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21 **SUPERIOR COURT OF CALIFORNIA**

22 **COUNTY OF LOS ANGELES**

23 **BS142775**

24 D.J. by Guardian Ad Litem E.A.; E.A.; B.S. by
25 Guardian Ad Litem C. L.; F.S. by Guardian Ad Litem
26 C. L.; C.L.; S.M. by Guardian Ad Litem M.R.; A.M. by
27 Guardian Ad Litem M.R.; M.R.; S.Z.; WALT
28 DUNLOP,

Petitioner/Plaintiff,

v.

STATE OF CALIFORNIA; CALIFORNIA
DEPARTMENT OF EDUCATION; TOM
TORLAKSON, STATE SUPERINTENDENT OF
PUBLIC INSTRUCTION, in his official capacity;
STATE BOARD OF EDUCATION; DOES 1-20,
INCLUSIVE,

Respondents/Defendants.

CASE NO.

**VERIFIED PETITION FOR WRIT
OF MANDATE AND
COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

**CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court**

APR 24 2013

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INTRODUCTION

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2 1. This petition is for mandamus under section 1085 of the Code of Civil Procedure, for
3 discrimination on the basis of race and national origin, Gov. Code, § 11135, and for illegal expenditure
4 of public funds. Civ. Proc. Code, § 526a. Respondents have abrogated their responsibility to provide
5 English learner education for students lacking oral and written proficiency in English, as mandated by
6 the 1998 Proposition 227 (Educ. Code, §§ 300 et al.), the federal Equal Education Opportunities Act of
7 1974 (20 U.S.C. § 1700, *et seq.*), and California constitutional authority. *Butt v. State of California*
8 (1992) 4 Cal.4th 668, 680 (education for children “must be made available to all on an equal basis”).

9 2. The Respondents are the State of California, the California Department of Education, the
10 State Board of Education, and Tom Torlakson (the State Superintendent for Public Instruction).

11 3. This action seeks to compel Respondents to comply with their non-discretionary duties to
12 ensure the delivery of English language education for English learners.

13 4. Public education in California occurs in English. Our State’s diverse cultural and
14 linguistic backgrounds enrich and define us, but unless California children master English, they cannot
15 participate meaningfully in the public education system, which serves a “distinctive and priceless
16 function . . . in our society.” *Serrano v. Priest* (1971) 5 Cal.3d 584, 608-09. English acquisition is thus
17 the baseline for accessing educational opportunity.

18 5. Students in California who lack oral and written English fluency cannot comprehend
19 what happens in the classroom, let alone master the core curriculum that the State of California has
20 mandated for all students in its K-12 public school system. As the United States Supreme Court held,
21 “[T]here is no equality of treatment merely by providing students with the same facilities, textbooks,
22 teachers, and curriculum; for students who do not understand English are effectively foreclosed from
23 any meaningful education.” *Lau v. Nichols* (1974) 414 U.S. 563, 566. Students who lack fluency in
24 English cannot realistically hope to obtain a higher education, pursue and succeed at desired career
25 opportunities, and participate in the sorts of civic engagement that define citizenship at state and national
26 levels. In short, children with no or limited English proficiency are denied the opportunity to achieve
27 their full potential, which is a tragedy for not only them, but also for their communities and our society
28 as a whole.

1 6. In California, one out of every four students has been identified as an English Language
2 Learner (“EL”) student who requires specialized language instructional services to effectively learn and
3 participate in our state’s K-12 public school system. With effective delivery of these services, even
4 children with no initial familiarity with English can rapidly and successfully learn English, become fully
5 engaged in their school community, and compete on equal status to their non-EL classmates.

6 7. State and federal law accordingly mandate that all children identified and designated as
7 ELs receive English language instructional services designed to help them successfully achieve oral and
8 written fluency in English. Education Code section 300, subdivision (c) states that “[t]he government
9 and public schools of California have a moral obligation and a constitutional duty to provide all of
10 California’s children, regardless of their ethnicity or national origins, with the skill necessary to become
11 productive members of our society, and of these skills, literacy in the English language is among the
12 most important.” Education Code section 300, subdivision (f) accordingly mandates that “all children in
13 California public schools shall be taught English as rapidly and effectively as possible.”

14 8. The California Constitution requires that all children, including ELs, receive access to
15 educational opportunity. Education is a fundamental right under the California Constitution. *Serrano v.*
16 *Priest* (1976) 18 Cal.3d 728, 761, 767-68. Where the state’s failure to act creates a real and appreciable
17 impairment of the right to education that falls substantially below prevailing statewide standards, and the
18 state does not have a compelling reason for failing to intervene, the state has denied basic educational
19 opportunity to students. *Butt v. California, supra*, 4 Cal.4th at p. 692. Language instructional services
20 are prerequisite for ELs to gain access to their education. The prevailing statewide standard, set by state
21 law and practices, is that all EL students are entitled to EL services until they no longer are designated as
22 ELs in need of those services.

23 9. To a similar end, Congress enacted the Equal Educational Opportunities Act (“EEOA”)
24 in 1974 to require that every state take action to address the language barriers confronted by ELs.
25 Specifically, section 1703(f) defines “the failure by an educational agency to take appropriate action to
26 overcome language barriers that impede equal participation by its students in its instructional programs”
27 as a denial of equal educational opportunity. 20 U.S.C. § 1703(f).

28 10. Although the state is the ultimate guarantor of the fundamental right to a public education

1 under California's Constitution, neither the State of California, nor any of its entities charged with
2 responsibilities for the operation of its K-12 public education system, including the State Board of
3 Education and the State Superintendent of Public Instruction, have taken meaningful steps to address
4 reports that not all children in need of and entitled to English language instructional services are
5 receiving such services. The State has never had a system to verify district reports that they were failing
6 to provide language instructional services to ELs, and the State has no plan to redress the statewide
7 breakdown in the delivery of EL services.

8 11. Notwithstanding clear and unequivocal mandates from the California Constitution,
9 Education Code, and from Congress, the State of California publicly admits that more than 20,000
10 children in the K-12 public school system in California who are entitled to English language
11 instructional services do not receive them. According to data issued by the California Department of
12 Education ("CDE"), these children are enrolled in more than a quarter of the State's school districts.

13 12. These data are published by the CDE in Dataquest, an online database that publicly
14 reports information collected annually by the CDE from school districts across California. The data
15 category labeled "ELs Not Receiving Any EL Instructional Services" reflects the number of EL students
16 who do not receive language instructional services for ELs.

17 13. The State has most recently admitted these facts on January 23, 2013, when counsel on
18 behalf of Petitioners in this action sent a seven page letter to the State Superintendent of Public
19 Instruction Tom Torlakson and President Mike Kirst of the State Board of Education demanding that the
20 State take appropriate steps to ensure that no EL student be denied English language instructional
21 services.¹ In response to this letter, the CDE issued a press release acknowledging that not all children
22 requiring English language instructional services actually receive such services and denying any
23 responsibility to ensure otherwise. It stated that "[s]chool districts - - which are responsible for
24 providing instruction to students and appropriate services to English learners - - currently report that
25 more than 98% of the State's 1.4 million English learners are receiving services." Press Release,
26 California Department of Education (Jan. 23, 2013), *available at*
27 <http://www.cde.ca.gov/nr/ne/yr13/yr13rel14.asp> (last visited April 18, 2013).

28 _____
¹ A copy of this letter is attached as Exhibit 1 to this Petition.

1 14. The 251 districts, who collectively report that more than 20,000 students do not receive
2 English language instructional services to which they are entitled, are both urban and rural, and enroll
3 both large and small EL student populations. There are five districts in which more than 1,000 EL
4 students receive no services, seven districts in which more than 500 EL students receive no services, and
5 26 districts in which a majority of EL students receive no services. In one district, Los Angeles Unified
6 School District, more than 4,000 EL students receive no services. Moreover, there exists compelling
7 evidence that the data reported on the CDE website is conservative, underreporting the actual number of
8 EL students denied appropriate services.²

9 15. The State disburses money dedicated for EL services to districts that report denying
10 English language instructional services to EL students. Economic Impact Aid (“EIA”) is a State funding
11 program designed to support compensatory education for EL students and economically disadvantaged
12 students. *See* Educ. Code, § 54001, *et seq.* Section 54025, subdivision (a) states that “[a] school district
13 shall expend economic impact aid funds to serve and assist English learners and economically
14 disadvantaged pupils...,” and subsection (b) states that “[a] school shall use funds received ... to support
15 programs and activities designed to assist English learners achieve proficiency in the English language
16 as rapidly as practicable...” Title III is a federal funding program designed to support language
17 instruction for ELs and immigrant children. 20 U.S.C. § 6801, *et seq.* Section 6825 states that “[a] State
18 educational agency may make a subgrant” to a school district only if it “agrees to expend the funds to
19 improve the education of limited English proficient children, by assisting the children to learn English
20 and meet challenging State academic content and student academic achievement standards.” 20 U.S.C.
21 § 6825(a); Educ. Code, § 3115. Yet each year, the State distributes EIA and Title III funds for EL
22 services to districts that report that they are not providing the language instructional services required by

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24 ² It is well known to districts that there is no meaningful accountability system in place to monitor actual
25 provision of services. For example, although Centinela Valley Union High School District reported “0”
26 ELs not receiving services, in 2011 the Office of Civil Rights found that a majority of ELs were not
27 receiving services. Mary Beth McLeod, United States Department of Education Letter to CVUHSD
28 Superintendent Fernandez, June 23, 2012. Additionally, although San Juan Unified School District
(SJUSD) reported denying services to 42 students in three schools in 2010-11, the State’s 2011 review
of SJUSD’s application for funding revealed that at least five entire schools failed to provide EL
students with the appropriate English Language Development instruction and exposure to academic
language. A copy of this finding is attached as Exhibit 3 to this Petition.

1 law to all EL students.

2 16. Petitioners in this action are EL students attending schools where they have not received
3 and/or do not receive services necessary to achieve proficiency in English, their parents, and California
4 taxpayers. Petitioners bring this action under the California Constitution, Education Code section 300,
5 *et seq.* and the Equal Education Opportunities Act of 1974 (20 U.S.C. § 1700, *et seq.*) as parties
6 beneficially interested in compelling Respondents State of California, the California Department of
7 Education, the State Board of Education and the State Superintendent of Public Instruction to comply
8 with their clear and certain legal duty to ensure that all EL students who require English language
9 instructional services have access to such services in order that they may achieve oral and written
10 fluency in English. Each of the districts in which petitioner students are enrolled has been identified on
11 the CDE website as failing to provide currently or in prior school years English language instructional
12 services to its EL students.

13
14 **PARTIES**

15 **Petitioners**

16 17. Petitioner B.S. is an eight-year old public school student who resides in Los Angeles
17 County. B.S. is in the second grade and attends a school within the Compton Unified School District
18 (“CUSD”). CUSD has designated B.S. as an EL student continuously, beginning with her enrollment in
19 CUSD in kindergarten. When B.S. was in the first grade, she received no English language instructional
20 services and was consequently required to repeat this grade the following academic year.

21 18. Petitioner F.S. is a ten-year old public school student who resides in Los Angeles County.
22 F.S. is in the fourth grade and attends a school within CUSD. CUSD has designated F.S. as an EL
23 student continuously, beginning with his enrollment in CUSD in kindergarten. When F.S. was in the
24 third grade, he received no English language instructional services and was consequently required to
25 repeat this grade the following year. F.S. is not currently receiving any English language instructional
26 services.

27 19. Petitioner C.L. is the mother of B.S. and F.S. She is filing concurrently with this petition
28 an Application and Order for Appointment of Guardian Ad Litem on behalf of B.S. for purposes of this

1 litigation. Petitioner C.L. is also a resident and taxpayer of Los Angeles County within the meaning of
2 Code of Civil Procedure section 526a, and she brings this action in this capacity as well.

3 20. Petitioner S.M. is a nine-year old public school student who resides in Los Angeles
4 County. S.M. is in the fourth grade and attends a school within the CUSD. CUSD has designated S.M.
5 as an EL student continuously, beginning with his enrollment in CUSD in kindergarten. When S.M. was
6 in the third grade, he received no English language instructional services for half of the school year. His
7 English reading, writing and listening scores dropped by an entire proficiency level during that year,
8 approximately the equivalent of a year of EL education. S.M. is not currently receiving any English
9 language instructional services.

10 21. Petitioner A.M. is a ten-year old public school student who resides in Los Angeles
11 County. A.M. is in the fifth grade and attends a school within CUSD. CUSD has designated A.M. as an
12 EL student continuously, beginning with her enrollment in CUSD in kindergarten. When A.M. was in
13 fourth grade, she received no language instructional services.

14 22. Petitioner M.R. is the mother of S.M. and A.M. She is filing concurrently with this
15 petition an Application and Order for Appointment of Guardian Ad Litem on behalf of S.M. and A.M.
16 for purposes of this litigation. Petitioner M.R. is also a resident and taxpayer of Los Angeles County
17 within the meaning of Code of Civil Procedure section 526a, and she brings this action in this capacity
18 as well.

19 23. Petitioner D.J. is a ten-year old public school student who resides in Los Angeles County.
20 D.J. is in the fifth grade and attends a school within CUSD. CUSD has designated D.J. as an EL student
21 continuously, beginning with her enrollment in CUSD in kindergarten. When D.J. was in the first grade,
22 she received no language instructional services. D.J. is not currently receiving any English language
23 instructional services.

24 24. Petitioner E.A. is the mother of D.J. She is filing concurrently with this petition an
25 Application and Order for Appointment of Guardian Ad Litem on behalf of D.J. for purposes of this
26 litigation. Petitioner E.A. is also a resident and taxpayer of Los Angeles County within the meaning of
27 Code of Civil Procedure section 526a, and she brings this action in this capacity as well.

28 25. Petitioner S.Z. is an eighteen-year old public school student who resides in San Diego

1 County. S.Z. is in the twelfth grade and attends a school within Grossmont Union High School District
2 (“GUHSD”). GUHSD has designated S.Z. as an EL student continuously, beginning with his
3 enrollment in GUHSD in ninth grade. When S.Z. was in the eleventh grade, he received no English
4 language instructional services for one half of the school year. When S.Z. was in the twelfth grade, he
5 received no English language instructional services the entire school year. S.Z. is not currently
6 receiving any English language instructional services. S.Z. has received no English language
7 instructional services since the second quarter of the eleventh grade. Petitioner S.Z. is also a resident
8 and taxpayer of San Diego County within the meaning of Code of Civil Procedure section 526a, and he
9 brings this action in this capacity as well.

10 26. Petitioner Walt Dunlop is a citizen resident and taxpayer of the State of California within
11 the meaning of Code of Civil Procedure section 526a. He has lived within the State’s boundaries and
12 paid income taxes and property taxes within one year of the date of this action. He has an interest in
13 preventing the illegal and wasteful expenditure of funds in connection with districts that fail to provide
14 services to EL students. Petitioner Dunlop has been a public school teacher in Oxnard Union High
15 School District (“OUHSD”) since 1985, and he has had EL students in his classroom. Petitioner Dunlop
16 assisted with the drafting of OUHSD’s 2009 Master Plan for English Learners. Petitioner Dunlop was
17 the Director of Compensatory Education for OUHSD from 2011-2012. The Director of Compensatory
18 Education supports interventions for struggling students, including ELs. Petitioner Dunlop has
19 complained to OUHSD on multiple occasions about the systematic denial of services for ELs, the failure
20 to implement the Master Plan for English Learners, the absence of administrator accountability and the
21 lack of State oversight, including in 2010, 2011, and 2012.

22 **Respondents**

23 27. Respondent State is the legal and political entity with ultimate authority and
24 responsibility for educating all California public school children, including the responsibility to establish
25 and maintain the system of free common schools under the California Constitution, article IX, section 5,
26 and to assure that all public school children receive their fundamental right to a free and equal education,
27
28

1 under the equal protection clauses of the California Constitution, art. I § 7; art. IV § 16, subd. (a).³
2 Respondent State is a State government and “grantee” within the meaning of 34 C.F.R. § 80.3. State
3 receives federal grants from the United States Department of Education to provide specialized education
4 services to California children and youth, including EL students, on terms mandated by provisions of
5 federal law and in accord with the express provisions of those grant agreements.

6 28. Respondent California Department of Education (“CDE”) is the department of the State
7 government responsible for administering and enforcing all laws related to K-12 public education.
8 Educ. Code, § 33308. CDE is charged with cooperating with federal and State agencies in prescribing
9 and carrying out rules, regulations and directives relating to K-12 public education as required by those
10 agencies.

11 29. Respondent Tom Torlakson is the State Superintendent of Public Instruction (“SPI”) for
12 the State of California. The SPI is a constitutional officer and is charged with the supervision of all
13 California schools and school districts. Educ. Code, § 33112. As such, the SPI is obligated to take all
14 necessary actions to ensure that public school districts comply with all State and federal legal
15 requirements concerning K-12 public educational programs and services. The SPI is also the Director of
16 Education for the State of California, in whom all executive and administrative functions of the CDE are
17 vested, and is the Executive Officer for the State Board of Education. Educ. Code, §§ 33111, 33301-
18 33303. SPI Torlakson is sued in his official capacity only.

19 30. Respondent State Board of Education (“SBE”) is an agency of the State of California
20 charged with determining policies that govern K-12 public schools in California and with adopting and
21 promulgating rules and regulations for the supervision and administration of all local school districts.
22 SBE must ensure that local school districts comply with State and federal law requirements concerning
23 the delivery of K-12 public educational services. Educ. Code, §§ 33030-33032.

24 31. Does 1 through 20, inclusive are, on the basis of information and belief, agents for the
25 named defendants. The identities of said DOES are currently unknown, and when they become known,
26 the Petition will be amended to add them.

27 ³ Article IX, Section One says “A general diffusion of knowledge and intelligence being essential to the
28 preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable
means the promotion of intellectual, scientific, moral, and agricultural improvement.”

1
2 **JURISDICTION AND VENUE**

3 32. Los Angeles County is a proper venue for this action pursuant to Code of Civil Procedure
4 section 401, which provides that an action against the State or its departments, boards or officers that
5 may be brought in Sacramento County may alternatively be brought in any county of California in
6 which the State Attorney General has an office. Gov. Code, § 450.

7 33. The State Attorney General has an office in Los Angeles County.
8

9 **FACTUAL ALLEGATIONS**

10 **California's English Language Learner Students**

11 34. As defined by Education Code section 306(a), an "English Learner" means a child who
12 does not speak English or whose native language is not English and who is not currently able to perform
13 ordinary classroom work in English, also known as a Limited English Proficiency or LEP child."

14 35. The English Learner designation encompasses newcomer English Learners, students of
15 any age who have recently arrived in this country, as well as long term English Learners, students in
16 grades six through 12 who have been in schools in the United States for six or more years, Educ. Code,
17 § 313.1. Where children have a home language other than English, they have fewer opportunities to
18 learn English. Where English Learners who were born in the United States or who have been in schools
19 in the United States for six years or more remain English Learners, it is because they have not developed
20 the English language proficiency levels required for reclassification.

21 36. For EL students to overcome language barriers and attain the target English language
22 proficiency, EL students need English Learner language instructional services. To understand the
23 teacher's presentations, the explanations and instructions contained in their textbooks, and to engage in
24 the classroom, ELs cannot be mainstreamed in a classroom without any EL services, where their
25 teachers do not know they have ELs in their classes.

26 37. As stated in "IMPROVING EDUCATION FOR ENGLISH LEARNERS: Research-
27 Based Approaches," a 2010 publication of the California Department of Education at page 1, "[w]ith
28 one of every four students being an English learner, no state has a greater stake in the education of these

1 students than California.” Moreover, as also recognized by CDE,
2 [i]n school, English learners face a formidable challenge. Not only must they acquire English to levels
3 comparable to that of native speakers of English of the same age and grade level, but they must also
4 meet the same challenging grade-level standards and graduation requirements.

5 *Id.* at p. 2.

6 38. As also pointed out in the CDE publication IMPROVING EDUCATION FOR ENGLISH
7 LEARNERS (p. 2), “the majority of English learners are racial and ethnic minorities.” For California
8 EL students, 82.7% have a home language of Spanish. CDE, DataQuest, *available at*
9 [http://dq.cde.ca.gov/dataquest/LEPbyLang1.asp?cChoice=LepbyLang1&cYear=2010-](http://dq.cde.ca.gov/dataquest/LEPbyLang1.asp?cChoice=LepbyLang1&cYear=2010-11&cLevel=State&cTopic=LC&myTimeFrame=S&submit1=Submit)
10 [11&cLevel=State&cTopic=LC&myTimeFrame=S&submit1=Submit](http://dq.cde.ca.gov/dataquest/LEPbyLang1.asp?cChoice=LepbyLang1&cYear=2010-11&cLevel=State&cTopic=LC&myTimeFrame=S&submit1=Submit) (last visited April 18, 2013).
11 Approximately 100,000 have a home language of Vietnamese, Mandarin (Putonghua), Cantonese,
12 Filipino (Pilipino or Tagalog) or Korean. *Id.*

14 **California’s Program for Delivering EL Services**

15 39. The State SPI directs all school districts to administer a Home Language Survey when a
16 child first enrolls in a public school in California. Education Code section 52164. 1. The survey
17 typically asks what language the child learned when he or she began to speak, what language the parent
18 or guardian uses when speaking with the child, what language the child uses most frequently at home,
19 and what language is most often spoken by the adults at home. CDE, Home Language Survey, *available*
20 *at* www.cde.ca.gov/ta/cr/documents/hlsform.doc (last visited April 18, 2013). If the answer to any of
21 these questions is a language other than English, then schools designate the child as a potential EL
22 student. Educ. Code, § 52164; CDE 2012-2013 CELDT Information Guide at 1, *available at*
23 <http://www.cde.ca.gov/ta/tg/el/documents/celdtinfoguide1213.pdf> (last visited April 18, 2013).

24 40. Every school district must “assess the English language development of each pupil in
25 order to determine the level of proficiency....” Educ. Code, § 313(a). The California English Language
26 Development Test (“CELDT”) is the test utilized by the State of California to determine English
27 language proficiency of students who have a primary language other than English. Education Code
28 section 11510. If a student does not pass the CELDT, he or she is then designated as an EL student.

1 Educ. Code, § 313, subd. (c). The student must thereafter continue to take the CELDT until he or she
2 passes the test and satisfies other indicia of English language proficiency determined by the SPI so as to
3 be “re-designated as English proficient.” *Id.*

4 41. State law specifies some of the services that districts must provide to EL students. For
5 example, “[c]hildren who are English learners shall be educated through sheltered English immersion
6 during a temporary transition period not normally intended to exceed one year.” Educ. Code, § 305.
7 Thereafter, “[o]nce English learners have acquired a good working knowledge of English, they shall be
8 transferred to English language mainstream classrooms.” *Id.*; *see also* Cal. Code Regs. tit. 5 § 11301(a).

9 42. CDE describes the “English Language Mainstream (ELM)” placement, as a setting where
10 “in addition to [English Language Development] instruction, English learners continue to receive
11 additional and appropriate educational services in order to recoup any academic deficits that may have
12 been incurred in other areas of the core curriculum as a result of language barriers.” CDE, Facts about
13 English Learners in California, *available at* <<http://www.cde.ca.gov/ds/sd/cb/cefelfacts.asp>> (last visited
14 April 18, 2013). In the 2011 language census instructions, CDE stated that “EL mainstream settings are
15 designed for ELs who have achieved a level of *reasonable fluency* in English, but still require additional
16 EL services as appropriate.” CDE 2011 Language Census Instructions, *available at*
17 <www.cde.ca.gov/ds/dc/lc/documents/lcinstruc11.doc> (last visited April 18, 2013).

18 43. State law provides no circumstance under which it is appropriate to deny language
19 instructional services to EL students. A parent can request to have his or her child moved to an
20 alternative or bilingual program, but the school must provide “a full description of the educational
21 materials to be used in the different educational program choices and all the educational opportunities
22 available to the child.” Education Code section 310. As Attorney General Bill Lockyer stated in 2000,
23 this description must be substantive in nature. 99-802 Op. Att’y Gen. 4 (Feb. 25, 2000) (“We do not
24 believe that a ‘full description of the educational materials to be used’ may consist of a blank page.”).

25 44. Indeed, under both federal and State law, school districts must “provide instructional
26 services” to EL students “in conformity with” federal requirements “designed to ensure that all pupils
27 have reasonable access to educational opportunities that are necessary in order for the pupils to achieve
28 at high levels in English and in the other core curriculum areas of instruction.” 20 U.S.C. § 6801; Educ.

1 Code, § 440, subd. (a).

2 45. Thus, as explained in greater detail in paragraphs 46-49 below, it is illegal under both
3 State and federal law for districts to operate a program for EL students in which students who are
4 designated as EL students are altogether denied English language instruction services.

5 46. Several dedicated sources of funding require the creation of programs to deliver
6 appropriate instructional services to EL students. The State legislature appropriates funds for EL
7 students to “assure a quality level of education for all pupils” because it recognizes that factors such as
8 “homes where a primary language other than English have a direct impact on a child’s success in school
9 and personal development.” Educ. Code, § 54025. The State distributes Economic Impact Aid (“EIA”)
10 to districts based on the number of low-income and EL students in that district. Education Code section
11 54023. Under State law, the State distributes these funds for compensatory services to EL students.
12 Educ. Code, § 54025(a) (“A school district shall expend economic impact aid funds to serve and assist
13 English learners and economically disadvantaged pupils and may not expend those funds at schoolsites
14 that do not have English learners or economically disadvantaged pupils.”). Schools must use these
15 funds “to support programs and activities designed to assist English learners achieve proficiency in the
16 English language as rapidly as practicable and support programs and activities designed to improve the
17 academic achievement of English learners and economically disadvantaged pupils.” Educ. Code, §
18 54025(b).

19 47. The State of California also receives hundreds of millions of dollars under Title III of the
20 Elementary and Secondary Education Act. Title III is a federal program designed to promote and
21 support English language acquisition and academic achievement of EL students. 20 U.S.C. § 6812(1)
22 (the purpose of the program is “to help ensure that children who are limited English proficient, including
23 immigrant children and youth, attain English proficiency, develop high levels of academic attainment in
24 English, and meet the same challenging State academic content and student academic achievement as all
25 children are expected to meet...”); 20 U.S.C. § 6812(9) (purpose of the program is “to provide State
26 educational agencies and local educational agencies with the flexibility to implement language
27 instruction education programs, based on scientifically based research on teaching limited English
28 proficient children, that the agencies believe to be the most effective for teaching English.”). Receipt of

1 these funds is conditioned upon assurances to the federal government that such monies will be expended
2 to deliver English language instruction to EL students, and the State distributes the funds to school
3 districts that enroll EL students.

4 48. As a necessary condition for receipt of Title III funds, the State must submit a plan to the
5 federal government describing how its districts will teach EL students “using a language instruction
6 curriculum that is tied to scientifically based research on teaching limited English proficient children and
7 that has been demonstrated to be effective.” 20 U.S.C. § 6823(b)(6).

8 49. The State of California then may provide Title III funds to a school district “only if [it]
9 agrees to expend the funds to improve the education of limited English proficient children, by assisting
10 the children to learn English and meet challenging State academic content and student academic
11 achievement standards.” 20 U.S.C. § 6825(a). To receive Title III funds from the State, a school district
12 must submit a plan to the State “[d]escrib[ing] how language instruction education programs carried out
13 under the subgrant will ensure that limited-English-proficient pupils being served by the programs
14 develop English proficiency.” Educ. Code, § 443, subd. (b)(6).

15
16 **The State’s Acknowledgement that the Denial of EL Services to EL Students Is Commonplace in**
17 **California Public Schools**

18 50. The CDE publishes educational data and statistics on its website, to “identify trends and
19 educational needs and to measure performance.” See CDE, Data & Statistics, *available at*
20 <http://www.cde.ca.gov/ds/> (last visited April 18, 2012). As part of these data and statistics, the CDE
21 requires school districts to report the language instructional services provided to EL students. Districts
22 may categorize students as receiving any of the following types of services for purposes of this
23 reporting:

- 24) ELs Receiving English Language Development (ELD) Services
- 25) ELs Receiving ELD and Specifically Designed Academic Instruction in English (SDAIE)
- 26) ELs Receiving ELD and SDAIE with Primary Language (L1) Support
- 27) ELs Receiving ELD and Academic Subjects through the Primary Language (L1)
- 28) ELs Receiving Other EL Instructional Services

6) *ELs not Receiving any EL Instructional Services*

2 CDE, DataQuest, *available at* <[http://dq.cde.ca.gov/dataquest/EIP2_State.asp?RptYear=2010-](http://dq.cde.ca.gov/dataquest/EIP2_State.asp?RptYear=2010-11&RptType=ELPart2_1a)
3 [11&RptType=ELPart2_1a](http://dq.cde.ca.gov/dataquest/EIP2_State.asp?RptYear=2010-11&RptType=ELPart2_1a)> (last visited April 18, 2013) (emphasis added).

4 51. In the 2011 Language Census instructions to school districts, the CDE advised districts
5 how to use the categories provided. CDE, 2011 Language Census (R3-LC) Instructions, *available at*
6 <www.cde.ca.gov/ds/dc/lc/documents/lcinstruc11.doc> (last visited April 18, 2013). The CDE
7 explained that EL students who do not receive some combination of ELD, SDAIE, or primary language
8 support, “but who receive another type of instructional service specifically designed for ELs, such as an
9 Individualized Education Program (IEP) developed for a special education EL” should fall into the
10 “Other” category. *Id.* For the no services category, districts must “count all the remaining ELs who
11 have not been counted previously” in the other categories. *Id.* “These ELs are not receiving any
12 specialized instructional services . . .” *Id.*

13 52. Pursuant to these instructions, 251 California school districts reported to CDE that they
14 are not providing EL students who have been identified as requiring English language instructional
15 services any such services at all. These school districts collectively reported to CDE that 20,318 EL
16 students are not receiving English language instructional services. These students were enrolled in 251
17 districts which make up more than a quarter of all school districts that enroll ELs in California. These
18 districts are rural and urban, with small and large EL populations, and spread across the State.

19 53. Below are a just a few representative examples of the consequences of Respondents’
20 failure to ensure delivery of English instructional services for ELs in districts across the State of
21 California.

22 54. Some of the largest and egregious examples are represented graphically below. These are
23 just four of 251 districts that fail to serve EL students:

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Chart 4.2 Percentage of No-Service ELs Across 4 Districts

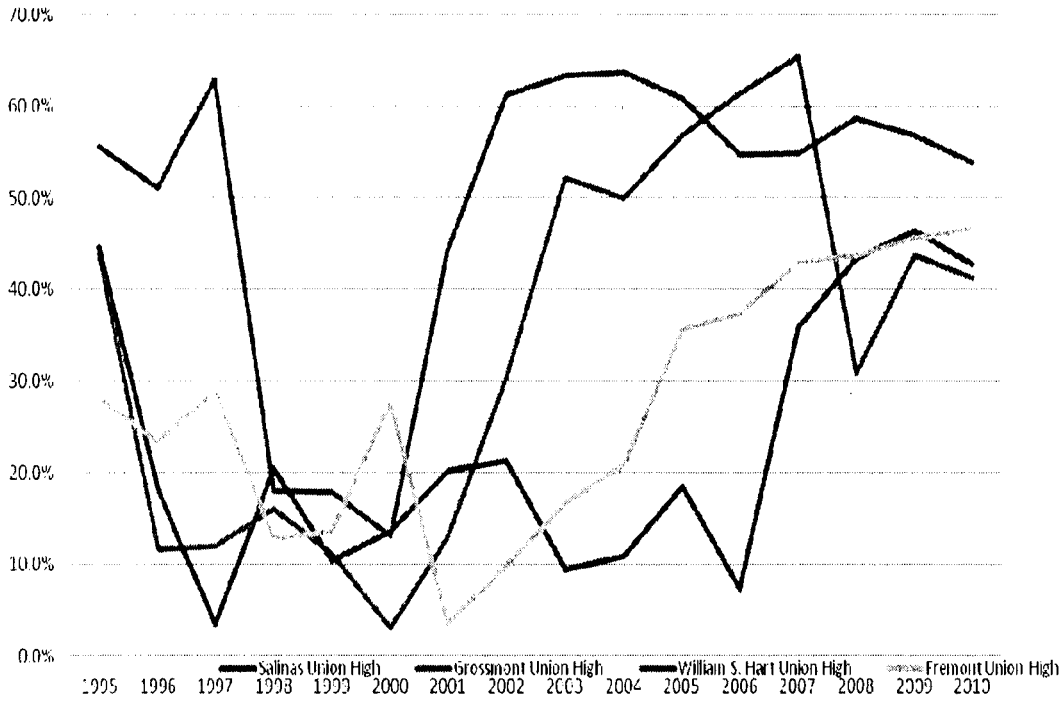
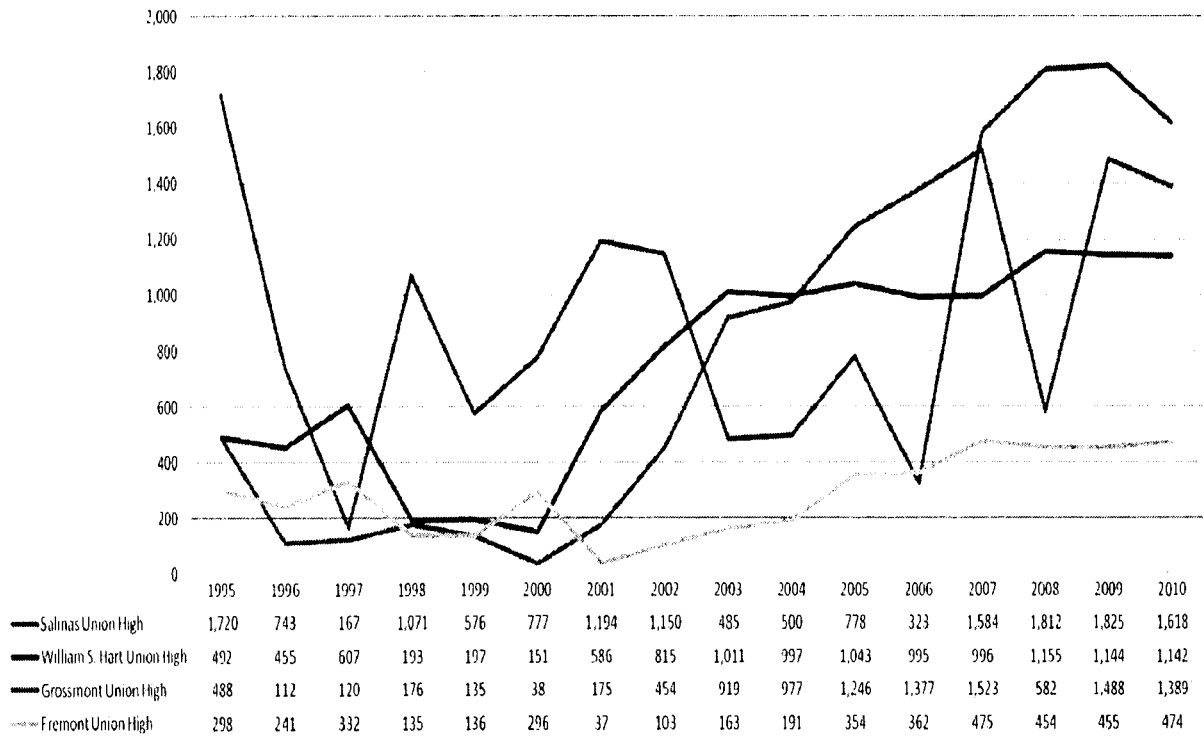


Chart 4.1 Number of ELs Receiving No Service Across 4 Districts



55. Petitioners B.S., F.S., S.M., A.M., and D.J. are currently enrolled in the Compton Unified School District and have each been enrolled there since kindergarten.

56. CUSD is a K-12 district located in Los Angeles County. CUSD currently enrolls 24,221 students at forty sites: 24 elementary schools, eight middle schools, three comprehensive high schools and five alternative schools.

57. In school year 2010-2011, CUSD enrolled 10,505 EL students. EL students comprise 44% of the student enrollment in the CUSD.

58. By ethnicity, CUSD enrolls 18,895 Hispanic students (78%), 139 Pacific Islander students (0.5%) and 4,011 African American students (16.5%).

59. For the 2010-2011 school year, CUSD reported to CDE that 1,697 out of 10,505 EL students received no English language instructional services. EL students in the CUSD who received no English language instructional services comprise about one of every six EL students in the district. William Jefferson Clinton Elementary School enrolled 166 EL students who received no English

1 language instructional services. Dickison Elementary School enrolled 107 EL students who received no
2 English language instructional services. Kelly Elementary School enrolled 106 EL students who
3 received no English language instructional services. Roosevelt Elementary School enrolled 115 EL
4 students who received no English language instructional services.

5 60. Pursuant to the State of California's Economic Impact Aid program to provide direct
6 services for EL and economically disadvantaged students in 2010-11, CUSD received \$361.39 for every
7 EL student enrolled in the district. For EL and economically disadvantaged students, CUSD received
8 \$10,338,469 in EIA monies. CDE, Economic Impact Aid, *available at*
9 <<http://www.cde.ca.gov/fg/aa/ca/eia.asp>> (last visited April 18, 2013).

10 61. The CUSD used federal Title III funds that were intended for EL students instead to pay
11 for clerks and a plant worker. (A copy of this finding is attached as Exhibit 2 to this Petition.) In 2011,
12 the CUSD "charged the Federal program (Title III) for the salaries of two Clerk Typists III and a Plant
13 worker in the district's school sites." CDE Categorical Program Monitoring, Notification of Findings,
14 Generated by CAIS, 14 (Nov. 4, 2011). CDE stated that "These positions ... provide sole clerical
15 support for an assigned function and grounds maintenance and custodial work. The services provided
16 by these positions benefit all children in the schools, not just English learners, and thus would not be
17 considered supplemental." *Id.* CDE also found that CUSD officials were not aware how and whether
18 State EIA dollars were spent at school sites to service ELs. CDE found that "English learners at Whaley
19 Middle School, Davis Middle School, and Compton High School are not provided with a consistently
20 implemented program of instruction in English language development targeted to each student's
21 proficiency level." *Id.* Yet in spite of these findings, the State developed no plan to ensure the delivery
22 of language instructional services to ELs. CUSD continues to report to the State that it is denying
23 language instructional services to EL students, and the experiences of Petitioner children confirms that
24 CUSD continues to deny language instructional services to EL students. CUSD has denied an average
25 of 1,697 EL students required language instructional services from 1995-2010, with an average denial
26 rate of 11.5%. In nine of the 16 years reported, CUSD denied more than 1,000 EL students required
27 language instructional services, and in 11 of the 16 years reported, CUSD denied more than 500 EL
28 students required language instructional services.

1 62. The State of California, the California Department of Education, State Superintendent of
2 Public Instruction Torlakson, and the State Board of Education know or reasonably should know that EL
3 students in the Compton Unified School District do not receive English language instructional services,
4 and have not received such services over each of the past 16 years. Nor has any Respondent taken any
5 meaningful steps to identify, correct and ensure no future recurrence of such denials of these services to
6 EL students within the CUSD.

7 63. Petitioner Walt Dunlop is a former teacher in the Oxnard Union High School District.

8 64. OUHSD is a 9-12 grade district located in Ventura County. OUHSD currently enrolls
9 16,790 students at eight sites: seven high schools and an adult school.

10 65. In school year 2010-2011, OUHSD enrolled 3,433 EL students. EL students comprise
11 about 20% of the enrollment in the OUHSD. 95% of the EL students are Spanish speakers.

12 66. By enrollment, OUHSD enrolls 12,152 Hispanic students (72.4%), 710 Filipino students
13 (4.2%), 61 Pacific Islander students (.36%), 402 African American students (2.4%) and 2,823 Caucasian
14 students (16.8%).

15 67. For the 2010-2011 school, OUHSD reported to CDE that 588 EL students received no
16 English language instructional services. EL students in the OUHSD who receive no English language
17 instructional services comprise more than one of every six EL students in the district. Adolfo Camarillo
18 High School enrolled 98 EL students who received no English language instructional services, nearly
19 half of its EL student enrollment. Frontier High School enrolled 70 EL students who received no
20 English language instructional services, more than half of its EL student enrollment. Hueneme High
21 School enrolled 211 EL students who received no English language instructional services, more than
22 one third of its EL student enrollment. Oxnard High School enrolled 73 EL students who received no
23 English language instructional services, nearly one fifth of its EL student enrollment.

24 68. Pursuant to the State of California's Economic Aid Program to provide direct services for
25 EL and economically disadvantaged students, in 2010-11, OUHSD was designated \$317.91 for every
26 EL student enrolled in the district. For EL and economically disadvantaged students, OUHSD received
27 \$1,869,947 in EIA monies. CDE, Economic Impact Aid, *available at*
28 <<http://www.cde.ca.gov/fg/aa/ca/eia.asp>> (last visited April 18, 2013).

1 69. OUHSD has denied an average of 1,556 EL students required language instructional
2 services from 1995 to 2010, with an average denial rate of 44.5%. For each of the 16 years, OUHSD
3 denied more than 500 EL students required language instructional services, and in 14 of those 16 years,
4 OUHSD denied more than 1,000 EL students required language instructional services. In all but three
5 years, the percentages EL students not receiving any language instructional services for ELs were higher
6 than 40%.

7 70. The State of California, the California Department of Education, State Superintendent of
8 Public Instruction Torlakson and the State Board of Education know or reasonably should know that EL
9 students in the Oxnard Union High School District do not receive English language instructional
10 services, and have not received such services over each of the past sixteen years. Nor has any
11 Respondent taken any meaningful steps to identify, correct and ensure no future recurrence of such
12 denials of these services to EL students within the OUHSD.

13 71. Petitioner S.Z. is currently enrolled in the Grossmont Union High School District
14 (“GUHSD”) and has been enrolled there since ninth grade. S.Z. has received no English language
15 instructional services since the second quarter of the eleventh grade. Without English language
16 instructional services, Petitioner S.Z. has struggled with an electronic translator to understand his
17 homework assignments.

18 72. GUHSD is a 9-12 district located in San Diego County. GUHSD currently enrolls 24,965
19 students at 19 sites: nine high schools, three charter schools, one continuation school, two alternative
20 education sites and four special education facilities.

21 73. In school year 2010-2011, GUHSD enrolled 3,368 EL students. EL students comprise
22 13.9% of the student enrollment in the GUHSD.

23 74. By ethnicity, GUHSD enrolls 7,745 Hispanic students (32%), 431 Asian, Not Hispanic
24 students (2%), 379 Filipino, Not Hispanic students (1.5%), and 1,832 African American students (7.6%).

25 75. For the 2010-2011 school year, GUHSD reported to CDE that 1,389 out of 3,368 EL
26 students received no English language instructional services. EL students in the GUHSD who received
27 no English language instructional services comprise nearly half of all EL students in the district. El
28 Cajon Valley High School enrolled 1,049 EL students who received no English language instructional

1 services. Grossmont High School enrolled 409 EL students who received no English language
2 instructional services. Monte Vista High School enrolled 425 EL students who received no English
3 language instructional services. Mount Miguel High School enrolled 354 EL students who received no
4 English language instructional services.

5 76. Pursuant to the State of California's Economic Impact Aid program to provide direct
6 services for EL and economically disadvantaged students in 2010-11, GUHSD received \$313.79 for
7 every EL student enrolled in the district. For EL and economically disadvantaged students, CUSD
8 received \$2,007,628 in EIA monies. CDE, Economic Impact Aid, *available at*
9 <http://www.cde.ca.gov/fg/aa/ca/eia.asp> (last visited April 18, 2013).

10 77. The State of California, the California Department of Education, State Superintendent of
11 Public Instruction Torlakson and the State Board of Education know or reasonably should know that EL
12 students in the Grossmont Union High School District do not receive English language instructional
13 services, and have not received such services over each of the past sixteen years. Nor has any
14 Respondent taken any meaningful steps to identify, correct and ensure no future recurrence of such
15 denials of these services to EL students within the GUHSD.

16
17 **Denial of English Language Instruction Services to EL Students Violates Federal Law**

18 78. Under federal law, no state may decline to provide EL students a language program
19 designed to deliver English language instruction designed to help them become proficient in English. In
20 1974, the United States Supreme Court addressed this issue conclusively when students of Chinese
21 ancestry challenged the San Francisco Unified School District's failure to provide English language
22 instructional services to students with language barriers. The Supreme Court held: "[T]here is no
23 equality of treatment merely by providing students with the same facilities, textbooks, teachers, and
24 curriculum; for students who do not understand English are effectively foreclosed from any meaningful
25 education." *Lau v. Nichols* (1974) 414 U.S. 563, 566. "We know that those who do not understand
26 English are certain to find their classroom experiences wholly incomprehensible and in no way
27 meaningful." *Id.* The Supreme Court made clear the denial of language instructional services for ELs
28 constitutes a denial of meaningful opportunity to participate in an educational program.

1 79. After this decision, Congress enacted the Equal Educational Opportunities Act
2 (“EEOA”), 20 U.S.C. §§ 1701 *et seq.*, and thereby codified the core holding of *Lau*. See *Castaneda v.*
3 *Pickard* (5th Cir. 1981) 648 F.2d 989, 1008.

4 80. Section 1703(f) of the EEOA provides that “[n]o State shall deny equal educational
5 opportunity to an individual on account of his or her race, color, sex, or national origin by ... the failure
6 of an educational agency to take appropriate action to overcome language barriers that impede equal
7 participation by its students in its instructional programs.” 20 U.S.C. 1703(f).

8 81. Under the EEOA, the term “educational agency” is defined as “a local educational
9 agency or a ‘State educational agency.’” 20 U.S.C. § 1720(a). “[T]he California State Board of
10 Education and the California State Department of Education fall within the [EEOA]’s definition of ‘state
11 educational agency.’” *Los Angeles Branch NAACP v. Los Angeles Unif. Sch. Dist.* (9th Cir. 1983) 714
12 F.2d 946, 951. The EEOA “makes clear, through the definition of the term ‘educational agency,’ that
13 the obligation to take ‘appropriate action’ falls on both the State and local educational agencies.” See 20
14 U.S.C. § 1703(f); *Idaho Migrant Council v. Board of Educ.* (9th Cir. 1981) 647 F.2d 69, 71; *Gomez v.*
15 *Illinois*, (7th Cir. 1987) 811 F.2d 1030, 1043 (“State agencies cannot, in the guise of deferring to local
16 conditions, completely delegate in practice their obligations under the EEOA.”). Under the EEOA,
17 “schools are not free to ignore the need of limited English speaking children for language assistance to
18 enable them to participate in the instructional program of the district.” *Castaneda*, 648 F.2d at pp. 1009-
19 10; 20 U.S.C. § 1703(f); *Gomez*, 811 F.2d at p. 1043 (“Although the meaning of ‘appropriate action’
20 may not be immediately apparent without reference to the facts of the individual case, it must mean
21 something more than ‘no action.’”). Thus, placing EL students in mainstream classes without regard to
22 their English proficiency and without providing services to help them access the school curriculum in
23 English contravenes the plain language of the EEOA and Congress’s intent in its enactment. See
24 *Castaneda, supra*, 648 F.2d at p. 1009.

25 82. Pursuant to the three-pronged test under *Castaneda*, the leading case interpreting the
26 EEOA, the EEOA requires that (1) the state pursue a program informed by an educational theory
27 recognized as sound by experts in the field, or that is deemed a legitimate experimental strategy; (2) the
28 programs and practices actually used by the state are reasonably calculated to implement effectively the

1 educational theory adopted; and (3) the state's program must not continue to fail, given sufficient time
2 for reasonable trial and error, to reduce the language barriers confronting EL students. *See Castaneda,*
3 *supra*, at p. 1008.

4 83. The State has not pursued a plan, promulgated guidelines, attempted meaningful
5 enforcement, or taken any appropriate action to address this systematic breakdown in the Statewide
6 program for ensuring EL students receive legally mandated services. The State's failure to act in the
7 face of evidence indicating a widespread, open and notorious violation of EL students' rights by a large
8 portion of the State's public school districts, which denies students educational opportunity that is
9 essential to their scholastic advancement, is a violation of its mandatory duty pursuant to prong one of
10 the *Castaneda* test. The State's failure to ensure its agents take steps reasonably calculated to deliver
11 language instructional services to all ELs in 16 years, and the State's failure to establish programs or
12 practices to respond to the open and notorious failure to deliver instructional services to ELs, is a
13 violation of its mandatory duty pursuant to prong two of the *Castaneda* test.

14 84. The State receives hundreds of millions of Title III dollars each year from the federal
15 government, specifically to ensure that EL students in California receive the English language
16 development services required by law. The State distributes those dollars to districts, including districts
17 that have reported that they are denying services to EL students, without taking any steps to ensure that
18 the districts in fact comply with the law as a condition of receiving the funds and that the funds are being
19 used to provide requisite services to all EL students. Respondents' inaction is thus all the more
20 offensive, because they are specifically receiving hundreds of millions of dollars with the understanding
21 that they will be distributed to the State's school districts to provide EL services mandated by federal
22 law, yet Respondents distribute such funds to districts while aware that nearly one out of four school
23 districts is violating the rights of EL students.

24 85. Respondents are thus violating their mandatory duty under the EEOA to take meaningful
25 action to address these widespread and open violations of EL students' rights.

26
27 **Denial of English Language Instruction Services to EL Students Violates the State Constitution**

28 86. Education is a fundamental right under the California Constitution, and any action that

1 has a real and appreciable impact upon such right is subject to strict scrutiny. *Serrano v. Priest* (1976)
2 18 Cal.3d 728, 761, 767-68. Where the State's action or failure to act creates a real and appreciable
3 impairment of the right to education that falls substantially below Statewide standards, and the State
4 does not have a compelling reason for failing to address the specific needs of English learners, the State
5 has denied basic educational opportunity to students. *Butt*, 4 Cal.4th at pp. 687, 692

6 87. The prevailing statewide standard within and among school districts in California is that
7 students identified as ELs must receive English language instructional services so that they may become
8 proficient in reading, writing, and comprehending English. This is essential so that these students have
9 access to the core curriculum the State of California requires all public school students to study and
10 master.

11 88. Under the California Constitution, the State is ultimately responsible for ensuring the
12 delivery of educational services. Public education is "uniquely a fundamental concern of the State" and
13 the Constitution "prohibits maintenance and operation of the common public school system in a way
14 which denies basic educational equality to the students." *Butt*, 4 Cal.4th at p. 685. "[L]ocal districts are
15 the state's agents for local operations of the common school system, and the State's ultimate
16 responsibility for public education cannot be delegated to any other entity." *Id.* at p. 681. Accordingly,
17 the State "is obligated to intervene when a local district's fiscal problems would otherwise deny its
18 students basic educational equality, unless the State can demonstrate a compelling reason for failing to
19 do so." *Id.*

20 89. The State of California and each of the Respondents in this action have a mandatory legal
21 duty to ensure the prevailing Statewide standard of delivery of English language instructional services to
22 all EL. The State's refusal to ensure the delivery of instruction to ELs is a real and appreciable
23 impairment on ELs' ability to access a public school education. The State has not and cannot set forth
24 any compelling reason for gathering information about the services provided to ELs, and then failing to
25 act where there is a breakdown in the system for provision of EL services in a quarter of all districts with
26 ELs.

27 90. Respondents thus have violated and are continuing to violate their mandatory duties
28 under the State constitution to assure basic educational equality by failing to take meaningful steps to

1 ensure that school districts are providing legally mandated services to EL students.

2 The State of California Refuses to Acknowledge any Responsibility to Correct or Prevent Such Denials

3 91. The State and the other Respondents have for years received overwhelming evidence of
4 widespread denial of English language instructional services to tens of thousands of EL students. Yet,
5 the only responsibilities they have assumed are dispensing funds and receiving reports of failure.

6 92. The State and the other Respondents have washed their hands of ensuring district
7 compliance, even though the students who have been denied service are disproportionately ethnic
8 minorities and many from low income families lacking the resources and opportunities to otherwise
9 become fluent in oral and written English.

10 93. The State and the other Respondents have adopted the policy that they will react only to
11 complaints from parents before doing anything at all, even though the State and the other Respondents
12 know that, while almost all of the EL students are U.S. citizens, their parents may not be. These parents
13 are likely unable or unwilling to confront authorities about the denial of services to their children.

14 94. As one illustration of the indifference on the part of the State of California and the
15 Respondents, the CDE has for some 16 years published on its website a listing of districts reporting the
16 numbers of EL students who receive no English language instructional services, yet undertaken no
17 meaningful steps to identify the causes of those denials, let alone correct or prevent their reoccurrence.
18 In numerous instances, these denials have continued for over a decade in the same districts. Neither the
19 State nor any of the Respondents in this action have established an accountability system that address
20 this open, notorious, and widespread denial to EL children of any English language instructional
21 services. There is no system currently in place to identify which districts acknowledge denying legally
22 mandated services to their ELs, to determine the reason that the districts are reporting the denial of those
23 services, and to remedy the denial of those services. The State has never had a system to verify district
24 reports that they failed to provide language instructional services to ELs. By collecting district
25 admissions about their failure to serve ELs, and by doing nothing more with this information other than
26 facilitate its publication, the State has perpetuated the perception that districts may continue to deny
27 English language instructional services to ELs without consequence.

28 95. As another illustration of this indifference, in response to a letter sent on January 23,

1 2013, to State SPI Torlakson and SBE President Kirst, which pointed out that CDE publicly reported
2 that “over 20,000 English Learner children are not receiving any language instructional services” and
3 asked that “immediate corrective action” be taken, the CDE issued a press release that same day which
4 admitted that 2% of all EL students do not receive any services and disavowing any legal duty to prevent
5 or correct the denial of these services. The press release stated:

6 Despite the enormous financial strains of recent years, California has
7 made dramatic progress in seeing that all English Learners receive
8 appropriate instruction and services. School districts – which are
9 responsible for providing instruction to students and appropriate services
10 to English learners – currently report that more than 98 percent of the
11 State’s 1.4. million English learners are receiving services.

12 Press Release, California Department of Education (Jan. 23, 2013) *available at* <
13 <http://www.cde.ca.gov/nr/ne/yr13/yr13rel14.asp> > (last visited April 18, 2013). Rather than taking steps
14 to address this widespread breakdown in the statewide program for delivering EL services, then, CDE
15 asserted that it deserved credit because only 2 percent of EL students are being denied legally mandated
16 services.

17 96. The State of California and all Respondents in this action have made clear they have no
18 intent of changing their practice. For at least 16 years, districts have openly reported to the State their
19 failure to provide English language instructional services to EL children of California. The State
20 publicly asserts that all responsibility for appropriate services rests with school districts, and the State’s
21 extraordinary stance is that it need not do anything to prevent hundreds of its public school districts from
22 denying English language instructional services to EL students. The State has in fact publicly declared
23 that the current failure to serve 20,318 EL students represents “dramatic progress.”

24 97. In addition, there exists considerable evidence known to Respondents that, as a direct and
25 proximate consequence of their refusal to establish and enforce a system to ensure that all EL students
26 receive English language instructional services, districts underreport the numbers of EL students who do
27 not receive such services. For example, although Centinela Valley Union High School District
28 (“CVUHSD”) reported “0” EL students as not receiving services, in 2011, the United States Office of

1 Civil Rights concluded that in fact a majority of EL students in the CVUHSD received no services.
2 Mary Beth McLeod, U.S. Department of Education letter to CVUHSD Superintendent Fernandez, June
3 23, 2012. The false reporting in the language census occurs, in large part, because district officials and
4 other personnel recognize that there is no verification process, and there will be no adverse consequence
5 from State education departments and officials for reporting the provision or denial to EL students of
6 essential and legally mandated instructional services.

7 98. To date, the State, Superintendent Torlakson, the SBE and the CDE have not issued any
8 public response to the January 23 letter other than the quoted press release and have not committed to
9 any meaningful steps to systematically address this fundamental breakdown within the statewide system
10 for providing EL services. On February 27, 2013, CDE distributed a memorandum to all school districts
11 encouraging them to reconsider reporting the number of ELs not receiving services. CDE stated: “A
12 review of the initial data certified to date shows that many (districts) have certified ‘no EL education
13 services’ for all or a large proportion of their EL students. This unexpected change or increase in the
14 certified data suggests that some (districts) may not have reported this data accurately.” In the
15 memorandum, CDE extended the time for districts to report EL educational services to March 22, 2013.
16 This memorandum is both suggestive and demonstrably false – there has been no “change or increase”
17 and it is certainly not “unexpected” given past year’s reports. Other than urging districts to reconsider
18 how they report serving EL students, CDE has taken no steps to ensure the delivery of EL services, and
19 CDE has no plan to redress the failure to provide EL services. Given this record, Petitioners have no
20 other alternative to filing this petition in order to vindicate the clear and unequivocal statutory and
21 constitutional rights.

22
23 **Respondents’ Violation of Their Mandatory Duties Causes Irreparable Injury**

24 99. The failure by Respondents State of California, the California Department of Education,
25 Superintendent Torlakson and the State Board of Education to ensure that all EL students receive
26 English language instructional services results in irreparable injury to petitioner children and to all EL
27 students denied such services.

28 100. The CDE has admitted that, “of course, all ELs must receive additional and appropriate

1 educational services until they are reclassified.” CDE, English Learners in California, Frequently Asked
2 Questions, August 21, 2006, *available at* <www.cde.ca.gov/sp/el/er/documents/elfaq.doc> (last visited
3 April 18, 2013) (emphasis added.)). ELD “[s]hould continue at least until students test CELDT Early
4 Advanced (level 4) . . . ELs require 4-6 years to achieve proficiency in English.” (McCoy, Mike, CDE:
5 Improving Education for English Learners: Research-Based Approaches, Slide 17). The State
6 Legislature has specifically directed that the State encourage personal language tutoring of members of
7 the community, “[i]n furtherance of its constitutional and legal requirement to offer special language
8 assistance to children coming from backgrounds of limited English proficiency.” Educ. Code, § 315.

9 101. CDE has unequivocally recognized the benefits of providing services to ELs. CDE has
10 concluded: “[S]tudies that compare outcomes for English learners receiving some form of
11 accommodation for limited English proficiency (ELD and/or primary language instruction) to outcomes
12 for English learners simply placed in mainstream classes and receiving no accommodation for their
13 limited English yield consistent results: the former is more beneficial than the latter.” CDE,
14 IMPROVING EDUCATION FOR ENGLISH LEARNERS: Research Based Approaches, at p. 30.

15 102. Research documents that English language instructional services are critical to enable EL
16 students to participate in the instructional programs of their schools. Petitioner students will likely
17 stagnate at an intermediate or lower level of English proficiency and find themselves unable to meet the
18 proficiency expectations for students in their grade if the State continues to neglect its duty to ensure the
19 delivery of English language instructional services. EL students that find themselves in schools that fail
20 to provide them targeted services for their academic advancement never experience the benefits of a
21 language program designed to meet their needs. See Menken, Kate and Kleyn, Tatyana, The Difficult
22 Road for Long-Term English Learners, 66 Educational Leadership 7 (April 2009), *available at*
23 <[http://www.ascd.org/publications/educational_leadership/apr09/vol66/num07/The_Difficult_Road_for](http://www.ascd.org/publications/educational_leadership/apr09/vol66/num07/The_Difficult_Road_for_Long-Term_English_Learners.aspx)
24 [_Long-Term_English_Learners.aspx](http://www.ascd.org/publications/educational_leadership/apr09/vol66/num07/The_Difficult_Road_for_Long-Term_English_Learners.aspx)> (last visited April 18, 2013).

25 103. The denial of English language instructional services to EL students accordingly results
26 in long-term academic failure. Laurie Olsen, *Reparable Harm: Fulfilling the Unkept Promise of*
27 *Educational Opportunity for California’s Long Term English Learners* 15 (Californians Together, 2010).
28 “Research on the effectiveness of various English Learner settings and programs shows that placement

1 of English Learners into 'mainstream' classes without English Learner support produces (over time) the
2 worst outcomes. Students who have been in these settings in elementary school are the lowest achievers
3 in comparison to students in any specially designed English Learner program. By middle school and
4 high school, EL students who have been in any form of specialized instruction are more likely to score
5 at grade level and less likely to drop out of high school than those who were in mainstream settings.”

6 Laurie Olsen, *Reparable Harm: Fulfilling the Unkept Promise of Educational Opportunity for*
7 *California's Long Term English Learners* 15 (Californians Together, 2010).

8 104. In contrast, EL students who have been given specialized instruction are more likely to
9 score at their appropriate grade level and are less likely to drop out of high school than those who are
10 placed into mainstream instructional courses without English language instructional services. *Id.* The
11 years during which EL children should have been equipped with the skills to access the content of their
12 education can never be returned to them. Each additional day an EL child goes without English
13 language instructional services is another day that she is effectively foreclosed from a meaningful
14 education.

15 105. This is confirmed by the experiences of the Petitioner EL school children in this action.
16 In 2012, Petitioner C.L. asked her son F.S.'s teacher why he did not receive any grades for the English
17 Language Development class during his third grade year, and the teacher said that F.S. did not receive a
18 grade because the teacher did not provide the service. F.S.'s teacher noted that F.S. was at risk of
19 retention, and needed improvement in reading and English. In September 2012, Petitioner C.L. learned
20 that her son would have to repeat the third grade. Petitioner C.L. also received progress reports from her
21 daughter B.S.'s teacher. The reports indicated "NA" for English Language Development," and a teacher
22 note indicated that B.S. had difficulty reading. Months later, the same teacher determined that B.S.
23 would have to repeat the first grade. Petitioner M.R. did not understand why her son S.M.'s report card
24 had "NA" next to the class for English Language Development. When Petitioner M.R. asked a teacher
25 why the English Language Development class had been marked with an "NA," the teacher informed
26 M.R. that the "NA" meant they didn't teach the course during that time. By the end of the third grade,
27 after S.M. was denied English language instructional services for half the school year, S.M.'s English
28 reading, writing and listening scores dropped by a proficiency level.

1 106. Unless enjoined, Respondents will continue to violate the right to an education and the
2 right to receive equal protection of the laws under the California Constitution, State law, and the EEOA,
3 and Petitioner students, other English learner students, and the general public will suffer irreparable
4 harm.

5
6 **FIRST CAUSE OF ACTION**

7 **(AGAINST ALL DEFENDANTS)**

8 **(Writ of Mandate (Civ. Proc. Code, § 1085) – Violation of the Equal Protection Clauses of the**
9 **California Constitution, Article I, Section 7(a) & Article IV, Section 16(a))**

10 107. Petitioners incorporate by reference the foregoing paragraphs of this Petition as though
11 fully set forth herein.

12 108. Respondents have a clear and present State-mandated duty under Article I, Section 7(a)
13 and Article IV, Section 16(a) of the California Constitution to ensure that EL students receive the equal
14 protection of the laws. This requires Respondents to ensure the delivery of language instructional
15 services to ELs so that no EL is effectively foreclosed from a meaningful education. Thus, Respondents
16 have a duty to ensure that school districts do not discriminate against ELs by failing to address EL
17 language barriers.

18 109. Respondents have knowingly violated and continue to violate the rights of Petitioners to
19 receive equal protection of the laws, pursuant to Article I, Section 7(a) and Article IV, Section 16(a) of
20 the California Constitution, by failing to provide them with basic educational opportunities equal to
21 those that other students in California receive. Respondents are on notice of the statewide serious
22 noncompliance with the requirement that ELs receive language instructional services. Through its
23 existing reporting mechanism and failure to act, the State is perpetuating the continued denial of services
24 by its acceptance of no services reports without consequences. Respondents' failure to guarantee
25 language instructional services for all students results in State-maintained discrimination that works to
26 the disadvantage of English language learner students. Respondents have always had the legal capacity
27 to fulfill their obligations to Petitioners but have failed to do so.

28 110. Petitioners seek injunctive relief enjoining Respondents from permitting school districts

1 to deny English language instruction to students identified as ELs.

2 111. Unless enjoined, Respondents will continue to violate the right to receive equal
3 protection of the laws under the California Constitution, and Petitioner students will suffer irreparable
4 harm.

5 112. Petitioners seek a writ of mandate to issue directing Respondents to perform ministerial
6 acts required by law, namely to: (1) cease doing nothing in response to reports from districts indicating
7 that nothing is being done to serve EL students; and (2) establish policies and procedures to effectively
8 ensure that all EL students in California public schools receive required English language instructional
9 services

10
11 **SECOND CAUSE OF ACTION**

12 **(AGAINST ALL DEFENDANTS)**

13 **(Writ of Mandate (Civ. Proc. Code, § 1085) – Violation of Article IX, Sections 1 and 5 of the**
14 **California Constitution)**

15 113. Petitioners incorporate by reference the foregoing paragraphs of this Petition as though
16 fully set forth herein.

17 114. Respondents have a clear and present State-mandated duty under article IX, sections 1
18 and 5 of the California Constitution to ensure that ELs receive access to an education. This requires
19 Respondents to ensure the delivery of language instructional services to ELs so that no EL is effectively
20 foreclosed from a meaningful education.

21 115. Respondents have breached their clear and present State-mandated duty in violating the
22 rights of Petitioners and those similarly situated, pursuant to Article IX, Sections 1 and 5 of the
23 California Constitution, to learn in a “system of common schools” that are “kept up and supported” such
24 that students may learn and receive the “diffusion of knowledge and intelligence essential to the
25 preservation of the[ir] rights and liberties.” Through its existing reporting mechanism and failure to act,
26 the State is perpetuating the continued denial of services by its acceptance of no services reports without
27 consequences. Respondents are on notice of the statewide serious noncompliance with the requirement
28 that ELs receive language instructional services.

1 116. Petitioners seek injunctive relief enjoining Respondents from permitting school districts
2 to deny English language instruction to students identified as ELs.

3 117. Unless enjoined, Respondents will continue to violate the right to receive equal
4 protection of the laws under the California Constitution, and Petitioner students will suffer irreparable
5 harm.

6 118. Unless enjoined, Respondents will continue to violate the right to education under the
7 laws under the California Constitution, and Petitioner students and the general public will suffer
8 irreparable harm.

9 119. Petitioners seek a writ of mandate to issue directing Respondents to perform ministerial
10 acts required by law, namely to: (1) cease doing nothing in response to reports from districts indicating
11 that nothing is being done to serve EL students; and (2) establish policies and procedures to effectively
12 ensure that all EL students in California public schools receive required English language instructional
13 services

14
15 **THIRD CAUSE OF ACTION**

16 **(AGAINST ALL DEFENDANTS)**

17 **(Writ of Mandate (Civ. Proc. Code, § 1085) – Violation of the Equal Education Opportunities Act**
18 **of 1974 (20 U.S.C. § 1700, et seq.)**

19 120. Petitioners incorporate by reference the foregoing paragraphs of this Petition as though
20 fully set forth herein.

21 121. Respondents have a clear and present mandatory federal duty to ensure equal educational
22 opportunity to any person. The law specially enjoins the State to take appropriate action to overcome
23 language barriers that impede the equal participation by its students in its instructional programs. Thus,
24 Respondents have a duty to ensure that school districts do not discriminate against ELs by failing to take
25 any action to address EL language barriers.

26 122. Respondents have denied Petitioner students educational opportunity by Respondents'
27 failure to guarantee that EL students receive some sort of language instructional services. Respondents'
28 refusal to ensure the delivery of EL services is not based on any sound educational theory.

1 123. Respondents' practices are not reasonably calculated to effectively implement any sound
2 educational theory to enable English language learner students to participate in the instructional program
3 of the district. Respondents have failed to create and implement a constitutionally-permissible means to
4 address the language barriers of EL students.

5 124. For more than a decade, the State has abdicated its responsibility to ensure that EL
6 students are provided the English language instructional services required for English language learners.
7 Ten years is far more than a sufficient period of time for anyone to unequivocally conclude that this
8 practice fails to overcome the language barriers that EL students face, resulting in the creation of a dual
9 system of learning in which the EL students unfortunate enough to attend certain districts will be placed
10 in a permanent dead-end track. Through its existing reporting mechanism and failure to act, the State is
11 perpetuating the continued denial of services by its acceptance of no services reports without
12 consequences. Respondents are on notice of the statewide serious noncompliance with the requirement
13 that ELs receive language instructional services.

14 125. Petitioners seek injunctive relief enjoining Respondents from permitting school districts
15 to deny English language instruction to students identified as EL students.

16 126. Unless enjoined, Respondents will continue to violate the right to receive equal
17 protection of the laws under the EEOA, and Petitioners, other EL students, and the general public will
18 suffer irreparable harm.

19 127. Petitioners seek a writ of mandate to issue directing Respondents to perform ministerial
20 acts required by law, namely to: (1) cease doing nothing in response to reports from districts indicating
21 that nothing is being done to serve EL students; and (2) establish policies and procedures to effectively
22 ensure that all EL students in California public schools receive required English language instructional
23 services

24
25 **FOURTH CAUSE OF ACTION**

26 **(AGAINST ALL DEFENDANTS)**

27 **Violation of Government Code, § 11135**

28 128. Petitioners incorporate by reference the foregoing paragraphs of this Petition as though

1 fully set forth herein.

2 129. Respondents constitute State agencies that receive State funding.

3 130. Respondents have engaged in the outwardly facially neutral practice of failing to address
4 the educational and language needs of English learners.

5 131. Section 11135 of the Government Code provides that “[n]o person in the State of
6 California shall, on the basis of race, national origin, ethnic group identification, . . . color, genetic
7 information . . . be denied full and equal access to the benefits of, or be unlawfully subjected to
8 discrimination under, any program or activity that is conducted, operated, or administered by the state or
9 by any state agency, is funded directly by the state, or receives financial assistance from the state.”
10 Further, the Legislature amended section 11139 of the Government Code to provide for a private right of
11 action under section 11135.

12 132. The absence of services denies access to the benefits of a public education
13 disproportionately to EL students, who are almost certainly to be students of color in all instances.
14 Respondents’ failure to guarantee language instructional services allows a method of administration of
15 the English language learner program that has the effect of substantially impairing the accomplishment
16 of the objectives of the State’s system of common schools with respect to ELs. The denial of English
17 language learner instructional services denies EL students the opportunity to obtain the education
18 received by other students in the school system.

19 133. The provision of education is a program or activity conducted, operated, or administered
20 by the State. Admin. Code tit. 22, § 98010.

21 134. Respondents have intentionally engaged in activity that has the effect of unlawfully
22 discriminating on the basis of race and national origin in the administration of education, a State
23 program.

24 135. Because the State of California has taken the position that it has no duty to act when
25 districts report that they will decline to provide the language instructional services required for English
26 learners, Petitioners have no administrative remedy available to them to resolve this matter.

27 136. Petitioners are entitled to injunctive relief.
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FIFTH CAUSE OF ACTION
(AGAINST ALL DEFENDANTS)
Violation of California Code of Civil Procedure § 526a
(Illegal Expenditure of Taxpayer Funds)

137. Petitioners incorporate by reference the foregoing paragraphs of this Petition as though fully set forth herein.

138. Petitioners, and their members, have within the last year, each been assessed for, and are liable to pay, taxes in the counties in which they reside, and pay income taxes to the State of California and United States of America.

139. Respondents received State and federal funds which have been appropriated and allocated to the Respondents, California Department of Education and Defendant State Board of Education, for the purpose of complying with State and federal mandates regarding specialized education programs for all EL students, including monitoring and oversight mandates as alleged herein.

140. By failing to implement adequate monitoring and oversight of these programs and otherwise failing to take steps to ensure equal educational access for all EL students, as alleged herein, Respondents have unlawfully diverted money intended for monitoring and oversight to other uses in violation of State and federal law.

141. Respondents, through the actions of their agents, have expended tax moneys and threaten to continue and will continue to expend tax monies in an illegal manner in violation of State law as alleged in this Petition.

142. Petitioner taxpayers have suffered and continue to suffer irreparable injury and are without a plain, speedy, and adequate remedy in the ordinary course of the law to compel Respondents to enforce and comply with the legal requirements outlined in this Petition, thereby rendering a Writ of Mandate appropriate. There is no provision in law for a taxpayer to receive money damages for unlawful governmental conduct; money damages would be difficult to ascertain; and money damages would not adequately compensate taxpayers for unlawful governmental activity.


143. There is no provision in law for a taxpayer to receive money damages for unlawful governmental conduct; money damages would be difficult to ascertain; and money damages would not

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- d. Article IX, Sections 1 and 5 of the California Constitution;
- a. Section 11135 of the California Government Code;
- 4. For cost of this suit and reasonable attorney's fees;
- 5. For such further equitable and legal relief as this Court deems just and appropriate.

Dated:

Respectfully submitted,

By 

JESSICA PRICE
ACLU FOUNDATION OF SOUTHERN
CALIFORNIA
Attorney for Petitioners

VERIFICATION

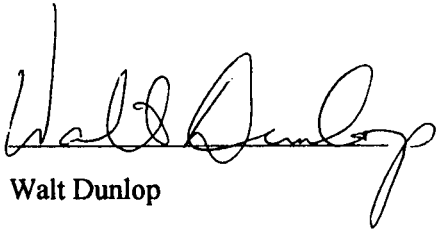
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I, Walt Dunlop, being first duly sworn, depose and say:

I am a Petitioner/Plaintiff in the above-entitled action. I have read the foregoing verified petition for writ of mandate and complaint for injunctive and declaratory relief and the facts alleged therein are within my knowledge and I know them to be true, except as to matters therein stated on information and belief, and as to facts alleged about other petitioners in paragraphs 17-25, 54, 70 and 97, and as to those matters, I believe them to be true.

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

Dated: 4-22-2013


Walt Dunlop