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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COALITION TO DEFEND AFFIRMATIVE)	Case No. 10-641 SC
ACTION, INTEGRATION AND IMMIGRANT)	
RIGHTS AND FIGHT FOR EQUITY BY)	ORDER RE: MOTION TO
ANY MEANS NECESSARY, et al.,)	INTERVENE AND DEFENDANTS'
)	<u>MOTIONS TO DISMISS</u>
Plaintiffs,)	
)	
v.)	
)	
ARNOLD SCHWARZENNEGER, in his)	
official capacity as Governor of)	
the State of California, REGENTS)	
OF THE UNIVERSITY OF CALIFORNIA,)	
and MARK YUDOF, in his official)	
capacity as President of the)	
University of California,)	
)	
Defendants.)	
)	
_____)	
WARD CONNERLY, AMERICAN CIVIL)	
RIGHTS FOUNDATION, and CALIFORNIA)	
ASSOCIATION OF SCHOLARS,)	
)	
Proposed)	
Intervenor-Defendants.)	
_____)	

Plaintiffs Coalition to Defend Affirmative Action, et al. (collectively, "Plaintiffs") bring this action challenging the constitutionality of Section 31 of Article I of California's constitution ("Section 31"), as it applies to the student admission policies of the University of California. ECF No. 1 ("Compl.").

1 Section 31 prohibits California from granting preferential
2 treatment to "any individual or group on the basis of race, sex,
3 color, ethnicity, or national origin in the operation of public
4 employment, public education, or public contracting." Cal. Const.
5 art. I, § 31. It was added as an amendment to California's
6 constitution in 1996 by Proposition 209, a voter initiative. See
7 Compl. Named as Defendants are University of California President
8 Mark Yudof ("Yudof") and the Regents of the University of
9 California ("UC Regents") (collectively, "UC Defendants"), as well
10 as California Governor Arnold Schwarzenegger ("the Governor"). Id.

11 This is not the first challenge to the constitutionality of
12 Section 31 as it applies to the student admission policies of
13 California's state-run schools. In a pre-enforcement action
14 brought in 1996, the Ninth Circuit found Section 31 to be
15 constitutional. Coal. for Econ. Equity v. Wilson, 122 F.3d 692
16 (9th Cir. 1997). The Governor and UC Defendants have not brought a
17 motion to dismiss Plaintiffs' action under Coalition for Economic
18 Equity, however. Rather, the Governor and UC Defendants have filed
19 separate motions arguing that under the Eleventh Amendment, they
20 are immune from the suit and are not the proper defendants in this
21 action. ECF Nos. 8 ("Gov.'s Mot."), 9 ("Gov.'s Mem. of P. & A."),
22 30 ("Opp'n to Gov.'s Mot."), 33 ("Gov.'s Reply"), ("UC Defs.'
23 Mot."), 28 ("Opp'n to UC Defs.' Mot."), 34 ("UC Defs.' Reply").
24 The Governor argues that UC Defendants are the proper defendants,
25 Gov.'s Mem. of P. & A. at 5, 8-9, while UC Defendants argue that
26 the Governor is the proper defendant, UC Defs.' Mot. at 1-2.

27 Upon consideration of the parties' papers, and without
28 expressing an opinion on the ultimate issue in the case, the Court

1 finds that both the Governor and UC President Yudof are proper
2 defendants in this action. Neither the Governor nor Yudof are
3 shielded by the Eleventh Amendment from defending this suit because
4 they are both state officers sufficiently connected to the
5 enforcement of Section 31 and because Plaintiffs seek only
6 injunctive relief that does not implicate the state treasury. Ex
7 parte Young, 209 U.S. 123, 156-57 (1908), Agua Caliente Band of
8 Cahuilla Indians v. Hardin, 223 F.3d 1041, 1045 (9th Cir. 2000).
9 Yudof is sufficiently connected through his role as UC President.
10 The Governor is sufficiently connected because under California's
11 constitution, the Governor serves as an ex officio UC regent, Cal.
12 Const. art. IX, § 9(a), and per the UC Regents' Bylaws, the
13 Governor serves as President of the UC Regents -- a position
14 distinct from Yudof's position as UC President. Bylaw 21.2,
15 Regents of Univ. of Cal. Bylaws. However, because the UC Regents
16 is a state entity, see Cal. Const. art. IX, § 9(a), it is immune
17 under the Eleventh Amendment from defending this suit and is
18 dismissed as a Defendant. Pennhurst State Sch. & Hospital v.
19 Halderman, 465 U.S. 89, 100 (1984). The Court DENIES the
20 Governor's motion to dismiss Plaintiffs' Complaint under Rule
21 12(b)(6) of the Federal Rules of Civil Procedure, finding that the
22 Complaint sets forth sufficient facts to state a claim against the
23 Governor and provides notice of this claim.

24 Also before the Court is a fully briefed Motion to Intervene
25 as defendants, filed by Ward Connerly ("Connerly"), former UC
26 Regent and original sponsor of Proposition 209; American Civil
27 Rights Foundation ("ACRF"); and California Association of Scholars
28 ("CAS") (collectively, "Proposed Intervenors"). ECF Nos. 18

1 ("Prop. Intervenor's Mot."), 29 ("Opp'n to Prop. Intervenor's'
2 Mot."), 35 ("Prop. Intervenor's Reply & Mot. to Strike"). Proposed
3 Intervenor's make this motion under Rules 24(a) and (b) of the
4 Federal Rules of Civil Procedure. Proposed Intervenor's attach to
5 this motion a draft of a motion they intend to file if they are
6 permitted to intervene, in which they argue that Plaintiff's case
7 should be dismissed in light of Coalition for Economic Equity, 122
8 F.3d 692. Prop. Intervenor's Mot. Ex. A ("Prop. Intervenor's Draft
9 MTD").¹

10 The Court finds that Connerly and ACRF may intervene as
11 Defendant-Intervenor's pursuant to Rule 24(a); Connerly and ACRF
12 have filed a timely motion to intervene in which they assert an
13 interest in this suit that may not be adequately represented by the
14 Governor and the UC Defendant's. Sagebrush Rebellion, Inc. v. Watt,
15 713 F.2d 535, 527 (9th Cir. 1983). For these reasons, Connerly's
16 and ACRF's motion to intervene is GRANTED. The Court DENIES CAS's
17 motion to intervene under Rule 24(a) and (b), having found that CAS
18 has failed to identify a substantial interest in the action.

19 For these reasons, the Court GRANTS IN PART and DENIES IN PART
20 UC Defendant's Motion, DENIES the Governor's Motion, and GRANTS IN
21 PART and DENIES IN PART Proposed Intervenor's Motion.

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24 ¹ Proposed Intervenor's have also moved to strike Plaintiff's
25 Opposition as untimely. Prop. Intervenor's Reply and Mot. to
26 Strike at 1. Plaintiff's deadline to file their Opposition was
27 Friday, July 2, 2010, and Plaintiff's filed it the following day.
28 See Opp'n to Prop. Intervenor's Mot. Plaintiff's have apologized
for this late filing and have made assurances that no other
deadlines will be missed. ECF No. 38. Although the Court does not
condone untimely filings and will not tolerate future missed
deadlines by the Plaintiff's, the Court finds this error to be
harmless and DENIES Proposed Intervenor's Motion to Strike.

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The Defendants in this action shall be:

- o ARNOLD SCHWARZENNEGER, in his official capacity as Governor of the State of California, and
- o MARK YUDOF, in his official capacity as President of the University of California.

The Defendant-Intervenors in this action shall be:

- o WARD CONNERLY, and
- o AMERICAN CIVIL RIGHTS FOUNDATION.

The Court finds that the most pressing issue in this action is whether Plaintiffs' Complaint should be dismissed under Rule 12(b)(6), given the Ninth Circuit's opinion in Coalition for Economic Equity, 122 F.3d 692. Accordingly, the Court ORDERS Defendant-Intervenors to notice and file a motion to dismiss addressing this issue. This motion shall be heard by the Court on November 15, 2010, at 10 a.m., in Courtroom 1, 450 Golden Gate Avenue, San Francisco. The Status Conference scheduled for Thursday, September 16, 2010, is VACATED.

IT IS SO ORDERED.

Dated: August 25, 2010


UNITED STATES DISTRICT JUDGE