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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ELIEZER WILLIAMS, a minor, by SWEETIE WILLIAMS, his guardian ad litem, *et al.*, each individually and on behalf of all others similarly situated,

Plaintiffs,

v.

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

Defendants.

No. 312236

[CLASS ACTION]

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Hearing Date:	September 13, 2001
Time:	8:30 a.m.
Department:	16, Hall of Justice
Judge:	Hon. Peter J. Busch

Date Action Filed: May 17, 2000

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INTRODUCTION

In its opposition to plaintiffs' motion for class certification, the State tries again to deflect this case's focus from the systemic problems the plaintiff schoolchildren seek to address. Instead, the State hopes to turn this case into one concerning only the particular conditions in some limited number of particular schools as they exist today. That effort is irrelevant to the question this Court must decide in this motion: whether the case should be certified as a class action. Moreover, the State's effort has been rejected at every stage of this case to date. This case in fact concerns (1) whether the State's "ultimate responsibility" for public education, *Butt v. State,* 4 Cal. 4th 668, 681, 692 (1992), requires that it set up a system of oversight and management to address the egregious conditions about which the schoolchildren plaintiffs complain, and (2) whether the State is doing a sufficient job of oversight and management to prevent or discover and correct these conditions. Those are the common legal questions uniting the class and subclass in this case, those are the questions that make this case quintessentially a class action, and those are the questions the State seeks to avoid.

The State's opposition reveals more by what it does not say than by what it does. The State does not challenge plaintiffs' satisfaction of most of the required elements of class certification. Even after taking 24 days and 7027 pages of deposition testimony from 9-, 11-, 13-, and 17-year-old children, some of whose depositions lasted for three and four days and whose depositions the State insisted it needed for purposes of opposing, and delaying, this motion (*see* May 10, 2001 transcript at 9), the State says nothing in its papers about the specificity of the class definition, the ascertainability of the class, or the typicality of the proposed class representatives' school conditions. The reason is simple: the State recognizes that the problems the plaintiffs have raised in this lawsuit are endemic and affect very large numbers of California students. Indeed, in a recent fundraising letter, Governor Davis described those problems in ways that make clear their numerosity and typicality:

> Dear Fellow Democrat: . . .
>
> You don't need a lecture about our problems in education. Politicians and educators have been talking about them for years.

> Crowded classrooms. Uncredentialed teachers. No books for kids to take home. Inadequate funding. Low standards. Wasted taxpayer dollars. Schools that aren't held accountable for their performance.[1]

The Governor's recognition of these problems parallels what the State has learned deposing the named class representative schoolchildren: that their school conditions are serious, specific, and typical of the class. For example, Alondra Sharae Jones, who attended Balboa High School in San Francisco, explained in her deposition that:

> It make you feel less about yourself, you know, like you sitting here in a class where you have to stand up because there's not enough chairs, and you see rats in the building, the bathrooms is nasty, you got to pay [for class materials].
>
> And then you—like I said, I visited Marin Academy, and these students, if they want to sit on the floor, that's because they choose to. And that just makes me feel real less about myself because it's like the State don't care about public schools. If I have to sit there and stand in the class, they can't care about me. It's impossible. So in all honesty, it really makes me feel bad about myself. . . .
>
> And I'm not the only person who feels that. It really make you feel like you really less than. And I already feel that way because I stay in a group home because of poverty. Why do I have to feel that when I go to school? No, there's some real weak stuff going on. . . .
>
> They can buy some chairs for us to sit down. They can afford to fix the tiles so I ain't got to sit there and worry about if something's going to fall on my head.
>
> They can get an extra janitor to clean the nastiness in that bathroom, and they can do something about that smell. I mean you still smell—the smell is horrendous.
>
> And also the money that they do increase, monitor it, like, okay, say they give whatever amount to the school district, I don't know if they're supposed to monitor or tell the schools what they supposed to spend it on, but at least act like you care.
>
> Like I said before, never once has somebody came—from the State came to my school, asked us what did we need, what's going good, what's going bad, what do you think we should change. And if there's a superintendent of all the schools, what the hell is your job if you not ensuring that I'm receiving equal education, you—it's no place for you to even be there. What's your place? Nothing. . . .

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[1] Letter from Gray Davis to "Fellow Democrat," attached as Exhibit 21 to the Declaration of Matthew I. Kreeger in Support of Plaintiffs' Reply in Support of Class Certification ("Kreeger Decl.")

> Don't sit there and expect me to fail and then pass me old, used-up . . . textbooks and expect me to achieve from that. I have achieved that because I can persevere, obviously. I've been through a lot so I can persevere.
>
> I'm just saying it's a lot they can do. I don't understand why they won't do it. You get paid enough. Do your job. But then again, it's probably just free money, they sitting there doing nothing and why not get paid for it, huh.[2]

Jones Dep. 348:17-350:25.

Alondra put it well for all the students in the proposed class: she explained that having insufficient chairs in class, having filthy bathrooms in school, having to pay to attend public school, having "old, used-up" textbooks and having to go to school with rats contrasts sharply with the educational conditions other children receive,[3] that she is "not the only person who feels that," that "it's like the State don't care about public schools," that the State should "[d]o your job," "monitor it," and "at least act like you care," and that ultimately, "if there's a superintendent of all the schools, what the hell is your job if you not ensuring that I'm receiving equal education, you—it's no place for you to even be there." In the face of this testimony, and that of the other proposed class representatives,[4] the challenges the State mounts to class certification necessarily fail.

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[2] Deposition of Alondra Jones, attached within Exh. 3 to Kreeger Decl., ("Jones Dep.").

[3] Notwithstanding the fact that Marin Academy is a private school, Alondra's ineluctable point that the conditions under which she attended school differed from and were inferior to conditions in other California schools, including superior public schools, remains.

[4] Although Alondra stated the case for class certification most comprehensively, she is far from alone among the class representatives in articulating the case. For example, Manuel Ortiz from Watsonville High School testified:

> I want the State of California guys to hear this. . . . This is pretty hard. Well, if they really care about us, it won't hurt them to give us what we need. That little kid that—from the press conference in LA, he needed a book. There's a lot of kids that need books. How does that hurt California to provide that for us? I think there's enough money out there to give us what we need. Isn't education the number one priority? It should be the number one priority on the list. They should give us what we need, because without education, we don't got a future. That's basically it.
>
> All I'm asking is just give us the books we need, proper facilities, and we'll try our best to, you know, come out on top. Because without education, all we could do is go work in the fields, get some of them low paying jobs. And we don't want the U.S. to be like this. We want to move along, move forward. And hopefully we will win this case, and they'll give us what we need to go along.

Footnote continues on next page.

Rather than address the merits of the motion for class certification, the bulk of the State's arguments are devoted to an attempt to shoehorn plaintiffs' claims into either a "remedy" theory or a "violation" theory, asserting that class certification cannot be granted under either interpretation. The State's arguments fundamentally misconstrue plaintiffs' claims. As plaintiffs have repeatedly pointed out, this case turns on the State's failure to implement a system of oversight and management, as evidenced by the conditions in particular schools. The State has offered no argument why such claims are not properly subject to class treatment.

First, the State claims that the cases "universally" hold that where a class is unnecessary none should be certified. State's Memorandum in Opposition to Class Certification ("State Opp.") at 13. In fact, however, the standard in California and in many other jurisdictions is that where class certification is advantageous—even if not absolutely required—class certification is appropriate and should be granted.

Second, as this Court has recognized, *see* Nov. 14, 2000 Order [on Demurrer] ("Order") at 2, this case will necessarily involve some limited examination of conditions in schools to establish evidence of the violation, although not to establish the violation itself. The State's liability depends

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> I really want that kid to go and be a teacher if that's his dream. If there's kids that want to be astronauts, why should the State of California, them guys, shatter their dreams? They should help them out with their dreams.
>
> That's it. I don't want to cry.

Deposition of Manuel Ortiz, attached within Exh. 14 to Kreeger Decl. ("Ortiz Dep."), 457:5-458:11 (incorporating changes Manuel made to the transcript).

Other, often younger, proposed class representatives confirmed the gravity of the issues at stake in this case and the need for systemic reform throughout their depositions as well. *See* Deposition of Cindy Diego, attached within Exh. 10 to Kreeger Decl. ("Diego Dep."), 25:10-23, ("I'm just seeking equality for each and every student. . . . For every student to be treated equal; to get the same resources that everybody else does. It doesn't matter what school you come from or what place do you stay at, as long as everybody is treated equal. And getting the same things that they deserve because education is important and education should be based on the same level."); Deposition of Lizette Ruiz, attached within Exh. 12 to Kreeger Decl. ("L. Ruiz Dep."), 83:12-14 (stating that through this suit she seeks "[b]etter school conditions, more qualified teachers, more teachers in general, more textbooks, better textbooks, better sanitary schools."); Deposition of Krystal Ruiz, attached within Exh. 7 to Kreeger Decl. ("K. Ruiz Dep."), 50:6-10 (testifying that she hopes as a class representative that "if something can change that would be neat . . . . [a]bout my schooling."); Deposition of Carlos Santos, attached within Exh. 9 to Kreeger Decl. ("Santos Dep."), 40:24-41:5 (testifying that he wants "[i]mprovement; that's all. . . . [o]f the schools. . . . Hoping for the schools to get better.").

on a showing that unconstitutional conditions exist in schools as evidence that the State's oversight mechanisms are inadequate—and constitutionally so.

Third, the State ignores the scores of cases, including many education accountability cases that seek much the same relief plaintiffs seek here, that have proceeded as class actions in California and throughout the country. For just one example, the class certified in *Serrano v. Priest*, 5 Cal. 3d 584, 589 (1971), included all public school students in California except those in one school district. These cases directly undermine the State's purported concerns about the size of the class and about the utility of the class device in this case. Moreover, the State's argument that there are so many public school students in California who lack minimal tools and conditions for learning that certifying a class would be unwieldy obviously concedes the numerosity prong of class certification. But even if the State had not made that concession in its brief, the many cases that have certified very large classes dismiss the concerns the State purports to raise. In addition, these cases demonstrate the benefits of class certification, including ensuring classwide relief for present and future students, rather than just for the named plaintiffs; protecting the judgment's applicability to a broad range of students; and ensuring consideration of the interests of absent class members by providing them opportunities to be heard at a fairness hearing and by ensuring that this Court consider their interests in fashioning a remedy.

Finally, the State's charges that plaintiffs' counsel violated a fiduciary duty to the class and that potential intra-class conflicts exist deliberately misunderstand the nature of relief plaintiffs seek. Contrary to the State's assertions, plaintiffs *do* aim to improve conditions at all class members' schools, but aim to do so by seeking a court order requiring the State to operate a system of oversight and management that will, as this Court has put it, "prevent or discover and correct such deficiencies going forward." Order at 2. As this Court itself recognized, "[i]f, in fact, the State does not have the legally required oversight and management systems in place, the same kind of problems would be prone to recur elsewhere." *Id.* Thus, the remedy plaintiffs seek is the only way to satisfy their fiduciary duty to ensure relief for all class members, who include future California public school students. In addition, nothing requires the zero-sum-game approach the State hypothesizes as the only way to remedy the conditions California schoolchildren suffer. The case law is clear that these

speculative conflicts that the State hopes might, but should not, arise at the remedial stage of the litigation, provide no basis to deny class certification.

ARGUMENT

I. THE COMMON QUESTIONS IN THIS CASE RENDER IT IDEALLY SUITED FOR CLASS CERTIFICATION

Contrary to the State's arguments, this case is ideally suited for class certification because the schoolchildren seek broad declaratory and injunctive relief on behalf of a large number of students challenging statewide systemic failures. The legal questions whether the State is constitutionally obligated to operate a system of oversight and management of its public schools and whether the State has satisfied that obligation are common to all members of the class and subclass.[5] The class and subclass are also united by at least two common factual questions: (1) what level of oversight does the State engage in with respect to the conditions in schools? (*see Gomez v. Ill. State Bd. of Educ.*, 117 F.R.D. 394, 400 n.8 (N.D. Ill 1987) ("[A] common question of fact exists regarding the defendants' conduct with respect to supervising local school districts, and enforcing state and federal law.")); and (2) whether members of the plaintiff class suffer educational deprivations that result from the State's failure to prevent or discover and correct the appalling conditions in their schools. These questions, which necessarily involve deciding in part whether the State's policies have resulted in discriminatory treatment, are prototypical class action questions. *See Anderson v. Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982) ("The Supreme Court has recently reiterated that 'suits alleging . . . discrimination are often by their very nature class suits, involving classwide wrongs, and that common questions of law or fact are typically present.'") (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147 (1982)); *Midwest Cmty. Council, Inc. v. Chicago Park Dist.*, 87 F.R.D. 457, 460 (N.D. Ill. 1980) ("Where broad discriminatory practices constitute the gravamen of a class suit, common questions of law and fact are necessarily presented.").

[5] Because the State mounts no arguments against certification of the subclass that differ from its arguments concerning class certification, we address the arguments together.

A. Systemic Education Reform Cases Seeking Equitable Relief Routinely Proceed As Class Actions

Notable about the State's opposition is its failure to cite or acknowledge the many systemic education reform cases in which courts have certified class actions. *See, e.g.*:

- *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1 (1973) (class action on behalf of children from poor families residing in low property tax base districts against state system of education funding);
- *Serrano,* 5 Cal. 3d 584 (class action on behalf of all students in California except those in one school district alleging that school finance system violates their right to equal protection);
- *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) (class action against the state and state superintendent of public instruction seeking a declaration that the Arizona school finance scheme violates the state constitution);
- *Alabama Coalition for Equity Inc. v. Hunt*, 624 So.2d 107 (Ala. 1993) (statewide class action on behalf of "all children who are presently enrolled or will be enrolled in public schools in Alabama that provide less than a minimally adequate education");
- *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985) (class action on behalf of students in poor and minority school districts, challenging state's education system as violating state constitution);
- *Diaz v. San Jose Unified School Dist.*, 733 F.2d 660 (9th Cir. 1980) (en banc) (class action on behalf of all Spanish-surnamed children challenging school district assignment policy as unconstitutional), *aff'd,* 861 F.2d 591 (9th Cir. 1988);
- *Gomez,* 117 F.R.D. 394 (class action on behalf of Spanish-speaking students who should have been classified as limited English proficient, alleging the state failed to implement standards and oversee local school districts' compliance with law);
- *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979) (class action challenging state high school graduation exam on constitutional and statutory grounds), *aff'd, vacated in part on other grounds,* 644 F.2d 397 (5th Cir. 1981);

- *Ceaser v. Pataki*, 2000 U.S. Dist. LEXIS 11532, at *25 (S.D.N.Y. Aug. 12, 2000) (unpublished) (statewide class action, excluding New York City schools, on behalf of all students of color attending public schools with "high-minority" enrollment).

Some of these class action cases sought to achieve accountability for public education, much like plaintiffs' goals here. For example, in *Gomez*, Spanish-speaking students sued the Illinois State Board of Education, alleging that the state had violated federal law guaranteeing them equal educational opportunity by, among other things, failing to "promulgate objective and uniform guidelines in order to identify properly limited English-proficient students," and failing "to supervise and ensure that local school districts comply with federal law requirements." *Gomez,* 117 F.R.D. at 396. The court held that there were common legal and factual issues among the class and that the class representatives' claims were typical because of the "standardized conduct of the defendants toward members of the proposed class," including its failure to set and ensure compliance with standards by "supervising local school districts." *Id.* at 399, 400 n.8.

Similarly, in *Ceaser,* students in school districts with large numbers of students of color sued New York state, alleging that the state's policies had resulted in their deprivation of basic educational necessities, such as certified teachers, remedial instruction, and suitable and appropriate buildings and grounds, in violation of federal law. In particular, they alleged that the State had failed to monitor the school system to ensure that they received these educational services. *See Ceaser,* 2000 U.S. Dist. LEXIS 11532, at *4-5. New York State opposed class certification, arguing that there were no common legal questions because the students were complaining about five different deprivations and that there were no common factual questions because "certification would require fact-specific inquiries concerning the differential status and conditions of an estimated 80,000 plaintiffs attending more than 150 high minority high schools." *Id.* at *17-18; *compare* State Opp. at 18 ("To resolve whether the six million class members have claims, the Court will thus have to make an individualized determination about the quality of education at each of the 8761 public schools in California."). The *Ceaser* court rejected the argument, holding that the students' allegation that the state had a policy of not ensuring that local districts comply with educational mandates constituted the common legal question. *Ceaser,* 2000 U.S. Dist. LEXIS 11532, at *18.

The similarity between the classes certified in *Ceaser* and *Gomez* and the proposed class in this case is incontrovertible. The common questions of law in those cases and this case concerning the State's failure to set standards and conduct oversight of local school districts resulting in deprivation of basic educational needs are, for all intents and purposes, identical. *See* Plaintiffs' First Amended Complaint ("FAC"), pp. 67-69, ¶¶ 293-98.

B. Resolution of Plaintiffs' Claims Does Not Require Inquiry into the Conditions at 8761 Schools

The State's purported confusion about the basis for plaintiffs' claims cannot defeat class certification. As plaintiffs have stated repeatedly throughout this case, "we are here to establish a system of accountability wherein the buck stops with the state." October 30, 2000 hearing transcript at 8:17-18; *see also* FAC ¶¶ 293-98. Most recently, in an April 26, 2001 hearing, plaintiffs explained the flaw in the State's refusal to deal with this case on its terms:

> MR. JACOBS: [T]he defendants have alternated in two polar views of what our claim is about. Sometimes they say the complaint is about particular conditions in particular schools. That's when they move on summary judgment for a district like Cloverdale.
>
> THE COURT: I've indicated my view of that, actually.
>
> MR. JACOBS: Exactly. Now, sometimes they go to the other extreme and they say this is about the system of oversight and management in the abstract or without grounding in the conditions of particular schools. Our position and your order on demurrer is dead in the middle. It is the system of oversight and management, but it is the system of oversight and management's breakdown as evidenced by the conditions in particular schools.

April 26, 2001 hearing transcript at 6:3-16.

Because this case concerns State-level oversight, this Court will not need to consider the conditions in all 8761 schools in the State to decide anything in this case, and the State's arguments concerning a purported "remedy" theory of the case are irrelevant to the class certification question. *See* State Opp. at 16-28. But the State also errs in asserting that "[e]vidence about the educational experience of particular children, like evidence about conditions at particular schools, will be entirely irrelevant" to plaintiffs' claims concerning the State's oversight of public education. State Opp. at 12. To the contrary, as this Court has already recognized, the conditions in particular schools serve as evidence of the breakdown in the State's oversight obligations, and help establish that the

breakdown has had a detrimental effect on California's public school students. *See* Order at 2. As a result, plaintiffs intend to introduce at trial evidence of the conditions at a representative number of schools—certainly far fewer than all 8761 California schools—to establish the harm that has befallen the members of the plaintiff class.[6]

The inquiry necessary in this case is thus similar to the inquiry necessary in *Reyes v. Board of Supervisors,* 196 Cal. App. 3d 1263 (1987), a statewide benefits class action in which defendants opposed class certification by arguing that a community of interest was lacking because each class member's right to recovery would depend on individualized inquiry into the specific grounds for which each recipient had benefits terminated. The *Reyes* court disagreed, holding that the common factual question of what the State's termination process actually was, and the common legal question of whether this process constituted a constitutional violation, supported certification. It held:

> [W]hether the County applied an unlawful sanctioning process can be proved by reviewing the testimony of the County's welfare regulations, the testimony of the County's welfare employees as to the standard practices followed in making sanctioning decisions, as well as a sampling of representative cases probative of the County's practice of sanctioning for nonwillful noncompliance with work program requirements.

Id. at 1279. Significantly, in *Reyes* the county only contested class status on the issue of past benefits. *Id.* at 1267. Unlike the State here, the county appears to have acknowledged the appropriateness of proceeding as a class for purposes of prospective injunctive relief.

Similarly, in *Baby Neal v. Casey*, 43 F.3d 48, 63 (3rd Cir. 1994), the Third Circuit held that class certification was appropriate where children under legal care and custody of Philadelphia's

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[6] It is important to note here that the State is not correct that "the Court will need to make an overall judgment, based on the curriculum offered and the school's overall academic performance, about whether the education offered in each school is constitutionally adequate." State Opp. at 19. Despite the State's best efforts to turn it into one, this case is not an "adequacy" case concerning whether the quality of education students receive is adequate by some standard of substantive information imparted or learned. Instead, this case involves minimum conditions, addressing whether conditions students experience in their schools fall below a minimum threshold required for an opportunity to learn. To make that determination, the Court will not need to engage questions about quality of curriculum offered but will instead need to consider whether students have access to such basic tools for learning as textbooks and teachers assigned to their classes for the duration of a school term and seats in classes.

Even if this case were an education adequacy case, however, such adequacy cases have been certified as class actions. *See Abbott*, 495 A.2d 376.

Department of Human Services complained of a large number of different conditions, including insufficient numbers of caseworkers and of medical, psychiatric, and psychological services, and sought declaratory and injunctive relief. Notwithstanding the differences among the children's individual factual circumstances, the Third Circuit held that class certification was appropriate because all plaintiffs raised the same legal claims against the defendant and all "alleged [that they were] victims of the [defendant's] systemic failures." *Id.* at 63. As in *Baby Neal* and *Reyes*, this case will involve inquiry into the standard practices the State follows and a limited sampling of representative cases probative of the State's failure to prevent or discover and correct the deprivations of minimally required educational conditions the schoolchildren now suffer; that inquiry is a classic injunctive class action inquiry and is appropriate here.[7]

C. Discovery to Date Confirms the Common, Statewide Nature of the Claims

Contrary to the parade of horribles the State proposes by arguing that this Court would have to examine the particular conditions in 8761 schools in order to decide this case, *see* State Opp. at 18, the discovery conducted by the parties to date confirms that the conditions in particular schools are representative of conditions in many other schools as well, and that the common questions raised in this case are answerable through examination of only a sampling of the schools in the State. The school principals whose depositions were noticed by the State in order to oppose class certification have not only repeatedly articulated the basic necessity of the tools and conditions the schoolchildren seek to guarantee for themselves through this lawsuit, but also testified that many of these tools and conditions in fact are missing in their schools. And the State educational agency employees whom plaintiffs have deposed to date have articulated the absolute absence of a system of accountability through which the State might ensure that the conditions the children, their teachers, and their principals know to be necessary—such as textbooks, teachers, and basically habitable facilities—in fact are present in the schools.

[7] In fact, one of the cases on which the State relies, *Stewart v. Winter*, 669 F.2d 328, 337 n.20 (5th Cir. 1982), justified its denial of class certification in part because in that case plaintiffs "do not allege that the state has failed to '(promulgate) detailed rules and regulations,' make 'regular' inspections or take 'vigorous' enforcement action . . . ." *See* State Opp. at 27-28. By contrast, we do allege precisely that State failure to operate an oversight system, which constitutes the kind of common legal question that was absent in the case on which the State urges this Court's reliance.

1. School-Level Depositions Establish the Existence and Importance of Conditions that Define the Class

The principals and assistant principals, and the students themselves, have confirmed that the proposed class representatives and their peers in their schools suffer the conditions that define the class.[8] For example, principals, assistant principals, and students alike confirmed that Manuel Ortiz, Krystal Ruiz, Carlos Ramirez, Cindy Diego, Moises Canel, and Silas Moultrie and their peers in their schools do not have enough textbooks for students to use in class without sharing and at home for homework.[9] Principals, assistant principals, and students also testified to such severe overcrowding

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[8] As noted in plaintiffs' Evidentiary Objections to Declarations and Summary Chart Filed in Support of Defendant State of California's Opposition to Class Certification, the State's "Chart of Allegations" attached to the State's Opposition (and the supporting documents) constitutes an improper attempt to argue the merits at the class certification stage. The State's chart so fundamentally misrepresents the state of the factual record, however, that plaintiffs feel compelled to provide a response. Attached to the Kreeger Declaration as Exhibit 1 is a chart comparing the most egregious mischaracterizations, or outright falsehoods, found in the State's chart to the actual facts shown in discovery to date. Exhibit 2 provides a more comprehensive review of the evidentiary support for the conditions at the class representative schools. The supporting documents referenced in both charts, and in this brief, are attached as exhibits to the Kreeger Declaration.

[9] *See* Deposition of Jose Banda (Watsonville High School), attached within Exh. 14 to Kreeger Decl. ("Banda Dep."), 116:2-8, 117:16-25, 118:9-11, 119:16-21, 125:10-19, 128:19-21; Deposition of Lawrence Lane (Watsonville), attached within Exh. 14 of Kreeger Decl. ("Lane Dep."), Vol. I, 80:7-16, 84:25-85:8, 88:10-12, 89:9-21; Lane Dep., Vol. II, 8:16-19, 9:21-24, 10:2-6, 51:12-23; Ortiz Dep. (Watsonville), 73:25-74:2, 74:11-20, 144:22-145:11, 146:6-10, 166:15-20, 181:17-18, 183:5-11, 190:1-4, 194:1-195:7, 198:1-20, 199:15-23, 201:23-202:21; 204:17-20, 233:10-12, 258:13-14, 260:10-12, 262:23-25, 263:1-13, 293:19-296:7, 377:3-7, 377:22-24, 387:16-388:1; Deposition of Carla Walden (Cesar Chavez Academy), attached within Exh. 7 to Kreeger Decl. ("Walden Dep."), 93:18-94:21, 436:10-16; K. Ruiz (Cesar Chavez) 137:24-139:19, 140:14-25, 196:9-197:5, 238:10-12; Deposition of Larry Alegre (Bryant Elementary School), attached within Exh. 4 to Kreeger Decl. ("Alegre Dep."), 207:15-209:2; Carlos Ramirez (Bryant), attached within Exh. 4 to Kreeger Decl. ("C. Ramirez Dep."), 108:19-109:6, 109:13-18, 204:14-206:4; 305:22-306:7, 318:16-25, 344:20-345:2; Deposition of Margaret Roland (Fremont High School), attached within Exh. 10 to Kreeger Decl. ("Roland Dep."). 47:17-23, 56:15-21, 232:20-24, 326:10-11; Deposition of Marcia Hines (Fremont), attached within Exh. 10 to Kreeger Decl. ("Hines Dep."), 68:21-69:3, 196:25-197:6, 202:1-7, 248:4-15, 248:22-249:8, 426:15-17, 427:3-6, 427:22-25, 428:21-429:10, 430:3-6, 434:22-24; Diego Dep. (Fremont), 59:11-25, 61:19-62:1, 72:18-19, 132:13-16, 201:4-21, 219:1-6, 223:1-2, 223:23-25, 233:11-13, 240:9-23, 245:8-246:1, 391:11-13, 408:5-8, 435:18-24, 492:6-11, 494:9-13, 544:1-3; Deposition of Steven Muzinich (Helms Middle School), attached within Exh. 11 to Kreeger Decl. ("Muzinich Dep."), 53:22-54:16, 58:12-25, 59:15-24, 61:2-5, 61:9, 61:11-13, 79:16-23; Deposition of Moises Canel (Helms), attached within Exh. 11 to Kreeger Decl. ("Canel Dep."), 102:23-25, 103:23-104:2, 135:1-3, 138:20-139:20, 144:5-6, 144:16-20, 154:19-21, 184:9-10, 199:18-25, 202:19-203:13, 221:15-17, 224:17-18, 229:8-12, 254:11-15; Deposition of John Michaelson (Luther Burbank Middle School), attached within Exh. 5 to Kreeger Decl. ("Michaelson Dep."), 75:7-13, 75:15-22, 83:12-13; Deposition of Silas Moultrie (Luther Burbank), attached within Exh. 5 to Kreeger Decl. ("Moultrie Dep."), 78:16-20, 80:9-14, 95:1-16, 110:17-19, 129:4-8, 160:11-17, 197:16-17, 25.

that students at Watsonville, Huntington Park, and Crenshaw High Schools must stand in class or sit on countertops because they do not have enough seats in their classes.[10] Principals also confirmed extreme rates of teacher turnover and the hiring of high percentages of undercredentialed teachers at Edison-McNair Academy and Cesar Chavez Academy, Balboa High School, and Luther Burbank Middle School.[11] Principals testified to such serious facilities problems at Helms and Luther Burbank Middle Schools, Edison-McNair Academy, and Fremont, Crenshaw, and Huntington Park High Schools that students routinely see vermin in their classrooms, cracked and falling ceiling tiles, and jagged, broken glass in their hallways. The vermin problems are so stark that school documents reveal that "rats are in room 222 - (the unfriendly kind . . .)" and that "cafeteria serving area spotted a huge rat walking from one store room to the other" and "rat is eating bread in cafeteria, cannot catch it" at Huntington Park High School, DT-LA 6333, that "rats [were] eating hot dog buns on bread rack" at Fremont High School, DT-LA 5416, and that "[t]he horticultural center is infested with rat; rat ate a hole in the pig" at Crenshaw High School. DT-LA 2996.[12]

At the same time that they confirmed the deprivations in their schools, school principals and assistant principals also testified that teaching credentials are important, that access to both textbooks

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[10] *See* Lane Dep., Vol. II 4:17-21, 55:12-57:2; Banda Dep. 76:8-16, 78:11-15; Ortiz Dep. 179:9-180:7, 196:1-197:7, 340:20-341:9, 342:7-8, 343:1-13; Deposition of Emilio Garcia (Huntington Park High School), attached within Exh. 12 to Kreeger Decl. ("Garcia Dep."), 69:12-73:14, 73:18-75:16; L. Ruiz Dep. 182:9-183:21, 186:14-187:1, 269:16-21, 270:4-272:15, 273:1-274:24, 275:5-283:7, 293:3-295:1, 321:11-23; Kiel Dep. 157:10-11, 167:17-21; Deposition of D'Andre Lampkin (Crenshaw), attached within Exh. 8 to Kreeger Decl. ("D'Andre Lampkin Dep."), 257:16-258:20, 263:21-264:7, 264:10-266:7, 268:15-269:7, 283:16-284:10, 286:20-22, 288:2-4, 291:10-292:11; Deposition of Delwin Lampkin (Crenshaw), attached within Exh. 8 to Kreeger Decl. ("Delwin Lampkin Dep."), 606:13-18, 636:2-640:24, 641:14-650:16, 652:20-655:7.

[11] *See* Deposition of Mary Seiersen (Edison-McNair Academy), attached within Exh. 9 to Kreeger Decl. ("Seiersen Dep."), 165:22-167:15, 183:8-23, 414:16-415:10; Walden Dep. 170:24-171:3, 178:8-17, 227:2-22, 228:19-25, 233:22-235:2, 319:18-320:16, 361:18-362:3, 383:19-385:2; Deposition of Patricia Gray (Balboa High School), (volume 1 in unofficial, minuscript form) attached within Exh. 3 to Kreeger Decl. ("Gray Dep."), 73:24-74:6, 80:17-81:3, 81:24-25, 82:9-22, 83:20-84:9, 91:4-92:5, 228:16-17, 310:4-15, 311:5-29, 369:1-14; Michaelson Dep. 111:19-112:7, 134:8-18, 136:12-137:3, 140:6-20; Moultrie Dep. 216:21-217:12.

[12] *See also* Muzinich Dep. 13:1-19, 14:6-8, 15:11-16, 17:6-12, 18:19-23, 24:5-7, 24:18-20, 45:4-21, 45:25, 46:2-4, 46:15-22, 47:8-13, 79:24-80:7, 90:20-22, 91:2-19, 96:9-15, 99:25-100:8, 100:12-21, 125:2-15; Michaelson Dep. 110:8-18, 109:6-17, 109:21-110:3; Seiersen Dep. 215:19-216:11; Roland Dep. 266:21-267:6; Hines Dep. 166:13-167:14, 299:7-18, 309:20-24, 310:14-20, 580:22-581:3, 591:2-15, 592:7-10, 593:1-594:4, 595:6-13; Kiel Dep. 138:2-140:24, 142:25-143:8; Garcia Dep. 81:10-86:15.

and permanently assigned teachers are fundamental to education, that no student should have to stand in school because there are not enough seats, that classroom temperatures and noise levels must be conducive to learning, that students should not attend school with rats, and that no student should have to pay money to attend public school.[13] For example, Crenshaw High School principal Travis Kiel summarized the importance of habitable school facilities by explaining that "I think if you want to know whether children's learning environment is sufficient, you look at it for yourself and ask yourself, would you like to stay there all day."[14] Kiel Dep. 359:14-17. John C. Fremont High School principal Margaret Roland responded to the State's question "[w]here on the list of items that we discussed that are relevant to the quality and effectiveness of a classroom teacher does the teaching credentialing process come?" that "I think that it's high. I say that because I feel that, as in any profession, there's a criteria that you must meet. . . . [I]f you are going to teach and there's a credential that's needed, you should get it just like you would get a driver's license if you wanted to drive a car or an automobile." Roland Dep. 32:17-33:5.[15]

2. Depositions Demonstrate that Neither the State Educational Agencies Nor the School Administrators Monitor to Ensure the Delivery to Desktops of the Basic Tools for Learning

Notwithstanding their recognition of the critical importance of each of the tools and conditions for learning that define the class, the school principals routinely stated that they did not know and did not check to find out whether students actually received these minimally required components of public education. For example, principal Travis Kiel testified that "I have not actually installed a policy for doing that [finding out whether, by the third week of school, teachers have

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[13] *See, e.g.*, Muzinich Dep. 54:24-55:4; Kiel Dep. 161:18-20, 361:5-7, 474:14-19, 475:5-14, 601:18-602:9, 642:1-9, 722:5-20, 726:13-727:5; Roland Dep. 174:6-13, 202:5-205:12, 261:21-262:14, 313:16-23; Hines Dep. 248:4-12, 431:22-432:3, 568:11-24; Deposition of Pamela Atkinson (Tenaya Middle School), attached within Exh. 13 to Kreeger Decl. ("Atkinson Dep."), 170:4-8, 182:20-183:18; Seiersen Dep. 372:23-373:17; Walden Dep. 238:3-240:16, 243:8-20, 251:4-13, 255:4-12, 382:3-14; Garcia Dep. 45:9-12; Gray Dep. 204:23-205:4, 206:3-9, 206:21-207:2, 339:8-13.

[14] Deposition of Travis Kiel, attached within Exh. 8 to Kreeger Decl. ("Kiel Dep.").

[15] *See also* Banda Dep. 138:1-10; Hines Dep. 496:13-25, 506:5-8 (testifying that now that the school has been able to hire more teachers with full, nonemergency teaching credentials "[i]t's a lot easier than the year before when we were dealing with teachers not in the classroom before and they needed massive amounts of assistance and we tried to give it to them.").

assigned books to their students]. I think that's a good idea." Kiel Dep. 405:16-23.[16] Similarly, the principals and assistant principals also confirmed that they receive no direction from the State or State education officials concerning the conditions that define the class.[17]

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[16] *See also id.* 411:5-6 ("No, I don't visit the classrooms to determine whether kids have enough books."), 712:23-713:3 (does not check classrooms to find out whether there are enough seats for students); Hines Dep. 424:20-425:2 (does not know if books had been distributed more than one month into the school year); Roland Dep. 325:15-22 (principal who began position at Fremont High School in September 2000 did not investigate any conditions identified in this case until May 2001), 223:21-225:10 (principal does not know whether books have arrived on campus or whether books have been distributed to students and has not talked to teachers or students about whether they have book), 234:7-12 (principal does not know if teachers have enough nontext materials); Michaelson Dep. 75:3-22 (principal did not know whether each student had a book to take home for each core subject); Gray Dep. 119:9-14 (after learning of allegations in complaint, principal "didn't investigate"), 342:10-343:6 (did not look at how many books a teacher requested for a class or at how many books were signed out to teachers).

[17] *See* Deposition of Lloyd Houske (Cahuenga Elementary School), attached within Exh. 6 to Kreeger Decl. ("Houske Dep."), 601:11-20, 602:25-603:5 (neither the State nor the district has provided guidance regarding the number of working bathrooms the campus should have); *id.* 603:7-13 (the State has provided no guidance regarding how clean the school bathrooms should be); Atkinson Dep. 118:25, 119:1-2 (no one from the State contacted Atkinson before this case was filed); Walden Dep. 329:15-330:8 (has not communicated with anyone from the State Board of Education about the school's needs); *id.* 333:1-6 (has not communicated with the Superintendent's office and does not know what their role is); Banda Dep. 215:7-25 (no communication directly with anyone from the State Board of Education in the last three years; no communication directly with anyone from the Department of Education); *id.* 216:1-25; 217:1-13 (not aware of the State Board of Education, State or Department of Education ever inquiring into the needs of the school specifically; not aware of anyone from the State Board of Education, Department of Education or State ever visiting the school); Lane Dep., Vol. II 102:18-105:25 (has never communicated with anyone from the State Board of Education, State of California, State Superintendent, Department of Education; to his knowledge, none of those entities have ever contacted Watsonville about textbooks, although there may have been contact on CCR items; no one from State Board of Education has ever visited the school during his time there except on CCR); Kiel Dep. 590:24-591:7, 602:14-22, 605:14-20, 617:14-21, 750:19-24 (receives no help from anyone at the state level recruiting teachers or filling teacher vacancies for Crenshaw High School); *id.* 676:14-23, 677:20-678:15 (not aware "if there is a requirement by the state" concerning the number of bathrooms or toilet a campus should have); *id.* 707:3-9 (not aware of any guidance from the State to schools concerning how to deal with pest control problems); *id.* 748:3-24 (never communicates with anyone from the State Department of Education or the State Superintendent of Public Instruction's office about Crenshaw High School); Hines Dep. 454:18-455:8 (no knowledge whether the State has standards regarding the availability of textbooks or requires that each student should receive a textbook to use in class or at home); *id.* 508:16-21 ("Not to my knowledge has anyone identified themselves as a State representative wanting to help . . . fill [teacher] vacancies."); *id.* 573:5-13 (no assistance from anyone at the State level in teacher retention); Roland Dep. 263:10-18 (not aware of anyone at the State level providing assistance to Fremont High School in filling teacher vacancies); *id.* 286:13-287:13 (no one from the State has communicated a particular number of bathrooms or toilets Fremont should have for students); *id.* 233:5-234:6 (does not know if the State has any standards with respect to the availability of textbooks for students in schools); Gray Dep. 212:2-215:11 (does not communicate with anyone at the State level, except to obtain her credential; does not direct anyone on her staff to communicate with anyone at the State level; does not know what the State education agencies do,

Footnote continues on next page.

That lack of direction is consistent with testimony from State official after State official that he or she does not have knowledge about or responsibility for whether California public school students actually have textbooks to use without sharing in their classrooms or facilities that are not in desperate need of repair or classrooms that are unbearably hot and infested with vermin. For example, Paul Warren, Deputy Superintendent of the Accountability Branch has testified that his branch has no duties or responsibilities with respect to school facilities or provision of textbooks and that he knows of no inquiries that the CDE has made regarding provision of textbooks.[18] Warren Dep. 133:17-134:1, 135:5-15, 239:21-240:20, 241:23-242:15. Similarly, Susan Lange, Deputy Superintendent of the Finance, Technology & Administration branch (which oversees the school facilities planning division) has testified that she is not aware of any systematic effort on the part of the CDE to collect information about the state of existing school facilities.[19] Lange Dep. 19:20-20:1.

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other than with regard to teacher credentialing); *id.* 345:18-346:3 (does not know of any procedure for reporting a school's lack of textbooks to anyone at the State level).

[18] Deposition of Paul Warren, attached as Exhibit 15 to Kreeger Decl. ("Warren Dep."). *See also* Warren Dep. 176:7-15 (stating that he has no knowledge of whether there are classrooms in the California schools where students do not have textbooks), 208:24-209:18 (stating that he knows of no CDE survey that has asked teachers what they regard as the principal problems in their classroom), 209:19-25 (stating that he has never directed any of the CCR staff to inquire of teachers about what resources they need).

[19] Deposition of Susan Lange, attached as Exhibit 16 to Kreeger Decl. ("Lange Dep."). Additionally, Eleanor Clark-Thomas, manager of the Coordinated Compliance Review Unit, which oversees the monitoring activities of twelve specially-funded programs, has testified that she does not make any inquiries regarding textbook availability or school facilities during her audits of schools. *See* Deposition of Eleanor Clark-Thomas ("Clark-Thomas Dep.") at 144:3-145:1, 183:5-13, 183:17-22, 184:5-6, 184:24-185:11. Leslie Fausset, Chief Deputy Superintendent for Policy and Programs has provided similar testimony, stating that CCR does not, and will not be redesigned to address availability of textbooks, adequacy of school facilities or excessive numbers of unqualified teachers. Deposition (uncertified) of Leslie Fausset ("Fausset Dep.") at 123:23, 124:10-15, 124:19-125:9, 125:10-16, 125:17-126:9. Further, Laurene Burnham-Massey, manager of the Language Proficiency and Academic Accountability Unit, has testified that she does not know anyone at the State level who looks at the schools for purposes of evaluating the state of school facilities of whether students have textbooks in their classrooms. *See* Deposition of Laurene Burnham-Massey ("Burnham-Massey Dep.") at 176:21-177:24. In addition to these State officials, Thomas E. Henry, Chief Executive Officer of the Fiscal Crisis and Management Assistance Team("FCMAT"), testified that he is "not aware of a state inventory of facilities," that he is not aware of any instance in which the State Allocation Board looks at school conditions, that he is not aware of any State standards regarding classroom temperatures or vermin, and that FCMAT has neither conducted a survey nor been directed to conduct a survey of schools in the State that need attention. Deposition of Thomas Henry (uncertified) ("Henry Dep.") at 84:7-8, 20:1-6, 52:15-19, 54:8-11, 89:3-15, 90:13-18.

And when the State officials do have knowledge about the public school needs in California, that knowledge is astounding: Deputy Superintendent Susan Lange testified that California would have to build a new school every day to meet the current needs of overcrowded schools. Lange Dep. 72:18 (stating that a quick estimate of the current schools facilities needs are "[a] school a day for several years.").[20] Laurene Burnham-Massey, manager of the Language Proficiency and Academic Accountability Unit, testified that she had no idea how many non-English-speaking students have gone for years without instructors who speak their language or are trained to teach them, or what it would take to provide trained teachers for these children. Burnham-Massey Dep. 69:10-70:22, 153:17-22, 185:22-186:10.[21] Moreover, the testimony of the State officials vividly illustrates the sorry patchwork of educational programs and processes in California that are driving forward the State's "new accountability" system while turning a blind eye to the fact that so many of California's schoolchildren (who lack the basic educational necessities) are being left behind. *See* Fausset Dep. 109:25-110:3 (stating that "much of the work of the Department is implementing independent and individual programs. And processes."), 214:3-15 (stating that there is no linkage between Department of Education programs such as school accountability report cards, accreditation assessments, and compliance review audits); Warren Dep. 105:18-107:3 (stating that the accountability branch has not been involved with policy relating to the underperforming schools program), 241:15-242:15 (stating that the State has not investigated whether there are missing basic educational inputs in schools in different ranks of the Academic Performance Index).

3. Discovery Supports Classwide Resolution of the Common Legal Questions of the State's Oversight Obligations and Whether They Fully Satisfy Those Obligations

Discovery to date demonstrates the critical need for statewide accountability through "a system that will either prevent or discover and correct," Order at 2, the very conditions students and educators alike seem to agree are minimally required but that are lacking because, as Alondra Jones

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[20] *See also* Lange Dep. 63:22-25 (stating that the CDE possesses basic data that "consistently substantiates that there are not enough facilities for the current and projected student population.").

[21] *See also* Burnham-Massey Dep. 48:20-50:6, 51:6-19 (stating that she is not aware of, nor does the State collect information regarding, whether districts provide necessary material to English language learners).

put it, State-level officials fail even to "at least act like you care." Jones Dep. 349:25. The discovery also confirms what plaintiffs have projected from the outset: that proof in this case need not include intensive evidence regarding the conditions of each school in the State. Instead, the case involves the legal questions whether the State must operate a system of oversight and management of schools and whether that system functions to ensure delivery of the essentials for learning. The case involves only the very limited factual question whether there are schoolchildren who suffer when that State-level accountability does not exist or function.

Thus, the State's reliance on cases in which class actions could not be certified because common factual questions did not exist, *see* State Opp. at 27-28, are inapposite. For example, one of the cases the State relies on, *Stewart v. Winter*, explains that its class could not be certified because although "there are certain practices which, taken alone, constitute cruel and unusual punishment . . . plaintiffs have identified no such practice common to all of the county jails." *Stewart,* 669 F.2d at 335 n.17. *See also K.L. v. Valdez*, 167 F.R.D. 688, 691 (D.N.M. 1996), *aff'd sub nom. J.B. v. Valdez*, 186 F.3d 1280 (10th Cir. 1999) (class certification was denied because "to the Court's knowledge, no named Plaintiff and no putative class member has allegedly suffered violations of all or even most of the statutory and constitutional rights listed *supra*."), *cited in* State Opp. at 27-28. Here, by contrast, plaintiffs have identified a statewide practice of failed oversight and management that is common to all public schools and that deprives all members of the plaintiff class in common of their constitutional right to basic educational opportunity.

The State's reliance on *City of San Jose v. Superior Court*, 12 Cal. 3d 447 (1974), is equally mistaken. *See* State Opp. at 19-20. In *City of San Jose*, plaintiffs sought to certify a class in a damages suit alleging that a local airport constituted a nuisance. Almost by definition, the court held that a community of interest was lacking and that an individualized determination about each plaintiff's property was required because of the "fundamental maxim that each parcel of land is unique." *City of San Jose,* 12 Cal. 3d. at 461. Here, by contrast, as in the other accountability cases, the students all complain of the denial of basic educational necessities resulting from the absence of a system of oversight and management. *City of San Jose* is therefore not on point.

II. CLASS CERTIFICATION SUBSTANTIALLY BENEFITS THIS LITIGATION

The State's insistence, based only on a handful of federal cases, that a class should be certified only if the class is necessary to relief, *see* State Opp. at 11-13, is simply wrong and applies the wrong legal standard in California. First, as plaintiffs have shown, numerous cases that sought accountability for public education have been certified as class actions, even though the class device was not actually necessary for relief. *See supra* at 6-7. Second, California cases have rejected the State's argument that a lack of necessity for proceeding as a class action is a reason to deny class certification.[22] For example, in *Miller v. Woods*, 148 Cal. App. 3d 862 (1983), plaintiffs sought declaratory and injunctive relief with respect to the alleged invalidity of a state regulation that denied certain payments for the housemates who provided care for totally disabled persons. The superior court denied class certification as unnecessary on the ground that a judgment against defendants in an individual case would provide relief that accrued to all members of the proposed class. The court of appeal reversed:

> The trial court's rule denying class certification rests upon a totally novel proposition: class action certification can be denied based upon the hope or

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[22] Thus, the State's claim that "[t]he cases hold universally that where only declaratory and injunctive relief are sought against a government entity, and where the relief sought, would automatically accrue to the benefit of all class members . . . class certification is unnecessary and should be denied," is dead wrong. State Opp. at 13. Many federal cases have explicitly rejected this "necessity" test for class certification. *See, e.g., Geraghty v. United States Parole Comm'n*, 579 F.2d 238, 252 (3d Cir. 1978) ("The plaintiff here need not have proved that certification was 'necessary,' as the trial judge seemed to indicate, but only that there was compliance with the prerequisites of Rule 23."), *aff'd*, 445 U.S. 388 (1980); *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978) ("[T]he rule of this circuit is that class certification may not be denied on the ground of lack of 'need' if the prerequisites of Rule 23 are met."); *Fujishima v. Bd. of Educ.*, 460 F.2d 1355, 1360 (7th Cir. 1972) (reversing district court where class certification was denied on the grounds that "there is no need for a class action."); *Littlewolf v. Hodel*, 681 F. Supp 929, 937 (D.D.C. 1988) ("Thus, the idea that a class may be certified only if 'necessary' flies in the face of the Federal Rules."); *aff'd sub nom., Littlewolf v. Lujan,* 877 F.2d 1058, (D.C. Cir. 1989); *see also* 1 *Newberg on Class Actions,* § 4.19 at 4-62 ("Like Newton's Law of Thermodynamics, for every class denial on the basis of lack of need, one is able to find a decision, or several decisions, often in the same circuit, where other courts have certified Rule 23(b)(2) classes under virtually the same circumstances."). The necessity requirement is also inconsistent with the Advisory Committee Notes to Rule 23(b)(2), which cite school desegregation cases as cases suitable for certification under Rule 23(b)(2). Advisory Committee Notes (citing, among others, *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963), in which plaintiffs sought to desegregate Fort Worth schools). However, under the State's "necessity" test, courts should never certify a class in desegregation cases because the remedy sought—to attend schools that have been desegregated—would benefit all members of the proposed class of minority students even if no class is certified.

> expectation the Department will voluntarily grant class relief after an adverse appellate decision in an individual's case. We cannot find any lawful authority to support this rationale. Class members are not parties to an individual decree. They cannot enforce such decision by contempt or supplemental decree.

Id. at 872. However, if the "rule" the State proposes were correct, the court of appeal should have affirmed the trial court's conclusion that class certification was unnecessary because a declaration and injunction against the validity of a regulation would seem to benefit all members of the proposed class.

Under the correct legal standard in California, the applicable question concerns whether class certification would benefit the litigation. *See City of San Jose,* 12 Cal. 3d at 459, 462 (reviewing a certified class to determine whether benefits from class certification accrue to litigants and the court); *Reese v. Wal-Mart Stores, Inc.*, 73 Cal. App. 4th 1225, 1234 (1999) (same). Substantial benefits accrue from class certification in this case.

A. Class Certification May Insulate a Judgment Granting Classwide Relief Against Reversal on Appeal

Class certification removes any doubt as to the propriety of an order requiring the State to set up a system of oversight that reaches all members of the proposed class, not just the named plaintiffs, thus protecting an order that provides class-wide benefits against reversal on appeal. Although the State promises that an injunction would necessarily benefit all members of the proposed class and subclass even without class certification, State Opp. at 11, as discussed above, a California court of appeal has explained that individuals should not be left only with the "hope or expectation" that they will benefit from injunctive relief from litigation to which they were not party. Instead, proposed classes should be certified to guarantee application of injunctive relief to all affected persons. *See Miller*, 148 Cal. App. 3d at 872. Similarly, the Ninth Circuit has reversed trial court injunctions inuring to the benefit of persons who were not party to the action. *See Zepeda v. United States INS*, 753 F.2d 719, 729 (9th Cir. 1983) (reversing a district court injunction that prohibited INS from engaging in a pattern of searches and interrogations against an entire class where no class had been certified); *see also Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1371 (9th Cir. 1984) (holding that it is improper to apply an injunction to anyone other than the plaintiffs where no class

has been certified). Thus, class certification would eliminate any doubt that a judgment on behalf of schoolchildren in this case will in fact benefit all California schoolchildren who suffer the conditions identified in the proposed class and subclass definitions.

B. Class Certification Prevents Multiplicity of Litigation and Duplicative Proceedings

Class certification protects against the possibility of multiple actions or duplicative proceedings. The State asserts without any support that there is no prospect of a multiplicity of litigation because, if plaintiffs prevail, an injunction would automatically benefit all class members and, if the State and State agencies win, *stare decisis* will foreclose later suits. *See* State Opp. at 14. In fact, however, as the *Miller*, *Zepeda*, and *National Center for Immigrants Rights* cases show, class members should not be left with any doubt that an injunction for the plaintiffs would benefit all members of the class. Moreover, if this matter were to terminate in the Court of Appeal, that court's decision would only bind inferior courts in that district and would not have *stare decisis* effect in other appellate districts. *See Auto Equity Sales, Inc. v. Super. Ct.*, 57 Cal. 2d 450, 455 (1962). The State itself points out that unnamed class members would need to intervene in the matter in order to enforce the judgment, State Opp. at 15, whereas intervention would be unnecessary if a class were certified. *See* 3 Newberg on Class Actions § 16.06 at 16-34 ("Intervention by a class member after certification is unnecessary under amended Rule 23 in order to participate in any judgment."). The intervention requirement jeopardizes the enforceability of a judgment in this case absent class certification: requiring an individual student who does not have the benefit of class counsel to file a motion to intervene burdens unnamed class members, most of whom are poor students who are highly unlikely to intervene to protect their rights. *Cf. Reyes*, 196 Cal. App. 3d at 1279 ("If the gravamen of this litigation is legally correct and many past general [welfare] relief recipients were illegally denied benefits, such victims as a practical matter without class certification will individually neither seek nor obtain redress because they are too poor, their claims too small and the legal issues too arcane to obtain private counsel.").

C. Class Certification Uniquely Protects the Interests of All Students Who Will Be Affected By This Judgment

Class certification protects the interests of the large numbers of students that could be affected by an order in this case. The parties agree that resolution of this case will necessarily affect unnamed students, at least those at the schools the class representatives attend. *See* State Opp. at 5. The core purpose of the class action requirements, of course, is to protect absent persons when a suit will invariably affect their rights. *See Hansberry v. Lee*, 311 U.S. 32, 43 (1940). To proceed in the class form is to give the absent persons some indicia of due process—notice and the opportunity to be heard at a fairness hearing or in other ways the court deems appropriate.[23] Moreover, in a class action, the Court must ensure that any settlement that resolves the matter is fair to all members of the class. *See* Local Rules for San Francisco Superior Court, Rule 9 (Class Action Manual) § 4.61 (requiring fairness hearing prior to settlement of any class action). To proceed without the class form is to wipe out the absent persons' rights while giving them no procedural opportunities whatsoever. Because the parties agree that this case will invariably affect the rights of absent persons, there can be no real dispute that the class device provides substantial benefits in this case.[24]

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[23] The State's contention that through class certification "plaintiffs' counsel hope to cut defendants and the districts off from communication about this case" is remarkable. In the first place, ethical rules and the Business and Professions Code prevent *counsel* for the State, but not the State, State agencies, or school districts, from communicating with class members about the litigation. *See* Model Rule 2-100 (Communication with a Represented Party). In addition, the State has not cited any case, nor are we aware of one, in which a court has denied class certification so that defendants' counsel would be free to communicate with members of the proposed class without plaintiffs' counsel present.

[24] The State provides not one shred of evidence in the form of a declaration or otherwise supporting its contention that there are "many millions [of students] who, with their parents, favor local control and not State supervision, who do not agree with the rigid standards plaintiffs seek to impose, who know from their own experience that plaintiffs' claims are vastly exaggerated, and who do not wish to see the current system of public education turned upside down." State Opp. at 15. If the State were correct, however, the opportunity to be heard and fairness hearing are effective methods to protect these rights. *See generally Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 485-88 (5th Cir. 1982) (certifying an injunctive class where some unnamed members opposed the goal of the lawsuit, and discussing ways to protect the rights of all class members). Although the State argues that this lawsuit will inevitably affect the interests of unnamed class members, it argues against the mechanism that will allow these students and their families to put their concerns before the Court and require the Court to evaluate the fairness of any settlement or consent decree from the perspective of all class members.

D. Class Certification Safeguards Against Mootness

Class certification protects against the all-too-real possibility of mootness in this case. While plaintiffs appreciate the State's recognition of the great public importance of the issues this case raises, *see* State Opp. at 14, the State is not in a position to guarantee that every court to review this case will elect to apply the discretionary public interest exception to the mootness doctrine. *Cf. Nat'l Ass'n of Wine Bottlers v. Paul*, 268 Cal. App. 2d 741 (1968) (dismissing an appeal as moot and rejecting an argument that the appeal should be decided as a matter of public interest). Class certification is thus important to protect a judgment here.

III. THE STATE'S MISCHARACTERIZATION OF THE SIZE OF THE CLASS AND SUBCLASS DOES NOT DEFEAT CLASS CERTIFICATION

Notwithstanding the numerosity prerequisite to certification of any class, the State tries to undermine certification on the ground that the class would somehow be too numerous. *See* State Opp. at 8. This argument fails, for several reasons. First, California courts and other courts have frequently certified classes with a large membership. Second, the State has simply miscounted the number of students who would be members of the class and subclass. Third, plaintiffs' causes of action, including the equal protection claim, support certification of a large class and subclass of students.

A. Courts Routinely Certify Very Large Classes

California courts have certified statewide classes consisting of large numbers of people. *See, e.g., Miller,* 148 Cal. App. 3d at 873 (trial court erred in refusing to certify a class of "all applicants, recipients and providers of [certain services for the disabled] in California who have been or will be disqualified from receiving or providing" aid due to a challenged regulation). Other courts have certified both statewide and even nationwide class actions. *See, e.g., Lynch v. Dukakis*, 719 F.2d 504, 506 (1st Cir. 1983) (the class consisted of "all children under the jurisdiction of Massachusetts's foster family home care system, and all members of the children's natural and foster families"); *Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126, 127 (7th Cir. 1974) (nationwide class of "perhaps several million" members). And it is common for courts to certify injunctive class actions in which plaintiffs, who are located in numerous different locations or

facilities, challenge a particular policy or policies that they contend violate the rights of class members and share common legal or remedial theories. *See, e.g., Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. Sept. 15, 1994) (certifying a class of disabled plaintiffs challenging conditions at 20 different theaters owned by the same defendant under the Americans with Disabilities Act); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3rd Cir. 1975) (certifying a class alleging employment discrimination against a company with numerous offices nationwide).

In the education context state courts in California and elsewhere have certified classes consisting of large numbers of or nearly all students in the state. For example, in *Alabama Coalition for Equity*, 624 So. 2d at 111, the court certified a statewide class of "all children who are presently enrolled or will be enrolled in public schools in Alabama that provide less than a minimally adequate education." And *Serrano*, 5 Cal. 3d at 589, certified a class of all students in public elementary and secondary schools in the California, except those in one school district. This class was exactly the multimillion-student statewide class the State contends is never certified. *See* State Opp. at 25.

B. The State's Headcount Is Wrong

In its effort to charge plaintiffs with seeking to certify a monstrous class, the State repeatedly mis-describes the class definition plaintiffs propose in order to elevate artificially the numbers of students who would be class members. Thus, rather than addressing the class actually proposed by plaintiffs, the State attempts to redefine the class to consist of the schools which supposedly "fail[] to conform to an arbitrary rigid standard which plaintiffs' counsel have proposed" in interrogatory responses. State Opp. at 21; *see also id.* at 3-6. For example, the State contends that "94% of California's students fall into plaintiffs' proposed class because their classrooms were constructed prior to 1994, and do not meet plaintiffs' classroom size standard." State Opp. at 5. The State apparently contends that the class as defined by plaintiffs encompasses any school that fails to meet the standards applicable to new school construction. Plaintiffs have, not, however, defined the class in such a manner. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for

Class Certification ("Opening MPA") at 4. The State's argument to the contrary deliberately misconstrues plaintiffs' actual interrogatory responses.[25]

In addition, the State offers no evidentiary support for the "94%" number it cites in its brief. The State relies on declarations from the Office of Public School Construction and the Division of the State Architect; neither declaration says that the classrooms do not meet any particular size standard. Instead, the declarations merely state the number of classrooms that were built after 1994, *see* Shellenberger Decl. ¶¶ 8-9; Bellet Decl. ¶¶ 10-13, and the State makes an unsupported leap in

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[25] Thus, the State points to plaintiffs' response to interrogatory number 170 as the source of this part of the class definition. The State ignores, however, the actual content of that interrogatory response:

> Plaintiffs do not believe that it is their obligation or burden to specify in detail the particular standards Defendants should develop or the particular language that must be contained therein. Rather, Plaintiffs believe that it is Defendants' burden to undertake that inquiry in collaboration with school districts and other interested organizations and, on the basis of their expertise in school administration, develop and implement appropriate standards.
>
> Plaintiffs believe that Defendants, with their expertise in school administration, can locate exemplary standards and improve upon them in developing an appropriate standard for adoption in California's public schools. Nonetheless, Plaintiffs believe that any standards relating to overcrowding should, at a minimum, include the following:
>
> (1) Availability of Appropriate Classrooms. Plaintiffs believe standards related to overcrowding should call for all instructional classes to take place in classrooms.
>
> (2) Availability of Classroom Seating or Desk. Plaintiffs believe standards related to overcrowding should call for the availability of a seat and/or desk for each student in the class.
>
> (3) Classrooms of Sufficient Size. Plaintiffs believe standards related to overcrowding should call for sufficient numbers of classrooms, so that all students receive instruction in classrooms, and classrooms of sufficient square footage to allow proper delivery of the curriculum. Plaintiffs refer Defendants to possible sources of inspiration for fashioning new standards applicable to all schools that could become the underlying standards to be enforced by a State system of oversight and management. With respect to fashioning a standard for an appropriate classroom, Defendants may look to the Standards for Development of Plans for the Design and Construction of School Facilities located at 5 C.C.R. § 14030, which currently apply only to new construction. . . .

Thus, plaintiffs made it clear that their reference to standards for new school construction was meant to provide possible exemplary standards, not to define the contours of plaintiffs' claims, or of the proposed class.

assuming that classrooms built before that date could not have satisfied modern size standards. That assumption is in fact unwarranted. For example, the guidelines that governed the application process for new construction as of 1976 are described in a "handbook" published by the State of California in 1992. The handbook defines a "Kindergarten" classroom as "a teaching station comprised of at least 1,350 square feet," and a "classroom" as "a teaching station of at least 960 square feet." Quality Control and Public Response Unit, Office of Local Assistance, State of California Department of General Services, *Applicant Handbook: State School Building Lease-Purchase Program* at Glossary 3, 5 (January 1992).[26] Thus, the modern size standards for classrooms were used in school construction in California far before 1994.

Another stark example of the State's mischaracterization of the class is its treatment of year-round, multi-track schools. The State charges that "Plaintiffs include in their class all children who are attending year-round and multitrack schools," which the State contends is 1.3 million students, or 22% of all California public schoolchildren. State Opp. at 4. In fact, however, plaintiffs' definition of the proposed class did not include all year-round schools, but was instead expressly limited to students who attend year-round, multi-track schools that "provide[] for fewer days of annual instruction than schools on a traditional calendar provide." Opening MPA at 4. According to a declaration the State itself filed along with its opposition to this motion, there are 239 such schools, all located in the Los Angeles, Lodi, Vista, and Palmdale districts. *See* Payne Decl. ¶ 8. Over 300,000 students attend these schools. *See* California Department of Education, *2000-2001 California Year-Round Education Directory, at* http://www.cde.ca.gov/facilities/yearround/direct00.htm.[27]

The State similarly mischaracterizes the portion of the class definition addressing availability of textbooks. The class is defined to include students who lack "reasonably current" textbooks, Opening MPA at 3, which, as the State points out, means textbooks that "fairly portray subject matter that is existing at the present time." State Opp. at 5. The State asserts, however, that "every student

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[26] Excerpts attached as Exhibit 23 to Kreeger Decl.

[27] Excerpts attached as Exhibit 22 to Kreeger Decl.

at every school in the State falls into the class" under this portion of the definition. *Id.* As support, the State cites to a declaration which describes the seven-year textbook adoption cycle, and concludes that "[i]n effect, plaintiffs' definition means that a textbook cannot be more than a year old." Griffith Decl. ¶ 4; *see* State Opp. at 5. This misreading of the class definition is manifest: plaintiffs have never maintained that all textbooks must be discarded after a single year.

In short, the proposed class, although large, encompasses far fewer than all of the schools in the state. The State's arguments rest on flawed assumptions.

C. Certification of a Large Class or Subclass Does Not Defeat the Causes of Action

The State argues erroneously that class certification must categorically be defeated here because "it is self-evident that *no* equal protection claim may exist on behalf of a class of *all* California schoolchildren." State Opp. at 8. First, this argument is irrelevant to the question whether a class should be certified, which, as the State itself concedes, precludes consideration of the merits of the litigation. *See* State Opp. at 10; *see also Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-40 (2000) ("[W]e view the question of certification as essentially a procedural one that does not ask whether an action is legally or factually meritorious."); *Reyes*, 196 Cal. App. 3d at 1271 ("[a]t the certification stage . . . the trial court is not to examine the merits of the case"). Thus, even if the State were technically correct—which it is not—that plaintiffs could not prevail on an equal protection theory because the class we seek to certify admits of no comparison group, that would not be a reason to deny class certification. Moreover, as shown above, plaintiffs do not seek to certify a class of all California schoolchildren, so the argument is a nonstarter. Finally, even if somehow the equal protection cause of action in this case were to be defeated, two viable causes of action would remain: a due process claim and plaintiffs' claim that students' rights to free education in a "system of common schools" that are "kept up and supported" have been violated.[28] *See* FAC ¶¶ 302-10.

[28] In addition, plaintiffs have a fourth remaining cause of action, concerning invidious race discrimination under Title VI of the 1964 Civil Rights Act, but that claim depends on a comparative analysis similar to the equal protection claim the text assumes to have been defeated for purposes of this analysis.

IV. NEITHER COUNSEL NOR PLAINTIFFS HAVE VIOLATED FIDUCIARY DUTIES TO UNNAMED CLASS MEMBERS AND NO CLASS CONFLICTS EXIST

The State mistakenly asserts that plaintiffs' counsel violated a fiduciary duty to the class by supposedly failing to seek to correct deficiencies at particular schools. The State ignores the obvious point that operation of the oversight and management system plaintiffs seek to "prevent or discover and correct such deficiencies going forward," Order at 2, will necessarily improve the particular conditions at all class members' schools, thus satisfying the very interests the State charges plaintiffs' counsel with ignoring. *See* State Opp. at 34-36. Nor has the State shown any conflict among members of the class. Remedying the conditions the students suffer does not require some students to benefit at the expense of other students. Instead, an effective State accountability system would perform precisely the opposite function, establishing a floor below which no school can fall, to ensure that all students receive the minimally required tools for learning and that no students suffer the serious deprivations the Plaintiff schoolchildren currently suffer.

A. The Schoolchildren and the Lawyers Have Satisfied Fiduciary Obligations to All Class Members

The State is mistaken when it charges plaintiffs with breaching a fiduciary obligation "to seek correction of the conditions complained of." State Opp. at 35. The statewide system of management and oversight plaintiffs seek in this case will necessarily both correct the conditions at plaintiffs' schools and prevent or discover and correct other similar problems in the future. As plaintiffs explained in the first oral argument in this case, "[t]hat quite frankly is why we have sued the State of California in this case because we seek to obtain those basic tools and conditions for now and for the future." Transcript at 8. The remedy plaintiffs seek does not just address the immediate needs of the named plaintiffs and unnamed members of the proposed class now in school; it also furthers the interests of all present and future unnamed class members by putting in place a system that will enable the State to identify and correct problems without resort to future litigation.

The case on which the State relies for its charge that plaintiffs have breached their fiduciary duty, *City of San Jose,* 12 Cal. 3d 447, is not on point here. *City of San Jose* involved a damages class action, in which the class representatives elected to pursue only damages for diminution of

property value, because the annoyance, inconvenience and discomfort damages were too individualized and therefore precluded class certification. *Id.* at 464. The Court held that class certification was inappropriate because plaintiffs "would effectually be waiving, on behalf of the hundreds of class members, any possible recovery of potentially substantial damages—present or future." *Id.* Here, however, where plaintiffs seek only injunctive relief and where the injunction would provide complete relief by correcting the particular conditions and preventing their future recurrence, there is no waiver of any claim or theory of recovery.[29] Plaintiffs' approach—seeking a Court order requiring the State to set up a system of oversight and management—is common in class actions seeking systemic change through prospective relief. For example, in *Baby Neal*, 43 F.3d at 64, the Third Circuit reversed a district court decision that "it would be impossible to conceive of an Order this court could make granting class-wide injunctive relief which could address the specific case-by-case deficiencies" in child welfare obligations. The Third Circuit articulated ways class-wide relief could be granted without individual inquiry and held that "[t]he district court will thus not need to make individual case-by-case determinations in order to assess liability or order relief. Rather, the court can fashion precise orders to address specific, system-wide deficiencies and then monitor compliance relative to those orders." *Id.* The choice plaintiffs have made is thus consistent with injunctive class actions generally and with our fiduciary obligations to absent class members.

B. No Potential Intraclass Conflicts Preclude Class Certification

The State asserts without evidentiary support that conflicts among the class members preclude certification. The major flaw in the State's class conflict argument is that it assumes that helping one student inevitably harms another. *See* State Opp. at 32 ("That is a game which will inevitably have losers as well as winners among California's school children."). Certainly that is the system the State

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[29] Even if plaintiffs were not seeking to have this lawsuit result in improvements in particular schools, *City of San Jose* would nevertheless probably not apply. The reasoning in *City of San Jose* is based on the conclusion that plaintiffs improperly waived particular categories of damages claims on behalf of absent class members. 12 Cal. 3d at 464. While failure to seek one type of damage recovery in a damages class action may bar a plaintiff from seeking that recovery in a later individual suit, the law is different with respect to class actions seeking only prospective equitable relief. For example, "the general rule is that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events." *Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir. 1996).

has operated to date, wherein some students have everything they could need in school while tens of thousands of other students suffer without basic tools for learning. But precisely the purpose of this lawsuit is to remedy that system of treating some students as less worthy than others, and nothing about the class definition or the structure of California's education bureaucracy, or anything else, prevents the State from remedying the injuries students in the plaintiff class and subclass suffer without robbing other students of their good fortune.

For just one example, the State's contention that reducing the number of undercredentialed teachers to below 20% in schools will automatically harm other students in the class by reducing the number of fully credentialed teachers in their schools is based on the State's speculation, made without any solid basis, that the supply of credentialed teachers cannot increase.[30] Cases in California and in other jurisdictions repeatedly hold that class certification should not be denied on the basis of this sort of speculation about possible conflicts at the remedial stage of the litigation. For example, in *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 476 (1981), one of the cases the State itself cites, the California Supreme Court held that potential class conflict at the remedies stage does not provide a basis for denying class certification, especially because there are other ways to address a potential conflict problem, such as later creating subclasses, if the conflict actually materializes. *See also Nat'l Solar Equip. Owners' Ass'n v. Grumman Corp.*, 235 Cal. App. 3d 1273, 1286 (1991) ("Even if a conflict should later appear, we believe denial of certification was too drastic a remedy."); *Social Serv. Union v. County of Santa Clara*, 609 F.2d 944, 948 (9th Cir. 1979) ("[m]ere speculation as to conflicts that may develop at the remedy stage is insufficient to support denial of initial class certification.").

The cases the State cites, concerning actual and not hypothetical class conflicts, are simply not on point. *See* State Opp. at 29, 33. Both *Hansberry,* 311 U.S. at 44-45, and *Horton v. Citizens National Trust & Savings Bank*, 86 Cal. App. 2d 680, 683-86 (1948), involved actual conflicts

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[30] Notably, the State itself considers the presence on a school campus of 20% undercredentialed teachers to be a tipping point that is supposed to trigger Fiscal Crisis Management Assistance Team review of school district hiring practices. *See* Education Code § 42127.85. The triggering of this review suggests that the State also believes some remedy is possible for improving the number of trained teachers at school sites.

between groups of homeowners, some of whom, in *Hansberry*, wanted to enforce a racially restrictive covenant and some of whom did not, and in *Horton*, some of whom wanted single-story homes to be developed and some of whom did not. Similarly, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997), concerned actual conflict between class members, some of whom had already suffered asbestos-related injuries and wanted immediate settlement payments that would exclude payments to other class members who had been exposed to asbestos but who had not yet suffered injuries. By contrast to the direct conflict extant among the potential class members in *Hansberry*, *Horton*, and *Amchem*, here there is no indication that any of the class members do not want to enforce their State constitutional and statutory rights to improve their schools and no class conflict now exists or necessarily need exist at some future date. Like the *Richmond*, *Grumman*, and *Social Services Union* courts, then, this Court should grant class certification at this stage, when no conflict exists and when alternative methods for addressing potential conflicts exist, if any ever arise.

CONCLUSION

For the reasons set forth above, and in the motion, plaintiffs respectfully submit that the proposed class should be certified.

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