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Sherri R. Carter, Executive Officer/Clerk
By: Kristina Vargas, Deputy

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous (SBN 132099)
tboutrous@gibsondunn.com
Marcellus A. McRae (SBN 140308)
Theane Evangelis (SBN 243570)
Enrique A. Monagas (SBN 239087)
333 South Grand Avenue, Los Angeles, CA 90071
Telephone: 213.229.7000, Facsimile: 213.229.7520

Joshua S. Lipshutz (SBN 242557)
Kevin J. Ring-Dowell (SBN 278289)
555 Mission Street, Suite 3000, San Francisco, CA 94105
Telephone: 415.393.8200, Facsimile: 415.393.8306

Theodore B. Olson (SBN 38137)
1050 Connecticut Avenue, N.W., Washington, DC 20036
Telephone: 202.955.8500, Facsimile: 202.467.0539

Attorneys for Plaintiffs Beatriz Vergara, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

BEATRIZ VERGARA, a minor, by Alicia Martinez, as her guardian ad litem, et al.,

Plaintiffs,

vs.

STATE OF CALIFORNIA, et al.,

Defendants,

CALIFORNIA TEACHERS ASSOCIATION; CALIFORNIA FEDERATION OF TEACHERS,

Intervenors.

CASE NO. BC484642

PLAINTIFFS' CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO STATE DEFENDANTS' AND INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION

Date: December 13, 2013
Time: 8:30 a.m.
Dept.: 58

The Honorable Rolf Michael Treu

FAC Filed: August 15, 2012
Trial Date: January 27, 2014

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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 consolidated opposition to the motions for summary judgment or in the alternative summary adjudication of the following defendants: the State of California, Edmund G. Brown, Jr. in his official capacity as Governor, Tom Torlakson in his official capacity as State Superintendent of Public Instruction, the California Department of Education, and the State Board of Education (collectively, "State Defendants"), and the California Teachers Association and the California Federation of Teachers ("Intervenors") (together with State Defendants, "Movants").[1]

I. INTRODUCTION

Forty years ago, a group of California public school children and their parents brought a lawsuit against the State of California to rectify harmful inequities in California's public education system. Their complaint alleged that a series of state laws was creating "substantial disparities in the quality . . . of educational opportunities." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 590 ["*Serrano I*"].) Although the laws being challenged in that case seemed benign on their face, the plaintiffs argued that the statutes had devastating consequences because they "[f]ail[ed] to provide children of substantially equal age, aptitude, motivation, and ability with substantially equal educational resources" and "[p]erpetuate[d] marked differences in the quality of educational services." (*Id.* at p. 590 fn. 1.) Moreover, the statutes had a disproportionately adverse impact on poor and minority students, "mak[ing] the quality of education for school age children in California, including Plaintiff Children, a function of . . . wealth" and leaving "children belonging to . . . minority groups . . . [with] a relatively inferior educational opportunity." (*Ibid.*)

In the 60-day trial that ensued, the trial court made "voluminous and comprehensive findings," including 299 findings of fact and 128 conclusions of law. (*Serrano v. Priest* (1976) 18 Cal.3d 728, 736, 744, 767-768 ["*Serrano II*"].) The trial court first examined the educational system itself to determine how the statutes functioned in practice. (See *id.* at pp. 744-745.) Next, the court

[1] State Defendants' memorandum in support of their motion for summary judgment or in the alternative for summary adjudication will be cited herein as "SDMSJ" and Intervenors' memorandum in support of their motion for summary judgment or in the alternative for summary adjudication will be cited herein as "IMSJ."

examined the effects of the statutory scheme to determine whether the laws at issue contributed to the disparities being alleged. (See *id.* at pp. 746-748.) Finally, the trial court "assess[ed] the discriminatory effect of the system." (*Id.* at p. 756.) After carefully reviewing all of the evidence, the trial court determined that the statutes at issue "cause[d] and perpetuate[d] substantial disparities in the quality and extent of availability of educational opportunities." (*Id.* at p. 747.) In the words of the California Supreme Court, "[t]he system in question has been found by the trial court, on the basis of substantial and convincing evidence, to suffer from . . . basic shortcomings"—"to wit, it allows the availability of educational opportunity to vary" in substantial and unjustified ways. (*Id.* at p. 768.) As a result, the trial court, applying "strict judicial scrutiny," struck down the statutes at issue as unconstitutional and the California Supreme Court affirmed. (*Ibid.*)

This lawsuit, like *Serrano*, 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. The statutes prevent California's school districts from providing even a minimally acceptable education to some of California's most vulnerable students because they effectively prohibit school districts from prioritizing, or meaningfully considering, the interests of their students when making critical teacher employment decisions. As a direct result of these five statutes, school districts are forced to place failing teachers—those who are often well known to be either unable or unwilling to perform their jobs in even a minimally satisfactory manner—in classrooms where they perform miserably year after year in teaching California's students. Students taught by these grossly ineffective teachers are missing out on *half or more* of the learning that students taught by average teachers receive in a school year, leaving them far behind their peers and placing the quality of the rest of their lives in jeopardy. (Declaration of Eric Hanushek ("Hanushek Decl.") ¶ 11, Ex. B at p. 467; *id.* ¶ 28.) In the words of Los Angeles Unified School District ("LAUSD") Superintendent Dr. John Deasy, the statutes are "a catastrophe for kids' lives." (Declaration of Enrique A. Monagas ("Monagas Decl.") ¶ 9, Ex. G at 172:15-23.)

If anything, the laws at issue in this case have a far more direct and substantial impact on the quality (and equality) of education in California than the financing scheme at issue in *Serrano*. The

California Supreme Court explained in *Serrano* that "differences in dollars . . . produce differences in pupil achievement" in part because money allows school districts to employ a "higher quality staff." (*Serrano II*, *supra*, 18 Cal.3d at p. 748.) The laws at issue here, however, *directly* prevent school districts from employing a high-quality staff that meets the needs of students. Yet State Defendants and the teachers' unions who intervened to defend the statutes want this Court to resolve this case on summary judgment—without hearing a single witness or allowing Plaintiffs to present a shred of evidence at trial—because, according to them, "the statutes treat all students in California uniformly and any purported causal relationship between the statutes and the . . . harm to Plaintiffs' fundamental interests . . . is too unintended, indirect, and attenuated." (IMSJ at p. 2; see also SDMSJ at p. 14.) Those are precisely the issues that this Court, like the court in *Serrano*, should resolve at trial.

Plaintiffs respectfully request that the Court deny the motions for summary judgment and allow the trial to proceed, so these weighty issues can receive a full and just hearing.

II. FACTUAL BACKGROUND

A. Teacher Effectiveness Is A Key Determinant Of Student Success

Decades of research confirm what students and parents have long known: the effectiveness of teachers is a key determinant of the quality of education that students receive and students' long-term success. (Plaintiffs' Separate Statement of Material Facts Precluding Summary Judgment ("PSS") at Nos. 1-2.) Indeed, experts agree that teachers can "dramatically accelerate or impede the academic performance" of their students. (Declaration of Arun Ramanathan ("Ramanathan Decl.") ¶ 9, Ex. E at p. 1.) Not only are students more likely to succeed in school when they are taught by effective teachers; teacher effectiveness "has substantial impacts on a broad range of [student] outcomes" outside of school, including the likelihood that a child will attend university, the quality of the university, the child's future earnings, the likelihood of her becoming pregnant as a teenager, the quality of the neighborhood in which she will live, and the amount she will save for retirement. (Hanushek Decl. ¶ 39, Ex. Q at pp. 2-4.)

Educational stakeholders across the State of California agree. Local districts, for example, find that the "most important issue in student learning" is the "effectiveness of [the] teacher" because "consistent and sustained engagement with high quality, effective teaching . . . ensur[es] that students

succeed academically." (Monagas Decl. ¶ 9, Ex. G at 40:16-41:8; *id.* ¶ 19, Ex. Q at 43:6-22.) The State Defendants acknowledge that teacher quality is "the single most important school-related factor in student success." (Declaration of Kevin J. Ring-Dowell ("Ring-Dowell Decl.") ¶ 12, Ex. J at CA0008918.) And Intervenors recognize that quality teachers ensure "better outcomes for schools and for students." (Monagas Decl. ¶ 27, Ex. Y at 145:9-24.) Simply put, effective teachers are "the most important in-school factor" influencing student achievement. (Hanushek Decl. ¶¶ 50, 58, 67.)

Not everyone agrees on the precise way to measure teacher effectiveness. But, at a bare minimum, an effective teacher is someone who can *teach* his or her students the academic materials they are supposed to learn. That is why the State of California requires school districts to evaluate teachers, at least in part, by looking at their students' performance on annual standardized tests. (See Stull Act, Cal. Educ. Code § 44660 *et seq*.)[2] And it is why federal law defines teacher effectiveness as the consistent ability to ensure that students "achieve acceptable rates (*e.g.*, at least one grade level in an academic year) of student growth." (Declaration of Joshua S. Lipshutz In Support of Plaintiffs' Request for Judicial Notice ("Lipshutz Decl.") ¶ 5, Ex. C at 47,996.) State Defendants have acknowledged that this federal definition is a reasonable method of measuring teacher effectiveness (Monagas Decl. ¶ 25, Ex. W at 200:18-24)—a reflection of the State's recognition that "there can be no honest assessment of a teacher's performance without considering what students have learned." (Ring-Dowell Decl. ¶ 13, Ex. K at CA0009332.)

The disparity between effective and ineffective teachers is dramatic. (PSS at Nos. 3-5.) Whereas the very best teachers are able to achieve a *year and a half* of student academic growth in a single school year, grossly ineffective teachers—those in the bottom five to ten percent of their profession—achieve student growth of no more than *half of a year*. (Hanushek Decl. ¶ 11, Ex. B at p. 467; *id.* ¶ 28.) As a result, students assigned to even a single grossly ineffective teacher can fall far behind their peers in only one academic year. (*Id.* ¶ 28.) And students assigned to two or more grossly ineffective teachers in a row are unlikely *ever* to catch up to their peers. (*Id.* ¶ 11, Ex. B; see also Monagas Decl. ¶ 28, Ex. Z at 125:24-126:2 ["[T]he long-term well-being of California is in

[2] Unless otherwise noted, all statutory references shall mean and refer to the California Education Code.

jeopardy."]; *id.* ¶ 9, Ex. G at 203:25-204:14 ["Not only is their education denied . . . their advancement is inhibited, their ability to learn is inhibited."], 403:16-21.)

B. The Challenged Statutes

Despite the paramount importance of effective teachers, certain provisions of the California Education Code force school districts to ignore teacher effectiveness when making critical teacher employment decisions. The five statutory provisions at issue in this action—(1) Section 44929.21(b), (the "Permanent Employment Statute"); (2) Sections 44934, 44938(b)(1) and (2), and 44944 (the "Dismissal Statutes"); and (3) Section 44955 (the "Last-in-First-Out Statute" or "LIFO Statute") (collectively, the "Challenged Statutes")—force school districts to make quality-blind teacher tenure and layoff decisions, and prevent school districts from dismissing grossly ineffective teachers who have proven themselves unable or unwilling to teach. As a result, the State of California is *knowingly* forcing school districts to place some of their students, year after year, in classrooms with teachers who hinder the students' academic progress and cause severe and lasting harm.

1. The Permanent Employment Statute

Pursuant to the Permanent Employment Statute, "a probationary employee becomes a 'permanent employee of [a school] district' after completing 'two complete consecutive school years in a position or positions requiring certification.'" (SDMSJ at p. 4 [citing § 44929.21(b)].) The district must notify a probationary teacher whether she will be reelected to a position of permanent employment by March 15 of the teacher's second year with the district, meaning that "districts are forced to make decisions about the granting of tenure within the first year-and-a-half of a teacher's employment in the district." (§ 44929.21(b); Ring-Dowell Decl. ¶ 13, Ex. K at CA0009372; PSS at Nos. 11-12.) In the event that a district is unable to reach a decision by March 15 of the teacher's second probationary year, the teacher is *automatically* reelected for the next school year as a *permanent* employee of the district. (§ 44929.21(b).)

2. Dismissal Statutes

"[T]he word permanent speaks for itself." (Monagas Decl. ¶ 19, Ex. Q at 38:8-22.) That is because the Dismissal Statutes set forth a labyrinthine set of requirements that a district must satisfy in order to dismiss a permanent certificated teacher. (PSS at Nos. 19-23, 27.) These protections go

far, far beyond the protections provided to nearly every other public employee in California and—according to State Defendants themselves—make dismissal "impossible." (Monagas Decl. ¶ 26, Ex. X at 131:10-22.)

First, if a district intends to dismiss a permanent certificated teacher for unsatisfactory performance, the district must provide the teacher with a "written notice of unsatisfactory performance." (§ 44938(b)(1).) The notice must specify the nature of the teacher's unsatisfactory performance and "specific instances of behavior" with "particularity [so] as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge." (*Ibid.*) The district must provide the teacher with at least ninety days to correct his or her performance, regardless of whether the district believes the employee to be capable of remediation, and may not proceed with dismissal until at least ninety days have transpired. (*Ibid.*) A district may proceed with a dismissal only if it issues the written notice of unsatisfactory performance prior to the final one-fourth of the school year—otherwise, it must wait until the following year. (§ 44938(b)(1), (2).)

Next, a district must file a written statement of charges and "give notice to the permanent employee of its intention to dismiss" him or her. (§ 44934.) For a dismissal based on "unsatisfactory performance," the notice must specify instances of the teacher's behavior and conduct constituting the charge, the statute or rule allegedly violated (where applicable), and the "facts relevant to each occasion of alleged . . . unsatisfactory performance." (*Ibid.*)

The teacher then has another thirty days to request a hearing on the dismissal charges. (§ 44934.) The hearing must commence within sixty days after that, "although that deadline may be extended 'for good cause shown.'" (IMSJ at p. 4 [citations omitted].) The dismissal hearing is conducted by a three-member panel called the Commission on Professional Competence ("CPC"), which consists of one administrative law judge and *two teachers*, both of whom must have at least five years' teaching experience in the employee's discipline within the past ten years. (§ 44944(b)(2).) Parties to CPC hearings are provided discovery rights equivalent to "the rights or duties of any party in a civil action brought in superior court." (§ 44944(a)(1).) Parties may not, however, introduce evidence regarding matters that occurred more than four years prior to the filing of the dismissal action. (§ 44944(a)(5).)

After the CPC hearing has concluded, the CPC issues "a written decision containing findings of fact, determinations of issues, and a disposition," which is "deemed to be the final decision" of the district. (§ 44944(c)(1), (4).) The parties are afforded an opportunity to appeal the CPC's decision to the Superior Court and, after that, to the Court of Appeal. (§ 44945.) If the CPC (or the Superior Court or Court of Appeal) determines for whatever reason that the teacher should not be dismissed, the district is automatically required to pay, *inter alia*, the expenses for the dismissal hearing, expenses incurred by CPC members, and the teacher's attorney's fees. (§ 44944(e)(2).)

3. LIFO Statute

The LIFO Statute governs the process by which teachers are laid off during a reduction in force ("RIF").[3] Districts implement RIFs only out of necessity, "for budgetary reasons or to address a mismatch in the district's teacher and student populations." (IMSJ at p. 6 [citations omitted].) The use of RIFs has increased sharply since the 2007-08 school year; RIFs have occurred every year since the 2007-08 school year, and RIFs are highly likely to be announced for the 2014-15 school year. (Ramanathan Decl. ¶¶ 20-30.) Because RIF layoffs have a demoralizing effect on teachers, districts typically wait until March 15, the statutorily mandated RIF layoff notification deadline, before announcing RIFs for the upcoming school year. (*Id.* ¶¶ 15-19; PSS at No. 49; § 44949(a).)

The LIFO Statute provides that "the services of no permanent employee may be retained . . . while any probationary employee, or any employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render." (§ 44955(b); PSS at No. 42.) The LIFO Statute further mandates that 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." (§ 44955(c).) "In other words, under the statute, less senior teachers generally are laid off before more senior teachers with

[3] Intervenors allege that the criteria to be used during a RIF may differ from those set forth in the LIFO Statute if the district and the teachers' exclusive bargaining representative agree to a modified layoff process. (IMSJ at p. 6 [citing Gov't Code § 3543.2(c)].) But any such deviation is subject to the unilateral veto of the teachers' unions themselves—meaning that, in practice, it does not occur. In fact, Intervenors' affiliate organization recently invoked Section 3543.2(c) as a justification for *preventing* LAUSD from deviating from the LIFO Statute. (Lipshutz Decl. ¶ 4, Ex. B at *60; Ring-Dowell Decl. ¶ 18 Ex. P [listing California Teachers Association affiliates].)

the same qualifications" and more senior teachers are entitled to assignments and reassignments ahead of less senior teachers. (IMSJ at pp. 6-7.)

The seniority provisions of the LIFO Statute apply whenever the more senior teacher is "certificated and competent" to render the service at issue—the bare minimum teaching requirements. (§ 44955(b).) Districts have limited discretion to define the term "competence," but may not define it by tying the term to student need. (*Alexander v. Bd. of Trustees of the Delano Joint Union High School Dist.* (1983) 139 Cal.App.3d 567, 572-573.)[4] Similarly, the LIFO Statute does not grant districts the discretion to define "competency" in a manner that would permit them to "skip" laying off more effective, less senior teachers in favor of less effective, more senior teachers. (See § 44955(b); Declaration of Dr. John Deasy ("Deasy Decl.") ¶ 12, Ex. C at No. 18; Ring-Dowell Decl. ¶ 6, Ex. D at No. 18.)

In two narrow circumstances, a district implementing a RIF may "skip" and retain a teacher with less seniority despite the seniority-based criterion that typically applies. First, a district may "skip" a less senior teacher when that teacher possesses special training and experience necessary to teach a specific course or to provide specific services that an employee with more seniority does not possess. (§ 44955(d)(1); see also *Bledsoe v. Biggs Unified School Distr.* (2008) 170 Cal.App.4th 127, 138 ["In order to retain a certificated employee under section 44955, subdivision (d)(1), however, a district must not only establish a *specific* need for personnel to teach a *specific* course of study, but establish the certificated employee it proposes to retain 'has *special* training *and* experience necessary to teach that course or course of study or to provide those services.'"] [emphases added].) Second, a district ostensibly may "skip" a teacher with less seniority to maintain or achieve "compliance with constitutional requirements related to equal protection of the laws." (§ 44955(d)(2).) The LIFO Statute does not otherwise define the circumstance or circumstances in

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[4] Intervenors, citing *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 135, argue that districts have discretion to define both the "certification *and* competency requirements" that apply during a RIF. (IMSJ at p. 7 [emphasis added].) *Bledsoe*, however, nowhere states or implies that a district has discretion to define a teacher's "certification" requirements. Nor does it alter the holding of *Alexander*, *supra*, 139 Cal.App.3d at p. 572, in which the court found that "'the needs of the district and students' is not a proper measure" to determine layoff order.

which LIFO Statute subsection (d)(2) would ever apply, and no reported decision has ever affirmed a district's efforts to invoke LIFO Statute subdivision (d)(2).[5] Moreover, neither RIF exception permits a district to retain a less senior teacher based on teacher effectiveness. (See § 44955; Monagas Decl. ¶ 9, Ex. G at 170:10-16; *id.* ¶ 28, Ex. Z at 124:22-23 ["[W]e aren't allowed to consider performance."]; see also Declaration of Lynda M. Nichols submitted with SDMSJ at p. 2 ["[S]ection 44955, governs 'Reductions In Force (RIFs),' i.e. layoffs, of a district's teaching staff for reasons unrelated to the performance of any particular teacher."].)

In recent years, a handful of districts—including San Francisco Unified School District and Sacramento City Unified School District—have attempted to invoke LIFO Statute subsection (d)(1) to implement RIF layoffs in ways that take into consideration the best interests of their students. (See Ramanathan Decl. ¶¶ 31-49.) Administrative law judges and courts reviewing the districts' layoffs, however, have rejected the districts' efforts to invoke subsection (d)(1) in that manner. (*Id.* ¶¶ 37 ["A district may not create skipping justifications other than those authorized by statute in order to avoid the seniority protection afforded to certificated employees with earlier dates of hire. This is true even if the district believes that skipping junior certificated employees is in the best interests of the district and of its students."], 42, 48-49.)

C. School Districts' Experiences with the Challenged Statutes

LAUSD, the Oakland Unified School District ("OUSD"), the Alum Rock Union Elementary School District ("ARUESD"), and districts across California are required to follow the procedures set forth in the Challenged Statutes when making teacher reelection, dismissal, and layoff decisions. The shared experience of these districts confirms that the Challenged Statutes result in the reelection and continued employment of grossly ineffective teachers who would otherwise be denied reelection, dismissed, or laid off.

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[5] United Teachers Los Angeles ("UTLA")—an affiliate of Intervenors represented by Intervenors' counsel—recently argued that LIFO Statute "subsection (d)(2) should be *narrowly* construed." (Lipshutz Decl. ¶ 4, Ex. B at *59 [emphasis added].) UTLA further contended that LIFO Statute subsection (d)(2), "by its plain terms," does not address "concerns about the quality of education" because "the provision was intended to permit school districts to accommodate constitutional concerns regarding the race and ethnicity of *teachers*, not to address minimal educational standards for students." (*Ibid.* [citations omitted] [emphasis in original].)

1. Los Angeles Unified School District

LAUSD is the second-largest school district in the United States, consisting roughly of 1,000 schools, 36,000 teachers, and 909,000 students—nearly 15% of the students in the entire State. (Monagas Decl. ¶ 9, Ex. G at 16:15-17, 17:8-12, 18:20-20:1; Ring-Dowell Decl. ¶ 23, Ex. U.) Notwithstanding LAUSD's goal of "hav[ing] a highly effective teacher in every classroom in front of every student every day," the district currently employs many ineffective teachers and assigns them to teach LAUSD students. (Monagas Decl. ¶ 9, Ex. G at 171:4-6; Deasy Decl. ¶ 12, Ex. C at No. 3.)

Under the Permanent Employment Statute, LAUSD has a mere sixteen months to make tenure decisions. (Declaration of Vivian Ekchian ("Ekchian Decl.") ¶ 3, Ex. B at Nos. 6, 16; Monagas Decl. ¶ 9, Ex. G at 92:14-93:24 ["[A] very, very limited and compressed period of time"].) This does "not [provide] enough time" to determine a teacher's effectiveness. (Deasy Decl. ¶ 12, Ex. C at No. 7; Monagas Decl. ¶ 9, Ex. G at 93:25-95:13, 109:21-110:21 ["[W]e don't have enough time to determine if a person is effective."].) In such a compressed timeline, there are "limits on every indicator" that LAUSD uses to make tenure decisions. (Monagas Decl. ¶ 9, Ex. G at 101:5-21 ["Classroom observation time is limited, the ability to demonstrate improvement over time is limited, [and] the amount of data . . . is limited."]; *id.* ¶ 12, Ex. J at 58:24-59:5 ["[D]ata district-wide is limited based on the amount of time that administrators have in order to make a tenure decision."]; Deasy Decl. ¶ 12, Ex. C at No. 8.) LAUSD does the best it can do under the circumstances and, in fact, recently reduced its non-permanent teacher reelection rate,[6] but the simple fact is that LAUSD is unable to determine teacher effectiveness in the time allotted under the Permanent Employment Statute and thus is unable to ensure that ineffective teachers are not awarded tenure. (Deasy Decl. ¶¶ 2-5.)

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[6] State Defendants contend that LAUSD's tenure reelection rate dropped from 99% in the 2008-2009 school year to 60% in the "last school year." (SDMSJ at p. 18.) But the deponent on whose testimony State Defendants rely cautioned that he was merely providing an "approximation," advised the parties that LAUSD would be able to provide the "exact number" of reelections, and never testified that the reelection figures that State Defendants cite referred specifically to the 2012-13 school year. (Monagas Decl. ¶ 10, Ex. H at 448:16-449:22.) LAUSD's written discovery responses, on the other hand, indicate that the District's non-permanent teacher reelection rate declined only from 99% to 97.3%. (Ring Dowell Decl. ¶ 10 Ex. H at No. 14.)

1 When LAUSD discovers ineffective permanent teachers in its classrooms, it is powerless to
2 dismiss them because the dismissal process involves a "tremendous amount of resources" (Monagas
3 Decl. ¶ 12, Ex. J at 119:24-25), including "many years of documentation" and a "borderline infinite
4 number of steps." (*Id.* ¶ 12, Ex. J at 104:22-105:19; *id.* ¶ 9, Ex. G at 123:4-8, 139:13-141:22 ["[I]f
5 you are going to move through this process . . . you had better have a lot of evidence."]; Ring-Dowell
6 Decl. ¶ 15, Ex. M.) It takes, "at a minimum . . . four or five years" for LAUSD to dismiss a single
7 permanent certificated teacher, sometimes much longer. (Monagas Decl. ¶ 12, Ex. J at 114:22-115:2,
8 122:8-17; Ekchian Decl. ¶ 2, Ex. A at Nos. 10-11; Deasy Decl. ¶ 10, Ex. A at No. 13; *id.* ¶ 12, Ex. C
9 at No. 10.) And it costs between ***$284,932 and $404,806 per teacher***, with "exceptional cases"
10 costing "millions." (Ekchian Decl. ¶ 3, Ex. B at No. 19; Monagas Decl. ¶ 12, Ex. J at 124:11-125:7.)
11 Faced with the "large monetary and human capital costs" required to pursue dismissal and the
12 relatively "low rate of successful dismissal decisions" (over a ten year period, the CPC has authorized
13 the dismissal of only *eleven* LAUSD teachers), LAUSD sometimes tries to pay ineffective teachers to
14 leave the district (referred to euphemistically as "settlement agreements"). (Deasy Decl. ¶ 12, Ex. C
15 at No. 17; Ekchian Decl. ¶ 2, Ex. A at No. 19.) But such agreements are expensive. (Ekchian Decl.
16 ¶ 3, Ex. B at No. 20 [LAUSD made settlement payments of $5,010,271 over a six year span].) And
17 LAUSD is unable to enter into settlement agreements with all of the ineffective teachers it employs.
18 (Deasy Decl. ¶ 8 ["[S]ome ineffective and grossly ineffective teachers simply refuse to enter into
19 settlement agreements"].) Worse still, ineffective teachers who sign settlement agreements often "go
20 get hired somewhere else" in California because the reasons for the settlement agreement are
21 typically confidential. (Monagas Decl. ¶ 9, Ex. G at 158:18-159:7; Deasy Decl. ¶ 8.)
22 Except for dismissals based on the most egregious types of behavior, LAUSD is forced to
23 leave ineffective teachers in the classroom during dismissal proceedings. (See Monagas Decl. ¶ 9,
24 Ex. G at 146:2-6; Deasy Decl. ¶ 12, Ex. C at No. 17.) Financial constraints prevent LAUSD from
25 assigning all ineffective teachers to non-classroom duties while their dismissal actions are pending.
26 (Deasy Decl. ¶ 9.) Moreover, the Dismissal Statutes require LAUSD to collect extensive evidence
27 and documentation to support dismissal, and administrators are unable to collect such evidence unless
28 teachers remain in the classroom. (See Monagas Decl. ¶ 9, Ex. G at 139:13-141:22 ["Failure to get

better over time also has to be documented"], 144:25-145:14 ["One year is too little evidence, two years as we have found in actual cases is too little evidence. So five years . . . have stuck; however, [] hundreds of youth" are affected in that time period].)

In part because LAUSD has a "finite amount of resources" at its disposal, the "lengthy, expensive process" to dismiss a permanent certificated teacher "absolutely" impacts the district's ability to dismiss as many ineffective teachers as it would like to dismiss, and causes ineffective teachers to "keep[] their jobs in LAUSD." (Monagas Decl. ¶ 9, Ex. G at 129:12-22, 142:1-20, 150:11-17, 152:9-15; *id.* ¶ 12, Ex. J at 140:5-13 ["Since the current process slows down our ability to take performance cases successfully to dismissal, it does harm our ability to raise the teaching bar"]; *id.* ¶ 13, Ex. K at 206:16-21.) Even though LAUSD has sought to dismiss more teachers in the last few school years than it had previously (*id.* ¶ 13, Ex. K at 115:16-22), there is no question that LAUSD cannot dismiss all grossly ineffective teachers under the existing dismissal process or that it would dismiss more ineffective teachers if the dismissal process took less time and cost less money. (Deasy Decl. ¶ 12, Ex. C at Nos. 15-16; *id.* ¶ 6 ["[T]he Commission on Professional Competence ordered the dismissal of only 3 teachers during the 2010-11 school year, or 0.01% of the . . . teachers employed by the District"]; Monagas Decl. ¶ 12, Ex. J at 123:23-124:2; *id.* ¶ 9, Ex. G at 127:6-130:15, 133:9-11, 142:1-20, 150:11-17.)

With respect to the LIFO Statute, LAUSD has issued a substantial number of RIF notices since the 2009-10 school year.[7] The district is forced to conduct teacher layoffs based on seniority, even though seniority does not correlate with effectiveness. (Ekchian Decl. ¶ 3, Ex. B at No. 18; Monagas Decl. ¶ 9, Ex. G at 75:13-25, 135:20-136:14 ["[T]he assumption you get better over time is simply not true."].) As a result, the district is prevented from considering teachers' effectiveness or the impact that layoffs will have on the well-being of students when deciding which teachers to lay off. (Deasy Decl. ¶ 12, Ex. C at No. 18; Declaration of Justo Avila ("Avila Decl.") ¶ 2, Ex. A at Nos. 6, 8, 10, 12 ["The District takes into account only those criteria authorized by Education Code section 44955, which does not include the effectiveness of a teacher"]; Monagas Decl. ¶ 3, Ex. A at 78:1-9;

[7] LAUSD issued layoff notices to 3,477 teachers in 2009-10; 2,102 teachers in 2010-11; 4,485 teachers in 2011-12; and 3,616 teachers in 2012-13. (Avila Decl. ¶ 2, Ex. A at No. 1.)

id. ¶ 4, Ex. B at 95:4-14; *id.* ¶ 9, Ex. G at 170:10-16.)[8] As a result of the LIFO Statute, LAUSD is forced to lay off highly effective teachers it would otherwise retain, and retain ineffective teachers it would otherwise lay off—all to the detriment of LAUSD students. (*Id.* ¶ 3, Ex. A at 54:24-55:13 ["[K]ids deserve the most effective, most qualified, highest quality teachers and the LIFO process doesn't allow for that function to occur."], 69:6-8; *id.* ¶ 9, Ex. G at 171:18-173:13, 190:17-25; Deasy Decl. ¶ 12, Ex. C at Nos. 19-20.)

2. Oakland Unified School District

OUSD is a district located in Oakland, California composed of 136 schools, 2,652 teachers, and 46,472 students. (Ring-Dowell Decl. ¶ 22, Ex. T; *id.* ¶ 8 Ex. F at No. 1.) OUSD believes that "[h]igh-quality, effective instruction for every child, every day in OUSD requires highly effective teachers in every classroom," but OUSD—like LAUSD—employs many ineffective teachers. (Monagas Decl. ¶ 28, Ex. Z at 42:16-23; Ring-Dowell Decl. ¶ 8, Ex. F at No. 3.)

As with LAUSD, the time limits of the Permanent Employment Statute leave OUSD with an insufficient amount of information when making tenure decisions. (Monagas Decl. ¶ 28, Ex. Z at 62:18-63:6 ["There's not enough to make a wise decision"], 76:14-77:4 ["[A]bsolutely inadequate"]; *id.* ¶ 19, Ex. Q at 46:24-47:24; Ring-Dowell Decl. ¶ 6, Ex. D at Nos. 7-8.) Without such information, administrators do not know whether teachers are effective when they make reelection decisions. (Monagas Decl. ¶ 28, Ex. Z at 63:9-23 ["[I]t is difficult to know and understand how to evaluate 'effective[ness]' in such a short time period."].) The consequence—a direct result of the statutory notification deadline—is that OUSD grants tenure to teachers who are ineffective. (*Id.* ¶ 19, Ex. Q at 51:11-21, 52:25-53:2; *id.* ¶ 28, Ex. Z at 80:21-81:11 ["[T]ime is too short. The data is too sparse."].)

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[8] LAUSD is not able to invoke LIFO Statute subsection (d)(2) to "skip" a teacher because that provision is too vague, making "the risk associated with the deviation being rejected by the Office of Administrative Hearings . . . too significant." (Avila Decl. ¶ 2, Ex. A at No. 14.) A 2010 lawsuit by students challenging the constitutionality of LAUSD's then-anticipated seniority-based RIFs illustrates the uselessness of that provision: LAUSD entered a consent decree that would have permitted the district to "skip" teachers pursuant to LIFO Statute subsection (d)(2). (*Reed v. United Teachers L.A.* (2012) 208 Cal.App.4th 322, 327-328.) But UTLA, the collective bargaining unit for LAUSD's teachers, appealed and the Court of Appeal overturned the consent decree, finding that it abrogated the contractual seniority rights of teachers—something that could not be done without a full trial "on the merits." (*Id.* at p. 327.)

OUSD describes the proceedings under the Dismissal Statutes as "extremely lengthy" and "extremely expensive." (Monagas Decl. ¶ 19, Ex. Q at 38:8-22; see also *id.* ¶ 28, Ex. Z at 87:2-11 ["[T]akes a long time."].) Dismissals take more than two years to complete (Ring-Dowell Decl. ¶ 8, Ex. F at No. 10), even in the least controversial and best documented case. (Monagas Decl. ¶ 28, Ex. Z at 97:23-98:6 ["The fastest, done well at every step, everybody is on board, it's just that clear, two years."].) And "the cost to prosecute [a dismissal action] is very high." (*Id.* ¶ 8, Ex. F at 71:7-10, 77:11-78:9; *id.* ¶ 29, Ex. AA, at 416:1-7 ["very costly"].) Attorney's fees alone cost OUSD from $100,000 to over $400,000 per dismissal. (*Id.* ¶ 8, Ex. F at 80:3-18; see § 44944(e)(2).)

Dismissing a certificated permanent teacher in OUSD is also "onerous and difficult" because of the amount of documentation required and the low likelihood of success. (Monagas Decl. ¶ 28, Ex. Z at 87:2-11, 93:16-94:8 ["[T]he extraordinary level and detail of the dismissal statute creates the conditions that make it really difficult."]; *id.* ¶ 19, Ex. Q at 77:21-78:6 ["It's detailed and comprehensive documentation"]; *id.* ¶ 8, Ex. F at 31:14-32:10; see also *id.* ¶ 8, Ex. F at 64:3-65:9 [noting that the composition of the CPC panel impacts OUSD's success rate in dismissal actions].) As a result, administrators must expend a significant amount of time and energy in pursuit of dismissal. (*Id.* ¶ 8, Ex. F at 39:1-40:8 ["[P]rincipal time, witness time, legal department time, time with person in classroom time."]; *id.* ¶ 28, Ex. Z at 92:13-93:15.) According to OUSD, this is time that could—and should—be spent elsewhere. (*Id.* ¶ 8, Ex. F at 52:23-53:14 ["Every effort . . . is an effort that could have been spent supporting another teacher."]; *id.* ¶ 28, Ex. Z at 94:8-12.)

When dismissal proceedings are pending, OUSD is forced to leave the teachers in the classroom for two principal reasons. (Monagas Decl. ¶ 29, Ex. AA at 418:23-420:6.) First, the district must gather the enormous amount of documentation required to support dismissal, which requires allowing ineffective teachers to continue teaching. (*Ibid.* ["[I]f you take them out of that role, you don't have the conditions then to continue documenting."]; see also *id.* ¶ 8, Ex. F at 32:11-23.) Second, OUSD is obligated to continue paying the salaries of teachers in dismissal proceedings and lacks the financial capacity to provide non-classroom duties to all ineffective teachers during dismissal actions. (*Id.* ¶ 29, Ex. AA at 415:21-416:7; *id.* ¶ 8, Ex. F at 165:25-166:20 ["[T]he number of nonteaching positions where we can afford to pay teaching salaries is very limited."].)

Due to the time, burden, and cost required to dismiss a permanent certificated teacher, OUSD does not dismiss ineffective teachers that it otherwise would dismiss if the dismissal process were simpler, faster, and less costly. (Ring-Dowell Decl. ¶ 6, Ex. D at Nos. 15-16; Monagas Decl. ¶ 8, Ex. F at 85:2-18; *id.* ¶ 19, Ex. Q at 73:24-74:9, 98:4-17; *id.* ¶ 28, Ex. Z at 100:3-100:9.) Because a single dismissal action requires a significant outlay of financial and human capital, OUSD must "choose which ones to pursue" despite its desire to initiate a greater number of dismissal actions. (Monagas Decl. ¶ 19, Ex. Q at 78:7-20 ["Our resources are scarce, and we make difficult and challenging decisions about how to commit those resources."], 78:21-79:16 ["[W]e have to do a cost benefit analysis."]; *id.* ¶ 28, Ex. Z at 98:16-99:13 ["[If] it's going to be too cost-prohibitive and . . . cost too much time . . . we don't end up dismissing that teacher."]; *id.* ¶ 8, Ex. F at 83:7-84:2.)

Like LAUSD, OUSD sometimes enters into settlement agreements with ineffective teachers to avoid the cost, burden, and uncertainty of dismissal proceedings. (Ring-Dowell Decl. ¶ 6, Ex. D at No. 17; *id.* ¶ 8, Ex. F at No. 15; Monagas Decl. ¶ 28, Ex. Z at 113:15-114:2; *id.* ¶ 19, Ex. Q at 102:4-16.) These settlement agreements are "expensive" and require OUSD to turn its limited funds over to ineffective teachers when it would "rather spend all of [its] money directly supporting classrooms." (Monagas Decl. ¶ 8, Ex. F at 51:21-52:18, 57:11-58:10, 66:17-67:9.) Moreover, the amount of money required to convince an ineffective teacher to leave the district is directly related to the difficulty of obtaining a dismissal. (*Id.* ¶ 8, Ex. F at 55:22-56:17 ["[T]he time frame and the cost of that time frame is a component of . . . settlement value."].) And while OUSD is able to reach agreements with *some* ineffective teachers, other ineffective teachers refuse to leave. (*Id.* ¶ 8, Ex. F at 87:20-88:10 ["I've had teachers personally say to me, 'You can't fire me. I'm going to retire here.'"]; *id.* ¶ 19, Ex. Q at 114:22-115:1.)

When OUSD implements teacher layoffs,[9] it is forced to follow the reverse-seniority provisions of the LIFO Statute, regardless of teacher quality. (Monagas Decl. ¶ 28, Ex. Z at 120:1-122:7 ["[L]ast in/first out is the rule. It doesn't matter how good the teacher is"], 124:22-23, 129:19-

[9] OUSD issued 61 preliminary layoff notices in 2010-11, 661 preliminary layoff notices in 2011-12, and 14 preliminary layoff notices in 2013-14. (Ring-Dowell Decl. ¶ 17, Ex. O.) Teachers were laid off in all of these school years. (*Ibid.*; Monagas Decl. ¶ 20, Ex. R at 368:1-370:6.)

131:7; *id.* ¶ 8, Ex. F at 116:5-16, 122:1-9; Ring-Dowell Decl. ¶ 6, Ex. D at No. 18; *id.* ¶ 8, Ex. F at Nos. 27, 29, 31, 33, 35; *id.* ¶ 7, Ex. E at No. 2.) The district believes that seniority is "not an adequate or sufficient indicator of teacher effectiveness" (Monagas Decl. ¶ 19, Ex. Q at 166:20-167:5; *id.* ¶ 8, Ex. F at 116:17-117:19; Ring-Dowell Decl. ¶ 6, Ex. D at No. 19), and that its layoffs therefore impose a substantial harm on OUSD students. (Monagas Decl. ¶ 28, Ex. Z at 129:19-131:7 ["[T]here's no way to protect kids with the current statute."]; *id.* ¶ 19, Ex. Q at 138:7-139:3 ["[T]o make staffing determinations on the basis of something that has nothing to do with the best interests of children does not serve children well."].) Reverse-seniority layoffs are also demoralizing for teachers, causing high-quality teachers to leave the district. (*Id.* ¶ 8, Ex. F at 118:18-119:15 ["[I]t's demoralizing to work extremely hard, to be deemed effective and then to be notified of a potential release, while the perception that a colleague who is not deemed effective is not . . . . [T]here are teachers who have said, I've chosen to work for a charter school because I don't have to worry about that; that if I'm good I get to stay."].) If OUSD were able to do so, it would select teachers based on effectiveness when deciding which teachers to lay off during a RIF. (Ring-Dowell Decl. ¶ 6, Ex. D at No. 20.)

3. Alum Rock Union Elementary School District

ARUESD is an elementary school district located in San Jose, California, which includes 27 schools, 653 FTE teachers, and nearly 13,000 students. (Ring-Dowell Decl. ¶ 24, Ex. V.) Like LAUSD and OUSD, ARUESD currently employs some teachers who are ineffective. (Fiss Decl. ¶ 5.) ARUESD administrators believe that the "insufficient time" in which they must make tenure decisions contributes to the retention of ineffective teachers. (*Ibid.*) ARUESD Superintendent Stephen Fiss agrees that the "complexity of the [dismissal] process and the amount of time and resources required in order to dismiss a teacher" under the Dismissal Statutes is "burdensome." (*Id.* ¶ 8.) Consistent with the experiences of LAUSD and OUSD, Superintendent Fiss has personally witnessed administrators who—but for the complexity and burdensome Dismissal Statutes—"would have recommended [the] dismissal of an ineffective teacher" and yet had not done so. (*Id.* ¶ 9.)

4. Other California School Districts

Other districts across the State experience the same problems with the Challenged Statutes. In fact, districts both large and small—from Sacramento City Unified to Emery Unified and everywhere in between—are beleaguered by the problem of grossly ineffective teachers.[10] They struggle constantly with teachers who have "verbally harassed and bullied students," "called students 'dumb,'" and "played rented movies to the class every day." (Raymond Decl. ¶ 7; Lindo Decl. ¶ 6.) In the San Gabriel Unified School District, the Baldwin Park Unified School District, and the Simi Valley Unified School District, for example, grossly ineffective teachers have "[thrown] books at students," "wor[n] see-through clothing to class," and "had guns delivered to school property." (Parks Decl. ¶ 7.) In the Corcoran Unified School District, Gilroy Unified School District, Oceanside Unified School District, and Cupertino Union School District, grossly ineffective teachers have "refused to change or update lesson plans" and "left students constantly unattended," causing their students to be "classified as remedial and woefully underprepared." (Bragg Decl. ¶ 6; Noonan Decl. ¶ 7.) Moreover, Superintendents across the State agree that the problem of grossly ineffective teachers stems from the Challenged Statutes: the Permanent Employment Statute does not provide districts with sufficient time to evaluate teacher effectiveness before making permanent employment decisions; dismissal under the Dismissal Statutes is prohibitively costly, burdensome, and unlikely to succeed; and the LIFO Statute requires districts to leave grossly ineffective teachers in place while laying off "exceptional teachers—true rising stars" during RIFs. (Bragg Decl. ¶¶ 9-10, 13-14, 18; Noonan Decl. ¶¶ 10-11, 14-15, 18-19; Lindo Decl. ¶¶ 9-10, 13-15, 18-19; Parks Decl. ¶¶ 9-10, 13-14, 17-18; Raymond Decl. ¶¶ 9-10, 13-14, 17-18; Rogers Decl. ¶¶ 9-10, 13-14, 18.)

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[10] Importantly, however, districts with an average daily attendance of less than 250 students are *not* subject to the Challenged Statutes. (§ 44929.20; § 44929.21(b).) Those districts are able to "remove and dismiss grossly ineffective teachers from the classroom without spending years and hundreds of thousands of dollars" because they possess "greater flexibility" than districts subject to the Challenged Statutes. (Greenfield Decl. ¶¶ 13-14.)

D. Impact Of The Challenged Statutes On California Students

1. Districts Are Forced To Assign Students To Grossly Ineffective Teachers

As a result of the Dismissal Statutes, school districts throughout California have no choice but to continue employing—and assigning their students to—grossly ineffective tenured teachers. (PSS at Nos. 32-35.) Indeed, in the past ten years, the CPC has allowed California's 1,052 school districts to dismiss only *91 teachers*—less than 10 per year out of nearly 275,000 teachers statewide. (Declaration of Quynh Vu ("Vu Decl.") ¶ 9; Monagas Decl. ¶ 25, Ex. W at 30:5-7; Ring-Dowell Decl. ¶ 23, Ex. U.) And the vast majority of those dismissals were for egregious conduct, not for being an ineffective teacher. Indeed, of the 91 total dismissals statewide over the past decade, a mere 19 were based, in whole or in part, on unsatisfactory performance. (Vu Decl. ¶ 10.)

It is no wonder that school districts view the dismissal process as unworkable and unusable. Even when school districts attempt to dismiss teachers who have committed lewd and disturbing conduct—truly horrific acts against their students—the dismissal process takes an inordinate amount of time and costs the districts precious funds that should be spent directly on students—*and often still doesn't succeed*. (PSS at Nos. 29, 31.) The following examples are illustrative:

- **Matthew Kim**, a former teacher at Grant High School in LAUSD, made inappropriate physical contact with his students, touching students' "intimate body parts" and asking "whether one of his students was a virgin." (Deasy Decl. ¶ 10, Ex. A at No. 13.) The CPC found that the allegations against Mr. Kim warranted dismissal, but refused to allow LAUSD to dismiss Mr. Kim because he "was remorseful" and his conduct, while "certainly inappropriate," was simply a "result of poor judgment." (Vu Decl. ¶ 5, Ex. A at p. 14.) The district appealed and ultimately prevailed, ***ten years and eight months*** after the conduct took place and after incurring at least ***$1,648,302*** in costs. (Deasy Decl. ¶ 10, Ex. A at No. 13.)

- **Colleen Kolter**, a former teacher at Pinewood Elementary School in LAUSD, was consistently unable "to deliver instruction to students," "expos[ed] herself in an inappropriate manner, appear[ed] on campus under the influence of a controlled substance, and ma[de] inappropriate comments . . . towards students." (Deasy Decl. ¶ 11, Ex. B at No. 9.) The CPC ordered Ms. Kolter dismissed, but Ms. Kolter appealed to the Superior Court and Court of Appeal. (*Id.*) The Court of Appeal affirmed her dismissal ***five years and three months*** after the first incident giving rise to her dismissal and after the district had incurred at least ***$307,586*** in costs. (*Id.*)

- **Deborah Payne-Kelley**, a teacher who bounced around several OUSD schools over the course of several years, was notified of dismissal proceedings based on immoral conduct, unprofessional conduct, unsatisfactory performance, evident unfitness for service, and persistent violation of or refusal to obey school laws or reasonable regulations. (Vu Decl. ¶ 6, Ex. B at pp. 1-13.) The CPC *agreed* with OUSD that Ms. Payne-Kelley had "difficult and problematic" interactions with students and colleagues, "did not consistently create lesson plans," "did not implement assigned curricula," and "missed or refused to participate in meetings," but nevertheless *refused* to authorize dismissal. (*Id.* at p. 17.) After ***more than two years*** of trying to dismiss Ms. Payne-Kelley, OUSD was required to pay her attorneys' fees, resulting in a total expense of ***$430,000*** for an unsuccessful dismissal. (Monagas Decl. ¶ 7, Ex. E at 106:12-19, 107:3-10.)

These are just a few of many similar examples where the Dismissal Statutes have made it effectively impossible for the districts to dismiss ineffective teachers. (See Vu Decl. ¶¶ 4, 9-12.)

2. Grossly Ineffective Teachers Cause Significant Harm To Their Students

Students taught by grossly ineffective teachers in California schools suffer long-lasting and severe harm as a result of the poor teaching quality that they receive. (PSS at No. 8.) For example, researchers have calculated that grossly ineffective teachers lower academic growth by at least 0.2 standard deviations compared to teachers at the median level of effectiveness.[11] (Hanushek Decl. ¶ 32.) Stated differently, students taught for a single year by a teacher in the bottom five to ten percent of teacher effectiveness miss out on *at least* half a year of academic growth, falling significantly behind their peers.[12] (*Id.* ¶ 11, Ex. B at p. 467; *id.* ¶ 28.) Students assigned to two or more grossly ineffective teachers in a row are unlikely ever to catch up to their peers or perform at grade level. (*Id.* ¶ 11, Ex. B at p. 467.) And the devastating effects of grossly ineffective teachers last beyond grade school, lowering the students' college attendance rates and lifetime earnings. (*Id.* ¶ 39, Ex. Q.) Indeed, replacing a grossly ineffective teacher with even an *average* teacher would increase students'

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[11] Standard deviation "is a measure of the extent to which data cluster around a mean." (*S.F. Fire Fighters Local 798 v. City and County of S.F.* (2006) 38 Cal.4th 653, 678 fn. 3; see also Hanushek Decl. ¶ 32 fn. 4.)

[12] In fact, there is reason to believe that the impact of a grossly ineffective teacher is even more disastrous. According to test results from the National Assessment of Educational Progress, 0.2 standard deviations is equal to 80% of a school year, *i.e.*, a student assigned to a grossly ineffective teacher loses approximately *eight months* of learning. (Hanushek Decl. ¶ 32 fn. 5)

cumulative lifetime income by a total of $1.4 million per classroom taught by that teacher. (*Id.* ¶ 12, Ex. D at p. 4 fn. 3; *id.* ¶ 40.) As the State Defendants recognize, ineffective teachers produce student "dropouts who are less likely to be employed and much more likely to be incarcerated when they leave schools without a diploma." (Ring-Dowell Decl. ¶ 13, Ex. K at CA0009387.)

3. Minority and Low-Income Students Are Disproportionately Harmed by the Challenged Statutes

The problem of grossly ineffective teachers plagues schools statewide, affecting students of all income levels and backgrounds. But low-income and minority students are disproportionately affected because they are far more likely to be taught by grossly ineffective teachers than their more affluent and non-minority peers. (PSS at No. 54; Monagas Decl. ¶ 28, Ex. Z at 122:1-5 ["[T]he disproportionate[ly] negative effect of the complex of these statutes [is] damaging the learning conditions . . . for the most high need kids"]; *id.* ¶ 29, Ex. AA at 367:14-21; *id.* ¶ 19, Ex. R at 466:3-16.) For example, in LAUSD, a low-income student "is more than twice as likely to have [an ineffective teacher] for English—Language Arts ("ELA"), and 66 percent more likely to have [an ineffective] teacher for math, than a student from a relatively more affluent background." (Ramanathan Decl. ¶ 9, Ex. E.) Likewise, "a Latino or African-American student is over three times as likely to have a [an ineffective] teacher for ELA, and nearly two times as likely to be assigned to [an ineffective] teacher for math, than a white or Asian student." (*Ibid.*) And while every child in California deserves an effective teacher, the impact of grossly ineffective teachers "disproportionately limits" low-income and minority students because they often do not "have any other opportunity *but* to have a high quality effective teacher." (Monagas Decl. ¶ 28, Ex. Z at 133:21-134:4 [emphasis added]; see also *id.* ¶ 28, Ex. Z at 132:7-13 ["[K]ids . . . living in generational poverty . . . don't have quality teachers, that is disproportionately affecting them"].)

Low-income and minority students are also more likely than their peers to be taught by novice teachers. (PSS at Nos. 53, 55; Deasy Decl. ¶ 12, Ex. C at Nos. 22-23; Ring-Dowell Decl. ¶ 6, Ex. D at Nos. 22-23; Ramanathan Decl. ¶ 56.) As a result, low-income and minority students lose a higher percentage of their teachers when seniority-based RIFs occur. (Ramanathan Decl. ¶ 8, Ex. D ["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."]; Deasy Decl. ¶ 12, Ex. C at Nos. 24, 26; Monagas Decl. ¶ 9, Ex. G at 173:14-25, 180:3-14; *id.* ¶ 28, Ex. Z at 108:8-109:22 ["[L]ast in/first out, with no regard for impact or effect or effectiveness . . . disproportionately damages the education environment for our most high-need kids."], 129:19-131:7; see also *Reed v. United Teachers L.A.* (2012) 208 Cal.App.4th 322, 348 (dis. opn. of Doi Todd, J.) ["The evidence likewise confirmed that future layoffs would continue to disproportionately impact the District's most struggling schools."].) The resulting churn of the teaching staffs in poor and minority schools "imposes large educational costs on students and significant recruitment and training costs on schools." (Ring-Dowell Decl. ¶ 3, Ex. A at No. 3; Monagas Decl. ¶ 19, Ex. Q at 162:6-163:15 ["When you have a constant churn . . . the ability of a school leader and a school to really get to the heart of high quality, effective instruction is negatively impacted"]; *Reed*, *supra*, 208 Cal.App.4th at p. 347 (dis. opn. of Doi Todd, J.) ["[H]igh teacher turnover . . . precluded the development of a stable support infrastructure . . . and inhibited the development of student-teacher relationships that are often critical to positive academic achievement"].)

4. The State Defendants And Intervenors Recognize The Problem

Both the State Defendants and Intervenors concede that students in California are being taught by ineffective teachers. (Ring-Dowell Decl. ¶ 5, Ex. C at No. 3; Monagas Decl. ¶ 25, Ex. W at 131:14-22, 132:8-24; see also Ring-Dowell Decl. ¶ 4, Ex. B at No. 3 ["California public school districts currently employ teachers who are ineffective"].) They also recognize many of the problems inherent in the Challenged Statutes. For example, State Defendants acknowledge that the Permanent Employment Statute "forces" districts to make reelection decisions while probationary teachers are still "under the wing" of programs designed to assist new teachers. (Ring-Dowell Decl. ¶ 13, Ex. K at CA0009372; Monagas Decl. ¶ 25, Ex. W at 222:4-13.) For this reason, State Defendants *agree* that the probationary period should be longer. (Ring-Dowell Decl. ¶ 13, Ex. K at CA0009377 ["Ideally, a decision about permanent employment should occur after the completion of the induction program"]; Monagas Decl. ¶ 25, Ex. W at 234:5-24 ["[I]n this document which State Superintendent Tom Torlakson clearly believes . . . it would be great to [make tenure decisions] at the end after induction was over."].) With respect to the Dismissal Statutes, State Defendants recognize that it is

“impossible” to fire a permanent certificated teacher (Monagas Decl. ¶ 26, Ex. X at 131:10-22), and that districts are unable to pursue dismissals because of the lengthy nature of dismissal proceedings. (*Id.* ¶ 26, Ex. X at 81:12-82:1.) Intervenors, too, acknowledge that the process to dismiss permanent certificated teachers in California should be “streamline[d] and shorten[ed],” and that the current process does not allow dismissals to be “handled fairly and in a timely manner.” (Ring-Dowell Decl. ¶ 19, Ex. Q; *id.* ¶ 20, Ex. R [“[S]hortening the dismissal appeal process . . . will . . . sav[e] time and expense for school districts.”].) As for the LIFO Statute, State Defendants admit that “extensive layoff[s] of excellent teachers” is a “significant state problem.” (*Id.* ¶ 13, Ex. K at CA0009343; see also Monagas Decl. ¶ 25, Ex. W at 205:1-3 [“Common sense would tell you that experience alone does not absolutely guarantee the ability to provide a better [learning] environment.”).

State Defendants and Intervenors also recognize that poor and minority students are disproportionately likely to be taught by grossly ineffective teachers. State Defendants acknowledge that “[r]egardless of how it is measured, teacher quality is not distributed equitably across schools and school districts.” (Ring-Dowell Decl. ¶ 11, Ex. I at CA0001210; see also *id.* ¶ 13, Ex. K at CA0009335 [“[E]xpert teachers . . . are the most unequally distributed school resources”].) Instead, “the most vulnerable students, those attending high-poverty, low-performing schools, are far more likely than their wealthier peers to attend schools having a disproportionate number of . . . ineffective teachers and administrators.” (*Id.* ¶ 11, Ex. I at CA0001205; see also Monagas Decl. ¶ 27, Ex. Y at 176:1-177:7 [agreeing, on behalf of CTA and CFT, with the statement that “schools with the greatest needs are filled with the most inexperienced and least skilled teachers.”].) And “[b]ecause minority children disproportionately attend such schools, minority students bear the brunt of staffing inequities.” (Ring-Dowell Decl. ¶ 11, Ex. I at CA0001205.)

Nevertheless, despite the well-recognized defects in the Challenged Statutes, legislative efforts to reform the statutes consistently fail. (Preston Decl. ¶¶ 7-11.) In early 2012, for example, widespread news coverage disclosed that LAUSD had paid approximately $40,000 to rid itself of Mark Berndt, a permanent certificated teacher at Miramonte Elementary School who had sexually abused hundreds of third-grade students. (*Id.* ¶ 7.) The “Miramonte Scandal” provoked a public outcry and, in response, the California State Senate passed a bill (SB 1530) by a vote of 33-4 that

would have permitted a streamlined dismissal process for teachers accused of sexual abuse. (*Id.* ¶ 9.) But Intervenors staunchly opposed SB 1530 and the bill did not make it out of the California State Assembly Education Committee. (*Id.* ¶¶ 10-11.) Instead, Intervenors—in a transparent effort to render this action moot and foreclose judicial review of the Dismissal Statutes (see IMSJ at pp. 26-27)—recently endorsed AB 375, a bill that was rushed through the California legislature just days before Intervenors' summary judgment motion was due to be filed, which would have made it *more* difficult to dismiss grossly ineffective teachers. (Preston Decl. ¶¶ 14-37.) Fortunately, Governor Brown vetoed the troublesome legislation, noting that the proposed changes "could create new problems" that "do more harm than good." (*Id.* ¶¶ 38-41; Lipshutz Decl. ¶ 3, Ex. A.)

Intervenors have opposed other efforts to hold teachers accountable for student achievement as well. For example, State Defendants began to develop a statewide electronic database that would "have tracked teacher[s] from entry into the profession until retirement" and allowed the State to monitor the academic performance of teachers' students. (Monagas Decl. ¶ 25, Ex. W at 49:7-12, 50:23-25, 51:15-23, 180:10-14.) The California Teachers Association, however, lobbied the State Superintendent of Public Instruction, the Deputy State Superintendent of Public Instruction, and other officials in "a number of meetings" to oppose the linking of student academic data with teachers. (*Id.* ¶ 25, Ex. W at 181:16-182:6, 184:17-185:3, 191:18-192:9.) Ultimately, the statewide database that State Defendants sought was defunded and never developed. (*Id.* ¶ 25, Ex. W at 49:11-12, 50:23-25.)

E. The Plaintiffs

Ultimately, it is schoolchildren in California, like Plaintiffs in this action, who suffer the harms imposed by the Challenged Statutes. Plaintiffs are nine school-aged children with a diverse range of backgrounds and aspirations. They hail from cities and towns across the State, including Los Angeles, Pomona, San Jose, and Oakland. Some Plaintiffs attend elementary school, while others are in middle school and high school. Yet Plaintiffs share one important trait: like many other California schoolchildren, they *all* face a substantial risk that they will be assigned to one or more grossly ineffective teachers in the California public school system.

1. Beatriz and Elizabeth Vergara

Beatriz, fifteen years old, and Elizabeth, sixteen years old, live in Pacoima, California. (Declaration of Alicia Martinez ("A. Martinez Decl.") ¶ 2.) Their family is socio-economically disadvantaged and Hispanic. (*Id.* ¶¶ 3-4.) Beatriz and Elizabeth attend a traditional district school in LAUSD and hope to attend college. (Declaration of Beatriz Vergara ("B. Vergara Decl.") ¶¶ 3-4; Declaration of Elizabeth Vergara ("E. Vergara Decl.") ¶¶ 5, 13; Monagas Decl. ¶ 30, Ex. BB at 53:7-9.) Although they have been taught by some teachers who have "inspired" them, they have also been taught by multiple grossly ineffective teachers. (B. Vergara Decl. ¶¶ 6-7; E. Vergara Decl. ¶¶ 6-7.) One of Beatriz's teachers, for example, consistently fell asleep during class and was utterly incapable of controlling his chaotic students. (B. Vergara Decl. ¶ 9.) Another teacher referred to Beatriz, Elizabeth, and his other Latino students as "cholos" who would "never graduate" and would instead "clean houses for a living." (B. Vergara Decl. ¶ 10; E. Vergara Decl. ¶ 8.) This same teacher permitted his students to smoke marijuana during class and "never seemed to care" about the well-being of his students. (E. Vergara Decl. ¶ 8.) In eighth grade, Elizabeth was taught by a grossly ineffective teacher who lacked all control over his class. (*Id.* ¶ 10.) Beatriz and Elizabeth suffered the consequences of their teachers' inadequacies, as Beatriz fell behind in math and Elizabeth's writing and analytical abilities deteriorated. (A. Martinez Decl. ¶¶ 8, 10, 15, 19, 22; B. Vergara Decl. ¶¶ 8, 11-12.) The sisters struggled mightily to stay academically competitive with their peers. (B. Vergara Decl. ¶ 11-12; E. Vergara Decl. ¶¶ 9, 11.) Yet despite their ambition, they worry that their shared dream of attending college is in jeopardy because of the grossly ineffective teachers that have held them back. (B. Vergara Decl. ¶ 13; E. Vergara Decl. ¶ 12.) They worry deeply that having another grossly ineffective teacher could put college out of reach for them entirely. (E. Vergara Decl. ¶ 12; Monagas Decl. ¶ 30, Ex. BB at 51:21-52:13.)

2. Daniella Martinez

Daniella Martinez is a twelve year-old Hispanic and economically disadvantaged student who lives in east San Jose, California, a primarily minority and low-income community. (Declaration of Daniella Martinez ("D. Martinez Decl.") ¶¶ 1-3.) Daniella attended traditional district schools in San Jose, California, but was assigned to multiple grossly ineffective teachers who were unable or

unwilling to teach Daniella how to read, write, or perform basic mathematical calculations. (*Id.* ¶¶ 5, 8-11; Monagas Decl. ¶ 22, Ex. T at 62:21-66:12.) As a third grader who still could not read, Daniella "was broken as a student." (Monagas Decl. ¶ 22, Ex. T at 149:13-17.) She felt isolated from her peers and fell further and further behind grade level in all subjects. (Declaration of Karen Martinez ("K. Martinez Decl." ¶¶ 10, 16.) In desperation, Daniella's parents transferred Daniella midway through her third grade year to Rocketship Si Se Puede Academy, a public charter school in the ARUESD. (*Id.* ¶ 17.) She began to thrive and even attained proficiency in her school subjects, a trend she has maintained at her current charter school. (Monagas Decl. ¶ 22, Ex. T at 85:1-86:25, 93:23-94:3, 105:5-17, 199:4-13.) When Daniella and other students became concerned about an ineffective teacher at their charter school, the teacher was swiftly replaced with a teacher that enabled the students to continue their academic progress. (K. Martinez Decl. ¶ 26.) Daniella's family would consider sending her back to a traditional district school—and may have no choice if she is denied admission to a charter high school—but based on their past experiences, they are horrified at the prospect that Daniella could again be assigned to another grossly ineffective teacher and that all of her hard-fought progress could be erased. (*Id.* ¶¶ 27-29; Monagas Decl. ¶ 22, Ex. T at 168:14-24.)

3. Brandon Debose, Jr.

Brandon Debose, Jr. is a seventeen year-old student who lives with his mother and father in Oakland, California. (Declaration of Brandon Debose, Jr. ("DeBose Decl.") ¶¶ 1-2.) Brandon and his family are African-American and, although his parents both work, they are economically disadvantaged. (Declaration of Satonna Ballard-Debose ("Ballard-Debose Decl.") ¶ 4.) Brandon is an accomplished football player who hopes to attend college and someday obtain a master's degree. (Monagas Decl. ¶ 11, Ex. I at 26:9-19, 35:2-13.) But Brandon has been hindered by two grossly ineffective teachers who made him feel "destined for failure." (DeBose Decl. ¶¶ 7-8.) One teacher told Brandon that he "wouldn't amount to anything" when he was only in the fifth grade. (*Id.* ¶ 7.) Another, Brandon's tenth-grade geometry teacher, expected his students to learn math on their own and whittled away the lion's share of class time taking attendance. (*Id.* ¶ 8.) Even though other teachers at Brandon's school were acutely aware of that teacher's ineffectiveness, and even warned Brandon to "be careful" in his class, the school could do nothing about it. (*Id.* ¶ 10; Monagas Decl.

¶ 11, Ex. I at 54:17-55:11.) During the period that Brandon was taught by this geometry teacher, Brandon's math skills stagnated and his grade point average plummeted. (*Id*. ¶¶ 8, 12) Even though Brandon is in twelfth grade, he worries that the teachers to whom he has recently been assigned, or the teachers to whom he may be assigned in the future, could also be grossly ineffective, jeopardizing his ability to attend college. (*Id.* ¶¶ 15-17; Monagas Decl. ¶ 11, Ex. I at 59:24-65:24.)

4. Julia Macias

Julia Macias is a thirteen year-old Hispanic student who lives in Reseda, California.[13] (Declaration of Julia Macias ("Ju. Macias Decl.") ¶¶ 2-3.) Julia—who dreams of attending Harvard Law School—has been taught by two grossly ineffective teachers in the traditional district system. (*Id.* ¶¶ 6, 12, 15; Monagas Decl. ¶ 18, Ex. P at 53:9-24, 54:10-23, 116:14-117:20.) Julia's second-grade teacher repeatedly told Julia that she was "just not good at math," devastating Julia's confidence and causing Julia to cling to her parents when they would drop her off at school. (Ju. Macias Decl. ¶ 6; Declaration of Jose Macias ("Jo. Macias Decl.") ¶ 6.) She even asked her parents if she could be home-schooled to avoid her teacher's disparaging words. (Jo. Macias Decl. ¶ 6.) Julia's parents contacted the principal, who agreed that the teacher was a problem and advised them "to transfer [Julia] to another classroom." (*Id*. ¶ 8.) In sixth grade, Julia was assigned to a second grossly ineffective teacher who would lose her students' assignments and even called some of her students "stupid." (Ju. Macias Decl. ¶ 12.) As a result, Julia's test scores plummeted and she again lost confidence in her abilities. (*Id*. ¶ 13.) When Julia was taught by two wonderful teachers, they both received RIF notices. (Jo. Macias Decl. ¶¶ 11, 18.) At one point, parents and teachers at Julia's school rallied "to save" one of her teachers, a teacher who was "caring, smart, and motivational," yet their efforts fell short and the teacher was laid off. (*Id*. ¶¶ 18-20; Ju. Macias Decl. ¶¶ 10-11.) Based on these experiences, Julia reasonably fears that she will again be taught by a grossly ineffective teacher who will destroy her confidence and academic progress. (Ju. Macias Decl. ¶ 15.)

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[13] Movants contend that Julia Macias is "not a member of an ethnic minority," apparently because her father testified that he considers her to be "American." (SDMSJ at pp. 10, 27; IMSJ at p. 28 fn. 19.) In addition to the obvious fact that one can both be a member of an ethnic minority and an American, the evidentiary record conclusively demonstrates that Julia Macias and her family are Hispanic. (Monagas Decl. ¶ 18, Ex. P at 23:20-24:19; Ju. Macias Decl. ¶ 3.)

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5. **Clara Grace Campbell**

2 Clara Grace Campbell is an eight year-old, White, fourth-grade student who lives in Encino, 3 California. (Declaration of Clara Campbell ("C. Campbell Decl.") ¶¶ 1-3.) Clara was taught by an 4 effective teacher during kindergarten and first grade, a teacher who "got [her] students excited about 5 learning" and was "universally liked by parents and students." (Declaration of Lauren Campbell ("L. 6 Campbell Decl.") ¶¶ 7-8.) When this "superstar" teacher received a RIF notice, the community was 7 distressed because laying off "one of the best teachers" "did not make any sense." (*Id.* ¶ 8.) In 8 contrast, Clara was taught by a grossly ineffective second grade teacher who spent an inordinate 9 amount of classroom time throwing parties rather than teaching. (Monagas Decl. ¶ 6, Ex. D at 57:25-10 58:23, 58:24-59:12, 62:14-23, 67:20-68:10.) Clara's parents and the parents of other students 11 complained to the school principal, who advised them that her "hands were tied." (L. Campbell Decl. 12 ¶ 12.) Clara struggled with many subjects and—after she was assigned to an effective teacher in third 13 grade—her standardized test scores skyrocketed from where they had been in second grade. (*Id.* ¶ 8.) 14 Clara's family has not yet determined where Clara will attend middle school,[14] but Clara and her 15 family fear that she is a substantial risk of being taught by another grossly ineffective teacher if she 16 decides to enroll in a traditional district school. (C. Campbell Decl. ¶ 10; L. Campbell Decl. ¶ 17.)

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6. **Herschel Liss**

18 Herschel Liss, a White ten-year old, also lives in Encino, California and attends school with 19 Clara Grace Campbell. (Declaration of Herschel Liss ("H. Liss Decl.") ¶¶ 1-4.) Herschel's family 20 has not yet determined where he will attend middle school and is considering Gaspar de Portola 21 Middle School, a traditional district school that has a predominately minority and socio-economically 22 disadvantaged student population. (Declaration of Lisa Liss ("L. Liss Decl.") ¶ 6; Ring-Dowell Decl. 23 ¶ 21, Ex. S.) Herschel has been fortunate thus far and has not been assigned to a grossly ineffective 24 teacher; however, Herschel's older brother was taught by a grossly ineffective teacher in a traditional

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26 [14] State Defendants contend that Clara Grace Campbell "will either attend a LAUSD charter middle 27 or join her older brother and sister at the private Chaminade College Preparatory School." (SDMSJ at p. 10.) But when State Defendants' counsel asked Clara Grace Campbell's mother 28 about this issue, she stated that she is "considering everything," including traditional district schools. (Monagas Decl. ¶ 6, Ex. D at 18:22-24.)

district school in LAUSD, and Herschel and his family are aware of Clara's experiences with a grossly ineffective teacher. (H. Liss Decl. ¶¶ 1-3; Monagas Decl. ¶ 17, Ex. O at 48:7-50:20, 52:13-19, 80:8-82:8, 84:1-89:6, 95:18-24.) They also have witnessed effective teachers receive RIF notices. (H. Liss Decl. ¶ 4; L. Liss Decl. ¶ 8.) As a result, Herschel justifiably fears that he will be taught by a grossly ineffective teacher if he remains in a traditional district school. (H. Liss Decl. ¶¶ 4-5.)

7. Raylene Monterroza

Raylene Monterroza, an Hispanic, socio-economically disadvantaged fifteen-year old student, lives in Pomona, California. (Declaration of Raylene Monterroza ("R. Monterroza Decl.") ¶¶ 1-4.) She loves to read novels and write stories, and aspires to study English in college. (*Id.* ¶ 5.) In order to reach that goal, Raylene has taken multiple courses at a private school for gifted students during her summer breaks. (*Id.* ¶ 14.) She currently attends a charter high school and previously attended traditional district schools in the Pasadena Unified School District and the Long Beach Unified School District. (*Id.* ¶ 6.) Raylene was unfortunate enough to have been taught by three grossly ineffective teachers while at traditional district schools. Her fifth-grade teacher, for example, often spoke about personal and inappropriate subjects to her elementary-school class and once threw an overhead projector in the direction of her students out of anger. (*Id.* ¶¶ 7-8; Monagas Decl. ¶ 24, Ex. V at 20:25-21:12, 82:15-20.) During middle school, Raylene's physical education teacher wasted large portions of the class, "ignored" his students, and told them they would not "amount to anything" and would "end up in jail." (R. Monterroza Decl. ¶¶ 9-10.) And in high school, Raylene was assigned to a grossly ineffective teacher who lacked any ability to control her classroom. (*Id.* ¶ 11.) Raylene has been taught by effective teachers as well, but at least one of those teachers received a RIF notice and was laid off because of his lack of seniority. (*Id.* ¶¶ 12-13.) Raylene would like to return to a traditional district high school that her friends attend, but she fears she would be assigned to yet another grossly ineffective teacher if she were to do so. (*Id.* ¶ 17.)

8. Kate Elliott

Kate Elliott lives in San Carlos, California and is a White senior at a traditional district high school in the Sequoia Unified High School District. (Declaration of Kate Elliott ("K. Elliott Decl.") ¶ 3.) Kate is an avid participant in extracurricular activities, hopes to attend Stanford University, and

envisions that she may someday become an architect. (*Id*. ¶¶ 5-6; Monagas Decl. ¶ 15, Ex. M at 27:10-28:19, 45:2-20.) The majority of Kate's teachers have been effective, yet she was assigned to a grossly ineffective science teacher during middle school. (K. Elliott Decl. ¶¶ 7-8.) Rather than engaging and challenging the students, her teacher wasted classes playing YouTube videos, instituting "coloring time" for her eighth-grade students, and playing with the classroom pets. (*Id*. ¶ 8; Monagas Decl. ¶ 14, Ex. L at 18:1-21:6.) The teacher even delegated her teaching duties to other eighth-grade students. (K. Elliott Decl. ¶ 8.) And when Kate expressed her frustrations with the principal and other teachers at her school, she learned that school officials were already well aware of her teacher's deficiencies. (*Id*. ¶¶ 9-10; Monagas Decl. ¶ 14, Ex. L at 22:8-24:23.) Because of this teacher, Kate fell behind in science and spent considerable time and effort trying to catch up. (K. Elliott Decl. ¶ 11.) As she prepares to attend college, Kate fears—based on previous experience—that one or more of the teachers that might teach her this year will be grossly ineffective, and that she will enter college at a competitive disadvantage as a result. (*Id*. ¶¶ 15-16.)

F. This Lawsuit

Plaintiffs allege that the Challenged Statutes are unconstitutional on their face and as-applied for two reasons: (1) they have a "real and appreciable impact" on students' constitutional right to equal educational opportunity, a right that the California Supreme Court has declared to be fundamental in California and protected by the Equal Protection Clause of the California Constitution; and (2) they have a disparate and devastating impact on poor and minority students in California, treating those well-recognized suspect classes of students unequally. (See *Serrano I*, *supra*, 5 Cal.3d at pp. 608-609; *Butt v. California* (1992) 4 Cal.4th 668, 685-686.) Based on the wealth of evidence that Plaintiffs have amassed thus far (a fraction of which is presented above), and the history of similar California cases that have succeeded under similarly dire circumstances, Plaintiffs respectfully request that this Court deny the Movants' summary judgment motions and allow Plaintiffs the opportunity to present their claims at trial for adjudication on the merits.

III. STANDARD OF REVIEW

Summary judgment must be denied unless "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law." (Code. Civ. Proc. § 437c(c).) The summary judgment procedure is "drastic and should be used with caution in order that it may not become a substitute" for trial. (*Roger H. Proulx & Co. v. Crest-Liners, Inc*. (2002) 98 Cal.App.4th 182, 195.) The moving party "bears the burden of persuasion that there is no triable issue of material fact." (*Id.* at p. 194 (citing *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850).) The moving party also bears the "burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Ibid*.) "Accordingly, declarations of the moving party are strictly construed, those of the opposing party are liberally construed, and doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party." (*Roger H. Proulx & Co.*, *supra*, 98 Cal.App.4th at p. 195.)

Similarly, summary adjudication is a "severe remedy" and must be denied if a triable issue of material fact exists. (*Everett v. Super. Ct.* (2002) 104 Cal.App.4th 388, 391-392; Code Civ. Proc. § 437c(f)(1).) "[D]oubts about the propriety of granting the motion should be resolved in favor of the opposing party." (*Everett*, *supra*, 104 Cal.App.4th at p. 392 [citation omitted].)

IV. ARGUMENT

This is not the first equal protection challenge to California's educational statutes and it would not be the first such case to go to trial. In a similar challenge more than forty years ago, the California Supreme Court recognized that a child's right to education is a fundamental interest guaranteed by the California Constitution. (*Serrano I*, *supra*, 5 Cal.3d at p. 609; 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 II*, *supra*, 18 Cal.3d at pp. 767-768; 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 fundamental right to education guarantees that "all 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." (*O'Connell v. Super. Ct.* (2006) 141 Cal.App.4th 1452, 1482; see also *Serrano I*, *supra*, 5 Cal.3d at pp. 605-606.)

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*, *supra*, 4 Cal.4th at p. 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 *S.F. 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."].) And when the State's laws infringe on the fundamental right to educational opportunity, as they do 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 *Serrano*, the Superior Court held a 60-day trial to determine whether the State's educational funding laws violated California students' fundamental right to education, making 299 findings of fact and 128 conclusions of law. (*Serrano II*, *supra*, 18 Cal.3d at p. 736.) Yet Movants attempt to dispose of this case without any trial at all, making many of the same arguments this Court already rejected at the demurrer stage and many of the same arguments that were rejected in *Serrano* itself. Movants' own arguments, however, highlight several of the *many* material facts that the parties vigorously dispute—facts that must be resolved at trial—including:

- Whether the Challenged Statutes "treat" students in California uniformly (IMSJ at p. 2);
- Whether there is a "causal relationship between the statutes and . . . the purported harm" to students' fundamental right to education (IMSJ at p. 2; SDMSJ at pp. 14-15);
- Whether "independent" decisions of districts, parents, and teachers—rather than the Challenged Statutes—are causing the harm that students are suffering (IMSJ at p. 24);
- Whether the relationship between the Challenged Statutes and the violation of Plaintiffs' fundamental right is "unintended, indirect, and attenuated" (IMSJ at p. 2; SDMSJ at p. 14);
- Whether districts have sufficient information about a teacher's effectiveness prior to the reelection deadline set forth in the Permanent Employment Statute (SDMSJ at p. 18 fn. 7);

- Whether the requirements imposed by the Dismissal Statutes are onerous, time-consuming, and costly enough to result in the retention of grossly ineffective teachers (IMSJ at p. 19);
- Whether a district's decision to pursue a small or a large number of dismissals depends on the burdens imposed by the Dismissal Statutes (IMSJ at p. 16);
- Whether "the vast majority of dismissal cases result in the teachers' voluntary resignation," thereby making it unnecessary to have a workable dismissal process (IMSJ at p. 23);
- Whether the LIFO Statute has qualifications and exceptions that are "significant" enough to ameliorate the harms posed by reverse-seniority layoffs (IMSJ at p. 7);
- Whether there must be an "inverse relationship" between experience and effectiveness for the LIFO Statute to result in the retention of grossly ineffective teachers (SDMSJ at p. 21);
- Whether grossly ineffective teachers are dispersed evenly across schools or are concentrated disproportionately in schools serving poor and minority students (SDMSJ at p. 26); and
- Whether the Challenged Statutes have contributed to Plaintiffs being assigned to grossly ineffective teachers and their risk of being assigned to such teachers in the future (IMSJ at p. 21).

In light of these and other critical factual disputes, Movants' motions for summary judgment only underscore the need for a trial in this case—just as a trial was needed to resolve the factual disputes in *Serrano* and many other historically significant facial constitutional challenges. (*See*, *e.g.*, *U.S. v. Virginia* (1996) 518 U.S. 515, 523; *Plyler v. Doe* (1982) 457 U.S. 202, 207; *Brown v. Bd. of Educ.* (1954) 347 U.S. 483, 494 n.10; *Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F. Supp. 2d 921, 929-932 [holding a trial to resolve "significant disputed factual questions" about the constitutionality of California's ban on same-sex marriage, Proposition 8].) Accordingly, Plaintiffs respectfully request that the Court deny the motions for summary judgment and permit Plaintiffs the opportunity to prove their constitutional claims at trial.

A. A Trial Is Required To Determine Whether The Challenged Statutes Are Facially Unconstitutional.

Plaintiffs allege, and will prove at trial, that the Challenged Statutes are facially unconstitutional for two independent reasons: (1) they impose a "real and appreciable impact" on students' fundamental right to education (*Butt*, *supra*, 4 Cal.4th at pp. 685-686; see also *Fair Political Pracs. Com. v. Super. Ct. of L.A. County* (1979) 25 Cal.3d 33, 47); and (2) they have a disparate adverse impact on poor and minority students (*Sakotas v. W.C.A.B.* (2000) 80 Cal.App.4th 262, 271;

Serrano I, *supra*, 5 Cal.3d at pp. 596-619). Movants attempt to dispose of these claims on summary judgment by misstating legal standards, ignoring binding California precedents, and glossing over key disputes of material facts. This Court should reject their flawed efforts to avoid trial.

1. Claims 1-3: The Challenged Statutes Violate Equal Protection Because They Infringe Students' Fundamental Right To Education.

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.*, *supra*, 25 Cal.3d at p. 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.) Intervenors *agree* that this Court can conduct a strict scrutiny analysis *only* through the presentation of evidence at trial. (IMSJ at p. 12 ["Plaintiffs' claims must be dismissed *unless* they can demonstrate [that strict scrutiny applies]." [emphasis added]]; see also, e.g., *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 359.) Because application of strict scrutiny is required in this case, Movants' summary judgment motions should be denied for that reason alone.

a. The Text Of The Statutes Alone Does Not Resolve Plaintiffs' Claims.

To avoid trial, Movants contend that Plaintiffs' facial "fundamental right" claims (Claims 1-3) fail because, according to Movants, the text of the Challenged Statutes is neutral and does not classify between students. (IMSJ at pp. 15-16; SDMSJ at p. 12.) Movants argue that the text of the statutes deals only with *teachers*, not students at all. (IMSJ at pp. 9-10; SDSMJ at pp. 13, 15.) Movants also argue that Plaintiffs' claims should be denied without trial because the text of the Challenged Statutes

does not expressly *require* the violation of students' right to education or *prohibit* the furtherance of students' interests. (See, e.g., IMSJ at p. 19 ["None of the challenged statutes on its face *prohibits* districts from terminating 'grossly ineffective' teachers . . . . Nor do the dismissal statutes *require* school districts to retain 'grossly ineffective' teachers."] [emphasis added]; SDMSJ at p. 17 ["[T]he Challenged Statutes do not impose any *requirements* on school districts"] [emphases altered].)[15] These arguments ignore binding California decisions that require this Court to look beyond the text of the statutes.

As this Court already recognized in rejecting these same arguments on demurrer (Ring-Dowell Decl. ¶ 25, Ex. W at p. 3 ["These are sufficient facts to allege a facial equal protection challenge to the Challenged Statutes arising out of their actual procedural scheme."] [citation omitted]; *id.* ¶ 26, Ex. X), courts in California do not confine themselves to the text of a statute when determining whether the statute is facially unconstitutional.[16] Rather, as the name of the Supreme Court's test implies, it is the statute's "real and appreciable *impact*" that matters. Courts therefore routinely consider evidence beyond the statutory text itself to determine whether the statute *in fact* results in an unconstitutional deprivation of fundamental rights. (See *Gould v. Grubb* (1975) 14 Cal.3d 661, 669 fn. 9 ["It is the unequal *effect* flowing from the [challenged law] that gives rise to the

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[15] Even as a purely factual matter, this argument fails because it ignores the many requirements and prohibitions that the Challenged Statutes, on their face, impose on school districts. The Challenged Statutes set forth a complex set of requirements relating to, among many other things, when districts must notify probationary teachers of reelection decisions (§ 44929.21); the consequences of failing to meet notification deadlines (*ibid.*); when districts must issue "notices of unsatisfactory performance" (*ibid.*); when districts must file statements of charges (*ibid.*); the timing of CPC hearings (§ 44934); the composition of the CPC panel (§ 44944); the type of evidence that may be introduced at CPC hearings (*ibid.*); teachers' ability to appeal CPC decisions (*ibid.*); the district's obligation to pay the teachers' attorney's fees when dismissal is not achieved (*ibid.*); and the district's obligation to lay off its least senior teachers during RIFs (§ 44955). Regardless of whether the Challenged Statutes require or prohibit specific teacher employment decisions, they prescribe the very requirements and prohibitions that prevent school districts from making teacher employment decisions that serve the best interests of their students.

[16] State Defendants cite *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218, for the proposition that "the standard for a facial constitutional challenge to a statute is exacting" and "consider[s] only the text of the measure itself." (SDMSJ at p. 17.) In fact, however, the Court in *Today's Fresh Start* explained that the standard for a facial challenge is "the subject of some uncertainty" and expressly declined "to settle the precise formulation." (*Today's Fresh Start*, *supra*, 57 Cal.4th at p. 218.)

equal protection issue in question"] [emphasis added]; *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."]; see also *Griffin v. Illinois* (1956) 351 U.S. 12, 23 (conc. opn. of Frankfurter, J.) ["Law addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal"].)

The California Supreme Court has emphasized the importance of external evidence and practical considerations in determining the facial constitutionality of a statute. For example, the statutes that comprised the school financing system at issue in *Serrano I* were facially neutral,[17] 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.*

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[17] The public education financing scheme at issue in *Serrano I*, *supra*, 5 Cal.3d at pp. 594-595 consisted of several components that—on their face—applied neutrally to all districts (and even appeared to provide less wealthy districts with extra financial support): (1) basic aid, which was distributed "on a uniform per pupil basis to all districts;" (2) equalization aid, which was provided only to poorer school districts; and (3) local real property taxes, which each district could levy at whatever rate it selected, commensurate with the "willingness of the district's residents to tax themselves for education." (*Serrano I*, *supra*, 5 Cal.3d at pp. 592, 598.) The court recognized that although these seemingly-neutral laws distributed basic aid "equally to all pupils" and permitted each "district to choose how much it wish[ed] to spend on the education of its children," the system as a whole nevertheless violated the equal protection clause because "fiscal freewill" was "a cruel illusion" for poorer districts. (*Id*. at p. 611.)

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."].)

Likewise, in *Somers v. Superior Court* (2009) 172 Cal.App.4th 1407, 1411-1412, the plaintiff challenged the constitutionality of a law that required California-born transgendered individuals seeking changes of gender on their birth certificates to file petitions in their counties of residence. Plaintiff alleged—and the court agreed—that the statutory provision at issue violated the equal protection rights of California-born transgendered individuals who lived out-of-state because it "effectively" denied them the right to obtain new birth certificates. (*Id.* at pp. 1414-1416.) Crucially, although the statute "on its face [did] not appear to create a class of petitioners that [was] treated differently, the [statute] . . . *act[ed]* to deny the rights created under the statute" to California-born transgendered individuals who lived out-of-state. (*Id.* at p. 1414 [emphasis added].)

Indeed, when an equal protection challenge is premised on the infringement of a fundamental right, rather than a suspect classification, the law at issue is often facially neutral. In *Bullock v. Carter* (1972) 405 U.S. 134, 144-145, for example, the U.S. Supreme Court held that a law requiring *all* political candidates to pay election filing fees was unconstitutional under the federal Equal Protection clause, despite the fact that the statutory language at issue did not expressly distinguish between individuals or classify groups of individuals. The *Bullock* court held that the filing fee requirement, the "initial and direct impact" of which was "felt by aspirants for office, rather than voters," nonetheless violated the equal protection rights of *voters* because it "tend[ed] to deny some voters the opportunity to vote for a candidate of their choosing." (*Id.* at pp. 142, 144 ["This disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause"].) It would "ignore reality," the court held, to overlook the fact that the "limitation . . . [fell] more heavily on the less affluent segment of the community." (*Id.* at p. 144.)

Similarly, in *Gould*, the California Supreme Court was asked to "determine the constitutionality of an election procedure which automatically afford[ed] an incumbent, seeking reelection, a top position on the election ballot." (*Gould*, *supra*, 14 Cal.3d at p. 664.) Even though

the statute itself said *nothing* about voters, the Court applied strict scrutiny and struck down the law because it "impose[d] a very real and appreciable impact on the *equality, fairness and integrity of the electoral process*," thereby infringing the equal protection rights of voters. (*Id.* at p. 670 [emphasis added].) As the Court explained, by providing "advantageous positions" to certain candidates, the election procedure "inevitably discriminate[d] against *voters* supporting all other candidates." (*Id.* at 664 [emphasis added]; see also *Choudhry v. Free* (1976) 17 Cal.3d 660, 664 ["Because the right of franchise is fundamental in character," strict scrutiny applies where a statute "has a real and appreciable impact upon the equality, fairness and integrity of the electoral process."].)

Indeed, *Gould* illustrates perfectly how this Court should evaluate Plaintiffs' facial constitutional claims in this case. Even if the text of the Challenged Statutes regulates only *teachers*, the statutes impose a "very 'real and appreciable impact' on the equality, fairness and integrity of the [public education system]," "inevitably discriminat[ing] against [certain *students*]." (*Gould*, *supra*, 14 Cal.3d at pp. 664, 670.) To the extent Movants contend that all students are "treated" equally under the purportedly "uniform" Challenged Statutes (IMSJ at pp. 13-14), that is a disputed issue of material fact requiring this Court to examine the "practical" consequences of the statutes at trial. (See, e.g., *id.* at p. 664 [reaching its decision "[a]fter a full evidentiary presentation at trial"]; *Serrano II*, *supra*, 18 Cal.3d at p. 756.) And to the extent Movants contend that the Challenged Statutes survive equal protection scrutiny because there is no way to know in advance *which* students will be injured (IMSJ at p. 16), that is no different from the situation in *Bullock* and *Gould*, in which there was likewise no way to know in advance *which* voters would have their votes "diluted" by the unfairness of the electoral system.[18] (*Gould*, *supra*, 14 Cal.3d at p. 670.) As *Serrano*, *Somers*, *Bullock* and *Gould* make clear, it is immaterial whether the text of the Challenged Statutes expressly classifies students or "treat[s]" them disparately; what matters is that a subset of California's students

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[18] State Defendants similarly argue that a statute cannot be subject to an equal protection challenge based on infringement on a fundamental right unless the statute itself identifies the particular "class of persons" whose rights are being denied, citing *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220. (SDMSJ at p. 13.) But the proposition discussed in that case was "limited to bond elections" until *Guardino* announced that it "applies equally to tax elections." (*Guardino*, *supra*, 11 Cal.4th at p. 258.) Courts in California have not extended the logic of *Guardino* outside of those limited bond and tax election contexts.

are being "effectively denied" their equal protection rights. (*Somers, supra*, 172 Cal.App.4th at p. 1415.) Plaintiffs have introduced more than enough evidence to show that the practical effect of the Challenged Statutes is to subject students to substantially unequal treatment. (See *supra* §§ II(C-E).) At a minimum, such evidence establishes a genuine issue of material fact requiring a trial.

b. The Challenged Statutes Have More Than An "Incidental" Effect On Students' Fundamental Right To Education.

Movants also contend that Plaintiffs' facial "fundamental right" claims (Claims 1-3) fail because the impact of the Challenged Statutes on students' fundamental rights is too "insubstantial" to justify heightened scrutiny. (IMSJ at p. 17.) Movants warn that, if heightened scrutiny applies in this case, then "every decision with any impact whatsoever on a student's education . . . would be subject to strict constitutional scrutiny." (*Id*. at pp. 17, 23 fn. 13.) Thus, Movants urge this Court to apply "rational basis" review and uphold the Challenged Statutes without a trial. (IMSJ at pp. 17-18, 20; SDMSJ at pp. 13-15.) But again, Movants ignore binding California precedents and turn a blind eye to the abundant evidence that Plaintiffs have gathered.

To the extent this Court is inclined to decide at this stage in the proceedings which standard of scrutiny applies, the overwhelming evidence points to strict scrutiny. To meet the "real and appreciable impact" standard and trigger strict scrutiny, Plaintiffs need only prove that the Challenged Statutes have more than an "incidental" effect on the right at stake. (*Planning & Conservation League, Inc. v. Lungren* (1995) 38 Cal.App.4th 497, 506; see also *Hawn v. County of Ventura* (1977) 73 Cal.App.3d 1009, 1019 [holding that "real and appreciable impact" will be found, and heightened scrutiny applied, unless a law has "only minimal, if any, effect on the fundamental right"]; *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"].) As the factual presentation above makes clear, the Challenged Statutes have far more than a "minimal" or "incidental" effect on students' fundamental right to education—they impose "long-term harm to [students'] opportunity" (Monagas Decl. ¶ 28, Ex. Z at 48:14-49:10), causing them to experience "significantly lower achievement and gains in achievement" (Ring-Dowell Decl. ¶ 11, Ex. I at CA0001216; Hanushek Decl. ¶¶ 27-28, 30, 32), and disadvantaging them for the rest of their

1 lives, (Monagas Decl. ¶ 9, Ex. G at 203:25-204:14; *id.* ¶ 10, Ex. H at 403:16-21; *id.* ¶ 29, Ex. AA at
2 435:13-18.)

3 Indeed, Plaintiffs' evidence is far more compelling than the evidence presented in other cases
4 in which California courts have applied strict scrutiny. In *Gould*, *supra*, 15 Cal.3d at p. 668, for
5 example, the court applied strict scrutiny based on a showing that preferential ballot placement
6 constituted one "factor" affecting the outcome of "municipal elections"—not the sole factor or even
7 the primary factor. Moreover, the *Gould* court reached that conclusion even though the plaintiffs did
8 not introduce *any* evidence specific to the city whose ordinance was being challenged. (*Id.* at pp.
9 667-668 ["[N]one of the petitioners' witnesses had conducted statistical studies on past Santa Monica
10 elections . . . . [I]n the absence of any evidence to the contrary, the trial court could properly infer
11 that the experts' general findings applied to Santa Monica elections."].) And in *Serrano II*, *supra*, 18
12 Cal. 3d 744, the court held that plaintiffs' evidence warranted strict scrutiny because it demonstrated
13 a "relationship" between the "cost and the quality of educational opportunities afforded," such that
14 the statutes at issue "affect[ed]" and "touch[ed] upon the fundamental interest of education."
15 (*Serrano II*, *supra*, 18 Cal.3d at pp. 748, 766, 776; see also *id.* at p. 745 [applying strict scrutiny even
16 though the statutes created only a "potential disparity" in educational opportunities].) There can be
17 no possible dispute that the Challenged Statutes here are a "factor" that "affects" students'
18 fundamental right to education; thus, strict scrutiny unquestionably applies.

19 Nor should this Court be swayed by Movants' professed concern that application of strict
20 scrutiny in this case would result in strict scrutiny being applied to "every decision" affecting a
21 "particular school," "a particular teacher," or a "district's resource allocation." (IMSJ at pp. 17, 23
22 fn. 13.) The defendants in *Serrano I* pointed to the same parade of horribles, arguing that the court's
23 application of strict scrutiny would result in the "destruction of local government." (*Serrano I*, *supra*,
24 5 Cal.3d at p. 614.) But the court "unhesitatingly reject[ed] this argument." (*Ibid.* ["We cannot share
25 defendants' unreasoned apprehensions of such dire consequences"]; see also *id.* at p. 599 fn. 13
26 [rejecting defendants' comparison to the subsidized lunch program because—unlike the challenged
27 financing scheme—the "[a]vailability of an inexpensive school lunch can hardly be considered of . . .
28 constitutional significance"].) As the court explained, the decision whether to apply strict scrutiny

must be made on a case-by-case basis and is appropriate whenever the law at issue "clearly affects the fundamental interest of the children of the state in education." (*Serrano II*, *supra*, 18 Cal.3d at 766 fn. 45.) It is difficult to imagine laws that more "clearly affect[ ] the fundamental interest of the children of the state in education" (*ibid.*) than the Challenged Statutes, which have a direct and substantial impact on school districts' ability to place students in classrooms with effective teachers.

If, however, this Court is disinclined to announce at this stage in the litigation that strict scrutiny applies, then it should find that the applicable standard of scrutiny—which turns on whether the Challenged Statutes have a "real and appreciable impact" on students' fundamental right to education—is *itself* a disputed factual question to be adjudged at trial. Other courts that have considered the "real and appreciable impact" test have reserved decision on the applicable level of scrutiny until after trial. (See *Gould*, *supra*, 14 Cal.3d at p. 670 [applying strict scrutiny "[i]n light of the trial court's finding that candidates in the top ballot position receive a substantial number of votes simply by virtue of their ballot position"]; see also *Butt*, *supra*, 4 Cal.4th at pp. 687-688 [affirming trial court's finding that the closing of a district's schools would have a "real and appreciable impact" because plaintiffs introduced "evidence of . . . educational disruption"]; *Rittenband v. Cory* (1984) 159 Cal.App.3d 410, 417 [noting that the impact of the challenged statute was determined "[a]t trial"].) In *Gould*, for example, there was "a full evidentiary presentation at trial" involving "abundant expert testimony" and "extensive empirical studies," which established that a priority ballot position affords candidates an advantage and therefore has a "real and appreciable" impact on voters' fundamental right to vote. (*Id.* at pp. 664, 667-668, 670; see also *id.* at 664-665 [explaining that the extent to which the ordinance impacted voters' fundamental rights was a disputed "factual question" to "be resolved after trial" [citing *Mexican-American Political Assn. v. Brown* (1973) 8 Cal.3d 733, 734; *Diamond v. Allison* (1973) 8 Cal.3d 736]].)

c. The Connection Between The Challenged Statutes And Students' Fundamental Right To Education Is Not "Attenuated."

Movants also argue that the "causal relationship between the statutes and . . . the purported harm to Plaintiffs' fundamental interests . . . is too unintended, indirect, and attenuated to trigger strict scrutiny." (IMSJ at p. 2; see also SDMSJ at pp. 14-15.) They point to "numerous independent

decisions by school districts, students, and their families" that they say are *more* responsible than the Challenged Statutes for the infringement of students' fundamental right to education (IMSJ at p. 16), and contend that "none of the procedural and substantive requirements established by the challenged statutes is so onerous, time-consuming, or costly that the statutes on their face 'effectively' prohibit the dismissal of grossly ineffective teachers." (IMSJ at p. 19; see also SDMSJ at pp. 14, 19-20.) Again, Movants misrepresent the applicable legal standards and make arguments that should be reserved for trial.

The "real and appreciable impact" test does not demand a showing of strict causation. Plaintiffs need not prove that the Challenged Statutes are the sole cause, or even the "but for" cause, of the infringement on students' fundamental right to education. The California Supreme Court clarified this very point in *Gould*:

> The city asserts that because its ballot placement procedure does not ***cause*** or encourage voters to cast their ballots haphazardly, it cannot be held constitutionally responsible for any resulting inequality in the voting procedure. *This argument simply misconceives the nature of the equal protection guarantee*. . . . It is the unequal ***effect*** flowing from the city's decision to reserve the top ballot position for incumbents that gives rise to the equal protection issue in question in this case.

(*Gould*, *supra*, 14 Cal.3d 661, at p. 669 fn. 9 [emphasis added].) Similarly, in *Serrano II*, the school financing statutes at issue did not *cause* districts to tax themselves at rates that produced disparities in educational opportunity—districts could, after all, select whatever tax rate they desired. (*Serrano II*, *supra*, 18 Cal.3d at p. 742.) The court recognized, however, that "the system itself" imposed practical "limitations" on districts' ability to provide their students with equal educational opportunities. (*Id.* at p. 761; see also *Fair Political Practices Com.*, *supra*, 25 Cal.3d at pp. 46, 48 [applying strict scrutiny to statutory provision that did "not directly limit or restrict the right to petition," but still constituted a "significant interference" with a constitutional right].) Notwithstanding the nominal "decisions" that districts could make under the statutes, the court held that the "source of the[] disparities [was] unmistakable." (*Serrano II*, *supra*, 18 Cal.3d at p. 740 [quoting *Serrano I*, *supra*, 5 Cal.3d at p. 594].)

Movants in this case, like the defendants did in *Serrano*, pretend that the harms being suffered by students are the result of independent decisions being made by the school districts, rather than the

California Education Code.[19] (IMSJ at p. 20; SDMSJ at pp. 16-21.) But, as in *Serrano*, the school districts' discretion with respect to teacher employment decisions is a "cruel illusion" (*Serrano I*, *supra*, 5 Cal.3d at p. 611) because it is confined by the "limitations" of the Challenged Statutes; it is "the system itself" that is the "source of the[] disparities." (*Serrano II*, *supra*, 18 Cal.3d at p. 740.) The unequal *effect* flowing from the Challenged Statutes is that school districts are forced to make premature tenure decisions and then are prevented from dismissing grossly ineffective teachers—to the detriment of their students. (See Declaration of Kevin S. Reed ("Reed Decl.") ¶¶ 14-29, 38-40; Hanushek Decl. ¶¶ 42-67; Monagas Decl. ¶ 28, Ex. Z at 80:21-81:4, 87:25-88:12, 94:25-95:18, 107:11-24, 108:18-109:11, 122:1-5; *id.* ¶ 29, Ex. AA 427:13-428:1; *id.* ¶ 26, Ex. X at 131:10-22 ["impossible [to dismiss] because the teacher was tenured"].) Thus, the statutes have a "real and appreciable" impact on students' fundamental right to education.[20]

In any event, causation "is generally a question of fact" that should be reserved for trial. (*Hoyem v. Manhattan Beach City School Dist.* (1978) 22 Cal.3d 508, 520; see also *Boon v. Rivera* (2000) 80 Cal.App.4th 1322, 1334 ["Whether or not certain conduct . . . was a legal cause of injury

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[19] For example, State Defendants argue that a "school district's decision to . . . assign a teacher to a particular school or classroom is entirely independent of—and completely unconnected to—the Challenged Statutes." (SDMSJ at p. 17.) But State Defendants' argument ignores that the Challenged Statutes—by causing districts to reelect and retain grossly ineffective teachers—create the very pool of teachers from which districts make teacher assignment "decisions."

[20] Movants cite *King v. McMahon* (1986) 186 Cal.App.3d 648, to support their strict causation argument, but that case is not on point. (IMSJ at pp. 17, 21; SDMSJ at p. 14.) In *King*, the court held that there was *neither* a suspect class *nor* a fundamental right at issue. (*King*, *supra*, 186 Cal.App.3d at pp. 658-662.) Further, *King* explained that the outcome may have been different if the statute had "fall[en] with disproportionate *impact* upon children of a particular race, ancestry or national origin"—confirming that strict causation is not required. (*Id.* at p. 658 [emphasis added].) Similarly, in *Rittenband*, *supra*, 159 Cal.App.3d at pp. 418-419, cited by Intervenors (IMSJ at p. 17), the court held that the right to be employed as a judge is not a fundamental right under the California Constitution. Moreover, *Rittenband* does not support Intervenors' strict causation argument because, with respect to the fundamental rights of voters, the court explained that equal protection is violated when laws "dilute the effectiveness of the franchise *either directly or [indirectly]*." (*Id.* at p. 422 [emphasis added].) And the court pointed to education as an area where the California Supreme Court's equal protection jurisprudence is even *more* expansive than its federal counterpart. (*Id.* at 420 fn. 7 [citing *Serrano II*, *supra*, 18 Cal.3d at pp. 764-767].) Finally, Intervenors cite *City and County of San Francisco v. Freeman* (1999), 71 Cal.App.4th 869, 874, but that decision, too, is inapposite. (IMSJ at p. 17.) The court held that strict scrutiny was not warranted because the "legislature's decision not to *subsidize* the exercise of a fundamental right [did] not infringe the right." (*Id.* at p. 873 [citation omitted] [emphasis added].) Unlike plaintiffs in *Freeman*, Plaintiffs here do not seek a *subsidy* of any kind; only fair and equal access to educational opportunity.

1 [is] normally [a] question[] of fact."]; *Eric M. v. Cajon Valley Union School Dist.* (2009) 174
2 Cal.App.4th 285, 298 ["[C]ause of injury [is] a question of fact"].) Thus, to the extent this Court
3 believes that the "real and appreciable impact" test raises questions about the causal link between the
4 Challenged Statutes and the harm being inflicted on students (as Movants urge), that is yet another
5 reason to hold a trial.

6 **d. Plaintiffs Need Not Prove That All Students, Or Even Most Students, In**
7 **California Are Injured By The Challenged Statutes.**

8 Intervenors also argue that Plaintiffs cannot prevail on their facial challenge unless they
9 demonstrate that the Challenged Statutes "inevitably and in every application result in students'
10 assignment to 'grossly ineffective' teachers." (IMSJ at p. 18; see also SDMSJ at pp. 16-17.) That
11 argument, however, ignores the very nature of an equal protection challenge, which focuses on
12 "unequal" treatment. (*Cooley v. Super. Ct. of L.A. County* (2002) 29 Cal.4th 228, 253.) If every
13 student in California were assigned to a grossly ineffective teacher—as Movants contend is required
14 for a facial challenge—there would be no disparity in the quality of instruction provided to California
15 students and no equal protection violation. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 36 fn. 6 ["It is
16 only a disparity in treatment between equals which runs afoul of the California constitutional
17 mandate of equal protection of the laws."].) The Challenged Statutes "pose a present total and fatal
18 conflict" with students' fundamental rights (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084)
19 because they "inevitably" (*ibid.*) result in significant *disparities* in educational opportunity for
20 students throughout California, *not* because they result in every single student being assigned to a
21 grossly ineffective teacher.

22 Intervenors also make the related argument that Plaintiffs' facial challenge fails in light of
23 their admission that "the majority of teachers in California are providing students with a quality
24 education." (IMSJ at p. 18.) But, again, the Court already rejected that argument at the demurrer
25 stage. (See Monagas Decl. ¶ 32, Ex. DD at 26:21-22, 27:18-23 ["The Court doesn't understand the
26 importance of the discussion regarding number . . . . Are you suggesting the constitutionality is
27 affected by numerosity? An individual student doesn't have the right to . . . an education that is not
28 affected by a teacher who is grossly substandard?"].) 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, e.g., *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 . . . ."]; *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."].)

In the education context, the California Supreme Court has held that the State and its officers and agents violate the equal protection clause when some 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 pp. 686-687.) In *Serrano II*, *supra*, 18 Cal.3d at pp. 741-744, for example, the public education financing system created disparities in per pupil spending that penalized *a portion* of California students—those attending schools in poorer school districts—and denied them their 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 statutes have a "real and appreciable impact" on the public education system that results inexorably in *some* students being arbitrarily subjected to unequal educational opportunities. Plaintiffs have gathered a mountain of evidence that the Challenged Statutes inevitably lead to such results. (See *supra* §§ II(A), (C-D); Hanushek Decl. ¶¶ 42-67.) At a minimum, this is a disputed issue of material fact requiring a trial.

e. Even If This Court Decides That Rational Basis Review Applies, It Should Hold A Trial To Test The Fit Between The Means And Ends Of The Challenged Statutes.

Even if Movants were correct that the Challenged Statutes should be evaluated under rational basis review (which they are not), and even if this Court were prepared to make that decision at this early stage of the litigation, the Court should still hold a trial to resolve the countless disputed

material facts.[21] Rational basis review does not mean no review at all—the Challenged Statutes must still "bear[ ] a rational relation to some legitimate end." (*Romer v. Evans* (1996) 517 U.S. 620, 631.) The State's supposed rationales "must find some footing in the realities of the subject addressed by the legislation," (*Heller v. Doe* (1993) 509 U.S. 312, 321), and must be ones that could "reasonably be conceived to be true by the governmental decisionmaker." (*Vance v. Bradley* (1979) 440 U.S. 93, 111.) Further, the Challenged Statutes themselves must bear at least a rational relationship to the governmental objective—their relationship to the asserted goal may not be so attenuated as to render the Challenged Statutes arbitrary or irrational. (*City of Cleburne v. Cleburne Living Ctr., Inc.* (1985) 473 U.S. 432, 446.) Thus, the California Court of Appeal has explained that the constitutionality of statutes, even under rational basis review, should "be determined . . . by a trial." (*D'Amico v. Bd. of Medical Examiners* (1970) 6 Cal.App.3d 716, 727-728.)

2. Claims 4-6: The Challenged Statutes Violate Equal Protection Because They Impose A Disparate Burden On Poor And Minority Students.

In addition to the "real and appreciable impact" test described above, this Court should review the Challenged Statutes under a strict scrutiny analysis because the statutes have a disparate adverse impact on poor and minority students. As the California Supreme Court has repeatedly recognized, 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, 338, fn. 20; *Serrano I*, *supra*, 5 Cal.3d at pp. 596-619.)

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[21] Movants argue that the Challenged Statutes survive rational basis review because they serve legitimate goals—according to Movants, they provide districts with the "opportunity" to evaluate teachers' effectiveness and allow the school districts to ensure a "stable" and "motivated" workforce. (SDMSJ at p. 15 [citing *Bakersfield Elementary Teachers Assn v. Bakersfield City School Dist*. (2006) 145 Cal.App.4th 1260, 1293 fn. 20]; IMSJ at pp. 10 [same].) But those are disputed material facts that should be resolved at trial. (See, e.g., Monagas Decl. ¶ 9, Ex. G at 93:25-95:13, 109:21-110:21 ["[W]e don't have enough time to determine if a person is effective"], 177-7-8 ["[T]here's constant churn"]; *id.* ¶ 19, Ex. Q at 162:22-163:7 ["[Y]ou have constant churn"]; *id.* ¶ 8, Ex. F at 118:18-22 ["[I]t's demoralizing"].) In addition, Movants make no argument whatsoever about the *means* by which the Challenged Statutes seek to accomplish those goals—means that are unconstitutional in light of the severe and long-lasting harm they impose on *students*. (See *Turner v. Bd. of Trustees* (1976) 16 Cal.3d 818, 825 ["Our school system is established not to provide jobs for teachers but rather to educate the young."]; Monagas Decl. ¶ 9, Ex. G at 30:13-30:20 ["[T]he sole, primary and singular purpose of the Los Angeles Unified School District is to serve students . . . ."].)

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Movants contend that Plaintiffs' facial "disparate impact" claims (Claims 4-6) fail to trigger strict scrutiny because the text of the Challenged Statutes does not expressly draw distinctions between students on the basis of race or wealth, and because there is no evidence that the statutes were enacted (or are being applied) with the purpose or intent of harming minority or low-income students. (IMSJ at p. 12 ["disparate impact alone is insufficient"] [citing *Village of Arlington Heights v. Metro. Housing Dev. Corp.* (1977) 429 U.S. 252, 265; *Washington v. Davis* (1976) 426 U.S. 229, 242]; SDMSJ at p. 21 ["[P]laintiffs cannot establish the requisite element of discriminatory intent."].) But, whatever the federal rule might be, California courts do *not* require a showing of discriminatory intent provided there is a showing of disparate impact, as even the State Defendants are forced to admit. (See SDMSJ at p. 21 [acknowledging "exceptions"].) In fact, the California Supreme Court has made it clear that the California Constitution "demand[s] an analysis different from that which would obtain if only the federal standard were applicable." (*Serrano II*, *supra*, 18 Cal.3d at p. 764.)[22]

In *Serrano I*, the defendants made the very same argument that Movants make here—that "no constitutional infirmity [was] involved because the complaint contain[ed] no allegation of purposeful or intentional discrimination." (*Serrano I*, *supra*, 5 Cal.3d at pp. 600-601.) The court explained that the "whole structure of this argument must fall for want of a solid foundation in law or logic" because, *inter alia*, disparate impact is unconstitutional even where it is "merely de facto." (*Id*. at pp. 602-604 [citing *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 881; *S.F. Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 937].) Accordingly, the court held that the plaintiffs properly asserted constitutional claims based on the "substantial disparities" resulting from the school financing scheme at issue. (*Serrano I*, *supra*, 5 Cal.3d at p. 618; see also *Butt*, *supra*, 4 Cal.4th at p. 682 ["[U]nder California principles . . . the absence of purposeful conduct by the State [does] not

[22] Movants cite *Sanchez v. State of California* (2009) 179 Cal.App.4th 467, 487-488, for the proposition that a plaintiff may not prevail on a "suspect class" claim by establishing disparate impact, even in California. (IMSJ at p. 13; SDMSJ at p. 21.) But in *Sanchez*, it was undisputed that plaintiffs "ha[d] made no showing that the Regulation and the Statute disproportionately impact[ed] a protected class of people." (*Sanchez, supra*, 179 Cal.App.4th at p. 487.) And in *In re Marriage Cases* (2008) 43 Cal.4th 757, 839-841, also cited by Intervenors (IMSJ at p. 13), the court never stated that disparate impact was insufficient to state a "suspect classification" claim; instead, it merely held that the claims at issue were not predicated on disparate impact.

1 prevent a finding that the State system for funding public education had produced unconstitutional
2 results."] [citations omitted].)[23]
3 Likewise, in *Serrano II*—a decision issued after *Washington v. Davis* (1976) 426 U.S. 229—
4 the California Supreme Court affirmed its earlier holding. (See *Serrano II*, *supra*, 18 Cal.3d at pp.
5 765-766.) As the Court explained, "the fact that a majority of the United States Supreme Court ha[s]
6 now chosen to contract the area of active and critical analysis under the strict scrutiny test for federal
7 purposes can have no effect upon the existing construction and application afforded our own
8 constitutional provisions." (*Id.* at p. 765.) In fact, the court pointed out that, even though the
9 California Legislature had made "significant" and well-intentioned "improvements" to the State's
10 school financing scheme following the *Serrano I* decision, the amended school financing system *still*
11 was unconstitutional because of its disparate impact. (*Id.* at pp. 741, 768.)
12 Indeed, State Defendants acknowledge a number of the California Supreme Court decisions
13 that have recognized the validity of disparate impact claims. (SDMSJ at pp. 21-23 [citing *Serrano I*;
14 *Serrano II*; *Butt*; *Jackson*; *S.F. Unified*].) State Defendants attempt to distinguish these cases as
15 "exceptional circumstances." (SDMSJ at p. 22.) But not a single one of the Supreme Court decisions
16 cited by State Defendants purports to limit application of its "disparate impact" analysis to "extreme"
17 or "exceptional" circumstances. In any event, even if disparate impact claims could prevail only in
18 "exceptional circumstances," this action would present such an "exceptional" situation. Students
19 taught by grossly ineffective teachers are missing out on *half or more* of the learning that students
20 taught by average teachers receive in a school year. (Hanushek Decl. ¶ 11, Ex. B at p. 467; *id.* ¶ 28;
21 see also Monagas Decl. ¶ 9, Ex. G at 172:15-23 ["It is a catastrophe for kids' lives."]; *id.* ¶ 28, Ex. Z.
22 at 121:4-11 ["[Y]ou have parents and family members, caregivers, crying and pleading and begging.
23 Please, please, please keep this teacher. You don't understand what this year has been like for my
24 child. This is one of the most extraordinary educators I've ever seen in my life. And they're
25 begging. And I can't honor their request."].) Surely, such an extreme disparity exemplifies the type
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[23] State Defendants assert that *Serrano I* "expressly found discriminatory intent," making the disparate impact discussion *dicta*. (SDMSJ at p. 22.) Not so. In fact, the court "decline[d] to attach an oversimplified label to the complex configuration of public and private decisions which ha[d] resulted in the" allocation of educational funds. (*Serrano I*, *supra*, 5 Cal.3d at p. 604.)

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of "educational disruption" condemned by the very cases that State Defendants cite. (See *Butt*, *supra*, 4 Cal.4th at p. 687 [finding a constitutional violation where students faced the loss of less than "one-fifth" of the standard school year].) Thus, even under State Defendants' own standard, Plaintiffs state valid disparate impact claims that warrant strict scrutiny.

3. Claims 3 and 6: Plaintiffs' Facial Challenges To The LIFO Statute Are Proper Notwithstanding The Statute's "Equal Protection" Exception.

State Defendants argue that the LIFO Statute cannot be facially unconstitutional because it contains a built-in "equal protection" exception. (SDMSJ at p. 20 [citing Section 44955, subd. (d)(2)].) That enigmatic and indeterminate 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. . . . [T]he *substance* of the [challenged statute] must be evaluated on its merits, quite apart from any legislative declaration designed to address expressed constitutional concerns."]; *Hunt v. City of L.A.* (C.D. Cal. 2009) 601 F.Supp.2d 1158, 1171 ["[T]he use of part of a legal standard [in a statute] does not, in and of itself, exempt a statute" from constitutional review]; *Nat. People's Action v. Blue Island* (N.D. Ill. 1984) 594 F.Supp. 72, 79-80 ["[T]he exemption in the present ordinance alludes to state and federal law and constitutions, thereby referring to a vast and diverse body of law as guidance for the potential canvasser. Such a general exemption does not sufficiently inform canvassers of the activity for which a permit is required."].) The Court of Appeal's decision in *Reed v. United Teachers L.A.* (2012) 208 Cal.App.4th 322, 327, reveals the hopeless vagueness of the LIFO "equal protection" exception and the substantial difficulties school districts face when trying to invoke it: *Reed* requires school districts to engage in a full-blown trial on the merits to determine whether the exception justifies violating a teacher's statutory "seniority rights." (*Id.* at p. 338.)

In fact, there is no evidence that *any* school district in California has *ever* tried to invoke the subdivision (d)(2) "equal protection" exception because it is so vague as to be, in all practicality, meaningless. (Avila Decl. ¶ 2, Ex. A at No. 14 ["This provision of Education Code section 44955 has not been interpreted and there is little guidance regarding its application."]; Ring-Dowell Decl.

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¶ 7, Ex. F at No. 4; see also Monagas Decl. ¶ 25, Ex. W at 77:19-22 [admitting that the State has not interpreted the exception].) And Intervenors have exploited the vagueness in the statute, arguing that the exception protects only the equal protection rights of *teachers*, not students. (Lipshutz Decl. ¶ 4, Ex. B at *59-60 ["[S]ubsection (d)(2)'s narrow exception to teacher seniority rights . . . was intended to permit school districts to accommodate constitutional concerns regarding the race and ethnicity of *teachers*, not to address minimal educational standards for students."] [citation omitted] [emphasis in original].) The exception therefore does nothing to ameliorate the real and appreciable impact that the LIFO Statute has on students' fundamental rights and cannot be a basis for avoiding a trial.[24]

4. Claims 3 and 6: Plaintiffs' Challenges To The LIFO Statute Are Ripe.

Intervenors argue that Plaintiffs' claims regarding the constitutionality of the LIFO Statute (Claims 3 and 6) are not ripe because "there is no evidence that any school district attended by any Plaintiff intends to implement a RIF in the reasonably foreseeable future" and that, even if it were foreseeable that a RIF would occur, it is not known which schools or teachers would be affected. (IMSJ at pp. 25-26.)

California courts, however, do not demand the level of certainty that Intervenors describe. (See *Vandermost v. Bowen* (2012) 53 Cal.4th 421, 463-464 [holding that petition to determine the effect of a proposed referendum was ripe even though it was not yet known whether the referendum would qualify for the ballot]; see also *Coral Const. Inc. v. City & County of S.F.* (2004) 116 Cal.App.4th 6, 25-26 [holding that case was "definite and concrete" where evidence showed that contractor would bid on a project "sometime in the relatively near future."]; *Serrano II*, *supra*, 18 Cal.3d at p. 757 ["To ask, as defendants do, that we defer our notice of such probable future disparities to the time of their actual occurrence is to ask that we ignore inherent defects in the system which we are called upon to examine."].) Nor are Plaintiffs required to identify *specific* schools or *specific* teachers that will be laid off during the 2014-15 school year in order to present concrete and

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[24] Movants also contend that Plaintiffs' challenge to the LIFO Statute is invalid unless Plaintiffs can prove there is an "inverse correlation" between a teacher's seniority and effectiveness. (IMSJ at p. 16; SDMSJ at p. 21.) That is obviously false. (See Declaration of Dan Goldhaber ¶¶ 36-45.) At a minimum, it is a question of fact to be resolved at trial.

justiciable claims. In *Coral Construction*, *supra*, 116 Cal.App.4th at pp. 9-10, for example, a contractor who had bid on a city contract challenged the constitutionality of an ordinance that provided preferential treatment to women- and minority-owned businesses. Like Intervenors, defendants in *Coral Construction* argued that the contractor's challenge was not ripe because the contractor could not identify a "*specific* contract" on which he intended to bid in the near future. (*Id.* at pp. 25-26 [emphasis in original].) The court rejected defendants' argument and held that the claims were justiciable; even though the contractor had not identified a specific future contract at issue, his lawsuit presented more than a "general, abstract challenge" to the rules that would govern the future bidding process. (*Id.* at p. 26.)

Plaintiffs have introduced abundant evidence to establish that RIFs are likely to occur in California during the 2014-15 school year and in other years in the near future, including in one or more of Plaintiffs' districts. For example, Plaintiffs have introduced evidence demonstrating that LAUSD has issued thousands of RIF layoff notices in almost every year since the 2009-10 school year, and that OUSD has issued RIF layoff notices in three of the last four school years. (Avila Decl. ¶ 2, Ex. A at No. 1; Ring-Dowell Decl. ¶ 17, Ex. O; Monagas Decl. ¶ 19, Ex. R at 368:1-370:6.) These repeated instances of past harm are highly relevant to the likelihood of future occurrences. (See, e.g., *Coral Const. Inc.*, *supra*, 116 Cal.App.4th at p. 24; *Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 300.) Although school districts in California have not yet announced whether layoffs will be required for the 2014-15 school year, the evidence shows that districts will not make that determination until shortly before the March 15, 2014 layoff notification deadline. (Ramanathan Decl. ¶¶ 15-19.) Neither LAUSD nor OUSD has ruled out the possibility that RIFs will be necessary for the coming school year (Monagas Decl. ¶ 10, Ex. H at 412:1-23 ["[I]t is way premature to answer" whether LAUSD will implement RIFs during the 2014-15 school year]); to the contrary, districts in California are likely to enact RIF layoffs for the coming school year and in future school years, either "for budgetary reasons or to address a mismatch in the district's teacher and student populations." (IMSJ at p. 6 [citations omitted]; Ramanathan Decl. ¶¶ 27-30.).

Moreover, there is nothing insufficiently concrete about Plaintiffs' claims. There is no question, for example, that the LIFO Statute will apply to the next round of RIFs, just as it applied in

previous rounds, thereby preventing districts from taking teacher effectiveness into account and resulting in layoffs that are not in the best interests of students. (PSS at Nos. 43-47.) There is also no question that the next round of RIFs (like all previous rounds) will have a disproportionate adverse effect on schools serving predominantly poor and minority schoolchildren, where teachers with lower seniority are congregated. (Deasy Decl. ¶ 12, Ex. C at Nos. 22-24, 26; Monagas Decl. ¶ 9, Ex. G at 173:14-25, 180:3-14; *id.* ¶ 28, Ex. Z at 108:8-109:22; Ring-Dowell Decl. ¶ 6, Ex. D at Nos. 22-23; Ramanathan Decl. ¶¶ 7-10, 44-47, 56-59.)

In any event, there is no question that Plaintiffs' challenges to the LIFO Statute *were* ripe at the time Plaintiffs filed their lawsuit in May 2012. At that time, both LAUSD and OUSD (as well as nearly every other school district in California) were confronting imminent RIFs that had already been announced for the 2012-13 school year, as well as a substantial likelihood that RIFs would occur during the following 2013-14 school year. (Monagas Decl. ¶ 19, Ex. G at 122:7-10 ["[W]e are currently in the process of pursuing a reduction in force"]; Avila Decl. ¶ 2, Ex. A at No. 1; Ring-Dowell Decl. ¶ 17, Ex. O.) And, in fact, there were a substantial number of layoffs across the State in both of those years. (Ramanathan Decl. ¶¶ 20-26.) Thus, Intervenors' argument is properly viewed as a mootness argument, which fails because Plaintiffs' injuries are capable of repetition yet evade review.[25] (*K.G. v. Meredith* (2012) 204 Cal.App.4th 164, 175 ["[T]here is a reasonable likelihood the alleged violations will continue to affect other" plaintiffs."]; *Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 1022, 1034 [finding controversy to be timely where there was a "likely recurrence of a similar controversy"].) Only a few months separate the announcement of RIF layoffs each year in March and the completion of layoffs in May—not nearly enough time to litigate the constitutionality of the LIFO Statute. (Ramanathan Decl. ¶¶ 15-19.)[26]

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[25] Mootness and ripeness are two sides of the same coin. (See Fletcher, J. *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 Cal. L. Rev. 263, 295 (1990).)

[26] Plaintiffs' claims also present "issues of broad public interest" because the LIFO Statute has a devastating impact on the fundamental right to education for thousands of California students. This, too, would entitle the Court to retain jurisdiction even if Plaintiffs' claims were untimely (which they are not). (See, e.g., *Bullis Charter School*, *supra*, 200 Cal.App.4th at p. 1033; *Cal. Correctional Peace Officers Assn. v. State of Cal.* (2000) 82 Cal.App.4th 294, 303-304; *Abbott Ford, Inc. v. Super. Ct.* (1987) 43 Cal.3d 858, 869, fn. 8.)

5. <u>Claims 2 and 5</u>: **Plaintiffs' Equal Protection Challenges To The Dismissal Statutes Are Not Moot Because Governor Brown Vetoed AB 375.**

Intervenors argue that AB 375 would have "moot[ed] Plaintiffs' claims regarding" the Dismissal Statutes (Claims 2 and 5). (IMSJ at pp. 26-27.) On October 10, 2013, however, Governor Brown vetoed AB 375, thereby "mooting" Intervenors' mootness argument. (Lipshutz Decl. ¶ 3, Ex. A.) In fact, Governor Brown's veto message acknowledged the need to "simplify" and "streamline" the "process for hearing and deciding teacher dismissal cases," and recognized that there are "problems" with the Dismissal Statutes. (*Ibid*.)[27]

B. A Trial Is Required To Determine Whether The Challenged Statutes Are Unconstitutional As Applied To Plaintiffs.

Plaintiffs have also asserted valid as-applied constitutional claims that should be resolved at trial. All nine Plaintiffs are schoolchildren who justifiably fear—like countless other students throughout California (and their parents)—the substantial and unjustified risk that they will be assigned to grossly ineffective teachers in the near future, jeopardizing their academic progress and, indeed, their very station in life. Plaintiffs' fears are well-founded, as they will prove at trial, because the Challenged Statutes leave their school districts with little or no ability to eliminate grossly ineffective teachers from the pool of teachers that will be assigned to Plaintiffs. Even worse, for the six Plaintiffs who are racial minorities and/or economically disadvantaged, the risk of being assigned a grossly ineffective teacher is even higher. Indeed, unless the Challenged Statutes are eliminated and school districts are freed to make teacher employment decisions that serve the interests of Plaintiffs and other schoolchildren, there is no question that grossly ineffective teachers will be assigned to *some* students—the only question is whether Plaintiffs will be among the unfortunate.

1. <u>Claims 1-3</u>: **All Nine Plaintiffs Have Good Reason To Fear That They Will Be Assigned To Grossly Ineffective Teachers.**

Intervenors contend that Plaintiffs' as-applied "fundamental right" claims (Claims 1-3) are invalid because "Plaintiffs cannot identify any specific instance in which the [C]hallenged [S]tatutes

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[27] Even if Governor Brown had not vetoed AB 375, Plaintiffs' claims would not have been moot. (See *Davis v. Super. Ct.* (1985) 169 Cal.App.3d 1054, 1057-1058 ["The enactment of subsequent legislation does not automatically render a matter moot."].) As Governor Brown described, AB 375 would only have made matters worse. (Preston Decl. ¶¶ 27-37.)

caused them to be assigned to any specific ineffective teacher, let alone to a 'grossly ineffective' teacher." (IMSJ at p. 21.) In fact, however, the vast majority of the Plaintiffs have identified and described, in vivid detail, specific teachers to whom they have been assigned that they believe were grossly ineffective, the reasons why they believe those teachers were grossly ineffective, and the long-lasting harm that those specific grossly ineffective teachers caused Plaintiffs.[28] (See *supra* § II(E).) Moreover, *all* of the Plaintiffs have expressed a justifiable fear of being assigned to grossly ineffective teachers in the future as a result of the Challenged Statutes. (*Ibid*.)

Plaintiffs' fears are well-founded. The superintendents of LAUSD, OUSD, ARUESD, and other districts throughout the State, for example, admit that there are ineffective teachers in their districts. (Monagas Decl. ¶ 19, Ex. Q at 50:25-51:5, 52:25-53:2; *id.* ¶ 29, Ex. AA at 365:7-11, 398:6-400:1; 435:13-18; Deasy Decl. ¶ 12, Ex. C at No. 3; Fiss Decl. ¶ 5; Raymond Decl. ¶ 7; Lindo Decl. ¶ 6; Parks Decl. ¶ 7; Bragg Decl. ¶ 6; Noonan Decl. ¶ 7; Rogers Decl. ¶ 6.) Both the State Defendants and Intervenors likewise admit that there are ineffective teachers scattered throughout California's public school system. (Monagas Decl. ¶ 25, Ex. W at 131:14-22, 132:8-24; Ring-Dowell Decl. ¶ 4, Ex. B at No. 3; *id.* ¶ 5, Ex. C at No. 3.) And the evidence demonstrates the substantial harm that Plaintiffs will suffer if they are unfortunate enough to be assigned to one or more grossly ineffective teachers. (Hanushek Decl. ¶ 11, Ex. B at p. 467; *id.* ¶¶ 28, 37-41.)

To the extent Intervenors dispute that the Challenged Statutes are the *cause* of Plaintiffs' harm (or threatened harm), they are simply ignoring the abundant evidence to the contrary.[29] For example, superintendents from around the State—including from Plaintiffs' districts—have explained that their

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[28] Plaintiff Liss does not believe he has been assigned to a grossly ineffective teacher in the past, but is acutely aware of grossly ineffective teachers who teach at his school and therefore faces the significant *threat* that he will be taught by one or more such teachers in the future. (H. Liss Decl. ¶¶ 4-5.)

[29] Movants concoct a false chain of attenuation between the Challenged Statutes and Plaintiffs' harm (see IMSJ at pp. 20-25; SDMSJ at pp. 13-15), but it is always possible to make two events seem as if they are separated by a fictional list of intervening causes. In fact, any alleged attenuation between the statutes and harm to students was unquestionably *more* pronounced in *Serrano* because educational funding was being used only as a *proxy* for educational quality, even though school districts could have chosen to spend their funds in countless ways. (*Serrano II*, *supra*, 18 Cal.3d at p. 748.) In this case, the Challenged Statutes *directly* restrain the ability of school districts to ensure an effective teaching staff that serves the best interests of their students. (Reed Decl. ¶¶ 14-41; Hanushek Decl. ¶¶ 42-67; Monagas Decl. ¶ 28, Ex. Z at 86:9-14.)

school districts would be diligent in dismissing ineffective teachers if only the statutes allowed them to do so. (Monagas Decl. ¶ 9, Ex. G at 142:1-142:20, 150:11-17; *id.* ¶ 28, Ex. Z at 98:16-99:13, 100:3-9; *id.* ¶ 29, Ex. AA at 340:18-341:16.) As then-OUSD Superintendent Tony Smith described, "the levels of protection [provided by the Challenged Statutes] ensure that [teachers] continue to be employed, regardless of their effectiveness or their impact on children." (*Id.* ¶ 28, Ex. Z at 86:9-14.) At a minimum, the degree of harm that Plaintiffs have suffered and the causal relationship between the Challenged Statutes and Plaintiffs' harm constitute disputed issues of material fact, the resolution of which is improper on summary judgment. (*Gould*, *supra*, 14 Cal.3d at p. 664.)[30]

2. <u>Claims 4-6</u>: The Economically Disadvantaged And/Or Minority Plaintiffs Have Even More Reason To Fear Grossly Ineffective Teachers.

State Defendants argue that Plaintiffs' as-applied "disparate impact" claims (Claims 4-6) also fail because Plaintiffs cannot "meet each of the requirements to establish an as-applied claim."[31] (SDMSJ at p. 28.) State Defendants' list of "requirements" for an as-applied challenge, however, consists of criteria apparently invented by State Defendants out of whole cloth. (*Id.* at p. 26 [listing eight "requirements" that Plaintiffs allegedly must meet].) State Defendants offer no explanation as to how or why these "requirements" are in fact "required," and provide no legal basis that would support their unfounded position. (*Ibid.*)

In any event, State Defendants' list of so-called "requirements" is simply a list of material facts that must be decided at trial, most of which are disputed and the rest of which are *indisputably satisfied* by Plaintiffs in this case. For example, there is *no* dispute that most of the Plaintiffs are minority and/or socio-economically disadvantaged students. Indeed, five of the Plaintiffs—Beatriz

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[30] Intervenors rely on *In re Flodihn* for their attenuated causation argument. (IMSJ at pp. 21-22 [citing *In re Flodihn* (1979) 25 Cal.3d 561, 568-569].) In that case, a prisoner who was dissatisfied with his new prison sentence challenged the constitutionality of the statute that required him to undergo a new sentencing hearing. But, as the court explained, there was nothing improper about the hearing itself; "all factors" relevant to the prisoner's sentence were "fairly considered." (*Id.* at p. 570.) Thus, the statute requiring the prisoner to undergo the new hearing could not be blamed for causing the prisoner's sentence. (*Ibid.*) Here, in contrast, it is the limitations imposed by the Challenged Statutes *themselves* that impede districts' efforts to ensure that their classrooms are staffed with effective teachers. (See *supra* Part IV(A)(1).) Moreover, the petitioner in *In re Flodihn* was a prisoner who did "not possess the same liberty interest[s] as [an] ordinary citizen[]." (*In re J.G.* (2008) 159 Cal.App.4th 1056, 1063.)

[31] Intervenors do not contest Plaintiffs' as-applied "disparate impact" claims (Claims 4-6).

Vergara, Elizabeth Vergara, Daniella Martinez, Raylene Monterroza, and Brandon Debose, Jr.—are *both* minority *and* socio-economically disadvantaged. (A Martinez Decl. ¶¶ 3-4; D. Martinez Decl. ¶¶ 1-3; R. Monterroza Decl. ¶¶ 1-4; Ballard-Debose Decl. ¶ 4.) Plaintiff Julia Macias is unquestionably a minority student as well (Monagas Decl. ¶ 18, Ex. P at 23:20-24:19; Ju. Macias Decl. ¶ 3), even though Movants seem to believe that being an "American" is incompatible with such a finding. (SDMSJ at pp. 10, 27; IMSJ at p. 28 fn. 19.)

State Defendants also assert that the Plaintiffs who attend traditional district schools in LAUSD cannot prevail on their as-applied challenges because grossly ineffective teachers are "dispersed throughout the district." (SDMSJ at p. 26.) But Plaintiffs do not contend that grossly ineffective teachers are found *only* in predominantly low-income and minority schools; rather, they allege (and will prove at trial) that the Challenged Statutes cause low-income and minority students to be assigned *disproportionately* to grossly ineffective teachers. (See First Amended Compl. ¶ 3 ["This problem affects California public students statewide . . . . But the problem is worse for students at schools that serve predominately minority and economically disadvantaged populations"].) The unrefuted evidence corroborates Plaintiffs' contention: "a low-income student [in LAUSD] is more than twice as likely to have [an ineffective] teacher for English—Language Arts ('ELA'), and 66 percent more likely to have [an ineffective] teacher for math, than a student from a relatively more affluent background." (Ramanathan Decl. ¶ 9, Ex. E.) And "a Latino or African-American student [in LAUSD] is over three times as likely to have [an ineffective] teacher for ELA, and nearly two times as likely to be assigned to [an ineffective] teacher for math." (*Ibid.*)

3. <u>All Claims</u>: The State Defendants Bear Ultimate Responsibility For The Quality Of Education That Plaintiffs Receive.

State Defendants, resurrecting another argument that the Court rejected at the demurrer stage, once again aver that they cannot be held responsible for Plaintiffs' as-applied claims because "school districts—not the State Defendants—apply the Challenged Statutes." (SDMSJ at pp. 17, 23-26; cf. Ring-Dowell Decl. ¶ 25, Ex. W at p. 4 ["State Defendants argue that they are not proper parties because the decision to offer tenure, assign teachers, or dismiss teachers lies with the school districts pursuant to the Challenged Statutes."]; *id.* ¶ 26, Ex. X.) But that argument ignores the crux of

1 Plaintiffs' claims: the Challenged Statutes, which are enforced by the State Defendants (Monagas
2 Decl. ¶ 25, Ex. W at 83:22-86:1 [admitting that State Defendants enforce the "laws set forth in the
3 Education Code"]), unconstitutionally *restrict* the authority of school districts to make teacher
4 employment decisions that are in the best interests of students, including those that would otherwise
5 ensure equal educational opportunity. Further, as the Court explained the last time State Defendants
6 raised this argument, "responsibility for public education lies with the State, even though school
7 districts are agents for local operations." (Ring-Dowell Decl. ¶ 25, Ex. W at p. 4; *id.* ¶ 26, Ex. X.)

8 In *San Francisco NAACP v. San Francisco Unified School District* (N.D. Cal. 1979) 484
9 F.Supp. 657, 665, the same State Defendants asserted that they were improper defendants in an equal
10 protection challenge, but the court rejected their argument explaining that "[s]chool districts are
11 [merely] agencies of the state for the local operation of the state school system," and the State
12 maintains "ultimate supervisory power over education" in California. (*Ibid*; see also *Butt*, *supra*, 4
13 Cal.4th at pp. 680-681 ["Local districts are the State's agents for local operation of the common
14 school system . . . and the State's ultimate responsibility for public education cannot be delegated to
15 any other entity."] [citations omitted]; *Cal. Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1533
16 ["[T]he Constitution continues to make education and the operation of the public schools a matter of
17 statewide rather than local or municipal concern."].) As this Court previously recognized, State
18 Defendants possess "ample means to discourage future mismanagement in the day-to-day operations
19 of local districts," and may not delegate their "ultimate responsibility for public education" to any
20 other entity, including local districts. (*Butt*, *supra*, 4 Cal.4th at pp. 681, 692.)[32]

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[32] State Defendants, relying on *Salazar v. Eastin* (1995) 9 Cal.4th 836, argue that Plaintiffs cannot prevail on their as-applied claims because they "have dismissed the school district defendants" from this action. (SDMSJ at pp. 25-26.) But *Salazar* says nothing of the sort. In *Salazar*, the California Supreme Court evaluated the continuing viability of a lower court's injunction of a law that authorized districts to charge non-indigent parents for certain school transportation costs, in light of the California Supreme Court's related holding that the statute at issue was facially constitutional. (*Salazar*, *supra*, 9 Cal.4th at pp. 839-841.) The *Salazar* court held that the injunction was improper—not because the plaintiffs had dismissed the school district from the action, but rather because there had never been a factual finding *of any kind* against *any defendant* that the statute had been applied in an unconstitutional manner. (*Id.* at p. 854 ["[P]laintiffs presented no evidence regarding the statute's application other than state records . . . . Nor did the trial . . . result in any findings of fact, either express or implied, regarding the statute's application."].) Moreover, the *Salazar* court noted that the injunction was improper because it would have expressly required the State defendants to issue regulations governing local districts,

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C. Plaintiffs Have Standing To Pursue Their Constitutional Claims.

Intervenors further argue that Plaintiffs lack standing to challenge the statutes at issue. (IMSJ at pp. 27-30.) But Plaintiffs—all nine of whom are California schoolchildren—unquestionably possess a concrete and "beneficial interest" in the outcome of this action. (*Holmes v. Cal. Nat'l Guard* (2001) 90 Cal.App.4th 297, 315.) Indeed, it is well established that students have a unique interest in the quality of their education. (See *Doe v. Albany Unified School Dist.* (2010) 190 Cal.App.4th 668, 684-685 ["[W]e fail to see how defendants can seriously argue [that] plaintiff Doe does not have a beneficial interest in the District's compliance with" a statute designed to "improve the health and well-being of elementary school students"].) And while their status as students alone should be sufficient to warrant a finding that Plaintiffs have standing,[33] Plaintiffs in this case have an even stronger "beneficial interest" because each of them has a tangible and rational fear of the significant threat of being assigned to grossly ineffective teachers in the future. (See *supra* §§ II(C)(1-3), (E).)

Intervenors contend that Plaintiffs must *also* demonstrate a "real and immediate threat" that they will be assigned to a grossly ineffective teacher in the future, but they cite no authority for this requirement. (IMSJ at p. 28.) In fact, to seek declaratory and injunctive relief, Plaintiffs need only "demonstrate[ ] . . . that the [statutes at issue] *could* have the effect of infringing [their] rights under the California Constitution." (*Holmes*, *supra*, 90 Cal.App.4th at p. 318 [emphasis added]; see also *Zubarau*, *supra*, 192 Cal.App.4th at p. 300.) But even if Plaintiffs were required to demonstrate a "real and immediate threat," Plaintiffs have more than satisfied this standard: Most of the Plaintiffs have been assigned to one or more grossly ineffective teachers in the past while attending traditional

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despite the fact that the statute at issue expressly reserved such regulation-making authority to local districts. (*Id.* at pp. 855-856.) There is no similar conflict here.

[33] In *Serrano II*, for example, the plaintiffs' standing was never even questioned or examined by the California Supreme Court. (See generally *Serrano II*, *supra*, 18 Cal.3d 728.) The court did not, for example, ask whether any of the plaintiffs' own schools or school districts were being adversely affected by the funding statutes; merely being students was enough. (See *ibid.*; see also *Serrano I*, *supra*, 5 Cal.3d at p. 589; *Global Minerals and Metals Corp. v. Super. Ct.* (2003) 113 Cal.App.4th 836, 851 [all members of a class must "possess the same interest and suffer the same injury" as the named plaintiff] [citation omitted].)

district schools, many of the Plaintiffs are aware of grossly ineffective teachers who teach in their schools, and Plaintiffs' districts (and State Defendants themselves) admit that they currently employ ineffective teachers.[34] (See *supra* §§ II(C)(1-3), (D)(4), (E).)[35]

D. Governor Brown Is A Proper Defendant In This Action.

In yet another attempt to re-litigate a legal issue previously decided at the demurrer stage, State Defendants argue that Governor Brown is not a proper party to this action because "the Challenged Statutes do not affect the institutional interests of the Office of the Governor in the immediate and direct manner requisite to support party status." (SDMSJ at p. 28.) State Defendants rely on the same legal authorities that they discussed in their demurrer briefing, namely *Serrano II*, *supra*, 18 Cal.3d at p. 752 and *San Francisco NAACP v. San Francisco Unified School Dist.* (N.D. Cal. 1979) 484 F.Supp. 657, 665 [reversed on other grounds by *San Francisco NAACP v. San*

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[34] Movants contend that Plaintiff Liss lacks standing because he has not been taught by a grossly ineffective teacher in the past, but Liss has introduced evidence showing that he is at substantial risk of being taught by grossly ineffective teachers and is aware of such teachers even within his own school. (H. Liss Decl. ¶¶ 4-5.) As such, Liss has been "threatened with an injury of sufficient magnitude" sufficient to establish standing. (*B.C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 948; see also *Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1349.) Plaintiffs Monterroza and Martinez currently attend charter schools, but have standing because they *would* attend traditional district schools if they were not at risk of being taught by grossly ineffective teachers in those schools (Monagas Decl. ¶ 23, Ex. U at 95:4-96:13, 98:10-19; K. Martinez Decl. ¶ 29)—a point that neither State Defendants nor Intervenors address in their motions for summary judgment. (*Dibona v. Matthews* (1990) 220 Cal.App.3d 1329, 1338-1339 ["Defendants assert [student] lacks standing because he was never officially enrolled in the class. The facts are at least susceptible of the interpretation, however, that [student] would have been enrolled but for the allegedly unconstitutional acts by the defendants."]; see also *Alch v. Super. Ct.* (2004) 122 Cal.App.4th 339, 388 [deterred applicants have standing to assert discrimination claims].) And while Movants contend that Plaintiffs Debose and Elliott do not have standing because they are seniors in high school (IMSJ at p. 28; SDMSJ at pp. 25 fn. 9, 27), both of them currently attend traditional district schools and are assigned to teachers who could turn out to be grossly ineffective. (Debose Decl. ¶¶ 15-17; K. Elliott Decl. ¶¶ 14-15). In addition, their current teachers could be replaced mid-year by grossly ineffective teachers or they could be assigned to grossly ineffective teachers for the upcoming Spring semester. (Debose Decl. ¶¶ 15-17; K. Elliott Decl. ¶¶ 14-15.) If and when Debose and Elliott graduate from high school (which has not yet happened), it would *still* be appropriate for this Court to consider their claims, which present "important issues of substantial and continuing public interest." (*DeRonde v. Regents of the Univ. of Cal.* (1981) 28 Cal.3d 875, 880, superseded by constitutional amendment on another ground, as recognized in *Strauss v. Horton* (2009) 46 Cal.4th 364, 447 fn. 25 [finding that plaintiff could challenge the constitutionality of law school admissions policy even though he "ha[d] graduated from another law school and ha[d] been admitted to the State Bar"].)

[35] Plaintiffs' Claim 7 for declaratory relief should likewise proceed to trial because it is "derivative" of Claims 1-6. (IMSJ at p. 25 fn. 15.)

Francisco Unified School Dist. (9th Cir. 1990) 896 F.2d 415].[36] They offer no new analysis and no reason for this Court to reevaluate its prior holding.

As this Court properly held at the demurrer stage, Plaintiffs "sufficiently bring this action against the State Defendants," including Governor Brown.[37] (Ring-Dowell Decl. ¶ 25, Ex. W at p. 4; *id.* ¶ 26, Ex. X.) The State and its officers and administrators, including the Governor, maintain ultimate authority over and responsibility for the public education system in California. (See *Butt*, *supra*, 4 Cal.4th at p. 680 ["Public education is an obligation which the State assumed by the adoption of the Constitution."]; accord 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, 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.'"].) As such, numerous California courts have permitted litigants to proceed against the Governor in constitutional challenges seeking declaratory 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* (2003) 30 Cal.4th 528.)

E. State Defendants' Motion Suffers From Fatal Procedural Deficiencies.

State Defendants' submission of a fatally defective separate statement of undisputed material facts ("SSUMF") also warrants dismissal of their motion for summary judgment. (See Code Civ. Proc. § 473c(b)(1).) The separate statement is not a "technical requirement," but an "indispensible" part of the summary judgment process. (*Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 415.) As such, courts commonly deny a motion for summary judgment where—as

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[36] State Defendants cite one additional decision, *Nagle v. Superior Court* (1994) 28 Cal.App.4th 1465, 1468, in support of their contention that the "time and the exigencies" of the Governor's everyday business would be impaired if the Governor could be named as a party in actions challenging the constitutionality of state laws. (SDMSJ at p. 30.) *Nagle* is inapposite, however, as it merely addressed the situations in which *depositions* of top government officials are warranted, not the circumstances in which top government officials may properly be named as party-defendants. (*Nagle*, *supra*, 28 Cal.App.4th at pp. 1468-1469.)

[37] This Court also explained that *Serrano II*, on which State Defendants rely, "did not hold that the Governor was an improper party, only that the Governor was not an indispensable one." (Order Overruling State Defendants' Demurrer at p. 4; see also *Atta v. Scott* (1980) 27 Cal.3d 424, 451.)

here—the movant fails to set forth "all material facts" in the separate statement. (*United Cmty. Church v. Garcin* (1991) 231 Cal.App.3d 327, 337, superseded on another ground by statute; see also *Eriksson v. Nunnick* (2011) 191 Cal.App.4th 826, 849-850.) It is irrelevant that a fact "might be buried in the mound of paperwork filed with the court" or "set out in the supporting evidence or memoranda of points and authorities" because the "Golden Rule" of summary judgment is that if a fact "is not set forth in the separate statement, *it does not exist*." (*North Coast Business Park v. Nielsen Constr. Co*. (1993) 17 Cal.App.4th 22, 30-31 [emphasis in original].)

In *Wilson v. Blue Cross of Southern California* (1999) 222 Cal.App.3d 660, 671, for example, the court overturned entry of summary judgment because the movants had submitted a "terse statement of facts" that identified only four "issues" and failed to reference two of the parties in the action. Similarly, State Defendants' SSUMF is woefully insufficient to support their motion. For example, it addresses only *three* of Plaintiffs' *seven* claims (Claims 4-6); it does not contain a *single* fact relating to Plaintiff Beatriz Vergara, which alone justifies denial of the motion as to her claims (see *Wilson*, *supra*, 222 Cal.App.3d at p. 671; see generally SSUMF); and it contains only thirteen "undisputed facts," eight of which relate to Plaintiffs' demographic information and school attendance records (see SSUMF at pp. 1-3). Such a "sparse evidentiary showing," lacking any reference whatsoever to multiple causes of action and one of the Plaintiffs, alone warrants dismissal of State Defendants' motion for summary judgment. Moreover, State Defendants cannot now correct the "substantive defects" in their separate statement by, for example, using their reply brief to supplement the record. (See *Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 576 [affirming the denial of a motion to submit a revised separate statement].)

V. CONCLUSION

Plaintiffs have amassed substantial evidence that the Challenged Statutes have a "real and appreciable impact" on their fundamental right to education. Movants' attempts to resolve this case without a trial ignore this evidence and the *many* disputed issues of material fact that the evidence raises—including important issues identified in the Movants' own papers. Plaintiffs respectfully request that the Court deny the motions for summary judgment or summary adjudication and allow both sides to present their evidence at trial.

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Respectfully submitted,

Dated: November 13, 2013

GIBSON, DUNN & CRUTCHER LLP

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

Attorneys for Plaintiffs Beatriz Vergara, et al.