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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

BEATRIZ VERGARA, a minor, by Alicia Martinez, as her guardian ad litem; ELIZABETH VERGARA, a minor, by Alicia Martinez, as her guardian ad litem; CLARA GRACE CAMPBELL, a minor, by Lauren Campbell, as her guardian ad litem; BRANDON DEBOSE, JR., a minor, by Satonna Ballard-DeBose, as his guardian ad litem; KATE ELLIOTT, a minor, by Terri Elliott, as her guardian ad litem; HERSCHEL LISS, a minor, by Lisa Liss, as his guardian ad litem; JULIA MACIAS, a minor, by Jose Macias, as her guardian ad litem; DANIELLA MARTINEZ, a minor, by Karen Martinez, as her guardian ad litem; and RAYLENE MONTERROZA, a minor, by Martha Monterroza, as her guardian ad litem,

Plaintiffs,

vs.

STATE OF CALIFORNIA; EDMUND G. BROWN, JR., in his official capacity as Governor of California; TOM TORLAKSON, in his official capacity as State Superintendent of Public Instruction; CALIFORNIA DEPARTMENT OF EDUCATION; STATE BOARD OF EDUCATION; LOS ANGELES UNIFIED SCHOOL DISTRICT; OAKLAND UNIFIED SCHOOL DISTRICT; and ALUM ROCK UNION SCHOOL DISTRICT,

Defendants.

CASE NO. BC484642

PLAINTIFFS' OPPOSITION TO THE DEMURRERS OF THE STATE DEFENDANTS AND DEFENDANT ALUM ROCK UNION SCHOOL DISTRICT TO PLAINTIFFS' FIRST AMENDED COMPLAINT

[Filed concurrently with Appendix of Non-California Authorities]

Date: November 9, 2012
Time: 8:30 a.m.
Dept: 58
Judge: The Honorable Rolf M. Treu

Action Filed: May 14, 2012
Trial Date: None Set

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Plaintiffs Beatriz Vergara, Elizabeth Vergara, Clara Grace Campbell, Brandon DeBose, Jr., Kate Elliott, Herschel Liss, Julia Macias, Daniella Martinez, and Raylene Monterroza (collectively, "Plaintiffs"), respectfully submit this combined opposition to the demurrers of the following defendants to Plaintiffs' First Amended Complaint ("FAC" or "Complaint"): the State of California, Governor Edmund G. Brown, Jr., State Superintendent of Public Instruction Tom Torlakson, the California Department of Education, and the State Board of Education (collectively, the "State Defendants"), and Alum Rock Union School District ("Alum Rock") (together with the State Defendants, "Defendants").[1]

I. INTRODUCTION

This lawsuit seeks to strike down five statutes that create substantial and unjustifiable disparities in the educational opportunities provided to similarly situated students, thus violating the equal protection guarantees of the California Constitution. Those statutes prevent California's schools from providing even a minimally acceptable education to some of California's most vulnerable students, and they prohibit school districts from prioritizing, or meaningfully considering, the interests of their students in not having grossly ineffective teachers when making teacher employment and dismissal decisions. Instead, these laws force school districts to offer permanent employment to nearly *all* new teachers without giving school districts the time needed to determine which teachers will be minimally effective, and then impede school districts from dismissing the worst performing teachers once they have tenure. When district-wide layoffs become necessary, these laws force school districts to fire some of their best teachers while leaving some of the very worst performing or grossly ineffective teachers in place. Thus, as a direct result of the five statutes at issue in this case, school districts cannot eliminate failing teachers—who are often well known to be either unable or unwilling to perform their jobs in even a minimally satisfactory manner—and are forced to place these teachers in classrooms where they perform miserably year after year in teaching California's students.

[1] The State Defendants' memorandum in support of their demurrer will be cited herein as "SDD" and Alum Rock's memorandum in support of its demurrer will be cited herein as "ARD."

It is the students, including Plaintiffs, who suffer the consequences of these laws. Recent studies have proven what parents and school administrators have long known—that teachers matter. Students who are assigned even a single grossly ineffective teacher can suffer significant educational setbacks, and students who are unlucky enough to be assigned multiple ineffective teachers can suffer life-long disabilities. The California Constitution demands more. Under longstanding California Supreme Court precedents, Plaintiffs have a fundamental right to equal educational opportunity. (*Serrano* v. *Priest* (1971) 5 Cal.3d 584, 609 ["*Serrano I*"].) Further, under well-established equal protection doctrine, any laws that have a real and appreciable impact on Plaintiffs' fundamental right to education are unconstitutional unless they are narrowly tailored to serving a compelling state interest. (*Butt v. California* (1992) 4 Cal.4th 668, 685-686.) And any laws that result in a disproportionately adverse impact on economically disadvantaged and minority communities—as the laws in this case do—must likewise be subject to strict scrutiny. (*Ibid*.) Plaintiffs' Complaint therefore asserts classic equal protection claims, under two separate theories, against five invidious laws—more than enough for this Court to overrule Defendants' demurrers.

In their demurrers, Defendants resort to three tactics, none of which justifies dismissal of Plaintiffs' Complaint. First, Defendants fault Plaintiffs for attempting to upset the existing order of things. But Plaintiffs are merely challenging a few targeted statutes that are violating their bedrock constitutional rights—they are not asking this Court to do anything courts are not well equipped to do. Second, Defendants argue that the challenged laws are needed to provide teachers with job protections. That argument, however, goes to the heart of the factual and legal dispute in this case. It is therefore not proper at the demurrer stage and will be resolved on the merits, where Plaintiffs will prove that the teacher employment protections provided by these statutes go far beyond due process requirements and cannot justify the great harm they impose on students. Third, Defendants point accusatory fingers at each other—the State Defendants blame the school districts for their hiring decisions, while Alum Rock school district says it is just following State law. In fact, *all* Defendants are responsible for violating Plaintiffs' constitutional rights because *all* Defendants are enforcing and carrying out these unconstitutional laws to the great detriment of the students.

It is striking that, in all of their demurrer papers, not one of the Defendants even pretends that the laws at issue in this case serve the interests of *students* by enhancing the quality of their education. Plaintiffs respectfully request that this Court overrule Defendants' demurrers so that Plaintiffs can prove the severe injuries these laws inflict on them and vindicate their fundamental constitutional rights.

II. SUMMARY OF FACTUAL ALLEGATIONS

Plaintiffs are nine children from Los Angeles, Oakland, Pasadena, Redwood City, and San Jose, ranging from seven to sixteen years old. (FAC ¶¶ 15-23.) Plaintiffs, like children all over California, are deeply concerned about the inadequate educational opportunities being provided to them by the California public schools, which rank 46th in the nation in fourth-grade reading and 47th in the nation in eighth-grade math. (*Id.* ¶ 1.) In particular, Plaintiffs fear the very real possibility that, during the course of their public school education, they will be arbitrarily assigned to grossly ineffective teachers, thereby placing them at a significant and longstanding disadvantage to their more fortunate peers. (*Id.* ¶¶ 15-23, 75-76.)

Plaintiffs have good reason to be concerned. In a recent survey of teachers working in the Los Angeles Unified School District ("LAUSD"), 68 percent of teachers reported that there are grossly ineffective tenured teachers working in their schools.[2] (FAC ¶ 40.) In the private sector or other public sector jobs, such grossly ineffective employees would, in all likelihood, be dismissed for cause. In fact, approximately 8 percent of private employees and 1 percent of California public employees are dismissed for cause each year. (*Id.* ¶ 58.) In the public school system, however, teachers are uniquely protected in their employment by certain statutes that make it nearly impossible—and certainly impractical, in light of budgetary and administrative resource

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[2] The term "grossly ineffective," as it is used in the Complaint, is not meant to be a term of art. As the California Supreme Court has acknowledged, our public education system is supposed to prepare schoolchildren to compete successfully in the economic marketplace and participate in the social, cultural, and political activity of our society. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 607 ["*Serrano I*"].) Grossly ineffective teachers are teachers that fail to advance these goals. California law already requires school districts to measure teacher effectiveness using the standardized test scores that California students receive annually, (see Stull Act, Cal. Educ. Code § 44660 *et seq.*), and Plaintiffs do not purport to prescribe any specific standard that should be used to determine a teacher's effectiveness. Rather, they merely seek to strike down laws that deprive the school districts of the discretion and authority to make teacher hiring and retention decisions based on teacher effectiveness, however that metric is rationally defined.

constraints—to dismiss a teacher for cause, even after the teacher has been identified as being grossly ineffective. School districts that have attempted to dismiss even a single teacher for extremely poor performance have spent hundreds of thousands, if not millions, of dollars on a dismissal process that takes several years and is often unsuccessful, even where there is extensive documentation of the teacher's ineffectiveness. (*Id.* ¶ 54.) Thus, only 0.002 percent of California's hundreds of thousands of teachers are dismissed for unprofessional conduct or unsatisfactory performance in any given year, and 80 percent of those dismissals are due to immoral or illegal conduct rather than poor teaching performance. (*Id.* ¶¶ 55, 58.) The vast majority of grossly ineffective teachers keep teaching, and harming, California students year after year.

The presence of even a small number of grossly ineffective teachers in California's public schools has a devastating impact on students. As parents and students have long experienced and recent studies have confirmed, teacher quality is the key determinant of educational effectiveness and has a profound impact on students' lifetime achievement. (FAC ¶ 8 [citing Chetty et al., Nat. Bur. of Economic Research, The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood (Working Paper 17699, Dec. 2011)]; see also FAC ¶¶ 36-37.) Students taught by effective teachers are more likely to attend college, attend higher-quality colleges, earn more, live in higher socioeconomic neighborhoods, and save more for retirement, and are less likely to have children during their teenage years. (*Ibid.*) Conversely, students who are assigned to even a single grossly ineffective teacher can suffer lasting negative consequences, remaining "stuck below grade level" for years. (*Id.* ¶ 37.) And students taught by two or more grossly ineffective teachers in a row are unlikely ever to catch up to others at their grade level. (*Id.* ¶ 3.) A recent study demonstrated that replacing a grossly ineffective teacher with even an *average* teacher would increase students' cumulative lifetime income by a total of $1.4 million per classroom taught by that teacher. (*Id.* ¶ 37.)

The California Education Code provisions at issue in this case—Section 44929.21(b) [the "Permanent Employment Statute"]; Sections 44934, 44938(b)(1) and (2), and 44944 [the "Dismissal Statutes"]; and Section 44955 [the "LIFO Statute"] [collectively, the "Challenged Statutes"] (see FAC ¶¶ 45, 51, 61)—directly result in the hiring and continued employment of such grossly

ineffective teachers because they prevent school administrators from considering teaching effectiveness as a meaningful component of their employment and dismissal decisions. In combination with other factors, the Challenged Statutes have resulted in each of the Plaintiffs having been assigned to, or being at substantial risk of being assigned to, one or more grossly ineffective teachers. (FAC ¶¶ 15-23, 43.) And the problem is worse for students like Plaintiffs Beatriz Vergara and Brandon DeBose, Jr., who attend schools that serve predominantly minority and lower-income populations, because those schools are staffed by a disproportionate share of grossly ineffective teachers. (*Id.* ¶¶ 70-73, 77-78.) In some school districts, students of color are two to three times more likely to have bottom-quartile teachers than their white and Asian peers. (*Id.* ¶ 42.)

- The Permanent Employment Statute forces school administrators to make a decision about whether to offer a teacher "permanent employment," or tenure, less than 18 months after a new teacher begins working. (FAC ¶ 45.) Studies show that it is impossible to predict a teacher's effectiveness during the first three years of teaching. (*Id.* ¶ 47.) Thus, the Permanent Employment Statute ensures that tenure will be awarded to some teachers who turn out to be grossly ineffective. Indeed, more than 98 percent of new teachers are offered the benefits of permanent employment within 18 months of starting their teaching careers. (*Ibid*.)

- The Dismissal Statutes provide these "permanently employed" teachers with employment protections that far exceed those afforded other public employees. (FAC ¶ 51.) The Dismissal Statutes create a nearly insurmountable set of obstacles for school administrators seeking to dismiss an ineffective teacher, such that the process for attempting to dismiss a single teacher often takes several years and costs already cash-strapped districts millions of dollars. (*Id.* ¶¶ 50-53.) As recent studies illustrate, the Dismissal Statutes essentially prevent school districts from dismissing the grossly ineffective and worst performing teachers. (*Id.* ¶¶ 54-56.) Without the Dismissal Statutes, school administrators would be able to dismiss grossly ineffective teachers, provided they comply with the same procedural due process protections that other public employees receive. (*Id.* ¶¶ 57-58.)

- The LIFO Statute provides that district-wide layoff decisions and subsequent reassignments must be based on teacher seniority, even though recent studies demonstrate that seniority is not an accurate measure of teacher effectiveness. (FAC ¶¶ 63-64.) In recent years, many

California school districts have been forced to implement district-wide layoffs. (*Id.* ¶ 65.) Those layoffs, conducted in accordance with the LIFO Statute, resulted in the dismissal of top-performing teachers instead of more senior low-performing teachers. (*Ibid.*) In 2009, for example, nearly 2,000 English teachers and 1,500 math teachers in the lowest quartile of teacher performance kept their jobs, while 20 percent of the English and math teachers laid off were in the top quartile of job performance. (*Ibid*.) In addition, because schools serving low-income and minority students typically have the highest concentration of low-seniority teachers, these schools are disproportionately affected by seniority-based layoffs. (*Id.* ¶ 72.) As one recent study showed, a school in the highest-poverty quartile is 65 percent more likely to have a teacher laid off than a school in the lowest-poverty quartile. (*Ibid.*) The disproportionate number of vacancies created in lower-income schools are then filled by transferring lower performing, sometimes grossly ineffective, teachers from other schools. (*Ibid.*) Without the LIFO Statute, school districts forced to engage in layoffs would make such decisions based on teacher effectiveness and the needs of individual schools, instead of teacher seniority. (*Id*. ¶ 66.)

By preventing school administrators from making teacher employment decisions based on teacher effectiveness, the Challenged Statutes substantially contribute to the provision of widely disparate educational opportunities to similarly situated California students. Those students who are unlucky enough to be assigned to a grossly ineffective teacher are denied the educational opportunities provided to other students—within their own schools or in other schools—who are more fortunate. Moreover, because the Challenged Statutes result in a disproportionate number of grossly ineffective teachers in schools that serve predominantly minority and lower-income students, students at these schools are disparately impacted by the Challenged Statutes. The laws at issue thus perpetuate the very achievement gap that education is supposed to remedy.

III. STANDARD OF REVIEW

In evaluating Defendants' demurrers, this Court must "assume the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn therefrom." (*Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 789, fn. 3.) The Court must "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d

311, 318.) "All that is required of a plaintiff, as a matter of pleading . . . is that [the] complaint set forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source and extent of his cause of action." (*Harman v. City and County of S.F.* (1972) 7 Cal.3d 150, 157; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 ["[I]t is well settled that a general demurrer admits the truth of all material factual allegations in the complaint; that the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court, and that plaintiff need only plead facts showing that he may be entitled to some relief."] [citations omitted].) "[A] general demurrer should not be sustained if the pleading, liberally construed, states a cause of action on any theory." (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 870-871 [citations omitted].)

IV. ARGUMENT

A. Plaintiffs Plead Proper Equal Protection Challenges To Five California Statutes

Plaintiffs allege that five statutes in the California Education Code violate the equal protection provisions of the California Constitution by creating substantial and unjustifiable disparities in the educational opportunities being provided to similarly situated students. (*Coleman v. Dept. of Personnel Admin.* (1991) 52 Cal.3d 1102, 1125 ["The constitutional guarantee of equal protection compels like treatment for persons similarly situated."].) In response to Plaintiffs' well-pleaded (and well-founded) allegations and concerns, Defendants warn that "California's educational system is ripe with complexity" and caution this Court not to "inject itself into the fray" or "intru[de] into educational reform, which [Defendants say] is and has always been recognized as distinctly within the plenary authority of the Legislature." (SDD at p. 19; see also *id.* at p. 1; ARD at p. 6.) But educational statutes, like other state laws, are not immune from constitutional review. "It is well established that it is a judicial function to interpret the law, including the Constitution, and, when appropriately presented in a case or controversy, to declare when an act of the Legislature . . . is beyond the constitutional authority vested in those branches." (*Schabarum v. Cal. Legis.* (1990) 60 Cal.App.4th 1205, 1213.) Defendants' scare tactics aside, Plaintiffs are not "seek[ing] to invalidate an entire statutory scheme" or asking this Court to invade the proper province of the legislative branch. (SDD at p. 1.) They are simply asking this Court to do what courts are properly authorized

to do: declare unconstitutional a limited number of targeted statutes that infringe on students' constitutional rights.

In fact, this is not the first equal protection challenge to California's educational statutes. In a similar challenge more than 40 years ago, the California Supreme Court recognized that a child's right to an education is a fundamental interest guaranteed by the California Constitution. (*Serrano* v. *Priest* (1971) 5 Cal.3d 584, 609 ["*Serrano I*"]; see also Cal. Const. Art. I, § 7; *id*. Art. IV, § 16; *id.* Art. IX, §§ 1 & 5.) The court held that education is a fundamental right because it "lie[s] at the core of our free and representative form of government." (*Serrano v. Priest* (1976) 18 Cal.3d 728, 767-768 ["*Serrano II"*]; see also *Serrano I*, *supra*, 5 Cal.3d at pp. 608-609 ["We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'"].) And "the right to an education today means more than access to a classroom." (*Serrano I*, *supra*, 5 Cal.3d at p. 607). At a minimum, the right guarantees a basic level of education that prepares our children to (1) compete successfully in the economic marketplace and (2) participate in the social, cultural, and political activity of our society. (*Id.* at pp. 605-606; see also *O'Connell v. Super. Ct*. (2006) 141 Cal.App.4th 1452, 1482 ["[A]ll California children should have equal access to a public education system that will teach them the skills they need to succeed as productive members of modern society."].)

In order to fulfill the constitutional promise of a meaningful education for all California children, "the State itself has broad responsibility to ensure basic educational equality." (*Butt v. California* (1992) 4 Cal.4th 668, 681.) "[T]he State's responsibility for basic equality in its system of common schools extends beyond the detached role of fair funder or fair legislator." (*Id.* at p. 688.) It must provide a statewide public education system "open on equal terms to all," (*id.* at p. 680), with "substantially equal opportunities for learning." (*Serrano II*, *supra*, 18 Cal.3d at pp. 747-748.) Where "substantial disparities in the quality and extent of availability of educational opportunities" persist, the State has a duty to intervene and ensure "equality of treatment to all the pupils in the state." (*Id.* at p. 747; see also *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 950 ["Unequal education . . . leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society."].) In addition, laws

that have a disparate impact on the educational opportunities afforded to minority or low-income students are unconstitutional because both race and wealth are suspect classifications under the California Constitution's equal protection guarantee. (See, e.g., *Coral Construction, Inc. v. City & County of S.F.* (2010) 50 Cal.4th 315, 332, 337, fn. 20; *Serrano I*, *supra*, 5 Cal.3d at pp. 596-619.)

Defendants belittle the fundamental importance of the right to a meaningful education, dismissing it as "amorphous" and nonexistent "as a distinct constitutional right." (SDD at p. 17; see also ARD at pp. 8-9.) But even the State Defendants recognize that "equality of educational opportunity" is guaranteed by the California Constitution. (See SDD at p. 18.) When the State's laws are infringing on that fundamental right, as they are here, it is the role of the courts to invalidate those unconstitutional laws. (See, e.g., *Serrano II*, *supra*, 18 Cal.3d at pp. 776-777.) In addition, when the State's laws create unjustifiable and disproportionate burdens on economically disadvantaged and minority communities, as the Challenged Statutes do here, the courts must likewise intervene. (*Ibid.*)

1. In Considering The Constitutionality Of The Challenged Statutes, This Court Must Look Beyond The Text Of The Statutes

The State Defendants contend that "[a] facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself." (SDD at p. 12.) Thus, according to Defendants, the Challenged Statutes are constitutional because they "do not use racial, ethnic or wealth classifications . . . on their face." (*Id.* at p. 14; see also *id.* at p. 15 ["the Challenged Statutes are entirely neutral on their face"]; ARD at p. 7.) But courts do not confine themselves to the text of a statute when determining whether the statute is unconstitutional. Rather, courts routinely consider evidence beyond the statutory text itself to determine whether the statute *in fact* results in an unconstitutional deprivation of rights or unconstitutionally disparate treatment. (See *In re Smith* (1904) 143 Cal. 368, 372 ["[C]ourts are not limited in their inquiry to those cases alone where such a situation is shown upon the reading of the statute. They will consider the circumstances in the light of existing conditions."].)

Even in facial constitutional challenges, the California Supreme Court has emphasized the importance of external evidence and practical considerations in determining the constitutionality of a

statute. The statutes that comprised the school financing system at issue in *Serrano I*, for example, were facially neutral, but the Court examined the real-world effects of the relevant statutes and determined that "*as a practical matter* districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts." (*Serrano I*, *supra*, 5 Cal.3d at p. 598 [italics added]; see also *id.* at pp. 599-600 ["[A]s a statistical matter, the poorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts."].) The Court rejected the State Defendants' argument that the Court should not concern itself with "unequal treatment [that] is only de facto, not de jure" (*id.* at p. 601), holding that courts "'must unsympathetically examine any action of a public body which has the *effect* of depriving children of the opportunity to obtain an education.'" (*Id.* at p. 606 [quoting *Manjares v. Newton* (1966) 64 Cal.2d 365, 376] [italics added]; see also *Parr v. Mun. Ct. for the Monterey-Carmel Jud. Dist. of Monterey County* (1971) 3 Cal.3d 861, 865, 868 [refusing "to look exclusively to the operative language of the ordinance" because "we may not overlook its probable impact"]; *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 533-534, affd. *sub nom. Reitman v. Mulkey* (1967) 387 U.S. 369 ["A state enactment cannot be construed for purposes of constitutional analysis without concern for its . . . ultimate effect."].)

When statutes infringe on fundamental rights, they are often facially neutral as to "racial, ethnic or wealth classifications." (SDD at p. 14.) In *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, for example, physicians and other interested parties brought facial challenges to the constitutionality of a law requiring minors to secure parental consent or judicial authorization before they could obtain an abortion. The text of the statute did not use racial, ethnic, or wealth classifications. But the trial court heard the testimony of 25 witnesses and six deponents covering "a wide range of subjects, including the relative medical and psychological risks posed to pregnant minors by abortion and childbirth, the general maturity of minors seeking abortion, the existing guidelines and practices with regard to the counseling provided to minors seeking abortion, and the general efficacy (or lack thereof) of the judicial bypass process in other jurisdictions." (*Id.* at p. 323.) Based on this testimony, "the trial court found that the evidence at trial overwhelmingly established that the legislation . . . would be counterproductive and detrimental both to the health of pregnant

minors and to the parent-child relationship" and was thus facially unconstitutional. (*Ibid.*) On appeal, the California Supreme Court affirmed the trial court's holding based on the "overwhelming evidence . . . that was introduced at the trial in this case." (*Id.* at pp. 354, 355-357, 359.)

Likewise, in *Arcadia Unified School District v. State Department of Education* (1992) 2 Cal.4th 251, the California Supreme Court examined a facial equal protection challenge to a facially neutral statute that authorized school districts to charge students for pupil transportation. (*Id.* at p. 256.) Although the court found the statute to be facially constitutional because it exempted indigent children from paying the fees in question, the court emphasized that it may not have reached the same conclusion if there had been evidence that the statute resulted in "children [being] prevented from attending school because they could not afford to pay the fees." (*Id.* at p. 267 [holding that "there [was] no *evidence* that the statute ha[d] been or [would] be applied in such a way as to discriminate against poor students or affect their ability to obtain an education."] [italics added].)

As alleged in the Complaint (see, e.g., FAC ¶¶ 43-69), the Challenged Statutes lead inexorably to an unjustified and unconstitutional disparity in the educational opportunities afforded California's public school students. (See, e.g., *id.* ¶ 43 ["This statutory scheme, enacted by the State of California through its Legislature and enforced by Defendants, inevitably presents a total and fatal conflict with the right to education guaranteed by the California Constitution because it forces an arbitrary subset of California students to be educated by grossly ineffective teachers . . . ."].) Plaintiffs should be given the opportunity to prove at trial, with evidence and expert testimony, that the Challenged Statutes are in "total and fatal conflict" with the rights guaranteed by the California Constitution and should therefore be invalidated. (ARD at p. 7.)[3]

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[3] Defendants argue that because the LIFO Statute includes an exception that permits school districts to deviate from seniority-based dismissals "[f]or purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws," it cannot be facially unconstitutional. (See SDD at p. 16 [citing Ed. Code, § 44955, subd. (d)(2)].) This language, however, does not shield the LIFO Statute from judicial scrutiny. (See, e.g., *Mendoza v. State of Cal.* (2007) 149 Cal.App.4th 1034, 1058 ["[T]he legislature may not, by means of legislative declaration, foreclose or limit the scope of judicial examination and review of the constitutionality of a legislative enactment. As a result, the *substance* of the [challenged statute] must be evaluated on its merits, quite apart from any legislative declaration designed to address expressed constitutional concerns."].) Indeed, the Court of Appeal's recent decision in *Reed v. United Teachers L.A.* (2012) 208 Cal.App.4th 322, exemplifies the substantial difficulties school districts face when trying to invoke the LIFO "equal protection" exception: *Reed* requires school districts to engage in a full-blown trial on the merits to determine whether a teacher's statutory "seniority rights" would be violated by invoking the exception. (*Id.* at p. 338.) As a result, this exception is, in all practicality, meaningless.

2. Plaintiffs' Claims Cannot Be Resolved On Demurrer Because They Require This Court To Analyze The Fit Between The Means And Ends Of The Statutes

Defendants also argue that Plaintiffs' equal protection challenges should be evaluated under a deferential standard of review that asks whether "'there is any reasonably conceivable state of facts that could provide a rational basis'" for the Challenged Statutes—a standard that Defendants say Plaintiffs' allegations fail to meet. (SDD at pp. 14-15 [quoting *Alviso v. Sonoma County Sheriff's Dept.* (2010) 186 Cal.App.4th 198, 205].) Even if rational basis review applied (which it does not), this Court would be required to analyze the purpose behind the Challenged Statutes and the means by which the statutes attempt to accomplish that purpose—an analysis that is inappropriate on demurrer. (See *D'Amico v. Bd. of Medical Examiners* (1970) 6 Cal.App.3d 716, 727-728 ["[D]etermining the reasonableness of a classification under the police power . . . should not be determined on demurrer but by a trial."].)

In fact, however, Defendants advocate the wrong standard. Plaintiffs allege that the Challenged Statutes have a real and appreciable impact on their fundamental right to education *and* they allege that the Challenged Statutes have a disparate impact on California public school students who attend schools that serve predominantly minority and lower-income students. (See, e.g., FAC ¶¶ 12-13, 78.) Under either inquiry, this Court should apply strict scrutiny in evaluating the Challenged Statutes—an analysis that cannot be undertaken on demurrer. (*People v. Scott* (1998) 64 Cal.App.4th 550, 567 [where a law "operates to the peculiar disadvantage of a suspect class *or* impinges on a fundamental right," it must be struck down unless it survives strict scrutiny] [italics added; citations omitted]; *American Academy of Pediatrics*, *supra*, 16 Cal.4th at p. 359 [holding statute to be unconstitutional under strict scrutiny analysis after extensive presentation of evidence and trial on the merits].)

a. Laws That Have A "Real And Appreciable Impact" On The Right To Education Must Be Narrowly Tailored To Serve A Compelling State Interest

The California Supreme Court has recognized that "the unique importance of public education in California's constitutional scheme requires careful scrutiny of state interference with basic educational rights." (*Butt*, *supra*, 4 Cal.4th at p. 683.) When a statute inflicts "a real and appreciable

impact on, or a significant interference with the exercise of [a] fundamental right . . . the strict scrutiny doctrine will be applied." (*Fair Political Pracs. Com. v. Super. Ct. of L.A. County* (1979) 25 Cal.3d 33, 47; see also *Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 254 [where plaintiffs allege "a real and appreciable impact on a fundamental right or interest, a heightened standard of scrutiny is applied"].) Because "education is the lifeline of both the individual and society" (*Serrano I*, *supra*, 5 Cal.3d at p. 605) and serves the "distinctive and priceless function" as "the bright hope for entry of the poor and oppressed into the mainstream of American society" (*id.* at pp. 608-609), laws that inflict a "real and appreciable impact" on the fundamental right to education are unconstitutional unless they are narrowly tailored to serve a compelling state interest. (*Butt*, *supra*, 4 Cal.4th at pp. 685-686.)

In *Butt, supra*, 4 Cal.4th at pp. 673-674, plaintiffs brought an equal protection challenge against the State and its officers and agents because their school district lacked the funds to complete the final six weeks of the school term. The State argued, like it does here, that its failure to address the resulting educational disparity should be "judged under the most lenient standard of equal protection review"—that is, rational basis—because the disparity at issue was based on "residence and geography," which "are not suspect classifications." (*Id.* at p. 685.) The California Supreme Court squarely rejected that argument, noting that "both federal and California decisions make clear that heightened scrutiny applies . . . whenever the disfavored class is suspect *or* the disparate impact has a real and appreciable impact on a fundamental right or interest." (*Ibid.* [italics in original].)[4]

Furthermore, to meet the "real and appreciable impact" standard, Plaintiffs need not allege that there has been a total deprivation of their fundamental rights or a complete ban on a protected activity. In *Planning & Conservation League, Inc. v. Lungren* (1995) 38 Cal.App.4th 497, the court explained that anything beyond an "incidental" effect will be considered a "real and appreciable impact on, or a significant interference with, the exercise of the fundamental right." (*Id.* at p. 506.)

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[4] Strict scrutiny review also applies when legislative enactments infringe fundamental rights outside of the education context. (See, e.g., *Bullock v. Carter* (1972) 405 U.S. 134 [applying strict scrutiny to a law that infringed upon the fundamental right to vote]; *Choudhry v. Free* (1976) 17 Cal.3d 660, 664 ["Because the right of franchise is fundamental in character, the . . . 'compelling interest' measure must be applied if a classification has a 'real and appreciable impact' upon the equality, fairness and integrity of the electoral process."] [quoting *Bullock*, *supra*, 405 U.S. at p. 144].)

Likewise, in *Hawn v. County of Ventura* (1977) 73 Cal.App.3d 1009, 1019, the court held that a real and appreciable impact will be found, and heightened scrutiny applied, unless a law has "only minimal, if any, effect on the fundamental right." (*Accord People v. Boulerice* (1992) 5 Cal.App.4th 463, 473 [explaining that strict scrutiny was inapplicable because "the regulation merely ha[d] an incidental effect on the exercise of protected rights"].) Plaintiffs therefore need not allege, or prove at trial, that the Challenged Statutes are the *only* cause—or even the "but for" cause—of the infringement of their fundamental rights in order to trigger strict scrutiny. Rather, to plead an equal protection claim, they need only allege that the Challenged Statutes have more than an incidental effect on their fundamental right to education. The Complaint easily meets that standard. (See, e.g., *Serrano I*, *supra*, 5 Cal.3d at p. 619 [overruling demurrer].)[5]

b. Laws That Have A Disparate Impact On Suspect Classes Are Also Subject To Strict Scrutiny Under The California Constitution

Plaintiffs also allege that the Challenged Statutes have a disproportionate adverse impact on minority and economically disadvantaged students. (See, e.g., FAC ¶ 73.) Both race and wealth are suspect classifications under the California Constitution's equal protection guarantee. (*Coral Construction, Inc.*, *supra*, 50 Cal.4th at pp. 332, 337, fn. 20 ["Racial preferences are presumptively unconstitutional and tolerated only when narrowly tailored to serve compelling governmental interests"]; *Sakotas v. W.C.A.B.* (2000) 80 Cal.App.4th 262, 271 ["The following suspect classifications have been identified: (1) race or national origin; (2) creed; (3) wealth; (4) gender; and (5) alienage."]; *Boulerice*, *supra*, 5 Cal.App.4th at p. 473, fn. 8 ["Suspect classifications triggering strict scrutiny include those based on race or wealth."].) In "cases involving suspect classifications

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[5] Defendants also argue that their demurrers should be sustained because "Plaintiffs fail to allege (and would never be able to demonstrate if they could get past this Demurrer) how the Challenged Statutes result in any disparities of the education provided to students." (ARD at p. 9; see also SDD at p. 9 ("[P]laintiffs fail to provide any specific factual support . . . that there is a causal connection between . . . the Challenged Statutes and . . . any violation of students' constitutional rights.").) But Plaintiffs have alleged in great detail how the Challenged Statutes have a real and appreciable impact upon the fundamental right to equal educational opportunities possessed by all students in California—by placing students at risk of being assigned to a grossly ineffective teacher who should not (and, absent the Challenged Statutes, likely *would* not) be teaching in the California public school system. Defendants' arguments about the ultimate *merits* of this causal analysis (see, e.g., SDD at pp. 18-19; ARD at pp. 8-9) are inappropriate at the demurrer stage, where Plaintiffs have not yet had the benefit of discovery or the opportunity to present expert evidence. (See, e.g., *Boon v. Rivera* (2000) 80 Cal.App.4th 1322, 1334 ["Whether or not certain conduct . . . was a legal cause of injury [is] normally [a] question[] of fact. Such a factual determination is not appropriate on demurrer."].)

. . . the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Rittenband v. Cory* (1984) 159 Cal.App.3d 410, 417-418.) For example, in *Serrano I*, the Court applied strict scrutiny to strike down a state public school financing system that had a disparate impact on school districts based on wealth, a suspect classification. (*Serrano I*, *supra*, 5 Cal.3d at pp. 596-619.)

Plaintiffs allege that students at schools serving predominantly minority and lower-income populations are more likely to be assigned to grossly ineffective teachers. (See, e.g., FAC ¶ 3 ["In certain school districts, students of color are two to three times more likely to have bottom-quartile teachers than their white and Asian peers."]; *id.* ¶ 42.) Plaintiffs further allege that "as a result of . . . the Challenged Statutes, grossly ineffective teachers are disproportionately assigned to schools serving predominantly minority and economically disadvantaged students," and that the "statutes thus make the quality of education provided to school-age children in California a function of race and/or the wealth of a child's parents and neighbors in violation of the equal protection provisions of the California constitution." (*Id. at* ¶ 13; see also *id.* ¶¶ 70-73 [explaining the "dance of the lemons" that results in a disproportionate concentration of ineffective teachers in schools that serve higher populations of minority and low-income students].) For that independent reason, and as the Court of Appeal has repeatedly admonished, this Court should evaluate the Challenged Statutes under strict scrutiny, an analysis that is inappropriate on demurrer. (See, e.g., *D'Amico*, *supra*, 6 Cal.App.3d at p. 728 [equal protection challenges "should not be decided on the limited showing which can be made on demurrer, but should be determined on a full scale hearing"].)

3. The Challenged Statutes Lead To Arbitrary And Substantial Differences Between The Educational Opportunities Of California's Public School Students

Defendants further contend that the Challenged Statutes cannot violate the Equal Protection Clause because Plaintiffs recognize "that 'the *majority* of teachers in California are providing students with a quality education' and that the number of allegedly 'grossly ineffective' teachers 'may be small.'" (SDD at p. 8 [quoting FAC ¶ 9]; see also SDD at p. 17.) But the operative question in an equal protection challenge is whether the law "affects two or more similarly situated groups in an unequal manner," not whether it adversely affects a majority of citizens. (*Cooley v. Super. Ct. of*

L.A. County (2002) 29 Cal.4th 228, 253; see also *Coleman*, *supra*, 52 Cal.3d at p. 1125.) Indeed, in most cases in which a law violates the equal protection clause, it is a *minority* of citizens who suffer from unequal treatment while the *majority* is treated in a perfectly satisfactory manner. (See *Hunter v. Erickson* (1969) 393 U.S. 385, 391 ["[T]he law's impact falls on the minority. The majority needs no protection against discrimination . . . ."]; see also *Avery v. Midland County* (1968) 390 U.S. 474, 481, fn. 6 ["Government—National, State, and local—must grant to each citizen the equal protection of its laws . . . no matter . . . how small the minority who object to their mistreatment."]; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141 [describing "the power of the courts . . . to preserve constitutional rights, whether of individual or minority"].)[6]

In the education context, the California Supreme Court has held that the State and its officers and agents violate the equal protection clause when students are subjected to a level of educational opportunity that falls "below prevailing statewide standards"—which, by definition, can happen only to a minority of students statewide. (*Butt*, *supra*, 4 Cal.4th at p. 686.). In *Serrano II*, *supra*, 18 Cal.3d at pp. 741-744, for example, students and parents brought an equal protection challenge against state and county officials because the public education financing system created disparities in per pupil spending that rewarded or penalized students depending on where those students attended school. The California Supreme Court, recognizing the disparity inherent in the financing scheme, held that the system deprived *a portion* of California students—those predominately located in poorer school districts—of the fundamental right to education. (*Id.* at p. 769.) Similarly, in *Butt*, *supra*, 4 Cal.4th 668, the Court held that "the equal protection clause precludes the State from maintaining its common school system in a manner that denies the students *of one district*"—a mere fraction of students statewide—"an education basically equivalent to that provided elsewhere throughout the State." (*Id*. at p. 685 [italics added].)

As *Serrano* and *Butt* make clear, the relevant question in this case is not *how many* students are adversely affected by the Challenged Statutes, but whether the Challenged Statutes have a "real

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[6] Defendants also say it is inconsistent for Plaintiffs to allege "that the number of 'grossly ineffective' teachers 'may be small,'" while alleging that "California governing boards hire and retain such teachers 'at an alarming rate.'" (SDD at p. 8 [quoting FAC ¶ 9 and FAC p. 11 line 1].) But even a small number of grossly ineffective teachers is "alarming," as each teacher is responsible for educating tens or hundreds of California schoolchildren every year.

and appreciable impact" on the public education system that results in certain students being arbitrarily subjected to unequal educational opportunities. Plaintiffs sufficiently allege, and intend to prove at trial, that the Challenged Statutes lead inexorably to such disparate results, and are therefore unconstitutional.[7]

4. Plaintiffs Have Standing To Challenge The Statutes At Issue

The State Defendants argue that "Plaintiffs fail to assert how each of them has been specifically harmed" and thus lack standing. (SDD at p. 8; see also SDD at pp. 23-24.) But it is well established that in California, standing may be based on "actual or threatened" injury. (*Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 94.) "In general, [any]one who is beneficially interested in the outcome of a controversy has standing to sue," (*TracFone Wireless, Inc. v. County of L.A.* (2008) 163 Cal.App.4th 1359, 1364), and "[a] complaining party's demonstration that the subject of a particular challenge has the effect of infringing on some constitutional or statutory right may qualify as a legitimate claim of beneficial interest sufficient to confer standing on that party." (*Holmes v. Cal. Nat. Guard* (2001) 90 Cal.App.4th 297, 324-325.)

Thus, in *Serrano I*, *supra*, the plaintiffs alleged that the State's financing system:

> A. Ma[de] the quality of education for school age children in California, including Plaintiff Children, a function of the wealth of the children's parents and neighbors . . . and
>
> B. Ma[de] the quality of education for school age children in California, including Plaintiff Children, a function of the geographical accident of the school district in which said children reside . . . .

(5 Cal.3d at p. 590, fn. 1.) Based on those allegations, the California Supreme Court held that "plaintiff children have alleged facts showing that the public school financing system denies them equal protection of the laws because it produces substantial disparities among school districts." (*Id.* at p. 618.) Plaintiffs' similar allegations are sufficient to establish standing in this case. Plaintiffs

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[7] The State Defendants argue that it is *theoretically possible* to apply the Challenged Statutes in a manner that avoids the hiring and retention of grossly ineffective teachers, and blame the school districts for failing to do so. (See SDD at pp. 2, 20.) But even if that were true, Plaintiffs have alleged and will prove at trial that constitutional application of the Challenged Statutes has proven to be impossible in practice, making the Challenged Statutes facially unconstitutional. (See *Cal. Teachers Assn. v. State of Cal.* (1999) 20 Cal.4th 327, 347 ["Although we may not invalidate a statute simply because in some future hypothetical situation constitutional problems may arise, neither may we ignore the actual standards contained in a procedural scheme and uphold the law simply because in some hypothetical situation it might lead to a permissible result."] [citations omitted].)

allege that they are public school students who, "as a direct result of the Challenged Statutes . . . [have] been assigned to, and/or [are] at substantial risk of being assigned to, a grossly ineffective teacher who impedes [their] access to the opportunity to receive a meaningful education." (FAC ¶¶ 15-21, 23.) Thus, Plaintiffs have standing to claim that the Challenged Statutes violate their constitutional right to equal educational opportunity.[8]

B. Declaring The Challenged Statutes To Be Unconstitutional Will Have No Effect On Teachers' Due Process Rights

Defendants contend that the California courts have already upheld the laws at issue against the type of challenge being asserted in this case. (See, e.g., SDD at pp. 4-5; *id*. at p. 16; ARD at p. 6.) But the cases Defendants cite have nothing to do with the constitutional rights of *students*. In fact, as Defendants admit, prior cases involving the Challenged Statutes focused only on whether the statutes satisfy *teachers*' constitutional rights—which of course they do, as they go far beyond the minimum employment protections that are constitutionally compelled. (See SDD at pp. 4-7 [explaining that the Challenged Statutes "protect teachers"]; see also ARD at p. 5 ["As is clear from the cases cited by the State Defendants, the Challenged Statutes are part of a legislative framework designed to protect teachers' due process rights in their employment."].) Tellingly, the only so-called "rights of students" that Defendants argue are served by the Challenged Statutes are the "rights of students to be educated by teachers whose employments are [protected]." (SDD at p. 1.)

Despite Defendants' attempt to recast this lawsuit as an attack on teachers' constitutional rights, this case challenges only *statutory* employment protections that have no bearing on the *constitutional* due process rights of teachers.[9] As Plaintiffs explain in the Complaint, teachers' due

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[8] Even though Plaintiff Martinez does not attend an ARUSD school (see ARD at p. 3), she has standing because she has a beneficial interest in the outcome of the case. Plaintiff Martinez alleges that she "was deterred from continuing to attend traditional public schools because of the substantial risk that she would be assigned to a grossly ineffective teacher who impedes her equal access to the opportunity to receive a meaningful education." (FAC ¶ 7; see also *id.* ¶ 22.) That is sufficient to confer standing. (See *Internat. Brotherhood of Teamsters v. U.S.* (1977) 431 U.S. 324, 365 [holding that plaintiffs deterred from applying for employment could assert discrimination claims: "When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application."]; see also *Alch v. Super. Ct.* (2004) 122 Cal.App.4th 339, 388 [holding that television writers deterred from applying for jobs had standing to assert discrimination claims against defendants].)

[9] The cases on which Defendants rely consistently characterize the employment protections at issue here as statutory, not constitutional. (See *Cal. Teachers Assn. v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 143,

process rights, like the due process rights of all other public employees, are already protected by the California Constitution and could not possibly be diminished if the Challenged Statutes are struck down. (See, e.g., *Internat. Brotherhood of Electric Workers v. City of Gridley* (1983) 34 Cal.3d 191, 207-208; *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 195, 215; see also FAC ¶ 57 ["In the absence of the Dismissal Statutes, teachers would retain the same *Skelly* due process rights afforded to other California public employees."].) Contrary to Defendants' suggestion (SDD at p. 19), teachers—like *all* other public employees—would still be protected against "arbitrary and capricious" dismissal in the absence of these statutes. (See *Katzberg v. Regents of U. of Cal.* (2002) 29 Cal.4th 300, 307 ["It is clear that the due process clause of article I, section 7(a) is self-executing, and that even without any effectuating legislation, all branches of government are required to comply with its terms."].) The statutory teacher employment guarantees at issue here go far *above and beyond* the constitutional due process protections afforded public employees.[10]

As the United States Supreme Court has explained, a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story," but "[t]o require more than this prior to termination

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152 [characterizing rights under several of the Challenged Statutes as "statutory rights" and "statutory protections for teachers" that "[t]he Code gives," not constitutional guarantees]; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 917-918 [discussing teachers' "statutory job protections" and the "heightened job protection the Education Code provides"]; *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 826 [finding that plaintiff was "entitled by statute to pretermination notice and hearing"]; *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1278 [noting that teacher classification "governs the level of statutory job protection the teacher enjoys"]; *Vasquez v. Happy Valley Union School Dist.* (2008) 159 Cal.App.4th 969, 974 [noting that employers' power to terminate teachers is "restricted by statute"].)

[10] A brief comparison of the protections provided by the Challenged Statutes to the constitutional due process rights described in *Skelly* is illustrative. "The essence of procedural due process is notice and an opportunity to respond." (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1279.) These two requirements comprise the entirety of the "[t]he minimal due process rights required by *Skelly* prior to discharge." (*Kirkpatrick v. Civil Service Com.* (1978) 77 Cal.App.3d 940, 945.) For example, an administrator in a public hospital must be "allowed a reasonable time, *not to exceed 10 days*, within which to respond orally or in writing before the discharge or demotion becomes effective." (*Shoemaker v. County of L.A.* (1995) 37 Cal.App.4th 618, 630 [citations omitted; italics added].) The administrator also has the right to "request a hearing," but "the hearing need not be held before the discharge or demotion takes effect" and is limited in scope. (*Shoemaker*, *supra*, 37 Cal.App.4th at p. 627 [citations omitted]; see also *Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 401 ["Our decision in *Skelly* did not impose a requirement that full evidentiary hearings be held prior to discipline."]; *Duncan v. Dept. of Personnel Admin.* (2000) 77 Cal.App.4th 1166, 1177 ["something less than a full evidentiary hearing is sufficient prior to adverse administrative action."].) In sharp contrast, under the Challenged Statutes, a teacher must be given written notice and 90 days to correct his or her deficiencies. (FAC ¶ 53.) Following that period, a teacher who receives notice of dismissal may request a pre-termination hearing akin to a civil trial, with each side having the right to discovery. (*Ibid.*) The hearing is held before a three-person Commission on Professional Competence, which then votes on the dismissal. (*Ibid.*) Teachers also have the right to appeal the decision to the state court system. (*Ibid.*)

would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." (*Cleveland Bd. of Ed. v. Loudermill* (1985) 470 U.S. 532, 546; see also *Bakersfield*, *supra*, 145 Cal.App.4th at p. 1293, fn. 20 ["The purpose of a statute giving tenure to teachers is to ensure an efficient permanent staff of teachers whose members are not dependent on caprice for their positions *as long as they conduct themselves properly and perform their duties well*."] [italics added].) In this case, Plaintiffs allege that the excessive statutory protections provided by the Challenged Statutes—which make it impossible for administrators to dismiss teachers even when they are *not* "perform[ing] their duties well" (*ibid.*)—violate the constitutional rights of public school students. (See *People v. Navarro* (1972) 7 Cal.3d 248, 260 ["Wherever statutes conflict with constitutional provisions, the latter must prevail."]; *Serrano II*, *supra*, 18 Cal.3d at p. 774 [legislative acts are not free "from general constitutional limitations applicable to all legislation"].) Because Defendants do not and cannot point to a single decision foreclosing such a claim, the Court should overrule Defendants' demurrers and allow Plaintiffs to present evidence in support of it.[11]

C. Plaintiffs Brought Their Claims Against The Proper Parties

Each defendant that filed a demurrer claims to be an improper defendant in this action and points an accusatory finger at another defendant: The State Defendants point to the school districts, arguing that "[t]he decisions to hire, discipline and dismiss teachers are entirely matters within the authority of . . . local school districts," and that Plaintiffs' claims are only proper "against th[e] school district's governing board[s]." (SDD at p. 2.) Alum Rock Union School District points back to the State, arguing that it "is simply following the laws with which it is required to comply. The State of California makes those laws; Defendant ARUSD complies with them." (ARD at p. 10.) Both arguments, however, miss the point. All of the Defendants bear responsibility for enforcing laws that are unconstitutional. (See, e.g., *Butt*, *supra*, 4 Cal.4th at p. 704; *Crawford v. Huntington Beach Union High School Dist.* (2002) 98 Cal.App.4th 1275, 1287.) Thus, even if they are simply "following the law" as it is written, the very act of doing so violates Plaintiffs' constitutional rights.

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[11] Even if the Dismissal Statutes were found to be required by the due process provisions of the California Constitution, Defendants do not argue that the Permanent Employment or LIFO statutes are likewise required. There is nothing in the California Constitution nor any court decision requiring public employees to be granted "permanent" status at all, let alone after only 18 months, and nothing requiring public employees to be laid off in reverse seniority order.

1. The State Of California Is A Proper Defendant In This Action

The State Defendants argue that the State of California is not a proper defendant. (SDD at p. 23.) But the State is commonly, and properly, a defendant in actions challenging the constitutionality of state laws in state court. (See, e.g., *Cal. Teachers Assn. v. State of Cal.* (1999) 20 Cal.4th 327, 357 [holding unconstitutional a provision of the Education Code imposing costs on teachers]; *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1362 [upholding judgment against State of California where amendment to proposition was unconstitutional].) In *Butt*, for example, the California Supreme Court affirmed, in part, injunctive relief against the State of California based on a similar equal protection challenge. (*Butt*, *supra*, 4 Cal.4th at p. 704.) The Court explained that "California courts have adhered to the following principles: Public education is an obligation which the State assumed by the adoption of the Constitution." (*Id*. at p. 680.)

2. The State Education Defendants Are Proper Defendants In This Action

The State Defendants also seek dismissal of all causes of action asserted against the State Superintendent of Public Instruction, the California Department of Education, and the State Board of Education (collectively, the "State Education Defendants"), arguing that the Challenged Statutes vest local school districts with "all authority" related to teacher employment decisions. (SDD at pp. 21-22.) That argument, however, ignores Plaintiffs' allegations that the Challenged Statutes, which are enforced by the State Education Defendants, *restrict* the authority of school boards to make teacher employment decisions that are in the best interests of students, and are therefore unconstitutional. (See FAC ¶ 44.) As the State Defendants recognize elsewhere in their brief, "state agencies are proper parties to actions seeking declaratory and injunctive relief arising from a challenge to the constitutionality of a state statute." (SDD at p. 1; see also *id.* at p. 20; *Serrano II*, *supra*, 18 Cal.3d at p. 752 ["It is the general and long-established rule that in actions for declaratory and injunctive relief challenging the constitutionality of state statutes, state officers with statewide administrative functions under the challenged statute are proper parties defendant."].)

In *San Francisco NAACP v. San Francisco Unified School District* (N.D. Cal. 1979) 484 F.Supp. 657, 665, the same State Education Defendants asserted that they were improper defendants in an equal protection challenge, but the court rejected their argument. The court explained that

"[s]chool districts are [merely] agencies of the state for the local operation of the state school system," and that the State and its officers and administrators maintain "ultimate supervisory power over education" in California. (*Ibid*; see also *Butt*, *supra*, 4 Cal.4th at pp. 680-681 ["Local districts are the State's agents for local operation of the common school system . . . and the State's ultimate responsibility for public education cannot be delegated to any other entity."] [citations omitted]; *Cal. Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1533 ["[T]he Constitution continues to make education and the operation of the public schools a matter of statewide rather than local or municipal concern."].) Because the State Education Defendants bear ultimate responsibility to provide California students with a constitutional education, they are proper defendants in this case.

3. Governor Brown Is A Proper Defendant In This Action

The State Defendants also contend that Governor Brown is not a proper party to the action because local school board officials, and not the Governor, exercise administrative functions related to implementation of the Challenged Statutes. (SDD at pp. 19-21.) As explained above, however, the State and its officers and administrators, including the Governor, maintain ultimate authority over the public education system in California. (See also Cal. Const. Art. V, § 1 ["The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed."]; *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 157-158 ["Consistent with [Article V § 1 of] the Constitution, Government Code section 12010 provides: 'The Governor shall supervise the official conduct of all executive and ministerial officers.'"] [citations omitted].) Accordingly, numerous California courts have permitted litigants to proceed against the Governor in constitutional challenges seeking declaratory and injunctive relief. (See, e.g., *Prof. Engineers in Cal. Government v. Schwarzenegger* (2010) 50 Cal.4th 989; *In re Marriage Cases* (2008) 43 Cal.4th 757; *White v. Davis, as Governor* (2003) 30 Cal.4th 528.)[12]

[12] The State Defendants cite *Serrano II* and *San Francisco NAACP* (SDD at pp. 20-21) for the proposition that the Governor is not a proper party, but those cases are not on point. In *Serrano II*, the issue was whether the Governor was an *indispensable* party (see *supra*, 18 Cal.3d at p. 752), and in *San Francisco NAACP*, the issue was whether the Legislature was a proper party (see *supra*, 484 F.Supp. at p. 665).

4. Alum Rock Union School District Is A Proper Defendant In This Action

Alum Rock claims to be an improper defendant, arguing that it "is simply following the laws with which it is required to comply." (ARD at p. 10.) But Plaintiffs allege that the laws themselves are unconstitutional; therefore, by following those laws, Alum Rock's actions are violating Plaintiffs' constitutional rights. As Plaintiffs explain in their Complaint, "Defendants [including ARUSD], and those subject to their supervision, direction, and control, are responsible for the enforcement of the statutes challenged herein." (FAC ¶ 33.) For that reason, school districts are commonly defendants in actions challenging the constitutionality of education-related statutes, even when they are following the requirements of those statutes in good faith. (See, e.g., *San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822; *Crawford, supra*, 98 Cal.App.4th at p. 1287; *Reed v. United Teachers L.A.* (2012) 208 Cal.App.4th 322; see also *Serrano II*, *supra*, 18 Cal.3d at p. 736, fn. 3 [permitting seven school districts to intervene as defendants].) Notably, neither of the other two school district defendants—Los Angeles Unified School District and Oakland Unified School District—has filed a demurrer to Plaintiffs' Complaint.[13]

D. Plaintiffs' Request For Injunctive Relief Is Justiciable And, Even If Improper, Would Not Provide Grounds For Sustaining The Demurrers

The State Defendants argue that Plaintiffs' request for injunctive relief against Governor Brown and the State of California is non-justiciable. According to the State Defendants, "[c]ourts may not order the Governor to sign or veto legislation, because this would violate the separation of powers doctrine." (SDD at p. 22 [citing *Serrano II*, *supra*, 18 Cal.3d at p. 751].) But Plaintiffs are not asking this Court to order the "Governor to sign or not to sign[] *specific* legislation . . . ." (*Serrano II*, *supra*, 18 Cal.3d at p. 751 [italics added].) Plaintiffs are merely seeking two standard remedies to unconstitutional statutes that routinely go hand-in-hand: a declaration that the Challenged Statutes violate the equal protection clause along with an injunction preventing enforcement of the unconstitutional statutes or any similar statutes in the future. (See, e.g., *Coral Construction, Inc.*, *supra*, 50 Cal.4th at p. 326, fn. 4 [affirming an injunction against enforcement of

[13] Alum Rock also asserts that Plaintiffs fail to plead a cause of action against it because none of the Plaintiffs "attends now or has ever attended an ARUSD school." (ARD at p. 3.) As discussed *supra* at footnote 8, however, Plaintiff Martinez has standing to assert claims against Alum Rock because the laws deter her from attending public school.

an unconstitutional ordinance "or any similar program in the future . . . ."]; see also *Serrano II*, *supra*, 18 Cal.3d at pp. 735, fn. 1, 776 [affirming a remedy whereby the trial court retained jurisdiction to ensure the statewide transition to a new and constitutional funding system]; *O'Connell*, *supra*, 141 Cal.App.4th at p. 1477 [describing "the relatively unremarkable legal proposition that the enforcement of a law found to be unconstitutional can be enjoined"].)

In any event, "[a] demurrer is not the appropriate vehicle to challenge a cause of action demanding an improper remedy." (*Caliber Bodyworks, Inc. v. Super. Ct.* (2005) 134 Cal.App.4th 365, 384; see also *Venice Town Council, Inc. v. City of L.A.* (1996) 47 Cal.App.4th 1547, 1562 ["[A] demurrer tests the sufficiency of the factual allegations of the complaint rather than the relief suggested in the prayer of the complaint."].) And Defendants fail to cite a single authority that would justify dismissing Plaintiffs' causes of action on these grounds.

E. Alum Rock's Special Demurrer Should Be Overruled Because The Complaint Is Sufficiently Clear To Apprise Alum Rock Of Plaintiffs' Claims

Defendant Alum Rock also asserts that the Complaint is defective because it is uncertain, vague, and internally inconsistent. (ARD at pp. 2-5; but see *supra*, fn. 6.) But the Complaint plainly "set[s] forth the essential facts of [Plaintiffs'] case with reasonable precision and with particularity sufficient to acquaint [Alum Rock] with the nature, source and extent" of Plaintiffs' causes of action. (*Youngman v. Nev. Irrigation Dist.* (1969) 70 Cal.2d 240, 245.) Nothing more is required at the demurrer stage, "even as against a special demurrer for uncertainty." (*Ibid.*; see also *Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616 ["A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures."]; *Polderman v. Hokanson Co.* (1958) 157 Cal.App.2d 28, 31 [holding that internal inconsistency "does not render [that portion of the complaint] vulnerable to a special demurrer for uncertainty or ambiguity"].)

Alum Rock also argues that its demurrer should be sustained because the Complaint purportedly does not follow certain formulaic pleading rules. (See ARD at p. 2 ["Plaintiffs never once use the term 'causes of action' in their FAC. Instead, Plaintiffs list out seven 'claims for relief.'"].) But California courts have repeatedly rejected such a rigid approach. (See, e.g., *Alfaro v.*

Community Housing Improvement System & Planning Assn. Inc. (2009) 171 Cal.App.4th 1356, 1371 ["What is necessary to state a cause of action are the *facts warranting legal relief*, and not whether a plaintiff has provided apt, inapt, or no labels or titles for causes of action."] [italics added]). The Supreme Court recognized as much in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, stating that "[t]he courts of this state have . . . long since departed from holding a plaintiff strictly to the 'form of action' he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained." (*Id.* at pp. 38-39 [internal citations and quotation marks omitted].)

F. If This Court Sustains Any Part Of Defendants' Demurrers, Plaintiffs Should Be Permitted To Amend The Complaint

If this Court sustains any portion of the demurrers (which it should not), Plaintiffs request leave to amend the Complaint. "Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Super. Ct*. (1995) 37 Cal.App.4th 1217, 1227; see also *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549 ["Where the complaint is defective, [in] the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment."] [internal citations and quotation marks omitted].) The California Supreme Court has "held it error to sustain a demurrer without leave to amend even where the defect was one of substance." (*Id.* at pp. 549-550; see also *Assn. of Community Organizations for Reform Now v. Dept. of Industrial Relations, Div. of Labor Stds. Enforcement* (1995) 41 Cal.App.4th 298, 302, fn. 2 [for special demurrers based on uncertainty, "plaintiff must be given an opportunity to clarify the uncertainty or ambiguity unless the pleading shows on its face that the defect cannot be cured"].)

V. CONCLUSION

Plaintiffs raise well-founded allegations about five Education Code statutes that have a "real and appreciable impact" on Plaintiffs' fundamental right to education. Their detailed Complaint is more than sufficient to state causes of action against Defendants for violating Plaintiffs' constitutional rights. Plaintiffs respectfully request that this Court overrule Defendants' demurrers.

Respectfully submitted,

Dated: October 29, 2012

GIBSON, DUNN & CRUTCHER LLP

By: Theodore J. Boutrous, Jr./LG
Theodore J. Boutrous, Jr.

Attorneys for Plaintiffs Beatriz Vergara, et al.

PROOF OF SERVICE

I, Jacquelyne E. Murray, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and am not a party to this action. My business address is 333 South Grand Avenue, Los Angeles, California 90071-3197, in said County and State. I am employed by Gibson, Dunn & Crutcher LLP and am currently working with Theodore J. Boutrous, Jr., a member of the bar of this Court. On October 29, 2012, I served the within:

PLAINTIFFS' OPPOSITION TO THE DEMURRERS OF THE STATE DEFENDANTS AND DEFENDANT ALUM ROCK UNION SCHOOL DISTRICT TO PLAINTIFFS' FIRST AMENDED COMPLAINT; AND APPENDIX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO THE DEMURRERS OF THE STATE DEFENDANTS AND DEFENDANT ALUM ROCK UNION SCHOOL DISTRICT TO PLAINTIFFS' FIRST AMENDED COMPLAINT

by placing a true and correct copy thereof in an envelope addressed to each of the persons named below at the address shown, in the manner described below:

Jennifer M. Kim, Esq., Supervising Deputy Attorney General Andrea Ventura, Esq., Deputy Attorney General Jonathan E. Rich, Esq., Deputy Attorney General California Department of Justice Office of the Attorney General 300 South Spring Street Los Angeles, CA 90013 *Jennifer.Kim@doj.ca.gov* *Andrea.Ventura@doj.ca.gov* *Jonathan.Rich@doj.ca.gov* *Counsel for State of California, Edmund G. Brown, Jr., Tom Torlakson, California Department of Education, and State Board of Education (the "State Defendants")*	Alex Molina, Esq. Los Angeles Unified School District Office of the General Counsel 333 South Beaudry Avenue, 20th Floor Los Angeles, CA 90017 *Alexander.Molina@LAUSD.net* Sue Ann Salmon Evans, Esq. Dannis Woliver Kelley 301 East Ocean Boulevard, Suite 1750 Long Beach, CA 90802 *SEvans@DWKesq.com* *Counsel for Los Angeles Unified School District*
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☑ **BY PERSONAL SERVICE:** I placed a true copy in a sealed envelope addressed to each of the persons named at the addresses shown and gave same to a messenger for personal delivery before 5:00 p.m. on the above-mentioned date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that the foregoing documents were printed on recycled paper, and that this Certificate of Service was executed by me on October 29, 2012, at Los Angeles, California.

Jacquelyne E. Murray