No. A133868
(Marin County Superior Court No. CIV 1100996)

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

SAVE THE PLASTIC BAG COALITION,
an unincorporated association,

Plaintiff and Appellant

v.

COUNTY OF MARIN et al.,
a political subdivision of the State of California

Defendants and Respondents

Appeal from Judgment of the
Superior Court of California, County of Marin
(Honorable Lynn Duryee, Presiding)

APPLICATION BY CALIFORNIANS AGAINST WASTE TO FILE AMICUS CURIAE BRIEF & AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT COUNTY OF MARIN

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APPLICATION OF CALIFORNIANS AGAINST WASTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Californians Against Waste respectfully requests permission to file the attached amicus curiae brief in support of Respondent County of Marin (hereafter the "County"). No party or counsel for any party in the pending appeal authored this proposed amicus curiae brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the attached brief.

1. Applicant's Statement of Interest

Californians Against Waste ("CAW") is a non-profit environmental research and advocacy organization dedicated to conserving resources, preventing pollution, and protecting California's environment through the development, promotion, and implementation of waste reduction and recycling policies and programs. CAW identifies, develops, promotes, and monitors policy solutions to pollution and conservation problems posing a threat to public health and the environment. Founded in 1977, CAW is the nation's oldest, largest, and most effective non-profit environmental organization advocating for the implementation of waste reduction and recycling policies and programs.

CAW is concerned about the proliferation of plastic bags in our environment, and the enormous public costs associated with their proper and improper disposal. An important source of urban litter, plastic bags are a threat to wildlife, a source of urban blight, and are a major component of oceanic pollution. CAW has been

encouraging local agencies to adopt a restriction on single-use bags for over a decade, and has prepared a model ordinance designed for use by local agencies to ban environmentally-damaging plastic bags. To address these concerns, municipalities have adopted ordinances prohibiting the distribution of plastic bags by retailers at point of sale.

2. The Proposed Amicus Curiae Brief Will Assist the Court

CAW's proposed brief, in summary, sets forth a detailed recitation of the facts, as well as the case law in light of those facts that has not been fully presented by the parties.

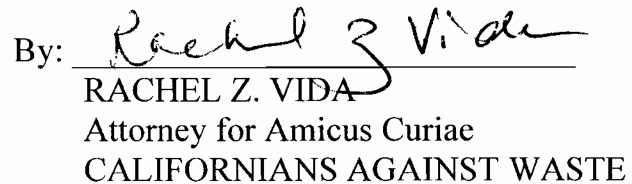
First, CAW presents a detailed presentation of the facts, with citations to the record, as relevant to the concerns that were the impetus for the ordinance at issue in this case. CAW, as an entity that has been engaged for over a decade in the analysis of plastic bag waste, and the practical means to effectively deal with waste, has a full grasp of these issues. With due respect to the parties, CAW believes that the facts have not been completely presented to the Court. CAW contends that the facts as presented by the parties do not fully elucidate the problems created by plastic bags.

Second, within the context of the detailed facts presented, CAW focuses on whether substantial evidence in the record supported the County's determination that categorical exemptions applied to the ordinance at issue, and in turn, whether substantial evidence supported a fair argument that an exception to the categorical exemptions applied. As explained in its brief, CAW

contends that the generic studies cited by Appellant Save the Plastic Bag Coalition do not provide substantial evidence that the *County's* ordinance may have significant impacts.

Thus, CAW's proposed brief is relevant to the disposition of this case because it presents a more comprehensive view of the facts—especially from the viewpoint of an organization particularly concerned about waste and the environmental impacts that result from waste—and a unique perspective on the applicable law, as informed by these facts. CAW focuses on these issues, but supports and joins in the arguments propounded by the County.

Dated: April 18, 2012 Respectfully Submitted,



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INTRODUCTION

Single-use plastic carryout bags are now widely recognized as a significant environmental hazard. As the California Legislature found, the production and disposal of these bags have caused significant environmental impacts on the entire world, requiring millions of barrels of oil, and causing the deaths of thousands of marine animals through ingestion and entanglement. (Legislature's findings in enacting Public Resources Code sections 44250-57, available at Stats. 2006, ch. 845, §1, subd. (a)(1).) Most plastic carryout bags do not biodegrade, resulting in the bags breaking down into smaller and smaller toxic pieces that contaminate soil and waterways, and enter the food web where animals accidentally ingest those materials. (*Id.*, subd. (a)(3).)

The County of Marin (hereafter the "County") is particularly susceptible to the problems associated with plastic bag litter along waterways, and introduced an ordinance to reduce the amount of single-use bags in its jurisdiction. The County found that its ordinance was exempt from review under the California Environmental Protection Act ("CEQA") because it was a regulation to "assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment." (Administrative Record "AR" Vol. 1, Tab E, p. 6; Cal. Code Regs., tit. 14, div. 6, ch. 3 ("CEQA Guidelines"), §§ 15307, 15308.)

The plastic bag industry, apparently perceiving a threat to its profitability, formed Appellant Save the Plastic Bag Coalition (hereafter "Save the Plastic Bag"), and sued multiple jurisdictions considering similar ordinances. (Appellant's Opening Brief (hereafter "Opening Brief"), p. 4; Appellant's Reply Brief (hereafter "Reply Brief"), p. 5.) Here, Save the

Plastic Bag argues that the County's ordinance should not be exempt from CEQA review because it may cause significant adverse environmental impacts by encouraging the use of paper and reusable bags. As support, Save the Plastic Bag cites primarily to life cycle reports that were deemed too speculative to constitute substantial evidence in a similar case that Save the Plastic Bag filed against the City of Manhattan Beach. (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 176 (*Manhattan Beach*).) The only other evidence Save the Plastic Bag cites to is an Environmental Impact Report ("EIR") prepared for another jurisdiction that does not purport to evaluate the impacts of the ordinance at issue in the County. Save the Plastic Bag fails to provide any evidence tailored to the County that the ordinance at issue will result in an adverse significant environmental impact, and thus fails to show that CEQA should apply here.

In the end, this case is really about an industry concerned that the demand for its products – which are well documented to cause environmental harm – is decreasing, and attempting to use legislation designed for environmental protection as a means to delay an environmental protection.

FACTUAL AND PROCEDURAL HISTORY

A. The Problem of Single-Use Plastic Bags

Single-use plastic bags are a blight on California's environment and economy. It is estimated that Californians use more than 19 billion single-use high density polyethylene (HDPE) grocery bags annually -- translating to 600 bags per second -- and recycle less than five percent of them. (AR

Vol. 1, Tab A, pp. 2, 43, 73; AR Vol. 1, Tab D, p. 17.) Those few bags that are recycled often clog machines, costing recycling companies time and money. (AR Vol. 1, Tab A, p. 84.) The remainder either become litter, where they are easily blown into waterways and storm drains, or are landfilled, where they often escape and are blown away into the environment to join the ranks with the other littered bags. (AR Vol. 1, Tab A, p. 87 (stating that 47% of landfill blow-away trash is plastic).)

Plastic bags have become one of the most common sources of trash on California's beaches. (AR Vol. 1, Tab A, p. 43; AR Vol. 2, Tab 3.) As a coastal area, the County is particularly susceptible to the effects from these bags. One environmental group collected almost 15,000 bags in just one day along the San Francisco Bay in 2009. (AR Vol. 1, Tab A, p. 45.) That group estimated that Bay area residents use 3.8 billion plastic bags every year, and about 1 million of those end up in the Bay. (AR Vol. 1, Tab A, p. 45.)

Ordinary plastic bags do not biodegrade. (See AR Vol. 2, Tab 13; AR Vol. 1, Tab D, p. 15 ("Plastic resin polymers are so durable that it can take hundreds of years for plastics to break down at sea, and some may never truly biodegrade in the marine environment.") Plastic bags do eventually "photodegrade," which means that sunlight can cause them to break into small pieces, but those smaller pieces persist in the environment as plastic for years and years – possibly forever. (See AR Vol. 2, Tab 13.) Where these bags represent a significant aesthetic and waste management problem on land, the bags become an environmental disaster when they reach the water.

The California Coastal Commission has estimated that 60 to 80 percent of marine debris, and 90 percent of floating marine debris, is plastic. (AR Vol. 1, Tab D, p. 15.) Much of the debris collects in areas where currents flow in a circular motion, known as gyres. (AR Vol. 2, Tab

81.) There are five major gyres, but the north pacific subtropical gyre located between California and Hawaii has gained a lot of attention, and is commonly referred to as the "Pacific Garbage Patch." (AR Vol. 2, Tab 85.) Here the trash accumulates, and breaks down into smaller and smaller pieces, but never leaves. (AR Vol. 1, Tab 85.) While there are varying accounts of how large this gyre is, there is no conflict about the environmental hazards it poses. (See AR Vol. 2, Tabs 9, 12, 81, 85, 93.) One study found that degraded plastic pieces outweighed plankton by a 6:1 ratio in this area, literally crowding out the ocean's food sources. (See AR Vol. 2, Tab 85.) And, because the plastic pieces break down into smaller and smaller pieces, it is incredibly difficult to remove. (AR Vol. 2, Tabs 9, 93.)

Marine and terrestrial animals are harmed by plastic debris, including plastic bags, mistaking them for food, where they can choke, starve, or suffocate on them. (AR Vol. 2, Tab 11; AR Vol. 1, Tab D, p. 15.) Marine debris is particularly harmful to seabirds, marine mammals, and sea turtles. (AR Vol. 1, Tab D, p. 15.) As the National Oceanic and Atmospheric Administration ("NOAA") says, while it is difficult to determine the amount of animals harmed by plastics, "the problem of marine debris ingestion is real; not just in seabirds, but species of fish, marine mammals, and sea turtles." (AR Vol. 2, Tab 11, p. 3.) Save the Plastic Bag tries to belittle the harm caused to these animals, but the fact remains that "each death is one too many. Marine debris doesn't belong in our oceans and waterways." (AR Vol. 2, Tab 11, p. 2 (NOAA); see Opening Brief, pp. 33-34.)

B. **Marin County Adopted a Local Ordinance to Reduce Its Contribution to this Problem**

The County, like many other jurisdictions in California, has made the determination that single-use plastic carryout bags impose a clear and significant cost on its residents, its environment, and on its adjacent bodies of water. (AR Vol. 1, Tab A, pp. 1-10.) In an effort to reduce the County's contribution to this problem, and as a way to meet storm water pollution and solid waste reduction goals, the County adopted Ordinance No. 3553 (hereafter the "Ordinance"), which prohibits stores in the unincorporated areas of the County from providing single-use plastic carryout bags. (AR Vol. 1, Tab E, pp. 1-5 (Marin Ord. No. 3553, adding Ch. 5.46 to the Marin County Code ("Ordinance"), § 5.46.020); AR Vol. 1, Tab A, p. 4 (describing County's zero-waste goals).) Recognizing that it would not be beneficial to simply replace one single-use product with another, the Ordinance requires that all paper bags offered at stores in unincorporated areas of the County be made of at least 40 percent postconsumer recycled materials, and requires consumers to pay a 5-cent fee for their use. (AR Vol. 1, Tab E, pp. 1-2 (Ordinance Findings); *id.* at p. 2, § 5.46.010, subd. (c); *id.* at p. 3, § 5.46.020, subd. (b)(2)(D).) After five years of research, outreach, and review, the County found that these provisions would dramatically reduce the use of both plastic and paper carryout bags, and increase the use of reusable bags. (AR Vol. 1, Tab E, pp. 1-2 (Ordinance Findings); AR Vol. 1, Tab A, pp. 2, 4.)

The County reviewed the efforts of cities, states, and countries to learn how best to structure the Ordinance so that the overall use of single-use bags would decrease. (AR Vol. 1, Tab A, pp. 3, 6.) A Washington, D.C. law that placed a 5-cent tax on plastic and paper bags had a

particularly impressive success rate. Before that law went into effect, city residents were using an average of 22.5 million disposable bags per month, but in the first month it was enacted, that number went down to 3 million. (AR Vol. 1, Tab D, p. 20; AR Vol. 1, Tab E, p. 37.) While the number increased a little, year-end estimates showed that bag usage declined by 80 percent overall. (AR Vol. 1, Tab D, p. 21 (55 million bags used in 2010, whereas 270 million used before the Ordinance); AR Vol. 1, Tab E, p. 40.) The decrease in bag use quickly translated to a decrease in bag litter. In just 4 months, the city noticed a 50 percent reduction in the number of bags found at an annual river cleanup. (AR Vol. 1, Tab D, p. 20.) Washington, D.C.'s experience showed that a 5-cent fee could motivate consumers away from single-use bags. The County analyzed the Washington, D.C. law and determined that a 5-cent fee on paper bags, combined with a total ban on plastic bags,[1] would reduce its residents' overall single-use bag consumption.[2] (See AR Vol. 1, Tab A, pp. 1-10.)

Then, recognizing that the Ordinance might be a "project" under CEQA, the County determined whether CEQA would apply to it. (See AR Vol. 1, Tab D, p. 1.) The County held a public hearing, though it was not required to, and considered objections raised by Save the Plastic Bag, as well as support from community members and environmental

[1] California law preempts local governments from imposing a fee on single-use plastic bags, but it does not prohibit a ban on plastic bags. (Pub. Resources Code, §§ 42250-42257.)

[2] Save the Plastic Bag argues that the D.C. experience is not comparable to the County's Ordinance, but Save the Plastic Bag does not cite to any evidence supporting its conclusions besides speculation, and ignores the County's outreach and education efforts that are similar to those in D.C. (Reply Brief, pp. 17-20; see AR Vol. 1, Tab D, p. 12 ($25,000 budgeted for Ordinance outreach and educational materials; gave away 12,000 reusable bags as of January 2011).)

organizations. (*Berkeley Hillside Preservation v. City of Berkeley* (2012) 203 Cal.App.4th 656, 665, fn. 5 (*Berkeley Hillside*) ("[N]o public hearing is required before an agency decides a project is categorically exempt under CEQA." (Citation omitted).); AR Vol. 1, Tab C, p. 26 (Notes from Hearing); AR Vol. 1, Tab D, p. 58 (Notes from Hearing).) The County also considered written comments made by Save the Plastic Bag. (AR Vol. 1, Tab C, pp. 18-22.) After reviewing all of the evidence, the County finally determined that the Ordinance was categorically exempt from CEQA review because it is a regulatory measure designed to protect natural resources and the environment generally, and that the available evidence showed the Ordinance would have a positive environmental impact. (See AR Vol. 1, Tab D, p. 1 (Letter from County Counsel); AR Vol. 1, Tab E, p. 6 (Notice of Exemption).)

C. Trial Court Proceedings

On February 24, 2011, Save the Plastic Bag sued. On August 19, 2011, the trial court permitted Californians Against Waste ("CAW") to file an amicus curiae brief in support of the County. On September 14, 2011, the trial court ruled in favor of the County. In response to a request by Save the Plastic Bag, the court issued an oral Statement of Decision on September 27, 2011. On October 7, 2011, the trial court entered its Judgment Denying Writ of Mandate and Declaratory Relief.

ARGUMENT

A. <u>The County Properly Relied on Categorical Exemptions to CEQA</u>

Save the Plastic Bag attempts to neatly describe the "conditions" for an exemption determination and the "steps" the County was supposed to take in responding to its argument that the County could not rely on the categorical exemptions. (Reply Brief, pp. 1-2.) Yet, in doing so, Save the Plastic Bag continually misstates basic CEQA principles, and – as what seems to be a common theme in this case – misapplies the facts to the case at hand.

1. CEQA Requires the County to Consider the Whole Ordinance – Including the 5-Cent Fee on Paper Bags – In Its Categorical Exemption Determination

The CEQA Guidelines define a "project" as "the <u>whole</u> of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (CEQA Guidelines, § 15378, subd. (a) (emphasis added).) If a project has the potential to result in significant effects on the environment, then an agency must consider mitigation measures that would be added to the project as a means to avoid or at least lessen such effects. (CEQA Guidelines, § 15002, subd. (a); see *id.* at § 15041, subd. (a) (authority to mitigate same as authority to require "feasible *changes* in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment") (emphasis added).) Here, the Ordinance is the "project" the County considered, which included both a ban on plastic bags and a 5-cent fee on paper bags as a way to meet the County's goal of decreasing the number of single-use bags and increasing

the use of reusable bags. The 5-cent fee is not a mitigation measure, but is and has always been part of the "whole of the action" the County considered. (See AR Vol. 1, Tab A, p. 1 (regarding first reading of proposed ordinance).)

Contrary to Save the Plastic Bag's assertions, *Azusa* and *Salmon Protection* are not controlling here as the measures considered in those cases were in fact mitigation measures added to the project after it was introduced. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1176; *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1103-1104, 1108; see *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1353 (*Wollmer*) (distinguishing *Salmon Protection* where county had relied on mitigation measures that were added to the "project design" in making its categorical exemption determination).) Instead, *Wollmer* is more on point. In that case, this Court concluded that modifications to a project description made before the project was proposed did not preclude the use of a categorical exemption as it had become part of the "project design." (*Id.* at p. 1353.) Here, the project description has always included the 5-cent fee on paper bags, and so is necessarily part of the "project design."

Furthermore, the County was required to consider the entire Ordinance in carrying out its environmental review. It is well established that, in conducting CEQA review, agencies are prohibited from dividing a project into separate parts. (See *Citizens Assn for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 167 (*Inyo*); *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 931-932.) Indeed, as one court explained: ". . . [A] large project shall not be divided into little

ones because such division can improperly submerge the aggregate environmental considerations of the total project," which would be "inconsistent with the mandate of CEQA." (*Inyo, supra,* 172 Cal.App.3d at p. 167.) While the case law on this issue pertains to projects that would have more of an environmental impact by looking at the entire project than at separate parts of it, this principle is equally applicable here, where the entire project actually lessens any environmental impact.

2. The County was Entitled to Rely on the Categorical Exemptions

Save the Plastic Bag makes a lot of novel claims regarding the County's ability to rely on the Class 7 and 8 categorical exemptions that are simply not true. For instance, Save the Plastic Bag claims that CEQA treats "legislative" decisions differently than "regulatory" decisions, but there is no authority to support such a conclusion. (Opening Brief, pp 1, 23.) Similarly, Save the Plastic Bag argues that somehow the County was not a "regulatory agency as authorized by state law or a local ordinance." (Opening Brief, p. 24; Reply Brief, pp. 5-9.)

In actuality, most regulatory decisions are legislative in that they involve rulemaking, which is legislation by administrative agencies. As the County explains, Article 11, Section 7 of the State Constitution provides it with the authority to approve regulations such as the Ordinance. (Respondent's Brief, p. 22; see also *Wollam on behalf of Culinary Workers & Bartenders Union v. Palm Springs* (1963) 59 Cal.2d 276, 294 (ordinance is valid exercise of city's police power where it bears a substantial relation to the health, safety and general welfare of the public and is not arbitrary, unreasonable or capricious); *Magan v. County of Kings* (2002) 105

Cal.App.4th 468, 472 (*Magan*) (upholding ordinance implemented as a regulatory action under a county's police powers to "assure the maintenance and enhancement of the environment").) Nobody is arguing that the Constitution grants the County "specific" authority to "ban plastic bags," as Save the Plastic Bag contends. (See Reply Brief, p. 9.) And, contrary to Save the Plastic Bag's claims, the ordinance itself provides procedures for protection of the environment, as required by the Class 7 and Class 8 categorical exemptions. (See, e.g., *Magan, supra*, 105 Cal.App.4th at pp. 475-476 (upholding ordinance under Class 8 categorical exemption finding where implemented procedures for protection of the environment that were more stringent than any procedures already in place) (case also discussed in Respondent's Brief, pp. 22-23; Reply Brief, pp. 9-11).)

Save the Plastic Bag also wrongly claims that a categorical exemption finding for a plastic bag ban in the County would translate to a "blanket" exemption for all plastic bag bans in the state. (Opening Brief, p. 21.) Save the Plastic Bag misreads the CEQA policy here. "A categorical exemption is based on a finding by the Resources Agency that a class *or category* of projects does not have a significant effect on the environment." (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115 (*Davidon Homes*) (citing Pub. Resources Code, §§ 21083, 21084; CEQA Guidelines, § 15354 (emphasis added).) Not surprisingly, the Secretary of Natural Resources included Class 7 and Class 8 projects in its list of categorical exemptions that do not have a significant effect on the environment because those projects "assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment." (CEQA Guidelines, §§

15307, 15308.) It is in the discretion of the public agency involved in the specific project at issue to determine if that project fits within these classes. (See *Save our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 688-689 (*Carmel River*) (as part of its preliminary review, each agency determines whether a project falls within one of the classes the Secretary of Natural Resources has determined to be exempt from CEQA because they "do not have a significant effect on the environment" (citing Pub. Resources Code, § 21084; CEQA Guidelines, § 15300).)

Save the Plastic Bag argues that any plastic bag ban is precluded because of a footnote in the Supreme Court's ruling in *Manhattan Beach*, but a categorical exemption was not at issue in that case. (Opening Brief, p. 21; Reply Brief, pp. 4, 6-8; *Manhattan Beach, supra*, 52 Cal.4th at pp. 163, 165 (city relied on negative declaration, not categorical exemption); *McDowell & Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38 ("It is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court. Further, cases are not authority for propositions not considered.").) In that footnote, the Supreme Court stated: "*According to plaintiff*, the movement to ban plastic bags is a broad one, active at levels of government where an appropriately comprehensive environmental review will be required." (*Manhattan Beach, supra*, 52 Cal.4th at p. 175, fn. 10 (emphasis added).) Even if the Court was not simply paraphrasing Save the Plastic Bag's argument in that case – which it seems to be – that footnote does not prohibit *all* plastic bag bans from being subject to a categorical exemption. Just as with any project under CEQA, an ordinance banning plastic bags requires a different

inquiry for each jurisdiction reviewing its own ordinance and analyzing it based on the facts at issue.

The "type" of project for Class 7 and Class 8 categorical exemptions does not refer to a specific "plastic bag ban," as Save the Plastic Bag contends, but rather to those types of projects that "assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment." (CEQA Guidelines, §§ 15307, 15308.) The question of whether a specific project fits within these exemptions is a fact-intensive inquiry made by the public agency considering it. Thus, the question before the County was whether the Ordinance at issue was a "project" that fit within that definition, and the County determined – based on substantial evidence – that it was. (CEQA Guidelines, §§ 15307, 15308.)

3. The County Based Its Categorical Exemption Determination on Substantial Evidence

Under CEQA, the County was required to base its categorical exemption determinations on substantial evidence. (See *Berkeley Hillside, supra,* 203 Cal.App.4th at p. 668 (providing that "relatively deferential substantial evidence standard of review" applies to a categorical exemption determination) (citation omitted).) As discussed in more detail below, substantial evidence consists of facts, reasonable assumptions predicated on facts, and expert opinion supported by facts. (Pub. Resources Code, § 21082.2, subd. (c).) The record shows that, after much research and deliberation, the County found that a ban on plastic bags with a fee on paper bags would best accomplish its goals of reducing the County's contribution of plastic and paper waste to landfills, reducing oil

consumption and greenhouse gas emissions in general, and reducing the mountain of plastic and paper litter in the environment that causes harm to marine wildlife. (AR Vol. 1, Tab A, pp. 1-8; AR Vol. 1, Tab E, p. 6 (Notice of Exemption); see generally AR Volume 1 for evidence relied on by County in passing the Ordinance.) In looking at the *whole circumstances* in the project area, the County found that the Ordinance assured the maintenance, restoration, and enhancement of natural resources and the environmental generally. (See AR Vol. 1, Tab E, p. 6 (Notice of Exemption).)

Save the Plastic Bag attempts to derail the County's efforts by arguing that it did not rely on accurate information. Save the Plastic Bag chides the County for citing an Ocean Conservancy statistic from a law review journal, which it mischaracterizes as extra-record evidence, providing that plastic bags were the second most common form of litter on 6.485 beaches in 100 countries in 2008. (Reply Brief, p. 30; Respondent's Brief, p. 5.) Then, Save the Plastic Bag improperly counters this citation with a 2011 figure - derived after the Ordinance was enacted - from true extra-record evidence citing plastic bags as the *sixth* most found item on beaches. (Reply Brief, p. 31, fn. 11.) Even if the County had this 2011 figure in the administrative record, it would have likely followed the same course of action. Whether it is the second most common found item on the beaches or the sixth, there is no denying that plastic bags are a serious environmental problem. Plastic simply does not belong on our beaches or, for that matter, in our water, our streets, or our storm drains. Furthermore, the 2008 Ocean Conservancy number referred to by the County is discussed at AR Vol. 1, Tab A, p. 45. (See also AR Vol. 2, Tab 3 (2010 Opinion piece citing plastic bags as third-most-common trash item on California

beaches).)

Save the Plastic Bag also completely mischaracterizes data the County cites from CAW in what seems to be an argument that the County did not base its categorical exemption determination on substantial evidence. (See Reply Brief, pp. 31-33.) At the time the County was considering the Ordinance, CAW estimated that state residents pay up to $200 per household per year in state and local fees and taxes to clean up litter and waste associated with single-use bags. (See Reply Brief, p. 31 (citing AR Vol. 2, Tab 83).) This number was an extrapolation of a 2004 San Francisco analysis that identified the cost of plastic bags to the city as 17 cents per bag based on total costs of $8.49 million and an assumption of 50 million plastic bags. (See AR Vol. 1, Tab A, pp. 75, 77 (reference v) (citing San Francisco's 17-cent estimate).) In early 2011, when the Ordinance was enacted, this was the most comprehensive data available on plastic bag impact costs in California.

Save the Plastic Bag then attempts to calculate litter cleanup costs using data in the administrative record[3] to show that this number was wrong, but those calculations appear to only reflect the cost of plastic bag litter cleanup and disposal by local governments – a cost that reflects just a fraction of the total costs posed by plastic bags. (See Reply Brief, p. 33.) First, the $375 million statewide estimate for litter cleanup and disposal costs of plastic bags by public agencies is limited to streets and roadways maintained by those agencies. The figure does not include beaches, storm water systems, and privately owned spaces. (See AR Vol. 1, Tab C, p. 2

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[3] Despite this claim, Save the Plastic Bag admittedly cites to a website for the Redwood Landfill tipping fee. (Reply Brief, pp. 31, 33.)

(figure "does not account for the millions of dollars that public and private landowners, businesses and waste haulers spend removing both paper and plastic bags from clogging recycling equipment, storm water and flood control pipes and facilities, storm drains, streets and culverts, sidewalks, and from fouling creeks, waterways, and San Francisco Bay").) Second, besides overlooking other areas and waterways where this easily airborne product migrates, Save the Plastic Bag's cost estimate does not include other pertinent and substantial costs associated with plastic bag litter and waste.[4]

Save the Plastic Bag is not an expert here, and is certainly not unbiased. Its speculative assertions are irrelevant. The information provided by CAW and the County was based on the facts and reasonable assumptions predicated on the facts that were available at the time the County was considering the Ordinance. (See Pub. Resources Code, § 21082.2, subd. (c); see also *id.*, § 21082.2, subd. (b) ("The existence of public controversy over the environmental effects of a project shall not require preparation of an environmental impact report if there is no substantial evidence *in light of the whole record* before the lead agency that the project may have a significant effect on the environment.") (Emphasis added).) Contrary to Save the Plastic Bag's claims, the County started out with good intentions and followed through with diligent work to ensure that it not only complied with all pertinent laws, but also created an effective

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[4] Such costs include, but are not limited to: nuisance management at landfills, including costs associated with building tall fences to keep bags from escaping into nearby properties and extra labor associated with keeping plastic bags from escaping; costs associated with repairing recycling machines, which often get clogged from plastic bags, as well as lost revenue during the repair time; and costs for compost facilities that have to remove plastic bags from their waste stream.

and successful Ordinance.

B. Save the Plastic Bag Fails to Meet Its Burden of Showing that the Unusual Circumstances Exception Applies to the Categorical Exemptions

Since substantial evidence supports the County's finding that the Ordinance falls within the Class 7 and Class 8 categorical exemptions, the burden is on Save the Plastic Bag to show that one of the exceptions listed in CEQA Guidelines section 15300.2 exists that would render the Ordinance subject to CEQA. (*Davidon Homes*, *supra*, 54 Cal.App.4th at p. 115; *Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1175 (*Apartment Assn.).*)[5] Here, Save the Plastic Bag claims that the "unusual circumstances" exception in Guidelines section 15300.2, subdivision (c) applies. (Save the Plastic Bag Opening Brief, pp. 25-28.) That exception provides that an agency cannot rely on a categorical exemption where there is a reasonable possibility that the activity in question will have a significant effect on the environment due to unusual circumstances. (CEQA Guidelines, § 15300.2, subd. (c).) Save the Plastic Bag claims that the Ordinance will result in an increased use of paper bags and reusable bags, which "may cause significant negative environmental

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[5] Save the Plastic Bag claims that it was the County's duty to determine that none of the exceptions in CEQA Guidelines section 15300.2 applied to its categorical exemption determination. (Reply Brief, p. 1.) However, the County's determination necessarily included an implied finding that none of the exceptions apply, and the burden falls to Save the Plastic Bag to show otherwise. (*Carmel River, supra,* 141 Cal.App.4th 677, 689 (citation omitted).) The only case Save the Plastic Bag cites to for support of its proposition is one involving the delisting of an endangered species. (Reply Brief, p. 1.) This case is readily distinguishable, however, in that the delisting of an endangered species triggers, as a matter of law, what is called a "mandatory finding of significance" pursuant to CEQA Guideline section 15065, subdivision (a). Such a finding precludes reliance on an exemption determination, which only applies in the absence of significant environmental effects. (*Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 124.)

impacts." (Opening Brief, p. 25.) Save the Plastic Bag does not provide substantial evidence showing a reasonable possibility of adverse environmental impact, however, and thus fails to meet its burden of showing that this exception applies here. (See *Berkeley Hillside, supra,* 203 Cal.App. 4th at p. 668.)

1. Save the Plastic Bag Does Not Present a Fair Argument of a Significant Effect on the Environment

Both parties agree that, for the purposes of this appeal, the fair argument standard applies to this matter. (See Reply Brief, p. 11; Respondent's Brief, p. 24.) As the County explains, this Court recently "streamlined" the two-step approach for reviewing an unusual circumstances exception claim to a categorical exemption by requiring both a finding of "significant effect on the environment" and an "unusual circumstance." (Respondent's Brief, p. 27; *Berkeley Hillside, supra,* 203 Cal.App.4th at pp. 668-672.) In *Berkeley Hillside,* this Court held that "the unusual circumstances exception applies whenever there is **substantial evidence** of a fair argument of a **significant** environmental impact." (203 Cal.App.4th at p. 671 (emphasis added).)

Substantial evidence is generally described to be evidence of "ponderable legal significance . . . reasonable in nature, credible, and of solid value" and as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." (*County of San Diego v. Assessment Appeals Board No. 2* (1983) 148 Cal.App.3d 548, 555 (citations and internal quotations omitted).) According to the Legislature, substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Pub. Resources Code, § 21082.2,

subd. (c).) It does not include "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts, which do not contribute to, or are not caused by, physical impacts on the environment . . . ." (*Ibid.*)

Thus, as the Court of Appeal observed in *Apartment Assn., supra,* 90 Cal.App.4th at pp. 1173-1176, the fair argument threshold is low, but it is not so low as to be non-existent. The evidence supporting such a fair argument must be of a substantial nature. Speculative possibilities and "pure speculation with no evidentiary support" do not constitute substantial evidence. The Court explained:

> We do not believe an expert's opinion which says nothing more than "it is reasonable to assume" that something "potentially . . . may occur" constitutes . . . substantial evidence. . . . "Substantial evidence" is defined in the CEQA guidelines to include "expert opinion supported by facts." It does not include "[a]rgument, speculation, unsubstantiated opinion or narrative."

(*Id.* at p 1176; see also *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504 (in situations where the testimony "is inherently improbable or if the witness is biased," or is "unsupported by the facts from which it is derived," such testimony does not constitute "substantial evidence.").) The record in this case does not include substantial evidence to support a fair argument of significant adverse environmental effects.

a. Save the Plastic Bag Does Not Provide "Substantial Evidence" that the Ordinance Will Result in an Increase in Paper Bag Use that Would Cause a "Significant Environmental Impact"

Save the Plastic Bag argues that a 5-cent fee will not be enough of a deterrent from paper bag use, but does not cite to any evidence in the record that shows the Ordinance will cause significant environmental impacts in the project area. CEQA defines "project" to mean "an activity which may *cause* either a direct physical change in the environment, or a *reasonably foreseeable* indirect physical change in the environment." (Pub. Resources Code, § 21065 (emphasis added); CEQA Guidelines, § 15378, subd. (a) ("'Project' means the *whole of an action*, which has a potential for resulting in either a direct physical change in the environment, or a *reasonably foreseeable* indirect physical change in the environment . . . .") (Emphasis added).) Thus, in order for an action to be a "project" subject to CEQA, there must be a causal relationship between the action and reasonably foreseeable adverse impacts on the affected environment. Yet, in this case, Save the Plastic Bag failed to produce any evidence establishing that the Ordinance "will culminate in," or is in some way linked to, a "reasonably foreseeable effect" for which CEQA was intended to require review.

In support of its argument, Save the Plastic Bag points almost exclusively to generic life cycle assessments, which were prepared for entirely different purposes, sometimes years ago, and in no way purport to evaluate the impacts of the County's Ordinance. (See, e.g., Opening Brief, pp. 6-9; AR, Vol. 2, Tab 20 (Franklin Report); AR Vol. 2, Tab 21 (Scottish Report); AR Vol. 2, Tab 22 (Boustead Report); AR Vol. 2, Tab 23 (Use

Less Stuff ("ULS") Report); AR Vol. 2, Tabs 24, 25 (Ecobilan/Carrefour Report).) None of the reports submitted had any information on ordinances similar in size and scope to the one approved by the County, let alone any information directly relevant to the local community in which the Ordinance was implemented. Indeed, the Supreme Court found these *same studies* -- which Save the Plastic Bag discusses at length in four pages of its Opening Brief – to be too generic and too divorced from the reality of the on-the-ground situation to constitute substantial evidence that an ordinance banning plastic bags, even without any accompanying fee or ban on paper bags, would result in significant environmental impacts.[6] (*Manhattan Beach, supra,* 52 Cal.4th at pp. 163 (discussing reports), 176 (reports unconvincing).) The Court explained:

> While some increase in the use of paper bags is foreseeable, and the production and disposal of paper products is generally associated with a variety of negative environmental impacts, no evidence suggests that paper bag use *by Manhattan Beach consumers* in the wake of a plastic bag ban would contribute to those impacts in any significant way.

(*Id.* at p. 176 (emphasis added).) Save the Plastic Bag's reliance on these studies actually motivated the Supreme Court to caution others:

> This case serves as a cautionary example of overreliance on generic studies of "life cycle"

[6] The Supreme Court reviewed four of the five studies Save the Plastic Bag submitted here. (*Manhattan Beach, supra,* 52 Cal.4th at pp. 163 (discussing Franklin, Scottish, Boustead, and ULS Reports).) The fifth report – the Ecobilan/Carrefour report – was cited in the LA EIR but is written entirely in French, so that one can safely presume that, like the other reports, it does not in itself analyze any data pertaining to the Ordinance or location at issue in this case. (AR Vol. 2, Tabs 24, 25.)

> impacts associated with a particular product. Such studies, when properly conducted, may well be a useful guide for the decision maker when a project entails substantial production or consumption of the product. When, however, increased use of the product is an *indirect and uncertain consequence*, and especially when the scale of the project is such that the increase is plainly insignificant, the product "life cycle" must be kept in proper perspective and not allowed to swamp the evaluation of actual impacts attributable to the project at hand.

(*Ibid.*) Despite this warning, Save the Plastic Bag continues to use these studies as its primary evidence.

The only other evidence Save the Plastic Bag cites to for support of its proposition that a 5-cent fee on paper bags is not enough of a charge to motivate consumers to use reusable bags is a Los Angeles EIR (hereafter "LA EIR"), which suggested that a 10-cent fee on paper bags would be necessary for Los Angeles County residents to switch from single-use bags to reusable bags. (Opening Brief, pp. 9-10.) It is not clear if the LA EIR was properly admitted into the administrative record,[7] but even if it were,

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[7] See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, 573 ("Accordingly, a court generally may consider only the administrative record in determining whether a quasi-legislative decision was supported by substantial evidence within the meaning of Public Resources Code section 21168.5.") Save the Plastic Bag sent an e-mail to the County requesting that the EIR be put into the record and providing it with a website address, but did not include any attachments with that e-mail as it was "too large" to do so. (Opening Brief, p. 9, fn. 2.) That website address has since changed. (Reply Brief, p. 20, fn. 5.) The administrative record itself contains a summary of the EIR prepared by Save the Plastic Bag, and some quotes and summary in Save the Plastic Bag's objections to the Ordinance, but that summary is not conclusive for the Court. (See *Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 580 (comment letter from attorney representing project opponents did not constitute substantial evidence under fair argument standard as it consisted almost exclusively of mere argument and unsubstantiated opinion).)

this information would not support Save the Plastic Bag's claims that the *project at issue here* will cause a significant increase in paper bag use, and a significant environmental impact in the project area. Simply asking questions about local impacts does not make up for this inadequacy. (See Opening Brief, p. 11.)

Without evidence tailored to the County, Save the Plastic Bag has nothing but speculation, which does not constitute the "substantial evidence" necessary to meet CEQA's fair argument requirements. (See *Apartment Assn., supra,* 90 Cal.App.4th at pp. 1175-1176 (finding that speculative nature of experts' predictions did not constitute substantial evidence necessary to invoke exception to categorical exemption).) Save the Plastic Bag's argument that the Ordinance is part of a countywide plan is similarly speculative. (See Respondent's Brief, p. 31.) Without some substantial evidence showing causation between the Ordinance and the kinds of adverse effects generically catalogued in the studies supplied by Save the Plastic Bag, there can be no "fair argument" and no exception to the County's categorical exemptions determination.

b. Save the Plastic Bag Does Not Provide "Substantial Evidence" that an Increase in Reusable Bags Would Cause a "Significant Environmental Impact"

In passing the Ordinance, the County intended to increase the use of reusable bags in its jurisdiction. (AR Vol. 1, Tab A, p. 2.) Save the Plastic Bag argues that this increase in reusable bags will result in significant environmental impacts. Again, Save the Plastic Bag fails to produce substantial evidence to support its argument.

The only evidence Save the Plastic Bag points to in support of its

argument is a figure from the LA EIR that reusable bags must be used at least 104 times before offsetting their environmental effects as compared to a single-use plastic bag. (Opening Brief, pp. 13-14; Reply Brief, p. 20.) Again, even if the LA EIR is a part of the administrative record in this case, it does not provide substantial evidence to support a fair argument here. There is no evidence that consumers would not use reusable bags that many times in the County, and there is no evidence showing that the 104 number is correct for the project area. It is also worth noting that one of the reports Save the Plastic Bag entered into the administrative record – the Carrefour/Ecobilan Report at AR Vol. 2, Tab 24, 25 – found that the life cycle of a particular type of reusable bag is used a minimum of 3 times (rather than 104).[8]

Save the Plastic Bag points to a newspaper article discussing how some consumers do not use the bags as much, but that article is inconclusive for consumers in the County. (AR Vol. 2, Tab 31.) That same newspaper article provides that if they are used as they were intended, reusable bags "can be an environmental boon, vastly reducing the number of disposable bags that do wind up in landfills." (AR Vol. 2, Tab 31, p. 1.) The article also cites a source commenting that if each reusable bag is used at least once a week, four or five reusable bags can replace 520 plastic bags a year. (AR Vol. 2, Tab 31.) Regardless, this article does not show any causation between the Ordinance at issue here and any significant adverse effects.

A Master Environmental Assessment ("MEA") was prepared for

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[8] The copy of this report in the administrative record is in French, but it is cited at Table 3.5.4-20 of the LA EIR. That document may not be in the administrative record, however, as discussed earlier.

Green Cities California to provide local governments with information about the impacts of local regulations on single-use bags such as the Ordinance at issue here. The MEA provides that reusable bags are designed to be used "up to hundreds of times" and that, assuming the bags are reused "at least a few times, reusable bags have significantly lower environmental impacts, on a per use basis, than single-use bags." (AR Vol. 1, Tab A, p. 80; see also chart at AR Vol. 1, Tab A, p. 81.)

The rest of the evidence in the record about this issue from Save the Plastic Bag pertains to 1) where the bags are manufactured; 2) whether the bags contain lead;[9] or 3) hygiene issues associated with the bags. None of the evidence cited by Save the Plastic Bag on these issues presents substantial evidence of a significant environmental effect. (See AR Vol. 2, Tabs 31-36, 41, 42, 43, 95, 96.)

2. There is No "Certainty" Requirement in the Fair Argument Standard

Save the Plastic Bag repeatedly argues that the County was required to refute its evidence "to a *certainty.*" (Opening Brief, pp. 26-27; Reply Brief, pp. 2, 4, 17-20.) There is no such requirement. The "certainty" language only pertains to the common sense exemption and does not apply to categorical exemption determinations or the fair argument standard of review. (See CEQA Guidelines, §15061, subd. (b)(3).)

Save the Plastic Bag cites to two cases in support of its proposition that the County was required to refute its argument to a "certainty," but neither helps its claim. The first case, *Banker's Hill, Hillcrest, Park West*

[9] There are several laws in place to protect California consumers from lead and other toxic materials, and the reusable bags discussed in the articles from Save the Plastic Bag were not in violation of any law. (See discussion at AR Vol. 1, Tab C, pp. 24-25.)

Community Preservation Group v. City of San Diego (2006) 139 Cal.App.4th 249 (*Banker's Hill*), merely provides that the fair argument standard applies, but there is no dispute about that here. (Reply Brief, p. 2; Respondent's Brief, p. 24; *Banker's Hill*, 139 Cal.App.4th at p. 264.) That case does not mention the word "certainty" anywhere. (See *Banker's Hill, supra,* 139 Cal.App.4th 249.) The second case, *Davidon Homes*, actually explains in detail differences between the two exceptions. (Reply Brief, p. 2; *Davidon Homes, supra,* 54 Cal.App.4th at pp. 116, 118.) The *Davidon Homes* court specified that, where the common sense exception requires an agency to "refute that claim to a certainty before finding the exemption applies," categorical exemption claims involve a "different showing." (*Davidon Homes, supra,* 54 Cal.App.4th at p. 118.) The court explains:

> In . . . categorical exemption cases, the agency first conducted an environmental review and based its determination that the project was categorically exempt on evidence in the record. It is appropriate under such circumstances for the burden to shift to a challenger seeking to establish one of the exceptions to produce substantial evidence to support a 'reasonable possibility' that the project will have a significant effect on the environment. [Citation.]
>
> In the case of the common sense exemption, however, the agency's exemption determination is not supported by an implied finding by the Resources Agency that the project will not have a significant environmental impact. Without the benefit of such an implied finding, the agency must itself provide the support for its decision before the burden shifts to the challenger. Imposing the burden on members of the public in the first instance to prove a possibility for substantial adverse environmental impact would frustrate CEQA's fundamental purpose of ensuring that government officials make decisions with environmental consequences in mind.

(*Id.* at p. 116 (citations and internal quotations omitted).) As this case only involves categorical exemptions, and not the common sense exemption,

there is no "certainty" requirement.

Since the County based its categorical exemption determinations on substantial evidence, and because Save the Plastic Bag fails to show that there is any exception to the County's categorical exemption determinations, full CEQA review of the Ordinance is not warranted.

CONCLUSION

In drafting the Ordinance, the County was following the lead of numerous California jurisdictions and more than 30 countries, ranging from Botswana to China, in an effort to decrease the serious problems associated with single-use bags. (AR Vol. 1, Tab A, pp. 6, 43.) Save the Plastic Bag is attempting to use CEQA against what it was intended to do as a means to delay this environmental protection. However, CEQA must not be "subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (CEQA Guidelines, § 15003, subd. (j); *Laurel Heights Improvement Assoc. v. Regents of U.C.* (1993) 6 Cal.4th 1112, 1132; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 557.) The words of Justice Richard Mosk, in writing a dissent for the Court of Appeal case that was overturned by the Supreme Court in *Manhattan Beach*, are equally as applicable here:

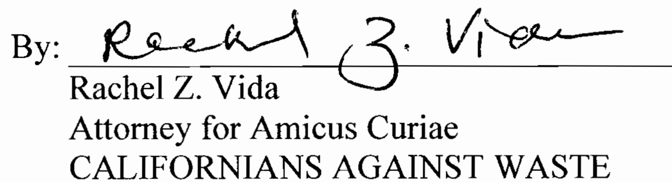
> This action to require an EIR was generated by the plastic bag industry for its economic interests, even though it is the plastic bag that has caused environmental concerns. . . .
>
> The Legislature and judiciary generally have taken steps to ensure that environmental impacts are given consideration, including when government acts. But that does not mean that we must apply

> environmental laws in a commercial dispute or when efforts are made to protect the environment in a limited area, just because of some hypothetical, de minimis effects of an ordinance."

(*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521, 546 (Dissent).)

The County's categorical exemptions determination was based on substantial evidence, and Save the Plastic Bag is not able to present any substantial evidence showing that the Ordinance would cause a significant adverse impact on the environment. As a result, the Ordinance must be upheld.

DATED: April 18, 2012 CALIFORNIANS AGAINST WASTE

By: 
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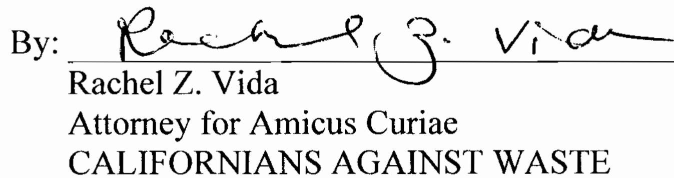
CERTIFICATION OF WORD COUNT

I, Rachel Vida, do hereby certify that this amicus curiae brief contains a total of 8,223 words, as determined by the word count function of the word processing software used to prepare this brief. The number of words in the brief therefore complies with the requirement of Rule of Court 8.204(c).

DATED: April 18, 2012 CALIFORNIANS AGAINST WASTE

By: 

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CALIFORNIANS AGAINST WASTE

PROOF OF SERVICE

I, the undersigned, declare that:

I am a citizen of the United States of America over the age of 18 years and am not a party to this action. I am employed with Californians Against Waste, 921 11th Street, Suite 420, Sacramento, CA 95814.

On the date set forth below, I served

APPLICATION BY CALIFORNIANS AGAINST WASTE TO FILE AMICUS CURIAE BRIEF & AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT COUNTY OF MARIN

on the interested parties in said action by placing a true copy thereof:

BY U.S. MAIL: by placing the documents listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as:

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BY HAND: by personally delivering the documents listed above to:

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Sacramento, CA 95814

BY ELECTRONIC TRANSMISSION: On April 18, 2012, the documents listed above was served and uploaded via electronic means, in accordance with California Rules of Court, Rule 8.212(c)(A) to:

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I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 18, 2012 at Sacramento, California.

____
LANH NGUYEN