Court of Appeal, First Appellate District, Division One - No. A163810

S273160

IN THE SUPREME COURT OF CALIFORNIA

En Banc

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.

Respondent's request for judicial notice is denied.
The petition for review and application for stay are denied.

Liu and Groban, JJ., are of the opinion the petition should be granted.

CANTIL-SAKAUYE

Chief Justice

SAVE BERKELEY'S NEIGHBORHOODS v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

S273160

Dissenting Statement by Justice Liu

As things stand today, approximately 3,050 students may lose the opportunity to attend one of our state's premier universities this fall. Because of a court order capping its enrollment in the context of an environmental lawsuit, the University of California at Berkeley (hereafter UC Berkeley or the university) appears on the brink of enrolling nearly one-third fewer undergraduates this fall compared to last fall. In addition to the acute loss to each of these prospective students, the City of Berkeley would also be denied the social and economic benefits of accommodating a full student population, while the university's potential loss of $57 million in tuition would undermine California's interests in expanding access to education. This is not even to mention the contributions of leadership, innovation, and service that our state and broader society may lose if thousands of students have to defer or forgo attending UC Berkeley this fall. Even if those students enroll elsewhere, the reshuffling will cause other displacements, and the effects of the enrollment cap will reverberate up and down the state.

The underlying dispute in this case concerns the university's compliance with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). The trial court ruled against the university and capped its enrollment at the level in 2020–2021, a somewhat low

benchmark because of the pandemic. UC Berkeley asserts that because its remaining offers of admission are scheduled to issue on March 24, 2022, it requires immediate judicial intervention to stay the enrollment cap. Without a stay, the university says, it will have to deny admission to thousands of students who would have otherwise enrolled this fall, and the potential losses described above will become real before the merits of the trial court's ruling are adjudicated on appeal. The Court of Appeal declined to stay the trial court's judgment pending appeal, and the university has petitioned this court for review of the Court of Appeal's refusal to grant a stay.

Because of the statewide importance of the issues presented, I would grant the university's petition for review and its request for a stay of the enrollment cap during the pendency of our review. But this court's denial of review need not be the end of the road for the several thousand students affected by this matter. The university may renew its request for a stay in the Court of Appeal, or the parties may engage in good faith negotiations or mediation to expeditiously settle this dispute. Indeed, given the stakes on all sides, it is hard to think of a case where a negotiated settlement seems more imperative for the good of the local community and our state.

I.

I would grant review in this matter "to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The petition by the Regents of the University of California presents significant questions regarding whether and how courts should account for harm to third parties when exercising their discretion to grant a temporary stay of a trial court injunction pending appeal.

A writ of supersedeas, which stays an injunction pending appeal, may be granted where " 'difficult questions of law are involved and the fruits of a reversal would be irrevocably lost unless the status quo is maintained.' " (*Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1039.) Applying this rule, the Court of Appeal reasoned in its summary denial order that the UC Berkeley appellants had "not shown that *they* 'would suffer irreparable harm outweighing the harm that would be suffered *by the other party*[.]' " (Italics added.) The Court of Appeal also considered UC Berkeley's delay in seeking a writ of supersedeas as further justification for denying such relief.

Absent from the Court of Appeal's discussion is whether and how third party interests played a role in its analysis. This silence is understandable. In describing the analysis that courts should undertake when evaluating a petition for writ of supersedeas, we have sometimes used language that refers exclusively to the interests of the direct parties to the litigation. (See, e.g., *Nuckolls v. Bank of California, Nat. Assn.* (1936) 7 Cal.2d 574, 578 [referring to the risk of "destroying rights which would belong to the respondent if the judgment is affirmed"]; *People ex rel. S. F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 537 [referring to the need to protect " 'the appellant's rights if his appeal were successful' "].)

By contrast, other decisions have suggested that third party harms must be taken into account when determining if a court should exercise its inherent power to stay proceedings. In *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324 (*Morning Star*), we found a fee scheme to be invalid under the Administrative Procedure Act (APA). But we nevertheless ordered the trial court to stay the proceedings upon

remand to "avoid significant disruption of the fee scheme," which we found to be of "critical importance to the State of California, as determined by the Legislature." (*Morning Star*, at pp. 341, 342.) We further directed that the stay should remain in effect "until such time" as the agency implementing the fee scheme "has had a reasonable opportunity to promulgate valid regulations under the APA." (*Id.* at p. 341.)

In *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200 (*California Hotel*), we similarly concluded that a minimum wage order issued by the Industrial Welfare Commission was invalid but ordered that the wage order remain in effect for 120 days of the finality of the opinion to allow the Commission time to correct the deficiencies. (*Id.* at p. 216.) We concluded it was necessary to preserve the status quo given the "critical importance" of the three-year-old wage order "to significant numbers of employees" who bore "no responsibility for the deficiencies of" the order. (*Ibid.*)

It is true that the parties in *Morning Star* and *California Hotel* were not seeking a traditional writ of supersedeas, and the temporary stays we ordered came after we had decided the case on the merits. The important point, however, is that our orders were rooted in the "inherent power of the court to make an order to preserve the status quo." (*California Hotel*, *supra*, 25 Cal.3d at p. 216, fn. 42; see *Morning Star*, *supra*, 38 Cal.4th at p. 341.) As *California Hotel*'s citations to *People ex rel. S. F. Bay etc. Com. v. Town of Emeryville* and Code of Civil Procedure section 923 make clear, this inherent power shares the same roots as the power to issue a writ of supersedeas. (*California Hotel*, *supra*, 25 Cal.3d at p. 216, fn. 42.)

These cases suggest that third party interests properly inform courts' exercise of their inherent power to protect the status quo pending appeal. But our case law has not addressed this issue clearly, and the matter before us seems an especially appropriate vehicle for doing so because the third party interests here are apparent and overwhelming.

If the trial court's injunction capping enrollment at the level for the 2020–2021 academic year remains in place, UC Berkeley will be forced to issue approximately 5,000 fewer letters of admission and to enroll 3,050 fewer students than planned. These aggregate numbers should not obscure the particular loss to each of these individuals. The benefits of an education at a prestigious university are substantial, especially for students from less privileged backgrounds, and can have lasting impacts on a student's future employment, income level, and personal and social development. (UC Berkeley, Office of the Vice Chancellor of Finance, Pell Grant Recipients <https://pages.github.berkeley.edu/OPA/our-berkeley/pell.html> [as of Mar. 1, 2022] [22% of freshmen and 42% of transfer entrants in 2020–2021 were Pell Grant recipients, i.e., "students from families with income typically below $60,000"]; *ibid.* ["Berkeley's high percentage of Pell recipients . . . translates into many more low-income students having access to a world class education. . . . [¶] . . . UC Berkeley is an engine for social mobility by producing many more low-income graduates than our private peers." (boldface omitted)].)

Notably, the injunction requires UC Berkeley to dramatically *decrease* the size of its student body as opposed to merely pausing future growth. The injunction ties the level of any future enrollment to the level in the 2020–2021 academic year, when enrollment was somewhat depressed due to the

global pandemic. To comply, UC Berkeley would have to reduce its undergraduate enrollment well below the level for the present 2021–2022 academic year. (The university says graduate student enrollment cannot absorb the reduction.) A reduction of 3,050 new undergraduate students would mean about 32% fewer students in the 2022 fall class compared to the prior year. (UC Berkeley Office of Planning and Analysis, UC Berkeley Fall Enrollment Data for New Undergraduates (Sept. 30, 2021) <https://opa.berkeley.edu/uc-berkeley-fall-enrollment-data-new-undergraduates> [as of Mar. 1, 2022] [total of 6,945 freshman and 2,660 new transfer students in "2021 Fall"].) Even for the new students who are fortunate enough to enroll this fall, the overall reduction will likely mean reduced resources, emptier classrooms, and a relatively anemic class of peers. For these students, their quality of education will be fundamentally altered.

Moreover, the potential third party harms go beyond the university campus. The City of Berkeley, once a party adverse to the university in this very suit, now avers that the injunction will negatively affect the broader Berkeley community and local economy through decreased taxes, depressed patronage of local businesses, and a reduction of the labor pool within the community. In addition, the lowered enrollment numbers would result in approximately $57 million less in tuition than anticipated, a loss that Governor Gavin Newsom asserts would undermine the foundations of his proposed state budget and statewide plans to promote access to quality education. Furthermore, California and our broader society stand to lose the contributions of leadership, innovation, and service that would otherwise accrue if several thousand students did not have to defer or forgo the benefit of a UC Berkeley education this

fall. Those students might go elsewhere, but that would simply distribute the effects of the enrollment cap to other institutions throughout the state and perhaps beyond.

Against these potential losses must be weighed the threatened harms to the community from the environmental impacts of UC Berkeley's enrollment if the enrollment cap is stayed. Plaintiff Save Berkeley's Neighborhoods (SBN) says the local community will "suffer environmental and quality of life impacts" that include "housing displacement, homelessness, and excessive noise . . . . Indeed, gentrification and displacement of low-income residents in Berkeley and Oakland is an ongoing adverse effect of UC Berkeley's enrollment increases . . . ."

These concerns should not be minimized, but they should be put in perspective. According to SBN's own allegations in its separate "student enrollment" lawsuit, UC Berkeley exceeded its student enrollment projections for more than a decade before SBN took any action. According to SBN, the university first began exceeding its enrollment projections set forth in its 2005 long range development plan environmental impact report fifteen years ago, back in 2007. (*Save Berkeley's Neighborhoods v. Regents of University of California* (2020) 51 Cal.App.5th 226, 232, review den. Sept. 9, 2020, S263673.) SBN did not challenge this practice until it filed the related action in 2018. (See *id.* at p. 233.) Since the university has been exceeding its projected enrollment numbers for nearly 15 years now, it is hard to understand how the harm resulting to SBN by staying the injunction for a 16th year outweighs the harm to the university and its students and prospective students if the injunction is kept in place. SBN does not allege that it will suffer any particular or new harm resulting from excessive student enrollment for the 2022–2023 academic year if it had to await

resolution of the underlying appeal. Instead, SBN more broadly asserts that the community in which it is located will *continue* to suffer the "environmental and quality of life impacts" noted above. I doubt such generalized notions of "continued" harm are sufficient to show irreparable harm or to outweigh the harms the university, its students and prospective students, the City of Berkeley, and the State of California may suffer absent a stay.

In sum, a clearer rule with regard to whether and how third party interests should inform the evaluation of a petition for a writ of supersedeas might well lead to a different conclusion regarding UC Berkeley's petition. The question clearly matters in this case. I would grant review to resolve this "important question of law" (Cal. Rules of Court, rule 8.500(b)(1)) and issue a stay pending our review.

II.

Although the court today denies UC Berkeley's petition for review, nothing in our denial order prevents the courts below or the parties themselves from acting with dispatch to mitigate or avoid the competing harms at issue here.

First, our denial of review does not foreclose any subsequent attempt by UC Berkeley to petition the Court of Appeal for temporary relief pending this appeal. We have never held that a denial of a petition for writ of supersedeas forecloses subsequent petitions. Indeed, successive writs may be especially appropriate if a petitioner is able to come forward with additional evidence to support a showing of irreversible harm. (Cf. *Most Worshipful Sons of Light Grant Lodge Ancient Free and Accepted Masons, Jurisdiction of Cal. v. Sons of Light Lodge No. 9* (1949) 91 Cal.App.2d 582, 589 [petition for a writ or supersedeas may be "denied without prejudice to its renewal"

and a "denial, except in most unusual cases, . . . is not *res judicata* of anything"].)

Even if the Court of Appeal remains reluctant to issue a traditional writ of supersedeas, it still possesses "*virtually unlimited discretion* to make orders to preserve the status quo in protection of its own jurisdiction, including issuance of a stay order other than supersedeas." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) ¶ 7:273.) *California Hotel* and *Morning Star* may provide guidance on appropriate options. Without prejudice to the Court of Appeal's analysis, these options could include giving UC Berkeley (1) the opportunity to show that it has already come into compliance with CEQA, (2) a reasonable duration to remedy any remaining deficiencies with the respective environmental impact reports, or (3) a reasonable duration to propose temporary mitigation alternatives.

Second, the Court of Appeal may exercise its power to order parties to enter prompt settlement negotiations. (Cal. Rules of Court, rule 8.248(a)(2) [presiding justice may "[o]rder all necessary persons to attend a conference to consider . . . settlement"]; Ct. App., First Dist., Local Rules of Ct., rule 9(b)(2), Settlement Conferences in Civil Appeals ["At any time during the pendency of an appeal, the panel to which the appeal has been assigned may order a settlement conference even though none was requested."].)

There is no reason why the parties cannot renew efforts to negotiate a settlement, with the aid of a skilled mediator, that would require UC Berkeley to engage in mitigation measures that curb environmental harms associated with its growth, while still protecting the interests of its students and

prospective students. It bears emphasizing that the City of Berkeley, an original party to this litigation, has already entered into a settlement agreement with the university that, among other terms, provides the City with increased funding for City services without any enrollment cap in return. A similar resolution between SBN and UC Berkeley would be foreclosed if SBN is staunchly opposed to *any* increase in the university's enrollment growth, regardless of the mitigation measures proposed. But such a stance would appear at odds with CEQA's mitigative and informational goals. (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 382 (*Cal. Building Industry Assn.*) [CEQA's "four related purposes" are to "(1) inform the government and public about a proposed activity's potential environmental impacts; (2) identify ways to reduce, or avoid, environmental damage; (3) prevent environmental damage by requiring project changes via alternatives or mitigation measures when feasible; and (4) disclose to the public the rationale for governmental approval of a project that may significantly impact the environment"].)

A durable settlement may provide an effective means to vindicate SBN's asserted interests in environmental protection. CEQA "does not necessarily call for disapproval of a project having a significant environmental impact, nor does it require selection of the alternative" that best protects the " 'environmental status quo.' " (*Cal. Building Industry Assn.*, *supra*, 62 Cal.4th at p. 383.) "Instead, when 'economic, social, or other conditions' make alternatives and mitigation measures 'infeasible,' a project may be approved despite its significant environmental effects if the lead agency adopts a statement of overriding considerations and finds the benefits of the project

outweigh the potential environmental damage." (*Ibid.*) It remains an open question to what extent UC Berkeley must mitigate the environmental effects of its enrollment growth or whether the trial court's ruling will be upheld on appeal. SBN may well be in a better position now to negotiate mitigation commitments from the university than at the end of a costly and uncertain litigation process.

Finally, if the ultimate result of the present suit is to deprive thousands of prospective students of the opportunity to attend one of our premier public universities, I would not be surprised if this stark consequence prompts political actors to rethink the balance that CEQA currently strikes between the interests of parties like SBN and UC Berkeley. (See, e.g., Sen. Bill No. 886 (2021–2022 Reg. Sess.) as introduced Jan. 27, 2022 [bill to "exempt from CEQA a student housing project . . . carried out by a public university"].) I express no view on the wisdom of such efforts. Instead, I highlight this evolving debate to suggest that the parties here have a chance to demonstrate that vindicating the goals of environmental protection through CEQA need not devolve into a zero-sum game.

Although it is the prerogative of any litigant to avail itself of the full extent of the legal process, the present impasse seems ripe for a mediated solution. It does not serve the university's long-term interest to negatively impact the local environment, and an outcome that negatively impacts the educational future of thousands of students would not appear to serve the long-term interest of litigants like SBN. It is not too late to find a solution that mitigates the local community's environmental concerns without leaving 3,050 of our young people behind.

LIU, J.

I Concur:
GROBAN, J.