Case No. B258589

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

BEATRIZ VERGARA, et al.,
Plaintiffs and Appellees,

v.

STATE OF CALIFORNIA, et al.,
Defendants and Appellants,
CALIFORNIA TEACHERS ASSOCIATION and CALIFORNIA FEDERATION OF TEACHERS,
Intervenors and Appellants.

On Appeal from an Order of the Superior Court
of the State of California, County of Los Angeles
(Superior Court Case No. BC484642)
Hon. Rolf M. Treu, Presiding

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

[PROPOSED] AMICUS CURIAE BRIEF OF THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, THE CALIFORNIA FACULTY ASSOCIATION, THE CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, AND THE SERVICE EMPLOYEES INTERNATIONAL UNION

JUDITH A. SCOTT
Service Employees
International Union
1800 Massachusetts Ave., NW
Washington, D.C. 20036
Telephone: (202) 730-7383
Facsimile: (202) 429-5565
Counsel for SEIU

MATTHEW S. BLUMIN*
MICHAEL ARTZ
American Federation of State,
County and Municipal Employees
1101 17th Street, N.W., Suite 900
Washington, D.C. 20036
Telephone: (202) 775-5900
Email: mblumin@afscme.org
Counsel for AFSCME

CLAIRE P. PRESTEL (#235649)
JAMES & HOFFMAN, P.C.
1130 Connecticut Ave., N.W.,
Suite 950
Washington, D.C. 20036
Telephone: (202) 496-0500
Facsimile: (202) 496-0555
Email: cpprestel@jamhoff.com
Counsel for SEIU

KATHRYN SHEFFIELD (#218407)
California Faculty Association
1110 K Street
Sacramento, CA 95814
Telephone: (510) 421-0555
Director of Representation for CFA

MICHAEL R. CLANCY (#148007)
California School Employees
Association
2045 Lundy Ave.
San Jose, CA 95131
Telephone: (408) 433-1245
Counsel for CSEA

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND **APPELLATE DISTRICT, DIVISION** TWO	Court of Appeal Case Number: B258589
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Claire P. Prestel, (#235649) James & Hoffman, P.C. 1130 Connecticut Ave., N.W. Suite 950 Washington, D.C. 20036 TELEPHONE NO.: (202) 496-0500 FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* cpprestel@jamhoff.com ATTORNEY FOR *(Name):* Service Employees International Union	Superior Court Case Number: BC484642 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: State of California, CTA, CFT RESPONDENT/REAL PARTY IN INTEREST: Beatriz Vergara, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): AFSCME, CFA, CSEA, SEIU

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 9/16/2015

Claire P. Prestel
(TYPE OR PRINT NAME)

▶ /s/ Claire P. Prestel
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes and Constitution

Regulations

Local Ordinances, Charters, and Rules

Other Authorities

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

Pursuant to CRC 8.200(c), the American Federation of State, County, and Municipal Employees ("AFSCME"), the California Faculty Association ("CFA"), the California School Employees Association ("CSEA"), and the Service Employees International Union ("SEIU") respectfully apply for permission to file the attached amicus curiae brief in support of appellant State of California and intervenors-appellants the California Teachers Association and the California Federation of Teachers.

Interests of Amici Curiae

AFSCME is a labor union comprised of a diverse group of people who share a common commitment to public service. AFSCME's 1.6 million members include workers in both the public and private sectors, and hundreds of thousands of members working in California and within the jurisdiction of this Court. The majority of these members have seniority benefits, progressive discipline procedures and employment-related due process protections similar to those at issue in this case. Together, AFSCME and its members advocate for prosperity and opportunity for working families across the nation through the efforts of its approximately 3,400 local unions and 58 councils in 46 states, the District of Columbia and Puerto Rico.

CFA is a labor union presently representing 25,900 faculty employed by the California State University. Faculty members include both tenure-line and adjunct instructors, coaches, counselors, and librarians who work on twenty three campuses throughout the state, as well as on satellite campuses, and in online programs. Within the bargaining unit CFA represents, 41% enjoy tenure or are on a tenure track; 59% are employed on a contingent basis and are rehired each year depending on the availability of work. CFA seeks to strengthen the cause of higher education for the public good; to promote and maintain the standards and ideals of the profession; to provide a democratic voice for academic employees; to provide legislative advocacy; and to maintain collective bargaining agreements covering salaries, working conditions, and other items and conditions of employment.

CSEA is a labor union representing about 220,000 classified school employees throughout the State. CSEA's "bargaining unit" members are employed in a wide variety of classified (non-certificated) positions in K-12 schools and community colleges – including positions such as secretary, custodian, groundskeeper, teaching assistant, maintenance worker and school bus driver. CSEA members enjoy statutory protections similar to those at issue here, providing for due process in discipline to prevent arbitrary or unjust termination, as well as fair treatment in the event of a

layoff under provisions providing for the retention of those with the most experience.

SEIU is a labor union representing over two million working women and men in the United States, Puerto Rico, and Canada, including 350,000 public sector workers in the State of California. SEIU's California membership includes school and community-college employees and university faculty and support staff across the state. SEIU supports the challenged statutes because they, along with similar statutes applicable to other public employees, provide essential due process, discipline and seniority protections that prevent arbitrary and discriminatory dismissal; have over decades elevated the professionalism of state civil service; ensure the stability of the public sector workforce to the benefit of both state employees and the citizens they serve; and in the education sector, promote innovation and collaboration in classrooms.

Reasons Why the Proposed Amicus Brief Will Assist the Court

Amici agree fully with all the legal arguments of the appellant State of California and intervenors-appellants California Teachers Association and California Federation of Teachers. Amici believe that the Superior Court failed to fully consider the challenged dismissal statutes in the larger context of due process procedures guaranteed for other public employees in the State of California. Amici also believe that the Superior Court failed to

fully consider the consequences of invalidating wholesale the challenged statutes leaving school districts, teachers, and courts mired in costly uncertainty around dismissal procedures.

The proposed amicus brief brings important context to this case by demonstrating that the challenged statutes grant teachers similar protections to those enjoyed by other classifications of public employees on both the state and local level via statutes and collective bargaining agreements. For example, in some cases the probationary period for certain classes of public employees prior to earning permanent status is even shorter than that afforded school districts prior to granting permanent status to teachers. This context is important in understanding that teachers do not receive "über due process," and that the due process procedures afforded teachers have been carefully calibrated over time to reflect the specific circumstances for teachers and school districts.

The proposed amicus brief also demonstrates that the Superior Court failed to fully consider the consequences of invalidating the challenged statutes. The Superior Court assumes that an administrative appeals process would be available to teachers, but that is not at all clear. In the absence of the challenged statutes, school districts will not know which procedures to apply for teacher dismissals, teachers will have to engage in costly litigation at the district court level to appeal a dismissal, and because it is unclear without the challenged statutes if teachers have a property right in

their employment at all, courts will have no guidance as to which standard of judicial review to apply.

The proposed amicus brief also demonstrates how the Superior Court's decision moves courts into the realm of policy-making best left to the legislature. Although the Superior Court claimed to be applying law rather than policy, by invalidating the challenged statutes, the Superior Court rejected the numerous policy rationales that the legislature found persuasive in developing the teacher dismissal statutes, and replaced them with its own.

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 the amicus curiae, its members, or its counsel in the pending appeal.

Conclusion

For the foregoing reasons, AFSCME's, CFA's, CSEA's, and SEIU's application for leave to file an amicus brief should be granted.

Date: September 16, 2015

Respectfully submitted,

CLAIRE P. PRESTEL
JAMES & HOFFMAN, P.C.

By: /s/ Claire P. Prestel
Claire P. Prestel

Attorney for Amici Curiae
Service Employees International Union

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with and support the arguments for reversal made by the State and by Intervenors. The Superior Court erred as a matter of law, and its decision should be overturned for all the reasons given in Appellants' briefs. SEIU and AFSCME write separately to make two additional points that amici believe will aid the Court in its analysis.

First, and as explained infra Part I, the Superior Court relied on an incorrect due process analysis to support its invalidation of the dismissal statutes in particular. *See* AA 7303. Contrary to the Superior Court's assertion, the dismissal statues at issue do not provide teachers with "über due process" when compared either to the minimum constitutional standard or to what other California public employees (including many AFSCME, CFA, CSEA and SEIU members) receive. Nor are teachers' tenure and layoff protections extreme or abnormal in public employment. The Superior Court reached contrary conclusions only because it misstated the constitutional due process standard and inaccurately described the protections afforded non-teacher public employees.

Second, and as explained infra Part II, the Superior Court grossly understated the chaos and confusion that are likely to result from its decision and likely to make the already difficult task of teacher recruitment and retention even harder. Contrary to the Court's assertions, it is not clear

what due-process protections and judicial standards of review will apply in the vacuum left by its decision; nor is it even clear which teachers will be entitled to robust due process. Moreover, the Superior Court's decision has the effect of inserting the judiciary into complex public-policy decisions that are appropriately left—and have always been left—to the Legislature.

ARGUMENT

I. Teachers Do Not Receive "Uber" Due Process.

In striking down California teachers' decades-old statutory due process protections, the Superior Court asserted incorrectly that those protections have afforded teachers "über due process." *Vergara v. California* (Super. Ct. L.A. County, 2014, No. BC484642) (AA 7303). The Court apparently believed that the challenged statutes have provided a level of due process beyond what either the Constitution requires or what other California employees receive, and the Superior Court cited that erroneous view as justification for invalidating the statutory scheme. AA 7304–7305. In fact, however, the due process protections respondents challenge have never afforded teachers "über due process," whether measured against the constitutional standard or against the treatment of other public-sector workers. Nor are the two-year probationary period and seniority-based layoff statutes by any measure extreme or abnormal in public employment. The basic employment protections afforded California's public school

teachers are well within the mainstream, contrary to respondents' claims and the Superior Court's mistaken view.

A. The Challenged Dismissal Statutes Do Not Provide "Über Due Process."

The Superior Court erred both as a matter of law and as a matter of fact in reaching the conclusion that the challenged dismissal statutes provide "über due process" when compared to the constitutional standard and to the protections other public employees receive.[1]

First, the Superior Court erred as a matter of law when comparing teachers' due process protections to the constitutional standard by misstating that standard; the Court described teachers' protections as "über" by comparison only because it misunderstood and ignored much of what the Constitution requires. Specifically, the Superior Court erred by identifying *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, as setting the constitutional floor, with teachers and classified employees constitutionally entitled only to pre-termination notice and an informal opportunity to respond. AA 7304. In fact, *Skelly* does not set the constitutional floor: In addition to their *Skelly* pre-termination rights to notice and an opportunity to respond, all public employees with a property

[1] By "dismissal statutes," *amici* mean the challenged provisions in Education Code sections 44934, 44938 and 44944.

interest in their employment—not only teachers—have the constitutional right to an evidentiary hearing before an impartial decision-maker, with the burden placed on the employer to prove that termination was proper. *See, e.g., Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 542, 545–48; *Brown v. City of L.A.* (2002) 102 Cal. App. 4th 155, 175 (public employee is entitled to an "evidentiary hearing" at which the employer bears the "burden of proving the charges") (quoting *Duncan v. Dep't of Pers. Admin.* (2000) 77 Cal. App. 4th 1166, 1176); *Burrell v. City of L.A.* (1989) 209 Cal. App. 3d 568, 577 (discussing requirement).) Failure to provide that evidentiary hearing, or to comply with Skelly, will invalidate an employee's termination. *See Parker v. City of Fountain Valley* (1981) 127 Cal. App. 3d 99 (city employee's termination reversed because employee was given *Skelly* rights but not evidentiary hearing with burden on the employer, which the Constitution requires).

In short, the Superior Court described teachers' due-process protections as "über" when compared to the constitutional floor only because it mistakenly identified *Skelly* as setting that floor and ignored the evidentiary hearing all permanent public employees are entitled to receive.

When compared to the constitutional standard set in *Loudermill*, teachers' statutory protections do not seem remarkable. The statutes respondents challenge ensure that teachers are given notice of the charges

against them and an opportunity to answer those charges at an evidentiary hearing before an impartial decision-maker, *see* Education Code §§ 44934, 44944, much as the Constitution requires. The teacher statutes differ from the constitutional standard in that they provide for one pre-termination proceeding that satisfies both *Skelly* and *Loudermill* at the same time, see *id*., rather than for two hearings, one to satisfy *Skelly* before termination and one to satisfy *Loudermill* after. But that efficiency, a variation in form rather than content, certainly does not justify the description of teachers' statutory as providing extreme or "über due process."

Second, the Superior Court also erred in suggesting that teachers' due process rights are extreme when compared to those of other public employees. AA 7304. Contrary to the Court's claim, *id*., classified school-district employees with a property right in their employment are entitled not only to a "*Skelly* hearing" but also to the same kind of evidentiary hearing before a neutral decision-maker that permanent teachers receive under the statutes at issue. *See, e.g., Norton v. San Bernardino City Unified Sch. Dist.* (2008) 158 Cal.App.4th 749 (describing termination process for permanent classified employee under the Education Code, including evidentiary hearing); *see also* Education Code § 45113(d) (no incidents more than two years old may be considered during dismissal proceedings). Only by misstating the due process rights of other public employees did the Superior

Court reach the conclusion that teachers receive "über due process" by comparison.

The due-process rights afforded many of amici's public-employee members provide further evidence that teachers' due-process protections fall well within the mainstream. For example, faculty in the California State University (CSU) system are represented by amicus California Faculty Association (CFA), and have due-process rights very similar to those at issue and that are in some ways more protective. Faculty are first entitled to notice of any disciplinary charges against them and are given the opportunity to respond to those charges in an internal hearing with the employer's designated reviewing officer (the Skelly process). Collective Bargaining Agreement Between CFA and CSU, 2014-2017, Art. 19.4–19.5, 19.7–19.9 (pp. 66–68).[2] Faculty are then also entitled to a full hearing before an impartial decision-maker (an arbitrator, faculty committee, or the State Personnel Board at the faculty member's option), with the effective date of termination delayed until after that hearing takes place if the employee chooses either the arbitrator or faculty committee options. *Id.* at 19.10, 19.12 (pp. 68–72). Similarly, professors in the University of California system are given at least one year to correct any deficient

[2] *Available at* < http://www.calfac.org/sites/main/files/file-attachments/cfa_cba_2014-17_final_1.23.2015.pdf> (as of Aug. 30, 2015).

performance (much more than the 90 days teachers are given under Education Code § 44938(b)(1)) and are then entitled to notice, an opportunity to respond internally, and a full evidentiary hearing before any termination takes effect, with the entire process expected to take two years. Academic Personnel Manual, Academic Personnel & Programs, University. of California., title. 1, APM–075, III(A)–(C).[3]

Other non-teacher public employees, including thousands of AFSCME, CSEA, and SEIU members up and down the state, holding a wide variety of positions, benefit from similar due-process protections. The exact procedures vary by jurisdiction, employer, and type of work, with the details and best approach for each work classification having been developed over time. The relevant procedures for each classification may be found in statutes, collective bargaining agreements, memoranda of understanding, rules, charters, or ordinances (or some combination of those). In all cases the procedures meet the Constitution's due process requirements, and in many they exceed the constitutional floor in some respect or another, e.g., by requiring the employer to follow a progressive discipline procedure.

For example, state-employee members of AFSCME Local 2620, including all the professional workers in state bargaining unit 19, such as

[3] *Available at* < http://www.ucop.edu/academic-personnel-programs/_files/apm/apm-075.pdf> (as of Aug. 30, 2015).

psychologists, pharmacists, social workers, rehabilitation therapists, and child abuse prevention specialists, benefit first from a progressive discipline procedure. *See* CalHR's Supervisors' Guide to Addressing Poor Performance, Cal. Dep't of Human Resources (under heading "Corrective Phrase," describing progressive discipline process for state civil service employees, including counseling, advice for improvement and opportunity to improve, in-person meetings, and written documentation, and instructing supervisors that the "State Personnel Board requires progressive discipline" to support a termination);[4] *see also, e.g., In re Nelson* (1992) 1992 Cal. St. Personnel Bd. LEXIS 13, 9–10 (overturning termination because of inadequate progressive discipline process). Then, once the employer moves forward with the termination process, the state civil service employee is entitled to detailed notice and an opportunity to respond internally, California Code of Regulations, title 2, § 52.6, followed by a full evidentiary hearing before the State Personnel Board, Government Code sections 19575, 19582, with a right to discovery, *id.* at §19574.1, presentation of evidence, and a written decision. *Id.* at §19582. Furthermore, any party who disagrees with the Board's decision on a discovery matter in connection with the evidentiary hearing may have the discovery question decided in superior court, *id*. at §19574.2, and the

[4] *Available at* < http://www.calhr.ca.gov/ Training/Pages/supervisors-guidebook.aspx# Corrective-Phase> (as of Aug. 30, 2015).

Board's ultimate decision regarding termination is subject to the same multi-level, administrative-mandamus review process that follows final decision in a permanent teacher dismissal case.

As another example, SEIU members employed by Riverside County have the right to a progressive discipline procedure in advance of termination (except in egregious cases), and then if the employer proceeds to termination, have the right to detailed notice and an opportunity to respond to the relevant department or district head, followed by a formal evidentiary hearing before a neutral arbitrator chosen by the parties. *See* Memorandum of Understanding, Cnty. of Riverside & SEIU Local 721, March 1, 2012 – November 30, 2016, Art. 11, § 2 (p. 58) & Art. 12, § 3 (p. 61).[5] Among other things, the arbitration must be reported by a court reporter; the arbitrator must issue written findings of fact and conclusions of law; all testimony must be given under oath; the parties must meet with the arbitrator in advance in complex cases, and the arbitrator is empowered to issue a "case management" order governing, inter alia, document production and expert testimony; and the employee must be awarded backpay if the arbitrator determines that his or her termination should be rescinded. *Id.* at Art. 12, §§ 8–9 (pp. 64–68).

[5] *Available at* <https://www.seiu721.org/inland-riverside_county_mou_2012-03 01_through_2016-11-30_covers.pdf> (as of Aug. 30, 2015).

Case law and amici's current collective bargaining agreements provide many other examples as well. *See, e.g., Brown v. City of L.A.* (2002) 102 Cal.App.4th 155 (describing provisions of the Los Angeles Police Department Manual that required the Department, before reassigning an officer for poor performance, to counsel the officer and provide him or her an opportunity to improve, that required "continue[d]" poor performance to institute downgrade proceedings, and even then, required the decision-maker to find a "clearly demonstrate[d] failure or inability to perform" indicating "the need for immediate reassignment"); *Skelly, supra,* 15 Cal.3d at 198–99 (describing lengthy progressive discipline and discharge process, including initial meeting and admonishment, further warnings, efforts to accommodate, a letter of reprimand and one-day suspension two years later, two more meetings, and another warning before termination was initiated); Memorandum of Understanding, Cnty. of Ventura & SEIU, Local 721, Sept. 10, 2013 – Aug. 9, 2016, Art. 20 (p. 68) (calling for informal coaching or counseling before more serious discipline and providing that unfavorable performance reports shall be removed from employees' personnel files, and cannot be introduced as evidence in any arbitration proceeding, after two years);[6] *id.* at Art. 29 (p. 84) (granting

[6] *Available at* < https://www.seiu721.org/contracts/tri-counties-county_of county_ of_ventura_mou_2013-09-10_through_2016-08 09_with_amendments.pdf> (as of Aug. 30, 2015).

employees the right to grieve written reprimands through the multi-step union-employer grievance procedure); *id.* at Art. 30 (pp. 88–94) (providing for formal arbitration of discipline charges, including, inter alia, a provision allowing parties to subpoena witnesses); Labor Agreement, Bay Area Rapid Transit Dist. & SEIU, Local 1021, July 1, 2013 – June 30, 2017 (pre-disciplinary hearing, i.e., *Skelly* hearing, must take place before a Hearing Officer and only incidents within previous 18 months may be cited as basis for discipline); Collective Bargaining Agreement, City & Cnty. of S.F. & SEIU, Local 1021, July 1, 2014 – June 30, 2017 (providing for a progressive discipline procedure, imposing a statute of limitations on discipline, and providing employees access to a multi-step grievance procedure culminating in formal arbitration);[7] Agreement, Cnty. of Santa Clara & SEIU, Local 521, Sept. 2, 2013 – June 21, 2015 (providing that even probationary employees must be given notice of discipline and a right to administrative review).[8]

Taken together, these examples show that the discipline and discharge statutes respondents challenge do not afford California teachers some unheard-of or "über" form of due process but instead grant public

[7] *Available at* <http://www.seiu1021.org/files/2013/10/SF_City_County_MISC_CBA_7.1.14-6.30.17_for-web.pdf > (as of Aug. 30, 2015).

[8] *Available at* <http://www.seiu521.org/files/2014/09/SCCo-Contract-2013-2015.pdf > (as of Aug. 30, 2015)

school teachers the same kind of due-process protections enjoyed by many other California public employees who have a property interest in their jobs.

B. Nor Are Teachers' Probationary Period and Layoff Protections Extreme or Unusual.

Throughout this litigation, plaintiffs/respondents have sought to characterize teachers' two-year probationary period and seniority-based layoff rights—like teachers' due process protections—as extreme and irreconcilable with the provision of quality public service. Again, however, the experiences of other public employers and employees show that teachers' probationary-period and layoff protections are common practices accepted as good workforce management and as entirely consistent with quality public work.

With respect to probationary period, respondents claim, contrary to the testimony of witnesses like Superintendent Jeff Seymour, that two years' probation does not give managers enough time to assess performance. *Compare, e.g.,* Respondents' Br. at 25 with RT 7120:2-8 (Seymour testimony stating that administrators have enough time and explaining why). Setting aside that management's probationary-period assessment of teacher performance is not final, since teachers may still be fired after probation, *see, e.g.*, Education Code § 44932, the two-year

probationary period for teachers is actually much longer than the probationary period for many other critical public employees. For example, state civil service employees serve a probationary period of only six months, with a possible extension to 12 months maximum. Government Code § 19170(a); *cf. also, e.g.*, L.A. City Rules of Bd. of Civil Serv. Comm'rs § 5.26 (probationary periods of six or 12 months for most city civil servants); L.A. Cnty. Code of Ordinances, tit. 5, app. 1 Civil Serv. Rules, § 12.02 (same for county employees). And the probationary period for Los Angeles police officers is only 18 months and for firefighters only 12 months. *See* L.A. City Charter, art. X, § 1011(a).

A review of the rules and contract provisions that govern SEIU and AFSCME public-employee members produces many other examples of probationary periods shorter than teachers serve, including for employees with difficult and sensitive positions like child welfare and social service workers, child support officers, nurses, psychologists, and public safety workers. *See, e.g.*, L.A. Cnty. Code of Ordinances, tit. 5, app. 1 Civil Serv. Rules, § 12.02 (limiting probationary period to 12 months); Memorandum of Understanding Cnty. of Riverside & SEIU Local 721, Art. 6, § 1(B) (p. 38) (12-month probationary period for county workers including para-professionals, professionals, registered nurses and supervisors); Memorandum of Understanding, Cnty. of Ventura & SEIU, Local 721, Art.

18 (p. 64) (probationary period of 1,040 or 2,080 hours (approximately one year) for county employees including, inter alia, children's social service workers, child welfare workers, psychiatrists, chemists, engineers, public defenders, and nurses); Labor Agreement, Bay Area Rapid Transit Dist. & SEIU Local 1021, § 26.1 (p. 115) (120-day probationary period); Collective Bargaining Agreement, City & Cnty. of S.F. & SEIU, Local 1021, Art. II(B) (p. 12) (standard six-month probationary period, with some shorter probationary periods, for city and county workers including child support officers, police cadets, senior psychiatric social workers, and marriage, family and child counselors); Agreement, Cnty. of Santa Clara & SEIU Local 521, § 6.1 (p. 18) (probationary period of either 19 pay periods or 25 pay periods (one year) for county employees including *inter alia*, nurses, children's counselors, child support officers, deputy fire marshal, psychologists, and hazardous materials specialists).

Teachers' seniority based layoff rights, which require reductions in force to follow inverse seniority order, although with significant exceptions, *see* Education Code §44955, are also well within the mainstream for California public employees. Many public employees are protected by rules or contract terms that require layoffs to follow strict inverse-seniority order, without exception. *See, e.g.*, Education Code § 45308 (classified employees); Agreement Covering Bargaining Unit 19,

AFSCME & State of Cal., 2013-2016, Art. 16, § 16.1(B) (agreement covering state professional health and social service workers, including, inter alia, child abuse prevention specialists, speech, occupational and rehabilitation therapists, behavior specialists, pharmacists, and psychologists; providing that layoffs shall be in order of inverse seniority and explicitly superseding Government Code section that would otherwise have allowed consideration of certain employees' "efficiency"); *see also, e.g., Alameda Cnty. Mgmt. Employees Ass'n v. Super. Ct.* (2011) 195 Cal.App.4th 325 (describing layoff of court employees implemented in inverse seniority order, as required by the Court's personnel policies); L.A. City Charter, article X, § 1015 (providing for inverse seniority layoffs); L.A. City Rules of Bd. of Civil Serv. Comm'rs § 8.1 (same); Labor Agreement, Bay Area Rapid Transit Dist. & SEIU Local 1021, Art. 23, § 23.2 (p. 104) & Art. 25, §§ 25.1, 25.2 (p. 113) (same); Agreement, Cnty. of Santa Clara & SEIU Local 521, Art. 5, §§ 5.1, 5.5 (p. 12) (same). Other public employees, like teachers, have a qualified right to seniority-based layoffs, with some exceptions allowed. *See, e.g.,* Memorandum of Understanding, Cnty. of Riverside & SEIU Local 721, Art. 15, §§ 1, 2 (providing that layoffs "shall be based primarily on date of hire, with the least senior employees being laid off first" but also that "[a]n employee may be laid off out of seniority when a less senior employee possesses essential skills necessary to the operation of the department, subject to [an

employee-notice provision and] the approval the Human Resources Director"); *cf.* Education Code § 44955(d) (allowing for deviation from seniority to account for a teacher's "special training and experience"). And while there certainly are some layoff provisions that allow for performance to be taken into account in carefully prescribed circumstances,[9] the preceding examples demonstrate that teacher layoff protections fall well within the mainstream.

Indeed, a review of the different layoff rules that govern California public employees shows that the general principle of inverse-seniority layoffs is well established across public employment, with that principle applied more strictly in some cases than in others. Overall the various provisions suggest a negotiation and working-out over time of the layoff procedures that work best for each jurisdiction, type of work, and employee classification—a careful process that, vis-à-vis teachers, the Superior Court cast aside with little apparent concern.

In sum, the Superior Court erred in describing teachers' discipline and discharge protections as providing "über due process." It reached that incorrect conclusion only by mis-stating the constitutional standard and

[9] *See, e.g.*, Memorandum of Understanding, Cnty. of Ventura & SEIU, Local 721, Art. 20, §§2301-2303 (providing for layoff in inverse order of seniority, except that employees who have been demoted or suspended for more than one day in the previous 26 pay periods may be laid off first).

drawing an inaccurate comparison between teachers and other public employees. The challenged discipline and discharge statutes, like the challenged probationary-period and layoff provisions, in fact afford teachers the same kinds of protections that many other California public employees receive.

II. Invalidation of the Dismissal Statutes Will Create Costly Administrative and Legal Uncertainty for School Districts, Teachers and Courts and Will Draw Courts into Policy Determinations Properly Left to the Legislature.

In addition to inaccurately characterizing teacher protections as providing "über due process," the Superior Court, in its analysis of the dismissal statutes, failed to take account of the confusing legal vacuum that invalidation of those statutes would create. As a result, the Superior Court wrongly concluded that there is no "need for" the dismissal statutes because, in the Court's mistaken view, the "independent judiciary of this state" can adequately provide teachers "reasonable due process" without the statutes. AA 7304–05.

To the contrary, the loss of the state statutes governing teacher dismissals would force school districts to improvise—and, no doubt, litigate—the new dismissal procedures they implement. In the meantime, teachers' employment expectations would be wildly unsettled. Given the difficulties California and other states already face in recruiting and

retaining teachers, *see* Intervenors-Appellants' Brief at 7, shaking the foundations of teacher tenure in California would not only harm teachers by upsetting their settled expectations about the protections they are entitled to, but also likely harm students by making it even harder to attract and keep top instructors and by creating discord and instability regarding teachers' rights.

Legislative attempts to cure this uncertainty by passing new statutes that comply with the Superior Court's decision could face serious legal challenges under *Skelly* and *Loudermill*, as many public employee dismissal schemes have in the past. And, contrary to the Superior Court's conclusory assertion that "of course" all teachers would still have "the right of a . . . multi-stage appellate review process" by California courts employing a "substantial evidence" standard of review, AA 7304, the reality is that the Superior Court's decision, by invalidating the tenure system that has given teachers a property right in their employment, would leave it entirely unclear what process is due which teachers (previously tenured or new), and by extension what standard of review should apply in reviewing teacher dismissals. Moreover, and as demonstrated by the Superior Court's decision itself, invalidation of the teacher protections at issue would draw courts into the kinds of policy determinations that both the U.S. Supreme

Court and California Supreme Court have viewed as properly left to the Legislature.

A. Without the Dismissal Statutes, School Administrators Would Not Know Which Due Process Procedures to Employ Nor How to Employ Any Procedures Lawfully.

The Superior Court's confidence that its decision would not wreak havoc ignores that while *Skelly* and *Loudermill* provide the due process framework that applies to all public employees, it is statutes (or ordinances, charter provisions or collective bargaining agreements) that fill out that framework and provide specific guidance as to how the dictates of *Skelly* and *Loudermill* are to be applied in practice for each work classification—guidance that in turn forms the basis for even more particularized removal procedures employed by school administrators at the local level. Already, even within the confines of the restrictions set by the dismissal statutes, administrators have considerable latitude to fashion their own policies with respect to retention and dismissal,[10] but the dismissal statutes provide rules and procedures to guide them how to do so with some level of predictability and consistency and without contravening constitutional due

[10] For example, Los Angeles has recently adopted both an "affirmative tenure" process and a policy of initiating dismissal proceedings whenever a teacher receives two consecutive below-standard evaluations, leading to a decreased percentage of teachers receiving tenure and an increased number of tenured teachers being dismissed. RT 475:8–10, 771:6–15, 774:23–775:15, 785:2–13, 9226:23–9227:12 (Deasy).

process requirements. In the absence of the dismissal statutes, administrators would start over from scratch, resulting in significant administrative costs and uncertainty for all involved.

It is also very possible that there would be complicated and time-consuming litigation over the validity of any new dismissal procedures—especially ones designed ad hoc by individual school districts in the vacuum that would result from striking down the dismissal statutes, but also those potentially passed by the Legislature sometime down the road. Even within the *Skelly/Loudermill* framework there remains some disagreement over the details of what process is constitutionally required for tenured public employees. *Compare, Townsel v. San Diego Metro. Transit Dev. Bd.* (1998) 65 Cal. App. 4th 940, 949 ("These cases make it clear that a permanent or tenured public employee facing a termination for cause has a due process right to challenge the factual basis for the termination in a *full* evidentiary hearing." (emphasis supplied)), *with Holmes v. Hallinan* (1998) 68 Cal. App. 4th 1523, 1531 (holding that a "full" hearing is not required in the sense that not all court rules and procedures need be followed). This is to say nothing about the legal problems that the myriad details of any new dismissal procedures might present—after all, the dismissal statutes have been struck down before for violating teachers' procedural due process rights. *See Cal. Teachers Ass'n,* 20 Cal. 4th at 343–44 (invalidating then-

section 44944(e), which required a terminated teacher to pay for part of any dismissal hearing the teacher lost).

Equally vexing is the question of which teachers will actually have full due process rights if the dismissal and tenure statutes are struck down. The Superior Court's statement that California teachers would still possess "reasonable due process rights" enforced by the "independent judiciary of this state," AA 7305, ignores the fundamental problem that those constitutional due process rights are themselves the product of the tenure and dismissal provisions the Superior Court invalidated. Without those provisions, it is entirely unclear which teachers, if any, would have *Skelly* and *Loudermill* rights in the first place.

An employee must have a "property interest in the continuation of his employment" in order for these rights to vest. *Skelly*, 15 Cal. 3d at 206 (citation omitted). It is clear that permanent teachers possess such a property interest under the current statutory scheme because the teacher tenure and dismissal protections have been held to give teachers an expectation of future employment. *Cal. Teachers Ass'n*, 20 Cal. 4th at 348. It is equally clear that, absent "representations" made to individual teachers "from which they could be assured of continuing employment . . . except for a showing of cause," probationary (i.e., non-tenured) teachers do not possess a property interest in their employment. *Grimsley v. Bd. of Trustees*

(1987) 189 Cal. App. 3d 1440, 1449-50. But it is unclear which teachers would possess a property interest in their employment if the Superior Court's decision invalidating the teacher tenure and dismissal protections were to stand. Without those protections, which have been held to create teachers' property rights in employment, which teachers, if any, will be entitled to the robust due process the Superior Court assumed would apply?

This uncertainty over whose termination would require due process and whose would not would plague all teachers, but especially first-year and second-year teachers. Under Grimsley, one would hope that previous tenure determinations would count as "representations" creating a vested property interest for already-tenured teachers at least, even if the Superior Court's opinion were affirmed and no new tenure provisions subsequently passed by statute. *See Perry v. Sinderman* (1972) 408 U.S. 593, 599-600 (non-tenured teacher may have property interest based on reliance on "de facto" tenure program even if job was technically at-will employment). The state of play is decidedly less clear for newer teachers, however.

Without the tenure and dismissal statutes to guide them, principals and other school administrators would no doubt seek to retain highly qualified, early-career teachers by discussing future plans with those teachers—addressing such topics as, for example, whether those teachers would receive tenure under any amended dismissal statutes that might be

passed in the future. Conversations of that nature might, or might not, create expectations of continued employment vesting a property right. *See Perry*, 408 U.S. at 602 (proof of a vested property interest may be supported by the policies and practices of the institution, including "the promisor's words and conduct in the light of the surrounding circumstances") (citation omitted). School districts, teachers, and courts would then be forced to grapple with whether and when such representations create(d) a property interest in employment, and, accordingly, what due process protections are or are not required in a given case. Such pervasive uncertainty would be bad for all involved.

B. Because It Is Unclear Which Teachers Would Possess a Property Right in Continued Employment, It Is Also Unclear What Judicial Review Process Would Apply To Different Categories of Teachers.

Not only would invalidation of the tenure and dismissal statutes create chaos because of uncertainty over how and when to apply *Skelly* and *Loudermill*, it would also cause confusion regarding the proper standard for judicial review of terminations. This is because, contrary to inaccurate statements by the Superior Court, administrative decisions terminating permanent public employees in California, including teachers, are reviewed by the judiciary not on appeal, but rather via mandamus. *See, e.g., Kolter v. Com'n on Prof. Competence* (2009) 170 Cal. App. 4th 1346. The standard

of review applied in those mandamus proceedings depends on whether the terminated employee had a property interest in continued employment—the same issue that would be thrown into disarray by invalidation of the tenure and dismissal statutes, as explained above. Thus, striking down those statutes would create even further uncertainty and instability.

When reviewing via mandamus the decision of an administrative body, such as the Commission on Professional Competence, which holds hearings on teacher terminations pursuant to Education Code § 44944, California trial courts apply different standards depending on the rights at stake. If the action involves "a fundamental right" that "is possessed by, and vested in, the individual" seeking mandamus, then the court will conduct "a full and independent review" of the administrative decision. *Bixby v. Pierno* (1972) 4 Cal. 3d 130, 144. "If, on the other hand, the order or decision does not substantially affect a fundamental vested right, the trial court's inquiry will be limited to a determination of whether or not the findings are supported by substantial evidence in light of the whole record." *Strumsky v. San Diego Cnty. Employees Ret. Ass'n* (1974) 11 Cal. 3d 28, 32.

Without the tenure and dismissal statutes to guide them, litigants and courts would likely struggle to determine which standard of review to apply. On the one hand, as the Supreme Court observed in Skelly, the status

of "permanent employee" constitutes a "property interest in the continuation of [] employment which is protected by due process." *Skelly*, 15 Cal. 3d at 206. On the other, as discussed above, striking down the tenure and dismissal statutes calls into question which teachers possess a property interest in their employment. Courts would thus be forced to engage in an inefficient, fact-intensive review in each case to determine not only whether teachers possess *Skelly* and *Loudermill* rights in the absence of the tenure and dismissal statutes, but also whether, whenever termination hearings are held pursuant to whatever dismissal procedures school districts ultimately apply, the courts should review resulting termination decisions under an independent judgment or substantial evidence standard of review.

As demonstrated by the foregoing, the Superior Court's opinion fundamentally misunderstands the difficult road ahead for the judiciary if the dismissal statutes are struck down. The courts sit in review of dismissal decisions not on appeal, but rather via mandamus proceedings; their role in those mandamus proceedings is not limited to "substantial evidence" review, but varies based on whether a property interest is at stake; and it is highly uncertain how they would carry out that role without the tenure and dismissal statutes providing definitive guidance about teachers' reasonable expectations (or not) of continued employment.

C. The Superior Court's Decision Draws Courts Into Public Policy Matters Properly Left to the Legislature.

The Superior Court may have been onto something—though something contrary to its holding—in observing, however obliquely, that invalidation of the tenure and dismissal statutes would leave the question of "the protection of reasonable due process rights" more firmly in the hands of the "independent judiciary of this state" than under the current statutory scheme. AA 7305. But even setting aside that the Legislature, in enacting Education Code section 44944, made a conscious effort to lessen the courts' role in the teacher dismissal process, *see Cal. Teachers Ass'n*, 20 Cal. 4th at 350, the problem with this result is that tailoring and then tinkering with the details of employment procedures and policies applicable to different subsets of public workers is not a proper role for the judiciary, absent a demonstrated constitutional deprivation (and there is none here). The Legislature and local agency governing boards fashion such public policy, and indeed, since the Superior Court's decision in this case, the Legislature has streamlined tenured teacher due process by its enactment of AB 215. That is as is should be: the statutory provisions at issue in this case raise a number of difficult public-policy questions and require balancing of many competing interests and goals—quintessential legislative work.

Although the Superior Court claimed to be applying law rather than policy, the truth is that the Court waded far into the Legislature's policy-

making domain, issuing a decision that amounts to a sub silentio rejection of all the policy rationales that elected officials have found to be persuasive justifications for the statutes at issue. For example, the California Legislature has provided teachers with due process protections, including some form of "tenure," a period of time to correct deficiencies, and an impartial hearing on termination, since early last century, motivated by the belief that such protections "insure an efficient permanent staff of teachers for our schools whose members are not dependent upon caprice for their positions . . . ." *Fresno City High Sch. Dist. v. De Caristo* (1939) 33 Cal. App. 2d 666, 674; *see also Meyer v. Bd. of Trs.* (1961) 195 Cal.App.2d 420, 428 ("The first tenure provisions were adopted in 1921.") The relevant California statutes have been amended many times over the years, as the Legislature has adjusted them based on experience and changing views,[11] but elected officials have never abandoned the principle that significant due process protections are necessary to protect teachers from personal, political or retaliatory discipline and to ensure merit-based decision-making.

[11] *See, e.g., Cal. Teachers Ass'n,* 20 Cal.4th at 350 (explaining that disciplinary statutes were amended to remove initial hearing from superior court jurisdiction); *Fresno City High Sch. Dist.* (1939) 33 Cal.App.2d at 669–70 (process at that time providing superior court hearing).

Indeed, this is a principle school administrators still believe in today and that dates from the progressive civil service reform movement of the late nineteenth and early twentieth centuries, when it was championed by officials like Theodore Roosevelt and Robert LaFollette, who had seen what can go wrong when civil servants are not so protected. *See, e.g.*, *Bush v. Lucas* (1983) 462 U.S. 367, 382–389 (describing reform-movement goals that led to the enactment of laws protecting federal civil servants from unjust terminations, including past experience with politically motivated dismissals and a desire to protect workers who reported problems from retaliation); RT 7132:12–28 (testimony of Superintendent Seymour that due process protections are important to protect teachers who "try to connect with individual students in ways that sometimes vary from what are viewed as the norm" and to protect good teachers from the "arbitrary behavior" of some principals); *see also Cal. Teachers Ass'n*, 20 Cal.4th at 356 (describing a "teacher's interests in avoiding dismissal" and "in clearing his or her name" as significant as well).

Similarly, the expressed legislative preference for seniority-based layoffs has a long history and significant policy justification, which the Superior Court cast aside with little apparent consideration. Like the due process protections discussed above, seniority rights are "one of the hard-fought protections that emerged" decades ago from the civil service reform

movement. Ctr. for Educ. Organizing, What's Missing From the Debate on Seniority (2011) Brown University.[12] A seniority system ensures fair and objective treatment in the event of a layoff, so administrators do not use layoffs as a means to circumvent due process protections and fire teachers on improper or discriminatory grounds, and it ensures that teachers with the most experience are retained. *See US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 404 ("[T]he typical seniority system . . . create[s], and fulfill[s], employee expectations of fair, uniform treatment" and "encourage[s] employees to invest in the employing company" by offering "an opportunity for steady and predictable advancement based on objective standards"); *Gassman v. Governing Bd. of Rincon Valley Union Sch. Dist. (*1976) 18 Cal.3d 137, 145 (when terminations are motivated by economic conditions rather than teacher conduct, "respect for seniority rights . . . follow[s] quite naturally"); RT 5766:27-5767:8 (testimony of former superintendent Fraisse that seniority "is a fair method that is perceived as fair"; "[w]hen tight economic times require tough things, an objective basis is required"; and that moving to merit-based layoffs would undermine teacher collaboration).

[12] *Available at* <http://files.eric.ed.gov/fulltext/ED527103.pdf> (as of Aug. 30, 2015)

These are all significant policy justifications, which the Superior Court effectively, albeit silently, rejected in favor of its preferred policy choices.

And while courts might sometimes have no choice but to weigh in on policy matters when a true constitutional violation has been proved, that is not the case here. Take the Superior Court's sweeping assertions that the challenged statutes "impose a real and appreciable impact" on a fundamental right and "disproportionately affect poor and/or minority students." AA 7300. These are critically important conclusions about causation, necessary to support what is essentially a theory that the facially neutral statutes at issue have a disparate impact, yet they are not proved by any of the statistical data or regression analysis that is the sine qua non of a disparate impact claim. *See, e.g., Life Technologies Corp. v. Super. Ct.* (2011) 197 Cal.App.4th 640, 650 ("Statistical proof is indispensable in a disparate impact case. . . . [T]he plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the [harm]."); *cf.* Vergara Ruling Offers California an Opportunity to Change a Broken System, L.A. Times (June 10, 2014) (editorial cited by respondents, noting that the evidence cited by the Superior Court failed actually to prove that "grossly ineffective" teachers are the "the key factor

in the state's achievement woes").[13] Without such evidence, there is no meaningful proof that the challenged statutes (as opposed to other factors) actually cause the perceived harm, which means the Superior Court's conclusions rest on nothing more than policy preferences.

Furthermore, and in addition to the Superior Court's legal errors regarding due process and the dismissal statutes, discussed supra, the Superior Court's legal analysis is flawed in other respects as well. For example, while the California Supreme Court has identified a carefully circumscribed right to "basic educational equality," *Butt v. State of Cal.* (1992) 4 Cal.4th 668, 692,[14] on the basis of the California Constitution's guarantees of "a system of common [and free] schools," article IX, §5, and "equal protection of the laws," article I, §7, the Superior Court concededly moved beyond the Supreme Court's case law to announce a new,

[13] *Available at* <http://www.latimes.com/opinion/editorials/la-ed-vergara-20140610-story.html> (as of Aug. 30, 2015)

[14] For evidence of the circumscribed nature of this right, *see, e.g., Butt,* 4 Cal.4th at 692, explaining that the right is not violated unless "the actual quality of [a] district's program, viewed as a whole, falls fundamentally below prevailing statewide standards" and that considerable variation is inevitable and requirement of strict equality would be "entirely unworkable." *Id.* at 681, 686–87; *see also Serrano v. Priest* (1971) 5 Cal.3d 584, 590, 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"); *cf. Gould v. Grubb* (1975) 14 Cal.3d 661, 670 (law subject to heightened scrutiny only if it has "real and appreciable" effect on fundamental right).

unsupported and ill-defined constitutional "right" to a certain "quality" of education. AA 7299. Although never explicitly identified or described, the Superior Court seems to have had in mind an individual right never to be assigned what it termed, without definition, a "grossly ineffective" teacher even for a moment. *Id.* at AA 7299-7300; Intervenor-Appellants' Brief at 2. But of course no such right can be found in the relevant constitutional text or in the interpretive case law, *see supra*, at n.14, and the near-impossibility of enforcing such a right opens the door to essentially unlimited judicial intervention in the school system. *Cf. Am. Fedn. of Labor v. Am. Sash & Door Co.*, (1949) 335 U.S. 538, 543 (Frankfurter, J., concurring) (noting that under the long-discredited *Lochner-era* approach to judicial decision-making, which led to the invalidation of many workplace protections, there was similarly "hardly any limit but the sky" on the Court's ability to invalidate state legislation); *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 391 (court decisions during that era relied on broad "right to contract" that the "[t]he Constitution does not speak of").

The Superior Court then compounded its error by incorrectly elevating its newly recognized right to "fundamental" status. By subjecting any limitation on its novel right to strict scrutiny, the Superior Court essentially ensured that that right would trump all competing considerations. *Cf. Strauss, Why Was Lochner Wrong?*, 70 U. Chi. L. Rev.

373 (2003) (arguing that the worst mistake of the Lochner era may not have been recognizing a "right to contract" but in "exalting" that right: "It is one thing to enforce [a right] in a limited and qualified way; it is quite another to make [that right] a preeminent constitutional value that repeatedly prevails over legislation that, in the eyes of elected representatives, serves important purposes."). By contrast, courts have long recognized, even vis-à-vis foundational First Amendment rights, that strict scrutiny is not appropriate when, for example, a statute is not aimed at interfering with any constitutional rights but has at most an incidental effect on them (as is true here)[15] or when the competing interests of students, teachers and public employers are all involved (as is also true here). *See, e.g., Pickering v. Bd. of Educ. of Township High Sch. Dist. 205* (1968) 391 U.S. 563, 568 (announcing balancing test to be applied in cases of public employee speech); *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.* (9th Cir. 1998) 149 F.3d 971, 978–79 (teachers' First Amendment rights are neither non-existent nor "absolute" but must be balanced against competing considerations).

[15] *See, e.g., Pickup v. Brown*, (9th Cir. 2014) 740 F.3d 1209 (applying rational-basis review to uphold California law regulating licensed mental-health professionals that was not aimed at speech but had an incidental effect on speech); *There To Care v. Comm'r of the Ind. Dep't of Revenue,* (7th Cir. 1994) 19 F.3d 1165 (similar analysis).

The result of all these errors is a decision that rests on policy preference rather than established law or proven fact, and that should have been left in the hands of the Legislature, where these kinds of decisions have been made for decades. As the California Supreme Court said years ago, when other challengers argued that the seniority-based layoff statute did not afford school districts "sufficient latitude," the plaintiffs' proper remedy "is to seek expansion of [layoff authority] from the Legislature" because "the judiciary enjoys no prerogative to override legislative policy judgments in such matters." *Gassman*, 18 Cal.3d at 148; *see also Pruneyard Shopping Ctr. v. Robins* (1980) 447 U.S. 74, 93 (Marshall, J., concurring) (constitutionalizing what is in effect a policy dispute has the negative effect of "freez[ing]" the law in the courts' current view and circumscribing the Legislature's "room for change"); *Am. Fed'n. of Labor*, 335 U.S. 553 (Frankfurter, J., concurring) (constitutionalizing policy disputes interferes with the process of legislative "experiment[ation]" and "trial and error" that most often leads to the best results). Indeed, even the Los Angeles Times editorial board, in the editorial about this case that respondents eagerly cite, could not understand how the Superior Court found this case to present a constitutional question rather than a policy dispute properly left to the Legislature. L.A. Times (June 10, 2014) (stating that "[w]hat [the Superior Court's] ruling leaves less clear is why these

policies . . . represent an *unconstitutional* barrier to a decent education" and suggesting legislative action) (emphasis added).

CONCLUSION

For the foregoing reasons, amici urge reversal.

September 16, 2015

Respectfully submitted,

JUDITH A. SCOTT
Service Employees
International Union

CLAIRE P. PRESTEL
James & Hoffman, P.C

MATTHEW S. BLUMIN
MICHAEL ARTZ
American Federation of State,
County and Municipal Employees

MICHAEL R. CLANCY
California School Employees
Association

KATHRYN SHEFFIELD
California Faculty Association

By: /s/ Claire P. Prestel
Claire P. Prestel
Attorneys for Amici American Federation of State, County and Municipal Employees, the California Faculty Association, the California School Employees Association, and the Service Employees International Union

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that the attached AMICUS BRIEF OF THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, THE CALIFORNIA FACULTY ASSOCIATION, THE CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, AND THE SERVICE EMPLOYEES INTERNATIONAL UNION is proportionally spaced, has a typeface of 13 points or more, and contains 8,584 words, excluding the cover, the certificate of interested entities or persons, 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: September 16, 2015

By: /s/ Claire P. Prestel

Claire P. Prestel

PROOF OF SERVICE (Court of Appeal)
Mail, Electronic Service or Personal Service

Case Name: Vergara v. State of California and CTA and CFT
Court of Appeal Case Number: B258589
Superior Court Case Number: BC484642

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. My ☐ residence ☒ business address is *(specify):* 1130 Connecticut Ave. N.W. #950 Washington, D.C. 20036

My electronic service address is: cpprestel@jamhoff.com

3. I mailed, electronically served or personally delivered a copy of the **App. to file ACB, ACB for Appellants** as indicated below *(complete either a, b or c):*

a. ☒ **Mail.** I mailed a copy of the document identified above as follows:

b. ☐ **Electronic service.** I electronically served a copy of the document identified above as follows:

c. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

Date mailed, electronically served or personally served: Sep 16, 2015

(1) Name of Person served: Theodore J. Boutrous
On behalf of (*name or names of parties represented, if person served is an attorney):*
Beatriz Vergara, et al., Plaintiffs and Respondents
(a) Address: 333 S. Grand Ave. Los Angeles, CA 90071
(b) E-Mail Address: tboutrous@gibsondunn.com

(2) Name of Person served: Glenn Rothner
On behalf of (*name or names of parties represented, if person served is an attorney):*
CTA and CFT, Intervenors-Appellants
(a) Address: 510 S. Marengo Ave, Pasadena, CA 91101
(b) E-Mail Address: grothner@rsglabor.com

(3) Name of Person served: Nimrod Pitsker Elias
On behalf of (*name or names of parties represented, if person served is an attorney):*
State of CA, CA Dep't of Educ., State Bd. of Educ., Edmund Brown Jr., et al.
(a) Address: 455 Golden Gate Ave Suite 11000 San Francisco, CA 94102
(b) E-Mail Address: nimrod.elias@doj.ca.gov

4. I am a resident of or employed in the county where the mailing occurred. The document was served from *(city and state):* Washington, D.C.

☒ Additional persons served are listed on the attached page *(See page 3).*

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

Date: Sep 16, 2015

Claire P. Prestel
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

/s/ Claire P. Prestel
(SIGNATURE OF PERSON COMPLETING THIS FORM)

Case Name:	Vergara v. State of California and CTA and CFT
Court of Appeal Case Number:	B258589
Superior Court Case Number:	BC484642

(4) Name of Person served: The Hon. Rolf M. Treu

On behalf of (*name or names of parties represented, if person served is an attorney):*

Superior Court

(a) Address:

111 North Hill St., Dept. 85 Los Angeles, CA 90012

(b) E-Mail Address:

(5) Name of Person served: Office of the Clerk

On behalf of (*name or names of parties represented, if person served is an attorney):*

California Supreme Court

(a) Address:

350 McAllister Street, #1295 San Francisco, CA 94102

(b) E-Mail Address:

(6) Name of Person served:

On behalf of (*name or names of parties represented, if person served is an attorney):*

(a) Address:

(b) E-Mail Address:

(7) Name of Person served:

On behalf of (*name or names of parties represented, if person served is an attorney):*

(a) Address:

(b) E-Mail Address:

(8) Name of Person served:

On behalf of (*name or names of parties represented, if person served is an attorney):*

(a) Address:

(b) E-Mail Address: