No. 1 Civil

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

STATE OF CALIFORNIA, DELAINE EASTIN, as State Superintendent of Public Instruction, STATE DEPARTMENT OF EDUCATION, and STATE BOARD OF EDUCATION,

Petitioners,

vs.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent

GINO BUCHIGNANI, JASON KEHRLI, and DREW SMITH,

Real Parties in Interest

Hon. Peter J. Busch, Judge
Civil Case No. BC 312236

PETITION FOR WRIT OF MANDATE

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WHY EXTRAORDINARY RELIEF IS APPROPRIATE

This Petition arises because the respondent court has effectively destroyed the utility of California's summary judgment statute in any multi-plaintiff case. C.C.P. § 437c. It ruled that when a defendant is sued by multiple plaintiffs who plead their claims in a single count, a court may not grant summary judgment or summary adjudication as to the claims of fewer than all plaintiffs because to do so would not "completely dispose" of a "cause of action" within the meaning of C.C.P. § 437c(f)(1).

That ruling was flatly wrong and contrary to over a century of California case law. The law has always been that when different plaintiffs allege violations of their rights, each plaintiff has a separate cause of action. Joining those separate causes of action in a single complaint, or in a single count of a complaint, does not merge them into a single "cause of action." Nor does it prevent the granting of a motion for summary judgment or summary adjudication against one or more but fewer than all plaintiffs.

In the underlying action, plaintiffs are 98 public school children who attend 38 schools in 18 school districts across California. They claim that petitioners State of California ("the State"), Delaine Eastin as Superintendent of Public Instruction, California Department of Education, and California Board of Education have deprived them of their right to "basic educational equality" by subjecting them to

"deplorable conditions" ranging from unqualified teachers to insufficient textbooks to rundown school facilities. They seek injunctive and declaratory relief requiring petitioners to institute a system of oversight and management of public education to ensure that these conditions are remedied and do not recur. The State has cross-complained against the school districts in which plaintiffs' public schools are located. The cross-complaint prays that, to the extent any of the conditions of which plaintiffs complain may exist and result in a deprivation of plaintiffs' constitutional rights, the respondent court should order the school districts to correct them.

Plaintiffs seek relief on the basis of four legal theories, which they plead as separate counts in their First Amended Complaint and label "causes of action." Plaintiffs allege (1) that they have been denied equal protection of the laws in violation of the California Constitution; (2) that they have been denied a free and basic education in violation of the California Constitution; (3) that they have been denied due process in violation of the California Constitution; and (4) that they have been discriminated against in violation of Title VI of the Civil Rights Act of 1964. Plaintiffs add a fifth count seeking declaratory relief. All 98 plaintiffs join in each of these counts.

Real parties in interest Gino Buchignani, Jason Kehrli, and Drew Smith attend Cloverdale High School in Cloverdale, California. They claim that their constitutional

rights have been violated because Cloverdale High School supposedly lacks textbooks for all classes and air-conditioning in all classrooms. On April 11, 2001, the State moved for summary judgment or, in the alternative, for summary adjudication on the claims asserted by real parties in interest. The other petitioners joined in the State's motion. Petitioners submitted undisputed evidence showing that Cloverdale High School is a good school, that real parties in interest and other students there are receiving a good education, that the "deplorable conditions" of which plaintiffs generally complain do not exist at that school, and that real parties' specific claims have no merit. Petitioners were therefore entitled to summary judgment or summary adjudication. Summary judgment for petitioners, moreover, would have rendered moot the State's cross-complaint against the Cloverdale Unified School District ("Cloverdale Unified") and resulted in the district's dismissal from the lawsuit. Cloverdale Unified therefore joined in petitioners' motion.

The respondent court did not find that any triable issue of material fact precluded summary judgment or summary adjudication. Cf. C.C.P. § 437c(g) (requiring such findings whenever a motion for summary judgment is denied on the basis that triable issues are present). Instead, by its Order of April 25, 2001, it denied petitioners' motion on the sole ground that the resolution of real parties' claims by summary judgment or summary adjudication would not "completely dispose" of a "cause of action" within the meaning of C.C.P. §

437c(f)(1), because all plaintiffs assert claims against petitioners and because real parties in interest are "only a subset" of all plaintiffs.

The respondent court's ruling unquestionably merits this Court's review. C.C.P. § 437c(*l*) provides expressly for review by extraordinary writ of a ruling denying summary judgment. Such review is especially appropriate here. The ruling below prevents <u>any</u> motion for summary judgment or summary adjudication in the underlying action that does not dispose of the claims of each and every plaintiff. It will therefore require petitioners to litigate through trial many individual claims that have no merit. In addition, it will cause each of the 18 cross-defendant school districts to remain in this litigation, even though, as here with respect to Cloverdale Unified, the facts may demonstrate that all students in one or more districts are receiving a constitutionally adequate education. The respondent court's ruling thus seriously impedes the simplification and streamlining of a very complicated piece of litigation.

The ruling below would have a similar effect in any case where more than one plaintiff joins in a single complaint or in a single count of a complaint. It would virtually eliminate the utility of the summary judgment procedure in such cases, would greatly increase the burden and expense of litigation, and would consume scarce judicial resources by requiring that frivolous claims be tried merely because

plaintiffs chose to join them in the pleadings with potentially meritorious ones.

One claim below aptly highlights the absurd consequences of the respondent court's ruling. The First Amended Complaint alleges that petitioners have violated Title VI of the Civil Rights Act of 1964 by discriminating against public school students of color and in favor of non-Hispanic Caucasian students. The undisputed evidence, however, shows that real parties are non-Hispanic Caucasian students, are members of the favored category, and cannot possibly have been victims of the discrimination alleged in the complaint. Nevertheless, the respondent court denied summary adjudication. It did so since other plaintiffs, who are students of color, allege that they have been discriminated against. Real parties' patently frivolous discrimination claim will thus proceed to trial and will require the continued time and attention of the parties and of the respondent court. No example could demonstrate more clearly the waste that will be the inevitable consequence of the ruling below.

"[A] writ of mandate will issue" when a trial court's denial of summary judgment "will result in trial on non-actionable claims." West Shield Investigations & Security Consultants v. Superior Court, 82 Cal. App. 4th 935, 946 (2000). That is the situation here. This is also a case of "general import to members of the bench and bar," Townsend v. Superior Court, 61 Cal. App. 4th 1431, 1434 (1998), since

C.C.P. § 437c is the principal procedural device by which litigants and courts weed out unmeritorious claims, and since the proper construction of this statute is of great importance to the administration of justice in California.

Courts of Appeal regularly issue alternative writs to resolve important questions concerning the meaning of C.C.P. § 437c(f)(1).[1] Here, the respondent court interpreted C.C.P. § 437c(f)(1) but got it badly wrong. Adverse consequences will result -- not only for the litigants in this case, but for all defendants and all California courts faced with multi-plaintiff lawsuits. The Court should issue an alternative writ or order to show cause, should set the matter down for hearing, and should issue a peremptory writ of mandate directing the respondent court to vacate its order and to enter summary judgment for petitioners. In the alternative, the Court should issue a writ directing the respondent court to vacate its order and to consider the merits of petitioners' motion.

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[1] Catalano v. Superior Court, 82 Cal. App. 4th 91, 92 (2000); Edward Fineman Co. v. Superior Court, 66 Cal. App. 4th 1110, 1116 (1998); DeCastro West Chodorow & Burns, Inc. v. Superior Court, 47 Cal. App. 4th 410, 422 (1996); Southern California Edison Co. v. Superior Court, 37 Cal. App. 4th 839, 847 (1995); Regan Roofing Co. v. Pacific Scene, 24 Cal. App. 4th 425, 429 (1994); Lilienthal & Fowler v. Superior Court, 12 Cal. App. 4th 1848, 1851 (1993).

PETITION FOR WRIT OF MANDATE

TO THE HONORABLE PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES, OF THE COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT:

Petitioners State of California ("the State"), Delaine Eastin as Superintendent of Public Instruction, California Department of Education, and California Board of Education petition this Court for a writ of mandate directed to respondent Superior Court of the State of California for the City and County of San Francisco, and by this verified petition allege:

1. All petitioners are defendants and the State is a cross-complainant in an action now pending before the respondent court entitled Eliezer Williams, et al. v. State of California, et al., being Civil No. BC 312236 on the files of the respondent court.

2. The respondent court is now, and at all times mentioned in this petition has been, the court exercising judicial functions in connection with the action described above.

3. In Williams v. State of California, plaintiffs are 98 public school children who attend 38 schools in 18 school districts across California. Ex. 12.[2] They claim that petitioners have deprived them of their right to an education

[2] All references to exhibits refer to the Appendix of Exhibits, which is being filed concurrently herewith.

by subjecting them to "deplorable conditions" ranging from unqualified teachers to insufficient textbooks to rundown school facilities. Ex. 12, ¶¶ 1, 4. They seek injunctive and declaratory relief requiring petitioners to institute a system of oversight and management of public education to ensure that these conditions are remedied and do not recur. Ex. 12, ¶¶ 324-326. The State has cross-complained against the school districts in which plaintiffs' public schools are located. Ex. 13. The cross-complaint prays that, to the extent any of the conditions of which plaintiffs complain may exist and result in a deprivation of plaintiffs' constitutional rights, the respondent court should order the school districts to correct them. See, e.g., Ex. 13, ¶¶ 92-95.

4. Plaintiffs seek relief on the basis of four legal theories, which they plead as separate counts in their First Amended Complaint and label "causes of action." Plaintiffs allege (1) that they have been denied equal protection of the laws in violation of Article I, Section 7(a) and Article IV, Section 16(a) of the California Constitution, Ex. 12, ¶¶ 299-300; (2) that they have been denied a free and basic education in violation of Article IX, Sections 1 and 5 of the California Constitution, Ex. 12, ¶¶ 301-303; (3) that they have been denied due process in violation of Article 1, Sections 7(a) and 15 of the California Constitution, Ex. 12, ¶¶ 304-310; and (4) that they have been discriminated against in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and 34 C.F.R. § 100.3(b)(2). Ex. 12, ¶¶ 311-

313. Plaintiffs add a fifth count seeking declaratory relief. Ex. 12, ¶¶ 320-322. All 98 plaintiffs join in each of these counts.[3] Ex. 12, ¶¶ 299-314.

5. On March 14, 2001, the State filed with the respondent court a motion for summary judgment or, in the alternative, for summary adjudication on the claims brought by three of the 98 plaintiffs, real parties in interest Gino Buchignani, Jason Kehrli, and Drew Smith. The other petitioners joined in the motion. It duly came on for hearing on April 11, 2001. On April 25, 2001, the respondent court entered its order denying petitioners' motion. Ex. 11. Petitioners seek an alternative writ of mandate to command the respondent court, its officers, agents, and all other persons acting through its orders, to vacate said order and to enter a new order granting petitioners' motion; or to show cause before this Court, at a time and place hereinafter specified by court order, why it has not done so and why a peremptory writ should not issue.

6. So that this Court may have the record before it in this action, true and correct copies of all materials that were presented to respondent court for its consideration and for determination of said motion are included in an Appendix of Exhibits that is being filed concurrently

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[3] Plaintiffs' First Amended Complaint alleged two additional counts: (1) violation of Education Code § 51004 and (2) violation of C.C.P. § 526a. On February 8, 2001, judgment on the pleadings against all plaintiffs was granted on these counts.

herewith. The Appendix includes: (1) the State's Notice of Motion[4] together with the accompanying (2) Memorandum of Points and Authorities, (3) Separate Statement of Undisputed Material Facts, and (4) Declaration of Gene Lile in support of the motion; (5) plaintiffs' Memorandum of Points and Authorities in opposition to the motion together with the accompanying (6) Declaration of Lois Perrin and attachments thereto, (7) Separate Statement of Undisputed Material Facts, and (8) Objections to Evidence Submitted in support of the motion; and (9) petitioners' Reply Memorandum of Points and Authorities in support of the motion.[5] These documents are marked as Exhibits 1 through 9, respectively. The reporter's transcript of proceedings of the respondent court at the April 11, 2001 hearing and the respondent court's Order of April 25, 2001 are at Exhibits 10 and 11, respectively. A copy of plaintiffs' First Amended Complaint is at Exhibit 12 and a copy of the relevant portions of the State's cross-complaint

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[4] The other petitioners' Notice of Joinder is at Exhibit 16 in the Appendix.

[5] In its Reply Memorandum in support of its motion, the State referenced legal arguments made by cross-defendant Campbell Union School District ("Campbell Union") in a memorandum in support of a motion by Campbell Union for judgment on the pleadings as to the State's cross-complaint. Campbell Union's motion was also heard by the respondent court on April 11, 2001 and was denied. For this Court's convenience, petitioners have included in their Appendix at Exhibit 14 a copy of Campbell Union's opening memorandum in support of its motion. Finally, the Cloverdale Unified School District ("Cloverdale Unified") joined in petitioners' motion. Petitioners have included in their Appendix at Exhibit 15 a copy of Cloverdale Unified's Notice of Joinder.

is at Exhibit 13. Petitioners incorporate the Appendix herein by reference. All references to the above documents are by reference to the Appendix.

7. The facts on which petitioners' motion for summary judgment or, in the alternative, for summary adjudication was based are set forth in paragraphs 8 through 14 hereof.

8. Real parties in interest Gino Buchignani, Jason Kehrli, and Drew Smith attend Cloverdale High School in the Cloverdale Unified School District ("Cloverdale Unified"). Real parties in interest are non-Hispanic Caucasian students. Ex. 4 ¶ 15; Ex. 7, ¶ 23. The thrust of petitioners' motion for summary judgment against real parties in interest was that Cloverdale High School is a good and successful school, that conditions there are good, that the "deplorable conditions" of which other plaintiffs complain at their schools do not exist at Cloverdale High School, and therefore that the claims of real parties in interest that they have been deprived of the right to an adequate education or that their constitutional rights have been infringed lack any substance.

9. The only conditions at Cloverdale High School about which real parties in interest complained in the First Amended Complaint were (a) an alleged insufficiency in the number of textbooks available to students in some classes, and (b) a lack of air-conditioning in some classrooms.

10. As to textbooks, real parties in interest alleged:

> Students cannot take books home for homework in some classes, including science and geography classes, because the school does not have enough books for all students in the school. In addition, students in some classes, including geography, do not have any books to use at all.

Ex. 12, ¶ 141.

11. The undisputed evidence demonstrates that this allegation is false. As shown by the Declaration of Gene Lile, the principal of Cloverdale High School, every student in every class at Cloverdale High School that uses a textbook has a textbook to use in class and to take home. Ex. 4, ¶ 5. The only exception is Physics. In that class, each student was issued a textbook to use in class and to take home at the beginning of the current 2000-2001 school year. Ex. 4, ¶ 9. Some students subsequently lost their textbooks, but all such students were and are provided with photocopies of all necessary textbook information. Ex. 4, ¶ 9. Cloverdale High School adopted this practice, rather than buying additional copies of the textbook, because a new edition of the Physics textbook has been adopted for the upcoming 2001-2002 school year, and the school did not wish to waste money by purchasing additional copies of an outdated textbook. Ex. 4, ¶ 9. In some other classes at Cloverdale High School, including Geography, instructional materials other than textbooks are used because a professional determination was made that such materials provide a method of instruction superior to traditional textbooks. Ex. 4, ¶¶ 5-6. Nevertheless, in these classes every student has copies of the relevant instructional materials to use in class and to take home. Ex. 4, ¶¶ 5-6.

12. As to air conditioning, real parties in interest alleged:

> Very few of the classrooms at Cloverdale High have air conditioning, even though temperatures inside the classrooms reach as high as 110 degrees and are consistently extremely hot during the months of August, September, October, May, and June. Students in the classrooms without air conditioning have difficulty concentrating and learning in the extreme heat. The Cloverdale High school calendar begins at the end of August and ends in June, and the absence of air conditioning severely undermines students' ability to concentrate during hot days.

Ex. 12, ¶ 140.

13. The undisputed evidence shows that, although some classrooms at Cloverdale High School do not have air-conditioning, all classrooms that currently lack air-conditioning will be equipped with it within the next two years by virtue of a $4 million facilities improvement and modernization bond passed in 1999 by voters in the Cloverdale Unified School District. Ex. 4, ¶¶ 12-13. In addition, all classrooms even now have ceiling fans that are used when it is warm. Ex. 4, ¶ 12. At the beginning (late August) or end (early June) of the school year, temperatures occasionally get warm toward the end of the school day. Ex. 4, ¶¶ 12, 14. But such temperatures are not average even at those times of the year. Ex. 4, ¶ 14.

14. Cloverdale High School is a good school where learning takes place in all classrooms at all times, including the occasional warm days. Ex. 4, ¶ 14. In 1999 Cloverdale High School met or exceeded the average of all California high

schools in 4 of 5 categories tested on the Stanford 9 (a state-wide assessment test), including reading, language arts, science, and social science. Ex. 4, ¶ 3. And in 2000 Cloverdale High School met or exceeded the average of all California high schools in 3 of 5 categories tested on the Stanford 9, including math, science, and social science. Ex. 4, ¶ 3. Cloverdale High School also met its year 2000 improvement goal for the Academic Performance Index, a tool used by the State Department of Education to measure student achievement. Ex. 4, ¶ 3. Finally, Cloverdale High School has been accredited for a period of six years -- the maximum period allowed -- by the Western Association of Schools and Colleges, the relevant accrediting agency. Ex. 4, ¶ 3.

15. Based on these facts, petitioners' motion for summary judgment or, in the alternative, for summary adjudication, showed:

a) There is no merit to real parties' claim that they were discriminated against in violation of Title VI of the Civil Rights Act of 1964 since the thrust of that claim is that petitioners' conduct has a disparate impact on "students of color," Ex. 12, ¶ 314, whereas real parties are non-Hispanic Caucasian students and are members of the group that is allegedly favored by petitioner's conduct. Ex. 4, ¶ 15; Ex. 7, ¶ 23.

b) There is no merit to real parties' claim that they were denied constitutional due process by (1) being

deprived of "basic educational opportunities," Ex. 12, ¶¶ 309-10, (2) being required to attend a "dangerous" school that jeopardizes their health and safety, Ex. 12, ¶ 306, or (3) being "ill-prepared" for the high school exit examination, Ex. 12, ¶¶ 307-10, since the undisputed facts in the record show that Cloverdale High School is a good school and that there is no substance to real parties' allegations to the contrary, Ex. 4, ¶¶ 1-15; Ex., 7, ¶¶ 1-23; and since the record contains no allegations, let alone evidence, that would allow a reasonable trier of fact to conclude that Cloverdale High School is "dangerous," that real parties' "health and safety" has been jeopardized, or that real parties have not been prepared for the high school exit examination. Ex. 12, ¶¶ 140-141.

c) There is no merit to real parties' claim that they were deprived of a "free and basic education," Ex. 12, ¶¶ 302-303, since the undisputed facts show that Cloverdale High School is a good school and that there is no substance to real parties' allegations to the contrary, Ex. 4, ¶¶ 1-15; Ex., 7, ¶¶ 1-23; and since the record contains no allegations, let alone evidence, that would allow a reasonable trier of fact to conclude that real parties in interest have not received a basic education or have been

charged fees for participation in educational activities. Ex. 12, ¶¶ 140-141.

d) There is no merit to real parties' claim that they were denied the equal protection of the laws, since (1) that claim is governed by Butt v. State of California, 4 Cal. 4th 668 (1992); (2) Butt plainly holds that "[u]nless the quality of [a] district's [educational] program, viewed as a whole, falls fundamentally below prevailing statewide standards, **no constitutional violation occurs**," id. at 686-87 (emphasis added); and (3) the undisputed facts concerning conditions at Cloverdale High School are such that no reasonable trier of fact could conclude that the quality of school's educational program fell so fundamentally below prevailing statewide standards as to violate constitutional requirements. Ex. 4, ¶¶ 1-15; Ex. 7, ¶¶ 1-23.

16. Real parties in interest did not offer evidence to dispute any of the foregoing material facts shown by petitioners. Ex. 7, ¶¶ 1-23.

17. In its order denying petitioners' motion for summary judgment or, in the alternative, for summary adjudication, the respondent court did not find that there was any triable issue of material fact. Ex. 11. Nor did it dispute petitioners' showing that none of real parties' rights had been infringed -- neither their right to a constitutionally adequate education nor any other

constitutional or statutory right which they possess. Instead, the respondent court denied petitioners' motion on the sole ground that resolution of the claims brought by real parties in interest would not "completely dispose" of a "cause of action" within the meaning of C.C.P. § 437c(f)(1), because all 98 plaintiffs, including real parties in interest, allege claims against petitioners and because real parties in interest are "only a subset" of all plaintiffs. Ex. 11.

18. The respondent court committed a clear error of law and abused its discretion by holding that petitioners may not seek summary judgment or summary adjudication as to the claims alleged by real parties in interest, even though those claims lack any factual basis.

19. The respondent court's ruling was arbitrary and capricious and contrary to over one hundred years of California law, which teaches that when different plaintiffs allege a violation of their rights, each plaintiff has a separate cause of action. Accordingly, the ruling was clearly contrary to the plain terms of C.C.P. § 437c(f)(1), which mandates summary adjudication where such relief would completely dispose of a cause of action that has no merit.

20. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition. Petitioners have no right of appeal from the respondent court's order. All other procedures are wholly inadequate because if an appellate court does not now review respondent court's order, petitioners will be required

to undergo a trial on the merits of the real parties' claims, with all the attendant burden, expense, and delay, before they would be permitted to appeal any final judgment that might be entered. As such, remedy by appeal after judgment at trial is no remedy at all.

21. Petitioners believe that the claims of many of the 98 plaintiffs are just as meritless as those of real parties in interest. If further discovery confirms that this is so, and that plaintiffs in addition to real parties have also alleged claims that have no merit, the respondent court will undoubtedly apply the reasoning of its April 25 Order to any future motion by petitioners for summary judgment and/or summary adjudication. The respondent court's ruling will thus prevent petitioners from cutting this overblown case down to size by eliminating claims that have no merit and by obtaining judgment against plaintiffs who possess no meritorious claims. Petitioners will accordingly be required to go to trial against many plaintiffs who have no meritorious claims. Significant time and public funds will be expended defending against those meritless claims.

22. The ruling below also significantly affects the 18 school districts that are cross-defendants in this case, such as Cloverdale Unified. The State contends that, to the extent that any of the "deplorable conditions" alleged by plaintiffs may exist and may deprive plaintiffs of any constitutional right, responsibility for remedying those conditions belongs to the districts. If there is no merit to

plaintiffs' claims against the State with respect to a particular school district, the State's cross-complaint against that school district will be moot, and the school district, as well as plaintiffs who attend school there, will all be dismissed from the lawsuit. But the respondent court's ruling has the effect that no school district may escape from the lawsuit, even though the facts may demonstrate that children attending school in that district receive an education that meets all constitutional requirements.

PRAYER

WHEREFORE, petitioners respectfully pray that this Court:

1. Issue a peremptory writ of mandate under seal of this Court, given petitioners' obvious right to relief, directing the respondent court to set aside and vacate its Order of April 25, 2001 denying petitioners' motion for summary judgment or, in the alternative, for summary adjudication on the claims brought by real parties in interest; and to enter its order granting that motion; or in the alternative to issue a peremptory writ directing the respondent court to set aside and vacate its said Order and proceed to consider petitioners' motion on its merits; or

2. Issue an alternative writ of mandate directing the respondent court, its officers, agents, and all other persons acting through its order to show cause before this

Court, at a time and place then or thereafter specified by court order, why it should not be directed as set forth above, and, upon return of the alternative writ, issue a peremptory writ of mandate as set forth above; and

3. Grant such other relief as may be just and proper.

Dated: May 10, 2001.

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State of California

and

BILL LOCKYER, Attorney General,
THOMAS R. YANGER,
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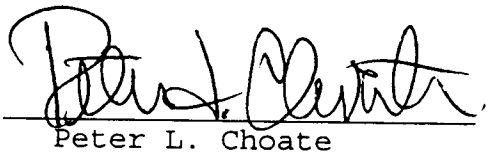
Attorneys for Petitioners
Delaine Eastin, State Superintendent of Public Instruction, State Department of Education, State Board of Education

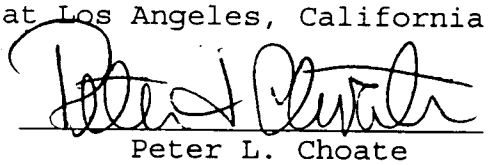
By 
Peter L. Choate

VERIFICATION

I, Peter L. Choate, am a member of the State Bar of California and one of the attorneys for petitioner State of California herein. I am signing this verification on behalf of the State because the facts set forth in this petition are based upon evidence submitted to the respondent court and the respondent court's proceedings in this matter, of which I have personal knowledge. I have read the above petition and have personally reviewed the records and documents described in the petition. I am informed and believe that the matters stated therein are true and correct and, on that ground, I allege that the matters stated herein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed May 10, 2001 at Los Angeles, California.



Peter L. Choate

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

I. SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OF REAL PARTIES' CLAIMS IS NOT BARRED BECAUSE OTHER PLAINTIFFS HAVE JOINED WITH REAL PARTIES IN THE COMPLAINT.

The respondent court ruled that when a defendant is sued by multiple plaintiffs who jointly plead their claims in one or more counts, a court may not summarily adjudicate the claims of fewer than all plaintiffs because to do so would not "completely dispose" of a "cause of action" within the meaning of C.C.P. § 437c(f)(1). Ex. 11. That ruling is literally unprecedented. No published opinion has limited the summary judgment procedure in a multi-plaintiff case in that manner. By its ruling, the respondent court has effectively eliminated the summary judgment remedy in the underlying action and in virtually every other multi-plaintiff case.

In the underlying action, 98 public school children alleged in five counts that petitioner has deprived them of their right to an education by subjecting them to "deplorable conditions" ranging from unqualified teachers to insufficient textbooks to rundown facilities. Ex. 12, ¶¶ 1, 4.[6] These allegations relate to 38 different schools scattered around the State; most of them have nothing whatever to do with the situation of real parties in interest Gino Buchignani, Jason

[6] Two additional counts have already been eliminated through motions for judgment on the pleadings: (1) count five, which alleged a violation of Education Code § 51004 and (2) count six, which alleged a violation of C.C.P. § 526a. Petition, ¶ 4 n.3.

Kehrli, and Drew Smith, who attend only one school -- Cloverdale High School in Cloverdale, California -- and who make no claims except that some classes at their school have an insufficient number of textbooks and that some classrooms lack air-conditioning. Petition ¶¶ 9-10, 12; Ex. 12, ¶¶ 140-141. On these facts real parties in interest base a case of constitutional violations against petitioners.

Petitioners sought summary judgment or, in the alternative, summary adjudication as to the claims of real parties in interest. Petitioners presented undisputed evidence that the conditions of which real parties complain do not exist or were mischaracterized in the complaint, and that real parties have not suffered any injury entitling them to relief against petitioners or anyone else. The respondent court denied petitioners' motion on the sole ground that resolution of real parties' claims supposedly will not "completely dispose" of a "cause of action" within the meaning of C.C.P. § 437c(f)(1), since the claims of the other 95 plaintiffs will remain to be adjudicated, and since all 98 plaintiffs have purported to join their claims in five counts.

At the April 11, 2001 hearing on petitioners' motion, the respondent court explained its reason for denying petitioner's motion in the following way:

> I am going to deny this motion, and I am going to deny it rightly or wrongly on the ground that the Cloverdale plaintiffs [real parties in interest] do not have a separate cause of action for purposes of the summary judgment statute here. They are some among many plaintiffs alleging the common violation against them

> all, as I understand the Complaint, and whether or not they are able to prove any of their violations does not affect the viability of the cause of action stated . . . .

Ex. 10, at 180:11-21. That ruling is clearly wrong.

A. Separate Plaintiffs Whose Rights Have Been Violated Possess Separate Causes of Action.

The respondent court's ruling was based on its interpretation of C.C.P. § 437c(f)(1). That section was added by amendment to the summary judgment statute in 1993. Stats. 1993, ch. 276, § 1. The effect of the amendment is to prevent the granting of a motion for summary judgment unless the motion disposes of an entire "cause of action." The sole question here, accordingly, is whether the claims of real parties in interest constitute "causes of action" separate from the claims of the other plaintiffs. If they do, then the ruling below was clear legal error, the respondent court abused its discretion in making it, and issuance of the peremptory writ is appropriate. City of Oakland v. Superior Court, 45 Cal. App. 4th 740, 751 (1996) ("[T]he issues presented [on denial of petitioner's motion for summary adjudication] are questions of law, making their immediate resolution on a petition for writ of mandate appropriate."); Payless Drug Store v. Superior Court, 20 Cal. App. 4th 277, 279 (1993) (court issued peremptory writ where "[t]here has been clear error under well-settled principles of law").

When the Legislature enacted C.C.P. § 437c(f)(1), the meaning of the term "cause of action" was settled by over

a century of California case law. It goes without saying that the term "cause of action" is a technical term of legal art. When the Legislature uses such a term in a statute, it is presumed that the Legislature intended the term to have the same meaning that it had in the existing case law. City of Long Beach v. Marshall, 11 Cal. 2d 609, 620 (1938) ("[T]he rule of law is well established that where the legislature uses terms already judicially construed, 'the presumption is almost irresistible [sic] that it used them in the precise and technical sense which had been placed upon them by the courts.'"); Walters v. Reed, 45 Cal. 3d 1, 11 (1988) (same); People v. Curtis, 70 Cal. 2d 347, 355 (1969) (same); Tapp v. Superior Court, 216 Cal. App. 3d 1030, 1035-1036 (1990) (same); Brazell v. Superior Court, 187 Cal. App. 3d 795, 799 (1987) (same); Pitzer v. Smith, 123 Cal. App. 3d 73, 78 (1981) ("We thus conclude that the Legislature did not alter the practical and continued judicial construction of the term 'claim'" when it adopted Probate Code § 720.); cf. In re Reynold's Guardianship, 60 Cal. App. 2d 669, 674 (1943) ("Statutes are not presumed to alter the common law otherwise than the act expressly provides . . . ."). The meaning of the term "cause of action" in the summary judgment statute is therefore the meaning that that term had in the pre-existing case law.

Long before the Legislature enacted C.C.P. § 437c(f)(1), California courts had always held that each plaintiff whose rights have been violated has a separate

"cause of action." For over one hundred years, the courts have uniformly adhered to the "primary right theory," under which a cause of action comprises a "primary right" in the plaintiff, a corresponding duty by the defendant, and a wrongful act by the defendant constituting a breach of that duty. Hutchinson v. Ainsworth, 73 Cal. 452, 454-455 (1887); McKee v. Dodd, 152 Cal. 637, 641 (1908); Panos v. Great Western Packing Co., 21 Cal. 2d 636, 638 (1943); Crowley v. Katleman, 8 Cal. 4th 666, 681 (1994). In a properly pleaded complaint, "[a] cause of action will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong." Tensor Group v. City of Glendale, 14 Cal. App. 4th 154, 160 (1993) (emphasis in original, internal quotation marks omitted).

The "primary right" is the plaintiff's right to be free from a particular injury. Crowley, 8 Cal. 4th at 681. When a defendant's wrongful act violates the primary right of one plaintiff, that plaintiff has a cause of action. Id. Similarly, when the defendant's wrongful act violates the primary rights of two or more plaintiffs, there are as many separate causes of action as there are injured plaintiffs. Edgar v. Citraro, 112 Cal. App. 183, 185 (1931) (defendant's negligence violated "primary right of each person" and "gave rise to a separate cause of action in favor of each injured person"); see also Miranda v. Shell Oil Co., 17 Cal. App. 4th

1651, 1659-1660 (1993) ("California defines a cause of action in accord with Pomeroy's 'primary right theory.' . . . Here, each plaintiff's primary right is his or her interest in avoiding harm as a result of exposure to pollutants."); Shelton v. Superior Court, 56 Cal. App. 3d 66, 79-81 (1976) (husband and wife each had separate causes of action where wrongful act of defendant violated separate primary rights of each); Smith v. Minnesota Mut. Life Ins. Co., 86 Cal. App. 2d 581, 591-591 (1948) (a cause of action is defined according to the primary right theory; unreasonable delay in acting upon application of deceased for life insurance policy may create cause of action in both administrator of deceased's estate and widow of deceased); Cross v. Pacific Gas & Elec., 60 Cal. 2d 690, 692-693 (1964) (each heir has "a personal and separate cause of action" for wrongful death of decedent and no recovery can be had by heir who suffered no loss); Sanderson v. Nieman, 17 Cal. 2d 563, 571 (1941) (there are "two separate rights or causes of action for damages which may arise out of injuries to the wife, which have been sustained through the wrongful act of another; the one which exists in the wife for damages 'caused by . . . injury to the *wife*', and the other in the husband, for the recovery of consequential damages suffered or 'sustained by the husband *alone.*'") (emphasis in original); Pillsbury v. Karmgard, 22 Cal. App. 4th 743, 757, 764 n. 15 (1994) (under the real party in interest doctrine, if a plaintiff "is not the owner of or person entitled to assert this particular cause of action, his complaint fails to

assert a breach of *his* primary right and the defect is raised by a general demurrer") (emphasis in original); Fields v. Napa Milling Co., 164 Cal. App. 2d 442, 448 (1958) ("Whether viewed as a joinder of parties or a joinder of causes of action the instant case consisted of four separate causes of action. Appellants could have brought separate actions."); Colla v. Carmichael U-Drive Autos, Inc., 111 Cal. App. Supp. 784, 788 (1930) ("No plaintiff is interested in the entire complaint. The interest of each is in his own 'case' or cause of action; and the complaint as a whole is merely a series of 'cases' embodied in one document."); Atchison, T. & S. F. Ry. Co. v. Smith, 42 Cal. App. 555, 559 (1919) ("It may be conceded that equity will not ordinarily prevent numerous individual claimants, each having a separate cause of action against the same person, from maintaining separate actions at law, merely to prevent a multitude of suits, or to relieve from excessive costs, even where the right of recovery in each depends on the same state of facts and the same principles of law."); 4 WITKIN, SUMMARY OF CALIFORNIA LAW, PLEADING § 40 (4th ed. 1997); 1 Am. Jur. 2d, Actions § 126 (1994 Rev.).

In the underlying action, real parties in interest claim that their rights have been violated due an alleged insufficient number of textbooks in some classes at Cloverdale High School and a lack of air-conditioning in some classrooms. Ex. 12, ¶¶ 140-141. It does not matter whether the right in issue is real parties' right to an education, or their constitutional right to equal protection of the laws, or their

constitutional right to due process. In either case the right that has been violated is a right belonging to the individual plaintiff, which could have been enforced even if no other plaintiff had sued. Under the primary right theory, it follows that each plaintiff has a separate cause of action.

The respondent court appears to have been misled by the fact that, in this case, all plaintiffs make similar allegations about petitioners' supposedly wrongful conduct and all plaintiffs seek similar relief. That is apparently why it referred to a "common violation" against all plaintiffs. Ex. 10, at 180:11-21. But under the primary right theory, a single wrongful act does not imply a single cause of action. A cause of action is not a defendant's wrongful act;[7] a cause of action is not the remedy that a plaintiff seeks.[8] Rather,

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[7] See, e.g., Edgar, 112 Cal. App. at 185 (where defendant's wrongful act resulted in personal injuries to more than one person, each injured person had a separate cause of action); Shelton, 56 Cal. App. 3d at 79-81(where defendant's wrongful act caused personal injuries to husband and wife, four causes of action arose -- one each in husband and wife for personal injuries and one each in husband and wife for loss of consortium); Holmes v. Bricker, 70 Cal. 2d 786, 788 (1969) (one wrongful act of defendant may give rise to two separate causes of action in a single plaintiff -- one for personal injuries and a second for damage to property); Zambrano v. Dorough, 179 Cal. App. 3d 169, 174 (1986) (single wrongful act of defendant gave rise to two causes of action in plaintiff -- one for pain and distress arising from misdiagnosis of tubal pregnancy and a second for loss of reproductive capacity resulting from hysterectomy); Bay Cities Paving & Grading v. Lawyers' Mut. Ins. Co., 5 Cal. 4th 854, 860 (1993) (different wrongful acts of defendant gave rise to only one cause of action in plaintiff where defendant violated only one primary right).

[8] See, e.g., Crowley, 8 Cal. 4th at 682 ("The primary right must also be distinguished from the remedy sought: 'The

it is the violation of a plaintiff's primary right, and if more than one plaintiff has a primary right that has been violated, then each injured plaintiff possesses a separate and distinct cause of action -- even if the same wrongful act violates each plaintiff's rights. See cases cited supra, at pp. 26-28.

This was the law when C.C.P. § 437c(f)(1) was enacted, and it is the law today. It follows that each separate plaintiff whose rights have been violated has a

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violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.'"); Wulfjen v. Dolton, 24 Cal. 2d 891, 895-896 (1944) (Plaintiff "was bound to frame her complaint in the *prior action* so as to avail herself of whatever relief the controlling set of facts would warrant . . . . The violation of *one primary right* constitutes a single cause of action, though it may entitle the injured party to many forms of relief."); Abbott v. 76 Land & Water, 161 Cal. 42, 47 (1911) (single breach of a nonseverable contract gave rise to only one cause of action for both legal and equitable relief); Olsen v. Breeze, Inc., 48 Cal. App. 4th 608, 625-626 (1996) ("Primary rights must be distinguished from the relief sought."); R & A Vending Servs., Inc. v. City of Los Angeles, 172 Cal. App. 3d 1188, 1194 (1985) ("The trial court had before it one lawsuit seeking three different remedies. It did not have three separate causes of action or potentially three separate lawsuits. . . . It is the right to be established, not the remedy or relief, which determines the nature and substance of the cause of action."); McCaffrey v. Wiley, 103 Cal. App. 2d 621, 624-625 (1951) (plaintiff's recovery of possession of land in ejectment action barred plaintiff from seeking damages for wrongful withholding of possession in subsequent action, since "both actions were based on the same invasion of the same right"); Shell Oil Co. v. Richter, 52 Cal. App. 2d 164, 168 (1942) ("Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted.").

separate "cause of action" for purposes of C.C.P. § 437c(f)(1), and summary judgment or summary adjudication of the claims of each separate plaintiff is proper. And in fact, courts grant summary judgment in just such circumstances. Catalano v. Superior Court, 82 Cal. App. 4th 91, 94-95, 98 (2000) ("[T]he trial court granted BM & J's motion for summary adjudication on all causes of action as to Kathy Catalano, Sam's wife, because it found the property at issue was the separate property of Sam and Kathy had no interest in it. . . . The order granting summary adjudication as to Kathy Catalano remains as ordered."); Miranda, 17 Cal. App. 4th at 1660 (trial court granted summary adjudication as to three plaintiffs in case where more than one hundred plaintiffs joined claims in multiple counts). No case holds to the contrary.

Here the undisputed facts showed that real parties in interest had no claim that would warrant relief. Ex. 4, ¶¶ 1-15; Ex. 7, ¶¶ 1-23. It follows that summary judgment or summary adjudication was proper on real parties' claims; and no obstacle was presented by the requirement of C.C.P. § 437c(f)(1) that summary adjudication dispose of an entire "cause of action." Accordingly, the respondent court erred as a matter of law when it refused summary judgment on the ground that resolution of real parties' claims would not "completely dispose" of a cause of action.

B. The Cases on Which Respondent Court Relied Do Not Support Its Ruling.

Besides the summary judgment statute, the only authorities on which the respondent court relied in its order denying petitioners' motion were Lilienthal & Fowler v. Superior Court, 12 Cal. App. 4th 1848 (1993) and Edward Fineman Co. v. Superior Court, 66 Cal. App. 4th 1110 (1998). Ex. 11. Neither case provides any support for the respondent court's ruling.

Lilienthal was an action for legal malpractice. The alleged malpractice occurred on two occasions, in connection with two entirely separate transactions, almost two years apart. The complaint was in two counts, one for breach of contract and one for negligence, each count styled a "cause of action" in the usual fashion of California pleaders. Each count included allegations relating to each of the two transactions and alleged that malpractice had occurred in connection with each transaction. Defendant moved for summary adjudication that any malpractice claim with respect to the first transaction was barred by the statute of limitations. The trial court denied the motion on the ground that it would not "dispose of" the entire "cause of action," since allegations with respect to the second transaction would remain in each count. 12 Cal App. 4th at 1850-1851.

This Court issued a writ of mandate to overturn the trial court's ruling. It held that a defendant was not bound by the way a plaintiff groups his allegations into counts, but

that summary adjudication was permissible if the allegations "involve two separate and distinct causes of action regardless of how pled in the complaint." Id. at 1854. It further held that because plaintiff's claims involved separate and distinct wrongful acts, the claims were separate causes of action even though they had been joined in the same count of the complaint:

> [T]he clearly articulated legislative intent of [§ 437c(f)] is effectuated by applying the section in a manner which would provide for the determination on the merits of summary adjudication motions involving separate and distinct wrongful acts which are combined in the same cause of action. To rule otherwise would defeat the time and cost saving purposes of the amendment and allow a cause of action in its entirety to proceed to trial even where, as here, a separate and distinct alleged obligation or claim may be summarily defeated by summary adjudication. Accordingly, we hold that under [§ 437c(f)] a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action.

Id.at 1854-55.

Fineman was similar. That was an action against a bank for wrongful payment of checks. The complaint contained several counts involving distinct legal theories, but each alleging that a total of 83 checks had been paid wrongfully. Defendant bank moved for summary adjudication that the claims were time-barred as to 23 checks. The trial court granted the motion, and the Court of Appeal affirmed on the ground that the claim as to each check presented a "separate cause of action susceptible to a complete disposition." 66 Cal. App. 4th at 1118. The fact that plaintiff had chosen to combine

those causes of action into a single count, and called it a "cause of action," did not prevent summary adjudication of the claims as to the individual checks.

Properly read, Lilienthal and Fineman make plain that the respondent court's ruling in this case was wrong, and that summary judgment or summary adjudication was appropriate here. The key holding of both cases is that neither a defendant nor the court is bound by the way that a plaintiff chooses to group his allegations into counts, even if those counts are labeled "causes of action." What constitutes a separate cause of action remains a question of law for the court; and a defendant is entitled to move for summary judgment on any claim that is properly a separate cause of action, whether or not it has been joined with other causes of action in one or more counts, and whether or not the plaintiff has labeled those counts as "causes of action." If it were otherwise, any plaintiff could effectively defeat summary adjudication by the artful grouping of allegations into counts or by artfully deciding which combinations of allegations to label as "causes of action." Pleading skill would allow meritless claims to proceed, and form would triumph over substance. Not surprisingly, both Lilienthal and Fineman rejected this interpretation of C.C.P. § 437c(f)(1).

The respondent court, however, got Lilienthal and Fineman exactly backwards. It relied on a dictum from Lilienthal that the term "cause of action" as used in C.C.P. § 437c(f)(1) could mean a "group of related paragraphs in the

complaint reflecting a separate theory of liability" -- in other words, a count[9] -- while ignoring the holding of both Lilienthal and Fineman that if two or more causes of action are included in the same count, summary adjudication is not precluded.

As applied here, Lilienthal and Fineman mean that the 98 separate causes of action of the 98 individual plaintiffs -- the 98 violations of their 98 individual primary rights to a basic education -- do not become a single "cause of action" precluding summary judgment merely because they are joined in the same count, as the respondent court mistakenly thought. The 98 claims of the 98 individual plaintiffs here

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[9] Ex. 11; 12 Cal. App. 4th at 1853. Taken in context, this language supports petitioner. The Court is pointing out that in California the phrase "cause of action" is sometimes used in a "broad sense" as "the invasion of a primary right," and sometimes in a narrower sense, as a "group of related paragraphs in the complaint reflecting a separate theory of liability." The Court suggests that when violation of a single primary right is pleaded on two or more legal theories which are set out as separate "causes of action" in the complaint (as when a personal injury plaintiff sues in both negligence and strict liability), summary adjudication may be obtained as to each count. That means that summary adjudication may sometimes be obtained when it disposes of something less than a cause of action in the "broad sense." But nothing in the Court's language suggests that summary adjudication may not be obtained when, as here, it does in fact dispose of a cause of action in the "broad sense" -- that is, a violation of a primary right -- even if that cause of action is joined with other such causes of action in a single count of a complaint. And any suggestion that summary adjudication is impermissible unless it completely disposes of whatever "group of related paragraphs" a plaintiff has chosen to call a cause of action -- the only rule that would help real parties here -- is squarely contrary to the holdings of both Lilienthal and Fineman.

are just as separate as the 83 claims relating to the 83 individual checks in Fineman. Summary adjudication is no more precluded in this case than it was in Lilienthal and Fineman by the manner in which plaintiffs have chosen to craft their pleading.

II. THE UNDISPUTED EVIDENCE PRESENTED TO THE RESPONDENT COURT SHOWS THAT REAL PARTIES IN INTEREST HAVE NOT SUFFERED ANY INJURY ENTITLING THEM TO RELIEF.

What has been said is sufficient to dispose of the sole ground on which the respondent court denied petitioners' motion. Accordingly, this Court -- at a minimum -- should direct the respondent court to vacate its order based on C.C.P. § 437c(f)(1) and proceed to consider the merits of petitioners' motion. In addition, the Court may wish to reach the merits of petitioners' motion itself, as it is plainly entitled to do. Yurick v. Superior Court, 209 Cal. App. 3d 1116, 1130 n.1 ("Here, respondent court failed to specify any facts and did not state any reason for denying summary judgment on the age harassment claim. Nevertheless, because the court denied the motion 'in its entirety,' we will proceed to a consideration of the merits of the petition.").[10] Such review is particularly appropriate given that there is no

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[10] See also Buss v. Superior Court, 16 Cal. 4th 35, 60 (1997) (appellate review of an order denying a motion for summary judgment or summary adjudication is *de novo*); Rubenstein v. Rubenstein, 81 Cal. App. 4th 1131, 1143 (2000) (trial court's stated reasons for ruling on motion for summary judgment do not bind appellate court, which reviews the ruling, not its rationale).

genuine dispute as to any fact -- let alone a material fact -- before the respondent court.

Real parties in interest allege that they are being denied an equal and adequate education in violation of the California Constitution and Title VI of the Civil Rights Act of 1964 because (1) some classes at Cloverdale High School lack sufficient textbooks and (2) some classrooms lack air-conditioning, which supposedly makes it difficult for some students to concentrate when it is hot. Ex. 12, ¶¶ 140-141. Based only on these two contentions, real parties in interest assert five counts against petitioners. Ex. 12, ¶¶ 299-314. The undisputed evidence presented to the respondent court, however, shows that the conditions alleged by real parties in interest either do not exist or have been grossly mischaracterized. Ex. 4, ¶¶ 1-15; Ex. 7, ¶¶ 1-23. Accordingly, real parties in interest have suffered no injury entitling them to relief.

A. There Is No Merit to Real Parties' Claim for Violation of Title VI of the Civil Rights Act of 1964.

In the fourth count, real parties in interest allege that petitioners have violated their right under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and 34 C.F.R. § 100.3(b)(2), to be free from discrimination on the basis of race, color, or national origin. Ex. 12, ¶¶ 311-314.

This claim is patently frivolous as to real parties in interest. The theory of the complaint is that petitioners'

conduct has a disparate impact on "students of color." Ex. 12, ¶ 314. Real parties in interest, however, are non-Hispanic Caucasian students. Ex. 4 ¶ 15; Ex. 7, ¶ 23. That is, they are among the students who are allegedly favored by petitioners' conduct. Ex. 12, ¶ 314. Accordingly, real parties in interest may not prevail on this claim. Fobbs v. Holy Cross Health Sys. Corp., 29 F.3d 1439, 1447 (9th Cir. 1994) (no claim under Title VI in absence of racial discrimination), overruled on other grounds by Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131 (9th Cir. 2001).

B. There Is No Merit to Real Parties' Claim for Violation of Article I, Sections 7(a) and 15 of the California Constitution.

In the third count, real parties in interest allege that petitioners have violated their constitutional right to due process[11] by: (1) depriving them of "basic educational opportunities," Ex. 12, ¶¶ 309-310; (2) requiring them to attend a "dangerous" school that jeopardizes their health and safety, Ex. 12, ¶ 306; and (3) "ill-preparing" them for a high school exit examination, the passage of which is necessary to obtain a high school diploma. Ex. 12, ¶¶ 307-310. Accepting solely for purposes of argument that if such facts were proven

[11] Article I, Section 7 of the California Constitution provides in part that "[a] person may not be deprived of life, liberty, or property without due process of law." Cal. Const. art. I, § (7)(a). Article I, Section 15 also provides in part that "[p]ersons may not . . . be deprived of life, liberty, or property without due process of law." Cal. Const. art. I, § 15.

a due process claim could be sustained, it is plain from the undisputed facts that real parties cannot make out their claims.

Take first the claim that real parties' due process rights were violated because they were deprived of "basic educational opportunities." Whatever deprivation of educational opportunities may be sufficient to make out a due process violation -- and the law is clear that such a violation requires a significant interference with the plaintiff's rights, Quintana v. Municipal Court, 192 Cal. App. 3d 361, 368 (1987) -- no such violation is present on the facts here. No reasonable trier of fact could find that it denies due process for geography to be taught using maps and other instructional materials instead of textbooks. Ex. 4, ¶ 6. No reasonable trier of fact could find that it offends the California Constitution for a Physics class to give students who have lost their textbooks photocopies of the relevant portions instead of a brand new textbook. Ex. 4, ¶ 9. No reasonable trier of fact could find that the California Constitution is violated because on a few days of the year it gets warm in some classrooms in Cloverdale High School. Ex. 4, ¶¶ 12, 14. On the contrary, California students and teachers (like those throughout the Nation) have suffered through the occasional warm school day for generations, and no court has ever suggested, let alone held, that such conditions deprive students of due process. And even if, somehow, on some theory, someone thought relief against Cloverdale Unified

were warranted, what injunctive relief against petitioners could conceivably be granted on a record that shows that in two years the entire high school will be air-conditioned, thanks to a bond issue that Cloverdale's voters passed last year? Ex. 4, ¶ 13; Ex. 7, ¶¶ 17-18.

Even less meritorious are real parties' other "due process" claims that Cloverdale High School is a "dangerous" school that jeopardizes their health and safety, or that it is "ill-preparing" them to take the high school exit exam. On the contrary, the undisputed evidence is that Cloverdale High School is a good school where learning takes place; and no facts in the record suggest that the school is dangerous or that real parties will not be adequately prepared to take their high school exit exam. Ex. 4, ¶¶ 1-15; Ex. 7, ¶¶ 1-23.

C. There Is No Merit to Real Parties' Claim for Violation of Article IX, Sections 1 and 5 of the California Constitution.

In the second count, real parties in interest allege that petitioners have violated their right to a "basic education" under Article IX, Sections 1 and 5 of the California Constitution by depriving them of the "bare essentials of an education." Ex. 12, ¶¶ 301-303.

Once again, whatever merit this theory might have in a different factual context, it is plain that there is nothing to it here. However one defines the "bare essentials" of an education, it is plain that real parties are receiving one here. No reasonable trier of fact could find that because

geography is taught with maps instead of textbooks, because physics students who lose their textbooks get photocopies instead of new texts, or because it is occasionally warm in some classrooms, the "bare essentials of an education" are not being provided.

An independent ground for summary judgment is that there is no reason to believe that either Sections 1 or 5 of Article IX give real parties any right pertinent here. Section 1 does no more than recognize the importance of a "general diffusion of knowledge and intelligence" and exhort the Legislature to "encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Cal. Const. art. IX, § 1. This is plainly the sort of constitutional provision that does not create any enforceable right in anyone, since it is not self-executing; instead, it "merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Leger v. Stockton Unified Sch. Dist., 202 Cal. App. 3d 1448, 1455 (1988). As for Section 5, the so-called "free school guarantee," which directs the Legislature to establish a "system of common schools by which a free school shall be kept up and supported in each district," Cal. Const. art. IX, § 5, there is no dispute that this section can create enforceable rights. But the relevant right is the right not to be charged fees for participation in educational activities. Hartzell v. Connell, 35 Cal. 3d 899, 911 (1984). Here there is not even an allegation, much less any evidence,

that real parties have been charged any fees. Ex. 4, ¶¶ 1-15; Ex. 7, ¶¶ 1-23; Ex. 12, ¶¶ 140-141.

D. There Is No Merit to Real Parties' Claim for Violation of Article I, Section 7(a) and Article IV, Section 16(a) of the California Constitution.

In the first count, real parties in interest allege a violation of the equal protection clauses of the California Constitution.[12] Ex. 12, ¶¶ 299-300. Real parties' equal protection claim is governed by Butt v. State of California, 4 Cal. 4th 668 (1992) and Serrano v. Priest, 5 Cal. 3d 584 (1971).

These cases stand for the proposition that equal protection requires some degree of equality in the education provided in California's various school districts. In Serrano, the Supreme Court struck down the property-tax system of financing public schools, on the ground that it denied equal protection to children in school districts lacking a large property tax base. Serrano, 5 Cal. 3d at 601. In Butt, when the Richmond Unified School District shut down its entire school system six weeks early, the Supreme Court held that this was a denial of equal protection, since schools in areas other than Richmond were open for the entire school year. Butt, 4 Cal. 4th at 692. The Court also held that the State,

[12] Article I, Section 7 of the California Constitution provides in part that "[a] person may not be . . . denied equal protection of the laws." Cal. Const. art. I, § 7(a). Article IV, Section 16 of the California Constitution provides in part that "[a]ll laws of a general nature have uniform operation." Cal. Const. art. IV, § 16(a).

as the entity ultimately responsible for public education in California, had some duty to remedy the denial of equal protection. Id. at 704. These cases thus stand for the proposition that there is an equal-protection right to "basic educational equality," and that students in a particular district who are denied this right may have a remedy. Id. at 685.

The portion of Butt that is most relevant here, however, is the Court's careful limitation on the equal protection right that it created. The Court recognized that local variation and autonomy were inevitable and desirable, and that the constitutional mandate of "basic educational equality" did not mean an identical education for every California school child. On the contrary, the Court held that "[u]nless the actual quality of the district's [educational] program, ***viewed as a whole***, falls ***fundamentally*** below prevailing statewide standards, ***no constitutional violation occurs***." Id. at 686-687 (emphasis added).

The Court stressed that students are not entitled to strict educational equality, only "basic educational equality." Id. at 686. Because the educational experience offered in any one district or school will differ "to a considerable degree" given the "inevitable variances in local programs, philosophies, and conditions," the Court recognized that an individual district's efforts to "gain maximum educational benefit from limited resources" must be given "considerable deference." Id. at 686. Accordingly, the Court

limited its holding to cases involving "extreme circumstances." Id. at 688. It found a violation in Butt only because the closure of the district "would cause an extreme and unprecedented disparity in educational service and progress." Id. at 687.

In the underlying action, real parties complain only that some classes at Cloverdale High School lack textbooks for all students and that some classrooms lack air-conditioning, which supposedly makes it difficult for some students to concentrate when it is hot. Ex. 12, ¶¶ 140-141. Even if these allegations were true, no reasonable trier of fact could find that they amount to "an extreme and unprecedented disparity in educational service and progress" between Cloverdale Unified and other school districts. Cf. Butt, 4 Cal. 4th at 687. And certainly no reasonable trier of fact could make such a finding based on the undisputed facts shown by the record, which demonstrate that Cloverdale High School is a good school, that students have textbooks or other instructional materials in all classes, that all classrooms have ceiling fans, that those classrooms which currently lack air-conditioning will be equipped with it shortly, and that students are meeting or exceeding the State's academic expectations. Ex. 4, ¶¶ 1-15; Ex. 7, ¶¶ 1-23. Real parties in interest have suffered no injury entitling them to relief under the standard of Butt, or any other case.

E. There Is No Merit to Real Parties' Claim for Declaratory Relief.

As explained above, real parties' claims as pled in the first, second, third, and fourth counts of the First Amended Complaint have no merit. Accordingly, their claim in the seventh count for declaratory relief has no merit either. The respondent court should have granted petitioners' motion for summary judgment.

CONCLUSION

For the reasons stated, the writ of mandate should issue as prayed.

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Respectfully submitted,

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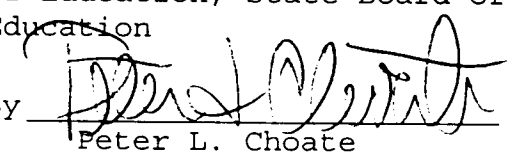
By 
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