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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO (UNLIMITED JURISDICTION)

HASTINGS COLLEGE CONSERVATION COMMITTEE, an unincorporated association of alumni of Hastings College of the Law; STEPHEN HASTINGS BREEZE, an individual; STEPHANIE AZALEA BRACKEL, an individual; CATHERINE TORSTENSON, an individual; SCOTT HASTINGS BREEZE, an individual; COLLETTE BREEZE MEYERS, an individual; and COLIN HASTINGS BREEZE, an individual,

Plaintiffs,

v.

STATE OF CALIFORNIA; DAVID FAIGMAN, in his official capacity as Chancellor and Dean of

CASE NO. CGC-22-602149

COLLEGE DEFENDANTS' NOTICE OF SPECIAL MOTION TO STRIKE AND SPECIAL MOTION TO STRIKE (CODE CIV. PROC., § 425.16); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

[Declarations of Claes Lewenhaupt, David Faigman, and Matthew S. Kahn; Request for Judicial Notice; and Proposed Order filed concurrently]

HEARING:
Date: November 30, 2022
Time: 9:30 a.m.

Hastings College of the Law; SIMONA AGNOLUCCI, in her official capacity as chair of the Board of Directors of Hastings College of the Law; CARL ROBERTSON, in his official capacity as vice chair of the Board of Directors of Hastings College of the Law; SHASHIKALA DEB, in her official capacity as a director of Hastings College of the Law; MICHAEL EHRLICH, in his official capacity as a director of Hastings College of the Law; ANDREW GIACOMINI, in his official capacity as a director of Hastings College of the Law; ANDREW HOUSTON, in his official capacity as a director of Hastings College of the Law; CLAES LEWENHAUPT, in his official capacity as a director of Hastings College of the Law; MARY NOEL PEPYS, in her official capacity as a director of Hastings College of the Law; COURTNEY POWER, in her official capacity as a director of Hastings College of the Law; ALBERT ZECHER, in his official capacity as a director of Hastings College of the Law; and DOES 1-25, inclusive,

Defendants.

Dept: 302
Judge: Hon. Richard B. Ulmer Jr.

Action Filed: October 4, 2022
Trial Date: None set

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 30, 2022 at 9:30 a.m., or as soon thereafter as the matter may be heard, in Department 302 of the Civic Center Courthouse, Superior Court of California for the County of San Francisco, located at 400 McAllister Street, San Francisco, CA 94102, defendants David Faigman, Simona Agnolucci, Carl Robertson, Shashikala Deb, Michael Ehrlich, Andrew Giacomini, Andrew Houston, Claes Lewenhaupt, Mary Noel Pepys, Courtney Power, and Albert Zecher (the "College Defendants") will and hereby do move to strike or dismiss all of Plaintiffs' causes of action against the College Defendants.

The College Defendants seek an order striking or dismissing Plaintiffs' claims against them because this is a meritless strategic lawsuit against public participation (or "SLAPP") barred by Code of Civil Procedure section 425.16. Plaintiffs' claims against the College Defendants all arise from the College Defendants' exercise of free speech and petition rights enshrined in the federal and state constitutions, and Plaintiffs cannot show a probability of prevailing on any of those claims.

First, Plaintiffs' claims against the College Defendants arise from classic protected activity. Plaintiffs take issue with public statements the College Defendants made in connection with meetings of the Board of Directors (the "Board") of UC Hastings College of the Law (the "College") to discuss a possible change in the College's name; 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; and the Board's request that the Legislature enact legislation to conform the Education Code to the school's new name. Plaintiffs sue the College Defendants not only in connection with protected conduct the College Defendants already undertook, but also to block 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.

Second, because Plaintiffs' claims against the College Defendants involve statements before an official proceeding, statements in connection with an issue under consideration in an official proceeding, and "other conduct in furtherance of the exercise of the constitutional right of petition or . . . free speech in connection with . . . an issue of public interest" (Code Civ. Proc., § 425.16,

subd. (e)), the burden shifts to Plaintiffs to prove "that there is a probability that [they] will prevail on the claim[s]" (*id.*, subd. (b)(1)). Plaintiffs cannot carry that burden as to any of their claims.

Plaintiffs' principal Contracts Clause claim fails for several independent reasons. The writing on which they base their claim is a *statute*, not a contract, and that statute contains nothing like the clear and unmistakable language required for a court to conclude that legislation creates contract rights. Even if there were a contract, Plaintiffs would have no rights to assert here: they are not parties to any agreement, have no basis to act as successors in interest to any party to the supposed contract, and have no concrete or reasonable third-party interests in any provision of the contract allegedly breached. And even if Plaintiffs could assert any contractual rights, their Contracts Clause claims would still fail because they have identified no impairment of any contract, much less the substantial, unreasonable, and unnecessary impairment required to make out a constitutional claim.

Plaintiffs' remaining claims are equally meritless. Plaintiffs' *ex post facto* claim fails because no criminal law was retroactively applied to *anyone*, much less to them. Their bill of attainder claim is also without merit: nothing in the Legislature's enactment singles out or punishes either S.C. Hastings's descendants or alumni of the College, and in any event the law is supported by a prospective, nonpunitive interest in safeguarding the College's existence, identity, and relationship with indigenous communities and the broader public. Plaintiffs' claim about the College's constitutional authority also fails because they cannot identify any unwanted interference with the College's internal affairs. And Plaintiffs' remaining claims are derivative of their initial claims and fail for the same reasons: their taxpayer claim to enjoin what they call "unlawful" expenditures has no probability of success because there was nothing unlawful in the College's decisions or the Legislature's statute, and their claims under 42 U.S.C. § 1983 fail because they have not raised any colorable federal constitutional claims.

The Court should strike or dismiss Plaintiffs' claims against the College Defendants and award the College Defendants attorney's fees and costs. (Code Civ. Proc., § 425.16, subd. (c)(1).)

The College Defendants' special motion to strike is based on this notice of motion; the accompanying memorandum of points and authorities; the concurrently filed declaration of Claes Lewenhaupt ("Lewenhaupt Decl."), declaration of Dean David Faigman ("Faigman Decl."), request for judicial notice, and declaration of Matthew S. Kahn ("Kahn Decl."); all other evidence, pleadings,

and records on file in this action; and any other written or oral evidence or argument that may be presented at or before the time this motion is decided.

DATED: November 2, 2022

Respectfully submitted,

By: */s/ Theodore J. Boutrous Jr.*

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INTRODUCTION

The College's decision to change its name was the result of a years-long, deliberate, and transparent public process that included extensive research, public hearings, and input from a wide range of stakeholders and experts. Plaintiffs' lawsuit challenging the result of that process is precisely the kind of strategic, meritless lawsuit that California's anti-SLAPP statute is meant to prevent.

Recent years shed light on the role of the College's founder, S.C. Hastings, in a campaign of violence against indigenous people. The College examined the historical record and engaged in public debate about how to repair its relationship with indigenous communities and choose a name for the College that expressed its values and identity. Ultimately, the Board passed resolutions changing the College's name and asking the Legislature to amend the Education Code to conform to the new name. The Legislature did so, passing a statute (AB 1936) with overwhelming support. Not everyone may agree with that outcome, but that is exactly how the democratic process should work.

Plaintiffs are alleged distant descendants of S.C. Hastings and a group of alumni who wanted to maintain the Hastings name. They now ask this Court to unwind the College's resolutions and the Legislature's statute. But those efforts run headlong into California's anti-SLAPP statute.

Plaintiffs' claims against the College Defendants are inseparable from speech and petitioning conduct. Plaintiffs challenge public statements by the College's dean and Board members, including at hearings to debate the name change; the Board's resolutions removing "Hastings" and changing the College's name; and the Board's request for legislation to conform to the new name. Plaintiffs also seek relief that would bar the College Defendants from engaging in similar speech and petitioning conduct in the future, including asking the Legislature for funding and requesting other changes to the College's statutory framework. Because those claims fall within the anti-SLAPP statute's "broad" scope (*Equilon Enters. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60), Plaintiffs must prove that there is "a probability that [they] will prevail on the claim[s]" (Code Civ. Proc., § 425.16, subd. (b)(1)).

Plaintiffs cannot satisfy that burden. Their principal Contracts Clause claim rests on a supposed contract between S.C. Hastings and the State. But there is no contract—just an 1878 *statute*. Statutes create contractual rights only if the Legislature's intent to do so is unmistakable, but nothing in the 1878 Act clears that hurdle. In any event, Plaintiffs have no standing to assert contractual rights and

cannot show that any contract was impaired, much less impaired in a substantial and unreasonable way.

Plaintiffs' remaining claims are also flawed. They assert that AB 1936 violates constitutional protections against retroactive criminal punishments, but they cannot show that any descendants or alumni are singled out for punishment, particularly in light of the plainly nonpunitive interests motivating the act. They claim that AB 1936 invades the College's constitutional sphere of autonomy, but they ignore that the Act simply conformed the Education Code to the *College's* exercise of authority at the *College's* request. And they tack on *ultra vires* expenditure and 42 U.S.C. § 1983 claims that depend on, and falter for the same reasons as, their other claims.

BACKGROUND

S.C. Hastings arrived in California during the Gold Rush. (Faigman Decl., Ex. 1, at p. 3.) Once here, he became California's first Chief Justice and third Attorney General. (Compl. ¶ 34.) He also became one of the state's largest landowners (*ibid.*), amassing tens of thousands of acres across northern California (Faigman Decl., Ex. 1, at p. 3.) Those property holdings generated "significant wealth" for Hastings. (Compl. ¶ 34.)

Much of the land Hastings acquired had been occupied, for centuries, by indigenous communities, including the Yuki People. (Faigman Decl., Ex. 1, at p. 3.) As white settlers like S.C. Hastings moved into the area, the land became prone to "cycles of violence": large herds of livestock disrupted the seeds, game, and fish on which the Yuki depended, so the Yuki raided the livestock "to subsist," and that in turn led to reprisals from the settlers. (*Id.* at pp. 3-4.) In the end, that violence "virtually extinguished" the indigenous population. (Lewenhaupt Decl., Ex. 3, at p. 2.)

S.C. Hastings contributed to this story in at least two ways. First, as Hastings admitted, he hired H.L. Hall to manage his livestock and kept Hall on even after learning he had committed "outrages" against indigenous people, including killing 14 in retaliation for a livestock raid. (Lewenhaupt Decl., Ex. 3, at pp. 3-4.) Hastings's choice left Hall in a position of power, and Hall abused that position, committing additional atrocities—including the murder of indigenous women and children. (*Ibid.*) Second, Hastings was "instrumental" in the formation and maintenance of a militia company, the Eel River Rangers (*id.* at pp. 5-6), which "massacred hundreds of Yuki [P]eople" (Compl. ¶ 43).

In 1878, Hastings donated $100,000 to start a law school. (Faigman Decl., Ex. 2, at p. 1.) As

Hastings explained, his "desire" was "to diffuse a knowledge of the great principles of jurisprudence, not only among those who propose to devote themselves to the noble profession of the law, but also among all classes of society." (Kahn Decl., Ex. 5, at p. 342.)

The Legislature enacted a statute in 1878 to create the College. (Kahn Decl., Ex. 1 [the "1878 Act"].) "The object of th[e] Act" was "to grant a perpetual annuity for the support and maintenance of [the] College." (*Id.*, § 13.) To that end, it provided that the State would fund the College from Hastings's donation. (*Id.*, § 8.) If the State withheld funding or the College "cease[d] to exist," Hastings or "his heirs or legal representatives" would be returned the $100,000 plus "unexpended accumulated interest." (*Id.*, § 13.) The Act also stated that the school would "be forever known and designated as 'Hastings' College of the Law'"; that a Board seat would be reserved for an "heir" or "representative" of Hastings; and that the Chief Justice of California would be Board president. (*Id.*, §§ 1, 14.)

Many of the Act's provisions have been amended over time. In 1885, for instance, the school's name was changed from Hastings' College to Hastings College. (Kahn Decl., Ex. 2, § 1.) And in 1980, the Legislature eliminated the provision reserving the position of Board president for the Chief Justice of California. (See *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1019.) The Act's provisions are now codified as separate sections of the Education Code. (See Educ. Code, §§ 92200-92215.)

In 2017, Dean David Faigman convened a committee to review Hastings's legacy. (Faigman Decl., Ex. 3, at p. 2.) He asked Professor Brendan Lindsay to conduct a "focused historical examination" of Hastings's conduct. (*Ibid.*) Professor Lindsay prepared a 119-page paper concluding that Hastings played a "significant" role in "fomenting violence and atrocity against California Indians, particularly in and around his holdings in Eden Valley." (Faigman Decl., Ex. 1, at pp. 3-6.) In September 2020, Dean Faigman's committee prepared a report recommending that the College pursue restorative justice initiatives. (Faigman Decl., Ex. 3, at pp. 4-7.) Dean Faigman did not initially recommend changing the College's name, though he recognized that there were alumni and faculty "on both sides of the question" (*id.* at p. 10) and that a name change was not off the table (Faigman Decl., Ex. 4, at p. 2).

Debate about S.C. Hastings's legacy continued and, in November 2021, the Board passed a public resolution deciding that "Hastings" should be removed from the College's name. (Lewenhaupt Decl., Ex. 1.) All Board members supported that resolution (*ibid.*), including Claes Lewenhaupt, the

great-great-grandson of S.C. Hastings who has sat on the Board since 2006. (Lewenhaupt Decl. ¶¶ 2, 7-8, 15.) So did Dean Faigman, whose position on the name change had evolved. (See Faigman Decl., Ex. 5, at pp. 1-2.)

After some alumni protested the resolution, the Board convened a committee "to further review Professor Lindsay's analysis" and "the arguments of the alumni who disagreed with it." (Lewenhaupt Decl., Ex. 3, at p. 1.) Even after giving S.C. Hastings "the benefit of the doubt," the committee concluded that he "played a significant role" in atrocities against the Yuki People. (*Id.* at p. 2.) After receiving that report, the Board reaffirmed its decision "to remove Hastings from the College's name." (Lewenhaupt Decl., Ex. 4, at p. 14.) Then, after an "extensive" deliberative process (Faigman Decl., Ex. 5, at p. 2), the Board passed a resolution changing the College's name to UC College of the Law, San Francisco and calling on the Legislature to pass legislation to conform the Education Code to the name. (Lewenhaupt Decl., Ex. 5, at pp. 15-16.)

The Legislature passed AB 1936 in August 2022, with zero "no" votes in either house. (See Kahn Decl., Ex. 4, at p. 4.) It emphasized the College's "three-year project to examine founder S.C. Hastings' involvement in mass killings of Native Americans" and its conclusion "that changing the name of the College is in the best interests of the continuation of the College in perpetuity" given "the needs of the current generation of Yuki Tribal members and the College's legal community." (Compl., Ex. 2 ["AB 1936"], § 1, subds. (k), (n).) AB 1936, which goes into effect in January 2023, amends the Education Code to conform to the name the College selected and eliminates the statutory provision reserving a Board seat for a Hastings heir or representative. (*Id.*, §§ 20-21.)

Plaintiffs are six alleged descendants of S.C. Hastings and an association of unidentified College alumni. (Compl. ¶¶ 7-13.) They view AB 1936 as the work of "modern-day cancel-culturalists" (*id.* ¶ 2) and seek to have the statute nullified in court. They sue the State as well as Dean Faigman and all members of the Board in their official capacities. (*Id.* ¶¶ 15-27.)

LEGAL STANDARD

The anti-SLAPP statute targets lawsuits that burden "the valid exercise of the constitutional rights of freedom of speech and petition." (Code Civ. Proc., § 425.16, subd. (a).) Its protections, which "shall be construed broadly" (*ibid.*), apply equally to public officials sued in their official capacity.

(*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17.) If the defendant shows the plaintiff's claims arise from protected activity, the burden then "shifts to the plaintiff to demonstrate the merit of the claim[s] by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) The plaintiff must make a "prima facie factual showing sufficient to sustain a favorable judgment," akin to "a 'summary-judgment-like procedure.'" (*Id.* at pp. 384-385.) A defendant who prevails on an anti-SLAPP motion is entitled to attorney's fees and costs. (Code Civ. Proc., § 425.16, subd. (c)(1).)

ARGUMENT

I. Plaintiffs' Claims Arise from Protected Speech and Petitioning Activity.

A defendant's initial burden under the anti-SLAPP statute is not heavy. The defendant doesn't have to prove that the plaintiff intended to chill protected conduct or that any chilling occurred. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) The defendant need only show that the acts "about which plaintiffs complain" fall "within the plain language of the anti-SLAPP statute." (*Id.* at p. 90.)

The anti-SLAPP statute bars suits, like this one, that "'masquerade as ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights.'" (*Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, 901.) Virtually every allegation in the Complaint about the College Defendants describes speech and petitioning activity. Plaintiffs complain, for instance, that Dean Faigman submitted a public report to the Board (a government entity) discussing S.C. Hastings's legacy and suggesting actions the Board could take (Compl. ¶¶ 45-47); that the Board held a public meeting to discuss changing the College's name (*id.* ¶¶ 3, 51); that Board members deliberated about the issue and resolved to change the College's name (*ibid.*); that the Board held a later public meeting at which "[p]oliticians," "Directors," "College leadership," "Native people," and others debated the name change, after which the Board adopted another resolution selecting a new name (*id.* ¶ 4); and that the Board called on the Legislature to pass a law conforming the Education Code to the new name (*id.* ¶¶ 3–4). Those allegations fall squarely within multiple provisions of the anti-SLAPP statute.

Statements related to official proceedings. The statute protects statements made during any "official proceeding" or in connection with issues under consideration in such proceedings. (Code Civ. Proc., § 425.16, subd. (e).) That language covers speech and petitioning activity linked to all manner of public proceedings. (See, e.g., *Schwarzburd v. Kensington Police Protection & Cmty. Servs. Dist.*

Bd. (2014) 225 Cal.App.4th 1345, 1354-1355 [comments at board meetings]; *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 426-427 [public comments and votes at council meetings].) Here, Plaintiffs take issue with statements Dean Faigman and others made in connection with Board meetings dedicated to debating a name change for the College. (Compl. ¶¶ 3-4, 45-47, 51.)

Conduct in furtherance of speech and petitioning. In two ways, Plaintiffs' claims also arise from "conduct in furtherance of the exercise of the constitutional right of petition or . . . free speech in connection with . . . an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).)

First, the College Defendants' public expressions about the College's name and identity and resolutions changing the school's name are speech that "'contribute[s] to the public debate'" about an issue of broad public interest. (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 150.) The anti-SLAPP statute protects "vigorous public debate related to issues of public interest" (*Seelig v. Infinity Broad. Corp.* (2002) 97 Cal.App.4th 798, 808), and the College Defendants' speech about the name and the reasons for changing the name directly "contributed to and furthered the ongoing public debate" about S.C. Hastings's legacy and the steps the College should take in response (*Sandlin v. McLaughlin* (2020) 50 Cal.App.5th 805, 825-826).

Second, Plaintiffs allege that the Board asked the Legislature to pass a statute recognizing the College's new name and amending the Education Code accordingly. (Compl. ¶ 4.) Again, that was unquestionably an issue "in which the public t[ook] an interest" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042), and the College Defendants' "pursuit of prospective legislation" is core protected activity (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 583).

Future protected conduct. Plaintiffs also seek to prevent the College Defendants from engaging in similar conduct in the future. They seek injunctive relief that would prevent the College Defendants from lobbying legislators for additional funding to implement the name change. (Compl. ¶¶ 82-83.) They also seek declaratory relief that would prevent the College Defendants from pursuing any other change to the College's original statutory framework—or even from referring to the College by the name they selected. (*Id.* ¶¶ 63-64, 75-76.) Because Plaintiffs' claims would prevent the College Defendants "'from exercising their political or legal rights'" on important issues of public interest, they are textbook examples of what the anti-SLAPP statute protects against. (*Sarver*, *supra*, 813 F.3d at

p. 901; see *Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 907.).[1]

II. Plaintiffs Cannot Establish a Probability of Prevailing on Their Claims.

A. Plaintiffs Cannot Show That Their Contracts Clause Claim Has Merit.

Plaintiffs claim that AB 1936 violates the federal and state Contracts Clauses—for which courts use identical analyses (*Campanelli v. Allstate Life Ins. Co.* (9th Cir. 2003) 322 F.3d 1086, 1097)—by impairing a supposed contract between the State and S.C. Hastings. But the writing on which Plaintiffs rely is a *statute*, and nothing in that act overcomes the heavy presumption that a statute doesn't create contract rights. And even if the act were read as a contract, Plaintiffs' claims would still fail: they have no rights under that supposed agreement and have identified no impairment of the agreement.

1. The 1878 Act Is a Statute, Not a Contract.

Plaintiffs' case rests on what they call "the State's written contract with S.C. Hastings." (Compl. ¶ 6.) That "contract" isn't a contract at all—it's printed in the *Statutes of California*, is labeled "An Act," and starts with the words "The People of the State of California, represented in Senate and Assembly, do enact as follows." (See 1878 Act.) The 1878 Act is a *statute*. And given "the centuries-old concept that one legislature may not bind the legislative authority of its successors," a statute can create contract rights only if it does so "'in unmistakable terms.'" (*United States v. Winstar Corp.* (1996) 518 U.S. 839, 872, 878; see *San Diego Police Officers' Assn. v. San Diego City Emps.' Ret. Sys.* (9th Cir. 2009) 568 F.3d 725, 737 [requiring "clear and unmistakable" language].) That "unmistakability" standard is exacting, and a party arguing that a statute is a contract "confronts a tropical-force headwind." (*Cranston Firefighters v. Raimondo* (1st Cir. 2018) 880 F.3d 44, 48.)

The 1878 Act doesn't have anything like the unmistakable "terms of contract" required to satisfy that standard. (Cf. *Indiana ex rel. Anderson v. Brand* (1938) 303 U.S. 95, 105.) To the contrary, the Act's language is consistently legislative. The Legislature called the law an "Act" four times and made clear it was "enact[ed]" by the Legislature. (1878 Act, title & §§ 7, 13, 15.) Like most statutes,

[1] The anti-SLAPP statute is subject to three "narrowly construed" exceptions (*City of Montebello*, *supra*, 1 Cal.5th at pp. 419-420), none of which applies here. This case is not an "enforcement action" brought by a public official (Code Civ. Proc., § 425.16, subd. (d)) and does not involve "comparative advertising" (*FilmOn.com*, *supra*, 7 Cal.5th at p. 147). Nor is this "entire action . . . brought in the public interest" because Plaintiffs seek relief "greater than or different from that sought on behalf of the general public." (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 312.)

the 1878 Act features provisions addressing its "object" and its entry into force following "its passage." (*Id.*, §§ 13, 15.) And it uses the prescriptive language of lawmaking, "authoriz[ing]" the College and detailing how the College will be funded and operated. (*Id.*, §§ 1-14.)

Plaintiffs focus on provisions stating that the College would "be forever known and designated as Hastings' College of the Law" and that there would "always" be a Board seat reserved for a Hastings heir or representative. (1878 Act, § 1.) But even a statement that something will "forever" be the case doesn't satisfy the requirement "of a plain expression by the legislature that at no time would it exercise the reserved power of amending or repealing the act." (*City of Covington v. Kentucky* (1899) 173 U.S. 231, 238-239.) At best, the Complaint identifies language making it "plausible" that the Legislature in 1878 intended to bind itself by contract—but mere plausibility falls well short of the "unmistakable" language required to read a statute as a contract. (*Cranston*, *supra*, 880 F.3d at p. 49.)

Plaintiffs also allege that Hastings "accepted the terms and conditions" of the supposed contract by donating $100,000 toward the College. (Compl. ¶ 38.) But when it comes to government programs, it's virtually always the case that a plaintiff could claim "the state 'received something in return.'" (*Cranston*, *supra*, 880 F.3d at p. 49.) Because such "'give something/get something' argument[s]" would flip the presumption that statutes don't create contract rights on its head (*id.* at p. 50), exchanges of that sort do not show a legislative intent to bind the government by contract "'in terms too plain to be mistaken.'" (*Puckett v. Lexington-Fayette Urban Cnty. Gov't* (6th Cir. 2016) 833 F.3d 590, 600.)

Too easily reading statutes as contracts "would enormously curtail the operation of democratic government." (*Pittman v. Chicago Bd. of Educ.* (7th Cir. 1995) 64 F.3d 1098, 1104.) Plaintiffs may be "disappointed by the action of the [State] legislature" in passing AB 1936 (*ibid.*), but their disagreement with that choice does not give them any basis to sidestep the democratic process.[2]

[2] Contrary to Plaintiffs' allegation (Compl. ¶ 61), *Foltz v. Hoge* (1879) 54 Cal. 28 doesn't establish that the 1878 Act is a contract. There, the College, in an effort to preserve its all-male status, argued that the Act was a "complete contract" that immunized it from the broader rule in the UC system guaranteeing women the right to enroll. (*Foltz*, *supra*, 54 Cal. at p. 28.) The College's comment had nothing to do with any alleged contractual obligation; it was an effort to preserve the Board's decisional independence. In any event, that comment is not binding here. Issue preclusion doesn't apply because the Court in *Holtz* didn't address whether the 1878 Act was a contract. (See *Hong Sang Mkt., Inc. v. Peng* (2018) 20 Cal.App.5th 474, 491, fn. 4.) And judicial estoppel doesn't apply because the College lost the appeal. (See *Victrola 89, LLC v. Jaman Props. 8 LLC* (2020) 46 Cal.App.5th 337, 357-358.)

2. Plaintiffs Have No Rights Under the Supposed Contract.

Even if the 1878 Act were read as a contract, Plaintiffs would have no contractual rights to assert. Plaintiffs seek declaratory relief under Code of Civil Procedure section 1060. But that section is not a limitless vehicle for a plaintiff to tell the State "how to do its job." (*Monterey Coastkeeper v. Cent. Coast Reg'l Water Quality Control Bd.* (2022) 76 Cal.App.5th 1, 18.) Plaintiffs can sue under section 1060 only when they are "legally interested in" a contract (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331), meaning they "ha[ve] rights flowing from" it (*Gardiner v. Gaither* (1958) 162 Cal.App.2d 607, 621). If the plaintiffs are "not a party to" the contract and do not "fit into any . . . exception[] to the requirement of contractual privity," they cannot invoke section 1060—no matter how "enthusiastic [they] may be" in their disagreement or what "practical" or "indirect" interest they might trace to the contract. (*D. Cummins Corp. v. U.S. Fid. & Guar. Co.* (2016) 246 Cal.App.4th 1484, 1490-1491.)

Hastings died in 1893 and is not a party here. Under black-letter law, Plaintiffs lack standing "to assert violations of another person's . . . rights." (*People v. Holmes* (2022) 12 Cal.5th 719, 778-779.) And although Plaintiffs make conclusory allegations that the alleged descendants are "successors in interest and/or third-party beneficiaries" of the supposed contract (Compl. ¶ 94), both theories fail.[3]

Successors in interest. Descendants cannot automatically assert rights of a distant ancestor; they need a legal basis to do so. Plaintiffs haven't alleged that there was any "assignment by [S.C. Hastings] of [his] rights under" any contract. (*Otay Land Co. v. Royal Indem. Co.* (2008) 169 Cal.App.4th 556, 565.) And although contract rights can sometimes be inherited, plaintiffs wanting to act as a decedent's representatives have to execute declarations and get an order showing they are the successors in interest of that part of the estate. (Code Civ. Proc., § 377.32.) Plaintiffs haven't claimed anything like that, and their asserted descendance from Hastings alone isn't enough.

Third-party beneficiaries. Parties can sue as third-party beneficiaries only to enforce provisions made "for [their] benefit." (*Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 944.) But the 1878 Act doesn't give Plaintiffs any such rights they could assert here.

[3] Plaintiffs appear to concede that the Hastings College Conservation Committee has no contract standing. (Compl. ¶¶ 6, 94.) And for good reason: associations have standing only to the extent their individual members have standing (*Apartment Assn. of L.A. Cnty., Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 129), and alumni have no conceivable rights in any supposed contract between the State and Hastings (*Kremen v. Cohen* (9th Cir. 2003) 337 F.3d 1024, 1029).

First, the provision of the Act naming the College makes no reference to descendants. (1878 Act, § 1.) Plaintiffs thus have no footing in the "language of the [Act]" to show that allowing individual descendants to sue to keep the College's name would be "'consistent with the objectives of the contract.'" (*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 830.) And although the Act arguably gives Hastings's heirs an interest if the College lost its funding or "cease[d] to exist" (1878 Act, § 13), Plaintiffs agree "the College has not 'cease[d] to exist'" (Compl. ¶ 104), nor has the State left the College without funding (AB 1936, § 1, subd. (g)). So even if Plaintiffs were "heirs" of Hastings who could seek relief under *that* provision, they would not have any interest in the provision of the 1878 Act establishing the College's name. At a minimum, therefore, Plaintiffs lack standing to challenge the name change, and any claims related to the name change should be stricken as a result. (See *Baral*, *supra*, 1 Cal.5th at pp. 391-392 [anti-SLAPP motion can be granted as to portions of a cause of action].)

Nor can Plaintiffs sue in connection with AB 1936's elimination of the hereditary Board seat. Plaintiffs asserting third-party beneficiary status must show that they "would *in fact* benefit from the contract." (*Goonewardene*, *supra*, 6 Cal.5th at p. 830, italics added.) Without that "actual and substantial interest in" the contract (*City of Santa Monica* (2005) 126 Cal.App.4th 43, 59), a plaintiff would have only a "'conjectural or hypothetical'" interest insufficient to satisfy the standing requirement (*Dept. of Fair. Emp't & Hous. v. M&N Fin. Corp.* (2021) 69 Cal.App.5th 434, 443-444).

The descendant plaintiffs can claim at best an attenuated, hypothetical interest in the Board seat. For over thirty-five years, only two people have held that seat: Jan Lewenhaupt, S.C. Hastings's great-grandson, who held it for twenty years; and Claes Lewenhaupt (a defendant here), who took over on his father's nomination in 2006. (Lewenhaupt Decl. ¶¶ 4, 7-8.) Claes Lewenhaupt is young and in good health, and he had had no plans to leave the seat before AB 1936 was enacted. (*Id.* ¶ 9.) And none of the descendant plaintiffs here ever expressed any interest in that Board seat to Claes Lewenhaupt; in fact, until the dispute over Hastings's legacy arose, those plaintiffs were not in communication with Claes Lewenhaupt at all. (*Id.* ¶¶ 20-21.)

3. Plaintiffs Cannot Identify Any Substantial or Unreasonable Impairment.

A state always retains "'wide discretion'" to exercise its police powers, even when it enters into a contract. (*U.S. Tr. Co. of N.Y. v. New Jersey* (1977) 431 U.S. 1, 16.) A state can act in any way that

does not effect a "substantial" impairment of a contract. (*Sveen v. Melin* (2018) 138 S.Ct. 1815, 1821-1822.) And even a substantial impairment of a contract does not give rise to any claim if the act was "reasonable and necessary to fulfill an important public purpose." (*In re Seltzer* (9th Cir. 1996) 104 F.3d 234, 236.) Plaintiffs cannot clear either hurdle.

Substantial impairment. A state does not substantially impair a contract if it leaves "the contractual bargain" intact. (*Sveen*, *supra*, 138 S.Ct. at p. 1822.) Here, the text of the 1878 Act makes unambiguous that the Legislature's "object" was "a perpetual annuity for the support and maintenance of [the] College." (1878 Act, § 13.) That was S.C. Hastings's view, too. As he put it in 1878, his "desire" was "to diffuse a knowledge of the great principles of jurisprudence." (Kahn Decl., Ex. 5, at p. 342.) The unity of the parties' "reasonable expectations" (*Sveen*, *supra*, 138 S.Ct. at p. 1822) is confirmed by the Act itself: of many provisions, the only ones for which the Legislature provided a remedy involve the College's existence and funding. (1878 Act, § 13.) But again, the College hasn't ceased to exist (Compl. ¶ 104), and the school has been consistently funded (AB 1936, § 1, subd. (g)). The parties' bargain is thus entirely unaffected by AB 1936.

History confirms the point. One provision of the 1878 Act required the Chief Justice of California to serve as the Board's president. (1878 Act, § 14.) The Legislature repealed that provision in 1980. (*Coutin*, *supra*, 220 Cal.App.3d at p. 1020.) Although that statute was challenged (unsuccessfully) on the ground that it interfered with the College's autonomy (see *id.* at pp. 1023-1027), no one suggested the Legislature could not amend that provision of the 1878 Act *as a matter of contract*. Nor was there any suggestion of a breach of contract in 1885, when the school's name changed from Hastings' College to Hastings College. (Kahn Decl., Ex. 2, § 1.)

Reasonable and necessary. A state can never "'contract away its power to govern in the public interest.'" (*Conn. State Police Union v. Rovella* (2d Cir. 2022) 36 F.4th 54, 62.) Although courts look skeptically on a state's efforts to avoid its own "financial obligations" (*U.S. Tr. Co.*, *supra*, 431 U.S. at pp. 25-26), when a state acts to serve "the public interest," its act is lawful unless the challenger proves it was "unreasonable or unnecessary." (*Rovella*, *supra*, 36 F.4th at pp. 63-67.) Because AB 1936 was amply justified by the State's rational interest in protecting the College's existence and relationship to indigenous communities and the broader public, Plaintiffs here cannot shoulder that burden.

In *Rovella*, for instance, Connecticut passed a law in response to nationwide calls for an end to racial injustice that nullified a provision in the state's collective bargaining agreement with the police union that kept police records from public disclosure. (36 F.4th at p. 58.) The Second Circuit held that the union was unlikely to prevail on its Contracts Clause claim. It explained that the state had not "acted self-servingly" in a way that justified heightened scrutiny, in that the state was not trying "to benefit itself financially" and instead was responding to protests calling for increased public accountability. (*Id.* at pp. 65-67.) Affording "deference" to the state's determination that the law was an appropriate way "to address issues related to police misconduct or accountability," the court held the union had failed to show that the law was unreasonable or unnecessary. (*Id.* at pp. 67-68.)

As in *Rovella*, the State here grappled with a policy issue: how to address a public institution's ties to an ugly era of the State's history and safeguard that institution's relationship with indigenous communities and the public. Far from seizing any financial advantage, the State took important and costly action to ensure the College's ability to operate "in perpetuity." (AB 1936, § 1, subd. (n).) Because those efforts "served a legitimate public purpose," the State's determination that AB 1936 "was reasonable and necessary" is entitled to deference and cannot be overcome absent a "compelling" showing. (*Rovella*, *supra*, 36 F.4th at pp. 63-67.)

Plaintiffs cannot make that showing. There's no doubt the State has a legitimate interest in safeguarding the College's identity and relationship with the public. And although Plaintiffs protest about a lack of "evidence" of what exactly S.C. Hastings "knowingly encouraged" (Compl. ¶ 50), it's undisputed that the Legislature had before it the fruits of *years* of labor by the College in grappling with the historical record, engaging with stakeholders, debating a variety of measures, and weighing the benefits of keeping the College's name against the real risks to the College of maintaining its association with a man linked to historical atrocities. The College's decision and the State's resulting legislation were the product of thorough research and debate; they merit deference from this Court.

Plaintiffs want to turn the courts into a fallback battleground for parties dissatisfied with the results of the political process. But they can no more litigate the history of mistreatment of Native Americans, S.C. Hastings's role in that history, or the College's choice to change its name than the union in *Rovella* could have litigated the history of racial inequality, the role of police in perpetuating

that inequality, or the benefits of greater public accountability. Those are political issues, not legal ones, and the remedy for disputes of that nature lies in the ballot box, not at the courthouse.

B. Plaintiffs' Bill of Attainder and *Ex Post Facto* Claims Are Meritless.

Plaintiffs next contend that "cancel-culturalists" have "heap[ed] scorn" on S.C. Hastings (Compl. ¶¶ 2, 70) and that the negative attention to Hastings's legacy violates constitutional protections against retroactive imposition of criminal punishments. Plaintiffs cannot show those claims have merit.

***Ex post facto* laws.** Plaintiffs first claim that AB 1936 is an *ex post facto* law. (Compl. ¶ 71.) But that constitutional protection "applies only to criminal laws." (*Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1419-1420.) Plaintiffs cannot identify any criminal law being retroactively applied to *anyone*, let alone to them.

Bills of attainder. The Bill of Attainder Clause was designed to prevent laws that subjected "named individual[s]" to things like "death, imprisonment, banishment, [or] the punitive confiscation of property." (*SeaRiver Mar. Fin. Holdings, Inc. v. Mineta* (9th Cir. 2002) 309 F.3d 662, 673.) Today, plaintiffs can win on bill of attainder claims only on the "clearest proof" that a statute "specifies the affected persons" and "inflicts punishment . . . without a judicial trial." (*Id.* at pp. 668-669.) Because "practically every law burdens someone" (*Franceschi v. Yee* (9th Cir. 2018) 887 F.3d 927, 941), it is not enough for a law to "impose[] burdensome consequences"; it must *inflict punishment* on specified individuals. (*Nixon v. Administrator* (1977) 433 U.S. 425, 471-473.)

AB 1936 is a classic "'prophylactic measure reasonably calculated to achieve a nonpunitive purpose.'" (*United States v. Munsterman* (9th Cir. 1999) 177 F.3d 1139, 1142.) AB 1936's proponents made clear that a new name was "in the best interests of the continuation of the College" and allowed the school to better "address the needs of the current generation of Yuki Tribal members and the College's legal community." (Kahn Decl., Ex. 3, at p. 3; see also Kahn Decl., Ex. 4, at p. 3 [name change appropriate to remove a "glaring barrier" to "the next generation of lawyers"].) AB 1936 itself confirms that nonpunitive interest by affirming that the act would best serve the College "in perpetuity." (AB 1936, § 1, subd. (n).) Because AB 1936 "'reasonably can be said to further nonpunitive legislative purposes,'" it is not a bill of attainder, even if it arguably "singles out an individual on the basis of irreversible past conduct." (*SeaRiver*, *supra*, 309 F.3d at p. 674.)

The interest in reforging the College's relationship to indigenous communities and the public would be justification enough even as to S.C. Hastings, the only person arguably "singled out" by AB 1936. But *nothing* in the Act suggests the Legislature acted to punish the College's alumni or descendants born long after Hastings's death. Any downstream consequences of AB 1936 for alumni or descendants would be too "indirect" to qualify as targeted punishment for bill of attainder purposes. (*Fresno Rifle & Pistol Club, Inc. v. Van De Kamp* (9th Cir. 1992) 965 F.2d 723, 728.)

C. Plaintiffs' Constitutional Autonomy Claim Lacks Merit.

Plaintiffs next turn to article IX, section 9 of the California Constitution, claiming AB 1936 infringes the College's constitutional autonomy. (Compl. ¶ 76.) That claim is without merit.

Section 9 protects the College from unwanted "'legislative interference.'" (*Coutin*, *supra*, 220 Cal.App.3d at pp. 1024, 1026-1027 [holding that Legislature's amendment to the Education Code to remove a provision of the 1878 Act stating that the Chief Justice of California would be president of the Board did not violate section 9].) There was no such unwanted interference here. The *College itself* changed the school's name, exercising its broad statutory authority to regulate the school. (See Educ. Code, § 92204.) And the *College* requested legislation to conform existing statutory provisions to the new name the Board selected. (Lewenhaupt Decl., Ex. 5, at pp. 15-16.) Had the Legislature not acted, those provisions would have conflicted with the College's chosen name. In all respects, therefore, the decision to rename the school was the College's own—it was not subject to any "political or sectarian influence" from the Legislature (Compl. ¶ 74).

No case holds that the Legislature cannot amend statutory provisions to conform to a decision that the Board reached independently, and in response to an express request from the Board itself. And for good reason: that would flip the principles underlying section 9 on their head, converting a rule to protect the Board's autonomy into one that limits the Board's power to exercise its authority. Because neither law nor logic supports Plaintiffs' autonomy claim, they cannot show any probability of prevailing.

D. Plaintiffs' Derivative *Ultra Vires* Expenditure and § 1983 Claims Lack Merit.

Plaintiffs' last two causes of action against the College Defendants fall with their other claims.

***Ultra vires* expenditure.** Plaintiffs invoke Code of Civil Procedure section 526a, which allows

taxpayers to sue to enjoin the State "from carrying on any unlawful actions." (*Hazle v. Crofoot* (9th Cir. 2013) 727 F.3d 983, 998.) Courts have warned against misuses of section 526a for "'disputes which are primarily political'" or suits "to enjoin every expenditure that does not meet with a taxpayer's approval." (*Chiatello v. City & County of San Francisco* (2010) 189 Cal.App.4th 472, 483.) Plaintiffs thus cannot sue under section 526a "where the challenged governmental conduct is legal." (*Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 714.) Here, because nothing in the 1878 Act or state or federal constitutions makes AB 1936 unlawful, Plaintiffs cannot show that their section 526a claim has any probability of success. (See, e.g., *Coutin*, *supra*, 220 Cal.App.3d at pp. 1026-1027 [affirming dismissal of unlawful-expenditure claim after ruling that the statute in question was lawful].)

Section 1983. Section 1983 protects against deprivations of "rights . . . secured by the [federal] Constitution and laws." (42 U.S.C. § 1983.) Plaintiffs' § 1983 claim rests on the same alleged violations of the Contracts, Bill of Attainder, and Ex Post Facto Clauses that underlie their first and second causes of action. (Compl. ¶ 86.) Because Plaintiffs cannot show any probability of success on those constitutional claims, their § 1983 cause of action is equally meritless. (See, e.g., *In re Tourism Assessment Fee Litig.* (9th Cir. 2010) 391 F.App'x 643, 646 [dismissing § 1983 claim as "derivative of" constitutional claims rejected elsewhere in opinion].)

CONCLUSION

The Court should strike or dismiss, with prejudice, Plaintiffs' claims against the College Defendants, and award attorney's fees and costs. (Code Civ. Proc., § 425.16, subds. (b)(1), (c)(1).)

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Respectfully submitted,

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