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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN BERNARDINO

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

Petitioners/Plaintiffs,

vs.

GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, CALIFORNIA NATURAL RESOURCES AGENCY, OFFICE OF ADMINISTRATIVE LAW, and DOES 1-50.

Respondents/Defendants.

Case No.: CIV-DS-1938432

MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

Date: July 31, 2020
Time: 10:00 a.m.
Dept.: S26
Judge: The Honorable David S. Cohn

Complaint Filed: December 19, 2019
Trial Date: None

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I. INTRODUCTION

While California's most vulnerable minority residents are suffering disproportionally from the pandemic, Respondents callously insist on enforcing as of July 1, 2020 regulations expanding the California Environmental Quality Act ("CEQA"), 14 Cal. Code of Reg. §15000, *et seq*. These regulations vastly increase the cost of housing when "shelter" is the most urgent of the pandemic's necessities. As explained in detail in the 256-page Verified Amended Complaint ("Comp."), the challenged regulations make California's notoriously costly housing even more expensive, and were adopted in violation of the bedrock civil rights protections in the California and federal Constitutions, as well as environmental, transportation and housing laws.

In this motion, Petitioners - civil rights association The Two Hundred, along with plaintiff-residents of San Bernardino County - fervently request this court grant a preliminary injunction to enjoin the implementation of part of one of these new CEQA regulations, which makes the act of driving a car or pickup truck (even an electric vehicle), for even a single mile in even a carpool on an existing road, a newly-invented "vehicle mile travelled" ("VMT") "impact" to the environment. Petitioners do not dispute that the regulation is valid inside the statutorily-authorized, miniscule fraction of California that qualifies as a transit priority area ("TPA"), which is located within ½ mile of frequent, "high quality" public transit service; however, Petitioners challenge the validity of Code of Reg. §15064.3(a), (b)(1) ("VMT Regulation") because it unlawfully applies to the majority of California that is outside TPAs where public transit is non-existent or ineffective.

To place the limited geographic extent of TPAs in the context of urgent housing needs, in the six county Southern California region, the state legislature and agency's have determined that 1.34 million new housing units must be planned for and accommodated over the next eight years, which includes about 800,000 housing units that the region (and its majority-minority residents) have long needed but not built. Much of the new housing must also be affordable to lower income families.

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Comp. ¶228; see also RJN[1], Ex. 1, p. 38-40. Less than 3% of all of that region is a TPA. RJN, Ex. 2, fg. 2.0-29. The vast majority of TPAs are in Los Angeles and Orange counties, where housing costs are among the highest in the state (and nation). Id. at fig. 2.0-10. TPAs are also located in existing neighborhoods, so placing all or most of 1.34 million new housing units – no matter how tall the building, or how tiny the apartment – would require the massive destruction and displacement of existing communities, including homes occupied by minority Californians near "the tracks" – now favored as transit. Respondents' transit solution for 1.34 million new homes is a cost-prohibitive pipe dream that will further worsen the housing crisis, which the state has declared disproportionately impacts minorities and caused increased racial residential segregation. Gov. Code §§65589.5.

If allowed to go into effect, the VMT Regulation would also be immediately enforceable in CEQA lawsuits challenging approved housing. Housing approved in existing neighborhoods has long been the state's top CEQA lawsuit target. Decl., ¶2, Ex. 23.[2] As acknowledged most recently by the League of Cities, housing cannot be financed or built while CEQA lawsuits are pending. RJN, Ex. 2, p. 4; RJN, Ex. 3. Housing delayed is housing denied, and Respondents' have created a conflicting morass that will enrich CEQA combatants, burden the courts, and harm minorities who need homes affordable to middle and lower income households even more urgently in this pandemic.

The VMT Regulation (and a concurrently-adopted "underground" VMT Regulation) is also replete with internal contradictions, and directly conflicts with other statutory mandates. Unless enjoined, mandatory statewide enforcement of this new VMT Regulation outside TPAs will worsen housing availability and affordability, thereby causing disparate harms to minority Californian.

II. FACTUAL BACKGROUND

A. The Ideology of Elevating VMT Into A New, Stand-Alone CEQA "Impact" To the Physical Environment Under CEQA

The number and length of vehicular trips – VMT – has been used for decades in CEQA to

[1] Citation to "RJN" are to the Request for Judicial Notice, filed concurrently herewith.
[2] Citations to "Decl." are to the Declaration of Jennifer Hernandez, filed concurrently herewith.

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estimate tailpipe air pollution from vehicle trips resulting from the construction and occupancy of new homes (and other projects). Longer trips over the same distance caused by traffic congestion delays also cause more air pollution, and can impede the safety and efficiency of local roads and highways. Before the VMT Regulation, CEQA mitigation was required to reduce significant excess tailpipe emissions, and to improve roads and highways to reduce gridlock delays and safety hazards, based on impacts that were calculated based on project VMT, much like project occupancy information is used to calculate water demand and other population-based impact calculations. Before the VMT Regulation, CEQA treated the act of driving a car like the act of living in a house, having a child, or working at a job – a basic human activity. Under CEQA the basic human activity of a new home resident travelling between destinations could conceivably cause a significant air, congestion or safety impact, but simply driving – mobility – is not a CEQA impact. Comp., ¶¶72-73.

The VMT Regulation elevates VMT – car trips taken by residents, guests, vendors and workers over the occupancy duration of a new home – as a stand-alone new "impact" to the environment. Pickup trucks count as cars; VMT from larger trucks and buses do not count at all. This is a radical departure from CEQA. As succinctly explained by a bi-partisan group of legislators::

"[t]he ideological approach of VMT is to get people to abandon their individual vehicles and utilize multimodal transit opportunities such as walking, biking, and using public transit. The regulation views road congestion as a good thing, since it slows down traffic and incentivizes individuals to use alternate forms of transit. Improvements like road widening is considered a negative impact on greenhouse gas reductions because it increases commuter speeds which the regulation assumes will encourage people to drive longer distances. The new regulation advocates that California go on a "road diet" and calls into question whether the voters understood this [road diet mandate imposed by state environmental regulators] when they approved an increase in the gas tax.

The highest cost imposed by the VMT regulation is in areas farther away from job centers. This is where housing can be produced at the lowest cost, and is the primary source of housing for low and middle class Californians. However, measures to mitigate VMT, especially in rural areas, significantly drive up the cost of residential development. VMT also disproportionately impacts low- and middle-class Californians who are predominantly communities of color. . . .

Communities of color depend on cars more than non-protected classes to get to their jobs which are often not at fixed locations served by transit (construction, farmworkers, janitors, etc.). The VMT regulation will increase, not decrease, the cost of housing and will have its greatest impacts

on classes protected by the federal and state constitutions and a variety of federal and state laws prohibiting housing discrimination. Moreover, [even] a $1,000 increase in the cost of a home [to mitigate VMT] eliminates 8,870 households from the ability to afford a home and puts the American dream of homeownership – the primary method of establishing economic stability, community participation and economic growth – further out of reach for those struggling to afford a home today.

During the COVID-19 health crisis, which has already produced dramatic reductions in VMT, we believe that you should pause this regulation for cities and counties until a more equitable solution can be achieved. Therefore, we respectfully request that you extend the implementation of the VMT regulation for two years." RJN, Ex. 4.

As Petitioner The 200 further explained in a similar plea:

"[t]he 2018 regulations expanding CEQA authorize imposing on purchasers of new homes hundreds of thousands of dollars for vehicle miles travelled (VMT) mitigation fees – up to $400,000 [per home]. These fees will disproportionately fall on prospective new home buyers who will be communities of color who are forced to commute long distances because of failed housing policies and land use regulations that stop housing production and infrastructure projects. This is unfair because white families who already own their own homes and have identical VMTs will pay nothing. Ultimately, these fees will force some families to other states that have higher per capita greenhouse gas (GHG) emissions thereby increasing global warming. . . .

We support California's commitment to be a global leader on climate change. However, California's minority communities should not become the collateral damage in the state's war on climate change." Decl., ¶3, Ex. 24.

California is already a climate change leader in reducing GHG emissions: even though it was (pre-COVID) the world's fifth largest economy, it contributed less than 1% of global GHG. Comp., ¶83. This VMT ideology is the equivalent of making homes more expensive and homeownership unattainable as the necessary solution to reducing smog, but President Obama confirmed that the nation reduced tailpipe pollutants producing smog by 98% through cleaner cars and fuels, even as national VMT increased. Respondents' summarily reject cleaner cars or other solutions. Comp. ¶84.

In 2019, the Legislature reached the policy conclusion that solving the housing crisis with housing affordable to middle and low income families was key to climate leadership: "An additional consequence of the state's cumulative housing shortage is a significant increase in greenhouse gas emissions caused by the displacement and redirection of populations to states with greater housing opportunities, particularly working- and middle-class households." Gov't Code §65589.5(a)(1)(I).

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Respondents' also rejected other, more cost-effective and less discriminatory GHG reduction measures, even though the leader of Respondent OPR is now an academic endorsing replacement of dung-burning, GHG spewing cook stoves in Africa as a very cost-effective GHG measure (Comp. ¶276), household GHG estimation methodology lauded by the California Air Resources Board correlates higher wealth households to higher GHG, effective forest management would reduce massive GHG from forest fires and avoid catastrophic losses of life, property and habitat, and weeks of skies choked with smoke and soot. Comp. ¶¶81, 276. These and other pleas to Respondents for more equitable GHG reduction solutions have fallen on deaf ears, locked away in distant state offices.

B. VMT and the COVID-19 Pandemic

The immediacy and severity of the harms created by the VMT Regulation have increased exponentially in the pandemic, with millions more unemployed adding to the housing crisis experienced every day by the 37% of disparately minority families (pre-pandemic) that cannot regularly meet basic monthly expenses due to high housing costs. RJN, Ex. 5. Minorities are also disproportionately likely to become ill and die from COVID-19. RJN, Ex. 6. The pandemic has caused scores of laws and regulations to be delayed or reconsidered – but Respondents' insist on their July 1 VMT Regulation implementation, because why not make housing more expensive – inside high density elevator buildings in TPAs – in a pandemic?

The mass transit VMT ideology is also directly contrary to pandemic health necessities, such as the Center for Disease Control's recommendation to avoid mass transit and instead "offer employees incentives to use forms of transportation that minimize close contact with others, such as offering reimbursement for parking for commuting to work alone or single-occupancy rides." RJN, Ex. 7. Transit ridership had already declined steadily pre-pandemic (RJN, Ex. 8), even as transit services were expanded; transit ridership has collapsed by 65%-75% (Los Angeles) to 90% (San Francisco) in the midst of the pandemic, and is not expected to return to even its depressed pre-pandemic levels

for the foreseeable future according to both UCLA transit scholars and other transit experts. Decl. ¶¶5-8, Exs. 25-28.

C. No Legislative Authorization for the VMT Regulation

For more than ten years, the Legislature has considered – and uniformly rejected – legislation requiring VMT reductions to achieve climate goal GHG reductions. For example, the first version of Senate Bill ("SB") 375 required VMT reductions, but this was immediately dropped and omitted from the2008 bill.[3] In the absence of any Legislative mandate to reduce statewide VMT from new housing, Respondent agencies instead unlawfully rely on SB 743. RJN, Ex. 9. Most of SB 743 eviscerated judicial review under CEQA to assure timely development of the Kings Arena basketball stadium in Sacramento. Comp., ¶304. A few add-on lines in a section titled "Modernization Of Transportation Analysis For Transit-Oriented Infill Projects" directed Respondent OPR to eliminate traffic congestion delay as a CEQA impact requiring roadway improvement mitigation, and adopt an alternate CEQA impact which could be VMT, but ***only*** inside TPAs. Pub. Res. Code § 21099(b)(1) (emphasis added); *see also* Decl., ¶9, Ex. 29. The VMT ideology in this add-on to the Kings Arena legislation was that CEQA should not be used to require roadway improvements to reduce congestion in neighborhoods with high frequency transit services and cities could instead plan those neighborhoods to prioritize transit, bike and pedestrian transportation. One four-line subsection of SB 743 authorized, but did not require, Respondent OPR to adopt a new CEQA regulation to establish "alternative metrics to the metrics used for traffic level of service transportation impacts outside transit priority areas," but this subsection did not authorize or reference VMT – and it obviously fell outside the "Transit-Oriented Infill Project" purpose. Pub. Res. Code § 21099(c)(1). In fact, a companion to the Kings Arena bill by the same author that expanded the "modernization" directive beyond TPAs to infill areas not served by transit was also defeated. RJN, Ex. 10.

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

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The Legislature has continued to reject VMT reduction mandates. In 2017, SB 150 initially required VMT reductions, but as enacted simply required a VMT study.[4] That VMT study showed that VMT had massively increased, not decreased, since the end of the Great Recession – and that transit ridership sought by VMT ideologues had massively decreased. The Legislature again declined to mandate VMT reductions outside TPAs in a 2019 bill that applied to the Coastal Zone (SB 986).

In short, each and every time the Legislature has been presented with a statewide VMT reduction mandate (or reduction mandate outside transit served TPAs), the VMT ideology was rejected. Scores of comment letters to Respondents documenting, with expert evidence, the infeasibility and racially disparate impact of the VMT Regulation were ignored or summarily dismissed during the rulemaking process, and the VMT ideology rejected by the Legislature morphed into the VMT Regulation poised to become the law in all of California.

E. Mandatory Procedural and Content Requirements for Adopting CEQA Regulations

CEQA regulations must be adopted in compliance with Pub. Res. Code §21083(b), requiring regulations to "specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a significant effect on the environment."[5] These criteria are referred to as "significance thresholds" because impacts that exceed these "thresholds" are "significant" and must be avoided or reduced to less than significant to the extent feasible. Id. at §§21002, 21081(a).

The adoption of CEQA regulations must comply with the Administrative Procedure Act ("APA"), Gov. Code §11340, *et seq*. Id. at §21083. The APA requires in pertinent part that the regulation is undergo a public notice and comment process and include an assessment of the "adverse economic impact on California business enterprises **and individuals**…" Id. at §11346.3(a)(emphasis

[4] *Cf.* Sen. Bill 150 (2017-2018 Reg. Sess.) as introduced on Jan. 18, 2017 *with* Stats. 2017, ch. 646 (S.B. 150).
[5] Although called "CEQA guidelines" these are in fact Regulations "binding on all public agencies," (14 Cal. Code §1500), so must be adopted in compliance with the Administrative Procedures Act like other regulations, and are to be afforded "great weight" – "except when . . . clearly unauthorized or erroneous under CEQA." Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., (1988) 47 Cal.3d 376, 391 n. 2.

added). CEQA regulations must also comply with several criteria, including:

> (a) "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record; Id. at §11349(a)
> (b) "Authority" means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation; Id. at §11349(b)
> (c) "Clarity" means written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them; Id. at §11349(c)
> (d) "Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law"; Id. at §11349(d)

D. Jurisdictional Limits of CEQA

CEQA does not supersede or displace federal or state due process and equal protection guarantees against government actions that result in disparate impacts to racial minorities. CEQA is subordinate to the federal Fair Housing Act (which prohibits racial discrimination in housing caused by government agency actions), the federal Clean Air Act (which protects people from excessive levels of pollution including higher tailpipe emissions caused by intentionally worsening traffic congestion), and federal transportation laws (which require efficient and safe roadways). CEQA also does not supersede other state statutes, including state regional housing needs assessment ("RHNA") housing laws requiring cities and counties to adopt General Plans that allow for enough housing to meet existing and eight years of future needs, at affordability levels that match the needs of the community for market rate as well as low income housing, everywhere – not just TPAs. Comp. ¶¶474, 489, 505; Gov't Code §65584 *et seq*.

III. STANDARD FOR GRANTING A PRELIMINARY INJUNCTION AGAINST THE JULY 1 IMPLEMENTATION OF THE VMT REGULATION OUTSIDE TPAS

A preliminary injunction may be granted based upon a verified complaint, such as Petitioners' 256-page Verified Complaint (adopted by reference). Civ. Proc. §527(a), (h). A preliminary injunction requires it to be "reasonably probable that the moving party will prevail on the merits." San Francisco Newspaper Printing Co., Inc. v. Sup. Ct., (1985) 170 Cal.App.3d 438, 442. However, it is unnecessary to show a likelihood of success on the merits as to all of its claims: a single claim is

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sufficient. Alliance for the Wild Rockies v. Cottrell, (9th Cir. 2011) 632 F.3d 1127, 1139. A preliminary injunction also requires a balancing of the harms, *i.e.,* the comparative consequences of the issuance and non-issuance of the injunction. Moorpark Homeowners' Ass'n v. VRT, (1998) 63 Cal.App.4th 1396, 1402; see Youngblood v. Wilcox, (1989) 207 Cal.App.3d 1368, 1372-73. These two showings operate on a sliding scale: "[T]he more likely it is that [the party seeking the injunction] will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue." King v. Meese, (1987) 43 Cal.3d 1217, 1227. The court must exercise its discretion "in favor of the party most likely to be injured … If denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." Robbins v. Sup.Ct., (1985) 38 Cal.3d 199, 205. An injunction may be issued is appropriate when the legality of a regulation is challenged. Conover v. Hall, (1974) 11 Cal.3d 842, 850 (holding that Code Civil Procedure §526(b)(4) does not apply to bar the issuance of a preliminary injunction when an unconstitutional or invalid statute or ordinance is at issue "and that courts have full authority to enjoin the execution of such enactments.") Finally, the court must also consider the public interest in delaying implementation of the VMT Regulation outside TPAs until the trial on the merits is completed. Tahoe Keys Prop. Owners' Assn. v. State Water Res. Control Bd., (1994) 23 Cal.App.4th 1459, 1472–73.

A. Petitioners Are Likely to Prevail on the Merits on Challenges to the VMT Regulation

1. The VMT Regulation is not authorized by statute outside TPAs. The Legislature's consistent and ongoing rejection of VMT reduction mandates outside of TPAs, even after confirmation that VMT had dramatically increased in the SB 150 report issued in 2018, demonstrates that Respondents have no statutory authority to make a new home resident's act of driving a mile between a new house and work (or school, or soccer practice, or the hospital) an "impact" requiring avoidance or mitigation under CEQA except in transit-oriented infill TPAs. Supra, Part II.C.

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2. The economic assessment for the VMT Regulation omits the required analysis of its economic impact on individuals in violation of Gov't Code §11346.3(a). RJN, Ex. 10.

3. The VMT Regulation includes an unlawful significance threshold, stating that for land use projects (including housing), "[p]rojects that decrease vehicle miles traveled in the project area compared to existing conditions should be presumed to have a less than significant transportation impact" if located just outside a TPA boundary. Guideline §15064.3(b)(1). Under the VMT Regulation, construction of a single home that results in even a single new car trip causes a "significant" VMT impact under CEQA. Thereby effectively establishing a "one molecule rule" (i.e., a project causing one unit of an impact), which has been expressly rejected both by reviewing courts and Respondents. Cmty. for a Better Env't v. Cal. Res. Agency, (2002) 103 Cal.App.4th 98, 120; *see also,* RJN, Ex. 12, p. 23.

4. The VMT Regulation was also issued concurrently with a complex and contradictory VMT regulatory "Technical Advisory" from Respondent OPR that "recommends" for statewide use multiple and contradictory VMT significance thresholds ("VMT TA Regulation"). RJN, Ex. 13. In conflict with the VMT Regulation's "one molecule" threshold, the VMT TA regulation states that unless new homes outside TPAs have 15% lower per capita VMT than the per capita VMT in existing homes in the same city, or 15% lower than the existing per capita VMT from homes in a larger but undefined "region," then the VMT is significant – triggering avoidance or mitigation mandates under CEQA. Id. at 15. The city versus regional VMT TA Regulation conflict with each other, and both conflict with the APA-adopted threshold in the VMT Regulation itself. These contradictory, conflicting thresholds violate both the mandate that CEQA regulations include clear criteria for determining the significance of impacts (Pub. Res. Code §21083), and the requirements for clarity and consistency (Gov't. Code §11340 *et seq.*). Conflicting thresholds for VMT by the same CEQA expert Respondent agency also create a morass of legal uncertainty for agencies, and judges, seeking

to enforce CEQA.[6]

The VMT TA Regulation is also an unlawful "underground regulation" because it was not adopted pursuant to the APA. Id. An agency "Technical Advisory" is in fact a "regulation" if it is intended to establish a rule or standard of general application, and it is intended to implement, interpret, or make specific the law enforced or administered by the agency. Id. at §11342.600. Further, "no state agency shall issue, utilize, or attempt to enforce any guideline . . . which is a regulation . . . unless the guideline . . . has been adopted as a regulation." Id. at §11340.5. Because the VMT TA Regulation bypassed the APA, it is invalid and unenforceable underground regulation. Clovis Unified School Dist. v. Chiang, (2010) 188 Cal.App.4th 794, 805. The VMT TA Regulation's status as an underground regulation was further cemented on April 13, 2020, when the California Department of Transportation ("Caltrans") released VMT guidance that expressly provides that Caltrans will formally object to local agency CEQA practices or documents that do not use the VMT TA regulation's VMT reduction thresholds to assess and mitigate VMT impacts of projects located outside of TPAs to achieve California's GHG reduction climate goals. RJN, Ex. 14.

Respondents also bypassed the APA mandate that this "guidance" be limited to implementing existing law, and can in fact be implemented consistent with other statutory mandates. For example, San Bernardino County determined, based on its own transportation expert analysis, that the 15% VMT reduction threshold is not feasible throughout the vast majority of unincorporated San Bernardino County, and in fact that the maximum achievable VMT reduction is only 4% below existing VMT per household (i.e., a reduction from 20.5 to 19.7 VMT per household). RJN, Ex. 15, p. 1, 5. Thus, in San Bernardino County, it is certain that no proposed housing project would have a

[6] See, e.g., Rialto Citizens for Responsible Growth v. City of Rialto (2012) 208 Cal.App.4th 899, 933 (lead agency air quality determinations upheld based on an applicable expert air district "guidance"); Santa Clarita Org. for Planning the Env't v. City of Santa Clarita, (2011) 197 Cal.App.4th 1042, 1047-1048 (acceptable to rely on OPR's technical advisory to calculate GHG emissions); Cleveland Nat'l Forest Found. v. San Diego Assn. of Gov'ts, (2014) 180 Cal.Rptr.3d 548, 582 (dissent)(reversed in part on unrelated matters)(lawful to rely on an OPR's 2014 technical advisory that sets forth "directions and step-by-step guidance aimed at assisting practitioners and lead agencies.")

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"less than significant" VMT impact under the VMT TA Regulation of 15% lower per capita VMT, and certainly every occupied home will cause at least one new VMT in the "project area" and is significant under the VMT Regulation. As detailed in the VMT TA Regulation, for housing with significant (15% VMT threshold) impacts, agencies should adopt the alternative of "locat[ing] the project in an area of the region that already exhibits low VMT." RJN, Ex. 13, p. 28. However, San Bernardino County is under state housing law mandates to authorize many thousands of thousands of new homes that must be affordable to moderate as well as low income residents under RHNA housing laws – and thwarting such new housing based on the Respondents' intended implementation of the VMT Regulation under CEQA violates state housing law. Gov't Code §65583.

B. The Balance of Harms Warrants Granting the Injunction

The second prong in deciding Petitioners' motion is the comparative balance of harm Petitioners are likely to sustain if the injunction were denied as compared to the harm Respondents is likely to suffer if the preliminary injunction were issued. Common Cause v. Bd. of Supervisors, (1989) 49 Cal. 432, 441-42. In other words, the court must consider whether Petitioners – and California's minorities – would suffer more harm in the meantime if an injunction were denied than Respondents would suffer if it were granted. Butt v. State of Cal., (1992) 4 Cal.4th 668, 693-94.

California is in the grips of a pandemic, civil unrest, an economic recession, and an already massive housing, homeless and poverty crisis. One of the only "benefits" of this catastrophic situation is that VMT – and all forms of tailpipe emissions including GHG – have plummeted, which is the policy objective Respondents purportedly seek to achieve with the VMT Regulation. And one more benefit, also as described above, is that working from home – telework – has emerged as a productive and accepted alternative for many office-based jobs, employers and experts agree that remote work is effective, and various pre-pandemic California demonstrated that telework can reduce VMT by between 60 and 90 percent. RJN, Ex. 16. The reality is that remote work, not the VMT transit-centric, high cost housing in TPAs ideology, has already proven to be an effective GHG reduction strategy as

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it relates to reducing personal automobile use. Further, the requested injunction explicitly respects the Legislature's decision to allow VMT to be a CEQA metric within TPAs – and thereby continues to encourage transit-oriented infill housing as described in SB 743. RJN, Ex. 17. In short, Respondents suffer no harm from issuance of a preliminary injunction against the statewide implementation of the VMT Regulation outside TPAs.

Since local agencies are required to accommodate new housing under RHNA (instead of openly defying such housing laws by shoving housing elsewhere in the" region" as endorsed in the VMT TA regulation), the VMT Regulation imposes unlawful new VMT "mitigation" cost burdens on new housing that conflicts with RHNA mandates that housing be affordable to moderate and low income residents, as well as creating unlawful new barriers to housing and homeownership in violation of the Federal Fair Housing Act ("FHA"), 42 U.S.C. § 3613(a). Comp., ¶¶461-472.

Mitigation of the VMT impact requires reducing VMT – reducing miles driven by someone, somewhere – to offset or mitigate the "significant" VMT caused by the new home. However, as documented in San Bernardino County (among others), the transportation choices available to the resident of an existing home or new home will not and cannot be changed by building of a new home: *i.e.*, residents of an existing home have the same transportation choices as residents of a new home built nearby. Recognizing that VMT cannot effectively be reduced by a new home project, the VMT TA Regulation states that "[b]ecause VMT is largely a regional impact, regional VMT-reduction programs may be an appropriate form of mitigation" and that "[i]n lieu fees have been found to be valid mitigation where there is both a commitment to pay fees and evidence that mitigation will actually occur." RJN, Ex. 13, p. 27.

In a series of VMT workshops, Respondent OPR showcased VMT fee projects such as charging new homes fees to subsidize public transit, school buses, and bicycle rental services. RJN, Ex. 18. One of the few quantified (by cost, and by avoided VMT) recommended VMT fees by LA

Metro to require new housing pay for transit passes for use by other people, elsewhere in the region, to reduce regional VMT. RJN, Ex. 19. This proposal had two fatal flaws:

First, depending on whether the "one molecule" VMT Regulation (and which 15% VMT threshold from the VMT TA regulation is used as a significance threshold), and making the heroic assumption that today's LA Metro Transit passes would remain the same price for a 30-year assumed occupancy of a new home –the VMT mitigation fee for each new home approved by San Bernardino county would be $45,100 per home (assuming the least costly of the two 15% VMT TA regulation thresholds) or $403,800 per home if the VMT Regulation's "one molecule" threshold is implemented. Comp. ¶¶315-317. Before the VMT fees are added, new homes prices are affordable to the majority of home purchasers in San Bernardino, which is currently minorities. RJN, Ex. 20; Ex. 21. If even the lower of the two VMT fees were imposed, 19,538 families who could otherwise afford to purchase home could no longer do so. Comp. ¶318.

Second, to be a valid CEQA mitigation, the VMT fee actually needs to result in getting a lot of people, somewhere, to drive significantly less miles. There is, however, no evidence that raising new home prices to pay for transit passes actually reduces VMT anywhere. Transit ridership, even in densely populated urban areas, had already declined precipitously pre-pandemic, with for example the LA Metro system carrying approximately 120 million fewer riders in 2019 than in 1985, despite LA Metro opening a huge rail system with six lines radiating from downtown. RJN, Ex. 1, p. 69. One reason for the decline is that the average commuter in the greater Los Angeles region can reach 33 times more jobs by car as by transit in a 30 minute commute. RJN, Ex. 22, p. 13. It should, accordingly, come as no surprise that no such "in lieu fee" VMT mitigation programs exists today.

By increasing the costs and CEQA litigation uncertainties for housing, the VMT Regulations also violate the federal Fair Housing Act ("FHA"), 42 U.S.C. §3613(a). The FHA authorizes any "aggrieved person" to bring a fair-housing suit for a "discriminatory housing practice." 42 U.S.C. §

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3613(a). It is unnecessary to establish an intent to discriminate under the FHA, the charging party must only "prove the discriminatory impact at issue." Pfaff v. U.S. Dept. of Hous. and Urban Dev., (9th Cir. 1996) 88 F.3d 739, 746 (citing Palmer v. U.S., (9th Cir. 1986) 794 F.2d 534, 538). Valid statistical evidence is admissible for this purpose. Id. As supported by statistical evidence in the Complaint, the VMT Regulation disproportionally affects minorities by promoting new housing in high-priced coastal job centers that are affordable to and disproportionately occupied by high-income white households, and by concurrently making it unlawful or economically infeasible to build housing that is affordable to and occupied primarily by minority households in inland Los Angeles and Bay Area counties, and the Central Valley. Bluntly, this is a racist regulation that will to continue to deprive minorities of affordable home ownership. Respondents defend their racist policy as a climate and environmental necessity; it is not.

IV. CONCLUSION

The politics of powerful special interests have bypassed state legislators to impose their VMT ideology on California's most vulnerable minorities through the state's most powerful anti-housing litigation tool: CEQA. VMT ideologues that demand (other) people ride the bus and live their lives as renters riding elevators to small apartments must also follow the rule of law however, as observed by the immediate past president of the Sierra Club Board of Directors, the club's first African American president Aaron Green concluded: "White privilege and racism within the broader environmental movement is existent and pervasive." Decl., ¶10, Ex. 30. Racism must be rooted out, even if camouflaged in green rhetoric and ideology. For the foregoing reasons, Petitioners respectfully request an order enjoining the VMT Regulation §15064.3(a) and (b)(1) from becoming effective outside TPAs on July 1, 2020 until the merits of Petitioners' Complaint are decided.

Dated: June 2, 2020

Jennifer L. Hernandez