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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARC STUDENTS FOR LIBERTY
CAMPAIGN, an unincorporated
association,

NO. CIV. S-09-2446 LKK/GGH

Plaintiff,

v.

O R D E R

LOS RIOS COMMUNITY COLLEGE
DISTRICT, BRICE W. HARRIS,
Chancellor, in his official
capacity; WILLIAM V. KARNS,
Vice Chancellor in his
capacity, and DOES 1-10,

Defendants.

_____ /

This case concerns an election for a Student Trustee at Los Rios Community College District. After perceived voting irregularities, the community college district invalidated an election and had leaders from each school in the district select the Student Trustee for the following year. Plaintiff has moved for summary judgment. Defendants have moved to dismiss plaintiff's case on the grounds of mootness. For the reasons described below, plaintiff's motion for summary judgment is granted, and defendant's

1 motion for dismissal is denied.

2 **I. BACKGROUND**

3 On April 21 and 22 of 2009, the Los Rios Community College
4 District ("District") held an election at its member colleges for
5 a Student Trustee. Following the election for the Student Trustee,
6 defendant Vice Chancellor William K. Karns and other members of the
7 executive staff of the District learned of irregularities in the
8 scheduling of voting hours. Specifically, the District's largest
9 college, American River College ("ARC"), advertised that its polls
10 would be open from 9:00 a.m to 9:00 p.m. on both days, two hours
11 later than the District permitted and than students at the other
12 schools were allowed to vote. ARC kept the polls open until 9:00
13 p.m. on the first day, but then, without notice to the student
14 body, closed the polls at 7:00 p.m. on the second day. The District
15 concluded that the irregularities in ARC's polling hours led to the
16 disenfranchisement of students at the other colleges on the first
17 day in that they could not vote after 7 p.m. and students at ARC
18 who tried to vote on the second day after 7 p.m. believing that the
19 polling was open until 9 p.m. The District has presented evidence
20 that a significant number of students were likely disenfranchised.
21 The District considered several options to overcome the
22 irregularities it perceived in the trustee election, including
23 conducting a new election, which it decided against due to lack of
24 monetary resources and scheduling issues with summer break
25 approaching. Ultimately, the District decided to invalidate the
26 election and allow student representatives from each college to

1 select the Student Trustee.

2 Subsequently, the District passed regulations to deal with
3 irregularities in elections for Student Trustees. These regulations
4 provide that if the election for Student Trustee is unfair, the
5 board may take several actions to ensure fairness, including
6 invalidating the election and selecting a Student Trustee in the
7 manner in which the April 2009 selection proceeded. These
8 regulations also have transferred responsibility for regulating the
9 elections from the student body to District employees.

10 The term of the Student Trustee selected in April 2009 has
11 ended. A new election for this year's Student Trustee was held in
12 April 2010. A student has been elected, and will be seated in the
13 fall, for this position.

14 **II. STANDARD FOR A FED. R. CIV. P. 56 MOTION FOR SUMMARY**

15 **JUDGMENT**

16 Summary judgment is appropriate when there exists no genuine
17 issue as to any material fact. Such circumstances entitle the
18 moving party to judgment as a matter of law. Fed. R. Civ. P. 56(c);
19 see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970);
20 Secor Ltd. v. Cetus Corp., 51 F.3d 848, 853 (9th Cir. 1995). Under
21 summary judgment practice, the moving party

22 always bears the initial responsibility of informing the
23 district court of the basis for its motion, and
24 identifying those portions of "the pleadings,
25 depositions, answers to interrogatories, and admissions
on file, together with the affidavits, if any," which it
believes demonstrate the absence of a genuine issue of
material fact.

26 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed.

1 R. Civ. P. 56(c)).

2 If the moving party meets its initial responsibility, the
3 burden then shifts to the opposing party to establish the existence
4 of a genuine issue of material fact. Matsushita Elec. Indus. Co.
5 v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); see also First
6 Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89
7 (1968); Secor Ltd., 51 F.3d at 853. In doing so, the opposing party
8 may not rely upon the denials of its pleadings, but must tender
9 evidence of specific facts in the form of affidavits and/or other
10 admissible materials in support of its contention that the dispute
11 exists. Fed. R. Civ. P. 56(e); see also First Nat'l Bank, 391 U.S.
12 at 289. In evaluating the evidence, the court draws all reasonable
13 inferences from the facts before it in favor of the opposing party.
14 Matsushita, 475 U.S. at 587-88 (citing United States v. Diebold,
15 Inc., 369 U.S. 654, 655 (1962) (per curiam)); County of Tuolumme
16 v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).
17 Nevertheless, it is the opposing party's obligation to produce a
18 factual predicate as a basis for such inferences. See Richards v.
19 Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). The
20 opposing party "must do more than simply show that there is some
21 metaphysical doubt as to the material facts Where the
22 record taken as a whole could not lead a rational trier of fact to
23 find for the nonmoving party, there is no 'genuine issue for
24 trial.'" Matsushita, 475 U.S. at 586-87 (citations omitted).

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III. ANALYSIS

**A. Defendants' Motion to Dismiss, or in the Alternative,
for Summary Judgment on the Grounds of Mootness**

1. Generally

Defendants argue that plaintiff's claims are moot and, thus, this case should be dismissed. Plaintiff sought preliminary injunctive relief to require the district to count the votes in the election and seat the student who obtained the most votes for the 2009-2010 school year term. That term has since passed. As such, plaintiff's claim to seat the student who obtained the most votes in the April 2009 election is moot. However plaintiff's complaint also seeks permanent injunctive relief enjoining defendants from "future unlawful interference with student elections" as well as declaratory relief from this court indicating that the district violated the due process rights of plaintiff's members in their handling of the April 2009 election. Compl. 1. These claims are simply not moot.

Further, plaintiff's claim epitomizes the exception to mootness of "capable of repetition, yet evading review". This exception applies when two criteria are met. First, there must be a reasonable chance that the plaintiff will suffer the injury again. Citizens for Clean Gov't v. City of San Diego, 474 F.3d 647, 650 (9th Cir. 2007). Second, the injury must be of inherently limited duration so that it is likely to always become moot before federal litigation is completed. Id. For example, in Roe v. Wade, 410 U.S. 113, 125 (1973), a seminal case concerning laws

1 prohibiting abortion, the Supreme Court denied a request by
2 defendants to dismiss on the grounds of mootness where the
3 plaintiff was no longer pregnant because the duration of pregnancy
4 was inherently likely to be shorter than the time required for
5 federal court litigation. Likewise here, the Student Trustee is
6 elected annually. Defendants would be able to evade review of their
7 actions concerning the election if every challenge to an election
8 became moot with the election of a new Student Trustee. As
9 described below, the regulations passed by the District demonstrate
10 a likelihood that defendant will again refuse to seat a popularly
11 elected Student Trustee due to perceived irregularities in an
12 election.

13 **2. The Amended Policy and Regulation**

14 Defendants largely misconstrues the nature of plaintiff's
15 claim. Plaintiff is not making a facial challenge to regulations
16 that were promulgated after the contested election. These
17 regulations set forth a procedure where the district may, under
18 circumstances similar to the controversy at issue here, invalidate
19 an election and seat a student who is not popularly elected.
20 Plaintiff argues that defendants lack the authority to do so either
21 through the District's general authority, or through the passing
22 of regulations. The regulations discussed in detail throughout
23 defendants' papers demonstrate that there is a significant chance
24 that defendants will take similar actions again.

25 Thus, the instant case is distinguishable from City of Los
26 Angeles v. Lyons, 461 U.S. 95 (1983), where the Supreme Court held

1 that a plaintiff seeking injunctive or declaratory relief must show
2 a likelihood of future harm. Id. at 105. In Lyons, plaintiff
3 brought a suit to enjoin as unconstitutional the use of chokeholds
4 by the Los Angeles Police Department in instances where the police
5 were not threatened with death or serious bodily injury. Id. at 98.
6 The Court reasoned that while Lyons could bring a suit seeking
7 damages for injuries resulting from the chokehold, he did not have
8 standing to enjoin the police because he could not demonstrate a
9 substantial likelihood that he, personally, would be choked again
10 in the future. Id. at 110. What was critical to the Court's
11 reasoning was that Lyons could not show that he was any more likely
12 than anyone else to be choked in the future. Id.

13 Here, however, plaintiff, a student group involved in
14 elections at American River College, is more likely than the
15 general population to be subject to the District's regulation of
16 the election for Student Trustee. Further, the District's
17 promulgation of the regulations following this incident that
18 specifically allow for a Student Trustee to be selected through a
19 means other than popular vote demonstrates a likelihood that
20 plaintiff will suffer this injury again. Further, it appears that
21 plaintiff contends that the irregularities that caused the District
22 to invalidate the April 2009 election were a pretext to prevent
23 plaintiff's chosen candidate from election. To the extent that
24 plaintiff's political goals remain at odds with those of the
25 District, plaintiff has demonstrated that it is more likely than
26 the general population to have its members' due process rights

1 violated in the future. Plaintiff is not seeking to invalidate the
2 regulations as unconstitutional. Rather, plaintiff is seeking to
3 enjoin the district from invalidating an election for Student
4 Trustee and, then, allowing a candidate who has not been popularly
5 elected to hold the office of Student Trustee. Plaintiff seeks to
6 enjoin this activity whether through formal regulation or the
7 informal, general authority of the district.

8 **B. Plaintiff's Motion for Summary Judgment¹**

9 Plaintiff moves for summary judgment on the grounds that
10 defendants' conduct here violated the Due Process Clause of the
11 federal Constitution. Essentially, it argues first that the state
12 legislature requires that the Student Trustee at the District be
13 elected by a popular vote of the students enrolled in the District
14 colleges. Second, plaintiff argues that defendants' actions
15 preventing the election of the Student Trustee contravenes state
16 law and violated the Due Process Clause of the federal
17 Constitution. Plaintiff does not raise any arguments as to whether
18 injunctive relief is proper and as to what the appropriate scope
19 and nature of such relief should be. Consequently, the court
20 construes plaintiff's motion as a motion for partial summary
21 judgment as to liability. Because the court grants plaintiff's
22 motion for partial summary judgment, plaintiff is instructed to

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24 ¹ The court notes that plaintiff's motion could be read to
25 suggest that he is seeking relief for a violation of the First
26 Amendment of the U.S. Constitution as well as the Due Process
Clause. At no time before this motion has plaintiff raised the
issue. As such, the court concludes that plaintiff's motion only
seeks summary judgment under the Due Process Clause.

1 file a motion as to remedy such that it will be heard on September
2 27, 2010. In order for permanent injunctive relief to issue, "[a]
3 plaintiff must demonstrate: (1) that it has suffered an irreparable
4 injury; (2) that remedies available at law, such as monetary
5 damages, are inadequate to compensate for that injury; (3) that,
6 considering the balance of hardships between the plaintiff and
7 defendant, a remedy in equity is warranted; and (4) that the public
8 interest would not be disserved by a permanent injunction."
9 Monsanto Co. v. Geertson Seed Farms ___ U.S. ___, ___ S.Ct. ___
10 (2010) available at 2010 WL 2471057 at *11 (quoting eBay Inc. v.
11 MercExchange, L.L.C., 547 U.S. 388, 391(2006)). The parties are
12 directed to respond to page *15 of Monsanto Co., where the Court
13 holds, "[I]f and when [defendant] pursues [conduct] that arguably
14 runs afoul of [federal law], [plaintiff] may file a new suit
15 challenging such action and seeking appropriate preliminary relief.
16 . . . Accordingly, a permanent injunction is not now needed to
17 guard against any present or imminent risk of likely irreparable
18 harm." Further, the parties shall address the scope and nature of
19 appropriate injunctive relief.

20 **1. State Law and Regulations²**

21 Section 72023.5(a) of the California Education Code provides
22 that the Student Trustee for each community college district "shall
23 be chosen, and shall be recalled, by the students enrolled in the
24

25 ² The court notes that the reasoning from its November 19,
26 2009 order denying plaintiff's motion for a preliminary injunction,
for the most part, remains unchanged.

1 community colleges of the district in accordance with procedures
2 prescribed by the governing board." The Student Trustee is a
3 nonvoting member of the board of trustees. Moreover, the Student
4 Trustee's powers are limited to: (1) "attending each and all
5 meetings of the governing board, except . . . executive sessions
6 of the governing board;" (2) being "seated with the members of the
7 governing board and . . . recognized as a full member of the board
8 at meetings, including receiving all materials presented to the
9 board members and participating in the questioning of witnesses and
10 the discussion of issues;" (3) making and seconding "motions at the
11 discretion of the governing board;" and (4) attending "closed
12 sessions, other than closed sessions on personnel matters or
13 collective bargaining matters, at the discretion of the board."
14 Cal. Educ. Code § 72023.5(a-b).

15 In support of its motion, plaintiff cites to an Opinion of the
16 California Attorney General concerning the election of Student
17 Trustees. After considering whether a community college district
18 governing board may establish procedures where the Student Trustee
19 could, among other options, be appointed by the board, the opinion
20 concludes that "student members must be selected in an election by
21 a majority or plurality of all community college students enrolled
22 in the district" because "no other intent can be reasonably
23 ascribed to the Legislature." Office of the Attorney General, State
24 of California, Opin. No. CV 78-104 (Mar. 23, 1979). Under
25 California law, the Attorney General's opinions are not binding,
26 yet are "entitled to great weight and, in the absence of contrary

1 controlling authority, persuasive." City of Irvine v. S. Cal. Ass'n
2 of Gov'ts, 175 Cal. App. 4th 506, 521 (Cal. Ct. App. 2009).³

3 In essence, defendants' argument is that vacating the election
4 and appointing a Student Trustee does not violate state law because
5 doing so was within the District's discretionary authority. In
6 support of this argument, defendants refer to Section 70902 of the
7 California Education Code. This section provides that, (1) "The
8 governing board of each community college district shall establish
9 rules and regulations not inconsistent with the regulations of the
10 board of governors and the laws of this state for the government
11 and operation of one or more community colleges in the district,"
12 id. at § 70902(a)(2); and (2) "In carrying out the powers and
13 duties specified in [California Education Code Section 72023.5],
14 the governing board of each community college district shall have
15 full authority to adopt rules and regulations, not inconsistent
16 with the regulations of the board of governors and the laws of this
17 state, that are necessary and proper to executing these prescribed
18 functions," id. at § 70902(c).

19 Defendants maintain that the election irregularities discussed
20 above caused the election to violate § 72023.5. Consequently, they
21 argue they were permitted to invalidate the election and initiate
22 a process for selection of a Student Trustee. Defendants do not
23 provide any specific statutory support for their authority to

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25 ³ Whether such deference should be accorded by a United States
26 District Court is open to doubt. Be that as it may, the statute
seems plain on its face without reference to the Attorney General's
opinion.

1 invalidate an election with irregularities or to initiate a process
2 to select a Student Trustee who is not popularly elected. Rather,
3 they rely on their general discretionary authority. This
4 discretionary authority, however, is clearly limited by the
5 regulations the board has promulgated and the laws of California.

6 In plaintiff's motion for a preliminary injunction, the
7 parties spent significant time discussing whether the
8 irregularities in the Student Trustee election rise to the level
9 that would warrant invalidation of the election. See November 19,
10 2009 Order, ECF No. 19, at 9-10. This issue does not appear to be
11 relevant in the instant motion. Specifically, plaintiff now argues
12 that the issue is whether the District may enact policies or take
13 actions that would prevent a Student Trustee from being elected by
14 the students in the District's colleges. Accordingly, the court
15 need not decide under what criteria the District may invalidate an
16 election. Rather, the court's inquiry is whether the District may
17 decide, through discretionary acts or through regulations, to seat
18 a Student Trustee who has not been elected by the student bodies
19 of the District's colleges.⁴

20
21 ⁴ Plaintiff challenges the regulations on the grounds of
22 vagueness because they allow for invalidation of elections under
23 principles of fairness. As discussed above, the court does not
24 consider this issue under the First Amendment. Section 72023.5 of
25 the Education Code, upon which plaintiff relies, provides that the
26 Student Trustee "shall be chosen . . . by the students enrolled in
the community colleges of the district in accordance with
procedures prescribed by the governing board." The governing
board's procedures, thus, may address determination of
irregularities and methods of responding to these irregularities
so long as the Student Trustee is nonetheless chosen by the
students of the District's colleges. Plaintiff only argues that

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2. Violation of Constitutional Due Process

The fundamental question to be answered is whether the invalidation of the election, in violation of state law, also violated rights protected by the Fourteenth Amendment. "[A] mere error of state law, . . . is not a denial of due process." Rivera v. Ill. 129 S. Ct. 1446, 1454 (2009), quoting Engle v. Isaac, 456 U.S. 107, 121 n.21 (1982). "The Due Process Clause . . . safeguards not the meticulous observance of state procedural prescriptions, but 'the fundamental elements of fairness'" Id., quoting, 385 U.S. 554, 563-64 (1967).

a. Substantive Due Process Rights In Elections

Although the high court has never articulated when a violation of state law is or is not a violation of the process due, the failure to comply with state and local laws concerning an election has been held to constitute a violation of federal due process where the fundamental fairness of the election is called into question. It has been held that where "the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots." Duncan v. Poythrese 657 F.2d 691, 703 (5th Cir. 1981) (quoting Griffin v. Burns, 570 F.2d 1065, 1077-78 (1st Cir. 1978). The Fifth Circuit applied this rule to hold that where the state officials "denied

defendants exceeded their authority under state law concerns the seating of a Student Trustee who was not chosen by the students.

1 the . . . electorate the right granted by state statute to choose
2 [their elected official], we are faced with patent and fundamental
3 unfairness." Id. at 703 (internal quotation omitted). The court
4 concluded that the official's actions eroded the constitutional
5 process by "purposely abrogat[ing] the right to vote, a right that
6 is fundamental to our society and preservative of all individual
7 rights." Id. at 703-04.

8 Similarly, in Bonas v. Town of North Smithfield, the court held
9 that the town's decision not to hold regular elections for the town
10 council and the school committee in its final odd-numbered year
11 before its elections were switched to even-numbered years was an
12 unconstitutional violation of the town charter and referendum,
13 which caused the switch. 265 F.3d 69, 77-78 (1st Cir. 2001). Also
14 applying Griffin, 570 F.2d at 1077, the court reiterated that "in
15 those few cases in which organic failures in a state or local
16 election process threaten to work patent and fundamental
17 unfairness, a colorable claim lies for a violation of substantive
18 due process (and, hence, federal jurisdiction attaches)." Bonas,
19 265 F.3d at 74. The court held that the total and complete
20 disenfranchisement that occurred demonstrated federal jurisdiction
21 where the town refused to hold a required election. Id. at 75.
22 Thus, refusal to seat a popularly elected official, as occurred
23 here, may offend due process. The remaining question is whether
24 this election warrants review under the federal Constitution.

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1 **b. Whether Elections Warrant Constitutional**
2 **Scrutiny**

3 The Supreme Court discussed whether a local election warranted
4 scrutiny under the U.S. Constitution in Hadley v. Junior College
5 District, 397 U.S. 50 (1970). There, the Court held that the
6 apportionment system of electing student trustees among several
7 junior colleges in a district violated the Equal Protection
8 Clause's "one man, one vote" principle. Id. at 58. The Court,
9 however, extended equal protection rights to the election of the
10 junior college student trustee because the trustees "carry out
11 governmental functions" and are elected by popular vote. Id. at 54.
12 The community college trustees in Hadley could "levy and collect
13 taxes, issue bonds with certain restrictions, hire and fire
14 teachers, make contracts, collect fees, supervise and discipline
15 students, pass on petitions to annex school districts, acquire
16 property by condemnation, and in general manage the operations of
17 the junior college." Id. at 53. This language does not set forth
18 a test for defining government function, but rather suggests that
19 the "governmental function" the trustees served was dependent on
20 or at least related to their broad powers over the residents of the
21 district. Moreover, these trustees were elected by residents in a
22 community college district, not by students enrolled in the
23 colleges. Id. at 51.

24 Nonetheless, when explaining its reasoning, the Court declared
25 that, "If there is any way of determining the importance of
26 choosing a particular governmental official, we think the decision

1 of the State to select that official by popular vote is a strong
2 enough indication that the choice is an important one." Id. at 55.
3 The Court continued and held that, "once a State has decided to use
4 the process of popular election and once the class of voters is
5 chosen and their qualifications specified, we see no constitutional
6 way by which equality of voting power may be evaded." Id. at 59.⁵

7 The parties contest whether Hadley sets forth a two part test
8 for constitutional scrutiny to apply to a local election.
9 Specifically, defendants argue that plaintiff must demonstrate both
10 (1) that the Student Trustee serves a "government function;" and
11 (2) that the Student Trustee is popularly elected. Plaintiff argues
12 that, under Hadley, it only must demonstrate that the legislature
13 intended for the Student Trustee to be popularly elected. While
14 plaintiff's interpretation is reasonable, the court interprets
15 Hadley to require both that the Student Trustee serve a government
16 function and is popularly elected for his election to be entitled
17 to review under the federal Constitution. Nonetheless, the fact
18 that the legislature decided to have a popular election for an
19 office provides substantial evidence that the office serves a
20 government function.

21
22 ⁵ Persuasive authority suggests that the requirement of
23 governmental function relates to whether a fundamental right
24 exists, and not as to when equal protection claims arise. In
25 Duncan, the court found strong parallels between the equal
26 protection claims and due process claims concerning the right to
vote: "Just as the equal protection clause of the fourteenth
amendment prohibits state officials from improperly diluting the
right to vote, the due process clause of the fourteenth amendment
forbids state officials from unlawfully eliminating that
fundamental right." Duncan, 657 F.2d at 704.

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i. Whether the Student Trustee is Popularly Elected

As discussed in this court's prior order, there is no question that the Student Trustee is popularly elected. Specifically, the state legislature decided to have Student Trustees selected by popular election by a class of voters determined by their enrollment in a community college. Defendant argues that because this class is not the same class from which the other trustees are elected, a so-called "general public election," the Student Trustee is not publically elected. This argument simply fails under Hadley. The Court specifically held that an election is popular when a legislature defines a class of voters. An election does not lose its status as popular depending on how the legislature chooses a class. Rather, even if "a State . . . limit[s] the right to vote to a particular group or class of people," such an election does not cease being popular. Id. at 59-60.

ii. Whether the Student Trustee Serves a Government Function

Determining whether the Student Trustee serves a government function is a more difficult question. As far as the court can find, no federal court has defined a government function. Rather, the powers must be "general enough and have sufficient impact throughout the district" to qualify as a government function. Id. at 53.

Plaintiff argues that the Student Trustee serves a government function. While a non-voting member of the governing board, the

1 Student Trustee nonetheless influences policy decisions that
2 concern the general population. In support of its contention that
3 a non-voting member of a agency may serve government functions,
4 plaintiff cites to numerous regulatory agencies and other
5 government bodies, which have non-voting members. While some of
6 these examples are not directly relevant because the non-voting
7 member of the agency is a federal government representative, some
8 are clearly applicable. While noting that many of these positions
9 are appointed positions, that fact does not alter a conclusion that
10 they nonetheless serve government functions.

11 Defendants have raised several arguments on this question.
12 They are either irrelevant or distinguishable. First, the court can
13 find no significance to the fact that the legislature included the
14 provision for election of the Student Trustee in the California
15 Education Code rather than the California Election Code. The issue
16 simply cannot turn on how the government organizes its statutes.

17 Likewise, defendants' reliance on Flint v. Dennison, 488 F.3d
18 816 (9th Cir. 2007) appears inappropriate. As the court discussed
19 in its prior order, Flint is distinguishable from the case at bar.
20 Most fundamentally, the election at issue there was entirely
21 different. That case dealt with the election of members of student
22 government, an issue which appears not to be dictated by the state
23 legislature. The Board of Regents ("Board") administered the
24 student government. Moreover, the student government had very
25 limited powers. Id. at 820-21. Their constitution must be approved
26 by the Board and all their actions must comply with the policies

1 of the Board. Id. The university considers the student government
2 to be primarily an educational tool. Id. at 821. Here, the election
3 at issue is mandated by state law and concerns membership in the
4 community college governing board. Furthermore, Flint concerns a
5 challenge to the election procedure set by the Board not, as here,
6 a claim based on the District's failure to follow a statute.
7 Lastly, Flint addresses a question of the rules which a candidate
8 must follow in running for office, not a question of whether
9 students were disenfranchised. Because of these substantial
10 differences between Flint and the case at bar, Flint is not
11 controlling, and does not indicate that plaintiff's due process
12 claim fails as a matter of law.

13 Third, defendants' reference to an opinion of the Attorney
14 General⁶ finding that Student Trustees do not hold civil offices,
15 as defined by California law, does not suggest that Student
16 Trustees do not serve government functions under federal law. See
17 62 Ops. Cal. Atty. Gen. 126, available at 1979 WL 29208 (Cal. A.G.
18 1979). In this opinion, the Attorney General opined that Student
19 Trustees do not "exercise[] a part of the sovereign power of the
20 government." California law defines the sovereign powers of

21 _____
22 ⁶ Defendants argue that their reliance on an opinion of the
23 California Attorney General is somehow equivalent to plaintiff's
24 reliance on another opinion. That is simply not the case. Plaintiff
25 relies on such an opinion as authority as to the interpretation of
26 state law. Defendants seek to rely on the California Attorney
General's opinion as authority as to how this court should
interpret the federal Constitution. Even if the Attorney General
addressed an issue relevant to the instant proceedings, his opinion
would be entitled to little, if any, weight in determining whether
defendants' conduct offends the federal Constitution.

1 government as "legislative, executive or judicial." Moore v.
2 Panish, 32 Cal. 3d 535, 545 (1982). In Wilson v. San Luis Obispo
3 County Democratic Central Committee, 175 Cal. App. 4th 489, 500
4 (2009), the California Court of Appeals applied Moore, and held
5 that political "[p]arty county central committee members do not
6 exercise any sovereign powers of government." As an initial matter,
7 California's definition of the sovereign powers of government is
8 far from the amorphous definition of government function in Hadley.
9 They are simply not the same test. Evidence of this difference can
10 be found in decisions from the Supreme Court, which found that the
11 U.S. Constitution applies to political party-run primary elections.
12 See Smith v. Allwright, 321 U.S. 649, 661-62 (1944) ("It may now
13 be taken as a postulate that the right to vote in such a primary
14 for the nomination of candidates without discrimination by the
15 State, like the right to vote in a general election, is a right
16 secured by the Constitution."); Terry v. Adams, 345 U.S. 461
17 (1953).

18 The court recognizes that this case raises a close call as to
19 whether the Student Trustee serves a government function.
20 Ultimately, this court finds that the facts that the California
21 legislature decided to codify the election of Student Trustees and
22 that the Student Trustee influences the administration and policies
23 of the community college district demonstrates that the Student
24 Trustee serves a government function, as defined in Hadley.

25 3. Defense of Unclean Hands

26 The defendants have not opposed this motion on the grounds

1 that there is a triable question as to whether plaintiff has
2 unclean hands. This is so despite defendants' request for discovery
3 on this issue and despite defendants raising factual disputes in
4 their response to plaintiff's statement of undisputed facts, which
5 suggest that this defense, however, was considered by the
6 defendants. Defendants' failure to oppose on this ground
7 constitutes waiver of the defense here.


8 **IV. CONCLUSION**

9 For the foregoing reasons, the court ORDERS as follows:

- 10 (1) Defendants' Motion to Dismiss, or in the Alternative,
11 for Summary Judgment, ECF No. 97, is DENIED.
12 (2) Plaintiff's Partial Motion for Summary Judgment as to
13 Liability, ECF No. 93, is GRANTED.
14 (3) Plaintiff SHALL file a motion relative to remedy such
15 that it shall be heard on September 27, 2010. All
16 memoranda SHALL be filed according to Eastern District
17 of California Local Rules.

18 IT IS SO ORDERED.

19 DATED: August 10, 2010.

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22 
23 LAWRENCE K. KARLTON
24 SENIOR JUDGE
25 UNITED STATES DISTRICT COURT
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