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July 17, 2012

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
CALIFORNIA SUPREME COURT
350 McAllister Strett
San Francisco, CA 94102-4797

Re: *Luquetta v. Regents of the University of California*
Case No.: S202820

Amicus Curiae letter of The American Council on Education, The Association of American Universities, and The Association of Public and Land-grant Universities in Support of the Petition for Review of The Regents of the University of California [Cal. Rule of Ct. 8.500(g)]

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, Amici Curiae The American Council on Education, The Association of American Universities, and The Association of Public and Land-grant Universities (collectively, "Amici") respectfully urge this Court to grant the petition for review of The Regents of the University of California ("Regents") in *Luquetta v. Regents*, No. S202820 ("*Luquetta*"). Following *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, *Luquetta* broadly held that commercial implied contract principles govern the relationship between the university and student-applicants in matters related to fees and expenses (and related issues of policy and term changes during a multi-year relationship). In so doing, *Luquetta* did not appropriately address—let alone satisfy—this Court's concerns in *Paulsen v. Golden Gate University* (1979) 25 Cal.3d 803, 811 fn.7 ("*Paulsen*") about whether traditional contract notions could or should apply to university-student interactions given the complex realities of that relationship. Review by this Court is warranted to resolve that important issue, which affects millions of students in the State's public colleges and universities every year, and the significance of which is heightened by the effects of the State's fiscal crisis on those institutions.

A. Statement of interest

The American Council on Education (widely known as "ACE") is a national non-profit organization founded in 1918, dedicated to the interests of improving higher education in America. ACE represents Presidents and Chancellors of various types of American accredited, degree-granting institutions. It receives inputs from over 1,600 member institutions of higher learning, and 200 associations of such institutions. For over 90 years it has provided leadership and a unified voice on higher education issues. It has participated in numerous cases as an amici. From this platform ACE is uniquely positioned to understand and provide perspective on major issues affecting higher education, and to provide helpful comment and data on the realities of higher education policies, relationships and challenges.

The Association of American Universities ("AAU") is an association of 59 U.S. and two Canadian research universities organized to develop and implement effective national and institutional policies supporting research and scholarship, graduate and professional education, undergraduate education, and public service in research universities.

The Association of Public and Land-grant Universities ("A·P·L·U") is a research and advocacy organization of public research universities, land-grant institutions, and state university systems with member campuses in all 50 states, U.S. territories and the District of Columbia. The association is governed by a Chair and a Board of Directors elected from the member universities and university systems. President Peter McPherson directs a staff of about 45 at the national office in Washington, D.C.

B. Higher education: A crisis of both finance and complexity

Amici suggest it is important to understand the canvas on which the current dispute before the court is painted. Higher education differs from commercial enterprise in many ways. Here are two of many phenomena that require dexterity in setting and changing institutional policy.

1. Budget realities

First, institutions of higher education must maintain flexibility to alter program offerings from year to year, as most institutions are dependent on unpredictable year to year funding. The reality is that it is becoming impossible for an

institution to create or sustain any unchanged long term programmatic or financial commitment. Degree programs are essentially based on semester-to-semester, or at best year-to-year, budgets and planned offerings. This is because many of the nation's public and private universities are in economic crisis, making it virtually impossible to sustain any long term or multi-year stable cost levels. To illustrate: In the private sector, charitable gifts to colleges and universities fell by 12 percent in 2009, the largest recorded decline in recent memory. Giving was 8 percent lower in 2010 than it was in 2006 in inflation adjusted dollars. (*See* <http://www.acenet.edu/AM/Template.cfm?Section+Search&section=Legal_Issues_and_Policy_Briefs1&template=CM/ContentDisplay.cfm&ContentFileID=3820>.) Federal government support for researcher salaries has also been reduced. (*See, e.g.*, <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-12-035.html>.)

For public institutions the problem is two-fold. Not only are gifts similarly in decline, but critical legislative support is also waning. A major factor in tuition increases at public institutions has been the withdrawal of state and local funding. (*See* <http://usnews.com/education/blogs/student-loan-ranger/2012/04/18/how-our-declining-investment-in-higher-education-hurts-students>.) Higher education is a discretionary budget item in most states, and has often been moved to the end of the state funding queue, resulting in state governments allocating a smaller share of their spending towards higher education. (Kane et al., 2003; Rizzo, 2004; State Higher Education Executive Officers [SHEEO], 2007.) State budget crises are a major factor in unpredictable and substantial student fee increases. Every yearly budget cycle brings with it a new round of adjustments, and with donations also in decline, public universities have no means to avoid annual re-costing of programs and revenues. Thus, the ability to change from year to year is vital, as economic conditions dictate.

2. Website and catalogue proliferation

Second, the number of informal expressions of university policy has grown exponentially. In the past decade university hard copy catalogues have been replaced by a dizzying array of websites stating, announcing, expanding upon, reiterating, explaining or otherwise discussing university policies and practices. These websites are best thought of as guidance rather than the formal codification of binding institutional policies. Much like FAQs on any site, they can explain or provide helpful information, but should not be interpreted to be a binding iteration of policy adopted by the governing public university legislative body. In this

respect a university is vastly more complex than the typical employer that has a single policy manual or handbook containing the appropriate rules relating to employment. The problem of accuracy is exacerbated by the growing phenomenon of archaic but still active websites or content, that is, statements that still appear on a site but may have been superseded by other enactments without or before being replaced

These two realities suggest that especially public sector higher education is an annually renewing proposition inextricably linked to state and federal budgeting, and that the official policies and requirements for each new session should, as a matter of law, be reasonably construed only as an annual restatement reflecting the then-current realities, rather than a binding commitment for the life of the student or some other fixed duration.

C. Reasons for granting review

Against these realities, this case presents two compelling reasons for review.

1. Question of first impression

First, whether *Luquetta* was correct in applying commercial contract principles to this university-student dispute is a question of first impression never previously addressed by this Court, and one about which the Court expressed concern in *Paulsen*. Contrary to Respondent's suggestion that this case is singular and anomalous, in reality the question of what legal standard should apply to university-student disputes is an issue with enormous potential economic and operational consequences to higher education nationally, and to the over 1,600 member institutions of The American Council on Education. Contracts bind and define commercial dealings and fix expectations; the university-student relationship is fundamentally different from, and more complex than, traditional commercial relationships, as *Paulsen* recognized, and evolves over a multi-year period. *Paulsen* is this Court's last word on the issue, and contains more of a statement of concern than a true settling of the complex issues before the court in this case. Not surprisingly, without any real direction from this Court, California appellate decisions have uneasily relied on out-of-state reasoning. (*See*, e.g., *Kashmiri v. Regents of Univ. of Ca.* (2007) 156 Cal.App.4th 809, 824 fn.8, [citing cases from New York, Florida, Pennsylvania, Washington, D.C., Colorado, and the Fifth Circuit on the issue of the extent to which the student-university relationship is best characterized as contractual.]

This Court now has an opportunity to give guidance on what the appropriate analytic standards are for dealings between universities and students in academic programs in the face of fiscally changing environments. This is a question of first impression for the Court, and one on which guidance is sorely needed by the higher education community generally.

2. Settle conflicting authority

Second, review is necessary to settle uncertainty in California precedent. *Luquetta's* unexamined assumption that commercial implied contracts concepts should apply does not derive from any holding by this Court that those are the appropriate rules governing university–student relationships. Instead, it derives essentially from dicta or simple broad statements in a trio of forty year old cases, which were directly questioned in this Court's 1979 *Paulsen* opinion.

In 1972 the Court of Appeal decided three cases, *Andersen*, *Zumbrun* and *Searle*, which recited, based on non-California authority and without detailed analysis, that the relationship between a student and the university was or could be in some circumstances contractual in nature. (*See Andersen v. Regents of the Univ. of Cal.* (1972) 22 Cal.App.3d 763, 769 [issue conceded at pretrial conference and thus not subject to debate on appeal]; *Searle v. Regents of the Univ. of Cal.* (1972) 23 Cal.App.3d 448 [dictum observing, based solely on out of state cases, that students have "certain contractual rights"]; and *Zumbrun v. Univ. of Southern Cal.* (1972) 25 Cal.App.3d 1, 9 [observing, based on a string cite of out-of-state cases and the *Searle* dictum, that the basic legal relationship between a student and a private university is "contractual in nature"].)

These uncritical assumptions by the Court of Appeal, however, were cast into doubt by this Court's decision seven years later in *Paulsen, supra*. There, in considering an argument that the university-student relationship was fundamentally contractual, the Court made two critical observations. First, it reapproved the long-acknowledged doctrine that because of the great deference traditionally given by courts to university management of student and academic affairs, university changes in student status for academic reasons will not be disturbed unless found to be "arbitrary or capricious" or the result of discriminatory factors. (*Paulsen, supra*, at 808-809.) Second, it noted that in general "framing of the student-university relationship contractual terms" is not

helpful because it "incorrectly portrays the manner in which the parties themselves view the relationship." (*Paulsen, supra*, at 811, fn. 7.)

Thus, this Court's 1979 expressions cast substantial doubt on the wooden application of contract doctrine to the complex university–student relationship, leaving unresolved whether an "arbitrary or capricious" standard might better fit the dynamics of that relationship, at least in areas relating to academic programming or other areas of judgment. When in 2007 the *Kashmiri* court embraced the *Andersen/Zumbrun/Searle* contract dictum (again relying heavily on out-of-state cases), it endorsed a different standard, that of commercial contract liability. It reasoned that "specific" promises, even if about curriculum or program issues, should not be assessed under the deference/"arbitrary or capricious" standard. In doing so, it failed adequately to address *Paulsen's* overarching issues of whether contract law as such best fits the nuances of the university-student relationship, and especially whether the deference doctrine should extend to decisions about the cost, availability or contents of academic programs. We suggest those decisions are every bit as academic as judgments about fitness for tenure or courses to be taught; in each circumstance institutional needs and the allocation of scarce resources are a critical element of the decision, and should be accorded, we respectfully submit, some deference by the courts, especially where, as here, the institution has a constitutionally independent mandate and functions in some sense as a fourth branch of California government.

The instant petition provides the Court with a much needed opportunity to harmonize conflicting opinions and doctrines on an issue that has enormous economic repercussions for higher education in general.

D. Practical consequences of the *Luquetta* standards

In and beyond California, the student-university relationship is unique and important in American higher education. In California, *Paulsen* questioned whether traditional contract doctrine well fits this relationship. (*See Paulsen, supra,* at 811 fn. 7.) In California and throughout the United States, courts have similarly struggled with the extent to which traditional contract law doctrines should apply to what all concede is a fluid and unique relationship. The practical consequences of this issue are profound.

To understand why it is useful to look at the competing bodies of doctrine, see what very different outcomes each produces, and understand why review should

be granted to give guidance to the lower courts on how to harmonize these important doctrines.

1. How the deference standard would apply in this case

For decades the courts have articulated and followed a policy of judicial deference to university judgments in academic, educational, and disciplinary matters, recognizing that courts are ill-equipped to evaluate the subtle and complex judgments that underlie academic and education-related decisions. (*See, e.g.*, *Regents of the Univ. of Michigan v. Ewing* (1985) 474 U.S. 214 and *Board of Curators of the Univ. of Missouri v. Horowitz* (1978) 435 U.S. 78.) In these cases, in general terms, university changes in student status for academic reasons will not be disturbed unless found to be "arbitrary or capricious" or the result of discriminatory factors. (*Paulsen, supra*, at 808-809; *see also Wong v. Regents of Univ. of Cal.* (1971) 15 Cal.App.3d 823, 830 and *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1551 [recognizing a policy of judicial deference to educational policies in denying a student's suit for breach of contract].)

Following this line of reasoning, some courts have refused to find any contractual relationship between a student and a university, or have severely limited the extent of the relationship. (*See* Sarah Anjum, Students As Consumers: Finding and Applying A Workable Standard When Institutions Fail to Give the "Benefit of the Bargain," (2011) 43 U. Tol. L. Rev. 151, 162 and cases there cited; hereinafter, "Anjum".)

The *Paulsen* standard, if applied to this case or cases like it, would allow universities needed flexibility in making changes as budgets and other external drivers dictate, while at the same time protecting expectations if changes are made without good reason, that is, are done "arbitrarily" or "capriciously." That standard does not ignore the representations made in catalogues and policies, but rather measures the actions taken against the standards published *and* other relevant factors. If there were no good reason for an action changing a published program, it might well be arbitrary, warranting relief; but where, as here, a showing that the motivating reason for the change was bona fide could be considered in assessing any claim. This standard resonates more with the good faith intertwined-path reality of student-university relationships, and allows change in academic programs short of the contractual standards of "impossibility" or "force majeure."

2. The statutory and express contract standards cases support a flexible rule of change unless an express intention to be bound is clearly evident.

The holding below also is in contrast with another important line of California authority: Cases that recognize that public university enactments have the force and effect of statutes. This body of law posits that making changes in published policies should be evaluated not by the tools of contract interpretation, but the tools of statutory construction and amendment. Under this line of thinking, policies may be amended or reduced from time to time by the sovereign as economic conditions change, except where the public entity has clearly indicated an intent to be bound by a bilateral contract conferring specific rights that it is authorized by statute to create and enter. (*Cf. Retired Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1182-1183.) While this is often accomplished by express contract, it may be accomplished by implied contract, but only where the intent of the public agency to be bound is shown by a "clear" expression of a "legislative intent to create private rights of a contractual nature enforceable against the [governmental body]." (*Id.* at 1187, quoting *Valdes v. Cory* (1983) 139 Cal.App.3d 773.) In *Luquetta*, by contrast, there is no evidence in the record of the clear intention of the Regents to be bound; to the contrary, the reservation of the right to change fees seems to directly belie such a conclusion, or at least present a triable issue of fact. Only by granting the petition can this Court address the dissonance between these doctrines and the Court of Appeal's contrary conclusion that implied contract law applies perforce, and as a matter of undisputed fact and law.

3. The problem with implied contract standards

The *Luquetta* holding follows the *Kashmiri* conclusion that implied contract doctrine should apply to student-university enrollment dealings, just as it would in any other setting. Amici urge that in considering the issue, the Court weigh the experiences of other states and insights of commentators on the degree to which various implied contract interpretive tools fit the student-university relationship and the facts of this case. The issue of whether, or how, to apply contract notions has been widely questioned in the case law, both in state and elsewhere, for a host of reasons, among which are:

a. The difficulty of the "academic v. economic" distinction

Kashmiri acknowledges that the divergence in case law on the question of the applicability of contract law to student issues is troubling, but draws a distinction between what it terms academic matters and what it terms "specific promises" about hours, services or classes. (*Kashmiri*, 156 Cal.App.4th at 826-827.) This distinction is, in reality, often very difficult to make out. Under the current paradigm, when a student brings suit against a college or university, the court must distinguish whether the suit challenges the quality of the education provided, a judgment of academic policy, or a breach of some aspect of the educational contract unrelated to academics. As one commentator observed, this is a difficult and often meaningless distinction for courts to draw in a principled manner, leading to inconsistent precedent and a lack of clear guidance to both institutions and students. (Anjum, *supra*, 43 U. Tol. L. Rev. 151, 154.)

b. The unique nature of the student-university relationship makes contract law an uneasy fit

Unlike other circumstances in which implied contracts might arise between commercial parties in predictable commercial roles, the student-university relationship is "fluid and continuous," requiring deference to the nuances of the educational system somewhat in the same way that "custom and practice in the industry" are relevant inquiries in commercial disputes. (K.B. Melear, The Contractual Relationship Between Student and Institution: Disciplinary, Academic, and Consumer Contexts (2003) 30 J.C. & U.L. 175, 180.) Such a notion by its very nature defies the rote application of traditional commercial contract law. As recognized in *Kashmiri*, contract law should not be strictly applied; "'the student-university relationship is unique, and it should not be and can not be stuffed into one doctrinal category.'" (*Kashmiri*, at 824, citations omitted.)

In limiting the applicability of these "unique" factors to academic and disciplinary matters *Kashmiri*—and by extension *Luquetta*—too narrowly read *Paulsen* and the policies underlying the doctrine. Postsecondary institutions serve important societal interests. Courts from other jurisdictions have only reluctantly and begrudgingly employed contract principles to adjudicate claims by disappointed students when institutions of higher education fail to abide by their promises or to meet student expectations; courts often complain that contract law is too inflexible either to capture the complexity of the student-university relationship or to provide

sufficient latitude to institutional decision-making. (Hazel Glenn Beh, Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing (2000) 59 Md. L. Rev. 183, 183-184.) "Due to the difficulty of finding some of the terms of the educational contract, contract law is not a perfect fit for the educational context." (Anjum, *supra*, at 159.)

c. Other consequences of an implied contract standard and their effect on policy and litigation

Nowhere is that conundrum more clear than in the case at bar. In implied contract law, a critical inquiry is finding whether both parties intended to be bound by a clear and specific set of promises. Let us consider several issues in a typical contract case:

i. Term

A key issue to be determined in any implied contract analysis is the contract term. At least one court has reasoned that if a term in a university-student contract is to be implied in law, it should be a semester, since that is the minimum performance unit for which tuition is paid. (*Eisele v. Ayers* (Ill. App. Ct. 1978) 63 Ill.App.3d 1039, 1045.) If a longer term is to be inferred, facts and realities that affect longer terms, like legislative action, budgetary pressure, and the like, must be considered to determine the intent of the parties. Here, there is at a minimum a question of fact concerning the university's intent to be bound to a fixed fee in perpetuity, since the 2003-2004 catalogue added a clear and conspicuous disclaimer that all fees were subject to adjustment.

ii. Act of acceptance

Even for those unknown persons who actually purported to know, rely on and intend to be bound by the "fee freeze" clause, there is a question about how, if at all, representations in the website were "accepted"; whether by "accepting" the offer of a place in the program, as *Luquetta* found, or by enrollment, as *Anderson* held was the appropriate measure. There is a question, if acceptance was by conduct, of how a court could discern how someone could accept some, but not all, of the implied clauses in the contract. These variances in the case law merit clarification and support granting of the petition.

iii. The litigation barrage

More importantly, should the *Kashmiri/Luquetta* regimen stand, a holding that all representations made in an institution's course catalogs and websites are potential contractual covenants threatens to spawn a barrage of fact-specific litigation, even in the absence of any actual reliance (as here, where the named plaintiffs admitted they could not recall having read the previous year's fee guide). Nor would the doctrine accomplish much in the long run: It would certainly encourage schools to disclaim more representations, and incorporate boilerplate disclaimers into their course catalogs and websites, stating that the program is subject to change and course offerings are not guaranteed, or the like. Respondent suggests these are changes within the power of the university, but it is right only to a point. There is no easy fix, but only the prospect of long and costly litigation: In any implied contract case, since all the facts and circumstances must be weighed by a trier of fact to determine if a contract exists,[1] a published disclaimer clause may only be rebuttable evidence of an intention not to be bound, and its effect might not be known until a costly trial takes place.

iv. Summary judgment, and class or group treatment, are inconsistent with implied contract law

Implied contracts require an evaluation of all the facts and circumstances from which a trier of fact might infer the creation of a meeting of the minds, and the terms thereof. Rarely if ever will this analysis lend itself to summary judgment. (*Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 718.) Even more importantly, implied contract analysis is entirely inconsistent with class treatment. Amici believe that few if any California employment implied contract class action cases have ever been certified and made it to the appellate court level to become a reported decision. The reason is likely that it is in the very nature of implied

[1] As the court's citation to *Scott v. P.G. & E.* illustrates, much of modern California implied contract law has been developed in the employment arena. (*See, e.g. Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454; *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1; *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311.) Under *Pugh* and its progeny, the presence of an implied contract for any specific duration or protection is based on an analysis that considers the "totality of the parties' relationship" and takes into account all of the "surrounding circumstances." (*Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 329.)

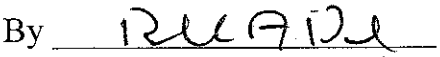
contract analysis that individual issues are likely to vary widely between class members.

v. Protecting students

Respondent suggests that a strict contractual regimen is necessary to protect students. In reality, the *Paulsen* approach does a better job, because of the unintended consequences of the *Kashmiri/Luquetta* model. As one commentator observed, "[f]inding that a contractual relationship does exist between student and institution, but holding that the contract is fulfilled if the institution does not act arbitrarily or capriciously, is perhaps the clearest approach. This standard, one of 'good faith and fair dealing,' adequately protects students while allowing institutions the necessary freedom to adjust their programs." (Anjum, *supra*, at 163.) It has been followed and worked well in cases of "specific promises" like *Jallali v. Southeastern University* (Fla. Dist. Ct. App. 2008) 992 So.2d 338, 340, where after a student was admitted a new catalogue toughened graduation requirements (an objective and specific standard). The court held that while the catalog could form a contract, that contract could be revised or modified so long as the dean did not act arbitrarily or capriciously. (*Id.*) Such a methodology gives recourse to students who are cheated or defrauded by a university, while still allowing educational institutions to respond, in good faith, to changing economic conditions creating pressures short of "impossibility" of performance. It actually would provide greater protection for students than they might have in a disclaimer-laden catalog or written signed acceptance contract which by its language prevented the creation of an implied contract *at all* (much like signed, integrated "at will" employment letters with disclaimers now essentially preclude the assertion of implied in fact employment agreements in the employment arena). (*Anjum*, *supra*, at 171-172.)

Respectfully submitted this 17th day of July, 2012,

Paul, Plevin, Sullivan
& Connaughton, LLP

By 
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cc: All Parties

Luquetta v. Regents of the University of California,

Supreme Court of California, Case No. S202820

CERTIFICATE OF SERVICE

I, Mary F. Duarte, hereby declare that I am over the age of eighteen years and not a party to this action. I am employed, or am a resident of, the County of San Diego, California, and my business address is: Paul, Plevin, Sullivan & Connaughton LLP, 401 B Street, Tenth Floor, San Diego, California 92101.

On June 18, 2012, I caused to be served the following document(s):

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XXX (By OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by the express service carrier, or delivered to a courier or driver authorized by the express service carrier to receive documents, in an envelope or package with delivery fees paid or provided for, and addressed on whom it is to be served pursuant to Code of Civil Procedure section 1013(c).

Executed on July 17. 2012, at San Diego, California.

Mary F. Duarte