Nos. 18-16105, 18-16141

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF OAKLAND,

Defendant-Appellant,

v.

OAKLAND BULK & OVERSIZED TERMINAL, LLC,

Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(Hon. Vince Chhabria)
Civil Case No. 16-cv-07014-VC

BRIEF OF AMICI CURIAE ARTHUR CHEN, WENDEL BRUNNER, WENDY J. PARMET, JULIA WALSH, CLAIRE BROOME, THOMAS McKONE, and JOHN SWARTZBERG IN SUPPORT OF APPELLANT AND REVERSAL OF THE DISTRICT COURT'S DECISION

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RULE 29(A)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state that their counsel authored this brief in its entirety, no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No Coal in Oakland, a nonprofit organization, has agreed to reimburse counsel for the cost of attorney admission to the Ninth Circuit and the costs of printing this brief.

STATEMENT OF IDENTITY, INTERESTS, AND AUTHORITY OF AMICI

Amici are public health advocates including former public health officials, educators, scientists, and public health practitioners. They consider the preservation of the traditional local police power foundational to the protection of public health and safety. Throughout their careers in the public and private sectors, *Amici* have used their expertise to protect public health and safety.

The Court's decision in this matter will impact *Amici's* interests. By affirming the district court's decision, this Court would tie the hands of municipal governments that enter into development agreements from subsequently exercising their inherent police powers over public health and safety. This would directly impact the communities *Amici* serve.

Amici are as follows:

Arthur Chen, MD is a practicing physician with over thirty years of experience in public health and safety net services. From 1996–2001, he was the Health Officer for Alameda County serving a population of 1.4 million. Alameda County is the county in which the coal terminal at issue in this case would be situated. Dr. Chen is a past president of the Alameda-Contra Costa County Medical Association. He is currently a Senior Fellow at Asian Health Services in Oakland, California, where he practices both inpatient and outpatient medicine as a family physician and where he previously served as Medical Director and Special

Programs Director. Dr. Chen sits on the Board of Directors of the California Physicians Alliance, an organization dedicated to universal health coverage.

Wendel Brunner PhD, MD, MPH was the Director of Public Health for Contra Costa County from 1983 until 2015. During that time, Contra Costa County had the highest concentration of hazardous waste and hazardous materials in California, and much of his work involved evaluating the impact of environmental contamination on community health. Coal trains headed to the proposed terminal would pass through numerous neighborhoods in Contra Costa County adding to this burden on the local populations. As Public Health Director, Dr. Brunner promoted policy approaches to improving community health, including some of the first local tobacco legislation in the country, nutrition labeling, restrictions on toxic materials, and industrial safety. Dr. Brunner received his PhD in Biophysics from UC Berkeley, his MD from UCSF and an MPH in Environmental Epidemiology from UC Berkeley School of Public Health. He has published in the areas of physical chemistry, immunology, infectious disease, environmental epidemiology and public health policy. He currently is the Principal Investigator of the California Chronic Disease Prevention Leadership Project with local health departments in California.

Wendy J. Parmet is the Matthews Distinguished Professor of Law and at Northeastern University School of Law and Director of its Center for Health Policy

and Law. Professor Parmet is a leading expert on health, disability, and public health law. She holds a joint appointment with Northeastern University's School of Public Policy and Urban Affairs in recognition of her national leadership in interdisciplinary thinking and problem solving on issues related to health care. Professor Parmet is the author of *Populations, Public Health, and the Law* (Georgetown Univ. Press 2009).

Julia Walsh, MD, MSc served for more than 20 years as a full-time Adjunct Professor of Maternal and Child Health and International Health in the Division of Community Health Sciences at the University of California, Berkeley School of Public Health. Dr. Walsh received her MD degree from New York University School of Medicine, trained in internal medicine at the University of San Francisco and in infectious diseases at Albert Einstein College of Medicine. She received her MSc in community health from London University School of Hygiene and Tropical Medicine. Dr. Walsh has conducted research on and taught maternal and child health, cost-effectiveness/benefit analysis, and global health. Her recent research has focused on determinants of health for pregnant women and newborns. Since retiring in 2015, she continues part-time work at UC Berkeley advising and teaching doctoral and undergraduate students.

Claire Broome, MD retired from the United States Public Health Service in 2006 after serving as an Assistant Surgeon General of the United States. She was Deputy Director of the U.S. Centers for Disease Control and Prevention (CDC) and Deputy Administrator of the Agency for Toxic Substances and Disease Registries from 1994–1999 and served as Acting Director and Acting Administrator of the CDC in 1998. These are the lead U.S. government agencies for managing and developing public health programs for the United States. In her roles at these agencies, she collaborated extensively with state and local public health agencies that hold the legally authorized public health powers. Dr. Broome was elected to membership in the National Academy of Medicine in 1996. She is currently an Adjunct Professor in the Department of Global Health, Rollins School of Public Health, Emory University.

Thomas McKone, PhD has worked for more than thirty years as a researcher and faculty member with the University of California. He earned a PhD in engineering from UCLA in 1981. His research has focused on the development, use, and evaluation of models and data for environmental risk assessments and the health and environmental impacts of energy, industrial, and agricultural systems. He has authored 160 journal papers, served on the U.S. EPA Science Advisory Board, been a member of fifteen U.S. National Academies committees, is a fellow of the Society for Risk Analysis and a former president of the International Society

of Exposure Science. He retired in 2015 but continues his research and student/staff mentoring as a senior scientist and advisor on energy analysis and environmental impacts at Lawrence Berkeley National Laboratory and as a Professor Emeritus of Environmental Health Sciences at the University of California, Berkeley School of Public Health.

John Swartzberg, MD, FACP served for thirty years as a Clinical Professor of Health and Medical Sciences at the University of California, Berkeley, where he is currently Emeritus Clinical Professor. He also is currently Clinical Professor of Medicine at the University of California, San Francisco School of Public Health. He is an internist and specialist in infectious disease. He is Chair of the Editorial Board of BerkeleyWellness.com, the UC Berkeley Wellness Letter and the Health After 50 newsletter. He was a member of the Editorial Board of the American Journal of American Epidemiology and is currently serving as Hospital Epidemiologist at Alta Bates Hospital, Berkeley, California; member of the Board of Regents, Samuel Merritt University; and member of the Editorial Board, American Journal of Medical Quality.

Amici have filed a Motion for Leave to file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(3).

INTRODUCTION

This appeal raises important policy considerations that surface when development agreements intersect with a city's duty to protect the health and safety of its citizens. California law authorizes cities to enter into development agreements that freeze zoning and land use regulations for a developer in exchange for some public benefit. Information about a project and its impacts on the community may arise, however, that warrants subsequent regulation to protect public health and safety. While a city normally has plenary powers to address these concerns through legislation supported by any rational basis, the development agreement at issue here purports to adopt a different standard. This appeal addresses how stringent that standard may be when new information about a development directly implicates public health and safety.

Here, Appellant the City of Oakland ("Oakland" or the "City") executed a development agreement with Appellee Oakland Bulk & Oversize Terminal, LLC ("OBOT") to construct a bulk commodities shipping terminal at a former army base in Oakland. OBOT, however, concealed its intention to use the terminal primarily for shipping coal and petroleum coke (collectively "coal"). After learning of OBOT's plans, Oakland held public hearings to address public health and safety concerns over the newly-identified coal project. Before rendering a decision, the City commissioned expert reports on likely impacts from the project

and considered those findings, other expert submissions, and numerous other public comments. The City also invited OBOT to address public health and safety concerns raised during the hearings, but OBOT refused to participate in any meaningful way.

After reviewing the information gathered during its nearly year-long public process, Oakland passed an ordinance and resolution prohibiting OBOT from using the proposed terminal for handling and storage of coal. OBOT then sued the City in the U.S. District Court for the Northern District of California. At trial, OBOT raised arguments and submitted expert reports for the first time criticizing the information and reports on which the City relied. The district court ultimately found in favor of Appellee OBOT, concluding the City's decision was not supported by the record before it. In reaching this conclusion, the court relied on expert opinions and arguments raised by OBOT for the first time at trial.

Amici offer this brief in support of the City and urge this Court to reverse the district court's decision. If upheld, the decision would contravene important public policy concerns. First, California law elevates public health and safety concerns implicated here over regulatory certainty for land use development. The district court's decision ultimately leads to the opposite conclusion; it imposes an impossibly high standard for responding to new health and safety concerns and ignores fundamental public health concepts, like the precautionary principle.

Second, affirming the decision will encourage developers to conceal important information when negotiating development agreements. Third, the district court's decision encourages developers not to participate in public proceedings meant to address public health and safety concerns. For these reasons, this Court should reverse the district court's decision.

ARGUMENT

A. The District Court's Flawed "Substantial Evidence" Review Is Incompatible With The City's Duty To Protect Public Health and Safety.

The district court applied a flawed "substantial evidence" standard that is incompatible with the City's duty to protect public health and safety. It set an impossibly high bar for cities to meet when new information concerning an existing development agreement implicates public health and safety. The decision eliminates the flexibility cities are normally afforded to address these matters to protect those who live and work within their borders.

1. California law does not support the district court's "substantial evidence" standard, which improperly elevates land use development over public health and safety concerns.

The California Constitution grants cities expansive police powers, subject only to territorial limits and state law preemption. *Candid Enterprises, Inc. v. Grossmont Union High Sch. Dist.*, 39 Cal. 3d 878 (1985). "This inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders." *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 738 (2013). There is a "long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health." *People ex rel. Deukmejian v. Cty. of Mendocino*, 36 Cal. 3d 476, 484 (1984). A city "may

not contract away its right to exercise police power in the future." S*anta Margarita Area Residents Together v. San Luis Obispo Cty*., 84 Cal. App. 4th 221, 232 (2000). Judicial review of a city's exercise of this power is normally highly deferential:

> [A]s long as there are considerations of public health [and] safety . . . which the legislative body may have had in mind, which could have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation.

Miller v. Bd. of Pub. Works of City of Los Angeles, 195 Cal. 477, 490 (1925).

California's development agreement statute authorizes cities to freeze local zoning and land use regulations, thereby limiting the police power of future city governments, "to encourage development" in exchange for some community benefit. *Ctr. for Cmty. Action & Envtl. Justice v. City of Moreno Valley*, 26 Cal. App. 5th 689, 707 (2018). Cities may reserve their police powers in the development agreement to address changes in circumstances that may arise.

When a development agreement reserves the city's police power authority, as Oakland did here, courts should not construe the agreements to favor development at the expense of public health and safety. Encouraging development is only a means to an end, and California's development agreement statute does not elevate land use development over public health concerns. *See* Cal. Gov't Code § 65865.3(b) (authorizing a newly incorporated city to modify or suspend provisions

of an existing county development agreement if "the city determines that the failure . . . to do so would place . . . the residents of the city . . . in a condition dangerous to their health or safety, or both."). Here, the district court's strict application of the "substantial evidence" standard contravenes these important concerns.

2. The district court's decision does not afford cities the necessary flexibility to address public health and safety concerns when certainty does not exist.

Public health professionals, and the municipalities that rely upon them for guidance in protecting public health and safety, must frequently make decisions based upon the best information available. The D.C. Circuit's seminal opinion in *Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1 (D.C. Cir. 1976) (en banc) (Skelly Wright, J.) illustrates these principles in considerable detail. There, Congress charged EPA under the Clean Air Act to regulate gasoline additives whose emission products "will endanger the public health or welfare." 541 F.2d at 7 (citing section 211(c)(1)(A) of the Clean Air Act). Pursuant to this mandate, EPA promulgated rules requiring annual reductions in lead content in gasoline. *Id*. Industry petitioners challenged the regulation, arguing that EPA could only rely on "a high quantum of factual proof . . . of actual harm" and that the regulations "must be based on the danger presented by lead additives 'in and of themselves'" without consideration of all other sources of lead exposure. *Id*. at 12.

The court rejected both arguments, largely based on the precautionary nature of the "will endanger" standard. From this foundation, the court reasoned that regulators "must be accorded flexibility . . . in favor of protection of the health and welfare of people, even in areas where certainty does not exist." *Id*. at 24. Both the law and "common sense . . . demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable." *Id.* at 25. The court held that the precautionary principles espoused in the statute do "not demand rigorous step-by-step proof of cause and effect." *Id*. at 28. Rather, regulations under precautionary laws must only be "rationally justified" based on the regulator's consideration of the available evidence. *Id*. EPA could "draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like." *Id*.

Relying again on basic public health principles, the court also rejected industry's argument that lead additives could only be regulated based on reviewing their impacts "in isolation," apart from other sources of lead exposure. *Id*. at 29. As the court noted, however, industry's argument was not in line with the realities of human exposure. *Id*. at 30. Even though airborne lead from gasoline may not be a threat "in isolation," it would become a threat when added to other sources of

exposure. *Id*. The court criticized industry's "tunnel-like reasoning" under which "no regulation could ever be justified" despite actual threats to human health and safety. *Id*. Indeed, industry's approach "would render the [Clean Air Act] largely useless as a basis for health-related regulation of lead emissions." *Id*. at 31.

Oakland's decision to ban coal operations at the terminal is consistent with these precautionary principles. The City considered a record that demonstrates coal transportation and terminals generate tons of fine particles ("PM2.5"), which epidemiological studies show are associated with significant adverse health outcomes, that at least some populations near the proposed terminal are overburdened with pollution, and that adding to this existing burden would endanger public health. Though the information before the City may not have been perfect, it justified the City's precautionary approach for protecting public health and safety.

3. The district court imposed an impossibly high bar on the City that is not required under the development agreement and undermines the City's ability to protect public health and safety.

Although Oakland is not setting a national standard, and is instead focused on a single development within its city limits, the *Ethyl Corp.* decision is instructive. The decision explains why courts should not hold those charged with protecting public health and safety to standards that require absolute precision.

Instead, courts should review the record deferentially given the precautionary nature of the regulator's charge.[1]

Under the district court's flawed version of the "substantial evidence" test, a city must engage in risky speculation, rebut arguments that were never raised before trial, and face a court willing to substitute its judgment for that of municipal authorities. Regarding Oakland's air pollution concerns, the district court faulted the City for not factoring in various air pollution mitigation measures and assumptions, including some that: 1) are not required by law; 2) may never be required by law; 3) are not in use in the United States; 4) are beyond Oakland's power to compel OBOT to use; 5) lack existing data as to their effectiveness; and 6) could lead to unintended harmful consequences.[2] ER0013–26. The district

[1] The D.C. Circuit reviewed EPA's lead additives regulation under the Administrative Procedure Act's "arbitrary and capricious" standard, 5 U.S.C. § 706(2)(A). *Ethyl Corp.*, 541 F.2d at 34. Under this standard, courts will uphold agency actions "if a rational basis exists for the agency's decision." *Id*. It is a highly deferential standard that "presumes agency action to be valid." *Id*. The court noted that this standard is "more lenient" than the "substantial evidence" standard, but that "the two standards often seem to merge." *Id*. at 37 n.79. Indeed, this Court has held, "[w]hen the arbitrary and capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test." *Wileman Bros. & Elliott v. Espy*, 58 F.3d 1367, 1374–75 (9th Cir. 1995), rev'd on other grounds, 521 U.S. 457 (1997).

[2] The district court's decision also presumes these mitigation measures are economically feasible.

court's decision demands that the City disregard its precautionary approach, which is consistent with public health principles.

An example that combines nearly all of these factors is the district court's finding that it was a "big mistake" for Oakland's consultant to assume covered rail cars would *not* be used to mitigate coal dust. ER0016. In support of this finding, the court relied on OBOT's willingness to "obligate" itself to only accepting coal transported by covered rail cars and to make a post-ordinance lease agreement with the terminal operator requiring covers. *Id*. This requires the City to assume these mitigating measures will be in place. But OBOT's willingness to require covers does not rise to a level that demonstrates the consultant's work, or the City's judgment, were so faulty that "no reliable conclusion about health or safety could be drawn" from the report. ER0005. The evidence weighed strongly against factoring in covers: they have not yet been used to ship coal in the United States, no existing rules or regulations require shippers to transport coal in covered cars, and there is little existing data about their effectiveness. ER0015–17. Likewise, OBOT's professed willingness to obligate itself to require covered cars via contract does not guarantee covers will ever be used. By concealing its true intentions for the terminal, OBOT had already shown itself an untrustworthy partner. Moreover, given that OBOT might later disclaim its commitment on any number of grounds (for example, the failure of any third party to manufacture the covers or of federal

regulators to approve their use), the City could not assume OBOT would actually follow through.

The district court also faulted the City for not assuming other regulators would manage the air pollution. In particular, the court referenced a "recently adopted" South Coast Air Quality Management District Rule that requires covers for "vehicles carrying [coal] before they leave the facilities." ER0016 (citing Rule 1158(d)). But this requirement offers virtually no protection from railcar emissions. The rule only applies to empty cars leaving the terminal; it *does not* apply to the thousands of coal-laden railcars that will cross Oakland for the 66-year duration of the development agreement. Rule 1158(d), moreover, only applies "to prevent material from escaping from the . . . railcar onto the *facility property*." Rule 1158(d)(12) (emphasis added). Rule 1158 does not, and cannot, require rail covers beyond the terminal's perimeter—*i.e.*, throughout the City.[3] Whatever minimal protections this rule provides, it does not rationally undermine the City's determination. In the field of public health, "[i]ncreasing emphasis is placed on upstream interventions—*eliminating the source* of the hazard rather than just

[3] The Air District may not regulate rail transportation once the railcars exit the facility. *See Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010) (holding the Interstate Commerce Commission Termination Act preempts California air district's rules for idling trains).

preventing or reducing exposure."[4] Mitigation measures, of course, *do not* eliminate or prevent exposure.

The district court also faulted Oakland for not comparing the coal terminal's potential impacts with the impacts of other existing air pollution sources. The court asked, "But if any emissions [from OBOT] are a substantial danger, how does the City justify allowing emissions from these [other] sources?" ER0031. The court's rhetorical question tracks industry's flawed "in isolation" argument in *Ethyl Corp*. 541 F.2d at 30. Like the industry challengers in *Ethyl Corp.*, the district court ignored the reality of human exposure. Under the district court's logic, cities could only prohibit a new source of air pollution if it would emit more pollution than all other existing sources or combination of sources.[5] This "two wrongs *make* a right" approach, however, is inconsistent with a city's duty to protect public health and safety—it would increase the population's exposure to harmful substances as pollution accumulates from each new source.

The district court presumes in error, moreover, that Oakland must address other sources of air pollution that are also harmful to public health. In other

[4] U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, PICTURE OF AMERICA, PREVENTION 2 (emphasis added), https://www.cdc.gov/pictureofamerica/pdfs/picture_of_america_prevention.pdf.
[5] The district court compares the OBOT coal terminal to emissions from the East Bay Municipal Utility District *and* an iron foundry. ER0026.

circumstances where a state law was reviewed under the rational basis test, the U.S. Supreme Court:

> has made clear that a legislature need not strike at all evils at the same time or in the same way, and that a legislature may implement its program step by step, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (internal quotations, modifications, and citations omitted). Oakland may address other sources of pollution with future regulations.

The district court also faulted the City's reliance on a University of Washington study that measured significant increases in fine particulate matter along coal train routes. ER0027–28. Because the coal from that study differed from the coal OBOT *initially* intends to ship, and because those trains travelled through different geographic features, the court determined the study's "numbers cannot be used as meaningful evidence" of OBOT's potential pollution of Oakland's air. ER0028. The district court ultimately concluded that the record "lacks any rigorous analysis of how OBOT would actually impact air quality in Oakland." ER0029.

Once again, the district court stumbles over foundational principles of public health. Regulators entrusted with protecting public health and safety are not:

> endowed with a prescience that removes all doubt from their decision-making. Rather, speculation, conflicts in evidence, and theoretical extrapolation typify their every action. How else can they act, given a mandate to protect the public health but only a slight or nonexistent data base upon which to draw?

Ethyl Corp., 541 F.2d at 24. Cities charged with protection of public health and safety must be able to consider the best evidence available and make rational decisions under the circumstances. Here, the peer-reviewed University of Washington study was the only known study measuring the release of fine particulates from coal trains. Though this study measured emissions from railcars transporting a different kind of coal, OBOT's terminal is capable of handling *any* kind of coal over its *66-year* lease term. The district court's reasoning would hamstring cities by requiring them to undertake "rigorous" scientific studies specific to their precise location and circumstances *chosen by the developer*.

Cities, charged with protection of public health and safety, "must be accorded flexibility, a flexibility that recognizes the special judicial interest in favor of protection of the health and welfare of people, even in areas where certainty does not exist." *Ethyl Corp.*, 541 F.2d at 24. Supported by testimony from numerous physicians and other public health officials, the City rationally decided to ban the proposed storage and handling of coal. Rather than accept the City's decision, the district court did what courts are "loathe" to do—it substituted its judgment for that of the City. *Miller*, 195 Cal. at 490.

B. The District Court's Decision Encourages Developers to Conceal Important Information Before Executing a Development Agreement.

It is crucial for public health professionals, and the municipalities that rely upon them, to know as much about a proposed development as possible. Holding cities to impossibly strict standards for subsequent public health and safety regulations, however, encourages developers to *withhold* important information. OBOT's actions illustrate the problem. Faced with potentially strong public opposition to a coal terminal, OBOT kept its intentions from the public until *after* finalizing the development agreement. ER0397, 400. Indeed, in 2013, an OBOT representative disclaimed any intention on the part of the company to construct or operate a coal terminal. ER0407.

The effect of OBOT's decision to conceal this information is evident from the record. By hiding its intentions, OBOT secured a regulatory freeze without the significant public scrutiny and environmental analysis that came after its plans became known. Had Oakland officials and the public known OBOT's plans, the City likely would have refused to execute the development agreement at issue in this appeal. Without the development agreement in place, the ordinance and its application to the site of the proposed coal terminal would have survived the "rational basis" review the law affords legislative acts. *See Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 31 (1964) (upholding ordinance banning oil and gas exploration where the challenger failed to show there was "no rational basis

whatever" for the ordinance); *see also Miller*, 195 Cal. at 490 (applying rational basis review of city's exercise of broad police powers). If this Court upholds the district court decision, developers will be encouraged to follow OBOT's blueprint and conceal important details of their plans from public officials and their constituents to secure an essentially unappealable regulatory freeze.

Public policy, of course, favors open and fair dealing when negotiating development agreements. *Cf. Santa Margarita Area Residents Together v. San Luis Obispo Cty.*, 84 Cal. App. 4th 221, 232 (2000) ("[a] contract which appears to have been *fair, just, and reasonable* at the time of its execution" may survive beyond the terms of the officeholders who executed the development agreement) (emphasis added) (internal quotations omitted)). Unlike a typical business contract, development agreements can bind entire communities—potentially for generations (here, for 66 years)—leaving them without redress normally available through the political process. Development agreements are also legislative acts that require public notice and comment to safeguard the public. Cal. Gov't Code §§ 65867, 65867.5(a). The marked differences between ordinary business contracts and development agreements, both in terms of their scope and procedural safeguards, demonstrate the strong policy interest in transparency, which was not present here. The district court's decision ultimately rewards OBOT for its lack of transparency.

C. The District Court's Decision Encourages Gamesmanship by Developers Seeking a Regulatory Freeze.

There is also a strong public policy interest in encouraging developers to address any and all public health and safety concerns during the administrative process rather than at trial. Under the court's decision, developers have no incentive to identify perceived flaws in the record before trial. Identifying a potential flaw would provide a city the opportunity to address the problem. But if the city addresses the problem, then there may be no error for the developer to raise at trial. Strategically, a developer would benefit by waiting until trial to reveal its criticism. The law notably discourages this kind of gamesmanship in numerous other contexts. *See e.g., Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 455 (9th Cir. 2016) (declining to consider argument under the National Environmental Policy Act that agency improperly assembled record of decision when raised for the first time on appeal); *City of Berkeley v. City of Berkeley Rent Stabilization Bd.*, 27 Cal. App. 4th 951, 979 (1994) (rejecting the plaintiff city's argument that defendant rent control board applied incorrect methodology where city never raised issue with board in the first instance). This Court should discourage such gamesmanship here.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to reverse the district court's decision.

Respectfully submitted this 17th day of December, 2018.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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  - ○ it is a joint brief submitted by separately represented parties;
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  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Kenneth J. Rumelt **Date** 12-17-18

*(use "*s/[typed name]*" to sign electronically-filed documents)*

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