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Supreme Court Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

—

SAVE BERKELEY'S NEIGHBORHOODS, PETITIONER (IN SUPERIOR COURT) AND RESPONDENT AND CROSS-APPELLANT (ON-APPEAL)

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL., RESPONDENTS (IN SUPERIOR COURT) AND APPELLANTS AND CROSS-RESPONDENTS

—

After Order by the Court of Appeal First Appellate District, Division One **(Case No. A163810)** On Appeal from the Superior Court for the State of California, County of Alameda, Case No. RG19022887 (Related Case Nos. RG18902751, RG19023058), Hon. Brad Seligman, Dept. 23, Telephone (510) 267-6939

PETITION FOR REVIEW OF ORDER DENYING PETITION FOR WRIT OF SUPERSEDEAS; IMMEDIATE STAY REQUESTED

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THE SOHAGI LAW GROUP, PLC
*Nicole H. Gordon, State Bar No. 240056
Margaret M. Sohagi, State Bar No. 126336
Mark J.G. Desrosiers, State Bar No. 302309
11999 San Vicente Boulevard, Suite 150
Los Angeles, California 90049-5136
(310) 475-5700
Email: ngordon@sohagi.com
Email: msohagi@sohagi.com

OFFICE OF THE GENERAL COUNSEL - UNIVERSITY OF CALIFORNIA
Charles F. Robinson, State Bar No. 113197
Alison L. Krumbein, State Bar No. 229728
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5201
(510) 987-0851
Email: Alison.Krumbein@ucop.edu

UC BERKELEY, OFFICE OF LEGAL AFFAIRS
David M. Robinson, State Bar No. 160412
200 California Hall, #1500
Berkeley, CA 94720
(510) 642-7791
Email: DMRobinson@berkeley.edu

Attorneys for THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

The Regents of the University of California, Michael V. Drake, in his capacity as President of the University of California, University of California, Berkeley ("UC Berkeley"), and Carol T. Christ, in her capacity as Chancellor of the University of California, Berkeley (collectively, "the Regents") respectfully petition for review of the First District Court of Appeal's February 10, 2022 Order denying the Regents' request for an emergency stay and a petition for writ of supersedeas.

ISSUE PRESENTED

Did the Court of Appeal err in denying a petition for writ of supersedeas staying enforcement of a trial court judgment that orders the Regents to freeze enrollment at UC Berkeley at pandemic-reduced artificially low 2020-2021 levels during the pendency of the Regents' appeal of the judgment, where the underlying project challenged under CEQA did not involve enrollment decisions?

I. INTRODUCTION

The Court of Appeal's error in denying the Regents' Petition for Writ of Supersedeas leaves the prohibitory portion of the superior court's fundamentally flawed Judgment in place, giving rise to immediate, irreparable, and damaging consequences. This Petition for Review presents

an important question of law and an urgent matter of public policy. (California Rules of Court, Rule 8.500, subd. (b)(1).)

The mandamus proceeding in the superior court resulted in the Judgment and Peremptory Writ of Mandate commanding the Regents to suspend any increases in student enrollment at UC Berkeley above the level of student enrollment in the pandemic-reduced 2020-2021 academic year until the Regents revise an environmental impact analysis prepared for a campus development project that is not connected to any decision to increase student enrollment.

UC Berkeley has already released its first set of admissions offers for freshman for the 2022-2023 academic year and is scheduled to issue remaining offers of admission for freshman for the 2022-2023 academic year on March 24, 2022. Compliance with the superior court's Judgment would mean UC Berkeley must deny offers of admission to more than 5,000 students who would otherwise have been offered admission. Such an outcome runs directly counter to the Legislature's goals of ensuring that "adequate spaces are available to accommodate all California resident students who are eligible and likely to apply to attend an appropriate place within the system." (Ed. Code, § 66202.5.)

Review by this Court is necessary to preserve the status quo and prevent irrevocable harm to these students and to the public interest that is served by providing higher education and financial aid opportunities to eligible students deserving of the chance to attend UC Berkeley. Absent a stay of that portion of the Judgment that freezes enrollment at UC Berkeley at 2020-2021 levels, the Regents' pending appeal of the Judgment will be of no assistance to the thousands of students who, but for the Judgment's

enrollment cap, would have matriculated at UC Berkeley in the Fall. The impacts on these students will be profound and irreversible and will permanently alter the course of their lives. By the time the Court of Appeal is able to decide this case on the merits, its ability to grant effective relief from the trial court's erroneous injunction will be lost.

The Regents therefore request this Court grant review and issue a writ compelling the Court of Appeal to issue a corrective writ of supersedeas staying enforcement of that portion of the Judgment that orders the Regents "to suspend any further increases in student enrollment at UC Berkeley, in academic years 2022-2023 and later, above the level of student enrollment in academic year 2020-2021," until the Court of Appeal determines the merits of the pending appeal. Additionally, because UC Berkeley is currently in the throes of making complex decisions on approximately 150,000 applications for fall 2022 admission, any delay of which will have permanent negative consequences, **the Regents also request an immediate stay by 5:00 p.m. on February 18, 2022**, pending the outcome of this Petition for Review.

II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A. The Parties

Petitioners here are the Regents, who are respondents in the underlying writ proceeding (Alameda Superior Court Case No. RG19022887).

Respondent is Save Berkeley's Neighborhoods ("SBN"), a non-profit organization that is petitioner in the action below.

B. The Project and CEQA Process

On May 16, 2019, the Regents approved a project to construct two buildings – one academic and one residential – at the UC Berkeley campus called the Upper Hearst Development for the Goldman School of Public Policy ("GSPP") ("GSPP Project" or "Project"). The GSPP Project also includes a minor amendment to the then-current Long Range Development Plan ("LRDP") for UC Berkeley ("2020 LRDP"). The 2020 LRDP was approved in 2005 and provided a framework for land use and capital investment decisions at UC Berkeley through 2020. To accommodate the new residential development within the 2020 LRDP's Housing Zone, it was necessary to amend the 2020 LRDP to expand the Housing Zone. (Petition for Writ of Supersedeas ("Petition") at ¶ 8.)

In connection with their approval of the GSPP Project, the Regents prepared and certified a Supplemental Environmental Impact Report ("SEIR") pursuant to the California Environmental Quality Act ("CEQA", Pub. Resources Code, § 21000 et seq.). The SEIR tiered off the programmatic EIR the Regents had prepared in 2005 for the 2020 LRDP ("2020 LRDP EIR"). (Petition at ¶ 9.)

By 2018, when the Regents issued a Notice of Preparation of the SEIR for the GSPP Project, UC Berkeley's 2017-2018 academic year student enrollment of 40,955 had exceeded the projections in the 2020 LRDP by approximately 7,505 students, and UC Berkeley projected additional growth in the campus headcount of approximately 3,780 students by 2022-2023, the year the GSPP Project was scheduled to be completed and occupied. (Petition at ¶ 10.)

In an effort to disclose the environmental impacts of the growth in campus population beyond the numbers analyzed in the 2020 LRDP EIR, the Regents decided to analyze this growth in the GSPP SEIR. (Petition at ¶ 11.)

C. The Petitions for Writ of Mandate in the GSPP Actions

In June 2019, SBN and the City of Berkeley ("City") each filed a petition for writ of mandate asserting the Regents failed to comply with CEQA when they approved the GSPP Project and certified the GSPP SEIR ("GSPP Actions"). (Petition at ¶ 12.)

SBN's operative complaint sought a writ of mandate ordering the Regents to void their approval of the GSPP Project and bring their determinations on the GSPP Project into compliance with CEQA ("SBN GSPP Petition"). The SBN GSPP Petition also sought a declaration that the Regents are estopped from contending that increases in enrollment above that projected for 2020 in the 2005 LRDP are not part of the SEIR's project description or that the SEIR's evaluation of these increases in student enrollment is not subject to judicial review by the court. (Petition at ¶ 13; see Exh. 8, pp. 238-239.) **The SBN GSPP Petition did not challenge any decision(s) related to increased enrollment; did not ask the trial court to void any decisions related to the increased enrollment; and did not ask for an order suspending further increases in enrollment**.

The City also sought a writ of mandate directing the Regents to vacate and set aside their SEIR certification and GSPP Project approval, and a declaration that "the decision to increase enrollment beyond that projected in an LRDP is a project requiring environmental review." ("City

GSPP Petition"). (Petition at ¶ 14; see Exh. 9, p. 279.) **Like the SBN GSPP Petition, the City GSPP Petition did not challenge any specific decision(s) related to increased enrollment; did not ask the trial court to void any decisions related to the increased enrollment; and did not ask for an order suspending further increases in enrollment**.

On November 20, 2019, the trial court related the GSPP Actions for purposes of briefing and record preparation. (Petition at ¶ 15.)

D. The Separate "Enrollment Action"

On October 7, 2020, the trial court related the GSPP Actions to a third suit, which had been filed by SBN in April 2018, prior to the Regents' decision on the GSPP Project. In this third suit, SBN filed a petition for writ of mandate specifically challenging the Regents' decisions to increase enrollment at UC Berkeley following adoption in 2005 of UC Berkeley's 2020 LRDP without conducting CEQA review (the "Enrollment Action"). The operative petition in the Enrollment Action raises claims related to alleged environmental impacts of enrollment changes on the UC Berkeley campus from 2005-2017. (Petition at ¶ 16; Exh. 12.)

The Regents demurred to SBN's petition in the Enrollment Action, ultimately resulting in the First District Court of Appeal's *Save Berkeley's Neighborhoods v. The Regents of the University of California et al.* (June 25, 2020) 51 Cal.App.5th 226 decision. That decision explained that "a public university's decision to increase enrollment levels can be a 'project' subject to CEQA whether or not it is related to a development plan." (*Id*. at 240.) The Court of Appeal explicitly did not, however, impose an enrollment cap: "[O]ur decision in no way caps enrollment at the University

of California or obstructs the Regents' authority." (*Id.* at 242.) (Petition at ¶ 17.)

In October 2020, the City of Berkeley, joined by SBN, moved to consolidate the GSPP Actions with the Enrollment Action. The Regents opposed. On November 10, 2020, the trial court denied the motion to consolidate. The Order denying the motion correctly distinguished the GSPP Actions from the Enrollment Action, finding that "[t]he SBN GSPP Action and City GSPP Action both challenge UC's May 16, 2019 approval of the Upper Hearst Development Plan for the Goldman School of Public Policy ('GSPP') and a minor amendment to UC's 2020 Long-Range Development Plan ('LRDP') under the California Environmental Quality Act ('CEQA'), alleging as one defect that UC's analysis of the effects of increased student enrollment were insufficient. The Enrollment Action presents a CEQA challenge to the University's decisions to increase student enrollment beyond the levels whose impacts were studied and mitigated when it adopted the 2020 LRDP in 2005." Because the GSPP Actions did not challenge the Regents' decision to increase student enrollment, and because "the administrative record supporting those decisions will look quite different from those in the GSPP Actions," the trial court declined to consolidate them with the Enrollment Action. (Petition at ¶ 18; Exh. 4.)

E. The Hearing, Order, and Judgment in the GSPP Actions

On April 16, 2021, the GSPP Actions came on for a hearing on the merits, and on July 9, 2021, the trial court issued an "Order Granting Petitions for Writ of Mandate." (Petition at ¶¶ 19, 20; Exhs. 3, 13.)

On July 23, 2021, SBN filed a proposed judgment and proposed peremptory writ of mandate. The Regents opposed the proposed judgment on numerous grounds. Relevant here is the Regents' opposition to language in the proposed judgment that would have ordered them to "suspend any further increases in student enrollment at UC Berkeley above the level of student enrollment in academic year 2020-2021 until Respondents have demonstrated full compliance with this Judgment and Writ and the Court orders discharge of the Writ." The Regents' opposed this language on the following grounds: (a) the recently-certified 2021 LRDP EIR encompasses and supersedes the GSPP SEIR's analysis of enrollment from academic years 2018-2019 to 2022-2023;[1] (b) there was no current discretionary action related to enrollment requiring analysis; and (c) "any increase in enrollment above the level of student enrollment in academic year 2020-2021 has already occurred and students will soon be arriving at the campus for this academic year to begin the Fall semester; therefore, if adopted, Petitioner's proposal would impose an extreme and unwarranted hardship on already accepted and committed incoming students that is completely unfair and unworkable." (Petition at ¶ 22; Exh. 15.)

[1] On July 22, 2021, in a separate administrative proceeding, the Regents approved a new LRDP for UC Berkeley, which includes student population projections between 2018 and 2037 ("2021 LRDP"), and certified an EIR for the 2021 LRDP ("2021 LRDP EIR"). The 2021 LRDP EIR analyzed the environmental impacts of enrollment levels through 2037, thus encompassing enrollment levels for the 2022-2023 academic year and beyond. (Petition at ¶ 21; declaration from Director, Physical and Environmental Planning, at the Office of the President of the University of California, Brian Harrington ("Harrington Dec."), Exh. A, Exh. B, p. 25, Exh. C, p. 2-3 to 2-4.)

On August 20, 2021, SBN replied to the Regents' opposition to the proposed judgment and conceded that the Regents "make a valid point that it is too late to void their decision to increase enrollment for the academic year 2021-2022" and asked that the proposed order be revised to read "Respondents are ordered suspend any further increases in student enrollment at UC Berkeley, in academic years 2022-2023 and later, above the level of student enrollment in academic year 2020-2021 until Respondents have demonstrated full compliance with this Judgment and Writ and the Court orders discharge of the Writ." (Petition at ¶ 23; Exh. 16.)

On August 6, 2021, the City of Berkeley filed a request for dismissal of the City GSPP Action. (Petition at ¶ 24.)

On August 23, 2021, without any hearing on the dispute over the proposed judgment, the trial court entered judgment in the SBN GSPP Action. The Judgment includes the revised language submitted by SBN verbatim, including ordering the Regents to suspend any further increases in student enrollment at UC Berkeley, in academic years 2022-2023 and later, above the level of student enrollment in academic year 2020-2021.[2] The Judgment incorporates the July 9, 2021 Order by reference, and includes a peremptory Writ of Mandate. (Petition at ¶ 25; Exh. 1.)

[2] Confusingly, the justification for this in the Judgment alludes only to concerns with “further increases in student enrollment above the *current* enrollment level at UC Berkeley,” which would suggest 2021-2022 levels rather than 2020-2021 levels. (Petition at ¶ 25; Exh. 1, p. 7.)

On October 18, 2021, the Regents filed and served a Notice of Appeal from the Judgment ("Appeal"). On October 25, 2021, SBN filed a cross-appeal from the Judgment ("Cross-Appeal"). (Petition at ¶¶ 26, 27.)

F. The Petition for Writ of Supersedeas

The Regents initially believed the filing of the Appeal stayed the entirety of the Judgment, as is typical on a judgment directing issuance of a writ of mandate. (See 2 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) ¶ 7:79 [“An appeal automatically stays proceedings on a judgment directing issuance of a writ of mandate.”].)

Subsequently, following substitution of new appellate counsel on November 12, 2021 and the filing of the record on appeal on December 28, 2021, the Regents were alerted to the prohibitory nature of the enrollment cap in Section 4 of the Judgment. (Petition at ¶¶ 7, 28, 30.) The Regents filed a petition for writ of supersedeas on January 28, 2022, seeking an immediate temporary stay and issuance of a writ of supersedeas staying the Judgment’s enrollment cap. On January 31, 2022, SBN filed an Opposition to Request for Immediate Stay and Preliminary Opposition to Petition for Writ of Supersedeas (“Opposition”). On February 10, 2022, the Court of Appeal issued an order summarily denying the petition for writ of supersedeas and request for stay. A true and correct copy of the Order is attached as Exhibit A.

G. Need for Writ Relief and an Immediate Stay

This petition requests an immediate temporary stay pursuant to Rule 8.112, subd. (c)(1) of the California Rules of Court pending a ruling on this petition. UC Berkeley issued its first set of admissions offers for freshman

for the 2022-2023 academic year on February 11, 2022 and is scheduled to issue remaining offers of admission for freshman for the 2022-2023 academic year on March 24, 2022, with final decisions needing to be confirmed by March 17. (Declaration of UC Berkeley's Associate Vice Chancellor of Enrollment & Dean of Undergraduate Admission Olufemi Ogundele ("Ogundele Dec."), ¶¶ 5, 6.) The possibility that enrollment must be capped at pandemic-exaggerated-low 2020-2021 levels is already affecting this decision-making and will continue to do so with every day that goes on. Delaying release of acceptance letters will put UC Berkeley out of alignment with the rest of the UC system and institutions nationally, negatively impacting its ability to yield Fall 2022 incoming enrollment targets, and disproportionately affecting low-income, under-represented students who would not be able to obtain adequate financial assistance counseling in time for the nationwide tuition deadline of May 1. (*Id.* at ¶¶ 7, 18.) It would also affect sister UC campus enrollments, and student ability to make future educational goals. (*Id.* at ¶¶ 7.) **The Regents therefore request an immediate temporary stay by 5:00 p.m. on February 18, 2022**.

This request is timely. The order denying the Petition for Writ of Supersedeas was final immediately upon filing. (CRC Rule 8.264, subd. (b)(2)(A).) Petitions for review in the Supreme Court must be served and filed within 10 days after the Court of Appeal decision is final. (CRC Rule 8.500, subd. (e)(1).) This petition for review has been filed within the 10 day timeframe.

III. LEGAL ARGUMENT

A. Review Should Be Granted To Settle An Important Question Of Law And An Urgent Matter Of Public Policy

The Supreme Court may grant review of an interlocutory order "[w]hen necessary to secure uniformity of decision or to settle an important question of law . . . ." (CRC Rule 8.500, subd. (a)(1), (b)(1).) Here it is necessary to resolve the question of whether the Court of Appeal erred in denying the petition for writ of supersedeas staying enforcement of the portion of a trial court judgment that freezes enrollment at UC Berkeley at 2020-2021 levels during the pendency of the Regents' appeal because this portion of the trial court's judgment far exceeds its jurisdiction. Further, resolution of this issue is critical to avoiding irreparable harm to the Regents and, more importantly, the population of students they serve. Unless the enrollment cap is stayed, more than 5,000 high school students who, this Spring, would otherwise receive letters of admission to UC Berkeley for Fall 2022 will be denied that admission through no fault of their own. (Ogundele Dec., ¶ 14.) This is <u>not</u> because UC Berkeley plans to increase enrollment by 5,000 students this year (it does not), but because in order to push total student enrollment numbers back down to what they were two years ago in 2020-2021 – when enrollment was abnormally low due to the pandemic – the campus would need to cut approximately 3,050 students. (*Ibid*.) To meet this target, UC Berkeley would have to deny admission to a total of as many as 5,083 qualified students because approximately 60% of admitted students typically accept the offer (60% of 5,083 is 3,050). (*Ibid.*)

But for the enrollment cap, these students, whose achievements would put them at the top of some 150,000 applicants, would have the opportunity to matriculate at "the best school in the country" according to Forbes' 2021 list of America's Top Colleges, (Ogundele Dec., ¶ 9-10.) This opportunity would come at a fraction of the cost of comparable, private universities, and with incomparable opportunities for financial assistance. (*Id.*, ¶ 11-12.) The benefits of this education would be felt directly by these students, whose earnings potential and employment opportunities would increase substantially. (*Id.*, ¶ 13.) These benefits would also extend to society as whole, which would benefit from a more skilled and educated workforce, and the social mobility inherent within it. (*Ibid*.)

Instead, denying these highly-qualified students admission to UC Berkeley to comply with the enrollment cap will irretrievably alter the course of their lives and negatively impact low-income, underrepresented students disproportionately to more privileged students. (*Id.*, ¶ 18.) This is because implementing the enrollment cap would require immediate, significant, and burdensome changes to the UC Berkeley admissions process that could only be achieved at this point by delaying sending acceptance letters. (*Ibid*.) As a consequence, the recipients of those letters may receive acceptance letters from other schools first, and many qualified and deserving applicants would likely elect to enroll in other competitor schools before receiving acceptance letters from UC Berkeley. (*Ibid*.) This, in turn, would have a catastrophic impact on UC Berkeley's ability to admit low-income, under-represented students because these students typically require more financial aid counseling and assistance from UC Berkeley admissions staff during the admissions process and in advance of the

nationwide May 1 tuition deposit deadline. (*Ibid*.) If these students do not have sufficient time to access that financial counseling and assistance, they are much less likely to complete the enrollment process. (*Ibid*.) By contrast, an enrollment cap would advantage more privileged students who have access to college counselors that would be aware of the newly-limited enrollment opportunities at UC Berkeley and would advise them to quickly accept the offers of admission. (*Ibid*.) Thus, while the most obvious harm would be to the otherwise-qualified students who would have accepted the offer to attend UC Berkeley this fall, the enrollment cap would harm all of the students who would not receive acceptance letters in the first place, foreclosing their ability to choose UC Berkeley at all.

B. The Court of Appeal Erred in Denying the Petition for Writ of Supersedeas

The Court of Appeal's order denying the petition for writ of supersedeas concludes, "it appears far more likely that the fruits of the *judgment* will be lost if a stay is issued than that the fruits of reversal will be lost if it does not." (Exh. A.) It also states that the Regents have not shown that they would suffer irreparable harm outweighing the harm that would be suffered by the other party. (*Ibid*.) The Court of Appeal is incorrect on both counts.

1. Issuing a Stay Will Not Result in a Loss of the Fruits of the Judgment

If the Judgment is upheld, UC Berkeley could reduce student enrollment back down to 2020-2021 levels in the future even if it now

enrolls its currently planned number of students in the 2022-2023 year. (Ogundele Dec., ¶ 27.) It would do so by reducing the size of the 2023-2024 (or later) freshman class. (*Ibid.*) Reducing enrollment in this way would be undoubtedly painful for all the same reasons compliance with the enrollment cap would be painful today, but it could be done. Thus, issuing a stay would absolutely not result in a loss of the fruits of the Judgment.

By contrast, if a writ of supersedeas does not issue, the Regents will have to enroll approximately 3,050 fewer freshman for the 2022-2023 academic year than currently planned, and will be unable to increase student enrollment at UC Berkeley beyond 2021-2022 levels during the pendency of the Appeal. Should the Regents prevail on appeal, they will not be able to go back and admit the high school students that will graduate this Spring who would have, but for the Judgment's enrollment cap, matriculated at UC Berkeley in the Fall. Admissions decisions cannot be undone, and once a student is rejected, they cannot be offered admissions at a later date unless they re-apply. (Ogundele Dec., ¶ 20.) If UC Berkeley were forced to implement the enrollment cap, it could not remedy the reduced enrollment by simply sending additional offers to previously rejected applicants. In the vast majority of cases, those applicants will have permanently lost their chance to attend UC Berkeley. Some of these students may attend other universities or colleges, likely at a much higher cost, but many others may simply forgo higher education for the foreseeable future. (*Id.*, ¶ 19.)

Further, the detrimental impacts of an enrollment cap for academic year 2022-2023 would not be limited to one year. If enrollment for the 2022-2023 academic year were frozen at 2020-2021 levels, and

subsequently unfrozen as a result of the Court of Appeal's ruling on the Regents' appeal, UC Berkeley would not have the necessary facilities or staff to get its original enrollment targets back on track without significant difficulty. (Ogundele Dec., ¶ 21.) It would not be possible to simply admit more freshman the following year to make up the difference, as constraints on class sizes and on-campus housing limit how many first-year students can be admitted in a single year. (*Ibid*.) At a minimum, UC Berkeley's enrollment would not meet current enrollment projections for another three to four years, and the consequences of a sudden drop in first-year enrollment in the 2022-2023 academic year would be felt for the entirety of that class's tenure at UC Berkeley. (*Ibid*.) If enrollment levels were frozen for longer than the 2022-2023 academic year, the consequences would become progressively worse. (*Ibid*.) UC Berkeley's costs and operations are not dynamic and cannot accommodate large swings in enrollment sizes from year to year. (*Ibid*.) Further, maintaining class size integrity is required to make sure no single department risks closure due to low enrollment, potentially harming the overall quality of the educational opportunities available to UC Berkeley students. (*Id.*, ¶ 15.)

The financial impacts would also be substantial. Lowering enrollment in the 2022-2023 academic year to match 2020-2021 enrollment numbers would mean UC Berkeley would receive approximately $57 million less in tuition than anticipated. (Ogundele Dec., ¶ 22.) UC Berkeley would not be able to recover this lost tuition by increasing enrollment in future years. This is because UC Berkeley cannot "front-load" a massive single-year increase in enrollment in the 2023-2024 academic year to meet its originally projected enrollment numbers, nor can it unilaterally increase

tuition. (*Ibid*.) Tuition at UC Berkeley funds facilities maintenance, faculty and staff salaries, and financial aid for low-income students. (*Id*., ¶ 23.) The loss in tuition would reduce the amount of financial aid available for low-income students. (*Ibid.*) Furthermore, a reduction in enrollment and tuition would make it nearly impossible to continue some of the programs specific to first-year students from low-income backgrounds, including the successful "Newly Admitted Student Pathway" program, which helps students determine the types and amounts of financial aid for which they are eligible. (*Ibid.*) The reduction in tuition from reducing the incoming undergraduate class could not easily be made up. (*Id.*, ¶ 24.)

By the time the Court is able to decide this case on the merits, the Court's ability to grant effective relief from the trial court's erroneous injunction will be lost. In short, denial of a stay "would deprive [the Regents] of the benefit of a reversal of the judgment against them..." (*Deepwell Homeowners' Protective Association v. City Council of the City of Palm* (1965) 239 Cal.App.2d 63, 66 ("*Deepwell*").)

The court faced a similar circumstance in *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861 ("*Mills*"). There, the trial court issued a writ that ordered the county to desist and refrain from enforcing provisions of a resolution that increased certain county fees. (*Id.* at 860-861.) The court concluded that preventing collection of the increased fees during the pendency of the appeal would irreparably harm the county, which could not go back and collect the additional fees should it prevail on appeal. (*Id*.) On the other hand, should the county not prevail, the court found the excess fees could be refunded. (*Id*. at 861.) In other words, issuing a stay would

ensure that the appellate court's decision to grant or deny the appeal on the merits would have its full effect, thereby preserving the court's jurisdiction.

The same reasoning applies in this action, though the stakes here are considerably higher. While the Regents, and thousands of would-be incoming freshman, would be irreparably harmed by the enrollment cap because their matriculation to UC Berkeley would be foreclosed, a stay of the enrollment cap would not affect or impede enforcement of the Judgment if the Court of Appeal affirms it on appeal. (Ogundele Dec., ¶ 27.) Nor would it effect SBN's ongoing challenge to the Regents' enrollment decisions in the pending Enrollment Action (Alameda County Superior Court Case No. RG19022887).

2. The Regents Have Demonstrated Irreparable Harm

As discussed above, the harms to the Regents and the population of students they serve will be severe, and the burden will fall disproportionately on the shoulders of would-be incoming freshman, and will significantly impact low-income, disadvantaged students. It will also affect the quality of the education UC Berkeley is able to offer for years to come. The harms demonstrated in the Petition include:

- A catastrophic impact on UC Berkeley's ability to admit low-income, under-represented students. (Ogundele Dec., ¶ 18.)
- Negatively altering the course of thousands of high school students' lives who would otherwise be offered the chance to attend "the best school in the country" (according to Forbes' 2021 list of America's Top Colleges) in the fall of 2022 for a

fraction of the price of comparable private universities. (Ogundele Dec., ¶ 9.)

- Ill effects across all of society from the loss of a more skilled and educated workforce, and the social mobility that comes with it. (Ogundele Dec., ¶ 13.)
- The risk that academic offerings at UC Berkeley will be limited due to low enrollment, and a commensurate decline in the quality of education UC Berkeley can offer. (Ogundele Dec., ¶ 18.)
- Severe economic impacts due to the loss of approximately $57 million in tuition, annually, for at least the next four years. (Ogundele Dec., ¶ 22.)
- Exacerbation of negative impacts from the unplanned and unexpectedly low level of enrollment that resulted from admitted students who did not want to participate in remote learning during the pandemic year of 2020, taking a semester or year off from their studies. (Ogundele Dec., ¶ 14.)
- A reduction in financial assistance for low-income students, and facilities operations and maintenance to make up for the lost tuition. (Ogundele Dec., ¶ 23.)
- Impairment of UC's obligation to provide affordable, high-quality education to California residents. (Ogundele Dec., ¶ 15.)

These impacts are profound and irreversible, and they will change the course of thousands of students' lives for the worse.

3. The Harm to SBN, If Any, is Extremely Minimal

On the other hand, granting the stay and writ would impose no significant hardship on SBN. In its Opposition to the Petition, SBN failed to include *any* evidence whatsoever of harm or prejudice it would face from a stay of the judgment pending appeal. The Opposition argued only that SBN would continue to "suffer environmental and quality of life impacts from UCB's incessant population growth, including housing displacement, homelessness, and excessive noise . . . ." (Opposition at p. 15.) But SBN did not, and could not, claim that re-analysis of the GSPP Project was the only means of avoiding this alleged harm.

In fact, the Regents have already fully analyzed, and mitigated, the environmental impacts of student enrollment at UC Berkeley in academic year 2022-2023 and beyond pursuant to CEQA. On July 22, 2021, in a separate administrative proceeding, the Regents approved the 2021 LRDP for UC Berkeley and certified an EIR for the updated LRDP, which analyzes the environmental impacts of projected enrollment levels at UC Berkeley through 2037, thereby encompassing enrollment levels for the 2022-2023 academic year and beyond. (Petition at ¶ 21; Harrington Dec., Exh. A, Exh. B, p. 25, Exh. C, p. 2-3 to 2-4.)

Thus, even if the Court of Appeal ultimately affirms the trial court's conclusion that the SEIR for the GSPP Project failed to adequately account for increased enrollment through 2023, the 2021 LRDP EIR analyzes the environmental impacts of student enrollment between 2018-2037. The merits of this analysis are being adjudicated right now in the Alameda

County Superior Court.[3] If the trial court in that case determines the Regents abused their discretion in approving the 2021 LRDP, it can order an appropriate remedy. If that remedy were to include a reduction in enrollment, the Regents could comply. (Ogundele Dec., ¶ 27.) Thus, SBN will not be harmed by any potential shortcomings in the analysis in the GSPP Project EIR of the increased enrollment in 2022-2023 and beyond.

4. The Regents Demonstrated the Appeal Raises Substantial Questions of Probable Error by the Trial Court

On appeal, the Regents will demonstrate the trial court erred in several ways by ordering a remedy that freezes student enrollment at UC Berkeley at 2020-2021 levels. First, the court had no jurisdiction to enjoin student enrollment increases in 2022-2023 or any other year. General rules governing administrative writs authorize a court only to enter judgments that command "respondent to set aside the order or decision" being challenged. (Code Civ. Proc., § 1094.5, subd. (f).)[4] Portions of a judgment "which purport to decide issues with respect to all pending and future

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[3] Three lawsuits have been filed challenging the 2021 LRDP EIR and are currently pending in Alameda County Superior Court (Case Nos. RG21109910, RG21110157, and RG21110142.) (MJN, Exhs. A, B, C.) On October 21, 2021, the Honorable Frank Roesch denied motions for preliminary injunction in two of these cases (Case Nos. RG21109910 and RG21110142.) (MJN, Exh. D, E.)

[4] SBN's operative Petition for Writ of Mandate states: "Plaintiff brings this action in mandamus pursuant to Code of Civil Procedure sections 1085, 1088.5, **and 1094.5**, and Public Resources Code sections 21168 and 21168.5." (Petition ¶ 13; Exh. 8, emphasis added.)

actions, rather than simply the one then before the court, are beyond the jurisdiction of the court." (*Sterling v. Santa Monica Rent Control Bd.* (1985) 168 Cal.App.3d 176, 187.) Decisions to increase student enrollment were not at issue in this proceeding; the only decision challenged was the Regents' approval of the GSPP Project and certification of the SEIR. In fact, in its order denying the Motion to Consolidate, the trial court correctly distinguished the separate Enrollment Action, which "challenges a series of decisions to increase student enrollment at UC", from the GSPP Actions, which only "challenge UC's May 16, 2019 approval" of the GSPP Project and "alleg[e] as one defect that UC's analysis of the effects of increased student enrollment were insufficient." (Petition at ¶ 18; Exh. 4, p. 156.)

Second, the prohibition in the Judgment exceeds the trial court's authority under CEQA. In a CEQA challenge, a court may not order a public agency to void a "determination, finding, or decision," unless it first finds "that any determination, finding, or decision of a public agency has been made without compliance with this division..." (Pub. Resources Code, § 21168.9, subd. (a).) Here, the trial court did not find the Regents made any determination, finding, or decision to increase enrollment without compliance with CEQA. In fact, the trial court's Order expressly found that the court did "not need to determine whether that past [enrollment] increase was part of the project under study here." (Petition at ¶ 18; Exh. 1, p. 16.)

Third, CEQA does not provide any basis to expand the trial court's Judgment to bar the Regents' ongoing enrollment activities. CEQA requires that "any order ... shall include only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division." (Pub. Resources Code, §

21168.9, subd. (b).) As discussed above, the only "project activities" challenged as being out of compliance with CEQA in this case are those directly related to the Regents' May 16, 2019 approval of the GSPP Project. Freezing future student enrollment increases for the 2022-2023 academic year and beyond is far beyond what is required to achieve compliance with CEQA for the GSPP Project approval. The Judgment does not comport with CEQA's emphasis on crafting narrow remedies.

Fourth, compliance with the enrollment cap would mean the Regents could never increase student enrollment at UC Berkeley unless and until they re-analyze the GSPP Project under CEQA. There is no justification in law or reason to allow this result. The Regents must, and do, have the ability to analyze projected campus enrollment pursuant to a separate CEQA process, regardless of any proposal related to the GSPP Project or any other development project. (See Pub. Resources Code, § 21080.09 ["Environmental effects relating to changes in enrollment levels at shall be considered for each campus or medical center of public higher education in the environmental impact report prepared for the long range development plan for the campus or medical center."].) So long as the Regents properly analyze projected enrollment for UC Berkeley in the EIR prepared for its LRDP, they should not be enjoined from increasing enrollment based on flaws in the analysis of the GSPP Project. Indeed, *Save Berkeley's Neighborhoods v. Regents of University of California* (2020) 51 Cal.App.5th 226 identified a separate path by which the Regents could comply with CEQA for enrollment decisions, i.e., by analyzing "a range of enrollment levels in a program EIR, based on reasonable estimates for high and low scenarios, giving them CEQA coverage for year-to-year variability

and for increases within the range." (*Id*. at p. 242.) Freezing enrollment until the Regents duplicate analysis of that enrollment in a potential future EIR for the GSPP project, despite the fact that the Regents can (and have already) analyzed this increased enrollment in the 2021 LRDP EIR, is inefficient, unnecessary, and excessive.

Fifth, because SBN has already challenged the Regents' decisions to increase enrollment in the pending Enrollment Action (Case No. RG19022887) and could have challenged the 2021 LRDP EIR, there is no compelling reason for the trial court to have issued the relief requested. (See *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401-402.) The 2021 LRDP EIR analyzes enrollment levels at UC Berkeley through 2037 and was certified on July 22, 2021. The ability to file a petition for writ of mandate ordering the Regents to set aside any enrollment increases in 2022-2023 and beyond based on the 2021 LRDP EIR provided SBN with an adequate remedy at law (of which it did not avail itself).

Sixth, an injunction cannot be granted "to prevent the execution of a public statute by officers of the law for the public benefit." (Code Civ. Proc., § 526, subd. (b)(4).) Here, Education Code section 66202.5 provides that "[t]he University of California and the California State University are expected to plan that adequate spaces are available to accommodate all California resident students who are eligible and likely to apply to attend an appropriate place within the system. The State of California likewise reaffirms its historic commitment to ensure that resources are provided to make this expansion possible, and shall commit resources to ensure that students from enrollment categories designated in subdivision (a) of

Section 66202 are accommodated in a place within the system." And Education Code section 66011 declares "that all resident applicants to California institutions of public higher education, who are determined to be qualified by law or by admission standards established by the respective governing boards, should be admitted to either (1) a district of the California Community Colleges, in accordance with Section 76000, (2) the California State University, or (3) the University of California." These and other Education Code sections provide the statutory framework for the Master Plan for Higher Education. The Master Plan for Higher Education guarantees that all California residents in the top one-eighth or top one-third of the statewide high school graduating class who apply on time be offered a place somewhere in the UC or CSU system. (Ogundele Dec., ¶ 25.) Freezing enrollment at UC Berkeley directly contravenes the Regents' mandate and authority to ensure that qualified applicants be admitted to the UC system. It thwarts the public interest and is contrary to Legislative policy.

Seventh, it is similarly not in the public interest to restrain public agencies in the performance of their duties. (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471 [citing to *Agricultural Labor Relations Bd., supra,* 16 Cal.3d at 401-402].) There is also a general rule against enjoining public officers or agencies from performing their duties.[5] (*Id.*)

[5] The Regents will assert additional arguments on the merits of the CEQA claims in their appeal. Here, the Regents have focused only on those aspects directly related to this Petition.

5. The Delay in Filing the Request for Stay or Supersedeas Was Excusable Error

The Regents reasonably believed the filing of the Appeal stayed the entirety of the Judgment, as is typical on a judgment directing issuance of a writ of mandate. (See 2 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) ¶ 7:79 [“An appeal automatically stays proceedings on a judgment directing issuance of a writ of mandate.”].)

Subsequently, following substitution of new appellate counsel on November 12, 2021 and the filing of the record on appeal on December 28, 2021, the Regents were alerted to the prohibitory nature of the enrollment cap in Section 4 of the Judgment. (Petition at ¶¶ 7, 28, 30.) The Regents filed a petition for writ of supersedeas as soon thereafter as practically possible. While the delay is regrettable, it is not prejudicial error.

6. The Regents’ Petition for Writ of Supersedeas Complied with the Rules of Court

The Court of Appeal faulted the Regents’ Petition for failing "identify the nature and date of the proceeding or act sought to be stayed," in violation of California Rules of Court, rule 8.116(a)(2). (Exh. A.) The cover of the Regents’ Petition specified it was seeking an immediate stay of the August 23, 2021 Judgment in Alameda Superior Court, Case No. RG19022887. It is not clear what more should have been done to comply with the Rules of Court.

IV. CONCLUSION

The Court of Appeal erred by denying supersedeas. This Court should issue an immediate stay and grant review to correct the error, to preserve the Court of Appeal's jurisdiction to decide the Regents' appeal, and to protect the Regents, the public interest, and thousands of eligible and deserving students against the irreparable harm that far outweighs any potential harm to SBN.

DATED: February 14, 2022 THE SOHAGI LAW GROUP, PLC

By: 

NICOLE H. GORDON
Attorneys for THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), I certify that the total word count of this Petition for Writ of Supersedeas or Other Appropriate Relief and Memorandum of Points and Authorities, excluding covers, table of contents, table of authorities, and certificate of compliance, is 6,973.

DATED: February 14, 2022 THE SOHAGI LAW GROUP, PLC

By: 

NICOLE H. GORDON
Attorneys for THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

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EXHIBIT A

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION ONE

SAVE BERKELEY'S NEIGHBORHOODS et al.,
Plaintiffs and Appellants,
v.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendant and Appellant;
AMERICAN CAMPUS COMMUNITIES et al.,
Real Parties in Interest and Respondents.

A163810
Alameda County
Sup. Ct. No. RG19022887

BY THE COURT:

The request for temporary stay and the petition for writ of supersedeas are denied.

We decline to issue a writ of supersedeas. (*Deepwell Homeowners' Protective Assn. v. City Council* (1965) 239 Cal.App.2d 63, 66–67 ["The issuance of such writ is *entirely discretionary* with the reviewing court."], italics added.) In this case, it appears far more probable that the fruits of the *judgment* will be lost if a stay is issued than that the fruits of reversal will be lost if it does not. The Regents have not shown that they "would suffer irreparable harm outweighing the harm that would be suffered by the other party[.]" (*Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 18; see *Nuckolls v. Bank of California, Nat. Assn.* (1936) 7 Cal.2d 574, 578 ["If a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction."]; *Sun-Maid Raisin Growers v. Paul* (1964) 229 Cal.App.2d 368, 376 [" 'The situation does not differ where the injunction is embraced in a final judgment. There, too, it is a part of the adjudication that the defendant should be enjoined at once, and this adjudication should not be set aside on appeal before a hearing on the merits of the appeal.' [¶] We must not balance conveniences on an application of

this kind, and we must keep in mind not only the rights of the appellants if the order is ultimately reversed but the rights of the respondents if it is affirmed. We cannot presume error, and we should not interfere with the normal incidents of a prohibitory injunction in the absence of a clear and compelling proof of extraordinary circumstances."].)

We note that the judgment in this case was entered August 23, 2021. The Regents filed an appeal from that judgment on October 18, 2021, yet they waited more than three months before seeking a stay or supersedeas. Other than to claim that either they or their counsel did not understand the nature of the judgment from which the appeal is taken, they offer no explanation for this lengthy delay. (See 2 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) ¶ 15:146.1 ["Courts are not inclined to look favorably upon petitions alleging the need for a stay and immediate relief if the petition is filed on the day before ... trial but the challenged order was rendered weeks ... previously. If a proceeding sought to be stayed is imminent, the petition should always set forth adequate justification for any filing delay."].)

Although the Regents' request for a temporary stay is effectively moot in light of our decision to deny the petition for writ of supersedeas, we note that the cover of the Regents' petition fails to "identify the nature and date of the proceeding or act sought to be stayed," in violation of California Rules of Court, rule 8.116(a)(2). If the petition does not comply with this requirement, the court may "decline to consider the request for writ of supersedeas or temporary stay." (Cal. Rules of Court, rule 8.116(c); see *Johnny W. v. Superior Court* (2017) 9 Cal.App.5th 559, 563, fn. 2 ["Strict compliance with this rule is especially important in cases such as this, where a stay is sought on relatively short notice. If a petitioner fails to comply with this requirement, 'the reviewing court may decline to consider the request for a temporary stay.' "].)

The parties' requests for judicial notice are denied.

Date: FEB 10 2022 HUMES, P.J.

P.J.

Before Humes, P.J., and East, J. (Judge of the San Francisco County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.)

PROOF OF SERVICE

Save Berkeley's Neighborhoods v. The Regents of the University of California et al.

Alameda Superior Court, Case No. RG19022887 ("SBN Action")

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 11999 San Vicente Boulevard, Suite 150, Los Angeles, CA 90049-5136.

On February 14, 2022, I served true copies of the following document(s) described as **PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address cmcaleece@sohagi.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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

Executed on February 14, 2022, at Los Angeles, California.

Cheron J. McAleece

SERVICE LIST

Save Berkeley's Neighborhoods v. The Regents of the University of California et al.
Alameda Superior Court, Case No. RG19022887 ("SBN Action")

Court of Appeal, First Appellate District, Division 1, Case No. A163810

Alison L. Krumbein, Senior Counsel, Land Use **OFFICE OF THE GENERAL COUNSEL** **UNIVERSITY OF CALIFORNIA** 1111 Franklin Street, 8th Floor Oakland, CA 94607-5201 Telephone: (510) 987-0851 Fax: (510) 987-9757 Email: alison.krumbein@ucop.edu	**ATTORNEYS FOR THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, IN HER CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA; UNIVERSITY OF CALIFORNIA, BERKELEY; CAROL T. CHRIST, IN HER CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF CALIFORNIA, BERKELEY**
David M. Robinson, Chief Campus Counsel **UC BERKELEY, OFFICE OF LEGAL AFFAIRS** 200 California Hall Mail Code No. 1500 Berkeley, CA 94720 Telephone: (510) 642-7791 Fax: (510) 643-5980 Email: dmrobinson@berkeley.edu	**ATTORNEYS FOR THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, IN HER CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA; UNIVERSITY OF CALIFORNIA, BERKELEY; CAROL T. CHRIST, IN HER CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF CALIFORNIA, BERKELEY**

Charles R. Olson
Philip J. Sciranka
Carolyn J. Lee
LUBIN OLSON & NIEWIADOMSKI LLP
600 Montgomery Street, 14th Floor
San Francisco, CA 94111
Telephone: (415) 981-0550
Fax: (415) 981-4343
Email: colson@lubinolson.com
Email: psciranka@lubinolson.com
Email: clee@lubinolson.com
Email: msaephan@lubinolson.com
Email: jwilson@lubinolson.com

ATTORNEYS FOR THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, IN HER CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA; UNIVERSITY OF CALIFORNIA, BERKELEY; CAROL T. CHRIST, IN HER CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF CALIFORNIA, BERKELEY

Thomas N. Lippe
LAW OFFICES OF THOMAS N. LIPPE, APC
201 Mission Street, 12th Floor
San Francisco, CA 94105
Telephone: (415) 777-5604
Fax: (415) 777-5606
Email: lippelaw@sonic.net
Email: kmhperry@sonic.net

ATTORNEYS FOR SAVE BERKELEY'S NEIGHBORHOODS

Winter King
Robert Perlmutter
Lauren M. Tarpey
Mindy Jian
SHUTE MIHALY & WEINBERGER
396 Hayes Street
San Francisco, CA 94102
Telephone: (415) 552-7272
Fax: (415) 552-5816
Email: king@smwlaw.com
Email: Perlmutter@smwlaw.com
Email: ltarpey@smwlaw.com
Email: jmiao@smwlaw.com

ATTORNEYS FOR CITY OF BERKELEY

Farimah F. Brown, City Attorney
Christopher D. Jensen, Deputy City Attorney
CITY ATTORNEY, BERKELEY
2180 Milvia Street, 4th Floor
Berkeley, CA 94704
Telephone: (510) 981-6950
Fax: (510) 981-6960
Email: fbrown@cityofberkeley.info
Email: cjensen@cityofberkeley.info

ATTORNEYS FOR CITY OF BERKELEY

Ella Foley-Gannon
Phillip J. Wiese
MORGAN LEWIS & BOCKIUS LLP
1 Market Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 442-1000
Fax: (415) 442-1001
Email: ella.gannon@morganlewis.com
Email: phillip.wiese@morganlewis.com

ATTORNEYS FOR AMERICAN CAMPUS COMMUNITIES; AMERICAN CAMPUS COMMUNITIES SERVICES, INC.; AMERICAN CAMPUS COMMUNITIES OPERATING PARTNERSHIP LP

Michael C. Niemeyer
HAND ARENDALL LLC
71 North Section Street, Suite B
Fairhope, Alabama 36532
Telephone: (251) 990-0079
Fax: (251) 210-0606
Email: mniemeyer@handarendall.com

ATTORNEY FOR COLLEGIATE HOUSING FOUNDATION

Amanda Monchamp
Robert Taboada
MONCHAMP MELDRUM LLP
50 Francisco Street, Suite 450
San Francisco, CA 94133
Telephone: (415) 704-8915
Fax: (415) 704-8938
Email: amonchamp@mlandlaw.com
Email: rtaboada@mlandlaw.com

ATTORNEYS FOR COLLEGIATE HOUSING FOUNDATION

Hon. Brad S. Seligman
ALAMEDA COUNTY SUPERIOR COURT
DEPARTMENT 23
1221 Oak Street
Oakland, CA 94612

BY MAIL