

# Holland & Knight

## IN THE NAME OF THE ENVIRONMENT

How Litigation Abuse Under the California Environmental Quality Act Undermines California's Environmental, Social Equity and Economic Priorities – and Proposed Reforms to Protect the Environment from CEQA Litigation Abuse

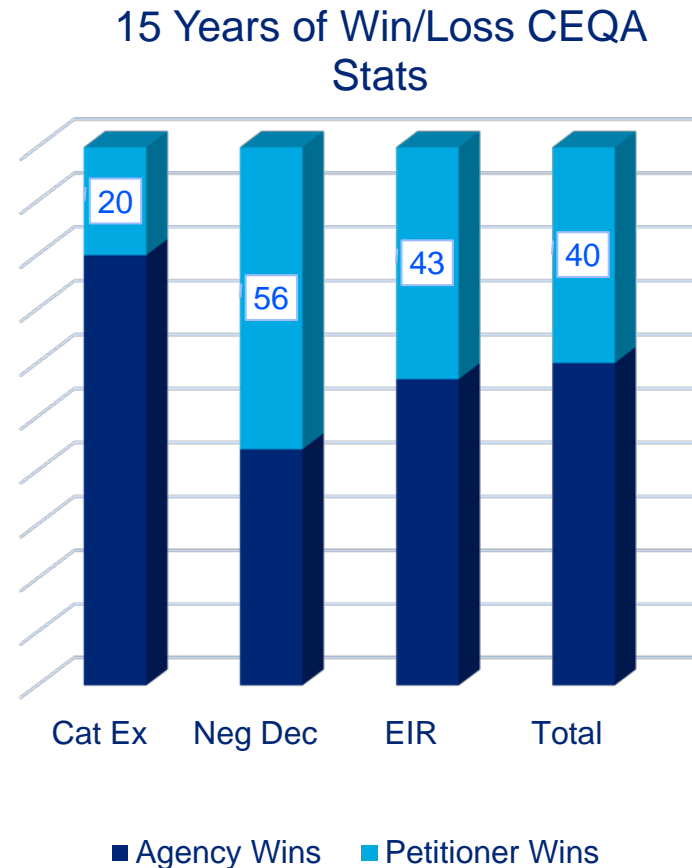
Jennifer Hernandez, David Friedman and Stephanie DeHerrera | Holland & Knight



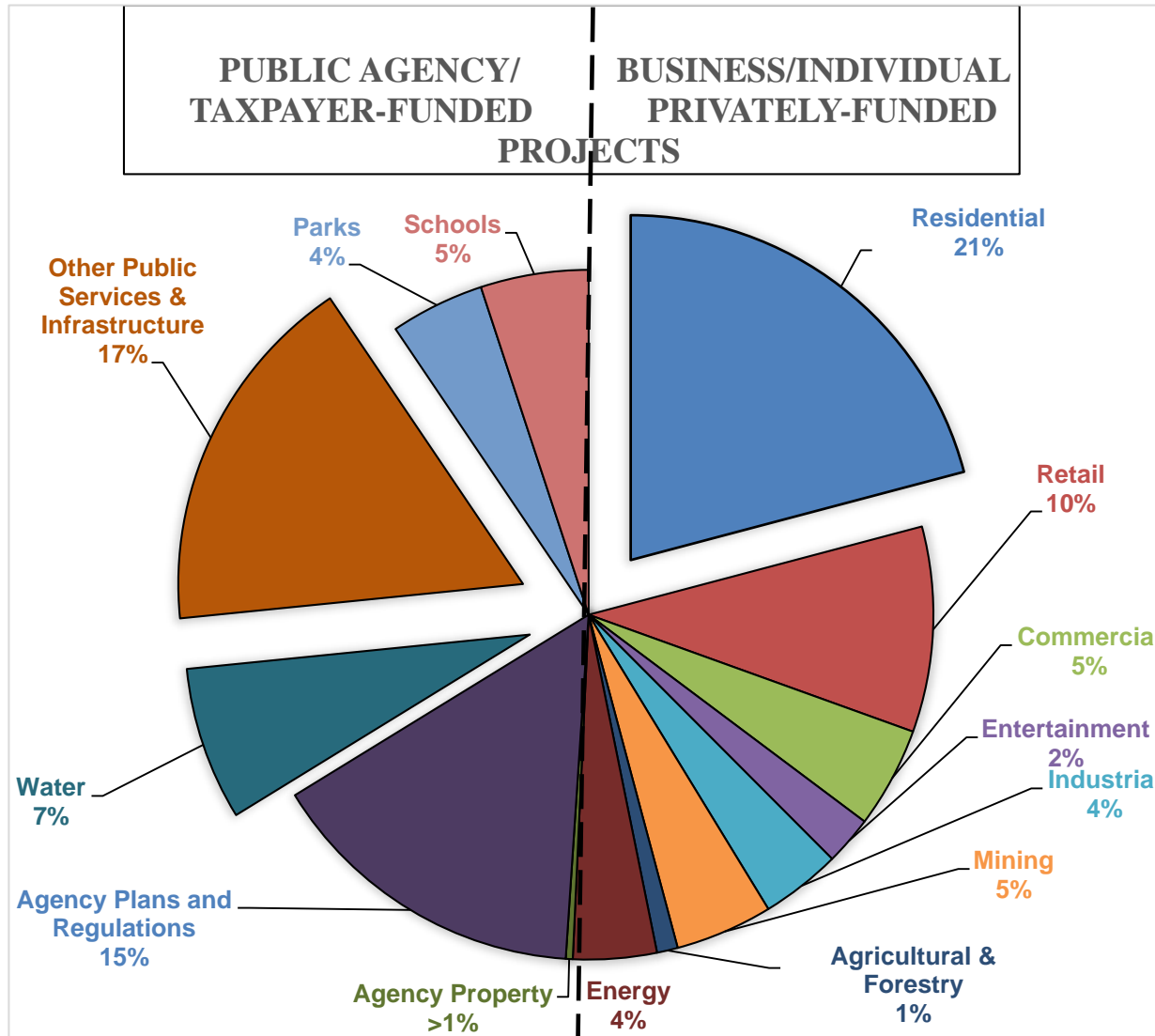
# CEQA is Great – CEQA Litigation Abuse Is Not

## Why CEQA Lawsuits Are An Unusually Powerful Leverage Tool

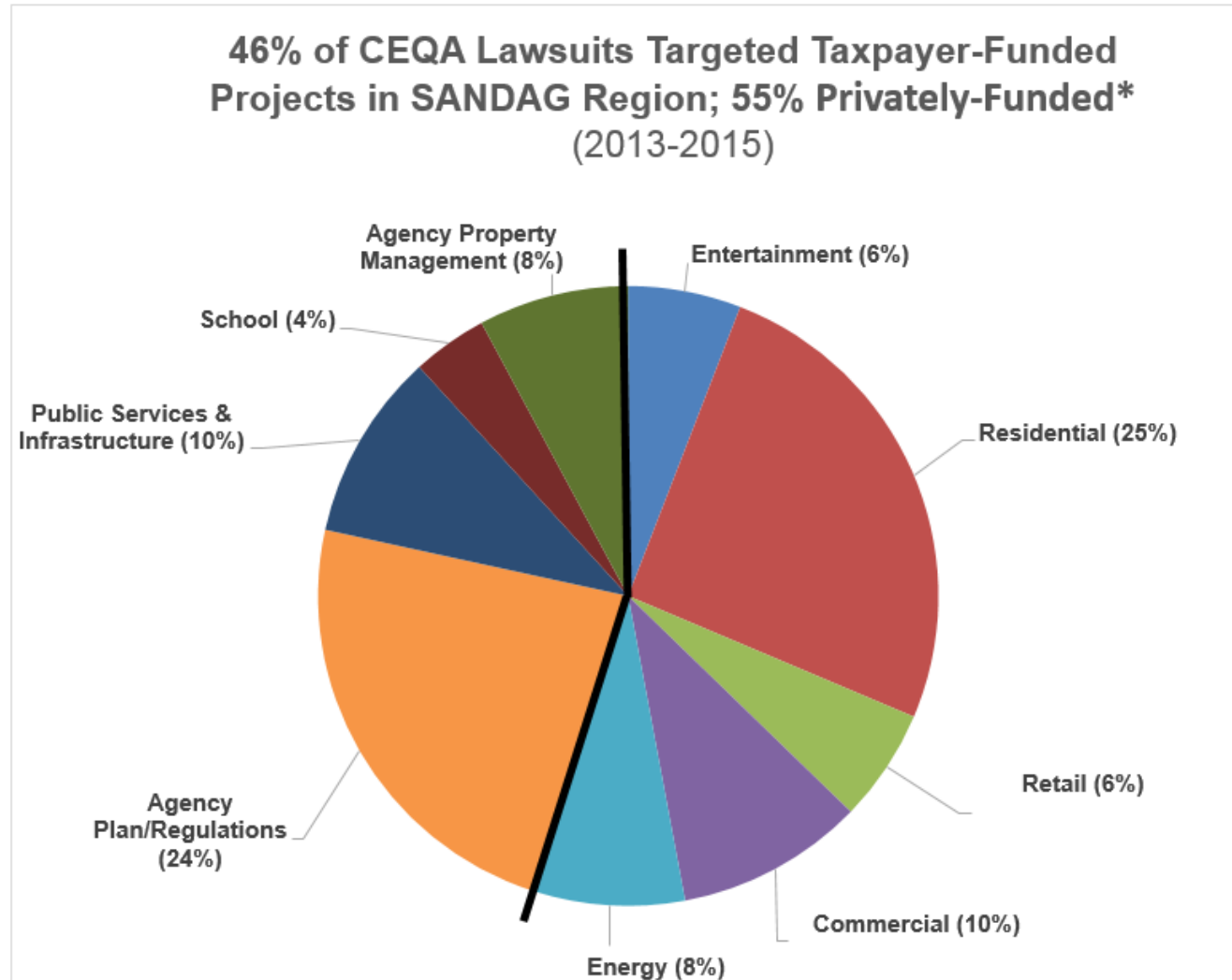
- » Anonymous Lawsuits Are Fine!
- » Cheap to file, easy to get \$\$
- » No clear rules/100++ questions
- » Judges “like” deciding these cases
- » Most common judicial remedy is reversal of project approval
  - Most lenders/grantors wait for lawsuit outcome (3+ years)
- » Bottom Line: filing lawsuit stops project



# Figure 1: Statewide (2010-2012) CEQA Lawsuits Targeting Taxpayer-Funded and Privately-Funded Projects

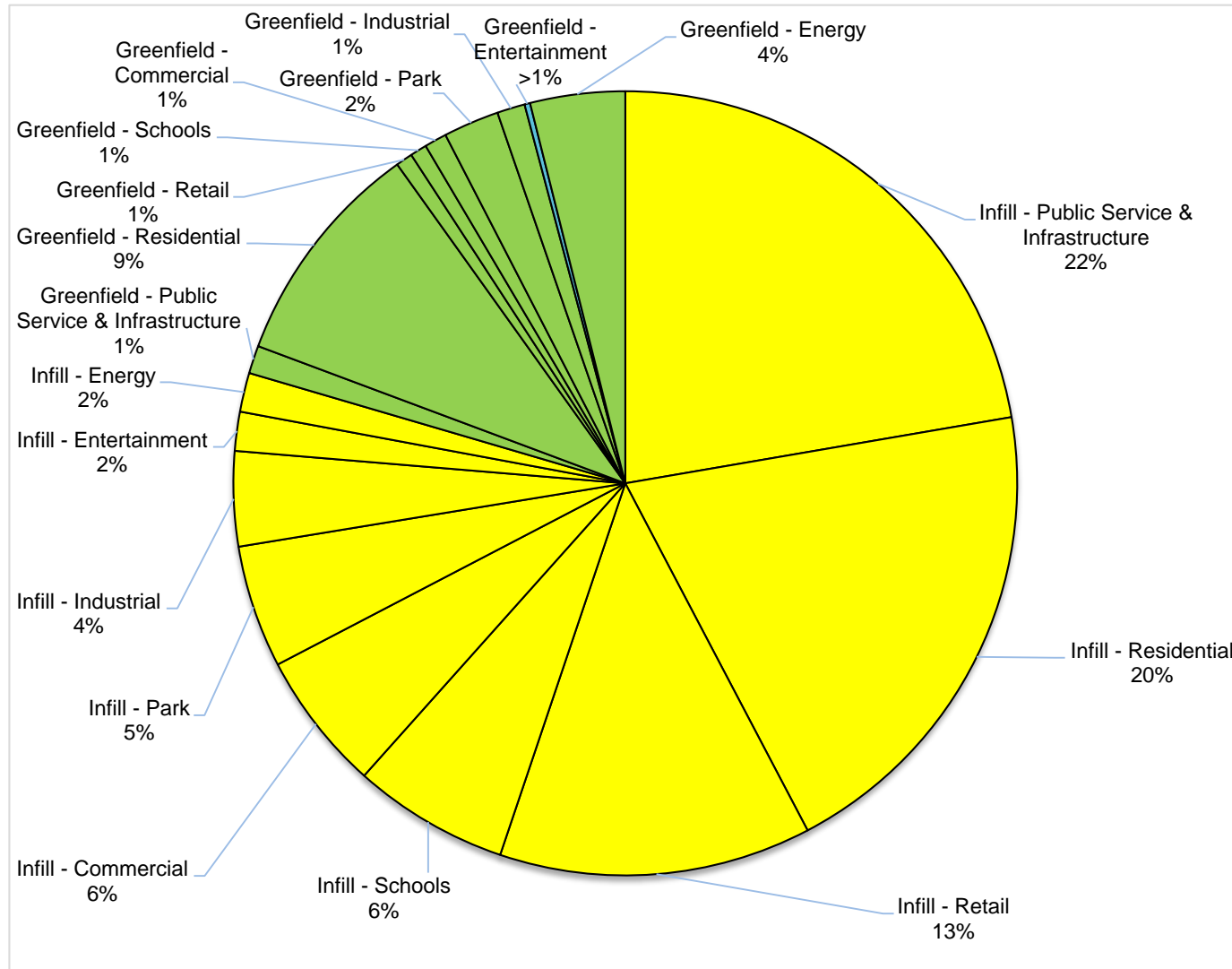


# Figure 1A: SANDAG Regional CEQA Update (2013-2015)

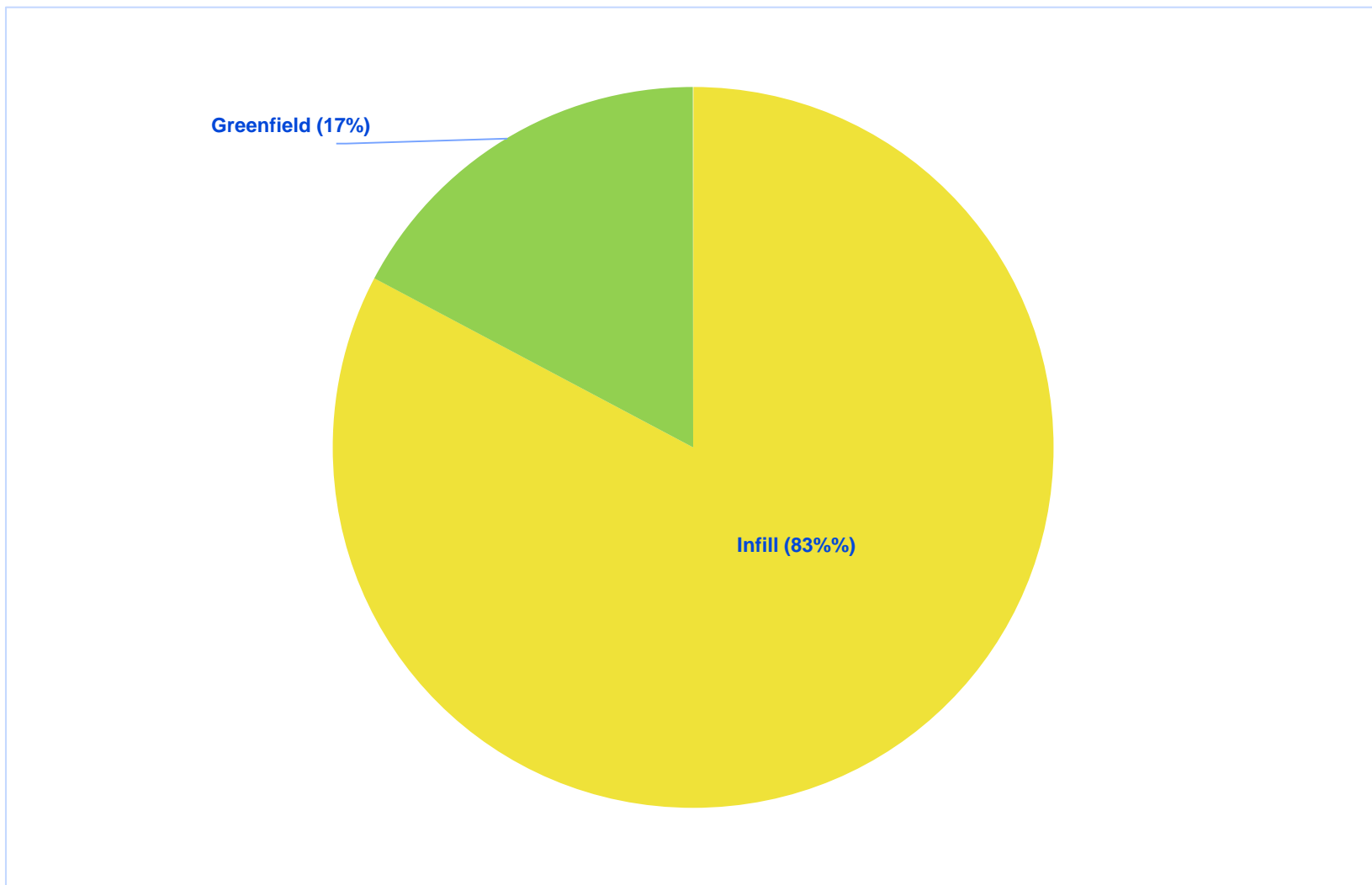


\*Due to rounding, percentages do not equal 100%.

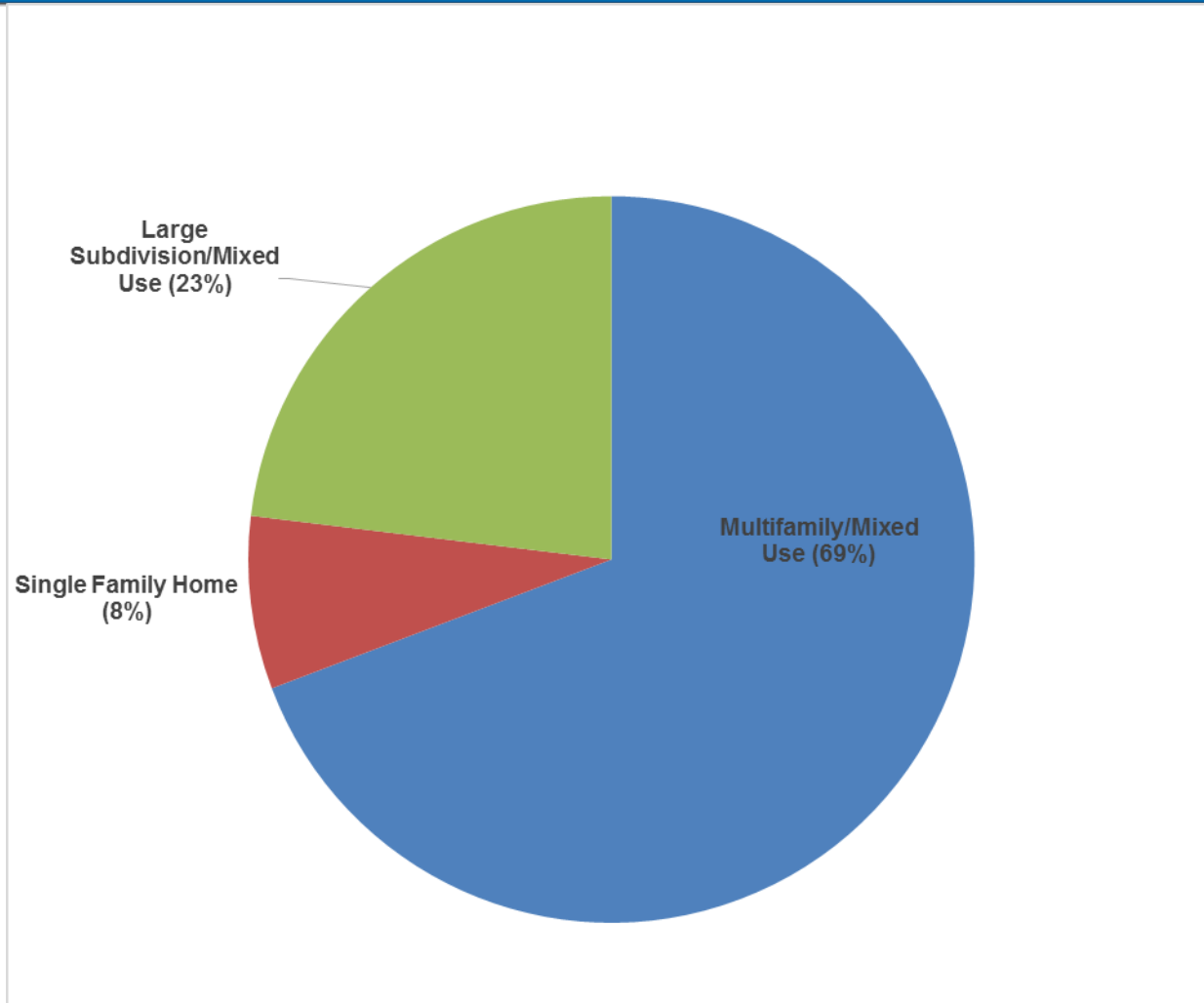
# Figure 2: Statewide (2010-2012) – CEQA Infrequently Used To Fight “Sprawl” CEQA Lawsuits Targeting Greenfield Versus Infill Projects



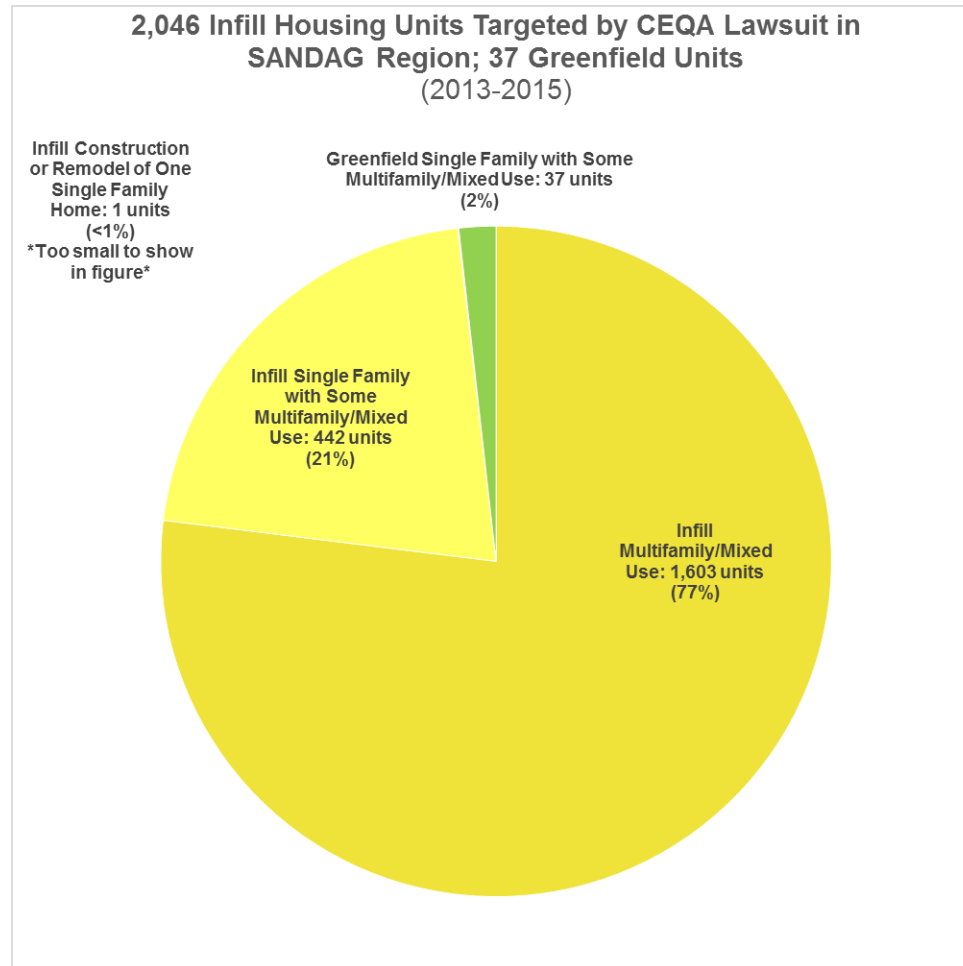
# Figure 2A: 83% of Projects Challenged in SANDAG Region are Located in Infill Areas (2013-2015)



# Figure 3A: CEQA Petitions Challenging Residential Projects in SANDAG Region (2013-2015)

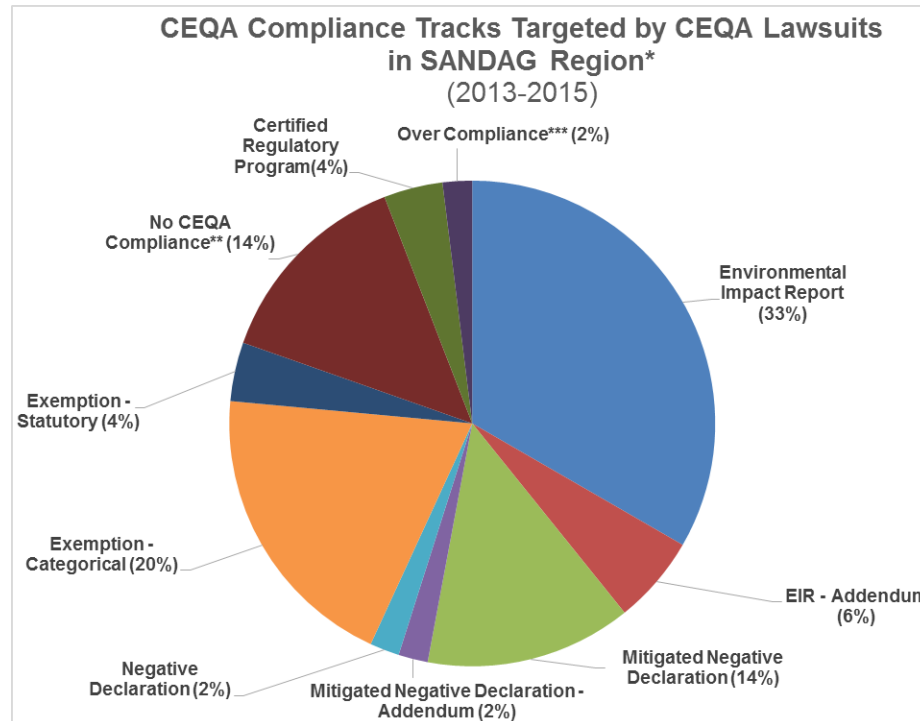


# Figure 3B: SANDAG Regional CEQA Update (2013-2015)

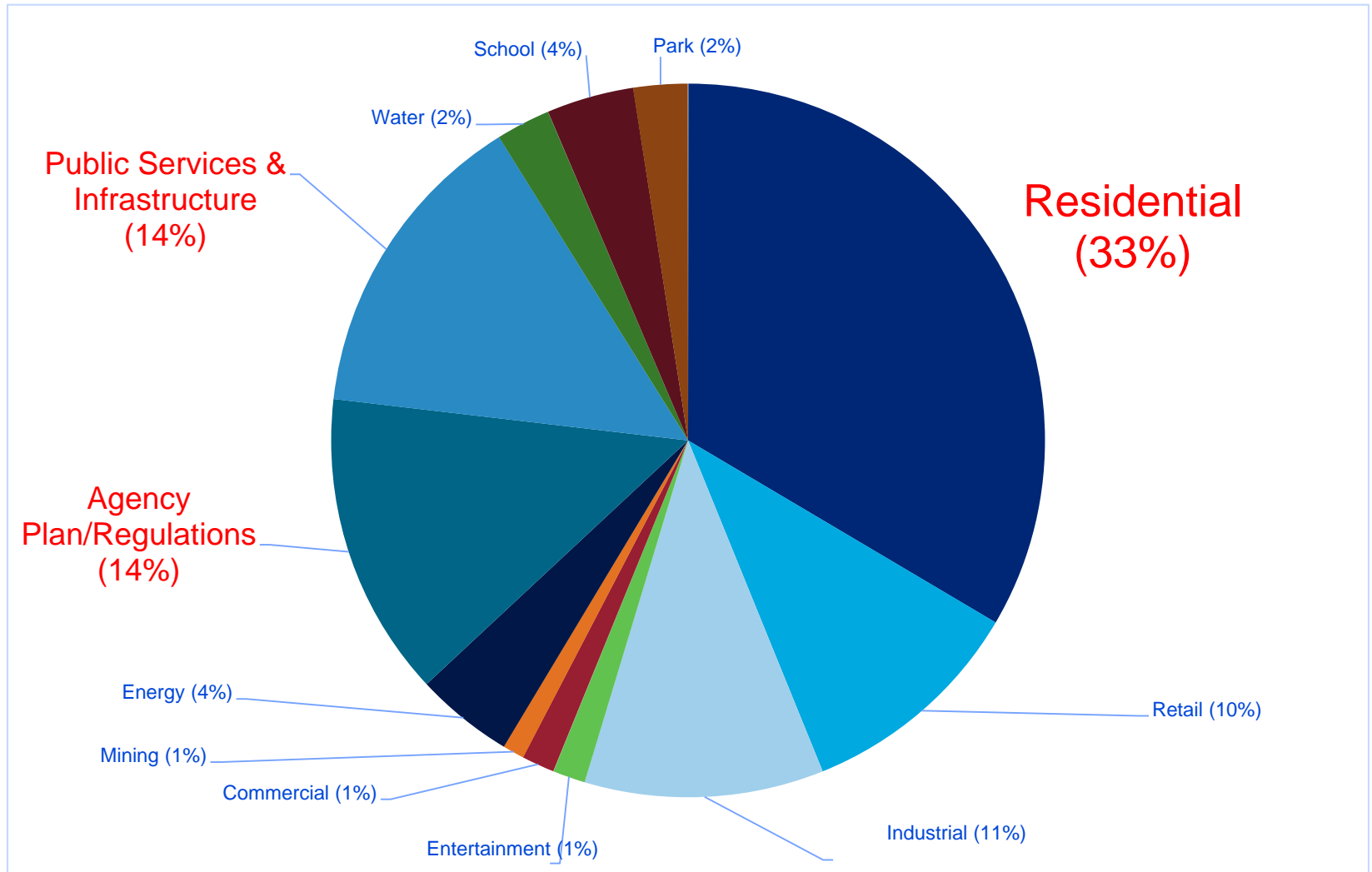




# Figure 3C: CEQA Compliance Track Targeted by CEQA Lawsuits: "Armor Up" and Don't Default to EIR

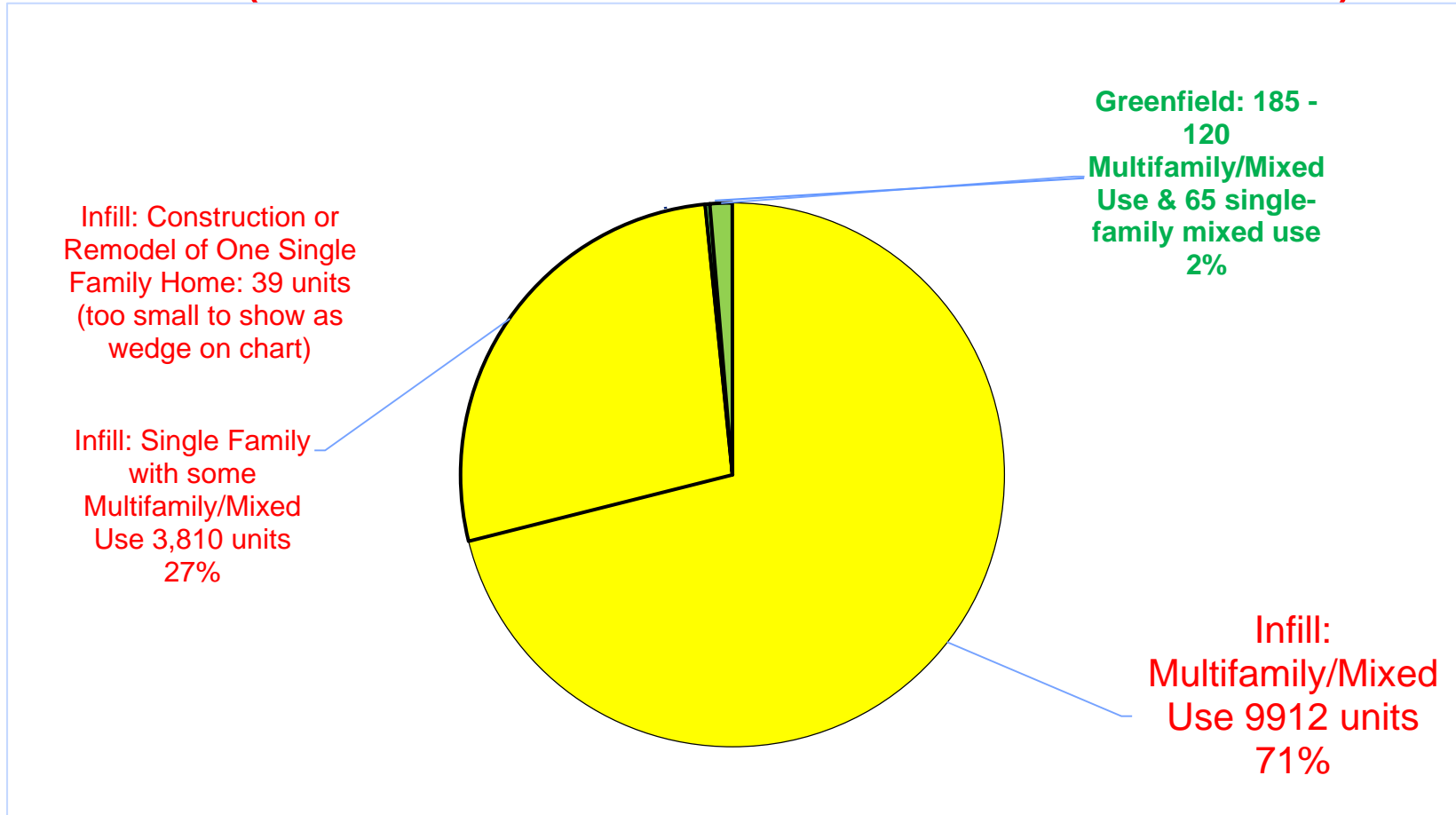


# Figure 4A: SCAG Regional CEQA Update (2013-2015)



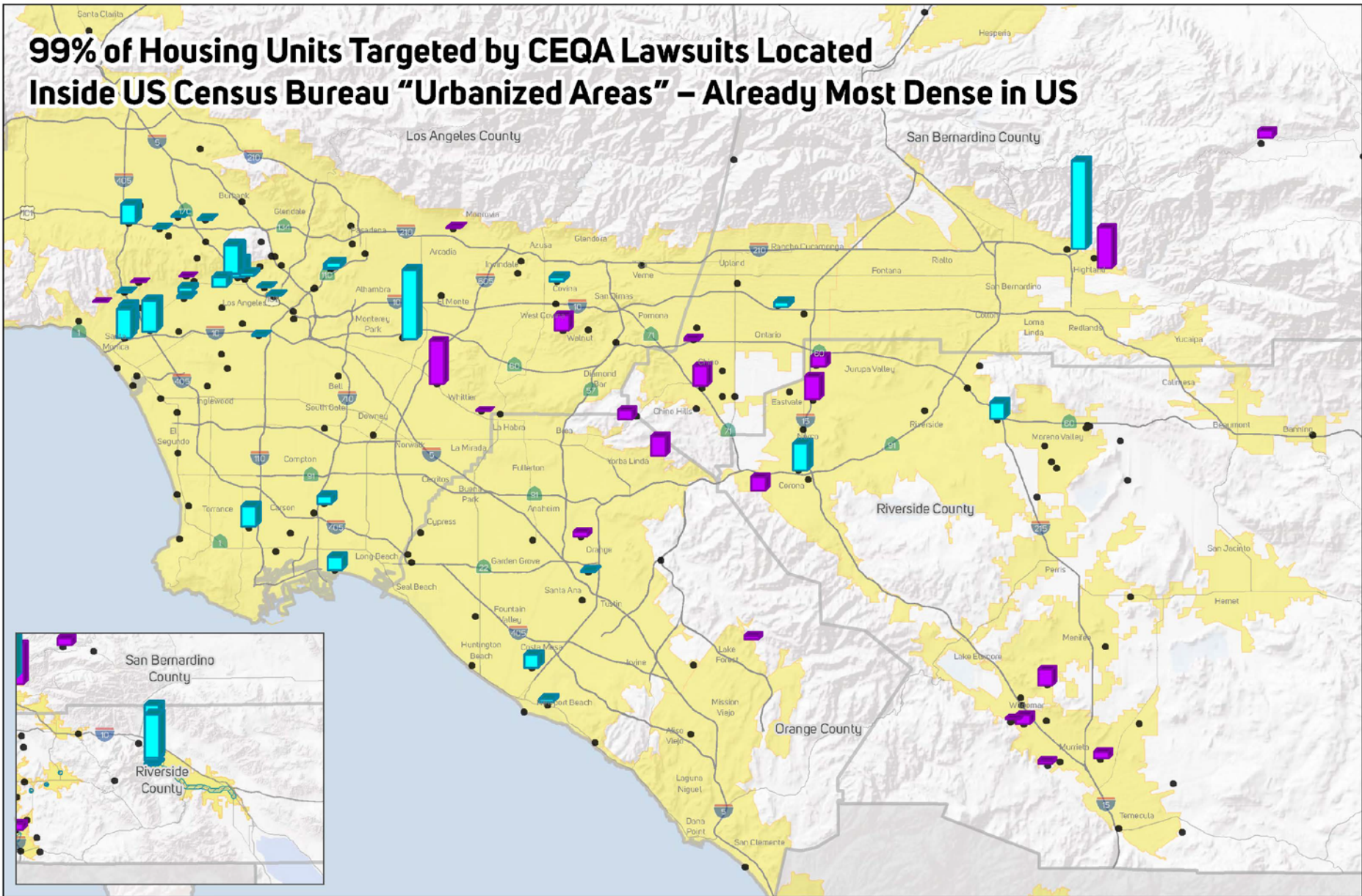
# Figure 4B: SCAG Regional CEQA Update (2013-2015)

98% of Challenged Housing Units were in “Infill” Locations – OPR “Infill” Definition (99% under US Census Bureau “Urbanized Area” Definition)





# 99% of Housing Units Targeted by CEQA Lawsuits Located Inside US Census Bureau "Urbanized Areas" – Already Most Dense in US

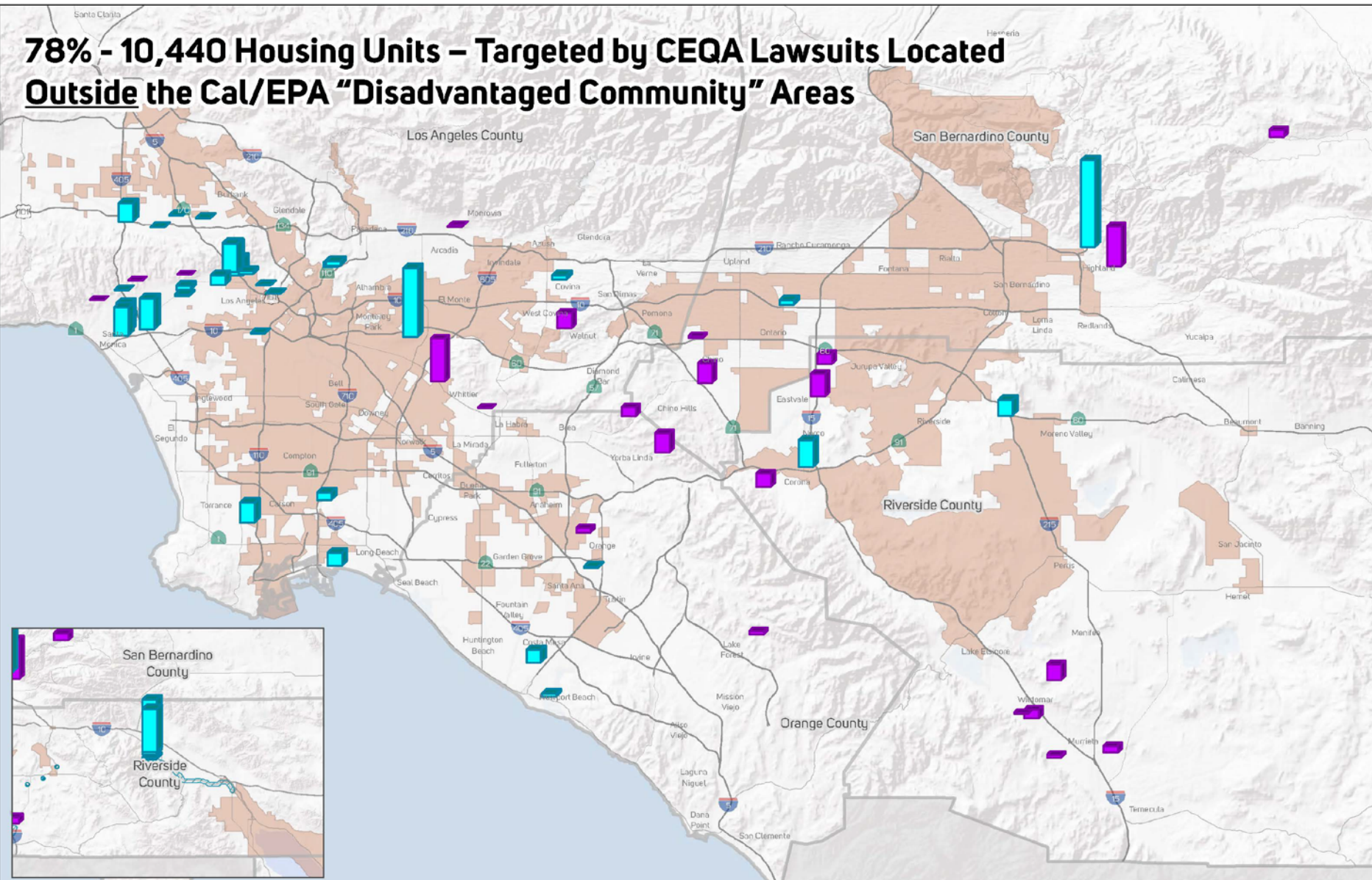


## Housing Projects Targeted by Recent CEQA Lawsuits

- Inside the 2040 TPAs/HQTAs
- Outside the 2040 TPAs/HQTAs
- US Census Bureau Urbanized Areas



# 78% - 10,440 Housing Units – Targeted by CEQA Lawsuits Located Outside the Cal/EPA “Disadvantaged Community” Areas



**Housing Projects Targeted by Recent CEQA Lawsuits**

■ Inside the 2040 TPAs/HQTAs    
 ■ Outside the 2040 TPAs/HQTAs

Cal/EPA Disadvantaged Communities (SB 535)



# Today's Urban Infill CEQA Lawsuits are not Properly "Justiciable" as then-Mayor Brown Wrote in an Amicus Brief to the California Supreme Court

## Litigation Abuse CEQA Reforms: Mend It, Don't End It

1. Require Litigation Transparency: Who's Suing and Why? - "Would dismantle CEQA"
2. End Duplicative CEQA Lawsuits – One Lawsuit for Plan, None for Conforming Projects
3. Align the Judicial Remedy with the Harm: Rescinding Project Approvals Reserved for Health/Environmental Harms (Kings Arena/Legislative Office Remodel Examples)



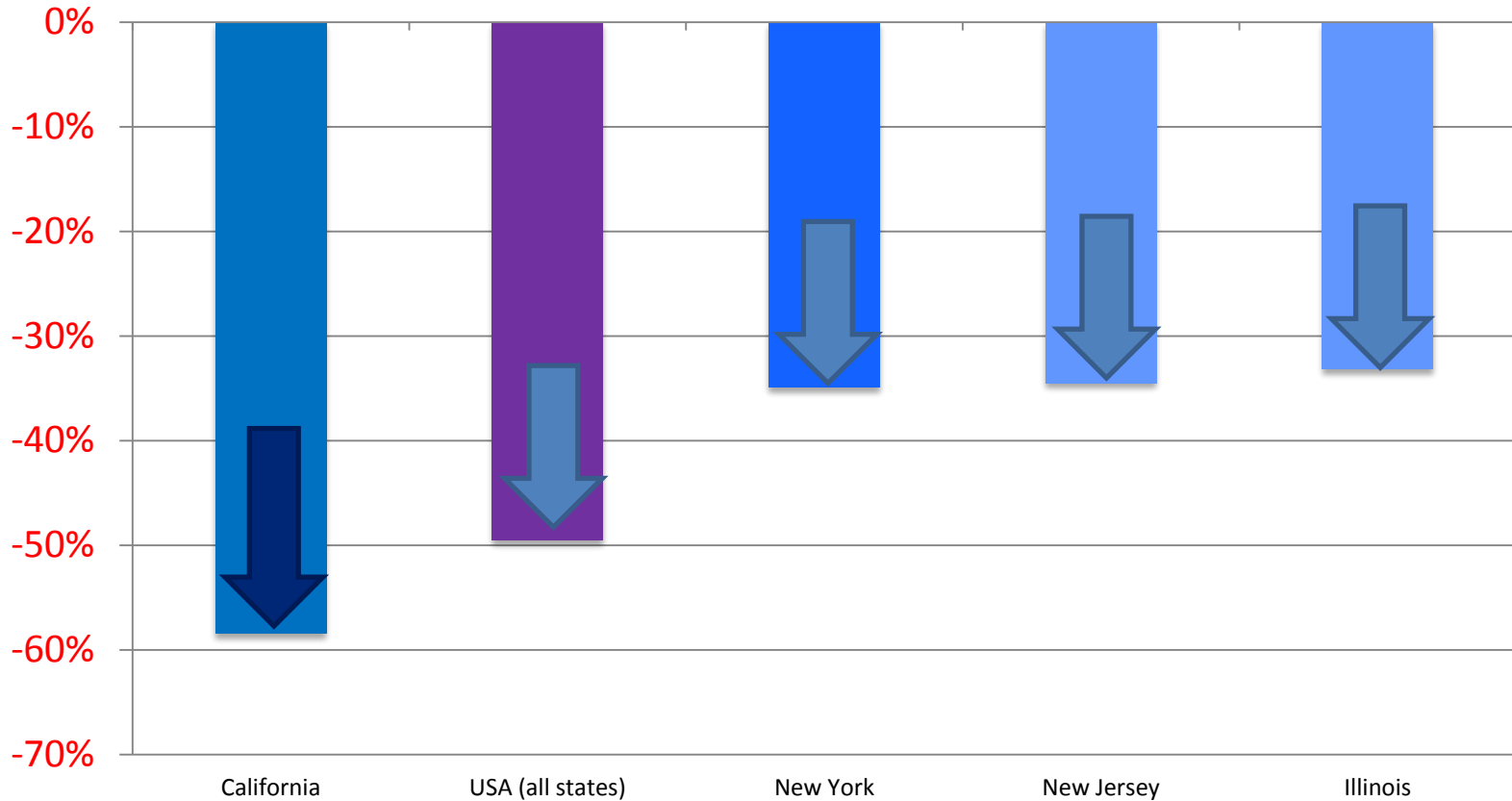
Should Voters and Elected Officials Shape Non-Polluting Housing Policy Choices . . . Or Should CEQA Petitioners and Judges?

# CEQA Reform Political Snapshot

- » Governor Brown
  - Term 3: CEQA Reform is “Lord’s Work”
  - Term 4: Reforming CEQA Not Possible – Labor Uses CEQA to Leverage Project Labor Agreements
- » CEQA Lawsuits as Labor Leverage: pioneered by Adams & Broadwell & Mechanical/Electric/Plumbing (MEP) Trades – Endorsement Litmus Test
  - Tension with Other Construction Trades
  - Tension with Non-Construction Unions
- » New Political Priorities – Never Waste a Crisis??
  - Climate
  - Housing
- » New Players: YIMBYs + Civil Rights Leaders [+ Other Unions?]
- » Will housing and climate disputes within Enviro & Labor organizations spill into CEQA split?



# Has CEQA Helped Unions? Percent Decline in Rate of Union Members in Construction Trades – Blue States & National Average (1983-2012)

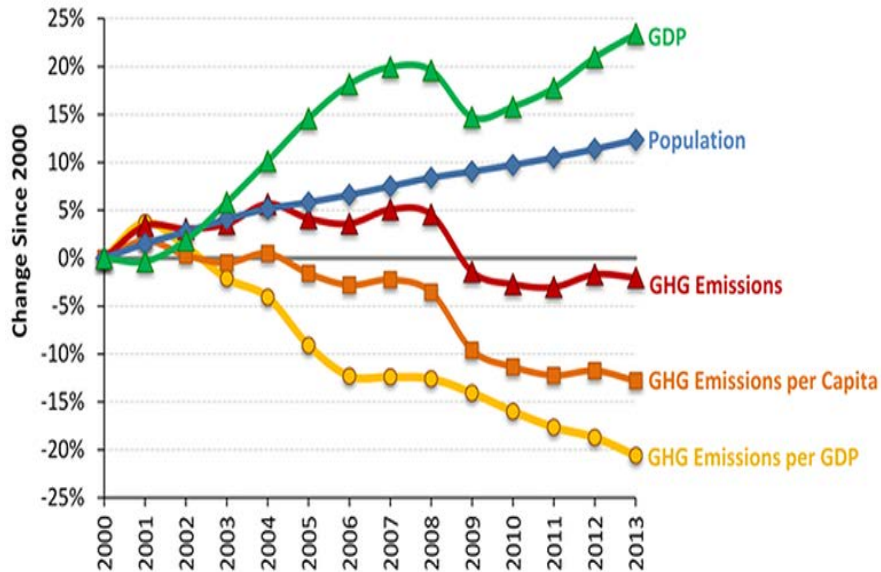


**UNION MEMBER HOUSEHOLDS DON'T EARN ENOUGH MONEY TO BUY HOMES NEAR JOBS:** Teachers, Nurses, First Responders, in "Missing Middle" of \$50-100k Annual Income. Median housing price of \$611k in San Gabriel Valley, assuming that buyers have \$140k in downpayment & closing costs, average mortgage payment would consume more than 70% of pre-tax salary of middle income union workers such as teachers, public safety, nurse, etc.

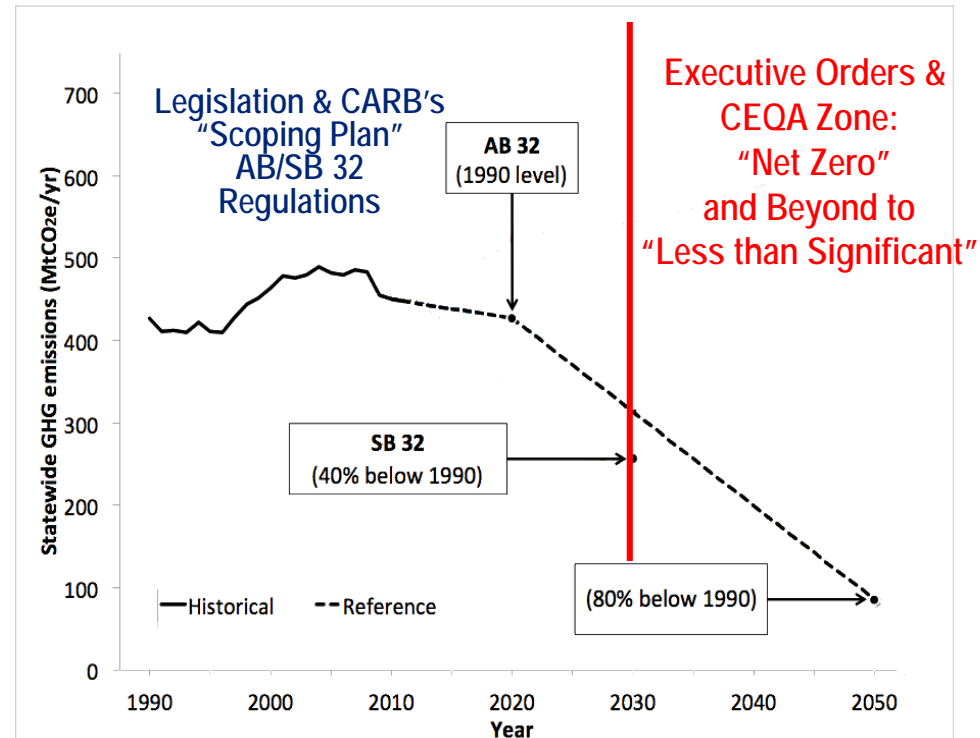
# Expanding CEQA and Climate Mandates – and Housing

## What We've Done So Far

Change in California GDP, Population and GHG Emissions since 2000



## What's Next in Climate Policy for Californians?

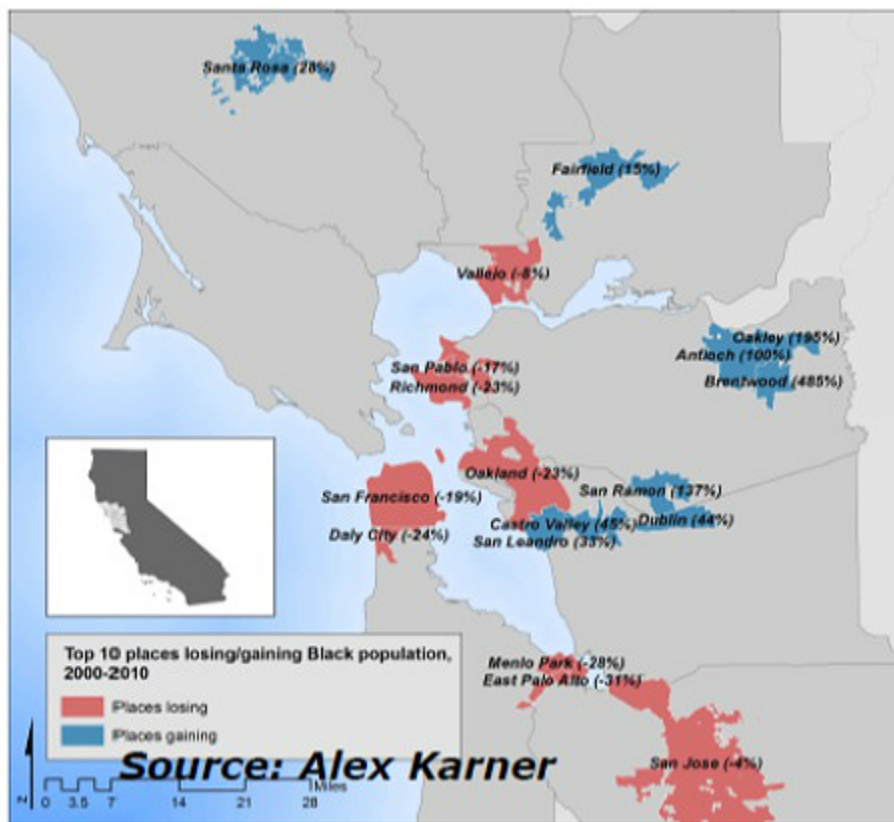


# California's Climate Law and Civil Rights

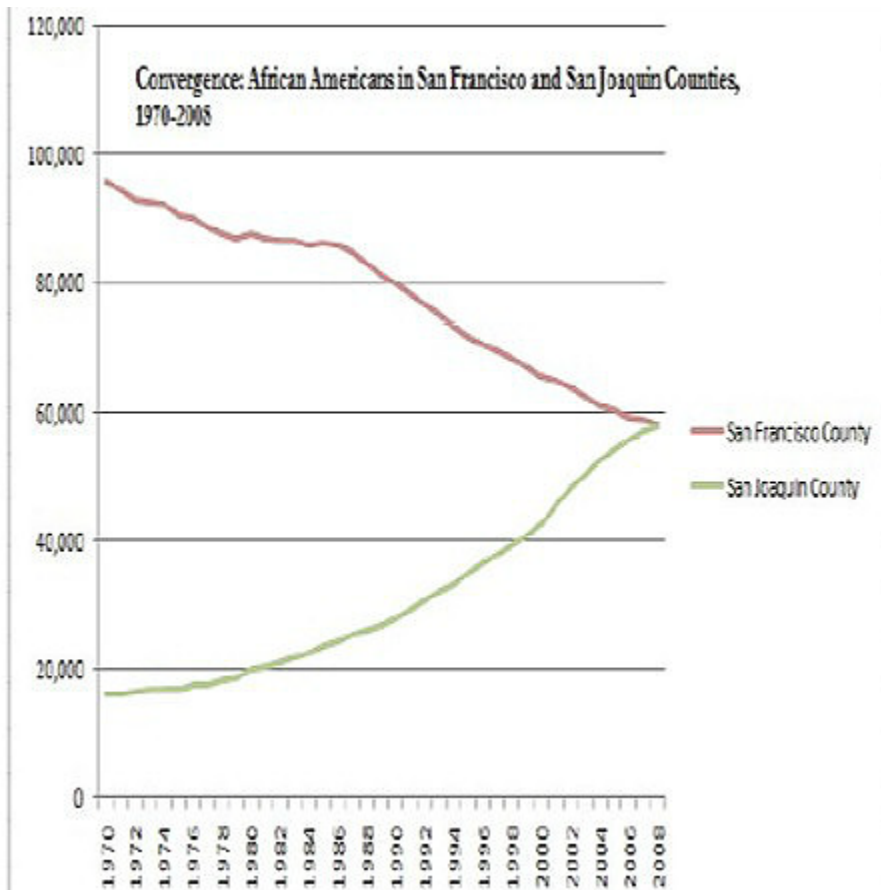
- » 25% of Californians are below federal poverty line – highest poverty rate in the nation, driven by housing costs- per US Census Bureau
- » 40% of Californians don't earn enough to meet basic monthly expenses (food/housing/utilities/transportation/medical/childcare) per United Way
- » Almost 20% of Californians have no HS diploma (second worst ranking)
- » California ranks among worst in income inequality
- » 14 of the 25 cities with the worst unemployment in nation are in California
- » California's middle class lost the most ground in the nation
  - Regressive taxes (e.g., state sales tax of 7.5%, with local surcharges adding another 1-2+%) erode purchase power but not measured in GINI co-efficient
- » Country's worst commute choke points: "road diet" realized
- » Declining transit ridership even with transit system expansions
- » Explosion in homelessness: 10% of homeless students at Cal State Long Beach – 59,000 in LA County alone
- » CARB December 2017 Scoping Plan: **Expand CEQA !!!**

# Segregation/Displacement

**Housing and Transportation:** African American Diaspora In Bay Area: Drive Until You Qualify (“SPRAWL!”)

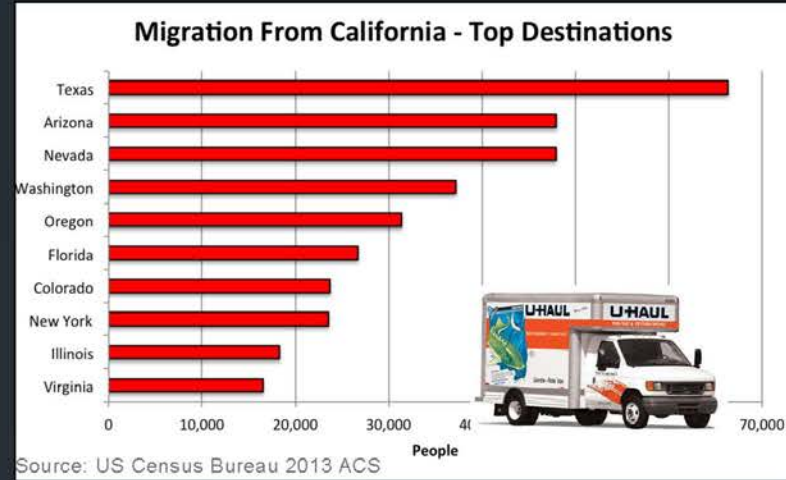


**African American Migration from Bay Area to Central Valley: Who Pays Per Mile VMT Travel Charges?**



# Outcomes: Gentrification, Displacement, Mega-commutes

All but long-term owners at risk of displacement

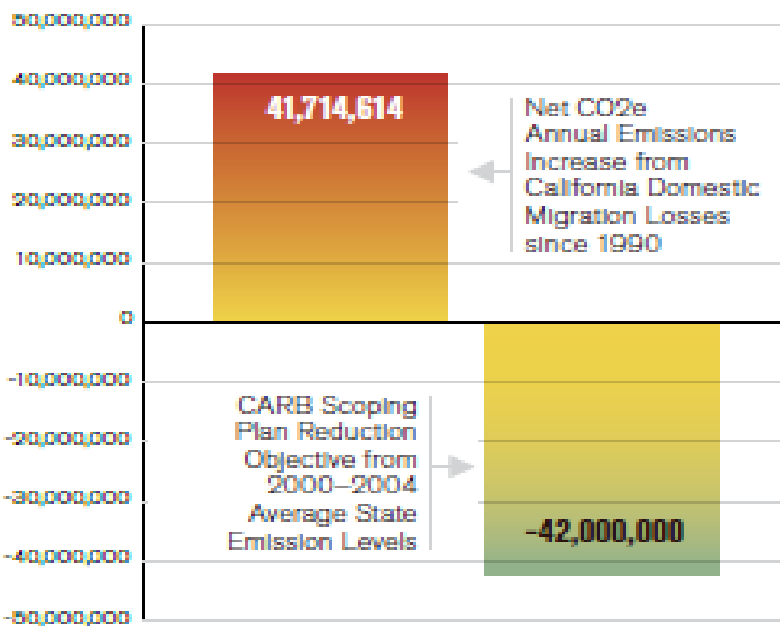


Homeless, “part-time” homeless, 2 hour commutes, forced out of State

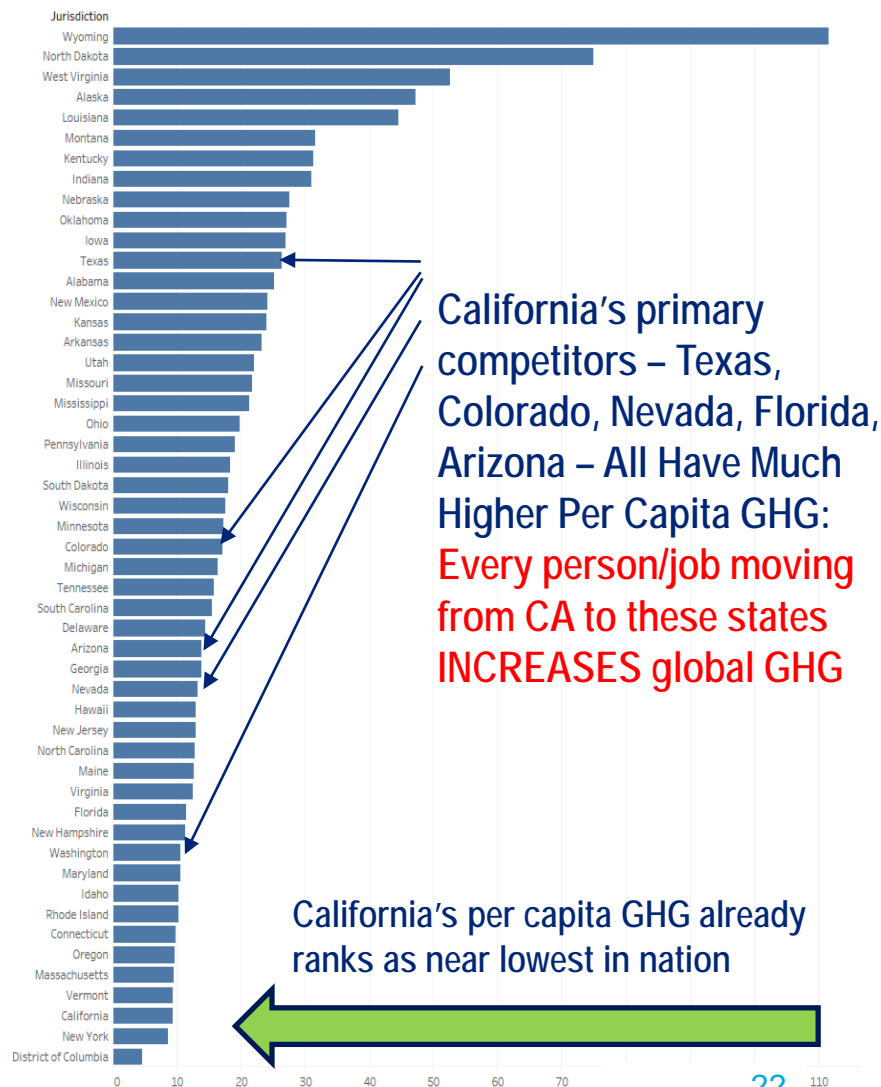
# Housing Costs Leakage Consequences: Net Migration from California to Other States was 625,000 (2007-2014)

## Driving People and Jobs Out of California Increases Global GHG

Emissions increases caused by Net Domestic Migration from California Versus CARB 2020 Reduction Target from 2000–2004 Levels (tons of CO<sub>2</sub>e per annum)



State CO<sub>2</sub> Emissions per Capita (2014 data)



# What happens when costs rise faster than incomes?

Fewer families afford the cost of a new infill home

Less infill in Oakland and Richmond, more sprawl in Central Valley

SFD



5 du/ac,  
2,000++ sf/du  
2 story

**Single Family Dwellings (SFD). Feasible without subsidy**

Lowest cost : wood, no union labor, no elevators/ADA  
Minimum sales price in Central Valley +-\$300k

SFD- Small lot



15 du/ac  
2,000++ sf/du  
3 story

Feasible in most markets.

Cost **1.3X** /sf SFD

Townhome



20 du/ac  
1,800 sf/du  
3 story

Feasible in most markets

Cost **1.5X** /sf SFD

Low density reduces economies of scale on small infill sites

Townhome/Condo



26 du/ac  
1,200 sf/du  
4 story

Feasible in more expensive markets.

Cost **2.0X** /sf SFD

**Price needs to be above +-\$600,000 or cannot build**

Midrise



50-100 du/ac,  
350+ sf/du  
5 story + Garage

Feasible in only expensive markets

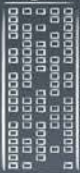
Cost **3.0X to 4.0X** /sf SFD

Sites need to be +/- 1 acre—rare in cities

**Price must reach \$4++/psf**

**Small units/high rents. Small % of renters who can afford larger units**

Highrise



>100 du/ac  
350+ sf/du  
8-50 story

Feasible in only EXTREMELY expensive markets.

5X SFD

**Price must reach \$4.50/5++/psf**

**Few renters/buyers and few places can afford**

**Hard to absorb an entire building**

# California Air Resources Board and Seven State Agencies On California Land Use/Transportation Pattern Climate Leadership 2.0

- » Expand CEQA with ambiguous/untested new mandates
  - Cities and counties should approve “Climate Action Plans” (CAP) to Achieve 40% GHG reduction by 2030 and 80% reduction by 2050
    - Reducing population and jobs (especially energy-intensive jobs like manufacturing which historically created upward mobility) is fastest/surest way for local governments to achieve dramatic mass GHG emission reductions by actions within their jurisdiction and control: support NIMBYs!
- » “Projects” subject to CEQA need to either show they comply with the CAP, or:
  - Adopt “all feasible GHG emission” mitigation measures to achieve zero net GHG emissions
    - Zero Net Electricity: not, even for single-family but especially for multi-family
    - Pay “offsets” – fees – in perpetuity for construction/building operations/all related traffic
  - If not “net zero” for each project, prove up in court that “all feasible” mitigation achieved
- » Intentionally worsen traffic congestion (“road diet”) to promote transit by:
  - Making a “vehicle mile travelled” even by electric car an adverse environmental impact
  - Adding a new mile of roadway capacity even for carpools an adverse env. impact
- » **Collectively, all increase housing/transportation/utility prices – regressively!**
  - **CIVIL RIGHTS communities awakening – aspiring homeowners, working families**



# Support Sensible Political CEQA Reforms

## » Sacramento:

- End anonymous lawsuits: Delgadillo (AB 2039)
- End duplicative lawsuits and reform presumptive CEQA remedy to “Mend Don’t End” – Kings Arena Reform
  - Transportation Projects Consistent with RTP/SCS and PEIR: Grayson (AB 1905)
  - Housing Projects: Glazer (SB 1340)
- Limit Attorneys Fees: Chavez (AB 3027)
- Oppose OPR’s CEQA Regulatory Expansion Proposal
- Support Civil Rights and YIMBY Advocates
- Enlist Support from Public Agency Representatives: Cities, Counties, Schools, Fire, Police, Hospitals, Parks, Youth Sports Teams/Leagues

## » Local (City/County Actions Requiring No Sacramento Action):

- Support Community Plans/Specific Plans: Housing Exempt By Statute
- Support “By Right” Ministerial Approval Revisions to Ordinances: Also Exempt
- Support “Armored Up” CEQA Practices – Tiering, SB 375 Exemptions, Etc.
- Use new Housing Tools: Housing Accountability Act, SB 35 “By Right Light”

# “Armor Up” Against CEQA Litigation in Entitlements

- » DO NOT DEFAULT TO PREPARING PROJECT-LEVEL EIR!!!
  - EIRs are FAR more likely to be sued: 3 statutory notices for trollers
  - EIRs have only [43%] Win-Loss Rate
  - EIRs add two years, and hundreds of thousands of dollars, to entitlements
- » ALWAYS Tier from at least one other previous EIR – old EIRs (unless they are “Master EIRs”) do not expire. Tiering generally possible from at least General Plan EIR and SANDAG RTP/SCS PEIR
- » Most Defensible CEQA Compliance Pathways
  - Statutory and Categorical Exemptions
  - Addendum to Earlier EIR, or “Focused EIR”
  - “Tiered” Negative Declaration
- » ALWAYS include all available CEQA compliance tracks: simple text additions, with no new technical studies, can create additional CEQA legal defenses – and you only have to win with one. Examples: redevelopment plan EIR, infill categorical exemption
- » City/County leadership and attorney support is critical to success: general briefings and trainings help – CEQA consultant issues also??

# Housing & Climate Consequences of CEQA?

Can we talk about equity/environment/upward mobility, Climate 2.0, and CEQA?

- » California's statutory "40% by 2030" goal for the land use/mobility sectors can be met by shifting population and jobs, ignoring consumption-based GHG, and increasing inequality/poverty/adverse educational and health outcomes – really??
- » Farthest left: housing is a human right (free for those unable to pay) as is guaranteed minimum income; live lighter on land; tax more
- » Enviro NIMBY left/right: California is "over its holding capacity" – reduce population, we've got ours and you don't
- » Moderate middle: Restore California dream: homeownership, replicable climate leadership
- » Right: No new taxes . . . ?



# Holland & Knight

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