[MS-039/002.002.025]

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

RICHARD LOPEZ and JOSEPH ANDAYA, on behalf of themselves and all others similarly situated, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), Western Region, LEAGUE OF WOMEN VOTERS OF SAN DIEGO, and CITIZENS UNITED FOR RACIAL EQUALITY (CURE),

Petitioners,

vs.

STATE ALLOCATION BOARD, WILSON C. RILES, VERNE ORR, LAWRENCE R. ROBINSON, JR., ALBERT S. RODDA, LOU CUSANOVICH, LEROY F. GREENE, and DIXON ARNETT, as members of the State Allocation Board,

Respondents.

No. _____

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

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IN THE SUPREME COURT OF THE

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RICHARD LOPEZ and JOSEPH ANDAYA, on behalf of themselves and all others similarly situated, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), Western Region, LEAGUE OF WOMEN VOTERS OF SAN DIEGO, and CITIZENS UNITED FOR RACIAL EQUALITY (CURE),	
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Respondents.	

PETITION FOR WRIT OF MANDATE

TO THE HONORABLE DONALD R. WRIGHT, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioners, RICHARD LOPEZ, JOSEPH ANDAYA, NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, Western Region, LEAGUE OF WOMEN VOTERS OF SAN DIEGO, and CITIZENS UNITED FOR RACIAL EQUALITY, respectfully petition this Court for a Writ of Mandate and in support of their petition allege as follows:

INTRODUCTION

I

This petition is for a writ of mandate to compel the California State Allocation Board to comply with the Federal and State Constitutions by taking all necessary steps to insure that

the $325,000,000 of public funds now being allocated by it for school construction purposes pursuant to the School Housing Aid Act (Education Code §§ 19700.51 et seq.) will not be used to perpetuate racial and ethnic segregation in the state's schools.

Respondents' sole rationale for refusing Petitioners' demand that they not subsidize the construction of racially segregated schools is the recent passage of Proposition 21. Proposition 21, commonly called the Wakefield Anti-Busing Initiative, repealed state laws requiring the prevention and elimination of racial imbalance in the public schools. Proposition 21 is itself, however, in violation of the Federal and State Constitutions, and any reliance on it by Respondents to support their award of public monies for school construction on racially segregated sites results in unconstitutional racial segregation.

Unless this Court acts, the majority portion of the $325,000,000 will be readied for allocation by the Board's August 21, 1973 meeting; thereby condemning large numbers of California's minority students to continued racial segregation.

RESPONDENTS

II

Respondents are the CALIFORNIA STATE ALLOCATION BOARD and its members: WILSON C. RILES, Superintendent of Public Instruction, VERNE ORR, Director of Finance, LAWRENCE R. ROBINSON, JR., Director of General Services, ALBERT S. RODDA, Senator, LOU CUSANOVICH, Senator, LEROY F. GREENE, Assemblyman, and DIXON ARNETT, Assemblyman. The State Allocation Board is responsible, pursuant to the School

Housing Aid Act (Education Code §§ 19700.51 et seq.), for apportioning $325,000,000 to local school districts for the replacement and repair of schools not conforming to the structural standards embodied in the Field Act. (Education Code §§ 15451 et seq.). In making these appropriations, Respondents are empowered to impose whatever qualifications and procedures it deems necessary "for determining the eligibility of [school] districts to apportionments ..." (Education Code § 19700.57(a).), including the condition that no portion of the state's funds can be used to cause or perpetuate racial and ethnic segregation.

PETITIONERS

III

Petitioners, RICHARD LOPEZ and JOSEPH ANDAYA, are students attending public schools who, unless this Court acts to require Respondents to allocate funds on the condition that local school districts do not expend funds to perpetuate or create racial segregation, will be condemned to attend racially segregated schools in their district for the indefinite future, to wit:

A. RICHARD LOPEZ is a ten year old Mexican-American student who attends school in the Stockton Unified School District. During this past year he was assigned to attend the McKinley Elementary school where he was in the fifth grade. McKinley is a racially and ethnically imbalanced school. Over 42% of the students are Spanish surname, 28% are Black, 12% are other minorities and only 16% of the students are Anglo. Also, the McKinley Elementary school was constructed in 1922 and fails to conform to the structural standards

established by the Field Act in 1933. To bring the McKinley Elementary school into compliance with the structural standards, the district plans to rebuild a new school on the same site. The enrollment at the new school, because it will be located on the same site, will also be racially imbalanced in that it will be 84% or more minority. (See Exhibit C-4).

B. JOSEPH ANDAYA is an eleven year old Mexican-American student at the Hazelton Elementary school in the Stockton Unified School District. He was enrolled in the fifth grade last school year. The Hazelton Elementary school has a heavy Spanish surname enrollment - over 40% and an additional 28% of the students are Black, Oriental or other minorities. Hence the Hazelton Elementary school is operated by the Stockton Unified School District as a racially imbalanced school. Hazelton was first occupied in 1916 and is a structurally inadequate school building. It is the plan of the Stockton Unified School District to replace Hazelton with a new school located on the same site. (See Exhibit C-4.) Replacing Hazelton on the same site will result in the continuation of the existing racial imbalance.

Stockton, typical of the other school districts slated to receive funds pursuant to the School Housing Aid Act, has ten elementary and one junior high school which can be brought into compliance with the Field Act only by rebuilding new facilities. Of those eleven schools, nine of them are also racially imbalanced as defined by the California Department of Education. The district plans to rebuild seven of the schools on the same sites, all but one

of which is presently racially and ethnically imbalanced. The remaining four schools will be abandoned and additional space will be constructed at other selected schools to handle the enrollments from those four schools. This plan, will at a minimum, perpetuate, and in some instances actually increase the amount of racial and ethnic segregation in the Stockton schools. (See Exhibit C-4 and Declaration of George W. McCormick analysing the impact of Stockton's plan on the racial enrollments attached as Exhibit D and incorporated herein by reference.)

IV

The foregoing Petitioners bring this action individually and on behalf of all other minority students who are attending and will attend racially imbalanced schools which are also structurally inadequate and who will continue to be assigned to racially segregated schools if their current schools are located on the same site. This class consists of persons too numerous to mention and joinder of all parties is impracticable. There are common questions of law and fact concerning their rights. The claims of the named Petitioners are typical of the class and they will fairly and adequately represent the class.

V

The organizational Petitoners herein, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Western Region, the LEAGUE OF WOMEN VOTERS OF SAN DIEGO, and CITIZENS UNITED FOR RACIAL EQUALITY are broad-based voluntary organizations whose members include parents of public school children, taxpayers, and citizens

of California, all of whom are vitally interested in and will be adversely affected if the $325,000,000 slated for the replacement and repair of public school buidlings is allocated and expended to perpetuate racial and ethnic segregation in California's public schools, to wit:

A. The NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Western Region, is a San Francisco based non-profit corporation whose membership is largely drawn from the Black community of the West Coast. It is primarily dedicated to the eradication of racial discrimination in all fields of economic and social life, but particularly in public education because it is instrumental to the achievement of so many other goals and rights. To this end, the NAACP, Western Region, has acted as both litigant and amicus in numerous federal and state cases concerned with equal educational opportunities, including many before this Court.

B. The LEAGUE OF WOMEN VOTERS OF SAN DIEGO is a local branch of the statewide organization of League of Women Voters of California. The San Diego League has been working for years to improve the quality of education in the San Diego Unified School District. It has conducted research studies and issued publications concerning the operations of the public schools in that district. An essential element of the League's involvement in San Diego has been their support of racial and ethnic integration as a component of quality education.

C. CITIZENS UNITED FOR RACIAL EQUALITY (CURE) is a non-profit corporation functioning as a civic league in San Diego,

California. The organization's purpose is to combat racism, support minority community efforts, and to present appeals to governmental institutions on matters affecting equal opportunity. C.U.R.E. specifically has appeared before the San Diego Board of Education expressing their opposition to the perpetuation of segregation by replacing pre-Field Act schools on the same sites.

VI

There are thirty-seven school districts in California attended by 1,334,179, or 30% of the state's total public school enrollment, which maintain school buildings that do not conform to the structural standards of the Field Act and are also racially and ethnically imbalanced. (A list of these 37 school districts with the number of non-conforming and racially imbalanced schools is attached as Exhibit A, and incorporated herein by reference.) Most of these local school districts plan to replace the present non-conforming schools with a new structure constructed on the same racially segregated site. For example, in seven major urban districts where approximately 70% of the reconstruction work is slated to take place, (A copy of the State Allocation Board's Report to the Legislature, dated December 31, 1972 is attached as Exhibit B and incorporated herein by reference.) the number of non-conforming schools, the number of these that are racially imbalanced, and the number to be replaced on a racially segregated site are as follows:

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Name of School District	Number of Schools: Non-Conforming (Field Act)	Racially Imbalanced	To Be Reconstructed on Racially Imbalanced Site
Los Angeles Unified	132	120	64
San Diego City Unified	25	15	10
San Jose City Unified	18	13	10
San Francisco Unified	55	23	19
Stockton Unified	11	9	6
Sacramento City Unified	20	11	no plan
Oakland Unified	32	25	no plan

(Copies of the rebuilding plans of San Diego, San Jose, San Francisco and Stockton, and statements of school officials in Los Angeles and Sacramento are contained in the declarations of J. Peter Bouvier attached hereto as Exhibit C, 1-6 and incorporated herein by reference.)

On information and belief, the remaining 30 school districts plan to replace most of their non-conforming school buildings on racially segregated sites.

VII

Respondents need not allocate public monies for school building construction in the racially segregated manner described in the preceeding paragraph. In fact, Respondents have available to them at least two alternatives which are administratively feasible and constitutionally less onerous in their impact on Petitioners, to wit:

A. New schools may be located on sites situated between

minority and Anglo neighborhoods, whereby the school enrollment would be racially balanced; and

B. Larger schools, also known as educational parks, could be constructed replacing smaller non-conforming schools thereby achieving racial balance where each of the smaller schools is comprised of different racial and ethnic groups.

(Plans utilizing the School Housing Aid Act funds to achieve structurally adequate schools that are also racially balanced for 3 of the 7 school districts named in paragraph VI, Stockton, Sacramento and San Diego are attached as Exhibit E, 1-3 and incorporated herein by reference.

VIII

On February 15, 1973, Petitioners made a formal written demand on the State Allocation Board that they implement steps to prevent the continuation of the aforementioned racial and ethnic imbalance and suggested a procedure to accomplish this, to wit:

(1) Require school districts to submit, in their application for School Housing Act funds, information concerning the probable racial and ethnic enrollment at any school which is to be constructed with the requested funds;

(2) A referral by Respondents of all applications indicating that a proposed school would be racially imbalanced to the State Department of Education for a determination of how the imbalance can be prevented; and

(3) Respondents apportion funds only after receiving assurances from a local school district applicant that the proposed

project will not promote or perpetuate racial or ethnic segregation.

Petitioners, in support of their demands, cited the Federal Constitution (14th Amendment) and state laws (Education Code §§ 5002, 5003 and 5 Cal.Adm. Code §§ 14020 and 14021) which require that the state not support or perpetuate racial segregation in the public schools. (A copy of Petitioners' letter to Respondent Board is attached as Exhibit F and incorporated herein by reference.)

IX

On March 16, 1973, Respondent answered, refusing Petitioners' demand and stating,in essence, their intention to allocate $325,000,000 toward the continuation of racial segregation in the California schools. While Respondents ignored the constitutional authority cited by Petitioners, they sought to justify their decision on the sole ground that Proposition 21 repealed the relevant California statutory law. Respondents admitted their awareness of litigation challenging the constitutionality of Proposition 21 but opined "it should assume the constitutionality of the Proposition" until final adjudication is reached. (A copy of the letter from the Board is attached as Exhibit G and incorporated herein by reference.

X

Petitioners renewed their request by telegramming the State Allocation Board on June 27, 1973. At that time the clear applicability of the United States Supreme Court's decision in Keyes v. School District No. 1, Denver, Colorado, __U.S.__, 41 L.W.

5002 to the unconstitutionality of Proposition 21 was brought to the Board's attention. (A copy of Petitioners' telegram is attached as Exhibit H and incorporated herein by reference.) Nevertheless, the Board again stated its refusal to take any steps to prevent the perpetuation of racial segregation until Proposition 21 is declared invalid. (A copy of the Board's second response is attached as Exhibit I and incorporated herein by reference.)

XI

Proposition 21, an initiative measure enacted by the voters at the last general election, purports to repeal Education Code §§ 5002 and 5003 and §§ 14020 and 14021 of Title 5 of the California Administrative Code. These repealed sections establish the prevention and elimination of racial imbalance as a high priority in decisions relating to school construction. Proposition 21, by adding § 1009.6 to the California Education Code, also provides that "No public school student shall because of his race, creed, or color, be assigned to attend a particular school." (The complete text of Proposition 21 and the Ballot Argument is attached as Exhibit J and incorporated herein by reference.)

XII

Proposition 21, by its literal language, historical context, immediate objectives and ultimate effect violates the guarantee of equal protection of the laws found in the Fourteenth Amendment to the United States Constitution and cognate provisions of the California Constitution (Article 1, Sections 11 and 21).

///

XIII

Respondents have a clear, present and unconditional duty mandated by a valid state law and the Federal and State Constitutions to take all necessary steps in its allocation of public monies for school construction and repair to avoid the perpetuation of racial and ethnic imbalance in the public schools. Respondents have already breached this duty by allocating $100,500,000 of School Housing Aid Act monies to school districts without imposing any conditions or qualifications on said school districts to achieve racial balance.

XIV

In addition to the $100,500,000 allocated ($54,800,000 of this allocated sum is not yet authorized for expenditure),as of July 1, 1973, 58 applications totalling $62,500,000 are pending for review and approval by the Board. Over the next few months, other project applications will be reviewed and the Board will routinely approve these as well as those presently pending. (Declaration of Gene Livingston containing statements of Jack Swoboda, Department of General Services, is attached as Exhibit K and incorporated herein by reference.)

Unless this Court acts to grant Petitoners the relief requested, Respondents will allocate the remainder of the $325,000,000 in School Housing Aid money to racially segregated school construction in violation of the Federal and State Constitutions. Prompt relief from this Court is required to prevent Petitioners from being subjected to irreparable injury by locking

them into perpetual racial segregation and thereby depriving them of the constitutionally-mandated equal educational opportunity.

XV

The necessity of this Court to exercise its original jurisdiction to resolve the issues presented by this case arises by reason of the grave, statewide importance of the questions presented, the urgency of the matter and the unavailability to Petitioners of any other plain, speedy or adequate remedy. In addition, the lower courts of this state are in conflict over the constitutionality of Proposition 21 and only this Court can resolve the conflict so as to prevent Petitioners from being schooled in publicly funded segregated buildings for the indefinite future and to enable local school boards to continue the orderly process of school desegregation.

WHEREFORE Petitioners pray:

1. That this Court issue its order requiring the Respondent State Allocation Board, pending entry of judgment in this matter, to stay execution of the decisions previously rendered by it allocating funds to local school districts pursuant to the School Housing Aid Act, and to cease and desist from allocating, appropriating or otherwise causing funds to be made available to local school districts for the construction of school buildings pursuant to the School Housing Aid Act if the expenditure of that money would be used to promote or perpetuate racial or ethnic segregation.

2. That this Court issue its alternative writ of mandate commanding the Respondent State Allocation Board to take all steps necessary to insure that the funds it apportions pursuant to the

School Housing Aid Act shall not be used to construct schools which will perpetuate racial or ethnic segregation, or to show cause before this Court at a specified time and place why it has not done so.

3. That on the hearing of the alternative writ and the return thereto, if any, this Court issue its peremptory writ of mandate commanding the Respondent State Allocation Board to take all steps necessary to insure that the funds it apportions pursuant to the School Housing Aid Act shall not be used to construct schools which will perpetuate racial or ethnic segregation;

4. For costs of this proceeding; and

5. For such other and further relief as the Court deems just.

On the Brief:

Respectfully Submitted,

BEVERLY J. EDMONDSON
Secretary

GENE LIVINGSTON

J. PETER BOUVIER
Law Clerk

FRED J. HIESTAND

Attorneys for Petitioners.

VERIFICATION

I, GENE LIVINGSTON, declare:

I am an attorney at law duly admitted and licensed to practice before all courts of this State and am one of the attorneys of record for Petitioners in the above-entitled matter.

I have read the foregoing Petition for Writ of Mandate and know the contents thereof.

I make this verification because Petitioners are absent from the county in which I have my office and because the facts set forth in said Petition for Writ of Mandate are within my knowledge and because as attorney for the Petitioners herein, I am more familiar with the facts than are the said party.

The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matter, I believe it to be true.

Executed on July ____, 1973 at Modesto, California.

I declare, under penalty of perjury, that the foregoing is true and correct.

_____
GENE LIVINGSTON
Attorney for Petitioners.

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

I

INTRODUCTION

This case raises for the Court's consideration the validity and effect of Proposition 21 (the Wakefield Anti-Busing Initiative) adopted by the voters at the last general election. Petitioners are aware that this issue has also been raised and briefed in Santa Barbara School District v. Superior Court, No. L.A. 30054 (Cal.Sup.Ct.).[1/]

In the Santa Barbara case the question of Proposition 21 was raised in the context of a school district seeking to implement a plan of desegregation. Proposition 21 is raised in this case because the State Allocation Board has relied on it to justify its refusal to take any steps to insure that the funds it allocates for school construction are not used to promote or perpetuate racial or ethnic segregation.[2/]

1/ Petitioner NAACP, Western Region, and the parent organization of the League of Women Voters of San Diego, the League of Women Voters of California, together with the Mexican American Political Association (MAPA) and California Task Force for Integrated Education submitted an amicus curiae brief to this Court in the Santa Barbara case on December 28, 1972.

2/ The opportunity to achieve substantial racial and ethnic balance by massive school construction is unique to this time. It is only because the Legislature has imposed the date of June 30, 1975 as a time when the pre-1933 schools can no longer be used that gives rise to this current opportunity. Schools, for the most part, are built or replaced one at a time with limited impact on the district's attendance practices. The replacement, however, of a

Because of the foregoing, Petitioners will set out in their memorandum of points and authorities the facts giving rise to this current controversy and the necessity for urgent action by this Court and will only review briefly the authorities demonstrating the unconstitutionality of Proposition 21, referring this Court to its amicus brief filed in Santa Barbara for a more extensive discussion.

There is, however, a compelling distinction between the Santa Barbara case and the one presented here by Petitioners. This distinction points out the necessity for this Court to resolve promptly the questions raised by Proposition 21 in this case.

In Santa Barbara this Court stayed the Superior Court's decision enjoining the implementation of a plan of desegregation in the Santa Barbara school district. As a result, desegregation is proceeding apace in the public schools there consistent with the Court's rulings in Jackson v. Pasadena City School District, 59 Cal.2d 876, 31 Cal.Rptr. 606 (1963) and San Francisco Unified School District v. Johnson, 3 Cal.3d 937, 92 Cal.Rptr.309 (1971). Hence no urgency for a decision exists in Santa Barbara.

On the other hand, in this case the Respondent Board will continue making allocations of funds which will be expended for constructing schools on racially segregated sites unless this Court acts to resolve the issues and does so immediately. In other words,

substantial number of schools increases proportionately the effect which can be had on a district's attendance practices, whereby significant progress toward achieving racial balance can be made.

the absence of a prompt decision resolving the question of the validity of Proposition 21 means, in this case, that the state will have contributed $325,000,000 to maintain the existing racial and ethnic imbalance.[3/]

The impact of Proposition 21 is broader than its obvious singular importance to the operation of the State Allocation Board administering the School Housing Aid Act. It has clouded the rights and obligations of students and local school boards throughout California and proper educational planning has been hindered and disrupted. Segregation, which this Court noted in San Francisco Unified School District v. Johnson, 3 Cal.3d 937, 92 Cal.Rptr. 309 (1971), must be instituted "at once" has come to a halt by reason of the intiative's passage. In fact, the adverse effect of Proposition 21 has been compounded because the uncertainty created by that initiative is actually greater today than it was immediately following its passage.[4/]

[3/] Petitioners have requested an order staying proceedings of the State Allocation Board if the result would be the expenditure of public funds for continuing racial and ethnic segregation. In addition, the Legislature has set June 30, 1975 as the last time pre-Field Act schools may be used. To meet this deadline construction must begin in the near future. Accordingly, the necessity for resolving the validity of Proposition 21 and the impact it has on the State Allocation Board's handling of the School Housing Aid Act funds is immediate.

[4/] At this time, two Superior Courts have ruled on the validity of Proposition 21. One held Section 1 of the Proposition unconstitutional, NAACP v. San Bernardino, No. 155286 (Super.Ct. San Bernardino 1973), and the other held it totally constitutional, NAACP v. Sacramento, No. 228896 (Super. Ct. Sac. 1973). Moreover, the question is presently pending in the Courts of Appeal for both

II

THIS COURT SHOULD EXERCISE ITS STAY POWER TO PREVENT RESPONDENTS FROM APPROVING THE EXPENDITURE OF $325,000,000 TO MAINTAIN RACIAL SEGREGATION IN THE PUBLIC SCHOOLS OF CALIFORNIA.

That a court's inherent power encompasses the authority to control any litigation before it and to issue any order necessary to protect the court's jurisdiction is a well recognized principle in California. Keeler v. Superior Court, 46 Cal.2d 596, 297 P.2d 967 (1956) inherent power to control course of litigation by remanding mandamus action for further proceedings; Tide Water Associated Oil Co. v. Superior Court, 43 Cal.2d 815, 279 P.2d 35 (1955), inherent power to adopt any suitable method of practice; In re Adoption of Pierce, 5 Cal.App.3d 316, 85 Cal.Rptr. 104 (1970), inherent power to stay order to protect appellate jurisdiction; Deepwell Homeowners' Protective Association v. City Council, 239 Cal.App.2d 63, 48 Cal.Rptr. 321 (1965), inherent power to stay judgment to protect appellate jurisdiction and to protect the fruits of appellant's appeal.

In addition, this Court's inherent power is further set out in Code of Civil Procedure Section 923. That Section provides:

> "The provisions of this chapter shall not limit the power of a reviewing court or of a judge thereof to stay proceedings during the pendency of an appeal or to issue a writ of supersedeas or to suspend or modify an injunction during the pendency of an appeal or to

the Fifth Appellate District, Pena v. Board of Education, No. 5 Civ. 1977, and for the Third Appellate District, NAACP v. Sacramento, No. 3 Civ. 14009. In both of the Appellate cases the validity of Proposition 21 is raised in the context of school desegregation actions.

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> make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jursidiction." (Emphasis Added.)

While the power of the court to issue a stay order was first recognized in connection with a writ of supersedeas, it is clear that the power "to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction" extends to a mandate proceeding. California Welfare Rights Organization v. Superior Court, No. 22817 (Cal. Sup.Ct. Order dated June 23, 1971); See also, People ex rel. San Francisco Conservation & Development Com'n v. Town of Emeryville, 69 Cal.2d 533, 72 Cal.Rptr. 790 (1968); Caminetti v. Guarante Union Life Insurance Co., 22 Cal.2d 759, 141 P.2d 423 (1943).

Perhaps the court in Fairfield v. Superior Court, 246 Cal. App.2d 113, 54 Cal.Rptr. 721 (1966) has best summarized this principle:

> "Every court has power '[t]o compel obedience to its judgments, orders, and process' in an action or proceeding pending before it, and to use all necessary means to carry its jurisdiction into effect, even if those means are not specifically pointed out in the code." 54 Cal.Rptr. at 720.

Hence this Court's authority to issue the stay requested is both an inherent and a statutory power. Because of the circumstances surrounding this case a stay is necessary to preserve the status quo and the Court's jurisdiction.

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Under the School Housing Aid Act (Education Code §§ 19700.53 et seq.) the Respondent State Allocation Board is charged with the responsibility of appropriating to local school districts $325,000,000 for school construction. This money will be made available to local districts, upon their application, for the purpose of replacing and repairing school buildings which fail to meet the structural standards contained in the Field Act (Education Code §§ 15451 et seq.) adopted by the Legislature in 1933.

In thirty-seven California school districts, including seven major urban districts, a substantial portion of the structurally inadequate buildings are also racially and ethnically imbalanced. (See Exhibit A). If the defective buildings are merely replaced on the same site, the racial and ethnic segregation existing now will be continued. Nevertheless, most of the defective schools, which are also racially and ethnically imbalanced, are destined for reconstruction in the same location. (See ¶ VI of the Petiton.)

The State Allocation Board is aware that the appropriations they make to these school districts will produce a continuation of racial and ethnic segregation. Nevertheless, the Respondent State Allocation Board has refused, despite Petitioners' written requests, to take the necessary steps to insure that the $325,000,000 it allocates will not be expended to perpetuate racial and ethnic segregation. (See ¶¶ VIII, IX and X of the Petition.)

Already over $100,000,000 has been allocated by the Respondent Board without securing from the local school districts any assurance that these public funds will not be expended to

perpetuate racial and ethnic segregation. Although slightly less than half of the funds allocated have actually been authorized for expenditure by local school districts, the approval process is ongoing with $62,500,000 in applications pending before the Board for review and imminent approval. (See ¶ XIV of the Petiton.) In short, at each Board meeting during the next few months the lion's share of the $325,000,000 will be delivered to local school districts and construction to concretize racial segregation in California's public schools throughout the life of the new buildings will begin.

Unless this Court issues its stay, the status quo will quickly deteriorate to an irretrievable situation. If that happens, Petitioners will be harmed irreparably in that they will be locked into segregated schools and the effectiveness of any judgment this Court may subsequently enter will be nil.

III

THIS PETITION PROPERLY INVOKES THE COURT'S ORIGINAL JURISDICTION BECAUSE THE ISSUES PRESENTED AFFECT RACIAL SEGREGATION IN CALIFORNIA'S SCHOOLS - A MATTER OF GREAT PUBLIC IMPORTANCE- AND CALL FOR A PROMPT DEFINITIVE RESOLUTION WHICH CAN BE MADE ONLY BY THIS COURT.

What this Court feared, and responded to avoid by invoking its original jurisdiction in San Francisco Unified School District v. Johnson, supra, has come to pass as a result of Proposition 21. In Johnson, the predecessor to Proposition 21 - Education Code Section 1009.5 (the Wakefield Bill) - was challenged on grounds nearly identical to those Petitioners have set forth here. This Court exercised its original jursidiction to interpret the Bill stating:

> "[T]he present case plainly called for the exercise of the original jurisdiction of the court. The issues presented respecting the interpretation and constitutionality of section 1009.5 are of great public concern and importance; their prompt resolution is essential to orderly planning and pupil assignment not only in San Francisco but throughout the state. The United States Supreme Court has directed that segregation in public schools must terminate "at once." (Alexander v. Holmes Board of Education (1969) 396 U.S. 19, 20, 90 S.Ct. 29, 24 L.Ed.2d 19.) Since section 1009.5, under one interpretation, may delay desegregation, prompt judicial action is essential to comply with this direction. We therefore decided to issue the alternative writ of mandamus requested by petitioners; ..." 92 Cal.Rptr. at 312-213.

The considerations which caused this Court to exercise its original jurisdiction in Johnson are presented by Proposition 21 in this case with even greater impact.[5/] Further, an additional statewide issue - the duty of the State Allocation Board to avoid the perpetuation of racial and ethnic imbalance as it apportions $325,000,000 to reconstruct public schools throughout California - is raised.

It is obvious, given the extreme significance of the issues presented, that they must ultimately be resolved by this Court. Respondents, however, will be taking actions in the next few months, which if left unrestricted, will result in large numbers of minority students being denied any relief from the imposition of state-funded school segregation. The timing of Respondents' actions allocating $325,000,000 to build new schools on segregated sites preclude Petitioners from obtaining a decision from this Court if

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[5/] The adverse effect of the uncertainty experienced by Proposition 21 is stated briefly in the Introduction portion of this memorandum.

they are compelled to pursue a remedy of trial and appeal -- a remedy which is clearly neither plain, speedy nor adequate.

IV

ARGUMENT

A. Historical Context, Legislative History - Field Act, School Housing Aid Act and Proposition 21.

In 1933 the California Legislature adopted the Field Act which established certain standards pertaining to the structure of public school buildings. (Education Code §§ 15451 et seq.) At that time, the Legislature anticipated that local school districts would move toward restructuring or replacing the pre-1933 school buildings which failed to conform to the new structural standards. However, because of the failure of local districts to respond, the Legislature in 1967 reiterated its early intention and stated its expectation that all pre-Field Act buildings would be rebuilt or replaced by 1983. (Education Code §§ 15501 et seq.). A time, which the Legislature noted, would mean that the youngest of the non-conforming buildings would be 50 years old. (Education Code § 15501.)

Apparently it was concluded that the previous declaration was not sufficient to obtain compliance. Accordingly, the following year the Legislature set June 30, 1975 as a time when the pre-Field Act buildings could no longer be used. (Education Code § 15516.)

Recognizing that local districts needed assistance to meet the 1975 deadline because of the refusal of local residents to pass bond elections, the State Legislature of 1971 enacted the School Housing Aid Rehabilitation and Replacement of Structurally Inadequate

School Facilities Act (hereinafter School Housing Aid Act). (Education Code §§ 19700.51 et seq.) That Act authorized $30,000,000, which was raised pursuant to the State School Building Aid Bond Law of 1966 (Education Code §§ 19931 et seq.) to be expended for replacement school construction and in 1973 the Legislature added another $15,000,000 from the same source.(Ch. 22, Statutes 1973). In addition, $250,000,000 of the money raised by the School Building Aid and Earthquake Reconstruction and Replacement Bond Law of 1972 was appropriated for the same purpose.[6/] Also, in 1972 another $30,000,000 was set aside for supplemental loans to districts for school replacement purposes out of school safety funds. (Education Code § 19700.45) In other words, a total of $325,000,000 has been appropriated by the Legislature pursuant to the School Housing Aid Act for apportionment to local school districts to assist them in rehabilitating and replacing structurally inadequate school buildings.

A substantial portion of the non-conforming schools are also racially and ethnically imbalanced. (See Exhibit A.). In most urban areas, the older schools are located in the center city area, which is now largely populated by racial and ethnic minorities. Obviously if non-conforming schools, which are also racially and ethnically imbalanced, are simply rebuilt on the same site, the existing imbalance will be perpetuated. Nevertheless, school

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[6/] The Bond Law of 1972 was approved by the voters in the June 1972 primary election and authorized the sale of $350,000,000 of state bonds.

districts throughout California plan to reconstruct most of the pre-Field Act schools on the same site despite the consequences of perpetuating extensive segregation.

Moreover, the State of California is ignoring the segrative consequences and participating in the perpetuation of racial and ethnic imbalance by contributing $325,000,000 to the reconstruction of schools on segregated sites. The state's participation has already begun and in the next few months a majority of that money will be allocated to finance the almost immediate construction of schools which are located to continue the educationally harmful separation of students by race.

The existing racial and ethnic imbalance, together with the resulting denial of equal educational opportunities to minority students can be significantly decreased if the State Allocation Board will undertake to meet its clear constitutional duty. There is available to the Respondent Board an administratively feasible alternative which safeguards minority students' constitutional rights. (See ¶ VII of the Petiton.) The State Allocation Board can act to require local school districts to expend the state's funds allocated by the Board to finance alternative school construction plans available to them.[7/]

[7/] See for example Exhibits E, 1-3, alternative plans for Stockton, Sacramento and San Diego school districts. These alternative plans while replacing the pre-Field Act schools also insure racial and ethnic balance in the schools to be constructed.

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On February 13, 1973 Petitioners made a formal written demand that the State Allocation Board take all necessary steps to insure that the monies it apportions pursuant to the School Housing Aid Act are not expended by local school districts to perpetuate the racial and ethnic imbalance existing in their schools.[8/] In response the State Allocation Board asserted that the passage of Proposition 21, which it assumed to be constitutional, abrogated their responsibility in regard to eliminating and preventing racial and ethnic imbalance in the public schools of California.

Following the decision by the United States Supreme Court in Keyes v. School District No. 1, Denver, Colorado, __U.S.__, 41 L.W. 5002 (1973), Petitioners again urged Respondents to fulfill their constitutional duty.[9/] Ignoring the clear applicability of the Keyes decision, Respondents maintained their reliance on Proposition 21 and reasserted their refusal to take any steps to

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[8/] Exhibit F, letter to State Allocation Board. In their demand, Petitioners suggested that the Board could require local districts to submit information pertaining to the projected racial and ethnic enrollment of any school to be replaced with funds allocated by the Board. If the information projects a racial and ethnic imbalance in the school, the application could then be referred to the Department of Education, Bureau of Inter-group Relations for determination of how to correct the imbalance. The apportionment would then be made only after the local district assured the Board that the proposed project will not promote or perpetuate racial or ethnic segregation.

[9/] In Keyes the court construed the recission of a previously adopted resolution to desegregate two schools as an affirmative act of de jure segregation.

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insure that state monies allocated by it are not used to cause or perpetuate racial segregation.

Proposition 21, however, in no way repeals or alters the effect of the Equal Protection provisions of the Federal and State Constitutions. These provisions require not only that the state refrain from acting to perpetuate racial and ethnic segregation, they in addition impose on the state an affirmative duty to act to eradicate such segregation where it exists.[10/] Moreover, Proposition 21 itself runs afoul of these constitutional provisions and is as a result null and void. Proposition 21 denies to local school officials the one tool absolutely essential to bring about desegregation and it places the state in the role of encouraging racial and ethnic segregation.

B. Respondents' Reliance on the Passage of Proposition 21 Is Misplaced Because That Initiative Does Not Lessen The Duty Arising From the State and Federal Constitutions.

Decisions of federal courts, including the United States Supreme Court, and early decisions of this Court relating to school segregation are predicated on the Fourteenth Amendment to the United States Constitution.[11/] However, in Serrano v. Priest, 5 Cal.3d 584,

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10/ The obligation of the State, acting through the Department of Education and State Allocation Board, to refrain from allocating state funds under the School Housing Aid for Compensatory Education Purposes Act (Education Code §§ 19691 et seq.) to cause or perpetuate racial segregation has been previously recognized. 48 Att. Gen. Ops. 54 (1966).

11/ Brown v. Board of Education, 347 U.S. 483, 47 Sup.Ct. 686

96 Cal.Rptr. 601 (1971) this Court recognized that the California Constitution also proscribed discrimination in the public schools, whether it is termed de facto or de jure.

Indeed, Section 11 ("all laws of a general nature shall have uniform operation ") and Section 21 (no "citizen, or class of citizens [shall] be granted privileges or immunities, which, upon the same terms shall not be granted to all citizens.") of Article 1 of the California Constitution has been construed recently to provide greater protection to racial and economic minorities than the Federal Constitution.[12/] Hence this Court in considering the duty of the State Allocation Board to obviate racial segregation is urged to also rely on the California Constitution.[13/]

Since 1954 it has been clear that a state is prohibited by the Fourteenth Amendment to the United States Constitution from requiring the segregation of students into separate schools because of race. Brown v. Board of Education, 347 U.S. 483, 74 Sup.Ct. (1954); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 Sup.Ct. 1267 (1971); Jackson v. Pasadena City School District, 59 Cal.2d 876, 31 Cal.Rptr. 606 (1963); San Francisco Unified School District v. Johnson, 3 Cal.3d 937, 92 Cal.Rptr. 309 (1971).

12/ See, e.g. Garcia v. United States, 381 F.2d 778 (9th Cir. 1967); c.f. Goesart v. Cleary, 335 U.S. 464, 69 Sup.Ct. 198 (1948) with Sail'er Inn Inc. v. Kirby, 5 Cal.3d 1, 95 Cal.Rptr.329 (1971). Also several recent decisions of this Court have been based on state constitutional provisions as well as on the federal constitution. See, e.g., In re King, 3 Cal.3d 226, 90 Cal.Rptr. 15 (1970), cert den., 403 U.S. 931 (1971); Department of Mental Hygiene v. Kirchner, 60 Cal.2d 716, 36 Cal.Rptr. 488 (1964) vacated and remanded, 380 U.S. 194 (1965) aff'd 62 Cal.2d 586, (1965); People v. Anderson, 6 Cal.3d 628, 100 Cal.Rptr. 152 (1972); Rios v. Cozens, 7 Cal.3d 792 (1972), vacated and remanded, __U.S. 93 Sup.Ct. 1019, aff'd ____ Cal.3d ___, 107 Cal.Rptr. 789 (1973)

13/ Ironically the only decision by this Court pertaining

686 (1950). The United States Supreme Court has most recently defined an act which resulted in the perpetuation of racial imbalance as "de jure" segregation. Keyes v. School District No. 1, Denver, Colorado, __U.S.__, 41 L.W. 5002 (1973). In Keyes the Court concluded that the recission of a previously adopted resolution to correct racial segregation constitutes unlawful, state-imposed segregation. In comparison, the role of the State Allocation Board appropriating $325,000,000 toward the perpetuation of existing racial and ethnic segregation throughout California looms substantially more significant and a fortiori should be condemned as a blatant act of racial segregation.

Moreover, this Court has since 1963 imposed on responsible school agencies the duty not only of refraining from promoting and perpetuating racial segregation but the burden, "insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause." Jackson v. Pasadena City School District, 59 Cal.2d 876, 31 Cal.Rptr. 606 at 610 (1963). Again, in San Francisco Unified School District v. Johnson, supra, this Court noted, "it is the presence of racial isolation, not its legal underpinnings, that creates unequal education. (citation omitted) 'Segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity.'" 92

to racial segregation annotated under the State Constitution upholds the right of the state to educate Black students in separate schools. Ward v. Flood, 48 Cal. 36, 17 Am Rep. 405 (1874).

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Cal.Rptr. at 316. As a result, this Court reasserted its position "in favor of enforcing an affirmative duty to eradicate school segregation regardless of its cause." 92 Cal.Rptr. at 322.[14/]

This Court's landmark decision in Serrano v. Priest, 5 Cal.3d 584, 96 Cal.Rptr. 601 (1971) removed any doubt that state agencies are obligated to prevent and eliminate all racial segregation. In that case the defendants contended that the discriminatory effect of the state's school taxing system should not be invalidated because it constituted mere de facto and not de jure discrimination. In response, this Court stated:

> "Although the United States Supreme Court has not yet ruled on the constitutionality of de facto racial segregation, this court eight years ago held such segregation invalid, and declared that school boards should take affirmative steps to alleviate racial imbalance, however created." 96 Cal.Rptr. at 615.[15/]

Therefore, it must be concluded that the State Allocation

14/ While the two decisions of this Court cited above eliminate any distinction between de facto and de jure discrimination, the clarity of that legal conclusion has been clouded by this Court's denial of a hearing in People v. San Diego Unified School District, 19 Cal.App.3d 252, 96 Cal.Rptr. 658 (1971). In that case the Court of Appeal apparently misconstrued this Court's holding in Jackson v. Pasadena City School District, supra, and held that the maintenance of a de facto segregated school "is not a denial of equal protection of the law unless the imbalance denies the minority group equal educational opportunities." 96 Cal.Rptr. at 666.

15/ Although the United States Supreme Court could have used the Keyes decision as a vehicle for resolving the de facto - de jure distinction under the Federal Constitution, it did not do so. Nevertheless, two justices, Powell and Douglas wrote separate opinions urging the elimination of the fictional distinction.

Board is obligated to take the necessary steps to insure the public funds it allocates to the local school districts is not expended to promote or perpetuate racial and ethnic imbalance.

C. The Ostensible Repeal of Education Code Sections 5002 and 5003 and 5 California Administrative Code Sections 14020 and 14021 Is Null and Void Because Proposition 21 Is Unconstititutional In Its Entirety

1. Section 1 of Proposition 21 is Patently Unconstitutional. The First Section of Proposition 21 Provides, Section 1009.6 Is Added to the Education Code to Read:

> "No public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school." 16/

The purpose and effect of this section is obvious. Its proponents seek to hamstring local school districts in meeting their obligation to remedy racial and ethnic segregation. If school authorities are precluded from taking race into account, no effective method of desegregation can be devised or implemented.

It is the result described above which caused the United States Supreme Court in North Carolina Board of Education v. Swann, 402 U.S. 43, 91 Sup.Ct. 1284 (1971) to declare invalid a North Carolina statute nearly identical to Section 1 of Proposition 21. 17/

16/ The constitutional defects of this section are discussed at length in the amicus curiae brief submitted by NAACP, League of Women Voters, MAPA and Task Force for Integrated Education in the Santa Barbara case at pp. 9-19.

17/ The North Carolina law stated, "No student shall be assigned or compelled to attend any school on account of race,

In doing so the Court notes that:

> "the statute exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illusory the promise of Brown v. Board of Education, 347 U.S. 483, 74 Sup.Ct. 686, 98 L.Ed. 73 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems." 402 U.S. at 45-46. (Emphasis Added)

The result of Section 1 of Proposition 21 was considered by this Court in San Francisco Unified School District v. Johnson, supra. In that case the original Wakefield Bill, which prohibited school authorities from transporting any student without first obtaining the consent of that student's parent, was involved. The Court construed this Bill to apply only to transportation and not to assignment of students to school. The Court reached this construction by noting that if the Bill applied to assignment, it "would proscribe a principle, and in some cases an essential and exclusive step to [eliminate de jure segregation and] must obviously violate constitutional requirements." 92 Cal.Rptr. at 320.

The construction of the original Wakefield Bill which this Court concluded would render it unconstitutional has been achieved in Section 1 of Proposition 21. It applies clearly and solely to

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creed, color or national origin, or for the purpose of creating a balance of race, religion, or national origin... ." N.C. Gen. Stat. §§ 115-176.1 (Sup. 1969).

restrict the assignment of students. Accordingly, this Court's statement in San Francisco Unified School District v. Johnson, supra, applies to render Proposition 21 invalid:

> "Any enactment which obstructed a school board from carrying out its constitutional duty to eliminate segregation 'root and branch,' or compelled it to resort to less effective or ineffective means, would be plainly unconstitutional under the reasoning of Green v. County School Board of New Kent County, supra." 92 Cal.Rptr. at 320.

2. The Provisions of Proposition 21 Are Non-severable and the Unconstitutionality of Section 1 Renders the Entire Proposition Void.

Given the clear unconstitutionality of Section 1, the remaining provisions of Proposition 21 must fall also despite the inclusion of a severability clause.[18/]

Numerous California judicial opinions hold that initiative measures cannot be severed whenever "void subject matter is an integral part of the [measure] to be submitted to the voters." Alexander v. Mitchell, 119 Cal.App.2d 816, 830, 260 P.2d 261 (1953). Accordingly, they have refused to permit partially void initiatives to go to the polls, either as written with the void matter included (Id.) or with the void matter excised, Bennett v. Drullard, 27 Cal.

[18/] Section 5 of Proposition 21 provides that "If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provisions or application, and to this end the provisions of this Act are severable."

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App.2d 180, 149 Pac. 368 (1915) See also Mitchell v. Walker, 140 Cal.App.2d 239, 295 P.2d 90 (1956); Mueller v. Brown, 221 Cal.App. 2d 319, 34 Cal.Rptr. 474 (1963); Campen v. Greiner, 15 Cal.App.3d 836, 93 Cal.Rptr. 525 (1971); and see Fletcher v. Porter, 203 Cal. App.2d 313, 325, 21 Cal.Rptr. 452 (1962).

Were the law otherwise, the electorate in voting on initiatives would be misled and their intent frustrated. For example, in regard to Proposition 21, only Section 1 enacted affirmative provisions. This one provision if valid would halt all desegregation efforts in California. The question arises what would be the voters choice if Section 1 of Proposition 21 were excised? Would they desire to retain the statutory and Admininistrative Code sections which provide definitions and procedures relating to desegregation or would they vote solely for their repeal thus leaving the enforcement of desegregation to state and federal courts?

Moreover, the inclusion of the severability provision can be given little, if any, significance in the initiative process. The voter is confronted with a Proposition seeking varied action and has no ability to modify, omit or amend any provision. His choice is to take it or leave it. Such a process differs substantially from the give and take of legislative bodies. Unlike a voter, a legislator casting his vote for legislation has had an opportunity, usually on several occasions, to amend the bill by striking, adding, or modifying its language. In the legislative process, a severability provision should be considered in assessing

the intent of the legislature because the act was more or less conformed to suit the desires of each member voting for it. That certainly is not the case in the initiative process; accordingly, severability provisions should be given little or no weight in determining the electorate's intent.

3. All of Proposition 21 is Unconstitutional Because It Serves To Encourage and Involve The State in Racial Segregation.

The approach formulated by this Court in Mulkey v. Reitman, 64 Cal.2d 529, 50 Cal.Rptr. 881 (1966) and subsequently affirmed by the United States Supreme Court[19/] is totally applicable to a constitutional analysis of Proposition 21. In Mulkey v. Reitman this Court determined that Proposition 14, an initiative measure nullifying State Fair Housing Laws and further prohibiting the State from adopting such laws in the future, was unconstitutional in view of its "historical context," its "immediate objectives" and "ultimate effect."

In "historical context" the passage of Proposition 21 follows the adoption of Sections 14020 and 14021 of Title 5 of the California Administrative Code by the State Board of Education and Sections 5002 and 5003 of the Education Code by the California Legislature.[20/] These sections declared that the prevention and

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19/ Reitman v. Mulkey, 387 U.S. 369, 87 Sup.Ct. 1627 (1967).

20/ These sections were cited by Petitioners in their request to the State Allocation Board that it act to prevent the continuation of racial segregation. In its reply, the Board refused Petitioners' request, relying on Proposition 21, but also noted they would reconsider the request if and when any portion of Proposition 21 is invalidated. Exhibit G.

elimination of racial and ethnic imbalance in pupil enrollments "shall be given high priority in all decisions relating to school sites, school attendance areas and school attendance practices." Section 14021(c) of the Administrative Code defined racial imbalance:

> "For purposes of these regulations, a racial or ethnic imbalance is indicated in a school if the percentage of pupils of one or more racial or ethnic group differs by more than 15 percentage points from that in all the schools of the district."

The priority placed on the prevention and elimination of racial imbalance in the public schools by these sections was approaching fruition as several school districts, voluntarily and pursuant to state and federal court orders, began the desegregation process.

Proposition 21 was the third effort to stymie the desegregation efforts resulting from these sections. Previously an emergency repeal of the Administrative Code sections was unsuccessful when a Superior Court ordered their reinstatement on the ground that no emergency in fact existed. Colley v. State Board of Education, No. 201941, (Super. Ct. Sac. 1970). The second tactic used by the opponents of desegregation surfaced in the passage of the original Wakefield Bill. (Education Code Section 1009.5) Its duration as obstructionistic legislation was short-lived when this Court, in exercise of its original jurisdiction, construed the section narrowly.[21/] San Francisco Unified School District v.

[21/] A more extensive description of the historical context surrounding the passage of Proposition 21 is contained at pp. 20-24 of the brief submitted in the Santa Barbara case by amici curiae, NAACP, Western Region, MAPA, League of Women Voters of California, and the Task Force for Integrated Education.

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Johnson, supra.

The "immediate objective" of Proposition 21 is made abundantly clear by the proponents' argument, written by Assemblyman Wakefield:

> "The Initiative repeals the law which states it is the declared policy of the Legislature that racial and ethnic imbalances in pupil enrollment shall be prevented and eliminated" and "... which states that prevention and elimination of such imbalance shall be given high priority" and"... which requires that districts study and plans of action, with schedules for implementation shall be submitted to the Department of Education for acceptance or rejection." Exhibit J, Proposition 21 and Ballot Argument, p. 56.

Apparently in a desire to leave no doubt of the objective of Proposition 21, Assemblyman Wakefield concludes his argument by stating:

> "We believe that legislation such as the forced integration law, which forces local school districts to reassign pupils from their neighborhood schools to achieve racial and ethnic balance violates the basic rights of school children and will ultimately destroy the public school system." Exhibit J, p. 57.

Finally, Proposition 21's "ultimate effect" is the same as Proposition 14 in Mulkey v. Reitman, supra. As a result of Proposition 21 the state is placed in the position of encouraging racial discrimination. "Where the state can be charged with only encouraging discriminatory conduct the color of state action nevertheless attaches." 50 Cal.Rptr. at 888.[22/] Hence in Mulkey,

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[22/] See for example, Robinson v. State of Floria, 378 U.S. 153, 84 Sup.Ct. 1693 (1964); Barrows v. Jackson, 346 U.S. 249, 73 Sup.Ct. 1031 (1953); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 Sup.Ct. 856 (1961).

Proposition 14 was unconstitutional because "the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one where it is encouraged." 50 Cal.Rptr. at 890.

The unconstitutionality of Proposition 21 is even more compelling than that of Proposition 14 in Mulkey. The state has an affirmative duty to insure an equal educational opportunity free of discrimination to all students whereas no such duty attaches to private housing.[23/] Hence the putative repeal of the Education and Administrative Code sections seeks to eliminate the state's affirmative duty to correct and eliminate racial and ethnic segregation, and by doing so involves much more than a mere declaration of racial neutrality:

> "[I]t moulds a medium of obstruction to the elimination of that evil ... yet the state can not constitutionally countenance obstructionism, for once the state undertakes to preserve de facto school segregation, or to hamper its removal, such state involvement transforms the setting into one of de jure segregation." San Francisco Unified School District v. Johnson, supra, 92 Cal.Rptr. at 322. 24/

23/ The reasons why the unconstitutionality of Proposition 21 is much clearer than that struck down in Mulkey is discussed in more detail at pp. 26-31 of the brief submitted by amicus curiae, NAACP, League of Women Voters, MAPA and Task Force for Integrated Education in the Santa Barbara case .

24/ The effect of Proposition 21, repealing state laws which mandated the elimination and prevention of racial and ethnic imbalance, is identical to the situation in the Keyes case which the United States Supreme Court held constituted "de jure" segregation. There, the local board had rescinded a previously adopted resolution which required the correction of racial imbalance in two predominantly minority schools. Under this authority, Proposition 21 should be invalidated as unlawful state action promoting racial segregation.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Stanislaus, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 405 H Street, Modesto, California. On July 19, 1973, I served the within PETITION FOR WRIT OF MANDATE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE on Respondents in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Modesto, California, addressed as follows:

STATE ALLOCATION BOARD
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Sacramento, California 95814

I declare, under penalty of perjury, that the foregoing is true and correct.

EXECUTED on July 19, 1973, at Modesto, California.

BEVERLY J. EDMONDSON