cannot be approved without undergoing an uncertain standard of "infeasibility of further VMT mitigation," without demonstrating the infeasibility of an "alternative" – including an alternative housing location – that does have a less than significant VMT impact, as discussed demonstrated in Figure 4 and discussed in paragraphs 13, 21, 194 and 254. Such housing projects are also subject to litigation uncertainty based on Defendants' failure to incorporate (or decline for express reasons) to incorporate the Supreme Court's CEQA GHG compliance pathways in *Newhall*, and are particularly susceptible to

[244] *See* Sen. Bill No. 375 (2007-2008 Reg. Sess.) §§ 2-15, amending Gov. Code §§ 65080, 65400, 65583, 65584.01, 65584.02, 65584.04, 65587, 65588; adding Gov. Code §§ 14522.1, 14522.2 and 65080.01; amending Pub. Res. Code § 21061.3, adding Pub. Res. Code § 21159.28, and adding Chapter 4.2 to Div. 13 of the Pub. Res. Code (commencing with § 21155). *See also* HCD, Memorandum for Planning Directors and Interested Parties, Re: Senate Bill 375 (SB 375) Chapter 728, Statutes of 2008, (Oct. 2, 2013), http://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/sb375_final100413.pdf.

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aesthetics and construction noise challenges based on racially disparate and NIMBY-deferential Aesthetics and Noise Redlining Regulations, as discussed in paragraphs 23, 24, 25, 155, and 156.

367. According to academic experts at New Geography, 85% of existing Californians live in suburban communities – with less than 15% in urban city cores.[245] The Redlining Regulations impose impossible-to-achieve-in-practice high density demands on urban cores, and provide no compliance pathway for cities and counties required by RHNA to adopt and implement timely Housing Element updates to General Plans that accommodate the millions of new homes.

368. Defendants received comments, including third party reports, that set forth uncontested facts about the failure of high density TPA development, pro-suburban NIMBY policies such as those long implemented in the Bay Area under many iterations of no-growth environmentalist regimes. This policy has failed, notwithstanding the vast wealth and relatively high public transit services provided in the Bay Area. In fact, all Bay Area cities have failed to produce adequate affordable housing, and the wealthiest communities have also failed to produce enough market rate housing, in violation of their RHNA obligations. Defendants embrace this Bay Area planning dogma with their VMT Redlining Regulation, while continuing to pander to anti-housing suburban NIMBYs with their GHG, Aesthetics, Construction Noise, and Mitigation Detail Redlining Regulations. This housing production planning dogma – exported statewide by Defendants has already, and will continue, to result in the displacement and disapora of legacy minority communities in central cities (as shown by Figure 25 above), and the explosion of supercommuters in communities where they drive until they qualify for housing they can afford to buy or rent (pre-COVID). See Figure 26:

[245] Wendell Cox, *California's Dense Suburbs and Urbanization*, New Geography (Mar. 14, 2018), https://www.newgeography.com/content/005908-californias-dense-suburbs-and-urbanization#:~:text=Now%2C%20more%20than%2085%25%20of,oriented%20suburbs%20(Figure%208)..

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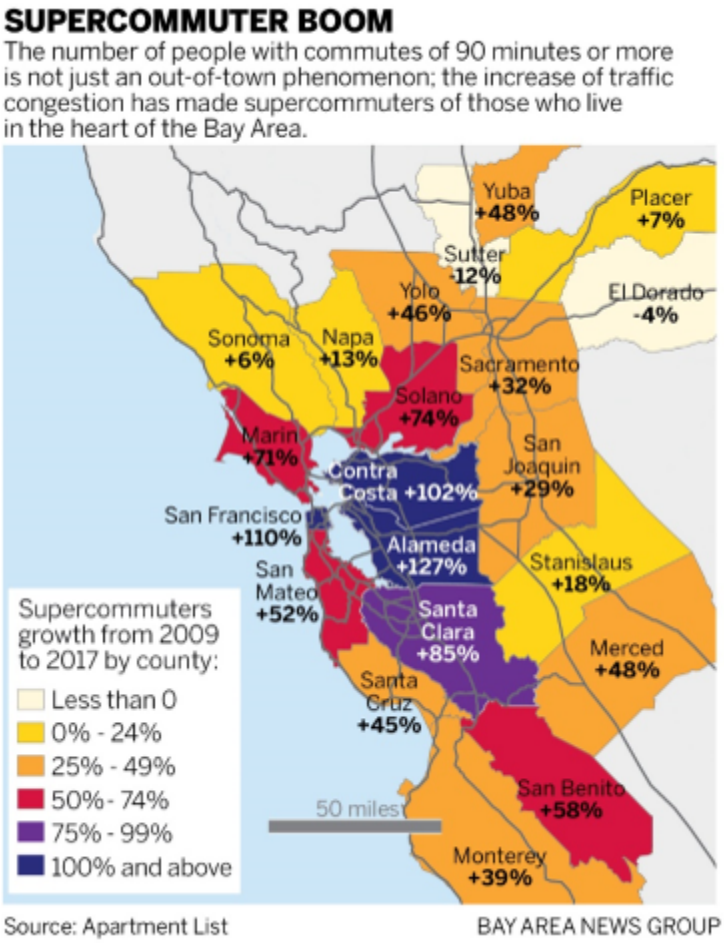
Figure 26: Bay Area Supercommuter Boom



369. Defendants' Redlining Regulations are inconsistent with, and unlawfully impede, compliance with General Plan laws requiring cities and towns to plan for economically diverse housing that meets existing and projected future needs, as described above and in in Paragraphs 8, 254 and 364. Defendants' Redlining Regulations generally, and the Section 15064.3(b)(1) threshold in particular, provides that projects located even 10 feet outside the one-half mile boundary surrounding a transit stop are presumed to have a less than significant VMT impact only if that project results in an actual net decrease in VMT in the project area. Since new housing includes vehicles used during construction, as well as vehicles used during occupancy by future residents (along with their guests and repair workers etc.), eligibility for this "less than significant" VMT determination requires occupants of new housing to pay vast and unknown sums to transit providers and others purporting to reduce VMT by an amount that offsets the new VMT from housing that cities and counties are required to plan for and approve, , as discussed in Paragraphs 135, 159, 166.

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370. The new housing must also meet affordability criteria for a range of household incomes including low and median income future residents for whom housing is already completely unaffordable. Adding tens if not hundreds of thousands of dollars to make housing even less affordable is directly contrary to state General Plan laws compelling affordable and median income housing. To the extent that Defendants' may argue that taxpayers – or ratepayers – or fuel purchasers – or post-capitalism governance structure – or any other "magic potion" will fund these added costs, today's housing obligations fall on local government and current housing victims who cannot conjure or wait for magic potion pots of money to appear.

371. To the extent that Defendants assert that exorbitant new VMT mitigation mandates that increase housing costs and cause disparate harms can be avoided only if all new housing is built in the 3% of the SCAG region that qualifies for a presumption of less than significant VMT impacts, another magic pollution solution must be conjured, as discussed in Paragraphs 159 and 262. We already know that the cost of building the most expensive type of housing unit (even small apartments in buildings of eight stories or more), on the most expensive type of land (already-developed neighborhoods with homes and businesses that must be bought out and demolished), with the most expensive and expansive retrofit needs (interconnected systems of aging and undersized water, sewer and other infrastructure designed to accommodate a fraction of the new density), is extraordinarily high and entirely unaffordable to median income workers. As recently reported by the City of Los Angeles' non-partisan City Controller, Ron Galperin, building even small apartments for the homeless cost about $530,000 per unit in urban neighborhoods even without transit proximity – most of these units exceed the median cost of an existing condominium in the City of Los Angeles or single family home in Los Angeles County, which are more appropriately sized for families and are not affordable for aspiring median (or even 120% and 150% above median) income homeowners.[246]

372. Finally, to the extent Defendants' Redlining Regulations are intentionally designed to make housing so expensive that more people will depart California entirely, and thereby reduce GHG emissions in California based on CARB's flawed GHG metric, even though GHG emissions

[246] Letter from Ron Galperin, *supra* note 52.

will actually increase based on the much higher per capita GHG emissions in the top three destination states for departing Californians (Texas, Arizona and Nevada), these Redlining Regulations are flatly in conflict with the Legislature's GHG emission reduction mandates in SB 375, which require California's region to achieve GHG emission reduction goals from the land use and transportation sectors while also accommodating population and economic growth, as discussed in Paragraphs 188 and 211. Defendants cannot hijack CEQA into a population reduction strategy under the guise of global climate change leadership by increasing housing costs and anti-housing litigation obstacles in order to expel all Californians except existing homeowners and high income earners, along with those too poor to move.

SIXTH CAUSE OF ACTION AGAINST DEFENDANTS NRA AND OPR

(Violation of the Congestion Management Plan Law, Gov. Code § 65088 *et seq.*)

373. Plaintiffs hereby re-allege and incorporate paragraphs 1-271, above.

374. California's transportation laws, including its Congestion Management Plan ("CMP") law (Gov. Code § 65088 *et seq*.), recognize the need for integrated regional transportation planning: "To keep our California moving, all methods and means of transport between major destinations must be coordinated to connect our vital economic and population centers." Gov. Code, § 65088(d). The Legislature has concurrently affirmed its commitment to "solving California's traffic congestion crisis," and its intent "to do everything within its power to remove regulatory barriers around the development of infill housing," and to assure that CMPs accommodate expanding homeownership "because homeownership is only now available to most Californians who are on the fringes of metropolitan areas and far from employment centers." Gov. Code § 65088(f)-(g).

375. Proposed amendments to the CMP law that would have eliminated required compliance with traffic congestion standards, and eliminated required roadway improvements to achieve compliance with such standards in unacceptable traffic congestion areas, were considered and expressly rejected by the Legislature.[247] CMPs are used to satisfy federal transportation laws

[247] *See, e.g.*, Assem. Bill No. 1098 (2015-2016 Reg. Sess.) as introduced Feb. 27, 2015 (AB 1098 ultimately died in committee pursuant to Cal. Const., Art IV, § 10(c) on Jan. 31, 2016).

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and regulations, including the federal Intermodal Surface Transportation Efficiency Act of 1991 and other federal laws governing the disbursement of federal funds to California for transportation projects.[248] Federal transportation funding is critical for California transportation infrastructure. CMPs must include performance metrics, including LOS measurements of traffic delay that were deleted as CEQA impacts by the challenged VMT regulations.[249]

376. In adopting the current version of § 65088 in the CMP law in 2003, traffic congestion was determined by the Legislature to cause hundreds of thousands of lost hours by commuters, hundreds of tons of air pollutants, and millions of added costs to "the motoring public." Gov. Code § 65088(c) SB 743, which authorized, but did not require, Defendants to amend CEQA regulations to eliminate LOS congestion impacts as a transportation impact, expressly provided that no change to CEQA was authorized for assessing air impacts.

377. Defendants OPR and NRA repeatedly, and falsely in response to comments, asserted that the new VMT impact would reduce CEQA compliance costs by eliminating the need to evaluate LOS traffic delay impacts. In fact, traffic delay impacts and improvements to avoid or minimize traffic delay impacts are required by CMP law (and in many local jurisdictions are also required by the Circulation elements of local General Plans). Defendants failed to disclose that an assessment of traffic delay continued to be required in project air emission analyses under CEQA, and in the required analyses of consistency with adopted plans to reduce environmental impacts, including CMPs, to reduce excess air and other impacts caused by excessive congestion-related traffic delays.

378. Defendants OPR and NRA repeatedly, and falsely in response to comments, asserted that the new VMT impact would result in less costly transportation mitigation measures because congestion-related mitigation measures would no longer be required; however, CMP law (and in many local jurisdictions the Circulation Elements of local General Plans) continue to have legal

[248] Gov. Code § 65089(e).

[249] *See, e.g.,* San Bernardino Associated, *San Bernardino County Congestion Management Plan: 2016 Update*, 1-3 (June 2016), https://www.gosbcta.com/wp-content/uploads/2019/10/2016-Congestion-Management-Plan-.pdf (last visited April 1, 2021).

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force and effect as adopted plans which avoid the environmental impacts caused by excessive congestion-related traffic delays.

379. Defendants' Section 15064.3 VMT regulation that only transportation projects that reduce VMT can be presumed to have a less than significant impact, and Defendants' Underground VMT Regulation, implement Defendant OPR's policy decision that reducing traffic gridlock will "induce" more VMT by shifting travelers toward auto use and away from other travel modes, i.e., that increasing traffic congestion will create an environmental benefit by inducing more people to take transit.[250] Unilaterally implementing, through CEQA, the promotion of gridlock on state and local roadways is in direct conflict with, and thereby specifically prohibited by, specific legal mandates requiring safe and sufficient highways and roadways, and pollution reduction from decreased congestion, such as the state's CMP laws as well as other federal and state highway and roadway transportation, safety, and air quality laws.

380. For example, CMP laws allow, pursuant to a very specific procedure, local jurisdictions to opt out of the CMP's planning and monitoring requirements *only if* opting out of this anti-gridlock state law is supported by a majority of jurisdictions within a county, representing a majority of the population within that county. Gov. Code § 65088.3. Los Angeles County, for example, did just that and opted out of the CMP process.[251] Transportation projects not approved in conformance with CMPs and related transportation laws are also not eligible for federal funding, including, but not limited to, transportation improvements approved by voters with sales tax and other funding mechanisms that assume ongoing compliance with law and access to federal transportation funding.

381. Apart from being flatly at odds with express federal and state legislated mandates to transportation efficiency and safety, and reductions of air emissions from longer gridlocked

[250] OPR, Updating Transportation Impact Analysis in the CEQA Guidelines: Preliminary Discussion Draft of Updates to the CEQA Guidelines Implementing Senate Bill 743 (Steinberg, 2013), 5, 9, 32-33 (Aug. 6, 2014) https://la.streetsblog.org/wp-content/uploads/sites/2/2014/08/Final_Preliminary_Discussion_Draft_of_Updates_Implementing_SB_743_080614.pdf (last visited April 1, 2021).

[251] Memorandum from Los Angeles County Metropolitan Transportation Authority to City of Los Angeles Department of Transportation, *Re: Dissolution of the Congestion Management Program in Los Angeles County* (Aug. 28, 2019), a true and correct copy of which is included as **Exhibit L**.

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commute trips, Defendants' assertion that promoting gridlock will "induce" transit ridership is not supported by substantial evidence, and is in fact arbitrary and capricious. The longstanding consensus of transportation researchers is that in the absence of a recession or declining population (both of which result in fewer commuters): (a) on urban commuter expressways and major urban roads, traffic congestion increases to meet maximum capacity; (b) public transit does not alleviate congestion; and (c) congestion pricing – charging for the use of roads during peak commute hours – does alleviate congestion.[252]

382. Empirical evidence supporting public transit as an alternative to roadway use is scant, and certainly does not extend statewide. For example, one of the studies relied on by Defendants is an observed increase in roadway congestion along a transit route during a transit worker strike in Los Angeles in 2003.[253] This common sense temporary result - when a successful transit system is temporarily removed, more people will drive to get to their destination – does not translate into any long-term or widespread conclusion that increasing congestion will induce transit use, since ***all*** data confirm that public transit use has declined even with expanded transit service and ever-increasing congestion.

383. Defendants' unlegislated policy decision expands CEQA to induce transit use by defining roadway safety increases that also increase roadway capacity and reduce gridlock-related air emissions as an adverse impact requiring mitigation, or to burden new housing occupants with VMT mitigation costs because they, like their more fortunate already-housed neighbors, must drive.

384. Far more minority residents, including homeowners, live in San Bernardino and other Inland Empire locations where housing costs are up to 80% lower than Santa Monica and other Coastal Job Centers. Minority residents of these areas are at higher risk of adverse health, safety and environmental harms caused by excessive traffic congestion. Fewer than 2% of San Bernardino residents use public transit, and transit ridership's most precipitous decline in the SCAG

[252] *See* Jaffe, *The Only Hope for Reducing Traffic*, CityLab, (Oct. 19, 2011), https://www.citylab.com/transportation/2011/10/only-hope-reducing-traffic/315/ (last visited April 1, 2021) (summarizing transportation research).

[253] *See, e.g.*, Jaffe, *Public Transportation Does Relieve Traffic Congestion, Just Not Everywhere*, CityLab, (Apr. 1, 2013), https://www.citylab.com/transportation/2013/04/public-transportation-does-relieve-traffic-congestion-just-not-everywhere/5149/ (last visited April 1, 2021).

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region has been for lower income minority commuters living throughout the region. The evidence presented to Defendants, and known to Defendants as of promulgation of the Redlining Regulations, unequivocally demonstrated that intentionally increasing congestion does not increase transit use even when transit system services have expanded. Increasing congestion – and the Los Angeles region now has the worst congestion conditions in the U.S. – extends commute times with consequent adverse air quality, GHG emission, and health consequences to minority drivers and the majority-minority population in the region.

385. Defendants' Redlining Regulations are accordingly inconsistent with, and unlawfully impede, compliance with the Transportation Congestion Management Plan law, in addition to General Plan laws requiring cities and towns to plan for economically diverse housing that meets existing and projected future needs.

SEVENTH CAUSE OF ACTION AGAINST DEFENDANTS NRA AND OPR

(Violations of the Health & Safety Code, § 39000 *et seq*., including the California Clean Air Act, Stats. 1988, Ch. 1568 (AB 2595))

386. Plaintiffs hereby re-allege and incorporate herein by reference the allegations contained in paragraphs 1-271, above.

387. California has ambient air quality standards ("CAAQS") which set the maximum amount of a pollutant (averaged over a specified period of time) that can be present in outdoor air without any harmful effects on people or the environment.

388. CAAQS are established for particulate matter ("PM"), ozone, nitrogen dioxide ("NO_2"), sulfate, CO, SO_2, visibility-reducing particles, lead, hydrogen sulfide ("H2S"), and vinyl chloride.

389. In California, local and regional authorities have the primary responsibility for control of air pollution from all sources other than motor vehicles. Health & Safety Code § 39002.

390. Under the California Clean Air Act ("CCAA"), air districts must endeavor to achieve and maintain the CAAQS for ozone, CO, SO_2, and NO_2 by the earliest practicable date. Health & Safety Code § 40910. Air districts must develop attainment plans and regulations to achieve this objective. *Id*.; Health & Safety Code § 40911.

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391. Each plan must be designed to achieve a reduction in districtwide emissions of five percent or more per year for each nonattainment pollutant or its precursors. Health & Safety Code § 40914(a). CARB reviews and approves district plans to attain the CAAQS (Health & Safety Code §§ 40923 and 41503) and must ensure that every reasonable action is taken to achieve the CAAQS at the earliest practicable date (Health & Safety Code § 41503.5).

392. If a local air district is not effectively working to achieve the CAAQS, CARB may establish a program or rules or regulations to enable the district to achieve and maintain the CAAQS. Health & Safety Code § 41504. CARB may also exercise all the powers of a district if it finds the district is not taking reasonable efforts to achieve and maintain ambient air quality standards. Health & Safety Code, § 41505.

393. The vast majority of California is designated nonattainment for the CAAQS for ozone and PM, including San Bernardino County.

394. Nitrogen oxides, including NO_2, CO, and VOCs are precursor pollutants for ozone, meaning they react in the atmosphere in the presence of sunlight to form ozone.

395. PM is a complex mixture of extremely small particles and liquid droplets found in the air which can cause serious health effects when inhaled, including asthma and other lung issues and heart problems. Some particles are large enough to see while others are so small that they can get into the bloodstream. PM is made up of PM_{10} (inhalable particles with diameters 10 micrometers and smaller) and $PM_{2.5}$ (fine inhalable particles with diameters 2.5 micrometers and smaller).

396. PM emissions in California and in San Bernardino County increased in 2016 as compared to prior years.

397. OPR's proposal for updating the CEQA Guidelines to include VMT as a metric for analyzing transportation impacts states that adding new roadway capacity increases VMT.[254] The OPR proposal further states that "[r]educing roadway capacity (i.e. a "road diet") will generally

[254] OPR, *Revised Proposal on Updates to the CEQA Guidelines Evaluating Transportation Impacts in CEQA: Implementing Senate Bill 743 (Steinberg, 2013)* (Jan. 20, 2016), at I:4, http://opr.ca.gov/docs/Revised_VMT_CEQA_Guidelines_Proposal_January_20_2016.pdf (last visited April 1, 2021).

reduce VMT and therefore is presumed to cause a less than significant impact on transportation. Building new roadways, adding roadway capacity in congested areas, or adding roadway capacity to areas where congestion is expected in the future, typically induces additional vehicle travel."[255]

398. Attempting to reduce VMT by purposefully increasing congestion by reducing roadway capacity will not lead to GHG emission reductions. Instead, increasing congestion will cause greater GHG emissions due to idling, not to mention increased criteria air pollutant[256] and toxic air contaminant[257] emissions. Increasing congestion increases emissions of multiple pollutants including NOx, CO, and PM. This would increase ozone and inhibit California's ability to meet the CAAQS for ozone, NO_2, and PM, among others.

399. Because Defendants rely on the unsupported assertion that substantial VMT reductions will occur if traffic congestion and gridlock conditions increase, and willfully ignored evidence that VMT increases with population and economic activity, and is particularly important for minority workers breaking out of poverty with entry level jobs as well as median income minority workers who have attained or aspire to attain affordable homeownership in communities like San Bernardino, and because longer-duration commutes increase emissions of smog-forming and health risk creating pollutants such as NO2 and PM, Defendants are violating their statutory duty to align CEQA with legislative and regulatory mandates to achieve the environmental and public health benefits of expeditiously achieving attainment of the CAAQS.

400. California law also creates a statutory duty under the Health & Safety Code to ensure that California meets the National Ambient Air Quality Standards ("NAAQS") set by the EPA.

401. Like the CAAQS, the NAAQS are limits on criteria pollutant emissions which each air district must attain and maintain. U.S. EPA has set NAAQS for CO, lead, NO_2, ozone, PM, and SO_2.

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[255] *Id*. at III:32.

[256] The six criteria air pollutants designated by the U.S. EPA are PM, ozone, nitrogen dioxide ("NO_2" or "NOx"), CO, SO_2, and lead. *See Criteria Air Pollutants*, US EPA https://www.epa.gov/criteria-air-pollutants (last visited April 1, 2021).

[257] Toxic air contaminants, or TACs, include benzene, hexavalent chrome, cadmium, chloroform, vinyl chloride, formaldehyde, and numerous other chemicals. *See Toxic Air Contaminants,* Office of Environmental Health Hazard Assessment, https://oehha.ca.gov/air/toxic-air-contaminants (last visited April 1, 2021).

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402. CARB is designated the air pollution control agency for all purposes set forth in federal law. Health & Safety Code § 39602. CARB is responsible for preparation of the state implementation plan ("SIP") required by the federal Clean Air Act ("CAA") to show how California will attain the NAAQS. CARB approves SIPs and sends them to EPA for approval under the CAA. Health & Safety Code § 40923.

403. While the local air districts have primary authority to adopt rules and regulations to achieve emissions reductions from non-mobile sources of air emissions and to develop the SIPs to attain the NAAQS (Health & Safety Code § 39602.5), CARB is charged with coordinating efforts to attain and maintain ambient air quality standards (Health & Safety Code § 39003) and to comply with the CAA (Health & Safety Code § 39602).

404. San Bernardino County is within the region designated as nonattainment/extreme for the ozone NAAQS and nonattainment for $PM_{2.5}$.

405. The vast majority of California is nonattainment for the ozone NAAQS and much of California is nonattainment for PM_{10}.

406. It is unlawful for Defendants to adopt CEQA regulations to intentionally undermine California's efforts to attain and maintain the NAAQS by adopting measures that intentionally increase congestion in an attempt to lower VMT to purportedly achieve GHG emission reductions.

407. In modifying CEQA to ignore traffic congestion and thereby increase the duration of vehicular trips, reduce VMT by intentionally increasing traffic congestion, and failing to provide express significance criteria for transportation projects, thereby increasing CEQA regulatory burdens, direct and indirect project costs, and regulatory delays to the completion of transportation improvements approved by regional, state and federal air quality and transportation agencies as consistent with NAAQS, CAAQS, and GHG emission reduction legal mandates, Defendants have unlawfully induced higher quantities of air pollution in San Bernardino County in violation of the California Clean Air Act.

EIGHTH CAUSE OF ACTION AGAINST DEFENDANTS NRA AND OPR

(Violations of the California Global Warming Solutions Act, Health & Safety Code § 38500 *et seq.*)

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408. Plaintiffs hereby re-allege and incorporate herein by reference the allegations contained in paragraphs 1-271, above.

409. When adopting amendments to CEQA regulations, Defendants are limited to making amendments that are authorized by statutes enacted by the Legislature, or making amendments to conform to judicial interpretations of statutes and regulations. All such regulatory amendments must also comply with the APA.

410. Defendants have repeatedly, and expressly, exceeded their authority and adopted regulatory amendments to comply with GHG emission reduction targets that were either expressly rejected by the Legislature, or never enacted by the Legislature.

411. SB 32 was originally proposed to require both a 40% GHG reduction target by 2030, and an 80% emission reduction target by 2050. The Legislature expressly rejected the 80% emission reduction target by 2050 in the final enacted version of SB 32, [258] yet Defendants have unlawfully incorporated this unlegislated 2050 GHG target with its oblique and unlawful new GHG regulatory criteria of "consistency with the State's long-term climate goals or strategies" in Section 15064.4(b)(3).

412. SB 375 was originally proposed to mandate VMT reductions, but VMT reduction mandates were expressly rejected in the final enacted version of SB 375.[259] Even more recently, Senate Bill No. 150 (2017) ("SB 150") was originally proposed to mandate VMT reductions, but VMT reduction mandates were again expressly rejected in the final enacted version of SB 150.[260] Directly thwarting the Legislature's refusal to mandate VMT reductions, Defendants' have imposed a "zero-minus-one" VMT reduction significance criteria for otherwise lawful housing projects located ten feet outside TPAs in Section 15064.3(b)(1). This policy thereby imposes CEQA mitigation costs of hundreds of thousands of dollars on each new housing unit in furtherance of the

[258] *Compare* Sen. Bill 32 (2015-2016 Reg. Sess.) as introduced on Dec. 1, 2014 *with* Stats. 2016, ch. 249 (SB 32).
[259] *Compare* Sen. Bill 375 (2007-2008 Reg. Sess.) as amended on Apr. 17, 2017 *with* Stats. 2008, ch. 728 (SB 375) (early version stating bill would require regional transportation plan to include preferred growth scenario designed to achieve reductions in VMT but modified before passage).
[260] *Compare* Sen. Bill 150 (2017-2018 Reg. Sess.) as introduced on Jan. 18, 2017 *with* Stats. 2017, ch. 646 (SB 150).

State's "long-term climate goals or strategies" (aka the 2017 CARB Scoping Plan), even if such housing is fully compliant with all applicable GHG emission reduction laws and regulations, and even if such housing is fully consistent with the future housing development planned for in regional GHG emission reduction plans adopted and approved by CARB itself pursuant to SB 375.

413. Defendants refer to Executive Orders and an agreement made by the prior administration as their authority to mandate VMT reductions as a GHG emission reduction under CEQA, and to rely on Executive Orders to require GHG emission reductions to housing projects more generally.[261] Defendants further identify their intention to use regulatory amendments to promote an evolving set of policy preferences. For example, in their original (and least camouflaged through unlawful feints like the Underground VMT Regulation) version of the proposed VMT regulation in 2014, Defendant OPR explained its policy reasons for wanting to define VMT as an "impact" under CEQA:

- Improving or increasing access to transit
- Increasing access to common goods and services such as groceries, school and daycare
- Incorporating affordable housing into the project
- Improving the jobs/housing fit of a community
- Incorporating neighborhood electric vehicle network.[262]

414. These may or may not be feasible, appropriate, attainable, or lawful policy directives as applied to any particular county, city or project – but without question, none falls within Defendants' lawful authority in promulgating regulations under CEQA.

415. Over time, Defendants have softened their pro-traffic congestion rhetoric and settled on promoting "infill housing" and "transit" as policy directives already established by the

[261] *See, e.g.*, OPR, *Revised Proposal on Updates to the CEQA Guidelines Evaluating Transportation Impacts in CEQA: Implementing Senate Bill 743 (Steinberg, 2013)* (Jan. 20, 2016), http://opr.ca.gov/docs/Revised_VMT_CEQA_Guidelines_Proposal_January_20_2016.pdf (last visited April 1, 2021).

[262] Hernandez and MacLean, *OPR Proposes to Increase CEQA's Costs, Complexity and Litigation obstacles with SB 743 Implementation*, JDSUPRA (Aug. 25, 2014), https://www.jdsupra.com/legalnews/opr-proposes-to-increase-ceqas-costs-c-48743/ (last visited April 1, 2021).

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Legislature, but the Legislature's directives on these issues have been surgical and rely much more on the "carrot approach" of exempting certain kinds of infill projects from certain types of CEQA processing or analytical requirements (e.g., aesthetics and parking, as described above). The Legislature has not, however, authorized any "stick approach" of charging new housing residents steep VMT mitigation fees, or requiring residents to pay for someone else's transit somewhere else. The Legislature has also not authorized any additional tax or fee aimed at reducing GHG emission for the consumption of gasoline by new housing occupants, or given CARB statutory authority to ignore the "wells-to-wheels" comprehensive cap-and-trade fee to impose differentially higher GHG transportation costs on new housing residents.

416. In fact, Defendants have provided zero evidence of their statutory authority to require VMT reductions under CEQA, or to require any GHG emission reduction beyond those already required by other laws and regulations applicable to housing projects, such as the solar rooftop standard, stringent water and energy conservation standards, and laws and regulations more uniformly applicable to such projects, such as renewable energy mandates for electricity production, mandates to phase in electric and other lower GHG-emitting cars, and the cap-and-trade program for reducing GHG from fossil fuels from "wells to wheels" (aka production through refining through ultimate consumer consumption).[263]

417. The California Supreme Court declined to require use of unlegislated Executive Order GHG emission reduction targets as CEQA significance thresholds, but did recognize the

[263] In 2017, the Legislature expanded its landmark "Cap and Trade" program establishing a comprehensive approach for transitioning from fossil fuels to electric or other zero GHG emission technologies, which already includes a "wells to wheels" program for taxing oil and natural gas extraction, refinement, and ultimate consumer use. Stats. 2017, ch. 135 (A.B. 398), 2017. CARB has explained that emissions from transportation fuel combustion and fuels used for residential, commercial, and small industry sources "are covered indirectly through the inclusion of fuel distributors [in the Cap and Trade Program]." CARB*, Final Statement of Reasons for California's Cap-and-Trade Program*, 2 (Oct. 2011), https://ww3.arb.ca.gov/regact/2010/capandtrade10/fsor.pdf (last fisted April 1, 2021) . The courts, too, have found it appropriate for a lead agency to rely on cap-and-trade to address both capped and uncapped, consumer emissions from fuel consumption. *See Assoc. of Irritated Residents v. Kern County Board of Supervisors* (2017), 17 Cal.App.5th at 739-44.

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important role that evolving science plays in CEQA.[264] Defendants do not address the science, and instead rely on unlegislated Executive Orders and other administration policies and activities. Were Defendants to actually engage on the science, the following inconvenient truths would defeat the Redlining Regulations:

- Climate change remains an urgent challenge, which California has elected to help lead.
- Climate change is a global challenge, and global GHG emission reductions are needed.
- Even though California is the world's fifth largest economy, if considered separately from the rest of the U.S., California contributes less than one percent of GHG emissions to the globe and has among the lowest per capita and per GDP GHG rates in the nation and among developed nations in the world. As former Governor Brown reported, California's climate leadership efforts will be "futile" unless other states and countries follow our lead.
- Keeping people (and their jobs) in California is better for the climate than exporting people to the higher per capita GHG states receiving Californians who have departed to find housing they can afford to buy.
- Converting California's forests from methane-emitting tracks of dead and dying trees that periodically and catastrophically explode into fatal, black carbon-emitting wildfires into sustainable forests with effective carbon sequestration sinks and suppliers of sustainable building products that do not have to be sent across the ocean with waste biomass used for renewable energy, is one of many far more effective global GHG emission reduction strategies that avoids the disparate harms of the Redlining Regulations – and could be replicated to help improve sustainable forestry management practices globally.

[264] *Cleveland Nat. Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 515-518.

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- Using climate as the latest excuse to cause disparate harms to minority communities where hard working families are deprived of purchasing homes and getting to work is a civil rights violation, so other GHG emission reduction strategies – such as changing GHG requirements for furniture purchased by wealthier households – should be pursued.
- CEQA has been distorted from a tool to challenge construction of freeways, clear-cutting of old growth forests, and pollution from new factories, into a redlining tool targeting housing in existing communities. Housing is an existential crisis. Adding compliance and litigation costs, ambiguities, and delays hurts housing the most – and minorities needing housing the most of all.
- There is no scientific rationale supporting the weaponization of CEQA in furtherance of unlegislated, unlawful, and ultimately ineffective climate policies.

NINTH CAUSE OF ACTION AGAINST DEFENDANTS NRA AND OPR

(Violation of CEQA for Mandatory Content of Guidelines, Pub. Res. Code § 21083(b))

418. Plaintiffs hereby re-allege and incorporate paragraphs 1-271, above.

419. Defendants NRA and OPR violated section 21083(b) of the Public Resources Code by failing to include in regulations implementing CEQA the required "express" criteria for public agencies to use in determining whether a project causes a significant impact to the environment, , as discussed in Paragraphs 99, and 231 through 238.

420. **Section 15064.3, Appendix G section XVII(b), and Underground VMT Regulation**. As described at length above, these contradictory, ambiguous, and unlawful provisions fall well short of the mandatory express regulatory content required by the Legislature in Public Resources Code section 21083(b).

421. **Section 15064.4 and Appendix G section VIII(a) and (b).** As described at length above, these contradictory, ambiguous, and unlawful provisions fall well short of the mandatory regulatory content required by the Legislature in Public Resources Code section 21083(b).

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422. **Section 15126.4 (Performance Standard Mitigation Measures), and Appendix G section I(c) (Aesthetic Impacts), and Appendix G section XXXXXX (XII)**, are unlawful under CEQA itself. Section 20183(a) of the Public Resources Code directs Defendant OPR to prepare the CEQA regulations "in a manner consistent with this division [CEQA]." The Legislature has unequivocally stated in section 20014 of the Public Resources Code:

> In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division. However, a public agency may use discretionary powers provided by such other law for the purpose of mitigating or avoiding a significant effect on the environment subject to the express or implied constraints or limitations that may be provided by law.

423. The VMT and GHG Redlining Regulations violate each and every provision of Pub. Res. Code § 20014.

424. Defendants have not shown, and cannot show, that the act of driving a car to work by a resident of a new home is itself an "effect on the environment," whereas the secondary environmental consequences of driving a car, such as the fact that air emissions are worse when traffic congestion extends the duration of commutes – not when a new home is 10 feet plus one-half mile further away from a bus stop used by 2 residents per acre in population centers like the Gateway Cities that have more than 8,000 residents per acre, are not an effect on the environment.

425. Similarly, keeping people in California with an adequate housing supply and lower housing costs, in homes meeting California's stringent energy and water conservation standards, serving as mini-renewable power plants by generating electricity on roofs, and driving the cleanest fleet of cars in the country, is a far better global GHG emission reduction and climate change leadership outcome than increasing housing prices and anti-housing CEQA litigation obstacles, and thereby inducing even more of the 48 percent of Californians currently contemplating moves to higher per capita GHG states to do so. Further, exacerbating residential racial segregation, and worsening the housing, poverty and homelessness crisis as a climate strategy is unlikely to inspire other states or countries to follow our lead and is thus, as former Governor Brown said, "futile."[265]

[265] *See generally* Hernandez & Friedman, *California Greenhouse Gas Regulation, and Climate Change*, Chapman University Center for Demographics & Policy, (2015) https://www.chapman.edu/wilkinson/_files/cas-oc-prio-fn-sm2.pdf (last visited April 1, 2021).

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426. As the California Supreme Court's dissent plainly explained in *Newhall*,[266] CEQA is absolutely not a population control statute – nor does it authorize Defendants to adopt Redlining Regulations to induce the departure of California residents and jobs to other states. Defendants have zero legal authority to pursue de-population by weaponizing CEQA to make it difficult, if not impossible, to build a home that is affordable to California's majority-minority median income aspiring homeowners given the complete black hole of GHG and VMT CEQA compliance uncertainty created by the Redlining Regulations.[267]

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[266] *Newhall,* 62 Cal.4th at 220.

[267] San Diego is the epicenter of this CEQA black hole, in a tortured and ongoing series of judicial decisions. In 2011, San Diego's regional transportation agency ("SANDAG") completed a regional land use and transportation plan that complied with the GHG reduction targets established for the region under SB 375, but which also acknowledged that—in the later years of the plan—regional GHG levels would increase with population growth even as per capita GHG would decrease. From 2012 to 2017, this regional plan was in litigation, losing at both the trial and appellate court levels before posting a partial win at the California Supreme Court, which disagreed with the Attorney General and environmental advocates that an unlegislated Executive Order GHG emission reduction target for 2050 was required as a CEQA GHG significance threshold independent of the region's compliance with the legislated SB 375 GHG reduction target. *Cleveland Nat. Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497. During the litigation, the challenged regional plan had been superseded by an updated plan mandated by SB 375 and the CEQA streamlining benefits conferred by SB 375 on housing projects that complied with the regional GHG reduction plans remained ephemeral. In a separate but related local agency action, in 2011, San Diego County adopted a requirement to prepare a Climate Action Plan ("CAP") as part of its General Plan update. The County's 2012 CAP was challenged, and both the trial and appellate court concluded that the CAP was legally inadequate because it did not include sufficiently enforceable GHG reduction measures and because it was not supported by a supplemental EIR. *See Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152. The County then approved a second CAP in 2018, which—among other provisions—required via a mitigation measure that new housing projects with General Plan amendments achieve a "net zero" GHG outcome, imposing on new housing the full cost of reducing GHGs – a CEQA GHG compliance strategy that had been endorsed by OPR, CARB and the California Attorney General for a master planned community in Los Angeles County that included, for example, converting dung- and wood-burning cook stoves to cleaner fuels on other continents. The County's second CAP was immediately challenged, however, for failing to require VMT reductions beyond "net zero" GHG emissions; for allowing an option for some reductions to occur outside San Diego County (something already allowed by the regulatory agencies and the Attorney General for the Los Angeles project); and for continuing to allow single-family home development in San Diego County, rather than limiting new housing to transit-oriented, higher density housing in existing urbanized areas. The trial court ruled against the County's second CAP, and the appellate court affirmed. *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467.Meanwhile, on a third litigation track, multiple anti-housing CEQA lawsuits were also filed against all approved County housing projects that relied on the "net zero" GHG CEQA compliance pathway. *See, e.g.*, *Center for Biological Diversity v. County of San*

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427. Defendants likewise have zero legal authority to reject CEQA jurisprudence in favor of their own (rejected) policy preferences of elevating unlegislated state climate policies as significance criteria while adamantly refusing to accept judicial decisions that endorse compliance with California's extensive GHG legislative and regulatory mandates as a CEQA compliance pathway given their (rejected) policy preferences that CEQA always require "additive" mitigation mandates above and beyond those required by other laws and regulations.[268]

428. Defendants have not shown, and cannot show, why the subjective aesthetics judgment of a sidewalk gazer peering at a new fourplex in Beverly Hills is an effect on the environment when the identical fourplex in the city of San Bernardino is not under Appendix G section I(c).

429. Defendants have not shown how Section 15064.7(b)'s express endorsement of "case-by-case" (and thus inherently arbitrary) significance criteria aimed at a particular project by a CEQA consultant or agency staff member, or by an anti-housing CEQA litigant, are appropriate or lawful substitutes for the significance criteria that the Legislature expressly directed be included in the CEQA regulations pursuant to Pub. Res. Code § 20083(b).

Diego (S. D. Cty. Sup. Ct. Case No. 37-2018-00054312-CU-TT-CTL [Newland Sierra project]); *Endangered Habitats League v. County of San Diego* (S.D. Cty. Sup. Ct. Case No. 37-2019-00038672-CU-TT-CTL [Village 14 project]); *Elfin Forest Harmony Grove Town Council v. County of San Diego* (S.D. Cty. Sup. Ct. Case No. 37-2018-00043049-CU-TT-CTL [Valiano project]); *Elfin Forest Harmony Grove Town Council v. County of San Diego* (S.D. Cty. Sup. Ct. Court Case No. 37-2018-00042927-CU-TT-CTL [Harmony Grove Village South project]). In a fourth litigation track, San Diego County also published, as the Redlining Regulations endorse, its own CEQA guidance setting forth criteria for determining whether project GHG impacts are significant (and require mitigation) under CEQA, relying in part on CARB-endorsed "efficiency metric" that established a per capita GHG threshold as opposed to a mass reduction threshold. The County's Guidelines were then targeted by another lawsuit, led by a luxury spa resort opposed to allowing nearby housing. Again the County lost in trial and appellate courts, who were not persuaded that the County's reliance on a CARB-endorsed per capita GHG efficiency metric was supported by substantial evidence, and further concluded that no CEQA significance criteria could be completed in advance of the County's then-pending second CAP. *Golden Door Properties, LLC v. County of San Diego* (2018) 27 Cal.App.5th 892. Anti-housing CEQA lawsuits against specific projects remain in litigation, with no housing expected to be constructed while this litigation onslaught is weaving its way through the courts. And, one fact is undisputed: additional years of housing construction delay is a certainty. The terms "black hole" and "legal miasma" are not intended as hyperbole or mere rhetoric, but as the ongoing reality for approved housing—and critically needed housing that no one is even trying to get approved—in San Diego County.

[268] *Newhall,* 62 Cal.4th at 229.

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430. Defendants have not shown why subsection (d) of Section 15064.7 recognizes some environmental standards as appropriate significance criteria, but rejects public health and safety standards that have been expressly endorsed as appropriate CEQA compliance pathways by many courts over many years,[269] given its persistent violations of its statutory obligation to update CEQA regulations every two years pursuant to Pub. Res.s Code § 20083(f), and its own regulatory mandate requiring regulatory amendments to "match new developments relating to CEQA" under CEQA Guidelines § 15007.

431. Finally, Defendants have not shown any legal authority under CEQA to reject CEQA jurisprudence upholding performance standard mitigation measures and instead require detailed mitigation requirements that can only be finalized with design and engineering unless it is "infeasible or impracticable" to prepare such costly details for a project that may never be approved, will certainly be modified, and will accordingly be misleading at the CEQA stage and require costly and potentially litigious revisions once the final configuration of a project receives agency approvals.

432. CEQA does not confer on Defendants the legal authority to neuter statutory mandates to safely accommodate population and economic growth in CMPs and General Plans, or SIPs or Sustainable Communities Strategies for regional reductions in GHG emission from land use and transportation decisions. CEQA does not confer on Defendants the authority to pretend that commuters behave differently if their home is ten feet further away from the one-half mile donut around a rail station, and proclaim that housing in the three percent of the SCAG region in the donut hole has no VMT impact, while the new house next door has to fund tens or even hundreds of thousands of dollars of transit passes for strangers.

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[269] *See, e.g., Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906 (upholding CEQA document's reliance on building code seismic standards compliance to reduce related impacts); *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 636-637 (upholding CEQA document's reliance on building code energy efficiency standards compliance to reduce related impacts); *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355 (upholding CEQA document's reliance on hazardous material registration regulation compliance to reduce related impacts); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308 (upholding CEQA document's reliance on air and water quality standards compliance to reduce related impacts).

433. Finally, CEQA does not confer on Defendants the legal authority to enforce purportedly "environmental" mandates that the Legislature has considered but soundly rejected, like the urban growth boundaries and ecosystem service taxes in the CARB Vibrant Communities Appendix that Defendants OPR and NRA vowed to implement – unlawfully – in their Redlining Regulations.

TENTH CAUSE OF ACTION AGAINST DEFENDANTS OPR AND NRA

(Violation of Administrative Procedure Act ("APA"), Gov. Code §11349)

434. Plaintiffs hereby re-allege and incorporate paragraphs 1-271, above.

435. Defendants violated section 11349 and 11349.1 of the APA in promulgating amendments to the CEQA regulations that fail mandatory APA criteria for necessity, authority, clarity and/or consistency, as more specifically described in Paragraphs 22, 25, 99, 135, 136, and 164. Gov. Code §§ 11349, 11349.1.

436. **Section 15064** newly mandates that lead agencies "briefly explain" how compliance with each significance criteria "means that the project's impacts are less than significant." Defendants' initially proposed that this explanation be supported by substantial evidence in the record, but then dropped the substantial evidence phrase and left the adequacy of the brief explanation to the imagination of lead agencies, contentious CEQA litigants, and judges.

437. CEQA allows,[270] and scores of judicial decisions have upheld as legally adequate,[271] the common practice of public agencies to use a "checklist" format for making significance determinations, including but not limited to the "Environmental Checklist Form" included as Appendix G of the CEQA regulations. Use of a checklist is particularly prevalent for smaller projects that are "categorically exempt" from the need for detailed and more costly CEQA compliance processes such as EIRs.

438. Smaller housing projects of the type far more likely to be affordable for minority family homeownership, such as building one to three single family homes in an existing residential area, or building lower density, lower cost small apartment structures that include up to six

[270] CEQA Guidelines § 15064(b)(1).

[271] *See Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 896; *see also Eureka Citizens for Responsible Gov. v. City of Eureka* (2007) 147 Cal.App.4th 357, 498.

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apartments, qualify for CEQA exemptions. CEQA Guidelines § 15303(a)-(b) Confirming project eligibility for CEQA categorical (as well as the more limited subset of statutory) exemptions constitutes the majority of CEQA compliance actions completed by public agencies and reported to Defendant OPR each year, as shown by Table 1 (Summary of CEQA Document Submittals by Year and Type) in Defendants NRA's December 2017 "Standardized Regulatory Impact Assessment" ("SRIA") prepared for the Redlining Regulations.[272]

439. Agencies using Appendix G or a similar "checklist" format that identify significance thresholds of general applicability to projects cannot legally preclude a member of the public from making a "fair argument" supported by "substantial evidence in the record" that a project may have a significant adverse impact on the environment due either to "unusual circumstances" or because the project at issue does not qualify for an exemption.[273] Lawsuits challenging CEQA exemptions, however, are not common: only 17 percent of all lawsuits filed statewide over a three year period (2010-2012) challenged exemptions.[274] When challenged in court, even the smallest of CEQA-exempt housing projects lose access to lower cost conventional construction loans and are typically delayed until the lawsuit is resolved: one CEQA-exempt replacement single family home in Berkeley was delayed by more than 11 years of judicial proceedings and by the time the exemption was judicially upheld the homeowner had abandoned the project.[275]

440. CEQA-exempt projects also have the lowest CEQA compliance costs. Defendants NRA lacks the legal authority under the APA "necessity" and "authority" mandates to require public agencies to expand the content of each checklist for each project to separately, but "briefly,"

[272] NRA, Standardized Regulatory Impact Assessment: CEQA Guidelines Updates (Dec. 6, 2017) at 4, http://www.dof.ca.gov/Forecasting/Economics/Major_Regulations/Major_Regulations_Table/documents/CEQAUpdatesSRIA_CNRA_12-6-17.pdf [hereinafter "SRIA"]. The actual number of CEQA-exempt projects are actually much greater since agencies are not required to file Notices of Exemption for exempt projects, and the SRIA reports only Notices of Exemptions.

[273] *See Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943.

[274] Hernandez, Friedman, and DeHerrera, *In the Name of the Environment: Litigation Abuse Under CEQA* (Aug. 2015), at 14, https://www.hklaw.com/publications/in-the-name-of-the-environment-litigation-abuse-underceqa-august-2015/.

[275] *Id*. at 1086.

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explain why each threshold is appropriate for each project. Defendants' Appendix G includes 88 project-specific thresholds (some of which involve sub-components and multi-part thresholds).

441. Defendants OPR and NRA are charged with updating CEQA's regulations based on new statutes or new judicial interpretations of CEQA. There is no new statute requiring this type of explanation to be added to long-established CEQA checklist practices. Two cases are cited by Defendant NRA to defend this new mandate.

442. *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108-09, as modified (Apr. 9, 2004), which states in the context of a judicial dispute about the significance of an impact that "thresholds cannot be used to *determine automatically* whether a given effect will or will not be significant."[276] *Rominger v. County of Colusa (Adams Group Inc., Real Party in Interest and Defendant)* (2014) 229 Cal.App.4th 690, 717, which likewise involves a disputed impact, and requires only that agencies consider *information presented to the agency* when determining whether an impact is significant.[277] Neither the *Amador* nor *Rominger* decisions can be read as imposing a legal obligation requiring all state nor local agencies to proactively defend the use of each of the 88 thresholds in Appendix G as applied to each and every project.

443. Plaintiffs specifically commented on Defendants' initially proposed expanded CEQA compliance obligation in Section 15064(b)(2), which required that lead agencies provide "substantial evidence" explaining why compliance with a threshold meant that a project would have a less than significant effect. In one of the only examples of Defendants' changing the proposed regulation in response to comments, the "substantial evidence" phrase was deleted and only the "briefly explain" text was retained.[278] Defendants' do not explain what text content is required to satisfy this new "briefly explain" mandate, or why the generally applicable CEQA standard of review requiring "substantial evidence" is not applicable to this new "briefly explain" mandate.

444. Defendant NRA's addition of subsection (b)(2) of Section 15064(b)(2) unlawfully expands the scope and cost of lead agencies' obligations under CEQA, which in turn increase

[276] *NRA - FSOR, supra* note 96, at 447.
[277] *Id*.
[278] *Id.* at 172.

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housing costs because applicants pay agency costs in the form of higher application fees or reimbursement requirements, and increase CEQA litigation obstacles for housing because the sufficiency of the newly-required "explanations" as to why each of the 88 impacts is appropriately used for a particular housing project present a new litigation target that shifts the evidentiary burden to the agency to proactively and repeatedly defend its CEQA methodology instead of the housing opponent who under current law is required to present substantial evidence of a fair argument that unusual circumstances render an otherwise categorical exempt project non-exempt.[279]

445. This new Redlining Revision fails the Gov. Code § 11349(a) criteria of necessity and Gov. Code § 11349(b) criteria of authority: neither any statute nor any judicial precedent require lead agencies to defend the adequacy of the approximately 88 significance thresholds – including significance thresholds included in the CEQA regulations promulgated by Defendants – as applied to every project. The absence of any criteria for what constitutes a lawful "brief explanation" fails the Gov. Code § 11349(c) criteria of clarity and reference as well.

446. **Section 15064.7** expressly encourages and endorses the use of "case-by-case" significance criteria. This fails the Gov. Code § 11349 criteria of necessity, authority, clarity, reference, and non-duplication.

447. **Section 15064.3(b)** and **Appendix G section XVII(b)** defining land use projects outside the three percent of SCAG land comprising transit donut holes, and transportation projects anywhere, as having a presumptively less than significant VMT impact only if the projects result in an overall reduction of VMT in the project area violates all Government Code section 11349 criteria including necessity, authority, clarity, consistency, reference and non-duplication. The Underground VMT Regulation further compounds these section 11349 violations.

448. **Section 15064.4** and **Appendix G § VII**, elevating unlegislated GHG emission reduction mandates, including related VMT Redlining Regulations, increasing housing prices and anti-housing CEQA litigation obstacles, violate all Gov. Code § 11349 criteria including necessity, authority, consistency, clarity, reference and non-duplication. **Section 15126.4** imposes new

[279] *See generally Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937.

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prohibitions on lawful performance standard mitigation measures and thereby violates the Gov. Code § 11349 criteria of necessity, authority, consistency, reference and non-duplication.

449. **Appendix G section I(c)** imposes arbitrary and differential aesthetics significance thresholds that violate the Gov. Code § 11349 criteria of necessity, authority, and reference.

ELEVENTH CAUSE OF ACTION AGAINST DEFENDANT OPR

(Violation of APA – Underground Regulations, Gov. Code § 11340-11365)

450. Plaintiffs hereby re-allege and incorporate paragraphs 1-271, above.

451. A regulation is defined by the APA as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." Gov. Code § 11342.600.

452. State agencies are required to adopt regulations following the procedures established in the APA and are prohibited from issuing and enforcing underground regulations. Gov. Code § 11340.5. Under the APA, an underground regulation is void: only regulations properly promulgated under the APA are valid.

453. The Underground VMT Regulation is a standard of general application for public agencies to implement and interpret CEQA. The Underground VMT Regulation includes recommended significance criteria that flatly contradict the promulgated Section 15064.3 VMT regulation, as described above.

454. The Underground VMT Regulation is particularly abhorrent in the context of civil rights violations and CEQA. Defendants' Underground VMT regulation has already been used as the basis for a CEQA lawsuit against housing in San Diego County, in which Petitioner housing opponents argue that San Diego County lacks the legal authority to adopt any VMT significance criteria or measurement methodology which is "less stringent than" the Underground VMT Regulation. Like every county in California, San Diego is obligated to accommodate more housing under the RHNA law – and the vast majority of the unincorporated County area is not within a TPA or otherwise served by frequent transit. The Underground VMT regulation says that the appropriate significance criteria for unincorporated county areas is 15% below the countywide VMT average,

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inclusive of VMT within cities that are served by transit. The City of San Diego and other coastal cities that do have transit have lower VMT than the unincorporated county area, but also have attributes – transit and pre-existing higher population densities – that counties do not have.

455. First, it is well-established, particularly in the context of civil rights, that claims may be based on an agency guideline, practice, or custom.[280]

456. Second, in the context of CEQA, it is hornbook law that "guidance" in documents such as the VMT Underground Regulation is generally accepted by other lead agencies as a benchmark.[281] Compliance with such "guidance" often conveys a presumption of adequacy, thereby adding force and weight to the "guidance."[282]

457. Such expert agency guidance documents have sufficient legal weight under CEQA that the California Supreme Court considered a non-binding CEQA guidance document issued by the Bay Area Air Quality Management District ("BAAQMD"), and found that some of the District's recommended significance criteria and other guidance "goes too far" and was in fact not authorized at all under CEQA. *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 386-87.

458. The Underground VMT Regulation is far more unlawful than the non-binding guidance issued by BAAQMD, and then litigated up to the California Supreme Court, because the Legislature specifically directed that CEQA's regulations – not mere "guidance" – be amended to address GHG impacts (Pub. Res. Code § 21083.05), and to eliminate traffic delay as a stand-alone CEQA impact (Pub. Res. Code § 21099).

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[280] *See, e.g., Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060, 1094 (upholding civil rights judgment for plaintiff based on jury instruction that "'Practice or custom' means any permanent, widespread, well-settled practice or custom that constitutes a standard operating procedure of the defendant. . . . .").

[281] *See* Kostka and Zischke, *Practice Under the California Environmental Quality Act* § 13.13 (CEB, 2d. Ed. 2018) ("Lead agencies often use performance standards adopted by regulatory agencies as thresholds of significance."); *Id.* at § 13.13 (Some "agencies have adopted manuals or other guidance documents designed to give lead agencies direction on how to assess impacts in CEQA documents").

[282] *See, e.g., Mission Bay Alliance v. Office of Community Investment & Infrastructure (GSW Arena LLC et al., Real Parties in Interest and Defendants)* (2016) 6 Cal.App.5th 160, 205 (upholding threshold for toxic air contaminants based on US EPA standards).

459. The Underground VMT Regulation is already being used as a basis for a CEQA lawsuit seeking to halt residential development in San Diego County. In a far more extensive technical evaluation of several different VMT methodology options, San Diego County – like San Bernardino county as discussed above adopted a VMT significance threshold and model methodology for residential projects in the unincorporated county area, and adopted a threshold that residential projects resulting in 15% less VMT than the existing residential project per capita VMT in the unincorporated county lands would be less than significant under CEQA. Both counties adopted this VMT threshold and methodology in full compliance with Section 15064.3, which expressly provides in pertinent part:

> (b)(1) "Projects that decrease vehicle miles traveled *in the project area* compared to existing conditions should be presumed to have a less than significant transportation impact. (Emphasis added).
>
> (b)(4) A lead agency has the discretion to choose the most appropriate methodology to evaluate a project's vehicle miles travelled, including whether to express the change in absolute terms, per capita, per household, or in any other measure. A lead agency may use models to estimate a project's vehicle miles travelled, and may revise those estimates to reflect professional judgment based on substantial evidence."

460. As explained by San Diego county in its VMT "Transportation Study Guide and associated thresholds of significance" for VMT, the county's chosen metric – 15% below VMT for unincorporated county lands – shifted its development priorities to the western portion of the county, nearer to the county's coastal cities, and would in fact achieve very significant VMT reductions in relation to previously-planned development patterns.[283] San Diego adopted its VMT threshold, notwithstanding the pandemic, on June 24, 2020 – a week ahead of the July 1 VMT Regulation implementation date.

461. This Complaint's prediction that the fact that the Underground VMT Regulation was issued concurrently with the final promulgation of Section 15064.3, along with the intentionally and unlawfully ambiguous use of the term "project area" in the regulation itself, would prompt anti-housing CEQA litigation, has been realized. This prediction was realized in a facial challenge to the

[283] County of San Diego, Final Transportation Study Guides (Jun. 2020), https://www.sandiegocounty.gov/content/dam/sdc/pds/SB743/COSD%20TSG%20FINAL.pdf.

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San Diego county's VMT threshold, which was based entirely on Plaintiffs' very different interpretation of the regulation's "project area" terminology, along with the wholesale elevation of the Underground VMT Regulation to regulatory status. Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, *Cleveland National Forest Found., v. County of San Diego et al.*, (Sept. 4, 2020) Case No. 37-3030-00031320-CU-WM-CTL (S.D. Sup. Ct. (attached hereto as **Exhibit M**).

462. Defendant OPR's purportedly non-regulatory "technical advisory" includes the 15% lower VMT numeric threshold (which both counties adopted), and direction that this quantitative threshold be applied either to average VMT within a city, or to average VMT within a "region" which consists of all cities as well as unincorporated county lands (which neither county adopted). The numeric threshold and the "project area" model methodology appear exclusively in the Underground VMT Regulation, and the Anti-Housing VMT Lawsuit that a local agency may only adopt a VMT threshold and methodology that "are more protective of the environment" than "required" by CEQA's regulations, and that the County's reliance on a project area definition that was co-terminus with its land use jurisdictional boundaries (much as a city could rely on a city-specific project area definition) was "not based on substantial evidence" because it fails to "rationally distinguish[] between significant and less-than-significant environmental impacts."[284] The Anti-Housing VMT Lawsuit does not acknowledge than San Diego county is required by the state's RHNA housing law to amend its General Plan and zoning ordinance to authorize an additional 6,700 new housing units – over the next eight years.[285]

463. Although there is no statewide database that timely reports on the filing of CEQA lawsuits against individual housing projects, based on information and experience VMT has become a major new obstacle to the completion of the CEQA process for new housing based on the arguments and assertions made by OPR representatives to representatives of cities, counties, applicants and consultants that any local agency or project deviation from the thresholds and methodological prescriptions the Underground VMT Regulation are only allowed to the extent they

[284] *Id.*
[285] SANDAG, *Final 6th Cycle Regional Housing Needs Assessment Plan* (July 10, 2020), https://www.sandag.org/uploads/projectid/projectid_189_27782.pdf.

are "more stringent" than the Underground VMT Regulation. Commenters, and at least one known lawsuit, are likewise alleging deficient VMT assessments in opposing housing projects. The Underground CEQA Regulations are, as alleged, intentionally being implemented as de facto regulations – and are accordingly unlawful as having not been approved as regulations pursuant to the APA.

TWELFTH CAUSE OF ACTION AGAINST DEFENDANTS NRA AND OPR

(Violation of APA – Mandatory Economic Impact Assessment, Gov. Code § 11346 *et seq*.)

464. Plaintiffs hereby re-allege and re-incorporate herein by reference the allegations of paragraphs 1-271, above.

465. Section 2003 of the California Department of Finance regulations (1 CCR § 2003(b)) ("Methodology for Making Estimates") provides that, "[i]n conducting the SRIA required by section 11346.3," Defendants "shall use an economic impact method and approach that has all of the following capabilities:

> (1) Can estimate the total economic effects of changes due to regulatory policies over a multi-year time period.
> (2) Can generate California economic variable estimates such as personal income, employment by economic sector, exports and imports, and gross state product, based on inter-industry relationships that are equivalent in structure to the Regional Industry Modeling System published by the Bureau of Economic Analysis.
> (3) Can produce (to the extent possible) quantitative estimates of economic variables that address or facilitate the quantitative or qualitative estimation of the following:
>
> > (A) The creation or elimination of jobs within the state;
> > (B) The creation of new businesses or the elimination of existing businesses within the state;
> > (C) The competitive advantages or disadvantages for businesses currently doing business within the state;
> > (D) The increase or decrease of investment in the state;
> > (E) The incentives for innovation in products, materials, or processes; and
> > (F) The benefits of the regulations, including but not limited to benefits to the health, safety, and welfare of California residents, worker safety, and the state's environment and quality of life, among any other benefits identified by the agency."

466. Department of Finance ("DOF") regulations require that DOF's "most current publicly available economic and demographic projections, which may be found on the department's website, shall be used unless the department approves the agency's written request to use a different projection for a specific proposed major regulation." 1 CCR § 2003(a).

467. DOF regulations also provide that: "An analysis of estimated changes in behavior by businesses and/or individuals in response to the proposed major regulation shall be conducted and,

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if feasible, an estimate made of the extent to which costs or benefits are retained within the business and/or by individuals or passed on to others, including customers, employees, suppliers and owners." 1 CCR § 2003(f).

468. Defendants OPR and NRA prepared a SRIA in December of 2017 for the Redlining Regulations as required by the APA for "major" regulatory proposals that "will have an economic impact on California business enterprises and individuals in an amount exceeding $50 million in any 12-month period."[286] As notified by several commenters, including Plaintiffs, the SRIA suffered from numerous fatal legal flaws.

469. First, the SRIA quantitatively considered only the cost of preparing CEQA documents such as VMT studies, and not the cost of complying with new CEQA compliance obligations such as mitigating significant VMT impacts. This is fundamentally flawed: the SRIA must evaluate all economic consequences of the regulatory proposal, and not simply document preparation costs – including the cost to a family of paying $58,000 in new VMT mitigation fees to purchase a new home that is actually affordable to median income minority families.

470. Second, the SRIA qualitatively assumed that new "infill" housing located in existing communities would not be required to pay any VMT or traffic congestion mitigation costs. Even for most "infill" projects – such as the 80% of non-TPA acres in the region's most densely populated cities in the Gateway Cities COG – VMT mitigation would in fact be required based on the Section 15064.3(b) regulatory threshold that projects must actually reduce total VMT in the project area, as well as in the un-promulgated Underground VMT Regulation dictating that projects outside TPAs should have 15% less VMT than the average for that jurisdiction, even if the project would reduce regional VMT.

471. Third, the SRIA qualitatively assumed that any VMT mitigation costs for non-infill development would be lower than traffic improvements required to reduce congestion delays under the traditional traffic congestion-based LOS standard, thereby reducing project costs. In fact, however, local, state and federal transportation laws – such as Circulation elements required to be included in local General Plans, regional CMP laws, and laws and regulations requiring adequate

[286] SRIA, *supra* note 273, at 3.

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transportation capacity to efficiently move people and goods, and avoid excess emissions from longer commute durations – continue to apply to new housing through other mandatory CEQA impact topics such as air quality, transportation safety, and land use plan consistency. Residents occupying new housing could thus continue to be required to fund roadway improvements as well as pay VMT costs, both under CEQA and under local land use law, making VMT mitigation a net increase in CEQA compliance costs.

472. Fourth, Defendants' ignored all comments about increased litigation obstacles, and associated increased costs and delays, regarding the absence of validated, consistent, or even knowable VMT data such as VMT "averages" for cities *or* regions. Defendants' instead delayed the effective date for required use of VMT under CEQA, apparently based on the assumption that California's 482 cities and 58 counties would develop (with substantial evidence) VMT data, VMT evaluation methodologies, VMT significance criteria, and effective VMT mitigation measures, at zero cost to any "individual" or "business." Cities and counties are scrambling to comply with this dramatic regulatory expansion of CEQA, but routinely pass through CEQA compliance costs to new housing applicants in the form of increased application and development fees – and all agency costs not paid by new housing residents are ultimately borne by individual and business taxpayers. Defendants' assertion in the SRIA that readily-available VMT models and mitigation measures are available is directly at odds with non-partisan transportation experts such as the scholars from U.C. Davis who have shown how inconsistent the VMT models actually are – and further how the absence of actual VMT validation data undermined the evidentiary value of any of these models. With agency fees already topping $100,000 per housing unit, and with the housing affordability crisis, Defendants' refusal to acknowledge and quantify the costs of expanding CEQA to VMT was likewise unlawful under the APA.

473. Fifth, Defendants applied arbitrary and inconsistent methodologies in the SRIA to assess the increased costs required to implement the Redlining Regulations. As noted above, for example, Defendants' quantified and claimed credit for the purportedly reduced regulatory costs for preparing VMT studies and no longer requiring traditional traffic studies that measure congestion-related delay based on LOS delay metrics. Defendants ignored or summarily rejected comments

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from traffic experts and other stakeholders that LOS studies would continue to be required under CEQA to accurately measure air emissions, transportation safety impacts, and consistency with other transportation laws, plans and policies including, but not limited to, the mandatory "circulation element" components of state-mandated local General Plans. In fact, recent surveys have confirmed that the majority of local jurisdictions are now requiring both LOS and VMT studies. Defendants likewise ignored or summarily rejected expert comments that LOS studies were required to accurately measure VMT, as well as comments regarding the adverse human health impacts of Defendants' decision to manipulate CEQA as part of Defendants' and CARB's unlegislated non-regulatory policy decision to intentionally worsening gridlock statewide to discourage driving and thereby decrease VMT.

474. Defendants likewise ignored or summarily dismissed comments about increased CEQA litigation costs and lawsuit loss risks engendered by the absence of validated VMT data, study methodologies, or mitigation measures. Defendants likewise ignored or summarily dismissed comments by experts and other stakeholders that the Redlining Restriction's unlawful new constraint on Performance-Based Mitigation Measures in Section 15126.4 would require applicants to build housing and other projects to prepare very detailed mitigation specifications without knowing whether the project was going to be approved, reconfigured, downsized, or denied.

475. For example, instead of using the common and judicially upheld "menu" of construction phase measures for reducing airborne dust and protecting water quality to meet specified regulatory standards and avoid "significant" CEQA impacts, Defendants' new constraint on Performance-Based Mitigation Measures would effectively require engineering-level drawings to demonstrate prescriptive dust control measures that may be redundant or counterproductive (i.e., watering surface dust during construction would be counterproductive on days when the only construction work underway is painting or pouring concrete), or deciding precisely where hay bales would be placed to protect stormwater runoff quality when bale placement would shift based on the construction status of permanent storm drain solutions. Even the expert air agencies (for construction dust management) and water quality agencies (for stormwater quality) recognize the effectiveness of Performance-Based Mitigation Measures with a menu of performance options, but

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Defendants refused to acknowledge or quantify in the SRIA the cost consequences of requiring prescriptive and precise, instead of performance-based, mitigation measures. Ignoring all such cost comments, Defendants' decreed that their more costly precise mitigation mandate would result in "the benefit of greater certainty regarding legal requirements," while providing no quantification of or evidence supporting this purported economic "benefit."[287]

476. Sixth, Defendants' ignored the global GHG consequences of increasing housing costs from both CEQA's expansion to VMT and the other Redlining Regulations, which continue to result in the out-migration of Californians to higher GHG states led by Texas, Nevada and Arizona.

477. Seventh, Defendants' simply ignored all comments about the disparate racial impacts of adding CEQA compliance and litigation costs to housing that is actually affordable for purchase by California's minority communities, as well as ignoring all comments about Defendants' intentional and unlawful policy opposition to attainable homeownership in favor of high cost, high density and overwhelming rental housing in the tiny fraction of California meeting the TPA transit-served criteria.

478. In sum, the economic impact assessment prepared by OPR and NRA, and accepted by OAL, violates the APA by (a) omitting any assessment of the impact of the challenged regulations on California residents, including but not limited to California residents harmed by the state's existing housing and homelessness crisis; and (b) omitting any assessment of the impact of the challenged regulations on the competitiveness of California businesses who are losing employees, or relocating to other states, because of California's acute shortage of housing units, and extraordinary and unaffordable housing costs.

THIRTEENTH CAUSE OF ACTION AGAINST DEFENDANTS NRA AND OPR

(Violation of APA, Gov. Code § 11346.9)

479. Plaintiffs hereby re-allege and incorporate paragraphs 1-271, above.

480. Under the APA, agencies proposing regulations must prepare and submit to OAL a written "Final Statement of Reasons" which includes, in pertinent part, "[a] summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal

[287] SRIA, *supra* note 273, at 27.

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proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change." Gov. Code, § 11346.9(a)(3).

481. Plaintiffs submitted 44 pages of comments, which included detailed citations and more than 200 pages of attached documents, to Defendant OPR dated March 14, 2015 describing the legal deficiencies, and racially disparate consequences of, Defendant OPR's 2017 proposed regulatory amendments to CEQA. In Exhibit A of its "Final Statement of Reasons for Regulatory Action" for amending CEQA regulations, Defendant NRA either summarily dismissed or rejected many of Plaintiffs' comments with the following form response: "The Agency is not making any change in response to this comment. This is beyond the scope of this regulatory package."[288] Examples of Plaintiffs' comments that were summarily dismissed as being "outside the scope of this rulemaking" include:

482. "Expanding CEQA, and increasing CEQA litigation risks, imposes stunningly regressive new costs and burdens on California lower and middle income families in the form of higher costs for basic necessities like utilities, transportation, fees and other CEQA 'mitigation' costs that are imposed solely on those needing the new housing and infrastructure.

483. "OPR's decision to impose new bundles of regressive cost burdens – like the VMT threshold and 'all feasible' mitigation mandates for 'significant' VMT quantities that universally occur in the inland areas of California that provide the only homeownership opportunities available to median or below median income families – makes homeownership even less affordable and accessible to our communities.

484. "No one in the Legislature voted to impose regressive new cost burdens that disproportionately harm California's minority communities. No one in the Legislature voted to authorize OPR to expand CEQA, or increase uncertainty and litigation risks. OPR is not empowered, in pursuant of climate or environmental goals, to worsen the housing, poverty and homelessness crisis."[289]

[288] NRA FSOR, *supra* note 334, at 501-577.
[289] *Id.* at 506-507.

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485. Plaintiffs submitted a second comment letter to Defendant NRA on July 20, 2018, again providing both detailed comments and extensive attachments and citations in support of the need to change proposed amendments to CEQA regulations. Again, Defendant NRA summarily dismissed as "outside the scope of this rulemaking" the commenters' urgent requests to avoid weaponizing CEQA to exacerbate the housing crisis and cause disparate harms to California's minority communities, particularly given Defendants' very clear explanation that it was making "policy" changes to CEQA regulations to advance the administration's climate goals. Examples of the comments that Defendants' summarily dismissed as "outside the scope of this rulemaking" include:

486. "Because California's climate leaders have chosen to enact GHG reduction metrics that count as GHG 'reductions' the act of forcing California residents and jobs to other states and countries, it is true that making CEQA ever more burdensome will likely induce even more Californians to depart to other states rather than continuing to suffer from our housing, homelessness, poverty and transportation crises.

487. However, this is not a color-blind government policy choice: wealthier, whiter and older Californians benefit, and poorer, minority and younger Californians are harmed, by further exacerbating our housing and related crises.

488. This is also not a defensible choice for California as a global climate leader. Since California's per capita and per GDP GHG emissions are among the lowest of any state in the nation, forcing Californians and jobs to move to other states and countries results in increased global GHG – and it is global GHG, rather than the less than 1% of global GHG attributable to California's economy that must be addressed by effective climate leaders. The research brief, 'California, Greenhouse Gas Regulation, and Climate Change' (2018), documents the ineffectiveness and inequity of California's GHG reduction strategies to date, as well as the fact that implementing the infill-only housing strategy included in the [CARB] Scoping Plan will achieve less than 1 percent of California's own GHG reduction goal and require the demolition of 'tens if not hundreds of thousands' of single family homes. California's GHG reductions account for only about 5 percent of the GHG reductions achieved in the United States since AB 32 was enacted in

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2007, even though we have the country's largest economy and population. Hernandez & Friedman, *California Greenhouse Gas Regulation, and Climate Change*, Chapman University Center for Demographics & Policy, (2015) https://www.chapman.edu/wilkinson/_files/cas-oc-prio-fn-sm2.pdf (last visited April 1, 2021).

489. With any honest accounting of global GHG emissions, weaponizing CEQA to further increase housing, energy and transportation costs against projects that meet every single environmental mandate (other than CEQA) approved by the Legislature or any state or local agency, will simply increase global GHG as well as income inequity and the housing, poverty, homelessness, and transportation crises."[290]

490. Defendants' summary dismissal of Plaintiffs' civil rights, environmental, and APA comments – in the context of nearly 40 pages of detailed comments and suggested revisions to regulatory amendments which would protect the environment as well as public health and not cause disparate harm to minority communities – with the response "[t]his comment is outside the scope of this rulemaking" violates Gov. Code § 11346.9(b) of the APA, which requires Defendants to include a written "explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change."

491. Defendants' NRA's near-blanket refusal to make any of the specific changes described on nearly 40 pages of text of the proposed regulations requested by Plaintiffs, or to recognize and address the SRIA's failure to quantify, disclose and assess the economic impacts to individuals and businesses of the Redlining Regulations, violate the APA.

492. Defendant NRA's failure to provide content in response to comments as required by section 11346.9 of the APA also extended to comments filed by other interested parties.

FOURTEENTH CAUSE OF ACTION AGAINST DEFENDANTS NRA AND OPR

(Ultra Vires Agency Action, Cal. Code of Civil Proc. § 1085)

493. Plaintiffs hereby re-allege and incorporate herein by reference the allegations contained in paragraphs 1-271, above.

[290] *Id.* at 640-641.

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494. The Redlining Regulations generally, and the Underground VMT and GHG Regulations in particular, are an unlawful attempt to achieve the 2050 GHG emission reduction target that was expressly rejected by the Legislature in SB 32, and to compel VMT reduction mandates that were expressly rejected by the Legislature in SB 150.

495. The GHG Redlining Regulations elevate to CEQA significance criteria status the "State's long-term climate goals or strategies" notwithstanding the Legislature's express rejection of numerous "goals or strategies" included in CARB's 2017 Scoping Plan, including but not limited to: reducing VMT as a GHG reduction mandate, mandating reduction of GHG emission by 80 percent by 2050, mandating the use of "net zero GHG" as a CEQA significance threshold, and mandating the urban growth boundaries, land conversion prohibitions, and eco-system service taxes and fees on urban residents included in the Scoping Plan's "Vibrant Communities" appendix. The GHG Redlining Regulations also elevate to CEQA significance criteria status unlegislated GHG Executive Orders such as Executive Order S-3-05 or other unlegislated actions undertaken by the Executive Branch such as the Subnational Memorandum of Understanding (Under 2 MOU) referenced by Defendants as among the policy mandates for the Redlining Regulations. Even the LAO has stated that, in consultation with Legislative Counsel, it is unlikely that even the state's primary climate regulator, CARB, has authority to adopt and enforce regulations to achieve 2050 GHG reduction targets.[291]

496. Defendants lack the legal authority to enforce through regulations GHG and VMT reduction targets that have been expressly rejected by the Legislature. Under Gov. Code § 11349(a) of the APA, California regulations must meet the "necessity" criteria whereby the "rulemaking proceeding *demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law*" (emphasis added). Under Gov. Code § 11349(b) of the APA, California regulations must also meet the "authority" criteria and be based on "*the provision of law* which permits or obligates the agency to adopt, amend, or repeal a regulation" (emphasis added). Only statutes, court decisions, or "other provision of law" – such as a regulation

[291] Taylor, *Cap-and-Trade Revenues: Strategies to Promote Legislative Priorities*, LAO (Jan, 21, 2016) 7, https://lao.ca.gov/reports/2016/3328/cap-trade-revenues-012116.pdf (last visited April 1, 2021).

authorized by another statute – can authorize regulations. In the rulemaking for the Redlining Regulations, Defendants repeatedly state their purpose as implementing climate change "goals and policies" – and then elevate such unlegislated actions to CEQA significance criteria in Section 15064.4.

497. The Redlining Regulations are ultra vires because they fail to satisfy either the necessity or authority criteria.

498. The Redlining Regulations are also ultra vires to the extent they are based on the 2017 CARB Scoping Plan, which is referenced in Defendants' rulemaking proceedings. The California Supreme Court determined that the Scoping Plan is not itself a regulation,[292] and accordingly cannot serve as the "statute, court decision, or other provision of law" that meets the APA necessity and authority criteria. Further, CARB staff responded in the record on the Scoping Plan that it's "net zero GHG" significance threshold, Vibrant Communities Appendix setting forth infill and transit policies, and even its per capita VMT reduction measure, were not "part" of the Scoping Plan, were properly excluded from the mandated economic and environmental assessments of the Scoping Plan, or both.[293] The Scoping Plan does provide the requisite authority and necessity criteria for the ultra vires Redlining Regulations.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs THE TWO HUNDRED, Jason Cordova, and Lynn Brown-Summers request relief from this Court as follows:

1. For a declaration, pursuant to Code of Civil Procedures § 1060, that the Redlining Regulations are unlawful, and thus are void and of no further force or effect;

2. For a writ of mandate or peremptory writ issued under the seal of this Court pursuant to Code of Civil Procedure § 1094.5 or in the alternative § 1085, directing OPR and NRA Defendants to Rescind the Redlining Regulations until such time as Defendants have complied with the requirements of the APA, CEQA, and the requirements of the Due Process and Equal Protection

[292] *Newhall,* 62 Cal.4th at 222-23.
[293] CARB, *Supplemental Response to Comments on the Environmental Analysis Prepared for the Proposed Strategy for Achieving California's 2030 Greenhouse Gas Target* (Dec. 14, 2017), at 14-22, https://ww3.arb.ca.gov/cc/scopingplan/final-supplemental-rtc.pdf.

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clauses of the California and United States Constitutions, and any other applicable laws cited herein;

3. For a writ of mandate or peremptory writ issued under the seal of this Court pursuant to Code of Civil Procedure § 1094.5 or in the alternative § 1085, directing Defendants to adopt findings that the Redlining Regulations do not meet the mandatory compliance requirements of the APA;

4. For permanent injunctions restraining Defendants/Defendants from issuing any further revisions or amendments to the CEQA Guidelines, or any new sections of the CEQA Guidelines, that address the issues described herein until such time as they have complied with the requirements of the APA, CEQA, and the requirements of the Due Process and Equal Protection clauses of the California and United States Constitutions, and any other applicable laws cited herein;

5. For an award of their fees and costs, including reasonable attorneys' fees and expert costs, as authorized by Code of Civil Procedure § 1021.5, 42 U.S. Code, section 1988, and any other applicable provision of law, and the cost of preparing and service of this Petition and Complaint;

6. For this Court to retain continuing jurisdiction over this matter until such time as the Court has determined that Defendants have fully and properly complied with its orders; and

7. For any other relief deemed just and proper by this Court.

Dated: April 2, 2021

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: _____

Jennifer L. Hernandez

Attorneys for Plaintiffs/Plaintiffs
THE TWO HUNDRED, Jason Cordova and Lynn Brown-Summers, *et al.*

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VERIFICATION

I, John Gamboa, am a member of THE TWO HUNDRED, an unincorporated association, Plaintiffs/Plaintiffs in this action. I am authorized to make this verification on behalf of THE TWO HUNDRED and its members named herein. I have read the foregoing First Amended **Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief** and know the contents thereof. I am informed and believe and on that ground allege that the matters stated therein are true.

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

Executed this _____ day of March 2020, at _____, California.

_____

John Gamboa

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Proof of Service by U.S. Mail

I, Maria Batres, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Holland and Knight LLP in the city of San Francisco, California.

2. My business address is 50 California Street Suite 2800, San Francisco, CA 94111. My mailing address is 50 California Street Suite 2800, San Francisco, CA 94111.

3. On March 12, 2020 in the city where I am employed, I served a true copy of the attached document(s) titled **FIRST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**, by placing a true copy of each document(s) to be placed in a sealed envelope with first-class postage affixed and placed the envelope for collection. Mail is collected daily at my office and placed in a United States Postal Service collection box for pickup and delivery that same day.

Xavier Bacerra Attorney General of California Eric M. Katz Supervising Deputy Attorney General John S. Sasaki Deputy Attorney General 300 South Spring St., Suite 1702 Los Angeles, CA 90013 Tel.: 213-269-6335 Fax: 213-897-2802 Email: John.Sasaki@doj.ca.gov *Attorney for Defendants/Defendants Governor's Office of Planning and Research, California Natural Resources Agency and Office of Administrative Las*	

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of March, 2020, at San Francisco, California.

Maria Batres