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Supreme Court of California
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Supreme Court Case No. S273160

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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SAVE BERKELEY'S NEIGHBORHOODS
*Respondent and Cross-Appellant*

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
*Appellants and Cross-Respondents*

AMERICAN CAMPUS COMMUNITIES; COLLEGIATE HOUSING FOUNDATION, ET AL.,
*Real Parties in Interest*

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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

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# ANSWER TO PETITION FOR REVIEW; OPPOSITION TO REQUEST FOR IMMEDIATE STAY

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TABLE OF CONTENTS Page

I. There Are No Grounds for Supreme Court Review . . . . . 6

II. The Court of Appeal Did Not Abuse its Discretion in Denying the Petition for Writ of Supersedeas . . . . . 8

A. The Regents would not suffer irreparable harm absent a stay or supersedeas relief . . . . . 9

B. The balance of hardships favors denying a stay and denying the petition for writ of supersedeas . . . . . 15

C. The Regents' appeal of Section 4 of the Judgment does not raise any substantial question regarding the merits of the appeal . . . . . 16

III. The Regents Requests for Supersedeas Relief and Immediate Stays in the Court of Appeal and this Court Are Dilatory . . . . . 21

IV. The Regents Claim of Urgency for an Immediate Stay or Supersedeas Relief Is Unsupported . . . . . 23

V. The Petition for Review and Request for Immediate Stay Should Be Denied Because They Seek to Change the Status Quo . . . . . 24

VI. Conclusion . . . . . 26

WORD COUNT CERTIFICATION . . . . . 27

TABLE OF AUTHORITIES Page

Cases:

Agricultural Labor Relations Bd. v. Superior Court
(Agricultural Labor Relations Bd) (1976) 16 Cal.3d 392 . . . . . 18

Blank v. Kirwan
(1985) 39 Cal.3d 311 . . . . . 7

Cahill v. San Diego Gas & Electric Co.
(2011) 194 Cal.App.4th 939 . . . . . 23

Caplan v. Fellheimer Eichen Braverman & Kaskey
(3d Cir.1995) 68 F.3d 828 . . . . . 9, 24

Clothesrigger, Inc. v. GTE Corp.
(1987) 191 CA3d 605 . . . . . 7

Daly v. San Bernardino County Bd. of Supervisors
(2021) 11 C5th 1030 . . . . . 8

Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs
(1965) 239 Cal.App.2d 63 . . . . . 6, 8

Denham v. Superior Court
(1970) 2 Cal.3d 557 . . . . . 7, 16

Findleton v. Coyote Valley Band of Pomo Indians
(2018) 27 Cal.App.5th 565 . . . . . 17

Horsford v. Board of Trustees of Calif. State Univ.
(2005) 132 Cal.App.4th 359 . . . . . 6

Jameson v. Desta
(2018) 5 Cal.5th 594 . . . . . 16

Laurel Heights Improvement Assn. v. Regents of University of California
(Laurel Heights I) (1988) 47 Cal.3d 376 . . . . . 16, 19

TABLE OF AUTHORITIES (con't) Page

Cases (con't):

Marriage of Fink
(1979) 25 Cal.3d 877 . . . . . 16

People ex rel San Francisco Bay Conservation & Dev. Comm'n v.
Town of Emeryville (Emeryville) (1968) 69 Cal. 2d 533 . . . . . 8

People v. Jackson
(2005) 128 CA4th 1009 . . . . . 7

Public Employment Relations Bd. v. Bellflower Unified School Dist.
(2018) 29 Cal.App.5th 927 . . . . . 16

Save Berkeley's Neighborhoods v. The Regents of the University of
California (SBN I) (2020) 51 Cal.App.5th 226 . . . . . 12, 20

Save Tara v. City of West Hollywood (Save Tara)
(2008) 45 Cal.4th 116 . . . . . 19

Sierra Club v. County of Fresno
(2018) 6 Cal.5th 502 . . . . . 16

Smith v. Selma Community Hosp.
(2010) 188 CA4th 1 . . . . . 8, 16

Sonic Mfg. Technologies, Inc. v. AAE Systems, Inc.
(2011) 196 Cal.App.4th 456 . . . . . 6

State Dept. of Public Health v. Superior Court
(2015) 60 Cal.4th 940 . . . . . 17

Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.
(Tahoe Keys) (1994) 23 Cal.App.4th 1459 . . . . . 18

U.S. v. Superior Court
(1941) 19 Cal.2d 189 . . . . . 9, 24

TABLE OF AUTHORITIES (con't) Page

Cases (con't):

Universal Home Improvement, Inc. v. Robertson
(2020) 51 Cal.App.5th 116 . . . . . 16

Western States Petroleum Assn. v. Superior Court
(1995) 9 Cal.4th 559 . . . . . 17

Statutes and Regulations:

Code of Civil Procedure -
§ 526(b)(4) . . . . . 17
§ 923 . . . . . 8
§ 1094.5 . . . . . 17
§ 1094.5(c) . . . . . 17
§ 1094.5(f) . . . . . 17

Evidence Code -
§ 413 . . . . . 24

Public Resources Code -
§ 21000 . . . . . 12
§ 21065 . . . . . 18
§ 21080.09 . . . . . 20
§ 21080.09(b),(c) . . . . . 20
§ 21089(1)(a) . . . . . 19
§ 21168.9(a)(2) . . . . . 17, 18

California Rules of Court -
§ 8.404(d)(1) . . . . . 27
§ 8.486(a)(4) . . . . . 26
§ 8.500(b)(1) . . . . . 6

Respondent and Cross-Appellant Save Berkeley's Neighborhoods ("SBN") respectfully answer the Petition for Review ("Petition") filed by Appellants and Cross-Respondents Regents of The University of California ("Regents") and oppose the Regents' request for immediate stay.

## I. There Are No Grounds for Supreme Court Review.

The Regents argue that grounds for Supreme Court review exists because the Petition presents "an important question of law and an urgent matter of public policy." (Petition, 7-8; 18, citing CRC, rule 8.500(b)(1).) The Regents cite no authority that "an urgent matter of public policy" constitutes grounds for Supreme Court review. Even if it were a ground for review, as discussed in sections II and IV below, the Regents desire to increase enrollment at UC Berkeley is not "an urgent matter of public policy."

Nor does the Petition present "an important question of law." The Regents frame the question presented as whether the Court of Appeal "erred" by denying supersedeas relief. But "the issuance of such writ is entirely discretionary with the reviewing court." (*Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs* (1965) 239 Cal.App.2d 63, 67.) Therefore, it is incumbent on the Regents to show that in exercising its discretion, the Court of Appeal committed legal error regarding an important question of law. (*Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal.App.4th 359, 393-394.)

Instead, the Regents ignore the applicable standard of review. This is fatal to the Petition. (*Sonic Mfg. Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465 ["Arguments should be tailored to the applicable standard of review … . Failure to acknowledge the proper scope of review is a concession of a lack of merit"].) "The proper standard of

appellate review guides and restricts the appellate court in resolving the points raised ... and ... has been characterized as the 'threshold issue' in every appeal. (*Clothesrigger, Inc. v. GTE Corp.* (1987) 191 CA3d 605, 611; *People v. Jackson* (2005) 128 CA4th 1009, 1018, ["the standard of review is the compass that guides the appellate court to its decision... . Deviations from the path ... leave writer and reader lost in the wilderness"].)

The Regents argue that the Court of Appeal's determination that "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," is "incorrect." (Petition, 20.) The "abuse of discretion" standard of review requires that the Regents show that the lower court ruling "exceeds the bounds of reason." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 ["The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion ... ."]; see also, *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331 ["a reviewing court will disturb discretionary rulings only upon a showing of "a clear case of abuse" and "a miscarriage of justice"].) The abuse of discretion standard requires more than mere disagreement with the result. The Regents fail to present any argument that the Court of Appeal's determination regarding the balance of hardships "exceeded the bounds of reason." Thus, the contention is waived.

Even if this court were to use its independent judgment to determine the relative balance of hardships, the Court of Appeal's determination is correct, as shown in section II below.

The Regents also suggest that the Petition presents a question of law regarding the trial court's jurisdiction to order the enrollment cap. (Petition

18, 27.) But this question of law is not presented in this Petition. "It is not the function of this court in passing upon an application for supersedeas to pass on the merits of the judgment appealed from; the validity of such judgment is to be reviewed on the appeal therefrom." (*Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs*, *supra*, 239 Cal.App.2d at 67.)

Ultimately, the Regents do not identify any "important question of law" presented by the Petition, the resolution of which would provide grounds for Supreme Court review. Therefore, the Petition should be denied.

## II. The Court of Appeal Did Not Abuse its Discretion in Denying the Petition for Writ of Supersedeas.

A writ of supersedeas may be granted only upon a showing that (a) appellant would suffer irreparable harm absent the stay, and (b) the appeal has merit. (*Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 C5th 1030, 1039; *Smith v. Selma Community Hosp.* (2010) 188 CA4th 1, 18 [party seeking supersedeas "must convincingly show that substantial questions will be raised on appeal and must demonstrate it would suffer irreparable harm outweighing the harm that would be suffered by the other party"].) The Regents failed to make either showing.

A writ of supersedeas is appropriate to protect the jurisdiction of the appellate court when the fruits of reversal would be irrevocably lost unless the status quo is maintained. (*People ex rel San Francisco Bay Conservation & Dev. Comm'n v. Town of Emeryville* (1968) 69 Cal. 2d 533, 537-539 (*Emeryville*); Code Civ. Proc. § 923.) Here, a writ of supersedeas is not necessary to protect the Court of Appeal's jurisdiction over the appeal.

### A. The Regents would not suffer irreparable harm absent a stay or supersedeas relief.

The Regents argue that the "burden" of the enrollment limit "will significantly impact low-income, disadvantaged students." (Petition, 24.) This assertion is entirely conclusory, without evidentiary support.

The Regents's unsupported hyperbole continues. They imply—without supporting evidence—that attendance at UC schools other than UC Berkeley represents a severe disadvantage. (Petition, 24-25). They absurdly suggest that the enrollment limit will prevent students from attending college anywhere and thus deprive society of a "more skilled and educated workforce." (Petition, 25). They suggest that the enrollment limit will cause a severe loss of revenue (Petition, 25), but without providing any information of the percentage of UC's budget that will be lost, thereby rendering the assertion meaningless.

Any harm that UCB may suffer from not obtaining a stay or supersedeas relief is self-inflicted, and therefore, not legally cognizable. (*U.S. v. Superior Court* (1941) 19 Cal.2d 189, 197 ["when a shipper acquires fruit in excess of the quantity allotted him under the weekly quota, any injury suffered by him is self-inflicted"]; *Caplan v. Fellheimer Eichen Braverman & Kaskey* (3d Cir.1995) 68 F.3d 828, 839 [where insured sought an injunction to prevent insurer taking action authorized by the insurance contract, the outcome was "self-inflicted" and "does not qualify as irreparable [injury]"].)

Between 2005 and 2017-18, UCB increased student enrollment by 9,155; from 31,800 to 40,955. (CT 493-495;[1] Declaration of Thomas N.

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[1]"CT" refers to the Clerk's Transcript transmitted to this court on December 17, 2021.

Lippe in Opposition to Petition for Review ("Lippe Decl"), Ex 5, 163 [AR 51].) In the 2018-19 academic year, UCB student enrollment was 39,708. (Lippe Decl, Ex 3, 157[LRDP FEIR p. 5-35].) In the 2019-20 academic year, UCB increased student enrollment to 43,204. (See Declaration of Phillip Bokovoy in Opposition to Request for Immediate Stay and Preliminary Opposition to Petition for Writ of Supersedeas or Other Appropriate Relief ("Bokovoy Decl.") ¶ 6, Ex 2.) In the 2020-21 academic year, UCB student enrollment to fell by about 800 students to 42,357. (Ogundele Decl., ¶ 14.) In the 2021-22 academic year, UCB increased student enrollment to 45,057. (Ogundele Decl., ¶ 14.) UCB projects that student enrollment in 2036-37 will be 48,200. (Lippe Decl, Ex 4, 160 [LRDP DEIR p. 5.12-19].)[2]

These enrollment levels are summarized here:

| Academic Year | Enrollment | Less | Change |
|---|---|---|---|
| 2017-18 | 40,955 | | |
| 2018-19 | 39,708 | 40,955 | -1247 |
| 2019-20 | 43,204 | 39,708 | 3,496 |
| 2020-21 limit | 42,357 | 43,185 | -828 |
| 2021-22 | 45,057 | 42,347 | 2,710 |
| 2036-37 projected | 48,200 | 45,057 | 3,143 |

These data show that many of the Regents claims are misleading or exaggerated. First, the enrollment cap is tied to a year (i.e., 2020-21) in which enrollment was down only 800 students, presumably due to the pandemic. Thus, the Regents description of this as an "exaggerated-low" is itself exaggerated.

Second, all of the enrollment levels after 2018 are on top of a dramatic increase in enrollment of nearly 30% from 2005 to 2018 (i.e.,

[2]35,000 undergraduate plus 13,200 graduates students.

9,155 students, from 31,800 to 40,955). Thus, taken in the broader historical context, the enrollment cap provides no basis for UC to claim an urgent need for relief.

Third, enrollment varies over time for many reasons. The Regents fail to explain why the roughly 3,500 student increase they seek this year is the magic number as compared to any other number. For example, why not admit 6,000 more students? Only admitting 3,500 more students instead of 6,000 more students will leave 2,500 deserving students without the opportunity to attend UC Berkeley. The problem with the Regents argument is that any enrollment level will have the effect of leaving some students without an offer of admission to UCB. That does not constitute "irreparable injury."

The Regents have never shared the constraints that they believe properly limit enrollment. Presumably these constraints include the physical sizes of classrooms, lecture halls, and laboratories; the ratio of students to faculty, etc. What is clear, however, is that the Regents do not consider the absence of student housing or the impact of students exacerbating the housing shortage in the surrounding community to be one of those constraints. This is remarkable considering that in the 2018-19 academic year, UCB failed to provide housing for 46,125 students, faculty, and staff, with unaccommodated students making up 30,736 of that total; and that in 2036-37, UCB projects that it will fail to provide housing for 46,574 students, faculty, and staff, with unaccommodated students making up 20,045 of that total. (Lippe Decl, Ex 4, 160 [LRDP DEIR p. 5.12-19].)

Fourth, because the enrollment process was too far advanced when the judgment was entered, SBN agreed that the limit tied to 2020-21 enrollment should not take effect in 2021-22, but only in 2022-23.

Therefore, the Regents already received the unexpected, and unearned, income of increasing enrollment in 2021-22 by 2,700 students.

Fifth, the Regents continue to increase enrollment. As discussed in section V below, a blanket stay of the enrollment limit while this appeal is pending would result in the Regents continuing their relentless enrollment increases for many years to come, without legal constraint and without, as the trial court found, legally adequate environmental review. Therefore, if the Court is inclined to grant some relief, it should not stay the enrollment limit entirely. Instead it should modify the limit to reflect 2019-20 enrollment of 43,204 students.

In 2018, SBN sued the Regents regarding their failure to analyze the environmental impacts of this increase pursuant to CEQA.[3] The Regents vigorously contested their legal obligation to do so, but SBN prevailed on this point in *Save Berkeley's Neighborhoods v. The Regents of the University of California* (2020) 51 Cal.App.5th 226 (*SBN I*).

Then UC Berkeley analyzed the environmental impacts of this increase pursuant to CEQA in the Environmental Impact Report challenged in this case; and the trial court found that analysis legally inadequate and entered Judgment accordingly. (CT 783; Compendium Regents' Compendium of Exhibits, Ex 1, p. 6.)

It is noteworthy that the Regents's Petition does not contest the trial court's rulings on the merits of SBN's CEQA claims that UCB failed to lawfully assess the population and housing impacts of its enrollment plans, which rulings are embodied the Judgment. Instead, the Petition contests

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[3]The California Environmental Quality Act, referred to herein as "CEQA," is codified at Public Resources Code § 21000 et eeq.

only the trial court's authority to order a specific remedy for these violations of CEQA, namely, the limit on enrollment until UCB lawfully assesses the environmental impacts of enrollment. Thus, for purposes of evaluating the balance of hardships to the parties from granting or denying an immediate stay or supersedeas relief, the Regents concede the correctness of these trial court rulings. Thus, the situation in which UCB now finds itself is entirely self-inflicted, and the harm it may suffer is not legally cognizable.

Also, the Regents purported showing of irreparable harm refers to purported harm to both California resident and non-resident high school seniors seeking admission to UCB, as opposed to other UC campuses, for the 2022-23 academic year. (Ogundele Decl. 4-12 ¶¶ 9-24.) At the same time, Mr. Ogundele testifies that the reason UCB's enrollment has increased so much is due to its obligations under the California Master Plan for Higher Education providing 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 Decl. 12-13 ¶¶ 25-26.)

Mr. Ogundele's testimony is entirely conclusory, with critical gaps in the evidence. For example, Mr. Ogundele fails to disclose the breakdown in offers of admission and actual admissions for next fall between California resident and non-resident high school seniors. In fact, UCB can fully accommodate its fair share (within the UC system) of qualified California resident applicants. (Bokovoy Decl. ¶'s 2-15.)

Also, the 2015 California State Auditor report regarding UC's admissions policy finds that UC has enrolled nonresident undergraduate students at the expense of resident undergraduates by relaxing admission standards for nonresident undergraduate admissions. Thus, system-wide,

nonresident undergraduate admissions grew 82% or 18,000 students from 2010 to 2015 while resident undergraduate admissions fell 1% or 2,200 students during that period. The State Auditor found that after the relaxation of nonresident admissions standards in 2011, UC admitted 16,000 nonresident undergraduates "whose scores fell below the median scores for admitted residents at the same campus on every academic test score and grade point average that we evaluated." In short, UC's actual policy has been to increase the enrollment of nonresident undergraduates who are not "highly qualified" while enrolling a declining number of resident undergraduates. (Declaration of David Shiver in Opposition to Request for Immediate Stay and Preliminary Opposition to Petition for Writ of Supersedeas or Other Appropriate Relief ("Shiver Supersedeas Decl") ¶'s 2-3, Ex 1.)

Mr. Ogundele suggests that growth in California resident undergraduate admissions is required due to the State of California Education Code and California Master Plan for Higher Education. As noted above, the actual number of resident undergraduates admissions shrank from 2010 to 2015.

Moreover, the cohort of California resident high school graduates is projected to decline during the next Long Range Development Plan ("LRDP") planning period. (Shiver Supersedeas Decl. ¶ 4.) The California Department of Finance ("DOF") projected in 2019 that the absolute number of high school graduates between 2019-2020 and 2028-29 will decline, not increase. (Shiver Supersedeas Decl. ¶ 5, Ex 2.) DOF's 2021 projections indicate that the declining trend in K-12 enrollment through 2030-2031 will be even more pronounced than in the 2019 projections. (Shiver Supersedeas Decl. ¶ 6, Ex 3.) DOF's data projects an even more pronounced decline in

overall K-12 enrollment through 2030-2031. (Shiver Supersedeas Decl. ¶ 7, Ex 4.)

Based on the DOF projections and past history, the Public Policy Institute has concluded that a historically rapid increase in student populations that began in the 1990's had peaked by 2007, that K-12 enrollments declined from 2010 to 2020, and K-12 enrollments will decline even more sharply in the decades to come. (Shiver Supersedeas Decl. ¶ 8, Ex 5, p.3 ["California's public K–12 school system is entering a long period of declining enrollment. By 2027–28, statewide enrollment is projected to fall nearly 7 percent (compared to 1.5% over the past decade"].)

Accordingly, contrary to the Regents assertion (at Petition, 25), UC will not need to increase resident undergraduate enrollment system-wide, or at any particular campus including UC Berkeley, in order to accommodate UC's enrollment commitment to the top 12.5% of California high school classes in the California Master Plan for Higher Education.

### B. The balance of hardships favors denying a stay and denying the petition for writ of supersedeas.

As the above discussion clarifies, the harm the Regents may suffer absent issuance of a writ of supersedeas is the loss of some nonresident and graduate admissions for one academic year and the financial loss associated with these higher-tuition paying students. This harm is outweighed by the fact that the community in which UCB is located continues to suffer environmental and quality of life impacts from UCB's incessant population growth, including housing displacement, homelessness, and excessive noise and the fact that UCB obstinately refuses to lawfully assess and mitigate these impacts as required by law. (Regents' Compendium of Exhibits, Ex 1,

pp. 7-8, ¶ 4; 20-25, 27-30; CT 737-742, 744-747; 787,791 ¶ 4; Lippe Decl, Exs 1, pp. 5-25; Ex 2, pp. 27-154.) Indeed, gentrification and displacement of low-income residents in Berkeley and Oakland is an ongoing adverse effect of UC Berkeley's enrollment increases; therefore, staying the enrollment cap will harm the community. (Declaration of David Shiver in Support of Answer to Petition for Review ¶'s 2-10.)

CEQA's purpose is to call public officials to account for their environmental decision-making. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 (*Laurel Heights I*).) Here, the trial court found that a limit on enrollment is necessary to accomplish this goal. (See CT 787, 791, ¶ 4; 737-742, 744-747; Regents' Compendium of Exhibits, Ex 1, pp. 7-8, ¶ 4; 20-25, 27-30.) As discussed below, the trial court was fully authorized to order this limit. The Regents have presented no good reason to stay that order.

### C. The Regents' appeal of Section 4 of the Judgment does not raise any substantial question regarding the merits of the appeal.

The trial court acted well within its legal authority in ordering the enrollment limit. The Regents' arguments to the contrary fail to "convincingly show that substantial questions will be raised on appeal." (*Smith v. Selma Community Hosp., supra,* 188 CA4th at 18.)

The most fundamental rule of appellate review is that an appealed judgment or order is presumed to be correct. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609.) "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Public Employment Relations Bd. v. Bellflower Unified School Dist.*

(2018) 29 Cal.App.5th 927, 939.) This includes the presumption "that the record contains evidence to support every finding of fact." (*Marriage of Fink* (1979) 25 Cal.3d 877, 887 (internal quotes omitted); accord, *Universal Home Improvement, Inc. v. Robertson* (2020) 51 Cal.App.5th 116, 125.)

The Regents' argue the trial court did not have jurisdiction to issue the enrollment limit, citing Code of Civil Procedure, section 1094.5, subdivision (f) and Code of Civil Procedure section 526(b)(4). (Petition, 27; 30.) The Regents waived these defenses because they did not raise them in the trial court. (CT 765-771; Regents' Compendium of Exhibits, Ex 15, 375-381.) (*Findleton v. Coyote Valley Band of Pomo Indians* (2018) 27 Cal.App.5th 565, 569 ["It is well established that appellate courts will ordinarily not consider errors that 'could have been, but were not raised below'"].)

Even if the defenses are not waived, section 1094.5 is inapplicable, because this action is for traditional mandamus, as it challenges a public agency decision to carry out a public works project. (See e.g., *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566.) It does not meet the criteria set forth in subdivision (c) of Code Civ. Proc., § 1094.5, for that statute to apply.

Also, Code of Civil Procedure section 526(b)(4) is inapplicable because, in compliance with Public Resources Code section 21168.9(a)(2), the Judgment includes a "mandate" that the public agency "suspend specific project activities." (See CT 787, 791, ¶ 4; 737-742, 744-747; Regents' Compendium of Exhibits, Ex 1, pp. 7-8, ¶ 4; 20-25, 27-30.) CEQA's remedy statute is more specific than Code of Civil Procedure section 526(b)(4); therefore, it governs. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960 ["more specific provisions take

precedence over more general ones"].)

The Regents argue that it is "not in the public interest to restrain public agencies in the performance of their duties," citing *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401 (*Agricultural Labor Relations Bd*) and *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471 (*Tahoe Keys*).) (See Petition, 30-31; Petition for Writ of Supersedeas, 31.)

These decisions are distinguishable. *Agricultural Labor Relations Bd* involved an injunction prohibiting the implementation of a regulation adopted by an administrative agency, which is not involved here. The Court held that courts cannot enjoin valid regulations but can enjoin invalid ones. (16 Cal.3d at 401.) So the decision is no help to the Regents.

*Tahoe Keys* notes that in the context of a motion for preliminary injunction, there is a "general rule against enjoining public officers or agencies from performing their duties." (23 Cal.App.4th at 1471.) But the decision is inapposite, because the instant context is a final judgement, not a preliminary injunction pending trial. Also, the "general rule" noted in *Tahoe Keys* is not inflexible, as it allows a preliminary injunction against a public agency on a proper showing. (*Id*.)

In essence, the Regents ask the Court to amend CEQA by deleting section 21168.9(a)(2). The argument is addressed to the wrong forum; only the Legislature can amend CEQA.

Further, the project "activity" targeted in paragraph 3(a) of the Judgment is increasing enrollment. (See Pub. Res. Code § 21065 ["'Project' means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment"].) Allowing future increases without valid environmental

review is at odds with CEQA. When an agency approves an activity in violation of CEQA, the remedy is to void approval of the activity because CEQA requires valid environmental review before, not after, Project approval. (*Laurel Heights I, supra*, 47 Cal.3d at 394 ["If postapproval environmental review were allowed, EIRs would likely become nothing more than post hoc rationalizations to support action already taken"]; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 134 (*Save Tara*) [decision approving a project "must be preceded, not followed, by CEQA review"]; CEQA § 21089(1)(a).)

Also, suspending future increases is necessary to make the trial court's Judgment effective, because limiting enrollment gives the Regents an incentive to expeditiously and lawfully conduct CEQA review of the increased enrollment. Not limiting enrollment would allow the Regents to produce one flawed CEQA analysis after another, ad infinitum, without any adverse consequence.

The Regents' argument is a reprise of their incorrect argument—which appears in various guises—that the EIR's analysis of the environmental impacts of the Excess Enrollment is not subject to judicial review in this case because it was "voluntary," not required by CEQA because enrollment is not part of the "project," was undertaken only for informational purposes to fulfill a promise made to the City of Berkeley, or that the Regents took no "discretionary" action regarding enrollment. (Petition 14, CT 503-506; 776-778.)

The trial court ruled that the EIR's analysis of the environmental impacts of the increased enrollment as part of a so-called "updated enrollment baseline" is "a novel concept under CEQA, and it was included because UC Berkeley misunderstood its legal obligations to study the

impacts of student enrollment." (CT 732-737.) As the Order observes:

> In June 2020, after the DSEIR and FSEIR were published, the Court of Appeal held that UC Berkeley's interpretation of CEQA was incorrect. "CEQA requires public universities to mitigate the environmental impacts of their growth and development." (Id. at p.231.) "In this context, growth includes student enrollment increases, which the Legislature has acknowledged 'may negatively affect the surrounding environment.'" (Ibid.) "[W]hen a public university prepares an EIR for a development plan, [Public Resources Code] section 21080.09 requires universities to expand the analysis to include a related feature of campus growth, future enrollment projections, which is entirely consistent with the traditional, broad definition of a CEQA project." (Id. at p.239.) "It does not say that subsequent changes to enrollment plans with new or increased environmental effects that have not been analyzed and addressed are exempt from CEQA." (Ibid.)

(CT 732.)

Further, Respondents stipulated at trial that the GSPP SEIR's analysis of the environmental impacts of the Excess Enrollment is subject to judicial review in this case. (CT 734; 1181:14-24.) Implicit in this stipulation is that judicial review be meaningful. Respondents' contention—if accepted— would turn the Court's ruling that the EIR's analysis of the enrollment increases is legally insufficient into a meaningless advisory opinion.

SBN has also countered UC's argument in many other ways. (See CT 503-506; 687; 691-694).) For instance, CEQA section 21080.09 legislates that UC's enrollment plans are always part of its CEQA project. *SBN I, supra*, 51 Cal.App.5th at 239. After UC certified its 2020 LRDP in

2005, it decided to conduct CEQA review of additional enrollment in the EIR challenged in this case. (See CEQA § 21080.09(b),(c).) SBN does not challenge UC's decision to use this EIR to analyze the environmental impacts of increased enrollment and the Regents cannot collaterally unmake that decision now.

The Regents argue that because their new Long Range Development Plan EIR analyzes the environmental impacts of enrollment increases projected to occur after 2018, this somehow affects the trial court's authority to order a limit on enrollment based on the legal deficiencies in the GSPP EIR's analysis of the environmental impacts of enrollment increases occurring prior to 2018. (Petition 26-27.) The argument is nonsensical, because the two EIRs address different project activities, i.e., enrollment increases prior to and after 2018.

The Regents argue that "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." (Petition, 29.) This is incorrect. The judgment does not require any additional CEQA analysis of constructing new buildings for the GSPP. It requires additional CEQA analysis of past enrollment increases. (CT 791, ¶ 5; Regents' Compendium of Exhibits, Ex 1, p. 8, ¶ 5.)

## III. The Regents Requests for Supersedeas Relief and Immediate Stays in the Court of Appeal and this Court Are Dilatory.

The Regents waited until the eleventh hour to seek relief in the Court of Appeal and this Court. Judgment was entered on August 23, 2021. SBN effected personal service on UC of the Judgment and the signed, unstamped copy of the Writ of Mandate on September 16, 2021. (CT, Vol. 4; 955-958.) SBN effected personal service on UC of the signed, stamped copy of the

Writ of Mandate on November 5 and 17, 2021. (CT, Vol. 5; pp. 1104-1124.) UC has been planning its admissions offers and enrollment targets for the last five months as if Section 4 of the Judgment does not exist. Instead of filing its Petition months ago without a request for immediate stay, however, the Regents waltzed into the Court of Appeal at the eleventh hour and dropped their scheduling problem in the Court's lap while inventing a parade of horribles if the Court does not jump when they say jump.

The Regents' counsels' mea culpa is both unpersuasive and unsupported by competent evidence. Based on the fact that "new" appellate counsel substituted in on November 11, 2021, and the record on appeal was filed on December 28, 2021, the Regents allege:

> Upon review of the Judgment in the context of the complete record, the Regents' new counsel alerted the Regents to the self-executing nature of the Judgment's suspension of enrollment increases and the immediate impacts on ongoing enrollment planning. This request for relief from that suspension is brought as soon as practically possible thereafter in the exercise of good faith and reasonable diligence.

(Petition for Writ of Supersedeas, 13 ¶ 7.) No reason is given as to why review of the complete record was necessary for old or new counsel to see that the enrollment limit is "prohibitory" and, therefore, not automatically stayed by the appeal. The only document that need be reviewed to reach this determination is the Judgment itself. The idea that UC did not understand the "prohibitory" nature of the enrollment limit and the legal effect thereof when the Judgment was entered last August is not credible.

Indeed, UC's "verification" of its Petition for Writ of Supersedeas

artfully elides UC's obligation to make these allegations under oath, stating: "I have read the foregoing petition, and either know its allegations to be true, or I believe them to be true ... ." Did UC's new counsel verify under oath that she did not determine or understand the "prohibitory" nature of the enrollment limit in the Judgment until December 28, 2021, or not?

The Regents argument that its "error" is "excusable" is unsupported by argument or citation to legal authority. (See Petition 32.) Therefore, it is waived. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

## IV. The Regents Claim of Urgency for an Immediate Stay or Supersedeas Relief Is Unsupported.

The Regents' claim of urgency for an immediate stay or supersedeas relief is unsupported—because Mr. Ogundele's declaration is entirely conclusory. For example, Mr. Ogundele does not testify that UCB "must" issue its first set of admissions offers by February 11, 2022, in order to avoid irreparable harm. Instead, he testifies that UCB "must" make internal decisions regarding its first set of admissions offers for next year's freshman class by February 4, 2022, in order to issue these offers by February 11 of 2022. (Ogundele Decl. 3 ¶ 5.)

But Mr. Ogundele fails to provide specific factual support for his generalized conclusion that "Failure to meet this release schedule, as established to align with the rest of the UC system and institutions nationally, can impact our ability to yield Fall 2022 incoming enrollment targets. It can also affect sister UC campus enrollments, and student ability to make future educational goals." (Ogundele Decl. 4 ¶ 8.) For example, he testifies that failure to meet this release schedule "can" impact UCB's ability to yield Fall 2022 incoming enrollment targets; "can" affect sister

UC campus enrollments; and "can" effect student ability to make future educational goals. He does not testify that failure to meet this release schedule "would" necessarily have these effects. Thus, his testimony is speculation, not competent evidence.

Nor does Mr. Ogundele provide enough information for the Court or SBN to independently judge whether any degree of slippage in this schedule, or what degree of slippage, could be tolerated without resulting in purported irreparable harm. The Court should not assume that evidence exists to fill in the blanks left by the Regents incomplete evidentiary presentation.[4]

Moreover, as discussed above, the Regents provide no valid reason for their five month delay in seeking the relief requested in their Petition. To the extent there may be urgency in the request for immediate stay, the Regents created the urgency. Therefore, any harm to UCB that might result from denial of the request for immediate stay is self-inflicted and therefore, not relevant. *U.S. v. Superior Court, supra; Caplan v. Fellheimer Eichen Braverman & Kaskey*, *supra*.

## V. The Petition for Review and Request for Immediate Stay Should Be Denied Because They Seek to Change the Status Quo.

Granting the Regents' Petition or request for immediate stay would change the status quo by allowing further increases in enrollment. The Petition for Review seeks Supreme Court review of the Court of Appeal's denial of the Regents petition for supersedeas relief. Supersedeas relief

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[4]See Evidence Code § 413 ["In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."]

would result in a stay of the enrollment cap included in the trial court's judgment until the appeal is decided.[5]

The Petition also includes a request for an immediate, temporary stay of the enrollment cap. Ordinarily, such a stay ordered by the Supreme Court would remain in effect until the Petition for Review is decided, and if review is granted the stay could be extended until Supreme Court review of the question presented is resolved. The body of the Petition, however, requests that:

> 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.

(Petition, 9.)

Granting review would trigger a proceeding in this court to consider whether the Court of Appeal abused its discretion in denying supersedeas relief.[6] That proceeding could take years before this Court returns the Regents' appeal of the enrollment cap to the Court of Appeal to decide whether the trial court erred by ordering the cap. At that point, if this Court

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[5]The Regents pray "that this Court (1) issue an immediate stay of Section 4 of the Judgment suspending increases in enrollment at UC Berkeley in academic years 2022-2023 and later above the level of student enrollment in academic year 2020-2021, and (2) then issue its writ of supersedeas staying this same Section 4 of the Judgment until the conclusion of the Regents' appeal." (Petition for Writ of Supersedeas, 21.)

[6]CRC, rule 8.500 et seq.

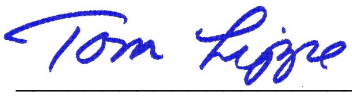
were to order the Court of Appeal to grant supersedeas relief pending resolution of the appeal, it might take several more years to resolve whether the trial court erred by ordering the cap. In the meantime, the Regents could continue to increase enrollment, further damaging the local environment.

The request for stay and Petition should be denied because the Petition is a transparent stalking horse to change the status quo by staying the enrollment cap that could remain in effect for years before any court decides the merits of the Regents appeal of the enrollment cap.[7]

## VI. Conclusion.

For the reasons set forth above, the Court should deny the request for immediate stay and the Petition.

Date: February 17, 2022 LAW OFFICES OF THOMAS N. LIPPE, APC



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[7]This Court cannot treat the Petition for Review as a Petition for Writ of Mandate because the Petition is not verified. (See CRC, rule 8.486(a)(4).)

## WORD COUNT CERTIFICATION

I, Thomas N. Lippe, counsel for Respondent and Cross-Appellant Save Berkeley's Neighborhoods, hereby certify that the word count of this Answer to Petition for Review 5,688 words according to the word processing program (i.e., Corel Wordperfect) used to prepare the brief, which is lower than the maximum word count of 28,000 set forth in CRC, rule 8.404(d)(1).

Dated: February 17, 2022 LAW OFFICES OF THOMAS N. LIPPE, APC

Tom Lippe

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