Case 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 and CALIFORNIA FEDERATION OF TEACHERS,
Intervenors-Appellants.

Appeal from Final Judgment of the Superior Court of California,
County of Los Angeles, Case No. BC484642
Hon. Rolf M. Treu, Dep't 58 (T: (213) 974-5689)

OPENING BRIEF OF INTERVENORS-APPELLANTS CALIFORNIA TEACHERS ASSOCIATION AND CALIFORNIA FEDERATION OF TEACHERS

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INTRODUCTION

Educational policy has been the subject of spirited public debate in California since the Legislature adopted a system of public school education in 1852. Stats. 1852, c.53, p. 117. Although few dispute the State's vital interest in providing students with a quality education and attracting and retaining talented and motivated public school teachers, there has long been disagreement about how best to accomplish those goals.

The California Constitution vests the Legislature with "sweeping and comprehensive" power to formulate education policy. *Wilson v. State Bd. of Educ.* (1999) 75 Cal.App.4th 1125, 1134-35. The Legislature's policy choices reflect a carefully calibrated balance among competing educational priorities and are captured in the California Education Code, which establishes the general framework for public education in the State. The Legislature continues to fine-tune that framework, including as recently as last year when it amended two of the five statutes at issue in this case. *See infra* at 22-24. Its policy choices are entitled to deference, and the constitutionality of those choices does not depend on whether some critics consider them improvident or contrary to the latest popular trends. *See City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 439-41.

This appeal challenges a broad injunction holding five provisions of the Education Code facially unconstitutional under the equal protection provisions of the California Constitution, Art. I §7 and Art. IV §16. The invalidated statutes establish: a two-year probationary period during which new teachers may be terminated without cause, Educ. Code §44929.21(b); due process protections for non-probationary teachers facing termination

for cause, §§44934, 44938, 44944; and procedures for implementing budget-based reductions-in-force ("RIFs"), §44955.[1]

The California Legislature carefully weighed a broad range of factors in enacting and amending these statutes, including the difficulties of recruiting talented public school teachers, the real-world pressures facing school districts and their administrators, and the pedagogical needs of teachers and students. *See Bd. of Educ. v. Round Valley Teachers Ass'n* (1996) 13 Cal.4th 269, 278. The resulting statutory framework reflects the Legislature's considered judgment about how to enable school districts throughout the State to obtain and retain the most qualified teaching pool for California public school students. The issue on this appeal is whether the Legislature acted within its constitutional authority in doing so.

The nine student plaintiffs in this high-profile, well-funded lawsuit, who sued as individuals and not on behalf of any class, cloaked their highly controversial educational policy arguments in the garb of an equal protection challenge. Ignoring that the Legislature vested school district administrators with broad discretion to make teacher hiring, dismissal, and assignment decisions under the statutory framework at issue, Plaintiffs contended that the five challenged statutes provided teachers too much job security and, in some school districts, were administered in a manner that Plaintiffs contended created an unconstitutionally high risk that Plaintiffs would be assigned to a "grossly ineffective" teacher – a term that neither Plaintiffs nor the trial court ever defined. *See* Appellants' Appendix ("AA") 29-33 ¶¶2, 9-10, 12-13.

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[1] The challenged statutes are set forth in the Appendix of Statutory Authorities. Statutory references are to the Education Code, unless otherwise noted.

After an eight-week bench trial, the Los Angeles Superior Court (Treu, J.) issued a perfunctory 16-page opinion adopting Plaintiffs' unprecedented constitutional theories in full and striking down each challenged statute as facially unconstitutional. AA 7298-7308. Judge Treu applied strict scrutiny to the challenged statutes after concluding that the consequence of being assigned to a "grossly ineffective" teacher "shocks the conscience" and that the risk of such assignment deprives students of their fundamental right to equal educational opportunity. AA 7299-7300. But in reaching that conclusion, the trial court failed to address such basic threshold issues as whether the challenged statutes actually *cause* any of the alleged harms, which specific provisions render each statute unconstitutional and why, or how the risk of being assigned by a school district to a so-called "grossly ineffective" teacher violates any students' equal protection right to basic educational equality – the only constitutional right at issue in this lawsuit. AA 50-54 ¶¶79-108.

The trial court's invalidation of the Legislature's statutory scheme was entirely without legal or factual justification. There was no evidence that any of the challenged statutes, alone or in combination, was the direct and unattenuated cause of any particular student being assigned to any particular teacher, "grossly ineffective" or otherwise. To the contrary, it is *undisputed* that each school district and its administrators independently decide which teachers to hire; which classrooms to assign them; which second-year teachers have earned protection against future dismissal without cause; when to initiate and pursue termination of under-performing teachers; and whether and how to implement RIFs. *See infra* at 45-46. Moreover, no Plaintiff presented any evidence that he or she was assigned to a "grossly ineffective" teacher as a result of the challenged statutes; and many of the teachers disparaged by Plaintiffs, including Pasadena Unified

School District's 2013 Teacher of the Year, were highly regarded by their districts. *See infra* at 76-78.

Plaintiffs' trial evidence mostly consisted of anecdotal testimony that a handful of California's school districts had failed to identify "grossly ineffective" teachers during the two-year probationary period, that *some* administrators had chosen not to initiate dismissal proceedings because of perceived time or cost restraints, and that *some* junior teachers who received RIF notices believed they were more effective in the classroom than senior teachers who were retained. That is hardly a basis for invalidating the entire integrated statutory scheme as facially unconstitutional, especially given the undisputed evidence that many school districts make reasoned tenure, dismissal, and RIF decisions within the statutory framework, thereby improving the overall quality of the public school teaching pool just as the Legislature intended. *See infra* at 7-21.

As Intervenors the California Teachers Association and California Federation of Teachers demonstrate below, the trial court erred at every step of its equal protection analysis. Besides other errors, the court ignored that the challenged statutes do not require differential treatment of any identifiable student or groups of students, an essential prerequisite to any equal protection challenge, *see infra* at 37-42; accepted a "disparate impact" equal protection theory that the California Supreme Court has held improper and that was not supported by competent statistical evidence in any event, *see infra* at 65-75; and invalidated the statutes on their face without regard to considerable evidence establishing their constitutionally valid applications, *see infra* at 33-36.

The trial court's opinion rested on disagreements over legislative policy rather than careful constitutional analysis. When all the relevant evidence is considered, it is clear that the statutes did not directly cause any of the individual Plaintiffs, much less any student in California, to have an

educational experience that, "*viewed as a whole*, falls fundamentally below prevailing statewide standards." *Butt v. California* (1992) 4 Cal.4th 668, 686-87 (emphasis added).

No statutory scheme will eliminate all perceived educational disparities. There will always be disputes about how to strike the most effective balance among competing educational policies. For example, lengthening the probationary period would allow more time for evaluation, but would also encourage administrators to procrastinate and keep underperforming probationary teachers in the classroom longer. Reducing the procedural protections for teachers facing termination might decrease the time or cost of firing teachers for cause, but would chill teachers' exercise of academic freedom, increase their fear of retaliation, allow arbitrary or unjustified dismissals, and make it harder to recruit capable and qualified new teachers. Eliminating consideration of seniority in RIFs might increase administrators' discretion, but would make the layoff process less efficient, increase discord, reduce the appeal of a long-term professional teaching career, and disregard the uniform consensus that experience correlates with effectiveness.

Striking the balance among these competing concerns is a quintessentially legislative function, but the trial court failed to give any deference to the Legislature's policy choices or to consider the myriad ways the carefully calibrated legislative scheme furthers the State's goal of attracting and retaining qualified teachers and improving the overall quality of the California public school teaching pool. While the wisdom of the Legislature's policy decisions may be the subject of legitimate public debate, those decisions are ultimately assigned to the Legislature, not the courts, under our constitutional system.

STATEMENT OF THE CASE

I. The Challenged Statutes and the Purposes They Serve

The five challenged statutes provide California public school teachers an initial probationary period during which they may be released from employment at their school district's discretion at the end of a school year, after which (if they earn "permanent" status – i.e., tenure) they can be terminated only for just cause. Before the current system was established, California school districts had a "widespread practice of hiring and firing teachers [based on] political patronage … rather than on a basis of merit." Request for Judicial Notice ("RJN") Exh. 1, at 9 (1959 Report of the Assembly Interim Committee on Education's Subcommittee on Extension and Restriction of Tenure). The Legislature designed the present statutory scheme to protect teachers against arbitrary or unfair dismissals or layoffs (including those based on political affiliation, cronyism, sexism, and disagreements about teaching philosophies or other educational issues) and to ensure that tenured teachers "are not dependent upon caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well." *Fresno City High Sch. Dist. v. De Caristo* (1939) 33 Cal.App.2d 666, 673. The evidence at trial showed that the system continues to provide tenured teachers with important protections upon which they rely. Former California Teacher of the Year Shannan Brown, for example, testified that she relied on those protections to advocate for her students on curriculum issues and to be truthful about her sexual orientation. RT 7408:19-23, 7449:16-7451:13.[2]

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[2] *See also* RT 7128:10-7129:8, 7131:9-24 (former El Monte Superintendent Jeff Seymour) (challenged statutes protect teachers who take risks when choosing strategies to motivate and connect students to learning); 8495:3-8496:8, 8508:25-8514:16, 8515:5-15 (California

Providing job security to public school teachers also enables California schools to attract and retain high quality applicants – many of whom have other more lucrative employment options. The dramatic decline in teacher salaries compared to other professions since the 1940s, budgetary pressures, over-crowded classrooms, and poor learning environments make it difficult for many school districts to recruit and retain highly qualified teachers. *See* RT 5917:18-5918:11 (UC Berkeley economist Dr. Jesse Rothstein).[3] Many teachers consider leaving the profession early in their careers, and many do in fact leave during the first five years of teaching. RT 8657:19-8660:12 (CSU Sacramento professor Dr. Ken Futernick) (nationally, 30% of new teachers leave profession in first five years). The statutory protections provided to teachers who earn tenure after two years of teaching and thereby gain protection from wrongful and arbitrary dismissals help counter these disincentives of low pay and difficult working conditions. RT 6051:19-6052:24 (Rothstein).

A. Section 44929.21(b): The Two-Year Probationary Period

The first challenged statute, §44929.21(b), defines the probationary period that teachers must serve before earning due process and for-cause dismissal protections, commonly referred to as "tenure."[4] Probationary

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Department of Education official Lynda Nichols) (challenged statutes protect teachers teaching controversial subjects such as Islam and evolution); 7035:21-7036:27 (veteran teacher Danette Brown); 8016:1-19 (veteran teacher Linda Tolladay); AA 1752-58 (Nichols).

[3] *See also* RT 7263:5-7265:27, 7272:6-13, 7259:4-8, 7261:14-7263:4, 7270:21-7272:5, 7272:18-7274:2, 7275:5-7277:17, 7277:27-7278:21 (veteran teacher Betty Olson-Jones) (describing salary stagnation and poor learning environment in Oakland Unified School District ("OUSD")); AA 6334-45.

[4] Unlike the tenure system for college and university professors, which generally guarantees lifetime employment absent gross misconduct or incompetency, *see, e.g.*, §89535, tenured public school teachers can be

teachers may be released at the end of a school year "without any showing of cause, without any statement of reasons, and without any right of appeal or administrative redress." *Kavanaugh v. West Sonoma County Union High Sch. Dist.* (2003) 29 Cal.4th 911, 917 (internal quotations and citations omitted). Section 44929.21(b) provides that teachers are eligible for non-probationary "permanent" status at the start of their third year of employment with the same district. Districts independently decide which teachers have earned tenure and need not provide any reason for denying tenure. *Id*. Districts must notify probationary teachers on or before March 15 of their second year if they will not be retained. *Id.*

The two-year probationary period "allows the new teacher sufficient time to gain additional professional expertise, and provides the district with ample opportunity to evaluate the instructor's ability before recommending a tenured position." *Bakersfield Elem. Teachers Ass'n v. Bakersfield City Sch. Dist.* (2006) 145 Cal.App.4th 1260, 1279 (citation omitted). Requiring these decisions to be made within the first two years provides an important check against administrative delay and procrastination, ensuring that district officials actively observe and evaluate their newest teachers and make prompt decisions about their assessed performance. Stanford Professor Dr. Linda Darling-Hammond, for example, testified that a two-year probationary period is optimal because a longer period would keep ineffective new teachers in the classroom longer and require districts to increase compensation. RT 8923:2-25, 8924:24-8925:12; *see also* RT

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terminated for numerous reasons, including "unsatisfactory performance," *see infra* at 11. Tenure for public school teachers "is not a guaranteed lifetime job … but consists only of an employee's right not to be deprived of her job until she has been afforded such procedural due process safeguards as an evidentiary hearing at which her employer must establish cause for the termination of her employment." *LaBelle v. San Francisco USD* (1983) 140 Cal.App.3d 292, 300.

5929:9-5931:16, 5946:8-5947:11, 5948:12-5949:1, 5950:28-5951:27 (Rothstein) (two years is optimal probationary period; extending period keeps ineffective teachers in classroom longer); 5658:20-5659:26 (former superintendent Dr. Robert Fraisse); *see also* RT 9543:11-9545:2 (Hanushek) (with four-year probationary period, principals delayed many tenure decisions). Of course, regardless of the length of the evaluation period, predictions of future effectiveness will always have a speculative component. RT 5957:25-5959:15 (Rothstein). But even Plaintiffs' experts acknowledged that a longer tenure period could cause problems. *See*, *e.g.*, RT 2922:10-21 (Kane).

The March 15 deadline ensures that teachers who fail to satisfy their district's criteria receive notice of the adverse decision "early enough to prepare for the future" and "make alternate plans, apply for other jobs, and have time to relocate if necessary." *Hoschler v. Sacramento City USD* (2007) 149 Cal.App.4th 258, 267. Providing professional status and security to teachers early in their career also helps reduce the loss of talented teachers who might otherwise leave the profession. RT 8924:14-23 (Darling-Hammond) (two-year period encourages competent teachers to stay in profession); 5915:27-5917:17, 5955:19-5956:9 (Rothstein).[5]

To be sure, some of Plaintiffs' witnesses testified that two years is not long enough to evaluate a new teacher's potential, RT 514:5-515:10 (Deasy), 2026:17-2027:25 (Raymond), 2428:9-2431:8 (Douglas), and that

[5] The two-year probationary period under §44929.21(b) is longer than the probationary periods for other California public employees, such as non-certificated school district employees, §45113(a) (one year), and civil service employees, including attorneys and physicians, Gov't Code §19170(a) (six months to one year). Probationary civil service employees, unlike probationary teachers, are entitled to challenge their release. Gov't Code §19175.

they later regretted having granted tenure to certain teachers, RT 2434:8-13 (Douglas), 2311:22-2313:5 (Kappenhagen). Many other school district administrators testified, though, that two years was enough time to make reasoned tenure decisions; and the evidence demonstrated that districts that conduct regular teacher observation, evaluation, and mentoring are able to make reasoned tenure decisions within that period. RT 7116:27-7118:1 (Seymour), 2910:6-11, 2933:10-21 (Weaver), 5645:11-18, 5658:2-19, 5660:5-8 (Fraisse) (current probationary period sufficient), 7573:13-16, 7578:7-7579:22, 7585:14-7586:11, 7589:12-7591:20 (San Juan Assistant Superintendent Beth Davies) (18 months sufficient), 6835:11-6838:4 (Riverside Assistant Superintendent Susan Mills) (easily identified teachers for non-reelection by February 1 of second probationary year); AA 5145-46 (Sacramento City USD). As Harvard Professor Dr. Susan Moore Johnson explained, "[I]f administrators, principals, and assistant principals take the responsibility seriously, meaning that they observe and assess teachers for a period of 16 months, there is no question that they can identify grossly ineffective teachers." RT 4455:23-4456:24.[6]

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[6] El Monte Superintendent Jeff Seymour similarly testified that it is easy to make tenure decisions by March of the teacher's second year "if a site administrator is in classrooms and at least weekly is working with their teachers." RT 7120:2-22. The testimony showed that by that time, school districts have considerable information available, including in-classroom observations, data on English language attainment, interim benchmark assessments, Advanced Placement and International Baccalaureate assessments, and teacher exams. RT 498:20-499:28 (Deasy), 5931:17-5940:10, 5941:25-5942:16 (Rothstein) (describing available evidence and explaining that districts can collect sufficient information within current probationary period). Plaintiffs pointed to the availability of only a single year of California standardized test data, but 40% of teachers do not teach a tested subject; those standardized scores are of limited utility; and nothing in the statutes prevents January testing, which would make scores available

Witnesses for all sides acknowledged that poorly performing teachers can be readily identified. RT 2102:9-19 (Raymond); 8920:23-8922:11 (Darling-Hammond); 8470:17-20 (Arizona State Professor Emeritus Dr. David Berliner). Some new teachers' lack of competence becomes apparent quickly, and many districts release certain teachers at the end of the first year. RT 4455:26-4456:21 (Johnson); 7584:28-7586:11 (Davies); 7290:5-7 (Olson-Jones); 8805:3-8809:23 (Webb) (identified unsatisfactory performance within three months in teachers' first probationary year). Although it may be difficult to predict how new teachers will *ultimately* perform, districts can (and often do) deny tenure to teachers whose likely future performance is unclear, which is permissible because §44929.21(b) gives school districts complete discretion in their tenure decisions. As the trial court specifically acknowledged, "in some districts" probationary teachers are released if there is "any doubt" at all. AA 7301-02.[7]

B. Sections 44934, 44938, and 44944: The Dismissal Process

Teachers who earn tenure may still be dismissed for cause thereafter. The Education Code provides several grounds for dismissing tenured teachers, including "unsatisfactory performance." §44932(a). The three dismissal-related provisions challenged in this lawsuit – §§44934, 44938(b), and 44944 (collectively, the "dismissal statutes") – establish the

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by March. RT 1357:24-1358:14 (Chetty), 8360:2-9 (Berliner); *see infra* at 53-54 & n.33.

[7] *See* RT 904:28-905:7 (Deasy) ("If the administration of LAUSD has any doubt that a teacher is not effective, they don't grant tenure."); 5658:20-5659:26 (Fraisse) (districts denied tenure if uncertain). Indeed, the "affirmative tenure" process recently adopted in Los Angeles now *requires* denial of tenure to any probationary teacher whose effectiveness is in doubt, dramatically reducing the percentage of teachers obtaining tenure. RT 475:8-10, 771:6-15, 772:19-27, 785:2-13 (Deasy).

procedures that protect tenured teachers from improper dismissal for unsatisfactory performance.[8]

The requirements of the dismissal statutes are straightforward.[9] Subsection 44938(b)(1) requires school districts to issue a "notice of the unsatisfactory performance" to a teacher facing dismissal, "specifying the nature [of the unsatisfactory performance] with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge." If the identified issues are not resolved within 90 days and the district intends to pursue dismissal, §44934 requires issuance of a "written statement of the charges" notifying the teacher that he or she will be terminated in 30 days unless a hearing is requested.

Section 44944 establishes the formal hearing process (for the small percentage of dismissal cases that do not settle). A hearing must be conducted within 60 days after a request, unless the parties agree otherwise. §44944(a)(1). Both parties are entitled to discovery, but evidence of conduct occurring more than four years before the issuance of written charges may not be considered. *Id.* The hearing is conducted by a

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[8] Plaintiffs' lawsuit focuses on teacher effectiveness, not misconduct, and thus implicates only the procedures for pursuing "unsatisfactory performance" dismissals. *See* RT 627:12-17 (limiting evidence to unsatisfactory performance dismissals, not dismissals for misconduct or "disciplinary reasons"). Plaintiffs also limit their attacks to the five challenged statutes and do not challenge any of the 15 other Education Code sections governing the dismissal process, including others that might affect the cost and efficiency of dismissals such as §44945, which authorizes judicial review of CPC decisions.

[9] Because the trial court did not consider the potential impact of the recent statutory amendments to the dismissal statutes, *see* AA 7216-38, 7309-12; RT (Aug. 6, 2014) 8:23-9:3, Intervenors first discuss the dismissal statutes as they existed before 2015 (which are reproduced in the Appendix of Statutory Authorities), and then discuss those amendments.

"Commission on Professional Competence" ("CPC"), consisting of an administrative law judge, one person selected by the district, and one selected by the teacher. §44944(b)(1). The party-selected members must "hold a currently valid [teaching] credential," "have at least five years' experience within the past 10 years in the discipline of the employee," and not be employees of the school district or related to the teacher. §44944(b)(2). The CPC acts by majority vote and must issue a written decision. §44944(c). Absent prejudice, a CPC may not overturn a dismissal on procedural grounds. §44944(c)(2). A teacher who prevails before a CPC is entitled to reasonable attorneys' fees. §44944(e).

The statutory dismissal process serves critical legislative purposes by ensuring that districts provide adequate procedural protections to tenured teachers facing dismissal, including protections required by due process. *See, e.g., Skelly v. State Pers. Bd.* (1975) 15 Cal.3d 194, 214-15 (1975) (before termination, public employer must provide "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing"); *Linney v. Turpen* (1996) 42 Cal.App.4th 763, 770 (pre-termination hearing must include "reasonably impartial and noninvolved reviewer"); *Townsel v. San Diego Metro. Transit Dev. Bd.* (1998) 65 Cal.App.4th 940, 949 (permanent employee has right to "trial-like" post-termination evidentiary hearing at which public employer must prove its case to impartial hearing officer). As the California Supreme Court has explained, the statutory dismissal process, which consolidates the constitutionally required pre- and post-termination procedures into a single pre-termination hearing, "satisf[ies] the due process requirement that the state provide the teacher some pretermination opportunity to respond," while preventing "unjustified or mistaken deprivations" of employment and promoting "participation and dialogue by affected individuals in the

decisionmaking process." *Cal. Teachers Ass'n v. State* (1999) 20 Cal.4th 327, 343-44.[10]

Preventing arbitrary or unfair dismissal enables public school teachers to address controversial subjects such as evolution or Islam and to advocate for their students without fear of reprisal; protects teachers from being fired for reasons of patronage, favoritism, false or frivolous complaints from vocal parents or students, differences of opinion with administrators on teaching methods, or political disagreements with elected school board members; and helps attract well-qualified individuals to the profession, notwithstanding difficult working conditions and comparatively low compensation. *See supra* at 6-7 & nn.2-3; *infra* at 15 nn.11-12.

The specific statutory requirements of the dismissal statutes each serve important purposes. The notice requirement of §44938(b)(1), by its express terms, provides teachers a reasonable opportunity to improve their performance, saving school districts the substantial costs associated with dismissal and teacher turnover. *De Caristo*, 33 Cal.App.2d at 674; *see* RT 1965:11-22 (Christmas) (remediation of teacher's performance in response to 90-day notice is "ideal" because it saves school district funds and serves students' interests), 8927:19-8928:22 (Darling-Hammond) (remediating teacher performance averts turnover, resulting in significant cost-savings). Section 44934 ensures that teachers receive written notice of the basis for their dismissal and gives them an opportunity to resign in lieu of requesting a hearing. The 60-day deadline under §44944 provides for prompt hearings upon request, while §44944's discovery provisions protect against

[10] Section 44939, another Education Code provision that Plaintiffs do not challenge, permits districts to suspend teachers without pay during the dismissal process if dismissal is sought for certain specified reasons other than "unsatisfactory performance."

"unjustified or mistaken deprivations" by enabling teachers to evaluate whether the stated reasons for dismissal are well-founded or pretextual. *See CTA*, 20 Cal.4th at 343-44. Those provisions also ensure that teachers are provided the "reasons … and materials upon which the [dismissal] is based." *Skelly*, 15 Cal.3d at 214.

Likewise, requiring an experienced three-member commission to hear and evaluate the evidence under §44944 satisfies the constitutional requirement that such decisions be made by impartial and independent hearing officers. The CPC's independence from the school board and school district employees helps guarantee impartiality.[11] Section 44944(b)(2)'s requirement that two members of the CPC hold teaching credentials in the same field as the teacher ensures that the impartial decision-making body will understand the relevant educational practice issues.[12]

Finally, §44944's requirement that the school district must pay reasonable attorneys' fees to a prevailing teacher (a standard statutory fee-shifting provision) ensures that the cost of obtaining representation does not prevent teachers from vindicating their rights, and deters school districts

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[11] As the record shows, schoolchildren (including Plaintiffs here) sometimes disparage teachers in ways that are utterly unfounded. *See infra* at 76-77 (discussing evidence regarding teachers whom Plaintiffs falsely disparaged as "grossly ineffective"). Parents, including those with political influence, may also seek to enmesh board members or administrators in personal campaigns against disfavored teachers. AA 5672-76 ¶¶12-30 (CPC decision reinstating teacher victimized by parents' unwarranted "witch hunt").

[12] These protections are particularly important for public school teachers. Not only do elected school board members face political pressures, but they may lack the teaching expertise needed to understand the range of a teacher's responsibilities and work. RT 8512:2-22 (Nichols), 8024:2-8025:6 (Tolladay).

from overreaching or unduly prolonging dismissal hearings. *Cf. CTA*, 20 Cal.4th at 343 (invalidating on due process grounds §44944(e) provision that "discourag[ed] a teacher from invoking the right to present, to an impartial adjudicator, evidence and nonfrivolous contentions that some or all of the district's charges are without merit, and that the teacher should not be dismissed or suspended").

Plaintiffs presented evidence at trial that some administrators believe that these procedures take too long or cost too much, discouraging them from terminating teachers whose performance they considered unsatisfactory. *See, e.g.*, RT 607:19-608:13 (Deasy), 1533:2-16 (Christmas), 2109:1-2110:7 (Raymond). However, the evidence showed that school districts routinely dismiss teachers pursuant to these statutory procedures. From 2010 through 2012, for example, Fresno USD pursued 22 unsatisfactory performance dismissals, settling 20 without a hearing (in a relatively short time) and prevailing in the one hearing that was completed before trial here began. RT 6505:8-6506:24, 6508:25-6509:2. Los Angeles USD ("LAUSD") was able to remove 786 teachers with performance issues over a recent four-year period, and increased the number of formal dismissal proceedings *almost tenfold* – in part due to a policy of initiating proceedings whenever a teacher received two consecutive below-standard evaluations. AA 689-90; RT 774:23-775:15, 9226:23-9227:12. Hueneme USD similarly had little difficulty obtaining resignations or securing dismissals of teachers with documented performance problems. RT 7138:6-25.

Many districts remedy teacher performance problems through Peer Assistance and Review ("PAR") programs and other forms of support, which is far less disruptive than dismissal. *See, e.g.*, RT 4432:19-4436:6 (Johnson) (50% of teachers referred to PAR programs were able to meet standards and return to classroom); RT 7441:25-7444:23 (S. Brown);

7602:13-7604:25, 7606:1-14, 7614:9-15 (Davies) (half of participants in San Juan USD's PAR program successfully remedied their performance issues while other half resigned without dismissal hearing). In part because of such programs, only a small number of teacher dismissal cases based on unsatisfactory performance require a full CPC hearing and decision. AA 1958-4549, 4956-5079, 5106-44. The vast majority of teacher dismissal proceedings are resolved well before the formal hearing stage through resignation, retirement, or remediation. RT 1521:24-1522:9, 1965:23-26, 1966:11-15 (Christmas), 7290:8-11 (Olson-Jones), 5650:19-5651:5 (Fraisse), 9218:19-9219:19 (Ekchian), AA 690-94, 5962. In Long Beach USD, for example, 95% of such cases are resolved informally. RT 6986:14-24. Such informal resolutions provide certainty of outcome, which school districts value, RT 1967:17-21 (Christmas), and are routinely negotiated at modest cost to school districts, RT 5650:6-18, 5654:6-5655:10 (Fraisse), 9217:23-9220:26, 9224:25-9225:23 (LAUSD spends on average $26,000 per settlement).[13]

[13] Some administrators who testified for Plaintiffs complained about the dismissal statutes' purportedly onerous documentation requirements, but §44934 simply requires a written statement of charges "specify[ing] instances of behavior and the acts or omissions constituting the charge," "stat[ing] the statutes and rules which the teacher is alleged to have violated," and "set[ting] forth the facts relevant to each occasion of alleged … unsatisfactory performance." Districts may remove teachers from the classroom as soon as they file such a statement. Other witnesses mistakenly believed they must prove a teacher is "incapable of remediation" before they initiate dismissal, but the dismissal statutes impose no such requirement, and Plaintiffs do not even challenge §44932, which establishes the substantive bases for dismissal. *See, e.g.*, RT 1518:23-1519:24. The trial court never attempted to determine how much of the time or cost of the dismissal process is attributable to the dismissal statutes' actual requirements, rather than what they are mistakenly perceived to require or what is required by other statutes or policies.

The evidence also showed that the dismissal process can be completed in a relatively short amount of time and at reasonable cost. In the past 10 years, dismissal cases involving unsatisfactory performance that went to a CPC hearing were resolved on average 310 days after school districts filed statements of charges. AA 1958-4549, 4990-5045, 7027-28.[14] Many witnesses, including former LAUSD superintendent Deasy, testified that the costs of the dismissal process did not deter their districts from pursuing a teacher's dismissal when warranted.[15] And of course, litigating disputed teacher termination cases in court – a likely consequence of the trial court's invalidation of the three dismissal statutes – would cost far more and take far longer than the Legislature's streamlined administrative procedure.

C. Section 44955: Reductions in Force

The fifth challenged statute, §44955, sets forth the procedures governing RIFs due to budgetary shortfalls, declining enrollment, or curricular changes. Section 44955(b) provides:

> Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of [§44955] while any probationary employee, or any other employee with less seniority, is retained to render a service

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[14] *See also* RT 6507:16-20 (Tuttle) (Fresno USD; 6-7 months), 529:21-530:8, 788:18-789:12 (Deasy) (LAUSD dismissal proceedings, including both shorter unsatisfactory performance proceedings and longer misconduct proceedings, take on average one to two years to complete).

[15] RT 790:7-11 (Deasy), 7000:28-7001:17 (Boyd). Plaintiffs' cost evidence included estimates from only three unsatisfactory performance dismissal proceedings in two districts. RT 1528:10-1529:1, 1809:7-22 (Christmas), 2031:25-2033:5 (Raymond). Former superintendent Deasy testified regarding the cost of teacher dismissal cases in LAUSD, but his estimate included a handful of sensational *misconduct* cases that cost LAUSD millions of dollars but are not relevant here. *Compare* RT 542:23-28, *with* RT 534:21-535:10, 537:6-538:9, 787:13-22, 788:10-13.

> which said permanent employee is certificated and competent to render.

Under this provision, competent and comparably credentialed teachers must, in general, be laid off in order of reverse seniority. However, §44955(d) allows districts to retain more junior teachers where the district

> (1) … demonstrates a specific need for personnel to teach a specific course or course of study … and [the junior] employee has special training and experience necessary to teach that course or course of study … which others with more seniority do not possess [or] (2) [f]or purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.[16]

The statutory RIF procedures serve crucial governmental interests. Although Plaintiffs might prefer to let districts use RIFs as a shortcut for dismissing disfavored teachers in times of budgetary crisis, that is not its purpose. Section 44955 was enacted to provide objective, administrable, and transparent criteria for school districts forced by budgetary or programmatic emergencies to make difficult layoff decisions – and there is considerable evidence that seniority is not only an easily applied criteria, but also a demonstrably fair one. As Superintendent Fraisse testified, seniority "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 more objective system than seniority." RT 5766:27-5767:8; *see also* RT 4563:28-4564:15 (Johnson) (seniority "is an objective criterion that can be applied in a way that people understand"); 6067:6-6069:6, 6070:16-28 (Rothstein) ("A reverse seniority RIF system establishes a clear objective criteria for which teachers will be laid off."). Tellingly, Dr. Johnson's

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[16] Although Plaintiffs' complaint challenged only the order-of-termination provisions in §44955, the trial court invalidated that statute in its entirety, including provisions regarding the reasons for and timing of RIFs. AA 7306.

study of school districts that *were* allowed to consider alternatives to seniority in making layoff decisions – including teacher performance – found that administrators *preferred* to base layoffs on seniority because of the difficulty of ranking teachers by relative performance and the discord caused by using alternative and subjective methods. RT 4562:15-4564:15.[17]

Using seniority as a criterion for layoffs also furthers the interests of students. Because teaching experience correlates with teaching effectiveness, layoffs conducted in part on the basis of seniority result, on average, in more effective teachers being retained and less effective teachers being laid off, as Plaintiffs' experts admitted.[18] Senior teachers retained during a layoff are also in a better position to mentor others and have deeper connections with their schools and districts; and seniority-based layoffs give teachers an incentive to invest in those connections,

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[17] *See also* RT 7145:8-7146:6 (Seymour) (effectiveness-based layoffs would "destroy … the professional learning community concept that's in place in the schools. Teachers would be far less willing to work cooperatively to meet student needs in that context. . . . [I]t would be very demoralizing to teachers."), 8028:2-8029:14, 8031:8-8032:4 (Tolladay) (effectiveness-based layoffs would "destroy the collegiality that's critical to teaching children"; teachers would be reluctant to teach students who tend to test poorly), 5765:23-5766:18 (Fraisse) (effectiveness-based layoffs would undermine collaboration and create an incentive "to make sure that you get easier kids to teach, higher performing students").

[18] RT 2898:25-2899:7 (Kane), 4564:16-4567:15 (Johnson), 8960:10-20 (Darling-Hammond), 1287:16-20 (Chetty), 3819:12-3821:3 (Goldhaber), 4134:17-4135:19 (Ramanathan), 6072:24-6075:4 (Rothstein); AA 6015-17 (Marshall).

build ongoing programs, and remain with their school districts. RT 8036:2-17 (Tolladay), 6065:12-6067:5 (Rothstein).[19]

Plaintiffs' administrator witnesses complained that the reverse seniority principle did not give them enough discretion to choose which teachers to terminate, preventing them from using budgetary crises as an opportunity to terminate disfavored teachers. RT 668:3-17 (Deasy), 2436:12-2438:17 (Douglas). But §44955 provides districts considerable discretion to decide which services will be reduced or eliminated in a RIF, which teachers are qualified (i.e., "competent") to provide those services, and whether to skip (and thereby retain) less senior teachers pursuant to §44955(d). Sacramento City USD, for example, successfully relied on subsections 44955(d)(1) and (d)(2) to retain certain junior teachers who had been trained to work at a set of low-achieving, high-poverty, high-minority schools. RT 2117:5-2118:28, 2121:9-2124:9, 2124:19-2126:10, 2127:1-18 (Raymond); AA 4636-64.[20]

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[19] Seniority-based layoffs are the norm for California public employees. *See, e.g.*, §45308(a) (classified school employees); Govt. Code §19997.3(a) (state civil service).

[20] Similarly, Capistrano USD retained junior teachers who were assigned to Title I and Program Improvement schools and who taught at the school with the district's highest percentage of low-income students and English Language Learners ("ELLs"). AA 5201, 5205. San Diego also retained junior teachers in certain low-achieving schools. AA 5565-70 & n.2. Districts routinely retain junior teachers to protect the interests of ELLs, special education students, and other at-risk students. *See* RT 1838:24-1843:12 (Christmas); AA 1056, 5170-72, 5247-48, 5253-56, 5296-99, 5312-25, 5346-47, 1068-72 (OUSD), 5384-85 (Chula Vista), 5539-44, 6552 (Pasadena); *see also Bledsoe v. Biggs USD* (2008) 170 Cal.App.4th 127, 138-42 (school district properly retained less senior teachers with "specialized background, training and experience" needed to work with "distinct and difficult student population").

D. The Legislature Regularly Revises the Challenged Statutes, as It Did in the Last Year

The Legislature has amended the five challenged statutes and other Education Code provisions countless times since the tenure system was first established in 1921. Every session brings new perspectives on how to improve public education. *See, e.g.*, *Wilson*, 75 Cal.App.4th at 1129-33 (describing Legislature's enactment and revision of the Charter Schools Act of 1992). The Legislature has devoted considerable resources to the ongoing process of updating the law to reflect changing conditions in California's schools and evolving judgments about how best to attract and retain qualified public school teachers. That is how it should be.

Until the 1970s, teacher dismissal hearings were conducted in Superior Court. In 1971, the Legislature created the administrative CPC dismissal process "to remove the initial disciplinary hearing from the jurisdiction of the superior court, thereby reducing the burden and costs of litigating dismissal proceedings." *CTA*, 20 Cal.4th at 350; *see* RJN Exh. 2 (Stats. 1971, ch. 361). Governor Reagan described the 1971 amendments as "the most advanced legislation in the area of tenure ever considered in California," which would ensure that "California elementary and secondary school children will be taught by competent and responsible instructors," and "make it possible to weed out incompetents from our educational system and, at the same time, protect and encourage dedicated educators." RJN Exh. 3.

Before 1983, teachers served a three-year (rather than a two-year) probationary period, but were permitted to challenge their termination during that probationary period. *See* RJN Exh. 5, at 130, 148, 150. The Legislature's 1983 amendments shortened the probationary period, but eliminated probationary teachers' opportunity to contest the grounds for their termination. *Id.* The 1983 amendments also substantially revised

§44955 by adding subsection (d), which significantly expanded the circumstances under which senior teachers can be laid off before less senior colleagues. *Id.* at 153.

Most recently, the Legislature enacted AB 215, effective January 1, 2015. RJN Exh. 6 (Stats. 2014, ch. 55) ("AB 215"). That law significantly revises the dismissal statutes and streamlines the process for dismissing tenured teachers for "unsatisfactory performance."[21] It shortens the timeline for such proceedings, permitting districts to initiate unsatisfactory performance dismissals throughout the school year and requiring dismissal hearings to begin within six months of a hearing request and to end no later than seven months after that request, absent extraordinary circumstances. AB 215 §§6, 15 (amending §§44936(a)-(b), 44944(b)(1)). AB 215 also sharply limits party-initiated discovery, requiring parties to disclose relevant documents and witnesses at the outset, restricting each party to five depositions absent good cause, and requiring administrative rather than judicial resolution of discovery disputes. AB 215 §§15, 16 (adding §44944.05, amending §44944(a)); *compare* §44944(a)(1), (2).

AB 215 streamlines the dismissal process in other ways as well. It expands the pool of individuals qualified to serve on a CPC by reducing the required experience level, allows the parties to agree to a single ALJ rather than a three-member CPC, and requires the State to pay half of the district's hearing costs when the CPC upholds a teacher's dismissal. AB 215 §15 (amending §44944).

According to the Legislature, AB 215 "updates and streamlines the teacher discipline and dismissal process, saving school districts time and

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[21] AB 215 also makes significant changes to the procedures for "egregious misconduct" dismissals, which Plaintiffs never challenged. *See* RT 627:12-17; *supra* 12 n.8.

money while at the same time ensuring due process." RJN Exh. 7 (AB 215, Assembly Floor Analysis, June 11, 2014) at 7. The Legislature cautioned, though, that like all of the provisions at issue in this case, the practical impact of the amendments depends on district implementation. The new law "has the potential to result in both costs and savings to the state and to local education agencies[, but t]he costs and savings realized will depend on the actions of individual parties in specific cases and will vary by action and year (as is true under existing law)." *Id.* at 6.

II. Procedural History

Plaintiffs filed their Complaint on May 14, 2012, suing the Governor, the State, the Superintendent of Public Instruction, the State Board of Education, the California Department of Education (collectively "State Defendants"), and two school districts (LAUSD and Alum Rock USD ("ARUSD")). AA 1-27. They filed their First Amended Complaint on August 15, 2012, adding an additional plaintiff and defendant Oakland USD. AA 28-55. Plaintiffs sued as individuals, not as a class, and did not seek to represent any students other than themselves.

Plaintiffs' complaint alleged equal protection violations only, asserting that the challenged statutes should be subject to "strict" scrutiny, because (1) the statutes discriminatorily infringed upon Plaintiffs' "fundamental right" to equal educational opportunity by increasing their risk of assignment to a "grossly ineffective" teacher; and (2) the statutes allegedly caused low-income and minority students to be disproportionately assigned to less effective teachers.

State Defendants and ARUSD demurred, principally because Plaintiffs could not establish causation. *See* AA 70, 79-80, 110. Judge Treu overruled the demurrers on November 9, 2012. AA 195.

In May 2013, the California Teachers Association and the California Federation of Teachers intervened. AA 270-73.

In September 2013, State Defendants and Intervenors moved for summary judgment on the ground that the undisputed facts established that (1) the challenged statutes did not discriminate between, or in any way classify, identifiable groups of students; (2) any possible causal relationship between the challenged statutes and a student's assignment to a "grossly ineffective" teacher was too indirect and attenuated to trigger strict scrutiny on a "fundamental interest" theory; (3) the challenged statutes were neither enacted nor applied for a discriminatory purpose; (4) Plaintiffs could not establish the elements of a valid facial or as-applied challenge; and (5) Plaintiffs lacked standing. AA 295-308, 342-54. Judge Treu denied these motions on December 13, 2013. AA 482-90.

Plaintiffs dismissed their claims against the school districts before trial. AA 274-277E (Vol. 29), 491-95. The remaining parties proceeded to the eight-week trial during which 52 witnesses testified (including 12 experts, 12 administrators, and 14 teachers) and more than 150 exhibits were introduced. *See* RT 301-10076. The matter was submitted after closing arguments and post-trial briefs. AA 6991-7112.

On June 10, 2014, the Superior Court issued a 16-page tentative ruling concluding that the challenged statutes were unconstitutional on their face and would be invalidated in their entirety. AA 7131-46.

The court's tentative (which became the final judgment with virtually no changes, AA 7293-7308) devoted only a single paragraph to the critical dispute about whether the challenged statutes directly *caused* any student to be assigned to a "grossly ineffective" teacher. That paragraph did not cite any evidence or explain the court's causation analysis, but summarily stated that "Plaintiffs ha[d] proven, by a preponderance of the evidence, that the challenged statutes impose a real and appreciable impact on students' fundamental right to equality of

education and that they impose a disproportionate burden on poor and minority students." AA 7138 (emphasis omitted).

The court then ruled that the Challenged Statutes did not survive strict equal protection scrutiny.

The court concluded that §44929.21(b) was unconstitutional because it did not allow districts enough time to identify which probationary teachers would turn out to be "grossly ineffective." Without addressing the contrary evidence or any of the well-documented benefits of the two-year probationary period (such as the State's strong interests in encouraging early teacher evaluation, providing incentives to prospective teachers, and limiting the probationary period effective new teachers must serve), the court concluded that "students and teachers are unfairly, unnecessarily, and for no legally cognizable reason (let alone a compelling one) disadvantaged by [§44929.21(b)]." AA 7140.

The court concluded that the dismissal statutes were unconstitutional because they were too costly and time-consuming to administer. The court rejected the due-process justification for those statutes based on its belief that "the independent judiciary of this state" can be trusted to protect the "reasonable due process rights of teachers," AA 7143 – even though the Legislature created the administrative dismissal procedure for the purpose of streamlining teacher-dismissal procedures and easing the pressures on the Superior Courts that formerly heard all such challenges, *see supra* at 22. The court did not address any of the other benefits of the dismissal statutes, such as protecting academic freedom, preventing arbitrary dismissal, and helping recruit and retain quality teachers. Nor did it indicate which

specific provisions of the three dismissal statutes were constitutionally impermissible or why.[22]

The court concluded that §44955 was unconstitutional because it could require a district to lay off a junior teacher while retaining a less effective senior teacher. AA 7143-44. The court said nothing, however, about the exceptions in §44955, the evidence regarding districts' exercise of discretion in implementing RIFs, the parties' undisputed acknowledgment of a positive correlation between experience and effectiveness, or any of the evidence showing the other benefits of §44955, such as administrative convenience, promoting collaboration among teachers, and diminishing the risk of discriminatory or unfair lay-off decisions.

Each party asked the trial court to issue a Statement of Decision pursuant to Rule of Court 3.1590. AA 7147-7212. State Defendants and Intervenors submitted comprehensive requests, noting the absence of citation, discussion, or analysis on a multitude of material legal and factual issues. *See* AA 7147-69, 7191-7212. The trial court declined to rule on these requests, stating that they were "in inappropriate form" and "violative of the rule that ultimate facts be the subject of a Statement of Decision."

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[22] If the trial court's injunction striking down all five statutes (including the statute requiring districts to make tenure decisions at a defined time) goes into effect, California public school teachers who have not yet earned permanent status could be relegated to at-will status indefinitely, with no right at any point in their career to due process protections such as advance notice of the reasons for termination, §44938, or the right to defend themselves in a hearing before an impartial decision-maker, §44944.

AA 7239-40. The trial court then issued a Proposed Statement of Decision and Judgment that was unchanged from the tentative ruling. AA 7240.[23]

State Defendants and Intervenors each filed Objections to the Proposed Statement of Decision and Judgment, AA 7242-92, again asking the court to state the legal and factual basis for invalidating the challenged statutes, and identifying the specific material issues as to which the trial court's proposed Statement lacked factual and legal support. *Id.* On August 27, the court overruled those objections in their entirety and entered the Proposed Judgment as the judgment. AA 7293-7312.

STATEMENT OF APPEALABILITY

Intervenors filed a Notice of Appeal on September 3, 2014. AA 7316-19. Intervenors' appeal is timely under C.R.C. 8.104(a).

STANDARD OF REVIEW

"The determination of a statute's constitutionality is a question of law that [this Court] review[s] de novo." *Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 307; *see also Herbst v. Swan* (2002) 102 Cal.App.4th 813, 816. "Th[e] reviewing court therefore exercises its independent judgment, without deference to the trial court's ruling." *Cal. Ass'n of Retail Tobacconists v. California* (2003) 109 Cal.App.4th 792, 807; *see also id.* at 826 (independently evaluating testimony offered during two-month trial in reviewing lower court's decision). In conducting that independent review, this Court must "presume the validity of the statute[s]

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[23] Code of Civil Procedure §632 requires that a party's request for statement of decision be made "in writing" and "specify those controverted issues as to which the party is requesting a statement of decision," but does not otherwise limit the form of such requests. The "rule" cited by the trial court governs the findings that *must* be included in a statement, not the content of a request for such a statement. Intervenors' request complied with the requirements of §632, and was proper in form.

in question, resolving all doubts in favor of the statute[s]." *Herbst*, 102 Cal.App.4th at 816; *see also Zubarau*, 192 Cal.App.4th at 307-08 ("Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears.") (citation omitted).

Independent appellate review of the facts and law, rather than "substantial evidence" review, is also required for two additional reasons.

First, to the extent the trial court made factual findings at all, they were made in the context of its legally erroneous conclusion that the challenged states are subject to strict scrutiny. *See* AA 7300-07; *infra* Section III. "Because the trial court's findings were premised on an erroneous view of the applicable legal standard, they cannot save the judgment." *Hill v. NCAA* (1994) 7 Cal.4th 1, 8-9, 13, 46-47 (rejecting trial court findings premised on erroneous construction of constitutional right to privacy).

Second, the trial court failed to address or make findings regarding most of the factual and legal issues identified in State Defendants' and Intervenors' Requests for a Statement of Decision and subsequent Objections. AA 7239-40, 7309. This Court may not "infer[] … that the trial court decided in favor of the prevailing party as to those facts or on th[ose] issue[s]." C.C.P. §634. Instead, the sizeable gaps in the trial court's analysis must be dealt with as they are – analytical holes that the trial court could have tried to fill but chose to let stand. *See In re Marriage of Hardin* (1995) 38 Cal.App.4th 448, 453; *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745.

ARGUMENT

In its decision, the trial court invoked seminal decisions like *Brown v. Board of Education* (1954) 347 U.S. 483; *Serrano v. Priest* (1971) 5 Cal.3d 584 (*Serrano I*), (1976) 18 Cal.3d 728 (*Serrano II*); and *Butt v. State of California* (1992) 4 Cal.4th 668. AA 7293-94. But those decisions offer

no support for its unprecedented ruling. *Brown* is completely irrelevant, of course, as Plaintiffs' claims in no way concern nor seek to remedy racial segregation, and *Butt* and *Serrano* are worlds apart from this case both factually and legally.

The plaintiffs in *Butt* and *Serrano* were students whose discriminatory treatment at the hands of the State directly deprived them of their fundamental right to basic educational equality. In both cases, the State subjected specific, identifiable categories of students to different treatment (in *Serrano*, through a school funding formula that classified districts and students on the basis of wealth and thereby disadvantaged less wealthy students; in *Butt*, through the premature closing of all Richmond USD schools after the district declared a fiscal emergency). That differential treatment undermined the quality of those students' educational experiences, rendering their educations fundamentally inferior to those provided to other California public school students.

Unlike the plaintiffs in *Butt* and *Serrano*, Plaintiffs here are not victims of state-mandated discrimination and have never been harmed by the state actions they challenge. The challenged statutes do not target Plaintiffs (or any identifiable group of students) for discriminatory treatment. Instead, those statutes establish *uniform* requirements applicable to school districts throughout California, draw no discriminatory classifications, and do not mandate the differential treatment of any ascertainable group of students. *Infra* Section III.A. Plaintiffs failed to establish at trial that any of the statutes has *ever* caused them harm them or will cause them harm in the future. *Infra* Section IV.

Further, unlike the discriminatory practices challenged in *Butt* and *Serrano*, any impact the challenged statutes could possibly have on Plaintiffs' fundamental rights is extremely indirect and attenuated. The discrimination about which Plaintiffs complain – being assigned to a

"grossly ineffective" teacher while other students are assigned to more effective teachers – could only result from independent hiring, retention, and assignment decisions by school district administrators that are necessarily affected by a complex interplay of intervening non-statutory factors that break any constitutionally significant chain of causation between the challenged statutes and any particular teacher assignment. *Infra* Section III.B.1. Moreover, the state action challenged in *Serrano* and *Butt* did not provide any countervailing benefits to detrimentally affected students, while the statutes challenged here reflect the Legislature's considered determination that the balance it struck would improve the overall quality of the public school teaching force and the resulting educational experiences of all California students. As *Butt* explained, the relevant constitutional inquiry is whether the State's actions caused the plaintiff's education "*viewed as a whole*" to "fall[] fundamentally below prevailing statewide standards." 4 Cal.4th at 686-87 (emphasis added). That analysis necessarily requires consideration of the statutory scheme as a whole, including the many positive benefits it provides. *See id.* (noting that outcome in *Butt* might have differed if such benefits were present); *infra* Section III.B.3.

For all of these reasons, Plaintiffs' ideological attack on the challenged statutes cannot be compared to the *Butt* and *Serrano* plaintiffs' successful civil rights challenges. The differences between those cases and this one are also fatal to Plaintiffs' claims. Statutes that do not distinguish between similarly situated and ascertainable persons or groups, like the challenged statutes, cannot be attacked on equal protection grounds. *Infra* Section III.A. Likewise, statutes whose only possible impact on fundamental rights is indirect, attenuated, and accompanied by significant countervailing benefits are not subject to heightened constitutional scrutiny. *Infra* Section III.B. And because the challenged statutes do not target or

harm Plaintiffs in any way, Plaintiffs lack standing to pursue any of their claims. *Infra* Section IV.

While Plaintiffs' equal protection claims fail for these reasons alone, the trial court also committed many other prejudicial, reversible errors. First, the court disregarded the well-established legal standard governing facial challenges, invalidating the five statutes on their face without addressing whether they are incapable of constitutional application and notwithstanding extensive evidence that school districts throughout the State implement the challenged statutes in an indisputably constitutional manner. *Infra* Section II. Second, the Court erred in concluding that Plaintiffs could establish a valid "suspect class" equal protection claim without showing that the challenged statutes were enacted for a discriminatory purpose or have a statistically significant disparate impact on members of a suspect class. *Infra* Section III.C. Third, even if this Court were to find merit in the trial court's analysis of the legal and factual issues presented at trial, AB 215 has mooted Plaintiffs' claims. *Infra* Section III.B.4.

I. Governing Legal Standards

Plaintiffs' claims are premised solely upon the California Constitution's equal protection provisions, Art. I, §7 and Art. IV, §16. *See* AA 50-54, ¶¶79-108. In the educational context, these provisions have never been held to mandate any particular *substantive* quality of education nor to "require[] the State to remedy all ills or eliminate all variances in service." *Butt*, 4 Cal.4th at 686. Instead, they mandate only basic educational equality. *Id.* at 684, 686-87; *see infra* Section III.B.2.a.

Where the State treats groups of individuals differently, equal protection generally requires that the differential treatment "bear some rational relationship to a legitimate governmental purpose." *Hardy v. Stumpf* (1978) 21 Cal.3d 1, 7. Only where the State's differential treatment

has a real and appreciable impact on the fundamental rights of an ascertainable group, or distinguishes between similarly situated groups on the basis of a suspect classification such as race or wealth, is the challenged line-drawing "subject to strict judicial scrutiny." *Id.*

If a statutory classification violates equal protection in all possible applications, it may be invalidated in its entirety. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1087. Where a statute is capable of constitutional application in some circumstances, each plaintiff must individually prove that the statute's application violated his or her constitutional rights, and the appropriate remedy is an order exempting *that plaintiff* from the statute's requirements. *Somers v. Super. Ct.* (2009) 172 Cal.App.4th 1407, 1415-16.

II. The Trial Court Erred in Striking Down the Five Statutes in Their Entirety as Facially Unconstitutional

In its decision, the trial court enjoined all future enforcement of the five challenged statutes and did not limit its discussion to Plaintiffs' individual circumstances. Although the trial court refused to state whether it intended to invalidate the five challenged statutes on their face or as applied, *see* AA 7168, 7265 ¶47 (requesting such findings), the issuance of a sweeping injunction invalidating a statute in all possible circumstances cannot occur without a finding of facial unconstitutionality. Consequently, the trial court's ruling must be construed – and reviewed – as holding all five challenged statutes facially unconstitutional. *See, e.g.*, *Tobe*, 9 Cal.4th at 1087 (suit that seeks to "enjoin *any* application of the ordinance to *any* person in *any* circumstance" is a facial challenge).[24]

A facial challenge is "the most difficult challenge to mount successfully." *Am. Civil Rights Found. v. Berkeley USD* (2009) 172

[24] Plaintiffs have never sought to represent a class in this case, and thus cannot assert that the relief provided by the trial court is appropriate as some form of class-wide relief.

Cal.App.4th 207, 216 (citation omitted). Such a challenge "considers only the text of the measure itself, not its application to the particular circumstances of an individual." *Tobe*, 9 Cal.4th at 1084. Plaintiffs "must demonstrate that the [statute's] provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." *Id.* (citation omitted). There must be "no set of circumstances … under which the law would be valid." *Am. Civil Rights Found.*, 172 Cal.App.4th at 216 (internal quotations and substitutions omitted); *see also Arcadia USD v. State Dep't of Educ.* (1992) 2 Cal.4th 251, 267.

The trial court erred in the first instance because it failed to find that "no set of circumstances exists under which the [challenged statutes] would be valid." *Am. Civil Rights Found.*, 172 Cal.App.4th at 216. Instead, the trial court's ruling rested on its conclusion that *some* districts might have denied tenure to *some* additional teachers had "more time been provided for the [evaluation] process," AA 7301; that *some* district administrators in *some* cases were "reluctant to even commence dismissal procedures" due to "time and cost restraints," AA 7303 (emphasis added); and that *some* school district might hypothetically be required to lay off a "gifted" junior teacher rather than a more senior "grossly ineffective" teacher, AA 7305-06. Those assertions, drawn from the anecdotal testimony of a small number of school district administrators, are insufficient to establish the statutes' *facial* invalidity – especially given the considerable *undisputed* evidence that each challenged statute can be and routinely is applied constitutionally under a wide variety of circumstances.

The record establishes, for example, that the two-year period mandated by §44929.21(b) was long enough for many school districts to make informed decisions about whether to retain or terminate probationary teachers, thus keeping poor performers out of the classroom and providing job security to effective new teachers. Many witnesses – school

administrators and educational policy experts alike – described districts that evaluated teachers fairly and fully within the two-year probationary period and routinely denied tenure to probationary teachers who failed to demonstrate sufficient competence. *See supra* at 8-11.

The record similarly documents many instances in which the dismissal statutes provided a bulwark against arbitrary or discriminatory termination while still allowing districts to terminate ineffective permanent teachers (either through the formal statutory dismissal process or voluntary resignation or retirement). *See supra* at 6, 14-18. The record was replete with evidence that school districts like Fresno, Long Beach, El Monte, Hueneme, and Los Angeles (after a policy change), for example, terminate teachers when appropriate and remove many underperforming teachers without proceeding to hearing. *See supra* at 16-17.

The record also shows that the RIF statute provides an objective, administrable, transparent standard for layoff decisions that promotes cooperation, creates no incentive for teachers to avoid being assigned to more difficult student populations, prevents districts from targeting more senior teachers if they are better compensated, and gives teachers incentives to invest in schools and communities. *See supra* at 19-21. The trial court's hypothetical application of §44955 ignores that teacher effectiveness improves over time, that the average teacher terminated during a seniority-based RIF is less effective than the average teacher retained, and that seniority-based layoffs therefore *increase* the overall effectiveness of a district's teaching force. *See supra* at 20.

No statutory scheme can guarantee that all poorly performing teachers are immediately identified and remediated or removed. Even Plaintiffs do not contend otherwise. To the extent the trial court found the challenged statutes facially unconstitutional because one or more school districts implemented those statutes in a manner that, in combination with

other factors, *sometimes* led to the hiring or retention of a "grossly ineffective" teacher, it committed reversible error. Such a finding cannot justify the elimination of statutory job security for *all* California public school teachers, the vast majority of whom are, as Plaintiffs admit, effective and dedicated professionals. AA 31 ¶9.

The trial court also erred by ignoring "the text of [each] measure," *Tobe*, 9 Cal.4th at 1084; *see also Rubin v. Padilla* (2015) 233 Cal.App.4th 1128, 1154 (citing *Tobe*), and by failing to identify which specific textual provisions rendered the statutes facially unconstitutional, as Intervenors requested. *See, e.g.*, AA 7154 ¶54, 7302-05. Had the court properly focused on the statutory text – which neither distinguishes between ascertainable groups of students nor requires districts to assign students to "grossly ineffective" teachers – it would have been required to find them facially constitutional. After all, §44929.21(b) expressly authorizes districts to release probationary teachers for any reason or no reason at all, and §44932(a)(5) expressly authorizes districts to dismiss tenured teachers for "unsatisfactory performance."

For these reasons, the challenged statutes are not in "total and fatal conflict with applicable constitutional prohibitions," *Tobe*, 9 Cal.4th at 1084, and the decision below must be reversed. *Hardin*, 38 Cal.App.4th at 453; *Sperber*, 26 Cal.App.4th at 745.

III. The Trial Court Erred in Concluding that Plaintiffs Established an Equal Protection Violation

Because Plaintiffs neither brought this case as a class action nor sought to represent other students, they could only challenge the constitutionality of the five statutes as applied to their own individual circumstances, and could only obtain relief for themselves as individuals. None of the Plaintiffs met that burden, as explained *infra* Section IV. But even if Plaintiffs were entitled to challenge the statutes' constitutionality as

applied to *other* California public school students, Plaintiffs' equal protection challenge would still fail for multiple, independent reasons.

A. The Challenged Statutes Do Not Discriminate Between Discrete and Ascertainable Groups

The equal protection clause does not guarantee substantive rights or outcomes; it protects against unjustified state discrimination. *See supra* Section I; *Butt*, 4 Cal.4th at 685-86 ("[H]eightened scrutiny applies to State-maintained *discrimination* whenever … the *disparate treatment* has a real and appreciable impact on a fundamental right or interest.") (emphasis added). For that reason, "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a *classification* that affects two or more similarly situated groups in an unequal manner." *Cooley v. Super. Ct.* (2002) 29 Cal.4th 228, 253 (emphasis altered). If a statute applies uniformly and contains no distinctions requiring disparate treatment, "there is no classification upon which to base an equal protection claim." *Valtz v. Penta Inv. Corp.* (1983) 139 Cal.App.3d 803, 810.[25]

As the California Supreme Court explained in *Serrano I*, courts considering an equal protection attack upon a statute must first ask whether the "*distinctions drawn by* [*the*] *challenged statute* bear some rational relationship to a conceivable legitimate state purpose" or whether "*the distinctions drawn by the law* are necessary to further its purpose." 5 Cal.3d at 597 (emphasis altered) (citation omitted). The statutory financing scheme in *Serrano* distinguished between districts and students on the basis

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[25] Equal protection claims are thus fundamentally different from claims arising under constitutional provisions, like the First Amendment or substantive due process, in which the question is whether the government invaded a plaintiff's substantive rights. *See, e.g.*, *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 713 (distinguishing direct fundamental rights claims from fundamental rights-based equal protection claims).

of wealth: Poorer districts received dramatically less funding per student than wealthier districts. *See Serrano II*, 18 Cal.3d at 766 n.45 ("The classification here in question … is based on district wealth"); *id.* at 768 ("[T]he state public school financing system … establishes and perpetuates a classification based upon district wealth."). In *Butt*, the "disparate treatment" – curtailment of 20% of the school year for students in one district – "cause[d] an extreme and unprecedented disparity" based on "residence and geography." 4 Cal.4th at 685-87; *see also id.* at 692 ("[D]enials of basic educational equality *on the basis of district residence* are subject to strict scrutiny.") (emphasis added).

Where a law draws no distinctions and does not discriminate against any ascertainable person or group, equal protection is inapplicable. Absent legislative or other governmental line-drawing, there can be no *equal protection* violation, because there is no distinction or discrimination between similarly situated groups that the government must justify. *Vacco v. Quill* (1997) 521 U.S. 793, 800 ("[L]aws that apply evenhandedly to all unquestionably comply with the Equal Protection Clause.") (internal quotations omitted).

Here, the challenged statutes establish uniform rules applicable to districts throughout California. They draw no distinctions and apply to every teacher in precisely the same way. They require districts to provide a two-year probationary period before giving *any* teacher tenure. They prohibit districts from dismissing *any* tenured teacher for cause or as part of a RIF, absent compliance with the dismissal statutes and §44955. There are no "distinction[s] drawn by" the challenged statutes between similarly situated groups of students. *Serrano I*, 5 Cal.3d at 597; *see also Butt*, 4 Cal.4th at 685-86. Nor do any of the statutes inherently distinguish between discrete and ascertainable groups of students. *Cf. Serrano II*, 18 Cal.3d at 766 (school financing scheme distinguished between districts and

students "on the basis of wealth").[26] Indeed, Plaintiffs have asserted that the statutes increase *all* students' risk of assignment to such a teacher – implicitly admitting that the statutes do not discriminate against any specific subset of students.

Statutes that establish such *uniform* legal requirements cannot violate equal protection. *See Citizens for Parental Rights v. San Mateo County Bd. of Educ.* (1975) 51 Cal.App.3d 1, 27 ("As the program on its face applies to all students equally and is taught to all students … there is no denial of equal protection[.]"); *Rubin*, 233 Cal.App.4th at 1152-53 (rejecting equal protection challenge to "top-two" electoral system that disadvantaged minor-party candidates but on its face "ma[de] no … distinction among candidates or political parties").

The trial court's inability to identify any feature of the challenged statutes mandating the differential treatment of identifiable groups of students should have been the end of its inquiry. Neither strict scrutiny *nor* rational basis analysis applies to statutes that draw no lines between identifiable groups. Instead, without any statutory classification upon which to focus, the trial court embarked on a freestanding, policy-driven, and entirely improper inquiry into the wisdom of the Legislature's decisions. *See In re Marriage Cases* (2008) 43 Cal.4th 757, 780 (courts do not review the Legislature's decisions "as a matter of policy").

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[26] *See also Griffin v. Illinois* (1956) 351 U.S. 12, 18 (payment required for preparation of appellate record necessarily discriminates on basis of poverty); *Bullock v. Carter* (1972) 405 U.S. 134, 137, 144 (filing fee required as "absolute prerequisite" to participation in political primary discriminated against voters and candidates "according to their economic status"); *Harper v. Vir. St. Bd. of Election* (1966) 383 U.S. 663, 666 (poll tax distinguished between individuals on basis of wealth and ability to pay tax).

Plaintiffs contended below (and the trial court seemed to agree) that even though the challenged statutes do not discriminate between identifiable groups, the statutes would be facially invalid under equal protection principles if they played any non-incidental role in allowing a school district to assign even one student to a "grossly ineffective" teacher. AA 7052:9-10. That is not the constitutional standard. Even apart from the fact that teacher assignment decisions are made by school districts, not the Legislature, *see, e.g.*, RT 817:9-818:17 (Deasy), the mere fact that a statute's application can affect different people in different ways does not trigger equal protection review. The statute must draw lines requiring the differential treatment of identifiable groups.

Such statutory line-drawing is required *even if* the statute's application arguably implicates a "fundamental" right. The California Supreme Court's decision in *Gould v. Grubb* (1975) 14 Cal.3d 661, is directly on point. *Gould* considered the constitutionality of various methods for determining which electoral candidate would enjoy the "significant advantage" of being listed in the top position on election ballots. 14 Cal.3d at 664. The Supreme Court began by reiterating the bedrock principle that equal protection prohibits state-mandated line-drawing that "reserves such an advantage for a *particular class* of candidates." *Id.* at 670 (emphasis added). The Court concluded that if ballot placement were determined by incumbency or alphabetical order, the ballot-selection procedure would violate equal protection because it would advantage some candidates while disadvantaging others in a "distinct, fixed class." *Id.* at 674-75.

Crucially, though, the Court held that the top position on election ballots could be assigned to candidates randomly chosen before each election. *Id.* at 676. Although such a system would cause the same harm to the same number of candidates and their supporters as the impermissible

systems, and even though that harm could be eliminated by rotating the order in which candidates were listed from ballot to ballot, the system did not violate equal protection because it would "not continually work a disadvantage upon a *fixed* class of candidates; all candidates are at least afforded an equal opportunity to obtain the preferential ballot position." *Id.* (emphasis added); *see also id.* (permitting use of system even though "rotational system is the most equitable system, and the implementation of such a procedure is generally feasible"); Elec. Code §§13111(f), 13112 (ballot order in municipal elections determined by "randomized alphabet"). The mere fact that the system would give "a significant advantage" to some candidates in every election (and, inevitably, would result in the dilution of some votes) did not subject the system to strict scrutiny because, like here, there was no discrimination against a "distinct, fixed class."

The trial court did not identify, and could not have identified, any statutory classification or discrimination between discrete and ascertainable groups of students in the challenged statutes. No *fixed* class of students is disadvantaged by the statutes. All students "are at least afforded an equal opportunity to obtain" an effective teacher. *Gould*, 14 Cal.3d at 676; *see also infra* Section III.C (explaining that the statutes also do not discriminate against poor or minority students). Just as equal protection does not require an electoral system that eliminates ballot-placement preferences altogether, equal protection does not require the Legislature to eliminate any risk that some student somewhere in California might at some point be assigned to a "grossly ineffective" teacher by his or her school district.[27]

[27] Notably, Plaintiffs' attack on the challenged statutes is premised upon the mere *risk* of such an assignment, while the randomized system in *Gould guaranteed* that the ballot-placement preference would dilute some votes in every election.

As the Supreme Court held, equal protection requires only that the Legislature not "continually work a disadvantage upon a *fixed* class." *Gould*, 14 Cal.3d at 676 (emphasis added). Because the challenged statutes do not expressly or inherently distinguish between any identifiable groups of similarly situated students, they cannot be challenged on equal protection grounds.

B. The Trial Court Erred in Applying Strict Scrutiny under a Fundamental Rights Theory

The trial court applied strict scrutiny rather than rational basis review based principally upon its conclusion that the challenged statutes unduly interfered with students' "fundamental right to equality of education." AA 7300. If this Court reaches the merits of Plaintiffs' equal protection challenge (despite the absence of any classification or differential treatment), it should conclude that the trial court's fundamental rights analysis was wrong for three independent reasons.

First, strict scrutiny is triggered only by statutory classifications that have a *direct and unattenuated* impact on a plaintiff's fundamental rights. Here, the challenged statutes have at most an indirect, attenuated impact. Teacher assignment decisions – like the broad range of related decisions involving teacher hiring, training, evaluation, and advancement – are within the exclusive authority of individual school districts, not the Legislature. To the extent any student's fundamental rights are adversely affected by assignment to an underperforming teacher, the direct cause of that assignment is a district's exercise of its discretion. The role played by the challenged statutes in that assignment, if any, is indirect and attenuated.

Second, the trial court misunderstood the nature of the fundamental rights inquiry. California's equal protection provisions do not mandate any particular substantive level of educational quality or achievement, but guarantee only "basic educational equality." *Butt*, 4 Cal.4th at 685-86. If

strict scrutiny were required every time a student complained about the quality of his or her educational experience, equal protection challenges by students dissatisfied with their teachers, principals, schools, courses, or even classroom or homework assignments would proliferate, and courts would be required to articulate and adjudicate "entirely unworkable standard[s] requiring impossible measurements and comparisons" between various possible in-classroom experiences. *Id.* at 686. Courts are not equipped to resolve such disputes, *see Peter W. v. San Francisco USD* (1976) 60 Cal.App.3d 814, 824, and judicial involvement in such matters in the guise of equal protection would undermine the Legislature's "broad discretion" over the education arena, *Wilson*, 75 Cal.App.4th at 1134-35.

Third, the trial court's assessment of the challenged statutes' impact on Plaintiffs' fundamental rights failed to give any consideration to the *net overall* impact of the challenged statutes, positive as well as negative. Any statutory scheme involves legislative trade-offs. When the Legislature decides how long the probationary period should be or which dismissal procedures best further the State's educational objectives, it necessarily weighs the competing benefits and burdens of each potential rule. Courts are ill-equipped to second-guess these legislative policy assessments; but to the extent a court must attempt to evaluate a particular statute's impact on a student's education "as a whole," at a minimum it must weigh the overall impact of the policy, benefits as well as burdens. *See Butt*, 4 Cal.4th at 686-87.

1. The Challenged Statutes Do Not Have a Direct and Unattenuated Impact on Students' Fundamental Rights

"[N]ot every limitation or incidental burden on a fundamental right is subject to the strict scrutiny standard. When the regulation merely has an incidental effect on exercise of protected rights, strict scrutiny is not

applied." *Fair Political Practices Comm'n v. Super. Ct.* (1979) 25 Cal.3d 33, 47 (internal quotation marks omitted). "[O]nly when there exists a real and appreciable impact on, or a significant interference with the exercise of the fundamental right [will] the strict scrutiny doctrine … be applied." *Id.* If a challenged law "ha[s] an unintended, indirect, and, in any case, attenuated effect on" a fundamental right, it is subject to rational basis review. *Rittenband v. Cory* (1984) 159 Cal.App.3d 410, 423 (internal quotation marks omitted) (mandatory judicial retirement law had incidental effect on right to vote). Otherwise, an enormous range of government decisions would be subject to strict scrutiny, including every provision of the Education Code that potentially affects students.[28]

Accordingly, when a law's effect upon fundamental rights depends on other intervening causal factors, the law is not subject to heightened scrutiny. *See, e.g.*, *In re Flodihn* (1979) 25 Cal.3d 561, 567-68 (rule that made one of two groups of similarly situated prisoners eligible for longer sentences had only *indirect* impact upon fundamental right to personal liberty because longer sentence "might or might not" be imposed after hearing); *City and County of San Francisco v. Freeman* (1999) 71 Cal.App.4th 869, 872 (rule prohibiting hardship reduction in child support

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[28] *See Tobe*, 9 Cal.4th at 1101 (strict scrutiny not required when burden on fundamental right to travel is "[i]ndirect or incidental"); *Ortiz v. Los Angeles Police Relief Ass'n* (2002) 98 Cal.App.4th 1288, 1311 ("Unless a law interferes directly and substantially with the fundamental right to marriage, it is not subject to strict scrutiny.") (internal quotation marks omitted); *Oxnard Harbor Dist. v. Local Agency Formation Comm'n* (1993) 16 Cal.App.4th 259, 269 (no strict scrutiny where effect on political rights is "incidental"); *King v. McMahon* (1986) 186 Cal.App.3d 648, 662 (foster child benefits rule had incidental effect on right to live with relatives).

obligations of parent to nonresident child has only "indirect and uncertain" burden on resident child's right to be supported by parent because "the amount of money the payer parent devotes to support of a resident child is subject to a host of other laws, economic factors, and parental choices.").

Here, the impact of the challenged statutes on any student is at most indirect and attenuated because school district administrators, not the challenged statutes, make the teacher assignment and personnel decisions about which Plaintiffs complain.

In leaping from its threshold finding that assignment to a "grossly ineffective" teacher causes harm to its conclusion that the challenged statutes are subject to strict scrutiny, the trial ignored the critical element of causation. AA 7300. Rather than analyzing whether the challenged statutes *cause* the complained-of teacher assignments (as Intervenors specifically requested, AA 7149-51 ¶¶14-23, 7249-51 ¶¶13-15), the trial court simply stated without explanation that "Plaintiffs have proven, by a preponderance of the evidence, that the Challenged Statutes impose a real and appreciable impact on students' fundamental right to equality of education." AA 7300. The trial court never addressed the critical question of whether, or how, each challenged statute directly *causes* Plaintiffs to be assigned to "grossly ineffective" teachers. AA 7301-06.

The gap in the trial court's reasoning mirrors the corresponding gap in Plaintiffs' evidence, which failed to prove that the challenged statutes were the direct and unattenuated cause of any student being assigned to a "grossly ineffective" teacher. Teacher assignment decisions are made by school districts, not by the Legislature, and certainly not by the challenged statutes – as Plaintiffs' own key witness acknowledged. *See* RT 817:9-21 (Deasy) (tenure and dismissal statutes "ha[ve] nothing to do with the assignment of teachers … to either schools or classes."). California is "a local control[] state, meaning almost all decisions about education,

practices, policies, procedures are determined at the local level." RT 8505:9-19 (Nichols). Under this local control system, school districts hire teachers, observe and evaluate them, grant or deny tenure, assign teachers to schools and classrooms, determine whether to pursue corrective measures or dismissal in particular cases, and decide whether and how to implement budgetary RIFs.[29] Each school district also defines "effectiveness" using its own criteria and is solely responsible for evaluating its own teachers. RT 8635:28-8637:1 (Nichols); AA 1349-50, 1356-57, 1360, 1362 (Nichols).

LAUSD's experience is particularly illustrative. Before 2011, LAUSD had a "passive" tenure system under which almost all probationary teachers received tenure. When LAUSD changed its policy to require each principal to make affirmative tenure decisions about each teacher, the percentage of probationary teachers who earned tenure dropped to about 50% – without any change in the relevant statutory framework. RT 771:6-15, 774:1-12 (Deasy).

School districts also decide what resources and programs to devote to improving teachers' performance – a key factor in teacher effectiveness. When school districts devote substantial resources to teacher remediation,

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[29] *See, e.g.*, AA 6325, 6283-84, 6144-48 (Marshall) (assignment, termination, tenure, evaluation), 1395-99, 1415-16, 1779-80 (Nichols) (layoffs); RT 1849:19-1850:2, 1851:28-1852:16, 1856:22-1859:15 (Christmas) & AA 941-42 (evaluation); RT 2405:8-24, 2597:20-28, 2556:26-2557:10 (Douglas) (tenure, assignments, transfers), 6829:17-6830:24, 6834:3-20 (Mills). For example, when a district assigns a teacher outside that teacher's credentialed fields of expertise, as often occurs, it is the *district* – not any statute – that undermines the teacher's effectiveness. *See, e.g.*, RT 8757:26-8758:27, 8759:18-8763:17, 8765:11-8766:22 (Futernick) ("[T]eacher misassignments do have a harmful effect on student performance and on quality teaching."); 8172:13-8186:3, 8195:22-8199:6 (Purdue) (quantifying frequency of misassignments); AA 6407-36.

they can improve the performance of struggling teachers; and even if those remediation efforts fail, the district is in a better position to obtain the teacher's resignation or dismissal. AA 1845-47 (Nichols); RT 4457:15-4458:9 (Johnson), 7442:16-7444:23 (S. Brown), 7599:22-7600:8, 7602:13-7604:25, 7606:1-8, 7614:9-15 (Davies), 7020:19-7023:12 (D. Brown); *see supra* at 16-17.

Teacher preference also plays a significant role in assignments, but has nothing to do with the challenged statutes. All witnesses agree that teachers generally prefer schools with more attractive working conditions. Less desirable schools – sometimes in high-poverty, high-minority neighborhoods – face relatively higher teacher turnover and greater concentration of less-experienced teachers. AA 6001, 6003, 6005-06 (more affluent OUSD schools have more senior teachers, less turnover); AA 1833-34, 1836 (Nichols); RT 821:17-822:15 (Deasy), 2115:24-2116:20 (Raymond), 8659:8-8660:12 (Futernick) (annual teacher turnover rates are significantly higher at high-poverty schools).

Yet those schools *can* reduce teacher turnover and improve student performance if district officials invest the effort and resources necessary to improve school conditions, as many do. For example, San Diego USD Board Trustee Richard Barrera described how his district reduced teacher turnover and improved academic achievement at low-performing schools in high poverty areas by hiring strong principals, encouraging teacher collaboration, and using student data not as a "weapon" but as a "flashlight." RT 6550:17-6556:5, 6653:2-6657:1; *see also* RT 9055:7-9057:4 (Darling-Hammond) (in high-minority, high-poverty schools, "resources spent on improving the working conditions, putting in place good leadership, adequate supplies, materials, equipment, smaller class sizes did result in a stable teaching force, experienced teachers staying in the school, raising achievement and narrowing of the gap"); RT 7417:19-

7420:21 (S. Brown), 7567:16-7570:2 (Davies), 2297:1-2298:20 (Kappenhagen).

The Oakland public schools illustrate how district decision-making and individual teacher preferences shape teacher assignments and teacher effectiveness. Oakland's greatest teaching-related difficulty is attracting and retaining qualified teachers, particularly in high-poverty, high-minority schools. RT 9714:2-10 (Smith); 7270:21-7272:5 (Olson-Jones). Teacher turnover is extremely high: 76% of teachers who started teaching in OUSD in 2003 had departed by 2008. *Id.* That turnover is driven by the district's poor working conditions, low pay, rising class sizes, and extensive school closures. *See supra* at 7 n.3; RT 1409:20-1410:13 (Adam); AA 6012. Administrative difficulties compound these problems. OUSD takes longer than most districts to evaluate its teachers; and without timely evaluations, it cannot identify and correct performance problems. RT 7280:23-7282:26 (Olson-Jones). A 44% rate of principal turnover further undermines the learning environment. RT 8660:13-8661:7 (Futernick); *see also* RT (Feb. 7, 2014) 2935:16-2936:14 (Weaver), 7279:15-7280:22 (Olson-Jones).

District decision-making and other local factors, not the challenged statutes, are the direct cause of the teacher assignments that Plaintiffs criticize. Nothing in the statutes dictates which teachers are hired or promoted; whether poor-performing teachers are supported, asked to resign, or terminated; or which teachers are assigned to which students. The statutes do not limit any district's authority to assign particular teachers to subjects for which they are more qualified or to non-classroom duties. *See supra* at 45-46 & n.29. Even more critical, there is no evidence that *any* of the individual Plaintiffs was assigned to a teacher who (1) would have been denied tenure had the probationary period been longer, (2) would have been dismissed but for the dismissal statutes, or (3) would have been laid off but

for §44955. The statutes did not "cause" the individual Plaintiffs any harm, directly or indirectly. *Infra* Section IV.[30]

In short, there is no direct and unattenuated causal relationship between the challenged statutes and any student's assignment to a "grossly ineffective" teacher. Each teacher's classroom assignment is the result of a long chain of events affected by a complex series of independent decisions. Even if Plaintiffs had been able to show that a challenged statute increased the admittedly small risk that some student somewhere in California might someday be assigned to a "grossly ineffective" teacher, that is not enough to trigger strict scrutiny, given the many independent intervening factors that more directly determine teacher assignments. *Flodihn*, 25 Cal.3d at 567-68; *Freeman* (1999) 71 Cal.App.4th at 872.

2. The Trial Court Misconstrued the Fundamental Right at Issue

Intervenors, who represent hundreds of thousands of teachers in California, agree that teachers play an important role in the educational process. But the constitutional issues before the Court do not turn on whether particular teachers are "good" or "bad" or as effective as they might be under different circumstances. Instead, the question is whether the policy choices made by the Legislature in enacting the challenged statutes were so lacking in justification as to deprive the individual

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[30] If the challenged statutes were the direct cause of students being assigned to "grossly ineffective" teachers, students in California charter schools should consistently outperform students in non-charter schools, because California charter schools are exempt from the challenged statutes. §§47610, 47611.5(c). But student academic achievement at charter schools varies widely, with some charter schools outperforming traditional public schools and others performing comparably or considerably worse. RT 6118:15-6119:4, 6120:27-6122:3 (Rothstein), 9565:6-9566:4, 9652:8-19 (Hanushek); *cf*. RT 1415:18-26, 1444:27-1446:5 (Adam) (test scores declined after school converted to a charter).

Plaintiffs of their equal protection right to basic educational equality. Had the trial court asked the right questions, it would have reached a completely different answer.

a. The equal protection right to basic educational equality

In concluding that the challenged statutes had a sufficiently direct, adverse impact on fundamental rights to trigger strict scrutiny, the trial court grossly misconstrued the nature of the underlying rights. Based solely on its conclusion regarding the effect of grossly ineffective teachers on students and "the number of grossly ineffective teachers" in California, the court subjected the challenged statutes to strict scrutiny. AA 7299-7300. In so ruling, the trial court by its own admission transformed the equal protection right to "basic educational equality" into a substantive right governing the "*quality* of the education [students] are afforded by the state." AA 7295 (emphasis added).[31]

The Supreme Court has held that equal protection does not guarantee an education of any particular substantive quality, only "*basic* educational *equality*." *Butt*, 4 Cal.4th at 684 (emphasis added). *Butt* explained that equal protection prohibits only "den[ying] the students of one district an education *basically equivalent* to that provided elsewhere throughout the State." 4 Cal.4th at 685 (emphasis added). *Serrano* likewise explained:

> If … uniformity of treatment were to result in all children being provided a low-quality educational program, or even a clearly inadequate educational program, the California Constitution would be satisfied. This court does not read the *Serrano (I)* opinion as requiring that there is any constitutional mandate for the State to provide funds for each

[31] The court also misunderstood the applicable constitutional provisions, as it cited Article IX §1 and Article IX §5 in support of its ruling, even though Plaintiffs' claims rested solely upon the Constitution's equal protection provisions. AA 50-54 ¶¶79-108, 7299.

> child in the State at some magic level to produce either an adequate-quality educational program or a high-quality educational program. It is only a disparity in treatment between equals which runs afoul of the California constitutional mandate of equal protection of the laws.

Serrano v. Priest (1977) 20 Cal.3d 25, 36 n.6 (*Serrano III*) (quoting trial court's "correct characterization" of the law).

In evaluating whether the fundamental right to "basic educational equality" has been infringed, the relevant inquiry is both comparative and broad: The question is whether "the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards." *Butt*, Cal.4th at 686-87. Even the loss of six weeks of school was not sufficient by itself in *Butt*: The Court required evidence establishing the actual impacts of that early closure. *See infra* Section III.B.2.c.

Butt also emphasized that rough equality, not absolute equality, is all the Constitution requires. Differences among individuals' educational experiences are inevitable in any education system. Variations in teacher effectiveness, classroom size, community support, and other factors all affect the learning experience but do not implicate the fundamental right to *basic* educational equality under the California Constitution. While "the experience offered by our vast and diverse public school system undoubtedly differs to a considerable degree among districts, schools, and individual students," the Constitution "does not prohibit all disparities in educational quality of service" – only those that cause a district's program to "fall[] fundamentally below prevailing statewide standards." *Butt*, 4 Cal.4th at 686-87.

b. The court's failure to provide any workable definition of "gross ineffectiveness"

The trial court held that assignment to a "grossly ineffective" teacher violates equal protection, yet it never defined the term "grossly ineffective." Nor does the record establish any objective standard for measuring when a particular teacher's quality of instruction in a particular classroom or at a particular time so fundamentally deviates from the norm as to violate the "right to basic educational equality." *Butt*, 4 Cal.4th at 685-86. The trial court's analysis is thus premised upon "an entirely unworkable standard." *Id.* at 686.[32]

Any reliable method for evaluating teachers must account for the fact that teachers may be strong in some areas but not others, well-matched for certain subjects or grades but not others, better in some years than others, more effective with some students than others, strong in some observers' eyes and weak in others, and in other ways not susceptible of easy categorization. RT 8757:26-8758:27, 8759:18-8763:17, 8765:11-8766:22 (Futernick), 8487:5-25 (Berliner). Plaintiffs, however, provided the court with no such method.

Plaintiffs' complaint defined "grossly ineffective" teachers as those "who fail to provide their students with the most basic tools necessary to compete in the economic marketplace or to participate as a citizen in our

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[32] Actions that increase the *risk* of any particular outcome can only violate the Constitution if the outcome itself would be unconstitutional. Consequently, when the trial court concluded that the challenged statutes are subject to heightened scrutiny because they purportedly increase students' *risk* of being assigned to "grossly ineffective" teachers, it necessarily concluded that every such assignment impacts a student's fundamental right to basic educational equality, and that every student facing such an assignment has a constitutional claim against his or her school district.

democracy", AA 31 ¶9, but Plaintiffs have never provided any objective mechanism for measuring compliance with that abstract standard.

Some individual Plaintiffs purported to identify their own "grossly ineffective" teachers. But their testimony simply highlighted the folly of using subjective student assessments of teacher effectiveness as a constitutional standard. After all, some of the teachers whom Plaintiffs disparaged most harshly, such as Pasadena's 2013 Teacher of the Year Christine McLaughlin, were well regarded by their school districts. *See infra* Section IV. And there was *no* evidence that any of Plaintiffs' former teachers would have been terminated but for the challenged statutes.

The standard for determining when teacher quality violates equal protection also cannot be based solely on value-added measurements ("VAMs") derived from standardized test scores, as some advocates urge in current education debates. The trial court cited studies purporting to show that students assigned to teachers who ranked in the bottom 5% as determined by VAMs fall behind in learning skills and lose future earning power. *See*, *e.g.*, RT 1218:25-1221:4 (Chetty), 2769:21-2771:20 (Kane). But those studies are highly controversial, fundamentally flawed, and provide no workable standard for determining whether any particular student's education is *constitutionally* inadequate. There will necessarily be a bottom 5% in any group, no matter how well or poorly that bottom 5% is performing in absolute terms.

VAM analysis is "new and evolving," and is based on standardized tests "which themselves are the subject of substantial controversy in a dynamic and changing education system." *Los Angeles USD v. Super. Ct.* (2014) 228 Cal.App.4th 222, 255-56. The evidence at trial showed that teachers' VAM scores are highly unstable from year to year. *See, e.g.*, RT 6076:9-12, 6090:5-23 (Rothstein) (scores are highly volatile, such that in one study, half of teachers in bottom fifth of VAMs in one year were in top

half following year). Many education experts have concluded that VAM studies are "notoriously unreliable and therefore invalid." RT 8337:12-19 (Berliner).[33] Even Plaintiffs' experts admitted that teacher effectiveness should not be measured by students' standardized test scores alone. RT 1242:2-5, 1243:5-13 (Chetty), 2716:19-2717:1, 2722:3-18, 2725:4-2726:14, 2727:3-21, 2751:23-2752:8, 2871:28-2875:14, 2886:7-15, (Kane), 9530:24-9531:6 (Hanushek). And VAMs cannot be used to evaluate the 40% of California teachers who do not teach subjects included on standardized tests. RT 8360:2-9 (Berliner).

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[33] *See also* RT 8340:10-8342:20, 8344:1-8345:1, 8345:6-8347:16 (Berliner) (studies showing volatility and unreliability), 8324:19-8325:14, 8336:17-22 (Berliner) (impact of class composition on student test scores), 8349:23-8351:2 (Berliner) (failure to ensure that tested items are sensitive to teacher instruction), 8356:5-8357:26 (Berliner) (failure of VAM studies to account for all relevant variables), 8753:16-8754:9, 8755:21-8758:27, 8773:19-8774:12 (Futernick) (VAM alone is unreliable measure of teacher performance where teacher's working conditions are poor, and generates both false positives and false negatives), 8918:7-8920:15 (Darling-Hammond) (further limitations), 6075:5-6079:11, 6087:22-6090:23 (Rothstein) (volatility and unreliability). The volatility and unreliability of VAMs in measuring teacher performance results in part from the fact that 90% of variation in student achievement is attributable to factors other than teachers, as Plaintiffs' experts admitted. RT 3815:12-3816:26 (Goldhaber); *see also* RT 8328:23-8329:23 (Berliner). Most of that variation reflects "out-of-school" influences like poverty and its consequences (e.g., inadequate medical care, hunger, family instability, and low birth weight), the language spoken at home, parents' education levels, and neighborhood income levels and segregation. RT 8328:23-8334:7 (Berliner). Further, Plaintiffs' California VAM studies examined teachers in only three LAUSD grades, and there was no evidence as to whether the identified effect (which exceeded those found in other districts) could fairly be extrapolated rather than being tied to the unique circumstances of that district. RT 1260:19-1263:9, 1277:6-1279:16 (Chetty), 2769:21-2771:20, 2876:20-2877:9, 2902:24-2903:26, 2904:12-16 (Kane), 6079:12-6087:15, 6110:27-6112:7 (Rothstein) (limitations of Kane and Chetty studies).

VAMs therefore do not provide a valid, reliable method for quantifying teacher effectiveness for any purpose, let alone for constitutional purposes. Indeed, the only evidence regarding any districts' *actual* use of VAM scores for high-stakes teacher employment decisions showed that such methods *undermine* educational quality by discouraging teachers from choosing to work in those districts or with the neediest students, and providing incentives to cheat. RT 8353:19-8355:28 (Berliner), 8953:13-8955:1 (Darling-Hammond), 9549:26-9550:2 (Hanushek); *see also* RT 2900:27-2901:18 (Kane) (risks of using VAM alone for high-stakes decisions), 6096:2-6097:4 (Rothstein) (same).

The trial court's estimate of the *number* of "grossly ineffective" teachers employed in California was likewise divorced from any definition of "gross ineffectiveness" and unsupported by record evidence. The court's assertion "that 1-3% of teachers in California are grossly ineffective" rested solely on the testimony of Dr. Berliner, who thought it would be "reasonable to estimate" that 1-3% of teachers in the United States have consistently strong negative effects on student outcomes. AA 7300; RT 8480:15-22. Dr. Berliner never attempted to quantify the number of *California* public school teachers who were "grossly ineffective," though, and there was no evidence connecting Dr. Berliner's estimate with the teachers identified in Plaintiffs' VAM studies.

As illustrated by this case, even education experts cannot agree upon how to measure or define teacher ineffectiveness. "Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught …." *Peter W.*, 60 Cal.App.3d at 824; *see also Wells v. One2One Learning Found.* (2006) 39 Cal.4th 1164, 1212-13 (claims of "educational malfeasance" not actionable because they are "based on

inherently subjective standards of duty and causation," "require judgments about pedagogical methods or the quality of … instructors," and "require evaluation of individual students' educational progress or achievement" and "the reasons for their success or failure"). Just as the Court of Appeal in *Peter W.* held that courts are not institutionally equipped to identify and hold districts to "an actionable 'duty of care,' in the discharge of their academic functions," 60 Cal.App.3d at 825, courts should not inject themselves into ongoing educational policy debates by adopting a new constitutional definition of "teacher ineffectiveness" or otherwise attempting to determine when a student's pedagogical experience with a particular teacher violates equal protection.

c. The effect of individual teacher assignments on a student's education "viewed as a whole"

Even if the trial court had been able to identify a workable constitutional standard for measuring gross ineffectiveness, the evidence would not support a finding that assignment to a grossly ineffective teacher, standing alone, causes any student's educational experience "viewed as a whole," to fall below "prevailing statewide standards." *Butt*, 4 Cal.4th at 686-87 (emphasis added). In *Butt*, the Supreme Court did not find a constitutional deprivation based solely on the significant curtailment of the school year. Rather, the Court explained that "[a] finding of constitutional disparity depends on the individual facts," and then carefully evaluated whether the closure caused "the actual quality of the district's program, *viewed as a whole*, [to] fall[] fundamentally below prevailing statewide standards." *Id.* at 686-87 (emphasis added). In making that determination, *Butt* considered evidence from Richmond teachers who had prepared their lesson plans in anticipation of a standard school year, and who stated that "the proposed early closure would prevent them from completing

instruction and grading essential for academic promotion, high school graduation, and college entrance." *Id.* at 687-88 & n.16.

Here, by contrast, the trial court did not even try to evaluate the impact of assignment to a "grossly ineffective" teacher on a student's education as a whole.

It is undisputed that many in-school factors other than teacher assignments influence educational outcomes and student academic performance, including class size, quality of physical facilities, principal leadership, peer group influences, school stability, curriculum, counseling and after school programs, student attendance, and of course, funding. RT 8325:17-8328:19; *see also supra* at 54 n.33 (90% of student achievement is attributable to factors other than teachers). Moreover, each student is assigned to a number of different teachers over time, some of whom may be highly effective teachers who were drawn to and remain in the teaching profession in part because of the protections afforded by the challenged statutes. *See supra* at 6-7. The overall impact of any particular teacher assignment (positive or negative) cannot fairly be measured without considering all aspects of that student's experience – including the quality of teaching provided by the students' other teachers. *See, e.g.*, RT 1228:23-1229:9 (Chetty), 6092:16-6093:13 (Rothstein) (impact of a single ineffective teacher, even as determined by VAM, fades and can hardly be detected a few years later), 7141:9-7142:15 (Seymour) (describing intervention strategy in which struggling students are taught by up to four teachers per day based on individual needs). Yet even Plaintiffs' expert could not predict the impact if a group of students were assigned to a grossly ineffective teacher one year and a highly effective teacher the next year. RT 1286:1-1287:13 (Chetty).

It is impossible on this record to conclude that any particular assignment, in the context of an overall educational experience that

includes assignment to teachers of varying effectiveness for varying lengths of time and that is shaped by a large number of other factors, causes a student's education to fall fundamentally below prevailing statewide standards. By considering each teacher assignment in isolation, without regard to the other teachers to whom a student is, has been, or will be assigned, the subject matter involved, or the other components of a student's educational experience, the trial court violated *Butt*'s requirement that the constitutionality of any challenged action depends on whether it causes a student's *overall* educational experience to fall fundamentally below prevailing statewide standards. As in *Butt*, where the Court explained that "a planned reduction of overall term length might be compensated by other means, such as extended daily hours, more intensive lesson plans, summer sessions, volunteer programs, and the like," 4 Cal.4th at 686, any negative educational experience resulting from assignment to a "grossly ineffective" teacher must be weighed in the constitutional balance against all other factors bearing on that student's educational experience.

3. The Challenged Statutes' Impact on Any Student's Fundamental Right to Basic Educational Equality Must Be Measured by the Statutes' Net Effect on the Student's Overall Educational Experience

To determine whether the challenged statutes have an impact on the fundamental right to educational equality sufficient to trigger strict scrutiny (assuming an otherwise actionable "classification"), the courts must determine whether any increased risk of assignment to a "grossly ineffective" teacher purportedly caused by the statutes so outweighs the statutes' positive effects on the overall quality of students' education (including by increasing the likelihood of assignment to highly qualified and effective teachers) that the statutes cause each student's educational experience "as a whole" to fall fundamentally below prevailing statewide standards. *Butt*, 4 Cal.4th at 686-87. The trial court committed

fundamental errors (in addition to the causation, identification, and quantification errors previously discussed) by overstating the challenged statutes' potential negative impacts on district decision-making and ignoring the countervailing positive impacts of those statutes on the overall quality of the teaching pool. *See, e.g.*, AA 7302 (stating that interests justifying two-year probationary period are not "legally cognizable"); RT 5336:21-5338:1 (erroneously excluding evidence regarding benefits of tenure); RT 8018:17-8023:28 (erroneously excluding evidence regarding dismissal statutes' benefits). When *all* of the relevant evidence is considered, as *Butt* requires, it is clear that the statutes' impact on students' education "as a whole" is positive and thus insufficient to trigger heightened equal protection scrutiny.

The court ruled that §44929.21(b) failed to satisfy strict scrutiny because Plaintiffs had presented "extensive evidence" that the statute "does not provide nearly enough time for an informed decision to be made" and "teachers are being reelected who would not have been had more time been provided for the process." AA 7301. In so ruling, the court failed to consider the extensive evidence that many districts successfully evaluate their teachers within the statutory two-year period, and that to the extent some "grossly ineffective" teachers were not identified during the probationary period, the blame often lay with the district that failed to observe and adequately assess teachers during that time period. *See supra* at 9-11, 48.[34]

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[34] The trial court was also factually mistaken in asserting that teachers who earn tenure in March but fail to obtain their credential in May would retain the right to remain employed as teachers. AA 7301; *cf.* AA 1549:9-15 ("[Y]ou cannot employ a person to teach who does not hold a teaching credential.") (Nichols); *see also* §§44830, 44831. While the court was correct that some teachers who fail to earn tenure within two years

Just as important, the trial court erred by asserting that "no legally cognizable reason" supported the two-year probationary period and ignoring the many positive impacts of that legislative decision. AA 7302. As previously explained, tenure protects teachers against arbitrary dismissal, allowing them to teach controversial subjects and to advocate for their students without fear of retaliation. *See supra* at 6, 14-15 & nn.2, 11-12. Providing such job security after two years rather than after some longer period prevents such dismissals, enhancing the attractiveness of a public school teaching career, increasing new teachers' commitment to their school district, and raising the dedication and experience level of the teacher pool. *See supra* at 8-9. A longer probationary period would have drawbacks of its own, causing some new teachers to pursue other opportunities, enabling districts to procrastinate or otherwise delay their decisions regarding new teachers, and keeping ineffective teachers in the classroom longer. *See id.*

The same errors are evident in the court's analysis of the dismissal statutes. The trial court concluded that the dismissal statutes do not satisfy strict scrutiny because the "time and cost constraints" associated with the dismissal process "cause districts in many cases to be very reluctant to even commence dismissal procedures." AA 7303. Its conclusion rested upon the testimony of a few administrators who stated that the time and expense of pursuing dismissal proceedings sometimes discouraged them from initiating that process, but many other administrators were *not* deterred

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might have been able to demonstrate their effectiveness if the probationary period were longer, AA 7301-02, that is entirely irrelevant to the issue in this case, which is whether *students'* constitutional rights are violated by the two-year period. And if districts lack resources to conduct adequate observation and evaluation, that problem exists regardless of the length of the probationary period and is not caused by §44929.21(b).

from initiating dismissals and succeeded in removing underperforming teachers through formal or informal means. *See supra* at 16-18. The evidence also showed that the dismissal process can often be completed in a relatively short amount of time, at reasonable expense. *See id.* The trial court ignored that evidence and made no attempt to quantify the particular degree of deterrence that would render the dismissal process unconstitutional, to identify the specific provisions of the dismissal statutes responsible for that deterrence, or to determine whether the deterrence resulted in part from non-statutory aspects of the process, from unchallenged statutory requirements, or from the requirements of due process itself. *See supra* at 13-14, 17 n.13.

To be certain, any protection against arbitrary teacher dismissals will have costs for district employers, and any expenditure of time or money required to pursue such dismissals could have some deterrent effect. Under *Butt*, however, that deterrence must be weighed against the benefits provided by such protections. As explained above, the dismissal statutes help ensure that school districts do not terminate teachers for arbitrary or unfair reasons, allow teachers to address controversial subjects, and provide significant job incentives that attract well-qualified individuals to the teaching profession. *See supra* at 6-7, 13-15. The trial court erred by refusing to consider these beneficial effects of the dismissal statutes, which significantly outweigh any negative deterrent effect.

As with the other statutes, the trial court failed to account for the educational benefits of §44955. The court concluded that §44955 failed to satisfy strict scrutiny because it might require a district to lay off a more effective junior teacher while retaining a less effective senior teacher. AA 7305-06. But §44955 is designed to provide an easily administered system for implementing mass layoffs; it is not a rule designed to facilitate individual terminations for cause. The question before the Legislature

when enacting §44955 was whether the system for implementing mass layoffs in times of budgetary crisis or programmatic need should use seniority as a guiding principle, or should instead involve hundreds of discrete retention decisions based on individualized evaluations of effectiveness. As explained above, seniority provides many benefits as an integral element of an administrative system for implementing painful mass layoffs. There is no dispute that seniority-based layoffs increase the overall average effectiveness of a district's teaching force. *See supra* at 20. Seniority-based layoffs also give teachers an incentive to invest in and remain with their school districts. *See supra* at 20-21. And seniority provides an objective, administrable, transparent standard for making difficult layoff decisions that limits the internal strife created by other alternatives, which is one reason districts given discretion to consider individual teacher effectiveness during layoffs have opted to use seniority to guide their decisions. *See supra* at 19-20 & n.17.

For all of these reasons, "respect for seniority … follow[s] quite naturally" during teacher layoffs, as the California Supreme Court has emphasized. *Gassman v. Governing Bd.* (1976) 18 Cal.3d 137, 145. Notably, the trial court did not find that any *alternative* system for implementing mass layoffs would be more efficient, cost effective, non-disruptive, or likely to increase the overall quality of a district's teaching pool.[35] The trial court simply misunderstood §44955's purpose, and therefore failed to recognize and consider its positive effects.[36]

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[35] While Plaintiffs' witnesses discussed a hypothetical layoff in which the order of termination was determined solely by teachers' VAM scores, school districts are unable to calculate annual VAM scores for every teacher, and Plaintiffs' own experts admitted that VAMs alone do not provide an adequate tool for implementing layoffs given the incentives

Of course, in our constitutional system it is the job of the Legislature, not the courts, to balance the due process rights of teachers, "the student's need for education, the teacher's need for job security, and the school board's need for flexibility in evaluating and hiring employees." *Round Valley Teachers Ass'n*, 13 Cal.4th at 278 (citation omitted). But if courts *must* determine whether the statutory balance struck by the Legislature causes any student's educational experience "as a whole" to fall fundamentally below prevailing statewide standards, *Butt*, 4 Cal.4th at 687, that assessment must evaluate the system's overall effects, positive as well as negative, while deferring to the Legislature's considered judgments. A system that affords no job security protections for teachers might give districts unfettered discretion to dismiss teachers they perceive as "grossly ineffective," but that system would have deleterious effects on teacher recruitment and retention, driving some effective teachers out of the teaching profession, deterring some prospective teachers from entering the profession at all, permitting effective teachers to be dismissed for arbitrary reasons, and increasing teacher turnover. Any proper constitutional analysis must account for all of these impacts of the Legislature's chosen policies.

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created by using VAMs for such high-stakes decisions. *See supra* at 52-55 & n.33.

[36] The trial court also ignored §44955(d)(2), which allows districts to retain less senior teachers when necessary to comply with equal protection. The court made no effort to explain how a statute that expressly permits seniority to be disregarded "[f]or purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws" could violate equal protection. *See also supra* at 21 & n.20 (noting instances in which school districts successfully skipped less senior teachers under §44955(d)(1) and (d)(2)).

4. The Legislature's Recent Enactment of AB 215 Highlights the Flaws in the Trial Court's Analysis and Moots Plaintiffs' Challenge to the Superseded Statutory Scheme

For the reasons explained above, the challenged statutes are entirely constitutional. This Court therefore need not consider the recent enactment of AB 215, which streamlined the process for dismissing teachers for ineffective performance. But to the extent this Court finds any merit in the trial court's analysis, the proper result is not to affirm, but to vacate the trial court judgment and remand for dismissal on the ground that AB 215, which the Governor signed two months before issuance of final judgment here, moots Plaintiffs' attack on the challenged statutes.

"Repeal or modification of a statute under attack, or subsequent legislation, may render moot the issues in a pending appeal." 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §754, p. 820 (collecting cases). When repeal or amendment has mooted a plaintiff's claims, the judgment below must be reversed and the case remanded with instructions to dismiss. *See, e.g.*, *Bell v. Bd. of Supervisors* (1976) 55 Cal.App.3d 629, 636-37; *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134; *San Bernardino Valley Audubon Society v. Metro. Water Dist.* (1999) 71 Cal.App.4th 382, 404.

Plaintiffs' constitutional theory, and the trial court's judgment and injunction, rest on their assertion that the challenged statutes, as they existed before the enactment of AB 215, made it too time-consuming and expensive for districts to dismiss "grossly ineffective" teachers. *See supra* at 26. AB 215 shortens the dismissal timeline, limits discovery, and otherwise substantially reduces the time and expense required to dismiss a teacher for poor performance. *See supra* at 23-24. The trial court's conclusions regarding the *prior* statutory regime cannot support an injunction against the newly revised statutes.

The sparse reasoning of the trial court's decision makes it difficult to determine whether the court held each of the five statutes unconstitutional on its own or only in combination with the others. Nonetheless, AB 215's substantial amendments to the dismissal statutes also moot Plaintiffs' challenges to §44929.21(b) and §44955. If districts can remove "grossly ineffective" teachers without unconstitutionally excessive time and expense, it does not matter, even under Plaintiffs' theory, whether some "grossly ineffective" teachers obtain tenure after two years or whether districts can use RIFs to lay off such teachers.

Accordingly, if this Court were to find merit in the decision below, the trial court's decision and injunction would need to be vacated in light of the changed statutory circumstances and the case dismissed as moot. *Compare City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 958-59 (reversing judgment and directing dismissal as moot when "actual consequences" of constitutional amendment changing local government financing "are not in the record before us").

C. The Trial Court Erred in Applying Strict Scrutiny Under a Suspect Class Theory

The trial court also applied strict scrutiny based on its alternative conclusion that the challenged statutes "disproportionately affect poor and/or minority students." AA 7306-07. The challenged statutes are not subject to strict scrutiny on that basis, however, because they do not classify based on race or wealth and were not enacted for the purpose of discriminating against poor or minority students. Even if Plaintiffs could rely on "disparate impact" alone, the challenged statutes do not cause disproportionate harm to poor or minority students.

1. The Challenged Statutes Are Facially Neutral and Were Not Enacted or Applied for the Purpose of Harming Poor or Minority Students

Plaintiffs' suspect class equal protection claims fail in the first

instance because a plaintiff challenging a statute on those grounds must establish either that the statute on its face classifies on the basis of a suspect class or was enacted or applied for the purpose of harming a suspect class; and it is undisputed that neither circumstance is present here. *See Village of Arlington Heights v. Metro. Housing Dev. Corp* (1977) 429 U.S. 252, 265; *Washington v. Davis* (1976) 426 U.S. 229, 242; *Hardy*, 21 Cal.3d at 7; *Sanchez v. California* (2009) 179 Cal.App.4th 467, 487 (claims of "discrimination by 'disparate impact'" do not trigger strict scrutiny unless challenged statute was "motivated at least in part by purpose or intent to harm a protected group").[37] Under this standard, evidence that a particular statute has a disparate impact on a protected class such as racial minorities, or even that legislators knew it would have such an impact, is inadequate. The statute must have been enacted "'because of,' not merely 'in spite of,' its adverse effects upon [the protected class]." *Pers. Adm'r v. Feeney* (1979) 442 U.S. 256, 279.

In *Hardy*, the California Supreme Court held that this "discriminatory intent" requirement, originally announced in federal equal protection cases, applies to claims under the California Constitution. *Hardy* rejected an equal protection challenge to a physical performance test required of police officer applicants that, although "neutral on its face," had a disproportionate impact based on gender – a suspect classification under the California Constitution. 21 Cal.3d at 6-7. The Court held that,

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[37] *See also In re Marriage Cases*, 43 Cal.4th at 839-41 (state statutes limiting marriage to one man and one woman subject to strict scrutiny under California Constitution because they facially classify on the basis of sexual orientation and "cannot be understood as having merely a disparate impact" on gays and lesbians); *Kim v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 1357, 1361 (equal protection challenge to facially neutral cap on workers compensation reimbursements failed due to absence of discriminatory purpose or intent).

"[s]tanding alone, disproportionate impact does not trigger the rule that [suspect] classifications are to be subjected to the strictest scrutiny." *Id.* at 7 (citing *Davis*, 426 U.S. at 242) (alterations omitted).

In *Sanchez*, 179 Cal.App.4th 467, the Court of Appeal applied the discriminatory intent requirement under circumstances very similar to those here. The *Sanchez* plaintiffs contended that an Education Code provision violated state equal protection because it "disproportionately impact[ed] less affluent and minority children," causing them to be educated in "an array of second-tier schools of limited quality and scope." *Id.* at 487, 489 (internal quotations omitted). The Court of Appeal held that the plaintiffs' failure "to show a discriminatory intent on the part of the Legislature" was fatal to their equal protection claim. *Id*. at 489.

Like the Education Code provision in *Sanchez*, the challenged statutes do not expressly or inherently classify students on the basis of their race or wealth. Further, Plaintiffs introduced no evidence of, and the trial court did not find, *intentional* discrimination against poor or minority students in teacher assignments, tenure decisions, dismissal decisions, or layoffs – let alone evidence that the Legislature enacted the challenged statutes for the purpose of harming such students. *See* RT 1064:24-1065:9 (Deasy), 2880:26-2881:2 (Kane); AA 6110-11, 6226, 6251-52 (Marshall). Absent such evidence, the challenged statutes are not subject to strict scrutiny on a suspect class basis. *Hardy*, 21 Cal.3d at 7.[38]

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[38] If a school district's teacher assignment policies had a disparate impact on minority students, those students could perhaps sue the *district* under Government Code §11135(a), which permits challenges to state-operated or state-funded "program[s] or activit[ies]" that have a disparate impact on the basis of factors including race or national origin. *See Darensburg v. Metropolitan Transp. Comm'n* (9th Cir. 2011) 636 F.3d 511, 519.

Plaintiffs urged the trial court to disregard this long-established equal protection principle based on the *Serrano* decisions. *See* AA 7045-46. But *Hardy* was decided by the California Supreme Court after *Serrano II*, and its requirement that plaintiffs must prove discriminatory intent in any suspect class state equal protection claim is binding on this Court. *See Auto Equity Sales, Inc. v. Super. Ct.* (1962) 57 Cal.2d 450, 455; *People v. Almanza* (2015) 233 Cal.App.4th 990, 1006 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.* (1989) 490 U.S. 477, 484).

In any event, the *Serrano* decisions are consistent with *Hardy*, because the statutory scheme challenged in *Serrano* classified districts and their students on the basis of wealth.[39] Where a statute expressly distinguishes on the basis of a suspect classification such as wealth or race, like the scheme in *Serrano*, strict scrutiny applies without further inquiry. *See, e.g.*, *Coral Const., Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 337. The challenged statutes contain no such express classification.

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[39] *See Serrano I*, 5 Cal.3d 598 (finding "irrefutable" contention "that the school financing system classifies on the basis of wealth"); *id.* at 603 (rejecting argument that school financing system "involves at most de facto discrimination"); *id.* at 604 (explaining that school financing system "discriminates on the basis of the wealth of a district and its residents"); *id.* at 614 (challenged system "conditions the full entitlement to [education] on wealth, *classifies its recipients on the basis of their collective affluence* and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents") (emphasis added); *Serrano II*, 18 Cal.3d at 756 (same); *id.* at 765-66 (school financing system implemented following *Serrano I* "involve[d] a suspect classification (insofar as th[at] system, like the former one, *draws distinctions on the basis of district wealth*)") (emphasis added).

2. The Challenged Statutes Do Not Cause Disproportionate Harm to Poor or Minority Students

Because the challenged statutes are facially neutral and were not enacted for the purpose of harming poor or minority students, they are not subject to strict scrutiny on a suspect class theory. But even if the California Constitution's equal protection provisions permitted disparate impact claims, Plaintiffs' challenge would still fail because they have not shown that the challenged statutes disparately harm poor or minority students.

A plaintiff cannot establish a disparate impact claim merely by showing that members of a suspect class disproportionately suffer some form of harm. *See Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1324; *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 650. The plaintiff must identify the specific practice purportedly responsible for that disproportionality and provide "'statistical evidence of a kind and degree sufficient to show that the practice in question has caused the [disparate impact]." *Carter*, 122 Cal.App.4th at 1323-24 (quoting *Watson v. Fort Worth Bank & Trust* (1988) 487 U.S. 977, 994-95). Those statistical disparities must be "'sufficiently substantial that they raise such an inference of causation.'" *Id.* at 1324 (quoting *Watson*, 487 U.S. at 994-95). If more than one practice, policy, or statute may be responsible for the disparate impact, the plaintiff must "specifically show[] that *each* challenged practice has a significantly disparate impact." *Wards Cove*, 490 U.S. at 657 (emphasis added); *see also Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, 2555-56.

To meet this heavy burden, Plaintiffs had to prove, and the trial court was required to find, that the challenged statutes caused statistical statewide disparities in the treatment of poor or minority students "sufficiently

substantial [to] raise … an inference of causation." *Carter*, 122 Cal.App.4th at 1324 (citation omitted). Strong statistical evidence was particularly important here because the challenged statutes do not directly regulate teacher assignments. *See supra* at 45-47 & n.29. Given that any possible causation was far more attenuated than the causation in cases like *Watson* and *Wards Cove*, compelling statistical evidence was required to establish that the challenged statutes, rather than other factors such as school district policies and individual teacher preferences, caused statistically verifiable disparities.[40]

Intervenors requested the findings required by these well-established standards. AA 7165-68 ¶¶158-173, 7253-25 ¶¶43-46. Rather than making those findings, the trial court summarily concluded that the challenged statutes caused the disproportionate assignment of "underqualified, inexperienced, out-of-field, and ineffective teachers and administrators" to poor and minority students, and that "the lack of effective dismissal statutes and LIFO" caused "churning (aka "Dance of the Lemons[”])" that "greatly affects the stability of the learning process to the detriment of such students." AA 7307. In so ruling, the court treated all five statutes as a unified whole, conflated distinct forms of purported harm, ignored substantial contrary evidence, and cited no evidence – let alone statistical evidence "sufficiently substantial" to raise "an inference of causation" – that the challenged statutes caused the alleged disparities.

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[40] Absent statistical evidence showing that the challenged statutes caused disproportionate harm to poor or minority students in every school district in California, the statutes cannot be invalidated on a statewide basis on a disparate impact theory, and any proper remedy would have to be limited to those districts in which a statistically significant disparate impact has been shown. *Cf. Dukes*, 131 S.Ct. at 2555-56 (plaintiffs could not rely on nationwide or regional analysis to establish existence of discriminatory practices in individual Walmart stores).

The only evidence cited by the trial court in support of its conclusion that the challenged statutes "disproportionately affect poor and/or minority students" was a 2007 California Department of Education report stating that students "attending high-poverty, low-performing schools, are far more likely than their wealthier peers to attend schools having a disproportionate number of underqualified, inexperienced, out-of-field, and ineffective teachers and administrators" and that "minority children disproportionately attend such schools." AA 7306-07. That 2007 report did not quantify any disparities in the assignment of poor or minority students to "grossly ineffective" teachers, or address whether those disparities exist statewide or only in particular districts. AA 4685; *see generally* AA 4681-4740.[41] And the report nowhere suggested that the *challenged statutes* caused such disparities. As the United States Supreme Court recognized in *Watson*, *Wards Cove*, and *Dukes*, evidence of such disparities is insufficient, standing alone, to establish a valid disparate impact claim, because it does not show causation.

The record does not include any statistical evidence that would support a conclusion that the challenged statutes cause the disproportionate assignment of "grossly ineffective" teachers to poor or minority students. Plaintiffs presented no evidence regarding the distribution of "grossly ineffective" teachers statewide (or even district-wide). Their only evidence of disparities concerned teachers in six LAUSD grades. RT 2779:20-2781:27, 2902:12-2903:19 (Kane). That evidence proved nothing about the *reasons* for those assignments, as Plaintiffs' witnesses conceded, and did

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[41] The court excluded evidence regarding the State's successful effort to remedy the problems discussed in the CDE report as irrelevant. *See* RT 8528:17-8530:26, 8531:18-8538:2. If the court intended to rely on the report's discussion of problems that existed in 2007, it should have considered the State's successful efforts to fix those problems.

not purport to show whether similar disparities exist in other grades or in other school districts. RT 2876:28-2877:9, 2877:17-22, 2878:19-21, 2885:1-4 (Kane); *see also* RT 2881:17-2884:23 (Kane) (inequitable distribution caused by uniform salary schedules that fail to compensate teachers for different working conditions in different schools), 4138:2-12 (Ramanathan); AA 709 (showing roughly equal distribution across LAUSD's geographic regions of teachers receiving overall "below standard" evaluations in 2012-13).[42]

The evidence also established that the challenged statutes do not compel California school districts to assign their least effective teachers to high-poverty, high-minority schools. In Riverside USD, for example, there is no disparity in teacher quality between more and less affluent schools, largely due to the district's efforts to make less affluent schools attractive places for teachers to work. RT 6841:9-16 (Mills). Professor Rothstein likewise testified that, controlling for experience, there is no significant difference in teacher effectiveness between high-minority and low-minority schools. RT 6113:1-19.

There is also no merit to the trial court's conclusion that the dismissal statutes and §44955 have a disparate impact on poor and minority students in the form of "churning" or a "dance of the lemons." AA 7307. Plaintiffs' "dance of the lemons" theory asserted that some school district administrators transfer teachers with unsatisfactory performance from one school to another, including to high-poverty, high-minority schools, rather than pursuing their dismissals. But Plaintiffs failed to prove that this

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[42] Plaintiffs also introduced evidence regarding persistent "achievement gaps," but again made no effort to prove – nor could they have proven – that the challenged statutes caused such gaps. *See also supra* at 54 n.33 (describing factors affecting student achievement).

phenomenon occurs with any regularity, much less throughout California, and did not provide any "sufficiently substantial" statistical evidence that each of the challenged statutes *causes* administrative transfers that result in the disproportionate assignment of "grossly ineffective" teachers to poor or minority students. *Cf. Dukes*, 131 S.Ct. at 2553-54 (disregarding expert testimony supporting plaintiffs' theory of causation where expert failed to quantify impact of challenged practice on disparate outcomes). To the contrary, numerous school administrators including Plaintiffs' witnesses testified that they do not permit such transfers and can adopt measures prohibiting such transfers and penalizing principals who initiate them. AA 5965:9-21 ("[OUSD] certainly does not support or in any way manage a system of dance of the lemons."); RT 774:13-22 (Deasy), 2025:28-2026:16, 2028:6-17 (Raymond), 2599:3-24 (Douglas), 5645:19-22 (Fraisse), 6843:15-20, 6844:9-15 (Mills); *see also* §35036 (restricting voluntary teacher transfers into low-performing schools). If that phenomenon occurred in some districts, responsibility rests with the administrators who implemented and enabled such transfers, not with the challenged statutes, which do not regulate teacher transfers.

Nor would the record have supported a finding that the statutes cause poor or minority students to experience disproportionate teacher turnover (i.e., "churning"). Plaintiffs' statistical evidence of turnover was limited to evidence regarding layoffs. Their experts provided no statistical evidence regarding the impact of §44955 on poor or minority students throughout California or statistical evidence that any future layoff pursuant to §44955

will necessarily have a disparate impact on poor and minority students in any particular school district.[43]

High-poverty, high-minority schools sometimes have less experienced teachers than low-poverty, low-minority schools within the same district. But Plaintiffs' own witnesses admitted that those patterns are not consistent across California. *See* RT 3844:7-3848:6 (Goldhaber) (school districts where lowest poverty schools had highest percentage of inexperienced teachers), 4144:12-25 (Ramanathan) (school districts where schools with fewest minority students had highest percentage of inexperienced teachers). Plaintiffs cannot rely on speculation and general patterns to establish their disparate impact claim, but must provide evidence establishing that §44955's statutory requirements have a substantial and

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[43] Dan Goldhaber testified about the impact of seniority-based layoffs outside California. RT 3712:23-26, 3716:4-11, 3822:10-18. Arun Ramanathan testified about the impact of past layoffs on three California school districts (only two of which were identified), but did not consider how any district's implementation decisions or other practices contributed to the identified disparities. RT 3965:10-15, 4101:24-4102:13, 4125:3-4127:3; *cf.* RT 9119:9-9120:12 (excluding Dr. Darling-Hammond's expert testimony as irrelevant because she studied only *five* California school districts). Rather than conducting the kind of statistical analysis required to prove a disparate impact claim, Goldhaber and Ramanathan both relied upon a study that considered only 15 of California's 1,044 school districts; involved a hypothetical layoff determined solely by teaching experience rather than actual layoffs governed by §44955 and its exceptions; and concluded that in many districts, students in high-poverty or high-minority schools were *less* likely to experience teacher layoffs than students in low-poverty or low-minority schools. *See* RT 3730:14-3731:1, 3731:10-13, 3844:7-3848:6 (Goldhaber), 4022:9-23, 4140:26-4141:25, 4144:12-25 (Ramanathan). Both experts also relied upon *Reed v. UTLA* (2012) 208 Cal.App.4th 322, but that case concerned only three schools in LAUSD and did not involve any factual findings regarding disparate impacts on suspect classes. *See id.* at 327, 336-37.

statistically significant disparate impact on poor and minority students in specific identified school districts.

Further, displacement of junior teachers from high-poverty, high-minority schools during layoffs is symptomatic of problems that have nothing to do with §44955. The evidence overwhelmingly established that more experienced teachers tend to prefer schools with more desirable working conditions. As a result, schools with less desirable working conditions – sometimes but not always high-poverty, high-minority schools – experience greater teacher turnover and concentrations of the least experienced teachers. *See supra* at 47-48. That disparity is not caused by the challenged statutes, and districts that invest effort and resources in improving working conditions can reduce teacher turnover and improve student performance. *See supra* at 47-48; RT 4559:20-4561:2 (Johnson). Eliminating seniority as a consideration in layoffs will not remedy any of those underlying structural problems.

D. The Challenged Statutes Serve Critical Government Purposes That Easily Satisfy Equal Protection

Absent discrimination involving a fundamental right or suspect class – neither of which is present here – equal protection generally requires only that statutory classifications bear "some rational relationship to a legitimate governmental purpose." *Hardy*, 21 Cal.3d at 7. This standard accords "wide latitude" to the Legislature's policy choices and "presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne*, 473 U.S. at 439-41; *see also Wilson*, 75 Cal.App.4th at 1135 (recognizing the Legislature's "broad discretion" over the "details" of California's public education program). For all the reasons previously discussed, the challenged statutes further critical – indeed, compelling – purposes that easily satisfy this "rational basis" review. *See supra* at 7-21. Even if the challenged statutes were subject to strict

scrutiny, they would survive because the statutory scheme as a whole is narrowly tailored to achieving the appropriate balance among the compelling but sometimes competing educational interests at stake, including meeting students' educational needs, attracting well-qualified individuals to the teaching profession, protecting teachers from unwarranted termination, promoting the early evaluation of new teachers, and ensuring that RIFs are conducted in an objective, transparent, administrable, and nondiscriminatory manner.

IV. Plaintiffs Never Established Standing or Any Personal Harm Caused by the Challenged Statutes

For each of the foregoing reasons, Plaintiffs cannot establish that the challenged statutes are facially unconstitutional or subject to strict scrutiny based on their application to students other than Plaintiffs. The trial court did not address whether the challenged statutes were unconstitutional as applied to Plaintiffs themselves, but no remand is necessary because Plaintiffs failed to establish that the application of the challenged statutes caused any past violation of their constitutional rights or poses any imminent threat to their rights. Given the absence of such evidence, Plaintiffs lack standing to pursue any of their claims.

An as-applied challenge focuses on a statute's application to the individual plaintiff before the court. The court must determine "whether in those particular circumstances the [statute's] application deprived the individual to whom it was applied of a protected right." *Tobe*, 9 Cal.4th at 1084. Plaintiffs did not establish that application of any of the challenged statutes violated or will violate their constitutional rights.

Only four Plaintiffs and one Plaintiff parent testified. Those were the only Plaintiffs who asserted at trial that they were assigned to one or more "bad" or "grossly ineffective" teachers at some point in their education. *See* AA 1077-78, 1089-90, 1102, 1110, 1146-47, 1149, 1188-

92, 1195-98, 1242-43, 1246-47, 5717A-B (vol.29), 5731, 6522-32, 6535-48. None of those Plaintiffs presented any evidence that those teachers retained their employment or were assigned to Plaintiffs *as a result of the challenged statutes*. Plaintiffs introduced no evidence, for example, that any of their teachers would have been denied tenure if the probationary period were longer, would have been dismissed but for the dismissal statutes, or would have been laid off but for §44955. Indeed, one teacher singled out by Plaintiffs was a long-term substitute who enjoyed no job security protections whatsoever. RT 7737:27-7738:14, 7761:3-6, 9216:20-26.

Plaintiffs also introduced no negative performance reviews suggesting that those teachers would have been terminated but for the challenged statutes. Several of the teachers whom Plaintiffs disparaged were in fact excellent teachers whose services were highly valued by their school districts. Plaintiff Monterroza, for example, claimed that her eighth grade English teacher was a "bad teacher," but that teacher was named Pasadena USD's Teacher of the Year in 2013 and was similarly honored by the local NAACP chapter. RT 3653:13-3654:15, 5846:14-5847:3. Plaintiff DeBose called his fifth grade teacher "grossly ineffective," but that teacher received outstanding performance evaluations and was nominated as her district's teacher of the year the very year she taught DeBose. RT 3399:10-3400:10, 7726:18-28, AA 5713A, 6359-61. Plaintiff Macias' sixth grade math teacher received uniformly favorable performance evaluations. RT 3354:23-3555, 6257:2-4, 6261:7-17. Plaintiff Elizabeth Vergara's eighth grade English teacher received outstanding evaluations and taught at her school as a long-term substitute out of dedication to its students, despite extremely challenging working conditions. RT 7738:15-7739:21, 7743:5-7744:19; AA 6362-75. None of these teachers would have been dismissed or targeted for layoff but for the challenged statutes.

Nor did Plaintiffs introduce any evidence that they are likely to be assigned to a bad teacher in the future, let alone that any such assignment would have been caused by the challenged statutes. Indeed, many Plaintiffs face *no* risk that the challenged statutes will affect their future education, because they do not attend schools governed by the challenged statutes. At the time of trial, Plaintiffs DeBose and Elliott were second-semester high school seniors. RT 3404:22-24, 3412:20-23; AA 1917. Plaintiffs Monterroza and Martinez attended charter schools that are not subject to the challenged statutes. AA 1918, 5419-5538, 5555-60; *see* §§47610, 47611.5(c). The Vergara sisters attended a pilot high school that can release teachers at the end of the year for any reason, including poor performance. RT 807:25-808:24; AA 695-703, 1917, 6518-19.

Plaintiffs also presented no evidence that any of their school districts have any plans to lay off teachers pursuant to §44955. RT 679:3-680:18 (LAUSD), 1848:12-19, 1849:11-18, 1987:9-1989:4 (OUSD). Although a few of California's 1,044 school districts were implementing layoffs at the end of the 2013-2014 school year, RT 4038:17-4039:2 (Ramanathan), Plaintiffs do not reside in those districts.[44]

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[44] In the absence of any evidence regarding planned RIFs in Plaintiffs' school districts, Plaintiffs' challenge to §44955 separately fails for lack of ripeness. Until a school district decides to implement a RIF and adopts the necessary implementing resolutions, it is impossible to determine which schools will be affected, which teachers will be subject to layoff, or how the RIF will be structured in terms of competency, credentialing, and "skipping" criteria, and thus impossible to determine how the RIF will impact any particular student. Under such circumstances, the facts needed to resolve any constitutional challenge to §44955 have not "sufficiently congealed to permit an intelligent and useful decision to be made." *Pacific Legal Foundation v. Cal. Coastal Comm'n* (1982) 33 Cal.3d 158, 171 (internal quotations omitted); *see also PG&E Corp. v. P.U.C.* (2004) 118 Cal.App.4th 1174, 1217 (case unripe where its "posture

Because Plaintiffs did not prove that the challenged statutes caused or will cause any violation of *their* constitutional rights, Plaintiffs' as-applied challenge fails. *See Tobe*, 9 Cal.4th at 1084 ("If a plaintiff seeks to enjoin future, allegedly impermissible, types of applications of a facially valid statute or ordinance, the plaintiff must demonstrate that such application is occurring or has occurred in the past.").

For the same reason, Plaintiffs lack standing:

> When a party asserts a statute is unconstitutional, standing is not established merely because the party has been impacted by the statutory scheme to which the assertedly unconstitutional statute belongs. Instead, the courts have stated that at a minimum, standing means a party must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.

County of San Diego v. San Diego NORML (2008) 165 Cal.App.4th 798, 814 (citation omitted). Because none of the Plaintiffs established that the challenged statutes ever caused them any harm or will do so in the future, they have no standing. *In re Tania S.* (1992) 5 Cal.App.4th 728, 737 (plaintiff who "has not demonstrated he suffered any direct injury resulting from the assertedly unconstitutional [statute]" lacks standing).[45]

Plaintiffs contended that they have standing because they are California public school students and fear being assigned to ineffective teachers in the future. These are precisely the kind of generalized interests "held in common with the public at large" that are insufficient to establish

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… require[s] [the] court to speculate about unpredictable future events in order to evaluate the parties' claims").

[45] The trial court made no findings regarding Plaintiffs' standing, even though Intervenors requested them. AA 7163-64 ¶¶139-144, 7261-63 ¶¶39-41; *see also Californians For Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232-33 ("For a lawsuit properly to be allowed to continue, standing must exist at all times until judgment is entered . . . .").

standing. *Tobe*, 9 Cal.4th at 1086 (citation omitted); *cf. Warth v. Seldin* (1975) 422 U.S. 490, 508 (to establish standing, "[plaintiffs] must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong"). Because Plaintiffs did not establish that *the challenged statutes* harmed them in the past or are likely to harm them in the future, they have no "special interest to be served" or "particular right to be preserved or protected" through an order invalidating those statutes. *Tobe*, 9 Cal.4th at 1086; *City of Los Angeles v. Lyons* (1983) 461 U.S. 95, 105-08 (plaintiff previously subjected to police chokehold who feared being subjected to chokehold again lacked standing to challenge chokehold policy absent proof that such an outcome was likely). A lawsuit challenging the validity of a statute cannot "be brought by any individual or entity that [simply] disagrees with it." *Coral Const., Inc. v. C.C.S.F* (2008) 116 Cal.App.4th 6, 15.[46]

V. The Trial Court's Sweeping Invalidation of the Challenged Statutes Was Not Tailored to Remedying Any Demonstrated Violation of Plaintiffs' Constitutional Rights

Finally, even if Plaintiffs had established that application of the challenged statutes deprived them of a constitutional right, the trial court's broad and sweeping injunction goes far beyond any remedy that might be necessary to protect Plaintiffs' constitutional rights.

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[46] Plaintiffs Campbell, Elliott, and Liss also lack standing to pursue their suspect class equal protection claims because they are white and are not economically disadvantaged. AA 5652-55, 6530-32, 6544, 5731; *see Estate of Horman* (1971) 5 Cal.3d 62, 77-78. Plaintiffs Macias, DeBose, and Monterroza are not economically disadvantaged, and so cannot pursue any suspect class claims premised on wealth. AA 5646-48, 5656-69; RT 3264:10-12 (Macias).

As the California Supreme Court emphasized in *Butt*, "principles of comity and separation of powers place significant restraints on courts' authority to order or ratify acts normally committed to the discretion of other branches or officials." 4 Cal.4th at 695. Any judicial remedy "must be tailored to the harm at issue" and courts must "always strive for the least disruptive remedy adequate to its legitimate task." *Id.* at 695-96; *see also Califano v. Yamasaki* (1979) 442 U.S. 682, 702 ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."); *O'Connell v. Super. Ct.* (2006) 141 Cal.App.4th 1452, 1464 (citing *Butt*).

The facial challenge standard described in *Tobe* defines the circumstances in which "principles of comity and separation of powers" permit courts to invalidate a statute in its entirety. As explained previously, Plaintiffs cannot satisfy the heavy burden required to establish that such relief is appropriate here. *See supra* Section II. Further, because Plaintiffs never sought to represent a class, they cannot seek any remedy addressing the statutes' application to other students. Any remedy in this case must therefore be tailored to the particular applications of the challenged statutes that violate Plaintiffs' individual constitutional rights.

If Plaintiffs' fundamental right to equal education opportunity has been or will be violated by their assignment to "grossly ineffective" teachers, the appropriate remedy would be an order requiring that they not be assigned to such teachers by their school districts. Such an order would prevent any future violation of Plaintiffs' constitutional rights while going no further than necessary. *See, e.g., California Family Bioethics Council v. Cal. Inst. for Regenerative Medicine* (2007) 147 Cal.App.4th 1319, 1339 ("The result of a successful as-applied challenge to a particular statute is not the invalidation of the statute as a whole, but rather an order enjoining

specific unlawful application of the statute."); *Somers*, 172 Cal.App.4th at 1415-16 (exempting individual plaintiff from statutory requirement).[47]

The relief provided by the trial court also goes far beyond any proper remedy for Plaintiffs' "disparate impact" claims. As previously noted, Plaintiffs did not establish any statewide statistical disparities that might justify the statewide remedy provided by the trial court. Any remedy should instead have been limited to those school districts in which the application of the challenged statutes causes statistically significant disparities in the treatment of a suspect class that includes a Plaintiff. *See supra* at 80 n.46. Because Plaintiffs established no such statistical disparities, however, the record would not even support this more limited remedy for Plaintiffs' disparate impact claims.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and instruct the trial court to dismiss Plaintiffs' claims with prejudice.

May 1, 2015

Respectfully submitted,

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[47] Because Plaintiffs' apparent goal in this case is not to remedy any actual violation of their constitutional rights but to invalidate statutory provisions to which they are ideologically opposed, they never sought such relief, and instead dismissed all school district defendants before trial. *See Salazar v. Eastin* (1995) 9 Cal.4th 836, 840 (as-applied remedy unavailable in the absence of school district defendants responsible for administering challenged Education Code provision).

By: 

Michael Rubin
Attorneys for Intervenors-Appellants California Teachers Association and California Federation of Teachers

CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that the attached OPENING BRIEF OF INTERVENORS-APPELLANTS CALIFORNIA TEACHERS ASSOCIATION AND CALIFORNIA FEDERATION OF TEACHERS is proportionally spaced, has a typeface of 13 points or more, and contains 23,515 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: May 1, 2015

By: 
Michael Rubin

APPENDIX OF STATUTORY AUTHORITIES

Education Code §44929.21(b)
(as in effect on Dec. 31, 2014)

(a) Every employee of a school district of any type or class having an average daily attendance of 250 or more who, after having been employed by the district for three complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district.

This subdivision shall apply only to probationary employees whose probationary period commenced prior to the 1983–84 fiscal year.

(b) Every employee of a school district of any type or class having an average daily attendance of 250 or more who, after having been employed by the district for two complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district.

The governing board shall notify the employee, on or before March 15 of the employee's second complete consecutive school year of employment by the district in a position or positions requiring certification qualifications, of the decision to reelect or not reelect the employee for the next succeeding school year to the position. In the event that the governing board does not give notice pursuant to this section on or before March 15, the employee shall be deemed reelected for the next succeeding school year.

This subdivision shall apply only to probationary employees whose probationary period commenced during the 1983–84 fiscal year or any fiscal year thereafter.

Education Code §44934
(as in effect on Dec. 31, 2014)

Upon the filing of written charges, duly signed and verified by the person filing them, with the governing board of the school district, or upon a written statement of charges formulated by the governing board, charging that there exists cause, as specified in Section 44932 or 44933, for the dismissal or suspension of a permanent employee of the district, the governing board may, upon majority vote, except as provided in this article if it deems the action necessary, give notice to the permanent employee of its intention to dismiss or suspend him or her at the expiration of 30 days from the date of service of the notice, unless the employee demands a hearing as provided in this article. Suspension proceedings may be initiated pursuant to this section only if the governing board has not adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3543.2 of the Government Code.

Any written statement of charges of unprofessional conduct or unsatisfactory performance shall specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his or her defense. It shall, where applicable, state the statutes and rules which the teacher is alleged to have violated, but it shall also set forth the facts relevant to each occasion of alleged unprofessional conduct or unsatisfactory performance.

This section shall also apply to the suspension of probationary employees in a school district with an average daily attendance of less than 250 pupils which has not adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3542.2 of the Government Code.

Education Code §44938
(as in effect on Dec. 31, 2014)

(a) The governing board of any school district shall not act upon any charges of unprofessional conduct unless at least 45 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

(b) The governing board of any school district shall not act upon any charges of unsatisfactory performance unless it acts in accordance with the provisions of paragraph (1) or (2):

(1) At least 90 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unsatisfactory performance, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

(2) The governing board may act during the time period composed of the last one-fourth of the schooldays it has scheduled for purposes of computing apportionments in any fiscal year if, prior to the beginning of that time period, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unsatisfactory performance, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

(c) "Unsatisfactory performance" as used in this section means, and refers only to, the unsatisfactory performance particularly specified as a cause for dismissal in Section 44932 and does not include any other cause for dismissal specified in Section 44932.

"Unprofessional conduct" as used in this section means, and refers to, the unprofessional conduct particularly specified as a cause for dismissal or suspension in Sections 44932 and 44933 and does not include any other cause for dismissal specified in Section 44932.

Education Code §44944
(as in effect on Dec. 31, 2014)

(a) (1) In a dismissal or suspension proceeding initiated pursuant to Section 44934, if a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a hearing. The hearing shall be initiated, conducted, and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. However, the hearing date shall be established after consultation with the employee and the governing board, or their representatives, and the Commission on Professional Competence shall have all of the power granted to an agency in that chapter, except that the right of discovery of the parties shall not be limited to those matters set forth in Section 11507.6 of the Government Code but shall include the rights and duties of any party in a civil action brought in a superior court under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure.

Notwithstanding any provision to the contrary, and except for the taking of oral depositions, no discovery shall occur later than 30 calendar days after the employee is served with a copy of the accusation pursuant to Section 11505 of the Government Code. In all cases, discovery shall be completed prior to seven calendar days before the date upon which the hearing commences. If any continuance is granted pursuant to Section 11524 of the Government Code, the time limitation for commencement of the hearing as provided in this subdivision shall be extended for a period of time equal to the continuance. However, the extension shall not include that period of time attributable to an unlawful refusal by either party to allow the discovery provided for in this section.

(2) If the right of discovery granted under paragraph (1) is denied by either the employee or the governing board, all of the remedies in Chapter 7 (commencing with Section 2023.010) of Title 4 of Part 4 of the Code of Civil Procedure shall be available to the party seeking discovery and the court of proper jurisdiction, to entertain his or her motion, shall be the superior court of the county in which the hearing will be held.

(3) The time periods in this section and of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and of Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure shall not be applied so as to deny discovery in a hearing conducted pursuant to this section.

(4) The superior court of the county in which the hearing will be held may, upon motion of the party seeking discovery, suspend the hearing so as to comply with the requirement of the preceding paragraph.

(5) No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters that occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice.

(b) (1) The hearing provided for in this section shall be conducted by a Commission on Professional Competence. One member of the commission shall be selected by the employee, one member shall be selected by the governing board, and one member shall be an administrative law judge of the Office of Administrative Hearings who shall be chairperson and a voting member of the commission and shall be responsible for assuring that the legal rights of the parties are protected at the hearing. If either the governing board or the employee for any reason fails to select a commission member at least seven calendar days prior to the date of the hearing, the failure shall constitute a waiver of the right to selection, and the county board of education or its specific designee shall immediately make the selection. If the county board of education is also the governing board of the school district or has by statute been granted the powers of a governing board, the selection shall be made by the Superintendent, who shall be reimbursed by the school district for all costs incident to the selection.

(2) The member selected by the governing board and the member selected by the employee shall not be related to the employee and shall not be employees of the district initiating the dismissal or suspension and shall hold a currently valid credential and have at least five years' experience within the past 10 years in the discipline of the employee.

(c) (1) The decision of the Commission on Professional Competence shall be made by a majority vote, and the commission shall prepare a written decision containing findings of fact, determinations of issues, and a disposition that shall be, solely, one of the following:

(A) That the employee should be dismissed.

(B) That the employee should be suspended for a specific period of time without pay.

(C) That the employee should not be dismissed or suspended.

(2) The decision of the Commission on Professional Competence that the employee should not be dismissed or suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors.

(3) The commission shall not have the power to dispose of the charge of dismissal by imposing probation or other alternative sanctions. The imposition of suspension pursuant to subparagraph (B) of paragraph (1) shall be available only in a suspension proceeding authorized pursuant to subdivision (b) of Section 44932 or Section 44933.

(4) The decision of the Commission on Professional Competence shall be deemed to be the final decision of the governing board.

(5) The board may adopt from time to time rules and procedures not inconsistent with this section as may be necessary to effectuate this section.

(6) The governing board and the employee shall have the right to be represented by counsel.

(d) (1) If the member selected by the governing board or the member selected by the employee is employed by any school district in this state, the member shall, during any service on a Commission on Professional Competence, continue to receive salary, fringe benefits, accumulated sick leave, and other leaves and benefits from the district in which the member is employed, but shall receive no additional compensation or honorariums for service on the commission.

(2) If service on a Commission on Professional Competence occurs during summer recess or vacation periods, the member shall receive compensation proportionate to that received during the current or immediately preceding contract period from the member's employing district, whichever amount is greater.

(e) (1) If the Commission on Professional Competence determines that the employee should be dismissed or suspended, the governing board and the employee shall share equally the expenses of the hearing, including the cost of the administrative law judge. The state shall pay any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board and the member selected by the employee, including, but not limited to, payments or obligations incurred for travel, meals, and lodging, and the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee. The Controller shall pay all claims submitted pursuant to this paragraph from the General Fund, and may prescribe reasonable rules, regulations, and forms for the submission of the claims. The employee and the governing board shall pay their own attorney's fees.

(2) If the Commission on Professional Competence determines that the employee should not be dismissed or suspended, the governing board shall pay the expenses of the hearing, including the cost of the administrative law judge, any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board and the member selected by the employee, including, but not limited to, payments or obligations incurred for travel, meals, and lodging, the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee, and reasonable attorney's fees incurred by the employee.

(3) As used in this section, "reasonable expenses" shall not be deemed "compensation" within the meaning of subdivision (d).

(4) If either the governing board or the employee petitions a court of competent jurisdiction for review of the decision of the commission, the payment of expenses to members of the commission required by this subdivision shall not be stayed.

(5) (A) If the decision of the commission is finally reversed or vacated by a court of competent jurisdiction, either the state, having paid the commission members' expenses, shall be entitled to reimbursement from the governing board for those expenses, or the governing board, having paid the expenses, shall be entitled to reimbursement from the state.

(B) Additionally, either the employee, having paid a portion of the expenses of the hearing, including the cost of the administrative law judge, shall be entitled to reimbursement from the governing board for the expenses, or the governing board, having paid its portion and the employee's portion of the expenses of the hearing, including the cost of the administrative law judge, shall be entitled to reimbursement from the employee for that portion of the expenses.

(f) The hearing provided for in this section shall be conducted in a place selected by agreement among the members of the commission. In the absence of agreement, the place shall be selected by the administrative law judge.

Education Code §44955
(as in effect on Dec. 31, 2014)

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of

the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary

to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

PROOF OF SERVICE

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

CASE NO: California Court Of Appeal, Second District, No. B258589

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On May 1, 2015, I served the following documents:

OPENING BRIEF OF INTERVENORS-APPELLANTS CALIFORNIA TEACHERS ASSOCIATION AND CALIFORNIA FEDERATION OF TEACHERS

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

A. By U.S. First Class Mail: I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. I placed each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

B. By E-Filing: I submitted the document via the California Court of Appeal, Second Appellate District electronic submission system at http://www.courts.ca.gov/2dca-efile.htm, per C.R.C. 8.212(c)(2) .

	ADDRESSEE	PARTY
A	Theodore J. Boutrous Marcellus A. McRae Gibson Dunn & Crutcher LLP 333 South Grand Avenue Los Angeles, CA 90071	Beatriz Vergara, *et al.*, Plaintiffs and Respondents

A	Nimrod Pitsker Elias Susan Marie Carson Office of the Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102	State of California, California Department of Education, State Board of Education, Edmund G. Brown, Jr., and Superintendent of Public Instruction, Defendants and Appellants
A	The Hon. Rolf M. Treu Department 58 Los Angeles Superior Court Stanley Mosk Courthouse 111 North Hill St., Dept. 85 Los Angeles, CA 90012	Trial court
B	Office of the Clerk California Supreme Court 350 McAllister Street, #1295 San Francisco, CA 94102	Supreme Court

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed May 1, 2015, at San Francisco, California.

Kristina Sinclair