Case No. S180720

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAVE THE PLASTIC BAG COALITION

Petitioner and Respondent,

v.

CITY OF MANHATTAN BEACH

Defendant and Appellant.

Court of Appeal, Second Appellate District No. B215788;
Los Angeles County Superior Court No. BS116362,
Honorable David P. Yaffe, Presiding

BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLANT CITY OF MANHATTAN BEACH

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I. INTRODUCTION

The City of Manhattan Beach sought to reduce the amount of pollution and trash that accumulates in the ocean and marine environment by promoting the use of reusable grocery bags and limiting the distribution of plastic bags at the point of sale. Plastic bag manufacturers and distributors formed the "Save the Plastic Bag Coalition" to combat the City's efforts. Under the guise of the California Environmental Quality Act ("CEQA"), the Coalition filed suit once the City Council adopted its plastic bag ordinance, claiming that it had "public interest" standing because it was formed "to file lawsuits to require governmental entities to prepare EIRs before banning or taking action against plastic bags." (Verified Petition for Writ of Mandate (Aug. 9, 2008) (hereafter, "Petition"), at 3.) The suit also claimed that the Coalition raised "substantial evidence of a fair argument" that the switch from plastic bags to paper bags due to the ordinance would result in environmental effects that first required study in an Environmental Impact Report ("EIR"). (*Id.*, at 9-12.)

The City disputed these claims, arguing that the Coalition lacked standing because it was not a citizens group seeking to protect the environment—it was nothing more than an industry group seeking to protect its market. The City also argued that the industry group failed to raise a fair argument of any environmental effects because the studies submitted by the group were not specific to the ordinance or the setting in Manhattan Beach. The City's initial environmental study and negative declaration, on the other hand, found that the ordinance would have only a "minimal or nonexistent" effect on the physical environment. (Legislative Record for City of Manhattan Beach Ord. No. 2115 ("AR"), at 109-121.) The trial court and majority below disagreed with the City and accepted the

Coalition's arguments on both counts, but not without drawing a sharp dissent.

Standing is an important constitutional and common law principle that ensures the justiciability of claims. The minimum threshold for justiciability in CEQA cases, while low, assigns to the plaintiff the burden of proving that it has a "genuine and continuing concern for environmental matters and compliance with the CEQA process." (*Burrtec Waste Industries, Inc. v. City of Colton* (2002) 97 Cal.App.4th 1133, 1139.) A purely commercial or competitive interest in the subject matter of the suit will not suffice. (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1229.) The Coalition in this case made no showing at trial that it had any genuine or continuing concern for environmental matters. Rather, the Coalition unabashedly confessed that it was formed to "defend the right of businesses to distribute . . . plastic bags." (AR, at 386.) Its motives are apparent—the Coalition has filed suit to save the plastic bag industry, and not to protect the quality of California's environment. Courts have recognized that in the wrong hands, CEQA can be abused as an instrument for "oppression and delay." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576.) The Coalition should not be granted standing under these circumstances.

It was undisputed that plastic bags contribute to environmental problems, and the ordinance would reduce those problems, to some degree. In adopting the ordinance, the City found that any possible increase in the use of paper bags that might result from the ordinance would have a "minimal or nonexistent" effect on the environment due to the limited scope of the ordinance, the lack of other such ordinances in the region, and the City's program to replace plastic bags with reusable bags, among other reasons. (AR, at 99-128.) The Coalition argued, however, that the City had

not adequately analyzed the environmental effects that the ordinance might have from increased paper bag use. It did this based solely on studies not specific to Manhattan Beach or its surrounding cities, or the sort of program adopted by the City. The trial court sided with the Coalition and issued a writ directing the City to prepare a complete environmental impact report ("EIR"). The majority below affirmed, against a strong dissent that argued that it was error to have given weight to the Coalition's evidence where none was due. The majority misconstrued and thus impermissibly lowered the standard of review for when an EIR is required under CEQA.

II. STATEMENT OF FACTS

The League and Association join in the statements filed by the City and amicus curiae Californians Against Waste. A brief statement of facts pertinent to the standing question are included here to assist the Court in its consideration of that issue.

A. City Council Considers Plastic Bag Ordinance And Plastics Industry Responds By Forming Coalition

The Manhattan Beach City Council, as part of its 2008-2009 Work Plan, directed City staff to investigate a possible limit on plastic bag distribution within the City. (AR, at 16.) City staff on June 3, 2008, circulated a draft ordinance to limit the distribution of plastic bags at the point of sale, and reported that reusable bags should serve as the City's "primary alternative" to plastic bags. (*Id.*, at 17, 20–22.) That same day, Elkay Plastics and Grand Packaging—two companies that manufacture and distribute plastic bags—formed the Save the Plastic Bag Coalition ("Coalition") to combat the City's efforts to limit the point-of-sale distribution of plastic bags. (AR, at 580a; Plaintiff's Answer Brief on the Merits (June 18, 2010) ("Answer Brief"), at 4.) The Coalition's legal counsel wrote the City to complain about the proposed ordinance, and expressed the Coalition's intent to sue to block the ordinance under CEQA.

(AR, at 23–30.)

In his June 3, 2008 letter, legal counsel for the Coalition explained its purpose as:

> A. The plastic bag is an excellent product that has been unfairly attacked and stigmatized.
>
> B. The anti-plastic bag campaign is based on myths, misinformation, gross exaggerations, and misconceptions propagated by groups, government officials, and politicians who have shown little or no interest in the facts and demonstrate no serious understanding or concern about the environment or economic consequences of their actions. Such governmental officials and politicians are overreaching and denying freedom of choice to businesses and consumers.
>
> C. Imposing fees on or banning plastic carryout bags would result in a massive switch to paper carryout bags, notwithstanding the availability of reusable bags. It is therefore critically important to ensure that government officials, politicians and the public know the truth about both plastic and paper bags and are provided with accurate information about their comparative environmental and economic merits and advantages.
>
> D. In the plastic versus paper debate, there is no reason why paper should be accorded preferential treatment. There is also no reason why consumers should be made to feel guilty about choosing plastic over paper.
>
> E. The Coalition will defend the right of businesses to distribute, and the right of consumers to receive, free plastic bags.

(AR, at 23–24.) At the City Council meeting that night, and after deliberations among Council, staff, and members of the public, the Council voted to postpone consideration of the ordinance to provide staff the opportunity to conduct an initial environmental study. *(Id.,* at 38-40, 46-91, 90-91.)

The Coalition's attorney wrote again on June 10, 2008, claiming that the Coalition was formed "to make people ask questions, look at *all* of the facts, consider *all* of the consequences, and think for themselves rather than believing everything they hear and jumping on the anti-plastic bag bandwagon." (AR, at 397, italics in the original.) He also communicated the Coalition's intent to sue the City to challenge the ordinance regardless of whether the City conducted any further environmental review:

> In my June 3 letter, I stated that even if an EIR is completed, the City of Manhattan Beach has no legal authority to ban plastic bags. . . . In the event that an ordinance is passed banning plastic bags, you should expect this issue to be litigated.

(*Id.*, at 395.)

B. City Council Approves Ordinance After Consideration Of Coalition's Viewpoints And Life Cycle Studies

After considering a variety of studies, bag alternatives, life cycle assessments, policy alternatives, and public input, City staff concluded that the proposed ordinance would have no significant effect on the environment. (AR, at 99.) On July 1, 2008, again after lengthy debate among the Council, staff, the Coalition's lawyer, and the public, the Council voted to introduce the ordinance limiting the distribution of plastic bags in the City. (*Id.* at 585, 611-630, 657–658.) The City Council ultimately approved a negative declaration under CEQA and adopted the ordinance on July 15, 2008. (*Id.* at 667, 673, 686.) The negative declaration concluded that, despite a possible increase in paper bag use, the ordinance would have no effect on the physical environment. (*Id.*, at 686.)

Other than its legal counsel's statements and objections in the June 3 and June 10 letters referenced above, the Coalition did not attempt to present information during the City's administrative proceedings evincing

any interest in the environment.

C. The Courts Rule Against The City

The Coalition sued the City, petitioning for a writ of mandate under CEQA to halt the limit on plastic bag distribution from going into effect. The petition identified the Coalition's members as Elkay Plastics Co., Grand Packaging, and Crown Poly, among other unidentified members. (Petition, at 2.) Some of its member companies "sell and distribute plastic bags to retailers, restaurants, and other businesses in Manhattan Beach." (*Id.*) All three of the identified member companies "supply plastic bags to businesses in Manhattan Beach." (*Id.*)

The petition asserted that the Coalition was formed to "counter such myths, misinformation and exaggerations by publishing the truth about plastic bags," and to "file lawsuits to require governmental entities to prepare EIRs before banning or taking action against plastic bags." (AR, at 23, 374, 580a; Petition, at 3.)[1] It is on these barest of assumptions that the Coalition alleged standing:

> This action involves public rights, and Petitioner's objective in bringing this action is that of an interested citizen seeking to procure enforcement of Respondents' public duties and compliance with applicable state and local laws.

(Petition, at 3.)

Identifying the plaintiff as "an unincorporated association of manufacturers and distributors of plastic bags," the trial court ruled that the

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[1] The Petition lists the Coalition's website: "www.savetheplasticbag.com." (Petition, at 3.) The website itself was not included in the trial record, but it belies the Coalition's claimed purpose: "The sole purpose of the coalition is to respond to the environmental misinformation campaign about plastic bags." (<http://www.savetheplasticbag.com/ReadContent522.aspx> (as of July 23, 2010).)

Coalition had standing to sue on the grounds that:

> [T]he broad standing rules applicable in CEQA cases have been held to confer standing upon petitioners who will receive a commercial benefit from enforcing compliance with CEQA unless the petitioner is a for-profit corporation that is seeking a commercial advantage over a specific competitor.

(Proceedings of the Superior Court (Feb. 20, 2009), at 1-2.) The trial court did not point to any evidence about the Coalition that led it to grant standing.

The court of appeal also ruled in favor of the Coalition, concluding that the Coalition qualified for standing under the "public right/public duty exception" to the beneficial interest standard based on the Coalition's purported purpose:

> In its writ petition, plaintiff describes itself as an unincorporated association of plastic bag manufacturers, distributors and others, including three companies that supply plastic bags to city businesses. As noted, plaintiff states it was formed to counter misinformation about the effect of plastic bag usage on the environment and to require government agencies to prepare environmental impact reports before banning plastic bags so that their decisions are based on accurate information.

(*Save The Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521, 537, superseded by grant of review.) The court of appeal concluded that "[t]he interest plaintiff asserts in its writ petition is not a commercial one. . . . This is not a case in which the plaintiff's interest is purely commercial and competitive." (*Id.*) In his dissent, Justice Mosk remarked that the Coalition "includes plastic bag manufacturers and distributors" and that the Coalition's action "was generated by the plastic bag industry for its economic interest. . . ." (*Id.*, at 546 n.2.)

III. THE COALITION LACKS STANDING

Elkay Plastics and Grand Packaging–two plastic bag manufacturers and distributors—formed the Save the Plastic Bag Coalition to "protect the right of businesses to distribute . . . plastic bags." (AR, at 24.) Under the guise of CEQA, the Coalition sued to halt the City's effort to limit the distribution of plastic bags. The City argued at trial and on appeal that the Coalition lacked standing to sue for failure to satisfy its burden to show that it had genuine and continuing interests beyond its own commercial survival.

A party must establish that he or she is entitled to judicial action separate from proof of the substantive merits of the party's claim. (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 990.) The standing rules in California are derived from the constitutional separation of powers doctrine and from statute. (*See People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912.) To establish standing, the plaintiff must show that it is "beneficially interested" or that it qualifies under the "public interest" exception to the beneficial interest requirement. (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 832.) The Coalition here never asserted beneficial interest standing, nor did it submit any evidence to prove beneficial interest standing in the trial court. The Coalition's standing arguments and the court decisions below rested solely on the public interest exception. The Coalition has thereby conceded the argument and cannot maintain beneficial interest standing.

A plaintiff seeking to qualify for standing under the public interest exception must show that it "is interested as a citizen in having the laws executed and the [public] duty in question enforced."[2] (*Green v. Obledo*

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[2] The public interest exception has also been referred to by the courts as the "citizen" or "public right/public duty" exception.

(1981) 29 Cal.3d 126, 144, internal citations and quotation marks omitted.) But business entities are not "citizens," and typically act out of private commercial interests, rather than to enforce public duties. (*Waste Management of Alameda County v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1237-38; *Gov. Code* § 241.) Accordingly, business entities, such as the Coalition, face a high bar when seeking to make use of this exception. Whether a business entity may qualify for public interest standing depends on the specific circumstances involved, including the context in which the dispute arises, whether the corporate entity has demonstrated a continuing interest in or commitment to the subject matter of the right asserted, and whether the action would conflict with competing legislative policies, among other factors. (*Waste Management*, 79 Cal.App.4th at 1238.)[3]

The appeals court erred in granting public interest standing to the Coalition by first neglecting to undertake the complete analysis necessary to evaluate whether the Coalition, as a business entity, qualified for public interest standing in the first place. The court perpetuated the error by accepting at face value the allegations in the Coalition's petition and the statements by the Coalition's legal counsel—statements which are not evidence. The Coalition's true motives are apparent from the name of the

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[3] The *Waste Management* test for business entity standing was raised before the California Supreme Court in the EPIC case, but the Court declined to comment on whether the test is a correct statement of the law as the case was decided on other grounds. (*Environmental Protection Information Center v. California Department of Forestry & Fire Protection* ("*EPIC*") (2008) 44 Cal.4th 459, 480.) The appellate districts to consider the issue have all adopted the *Waste Management* test. (*See, e.g., Regency Outdoor Advertising, Inc. v. City of West Hollywood* (2007) 153 Cal.App.4th 825, 830 (Second District); *Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 446 (Fourth District); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1205 (Fifth District).)

group—the Coalition is seeking to save the plastic bag industry, not California's environment. As a constitutional and common law principle for ensuring the justiciability of legal claims, standing to challenge government action under CEQA should be withheld from parties whose sole aim is to protect their own commercial interests.

A. Standing Is Subject To Independent Review

Standing is a question of law subject to the Court's independent review. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 453.) The lower courts' construction of relevant statutes with respect to plaintiff's standing is subject to "de novo review." (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1092 (tenants of an apartment building were "not among the class of persons the Subdivided Lands Act was intended to protect," and thus lacked standing to sue), citing *Reis v. Biggs Unified School Dist.* (2005) 126 Cal.App.4th 809, 816.) To the extent there are any factual determinations by the trial court that bear on the issue of standing, the Court will review whether the trial court's determinations are supported by substantial evidence. (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1092.) It is plaintiff's burden in the first instance to plead and prove facts that show that it has standing to sue. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351; *California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337, 349.)[4]

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[4] The Coalition argues that the trial court's factual determinations on standing are "effectively final" because under Rule of Court 8.500(c)(2) the City did not petition for rehearing below. (Answer Brief, at 21.) This contention is incorrect because Rule 8.500(c)(2) pertains to the Court of Appeal's statement and says nothing about the trial court's findings. The contention is irrelevant because determinations of standing are generally matters of law, not fact. (*Dix v. Superior Court*, 53 Cal.3d at 453.) Standing may also be raised at any time, even on appeal. (*McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90.) In any event, the trial and appellate courts did not make any factual findings with regards to standing

B. The Courts Below Failed To Assess First Whether The Coalition Qualified For Public Interest Standing As A Corporate Entity

The appeals court held that the Coalition possessed standing based solely on the public interest exception, and the notion that citizen plaintiffs need not show "any legal or special interest in the result. . . ." (*Save the Plastic Bag Coalition*, 181 Cal.App.4th at 537, quoting *Board of Social Welfare v. County of Los Angeles* (1945) 27 Cal.2d 98, 100-101 [internal quotations omitted].) But unlike most plaintiffs, corporations ordinarily may not exercise citizen standing because they are not citizens (even if the law considers them "persons"). (*Regency Outdoor Advertising*, 153 Cal.App.4th at 830, citing *Waste Management*, 79 Cal.App.4th at 1237; *see also* Gov. Code, § 241 (citizens are persons "born").)

The question of whether a corporate entity should be accorded the attributes of a citizen litigant turns on the specific circumstances involved, including the strength of the nexus between the artificial entity and human beings and the context in which the dispute arises, among other factors. (*Waste Management*, 79 Cal.App.4th at 1238.) This higher standing requirement emanates from the notion that "it is generally to be expected that a corporation will act out of a concern for what is expedient for the attainment of corporate purposes, rather than by virtue of the neutrality of citizenship." (*Regency Outdoor Advertising*, 153 Cal.App.4th at 833.)

The appellate districts have uniformally held that a corporate plaintiff attempting to enforce an important public right may enjoy citizen standing only if it meets four criteria:

> (1) whether the corporation has demonstrated a continuing interest in or commitment to the subject matter of the public right being asserted;

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and the City is therefore not precluded from raising this issue on appeal.

> (2) whether the entity is comprised of or represents individuals who would be beneficially interested in the action; (3) whether individual persons who are beneficially interested in the action would find it difficult or impossible to seek vindication of their own rights; and (4) whether prosecution of the action under public interest standing would conflict with other competing legislative policies.

(*Waste Management*, supra, 79 Cal.App.4th at 1238; *Regency Outdoor Advertising*, 153 Cal.App.4th at 833; *Imagistics Internat., Inc. v. Department of General Services* (2007) 150 Cal.App.4th 581, 594.)

The majority below erred in omitting this analysis. And contrary to the holding below, corporate plaintiffs *are* required to show some legal or special interest in the matter to qualify under the public interest exception.

C. The Coalition Has Not Demonstrated A Genuine And Continuing Concern For The Environment

The Coalition argues that, as a business entity, it has standing to enforce CEQA so long as "the issues raised relate to the purposes of CEQA." (Answer Brief, at 25, citing *Burrtec Waste Industries, Inc. v. City of Colton* (2002) 97 Cal.App.4th 1133.) Accepting the Coalition's argument would render standing meaningless in California because any corporate plaintiff could simply allege CEQA issues in its complaint and establish the right to sue. Even under *Burrtec*, more is required.

In *Burrtec*, the court found that a corporate plaintiff qualified for public interest standing because it had shown a "genuine and continuing concern for environmental matters and compliance with the CEQA process." (*Burrtec Waste Industries*, 97 Cal.App.4th at 1139.) In contrast, public interest standing was denied in two cases where the individual business entities could not make the same showing. (*Waste Management*, 79 Cal.App.4th at 229; *Regency Outdoor Advertising,* 153 Cal.App.4th at

833 (public interest standing not granted to a for-profit corporation whose principal activity was owning billboards and tall wall signs in an action under CEQA challenging permits for construction of other wall signs).) The dividing line between these cases was whether the plaintiff's purported environmental interest was genuine or merely "self interest masquerading as environmentalism." (*Regency Outdoor Advertising*, 153 Cal.App.4th at 833.)

To determine whether a plaintiff's purported environmental interest is genuine, these courts have examined the record for specific evidence pointing towards the plaintiff's true purpose. (*See, e.g.*, *Burrtec Waste Industries*, 97 Cal.App.4th at 1139.) In *Burrtec*, for example, the court relied on testimony that the plaintiff waste company had long monitored the environmental compliance of itself and others in the industry to conclude that the company had demonstrated a "genuine and continuing concern for environmental matters and for compliance with the CEQA process." (*Id.*)

In *Waste Management*, the court reviewed the nature of the plaintiff's business and the context of the suit to find that the plaintiff's interest was commercial and competitive. (*Waste Management*, 79 Cal.App.4th at 1229.) There, the plaintiff's commercial interest was clear because "both Waste Management and Browning-Ferris are in the business of solid waste disposal," and the only interest the plaintiff invoked was the extra cost it incurred and continuing competitive injury it would suffer as the result of the application of CEQA. (*Id.*)

Likewise, the court in *Regency Outdoor Advertising* found that the corporate plaintiff did not have standing under the public interest exception because it had not engaged in any environmental issues where it had nothing to gain financially. (153 Cal.App.4th at 833.) There, the plaintiff—a company engaged in owning and operating billboards—had attempted to distinguish itself from the circumstances in *Waste*

Management by pointing to the series of lawsuits it had brought to enforce CEQA against other billboard companies. The court found that evidence unpersuasive, and that it actually proved the opposite point—that the plaintiff was serially litigating against its competitors in order to protect its commercial interests, and not for altruistic, environmental purposes. (*Id.*)

Rather than evaluate critically the underlying motives of the Coalition, the appeals court here took the Coalition's claims at face value. For example, without any examination of the record, the court referred to how "the plaintiff *describes* itself"; why the "plaintiff *states* it was formed"; and what "interest the plaintiff *asserts* in its writ petition." (*Save the Plastic Bag Coalition*, 181 Cal.App.4th at 537, italics added.) Moreover, most of the statements concerning the Coalition's purpose were made by its legal counsel, and thus are not evidence. (*See Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 580 (statements by counsel did not constitute substantial evidence); *In re Zeth S.* (2003) 31 Cal.4th 396, 414 n.11 ("it is axiomatic that the unsworn statements of counsel are not evidence").)

Similarly here, an examination of the record shows that the Coalition does not have a genuine and continuing concern for the environment; rather, its interests are commercial and competitive. The Coalition's members are manufacturers and distributors in the plastic bag industry that "sell and distribute plastic bags . . . in Manhattan Beach." (Petition, at 2.) The Coalition's attorney, in his first letter to the City, explained that "the plastic bag is an excellent product," and that the purpose of the Coalition was to prevent consumers from feeling "guilty about choosing plastic over paper" and to defend "the right of businesses to distribute . . . free plastic bags." (AR, at 23-24.) It goes without saying that with the ordinance in place, the market for plastic bags will decline. It also goes without saying that if local businesses and consumers switch to paper or reusable bags, the

market for plastic bags will decline. The Coalition therefore has a commercial and competitive interest in preserving the market for plastic bags. Perhaps the most telling evidence about of the Coalition's purpose is its name: the Coalition is seeking to "Save The Plastic Bag," not the environment.

The record evidence here is remarkably distinct from the circumstances in the *EPIC* case—which itself did not involve a corporate plaintiff—where a steelworkers union had shown a "long-standing involvement in environmental and economic sustainability issues," and consequently had standing to challenge a sustained yield plan for harvesting timber. (*Environmental Protection Information Center v. California Department of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 481.) But like the billboard company in *Regency Outdoor Advertising*, the fact that the Coalition is now vigorously pursuing legal action to enjoin municipalities from placing limits on plastic bags is merely further evidence that the Coalition is pursuing its commercial interests. It is fighting for economic survival, not the environment.

'Watch what we do, not what we say.' Had the appeals court adhered to that sage advice, the Coalition's purpose for filing suit would have been clear. Its purpose is commercial, and it is competitive. As such, the Coalition should not have been granted standing to sue under CEQA.

It is important to give each citizen his or her day in court. But it would defeat the purposes of CEQA to allow any industry group to form a coalition around an allegedly altruistic, environmental purpose and then litigate to protect their commercial products at considerable expense to local governments. The trial court and appellate majority below erred in applying the public interest exception. In doing so, the lower courts have misconstrued and thus impermissibly lowered the bar for corporate entities to assert standing under CEQA. This ruling, if left to stand, will only

encourage more litigation at ever greater cost and expense to cities and counties.

The Court should reverse the appellate court's decision and deny standing for corporate plaintiffs seeking to enforce CEQA under the public interest exception for commercial rather than environmental gain.

IV. THE COALITION DID NOT RAISE SUBSTANTIAL EVIDENCE OF A FAIR ARGUMENT OF ANY SIGNIFICANT ENVIRONMENTAL EFFECT

Cities and counties throughout California are being compelled to prepare complete EIRs, at considerable cost in time and money, even when such in-depth review is not warranted. Mitigated negative declarations—which historically served as alternatives to EIRs on projects with lower environmental impacts—are becoming increasingly rare. The reasoning in the decision below, if left to stand, would only accelerate that trend and would compel local agencies to prepare EIRs whenever there is any scintilla of evidence submitted by an opponent, however remote that evidence might be. In enacting CEQA, the Legislature did not intend to provide such a low threshold for an EIR, and for that reason this Court should reverse the lower court's decision.

A. The Fair Argument Standard Is Low, But Not So Low As To Be Non-Existent

Under CEQA, "If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared." (Pub. Res. Code, §§ 21080(d), 21082.2(d); *CEQA Guidelines*, §§ 15064(a)(1), (f)(1).) On the other hand, if the lead agency determines that "there is no substantial evidence that the project may have a significant effect on the environment," a negative declaration or mitigated negative declaration "shall be prepared." (*CEQA Guidelines*, §§ 15064(f)(2)-(f)(3).)

This dividing line between a negative declaration and an EIR is referred to as the "fair argument standard," under which "a public agency must prepare an EIR whenever substantial evidence supports a fair argument that a proposed project 'may have a significant effect on the environment.'" (*Laurel Heights Improvement Ass'n v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123 [citations omitted]; *see also* Pub. Res. Code, §§ 21080(d), 21082.2(d); *CEQA Guidelines*, §§ 15064(a)(1), (f)(1).) Ultimately, it is the plaintiff's burden to make the showing that there is substantial evidence in the record to support a fair argument. (*Architectural Heritage Ass'n v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1112.)

Under CEQA, substantial evidence "includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub. Res. Code, § 21080(e)(1), 21082.2(c); *CEQA Guidelines*, § 15064(f)(5).) Substantial evidence does not include "argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous. . . ." (*Id.*, § 21080(e)(2), 21082.2(c); *CEQA Guidelines*, § 15064(f)(5).) For example, "an expert's opinion which says nothing more than 'it is reasonable to assume' that something 'potentially . . . may occur'" is not substantial evidence. (*Apartment Association of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1173-1176.) Likewise, expert opinions without sufficient factual information pertaining to the specific project in question will lack adequate foundation and are not substantial evidence. (*See Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1422 (expert opinion contending that a subdivision project "would not affect groundwater, with the 'possible exception' of one area" demonstrated that the opinions "were not clearly based on an adequate foundation of factual information about the Project.").)

The CEQA Guidelines explain how an agency should treat conflicting expert opinions in "marginal cases":

> [I]n marginal cases where it is not clear whether there is a substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is a disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

(*CEQA Guidelines*, § 15064(g).) But even when there may be conflicting expert opinions, the lead agency may reject certain evidence if other evidence in the record explains why it may be erroneous:

> A lead agency's duty to base its decision on the entire record includes authority to consider evidence showing that other evidence does not constitute substantial evidence. Accordingly, erroneous information that is corrected by other evidence in the record may be disregarded.

(Kostka & Zischke, *CEB Practice Under the California Environmental Quality Act* (2d ed. 2010) § 6.38, at 342-43 (citing *Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337; *Newberry Springs Water Ass'n v. County of San Bernardino* (1994) 150 Cal.App.3d 740, 750.) This premise is echoed by another leading CEQA treatise:

> [A] reviewing court should carefully examine the evidence on which a petitioner bases its demand for an EIR. Importantly, evidence that, if viewed in isolation, might seem to give rise to a 'fair argument' may ultimately prove insubstantial after all if other information in the record shows that the 'evidence' is merely speculation or unsubstantiated opinion, or is inaccurate or misleading.

(Remy, Thomas, Moose & Manley, *Guide to the California Environmental Quality Act* (11th ed. 2007), at 255 (citing *Apartment Association of Greater Los Angeles*, 90 Cal.App.4th at 1173-1176.)

As the majority correctly pointed out below, this Court has long held that CEQA was intended to be interpreted "in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Id.*, at 540 (quoting *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259; *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 381).) But the majority's view of the fair argument standard is beyond the "reasonable scope" of the statutory language, and would serve to cut local agencies' reliance on negative declarations in the CEQA process. "[T]he 'fair argument' threshold is low, but it is not so low as to be non-existent." (*Apartment Association of Greater Los Angeles*, 90 Cal.App.4th at 1173-1176).)

B. The Appeals Court Erred In Its Application Of The Fair Argument Standard

The majority below held that "it can be fairly argued . . . that the plastic bag distribution ban may have a significant effect on the environment." (*Save the Plastic Bag Coalition*, 181 Cal.App.4th at 544.) As evidence, the majority pointed to five life-cycle studies put forward by the Coalition. (*Id.*, at 530-535.) None of those reports analyzed the sort of ban proposed by the City, nor did they address the specific effects that might have been reasonably attributed to the City's ban. (*Id.*, at 530-535, 547-549 (J.Mosk, dissenting).)[5] Indeed, some of the reports demonstrated

[5] The League and Association concur in the argument by amicus curiae Californians Against Waste that life-cycle studies of the sort relied on by the Coalition are not necessarily relevant or appropriate in a project-level

that a conversion from plastic to reusable bags—a practice that the City sought to promote with its ordinance—would be the most environmentally beneficial practice. (*Id.*, at 535 (citing the Los Angeles County Report, which concluded that "[r]eusable bags contribute towards environmental sustainability over plastic and paper carryout bags.").) The Coalition did not provide a scintilla of evidence—not a single fact, and not a single expert opinion—specific to Manhattan Beach or the ordinance before its Council. The appeals court nonetheless held that an EIR would be required. In so holding, the majority disregarded the project-specific setting and the fact that the Coalition had failed to identify or opine as to any specific direct, indirect, or cumulative impact associated with the City's ordinance.

The life-cycle studies submitted by the Coalition and relied upon by the majority below are just the sort of evidence that, under the fair argument standard, lead agencies and the courts have rejected as irrelevant, erroneous, misleading, lacking in credibility, or lacking in foundation. Certainly, those life cycle studies did not fairly represent the circumstances here, or offer any opinion as to the specific ordinance at issue in this case. (*Save the Plastic Bag Coalition*, 181 Cal.App.4th at 547-549 (J.Mosk, dissenting).) The City was thus wholly within its prerogative to disregard that evidence as irrelevant and unhelpful, even under the fair argument standard of review.

While the five life-cycle studies submitted by the Coalition might be considered "expert opinion" about alternative regulatory limits on plastic

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CEQA analysis. It is worth noting that the Coalition never argued that the City's ordinance would exceed the thresholds in Appendix G to the CEQA Guidelines (e.g., by causing a decrease in the level of service (LOS) at any roadway or intersection; impairing the region's ability to attain air quality; or impeding implementation of an approved habitat conservation plan).

bags in discrete circumstances and distinct geographic areas (including other countries), those opinions are limited to the facts and circumstances surrounding those reports. For example, several of the studies make the careful statement that they are relevant to the situations at hand, and not necessarily controlling in other circumstances. (AR, at 405 (1990 report identifying a margin of error of plus or minus 10 percent), 459 (Scottish study qualifying that its findings "cannot be a precise quantification of environmental impacts"), 543 (FRIDGE report acknowledging that its results were contradictory, and that life cycle analysis is "highly sensitive" to variables such as "scope, methodology, objectives and environmental and geographic context").) With those limitations, the life-cycle studies cannot be deemed substantial evidence of a potentially significant impact in this case. (*See Gentry*, 36 Cal.App.4th at 1422 (expert opinion not substantial evidence where "not clearly based on an adequate foundation of factual information about the Project.").)

Moreover, those studies do not provide any expert opinions about the ordinance at issue here, and none of the studies suggest that the City's ordinance in particular would cause any adverse environmental effects in Southern California. Consequently, there is no "disagreement among expert opinion," and no basis for requiring an EIR. (*See Association for Protection of Environmental Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 734-737 (on review of a 2,700 square-foot, single-family residence, the court found no substantial evidence of adverse impact where expert opinion concerning soil instability did not necessarily conflict with evidence that the proposed building foundation was adequate); *see also Leonoff*, 222 Cal.App.3d at 1352 (finding no conflict between the analysis

of the lead agency and the testimony from opponents concerning possible traffic safety issues).)[6]

While the record is devoid of any expert opinions about the possible adverse effects of the City's limit on plastic bags, it is replete with opinions by the Coalition's lawyer, Stephen Joseph. (AR at 381, 386.) But these statements were not supported by any facts specific to Manhattan Beach or its particular ordinance. And as advocacy statements of the Coalition's attorney, they are not substantial evidence. (*See Pala Band of Mission Indians*, 68 Cal.App.4th at 580 ("mere argument and unsubstantiated opinion" by counsel are not substantial evidence).)

On the other hand, City staff reviewed actual data specific to the City and its ordinance, and concluded that the ordinance would have no significant effect on the environment. (AR, at 99-121.) The City's initial study specifically concluded that the ordinance would have minimal or nonexistent effect on the environment. (*Id.*) The City's findings were based on the limited scope of the ordinance, the lack of other such ordinances in the region, and the City's program to replace plastic bags with reusable bags, among other reasons. (*Id.*) The City also looked at the rates at which the community is already recycling plastic and paper bags, the level of recycled content of paper bags, and the use of reusable bags (which was above average and already occurring at significant rates). (*Id.*, at 101.) Given the limited scope of the ban and the propensity of retail

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[6] Further, lead agencies have discretion to disbelieve testimony if the testimony is inherently improbable or if the witness is biased. (*Brentwood Ass'n for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504.) Some of the life-cycle studies were prepared by private companies and the plastics industry—the very industry seeking to preserve the use of plastic bags. (*Save the Plastic Bag Coalition*, 181 Cal.App.4th at 547-548 (J.Mosk, dissenting).) Consequently, they could have been discounted as biased.

shoppers to replace those bags with higher volume paper bags and reusable bags, it was clear that any effect on the environment would be "minimal or nonexistent." (*Save the Plastic Bag Coalition*, 181 Cal.App.4th at 543, 548 (J.Mosk, dissenting).)

Due to the low threshold for preparing an EIR and the "delay and expense" associated with legal challenges, "some agencies opt to prepare an EIR for controversial projects to avoid legal challenge, even when a mitigated negative declaration might be appropriate." (Kostka & Zischke, *CEB Practice Under the California Environmental Quality Act* (2d ed. 2010) § 7.3, at 394.) The majority's view, if left to stand, will accelerate this trend and compel cities and counties to expend more time and money in circumstances when it is already clear that the environmental effects of the action will be minimal or nonexistent. In enacting CEQA, the Legislature did not intend to provide such a low threshold for an EIR.

V. CONCLUSION

For the foregoing reasons, the League of California Cities and California State Association of Counties respectfully urge this Court to reverse the lower court's ruling and set practical limits on (1) corporate standing to sue under CEQA, and (2) the evidentiary threshold necessary to establish a fair argument that an EIR must be prepared.

Dated: August 6, 2010

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 6,282 words as counted by Microsoft Office Word 2003.

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