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11 SUPERIOR COURT OF CALIFORNIA

12 COUNTY OF ALAMEDA

13 LORENZO AVILA, a taxpayer, and as) Case No. RG03110397
14 Guardian Ad Litem for Francisco Ching Avila)
and Pablo Ching Avila, minors,) **PROPOSED INTERVENERS'**
15) **MEMORANDUM OF POINTS AND**
Plaintiff,) **AUTHORITIES IN SUPPORT OF**
16) **THEIR MOTION FOR LEAVE TO**
-vs-) **FILE COMPLAINT IN**
17) **INTERVENTION**

18 BERKELEY UNIFIED SCHOOL DISTRICT, and)
19 MICHELE LAWRENCE, in her official Capacity as)
Superintendent of Berkeley Unified School District,)

20 Defendants,)

21 and)

22 KEVIN ADKINSON, on his own behalf)
and as Guardian Ad Litem for Kamali Adkinson,)
a minor, REBECA MIRELES, on her own behalf and)
23 as Guardian Ad Litem for Maya and Marina Rios,)
minors, and ROBIN SILVERMAN,)
24 on her own behalf and as Guardian Ad)
Litem for Noah St. John, a minor, UEAA, and)
25 BAMN.)

26 Proposed Interveners.)

) Date: March 8, 2004
) Time: 9:00 AM
) Dept.: 31
) Judge: James A. Richman
) Action Filed: Aug. 6, 2003
) Trial Date: None Set
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Gary Orfield and John T. Yun, *Resegregation in American Schools* (The Civil Rights Project, Harvard University, 1999).....6

1 equality; and to ban any conscious effort to achieve integration—knowing full well that a ban on
2 conscious efforts to achieve integration inevitably would mean the return of segregation in
3 Berkeley and throughout California.

4 The Foundation’s suit rests on a sleight of hand—it claims that any consideration, any
5 recognition of race is somehow a preference based on race. It asks this Court to adopt a
6 contention that the electorate of California decisively rejected when it voted down Proposition 54
7 by a two-to-one margin.

8 The proposed interveners reject the plaintiff’s spurious claim that the plan at issue
9 contains any element of unlawful discrimination or preference. On the contrary, the Berkeley
10 plan is necessary in order to prevent rank discrimination, inequality, and segregation. The
11 Berkeley plan is necessary to achieve the educational equality and intellectual vitality that can
12 only be achieved in diverse, integrated schools.

13 The contradictions of 1964 are still with us—albeit in a different form. We inherit and
14 live a history of planned racial segregation and inequality. But we also honor and proudly aspire
15 to the moments when the struggle for equality has shined forth: in the courage of James Cheney,
16 Andrew Goodman, and Michael Schwerner; in *Brown*; in the protest marches of Mexican-
17 American and Filipino grape workers; and in the March on Washington and the speech that
18 galvanized a nation.

19 The plan under challenge is another shining example. The proposed interveners seek to
20 defend it and the real gains that it has brought to their lives. They ask this Court to grant them
21 intervention into this case to defend their right to an equal and integrated elementary education.

22 **ARGUMENT**

23 Intervention is governed by California Code of Civil Procedure section 387. Section 387,
24 subdivision (a), governing permissive intervention, provides that in the court’s discretion “any
25 person, who has an interest in the matter in litigation, or in the success of either of the parties, or
26

1 an interest against both, may intervene in the action or proceeding.” Section 387, subdivision (b)
2 provides for mandatory intervention when

3 “the person seeking intervention claims an interest relating to the property or transaction
4 which is the subject of the action and that person is so situated that the disposition of the
5 action may as a practical matter impair or impede that person’s ability to protect that
6 interest, unless that person’s interest is adequately represented by existing parties.”

7 The purpose of these provisions is “to promote fairness by involving all parties
8 potentially affected by a judgment.” *Simpson Redwood Co. v. State of California*, 196 Cal. App.
9 3d 1192, 1100 (1987). Allowing intervention also serves judicial economy by preventing
10 multiplicity of actions. *People ex rel. Rominger v. County of Trinity*, 147 Cal. App. 3d 655, 660
11 (1983). Accordingly, section 387 should be liberally construed in favor of intervention. *Simpson*,
12 *supra*, 196 Cal. App. 3d at 1200; *Mary R. v. B. & R. Corp.*, 149 Cal. App. 3d 308, 315 (1983);
13 *Fireman’s Fund Ins. Co. v. Gerlach*, 56 Cal. App. 3d 299, 302 (1976).

14 Under both subdivisions of section 387, the proposed interveners are clearly entitled to
15 intervene.¹

16 **A. The proposed interveners meet the requirements of permissive intervention
17 under California Code of Civil Procedure section 387, subdivision (a).**

18 Under the requirements of permissive intervention, a proposed intervener must
19 demonstrate that she has a sufficient interest in the litigation; that intervention will not
20 impermissibly enlarge the issues in the litigation; and that the reasons for intervention outweigh
21 the right of the original parties to litigate in their own manner. *See, e.g., Reliance Insurance Co.*
22 *v. Superior Court*, 84 Cal. App. 4th 383, 386 (2000); *Rominger, supra*, 147 Cal. App. 3d at 664.
23

24 ¹ Both subdivisions require a “timely application.” That requirement has been met here. The
25 complaint was filed in August 2003 and served in November 2003, approximately three months
26 ago. The defendants’ demurrer to the complaint will be the subject of a hearing currently set for
February 20, 2004. The first case management conference has been moved to April 2004. No
discovery has yet occurred.

1 **1. The proposed interveners’ interests are more than sufficient for**
2 **permissive intervention.**

3 An intervener must possess a direct and immediate interest in the litigation: he must stand
4 to either “gain or lose by the direct legal operation and effect of the judgment.” *Rominger, supra*,
5 147 Cal. App. 3d at 660 (citation omitted). It is not necessary that his interests “will *inevitably* be
6 affected by the judgment. It is enough that there be a substantial *probability* that his interests will
7 be so affected.” *Timberidge Enterprises, Inc. v. City of Santa Rosa*, 86 Cal. App. 3d 873, 881
8 (1978) (emphasis in original). The interest need not be pecuniary. *Rominger, supra*, 147 Cal.
9 App. 3d at 661. Indeed, it is not necessary that an intervener possess any specific legal or
10 equitable interest in the subject matter of the litigation. *Id.*

11 In accordance with these parameters, the courts have granted permissive intervention to
12 parties with a broad range of interests. For example, in *Rominger, supra*, the Court of Appeal
13 reversed a trial court ruling that had denied the Sierra Club intervention into an action by the state
14 alleging preemption of county ordinances that controlled the use of certain herbicides. Because
15 the Sierra Club’s members might be harmed if use of the herbicides resumed, its interest was
16 adequate, and the refusal of the trial court to allow it to intervene was an abuse of discretion.
17 *Rominger, supra*, 147 Cal. App. 3d at 663-663. In *Highland Development Company v. City of*
18 *Los Angeles*, 170 Cal. App. 3d 169 (1985), the Court of Appeal found the intervention had been
19 properly granted to a homeowner’s association in a district abutting the construction zone at issue
20 in the litigation; the contiguous physical relationship alone gave rise to a sufficient interest under
21 section 387, subdivision (a). 170 Cal. App. 3d at 179.

22 Permissive intervention has also been allowed into school desegregation litigation. In
23 *Bustop v. Superior Court*, 69 Cal. App. 3d 66 (1977), an organization of white parents opposed to
24 integrationist busing sought to intervene in litigation over the compliance of a school assignment
25 plan with the Supreme Court’s mandate in *Crawford v. Board of Education*, 17 Cal. 3d 280
26 (1976). Both the plaintiff and the defendant District opposed intervention, and the trial court

1 | agreed, denying Bustop’s petition to intervene. *Bustop, supra*, 69 Cal. App. 3d at 70. The Court
2 | of Appeal reversed and issued a peremptory writ of mandate directing the trial court to grant the
3 | petition, rejecting the argument that Bustop did not have a sufficient interest because no student
4 | has a right to assignment at any particular school. Rather, the Court found that the “direct social,
5 | educational, and economic impact” of school reassignment gave rise to a sufficient interest. *Id.*
6 | at 71.

7 | The interests of the proposed interveners here are far more substantial and at least as
8 | direct as the interests asserted in these cases and others in which permissive intervention has been
9 | granted on appeal on a finding of abuse of discretion.²

10 | It is incontestable that the elementary school students who seek to intervene—through
11 | membership in the coalition United for Equality and Affirmative Action (UEAA) and as
12 | individuals—have a profound and immediate interest in attending integrated and diverse schools.
13 | Six months ago the United States Supreme Court confirmed that the state has a compelling
14 | interest in racial integration and diversity in higher education. *Grutter v. Bollinger*, __ U.S. __,
15 | 123 S.Ct. 2325 (2003). If the state’s interest in the context of higher education is compelling, the
16 | students’ own interest in the context of primary education is far more so. The Berkeley students’
17 | experience of attending racially integrated primary schools is precious and irreplaceable. A
18 | judgment against the District would gravely harm this interest of *all* students.

19 | Such a judgment would also harm a distinct though related interest of black, Latino, and
20 | Asian-American students: the right to equal educational opportunity. Education is a fundamental
21 | right under the California Constitution. *Butt v. State of California*, 4 Cal. 4th 668, 683 (1992);

22 |
23 | ² As will be further detailed below at pages 10-12, the proposed interveners’ interests are different
24 | from those of the District and will not be adequately represented absent intervention. While the
25 | District has to date legally defended the plan, it has also very recently abandoned its actual use.
26 | On February 4, 2004, the School Board voted to adopt a new student assignment plan that does
not take account of the race of individual students. The specific defense of race-conscious
assignment may therefore turn on the participation of the interveners. More generally, the
District, unlike the proposed interveners, has a broad range of administrative, political, and
potential legal concerns that compete with its concern to desegregate the schools.

1 *Serrano v. Priest*, 18 Cal. 3d 728, 767-768 (1977). The recent experience of school districts
2 across the country makes it clear that if the plan were dismantled, the District would resegregate.
3 Black, Latino, and Asian-American students would find themselves in increasingly racially
4 isolated, inferior, and inadequate schools. See Gary Orfield and John T. Yun, *Resegregation in*
5 *American Schools* 13-16 (The Civil Rights Project, Harvard University, 1999). As the Supreme
6 Court recognized in its best known and most revered sentence, “[s]eparate educational facilities
7 are inherently unequal.” *Brown, supra*, 347 U.S. at 495.

8 Second-class education is a preparation for second-class citizenship. The minority
9 children here must not be relegated to the sidelines of this litigation while their basic right to
10 equality is debated by others. Since *Brown*, young people, together with their parents, have
11 struggled for equal educational opportunity as a necessary prerequisite to full citizenship and
12 democracy. The students have an interest in their diverse city’s continuing to strive for the full
13 and democratic participation of all.

14 The parents who seek to intervene have a substantial interest in their children’s access to
15 integrated and equal educational conditions:

16 The injury [the plaintiffs, black parents,] identify—their children’s diminished ability to
17 receive an education in a racially integrated school—is, beyond any doubt, not only
18 judicially cognizable, but ... one of the most serious injuries recognized in our legal
19 system.

20 *Allen v. Wright*, 468 U.S. 737, 756 (1984).

21 The parents also have interests as taxpayers commensurate with those of the plaintiff: if
22 the plaintiff prevails, their money will be used to finance the resegregation of the District against
23 the will of the overwhelming majority of its residents.

24 The teachers and administrators who work in Berkeley’s elementary schools possess a
25 shared interest in the maintenance of integration because it is the most fundamental—and the
26 most positive—element of their working conditions. As with the other proposed interveners,

1 their interest in the intellectual vibrancy and social health of Berkeley's schools is more than
2 sufficiently significant for permissive intervention.

3 Some of the parents and teachers themselves attended Berkeley elementary schools
4 integrated under earlier iterations of the plan under attack. These community members have a
5 special commitment to the maintenance of an integrated school system in Berkeley.

6 UEAA is an umbrella organization including the Berkeley elementary school students
7 and parents discussed above; the District employees discussed above; and other supporters of
8 integration and equality in Berkeley, elsewhere in California, and in other states. It was formed
9 for the purpose of defending race-conscious admissions policies in higher education in *Grutter v.*
10 *Bollinger, supra*, and was a named intervener in that case. UEAA was also a plaintiff in civil
11 rights litigation in defense of the democratic right of residents of the Detroit, Michigan School
12 District to determine school policy by electing the Detroit School Board. UEAA's interest
13 derives from its representation of its members. *See Rominger, supra*, 147 Cal. App. 3d at 664
14 (concluding that the Sierra Club was entitled to intervention as representative of its members,
15 whose interests were threatened by the underlying litigation).

16 The Coalition to Defend Affirmative Action and Integration and Fight for Equality By
17 Any Means Necessary (BAMN) is an organization founded in Berkeley in 1995 in response to the
18 elimination of affirmative action policies at the University of California. BAMN has since led the
19 effort to win reversal of that policy, resulting in a unanimous vote by the U.C. Regents in May
20 2001, and was the driving force behind the national March on Washington in April 2003. Like
21 UEAA, BAMN was an intervening defendant in *Grutter v. Bollinger*. Michigan counsel in this
22 case represented the intervening student defendants in that case before the district court, the Sixth
23 Circuit, and the United States Supreme Court. BAMN members have participated in public
24 hearings held by the District's Student Assignment Committee and spoken at School Board
25 meetings on desegregation and student assignment. BAMN also spearheaded a successful
26 campaign to defend the plan here under challenge when the Pacific Legal Foundation attempted

1 to intimidate the District into abandoning it several years ago. BAMN has worked on an ongoing
2 basis with teachers and students at Berkeley High School on the challenge to maintain integration
3 and to limit the reach of Proposition 209 in the District and in higher education. *See Highland,*
4 *supra*, 170 Cal. App. 3d at 180 (prior involvement of homeowners' association in activities
5 relating to the underlying litigation sufficient to trigger *mandatory* intervention); *see also Simac*
6 *Design v Alciati*, 92 Cal. App. 3d 146, 157 (1979).

7 **2. Intervention will not impermissibly enlarge the issues in the**
8 **litigation.**

9 The proposed interveners' participation in the case will not impermissibly enlarge the
10 issues. Like the District, the proposed interveners assert that the plaintiff's claim has no legal
11 basis. However, should further proceedings become necessary, the pleadings demonstrate that
12 this lawsuit involves the mechanics of the student assignment plan, the benefits of integration,
13 and the status of Proposition 209—Article I, section 31 of the California Constitution—in relation
14 to other provisions of state and federal law. The attached proposed complaint in intervention
15 shows that the applicants do not seek to bring into the proceedings any issues not already
16 implicated. *See Simpson, supra*, 196 Cal. App. 3d at 1202 (new causes of action introduced by
17 intervener turned on essentially same facts as existing causes of action and would not cause
18 undue delay, confusion, or enlargement of the scope of the litigation).³

19 **3. The proposed interveners' interests outweigh the right of the**
20 **original parties to litigate in their own manner.**

21 Because the proposed interveners are the direct beneficiaries of the plan being
22 challenged, and because what is at stake is the character and quality of their education, their
23 future, and their community, their interests are exceptionally intense and compelling. The

24 ³ The proposed interveners will ask the Court for a postponement of the hearing on the
25 defendants' demurrer to plaintiffs' complaint, which is currently set for February 20, 2004, until
26 after the Court has had the opportunity to rule on their motion, which is set for hearing on March
8, 2004, so that they may take part in that proceeding if intervention is granted. Other than this
brief postponement, their participation in the litigation will not cause undue delay.

1 original parties' interest in litigating in their own manner is incapable of outweighing those
2 interests. *See Rominger, supra*, 147 Cal. App. 3d at 665 (interests of direct beneficiaries of
3 challenged ordinance sufficiently compelling to overcome interest of original parties in litigating
4 on their own terms).

5 Because the proposed interveners surpass the standards for permissive intervention
6 pursuant to section 387, subdivision (a), the Court should grant them leave to file the attached
7 proposed complaint in intervention.

8 **B. The proposed interveners meet the requirements of mandatory intervention**
9 **under California Code of Civil Procedure section 387, subdivision (b).**

10 Under the requirements of mandatory intervention, a proposed intervener must show that
11 she has an interest in the subject matter of the litigation, that she is so situated that the litigation
12 may as a practical matter impede or impair her ability to protect her interest, and that her interest
13 is not adequately represented by existing parties. Cal. Code Civ. Proc. 387(b); *Coalition for Fair*
14 *Rent v. Abdelnour*, 107 Cal. App. 3d 97, 114 (1980).

15 **1. The proposed interveners' interests are sufficient for mandatory**
16 **intervention.**

17 The interests detailed above at pages 5-8 are clearly sufficient for mandatory
18 intervention. The children's interest speaks for itself. The interest of their parents is "one of the
19 most serious [interests] recognized in our legal system." *Allen, supra*, 468 U.S. at 756. The
20 interest of the teachers and other school employees is a fundamental interest in their daily
21 conditions of work. UEAA's interest follows from the interests of its members, the students,
22 parents, and District employees. BAMN's interest is established by its substantial history of
23 engagement with the subject matter of the litigation, as well as its broader commitment to the
24 cause of integration. *Highland, supra*, 170 Cal. App. 3d at 180.

25 **2. The proposed interveners are situated such that the litigation may as**
26 **a practical matter impair their ability to protect their interests.**

1 This is public impact litigation, not a lawsuit to reallocate obligations between discrete
2 private parties. The outcome of the case will set school assignment policy throughout the district
3 in which the proposed interveners reside. It is therefore plain that they are situated in such a way
4 that any negative outcome for the plan under challenge, or for integration in the District more
5 generally, would not merely impair but eliminate their ability to protect their compelling and
6 immediate interests. See *Rominger, supra*, 147 Cal. App. 3d at 664 (reversing trial court’s denial
7 of intervention on partial grounds that “if the prohibition against [the] herbicides is invalidated, it
8 is invalidated as to *all* persons in the County...” (emphasis in original).

9 **3. The existing parties do not adequately represent the proposed**
10 **intervenors’ interests.**

11 Finally, the proposed interveners’ interests are adequately represented by neither the
12 District nor obviously the plaintiff.

13 First, the students’ interests are different from and of necessity deeper and simpler than
14 those of the defendants. The interveners are the direct beneficiaries of the plan. Unlike the
15 defendants, they are not charged with the duty of managing the schools, and they are not subject
16 to the pressures attendant on public administration, such as cost pressures and competing political
17 pressures. The interveners’ commitment to the 1995 plan is unalloyed.

18 Differences and potential conflicts in role and position between an existing party and a
19 proposed intervener *with an identical view of the merits* militate in favor of granting intervention.
20 In *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates*, 43 Cal.
21 App. 4th 1188 (1996), the Court of Appeal reversed the trial court’s negative rulings on both
22 permissive and mandatory intervention, holding that the proposed intervener, the Department of
23 Finance, should have been allowed to intervene because in light of the relationship between the
24 two entities, “the Commission cannot be said to have adequately represented all the interests of
25 DOF, even though its staff agreed with DOF’s position on the merits.” *Id.* at 1198.
26

1 Further, when a proposed intervener seeks the same result as an existing party, the
2 possibility that the latter will settle can be a “telling factor” in favor of granting intervention.
3 *Simpson, supra*, 196 Cal. App. 3d at 1203. In *Simpson*, the intervener and the State of California
4 sought the same outcome in a quiet title action brought against the State: the defeat of the
5 plaintiff’s claim and the maintenance of the status quo. But in part because there was a risk that
6 the State might choose to settle the lawsuit, and even though the risk was hypothetical, the Court
7 of Appeal reversed the trial court’s denial of the intervener’s application so that the intervener
8 could itself represent its interest in the property in question. *Id.* at 1196-1200, 1203-1204.

9 Here the divergence in interests and roles and the risk of settlement are concrete. On
10 February 4, 2004, five days before the filing of these papers, the Berkeley School Board voted to
11 adopt a new student assignment plan. The new plan, while designed to maintain racial integration
12 in Berkeley’s schools, abandons the direct use of race as a factor in assignment. With the Court’s
13 permission, the proposed interveners will join the District in defending any plan that promotes
14 diversity and integration in Berkeley’s schools, including the new one if it should fall subject to
15 challenge. However, they assert an additional and compelling interest in defending the legality of
16 the plainly race-conscious 1995 plan to which the plaintiff objected in the complaint on grounds
17 that it is a far better, clearer, and more integrationist plan.

18 The interveners’ interest in defending the 1995 plan is the direct expression of their
19 interest in the principle of race-conscious decision-making—both for its own sake, as a positive
20 and healthy recognition of the racial inequality that continues to plague our society, and as the
21 indispensable means to the most compelling end: the achievement of equality. History shows
22 that progress toward integration requires clearly and explicitly race-conscious methods. When
23 such methods are abandoned, regression inevitably occurs.

24 Therefore, whether or not the defendants continue to defend the 1995 plan, the
25 interveners seek to do so. A judicial declaration that it is lawful will enable the proposed
26 interveners to seek its reinstatement through the democratic process that has sustained Berkeley’s

1 desegregation plan for forty years. In this way the interveners will struggle to bequeath to their
2 own children an even better, even more equal and integrated education in an even better, even
3 more equal and integrated Berkeley.

4 **CONCLUSION**

5 For the above reasons, the proposed interveners Kevin Adkinson, *et al.* respectfully
6 request that the Court grant them leave to file the attached proposed complaint in intervention
7 pursuant to California Code of Civil Procedure section 387, subdivisions (a) and (b).

8
9 Dated: February 9, 2004

By Attorneys for Proposed Intervenors,

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11 _____
KEVIN PIMENTEL, No. 203952

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MIRANDA K.S. MASSIE*
16 GEORGE B. WASHINGTON*
JODI-MARIE MASLEY*
17 SHANTA DRIVER*
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18
19 * *Admitted to practice in Michigan. Motion to admit pro haec vice forthcoming.*