No. S234741

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BEATRIZ VERGARA, *et al.*
Plaintiffs-Petitioners,

v.

STATE OF CALIFORNIA, *et al.*
Defendants-Respondents,

and

CALIFORNIA TEACHERS ASSOCIATION and CALIFORNIA FEDERATION OF TEACHERS,
Intervenors-Respondents.

After a Decision of the Court of Appeal of the State of California, Second Appellate District, Division Two, Case No. B258589

Appeal from Final Judgment of the Superior Court of California, County of Los Angeles, Case No. BC484642 (Hon. Rolf M. Treu, Dept. 58)

ANSWER TO PETITION FOR REVIEW OF INTERVENORS-RESPONDENTS CALIFORNIA TEACHERS ASSOCIATION AND CALIFORNIA FEDERATION OF TEACHERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

California Cases

United States Constitution

California Statutes

INTRODUCTION

No one disputes the importance of providing the best possible education to California students and attracting and retaining the most talented and motivated teachers for the State's public schools. But how to achieve those goals has been the focus of spirited, ongoing debate since the Legislature adopted a system of public school education in 1852. Stats. 1852, c.53, p. 117. In this well-funded, highly-publicized lawsuit, nine individual students unsuccessfully sought to bypass the constitutionally mandated legislative process for resolving those complex policy disputes by using the blunt tool of litigation to impose their own policy preferences. The Court of Appeal panel (Boren, P.J., with Ashmann-Gerst and Hoffstadt, JJ.) rejected those efforts, applying well-settled legal principles in concluding that Plaintiffs had failed to establish even the most basic elements of an equal protection challenge to the facial validity of the five Education Code provisions the trial court had invalidated.

Plaintiffs' Petition for Review, and the letters from their supporting amici, make clear that sharp divisions continue to exist among educational policy advocates who seek to improve the quality of California public schools. But the constitutional arguments they present are not worthy of Supreme Court review.

After an eight-week bench trial, the Los Angeles Superior Court (Treu, J.) issued a perfunctory 16-page opinion adopting Plaintiffs' novel approach to equal protection analysis and striking down each challenged statutory provision as facially unconstitutional and enjoining its future application (while staying that injunction pending appeal). 28AA 7298-7308. The Second District Court of Appeal unanimously reversed. Emphasizing the deference owed to the Legislature's policy judgments and applying longstanding and well-established equal protection principles, the Court of Appeal concluded that Plaintiffs had failed to establish the

statutes' facial invalidity under the California Constitution's equal protection provisions because there was no evidence that any of the challenged statutes inevitably *caused* any constitutional violations and because those statutes did not *classify* among identifiable groups of individuals—essential prerequisites for a facial equal protection challenge.

The Court of Appeal's analysis was fully consistent with well-settled California equal protection principles. Plaintiffs have provided no persuasive justification for Supreme Court review.

Plaintiffs begin by asking this Court to use this case as a vehicle for deciding whether a statute that has a disparate impact on the fundamental rights of a suspect class is subject to strict scrutiny without additional proof of discriminatory intent. That issue is not properly presented by this case. The Court of Appeal *agreed* with Plaintiffs, as a threshold matter, that proof of discriminatory intent is not required to establish an equal protection claim under the California Constitution. The reason the Court of Appeal rejected Plaintiffs' disparate impact claim was not because of the absence of discriminatory intent, but because Plaintiffs did not prove that the challenged statutory provisions caused the alleged disparate impacts. This Court should wait for a case in which the plaintiffs actually established that the state's challenged conduct had a disparate impact on the fundamental rights of a protected class, or in which the lower court prevented a plaintiff from presenting such a theory, before granting review to decide whether proof of discriminatory intent is also required in such a case.

Next, Plaintiffs ask this Court to grant review to decide the standard for evaluating a facial equal protection challenge to a statute based on a disparate impact theory, and the degree of deference a trial court's Statement of Decision merits in such a case. Neither of those issues warrants review either.

First, as the Court of Appeal concluded, Plaintiffs failed to satisfy either of the two existing tests for proving facial invalidity. Op. 32 n.14 (Plaintiffs "certainly did not show that [a constitutional] defect [in the challenged statutes] existed in the generality or vast majority of cases") (citing *Today's Fresh Start, Inc. v. Los Angeles Cty. Office of Educ.* (2013) 57 Cal.4th 197, 218). Because Plaintiffs could not prove that the challenged statutes were the *cause* of any school district's disproportionate assignment of so-called "grossly ineffective" teachers to low-income and/or minority students, Plaintiffs did not come close to proving that the statutes, alone or in combination, were the *inevitable* cause of unconstitutional assignments for facial-invalidity purposes. "[T]he evidence at trial showed what the text of the challenged statutes makes clear—that the challenged statutes do not in any way instruct administrators regarding which teachers to assign to which schools[.]" Op. 33. Instead, "administrative decisions (in conjunction with other factors), and not the challenged statutes … determine where teachers are assigned throughout a district." *Id.*[1]

Plaintiffs criticize the Court of Appeal for not concluding that school districts inevitably assign their least experienced and least effective teachers to predominantly poor and minority schools. Pet. 23. But that was because the trial evidence showed that such school-by-school disparities in teacher experience and quality are *not* inevitable and can be prevented if the district

[1] *Accord* Amicus Curiae Brief of Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Education Law Center, Equal Justice Society, Southern Poverty Law Center, and Asian Americans Advancing Justice – Los Angeles at 22 n.3; *see also id.* at 18-36 (explaining why Plaintiffs' evidence was inadequate to establish direct causation, while citing considerable scholarly research demonstrating that the principal impediment to higher quality public education is inadequate education funding).

administrators make reasoned assignment decisions—as the record confirms many administrators do. Op. 20, 35.

Second, there is no reason for this Court to grant review to decide whether the Court of Appeal articulated or applied the proper standard of appellate review of trial court factfinding. The trial court's decision would have been reversed under any standard, because there was no evidence that any of the challenged statutes inevitably *caused* any disproportionate harm to poor or minority students. Op. 33-34. Even if this were a close case, there could be no meaningful dispute about whether the Court of Appeal appropriately applied the governing standard of review given the paucity of material fact findings in the trial court's conclusory legal ruling.

After the trial court issued its tentative decision, the parties diligently sought to inquire into the factual basis for that ruling and the sweeping injunction the trial court proposed to issue. Pursuant to C.C.P. §632, Intervenors, State Defendants, and Plaintiffs each separately requested that the trial court make specific factual findings on every material controverted issue pertaining to Plaintiffs' disparate impact claim. The trial court declined to include *any* such findings in its Statement of Decision though, which meant that C.C.P. §634 *precluded* the Court of Appeal from drawing any factual inferences in support of the trial court's conclusory ruling or from deferring to its nonexistent findings. Given the factual barrenness of the trial court's ruling and the trial court's failure to address any of the parties' requests for factual findings in response to its stunningly broad tentative ruling, this would not be an appropriate case for reconsidering the standard of appellate review even if there were some legitimate basis for disputing the Court of Appeal's review of the trial court's decision—which there is not.

Finally, Plaintiffs ask this Court to review the Court of Appeal's application of the black-letter constitutional law principles that there can be

no equal protection challenge without state action that classifies or draws lines between identifiable groups, and that a fundamental rights-based equal protection claim requires, at a minimum, a distinction between groups based on "a shared trait other than the violation of [that] fundamental right." Op. 29. These propositions are hardly open to legitimate dispute, since the essence of "equal protection" is the right of groups who are treated differently by the state to demand that their differing treatment be sufficiently justified.

Plaintiffs' novel argument that any statute that has an impact upon a plaintiff's fundamental rights is necessarily subject to strict scrutiny *as a matter of equal protection*—which the Court of Appeal aptly characterized as circular and "tautological," *id.* (citation omitted)—finds no support in any prior judicial decision applying equal protection principles. Plaintiffs' approach would eradicate any distinction between direct fundamental rights claims (in which the merits analysis and remedy focus on protecting the plaintiff's substantive rights) and equal protection claims arising from discrimination that affects the fundamental rights of one group but not another (in which the merits analysis and remedy are concerned solely with the State's differential treatment of similarly situated groups). *Compare Campaign for Quality Education v. State* (2016) 246 Cal.App.4th 896, *petition for review pndg.* No. S234901 (direct fundamental rights claim alleging violation of constitutional right to education of minimum substantive quality), *with Police Dept. of City of Chicago v. Mosley* (1972) 408 U.S. 92, 94-95 (like all other equal protection claims, fundamental rights-based equal protection claims consider "whether there is an appropriate governmental interest suitably furthered *by the differential treatment*") (emphasis added). As several prominent constitutional law scholars explained in their amicus brief to the Court of Appeal, Plaintiffs' contrary approach would "make[] literally every aspect of public education

subject to a constitutional challenge." Brief of Constitutional Law Professors as Amici Curiae in Support of Appellants, at 24.[2] There is no reason for this Court to revisit the well-established principle that equal protection challenges require, as a basic prerequisite, a classification that treats members of two identifiable groups differently.

Of course, no statutory scheme will eliminate all educational disparities. There will always be a "bottom 5%"— even if there were no just-cause protections for teachers after two years, no due process protections from unfair, arbitrary, or discriminatory dismissal, and no limitations on district administrators' discretion to make subjective choices about layoffs and retention. So too, will there always be disputes among educators, policymakers, and the general public about how to improve the quality of public education and increase the pool of highly qualified new and returning teachers. It is for the Legislature to decide where to draw the line between competing policies, and the Legislature had ample authority to strike that balance where it did.[3]

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[2] The constitutional law scholars' brief was joined by, among others, Profs. Erwin Chemerinsky, Catherine Fisk, Pamela Karlan, David Kirp, Charles Ogletree, and Alexander Volokh.

[3] *See also* Amicus Brief of Education Deans, Professors, and Scholars in Support of Appellants, at 1, 16 (education scholars' brief, signed by 98 scholars including Profs. Kris Gutiérrez, Edward Haertel, Donald Heller, Richard Ingersoll, Kevin Welner, Richard Kahlenberg, William Koski, Helen Ladd, Judith Warren Little, Pedro Noguera, Jeannie Oakes, Gary Orfield, Diane Ravitch, Sean Reardon, and Richard Shavelson, and 15 current and former education school deans, explaining why the trial court's injunction would be harmful to students, including by making it more difficult for school administrators to "recruit effective teachers, retain them once they enter the profession, and foster a supportive environment that promotes student learning"); Amicus Curiae Brief of School District Trustees and Administrators Beiser et al., at 10-13 (school board members and administrators explaining that invalidating statutes will undermine

(continued …)

There is no "right" answer about how best to improve public education. Lengthening the probationary period might allow more time for evaluation, but would also encourage administrators to procrastinate and keep underperforming probationary teachers in the classroom longer. Reducing procedural protections for teachers facing termination might decrease the time or cost of firing teachers for cause, but would also chill teachers' exercise of academic freedom, increase their fear of retaliation, allow arbitrary or unjustified dismissals, and make it harder to recruit capable and qualified new teachers—exacerbating California's current teacher shortage crisis. Eliminating consideration of seniority in reductions-in-force might expand administrators' discretion, but would also make the lay-off process less efficient, increase discord, reduce the appeal of a long-term professional teaching career, and disregard the uniform consensus that experience correlates with effectiveness.

Striking the balance among these competing concerns is a quintessentially legislative function, as the Court of Appeal recognized. There is no reason to review the Court of Appeal's decision, which applies well-established legal principles to permit the Legislature to continue serving its assigned role within our constitutional system.

ARGUMENT

In seeking Supreme Court review, Plaintiffs mainly focus on the Court of Appeal's rejection of their "suspect class" equal protection claim. But as the Court of Appeal recognized, Plaintiffs' meager evidence could

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teacher recruitment, retention, and collaboration, particularly in challenging assignments, as well as other important policies); Brief of Amici Curiae Award-Winning California Teachers et al., at 1-2 (award-winning teachers and other organizations' analysis of how the challenged statutes protect teachers' ability to present curriculum, promote teacher retention, and otherwise benefit students).

not satisfy any standard for determining when a statute is facially invalid based on an alleged disparate impact on the fundamental rights of a suspect class. The Court of Appeal relied upon well-established legal principles in rejecting Plaintiffs' disparate impact claim. This Court should not revisit those principles, especially where Plaintiffs failed to establish that the challenged statute or practice was in fact the cause of disproportionate harm to a suspect class. Likewise, there is no reason for this Court to review the Court of Appeal's holding, which rested upon longstanding equal protection principles, that any equal protection claim requires a showing of discrimination between groups that can be defined in a non-tautological manner.

I. This Court Should Not Grant Review To Decide Whether Disparate Impact Claims Are Cognizable Without a Showing of Discriminatory Intent, Because the Court of Appeal Properly Found No Evidence of Disparate Impact.

Struggling to identify an issue of sufficient import to justify Supreme Court review, Plaintiffs first ask this Court to review a side issue *on which they prevailed* below: whether a party can establish a "suspect class" equal protection claim under the California Constitution without proof of discriminatory intent. Pet. 17-18. In a footnote, the Court of Appeal stated in dicta that Plaintiffs would not be required to prove discriminatory intent if they could establish that the challenged statutory provisions had a disparate impact on the fundamental rights of a suspect class. Op. 31 n.13. That statement was dicta because the Court of Appeal concluded that Plaintiffs had failed to meet their threshold burden: They had not proved, through statistical evidence or otherwise, that the challenged statutes (rather than the independent actions of local school district administrators) were the *cause* of any allegedly disproportionate assignment of "grossly ineffective" teachers to poor and minority students. Op. 32-35. Surely there is no reason for this Court to grant review to

consider whether the California Constitution (unlike the federal Constitution) permits disparate impact equal protection claims in a case where Plaintiffs failed to present evidence sufficient to establish disparate impact.

Moreover, despite some uncertainty about the scope of disparate-impact liability in California, there is no irreconcilable conflict among the appellate authorities cited by Plaintiffs. The Court of Appeal stated that no proof of discriminatory intent is required when a statute with a disparate impact upon a suspect class also "impinges a fundamental right." Op. 31 n.13 (citing *Crawford v. Bd. of Educ.* (1976) 17 Cal.3d 280, 297; *Hardy v. Stumpf* (1978) 21 Cal.3d 1, 7-8). Plaintiffs contend that *Hardy* "seem[ed] to go the other way" by requiring proof of discriminatory intent. Pet. 17. But as Plaintiffs themselves argued to the Court of Appeal, the challenged classification in *Hardy* did *not* "impinge upon a fundamental right." 21 Cal.3d at 8; *see* Plaintiffs-Respondents Ct. App. Br. 98 ("Resp. Br.") ("*Hardy* did not purport to address the legal standards that apply to suspect class claims when laws impose a disparate and adverse impact on students' *educational* opportunities" and so did not "address[] the issue presented here") (emphasis in original). Likewise, the plaintiffs in *Sanchez v. California* (2009) 179 Cal.App.4th 467, failed to establish either a disparate impact upon a protected class, *see* Resp. Br. 98 n.39, *or* a sufficiently adverse impact on their fundamental right to educational equality. 179 Cal.App.4th at 488-89. Thus, neither *Sanchez* nor *Hardy* specifically addressed the level of equal protection scrutiny that applies to a law that has a disparate impact on the fundamental rights of a suspect class.

While there may be some tension between the reasoning of those decisions and the Court of Appeal's dicta in this case, that is not the type of direct conflict warranting Supreme Court review. Even if it were, the Court's consideration of the issue should await a case in which its

resolution would actually affect the result, not one in which Plaintiffs were unable to establish the fundamental elements of a disparate impact claim in the first place.[4]

II. This Court Should Not Grant Review To Consider the Standard Required To Establish Facial Invalidity on a Disparate Impact Theory.

Plaintiffs next contend that the Court of Appeal imposed an overly demanding standard for establishing the facial invalidity of a statute on a disparate impact theory. Pet. 18-20. However, that issue is not raised by the Court of Appeal's ruling either, because Plaintiffs' evidence did not come close to meeting *any* potential standard for facial invalidity.

Plaintiffs' disparate impact theory rested upon their contention that the challenged statutes *cause* an unconstitutional concentration of ineffective and/or inexperienced teachers at schools serving low-income and minority students. *See* Pet. 11-13. Yet Plaintiffs' own witnesses acknowledged that the challenged statutes "ha[ve] nothing to do with the assignment of teachers … to either schools or classes." RT 817:9-21 (Deasy). As the Court of Appeal explained:

> [T]he evidence at trial firmly demonstrated that staffing decisions, including teacher assignments, are made by administrators, and that the process is guided by teacher preference, district policies, and collective bargaining agreements. This evidence is consistent with the process set forth in the Education Code, which grants school district superintendents the power to assign teachers to specific

[4] Nor is this an issue that arises with any frequency in California, because state-operated and state-funded programs and activities that disparately harm certain protected classes can independently be challenged on disparate impact grounds under Government Code §11135(a). *See, e.g.*, *Darensburg v. Metropolitan Transp. Comm'n* (9th Cir. 2011) 636 F.3d 511, 519 (disparate impact challenge under §11135(a) to Bay Area transit financing scheme).

> schools or to transfer teachers between schools within a district, subject to conditions imposed by collective bargaining agreements, district policies, and by statute. Further, the evidence at trial showed what the text of the challenged statutes makes clear—that the challenged statutes do not in any way instruct administrators regarding which teachers to assign to which schools. Thus, it is administrative decisions (in conjunction with other factors), and not the challenged statutes, that determine where teachers are assigned throughout a district.

Op. 33 (citations omitted). Contrary to Plaintiffs' contentions, the Court of Appeal did not require Plaintiffs to prove that a challenged law is the "*exclusive* cause of disproportionate harm to protected groups." Pet. 19 (emphasis in original). Instead, that Court concluded on the basis of undisputed trial evidence that the challenged statutes did not cause disparate assignments *at all*.[5]

Equally fatal to Plaintiffs' efforts to establish *facial* invalidity was the extensive undisputed trial evidence, including from Plaintiffs' own witnesses, demonstrating that school districts in California *can* and routinely *do* operate within the existing statutory scheme without assigning poor or minority students disproportionately to less-effective or less-experienced teachers. *See* Op. 20 (noting testimony from district administrators that their districts did not assign less effective teachers to low-income/high-need schools); RT 6841:9-16 (Mills) (no disparity in teacher quality between affluent and poorer schools in Riverside); RT

[5] Plaintiffs' shifting theories have changed once again in their petition, but their new contention that poor and minority students are disparately impacted by the challenged statutes because they suffer cognizably greater constitutional injury than other students assigned to the same "grossly ineffective" teachers, Pet. 12, is not supported by any authority and is in any event waived because it was neither adequately presented in the proceedings below nor addressed by the trial court or the Court of Appeal.

6113:1-19 (Rothstein) (same as between high-minority and low-minority schools); RT 3844:7-3848:6 (Plaintiffs' witness Goldhaber) (identifying school districts where inexperienced teachers are concentrated in wealthiest schools); RT 4144:12-25 (Plaintiffs' witness Ramanathan) (identifying school districts in which schools with fewest minority students had highest percentage of inexperienced teachers).[6]

The Court of Appeal thus had ample basis for concluding that Plaintiffs' showing was grossly inadequate under *either* existing facial invalidity standard. *See* Op. 32-33 n.14.[7] The Court did not imagine "a hypothetical, counter-factual world in which less experienced teachers are *not* concentrated in poor and minority schools" or disregard the "realities of the world in which [the challenged] laws operate." Pet. 19, 21 (emphasis altered). Instead, it carefully considered the trial record and concluded that

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[6] Many school administrators who testified at trial, including several of Plaintiffs' own witnesses, testified that their districts *prohibit* transfers of ineffective teachers to high-poverty or high-minority schools, and penalize principals who initiate them. RT 774:13-22 (Plaintiffs' witness Deasy), 2025:28-2026:16, 2028:6-17 (Plaintiffs' witness Raymond), 2599:3-24 (Plaintiffs' witness Douglas), 5645:19-22 (Fraisse), 6843:15-20, 6844:9-15 (Mills); *see also* 23AA 5965:9-21 (Marshall deposition); Educ. Code §35036(a) (prohibiting transfer of low-performing teacher over objection of principal at transferee school) (cited at Op. 7).

[7] Notably, no California appellate court has ever applied Plaintiffs' preferred "vast majority of circumstances" standard for evaluating facial invalidity to equal protection claims. That standard has only been applied to claims involving First Amendment and privacy rights (which raise unique overbreadth concerns) and due process (which requires the same process in all comparable cases). Pet. 20; *see Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 679; *Alviso v. Sonoma Cty. Sheriff's Dept.* (2010) 186 Cal.App.4th 198, 205. Even under that standard, however, facial invalidity requires proof (which was absent here) that a statute "broadly impinges upon fundamental constitutional … rights in its general, normal, and intended application." *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 343.

any "constitutional infringement" that might have resulted (in some districts, on some occasions) from the disproportionate assignment of minority students to "grossly ineffective" teachers was necessarily "the product of staffing decisions [made by individual school district administrators], not the challenged statutes." Op. 33-35.[8]

Thus, it makes no difference for this case whether the standard for facial invalidity requires that a statute inevitably cause constitutional violations in *all* applications, *see, e.g.*, *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (requiring proof that an act's "provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions"), or only in the "vast majority" of cases, *see, e.g.*, *Today's Fresh Start*, 57 Cal.4th at 218. Plaintiffs' evidence did not meet either standard.

Nothing in the Court of Appeal's reasoning is inconsistent with this Court's *Serrano* decisions either. *Serrano* was not a disparate impact or "de facto discrimination" case; it involved an *actual statutory classification* that distinguished between school districts and their students based on wealth. *Serrano v. Priest* (1971) 5 Cal.3d 584, 603-04, 614 ("*Serrano I*"); *see also Serrano v. Priest* (1976) 18 Cal.3d 728, 756, 765-66 & n.45, 768 ("*Serrano II*"); *Butt v. California* (1992) 4 Cal.4th 668, 682. As the Court of Appeal explained, the unequal funding scheme at issue in *Serrano* was "mandate[d]" by "the text of the statute[s]" being challenged. Op. 32.

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[8] The Court of Appeal noted that even if the challenged statutes were struck down in their entirety, that still "would not prevent administrators from assigning the worst teachers to schools serving [those] students," Op. 35—underscoring that discretionary district decision-making is the cause of any disproportionate assignment of "grossly ineffective" teachers to poor and minority students. There is nothing "inevitable" about the effects of a statutory scheme when discretionary implementation at the district level has resulted in such a broad and varied range of outcomes.

Further, the role of local school district discretion here is not at all comparable to the facts in *Serrano.* Plaintiffs quote this Court's acknowledgement in *Serrano* that local tax rates affected school funding. But they omit this Court's conclusion that "as a practical matter districts with small tax bases *simply cannot* levy taxes at a rate sufficient" to equalize their revenue with wealthier districts. *Serrano I*, 5 Cal.3d at 598 (emphasis added); *see also id.* at 611 (noting that "fiscal freewill is a cruel illusion for the poor school districts" and that a "poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide"). Here, by contrast, Plaintiffs did not show that the challenged statutes made it practically impossible for schools to avoid the disproportionate assignment of "grossly ineffective" teachers to low-income and/or high-minority schools. Instead, multiple witnesses testified that such outcomes did not occur in their districts, where school administrators made assignment decisions that remediated, rather than exacerbated, past disparities.[9]

Finally, nothing in the Court of Appeal's disparate impact analysis conflicts with the well-established standards applicable to statutory disparate impact claims, which require evidence of a statistically significant disparity in the harm suffered by members of a suspect class and proof that

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[9] Neither *Gould v. Grubb* (1975) 14 Cal.3d 661, nor *Bullock v. Carter* (1972) 405 U.S. 134, support Plaintiffs' position that an equal protection plaintiff should not be required to show that a challenged statute inevitably causes constitutional harm. To the contrary, both decisions emphasized that the harm resulting from the statutes at issue *was* inevitable. *See Gould*, 14 Cal.3d at 668, 670 (ballot placement preference "inevitably" and in "virtually all elections" "dilute[d] the weight of the vote of all those electors who cast their ballot for a candidate who is not included within the favored class"); *Bullock*, 405 U.S. at 144 (excessive filing fee inherently discriminated between candidates and their supporters "according to their economic status").

the cause of that disparity is the specific law, policy, or practice being challenged. Plaintiffs are right that the starting point for any disparate impact claim is statistical proof that the plaintiffs, as members of a protected class, have suffered disproportionate harm. But the courts have long recognized that a broad-based disparate impact claim cannot be grounded on "'small or incomplete data sets'" that, as here, concern only a fraction of the population on whose behalf the claim is brought. *Carter v. CB Richard Ellis* (2004) 122 Cal.App.4th 1313, 1324 (quoting *Watson v. Fort Worth Bank & Trust* (1988) 487 U.S. 977, 996-97); *see also, e.g., Shutt v. Sandoz Crop Protection Corp.* (9th Cir. 1991) 944 F.2d 1431, 1433. Moreover, it is long settled that a showing of statistical disparity alone is legally insufficient to satisfy the plaintiff's burden of proof. A plaintiff must "specifically show[]" that the disparity is caused by the particular practice or law at issue. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 657; *see also Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1406.[10] The reason, of course, is because disparate

[10] Although a statistical analysis need not account for every minor variable that might contribute to a statistically significant disparity, an analysis that fails to take into account the *major* contributing factors is not even admissible. *See Bazemore v. Friday* (1986) 478 U.S. 385, 400 & n.10. Plaintiffs here did not attempt to undertake a statistical analysis that controlled for major contributing factors such as school district policies, collectively bargained provisions governing teacher assignment, or school district decisions about which services to eliminate during a reduction-in-force. Nor did they attempt to isolate the potential impacts of other statutory provisions they chose not to challenge, or to distinguish the procedural protections required by the statutory dismissal provisions from those required by due process.

impact claims target the *causes* of disparities, not simply their existence. *See, e.g.*, *Wards Cove*, 490 U.S. at 656-57.[11]

Plaintiffs did not present (and could not have presented) the detailed proof necessary to establish that the challenged statutes cause statistically significant disparate harm to poor or minority students, and the trial court made no findings regarding those core elements (despite State Defendants' and Intervenors' request for such findings). Plaintiffs' statistical evidence at most purported to show inequitable distributions in a small number of California school districts, which could not by itself support statewide invalidation of the challenged statutes. *See* Op. 16-17 (describing Plaintiffs' expert testimony).[12] Moreover, Plaintiffs made no effort to prove a causal link between such disparities and the challenged statutes while adequately accounting for other important factors that determine teacher assignments, relying instead on one expert's uninformed, conclusory speculation upon which even the trial court did not rely. Pet. 16; Op. 34; RT 2879:17-2880:22. Because local district administrators assign teachers to particular schools and students, this failure of proof

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[11] Plaintiffs' cited cases are entirely consistent with the Court of Appeal's analysis. *City & Cty. of San Francisco v. Fair Emp. & Housing Comm'n* (1987) 191 Cal.App.3d 976, 986, 988-89, recognized that California disparate impact analysis is "identical to federal standards under Title VII," and required a showing that a substantial racial disparity could not be explained by other factors. *Farrakhan v. Washington* (9th Cir. 2003) 338 F.3d 1009, 1011-12, 1015-16, did not apply the general standards governing statutory disparate impact claims, but instead applied the unique standard governing claims under Section 2 of the Voting Rights Act.

[12] Plaintiffs' experts also acknowledged that the claimed disparities were not uniform throughout California; indeed, in some districts, schools with the fewest poor or minority students had the highest percentage of inexperienced teachers. *See supra* at 14-15; RT 3844:7-3848:6 (Plaintiffs' witness Goldhaber), 4144:12-25 (Plaintiffs' witness Ramanathan).

would be fatal under even the most generous standard of review. *See Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2523-24; *Bazemore*, 478 U.S. at 400 n.10.[13]

III. This Case Is Not an Appropriate Vehicle for Deciding the Standard of Appellate Review that Applies to a Finding of Unconstitutional Disparate Impact.

Plaintiffs next argue that this Court should grant review to consider the standard of review that should apply to the factual underpinnings of a trial court's disparate impact ruling. Pet. 24-27. This is not an appropriate case for reconsidering that standard, because the trial court's ruling rested on conclusory statements rather than actual findings, and because C.C.P. §634 prohibited the Court of Appeal from filling the holes in the trial court's analysis through inference. Besides, Plaintiffs' evidence was inadequate under any standard of appellate review.

After the trial court announced its tentative decision, all parties submitted written requests for factual findings, including findings concerning whether the challenged statutes caused any statistically significant disparity in the assignment of ineffective teachers to poor or minority students. *See* 28AA 7165-68 ¶¶158-173; 28AA 7194-95 ¶¶10-15; 28AA 7263-65 ¶¶43-46; 28AA 7271-72 ¶¶9-15. The trial court declined to make any such findings, overruled State Defendants' and Intervenors' subsequent objections without comment, and re-issued its tentative

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[13] The "robust causality requirement" performs an important constitutional role in disparate impact cases, including by preventing the adoption of remedial measures that might violate the U.S. Constitution, *Inclusive Communities Project*, 135 S.Ct. at 2523, and ensuring appropriate deference to the Legislature's policy decisions, *see* Op. 24; *Arcadia Unified Sch. Dist. v. State Dept. of Educ.* (1992) 2 Cal.4th 251, 260 ("In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act."). It also helps policy-makers identify the most effective solutions to social problems. *See supra* n.8; Op. 35.

Statement of Decision as its final judgment. 28AA 7309. Because the trial court failed to address any of the controverted issues regarding Plaintiffs' disparate impact claim, the Court of Appeal was *prohibited* as a matter of state law from "infer[ring] on appeal ... that the trial court decided in favor of the prevailing party as to those facts or on th[ose] issue[s]." C.C.P. §634. By enacting C.C.P. §§632 and 634, the Legislature has already answered the question that Plaintiffs ask this Court to review.

The Court of Appeal was also correct that California appellate courts must apply an independent standard of review to mixed questions of law and fact that implicate constitutional rights, because such determinations present primarily legal rather than factual questions. Op. 24; *People v. Cromer* (2001) 24 Cal.4th 889, 894; *Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 448-49. While deferential review might apply to certain facts regarding actual statistical disparities, or to facts demonstrating the specific effect a challenged provision had on a particular school district's teacher assignments (if any), *cf., e.g., City of Rome v. United States* (1980) 446 U.S. 156; *Jumaane*, 241 Cal.App.4th at 1394, 1399-1400, whether those facts are sufficient to establish an unconstitutional disparate impact traceable to the challenged statutes presents a mixed question that "[goes] to the heart" of the constitutional equal protection right at issue. *Cromer*, 24 Cal.4th at 894. Independent appellate review of such a conclusion is essential to maintain uniformity of decisions addressing whether state laws have an unconstitutional disparate impact based on race or wealth, and to ensure that such decisions do not implicate the constitutional concerns raised by the U.S. Supreme Court in *Inclusive Communities Project*—especially where, as here, the trial court declined to offer any meaningful explanation of the specific factual basis for its decision. *See Cromer*, 24 Cal.4th at 896 (discussing *Ornelas v. United States* (1996) 517 U.S. 690, 697).

Even if the Court of Appeal had applied a more deferential standard of review, the result would not have changed. The only finding concerning disparate impact made by the trial court was based on a short reference to a 2007 California Department of Education report, which stated in general terms that poor and minority students tend to be taught disproportionately by "underqualified, inexperienced, and ineffective" teachers. Op. 33-34; 28AA 7306-07. Even if true, that statement did not even purport to suggest that the challenged statutes *caused* that disparity. *See* Op. 33.[14] The additional testimony Plaintiffs now cite, Pet. 11-12, was so speculative that the trial court itself declined to credit it, and the Court of Appeal simply followed the trial court in rejecting that testimony. Op. 34; *see, e.g.*, *Wise v. DLA Piper LLP* (2013) 220 Cal.App.4th 1180, 1191-92, 1194.

Finally, to the extent the trial court's rulings did incorporate any factual findings, those "findings" were made only *after* the trial court concluded that the statutes were subject to strict scrutiny. 28AA 7300, 7306-07. Because Plaintiffs could not make the minimum threshold showings necessary to state an equal protection claim, however, Op. 28-29, strict scrutiny should not have applied, and any findings made under that standard were not entitled to appellate deference. *See Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1, 47 ("findings [] premised on an erroneous view of the applicable legal standard" warrant no deference).

[14] That outdated report's reference to a "dance of the lemons" similarly did not identify the challenged statutes as a *cause* of the practice. *See also* Op. 34; *supra* at 18 n.6 (citing evidence that many school districts penalize such teacher transfers).

IV. This Court Should Not Grant Review To Reconsider the Well-Established Principle that an Equal Protection Challenge Requires a Classification Between Identifiable Groups.

Finally, Plaintiffs ask this Court to revisit longstanding precedents recognizing that the fundamental prerequisite for any equal protection challenge is materially different state treatment of two or more *identifiable* groups. *See, e.g., Cooley v. Super. Ct.* (2002) 29 Cal.4th 228, 253. In concluding that Plaintiffs could not premise their equal protection challenge on the statutes' purported impact on the fundamental rights of non-ascertainable groups who share no defining characteristic (other than having allegedly suffered that adverse impact), the Court of Appeal applied the decades-old equal protection principle that there can be no equal protection challenge to statutes that do not establish a "classification that affects two or more similarly situated groups in an unequal manner." *Id.* at 253. The Court of Appeal properly recognized that Plaintiffs cannot evade this requirement through such a "tautological" and "circular" definition of the groups at issue. Op. 28-31.[15]

Plaintiffs offer no compelling reason for this Court to revisit that foundational principle. Pet. 27-30. Plaintiffs cannot cite a single state *or* federal precedent upholding an equal protection challenge to facially neutral state action that did not discriminate between identifiable classes defined by an extrinsic characteristic other than the harm itself. Instead,

[15] To be sure, the challenged classification need not appear on the face of a statute or regulation for a plaintiff to have a potentially cognizable equal protection challenge. *See, e.g., Harper v. Va. Bd. of Elections* (1966) 383 U.S. 663, 666 (poll tax inherently discriminated on basis of wealth); Op. 28-29. But for a statute to be subject to equal protection challenge, it must distinguish between groups defined by some characteristic other than the differential treatment itself. *See* Op. 29.

Plaintiffs mischaracterize cases in which courts expressly found state line-drawing.

In *Gould*, for example, this Court invalidated "an electoral classification scheme which afford[ed] advantages to candidates on the basis of incumbency" by placing incumbents at the top of each ballot—a classification that distinguished between incumbents (and their supporters) and non-incumbents (and their supporters), and adversely impacted the voting rights of the latter group. 14 Cal.3d at 673-74. The Court ruled that the defendant also could not list candidates alphabetically, because that differential treatment of candidates would likewise "invariably impose[] a substantial disadvantage on a distinct, fixed class of candidates' proponents." *Id.* at 675. By contrast, the Court concluded that a *random* ordering of candidates, chosen in advance of the election for use in a single election, would *not* violate equal protection, because although randomization would still provide an advantage to certain candidates, it would "not continually work a disadvantage *upon a fixed class of candidates*." *Id.* at 676 (emphasis added). The requirement that there be some classification based upon shared characteristics other than having suffered harm was thus central to this Court's equal protection analysis in *Gould*. *See* Op. 30-31.[16]

Plaintiffs similarly mischaracterize *Serrano* in asserting that the educational funding scheme at issue discriminated against all "'students of this state'" without differentiation or distinction. Pet. 29 (quoting *Serrano II*, 18 Cal.3d at 766). *Serrano* explained *repeatedly* that the funding

[16] Contrary to Plaintiffs' contention, Pet. 29, the voters in *Gould* did share an identifiable trait. The candidates whom those voters supported shared extrinsic traits based upon incumbency or last name, and the voters were defined by their support for those candidates.

scheme at issue impermissibly distinguished between school districts and their students on the basis of wealth and geography. *Serrano I*, 5 Cal.3d at 598 ("irrefutable … that the school financing system *classifies on the basis of wealth*") (emphasis added); *id.* at 603 (case "unusual in the extent to which governmental action *is* the cause of *wealth classifications*") (second emphasis added); *id.* at 604, 614 (similar); *Serrano II*, 18 Cal.3d at 756, 765-66 (similar); *accord Butt*, 4 Cal.4th at 682 (*Serrano* concerned "purposeful state legislative action which had produced *the geographically based wealth classifications*") (emphasis added).[17]

Under Plaintiffs' theory, if a state statute has any non-incidental impact on even a single individual's fundamental rights, it is subject to strict scrutiny under the California Constitution's equal protection provisions. Pet. 28. That argument obliterates any distinction between direct fundamental rights claims and equal protection claims based on a state-drawn classification's allegedly discriminatory impact on the fundamental rights of one group but not another. *See, e.g.*, *Mosley*, 408 U.S. at 94-95 (rather than focusing on substance of right at issue, fundamental right-based equal protection claim considers "whether there is an appropriate governmental interest suitably furthered *by the differential treatment*") (emphasis added). Those are different types of claims, arising under different constitutional provisions. They focus on different kinds of harm, involve different legal standards and proof, and seek different remedies. Plaintiffs' improper conflation of the two distinct legal doctrines

[17] Plaintiffs also cite *Fair Political Practices Comm'n v. Super. Ct.* (1979) 25 Cal.3d 33, 45, 47, and *Planning & Conservation League, Inc. v. Lungren* (1995) 38 Cal.App.4th 497, 509 n.6, but those decisions addressed the First Amendment, not equal protection.

offers no reason for this Court to revisit longstanding equal protection principles.[18]

Plaintiffs in this case mounted a sweeping facial attack against five Education Code provisions, based on an equal protection theory that was fundamentally flawed from the outset. Plaintiffs acknowledge that they deliberately chose to pursue *only* an equal protection challenge, Pet. 8; *see also* Op. 6, not a direct fundamental rights claim (as, for example, the plaintiffs did in *Campaign for Quality Education*, 246 Cal.App.4th 896).[19]

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[18] Plaintiffs' amici try to make the new argument that the Court of Appeal "seems to have wholly ignored" equal protection cases allowing non-class-based claims. Amicus Letter of Tristan Duncan et al. at 5 n.5 (citing *Engquist v. Or. Dept. of Ag.* (2008) 553 U.S. 591). Plaintiffs themselves never asserted such a claim, which would have required a showing that a plaintiff's assignment to a particular "grossly ineffective" teacher discriminated against that plaintiff as a "class of one." Plaintiffs here did not challenge their particular teacher assignments (and the evidence would not have supported such a challenge anyway, *see infra* at 30-31 & nn.20-22), but instead chose to challenge the five statutory provisions on their face. Nor could Plaintiffs have established any of the elements of a class-of-one equal protection claim. *See Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564 (class-of-one claim requires *intentional* discrimination and absence of rational basis for differential treatment); *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 17 Cal.App.4th 837, 859 (same); *Engquist*, 553 U.S. at 602-03 (class-of-one claims are only appropriate when there is a "clear standard against which departures, even for a single plaintiff, could be readily assessed," not when government "exercise[s] discretionary authority based on subjective, individualized determinations," as it does when making public employment decisions).

[19] While many of Plaintiffs' amici argue that the Court of Appeal's decision threatens the fundamental right to an education of a particular substantive quality under the California Constitution, this case does not involve a direct fundamental rights challenge. That concern would be better addressed in a case like *Campaign for Quality Education*, in which the Court of Appeal held that no claim was stated by the plaintiffs'

(continued …)

There is no reason for this Court to grant review to consider how different legal theories might have fared had Plaintiffs actually presented them.

V. Granting Review Would Require This Court To Address Numerous Other Fatal Flaws in Plaintiffs' Case.

There remains yet another set of reasons why Supreme Court review should not be granted. Reversal of the trial court's sweeping injunction would be required even if Plaintiffs were correct as to every argument asserted in their petition.

First, although the Court of Appeal did not address standing, the record shows that all nine Plaintiffs lacked standing because the challenged statutes neither caused any past violation of their constitutional rights nor presented any imminent threat to such rights. While some Plaintiffs testified they had been assigned to "bad" or "grossly ineffective" teachers at some point in their education, the evidence showed that many of those teachers were highly regarded by their school districts.[20] Plaintiffs also made no attempt to establish that the criticized teachers would have been denied tenure if the probationary period were longer, dismissed but for the dismissal statutes, or laid off but for the reduction-in-force statute.[21] Nor did Plaintiffs present any evidence that they were personally likely to be

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allegation that inadequate levels of state funding deprived California students of their fundamental right to an education.

[20] For example, one such teacher was named Pasadena Unified School District's teacher of the year in 2013 and similarly honored by the local NAACP chapter. RT 3653:13-3654:15, 5846:14-5847:3. Three other plaintiffs identified teachers whose superiors gave them uniformly favorable evaluations. RT 3354:23-3357:8, 3399:10-3400:10, 3531:17-19, 3532:23-3533:5, 6257:2-4, 6261:7-17, 7726:18-28, 7738:15-7739:21, 7743:5-7744:19; 29AA 5713A, 25AA 6359-75.

[21] Indeed, one criticized teacher was a long-term substitute who enjoyed no job security protections whatsoever. RT 7737:27-7738:14, 7761:3-6, 9216:20-26.

assigned to a "grossly ineffective" teacher in the future due to the challenged statutes.[22] Because Plaintiffs failed to establish any past or imminent injury from the challenged statutes, they lacked standing to assert their claims. *See Cty. of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 814; *In re Tania S.* (1992) 5 Cal.App.4th 728, 737.

Plaintiffs' "fundamental rights" equal protection claim fails for two additional, independent reasons. First, strict scrutiny only applies when a challenged law has a direct and unattenuated impact on a fundamental right. *See, e.g.*, *Fair Political Practices Comm'n*, 25 Cal.3d at 47. Because decisions regarding teacher hiring, tenure, training, initiation of dismissal proceedings, and assignment are made by local district administrators under California's system of local control, any impact of the challenged statutes upon the right to basic educational equality depends upon multiple other intervening causal factors. *See* Op. 7, 33-35; RT 817:9-21 (Deasy); 8505:9-19 (Nichols). When LAUSD changed its policy from granting tenure nearly automatically to requiring affirmative tenure decisions about each teacher and denying tenure when there were any doubts about a teacher's effectiveness, for example, the percentage of LAUSD probationary teachers achieving tenure dropped to 50%—without any change in the challenged statues. RT 771:6-15, 772:19-773:6, 774:1-12 (Deasy). When LAUSD adopted a policy of initiating dismissal proceedings whenever a teacher received two below-standard evaluations, the number of LAUSD teachers who were dismissed for performance-related reasons or who resigned to

[22] The trial court did not make any findings regarding Plaintiffs' standing, although Intervenors requested them. 28AA 7163-64 ¶¶139-144, 7261-63 ¶¶39-41.

avoid such a dismissal jumped from 16 (in 2005-06) to 212 (in 2012-13)—again, without any statutory change. Op. 19.[23]

The case law is settled that where, as here, any causation is at most indirect and attenuated (given the many intervening causal factors underlying teacher assignment decisions), heightened equal protection scrutiny is *not* required. *See In re Flodihn* (1979) 25 Cal.3d 561, 567-68 (rule making some prisoners eligible for longer sentences had only *indirect* impact upon fundamental liberty right, because longer sentence might not be imposed after hearing); *City & County of San Francisco v. Freeman* (1999) 71 Cal.App.4th 869, 872 (rule prohibiting hardship reduction in child support obligations of parent to nonresident child has "indirect and uncertain" impact because amount of money remaining to support child is affected by other factors).

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[23] While Plaintiffs are correct that only a small number of teachers are terminated each year after pursuing the full Commission on Professional Competence ("CPC") hearing and decision process, Pet. 10; Resp. Br. 35 (citing RT 4913:27-4914:23), that is because the full process is rarely needed. School districts large and small "are able to remove poorly performing teachers" without formal proceedings, and the "majority of potential teacher dismissals are resolved through resignation, settlement, retirement, or remediation rather than a CPC hearing." Op. 19; *see also* RT 1521:24-1522:9, 1965:23-26, 1966:11-15 (Christmas, Oakland USD), 9218:19-9219:19 (Ekchian, LAUSD), 6986:14-24 (Boyd, Long Beach USD; district successfully resolves 95% of its teacher dismissal cases informally). As noted above, *hundreds* of teachers whom LAUSD had sought to dismiss resigned in 2012-13 alone. Plaintiffs similarly exaggerate the record when they claim that dismissals cost $50,000 to $450,000. Pet. 10. That cost estimate is based on figures that included outlier *misconduct* cases that are irrelevant to the performance-related claims in this case. RT 537:6-538:9, 787:13-22, 788:10-13 (Deasy). The average cost of a monetary settlement in a *performance*-based dismissal in LAUSD was just $26,000. Op. 19.

Second, the trial court failed to consider the many *positive* countervailing impacts of the challenged statutes upon the quality of education in California, as it was required to do in determining whether the statutes cause any student's educational experience "viewed as a whole," to "fall[] fundamentally below prevailing statewide standards." *Butt*, 4 Cal.4th at 686-87. In *Butt*, for example, this Court noted that a six-week reduction of the school year might not affect students' right to basic educational equality if "compensated [for] by other means, such as extended daily hours, more intensive lesson plans, summer sessions, volunteer programs, and the like." *Id.* at 686. Yet here the trial court refused to consider the extensive trial evidence regarding the positive educational effects of the challenged statutes. *See* Op. 18-20 (summarizing evidence that statutes helped districts attract and retain teachers, protected teachers against arbitrary dismissal, prevented delay in making decisions about ineffective probationary teachers, and provided an easily administrable system for layoffs that did not undermine teacher cooperation).[24] While it is the role of the Legislature, not the courts, to balance the benefits and burdens of constraining district administrators' discretion by providing statutory due process protections for teachers, if courts are to evaluate the challenged statutes' overall impact on educational quality, their constitutional analysis must consider not only any purported detrimental effects of the challenged laws but also their positive effects.

[24] The evidence showed that layoffs based on seniority result, on average, in the retention of a more experienced workforce, which is likely to be more effective overall because (as all witnesses agreed) a teacher's increased experience correlates with increased effectiveness, especially in the earliest years of a teacher's career when he or she is most likely to face seniority-based layoffs. RT 1267:3-17 (Chetty), 2898:25-2899:7 (Kane).

CONCLUSION

For the foregoing reasons, Plaintiffs' petition for review should be denied. Should this Court grant review, however, it should also consider the following related issues, for the reasons set forth in Section V:

1) Whether a student's actual or potential enrollment in a California public school is sufficient to establish that student's standing to challenge any Education Code provision regulating teacher employment.

2) Whether strict scrutiny applies to an equal protection challenge to a statute based on deprivation of the fundamental right to basic educational equality when there are multiple independent and intervening causes of any such deprivation.

3) Whether the educational benefits of a statute must be considered in determining whether a statute causes any student's education, viewed as a whole, to fall fundamentally below prevailing statewide standards in violation of that student's fundamental right to basic educational equality.

Dated: June 13, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.504(d)(1) of the California Rules of Court that the attached ANSWER TO PETITION FOR REVIEW OF INTERVENORS-RESPONDENTS CALIFORNIA TEACHERS ASSOCIATION AND CALIFORNIA FEDERATION OF TEACHERS is proportionally spaced, has a typeface of 13 points or more, and contains 8,304 words, excluding the cover, the tables, the signature block, and this certificate. Counsel relies on the word count of the word-processing program used to prepare this brief.

DATED: June 13, 2016

By: _____
Michael Rubin

PROOF OF SERVICE

CASE: *Beatriz Vergara, et al. v. State of California, et al.*

CASE NO: California Supreme Court No. S234741;

Court Of Appeal, Second District, No. B258589

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On June 13, 2016, I served the following documents:

ANSWER TO PETITION FOR REVIEW OF INTERVENORS-RESPONDENTS CALIFORNIA TEACHERS ASSOCIATION AND CALIFORNIA FEDERATION OF TEACHERS

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 13, 2016, at San Francisco, California.

_____

Jean Perley