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

ELIEZER WILLIAMS, et al.

Real Parties in Interest

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

PETITION FOR WRIT OF MANDATE

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TABLE OF CONTENTS

Page

WHY EXTRAORDINARY RELIEF IS APPROPRIATE.................... 1

PETITION FOR WRIT OF MANDATE.................... 8

VERIFICATION.................... 26

MEMORANDUM OF POINTS AND AUTHORITIES.................... 27

I. INTRODUCTION.................... 27

II. THIS COURT HAS HELD THAT THE CLAIMS PLED IN THE FIRST AMENDED COMPLAINT REQUIRE PROOF OF INJURY BASED ON SPECIFIC CONDITIONS AT INDIVIDUAL SCHOOLS.... 28

III. THE RESPONDENT COURT'S ORDER CERTIFYING A CLASS MUST BE SET ASIDE AS CONTRARY TO LAW.................... 32

A. A Class Certification Order Must Be Set Aside When It Is Based on the Application of Improper Legal Standards.................... 32

B. The Respondent Court Certified the Class Below Based on a Theory of Liability That This Court Rejected.................... 33

IV. THE RESPONDENT COURT COMMITTED LEGAL ERROR WHEN IT REFUSED TO DECERTIFY THE CLASS.................... 39

A. The Respondent Court Assumed Wrongly That Classwide Relief Can Be Granted Based On The Claims Of Just A Few Students.................... 42

B. The Only Purpose of a Class Action is to Adjudicate the Claims of Class Members.................... 45

V. THE RESPONDENT COURT COMMITTED CLEAR ERROR WHEN IT DENIED THE STATE'S SECOND SUMMARY JUDGMENT MOTION, ALTHOUGH THE MOTION WAS PROPER AND CONSISTENT WITH THIS COURT'S RULING.................... 49

A. The Cloverdale Class Motion Was Procedurally Proper.................... 51

B. The Respondent Court's Ruling Means that Petitioners Have No Way of Testing Who Has Actionable Claims and Who Does Not.................... 54

CONCLUSION.................... 56

TABLE OF AUTHORITIES

Cases **Page**

Bauman v. Islay Invs.,
45 Cal. App. 3d 797 (1975) 34

Berwecky v. Bear, Sterns & Co.,
197 F.R.D. 65 (S.D.N.Y. 2000) 52

Blue Chip Stamps v. Superior Ct.,
18 Cal. 3d (1976) 7, 32, 37, 46, 48

Brown v. Regents of Univ. of Cal.,
151 Cal. App. 3d 982 (1984) 34

Butt v. State of California,
4 Cal. 4th 668 (1992) 43, 44

City of San Jose v. Superior Ct.,
12 Cal. 3d 447 (1974) 2, 6, 32-37, 44, 48, 51

City of Santa Cruz v. Pacific Gas & Elec. Co.,
82 Cal. App. 4th 1167 (2000) 51

Clausing v. San Francisco Unified Sch. Dist.,
221 Cal. App. 3d 1224 (1990) 34

Clemente v. State of California,
40 Cal. 3d 202 (1985) 2, 31

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 46

Eyak Native Village v. Exxon Corp.,
25 F.3d 773 (9th Cir. 1994) 45

Green v. Obledo,
29 Cal. 3d 126 (1981) 39

Grogan-Beall v. Ferdinand Roten Galleries, Inc.,
133 Cal. App. 3d 969 (1982) 32, 39

Hicks v. Kaufman & Broad Home Corp.,
89 Cal. App. 4th 908 (2001) 34

In re Cement Antitrust Litig.,
688 F.2d 1297 (9th Cir. 1982) 51

Kowis v. Howard,
3 Cal. 4th 888 (1992) 2, 31

TABLE OF AUTHORITIES CONTINUED

Cases **Page**

Linder v. Thrifty Oil Co.,
23 Cal. 4th 429 (2000) 46

Occidental Land, Inc. v. Superior Ct.,
18 Cal. 3d 355 (1976) 32

Osborne v. Subaru of America, Inc.,
198 Cal. App. 3d 646 (1988) 47

Phillips Petroleum v. Shutts,
472 U.S. 797 (1985) 45

Reyes v. Board of Supervisors,
196 Cal. App. 3d 1263 (1987) 47

Richmond v. Dart Indus., Inc.,
29 Cal. 3d 462 (1981) 46

Rose v. City of Hayward,
126 Cal. App. 3d 926 (1982) 47

Rutherford v. Owens-Illinois, Inc.,
16 Cal. 4th 953 (1997) 53

Sentry Ins. v. Superior Ct.,
207 Cal. App. 3d 526 (1989) 53

Silva v. Block,
49 Cal. App. 4th 345 (1996) 34

Slaven v. BP America, Inc.,
190 F.R.D. 649 (C.D. Cal. 2000) 52

Stieberger v. Sullivan,
738 F. Supp. 716 (S.D.N.Y. 1990) 51

Washington Mut. Bank v. Superior Ct.,
24 Cal. 4th 906 (2001) 2, 7, 32, 33, 34

West Shield Invest. & Sec. Consultants v. Superior Ct.,
82 Cal. App. 4th 935 (2000) 7

TABLE OF AUTHORITIES CONTINUED

Cases **Page**

Statutes

California Code of Civil Procedure § 437c(f)(1)........ 13, 30

California Code of Civil Procedure § 526a.............. 11, 29

California Education Code § 51004...................... 11, 29

California Rules Court Rule 56(c)......................... 12

WHY EXTRAORDINARY RELIEF IS APPROPRIATE

This is an overgrown piece of litigation that is rapidly being made unmanageable by the respondent court's indefensible procedural rulings. Since what is ultimately at stake is real parties' attempt to use the courts to restructure California's entire system of public education, these rulings could have very serious consequences. They unquestionably merit this Court's review.

In the underlying litigation, real parties' basic theory is that California school children are receiving a constitutionally inadequate education based on "deplorable conditions" that allegedly exist in their schools. These conditions range from unqualified teachers to insufficient textbooks to rundown school facilities.

Three months ago -- when this case was last here -- the Court issued a peremptory writ because the respondent court refused to hear petitioner State of California's motion for summary judgment. The State's motion demonstrated that the plaintiffs to whom it was directed were receiving a good education, were suffering no violations of their constitutional rights, and were therefore entitled to no relief against the State or anyone else. Nevertheless, the respondent court denied the motion on the spurious ground that it failed to "completely dispose" of an entire cause of action under C.C.P. § 437c(f)(1) because it did not address the claims of <u>all</u> plaintiffs in the action.

In issuing its peremptory writ, this Court correctly held that the claims of each plaintiff below "are based upon each named plaintiff's specific allegations concerning his or her own school or school district," and that unless a plaintiff can "establish the violations alleged in the complaint concerning [his or her individual school]," petitioners will be entitled to judgment on that plaintiff's claims. Ex. 6 at 0234-0235. This Court's ruling is law of the case, and the respondent court was and is obligated to follow it in all further proceedings. Kowis v. Howard, 3 Cal. 4th 888, 891, 894 (1992); Clemente v. State of California, 40 Cal. 3d 202, 211-12 (1985).

Nevertheless, in the face of this Court's ruling, the respondent court has now certified, and refused to decertify, a statewide "class" that includes millions of California public school students in thousands of schools. Exs. 27, 33. It is, of course, settled law that no class may be certified where, in order to establish liability, putative class members will be required to litigate "numerous and substantial individual issues." Washington Mut. Bank v. Superior Court, 24 Cal. 4th 906, 913-14 (2001); City of San Jose v. Superior Court, 12 Cal. 3d 447, 460 (1974). That is manifestly the case here. Because -- as this Court has held -- each class member's right to relief depends on proof of constitutional violations existing at his or her individual school, petitioners' liability vel non to that class member can only be established by determining if circumstances at the

class member's individual school deprive him or her of a constitutionally adequate education.

This settled rule of law should have prevented certification of the class below. But the respondent court swept it aside with the astonishing explanation that a class is proper because the respondent court does not propose to adjudicate the millions of claims that it has swept into the class:

> [W]hoever the named plaintiffs are will have to establish their claims, and based on the evidence that they present, if they establish their claims, any remedy would be controlled by and limited to the evidence and appropriate to the evidence that they were able to present on the claims that they made. Any other class members, if there were a class, would be those people who did meet the categories and qualities of remaining class members who established a claim, and it's not clear to me why the claims of absent class members would then have to be specifically litigated. . . . [T]he need to litigate any individual issues will not arise because it will not be necessary to determine whether an individual turns out to have been or not to have been entitled to a specific remedy or ultimately to determine specifically who is or is not a member of the class.

Ex. 33 at 4551:13-22, 4571:3-7.

In other words, the respondent court expects to adjudicate the claims of the 14 class representatives, and then to give classwide relief on the mere assumption that the absent class members will have claims whenever their representatives do. That procedure will be fundamentally unfair. It will allow plaintiffs to present their case as if thousands or millions of students suffered from poor conditions -- without ever proving it. It will expose

petitioners to the risk that thousands or millions of absent class members will be allowed to seek a remedy without proving facts sufficient to show that they possess even a valid claim. And it will contradict what this Court has said is the law applicable to this case.

For the respondent court's assumption is directly contrary to this Court's prior ruling that whether a given plaintiff has a claim depends on whether he or she can "establish the violations in the complaint" at his or her individual school. Ex. 6 at 0234. Proof of a violation at one school will not show a violation at another school; and to give classwide relief simply on the assumption that absent class members have each and every claim the class representatives establish is to deny petitioners the most elementary opportunity to meet and defend the claims asserted against them.

On the other hand, if the respondent court actually intends not to adjudicate the claims of absent class members, but to give only such relief as the 14 class representatives themselves may be entitled to, then the procedure it has adopted is absurd. If the claims of millions of absent class members will not be adjudicated, there is no justification for sweeping them into the class. After all, the only reason for a class action is that it provides an efficient and economical way to adjudicate large numbers of claims. If the claims of millions of class members do not need to be adjudicated, it is a massive waste of judicial and party resources to bring those

claims before the court, throw them into a mammoth litigation class, and then let them go with no adjudication.

But the respondent court did not stop with class certification. Having certified a class on the patently false assumption that millions of students across California will be entitled to whatever relief 14 class representatives might be entitled to, it has refused even to allow petitioners to show that the assumption is false and that many -- virtually all, petitioners believe -- absent members of the class are receiving a good education, have suffered no constitutional injury, and are entitled to no relief whatever.

The Court will recall that the previous writ proceeding involved the claims of three named plaintiffs at Cloverdale High School in the Cloverdale Unified School District. Following the Court's ruling directing issuance of the peremptory writ, real parties in interest dismissed with prejudice the claims of those three plaintiffs. But that left in the case the claims of all the other students at Cloverdale High School, who are now absent members of the certified class.

Accordingly, the State filed a second motion for summary judgment -- in all substantive respects identical to the one previously before the Court -- seeking dismissal of the claims of absent class members who attend Cloverdale High School. Just as it had refused to consider the merits of the first Cloverdale motion, the respondent court has now refused to consider the State's second motion -- this time on the

ground that, because a class has been certified, there is no need to address the "individual" issues of whether any given class member possesses a valid claim. Ex. 48. The result is that petitioners now have no way to obtain the relief that this Court held, last time, they are entitled to: a determination of whether real parties in interest can prove "the violations alleged in the complaint concerning Cloverdale High School." Ex. 6 at 0234. Yet under the Court's ruling in the first writ proceeding, no student at Cloverdale High School can be entitled to a remedy before that determination is made.

The respondent court's extraordinary rulings have created a vintage Catch 22: a class action has been used to "create injustice" by precluding defendants from defending. City of San Jose, 12 Cal. 3d at 458. Petitioners now face the claims of millions of absent class members, all of whom must prove, in order to establish a right to relief, that conditions at their individual schools are unconstitutionally inadequate. Petitioners believe that such a burden can be met by students at very few, if any, of the 8,761 schools in California. Yet the respondent court's procedural rulings make it impossible for petitioners to test that issue before trial. And the respondent court has said it expects to try the claims only of the 14 class representatives and to grant classwide relief without ever determining whether any of the other millions of class members in fact have viable claims.

Nothing in California law supports what the

respondent court has done in this case. Even in an ordinary piece of litigation, the respondent court's actions would merit the Court's review. Washington Mutual, 24 Cal. 4th at 912 (writ granted to set aside class certification based on improper legal standards); Blue Chip Stamps v. Superior Court, 18 Cal. 3d (1976) (same); C.C.P. § 437c(*l*) (writ review for denial of summary judgment); West Shield Investigations & Security Consultants v. Superior Court, 82 Cal. App. 4th 935, 946 (2000) (writ of mandate will issue when denial of summary judgment "will result in trial on non-actionable claims"). But in a case where what is at stake is potentially the future of public education in California, it is unthinkable that the issues should be determined by procedures so unprecedented, so one-sided, and so unfair. The Court should issue its alternative writ (a second time) and, if the respondent court persists in its rulings, issue a peremptory writ requiring the respondent court to set them aside.

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. The operative pleadings below are the First Amended Complaint and the answers of petitioner State of California and petitioners Delaine Eastin as Superintendent of Public Instruction, California Department of Education, and California Board of Education. True and correct copies of these documents are included as Exhibits 1, 2, and 3,

respectively, in the Appendix of Exhibits that is being filed concurrently herewith. Petitioners incorporate the Appendix herein by reference. All references to Exhibits herein are by reference to the Appendix.

4. The underlying litigation was filed by 100 plaintiffs, 98 of whom are public school children who attend 38 schools in 18 school districts across California. Ex. 1. On October 1, 2001, the respondent court certified the underlying litigation as a class action. As explained below, see infra ¶¶ 17-18 & n.3, the class includes a large fraction, if not all, of the six million children who attend California's 8,761 public K-12 schools.

5. There are 14 class representatives certified by the respondent court. They attend 12 schools in six school districts.[1] Ex. 11 at 0285-0332; Ex. 24 at 1833-1839. Of the original 98 student plaintiffs, 79 have dismissed their claims. Accordingly, real parties include the remaining 21 named plaintiffs below in addition to the millions of class members whose claims are now before the respondent court.

6. Real parties in interest allege that petitioners have deprived them of their right to an education

[1] Eleven of the class representatives attend school in three school districts; six attend school in just one school district: the Los Angeles Unified School District. Originally, there were 15 class representatives. Ex. 11 at 0285-0332; Ex. 24 at 1833-1839. Two of them dismissed their claims, and one of those two was replaced by an alternate class representative.

by subjecting them to "deplorable conditions" ranging from unqualified teachers to insufficient textbooks to rundown school facilities. Ex. 1, ¶¶ 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. 1, ¶¶ 324-326.

7. The State has cross-complained against the 18 school districts in which the original 98 student plaintiffs attend school. The cross-complaint prays that, to the extent any of the conditions of which these plaintiffs complain may exist and result in a deprivation of their constitutional rights, the respondent court should order the school districts to correct those conditions. Ex. 4.

8. Real parties seek relief against petitioners based on four causes of action pled in the complaint, to-wit: (1) denial of equal protection of the laws in violation of Article I, Section 7(a) and Article IV, Section 16(a) of the California Constitution, Ex. 1, ¶¶ 299-300; (2) denial of a free and basic education in violation of Article IX, Sections 1 and 5 of the California Constitution, Ex. 1, ¶¶ 301-303; (3) denial of due process in violation of Article 1, Sections 7(a) and 15 of the California Constitution, Ex. 1, ¶¶ 304-310; and (4) discrimination 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. 1, ¶¶ 311-313. The complaint contains a

fifth cause of action for declaratory relief. Ex. 1, ¶¶ 320-322.[2]

9. This Petition involves three related rulings by the respondent court:

(a) its written order of October 1, 2001, granting real parties' motion to certify a class, Ex. 27;

(b) its oral order of November 15, 2001, denying petitioners' motion to decertify the class, Ex. 33; and

(c) its oral order of December 18, 2001, denying petitioners' motion for summary judgment, Ex. 48.

Each of these rulings was clear error and was an abuse of the respondent court's discretion. Each was also contrary to this Court's opinion and order of October 4, 2001, in the prior writ proceeding in this case. State of California v. Superior Ct., Case No. A094890 (the "First Writ Proceeding").

10. 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 each of its aforesaid orders, and to enter new orders denying class

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[2] The complaint alleged two additional causes of action: (1) violation of California Education Code § 51004 and (2) violation of California Code of Civil Procedure § 526a. On February 8, 2001, judgment on the pleadings against all plaintiffs and in favor of petitioners was granted on these causes of action.

certification, decertifying the class and/or considering petitioners' summary judgment motion on the merits; or to show cause before the 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.

11. So that the Court may have the record before it in this action, petitioners have included in the Appendix pursuant to C.R.C. Rule 56(c) true and correct copies of all documents and exhibits submitted to the respondent court in connection with its consideration and determination of (a) real parties' motion for class certification, (b) petitioners' motion to decertify the class, and (c) petitioners' motion for summary judgment. Documents relating to the motion for class certification are Exhibits 8 through 27, those relating to the motion to decertify the class are Exhibits 28 through 33, and those relating to the summary judgment motion are Exhibits 34 through 44 and 48.

The First Writ Proceeding

12. On March 14, 2001, the State filed with the respondent court a motion for summary judgment on the claims of Gino Buchignani, Jason Kehrli, and Drew Smith, who attend Cloverdale High School in the Cloverdale Unified School District (the "Cloverdale plaintiffs"). Exs. 45-47. On April 25, 2001, the respondent court entered its order denying the State's motion on the ground that the State could not seek summary judgment as to fewer than all plaintiffs because to do

so would not "completely dispose" of an entire cause of action within the meaning of C.C.P. § 437c(f)(1).

13. On or about May 10, 2001, petitioners filed with this Court a petition for writ of mandate, seeking relief from the respondent court's April 25, 2001, order. On June 5, 2001, the Court issued its Alternative Writ, ruling that the "superior court erred" when it denied the State's motion. Ex. 5 at 0231. By order dated June 25, 2001, the respondent court refused to set aside its April 25, 2001, order in response to the alternative writ. Accordingly, on October 4, 2001, the Court issued a written opinion (the "Opinion"), directing the issuance of a peremptory writ. Ex. 6. The Opinion became final and the writ issued on December 4, 2001. Ex. 7.

14. The Opinion began its analysis by determining what causes of action were at issue in this case. The Court concluded that while the complaint "generally alleges a . . . 'shocking scope of substandard educational conditions' in many schools, . . . the alleged violations, however, are based upon each named plaintiff's specific allegations concerning his or her own school or school district." Ex. 6 at 0234. In particular, "[e]ach of the Cloverdale plaintiffs claims injury based on facts specific to the Cloverdale High School." Ex. 6 at 0235. The Court held that because petitioners "sought summary judgment or summary adjudication on the basis that the Cloverdale plaintiffs could not establish the violations in the complaint concerning Cloverdale High School," resolution of the motion "would have eliminated some or all of the causes

of action as to the Cloverdale plaintiffs." Ex. 6 at 0234-0236.

15. The Opinion constitutes an appellate ruling about what proof will be needed to establish petitioners' liability on the causes of action pled in the complaint, and it is now the law of the case, binding on the respondent court and on real parties. Based on the Opinion, judgment in favor of petitioners and against an individual plaintiff will be required if an individual plaintiff's allegations concerning the specific conditions alleged to exist in his or her school are disproved or not sustained by the proof.

16. Following the issuance of the Opinion, on November 27, 2001, counsel for real parties in interest caused the three Cloverdale plaintiffs to dismiss their claims in the underlying action with prejudice. The effect, and obvious intention, of this procedural maneuver was to avoid a ruling by the respondent court on the legal issues presented by petitioners' motion for summary judgment, notwithstanding the peremptory writ issued by this Court which commanded the respondent court to hear and decide the motion.

The Respondent Court's Class Certification Order

17. On September 20, 2001, real parties in interest moved the respondent court for an order certifying the underlying litigation as a class action. On October 1, 2001, -- just three days before the Court issued its Opinion in the First Writ Proceeding -- the respondent court issued a written

order certifying the following class, exactly as real parties had proposed:

> All students who are attending or will attend public elementary, middle or secondary schools in California who suffer from one or more deprivations of basic educational necessities. The specific deprivations are as follows:
>
> (A) a lack of instructional materials such that the student does not have his or her own reasonably current textbook or educational materials, in useable condition, in each core subject (1) to use in class without sharing with another student; **or** (2) to use at home each evening for homework;
>
> (B) a lack of qualified teachers such that (1) the student attends a class or classes for which no permanent teacher is assigned; **or** (2) the student attends a school in which more than 20% of teachers do not have full, non-emergency teaching credentials; **or** (3) the student is an English Language Learner ("ELL") and is assigned a teacher who has not been specially qualified by the State to teach ELL students;
>
> (C) inadequate, unsafe and unhealthful school facilities such that (1) the student attends classes in one or more rooms in which the temperature falls outside the 65-80 degrees Fahrenheit range; **or** (2) the student attends classes in one or more rooms in which the ambient or external noise levels regularly impede verbal communication between students and teachers; **or** (3) there are insufficient numbers of clean, stocked and functioning toilets and bathrooms; **or** (4) there are unsanitary and unhealthful conditions, including the presence of vermin, mildew or rotting organic material;
>
> (D) a lack of educational resources such that (1) the school offers academic courses and extracurricular offerings in which the student cannot participate without paying a fee or obtaining a fee waiver; **or** (2) the school does not provide the student with access to research materials necessary to satisfy course instruction, such as a library or the Internet; **or**
>
> (E) overcrowded schools such that (1) the student is subject to a year-round, multi-track schedule that

> provides for fewer days of annual instruction than schools on a traditional calendar provide; **or** (2) the student is bused excessive distances from his or her neighborhood school; **or** (3) the student attends classes in one or more rooms that are so overcrowded that there are insufficient seats for each enrolled student to have his or her seat or where the average square footage per student is less than 25 square feet.

Ex. 27 at 4498:7-8; Ex. 9 at 0252-0253 (emphasis added).

18. In California, approximately six million children attend 8,761 K-12 public schools. Ex. 18 at 0575-0579; Ex. 20 at 0836-0837 (Payne Decl. ¶¶ 6, 8). Based on real parties' interpretation of the vague terms in the class definition they drafted, the State believes that virtually all six million public school students fall into the class.[3] Real

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[3] For example, the class includes all students attending schools in which there are "insufficient numbers of clean, stocked and functioning toilets and bathrooms." Real parties in interest have taken the position in interrogatory responses that bathrooms are "insufficient" if schools do not provide as many toilets for girls as toilets and urinals for boys. Ex. 21 at 0935-0936, 0941-0942, 0981-0982 (Pls.' Resp. Interrog. Nos. 78, 82, 262-263); Ex. 20 at 0694-0698 (Bellet Decl. ¶¶ 3-9). It is unlikely that any California public school designed prior to 1998 has "sufficient" bathrooms based on real parties' criterion. Ex. 20 at 0697-0698 (Bellet Decl. ¶¶ 7-9). This branch of the class definition alone thus sweeps in almost every public school student in California. Ex. 20 at 0697-0698 (Bellet Decl. ¶¶ 7-9). Similarly, the class includes every student at any public school that lacks "reasonably current" textbooks for each student in each core subject. In their interrogatory responses, real parties define "reasonably current" as meaning that the textbooks "fairly portray subject material that is existing at the present time." Ex. 21 at 0972 (Pls.' Resp. Interrog. No. 239). But textbooks throughout California are approved and adopted on a seven-year cycle. Ex. 20 at 0781-0782 (Griffith Decl. ¶¶ 5-6). At any given time, therefore, on average 14% of all textbooks in California are seven years out of date; and every student at every school in California falls into the

parties interpret the class definition more narrowly, but it is not disputed that the class includes millions of public school students, that the class when certified included the three Cloverdale plaintiffs (and would still include them if they had not dismissed their claims with prejudice), and that the class still includes all other students attending Cloverdale High School.

19. In its Class Certification Order, the respondent court purported to determine that common questions of law and fact predominate, thereby supposedly justifying class certification, because (1) all plaintiffs seek the same remedy, namely an "adequate system of oversight and management of public education"; and because (2) the "liability issue is whether there is a failure on a state-wide level, not whether any particular individual has suffered." Ex. 27 at 4495:21, 4496:6-7 (emphasis added).

20. Under this Court's Opinion in the First Writ Proceeding, the respondent court's analysis of the "liability issue" was plainly wrong. According to this Court, petitioners' liability to any plaintiff or class member on the claims pled in the complaint will not be established by proof of some generalized "failure on a state-wide level." On the contrary, petitioners will have liability to a plaintiff only if there is proof that that plaintiff or class member suffered

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class based on this branch of the class definition. Ex. 20 at 0780-0781, 0783 (Griffith Decl. ¶¶ 4, 10).

constitutional injury as a result of specific conditions at his or her individual school. Ex. 6 at 0234-0235.

21. No class can be certified where each putative class member will be required to litigate numerous and substantial individual issues to establish a right to relief, or where the defendant's liability to all class members cannot be established by proof common to the class. That is precisely the situation here since, in the First Writ Proceeding, this Court determined that no plaintiff will be entitled to any relief on the claims pled in the complaint unless he or she proves injury based on the conditions that exist at his or her individual school. Since there are 8,761 schools in California, and since evidence of the conditions at thousands of them must be assessed to determine petitioners' liability to the class members who attend those schools, it is plain that numerous and substantial individual issues must be litigated in order to determine the class members' right to relief. The respondent court therefore abused its discretion and committed clear error by certifying the class.

The State's Motion to Decertify the Class

22. Having received this Court's opinion in the First Writ Proceeding, the State filed a motion to decertify the class on October 23, 2001. Exs. 28-29. The State's moving papers showed (1) that, based on the Court's Opinion in the First Writ Proceeding, no facts common to the class can establish petitioners' liability to particular class members;

and (2) that each putative class member will therefore be required to litigate numerous and substantial individual issues to establish his or her entitlement to relief, so that class action treatment is impractical and legally impermissible. Ex. 29.

23. At the hearing of the motion on November 15, 2001, the respondent court conceded that, to establish a right to relief on the claims pled, each plaintiff must prove that he or she has suffered injury based on the conditions alleged to exist at his or her individual school. Ex. 33 at 4571:8-17. The respondent court thus conceded that the "liability issue" in the underlying action is not whether there has been a generalized "failure on a state-wide level" -- as it had mistakenly assumed when it certified the class, see supra ¶ 19. Nevertheless, the respondent court concluded that a class was still proper, on the ground that there would be no need to adjudicate the claims of absent class members. Ex. 33 at 4551:13-22, 4571:3-7. The respondent court apparently assumed that members of the class will be entitled to relief so long as at least some of the 14 class representatives are entitled to relief. Ex. 33 at 4551:13-22, 4571:3-7. This assumption is directly contrary to this Court's ruling, in the First Writ Proceeding, that no plaintiff will be entitled to relief on the claims pled in the complaint unless he or she proves injury based on conditions that exist at his or her school. Ex. 6 at 0234-0235.

24. There is also no basis for the respondent court's suggestion that a class may be certified on the ground that the claims of the absent class members will never be adjudicated. The only purpose of the class action device is to adjudicate the claims of class members. If the claims of class members will not be adjudicated, a class action cannot provide any possible benefit to the parties or the respondent court, and no class should be certified.

The State's Motion for Summary Judgment or Summary Adjudication as to the Claims of All Non-Hispanic Caucasian Students Attending Cloverdale High School

25. The First Writ Proceeding involved the State's motion for summary judgment against the three Cloverdale plaintiffs. After the Court issued its Opinion, real parties dismissed with prejudice the claims of the three Cloverdale plaintiffs. But the respondent court's decision to certify a class meant that the other students attending Cloverdale High School became members of the class. Their claims are thus pending before the respondent court.

26. Accordingly, on November 19, 2001, the State filed a second motion for summary judgment (the "Cloverdale Class Motion"), this time directed to all non-Hispanic Caucasian students attending Cloverdale High School (the "Unnamed Cloverdale Class Members") -- that is, to all Cloverdale High School students who are situated identically to the original three plaintiffs. Exs. 34-37. At a hearing

on December 18, 2001, the respondent court issued an oral ruling denying the State's motion. Ex. 48.

27. The Cloverdale Class Motion was identical in all substantive respects to the State's earlier motion for summary judgment or summary adjudication as to the three Cloverdale plaintiffs.[4] Compare Exs. 35, 36, & 43 with Exs. 45, 46, & 47. Both motions relied on the same evidence and the same legal and factual arguments. This was because, based on the Court's Opinion in the First Writ Proceeding, the claims of the Unnamed Cloverdale Class Members are identical to those of the three Cloverdale plaintiffs: they are the claims pled in the complaint, and they depend on proof of injury arising from the specific conditions alleged to exist at Cloverdale High School. Ex. 6 at 0234-0235.

28. The only conditions at Cloverdale High School at issue in the underlying litigation are: (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. Ex. 1, ¶¶ 140-141. The thrust of the Cloverdale Class Motion -- like that of petitioner's earlier summary judgment motion -- was that Cloverdale High School is a good school, that conditions there are good, that the specific allegations which plaintiffs make about Cloverdale High School

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[4] So that the Court can judge for itself, the Appendix contains the papers submitted in connection with the original summary judgment motion as to the three Cloverdale plaintiffs. These documents are marked as Exhibits 45 to 47, respectively.

are false or distorted, that the "deplorable conditions" of which other plaintiffs complain at their schools do not exist at Cloverdale High School, and therefore that there is no substance to the claims of the Unnamed Cloverdale Class Members that they have been deprived of their constitutional rights. Ex. 35; Ex. 36, ¶¶ 1-23.

29. When the respondent court denied the Cloverdale Class Motion, it did not find that there was any triable issue of material fact. Ex. 48. Nor did it dispute petitioner's showing that none of the Unnamed Cloverdale Class Members' rights had been infringed. Ex. 48. Instead, the respondent court denied the motion on the sole ground that, having certified a class, it did not wish to reach the "individual" issues of whether students at Cloverdale High School have actionable claims entitling them to relief. Ex. 48.

30. In the First Writ Proceeding, this Court held that petitioners would be entitled to summary judgment on the claims pled by students attending Cloverdale High School unless plaintiffs could establish the violations alleged in the complaint concerning that school. Ex. 6 at 0234-0235. The State's first summary judgment motion demonstrated that plaintiffs could not establish those violations. The State's second summary judgment motion demonstrates that fact again. Yet the respondent court still refuses to reach the merits of the motion, or to allow petitioners to establish that they have no liability to students at Cloverdale High School. As a result, these entirely unmeritorious claims remain in the

case, and the Cloverdale Unified School District remains as a party to the State's cross-complaint.

31. The respondent court's ruling means that it will not entertain <u>any</u> summary judgment motions based on conditions at particular schools. Yet petitioners believe that the claims of literally <u>millions</u> of class members attending thousands of public schools across California are just as meritless as those of the Unnamed Cloverdale Class Members. Ex. 20. If further discovery confirms that this is so, and that additional class members also have claims that have no merit, the respondent court will undoubtedly deny petitioners the right to seek summary judgment on those claims. 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 class members who are entitled to no relief.

32. 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 rulings. All other procedures are wholly inadequate because, if an appellate court does not now review the respondent court's rulings, petitioners will be subjected to the claims of millions of class members who should not be in this litigation, and required to undergo trial as to issues that will not suffice to determine the fundamental issue of their liability to any class members, with all the attendant burden, expense, and delay, before they

will 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.

PRAYER

WHEREFORE, petitioners respectfully pray that this Court:

1. Issue a peremptory writ of mandate under the seal of this Court, given petitioners' obvious right to relief, directing the respondent court to set aside and vacate (1) its order of October 1, 2001, certifying a class; (2) its order of November 15, 2001, refusing to decertify the class; and (3) its order of December 18, 2001, denying petitioners' motion for summary judgment; and to enter new orders denying class certification and considering the summary judgment 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 the 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: January 6, 2002.

O'MELVENY & MYERS LLP
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PETER L. CHOATE

Attorneys for Petitioner
State of California

and

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Attorneys for Petitioners
Delaine Eastin, State
Superintendent of Public
Instruction, State
Department of Education,
State Board of Education

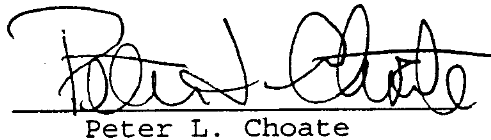
By
Peter L. Choate

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 and my clients do not. 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 January 6, 2002 at Los Angeles, California.



Peter L. Choate

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Petition arises because the respondent court has made a series of indefensible procedural rulings. They are contrary to settled law, and they are inconsistent with this Court's October 4, 2001, opinion in the prior writ proceeding in this case. State of California v. Superior Court (No. A094890) (the "First Writ Proceeding").

First, the respondent court certified a mammoth class in the underlying litigation. It swept into that class the claims of millions of students at thousands of public schools -- even though this Court's ruling in the First Writ Proceeding makes clear that, to establish petitioners' liability, each class member will be required to litigate numerous and substantial individual issues.

Second, even when this Court's ruling in the First Writ Proceeding was specifically called to its attention, the respondent court refused to decertify the class. It gave the astonishing explanation that individual issues would not predominate because it did not intend to adjudicate the claims of the millions of absent class members. The respondent court apparently assumed that it could give all class members relief based on the entitlement to relief of 14 class representatives. This assumption, too, is contrary to law and to the Court's ruling in the First Writ Proceeding. But even

if it were right, it would be no justification for a class. If the claims of absent class members will never be adjudicated, then those claims should not be in the class.

Third, the respondent court has once again denied on procedural grounds a summary judgment motion by the State directed to students attending Cloverdale High School. It has done so even though this Court held in the First Writ Proceeding that it was proper to test by summary judgment whether plaintiffs attending that school can prove their claims of constitutional violations.

With these rulings, the respondent court has severely restricted petitioners' opportunity to mount a meaningful defense against the claims that are now looming below. Having certified a class comprising millions of students presenting a multitude of factually diverse claims, the respondent court has refused to allow petitioners to test whether the claims of any of those students have merit.

II. THIS COURT HAS HELD THAT THE CLAIMS PLED IN THE FIRST AMENDED COMPLAINT REQUIRE PROOF OF INJURY BASED ON SPECIFIC CONDITIONS AT INDIVIDUAL SCHOOLS.

The First Amended Complaint was filed on behalf of 98 public school children attending 38 schools in 18 school districts across California. Ex. 1. In the complaint, real parties in interest allege that petitioners 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. Ex. 1, ¶¶ 1, 4.

The complaint contains four principal causes of action, to wit: (1) denial of equal protection in violation of the California Constitution; (2) denial of a free and basic education in violation of the California Constitution; (3) denial of due process in violation of the California Constitution; and (4) discrimination in violation of Title VI of the Civil Rights Act of 1964. Ex. 1, ¶¶ 299-313. The complaint contains a fifth cause of action seeking declaratory relief.[5] Ex. 1, ¶¶ 320-322. On the basis of these causes of action, real parties seek injunctive and declaratory relief requiring petitioner to institute a system of oversight and management of public education to ensure that the alleged deplorable conditions are remedied and do not recur. Ex. 1, ¶¶ 324-326.

At issue in the First Writ Proceeding was the State's motion for summary judgment against three named plaintiffs who attend Cloverdale High School in the Cloverdale Unified School District (the "Cloverdale plaintiffs"). Petition, ¶¶ 12-13. The State presented undisputed evidence that the three Cloverdale plaintiffs had not suffered any injury entitling them to relief. Petition, ¶¶ 12, 27-28.

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[5] The complaint alleged two additional causes of action: (1) violation of California Education Code § 51004 and (2) violation of California Code of Civil Procedure § 526a. On February 8, 2001, judgment on the pleadings against all plaintiffs was granted on these causes of action. Petition, ¶ 8 & n.2.

Nevertheless, the respondent court denied the State's motion on the ground that petitioners could not seek summary judgment as to the claims of fewer than all 98 original plaintiffs because to do so would not "completely dispose" of a cause of action within the meaning of C.C.P. § 437c(f)(1). Petition, ¶ 12.

This Court held that that ruling was legal error. Ex. 6. The Court began its analysis, as it was required to, by carefully determining what causes of action were at issue in this case.[6] In its October 4, 2001, opinion (the "Opinion"), the Court concluded that while the complaint "generally alleges a . . . 'shocking scope of substandard educational conditions' in many schools[,] . . . [t]he alleged violations, however, are based upon each named plaintiff's specific allegations concerning his or her own school or school district." Ex. 6 at 0234-0235 (emphasis added). In particular, "[e]ach of the Cloverdale plaintiffs claims injury based upon facts specific to the Cloverdale High School." Ex. 6 at 0235 (emphasis added). The Court held that because petitioner "sought summary judgment or summary adjudication on the basis that the Cloverdale plaintiffs could not establish the violations in the complaint concerning Cloverdale High

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[6] "As the pleadings 'delimit the scope of the issues' we examine them to determine whether the motion would have eliminated needless trials . . . . In evaluating the operative complaint, we look first to the causes of action pleaded." Ex. 6 at 0234 (citation omitted).

School," resolution of petitioner's motion "would have eliminated some or all of the causes of action as to the Cloverdale plaintiffs." Ex. 6 at 0234-0236.

Under the allegations of the complaint, each named plaintiff is situated identically to the Cloverdale plaintiffs: that is, each makes allegations about specific conditions at individual schools; and the "alleged violations . . . are based upon each named plaintiff's specific allegations concerning his or her own school or school district." Ex. 6 at 0235. The Court's Opinion is thus a legal ruling about what proof will be required for any plaintiff to establish a right to relief in the underlying litigation. Under the Opinion, judgment in favor of petitioners and against an individual plaintiff will be required if the evidence proves that the plaintiff has not suffered injury based on unconstitutionally inadequate conditions at his or her individual school.

The Opinion is law of the case and was and is binding on the respondent court. Kowis v. Howard, 3 Cal. 4th 888, 891, 894 (1992); Clemente v. State of Cal., 40 Cal. 3d 202, 211-212 (1985). While purporting to follow it, however, the respondent court has effectively gutted this Court's ruling. It has certified a class of millions of students, yet it has effectively eliminated any opportunity for petitioners to show, as they believe they can, that few, if any, of the millions of students now in the class can "establish the

violations in the complaint" concerning conditions at their schools, so as to be entitled to any relief. Ex. 6 at 0234.

III. THE RESPONDENT COURT'S ORDER CERTIFYING A CLASS MUST BE SET ASIDE AS CONTRARY TO LAW.

A. A Class Certification Order Must Be Set Aside When It Is Based on the Application of Improper Legal Standards.

The decision to grant or deny class certification rests within the discretion of the trial court. Occidental Land, Inc. v. Superior Ct., 18 Cal. 3d 355, 361 (1976). This general rule, however, is subject to an important exception applicable here: trial courts have no discretion to allow class action treatment based on the application of improper legal standards. Id. ("[T]he showing required for certification of a class is within the trial court's discretion provided that correct criteria are employed.") (emphasis added); Grogan-Beall v. Ferdinand Roten Galleries, Inc., 133 Cal. App. 3d 969, 975 (1982) ("The showing required for decertification of a class is within the trial court's discretion, provided that correct criteria are applied.") (emphasis added). When trial courts authorize class actions based on application of improper legal standards, reviewing courts do not hesitate to grant writ review to correct legal error. See, e.g., Washington Mutual Bank v. Superior Ct., 24 Cal. 4th 906, 911-912 (2001) ("We conclude the certification order must be vacated, for it was based upon an incomplete and erroneous analysis of factors relevant to certification.");

see also Blue Chip Stamps v. Superior Ct., 18 Cal. 3d 381, 387 & n.4 (1976); City of San Jose v. Superior Ct., 12 Cal. 3d 447, 452-453 (1974).

In this case, as will be shown, the respondent court's class certification order was based on a theory of liability inconsistent with this Court's Opinion. It is thus clear that the respondent court applied the wrong legal standard in certifying the class, and its certification order should be set aside.

B. The Respondent Court Certified the Class Below Based on a Theory of Liability That This Court Rejected.

The respondent court's class certification order was entered on October 1, 2001 -- three days before this Court issued its Opinion in the First Writ Proceeding. The lengthy class definition is set out in paragraph 17 of the Petition and will not be repeated here. Petitioners believe that the class definition is such as to sweep into the class virtually all of the six million public school students at the 8,761 public schools in California. Petition ¶ 18 & n.3; Ex. 18 at 0576-0578. Real parties in interest interpret the class definition more narrowly, but do not dispute that millions of students at thousands of schools are included in the class.

A class may be certified if and only if there exists a sufficient "community of interest" among putative class members. See, e.g., Washington Mutual, 24 Cal. 4th at 913; City of San Jose, 12 Cal. 3d at 459. This determination turns

on the existence and extent of common questions of law and fact. Id.

California law is clear that there is an insufficient community of interest -- and that no class can be certified -- where each putative class member would be required to litigate numerous and substantial individual issues to establish his or her right to relief. See e.g., Washington Mutual, 24 Cal. 4th at 913-914; City of San Jose, 12 Cal. 3d at 463; Hicks v. Kaufman & Broad Home Corp., 89 Cal. App. 4th 908, 916 (2001); Silva v. Block, 49 Cal. App. 4th 345, 351 (1996); Clausing v. San Francisco Unified Sch. Dist., 221 Cal. App. 3d 1224, 1233 (1990); Brown v. Regents of Univ. of Cal., 151 Cal. App. 3d 982, 988-989 (1984); Bauman v. Islay Invs., 45 Cal. App. 3d 797, 802 (1975). In other words, class certification is impermissible where a defendant's liability to the class cannot be established by proof common to the class. City of San Jose, 12 Cal 3d at 460-461.

In the leading case of City of San Jose, the Supreme Court explained why this rule exists:

> [A] class action cannot be maintained where each member's right to recover depends on facts peculiar to his case . . . . The rule exists because the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the "class judgment" determining issues common to the purported class.
>
> . . .

> It is true some questions common to the members of the class [are present]. But the class judgment rendered on these facts would not determine issues of sufficient number or substantiality to warrant class treatment. Most notably, the class judgment would fail to establish the basic issue of defendant's liability to the purported class. While we have held in several cases the failure of the class judgment to establish individual damage would not be fatal, in each the class judgment to be rendered would have established the basic issue of liability to the class. Only in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove not only damages but also liability.

12 Cal. 3d at 459, 463 (citations omitted).

In City of San Jose, the Court held that plaintiffs could not certify a class on theories of nuisance and inverse condemnation on behalf of property owners situated in the flight pattern of the San Jose Municipal Airport. Id. at 452-453. The Court reasoned that "the basic issue of defendant's liability" to the class depended on a "myriad of individualized evidentiary factors," none of which was determinative as to each parcel of land. Id. at 460-461, 463.

When the respondent court certified the class below, it concluded that, unlike City of San Jose, common issues of fact and law do predominate. Ex. 27 at 4496:4-9. It based this conclusion on two grounds. First, it said that all plaintiffs sought the same remedy, namely an "adequate system of oversight and management of public education." Ex. 27 at 4495:20-21, 4496:4-9. Second, it concluded that "[t]he liability issue is whether there is a failure on a state-wide level, and not whether any particular individual has

suffered." Ex. 27 at 4496:4-9 (emphasis added).

The Court's Opinion in the First Writ Proceeding, however, is entirely inconsistent with the respondent court's view of the "liability issue." According to the Opinion, petitioners' liability on the claims pleaded cannot be established merely by proof of some generalized state-wide failure. Rather, whether petitioners will have liability to any given class member depends on proof of injury to that class member arising from specific conditions at his or her individual school. Ex. 6 at 0234-0235. Contrary to the respondent court's class certification order, liability to a particular class member under this Court's Opinion does indeed turn on "whether any particular individual has suffered." The Opinion thus confirmed what the State had argued in its Opposition to real parties' motion for class certification: that each class member will be required to litigate numerous and substantial individual issues in order to establish his or her own right to relief.[7] Ex. 18 at 0591-0593.

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[7] In reading the briefing of the class certification motion and the transcript of the argument before the respondent court on September 20, 2001, it is important to understand that two theories of liability were in play. The State's position was that for petitioners to be liable to any plaintiff, that plaintiff would have to prove the existence of conditions at his or her individual school amounting to a constitutional violation; and that, because of the necessity for such individual proof the test of City of San Jose could not be met. Ex. 18 at 0589-0601; Ex. 26 at 4468:10-19. This Court's Opinion is consistent with the State's position.

Real parties, however, urged, and the respondent court ultimately held, that real parties could establish petitioners' liability on the basis that petitioners owed a

Once it is clear that liability in this case to any individual plaintiff can be established only if there is proof of unconstitutionally inadequate conditions at specific schools, then it is plain that the class certified by the respondent court has the same fatal deficiency as the class in City of San Jose. No evidence common to the class can prove anything about the actual conditions at particular schools across California. Similarly, no evidence common to the class can prove anything about whether students at particular schools are being deprived of a constitutionally adequate education based on the conditions that exist at their schools. Thus, no evidence common to the class can "establish the basic issue" of petitioners' liability. City of San Jose, 12 Cal.

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duty to every California school child, whether or not they were receiving a constitutionally adequate education, to have a State-directed system of oversight and management. Ex. 23:1799:7-14; Ex. 26 at 4465:4-8; Ex. 27 at 4495:20-24, 4496:4-9. The State's response to this theory was that there was no legal basis for it, but that if in fact relief on such a theory were possible, no class would be necessary since if the existence of such a system were constitutionally required and if it did not exist, any individual student could obtain an order directing the establishment of such a system. Ex. 18 at 0582-0589; Ex 26 at 4468:10-4469:7, 4474:5-11.

At the hearing on the motion, the respondent court made clear very early on that it would accept (as it ultimately did) real parties' theory that liability to class members could be established without proof of individual injury at specific schools. Ex. 26 at 4449:6-12, 4454:16-17. The argument at the hearing thus focused on that theory, and on the question of whether, assuming that was a valid theory of liability, a class provided "substantial benefits" to the litigants and the Court. Ex. 26 4448:20-4449:12; Blue Chip Stamps v. Superior Court, 18 Cal. 3d 381, 385 (1976); City of San Jose, 12 Cal. 3d at 459.

3d at 463.

In other words, even if all so-called "common issues" (which here, in fact, are merely issues about remedy) are resolved against petitioners, each student who falls within the class certified below will be required to litigate numerous and substantial issues related to conditions at his or her own school in order to establish any right to relief. How numerous and substantial those issues will be is well shown by the Appendix, which contains thousands of pages of evidence offered to the respondent court as the parties debated, in connection with the class certification motion, what conditions obtained at the 12 schools the class representatives attend. Ex. 11 at 0282-0344; Ex. 19 at 0612 to Ex. 21 at 1790; Ex. 24 at 1832-4423. But the class contains literally millions of students, who attend not a dozen schools but thousands of them. Petition, ¶ 18 & n.3. To resolve all of their claims in a manner consistent with the Court's Opinion in the First Writ Proceeding, the parties must introduce -- and the respondent court must evaluate -- evidence relating to conditions at hundreds or thousands of schools in a myriad school districts. The case law holds uniformly that that is not the type of undertaking that can or should take place in the context of a class action. See pp. 34-35, supra (cases cited).[8]

[8] In the court below plaintiffs relied heavily on a number of cases from other jurisdictions where "education reform" cases

IV. THE RESPONDENT COURT COMMITTED LEGAL ERROR WHEN IT REFUSED TO DECERTIFY THE CLASS.

As previously stated, the respondent court's class certification order was entered without benefit of this Court's Opinion in the First Writ Proceeding. Thinking that knowledge of this Court's views might induce the respondent court to alter its position and avoid further appellate proceedings, on October 23, 2001, the State filed a motion to decertify the class below. Petition, ¶ 22; Exs. 28-29. The theory of the State's motion was that the Court's Opinion in the First Writ Proceeding constituted "changed circumstances" justifying decertification. Green v. Obledo, 29 Cal. 3d 126, 148 (1981) (class may be decertified based on changed circumstances); Grogan-Beall, 133 Cal. App. 3d at 977 (same).

At the November 15, 2001 hearing on the State's motion, the respondent court agreed that "circumstances" had indeed changed in light of the Court's Opinion. Ex. 33 at 4550:20-26. The respondent court also acknowledged,

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had been allowed to proceed on a class basis. Ex. 9 at 0266:3-16; Ex. 23:1805-1807; Ex. 26 at 4450-4451. In most of those cases it is not clear that the issue of class certification was ever presented to the court and decided, and therefore the cases are authority for nothing pertinent here. Ex. 26 at 4469:19-23. But in any event, it is sufficient to say that none of those cases involved theories of liability that depend, as this Court's Opinion holds liability in the underlying case depends, on individualized determinations about individual schools. Ex. 6 at 0234-0235. It proves nothing about this case that in other cases, based on other theories, adjudication of individual issues was not required. Such adjudication is required here, and therefore there may not be a class.

consistent with this Court's Opinion, that the "liability issue" in the underlying litigation would not be whether there is a generalized "failure on a state-wide level," see Ex. 27 at 4496:6 -- as it had mistakenly assumed when it certified the class -- but whether individual plaintiffs have suffered constitutional injury based on conditions in their respective schools:

> The Court of Appeal has interpreted the plaintiffs' claims here as requiring that individual students establish, based on evidence at their schools affecting them, that they have a cause of action and that absent that they have no cause of action and shouldn't be part of this case . . . .
>
> . . .
>
> [A]ny remedy, if one were available and if the plaintiffs prove entitlement to one, will only exist if the named plaintiffs prove that they have a claim, as defined by the Court of Appeal here, and that they have suffered injury as a result of that claim . . . .

Ex. 33 at 4556:25-4557:1, 4571:9-14.

Nevertheless, the respondent court refused to decertify the class. It was unmoved by the cases holding that a class may not be certified in the absence of common proof sufficient to establish liability to all class members. See pp. 34-35, supra. The respondent court swept that settled principle of law aside with the astonishing explanation that it does not propose even to adjudicate the claims of absent class members or to even determine who is a member of the class. In the respondent court's own words:

> [W]hoever the named plaintiffs are will have to establish their claims, and based on the evidence that they

> present, if they establish their claims, any remedy would be controlled by and limited to the evidence and appropriate to the evidence that they were able to present on the claims that they made. Any other class members, if there were a class, would be those people who did meet the categories and qualities of remaining class members who established a claim, and it's not clear to me why the claims of absent class members would then have to be specifically litigated. . . . [T]he need to litigate any individual issues will not arise because it will not be necessary to determine whether an individual turns out to have been or not to have been entitled to a specific remedy or ultimately to determine specifically who is or is not a member of the class.

Ex. 33 at 4551:13-22, 4571:3-7.

It appears the respondent court believes that it can try the individual claims of the 14 class representatives, and then, based on the showing that they make, it can assume that other class members, meeting the class definition, also have valid claims, and can grant a remedy on that assumption. If that is the meaning of the respondent court's language, then the unfairness of what the respondent court is doing is patent: it thinks it can grant relief against petitioners and in favor of millions of absent class members based solely on proof that the class representatives have individual claims, without ever litigating whether the absent class members themselves have a right to relief. If the evidence introduced at the trial of a class representative's claim sufficed to resolve the claims of the absent class members -- in other words, if there were common proof of liability -- such a procedure would be possible. But the point of this Court's Opinion in the First Writ Proceeding is that no common proof

will suffice to establish liability in this case: on the contrary, each class member's claim will depend on proof of conditions at his or her individual school.

In the alternative, if the respondent court meant that it will grant relief (or not) based solely on the claims of the 14 class representatives, then its procedural ruling is absurd. On that hypothesis, it will have swept into this case millions of claims that it has no intention of deciding or adjudicating, and which will make no difference whatsoever to the outcome. But the sole purpose of a class action is to adjudicate claims of the class members. If the respondent court does not intend to adjudicate the claims of the absent class members, then they should not be in the class, and the class certification was improper.

A. The Respondent Court Assumed Wrongly That Classwide Relief Can Be Granted Based On The Claims Of Just A Few Students.

The respondent court's assumption seems to be that it makes no difference in this case whether liability is found to the 14 class representatives, or to millions of California school students. That is ludicrous. The 14 class representatives attend 12 schools in six school districts; 11 of them attend schools in just three districts; and six of them attend schools in just one district: the Los Angeles Unified School District. Petition, ¶ 5 & n.1; Ex. 11 at 0285-0332; Ex. 24 at 1833-1839. If one or more of the 14 class representatives should prove that they are receiving a

constitutionally inadequate education based on the conditions in their schools, they will of course be entitled to some remedy against someone. But proof of a violation as to a handful of students, by a handful of school districts, does not mean that a remedy is required that would run against the State or have statewide impact. For just that reason, the State filed a cross-complaint against the districts where the class representatives attend school. Ex. 4. If it turns out that those districts are providing a constitutionally inadequate education, the obvious remedy will be to order the offending districts to fix any problem.

The fundamental principle in this case, as in any other, is that "a judicial remedy must be tailored to the harm at issue," and that "[a] court should always strive for the least disruptive remedy adequate to its legitimate task." Butt v. State of California, 4 Cal. 4th 668, 695-696 (1992). If five, or ten, or 14 class representatives prove that they individually have suffered a constitutional injury, they will be entitled to some remedy -- more precisely, they will be entitled to the "least disruptive remedy" sufficient to cure or prevent their injury. But under this Court's Opinion, for any student to be entitled to relief on the claims pled, that student must "establish the violations in the complaint" at his or her individual school. Ex. 6 at 0234.

Proof of injury to students at one school does not equate to proof of injury to students at another school, and proof that the class representatives have been injured is not

proof that the millions of absent class members have also been injured. That proof can come only from consideration of the individual circumstances of the millions of absent class members. And since any remedy must be narrowly tailored to the injuries proven, the respondent court was entirely mistaken in thinking that it makes no difference whether ten named plaintiffs or ten thousand class members can prove injury. It cannot try 14 individuals' claims, and then give a remedy on the assumption that 14,000 or 140,000 individuals had also proved a claim. To do so deprives petitioners of their fundamental right to defend the claims that are asserted against them, and to be held liable only to those who have proved a claim. A class action used this way does not avoid injustice, it creates it. City of San Jose, 12 Cal. 3d at 458, 462.

Finally, real parties cannot avoid the need for individualized proof by pretending that the "deprivations" or bad conditions that define class membership themselves equate to constitutional violations. On the contrary, the leading decision of Butt, 4 Cal. 4th 668, on which real parties' complaint primarily rests, is directly to the contrary. Butt says squarely that "[u]nless the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs." Id. at 686-687 (emphasis added). Accordingly, in order to establish that a student is receiving a constitutionally inadequate education (and therefore

entitled to any relief), real parties will have to show not merely that one or more of the conditions that define the class exists; they will have to show in addition that the program of the district "viewed as a whole" falls beneath prevailing statewide standards. The respondent court, in other words, will have to consider, and evaluate, the entire educational program of the relevant school or district. Even for the schools of the 14 class representatives, that will be a daunting task. To perform it for hundreds or thousands of schools, which is what will be required if there is a class, is simply unthinkable.

B. The Only Purpose of a Class Action is to Adjudicate the Claims of Class Members.

If the respondent court did not intend to impose on petitioners the gross unfairness of trying 14 individual claims and then assuming that thousands or millions of remaining class members had also proved claims, then it can only have meant that it did not intend to adjudicate the claims of absent class members at all. On such a hypothesis, it would decide the claims of the 14 class representatives, and give whatever remedy those 14 individuals were entitled to, without regard to the claims of the millions of other class members. But such a course would be utterly pointless, and could provide no basis for certifying a class.

A class action, after all, is nothing more than a procedural joinder device that brings the claims of many

individuals before a tribunal for adjudication. See, e.g., Eyak Native Village v. Exxon Corp., 25 F.3d 773, 781 (9th Cir. 1994) ("A class action is a 'multiple joinder device, permitting the litigation, in one single action, of multiple claims . . . .'") (emphasis added); Phillips Petroleum v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually.") (emphasis added); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.") (emphasis added).

In California, as elsewhere, courts utilize the class action procedure in order to adjudicate the claims of absent class members. The California Supreme Court has confirmed this most basic principle on multiple occasions.

> By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.

Richmond v. Dart Indus., Inc., 29 Cal. 3d 462, 469 (1981) (emphasis added); Linder v. Thrifty Oil Co., 23 Cal. 4th 429, 435 (2000) (class actions provide a "technique" by which "the claims of many individuals can be resolved at the same time") (emphasis added); Blue Chip Stamps, 18 Cal. 3d at 389 (class actions allow "litigation of the underlying claims through

aggregate procedures rather than through separate trials.") (emphasis added).

California's appellate courts have likewise concluded that the precise purpose of the class action device is to adjudicate the claims of class members.

> Class actions serve an important role by establishing a judicial process within which the claims of many individuals can be resolved simultaneously, eliminating repetitive litigation and providing claimants with a practical method of securing redress for claims which because of their size do not warrant individual litigation.

Reyes v. Board of Supervisors, 196 Cal. App. 3d 1263, 1270 (1987) (emphasis added); Osborne v. Subaru of America, Inc., 198 Cal. App. 3d 646, 652 (1988) (class actions provide a "technique" by which "the claims of many individuals can be resolved at the same time") (emphasis added); Rose v. City of Hayward, 126 Cal. App. 3d 926, 935 (1982) ("[T]he very purpose of class actions is to open a practical avenue of redress to litigants who would otherwise find no effective recourse for the vindication of their legal rights.") (emphasis added).

If the claims of the absent class members below will not be adjudicated, the foregoing authorities teach that there is absolutely no reason to have a class. Class actions exist only to adjudicate claims of class members; when that need disappears, so does the reason for a class action. Even the respondent court expressly acknowledged at the November 15, 2001, hearing that there is no need for a class below:

> I don't think it is necessary to have a class here, and I

> don't think that the existence of a class fundamentally changes the nature of the trial that we will be having or should fundamentally change in any way the course of the litigation.

Ex. 33 at 4571:18-22 (emphasis added).

Both law and logic dictate that if no benefit can be derived from having a class, a class ought not to be allowed. See generally Blue Chip Stamps, 18 Cal. 3d at 385 ("[T]he representative plaintiff must show substantial benefit will result both to the litigants and to the court" to justify class certification.) (emphasis added); City of San Jose, 12 Cal. 3d at 459 (class action treatment allowed "only where substantial benefits accrue both to the litigants and the courts.") (emphasis added). If the respondent court has no intention of adjudicating the claims of millions of California public school students, then it had no business certifying a class that contains them, and its order refusing to decertify the class should be set aside.[9]

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[9] Petitioners recognize, of course, that in lawsuits other than this one, class members might have individual claims in addition to the claims adjudicated as part of the class proceeding. A class claiming that their employer fired them based on their race, for example, may include some members with claims for wrongful discharge not based on race. In such a case it might make sense to distinguish the "class claims" from the individual claims and to try the class claims first. However that may be, in this case there is no distinction between "class" claims and "individual" claims. No claim by any class member can be fully adjudicated without individual proof about conditions at individual schools. Under the Court's Opinion, all class members' claims will depend on proof that they suffered "injury based upon facts specific to" their individual schools. Ex. 6 at 0235. There is thus no

V. THE RESPONDENT COURT COMMITTED CLEAR ERROR WHEN IT DENIED THE STATE'S SECOND SUMMARY JUDGMENT MOTION, ALTHOUGH THE MOTION WAS PROPER AND CONSISTENT WITH THIS COURT'S RULING.

What has been said is sufficient to show that the respondent court committed clear legal error when it refused to decertify the underlying litigation as a class action. The respondent court compounded its error when it denied the State's motion for summary judgment as to class members attending Cloverdale High School. For the only ground given by the respondent court for denying the motion was the court's own erroneous certification of a class. Ex. 48. Having brought all Cloverdale High School students into the case by its class certification order, the respondent court now relied on precisely that order as the reason petitioners could not test whether the students newly in the case have any valid claim. Ex. 48.

In the First Writ Proceeding, the Court ruled that petitioners were entitled to test by summary judgment or summary adjudication whether the three Cloverdale plaintiffs had actionable claims. Exs. 5-7. Following the Court's issuance of a peremptory writ, the three Cloverdale plaintiffs dismissed their claims <u>with</u> <u>prejudice</u>. Petition, ¶ 16. But in the meantime, the class had been certified and the claims

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plaintiff in this case, either a named plaintiff or an absent class member, whose claim can be adjudicated without determining whether conditions at that individual plaintiff's school are sufficiently bad to deprive him or her of a constitutionally adequate education.

of all other students attending Cloverdale High School, now absent class members, were pending before the respondent court.

The State therefore filed a second summary judgment motion, which was identical in all substantive respects to the one that was previously before this Court. Petition, ¶¶ 26-27; compare Exs. 35, 36, & 37 with Exs. 45, 46, & 47. It differed only in that it was addressed to the claims of all non-Hispanic Caucasian students attending Cloverdale High School (the "Unnamed Cloverdale Class Members"), not merely the three named plaintiffs. But the claims of the Unnamed Cloverdale Class Members are identical to those of the three now-dismissed Cloverdale plaintiffs: they necessarily rest on what is alleged in the complaint, and to prove them plaintiffs will have to "establish the violations alleged in the complaint concerning Cloverdale High School." Ex. 6 at 0234.

The only conditions alleged to exist at Cloverdale High School are that (1) some classes 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. 1, ¶¶ 140-141. Just like the first summary judgment motion, the State's second motion set forth undisputed evidence that these alleged conditions either do not exist or have been grossly mischaracterized; that students at Cloverdale High School are receiving a good education; and that they have suffered no injury entitling them to any relief

on any of the five causes of action alleged in the complaint. Petition, ¶ 28; Ex. 37, ¶¶ 1-15; Ex. 40, ¶¶ 1-23.

Despite that undisputed evidence, the respondent court denied the State's second motion on procedural grounds, without reaching the merits -- just as it had denied the State's first motion. Petition, ¶ 12, 26. This time, it concluded that because it had certified a class, it did not wish to decide the "individual" issue of whether students at Cloverdale High School actually have meritorious claims. Ex. 48. The effect is that the State must defend against the claims of Cloverdale High School students, but is deprived of any means of testing, before trial, whether their claims are valid. This is indefensible and unfair.

A. The Cloverdale Class Motion Was Procedurally Proper.

Case law specifically allows defendants to seek summary judgment as to the claims of unnamed class members. See, e.g., City of Santa Cruz v. Pacific Gas & Elec. Co., 82 Cal. App. 4th 1167, 1188 (2000) (granting summary judgment against fewer than all class members); Stieberger v. Sullivan, 738 F. Supp. 716, 758 (S.D.N.Y. 1990) (granting summary judgment motion "to the extent it relates to those members of the plaintiff class represented by counsel . . . who knew or should have known of the facts giving rise to this action"). This rule makes sense because class members, after all, are for most purposes considered parties to an action, and especially for purposes of whether they can be bound by an

adverse judgment. See, e.g., City of San Jose, 12 Cal. 3d at 460 (unnamed class members are parties for purposes of imposition of judgment); In re Cement Antitrust Litig., 688 F.2d 1297, 1309 (9th Cir. 1982) ("Whatever the rule may be with respect to treating class members as parties for certain procedural purposes, it is clear that class members and parties are treated in substantially the same manner in regard to the substantive benefits and burdens of judgment.").

Petitioner's right to seek summary judgment against unnamed class members, however, is fixed not just by case law. It is a natural consequence of the class action device itself. As explained above, a class action is nothing more than a procedural joinder device that brings the claims of many individuals before a tribunal for adjudication. See pp. 46-47, supra (cases cited). Because the purpose of any summary judgment motion is to weed out meritless claims, it should make no difference whether the claims at issue belong to named plaintiffs or unnamed class members.

This is not to say that there could not be circumstances where a trial court might be justified in refusing on procedural grounds to decide the merits of a summary judgment motion directed to the claims of some absent class members. For example, if the basic issue of a defendant's liability can be established by proof common to the class, a court might be justified in avoiding a summary judgment motion addressed to the individual circumstances of certain class members. Cf. Berwecky v. Bear, Sterns & Co.,

197 F.R.D. 65, 69 (S.D.N.Y. 2000) (holding that "[a]ny unique damages individual plaintiffs have suffered can be addressed after the issue of liability has been determined"); Slaven v. BP America, Inc., 190 F.R.D. 649, 655 (C.D. Cal. 2000) (holding that, although "all fishermen . . . share the same factual basis for their liability claims, . . . the class members differ widely as to the damages suffered and the manner in which damages were caused," so that these issues could be addressed in subsequent trial).

But where, as here, no common proof will suffice to establish petitioners' liability, and the claims of each class member necessarily depend on facts unique to that class member, it is manifestly an abuse of discretion to prevent a defendant from testing before trial whether those factually unique claims give the class member any entitlement to relief. After all, courts cannot simply deprive defendants of their right under the summary judgment statute to weed out meritless claims before trial. Sentry Ins. v. Superior Ct., 207 Cal. App. 3d 526, 529 (1989); cf. Rutherford v. Owens-Illinois, Inc., 16 Cal. 4th 953, 967 (1997) (trial court's inherent power to control litigation before it must not be exercised in unreasonable manner).

Given that petitioners' liability to the members of the class in this case cannot be established by common proof, it makes no practical sense for the parties and the respondent court to avoid indefinitely the only issue tendered by the State's motion: whether, based on the evidence in the record,

petitioners can have _any_ liability to students attending Cloverdale High School.

B. The Respondent Court's Ruling Means that Petitioners Have No Way of Testing Who Has Actionable Claims and Who Does Not.

Cloverdale High School is just one among thousands of other schools that fall within the class certified by the respondent court. Petition, ¶ 18 & n.3. Millions of absent class members attend these other schools. _Id._ To establish a right to relief, each one of them must prove that the conditions at his or her individual school are constitutionally inadequate. Ex. 6 at 0234-0236.

Petitioners believe that the conditions at few, if any, schools in California actually deprive students of a constitutionally adequate education. Ex. 20 at 0648-0919 (State's Compendium of Declarations). But the respondent court's ruling on the Cloverdale Class Motion makes it impossible for petitioners to mount that defense before trial. Even when undisputed evidence is available, as petitioners believe, to prove that millions of class members at thousands of schools like Cloverdale High School are receiving a constitutionally adequate education -- and thus have no actionable claims -- the respondent court will not hear it.

The consequence is that petitioners continue to face the claims of these millions of absent class members. Real parties can be expected to argue that, if they have proved the claims of 14 class representatives, they should be entitled to

relief based on the theory that absent class members have similar claims. Petitioners, therefore, must investigate the circumstances of the absent class members and their schools, and must prepare to defend their claims at trial. The summary judgment statute was intended to free defendants from the burden of defending and discovering against meritless claims. The respondent court's rulings here have effectively gutted the statute.

Similarly, the respondent court's refusal to rule whether students at Cloverdale High School (and by implication many other schools) have suffered any constitutional injury means that the Cloverdale Unified School District, like the other school districts which are parties to the State's cross-complaint, must continue to remain a party to this action. If the respondent court were to allow a ruling on the basic question of whether Cloverdale High School students have a claim, and if (as the State expects and as real parties virtually conceded by dismissing the claims of the original three Cloverdale plaintiffs) the result of the motion would be dismissal of those claims, then the State could dismiss its cross-complaint against the Cloverdale District and the case could be simplified.

The respondent court's persistent refusal to allow summary judgment motions is wrong. It unnecessarily complicates this action. It impedes petitioners' ability to defend. It prevents simplification of the action, and it

prolongs and complicates the proceedings. This Court has already intervened once. It needs to intervene again.

CONCLUSION

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

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Respectfully submitted,

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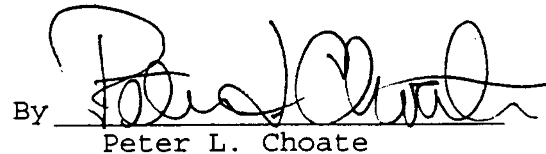
By 
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