

CASE NO. A166898

**THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT—DIVISION FOUR**

HASTINGS COLLEGE CONSERVATION COMMITTEE, STEPHEN
HASTINGS BREEZE, STEPHANIE AZALEA BRACKEL, CATHERINE
TORSTENSON, SCOTT HASTINGS BREEZE, COLLETTE BREEZE
MEYERS, AND COLIN HASTINGS BREEZE,
Plaintiffs and Respondents,

v.

DAVID FAIGMAN, SIMONA AGNOLUCCI, CARL ROBERTSON,
SHASHIKALA DEB, MICHAEL EHRlich, ANDREW GIACOMINI,
ANDREW HOUSTON, CLAES LEWENHAUPT, MARY NOEL PEPYS,
COURTNEY POWER, AND ALBERT ZECHER,
Defendants and Appellants,

and

STATE OF CALIFORNIA,
Defendant.

Appeal from Order Denying Special Motion to Strike of the
Superior Court of San Francisco County, Case No. CGC-22-602149
Honorable Richard B. Ulmer, Jr., (415) 551-3723

RESPONDENTS' ANSWERING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.208, Plaintiffs and Respondents Hastings College Conservation Committee, an unincorporated association of alumni of Hastings College of the Law (“HCCC”), and Stephen Hastings Breeze, Stephanie Azalea Brackel, Catherine Torstenson, Scott Hastings Breeze, Collette Breeze Meyers, and Colin Hastings Breeze (collectively, “Heirs,” and individually “Heir”; HCCC and Heirs are collectively referred to as “Plaintiffs” and/or “Respondents”), hereby submit the following supplemental certificate of interested entities or persons:

The undersigned certifies that the following entities or persons, other than Defendants and Appellants David Faigman, Simona Agnolucci, Carl Robertson, Shashikala Deb, Michael Ehrlich, Andrew Giacomini, Andrew Houston, Claes Lewenhaupt, Mary Noel Pepys, Courtney Power, and Albert Zecher’s (collectively, “College Defendants” and/or “Appellants”), who are sued by Plaintiffs in their official capacities as the Dean and Directors of the “Board” of the “College,” should be disclosed under rule 8.208:

- State of California (a defendant in the underlying civil action, but not a party to this appeal);

Respondents are unaware of any other interested entities or persons required to be disclosed under rule 8.208.

Dated: March 16, 2023

Respectfully submitted,

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By: /s/ Gregory R. Michael
Gregory R. Michael

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INTRODUCTION

Plaintiffs, in the underlying action, challenge Assembly Bill 1936 (“AB 1936”), which was recently enacted by the State of California (the “State”). They allege that AB 1936 violates the State and U.S. Constitutions because it:

(1) changed the name of the venerated “Hastings College of the Law” to the generic “College of the Law San Francisco” (the “College”), thereby substantially impairing the State’s agreement with the College’s namesake and founder, Serranus Clinton Hastings (“S.C. Hastings”), who paid the State \$100,000 in gold coin in 1878 with the express understanding that the College would “forever” be named “Hastings College of the Law,” and which payment AB 1936 does not return to S.C. Hastings’ family, including the individually-named Plaintiffs, as surviving heirs and representatives of S.C. Hastings;

(2) eliminated the seat on the College’s Board of Directors (the “Board”) that had been “always” reserved for an heir or representative of S.C. Hastings (“Hereditary Seat”), another express condition of the bargained-for exchange between the State and S.C. Hastings; and

(3) without a trial—or even any independent inquiry into the historical record by the State Legislature—wrongly “finds and declares,” *inter alia*, that “S.C. Hastings...promoted and financed Native American hunting expeditions in the Eden and Round Valleys, funding bounties resulting in the massacre of hundreds of Yuki men, women, and children,” and further punitively encourages an annual “reading” by the College of the atrocities that S.C. Hastings did not commit.

College Defendants, who are sued by Plaintiffs in their official capacities as the Dean and Directors of the College for declaratory and injunctive relief, appeal from the trial court’s Order denying their special motion to strike Plaintiffs’ claims pursuant to Section 425.16 of the Code of

Civil Procedure (the “anti-SLAPP Statute”). Their appeal fails for several reasons.

First, as an initial matter, College Defendants’ primary arguments on appeal are forfeit because they did not adequately raise their new theories regarding the applicability of the anti-SLAPP Statute in their motion to the trial court. On appeal, College Defendants identify activities they argue give rise to Plaintiffs’ claims—namely, AB 1936’s renaming of the College and amorphous, hypothetical consequences that AB 1936’s being declared unconstitutional may have on College Defendants’ future speech activities. As College Defendants did not raise their current theories in their motion to the trial court, they cannot be asserted for the first time on appeal.

Second, College Defendants’ new theories for why the anti-SLAPP Statute should apply to Plaintiffs’ claims against them remain just as fatally defective as those they raised at the trial court. Assuming *arguendo* that State legislation could itself constitute a “protected activity” under the anti-SLAPP Statute—which no California Court has ever held and which would, itself, unconstitutionally curtail the judiciary’s authority to review legislative action—the enactment of AB 1936 was not an action undertaken by College Defendants and is therefore not *their* speech. As such, College Defendants cannot show that their asserted liability for declaratory and injunctive relief in this action arises from their protected speech.

Likewise, College Defendants’ frustration that, in the future, they may not be able to refer to the College in the manner of their choosing, does not equate to Plaintiffs’ claims arising from that frustration. Plaintiffs do not, themselves, mandate that College Defendants refer to the College in any specific manner. The fact that none of the Parties to this appeal, Plaintiffs included, consistently refer to the College by any of its past or present names as identified by statute makes this abundantly clear. Rather, Plaintiffs seek only to require that the College Defendants refrain from

wasting taxpayer funds implementing the unconstitutional aspects of AB 1936. College Defendants' frustration that AB 1936's unconstitutionality may affect their future speech, implies only that College Defendants are unhappy with the previous versions of State law supplanted by AB 1936. Accordingly, College Defendants have failed to establish that the anti-SLAPP Statute applies to Plaintiffs' claims.

Lastly, assuming for argument's sake that the anti-SLAPP Statute does apply, Plaintiffs claims far exceed the requisite "minimal merit" needed to move past the pleading stage. Admissible evidence and judicially noticeable materials, including newly identified materials obtained from the California State Archives, establish as much. The Contracts Clauses of the State and U.S. Constitutions bar implementation of AB 1936 because it substantially impairs, without reason or necessity, the State's contractual obligations to S.C. Hastings and his Heirs and representatives. The State's retroactively applied punitive and retributive measures against S.C. Hastings and his descendants further violate constitutional prohibitions against bills of attainder and ex post facto laws, as well as the California Constitution's requirement that the College remain free from sectarian or political influence, which lies at the heart of AB 1936.

By extension, Plaintiffs have established that their remaining claims against College Defendants have merit. College Defendants, for their part, intend to implement the unconstitutional aspects of AB 1936 in their official capacities at the College, warranting injunctive relief under Code of Civil Procedure Section 526a and State common law which prohibit the waste and ultra vires expenditure of taxpayer dollars, as well as under the federal civil rights statute, 42 U.S.C. § 1983. Accordingly, Plaintiffs respectfully request that this Court affirm the trial court's Order denying College Defendants' anti-SLAPP motion.

STATEMENT OF THE CASE

College Defendants' Opening Brief mischaracterizes how the State Legislature came to adopt its 1878 Act titled, "An Act to create Hastings' College of the Law, in the University of the State of California" (the "1878 Act"); how the 1878 Act has historically been interpreted by California courts; and the circumstances leading to the State's recent enactment of AB 1936 to eliminate the 1878 Act's contractual guarantees.

A. **The 1878 Act: S.C. Hastings, the Founding of "Hastings' College of the Law," and the Formation of a Binding Agreement**

In many respects, S.C. Hastings' life embodied the American dream. Born in 1814 in New York, S.C. Hastings acquired legal training and moved west, quickly rising through the ranks of state and territorial politics to become a U.S. Representative for Iowa's then at-large district (1846-1847) and the third Chief Justice of the Iowa Supreme Court (1848-1849). (1-Appx-25-26, 128-29.) S.C. Hastings then moved to California, becoming the first Chief Justice of the California Supreme Court (1849-1851) and California's third Attorney General (1852-1854). (1-Appx-26.) After leaving public office, S.C. Hastings engaged in private practice but ultimately amassed his significant wealth through lawful real estate ventures. (1-Appx-26, 135.) By 1870, S.C. Hastings had become one of the largest landowners in California and had fostered a reputation as a "prominent and respected citizen of this State." (Plaintiffs' Motion Requesting Judicial Notice [hereafter, "RJN"] p.21 [Ex. 1].)

In 1878, S.C. Hastings proposed to California Governor William Irwin and the State Legislature that he should found and establish what would be the first law school on the West Coast of the United States. (*Id.* at pp.21-22 [Ex. 1]; 1-Appx-26.) "[T]o this end," S.C. Hastings proposed, he would "pay into the treasury of the State...one hundred thousand dollars, gold coin, in *consideration* whereof the State shall *enact a law* providing

that the State shall pay the Directors of a college to be incorporated under the law of this State, interest at the rate of seven (7) percent per annum,” which was a fortune in the mid-1800’s, and “that so far as may be this college shall be perpetual; and if its existence shall terminate from any cause...one hundred thousand dollars and unexpended interest ***shall revert to the founder, his heirs and assigns, forever.***” (RJN pp.21-22 [Ex. 1, emphasis added]; *see also* 1-Appx-26.)

Governor Irwin supported S.C. Hastings’ proposal, informing the Legislature that S.C. Hastings “asks that the State...become a ***Trustee*** to execute the ***trust***” that will be created “on the terms set forth in the communication” and expressed hope that the Legislature will “devise a practical scheme” for the founding of the College that “will not only ***perpetuate the name of its founder***...but will be an important and valuable agency in the conservation of law and order, and in promoting the peace and welfare of society ***through an indefinite future.***” (RJN p.21 [Ex. 1, emphasis added].)

On February 27, 1878, after receiving S.C. Hastings’ proposal, the State Senate Judiciary Committee (the “Judiciary Committee”) introduced Senate Bill 438 (“SB 438”), initially titled, “An Act to ***accept a proposition*** of S.C. Hastings and to establish a College of Law.” (RJN p.24 [Ex. 2, emphasis added].) SB 438 was thus not introduced *sua sponte*, but in reaction to, and for the acceptance of, an offer made by S.C. Hastings to enter into an agreement concerning the founding of the College.

SB 438 went on to provide that: “the following ***proposition*** of S. Clinton Hastings submitted to the Legislature...by the Governor is hereby ***accepted,***” (*id.* at pp.25-28 [Ex. 2, Section 1, emphasis added]); S.C. Hastings is authorized to pay...the Treasury of the State the sum of ***one hundred thousand dollars in gold coin***; and upon the said payment being made the Treasurer of the State shall give a receipt to the said Hastings,”

(*Id.* at p.29 [Ex. 2, Section 2, emphasis added]); and “the Governor, Controller and Secretary of State are...*to execute and deliver to...*said Hastings, upon the production of said receipt, a ***contract in the name of the State...***” (*Id.* at pp.29-30 [Ex. 2, Section 3, emphasis added].)

As noted above, the Judiciary Committee’s initial version of SB 438 would have required S.C. Hastings to first pay the State the consideration of \$100,000 in gold coin, and then the State would be obligated to deliver the “contract” to S.C. Hastings. (RJN pp.29-30 [Ex. 2: Section 3].) By its terms, that version of the bill would have “take[n] effect immediately,” meaning that S.C. Hastings would need to pay the \$100,000 before knowing what would be precisely stated in the subsequent contract. (RJN p.32 [Ex. 2: Section 8].) The 1878 Act ultimately adopted, however, reversed that process by delivering first the terms of the bargained-for “contract” (*i.e.*, the 1878 Act’s memorialization of the agreement between the State and S.C. Hastings), and then conditioning the Act’s effectiveness on S.C. Hastings paying the required consideration of \$100,000 in gold coin to the State: “***Condition.*** SEC. 7. This Act is passed ***upon the condition*** that said S.C. Hastings shall pay into the State treasury the sum of one hundred thousand dollars.” (1-Appx-47 [emphasis added].)

In its final form, the 1878 Act, was titled “An Act to create Hastings’ College of the Law, in the University of the State of California,” and extended an offer of unilateral contract to S.C. Hastings on behalf of the State.¹ (1-Appx-43-44 [emphasis added].) Specifically, the 1878 Act authorized S.C. Hastings to “found and establish a Law College, to be ***forever*** known and designated as ‘Hastings’ College of the Law.’” (*Ibid.*

¹ A “unilateral contract” is a contract in which acceptance is conveyed through the accepting-party’s performance of his contractual obligations, rather than a promise to perform in the future. (See, e.g., *Davis v. Jacoby* (1934) 1 Cal.2d 370, 378.)

[Section 1, emphasis added].) Significantly, the Act not only provided that the College would bear the surname of its founder, but it added a possessive apostrophe to it (i.e., Hastings’), further indicating that the 1878 Act was adopted as a result of S.C. Hastings’ offer to the State and the State’s acceptance thereof. (*Ibid.*) The 1878 Act covenants that the College would be governed by an independent board of directors—the Board—instead of the Regents of the University of California (“UC”), despite its additional covenant that the College “affiliate” with UC. (*Ibid.* [Sections 1 & 2].) Customizing that Board for benefit of S.C. Hastings and his descendants, the State Legislature drafted the 1878 Act to mandate that the Board “**shall always** provide for filling a vacancy [on the Board] with some **heir or some representative of the said S.C. Hastings.**” (*Ibid.* [emphasis added].)

It was understood by all, including the College’s leadership at that time, and when the evidence was readily available and relevant parties alive, that a “contract” was being formed and that the consideration to be paid by S.C. Hastings to the State was not merely a detached gift. (See *Foltz v. Hoge* (1879) 54 Cal. 28, 28 [“The statute (1877-8, p. 533) and the payment of \$100,000 by Judge Hastings, constituted a complete contract between Hastings and the State”].) In fact, the 1878 Act explicitly provided that, if the State failed to pay to the College the agreed upon annuity, or the College “cease[d] to exist,” then the State must return to “S.C. Hastings, heirs or legal representatives the sum of . . . (\$100,000) and all unexpended accumulated interest,” 1-Appx-44 [Section 13], thereby establishing another customized condition for the benefit of S.C. Hastings and his descendants.

S.C. Hastings accepted the offer of unilateral contract extended by the 1878 Act by fully performing his end of the bargain and paying the \$100,000 in gold coin to the State and establishing the College. (See, e.g., 2-Appx-343; 4-Appx-577.) In accordance with the 1878 Act, on August

7th, 1879, the Regents of the UC system formally affiliated the College with the UC in a resolution entitled “Conditions of Affiliation” wherein the UC Regents:

Resolved, That the institution known as the Hastings College of Law shall be affiliated with the [UC] . . . and incorporated therewith, ***upon the following terms and conditions, which are hereby made a part of such affiliation . . .***:

First—The Directors of said College . . . shall have authority to fill vacancies in their Board . . .

Second—Honorable S. Clinton Hastings . . . and his legal representatives, shall ***always be entitled to have the appointment from his heirs or representatives of one of said Directors . . .***

The committee on the affiliation of the . . . College with the [UC] respectfully report that the plan and method of such affiliation . . . ***which is acceptable to Honorable S.C. Hastings (having been fully approved by him)*** are embodied in the foregoing resolutions, which your committee have prepared . . .

(RJN p.50 [Ex. 4, certain emphasis added].)

The State’s intention to be permanently bound by the 1878 Act was not only manifest on the Act’s face and its legislative history, but in the collective will of the People of the State. The year following the Act’s passage, in 1879, the People voted to ratify Article 9, Section 9 of the California Constitution to forbid any changes to the College’s “form and character” from what was laid out in the 1878 Act. (Cal. Const. Art. 9, § 9 [1879]; *People v. Kewen* (1886) 69 Cal. 215, 216.) The State Legislature further codified the terms of the Act into the State’s Education Code, Cal. Educ. Code, § 92200, *et seq.* (1977).

In over 144 years since its founding, the College has educated

thousands of lawyers and has been the subject of a few legal disputes. In a case almost identical to this one, S.C. Hastings himself, as the Dean of the College, petitioned the State Legislature for the enactment of legislation changing the composition of the College's Board, with whom S.C. Hastings was embroiled in dispute. (*People v. Kewen, supra*, 69 Cal. at p.216; see also 4-Appx-570-71 [1883 Act]; 4-Appx-573-74 [1885 Act].) The California Supreme Court struck down the resulting legislations, holding that alterations to the College's Board conflicted with the California Constitution. (*Kewen, supra*, at p.216.)

Although the specific constitutional text relied upon by the *Kewen* Court has since been altered, the underlying understanding persists: it is intended that the State Legislature may not eliminate a seat on the Board, or in any event alter the 1878 Act, except in very limited delineated circumstances, none of which are present here nor have College Defendants argued may exist. (See *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1024 [holding that the Legislature could eliminate the ex officio Board seat reserved for the Chief Justice of the California Supreme Court, because the power to set the Chief Justice's official duties was inherently reserved for the State and had statewide implications].)

B. College Defendants Initially Resist the Mounting Political Pressure to Change the College's Name.

In 2017, a lawyer by the name of John Briscoe began to question publicly in an op-ed whether the College should change its name, arguing erroneously that S.C. Hastings was a “promoter [and] financier of Indian-hunting expeditions in the 1850s.” (1-Appx-274, 321.) Debate ensued, and the College's Dean, David Faigman, formed the Hastings Legacy Review Committee (“HLRC”) to investigate the historical record underpinning the accusations against S.C. Hastings. (1-Appx-120.)

To that end, Dean Faigman retained, and made a member of the

HLRC, Dr. Brendan Lindsay, who, only two years earlier, in 2015, had published a book colorfully titled, *Murder State: California's Native American Genocide*. In his book on the subject, Dr. Lindsay had already openly accused S.C. Hastings of having “committed, directly and indirectly, some of the foulest depredations that men have committed against their fellow men in human history,” and that “men like Hastings formed the central motive for genocide in California.” (3-Appx-512-16 [¶¶7–21: discussing Dr. Lindsay and the HLRC’s historical “gap-filling,” their failure to consider important historical realities, and apparent hindsight bias].) Thus, at the time of the HLRC’s investigation, Dr. Lindsay had personal, economic, and professional interest to reach conclusions that corroborated, rather than undermined, the narrative of his book. (*Ibid.*) Nevertheless, Dean Faigman hired Dr. Lindsay as the sole historian on the committee and, predictably, Dr. Lindsay and the HLRC’s “White Paper” about S.C. Hastings parroted Dr. Lindsay’s earlier writings available for purchase. (See 1-Appx-123-241.)

The grievances alleged by the White Paper against S.C. Hastings were the following (1-Appx-138-160):

(1) S.C. Hastings employed a man, H.L. Hall, who—without knowledge or direction from S.C. Hastings—killed several Yuki Indians, concealed those killings from S.C. Hastings, and was thereafter terminated by S.C. Hastings upon Hastings’ discovery of the same, 1-Appx-180 [Deposition of S.C. Hastings, establishing that he lived approximately a seven-day horse ride from where the events occurred, that he did not discover the occurrence of such events until he was informed by his son, and after which he terminated the employment of H.L. Hall, upon their next meeting];

(2) S.C. Hastings petitioned the State to call forth the militia after the U.S. Army refused to assist him with, or prevent, the repeated slaughtering

of S.C. Hastings' livestock by the local Indigenous population. (1-Appx-182.) The militia was eventually organized by the State, and though never under S.C. Hastings' supervision or control, it went on to heinously massacre the local Indigenous population over the course of approximately six months, *ibid*; and

(3) S.C. Hastings purportedly wrote a promissory note in which he promised to cover the militia's costs until such time as State funds were made available for reimbursement, 1-Appx-156. Strikingly, there is no evidence that S.C. Hastings did, in fact, expend any funds in support of the State's rogue militia, nor was the referenced promissory note ever located. (See 1-Appx-195 [Deposition of B. Newman].)²

Apart from Dr. Lindsay and the HLRC's report, the State's own legislature, in the 1860's, commissioned an investigation into the underlying atrocities committed by the State's militia against the local Indigenous population. That investigation involved obtaining sworn statements from several witnesses, including S.C. Hastings himself. (1-Appx-180-81.) In neither the majority, nor minority reports arising from that investigation was S.C. Hastings accused of having done anything wrong, let alone illegal. (1-Appx-255.)

Ultimately, the HLRC and the College's Dean concluded that the White Paper's findings did *not* warrant changing the College's name and they argued that doing so would likely harm, not aid, the College's

² The account of the illusive promissory note comes in the form of a second- or third-hand report by a man named H.H. Buckles, who claimed to have been shown such a note by an agent of Kaskel Mears & Co., who in turn claimed to have received it from a Capt. Jarboe—a notorious Indian killer. (1-Appx-167.) Capt. Jarboe, in turn, purportedly represented the note to the agent as being from S.C. Hastings in connection with Jarboe's efforts to acquire supplies from Kaskel Mears & Co. without paying for them. (1-Appx-194.)

“restorative justice” efforts. (1-Appx-243-50 [July 29, 2020, HLRC report concluding on p.248 that “the College should not change its name.”]; 1-Appx-273-83 [September 2, 2020, report in which Dean Faigman concurs with the HLRC’s recommendation].) They drew such conclusions even before a group of alumni brought to light the White Paper’s many mischaracterizations and omissions, which resulted in the Board’s subsequent recognition that “there is *no incontrovertible proof that Judge Hastings knew more than he acknowledged*” in his deposition testimony. (2-Appx-349 [emphasis added].) And so, it was understood that the debate over whether to change the name of the College had come to an end. (3-Appx-470 [over a year later, Dean Faigman sought to “make clear” that he did not oppose a name change, despite the public’s perception otherwise].)

C. After the New York Times Publishes a Hit-Piece About the College and Its Namesake, the Board Urgently Undertakes a Clandestine Meeting and Reverses Its Stance on Changing the College’s Name.

College Defendants’ position against removing “Hastings” from the name of the College changed abruptly sometime between October 27, 2021 and November 2, 2021. The first date, October 27, 2021, coincided with the publication of a hit-piece written by Thomas Fuller of the New York Times, which included an image of the College’s Dean, David Faigman, and a headline falsely stating that S.C. Hastings “masterminded the killings of hundreds of Native Americans.” (3-Appx-470-87.) Dean Faigman issued a response to this article to the College community the same day, on October 27, 2021. (3-Appx-470.) A few days later, on November 2, 2021, and before the ink could dry on the New York Times article, the Board held a “special” meeting, with no advanced public notice, where it voted unanimously to direct Dean Faigman to work with the State Legislature to remove “Hastings” from the College’s name. (2-Appx-343-44, 354-55 [rejecting alumni concerns over the lack of notice]; 3-Appx-10-11 [email

from Dean Faigman announcing the Board’s decision].)

College Defendants have subsequently mischaracterized the Board’s November 2, 2021, action as having “voted to change” the College’s name. (AOB pp.11, 29.) The Board has never purported to hold such a vote, nor does it possess the authority to independently change the College’s name. (1-Appx-48 [AB 1936: “An act of the Legislature is needed to change the name of the College”]; 2-Appx-343 [“the Board does not have the authority to change the name of the College”].) Instead, the Board’s actions were limited to “recommend[ing]” to the State that the *Legislature* adopt a new name for the College. (2-Appx-391; see also 2-Appx-344.)

Notably, the Board’s name-change resolution was brought about in a manner that wholly disregards UC policy, which requires that when a campus’s renaming is proposed, reasonable efforts should be made to contact the family of the original donor, and that if the renaming impacts a public trust, the State Attorney General should also be consulted—neither of which did or could have occurred prior to the urgently held meeting at which the issue was decided. (RJN p.66 [Ex. 5]; see also *Foltz v. Hoge*, *supra*, 54 Cal. at p.34 [holding that the affiliation of the College with UC “imports a subjection to the same general laws and rules that are applicable to the parent institution”]; *Coutin v. Lucas*, *supra*, 220 Cal.App.3d at p.1020 [describing the 1878 Act as creating a “private trust of Serranus C. Hastings”]; e.g., 3-Appx-468 [¶10-11: declaration of Plaintiff Colin Hastings Breeze, a direct descendant of S.C. Hastings *who was attending the College at the time*, confirming no one from the College or Board reached out to him about the name-change resolution].)

On appeal, College Defendants all but concede that the Board’s decision to strike “Hastings” from the College’s name was driven by political expediency and was not the product of an open and deliberative process: “S.C. Hastings’ relative obscurity evaporated...when the New

York Times ran a detailed article discussing Hastings[.]” resulting in “increased public scrutiny” (which is neither true, nor measurable) and leading “Dean Faigman to endorse changing the College’s name.” (AOB pp.25-26.) In their rush to avoid political scrutiny, College Defendants shirked their earlier expressions that input “on the subject from students, alumni and the greater community needs to be obtained before a permanent decision is made” on the issue. (1-Appx-291.)

D. The State Legislature Enacts AB 1936.

After resolving that “Hastings” should be removed from the College’s name, College Defendants turned to deciding what to recommend to the Legislature for the College’s *new* name. Curiously, unlike the removal resolution, this process lasted several months and involved numerous public meetings, with the Board ultimately recommending that the State Legislature replace the College’s name with “College of the Law, San Francisco.” (2-Appx-346, 357-92.) Even more curiously, the Board made such a recommendation over the recorded objections of several Native Americans, to whom the name “San Francisco” harkens back to the Spanish mission era and the gruesome enslavement and abuse suffered by California’s Indigenous population at that time. (2-Appx-383; 3-Appx-478.) Despite that insensitivity, the State Legislature accepted the Board’s recommendation, and did so just in time to be announced before the November, 2022, elections. (1-Appx-47-48.)

On September 23, 2022, California Governor Gavin Newsom signed into law AB 1936 to: rename “Hastings College of the Law” to the generic “College of the Law, San Francisco;” amend the State’s statutes to conform to the new name; and eliminate S.C. Hastings’ family’s Hereditary Seat on the Board. (4-Appx-708-64.) At the same time, it remained silent as to the \$100,000 and whether any of those funds would be returned to S.C.

Hastings' family.³ (1-Appx-46-90.) Under Section 1 of AB 1936, the California Legislature also made several “findings” and declared, *inter alia*, that “S.C. Hastings, founder of the Hastings College of the Law, promoted and financed Native American hunting expeditions in the Eden and Round Valleys, funding bounties resulting in the massacre of hundreds of Yuki men, women, and children,” 4-Appx-709-10, despite refusing to conduct its own inquiry into the historical record.

In fact, when State Senator Andreas Borgeas cautioned that the State should not simply accept as true the accusations against S.C. Hastings, but should first investigate the historical record, he was met with stern opposition from one of AB 1936's coauthors, State Senator Tom Umberg: “the issue is...no longer debatable...[t]here is no reasonable doubt that Serranus Hastings engaged, involved, participated in the funding of this genocidal activity.” (4-Appx-688; but see 2-Appx-349 [conclusion by the College's Board that “there is no incontrovertible proof that Judge Hastings knew more than he acknowledged”].) The State, it seems, was bent on blindly deferring to the conclusions drawn by the HLRC and Dr. Lindsay, or at least those legislators' interpretations of those conclusions.

The Legislature was also cautioned about implications arising from “contract law” and other constitutional issues, but it was argued “that the matter would be settled outside our arena”—presumably by the courts. (See

³ College Defendants assert that the provision in the 1878 Act calling for repayment of \$100,000, plus interest, is not at issue here because Plaintiffs, College Defendants claim, have conceded that the College has not “ceased to exist.” (AOB pp.60, 64.) However, in their recitations, College Defendants fail to complete the alternative context of those references: “If, however, the trier of fact finds that the College has ‘ceased to exist’—it has not—then the State's failure to return S.C. Hastings' descendants the sum of the present value of the \$100,000...is a further breach of the agreement....” (1-Appx-39 [¶104].)

4-Appx-662 [statement by State Senator Glazer].) No substantive debate or meaningful review of the contractual and constitutional issues raised by Plaintiffs in this action were undertaken by the State Legislature prior to its enactment of AB 1936. (4-Appx-583-706.)

E. Plaintiffs File Suit Challenging the Constitutionality of AB 1936 and the Trial Court Denies College Defendants’ Anti-SLAPP Motion.

On October 4, 2022, mere days after Governor Newsom signed AB 1936 into law—and nearly a year after the Board passed its November 2, 2021, resolution seeking the enactment of such legislation—Plaintiffs filed suit challenging the constitutionality of AB 1936. (1-Appx-18, 46; 2-Appx-343-44, 354-55.) In their Complaint, Plaintiffs assert five causes of action against the State and College Defendants, who are charged with implementing AB 1936 and are sued in their official capacities as either the Dean or a Director of the College, for prospective declaratory and/or injunctive relief, as follows:

Claim 1: AB 1936 violates the Contracts Clauses of the California and U.S. Constitutions, (1-Appx-31-33 [¶¶58-65: seeking declaratory relief, only]);

Claim 2: AB 1936 violates the California and U.S. Constitutions’ prohibition against bills of attainder and ex post facto law, (1-Appx-33-34 [¶¶66-72: seeking declaratory relief, only]);

Claim 3: AB 1936 violates Article 9, Section 9 of the California Constitution which provides that “[t]he university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs....” (1-Appx-35 [¶¶73-77: seeking declaratory relief, only]);

Claim 4: College Defendants’ intended use of millions of taxpayer dollars to carry out AB 1936’s unconstitutional aims violates Code of Civil

Procedure Section 526a and California common law, (1-Appx-35-37 [¶¶78-84: seeking injunctive relief, only];) and

Claim 5: College Defendants' implementation of AB 1936's unconstitutional provisions, again in their official roles as the College's Dean or Directors, violates 42 U.S.C. § 1983, (1-Appx-37 [¶¶84-91: seeking declaratory and injunctive relief, only]).

Plaintiffs also assert, as less-favored alternatives to Claims 1 through 5, two additional claims for breach of contract against the State (Claim 6: for specific performance; and Claim 7: for damages). (1-Appx-38-40 [¶¶92-105].) Those claims, however, are not at issue in this appeal.

On October 7, 2022, College Defendants filed a special motion to strike Claims 1-5 pursuant to Section 425.16 of the Code of Civil Procedure. (1-Appx-91-95.) Upon doing so, all discovery and proceedings on the merits of Plaintiffs' claims were halted. (Cal. Code Civ. Proc., § 425.16, subd. (g); 6-Appx-1580-82.) As such, no discovery has been conducted as to any of the factual representations made by College Defendants, including as to: what transpired between October 27, 2021, and November 2, 2021, that resulted in College Defendants' sudden decision to seek legislation removing "Hastings" from the College's name, 2-Appx-472, 484; why the Board felt it appropriate to forego public notice of their intention to consider that issue prior to the Board's deciding it, 1-Appx-354-55; and whether, as College Defendants assert, it was the Board that spurred action by the Legislature or, as the current record seems to bear out, the Board acted only in response to legislation already being considered, *ibid.*

At the trial court, College Defendants argued that the anti-SLAPP Statute applies to Plaintiffs' claims because Plaintiffs' Complaint purportedly "take[s] issue" with College Defendants' "public statements" at Board meetings regarding the name-change resolutions; the "Board's

request that the Legislature enact legislation...”; and because Plaintiffs purportedly seek to prevent College Defendants from engaging in similar activity “in the future” including “referring to the College by its new name.” (1-Appx-93.) Those activities, according to College Defendants, gave rise to Plaintiffs’ causes of action, and not the unconstitutional aspects of AB 1936 itself. (*Ibid.*) Plaintiffs opposed the motion, and on December 19, 2022, after a hearing on the matter, the trial court issued an Order denying the same. (5-Appx-1265-68.) The trial court concluded that Plaintiffs’ claims “arise from” AB 1936 itself, not College Defendants’ activities prior to its enactment. (*Ibid.*) College Defendants now appeal that decision. (5-Appx-1285-87.)

Apart from the anti-SLAPP motion, the trial court also considered and denied Plaintiffs’ motion for a preliminary injunction. (6-Appx-1569-74.) Although Plaintiffs filed a notice of appeal as to that ruling, they later voluntarily dismissed their appeal after this Court denied Plaintiffs’ request to temporarily stay the effectiveness of AB 1936. (6-Appx-1576-77.) On February 2, 2023, this Court granted, over College Defendants’ opposition, Plaintiffs’ motion to expedite this anti-SLAPP appeal.

STANDARD OF REVIEW

This Court reviews de novo a trial court’s ruling denying an anti-SLAPP motion, *Callanan v. Grizzly Designs, LLC* (2022) 81 Cal.App.5th 517, 525, and engages in the same two-step analysis undertaken by a trial court—i.e., whether the plaintiff’s claims arise from the defendant’s protected speech or petitioning and, if so, whether those claims lack even “minimal merit.” (Cal. Code Civ. Proc., § 425.16; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) Where, as here, the trial court denied a defendant’s anti-SLAPP motion at the first step of the analysis, without reaching the second step, this Court may still affirm or reverse based on the second step, provided that the record is complete and the issue may be fully

considered on appeal. (*Muddy Waters, LLC v. Superior Court* (2021) 62 Cal.App.5th 905, 922.)

As discussed below, this Court should affirm the trial court’s ruling as to the first step of the anti-SLAPP analysis. If this Court reverses that ruling, however, it should reach the second step of the analysis only upon granting Plaintiffs’ concurrently filed motion requesting this Court to take judicial notice of certain legislative and executive history materials, which are central to that step of the analysis. (See, generally, RJN.) Absent such judicial notice, Plaintiffs submit that the record will not be sufficiently complete for this Court to conduct the second-step analysis at this time, and the Court should remand to the trial court to do so in the first instance. (See, e.g., *Symmonds v. Mahoney* (2019) 31 Cal.App.5th 1096, 1100.)

ARGUMENT

I. PLAINTIFFS’ CONSTITUTIONAL CHALLENGES TO RECENTLY ENACTED STATE LAW DO NOT “ARISE FROM” COLLEGE DEFENDANTS’ PURPORTEDLY PROTECTED ACTIVITIES.

The first step of the anti-SLAPP inquiry—whether plaintiff’s claims arise from the defendant’s engagement in protected activities—“is not always easily met.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66; see also *Baral v. Schnitt* (2016) 1 Cal.5th 376, 392; Cal. Code Civ. Proc., § 425.16.) A claim arises from protected activity when that activity underlies or forms the basis for the claim. (*Park v. Board of Trustees of Cal. State Univ.* (2017) 2 Cal.5th 1057, 1062.) A protected activity forms the basis of a claim “only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.” (*Id.* at p.1060 [original emphasis].)

A claim is not subject to the anti-SLAPP Statute simply because the relief sought from a government decision may have a collateral or ancillary

impact on a party's alleged protected speech. (See *San Ramon Valley Fire Prot. Dist. v. Contra Costa Cnty. Employees' Ret. Assn.* (2004) 125 Cal. App.4th 343, 357-58 [holding anti-SLAPP protection did not apply to declaratory relief action even though the relief sought would affect subsequent government activities] ["*San Ramon*"].) Nor is anti-SLAPP protection triggered merely for contesting a government decision "that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity." (*Park, supra*, 2 Cal.5th at p.1060.)

To carry their burden, College Defendants must establish that the purportedly protected activities they identify actually "supply elements of the challenged claim." (*Rand Res., LLC v. City of Carson* (2019) 6 Cal.5th 610, 621; see also *Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1232 ["[t]he [anti-SLAPP] statute's definitional focus is...[whether] the defendant's activity *giving rise to his or her asserted liability*...constitutes protected speech or petitioning," emphasis added].) College Defendants do not meaningfully attempt to meet this burden, AOB p.53, nor is it possible for them to do so.

A. College Defendants Have Abandoned Their Flawed Theories Asserted at the Trial Court and Their New Theory on Appeal Is Forfeit.

Theories not raised in the trial court cannot ordinarily be asserted for the first time on appeal. (*Nellie Gail Ranch Owners Ass'n v. McMullin* (2016) 4 Cal.App.5th 982, 997.) "Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." (*Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1519.) "This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal."

(Hewlett-Packard Co. v. Oracle Corp. (2021) 65 Cal.App.5th 506, 548 [quotations omitted].) This concern is brought into focus where, as here, the appealing party also seeks to recover attorneys’ fees and costs arising from its antics. (AOB p.38 [citing Cal. Code Civ. Proc., § 425.16 subds. (b)(1), (c)(1)].) Accordingly, where a point asserted on appeal was not adequately briefed in the trial court, the appellate court may treat the point as a forfeited new theory. (*Mendoza v. Trans Valley Transp. (2022) 75 Cal.App.5th 748, 769.*)

At the trial court, College Defendants’ anti-SLAPP motion identified the following protected activities from which they argued Plaintiffs’ claims arise:

- “public statements the College Defendants made in connection with meetings of the Board;”
- “the Board’s public resolutions removing ‘Hastings’ from the College’s name and changing the school’s name to UC College of the Law, San Francisco;”
- “the Board’s request that the Legislature enact legislation to conform the Education Code to the school’s new name;”
- “similar protected activity in the future, including any conduct referring to the College by its new name, any petitioning for additional funds to implement the name change, and any pursuit of other legislative amendments to the Education Code provisions addressing the College.”

(1-Appx-39.) College Defendants abandon on appeal each of these purported protected activities—several of which are factually incorrect and none of which gave rise to Plaintiffs’ constitutional challenges to AB

1936.⁴ (See, generally, AOB; 5-Appx-1265-68.)

Now, College Defendants argue that the relevant protected activity is “the ‘content of speech’ the government ‘has promoted or supported’”— i.e., AB 1936, itself, and the name-change it effectuates. (AOB p.39 [quoting *San Ramon, supra*, 125 Cal.App.4th at p.357]; but see 1-Appx-91-117 [College Defendants’ moving papers failed to cite *San Ramon*, let alone rely on its commentary].) College Defendants then obliquely argue that because AB 1936 “implicates” their speech, the anti-SLAPP Statute should apply to Plaintiffs’ claims concerning that legislation. (AOB p.43.) While, as explained below, College Defendants’ new theory also fails, this Court need not reach the issue because it is forfeit.

Rather than acknowledge and address their failure to assert this theory below, College Defendants obfuscate the issue, deceptively casting blame on the trial court for purportedly failing to consider “that point.” (AOB pp.14, 39 [claiming that the trial court’s non-existent mistake was nevertheless “understandable” because the anti-SLAPP analysis is “complex and challenging”].) In reality, the trial court did not address College Defendants’ current theory for the simple reason that they did not raise it anywhere in their moving or reply papers. Accordingly, College Defendants’ new theory as to the first step of anti-SLAPP analysis is forfeit, and this Court should not proceed further in its review of this matter.⁵

⁴ For example, the Board’s resolutions do not purport to change the College’s name; they merely direct the College’s Dean, who previously opposed the name-change, to seek legislation accomplishing as much. (2-Appx-344, 346.)

⁵ College Defendants’ forfeiture does not leave them without recourse. The substantive issues raised by their anti-SLAPP motion—substantially all of which are based solely on the pleadings and judicially noticeable material—may still be asserted by demurrer at the trial court.

**B. Plaintiffs’ Claims Do Not Arise From Speech or
Petitioning Activity Undertaken By College Defendants.**

College Defendants’ new theory regarding AB 1936 “itself,” and the hypothetical consequences they believe may follow from pre-AB 1936 law standing in place AB 1936, satisfy step one of the anti-SLAPP analysis. The crux of College Defendants’ burden under the first step is to establish that *their* purportedly protected activities “giv[e] rise to [their] asserted liability.” (See *Tuchscher Dev. Enterps. Inc. v. San Diego Unified Port Dist.*, *supra*, 106 Cal.App.4th at p.1232.) Simply “complain[ing] about [the plaintiff’s]...pleading” while failing to identify any statement or writing by that particular defendant on which the claims are based is insufficient to carry this burden. (*Shahbazian v. City of Rancho Palos Verdes* (2017) 17 Cal.App.5th 823.) On appeal, College Defendants newly claimed “protected” activities fail to meet this burden.

**1. The State Legislature, Not College Defendants,
Enacted AB 1936.**

Critically, AB 1936 itself is not *College Defendants’* speech. (See *Navellier v. Sletten*, *supra*, 29 Cal.4th at p.89 [“the critical consideration is whether the cause of action is based on *the defendant’s* protected free speech or petitioning activity,” emphasis added].) It is even disputable whether the enactment of a statute—as opposed to government endorsed pamphlets or advertisement—could even be conceivably construed as speech uttered by the State Legislature. (See *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 425-26 [“holding acts of governance to be protected activity under section 425.16 ‘would significantly burden the petition rights of those seeking mandamus review for most types of governmental action’...[T]he result would be to ‘chill the resort to legitimate political oversight over potential abuses of legislative and administrative power,’” citing approvingly *San Ramon*, *supra*, 125 Cal.App.4th at pp.357-58].)

Indeed, tellingly, the State did not file any anti-SLAPP motion in this case, and instead presses the legal questions presented by this case through its demurrer, the adjudication of which has been suspended due to College Defendants' filing of this appeal. (7-Appx-1579-83.)

The distinction between who uttered this purported "speech" is significant. Had College Defendants adopted a resolution replicating verbatim the text of AB 1936, their doing so would not by itself have given rise to this litigation because College Defendants have no authority to rename the College. (2-Appx-343 ["the Board does not have the authority to change the name of the College".]) That authority rested with the State Legislature until it contracted away that right as discussed below, but even if the State Legislature still had that authority, it would be the Legislature's action—not College Defendants'—that gave rise to Plaintiffs' claims. (1-Appx-48 [AB 1936: "An act of the Legislature is needed to change the name of the College"]; 3-Appx-550 [statement from Dean Faigman recognizing that the name-change goes into effect upon AB 1936's becoming effective, not on some earlier date].) Indeed, even if College Defendants had opposed the Legislature's enactment of AB 1936, Plaintiffs would *still* need to request injunctive relief prohibiting College Defendants from carrying out the actions otherwise mandated by State law, further impressing that it is the statute's enactment itself—not College Defendants' activities—that gives rise to Plaintiffs' claims. As such, College Defendants cannot demonstrate that AB 1936 extends anti-SLAPP protections to them in this context.

That College Defendants view themselves as the impetus for the State Legislature's adoption of the new name is irrelevant to whether anti-SLAPP protections apply. (See *Park v. Board of Trustees of Cal. State Univ.*, *supra*, 2 Cal.5th at p.1060 ["a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at

following speech or petitioning activity”].) The fact that speech or petitioning activity led up to a decision does not transform that decision itself into “protected activity.” (*City of Montebello v. Vasquez, supra*, 1 Cal.5th at pp.425-26; *San Ramon, supra*, 125 Cal.App.4th at pp.357–58.) Moreover, College Defendants’ representation that the idea to change the College’s name originated with them is factually dubious. (2-Appx-355 [stating the reason for the November 2, 2021, Emergency Meeting was “because legislation *is already being prepared* relating to the name of the College, and it is necessary for the Board to consider this subject so that the College can engage constructively in the legislative process,” (emphasis added)].)

The cases cited by College Defendants do not alter this result. In *Schroeder v. Irving City Council* (2002) 97 Cal.App.4th 174, for example, the plaintiff sought judgment against four city councilmembers because they voted in favor of a voter registration program that the plaintiff believed was unlawful. (*Id.* at p.181.) The defendants’ acts of voting in that case were unquestionably protected activities, and their voting was also unquestionably the basis for liability alleged by the plaintiff. (*Id.* at p.183 [acknowledging that the plaintiff conceded applicability of the anti-SLAPP Statute].) As such, the plaintiff’s claims arose from the defendant councilmembers’ engagement in protected activities, and the anti-SLAPP Statute applied. (*Ibid.*)

Conversely, in *San Ramon, supra*, 125 Cal.App.4th at p.357, this Court refused to apply the anti-SLAPP Statute to a plaintiff’s claims against a defendant government board responsible for administering retirement benefits for county employees. (*Id.* at p.347-49.) Because the protected activity identified by the government defendant—namely, its decision to assess \$2.3 million in additional pension contributions—was not “itself [] an exercise of free speech,” the anti-SLAPP Statute was found to be

inapplicable, even though the defendant government board had voted to adopt the action. (*Id.* at p.354.)

Here, unlike in *Schroeder*, Plaintiffs do not assert claims against College Defendants because of how they voted at any Board meetings, for any speech they uttered, or because they advocated for State legislation to change the College’s name. College Defendants merely occupy official positions on the College’s Board for which injunctive relief is needed to effectively cease implementation of AB 1936 by the College. While information regarding College Defendants’ past activities is relevant to Plaintiffs’ narrative of how AB 1936 came to be, those actions do not themselves give rise to Plaintiffs’ claims—AB 1936 does. (See *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1400 [admonishing a defendant for “confus[ing] the acts of alleged misconduct with the evidence needed to prove them”].)

In citing *San Ramon*, College Defendants excitedly identify on appeal what they believe to constitute a government decision that is itself “an expression of free speech”: AB 1936’s renaming of the College. (AOB pp.41-42.) In doing so, however, College Defendants overlook that, unlike the defendant in *San Ramon*, College Defendants did not enact or vote to enact AB 1936. Since College Defendants did not enact the purportedly protected activity they identify, AB 1936, that activity cannot have given rise to their asserted liability. (See *Navellier v. Sletten*, *supra*, 29 Cal.4th at p.89.)

2. Hypothetical Collateral Consequences on College Defendants’ Future Speech Do Not Give Rise to Plaintiffs’ Claims.

Central to College Defendants’ argument on appeal is that they would like to “refer[] to the College by the name they selected.” (AOB p.34.) They argue that Plaintiffs’ challenges to AB 1936 will “directly

affect[] how the College Defendants will represent the College’s identity,” and this should warrant application of the anti-SLAPP Statute. (AOB p.39.) But their concern for their hypothetical, future speech is not what has given rise to Plaintiffs’ claims. (See *Park v. Board of Trustees of Cal. State Univ.*, *supra*, 2 Cal.5th at p.1060 [disavowing the notion that anti-SLAPP protection is triggered merely for contesting a government decision “that was thereafter communicated by means of speech or petitioning activity”].) Nor is the relief sought Plaintiffs going to impose any restrictions on College Defendants’ speech that does not already exist in the absence of AB 1936. (See, e.g., Cal. Educ. Code, § 92200, *et seq.*) While College Defendants’ frustration under prior law may well return should Plaintiffs prevail on their claims, those claims do not arise from that frustration.

A simple thought experiment illustrates the point: if College Defendants vote tomorrow to revert to using the College’s former name, “Hastings College of the Law,” they would still be unable to refer to the College in the manner of their choosing, despite having aligned themselves with Plaintiffs, because AB 1936 mandates otherwise. (See AOB p.51.) Conversely, Plaintiffs, upon prevailing in this litigation, will not be “selecting” the College’s revived name any more than College Defendants “selected” the name codified by AB 1936. (*Supra*, Section I(B)(1).) As such, Plaintiffs’ claims cannot be said to be the source of any restrictions on College Defendants’ future speech activities; rather, those restrictions arise from the legal regime to which the College is subject. The validity of that regime, however, is not at issue in this litigation.

Plaintiffs, furthermore, do not seek to restrain College Defendants’ individual speech activities or seek to prohibit or limit the College Defendants’ ability to engage in lobbying activities in the future. At issue in this case is the *legal name* of the College, as set by the State Legislature and modified by AB 1936. Indeed, even in the context of this litigation,

none of the Parties consistently refer to the College by any of its given statutory names, past or present. (See, e.g., 1-Appx-3 [Plaintiffs allege that the “College” is “often referred to simply as ‘Hastings’ by the legal community.”].) Plaintiffs’ claims seek only to compel College Defendants to disregard all unconstitutional provisions of AB 1936 and to abide by relevant federal and state laws concerning the expenditure of taxpayer funds. Any separate grievances College Defendants harbor with respect to prior laws, or the impact those laws have on their speech, did not give rise to this litigation.

College Defendants’ desire, in essence, is to codify their preferred speech into State law. While the nullification of the relevant portions of AB 1936 will indeed deprive College Defendants of that outcome, that alone does not subject Plaintiffs’ claims to the anti-SLAPP Statute. (See *Park v. Board of Trustees of Cal. State Univ.*, *supra*, 2 Cal.5th at p.1060 [“[A] claim is not subject to a motion to strike simply because it contests an action or decision...that was [] communicated by means of speech or petitioning activity.”]; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77-81.)

Even if there was some rationale by which a protected activity of College Defendants could be construed as forming a basis for Plaintiffs’ claims (there is not), the gravamen of those claims remains focused on the constitutionality of AB 1936—not on College Defendants’ speech activities. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1550 [the question presented is “whether the gravamen of the cause of action targets protected activity”].) Accordingly, College Defendants cannot carry their burden under the first step of the anti-SLAPP analysis, and this Court should affirm the trial court’s decision denying their anti-SLAPP motion.

II. THERE IS A “REASONABLE PROBABILITY” THAT PLAINTIFFS WILL PREVAIL ON THEIR CLAIMS.

As discussed above, College Defendants failed to carry their burden under the first step of the anti-SLAPP analysis. Even if they had, however, the trial court’s Order denying their anti-SLAPP motion should be affirmed for the alternative reason that Plaintiffs have demonstrated “the requisite minimal merit” to proceed. (See *Navellier v. Sletten*, *supra*, 29 Cal.4th at p.94.)

A. College Defendants Misstate the Applicable Legal Standards.

In the second step of the anti-SLAPP analysis, the plaintiff must demonstrate that its claims have at least “minimal merit” by “establishing a probability of success.” (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p.384.) In doing so, this Court does not weigh evidence or resolve conflicting factual claims. (*Ibid.*) Its inquiry is limited to “whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment.” (*Id.* at pp.384-85.) As such, this Court must accept Plaintiffs’ evidence as true, and evaluate College Defendants’ showing only to determine if it defeats Plaintiffs’ claims as a matter of law. (*Id.* at p.385; see also *Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.) The Court may look to the pleadings, declarations or affidavits, and judicially noticeable material concerning the facts upon which liability is based when conducting this analysis. (Cal. Code Civ. Proc., § 425.16(b)(2); *Navellier v. Sletten*, *supra*, 29 Cal.4th at p.89.)

College Defendants misapply these standards in two significant respects. First, the trial court’s decision denying Plaintiffs’ motion for preliminary injunction has no bearing on this appeal. (AOB p.56.) The trial court’s preliminary injunction decision is not a decision on the merits of Plaintiffs’ claims. (See *Huntingdon Life Scis., Inc. v. Stop Huntingdon*

Animal Cruelty USA, Inc. (2005) 129 Cal.App.4th 1228, 1248–49 [“a decision on an application for a preliminary injunction does not amount to a decision on the ultimate rights in controversy.”].) The preliminary injunction decision has no issue preclusive effect on Plaintiffs’ claims or on College Defendants’ anti-SLAPP appeal, and it was the product of the trial court’s application of an entirely different set of evidentiary burdens and equitable standards. (See *Lam v. Ngo* (2001) 91 Cal.App.4th 832.)

Second, College Defendants conflate Plaintiffs’ ultimate burden of persuasion at trial with the “minimal merit” necessary to defeat College Defendants’ anti-SLAPP motion at this preliminary stage in the proceedings. (E.g., AOB p.15.) College Defendants insist, for example, that Plaintiffs face a heavy burden in proving that the 1878 Act is a contract and not merely a statute, likening it to “sailing into ‘a tropical-force headwind.’” (AOB p.58.) For purposes of the anti-SLAPP Statute, however, Plaintiffs do not need to convince either the courts or a jury that they *will* prevail on the merits, only that a legally sufficient basis exists on which they *could* prevail. (*O&C Creditors Group, LLC v. Stephens & Stephens XII, LLC* (2019) 42 Cal.App.5th 546, 566 [describing the burden under the second step as “not particularly high”]; *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907-908 [analogizing the second step analysis to that “used in determining motions for nonsuit, directed verdict, or summary judgment.”].) Since the Parties do not dispute that it is at least “plausible” that the 1878 Act constitutes a contract, 1-Appx-109, and admissible and judicially noticeable materials establish that plausibility, Plaintiffs have carried their burden for purposes of establishing the existence of a contract under the anti-SLAPP analysis.

B. Claim 1: Contracts Clauses

“Both the United States and California Constitutions contain provisions that prohibit the enactment of laws effecting a ‘substantial

impairment’ of contracts.” (*Alameda Cnty. Deputy Sheriff’s Ass’n v. Alameda Cnty. Employees’ Ret. Ass’n* (2020) 9 Cal.5th 1032, 1075 [citing *Cal Fire Loc. 2881 v. California Pub. Employees’ Ret. Sys.* (2019) 6 Cal.5th 965, 977]; see also Cal. Const. art. 1, § 9; U.S. Const. art. I, § 10, cl. 1.) Courts apply a “two-step test” to determine whether a state law has impermissibly impaired a contract. (*Sveen v. Melin* (2018) 138 S. Ct. 1815, 1821; *Alameda Cnty. Deputy Sheriff’s Ass’n, supra*, 9 Cal.5th at p.1075.)

First, as a threshold question, courts determine “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.” (*Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 411; *Apartment Ass’n of Los Angeles Cnty., Inc. v. City of Los Angeles* (9th Cir. 2021) 10 F.4th 905, 913 [assessing “the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents the party from safeguarding or reinstating his rights”].)

Second, where a state acts to impair its own contractual obligations (as the State has done here), courts apply a heightened judicial scrutiny: the legislation “may be constitutional if it is reasonable and necessary to serve an important public purpose.” (*U.S. Trust Co. of N.Y. v. New Jersey* (1977) 431 U.S. 1, 22, 25 [“[D]eference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake.”].) Not only must the State identify a “legitimate” public purpose such as remedying “a broad and general social or economic problem,” *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 245–49 [internal citations omitted], the legislation must also be drafted in a “moderate course” in achieving such goals to serve a legitimate purpose. (*Alameda Cnty. Deputy Sheriff’s Ass’n, supra*, 9 Cal.5th at p.1075.)

1. The State Entered into a Binding Contract with S.C. Hastings.

“[A] legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of [the Contracts Clause].” (*Indiana ex rel. Anderson v. Brand* (1938) 303 U.S. 95, 100 [quoting *State of New Jersey v. Yard* (1877) 95 U.S. 104, 114]; see also *Taylor v. Board of Ed. of City of San Diego* (1939) 31 Cal.App.2d 734, 746 [reciting the same].) Where a unilateral contract is alleged to arise from such an undertaking, courts do not need to “even inquire into[] manifestations of legislative intent to confer contractual rights” (although evidence of such intent is present here), but instead determine only whether the alleged contractual right arising from the legislation has “vested.” (See *Cal Fire Loc. 2881, supra*, 6 Cal.5th at pp.977, 983, 988 [discussing *Kern v. City of Long Beach* (1947) 29 Cal.2d 848].) Once the offered benefit has been earned through performance of the required act, the benefit conveyed by the legislation may be “protected by the contract clause, even in the absence of a manifest legislative intent to create contractual rights.” (*Cal Fire Loc. 2881, supra*, 6 Cal.5th at p.985.)

Here, the State, vis-à-vis the 1878 Act, invited S.C. Hastings to perform by paying the State \$100,000. Upon his doing so, the 1878 Act—and its many perpetual provisions regarding the name and governance of the College—vested according to its own terms. (1-Appx-44 [Section 7: “This Act is passed upon the condition that S.C. Hastings shall pay into the State treasury the sum of one hundred thousand dollars.”].) Upon such vesting, the College was established, its Board convened, and the State’s annual funding obligations were met, all in accordance with the terms of Act. Had the benefits afforded by the 1878 Act not vested upon the State’s receipt of S.C. Hastings’ payment, then the State could have reneged on its

deal immediately upon accepting Hastings' gold and made use of it in any manner it deemed fit—a patently absurd result, yet is, in effect, precisely what College Defendants urge this Court to find. That the State has waited 144 years to seize those funds does not little ameliorate the problem.

College Defendants argue that no contract was formed between the State and S.C. Hastings because there was no “unmistakable” expression of intent by the Legislature to do so. (AOB p.58.) They are wrong on two counts.

First, as discussed above, courts do not look for evidence of such legislative intent where the contractual right established by the legislation has vested through performance undertaken by a person in reliance on that legislation. “The Legislature is presumed to be cognizant of judicial decisions relevant to the subject matter of a statute” and it is assumed “that in passing a statute, the Legislature acted with full knowledge” of the applicable law at the time. (*Tafoya v. Hastings College* (1987) 191 Cal.App.3d 437, 447.) It follows that the State, as well as its first Chief Justice, S.C. Hastings, were aware of the U.S. Supreme Court’s landmark decision, *Trustees of Dartmouth College v. Woodward* (1819) 17 U.S. 518, 644, which applied generally applicable contract law when holding that the charter granted to the trustees of Dartmouth College by the British Crown in 1769 “is plainly a contract” within the meaning of the Contract Clause. Since the State and S.C. Hastings understood the legal landscape to be as such, see *Foltz v. Hoge, supra*, 54 Cal. 28 [citing *Dartmouth* in 1879, one year after the enactment of the 1878 Act], retroactively requiring them to satisfy some higher standard would serve only to undermine the Legislature’s stated desire that the terms of the 1878 Act continue in perpetuity—in diametric opposition to established canons of construction. (Cal. Code Civ. Proc., § 1859.)

Second, even if a showing of such unmistakable intent is required,

ample evidence exists on which a trier of fact could draw that conclusion. “In California law, a legislative intent to grant contractual rights can be implied from a statute if it contains an unambiguous element of exchange of consideration by a private party for consideration offered by the state.” (*Cal. Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494 [“a clear manifestation of intent to contract does not require explicit statutory acknowledgement”]; see also *Retired Employees Assn. of Orange Cnty, Inc. v. Cnty. of Orange* (2011) 52 Cal.4th 1171, 1187 [“Although the intent to make a contract must be clear, our case law does not inexorably require that the intent be express.”].)

Here, the 1878 Act authorized S.C. Hastings to found and establish a College that would “forever” bear his family’s name and afford rights to his Heirs and representatives in perpetuity “on the condition” that he pay the State \$100,000. (1-Appx-43 [Sect. 1].) S.C. Hastings accepted those terms, paid the consideration to the State treasury, and founded the College. (1-Appx-47 [Sect. 1, subd. (e)].) The self-evident bargained-for exchange laid out in the Act is further bolstered by the College’s admission in *Foltz v. Hoge, supra*, 54 Cal. at pp.28–29, that “[t]he statute (1877-8, p.533) and the payment of \$100,000 by Judge Hastings, constituted a complete contract between Hastings and the State, under which the college was founded.” (*Ibid*; see also *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1020 [describing the 1878 Act as creating a “private trust of Serranus C. Hastings”]; John H. Langien, *The Contractarian Basis of the Law of Trusts* (1995) 105 Yale L.J. 625, 627.) SB 483 further reflects that the 1878 Legislature and S.C. Hastings himself envisioned the Act to be “a contract” that would serve as consideration for the State’s receipt of S.C. Hastings’ payment of \$100,000 in gold coin. (RJN pp.25-30 [Ex. 2: Section 1, 3].) Accepting as true the evidence favorable to Plaintiffs, as this Court must do in the second-step analysis, Plaintiffs easily carry their burden of

establishing a reasonable probability that a contract exists. (See *Flatley*, *supra*, 39 Cal.4th at p.326.)

The cases cited by College Defendants, AOB pp.57-58, fail to persuade otherwise because they deal with statutes that are broadly applicable to the public or pertain to a state's inherent taxing and spending authority. (See *City of Covington v. Commonwealth of Kentucky* (1899) 173 U.S. 231, 238 [state tax exemption could be legislatively withdrawn]; *Cranston Firefighters, IAFF Loc. 1363, AFL-CIO v. Raimondo* (1st Cir. 2018) 880 F.3d 44, 49-50 [state-run pension plan could be legislatively modified, but leaving open the question of whether the mere creation of a retirement plan to which members contribute their pay establishes a contract].) The 1878 Act, on the other hand, neither conveys rights to broad swaths of the public, nor seeks to place limits on the State's inherent authority to tax and spend. Rather, the relevant obligations arising under the 1878 Act pertain to a single person, identified by name, as well as his Heirs and legal representatives, and contemplate promises by the State made in exchange for a payment of \$100,000 tendered by a single individual.

2. Plaintiffs Have Standing to Seek Protection for Their Contractual and Statutory Interests.

College Defendants argue that Plaintiffs may assert their claims for declaratory relief under the Contracts Clauses of the U.S. and California Constitutions only if "they show they have concrete 'rights flowing from'" the underlying contract. (AOB p.65.) The cases College Defendants cite, however, do not support that proposition but discuss contractual privity requirements generally applicable to breach of contract actions, which claims are not being asserted against College Defendants. (See *D. Cummins Corp. v. United States Fidelity & Guaranty Co.* (2016) 246 Cal.App.4th 1484, 1490; *Gardiner v. Gaither* (1958) 162 Cal.App.2d 607, 622.)

Even if Plaintiffs must establish contractual privity to assert their

constitutional claims, they have amply done so. First, Plaintiffs have, in their own right, vested contractual, statutory, and reputational interests to protect. (See Cal. Educ. Code, § 92200, *et seq.* (2021) [the College is to bear the “Hastings” family name, provide for the Hereditary Seat, and afford S.C. Hastings’ heirs or representatives the right to recover his \$100,000 payment from the State should the College “cease to exist”].) AB 1936 eliminates the Hastings’ family name from the College; forever tarnishes S.C. Hastings’ and his descendants’ reputations, and by extension the College’s alumni who made substantial investments to acquire diplomas bearing the Hastings name; eliminates entirely the Heirs’ eligibility for the Hereditary Seat, and frustrates their ability to safeguard their continued financial interest in the College’s existence.

Plaintiffs also have standing as third-party beneficiaries because the 1878 Act was “made expressly for the benefit of a third person”—namely, “some heir or some representative of said S.C. Hastings.” (Cal. Civ. Code, § 1559; 1-Appx-43-44 [Sections 1, 13].) That a contract is “made expressly for the benefit” of a third party has been held not to mean “exclusively,” *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, “solely,” *Le Ballister v. Redwood Theatres, Inc.* (1934) 1 Cal.App.2d 447, or “primar[il]y,” *Montgomery v. Dorn* (1914) 25 Cal.App. 666, for the benefit of a third person. Nor does this phrase require that performance be rendered “directly” to the beneficiary, *Lucas v. Hamm* (1961) 56 Cal.2d 583, or that the beneficiary be specifically named or identified in the contract, *Garratt v. Baker* (1936) 5 Cal.2d 745. The 1878 Act specifically contemplates and extends rights to S.C. Hastings’ “heirs or legal representatives”—including the Heirs and at least one member of HCCC—and also consistently refers to the State’s obligations, including as to the College’s name, as being perpetual and necessarily surviving S.C. Hastings himself and even the dissolution of the State itself. (See 1-Appx-109; 1-Appx-44 [Sect. 13:

referring to “the State, or its successor”].) As such, the 1878 Act evinces a clear intent to convey benefits to Plaintiffs, which they may protect.

3. AB 1936 Substantially and Impermissibly Impairs the State’s 1878 Contract with S.C. Hastings.

Next, College Defendants erroneously argue that AB 1936 does not substantially impair the State’s agreement with S.C. Hastings because, according to them, the parties’ bargain is “unaffected” by AB 1936. (AOB p.68.) However, the plain language of the 1878 Act affords perpetual, mandatory rights to S.C. Hastings’ descendants. S.C. Hastings paid the State \$100,000 in consideration—a fortune in 1878—with the expectation that the College would (a) “forever” bear the “Hastings” family name; (b) that one of his heirs or representatives “shall always” have a Hereditary Seat on the Board; and (c) his descendants would be entitled to \$100,000 plus “unexpended accumulated interest” should the College ever “cease to exist.” (1-Appx-43-44; see also Cal. Civ. Code, §§ 1636, 1638, 1641, 1643-44, 1647, 1652, and 1654.) AB 1936 substantially impairs the State’s obligations under its contract with S.C. Hastings by wholly eliminating or at least frustrating these plainly material terms.

Nor is AB 1936 reasonable or necessary to advance a legitimate and important public interest. The College Defendants rely on *Conn. State Police Union v. Rovella* (1st Cir. 2022) 36 F.4th 54, which cuts against their position. In *Rovella*, the First Circuit recognized that a state acts self-interestedly if the legislation was enacted “because doing so was politically expedient.” (*Id.* at p.65.) The court also reaffirmed that legislation that merely benefits “special interest[s]” as opposed to a more social or economic problem is evidence of a political motivation. (*Id.* at p.63.) In that case, the court ultimately held the disputed legislation had a legitimate public purpose since the only contrary evidence presented by plaintiffs was the fact that lawmakers were aware of the potential conflict between the

enacted legislation and the prior agreement when enacting the law. (*Id.* at p.65.)

Contrary to the isolated singular evidence presented in *Rovella*, College Defendants have not successfully contradicted the multiple allegations in the pleadings or Plaintiffs’ evidence of a politically motivated intent. For instance, College Defendants’ evidence includes an admission that the Yuki and associated tribes “[had] not called upon [College Defendants] to change the name of the school.” (1-Appx-282.) In fact, “[m]any expressly opposed it.” (*Ibid.*) College Defendants also admit the name change was to “attract the best legal minds” and “in the best interests of the College and key stakeholders,”—not the Yuki and associated tribes—and that “the College relies on its relationships to constituents and lawmakers.” (2-Appx-339 [¶13].) In addition, College Defendants’ position on the College’s name shifted 180-degrees after the publication of a hit-piece in the New York Times. These facts indicate that the disputed aspects of AB 1936 have no legitimate purpose, albeit buried in otherwise public interest efforts.

Furthermore, AB 1936 could have been more moderately drafted with equal effect in that all the identifiable “restorative justice” measures promulgated for the benefit of the Round Valley Indian Tribes and Yuki people can be provided without removing the “Hastings” family name from the College or the Board’s Hereditary Seat. As College Defendants have already acknowledged, the State (and the College) is free to pursue “restorative justice” measures as they see fit and in a manner that does not undermine such noble aims by altering the State’s existing contractual obligations. (1-Appx-247-49, 279-83.) Plaintiffs do not challenge other meaningful restorative justice measures in AB 1936 such as forming a non-profit organization to be jointly governed by the Yuki (1-Appx-48, Sec.2(b)(1)); organizing pro bono legal assistance to assist tribal leadership

with various legal support (*id.* at Sec.2(b)(2)); and so forth. There is no evidence that any of the tribes opposed such proposals, whereas the same cannot be said about the College’s name change. (E.g., 1-Appx-327 [tribe leader co-authoring an article affirming that “changing the name of the school” would do little for his people]; 2-Appx-383 [criticizing the new name “San Francisco”].) Unlike those efforts, the name change was merely political, gratuitous, and superfluous, designed to appease a narrow political constituency prior to the November, 2022, election, without providing any measurable benefit thereto, and alleviating the State of its contract obligations to the detriment of Plaintiffs. (See *Alameda Cnty. Deputy Sheriff’s Ass’n, supra*, 9 Cal.5th at p.1075 [emphasis added].) Therefore, AB 1936 cannot be deemed to serve a reasonable, necessary, and important public purpose and violates the Contracts Clause of the State and U.S. Constitutions.

C. Claim 2: Bill of Attainder and Ex Post Facto

Both the State and U.S. Constitutions, Cal. Const. Art. 1, § 9, U.S. Const. Art. I, § 10, cl. 1, prohibit the State from enacting legislation constituting a bill of attainder or ex post facto law. “[L]egislative acts, no matter what their form, that apply...to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.” (*United States v. Lovett* (1946) 328 U.S. 303, 315.) “The Ex Post Facto Clause protects liberty by preventing governments from enacting statutes with ‘manifestly unjust and oppressive’ retroactive effects.... In such a case, the government refuses ‘to play by its own rules.’ It has deprived the defendant of the ‘fair warning,’ that might have led him to preserve exculpatory evidence.” (*Stronger v. California* (2003) 539 U.S. 607, 611.)

Contrary to the College Defendants’ assertion, “a civil statute may violate the Ex Post Facto Clause if it is so punitive either in purpose or

effect as to negate [the State’s] intention to deem it ‘civil.’” (*Coats v. New Haven Unified Sch. Dist.* (2020) 46 Cal.App.5th 415, 425 [emphasis added].) Here, AB 1936’s punitive purpose and effects are plainly apparent. AB 1936 removes “Hastings” from the College’s name, eliminates the Hereditary Seat, and, at a minimum, frustrates their right to recover S.C. Hastings’ \$100,000 payment in the event the College closes, because the State surmised that “S.C. Hastings...promoted and financed Native American hunting expeditions...fund[ed] bounties resulting in the massacre of hundreds of Yuki men, women, and children...enriched himself through the seizure of large parts of [Eden and Round Valleys]...[and] bear[s] significant responsibility for the irreparable harm caused to the Yuki people and the Native American people of the state” such that “S.C. Hastings’ name must be removed from the College to end this injustice and begin the healing process for the crimes of the past.” (1-Appx-48 [Sec. 1, subd. (u).])

These Legislative “findings” make clear that AB 1936 seeks to retroactively, and without judicial trial, heap scorn and punishment upon S.C. Hastings, his descendants, and indeed, by association, upon the tens of thousands of the College’s graduates to gaslight and squelch any dissent to the State’s politically motivated action. It does so despite the California Legislature’s own investigation of these events in 1860, which did not, in either the majority or minority reports resulting therefrom, levy such charges against S.C. Hastings when he was alive to answer for himself and when pertinent evidence and witnesses were available. Therefore, AB 1936 violates the State and U.S. constitutional prohibitions against the enactment of bills of attainder and ex post facto laws.

D. Claim 3: Collegiate Freedom

By eliminating “Hastings” from the College’s name and eliminating the Hereditary Seat, AB 1936 violates Article 9, Section 9 of the California Constitution, which provides that “[t]he university shall be entirely

independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs....” (See *People v. Kewen*, *supra*, 69 Cal. at p.216 [applying art. 9, § 9 to the College]; see also *Tafoya v. Hastings College of the Law*, *supra*, 191 Cal.App.3d at pp.442-43.) AB 1936’s changes to the College’s name and governance structure are politically motivated and constitute unconstitutional changes to the College.

College Defendants argue that AB 1936’s mandate that “S.C. Hastings’ name must be removed from the College” does not violate Article 9, Section 9 of the California Constitution because the College’s current Board invited such changes. (AOB p.79 [ignoring that the Board did not ask the Legislature to eliminate the Hereditary Seat].) Even if the Board had invited those changes, case law counsels against the narrow reading of the State Constitution which College Defendants advance. (See *Coutin v. Lucas*, *supra*, 220 Cal.App.3d at p.1024.) Prior to 1918, Article 9, Section 9 expressly forbade all changes to the “form and character” of the College. (*Tafoya v. Hastings College of the Law*, *supra*, 191 Cal.App.3d at pp.442-43.) While the language “form and character” was removed in 1918, it was substituted with a similar mandate that the College “shall be entirely independent of all political or sectarian influence....”

The 1918 amendment was not intended to diminish the Board’s constitutional obligation to refrain from changing the College’s form or character. (See *Coutin v. Lucas*, *supra*, 220 Cal.App.3d at p.1024.) In fact, the ballot arguments for the 1918 amendment stated that the proposed changes were limited to the following: “(a) To permit the adaptation of the details of the internal organization of the university to meet modern-day requirements; (b) to give to the alumni of the university direct representation on the governing body of the university.” (*Ibid.*) It stands to reason, then, that the mere fact the Board requested the State to act in an

unconstitutional manner by modifying the form or character of the College for reasons unrelated to such narrow concerns does not mean that the State may in fact do so.

Even so, AB 1936 violates the plain meaning of the Article 9’s current prohibition on political or sectarian influence. From the New York Times article spurring the Board to distance itself from the “Hastings” name, to Dr. Lindsay’s predetermined historical analysis, to the State Legislature’s refusal to research the historical events upon which has opined, AB 1936 represents the wishes and demands of the current political climate—not a rational and deliberate choice made free of such influences.

E. Claim 4: Taxpayer Claim

State common law and the Code of Civil Procedure Section 526a authorize taxpayers to sue to enjoin the State from carrying on any unlawful actions. (See, e.g., *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1249.) As pertinent here, at least one member of HCCC has, within the past year, paid taxes to the State, providing revenue for the State’s General Fund. (3-Appx-511 [¶4].) According to legislative history materials concerning AB 1936, the State expects that “approximately \$3.4 million” in “General Fund costs” will result from AB 1936. (4-Appx-700.) Of that amount, “\$1.9 million would be for one-time costs related to renaming the institution; [and] \$945,000 for one-time costs associated with communicating the new name to prospective students and employers.” (*Ibid.*) College Defendants’ planned use of taxpayer money to carry out AB 1936’s unconstitutional provisions constitute wasteful and ultra vires expenditures.

F. Claim 5: 42 U.S.C. § 1983

Section 1983 provides a cause of action against any person acting under color of state who deprives another’s rights guaranteed by the U.S. Constitution, including the right not to have the State impair its obligations

of contract. (*S. Cal. Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, 886.) Here, College Defendants intend to act, under color of state law afforded to them by virtue of their positions as Dean or Directors of the College, to implement the unconstitutional aims of AB 1936. (Cal. Educ. Code, § 92200; 4-Appx-550-51; 3-Appx-490.) As discussed above, College Defendants cannot lawfully do so without violating Plaintiffs' rights protected by the U.S. Constitution.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the trial court's Order denying College Defendants' anti-SLAPP motion.

Dated: March 16, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this brief contains 12,952 words, including footnotes and excluding the cover page, tables, and the certificates. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: March 16, 2023

By: /s/ Gregory R. Michael
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CERTIFICATE OF SERVICE

I hereby certify that: I am at least 18 years of age and not a party to this action. My business address is Michael Yamamoto LLP, 1400 Shattuck Ave., #412, Berkeley, CA 94709. On March 16, 2023, I served a true and accurate copy of the foregoing Respondents' Answering Brief on the persons named and in the manner set forth below.

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

Dated: March 16, 2023

/s/ Gregory R. Michael

Gregory R. Michael