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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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| **COMMUNITY INITIATIVES,**<br><br>Petitioner/Plaintiff,<br><br>**v.**<br><br>**BRICE HARRIS, in his official capacity as Chancellor; BOARD OF GOVERNORS, CALIFORNIA COMMUNITY COLLEGES, in their official capacity,**<br><br>Respondents/Defendants. | Case No. CPF 13-512950<br><br>**RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR WRIT OF MANDATE AND DECLARATORY RELIEF**<br><br>Date: August 13, 2013<br>Time: 9:30 a.m.<br>Dept: 302<br>Judge: Hon. Marla J. Miller<br><br>Action Filed: May 1, 2013 |

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## INTRODUCTION

This petition must be denied because the twenty-three-year-old regulations petitioner now challenges were lawfully promulgated pursuant to the statutory authority conferred by the Legislature on the Board of Governors of the California Community Colleges (the Board). The Board exercised its quasi-legislative powers consistent with the statutes when it adopted these regulations in 1990. Petitioner now challenges these regulations on the ground that the Board should not require district governing boards to "consult collegially" with academic senates when adopting policies and procedures on academic and professional matters. Petitioner's arguments fail because (1) the Board lawfully exercised its quasi-legislative authority; (2) the regulations at issue effectuate the statutory mandates; (3) petitioner's claims of conflict are based on mischaracterizations of the plain language; and (4) petitioner lacks standing necessary for a writ of mandate. As this petition is an attempt to control the Board's discretion, it should be denied.

## STATEMENT OF THE CASE

### A. This Lawsuit

This lawsuit challenges two regulations adopted by the Board in 1990 – Title 5 of the California Code of Regulations, Sections 53200 and 53203. Petitioner, Community Initiatives, describes itself as "an incubator of fiscally sponsored nonprofit projects throughout California and in several other states." (Mtn., 1:10-12.) Respondents are the Board, and the Chancellor.[1] Petitioner argues that parts of the two regulations violate the plain language of parts of two statutes enacted by AB 1725 (Educ. Code, §§ 70901, 70902) and also that they are bad policy, because, petitioner argues, the regulations "harm" the colleges. Petitioner seeks a writ of mandate to "void" parts of the regulations, and to compel the Board to adopt new or different regulations.

### B. California's System for Governance of the Community Colleges

The California Community Colleges is the largest system of higher education in the United States, with 2.4 million students each year attending 112 colleges administered by 72 community

[1] The Board of Governors appoints a chief executive officer, the Chancellor of the California Community Colleges. (Educ. Code, § 71090.) While the Board and the Chancellor serve different functions, neither the Complaint nor the Motion differentiate between them, so for purposes of this Opposition, respondents refer to "the Board."

college districts. The Board is charged with "the duties, powers, purposes, responsibilities, and jurisdiction . . . with respect to the management, administration, and control of the community colleges." (Educ. Code, § 71024.) Specifically, the Board "shall prescribe minimum standards for the formation and operation of the California Community Colleges and exercise general supervision over the California Community Colleges." (*Id.*, § 66700.) The composition of the Board is statutorily defined, and must include faculty, students, current or former elected members of district governing boards, and all must be "outstanding lay citizens of California who have a strong interest in the further development and improvement of the public community colleges." (*Id.*, §§ 71000; 71002.)

In developing and reviewing policy proposals, the Board is required to consult with institutional representatives of the community college districts, community college organizations, interested individuals and specified parties, so they have "an opportunity to review and comment on proposed policy before it is adopted by the [Board]." (Educ. Code, § 70901, subd. (e).) "Subject to, and in furtherance of" the Board's work, "and in consultation with community college districts and other interested parties as specified," the Board "shall provide general supervision over community college districts and shall, in furtherance thereof" perform specified functions. (*Id.*, subd. (b)(1) –(16).) In fact, the Board maintains a consultation process to ensure representatives from all levels of the community college system have an opportunity to advise the Board on policy proposals. (*Id.*, subd. (e).)

Subject to, and in furtherance of, its obligations to provide leadership and direction, the Board has "full authority to adopt rules and regulations necessary and proper" for all functions the Board "is expressly authorized by statute to regulate." (Educ. Code, § 70901(c); see also § 70901.5.) At issue here is one function requiring the Board to consult with community college districts and other specified interested parties, to establish:

> [m]inimum standards governing procedures established by governing boards of community college districts to ensure faculty, staff, and students the right to participate effectively in district and college governance, and the opportunity to express their opinions at the campus level and to ensure that these opinions are given every reasonable consideration, and the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards.

(Educ. Code, § 70901(b)(1)(E).)

In contrast to the responsibilities vested in the Board for management of the entire community college system, the governing board of each of the 72 community college districts has different responsibilities. (See Educ. Code, § 70900 [The Board "shall carry out the functions specified in Section 70901 and local districts shall carry out the functions specified in Section 70902"].) The other statute raised here directs governing boards, not the Board, to "establish, maintain, operate, and govern one or more community colleges in accordance with the law." (*Id.*, § 70902(a)(1).) The governing boards are required to "establish rules and regulations not inconsistent with the regulations of the [Board] and the laws of this state for the government and operation of" district community colleges. (*Id.*, subd.(a)(7); see also subd.(c).) In other words, the governing boards cannot establish rules that would be inconsistent with the minimum standards established by the Board. There is no allegation here that any district rule or regulation conflicts with Education Code, section 70902.

**C. AB 1725**

In 1988, the California Community College Reform Bill, Assembly Bill 1725, was signed into law. (1988 Cal. Stat. Ch. 973 § 3, 3093.) This bill sought to implement a visionary plan for California's higher education systems. One aspect was a major reform of the California Community College system that included changes in five major areas of mission and function, governance, access and success, staffing and financing, including strengthening the Board. (*Id.*) Among other things, AB 1725 added Education Code sections 70901, 70901.5, and 70902.

**D. The Board Promulgated These Regulations in 1990.**

The Board promulgated these regulations in 1990 to implement statutes added by AB 1725, and also pursuant to its general authority to adopt, amend or repeal regulations which is contained in various provisions of the Education Code, including but not limited to, section 66700 and 70901. (See Cal. Code Regs., tit. 5, § 53200 et seq.) The two regulations at issue here provide definitions (§ 53200) and minimum standards for the governing boards to adopt policies for "appropriate delegation of authority and responsibility to its college and/or district academic senate." (§ 53203, subd. (a).)

In October 1990, when asked to address exactly the issue petitioner raises here – whether the Board's regulations exceeded its statutory authority beyond the intent of AB 1725 – the Governor's Office found that "the regulations are fully within the authority and intent of AB 1725." (Resp. Req. for Jud. Ntc. (RJN), Ex. 1, p. 8.) Specifically, not only did the Board provide for "full and extensive consultation on these regulations," but then-Governor Deukmejian's office noted "that the regulations are regarded as a fair and effective response to an admittedly complex and controversial task that AB 1725 assigned to the Board of Governors." (*Ibid.*) Further, the Governor's Office noted that, "the task of developing these regulations was both complex and controversial. We believe the Board acted fully within the authority and spirit of AB 1725. We also believe that they exercised commendable leadership through a deliberate and open process that resulted in full opportunities for involvement, and a product that almost all key parties of interest were able to accept and support." (*Id.*, p. 10.) The letter also stated that "a clear intent of the Legislature in AB 1725 was to strengthen the role of academic senates in district and college governance." (*Id.*, p. 9.)

As petitioner notes, in April 1991, the Legislative Counsel issued an advisory opinion concerning the validity of Section 53203 in addressing the role of academic senates in local district governance. (Compl., Ex. A, at Ex. 3.) At that time, the Chancellor considered that opinion, but found that it was focused only on a narrow portion of one statute (Educ. Code, § 70901(b)(1)(E)) and did not consider the broader powers conferred upon the Board to prescribe minimum standards for operation of community colleges. (RJN, Ex. 1, pp. 2-4.)

An extensive process for input and comment occurred before the regulations were adopted. The steps included:

- meeting with leadership of the statewide trustee organization and the statewide organization of chief executive officers to discuss the approach to the regulations as early as October 27, 1989;
- review and discussion by seven standing councils over a period of six months;
- convening a small task force (of two trustee representatives, two chief executive officers, four members of the statewide Academic Senate) which met on two occasions and was instrumental in developing the language that the Board eventually adopted;

- discussing the regulations, and their implications, in detail and in depth at statewide meetings, including at a general session of the statewide trustees organization attended by hundreds of trustees;

- placing the regulations on the Board's agenda for three public meetings, March 8-9, May 10-11, and July 12-13, where full opportunity for testimony was provided at each meeting.

(See RJN, Ex. 1, at pp. 5, 9.) Petitioner does not allege that either Community Initiatives or California Competes participated in any part of this process. Nor does petitioner allege that the process for promulgating these regulations was in any way deficient or unlawful.

**E. Ongoing Legislative Oversight of Community College Governance.**

Critically, AB 1725 was neither the first, nor the last, time that the Legislature looked at community college governance issues. The Legislature continues to monitor and address the complicated governance of the community colleges.[2] (See e.g., Stats. 2011, c. 112 (AB 1029) § 2, adding a new § 70901, operative January 1, 2014; see also Senate Bill 1143 Stats., 2010, c. 409 [creating a Student Success Task Force to develop a plan to improve student success; in January 2012, the Board adopted 22 recommendations of the Task Force].)

**F. In December 2012, California Competes Challenged the Regulations.**

More than two decades after these regulations were promulgated, on December 11, 2012, a private entity called "California Competes: Higher Education for a Strong Economy" submitted a Legal Challenge and Petition for Rulemaking to the Chancellor (Legal Challenge). (Complaint, Ex. A.) California Competes, self-identified as "a nonprofit initiative focused on improving educational outcomes through nonpartisan and financially pragmatic recommendations for policies and practices in California higher education" does not allege it is involved in the community college system at all; not on the state level, district level, individual community

[2] For example, on July 1, 2010, the Legislature's Joint Committee on the Master Plan for Higher Education issued a report based on the 50th Anniversary of the Master Plan. http://www.cpec.ca.gov/publications/masterplanindex.asp. Another statute, AB 1417 (Stat. 2004, Ch. 581), requires the community colleges to annually report to the Legislature on issues, including of governance. The Little Hoover Commission, an independent state oversight agency created in 1962 to investigate state government operations and promote efficiency, economy and improved service, reviewed the California Community Colleges and in February 2012 issued a lengthy, 120-page, report entitled Serving Students, Serving California: Updating the California Community Colleges to Meet Evolving Demands. (http://lhc.ca.gov/studies/210/report210.html)

college, nor as a student. (*Id.*, at p. 1.) Rather, California Competes claims that its unidentified Council members are "interest[ed] solely as citizens of California who want a better future for the state and for its current and future residents." (*Id.*)

According to the Complaint (¶14), California Competes brought this Legal Challenge pursuant to Education Code Section 70901.5(a)(7), which provides that "[a]ny district or other interested party may propose a new regulation or challenge any existing regulation." An "interested party or individual" is defined in the Board's Procedures and Standing Orders (Procedures) as "every entity or person who has filed a written request for notice of regulatory actions with the Board." (§ 202(c), available at http://extranet.cccco.edu/SystemOperations/BoardofGovernors/ProceduresStandingOrders.aspx.) Neither the Legal Challenge, nor the Complaint, nor this Motion alleges that either California Competes or petitioner Community Initiatives meets the definition of an "interested party."

The Chancellor responded to the Legal Challenge, and on January 24, 2013, transmitted the response to the Board, which became final in forty-five days pursuant to Procedures, section 212.[3] (Compl., Ex. B.) In the response, the Chancellor pointed out not only that the regulations are lawful, but that shared governance is good public policy. (*Id.* at p. 2.) Additional materials submitted by California Competes did not change the Chancellor's decision. (Compl., Ex. C.)

Then, on May 1, 2013, a different entity, "Community Initiatives," filed a Petition for Writ of Mandate and Complaint for Declaratory Relief seeking judicial review of the Board's "decision refusing to amend the challenged regulations." (Compl. ¶ 17.)

## STANDARD OF REVIEW

The standard for review of the Board's regulation is the "arbitrary and capricious" test. "Mandamus may issue to correct the exercise of discretionary legislative power, but only if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. This is a highly deferential test." (*Carrancho v. Calif. Air Resources Bd.* (2003)

[3] While petitioner notes that the petition was denied without hearing or opportunity for comment, there is no requirement for either. (Mtn., 2:15-17.) Nor does petitioner allege any procedural violation of any regulatory process.

111 Cal.App.4th 1255,1265.) Where an agency, like the Board, has been delegated the Legislature's lawmaking power, its "quasi-legislative rules have the dignity of statutes" and the scope of judicial review is narrow. (*Yamaha Corp. v. State Bd. of Equal.* (1998) 19 Cal.4th 1, 10.)

The Legislature conferred broad authority and discretion on the Board to issue regulations and to establish "minimum standards." (Educ. Code, §§ 66700; 70901(c).) Additional factors in favor of deference to the Board, such as those that courts consider when assessing the weight due to an agency's interpretation of law, overwhelmingly weigh in favor of deference to the Board's regulations: (1) the Board "has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion;" (2) the record reflects careful consideration by senior agency officials; (3) the Board has consistently maintained the interpretation over a long period of time; and (4) "the agency's interpretation was contemporaneous with legislative enactment of the statute being interpreted." (*Yamaha, supra*, 19 Cal.4th at pp. 12-13 (citations omitted).) Accordingly, "the court does not inquire whether, if it had power to act in the first instance, it would have taken the action taken by the administrative agency. The authority of the court is limited to determining whether the decision of the agency was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair." (*Fullerton Joint Union High School Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 786.)

## ARGUMENT

### I. THE PETITION MUST BE DENIED BECAUSE PROMULGATION OF THESE REGULATIONS WAS A LAWFUL AND APPROPRIATE EXERCISE OF THE BOARD'S DISCRETION.

#### A. The Regulations Are an Authorized and Appropriate Exercise of the Board's Discretion.

The Board has broad statutory authority to implement certain statutes, including those established by AB 1725, through regulations. The Board is charged with expertise in governing the community college system, and has been granted discretion to adopt regulations in furtherance of this role. The Legislature vested the Board with the authority to prescribe minimum standards for the operation of the community colleges. (Educ. Code, §§ 66700 [The

Board "shall prescribe minimum standards for the formation and operation of the California Community Colleges and exercise general supervision over the California Community Colleges"]; 70901 [The Board shall "provide leadership and direction;" "provide general supervision over community college districts;" "establish minimum standards"].) And, the Legislature clearly vested the Board with "the full authority to adopt rules and regulations necessary and proper to execute the functions specified in this section as well as other functions that the [Board] is expressly authorized by statute to regulate." (*Id.*, § 70901(c); see also § 71024 [the Board "has the duties, powers, purposes, responsibilities, and jurisdiction . . . with respect to the management, administration, and control of the community colleges"].) The regulations petitioner quarrels with were implemented pursuant to that authority in 1990. These regulations are quasi-legislative acts of the Board, adopted after careful consideration by senior officials; following a lengthy public process, with opportunity for input; and have been in place for over twenty years. (See, RJN, Ex. 1.) The regulations are neither arbitrary nor capricious, but fully comport with the Legislative delegation of authority and intent. Fundamentally, petitioner is attempting to use the writ process to control the Board's discretion. But a writ of mandate may not be used to compel the Board to exercise its discretion in any particular manner. (*Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 445 [a court "may not substitute its discretion for that of legislative or executive bodies in matters committed to the discretion of those branches."].)

**B. Petitioner's Arguments to the Contrary Must Be Rejected.**

**1. Petitioner's arguments fail.**

Petitioner makes many claims about how the regulations violate "AB 1725" but all of them fail. Because the regulations neither conflict with nor change the scope of the statutes, it is clear that this petition is really an attempt to control the Board's discretion to "establish minimum standards." Significantly, the Board's statutory authority is broader than portrayed by petitioner. Petitioner's attempt to limit the scope of the Board's authority by focusing only on narrow language within two statutes enacted by AB 1725 must be rejected. The Board's statutory authority, as set forth in Education Code sections 66700 and 71024, is completely omitted from petitioner's motion and complaint. Thus, petitioner's premise, that the Board's authority over the

district board's governing authority is limited "to a single item" is belied by the statutes. (Mtn., 4:4-13; see contra, Educ. Code, §§ 66700; 70901; 71024.)

**a. The "Collegial Consultation" Requirement is Not Unlawful.**

Petitioner's argument that the Board's regulations "expressly require the District Boards to grant 'Powers' to the academic senates in a manner that is fundamentally at odds with the broad constitutional and statutory grant of powers and responsibilities to the District Boards" fails for a number of reasons. (Mtn., 5:26-28.) Notably, the arguments are meritless because the Board's power is broader than petitioner admits; the regulatory language does not say what petitioner alleges; the statute is not as limited as petitioner contends; and the regulations do not effect any transfer of power among any entity.

The language of the regulations is very different from what petitioner alleges. To "consult collegially" is defined as requiring each district governing board to use its "own discretion" to define "consult collegially" as either: "relying primarily upon the advice and judgment of the academic senate; or agreeing that the district governing board . . . and the representative of the academic senate shall have the obligation to reach mutual agreement by written resolution, regulation, or policy of the governing board effectuating such recommendations." (Cal. Code Regs., tit. 5, § 53200(d).) This definition is a far cry from petitioner's contention that the regulations, on their face, "grant 'Powers'" to the academic senates. (Mtn., 5:26-27.)

Nor does this regulation conflict with Education Code section 70901(b)(1)(E) for any of the reasons petitioner claims. This subsection expressly requires the Board to establish minimum standards for governing procedures so that faculty, staff, and students have the right to participate effectively in district and college governance; have the opportunity to express their opinions at the campus level; and are assured that these opinions are given every reasonable consideration; and that academic senates have the right to assume primary responsibility for making recommendations in the areas of curriculum and academic standards. (*Id.*, § 70901(b)(1)(E).) By setting the minimum standards to require the district boards to "consult collegially" with the academic senate when developing policies on academic and professional matters, the Board has effectuated its statutory mandate.

Requiring the district boards to "consult collegially" with the academic senate does not expand the requirement that district board give the opinions of faculty, staff and students "every reasonable consideration." The requirement to "consult collegially" is simply the floor that the Board has set for how the district governing boards shall go about ensuring that academic senates have the right to participate in "college governance" as well as the right to assume "primary responsibility" for making recommendations related to "curriculum and academic standards." Nor does requiring the governing boards to "consult collegially with the academic senate when adopting policies and procedures on academic and professional matters" expand the Legislature's requirement that the Board ensure "the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards. " (Educ. Code, § 70901(b)(1)(E); Cal. Code Regs., tit. 5, § 53203(a).)

There is no authority for the proposition that the Board cannot require governing boards to confer collegially when making policies and procedures in academic or professional matters, or that the regulations have "created" the problems colleges may face. As the Chancellor previously pointed out, in specific situations where "academic senates have attempted to use the regulations to inhibit action, there are invariably deeper problems at the district involving fiscal challenges, leadership, labor-management relations or some other fundamental problem." (Compl., Ex. B, p. 3.) Petitioner has failed to meet its burden to show that the regulations, and the regulations alone, are unlawful or are the cause of any governance problem in any district – much less state-wide. As the Chancellor noted, "[i]f an academic senate and a local board of trustees cannot work together amicably, a regulatory change will not improve the relationship." (*Ibid.*)

**b. The Regulations Do Not Alter Any Statutory Delegation of Authority.**

Petitioner's contention that the language of the regulation alters the statutory delegation of authority is unfounded. Specifically, petitioner reads Section 53203(a) as: "requiring the District Boards to 'delegate authority and responsibility' to the academic senates, the Regulations unlawfully expand the academic senate's role far beyond 'making recommendations in the areas of curriculum and academic standards' as provided by statute." (Mtn., 6:16-18.) However, this is

incorrect on its face. The regulation requires district boards to "adopt policies for appropriate delegation of authority and responsibility to its college and/or district academic senate" (§ 53203(a)); it does not require "district boards to delegate authority and responsibility to academic senates." (Mtn., 8:4-9:11.) Not only is there no conflict, but the regulation promotes the statutory directive.

In any event, the Board's authority for this regulation stems from its obligation set forth in the first sentence of that subdivision: to set minimum standards "to ensure faculty, staff, and students the right to participate effectively in district and college governance." (Educ. Code, § 70901(b)(1)(E).) One way the Board has chosen to set this minimum standard is that the district boards must adopt policies that require them, at a minimum, to consult collegially with the academic senate "when adopting policies and procedures on academic and professional matters." (§ 53203(a).) Thus, this regulation neither conflicts with, nor expands "the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards." (Educ. Code, § 70901(b)(1)(E).) As described above, to "consult collegially" is not the same as to "assume primary responsibility," nor is it so defined.

Petitioner also argues that the regulations are silent on the participation of faculty, students or staff who are not represented by the academic senate. (Mtn., 12:5-27.) However, no statute compels their inclusion in the process, so nothing in the regulations conflicts with, nor changes the scope of, the statutory directive that the district boards establish procedures "to ensure faculty, staff, and students the right to participate effectively in district and college governance." (Educ. Code, § 70901(b)(1)(E).) Nor does petitioner address the Board's composition, or its consultative process, which includes opportunity for those perspectives.

**c. These regulations do not "transfer" any "power."**

Petitioner's argument, that these two regulations "upset the entire governing structure and balance of power," also cannot succeed in light of the actual language of the regulations. As stated above, Section 53203 does not require district governing boards to "delegate authority," but rather requires them to "adopt policies for appropriate delegation of authority and responsibility to its college and/or district academic senate." In addition, petitioner's argument about the

"transfer" of power fails to account for the actual delegation of authority between the Board, and the district governing boards. Petitioner ignores entirely the powers entrusted to the Board. (Mtn., 9:14-10:8.) The argument is premised entirely on the assumption that the governing boards of the local community college districts have a "broad grant of authority" to govern the districts, and therefore, the Board is prohibited from acting in a manner that might infringe upon the governing boards' power, which, according to petitioner, is what happens when the governing board is required to consult collegially with the academic senate. (Mtn., 3:4-4:17; 5:26-28 ["the broad constitutional and statutory grant of powers and responsibilities to the District Boards"].) As this entire argument is belied by the actual statutory grant of authority conferred upon the Board, it lacks merit. (See Mtn., 9:14-10:8.)

**2. Petitioner cannot challenge the Regulations' "Standards" because petitioner does not meet the statute's requirements.**

Petitioner also argues that the regulations do not meet the standards of "consistency" and "clarity." (Mtn., 13:1-14:13.) However, as set forth in Education Code section 70901.5, subd.(a)(3): "The [Board] shall ensure that all *proposed* regulations of the board meet the[ese] standards . . . . A district governing board or any other interested party may challenge any *proposed* regulatory action *regarding application* of these standards. (Emphasis added.)" Petitioner is not challenging a "proposed regulatory action regarding application of these standards." Rather, petitioner challenges a regulation that has been in place for over twenty years. Had the Legislature intended that any person or entity could challenge, at any time, the standards for an established regulation, it would not have provided this express limitation. (See also, Educ. Code § 70901.5, subd. (a)(7), limiting the proposal for a new regulation or challenge to any existing regulation to "[a]ny district or other interested party.")

## II. THE PETITION MUST BE DENIED BECAUSE PETITIONER LACKS STANDING TO CHALLENGE THE REGULATIONS, AND THE ELEMENTS FOR A WRIT ARE NOT MET.

In order to obtain a writ of mandate, respondent must have a clear, present, and ministerial duty, and petitioner must have a clear, present and beneficial right to the performance of the duty sought. (Code of Civ. Proc., §§ 1085(a), 1086; *Save the Plastic Bag Coalition v. City of*

*Manhattan Beach* (2011) 52 Cal.4th 155, 165-166.) Here, petitioner has shown neither. As set forth above, petitioner has not demonstrated that the Board has failed to perform any duty. In additional, petitioner has failed to show that it is beneficially interested.

A writ requires "the verified petition of the party beneficially interested." (Code of Civ. Proc., § 1086.) However here, verification is not from "the party beneficially interested." Rather, the Complaint's verification, signed by a Robert Shireman, alleges "I am the petitioner in this proceeding" despite the fact that he is not the petitioner. (Compl., p. 22.) There is no allegation regarding either Mr. Shireman or his relationship to petitioner Community Initiatives. On this ground alone, the petition should be denied.

In any event, the petitioner, Community Initiatives, has not alleged any interest "above the interest held by the public at large" in the Board's performance "of their duties to manage community colleges properly in accordance with state law." (Compl., ¶ 11.) To the contrary, petitioner's claim for standing is that it "has a beneficial interest in the performance by Respondents of their duties to manage community colleges in accordance with state law" (Mtn., 1:24-26) – an interest that it shares with the Board and every citizen of California. "The purpose of a standing requirement is to ensure that the courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor." (*Common Cause, supra,* 49 Cal.3d at pp. 439–440.) The beneficial interest must be direct and substantial. (*Save the Plastic Bag Coalition, supra.*, 52 Cal.4th at 165.) But here, there is no actual controversy between Community Initiatives and the Board that can be resolved by a writ of mandate; Community Initiatives will not gain a direct benefit from the issuance of a writ – such as any re-allocation of the governing structure of the community colleges – nor will petitioner suffer any direct detriment if it is denied. Nor is petitioner's argument that the regulations will cause districts to act in a way that violates the law "direct" or "substantial."

Because petitioner cannot meet the beneficial interest requirement, it seeks to invoke the "public right/public duty" exception. That exception relaxes the beneficial interest standard when the purpose of the writ is enforcement of a clear public duty and the public interest would suffer greatly from a failure to perform such duty. (See, e.g., *Green v. Obledo* (1981) 29 Cal.3d 126, 144

[petitioners who had successfully challenged portions of a welfare regulation also had standing to challenge remainder of regulation as citizens acting in public interest even though they were not beneficially interested].)

The California Supreme Court has cautioned, however, that public interest standing is not "freely available." (*Save the Plastic Bag Coalition supra.,* 52 Cal.4th at p. 170, fn. 5, citations omitted [No party "may proceed with a mandamus petition as a matter of right under the public interest exception . . . 'Judicial recognition of citizen standing is an exception to, rather than repudiation of, the usual requirement of a beneficial interest. The policy underlying the exception may be outweighed by competing considerations of a more urgent nature.'"].) Specifically, "the propriety of a citizen's suit requires a judicial balancing of interests, and the interest of a citizen may be considered sufficient when the public duty is sharp and the public need weighty." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232–1233, disapproved on other grounds in *Save the Plastic Bag Coalition, supra*, 52 Cal.4th at pp. 169-170.)

The policy permitting an exception to the beneficial interest requirement does not apply here. In this case, petitioner is seeking to compel a regulatory change to the guidelines provided for parties involved in the community college governing process. This is not a "sharp" public duty. Nor is the public need for petitioner's approach – at the expense of other governance approaches and without input here from even one of the 72 governing boards themselves – "weighty." Notably different from *Common Cause*, the case petitioner relies upon for its standing, petitioner here is not a "citizen," but rather some vaguely defined shell-entity with an unclear interest in the administration of the community colleges. (Compl., ¶ 11, 12 [Petitioner is "a nonprofit corporation that sponsors policy work"]; Mtn., 1:24-2:3.)

Finally, mandate is an extraordinary remedy, and is only available where there are no other remedies at law. (Code of Civ. Proc., § 1086.) Here, petitioner has not alleged that it is unable to participate in the ongoing deliberations about how the community colleges should be administered. "[C]ourts will not issue a writ of mandate to enforce an abstract right of no practical benefit to petitioner, or where to issue the writ would be useless, unenforceable, or

unavailing." (*County of San Diego v. State* (2008) 164 Cal.App.4th 580, 595-596.) Community Initiatives is asking this court to weigh in on an issue that (1) the Legislature properly delegated to the Board over twenty years ago; (2) impacts parties not involved in this lawsuit (such as districts, colleges, faculty, students and California taxpayers); (3) will not have any impact on the petitioner itself; and (4) may contrast with the current oversight of this issue by the Legislature and other policy makers. This court should decline to do so.

## III. PETITIONER IS NOT ENTITLED TO DECLARATORY RELIEF.

As set forth above, the Board has not violated any mandatory duty; there is no actual controversy between these parties; and petitioner has not stated a cause of action for declaratory relief. Nor does petitioner make any argument for declaratory relief; therefore, this cause of action is waived. "Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived." (*Jones v. Sup. Ct.* (1994) 26 Cal.App.4th 92, 99.) Accordingly, petitioner's request for declaratory relief must be denied.

## CONCLUSION

For all the foregoing reasons, respondents respectfully request that the court deny the petition for writ of mandate, and request for declaratory relief.

Dated: July 31, 2013

Respectfully Submitted,

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