No. B258589

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

BEATRIZ VERGARA, *et al.*
Plaintiffs-Respondents,
v.
STATE OF CALIFORNIA, *et al.*,
Defendants-Appellants
and
CALIFORNIA TEACHERS ASSOCIATION, *et al.*,
Intervenors-Appellants.

Appeal from Final Judgment of the Superior Court of California,
County of Los Angeles, Case No. BC484642
Honorable Rolf M. Treu

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND PROPOSED BRIEF OF AMICUS CURIAE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF INTERVENORS-APPELLANTS

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APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF INTERVENORS-APPELLANTS

Interest of the Amicus Curiae

The National Education Association (NEA) is a national labor organization that represents some three million public school teachers, education support professionals and other education employees, the vast majority of whom serve in our public schools. NEA's core belief is that public education is the cornerstone of our social, economic, and political structure; and that students of all backgrounds have the right to quality public schools. The shared mission of NEA members is to work together for great public schools for every student.

NEA members across the country rely on their earned due process protections to provide the best education possible for students. These protections are essential to maintaining a strong and stable teaching force and to ensuring that students receive the benefits that accompany such a force. The decision of the lower court to strike down well-considered due process protection statutes passed by the California Legislature sets a dangerous precedent with no basis in law and threatens to destabilize public education employment policies in a way that will negatively impact our public schools.

Reasons why the proposed amicus brief will assist the court

The proposed *amicus curiae* brief seeks to provide this court with historical background that underscores the need, past and present, for due process protections in education. The proposed brief offers this court the perspective of a nationwide overview that demonstrates just how critical, cautious, and commonplace these statutory protections truly are. This

perspective illustrates the diligent work and thoughtful balance of competing interests and needs that legislatures have struck—in California and elsewhere in enacting such statutes. The proposed brief also provides an exposition of how unprecedented and inappropriate the trial court's ruling is given controlling California precedent and demonstrates that the policy choices of the California legislature are well supported by research and the record in this case.

Good Cause exists to accept this amicus brief

The Court's decision in this case has the potential to affect hundreds of thousands of NEA members across the state of California. What is more, the outcome of the case will affect the education of California's students and potentially, students throughout the country. Granting the NEA leave to file this brief will allow this court to consider the views of the nation's oldest and largest education-focused membership organization, the NEA.

CRC 8.200(c)(3) Disclosure

No party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the proposed amicus brief, other than amicus curiae, its members, or its counsel in the pending appeal.

Conclusion

For the foregoing reasons, NEA's application for leave to file an amicus brief should be granted.

INTRODUCTION

The State of California and the Intervenor Union Defendants have filed hundreds of pages of briefs explaining in great detail why the Superior Court's decision is fatally deficient on multiple scores and provides no sound basis for striking down, in their entirety, the five challenged California state statutes that have framed the basic employment relationship in California between public school teachers and school districts for decades. These statutes allow a teacher to earn due process protections after two years of service. These protections provide that a teacher may only be dismissed for a statutorily defined list of causes, including unprofessional conduct, unsatisfactory performance, and the like, that dismissal for cause requires notice and a hearing, and that layoffs must be made on the basis of seniority.

The purpose of this amicus brief is not to reiterate those prior submissions, but to explain the role that state tenure laws have played in professionalizing teaching and thereby raising the status of teachers, and the quality of individuals recruited and retained into the profession. This brief does so by first (in point 1) discussing the origin of state tenure laws, including those of California; and then (in point 2) explaining the various choices that states, including California, have made in enacting, amending, and refining those laws over the last several decades. This brief then details (in point 3) why those very different educational policy choices by legislatures cannot amount to a constitutional violation under the *Serrano* and *Butt* standard and, indeed, why the ruling below is not only unprecedented in California but unprecedented anywhere. Finally, this brief explains (in point 4) that the wisdom of the educational policy choices

made by California in the challenged tenure statutes is supported by the trial record in this case.

ARGUMENT

I. Tenure protections have been adopted by almost every state reflecting a widespread understanding that such due process protections are important to a quality public education system.

A. The need to professionalize teaching and protect teachers from political overreach led to the adoption of state teacher tenure laws.

The history of tenure is long, deliberative, and grounded in the unique challenges and history of providing a free and public education.

Calls to tenure teachers first arose in the late 19th Century based on the need to professionalize the teaching profession and remove teachers from the political vicissitudes of their public employers. As one of the early NEA proponents for tenure explained, "As long as a teacher finds that he must be regarded as a hireling, with no guarantee of remaining in office over a year, and with all the uncertainties of an annual election before his vision,—so long as he finds himself not connected with a profession, properly so called, he lacks one of the greatest incentives to professional study, and is tempted to make his teaching not even a calling, but only a steppingstone to some other work. Serious as is the injury to the teachers, still more serious is it to the children whom they teach." (Higbee, Addresses and Proceedings of the NEA (1887) p. 308.)

In 1909, New Jersey adopted the nation's first tenure law "as a clean government reform after decades of politically influenced teacher appointments, in which schools were part of the patronage machine." (Goldstein, Teacher Wars: A History of America's Most Embattled Profession (2014) p. 85.) The problem of patronage was by no means

unique to New Jersey. In New York City, ward bosses staffed schools however they saw fit. (Ravitch, The Great School Wars: New York City, 1805–1973; A History of the Public Schools as Battlefield of Social Change, (1974) p. 85.) Chicago teachers were fired in an effort to break up the nascent union and quash dissent over substantial budget cuts. (Goldstein, *supra* at pp. 83–84.) And the situation in Philadelphia were described this way:

"You can't too strongly emphasize the demoralization in some schools," said a principal. "First, the subordinate, knowing that her position comes from the 'boss,' not as a reward of good work, acts accordingly. The principal is in many instances without authority over his subordinates. Then the children scent the situation and recognize the principal's situation, and then you have discipline gone. And you will be surprised to know that politics even gets into cases of discipline. Then the system of choosing teachers gives us frequently teachers who promise to be failures, instead of others who show promise. Every principal in the city is carrying deadwood, and sees poor teachers appointed and promoted for political reasons." (*Politics in Philadelphia Schools*, (1903) 66 (15) The Sch. J. 415, 426.)

To remove politics from educational staffing, due process protections were developed. Rather than upending the faculty of public schools when school administrations changed, legislatures across the country recognized the value of maintaining a stable teaching force that, insulated from political currents, could gain experience and perform their work educating the nation's students. State legislatures came to understand that "[t]he purpose of the tenure system is to afford tenured teachers procedural safeguards, guarantee continuous service on the basis of merit for able, experienced teachers and prevent dismissal for political, partisan or capricious reasons." (*Evans v. Benjamin Sch. Dist. No. 25* (Ill. App. Ct.

1985) 480 N.E.2d 1380, 1383–84; see also *Bryan v. Ala. State Tenure Comm'n* (Ala. Ct. App. 1985) 472 So. 2d 1052, 1055 ["the purpose of the Teacher Tenure Act is to protect 'teachers' from cancellation of their contracts or transfers for political, personal, or arbitrary reasons"].)

These policies have endured because political threats to the teaching force did not fade with the death of Tammany-Hall-era corruption and cronyism—successive generations of teachers have faced their own political pressures. Teachers during World War I faced discipline or dismissal for failure to buy war bonds or for pacifist or anti-war attitudes related to their religious or political views. (Kahlenberg, *How Due Process Protects Teachers and Students* (Summer 2015) AM. EDUCATOR at 6, *available at* http://www.aft.org/sites/default/files/ae_summer2015_kahlenberg.pdf.) During the Great Depression, female teachers faced dismissal for marriage. *Id.* And during the fight for civil rights, teachers had their licenses revoked for membership in the NAACP, and several Southern states, facing integration, repealed tenure laws in order to allow white administrators to fire black teachers more easily. (Goldstein, *supra*, at 112.) Even today, the politics surrounding public education produce heated debates that would ensnare professional educators in the absence of protections that let them to do their jobs.[1]

The due process protections were designed to "protect competent and worthy instructors and other members of the teaching profession against

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[1] (See e.g. Associated Press, *Texas Approves Disputed History Texts for Schools*, N.Y. TIMES (Nov. 23, 2014) at A22, *available at* http://www.nytimes.com/2014/11/23/us/texas-approves-disputed-history-texts-for-schools.html?_r=0; Slevin, *Kansas Education Board First to Back 'Intelligent Design'*, WASH. POST (Nov. 9, 2005) http://www.washingtonpost.com/wp-dyn/content/article/2005/11/08/AR2005110801211.html.)

unjust dismissal of any kind—political, religious or personal, and secure for them teaching conditions which will encourage their growth in the full practice of their profession, unharried by constant pressure and fear." (*Million v. Bd. of Educ. of Wichita* (Kan. 1957) 310 P.2d 917, 921.) These policy choices also reflected legislators' judgments that laws were needed "to aid in the establishment of a competent and efficient school system by providing teachers, principals and superintendents with a measure of security in the rank they hold after years of service." (*Bd. of Educ. of Manchester Twp., Ocean Cnty. v. Raubinger* (N.J. Super. Ct. App. Div. 1963) 187 A.2d 614, 620; see also *Watson v. Burnett* (Ind. 1939) 23 N.E.2d 420, 423 ["The principal purpose of the Act was to secure permanency in the teaching force"].) All of these choices, as one early court put it, "represent important expressions of legislative policy." (*Viemeister v. Bd. of Educ. of Borough of Prospect Park, Passaic Cnty.* (N.J. Super. Ct. App. Div. 1949) 68 A.2d 768, 770.)

California arrived at the same conclusion that due process protections were needed to prevent political forces from damaging the education system and to promote a stable and competent teaching force. The 1959 Assembly Interim Committee on Education released a report noting that prior to the existence of due process protections in California, there was a "widespread practice of hiring and firing teachers on a political patronage basis." (Rep. of the Subcom. on the Extension and Restriction of Tenure of the Assem. Interim Com. on Education (Mar. 1959).) When California originally passed its due process protections as part of a package of education bills, the 1923 5th Biennial Report of the State Board of Education called that set of laws "the most advanced and most important of any that has been approved at any legislative session in the history of the state." (5th Biennial Report of the State Board of Education (1923).) In his

inaugural address, Governor James Rolph, Jr. agreed, stating that "[c]ompetent teachers should be protected in their positions by a just and reasonable tenure law." (J. of the Senate during the Forty-Ninth Session of the Legislature of the State of California 182 (Lt. Gov. Frank F. Merriam & Joseph A Beek, Eds., Cal. State Printing Office) (Jan. 6, 1931).)

B. State tenure laws are founded on legislative judgments that providing teachers with due process best serves students.

As the California Legislature stated when it reaffirmed the value of due process protections in 1959: "1. The maintenance of a sound teacher tenure system is advantageous to the best interests of the public school system. 2. The present teacher tenure provisions have operated to the benefit of education within this state. The advantages of such a system have far outweighed the disadvantages." Assembly Interim Committee Reports, *supra*.

These advantages are numerous and well documented. Studies have consistently shown that teacher experience leads to greater effectiveness in the classroom.[2] And these gains increase at higher rates when a teacher works in a supportive, professional-development-rich atmosphere.[3]

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[2] (Clotfelter, Ladd, & Vigdor, *How and Why do Teacher Credentials Matter for Student Achievement?* (Jan. 2007) National Bureau of Economic Research Working Paper Series, 27 ["Consistent with other studies ([collecting studies]), we find clear evidence that teachers with more experience are more effective than those with less experience. Compared to a teacher with no experience, the benefits of experience rise monotonically to a peak in the range of 0.092 (from model 4) to 0.119 (from model 5) standard deviations after 21-27 years of experience, with more than half of the gain occurring during the first couple of years of teaching."].)

[3] (See generally Kraft & Papay, *Do Supportive Professional Environments Promote Teacher Development? Explaining Heterogeneity in*

But between 40 and 50 percent of teachers leave the profession within their first five years of teaching.[4] The rates among teachers from charter schools, who rarely have due process protections, are higher than teachers in traditional public schools, and these teachers cite lack of job security as a primary factor in that decision.[5] And recent research indicates that retention presents a better policy candidate than recruitment for ensuring that all classrooms have high-caliber teachers.[6] Basic job security protections, like tenure, provide an important incentive for teachers to remain in the classroom.

Recruiting new teachers to the profession is also vital, and due process protections assist in that too. The job security earned through tenure and seniority provides an incentive to join a profession that is otherwise widely regarded as difficult and undercompensated relative to other high-skill jobs.[7]

Returns to Teaching Experience (Dec. 2014) 36(4) EDUC. EVALUATION AND POL'Y ANALYSIS 446.)

[4] (Ingersoll, *Beginning Teacher Induction: What the Data Tell Us*, (2012) 93(8) PHI DELTA KAPPAN 47, 49, *available at* http://repository.upenn.edu/gse_pubs/234.)

[5] (Gross & DeArmond, National Charter School Research Project, *Parallel Patterns: Teacher Attrition in Charter vs. District Schools*, 6-7, 13-14 (Sept. 2010) *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.173.3338&rep=rep1&type=pdf.)

[6] (See Mervis, *Data Say Retention is Better Answer to 'Shortage' than Recruitment* (Oct. 29, 2010) 330 SCIENCE 580, 580–81.)

[7] One recent report found that teachers beginning their careers at age 25 earn about 80% of what non-teachers earn. That wage disparity worsens with teacher experience. By age 45, teachers earn only about 70% of what non-teachers earn. (Education Law Center, Fair Funding Report (2015) pp. 28–29.)

Recruitment is especially important given the rising number of veteran teachers who are retiring, the growing student population, and the increasing number of teacher shortages across the country.[8] This problem is particularly acute in California, where enrollment in teacher preparation programs dropped more than 55 percent from 2008 to 2012 and where the state is now seeking to fill 21,500 slots this school year.[9]

States that have sought to roll back due process and seniority protections for teachers in recent years have found themselves especially hard hit by the drought of educators willing to work in those locations, with many teachers leaving for other states.[10] In light of the importance and difficulty of teacher recruitment and retention, the Legislature's decision to use tenure to promote stability in the teaching profession is understandable.

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[8] (Brenneman, *Districts Facing Teacher Shortages Look for Lifelines* (Aug. 4, 2015) EDUC. WEEK [discussing teacher shortages and causes in several states] *available at* http://www.edweek.org/ew/articles/2015/08/05/districts-facing-teacher-shortages-look-for-lifelines.html; see also Turner, *Indiana Faces Shortage of First-Time Teachers* (Aug. 2, 2015) INDIANAPOLIS STAR http://www.indystar.com/story/news/education/2015/07/30/indiana-faces-shortage-first-time-teachers/30906573/; Huicochea & Jung, *Shortage Puts Uncertified Teachers in Arizona Classrooms*, (Aug. 1, 2015) ARIZONA DAILY STAR http://tucson.com/news/local/education/shortage-puts-uncertified-teachers-in-arizona-classrooms/article_b0344334-7730-5356-89d7-bdbc9eb461a7.html.)

[9] (Rich, *Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional)*, N.Y. TIMES (Aug. 9, 2015) *available at* http://mobile.nytimes.com/2015/08/10/us/teacher-shortages-spur-a-nationwide-hiring-scramble-credentials-optional.html?_r=1.)

[10] (Strauss, *Why Teachers Can't Hotfoot It Out of Kansas Fast Enough*, WASH. POST, (Aug. 2, 2015), http://www.washingtonpost.com/blogs/answer-sheet/wp/2015/08/02/why-teachers-cant-hotfoot-it-out-of-kansas-fast-enough/.)

What is more, due process protections also empower teachers to advocate for policies and practices that serve the best interests of their students without fear of reprisal.[11] Similarly, teachers with due process protections are free to hold students to high standards,[12] act as student advocates,[13] and teach controversial topics without concern that they might be dismissed at the whim of an offended parent or administrator.[14]

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[11] (See e.g., *Mpoy v. Rhee* (D.C. Cir. 2014) 758 F.3d 285, 288 [non-tenured teacher dismissed after complaining that classroom was "dirty and lacked books and other necessary materials" and refusing administrator instructions to falsify test scores]; *Stahura-Uhl v. Iroquois Cent. Sch. Dist.* (W.D.N.Y. 2011) 836 F. Supp. 2d 132 [nontenured teacher dismissed after complaining that school was not following students' Individualized Education Plans as required by law]; *Rodriguez v. Int'l Leadership Charter Sch.* (S.D.N.Y. Mar. 30, 2009) No. 08 Civ. 1012, 2009 WL 860622 [nontenured teacher fired for complaints to administration about inadequate services for students with disabilities and students requiring English as a second language]; Associated Press, *Colorado School District Denies Allegations of Grade Inflation*, THE GAZETTE (Apr. 13, 2014) [ALJ finds in favor of tenured teacher dismissed after complaining about elimination of tutoring program and pressure to inflate grades], *available at* http://gazette.com/colorado-school-district-denies-allegations-of-grade-inflation/article/1518179.)

[12] For example, tenure protections saved the job of an award-winning science teacher, who was selected as a "Teacher of the Year" on multiple occasions and developed a rigorous science curriculum, secured grant funding to build a science laboratory, and developed a robust science fair program, when parents were upset that she had sternly reprimanded their children for skipping class. (*In re Sargent Sch. Dist. RE 33J v. Resp't.* Colo. Rev. Stat. s. 22-63-302 hearing Oct. 25, 2013.) Tenure protections also saved the job of a business teacher who held herself and her students to high standards, and refused to lower them despite her principal's subtle and not-so subtle hints to do so (including by telling her it might be good if she "got drunk and gave everybody an A"). (*Rodzinak v. Bd. of Trs. of Sch. Dist. No. 4, Uinta Cnty. Wy.* (Wyo. Dist. Ct. Mar. 21, 1975) No. 69-362.)

[13] Tenure saved the job of a veteran special education teacher who was charged with dismissal for allegedly altering a student's Individualized

States that have robust due process protections for teachers see benefits that states with weaker protections do not. A state-by-state survey suggests that these protections help, rather than hinder, student achievement. Massachusetts, Vermont, Maryland, and New Jersey—to name a few states with strong due process protections for teachers[15]—consistently score at or near the top in the nation in terms of performance on the National Assessment of Educational Progress ("NAEP") assessment.[16] Vermont,

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Education Plan. (*Pet. v. Greenup Cnty. Schs.* (Ky. Admin. Action June 24, 2010) No. 10-EAHC-0128.) And tenure saved the job of a high school gym teacher who physically intervened in a fight between a large and much smaller student. The larger student turned on the teacher and punched him in the head repeatedly, placing him in a chokehold. The teacher was brought up on dismissal charges for attempting to defend himself and the smaller student. The charges were rejected because the tenure panel found the teacher's actions to have been reasonable. (*In re Resp't* (Cal. Comm. Prof'l Competence Aug. 13, 2013) OAH No. 2013030338.)

[14] In the trial below, teachers testified that the due process protections provided by the challenged statutes made teachers feel more comfortable choosing topics that they knew would be controversial – for example, teaching about the Muslim world to middle schoolers in the wake of 9/11 or talking with their colleagues about how to prevent bullying of LGBT students. (Nichols) RT 8495:10-8514:16; (Seymour) RT 7128:10-7129:8. In contrast, non-tenured teachers have been fired for making curriculum selections that some viewed as controversial. For example, the non-tenured high school English teacher was recently fired for teaching Fahrenheit 451 and Siddharta to her class (*Evans-Marshall v. Bd. of Educ. Of Tipp City Exempted Vill. Sch. Dist.* (6th Cir. 2010) 624 F.3d 332, or the non-tenured high school teacher who was fired for expressing her opinion on the Iraq war in response to a student's request for it during a classroom discussion of current events (*Mayer v. Monroe Cnty Cmity Sch. Corp.* (7th Cir. 2007) 474 F.3d 477.)

[15] (See Mass. Gen. Laws Ann. ch. 71, § 42; Vt. Stat. Ann. tit. 16, § 1752; N.J. Stat. Ann. § 18A:28-5; Md. Code Ann., Educ. § 6-202.)

[16] (National Center for Education Statistics, *The Nation's Report Card: A First Look: 2013 Mathematics and Reading* (NCES 2014-451), 8–

along with California, is one of the states that has a two-year probationary period before a teacher can acquire tenure. (Vt. Stat. Ann. tit. 16, § 1752.) New Jersey, like California, has a strictly seniority-based layoff procedure. (N.J. Stat. Ann. § 18A:28-10.) Yet these states consistently rank among the very best in the nation in numerous state educational rankings.[17]

On the other hand, some of the lowest performing states on the NAEP exam lack tenure protections and prohibit seniority-based layoffs. Mississippi, for example, offers limited protections and consistently ranks among the lowest performing states in the nation in terms of student achievement. (Nat'l Center for Education Statistics, *The Nation's Report Card: A First Look: 2013 Mathematics and Reading* (NCES 2014-451), 8–9 (2014); Miss. Code. Ann. § 37-9-101 ["It is the intent of the Legislature not to establish a system of tenure."].) Missouri requires five years of service and retention before a teacher may earn tenure but produces only middling academic outcomes. (National Center for Education Statistics, State Profiles, *supra*; Education Week Research Center, *supra*, Mo. Ann.

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9 (2014) *available at* http://nces.ed.gov/nationsreportcard/subject/publications/main2013/pdf/2014451.pdf.; National Center for Education Statistics, NAEP State Profiles, http://nces.ed.gov/nationsreportcard/states/.) NAEP scores are congressionally authorized, sponsored by the U.S. Department of Education, and frequently referred to as the Nation's Report Card, are often considered the "gold standard" for evaluating student performance in the United States.

[17] (See, e.g., Education Week Research Center, *Quality Counts 2015: Report and Rankings* (Jan. 8, 2015), available at http://www.edweek.org/ew/toc/2015/01/08/index.html?intc=EW-QC15-LFTNAV; Wallace, *The States with the Best Schools* (Apr. 5, 2015) SmartAsset, https://smartasset.com/student-loans/states-best-schools; Klein, *These Are the States With The Best And Worst School Systems, According To New Rankings*, HUFFINGTON POST (Aug. 4, 2014), *available at* http://www.huffingtonpost.com/2014/08/04/wallethub-education-rankings_n_5648067.html.)

Stat. § 168.104.) Louisiana's system mirrors what Plaintiffs seek here. It mandates a seven-year probationary period, allows tenure to be easily revoked for a variety of reasons, and provides that layoffs be "based solely upon demand, performance, and effectiveness." (La. Rev. Stat. Ann. § 17:81.4.) Yet Louisiana scores near the bottom of the country on the NAEP, and other, assessments. (National Center for Education Statistics, *supra*.)[18]

II. Nearly every state provides teachers with due process protections, which like those of California, have been repeatedly refined to meet current conditions.

Given these benefits, among many others, it is unsurprising that all but five states in the nation have adopted some form of due process protections for their teachers. (See generally Education Commission of the States, *Teacher Tenure/Continuing Contract*, http://www.ecs.org/html/educationIssues/teachingQuality/teacherdb_intro.asp (last visited Sept. 13, 2015. Similarly, only ten states prohibit use of seniority or tenure status during layoffs. (*Ibid*.)

Since the early part of the 20th Century, the question for legislatures has not been whether due process protections for teachers are desirable, but rather how to strike the right balance on protections and process. While the existence of the protections has been constant, the contours of those protections have not been immutable, and there has been no shortage of commentators, even among supporters, seeking to make changes to various

[18] Indeed, Louisiana ranked 48th in one recent statewide ranking. (Education Week Research Center, *Quality Counts 2015: Report and Rankings* (Jan. 8, 2015), available at http://www.edweek.org/ew/toc/2015/01/08/index.html?intc=EW-QC15-LFTNAV.)

aspects of the due process regimes. (See e.g., Kahlenberg, *supra* at 8–10.) Most states, California among them, have continued to make changes to their laws. Since 2010 almost every state with a teacher tenure law, including California, has revised those laws to respond to current policy needs. (See Education Commission of the States, *supra*.)

The California legislature has likewise modified the due process protections through the decades. A 1971 amendment for example led then-Governor Ronald Reagan to declare that the law ensured that "California elementary and secondary school children will be taught by competent and responsible instructors and at the same time provides increased job protection for qualified teachers" and called the law "the most advanced legislation in the area of tenure ever considered in California." (Office of the Governor, Press Release on Signing AB 293 (Jul. 21, 1971).) Assemblyman John Stull, the bill's author, hailed it as "a significant step" forward that would substantially improve the effectiveness of the challenged statutes. (The Office of Assemblyman John Stull, Press Release on Passage of AB 293 (Jul. 2, 1971).)

A key provision of that law, and one challenged by the Plaintiffs here, is the establishment of hearings before a "Commission on Professional Competence," a procedural step designed to streamline the dismissal process. This modification was described by Mr. Stull as stemming from a desire "to establish a totally separate hearing body whose decision would be final but which could be appealed to the courts only for review of evidence." (John Stull, Speech to San Diego County Administrators Association (Feb. 2, 1972).) In defense of the law he noted that "[w]ere this law written any other way, it would merely have established another bureaucratic step between the school district, acting as the employer, and the courts. This was <u>not</u> my intention." (*Ibid.*) (emphasis in original).

Instead, the law "should have the effect of removing some of the load from our already overcrowded courts. In addition, it establishes peer group evaluation, a system which clearly places the burden on the professional educator to scrutinize and improve his own profession." (*Ibid.*)

Here again, California was not alone in its thinking. Michigan for example has a similar extra-judicial hearing process. The high court of that state, discussing a similar provision, noted that "the general purpose of the Tenure Act. . . is to resolve conflicts between the teacher and the board without the necessity of court action, so long as it is consistent with the general principle that the Tenure Commission is not assuming powers reserved to the courts under the wording of the act or its reasonable interpretation." (*Lipka v. Brown City Cmty. Sch.* (Mich. 1977) 252 N.W.2d 770, 775 *on reh'g*, (Mich. 1978) 271 N.W.2d 771.) (quoting *Young v. Hazel Park Sch. Dist.*, No 64-2 (State Tenure Comm'n, June 23, 1965).)

By 1983, the California Legislature had decided to modify the law again, this time with SB 813, the Hughes-Hart Education Reform Act. A briefing paper about the bill stated that "[t]he general purpose of SB 813 in relation to school personnel was to enhance the authority of local governing boards to effectively recruit, retain and manage administrators and teachers . . . The bill provided greater flexibility to school districts in the timing of and criteria for laying off teachers (allowing the basis of curricular needs); in dismissing administrators or teachers; and in suspending without pay teachers in violation of codes of professional conduct. " (SB 813: Briefing Paper: Status of the Hughes-Hart Education Reform Act of 1983 [emphasis in original].) When he signed the bill, Governor Deukmejian boasted that "[t]hese reforms will be accompanied by measures to improve the quality of teaching in California. School boards will now have greater authority to

dismiss inadequate teachers." (Office of the Governor, Press Release: Signing of SB 813 (Jul. 28, 1983).)

Indeed, as recently as 2014, the Legislature has sought to strike the appropriate balance of protection and process needed to benefit California students. This new law, introduced by Assemblywoman Joan Buchannan, "revise[s] [the challenged] statutes in a manner that will update and streamline the procedures for certificated employee discipline and dismissal, making it more cost effective and reducing the time necessary to complete the dismissal process." (Assembly Bill 215, § 1(b) (2014).) The new statute allows for charges of unsatisfactory performance to be brought at any time during the instructional year and for charges of misconduct of any kind but unsatisfactory performance to be brought at any time, whereas before they could only be brought between May 15 and September 15. (Educ. Code § 44936.) The modifications also offer the option to have an ALJ decide the case alone, without a Commission on Professional Competence, if both parties consent; and the changes require that the hearing commence within six months and conclude within seven, absent extraordinary circumstances. (Educ. Code. § 44944.) Finally, while in the past school districts had to shoulder the entire cost of the hearing even if the teacher did not prevail, now the cost of the hearing is split between the district and the State in cases in which the district prevails. *Ibid.*

A survey of recent changes to due process protections shows just how varied and nuanced legislative choices about tenure can be. Some states, for example, have determined that a slightly longer probationary period is preferred. Connecticut changed its probationary period from 30 to 40 months before a teacher earns tenure and required that any such decision be based on "effective performance." (An Act Concerning Educational Reform, 2012 Conn. Legis. Serv. P.A. 12-116 (S.B. 458); Conn. Gen. Stat.

Ann. § 10-151.) Maryland moved from requiring two years for a teacher to earn tenure to three years. (Education Reform Act of 2010, 2010 Maryland Laws Ch. 189 (H.B. 1263); Md. Code Ann., Educ. § 6-202; see also Teacher Effectiveness and Accountability for the Children of New Jersey Act (TEACHNJ Act), 2012 N.J. Sess. Law Serv. Ch. 26 (SENATE 1455); N.J. Stat. Ann. §§ 18A:6-119, 18A:28-5.) And in 2012 the New Jersey Legislature made a variety of changes to that state's tenure law, which included mandating time-limited arbitration of contested dismissal cases. (See Teacher Effectiveness and Accountability for the Children of New Jersey Act (TEACHNJ Act), 2012 N.J. Sess. Law Serv. Ch. 26 (SENATE 1455); N.J. Stat. Ann. §§ 18A:6-119, 18A:28-5.)

But at least one other state has shortened the time for high performers. For example, Illinois has implemented a new student-growth-based performance evaluation system that has created two separate tracks for earning due process protections. Teachers hired prior to the implementation of the new evaluation system must be reemployed for a fourth year in order to earn due process protections, but teachers hired while or after the new evaluation system is implemented can earn tenure either by receiving an "excellent" performance rating during all of their first three years or by being retained, receiving a "proficient" or better rating during their fourth year, and receiving the same or better rating during either their second or third year. (Performance Evaluation Reform Act (PERA), 2009 Ill. Legis. Serv. P.A. 96-861 (S.B. 315); 105 Ill. Comp. Stat. Ann. 5/24-11; 105 Ill. Comp. Stat. Ann. 5/24A-5.) Several other states have also enacted laws providing for a shortened probationary period in cases of high performance or transfer. (See e.g. Mass. Gen. Laws Ann. ch. 71, § 41; Mich. Comp. Laws Ann. §§ 38.81; 38.83b; Minn. Stat. Ann. § 122A.40(5); Okla. Stat.

Ann. tit. 70, § 6-101.3; Nev. Rev. Stat. Ann. § 391.3197; N.Y. Educ. Law § 3014(1).)

Where changes to due process protections are needed, determined to be desirable, or simply selected for experimentation in hopes of striking a better balance, the legislatures of California and other states have made those changes. There is no need to constitutionalize these policy decisions.

III. These different policy choices are not unconstitutional under the standards established by *Serrano* and *Butt*.

The Legislature has plenary power over California's public school system, with "sweeping and comprehensive powers" over schools, "including broad discretion to determine the types of programs and services which further the purposes of education." (*Wilson v. State Bd. of Educ.* (1999) 75 Cal.App.4th 1125, 1134–35.) And "[t]he Legislature's 'plenary' power over public education is subject only to constitutional restrictions." (*Butt v. State of Cal.* (1992) 4 Cal.4th 668, 681.)

The California Constitution embodies a "fundamental interest" to educational equality. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 604 (*Serrano I*).) And courts have a vital role in policing education statutes to ensure that they do not violate that "fundamental interest." This "fundamental interest" means that when a governmental classification based upon a suspect classification—such as race or wealth—affects education, the governmental classification "must be examined under our state constitutional provisions with that strict and searching scrutiny." (*Serrano v. Priest* (1976) 18 Cal.3d 728, 766 (*Serrano II*).)

And the fundamental interest also means that when the state treats students differently and such disparate treatment has a "real and appreciable impact" on the fundamental interest to educational equality, the disparate treatment is subject to strict scrutiny. (*Butt*, *supra*, 4 Cal.4th at 686.) This

second line of protection, the Supreme Court has made clear, "does not prohibit all disparities in educational quality and service," and the "principles of equal protection have never required the State to remedy all ills or eliminate all variances in service." (*Id.* at 686.) Strict scrutiny is triggered only when the disparate treatment causes "the actual quality of the district's program, viewed as whole, [to] fall fundamentally below prevailing statewide standards." (*Id.* at 686-87.) In reviewing challenges to educational policies under the second line, the court should consider whether the challenged scheme "cause[s] an extreme and unprecedented disparity in educational service and progress." (*Id.* at 687.) The "substantial disparities" must be a "direct result" of the challenged statutes. (*Serrano I*, *supra*, 5 Cal.3d at pages 604, 618 [finding violation because discrimination was "direct result" of challenged statute, which had "direct and significant" effect on fundamental right, and "produce[d] substantial disparities among . . . districts"].) And in determining whether the program, as a whole, falls below statewide standards the specific legislative determinations about education policy "are entitled to considerable deference." (*Butt*, *supra*, 4 Cal.4th at page 686.)

Due process protections like tenure are not classifications based on race or wealth, and it cannot be said that, when considered as whole, they directly cause extreme and unprecedented disparities in educational service and progress. Indeed as noted, these protections promote rather than hinder educational service and progress.

In fact, the Superior Court's ruling is entirely unprecedented; no court in the country has concluded that due process protections are unconstitutional. And no court in the country has concluded that these protections harm students. To the contrary, those courts that have been asked to rule on whether changing tenure laws is necessary to ensure teacher quality, have

emphatically concluded that it is not. As the North Carolina Court of Appeals recently explained, in considering a challenge to a tenure repeal, that state's tenure law "is an asset for attracting and retaining quality teachers to serve in our State's public schools," and provides "school administrators with sufficient tools to discipline and/or dismiss teachers who have already earned career status and thus did not impede their ability to remove such teachers for inadequate performance. . . ." (*N.C. Ass'n of Educators, Inc. v. State* (N.C. Ct. App. June 2, 2015) No. COA14-998, 2015 WL 3466263, at *13, review granted, Aug. 20, 2015 No. 228A15, ___ S.E.2d ___ [table].) And the notion that "granting tenure to teachers creates insurmountable obstacles to dismissing ineffective teachers, and that removing those obstacles will therefore help improve student performance" is based on "vague and sweeping generalizations about tenure." (*Ibid.*; see also *Elliott v. Bd. of Sch. Trs. of Madison Consol. Sch.* (S.D. Ind. Mar. 12, 2015) No. 1:13-CV-319-WTL-DML, 2015 WL 1125022, at *11 [noting that due process protections do not prevent districts from terminating ineffective teachers; they "*always* had the ability to fire poor-performing tenured teachers" [emphasis in original]].)

If, on the other hand, the Superior Court's approach were countenanced here, the myriad legislative decisions about how to balance teacher job security with administrative flexibility would be subject to persistent constitutional oversight. Is a two-year probationary period so educationally unsound as to be unconstitutional but a three-year probationary period sound enough to be constitutional? Is an administrative hearing process always or only sometimes unconstitutional? Must all teacher employment disputes be brought to the courts? Can seniority sometimes be considered in making layoff decisions? Never?

Under the Superior Court's ruling, all these questions—and many more—become not legislative policy decisions about how best to manage the state's teaching workforce, but become fact-based decisions that courts must adjudicate. And the outcome of those cases will often turn on whether a particular trial court judge is persuaded by competing educational experts.

That result has nothing to recommend it. Courts regularly and rightly express "doubts about the appropriateness of litigation that is intended . . . to wrest the day-to-day control of our troubled public schools from school administrators and hand it over to judges and jurors who lack both knowledge of and responsibility for the operation of the public schools." (*Gernetzke v. Kenosha Unified Sch. Dist. No. 1* (7th Cir. 2001) 274 F.3d 464, 467). "That courts should not interfere with the day-to-day operations of schools is a platitudinous but eminently sound maxim which this court has reaffirmed on many occasions." (See *Shanley v. Ne. Indep. Sch. Dist., Bexar Cnty., Tex.* (5th Cir. 1972) 462 F.2d 960, 967). "The more detailed the Court's supervision becomes, the more likely its law will engender further disputes . . . Consequently, larger number of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office." (*Morse v. Frederick* (2007) 551 U.S. 393, 428).

The Plaintiffs, for their part, recognize that their approach will result in education policy disputes being decided by courts rather than the Legislature. According to the Plaintiffs, this is not a bug in their theory, but a feature. Moving the debate about education policy from the Legislature, school boards, and schools, to the courts, they say, is a good thing. As they argued in their opening statement, disputes about which types of policies lead to effective teachers are not "political issues or issues for the

legislature, but these are constitutional issues." RT 305:11–15. By constitutionalizing educational debates, as the Plaintiffs' lawyer put it, "political gridlock, campaign contributions, all the rhetoric and political campaigning" surrounding educational policy disputes can be avoided. RT 305:20–22.

Indeed, Plaintiffs would have it that assignment to even one grossly ineffective teacher entitles a student to a constitutional challenge under *Serrano* and *Butt*, evaluated under strict scrutiny, against the district and the State of California. Moreover, any student who believes that any given educational policy puts her at substantial risk of being assigned to a grossly ineffective teacher would be entitled to the same. These students could identify a policy, hire an expert who has concluded that the policy has *or could* lead to an outcome in which the student has an ineffective teacher, and thereby bind the court to strict scrutiny review of state-wide educational policies. (See, e.g., *Lockhart v. McCree* (1986) 476 U.S. 162, 170 [noting that two Circuit courts reviewed the same social science studies, only one credited the study, leading the two courts to arrive at two different constitutional conclusions].)

That roadmap is the exact one Plaintiffs followed here. Plaintiffs contend that due process protections and seniority-based layoffs lead to a concentration of ineffective teachers in the classrooms of low-income and minority students. Defendants rebutted these claims with expert testimony that this concentration is the result of experienced, high-skill teachers being attracted to the superior working conditions available in more affluent school districts. And despite the Plaintiffs' own witnesses readily admitting that the challenged "dismissal statutes have nothing to do with the assignment of teachers to classes or schools," (RT 818:15-17 (Deasy)), the

judge credited the Plaintiffs' view and struck down large swaths of the California Education Code.

Allowing this approach to stand will shift the debate about the efficacy of a whole range of educational policies from schoolhouses, school boards, and the legislature, to the California courts. Educational policymaking will become a race to the courthouse to see whose preferred policy becomes the constitutional mandate versus whose becomes constitutionally prohibited.

IV. Legislative judgments about the value of due process rest on firm educational policy foundations.

Although it is not necessary for this court to weigh the evidence before the trial court to overrule the legally defective ruling below, the legislative policy judgments at issue here nevertheless stand on sound footing, supported by both the trial record and social science.

The five statutes that Plaintiffs challenge further the government's legitimate objective of recruiting and retaining a competent permanent staff of teachers in the State. They help attract teachers to the profession; retain effective teachers and protect them from capricious terminations or layoffs during harsh economic times; channel employment disputes involving teachers to administrative processes, and away from the courts; and insure that the State is complying with its constitutional obligation to provide due process before depriving a teacher of employment.

Even the particulars of the California scheme were supported by education policy experts. Two years, according to experts, was sufficient time to determine whether non-probationary status should be granted. Professor Linda Darling-Hammond, an education professor from Stanford

University,[19] thought "that a school administrator should be able to identify a grossly ineffective teacher easily within even the first year of practice, and certainly within two years." RT 8921:11–14 (Darling-Hammond). And that it made sense to make that decision within two years from a students' perspective because good teachers obtained tenure early and poor teachers who floundered would not be exposed to students for longer than necessary. RT 8923:12–25 (Darling-Hammond). Most importantly, Professor Darling-Hammond testified that the time given to the make the decision mattered less than the tools the school uses to assess teacher competence—schools could have a long time with poor evaluation tools and instructional quality would not improve. RT 8925:13–21 (Darling-Hammond); see also RT 4456:4–8 (Johnson)[20] ("no question" grossly ineffective teachers can be

[19] Prof. Darling-Hammond is Charles E. Ducommun Professor of Education, Emeritus at Stanford University's Graduate School of Education and the Faculty Director for the Stanford Center for Opportunity Policy in Education. She is a former president of the American Educational Research Association and member of the National Academy of Education as well as the American Academy of Arts and Sciences. Her research and policy work focus on issues of educational equity, teaching quality, and school reform. She has advised school leaders and policymakers at the local, state, and federal levels. In 2008, she served as director of President Obama's education policy transition team.

[20] Prof. Susan Moore Johnson is Jerome T. Murphy Research Professor in Education at Harvard University's Graduate School of Education. Prof. Johnson directs the Project on the Next Generation of Teachers, which examines how best to recruit, develop, and retain a strong teaching force. She is widely published, authoring or co-authoring six books and many articles, and served as academic dean of the Education School from 1993 to 1999. Between 2007 and 2015, Johnson was co-chair of the Public Education Leadership Project (PELP), a collaboration between Harvard's Education and Business Schools.

identified within 16 months);[21] RT 5929:27–5931:7 (Rothstein) (more time will only delay the decision, leaving ineffective teachers in the classroom longer).

Several school administrators likewise agreed that two years was sufficient. RT 6837:25–6838:9 (Mills, an assistant Superintendent in Riverside USD) (no difficulty making tenure decisions in the first two years); RT 7120:14–22 (Seymour[22]) ("[i]f a site administrator is in classrooms and at least weekly is working with their teachers in their professional learning communities . . . they have a good [information about whether] th[e] teacher is going to be successful or not" within the first two years).

Plaintiffs' contention that two years is simply not enough time to evaluate teachers because principals and administrators are busy doing other, more important things, and that the granting of tenure is automatic was contradicted by one of their star witnesses. John Deasy, the now-former Superintendent of the LAUSD, specifically rebutted the notion that

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[21] Prof. Jesse Rothstein is Associate Professor of Public Policy and Economics and Director of the Institute for Research on Labor and Employment at the University of California, Berkeley. He previously served as Senior Economist at the U.S. Council of Economic Advisers and then as Chief Economist at the U.S. Department of Labor. Prior to entering public service, he was assistant professor of economics and public affairs at Princeton University.

[22] Jeff Seymour worked as an educator for more than four decades and spent nearly 25 years as superintendent of Monte City School District—a school district that is 75–80% Latino and has about 90% of students on the free lunch program. He has also spent 10 years teaching in the Administrative Masters Program at Cal Poly and serves on the board of the El Monte Promise Foundation. The Monte City School District recently opened the Jeff Seymour Family Center in his name, which will provide social services, health and mental health care, and other community supports for the district and surrounding communities.

tenure is automatic, testifying that in LAUSD, only 50% of teachers are granted tenure after the two years and that grants of tenure are no longer automatic due to a change in district policy, not in the challenged statutes. RT 722:19–26 (Deasy); see also RT 2578:13–24 (Douglas, an Assistant Superintendent at Fullerton SD) (when there is any doubt about a teacher's effectiveness, his district does not grant tenure).

Education experts and educators also disagreed with the Plaintiffs' view that 5% of all teachers are "grossly ineffective" and that education in high-poverty schools would be improved by making it easier to simply dismiss that 5%. Professor Darling-Hammond testified that firing the "bottom" 5% would be a bad idea for several reasons: first, the metrics used to determine the 5% are inaccurate; second, the "bottom 5%" is a dynamic group—the composition of which will differ from year to year; and third, when you create a punitive rather than supportive environment designed to attract high-quality teachers, that environment becomes unattractive and teachers will simply flee. RT 8953:21–8954:11 (Darling-Hammond). In fact, the City of Houston has tried the Plaintiffs' preferred approach—firing those that it perceives to be at the bottom—and now Houston is "finding that they have fewer and fewer people who are willing to come apply for [teaching] jobs." RT 8954:12–22 (Darling-Hammond).

The problem in high-poverty schools is not that there are too few teacher terminations and too little turnover, but that there is too much. For example, upwards of half of all teachers leave the profession in the first five years, yet teachers in high-poverty schools leave the profession in those first five years at markedly higher rates. RT: 8669:24–8670:2 (Futernick, a Professor of Education at California State University); RT 6112:13–6114:22 (Rothstein) (average effectiveness of teachers in high-poverty schools that serve students of color is similar to teacher effectiveness at

more affluent schools; problem is that more senior teachers leave high-poverty schools); Ingersoll, *supra*, p. 49.

And it is poor working conditions that drive teachers from the profession. RT 9055:12–9056:7 (Darling-Hammond) ("source of the turnover problem is the poor working conditions that many districts allow to persist in those schools," and not the challenged statutes); RT 9714:2–10 (Smith, the former Superintendent of OUSD) (Oakland has a hard time retaining teachers because working conditions are very difficult).

Moreover, the challenged statutes make it possible for districts to rely on methods that have actually been proven to improve teacher effectiveness, and removing those protections would undermine, rather than promote activities that lead to teacher improvement. Professor Darling-Hammond testified that, in her experience, when effective Peer Assistance and Review ("PAR") mentoring programs, which rely on training and development rather than threats of termination, are used, half of all teachers placed in such programs improved their performance. RT 8926:13–8927:11 (Darling-Hammond). As for the other half, because they had been given a chance to improve, when an action is taken to remove them there's "almost never a grievance or a lawsuit." RT 8927:9–11 (Darling-Hammond). PARs improved teacher performance and where they did not, "teacher dismissal was . . . efficient and effective" because everyone—the Union, the teacher, and the administration—was invested in the process so when it came time to dismiss the underperforming teacher "it did not lead to expensive, lengthy arbitration or appeal." RT 4457:27–4458:9 (Johnson).

And as Danette Brown, an Academic Coach in the La Habra City School District, in Orange County, testified, the protections afforded by the challenged statutes facilitated ineffective teachers becoming effective teachers by fostering the "culture that has been established in La Habra,"

"one that's built on trust." "[T]o be a successful academic coach," she testified, the teachers need to trust you and feel free to "take risks," and that requires that the "teachers feel that they can have [a] safe practice during the professional development cycle," and the challenged statutes provide that safety. RT 7036:2–27 (Brown).

The reliance on seniority during periods of layoffs was also supported by many experts and educational professionals. Professor Darling-Hammond affirmed that relying on seniority was rational because studies confirm that there is a "positive relationship between teacher experience and teacher effectiveness," and districts lacked the evidence needed to rank their teacher to effectively effectuate lay-off based on a ranking of teacher effectiveness. RT 8963:17–25 (Darling-Hammond). Using seniority for layoffs makes sense because "it is an objective criterion that can be applied in a way that people understand." RT 4564:7–15 (Johnson).

Teachers laid off under a seniority-based RIF were, on average, less effective than the teacher workforce as a whole. Although "you will have some first-year teachers who are better than second-year teachers . . . the large quantitative analyses that are based on value-added scores demonstrates that there is a steady improvement on average." RT 4564:28–4565:4 (Johnson); see also Clotfelter, Ladd & Vigdor, *supra*, at 27 (Jan. 2007) ["Consistent with other studies, we find clear evidence that teachers with more experience are more effective than those with less experience." [collecting studies].)

Making RIF decisions based on teacher rankings would be a bad idea because it would destroy vital collegiality. As one educator put it, "[O]ur district is so based on . . . people working together, that I believe, once you start putting a rank system of people's test scores and names together, [and tie layoffs to those results], [teachers] will not be working together on best

practices, and share." RT 6867:9–14 (Mills). If layoffs were tied to rankings, Robert Fraisse, who had served in the administrations of many California school districts, including Long Beach USD, "fear[ed] that we could go from a model of collaboration in schools whereby students are on the rosters of all of the grade level or all of the department, all teachers taking responsibility for all children, to a model that is more protective of your roster to make sure that you get easier kids to teach, higher performing students." RT 5766:9–15. Using seniority in layoffs is preferred because "based upon [his] experience, it is a fair method that is perceived as fair. When tight economic times require tough things, an objective basis is required, and I have not seen a better more objective system than seniority." RT 5767:4–8; RT 7145:8–7146:6 (Seymour) (if "effectiveness" were used to determine layoffs, it would lead to more conflict and less collaboration); RT 8028:2–8029:14 (Tolladay) (RIFs based on rankings would "destroy the collegiality that's critical to teaching children").

Not only do educators feel that the collegiality that flows from these policies benefits students, research shows that a sense of collegiality and collaboration reduces turnover and increases student achievement. (See, e.g., Alliance for Excellent Education, *On the Path to Equity: Improving the Effectiveness of Beginning Teachers* 4–5 (July 2014) *available at* http://all4ed.org/wp-content/uploads/2014/07/PathToEquity.pdf).

Other experts went further, testifying that getting rid of due process protections like tenure will have the unintended consequence of encouraging good teachers to leave challenging schools for more affluent schools, and could encourage yet other teachers to leave the profession altogether. Kane—Plaintiffs' own expert—wrote in a 2006 paper, that changes in the tenure process might make it more difficult to recruit and retain teachers. RT 2895:1–14. Plaintiffs' witness, Superintendent Deasy,

testified that if a district was known to never grant tenure, "you would simply no longer have people who wanted to apply." RT 754:19–24.

Moreover, others testified that the due process protections like tenure served other values, including protecting teachers—good teachers—from being fired for favoritism, cronyism, sexism, racism, religious belief, or political activities. RT 7128:10–7129:8, 7131:25–7133:2 (Seymour, a retired Superintendent in El Monte City School District) (a strong, risk-taking teacher who had a program of discussing real-life problems of middle schoolers with colleagues in which he discussed "what to do if a gay or lesbian student came out to you" and testified that due process protections promote similar, important risk-taking by teachers); RT 8508:25–8512:10 (Nichols, a former teacher) (taught students about Islam, believing that it was important for them to understand, but some parents accused her of indoctrination; she "would not have been as comfortable" teaching it if she did not have the protections of the challenged statutes).

In short, numerous witnesses confirmed that the challenged statutes serve important governmental objectives, and when handled by effective administrators, provide no insurmountable barrier to removing ineffective teachers, and in fact, provide the security necessary for ineffective teachers to become better teachers.

CONCLUSION

Amicus curiae NEA respectfully requests that the Superior Court's decision striking down the challenged statutes be reversed.

Dated: September 16, 2015

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Eric A. Harrington, hereby certify that pursuant to Rule 8.520(c)(1) and Rule 8.204(b), the enclosed *amicus curiae* brief is produced using 13-point Times New Roman type and is 7,210 words in length as determined by the computer program used to produce this brief.

Dated: September 16, 2015

/s/ Eric A. Harrington

Eric A. Harrington

PROOF OF SERVICE

I am employed in Washington, D.C., am over the age of 18 years, and am not a party to this action. My business address is 805 15th Street NW, Washington, DC 20005.

On September 16, 2015, I served the foregoing document described as APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND PROPOSED BRIEF OF AMICUS CURIAE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF INTERVENORS-APPELLANTS on all interested parties in this action by placing true copies of the document(s) in a sealed envelope addressed to each interested party as shown above and submitting those envelopes for shipping with postage paid.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 16, 2015, at Washington, District of Columbia.

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