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Superior Court of California
County of Los Angeles

APR 10 2014

Sherri R. Carter, Executive Officer/Clerk
By Raul Sanchez, Deputy

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' POST-TRIAL BRIEF

Trial Date: January 27, 2014
Time: 10:00 a.m.
Dept.: 58

The Honorable Rolf Michael Treu
FAC Filed: August 15, 2012

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I. INTRODUCTION

In two months of trial, Plaintiffs proved that the Challenged Statutes are creating vast and unjustified inequalities in the educational opportunities being afforded to students across California. The Permanent Employment Statute forces school districts to make tenure decisions after teachers have been on the job for only 16 months—far too little time to be able to predict with accuracy whether a teacher will be effective at teaching students. As a result, districts grant permanent status year after year to some grossly ineffective teachers—teachers who would be screened out if districts had more time to make considered decisions. Once those grossly ineffective teachers obtain tenure, a series of three Dismissal Statutes makes it virtually impossible for districts to remove them from the classroom. School districts must spend years, and hundreds of thousands of dollars, in order to have any chance of dismissing a single grossly ineffective teacher—and even then, their efforts are likely to fail. As a result, district administrators are left with no choice but to shake their heads, hold their noses, and assign these grossly ineffective teachers to classrooms full of unlucky students every year. Then, in a particularly cruel and irrational twist, when economic downturns or declining enrollment force school districts to conduct layoffs, administrators are *still* prevented from removing these grossly ineffective teachers—forced instead to fire some of their best, most beloved, most effective teachers, based almost exclusively on those teachers' seniority.

This Court need not rely on Plaintiffs' evidence alone to reach these inescapable findings; even the evidence presented by Defendants and Intervenors proves Plaintiffs' case. Their own witnesses and documents admit that "[g]rossly ineffective teachers harm students," (2/18/14 R. Tr. at 2174:27–2175:4 [Johnson]); that the Permanent Employment Statute provides too little time to make informed tenure decisions, (3/6/14 R. Tr. at 2803:3-2804:2 [Rothstein]; 3/18/14 R. Tr. at 3890:23-3891:5 [Berliner]); that dismissal is so "expensive" and "time-consuming" that "administrators believe it is impossible to dismiss a tenured teacher," (2/18/14 R. Tr. at 2189:3-16 [Johnson]; see also 3/10/14 R. Tr. at 2929:8-9 [Tuttle]); that "extensive layoffs of excellent teachers" is "a significant state problem," (Pls. Ex. 327 at P0327-6, CA Dept. of Ed. Publication); and that 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," (3/19/14

R. Tr. at 3983:13–22 [Nichols].) Indeed, Defendants' own expert witness estimated that 1-3% of the teachers in California "consistently have strong negative effects on student outcomes no matter what classroom and school compositions they deal with" (3/18/14 R. Tr. at 3884:25-3885:4 [Berliner])—as many as 8,250 grossly ineffective teachers depriving more than 200,000 students of an education every single year.

The inevitable and predictable consequence of the Challenged Statutes is that the constitutional promise of equal educational opportunity is being broken every day of every year. In most classrooms across California, students are receiving effective, even excellent, instruction. But in the classroom next door, or in the school across town, their less fortunate peers are stuck in classrooms with teachers that everyone knows cannot—or will not—teach: English teachers who cannot spell the words "magician" or "truth," (2/10/14 R. Tr. at 1555:21-1556:2 [Pulley] ["*magition*" and "*thruth*"]); burned out teachers who constantly waste instructional time showing movies and doing crossword puzzles, (2/11/14 R. Tr. at 1756:25-1757:22 [Melvoin]); incompetent teachers who fail to develop lesson plans and are prone to "procrastination, forgetfulness, inefficiency, . . . and an unwillingness or inability to meet reasonable performance standards," (Pls. Ex. 20 at P0020-1119, 1124 [dismissal case of Linda Strong]); uncaring teachers who let their classrooms devolve "in[to] chaos," (Pls. Ex. 20 at P1718 [dismissal case of Mary Crum]); derisive teachers who scare and intimidate children by yelling at the top of their lungs six inches from their students' faces, (2/7/14 R. Tr. at 1493:6-1494:21 [Moss]); or worse (2/11/14 R. Tr. at 1675:4-6 [B. Vergara] [calling Latino students "cholos"]; 2/11/14 R. Tr. at 1676:2-5 [B. Vergara] [calling a student a "whore"].)

As a result of these grossly ineffective teachers, students are losing *nine to twelve months* of learning in a single academic year—a deprivation they will never recover. (2/6/14 R. Tr. at 1316:15-25, 1318:11-19 [Kane].) And classrooms of students assigned to grossly ineffective teachers are being deprived of $1.4 million in lifetime earnings as compared to classrooms taught by average teachers. (1/30/14 R. Tr. at 529:7-13 [Chetty].) This is happening right now—in Los Angeles and across the rest of California—and it must stop. Plaintiffs respectfully request that this Court strike down the Challenged Statutes as unconstitutional on their face so that *all* California students can enjoy the educational opportunities promised to them under the state Constitution.

II. LEGAL FRAMEWORK

To decide this case, this Court should employ a two-step analysis. First, the Court should decide whether Plaintiffs have proven, by a preponderance of the evidence, (a) that the Challenged Statutes impose a "real and appreciable impact" on students' fundamental right to education (*Butt v. California* (1992) 4 Cal.4th 668, 685-686; see also *Fair Political Pracs. Com. v. Super. Ct. of L.A. County* (1979) 25 Cal.3d 33, 47), *or* (b) that the Challenged Statutes impose a disproportionate burden on poor and minority students (*Sakotas v. W.C.A.B.* (2000) 80 Cal.App.4th 262, 271; *Serrano v. Priest* (1971) 5 Cal.3d 584, 596-619 ["*Serrano I*"].) Plaintiffs respectfully submit that the answer to *both* of those questions is a resounding "yes." But as long as the answer to *either* question is yes, then the Court should apply strict scrutiny. (*Butt*, *supra*, 4 Cal.4th at pp. 685-686.) Under that second-step strict-scrutiny analysis, the "*state* bears the burden of establishing not only that it has a compelling interest which justifies [the Challenged Statutes] but that the distinctions drawn by the law[s] are necessary to further [their] purpose." (*Serrano I*, *supra*, 5 Cal.3d at p. 597 [italics added].) Defendants and Intervenors have not come close to meeting that heavy burden.

A. The California Constitution Protects The Fundamental Right Of Students To Equal Educational Opportunity.

More than forty years ago, the California Supreme Court recognized that education is a fundamental interest guaranteed by the California Constitution. (*Serrano I*, *supra*, 5 Cal.3d at pp. 608-609; see also Cal. Const. Art. I, § 7; *id.* Art. IV, § 16; *id.* Art. IX, §§ 1 & 5.) Education is a fundamental right because it "lie[s] at the core of our free and representative form of government." (*Serrano v. Priest* (1976) 18 Cal.3d 728, 767-768 ["*Serrano II*"]; see also *Serrano I*, *supra*, 5 Cal.3d at pp. 608-609 ["We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'"].) And access to education is "the bright hope for entry of the poor and oppressed into the mainstream of American society." (*Serrano I*, *supra*, 5 Cal.3d at p. 609; 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."].)

"[T]he 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.) 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 p. 776.) As the California Supreme Court has explained, "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.)

B. This Court Should Examine Both The Text Of The Challenged Statutes And The Practical Effects They Have On Students.

The Challenged Statutes at issue in this case impose numerous requirements and prohibitions on school districts, all of which constrain districts' ability to serve the best interests of their students. On their face, the Challenged Statutes set forth a complex web of requirements relating to, among many other things, when districts must notify probationary teachers of reelection decisions (Cal. Educ. Code § 44929.21); the consequences of failing to meet notification deadlines (*ibid.*); when districts may issue notices of unsatisfactory performance (§ 44934); when districts may file statements of charges (§ 44938); the timing of dismissal hearings before the Commission on Professional Competence ("CPC") (§ 44944); the composition of the CPC panel (*ibid.*); 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 a teacher's attorney's fees when dismissal is not achieved (*ibid.*); and the district's obligation to lay off its least senior teachers during reductions in force ("RIFs") (§ 44955). All of these provisions are the subject of Plaintiffs' constitutional challenge.

But courts in California do not confine themselves to the text of a statute when determining whether the statute is facially unconstitutional. 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 procedural scheme *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 equal protection issue in question"] [italics 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."].)[1]

The California Supreme Court has repeatedly 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, 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.) 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 pp. 606-607 [quoting *Manjares v. Newton* (1966) 64 Cal.2d 365, 375-376] [italics added]; see also *Parr v. Mun. Ct. for the Monterey-Carmel Jud. Dist. of Monterey County* (1971) 3 Cal.3d 861, 865, 868 [refusing "to look exclusively to the operative language of the ordinance" because "we may not overlook its probable impact"]; *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 533-534, affd. *sub nom. Reitman v. Mulkey* (1967) 387 U.S. 369 ["A state enactment cannot be construed for purposes of constitutional analysis without concern for its . . . ultimate effect."].)

[1] In *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218, the California Supreme Court explained that the standard for a facial challenge is "the subject of some uncertainty" and expressly declined to "settle the precise formulation." But it did not overrule any prior cases setting forth the standards for a facial challenge.

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. 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 [italics 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, despite the fact that the statutory language at issue did not expressly distinguish between individuals or classify groups of individuals. (*Id.* at pp. 141, 144.) 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 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 [italics 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 [italics added].)

C. Plaintiffs Need Not Prove That The Challenged Statutes Are The Sole Cause Of Disparities In The Education System.

In addition, Plaintiffs need not prove that the Challenged Statutes are the sole cause of unequal education opportunities. 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 at p. 669 fn. 9 [italics added].) Indeed, the court struck down the statute at issue even though preferential ballot placement constituted only one "factor" affecting the outcome of "municipal elections"—not the sole factor or even the primary factor. (*Id.* at p. 668.)

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 pp. 741-742.) 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].) Here, as in *Serrano*, any discretion the districts have with respect to teacher employment or assignment decisions is a "cruel illusion" (*Serrano I*, *supra*, 5 Cal.3d at p. 611) because such discretion 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 pp. 740, 761.)

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

It is the very nature of an equal protection challenge to focus on "unequal" treatment. (*Cooley v. Super. Ct. of L.A. County* (2002) 29 Cal.4th 228, 253.) Thus, Plaintiffs need not prove that *every* student in California is assigned to grossly ineffective teachers, or even that every *school district* in California is saddled with grossly ineffective teachers—the Challenged Statutes "pose a present total and fatal conflict" with students' fundamental rights (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084) because they "inevitably" (*ibid.*) result in significant *disparities* in educational opportunity for students throughout California, *not* because they result in every student being assigned to a grossly ineffective teacher. (See *Serrano v. Priest* (1977) 20 Cal.3d 25, 36 fn. 6.)

It is therefore immaterial whether certain districts alleged by Defendants and Intervenors to be "well-managed" believe they can operate within the confines of the Challenged Statutes. Indeed, in *Serrano*, students in many districts—for example, those with a wealthier-than-average tax base—were *benefiting* from the existing financing scheme, yet the laws were still facially unconstitutional statewide. (*Serrano II*, *supra*, 18 Cal.3d at 744.) Students cannot control whether they live in a so-called "well-managed" or "mismanaged" district; thus, the California Supreme Court has held that "the California Constitution guarantees 'basic' equality in public education, *regardless of district residence*." (*Butt*, *supra*,4 Cal.4th 668 at p. 692 [italics added]; see also *Serrano I*, *supra*, 5 Cal.3d at p. 614 [holding that it is unconstitutional for the "quality of a child's education [to be] depend[ent] upon the resources of his school district"].)

Likewise, the effort by Defendants and Intervenors in this case to blame the inequalities on local district *mis*management fails as a matter of law because it has *already been squarely rejected* by the California Supreme Court. (*Butt, supra,* 4 Cal.4th at pp. 684-685.) Even if "local mismanagement causes one district's services to fall seriously below prevailing statewide standards" (as it did in the *Butt* case, where the Richmond school district mismanaged the funds it received from the State), "strict scrutiny" still applies because "[m]anagement and control of the public schools is a matter of state, not local, care and supervision." (*Id.* at pp. 679-681; see also *id.* at p. 688 [rejecting the State's argument that "the District's students [should] absorb the consequences of District mismanagement"].)[2]

Similarly, it is immaterial that the majority of teachers in California are providing students with a quality education—a fact that Plaintiffs readily concede. Indeed, in most cases in which a law violates the equal protection clause, it is a *minority* of citizens who suffer from unequal treatment

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[2] In addition, Plaintiffs need not produce live witnesses from all 1,052 school districts in California in order to prove their facial challenge. Courts evaluating facial challenges routinely draw inferences regarding the existence of an event or condition in one location based on the existence of that event or condition elsewhere. (See *Gould*, *supra*, 14 Cal.3d at pp. 667-668 [affirming order invalidating ordinance based on studies of other jurisdictions because "nothing in the record suggest[ed] that Santa Monica voters differ[ed] significantly from the voters who participated in the numerous elections that were studied."]; see also *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 356 [law was facially invalid, in part, based on testimony regarding witnesses' "experiences in other jurisdictions"].)

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 . . . ."].) 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, *somewhere* in California, being arbitrarily subjected to unequal educational opportunities.

E. Plaintiffs Need Not Prove Intentional Discrimination Against Minority Or Low-Income 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.) Moreover, irrespective of the standard in federal court, such laws are unconstitutional in California even where they do not draw express distinctions between students on the basis of race or wealth, and even where 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. (Compare *Village of Arlington Heights v. Metro. Housing Dev. Corp.* (1977) 429 U.S. 252, 264-265; *Washington v. Davis* (1976) 426 U.S. 229, 242.) Whatever the federal rule might be, 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.)

In *Serrano I*, the defendants argued 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 p. 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; *Johnson*, *supra*, 3 Cal.3d at p. 937; see also *Butt*, *supra*, 4 Cal.4th at p. 682 ["[U]nder California principles . . . the absence of purposeful conduct by the State [does] not

prevent a finding that the State system for funding public education had produced unconstitutional results."] [citations omitted].) Likewise, in *Serrano II*—a decision issued after *Washington*, *supra*, (1976) 426 U.S. 229—the California Supreme Court affirmed its earlier holding. (See *Serrano II*, *supra*, 18 Cal.3d at pp. 765-766.) As the Court explained, "the fact that a majority of the United States Supreme Court ha[s] now chosen to contract the area of active and critical analysis under the strict scrutiny test for federal constitutional purposes can have no effect upon the existing construction and application afforded our own constitutional provisions." (*Id.* at p. 765.)[3]

F. Plaintiffs Need Not Prove That The Challenged Statutes Have Inflicted Harm On Them Personally To Prevail On Their Facial Challenge.

Finally, to prevail on their facial challenge, Plaintiffs need not establish that the Challenged Statutes have caused *them* harm in the past *or* that the Challenged Statutes will necessarily cause *them* harm in the future. Any such requirement would fundamentally misconceive the nature of a facial challenge, which examines whether a law "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions," "*not* its application to the particular circumstances of an individual." (*Tobe*, *supra*, 9 Cal.4th at p. 1084 [italics added]; see also *Gould*, *supra*, 14 Cal.3d at p. 670 [ordinance "impose[d] a very 'real and appreciable impact' on the equality, fairness and integrity of the electoral process," not on the particular plaintiff]; *Serrano II*, *supra*, 18 Cal.3d at pp. 775-777 [holding statutes facially unconstitutional without analyzing harms to any particular plaintiff].) The only plaintiff-specific requirement for bringing a facial challenge is that Plaintiffs must have standing to assert their claims—which Plaintiffs in this case plainly do. (See *infra* § III.F.)[4]

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[3] More recent cases are not to the contrary. In *Sanchez v. State of California* (2009) 179 Cal.App.4th 467, 487-488, it was undisputed that plaintiffs "ha[d] made no showing that the Regulation and the Statute disproportionately impact[ed] a protected class of people." (*Id.* at p. 487.) And in *In re Marriage Cases* (2008) 43 Cal.4th 757, 839-841, 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.

[4] Again, more recent cases are not to the contrary. For example, *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, was a *standing* decision; it did not discuss the requirements for facial constitutional challenges. (*Id.* at p. 818.) And *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776, is inapposite because it involved a negligence cause of action and not a facial constitutional challenge. (*Id.* at p. 766.)

III. THE EVIDENCE AT TRIAL

Plaintiffs' evidence—including testimony from witnesses drawn from 28 school districts across California covering more than 22% of California students,[5] seven of the leading education experts in the world, and documents containing critical admissions from the State Defendants—proves that this Court should reach the very same conclusions that the California Supreme Court reached in *Serrano*: that the Challenged Statutes (1) produce "substantial disparities in the quality and extent of availability of educational opportunities"; (2) make the "quality of a child's education depend[ent] upon the resources of his school district and ultimately the pocketbook of his parents," as well as the child's race and ethnicity; and (3) are "not necessary to the accomplishment of any compelling state interest." (*Serrano II*, *supra*, 18 Cal.3d at p. 747, 755, 749 fn. 20.) Thus, as the court did in *Serrano*, this Court should strike down the Challenged Statutes as unconstitutional.

A. Teachers Are A Critical Component Of The Fundamental Right To Education.

"[T]he right to an education today means more than access to a classroom." (*Serrano I*, *supra*, 5 Cal.3d at p. 607). In *Serrano*, the California Supreme Court explained that there can be no equality of educational opportunity without equal funding. (*Serrano II*, *supra*, 18 Ca.3d at p. 748 ["There is a distinct relationship between cost and the quality of educational opportunities afforded. . . . [D]ifferences in dollars do produce differences in pupil achievement."].) And in *Butt*, the California Supreme Court explained that the amount of time that students spend in school must also be equal statewide. (*Butt*, *supra*, 4 Cal.4th at p. 688 ["[T]he State's responsibility for basic equality in its system of common schools extends beyond the detached role of fair funder"]; *id*. at p. 687 ["District students faced the sudden loss of the final six weeks, or almost one-fifth, of the standard school term . . . provided everywhere else in California."].)

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[5] These districts, from largest to smallest, include: Los Angeles (Deasy, Pulley, Melvoin, Chetty, B. Vergara, E. Vergara, Macias, Parks); San Diego (Ramanathan); Long Beach (Ramanathan); San Francisco (Kappenhagen, Smith, Ramanathan); Sacramento City (Raymond); Oakland (Smith, Christmas, Adam, Weaver, DeBose); Kern (Fekete); Mount Diablo (Rogers); Chino Valley (Douglas); Bakersfield (Fekete); Pomona (Monterroza); Compton (Moss); Pasadena (Monterroza); Simi Valley (Parks); Baldwin Park (Parks); Tracy (Rogers); West Covina (Pulley); Fullerton Elementary (Douglas); Evergreen Elementary (K. Martinez Depo. Tr. at 31:11-25); Alum Rock Elementary (K. Martinez Depo. Tr. at 111:8-13:22); Santa Monica-Malibu (Deasy); Arcadia (Bhakta); Lincoln (Rogers); Berryessa (K. Martinez Depo Tr. at 23:14-24:20); San Gabriel (Parks); Monrovia (Bhakta); Oakley Union (Rogers); and Emery (Smith).

But even if funding and time in school are equal, students *still* cannot be assured of equal educational opportunities unless they have equal access to effective teachers. After all, teachers are the very vehicle through which students receive their education. As the California Supreme Court explained in *Serrano*, "differences in dollars . . . produce differences in pupil achievement," in part, because money allows districts to employ a "higher quality staff"—a recognition that teachers are an essential component of the right to equal educational opportunity. (*Serrano II*, *supra*, 18 Cal.3d at p. 748.) In the words of Dr. John Deasy, Superintendent of LAUSD, "[t]he mission of the District is to assure that students learn. That is the only reason we open our doors in the morning. . . . In order to do that, the most important factor is a teacher, a highly effective teacher." (1/28 Tr. at 238:14-20 [Deasy].) And, as the California Department of Education ("CDE") acknowledges, "[t]he academic success of California's diverse students is inextricably tied to the quality and commitment of our educator workforce." (Pls. Ex. 327 at P0327-6 [CA Dept. of Ed. Publication].) This is because "teacher quality is the single most important school-related factor in student success. Ample research supports this principle." (Pls. Ex. 289 at P0289-3 [CA Dept. of Ed. Report].)

All of the evidence at trial overwhelmingly supports the self-evident principle that effective teachers are essential to the provision of education. But Plaintiffs' evidence went far beyond that basic and indisputable premise, proving that teacher effectiveness—the ability of a teacher to achieve student learning—can be assessed and measured, such that ineffective and grossly ineffective teachers in California districts can be (and routinely are) identified when administrators have sufficient time and information. In addition, Plaintiffs proved that the disparity between effective and ineffective teachers in Los Angeles, California's largest district, is substantial—larger than elsewhere in the country—such that students taught by grossly ineffective teachers in Los Angeles fall far behind their peers in school and suffer substantial harm that impairs the rest of their lives. All of those findings are supported by ample testimony from Plaintiffs' witnesses, including:

- Dr. Raj Chetty, who recently conducted a groundbreaking study on teacher impact that will be published in the American Economic Review. His study analyzes the school and tax records of 2.5 million students over a 20-year period, in order to determine whether their life outcomes could be traced back to differences in teacher quality. (1/29/14 R. Tr. at 450:3-21, 452:25-453:6, 460:18-

461:6.) Using sophisticated statistical analyses of *actual* student data, Dr. Chetty was able to demonstrate remarkably consistent correlations between individual teachers and life outcomes, proving the undeniable and long-lasting impacts that teachers have on students' lives. As Dr. Chetty explained: "Teacher effectiveness has a profound effect on students' long-term success as measured by a variety of indicators, such as probabilities of attending college, earnings, teenage pregnancy rates, the neighborhoods where children live as adults, and so forth. And so having a highly effective teacher significantly improves children's outcomes and having a highly infective teacher, conversely, does substantial harm." (1/30/14 R. Tr. at 510:5-12.) Moreover, Dr. Chetty was able to quantify the harms suffered by students who get stuck with a grossly ineffective teacher. Even a single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom—a figure that was unrebutted during trial. (1/30/14 R. Tr. at 529:7-13.)

- Dr. Thomas Kane, who recently concluded a four-year study called the "Measures of Effective Teaching Project" on behalf of the Gates Foundation. Dr. Kane found unequivocally that "it is possible to implement systematic and replicable measures of teacher effectiveness." (2/6/14 R. Tr. at 1248:19-21.) In fact, the MET Project was able to identify effective and ineffective teachers in a variety of ways, including "by combining evidence" of "student achievement gains" with classroom observations and student surveys. (2/6/14 R. Tr. at 1275:4-1276:15.) And when Dr. Kane conducted a statistical analysis of LAUSD—using *actual* data from students and teachers in that district—he found that the disparity in teacher effectiveness in LAUSD is nearly twice as large as every other district he has studied, the result of many years of being stuck under the rule of the Challenged Statutes. (2/6/14 R. Tr. at 1314:5-10.) Students in LAUSD who are unlucky enough to be in a classroom with a bottom 5% teacher for a single year lose between *9 and 12 months* of learning compared to students with average teachers. (2/6/14 R. Tr. at 1316:26-1317:3, 1318:13-19.)
- Superintendents from Sacramento and Los Angeles, who explained that they use a variety of techniques to determine whether a teacher's students are *actually* learning—from standardized test scores to other types of data and artifacts of student work. (2/3/14 R. Tr. at 896:6-897:4 [Raymond] [objective ways to measure a teacher's impact on student learning include "looking at student work through the use of rubrics, looking at assessment data, both formative and summative

assessment data"]; 1/27/14 R. Tr. at 117:13-19; 118:25-119:2 [Deasy] [LAUSD uses "myriad []sources to make judgments on a teacher's overall effectiveness," including Academic Growth Over Time, an "algorithm [that] measures student learning gains" and accounts for "other factors so that those students' learning gains . . . can be attributed to the teacher."].) In fact, not a *single* school administrator who testified in this case, on either side, expressed that they have any difficulty identifying their best and worst tenured teachers, given enough time and information.[6]

Defendants and Intervenors' own witnesses further confirmed that "[g]rossly ineffective teachers harm students." (2/18/2014 R. Tr. at 2174:27-2175:4 [Johnson].) And the CDE's own documents acknowledge that "[s]tudents who are assigned to a succession of ineffective teachers have significantly lower achievement and gains in achievement than do those who are assigned to a succession of highly effective teachers," (Pls. Ex. 289 at P0289-16), and agree that the "difference between an effective and non-effective teacher can be one full level of achievement in a single school year." (Pls. Ex. 236 at P0236-1.) Further, both Defendants and Intervenors admit that California school districts currently employ ineffective teachers. (See Pls. Ex. 319 at P0319-2 to P0319-3, RFA No. 3 [Defendants' admission]; Pls. Ex. 318 at P0318-3, RFA No. 3 [Intervenors' admission].)

Over the course of the trial, Defendants and Intervenors introduced evidence about additional factors *other* than teachers—including out-of-school factors like poverty and safety—that also affect student achievement. But the existence of other factors that might affect student achievement—

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[6] There was much discussion at trial about *how* to measure teacher effectiveness, including substantial evidence about standardized test scores and the value-added methodology. The expert witnesses testifying for Defendants and Intervenors agreed with Plaintiffs' experts that value-added methodology and the use of standardized tests—both of which, like any other metric, provide imperfect information—are useful components for measuring a teacher's effectiveness. (3/7/14 R. Tr. at 2852:16-21 [Rothstein] ["Value added studies allow us to put a number on things that are not inherently numeric."]; 3/20/14 R. Tr. at 4253:6-9 [Darling-Hammond] ["One indicator of whether a given teacher is effective is the accomplishment of his or her students, including how well they do on tests."]; 2/18/2014 R. Tr. at 2178:14-18 [Johnson] ["Student test scores should be used in assessing teacher effectiveness to confirm other means of assessing a teacher's performance."].) And the experts who testified for Defendants and Intervenors used value-added modeling and standardized test scores in their own work to measure teacher effectiveness. (3/18/2014 R. Tr. at 3878:28-3879:28 [Berliner]; 3/7/14 R. Tr. at 2852:2-15 [Rothstein].) But the subject of *how* to measure teacher effectiveness need not give the Court much pause; suffice it to say, there are many ways to do it. Plaintiffs agree with Defendants and Intervenors that multiple measures should be used when making high-stakes employment decisions and are not asking this Court to impose any particular methodology on districts.

which Plaintiffs do not dispute—does not diminish the importance of *teachers*. (See 2/18/14 R. Tr. at 2173:12-15 [Johnson] [agreeing "that teachers are the most important school level factor affecting student learning"].) As former Oakland superintendent Dr. Anthony Smith explained, "every one of our kids deserves and needs an effective teacher, and every kid in California does. There are conditions outside of schools that make it more or less difficult . . . [but] life and experience inside the school has to be first, foremost, and always about the exchange between the teacher and the student and creating the conditions for an effective teacher to be working deeply with children. That's our job." (3/24/14 R. Tr. at 4479:19-27 [Smith].)

Defendants also introduced evidence about the teacher credentialing process—evidence that would be relevant only if Defendants' position were that all teachers in California must be effective merely because they are credentialed by the State. But any such argument is belied by Defendants' own witnesses, including the chairwoman of the California Commission on Teacher Credentialing ("CTC"), who admitted that holding a teaching credential "does not guarantee that a teacher will be effective." (3/20/14 R. Tr. at 4260:12-15 [Darling-Hammond]; see also 3/19/14 R. Tr. at 4034:3-6 [Futernick].) Relatedly, Defendants tried to present evidence showing that teacher ineffectiveness should be attributed to misassignments—for example, an English teacher being assigned to teach a math class. But again, the State's own witnesses readily admitted that the issue is a red herring; misassigned teachers can still be effective at teaching and properly assigned teachers can be ineffective. (3/19/14 R. Tr. at 4059:26-4060:4 [Futernick].) In fact, the CTC employee tasked with investigating teacher misassignments in California testified that the State has no idea how many teachers in California are misassigned. (3/17/14 R. Tr. at 3759:3-9, 3760:21-3761:2 [Purdue] [teacher misassignment data is "all over the ballpark"].)

Finally, Defendants and Intervenors have tried to show that the number of grossly ineffective teachers in California is small. As an initial matter, even if there were only one grossly ineffective teacher in California who could not be fired, that would be more than sufficient to establish an equal protection violation because "[e]ach case of unaddressed teacher incompetence harms hundreds of students." (3/20/14 R. Tr. at 4239:24-4240:9 [Darling-Hammond].) But more importantly, even using the estimate provided by Defendants' own expert witness that 1 to 3% of teachers are grossly

ineffective, that is no small number. (3/18/14 R. Tr. at 3885:2-4 [Berliner].)[7] Three percent of 275,000 teachers means there are 8,250 grossly ineffective teachers in California teaching more than 200,000 students per year, and costing those students more than *$11 billion* in lost lifetime earnings.

B. The Challenged Statutes Impose Real And Appreciable Harm On Students Statewide.

Because access to effective teachers is so critical to a student's education, this Court should conclude that the Challenged Statutes—which ensure that students in California will *not* have equal access to even minimally effective teachers—have a "real and appreciable impact" on the fundamental right to equal educational opportunity, and therefore that strict scrutiny applies.

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 evidence presented at trial makes clear, the Challenged Statutes have far more than a "minimal" or "incidental" effect on students' fundamental right to education.

Indeed, Plaintiffs' evidence is far more compelling than the evidence presented in other cases in which courts have applied strict scrutiny. In *Gould*, *supra*, 14 Cal.3d at p. 668, for example, the Court applied strict scrutiny based on a showing that preferential ballot placement constituted one "factor" affecting the outcome of "municipal elections"—not the sole factor or even the primary factor. Moreover, the *Gould* court reached that conclusion even though the plaintiffs did not introduce *any* evidence specific to the city whose ordinance was being challenged. (*Id.* at pp. 667-668.) And in *Serrano II*, *supra*, 18 Cal. 3d 744, 766, 776, the Court held that plaintiffs' evidence warranted strict scrutiny because it demonstrated that the statutes at issue "affect[ed]" and "touch[ed]

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[7] Plaintiffs' experts estimate that approximately 5% of teachers in California are grossly ineffective. (1/29/14 R. Tr. at 484:1-12 [Chetty]; 2/5/14 R. Tr. at 1319:10-21 [Kane]; 3/24/14 R. Tr. at 4367:15-4368:13 [Hanushek].)

upon the fundamental interest of education." (See also *id.* at p. 745 [applying strict scrutiny even though the statutes created only a "potential disparity"].)

The evidence at trial leaves no doubt that each of the Challenged Statutes is a "factor" that "affects" students' fundamental right to education—and that collectively, the statutes are devastating. The superintendents of Sacramento City and Oakland school districts perhaps summarized it best:

- Jonathan Raymond (Sacramento City): "We have to spend considerable energy working around, over and through [the Challenged Statutes] as opposed to simply saying, you know what, our energy should be focused on teaching and improving the lives of children. [T]hese laws are simply flawed. They must be changed." (2/4/14 R. Tr. at 976:20-24.)
- Dr. Anthony Smith (Oakland): "Our job is to ensure that there are effective teachers in classrooms, and . . . to do everything we can to make sure that we get teachers that are there to meet the needs of kids. The statutes themselves, though, make it unlikely that we would be successful . . . ." (3/24/14 R. Tr. at 44676:26-4468:4.)

1. The Permanent Employment Statute Harms Students.

The Permanent Employment Statute harms students because it forces school districts to make teacher tenure decisions before they have an opportunity to evaluate a teacher's effectiveness in an informed manner. By the statute's own terms, districts must notify teachers whether they will be reelected to permanent teaching positions no later than March 15 of the teachers' second probationary year. (§ 44929.21(b).) But 16 months is an insufficient amount of time for administrators to make well-informed tenure decisions for all of their probationary teachers because of the limited amount of classroom evaluation data, student and parent input, and student achievement data that can be collected over such a short period. The net result is that ineffective and grossly ineffective teachers earn tenure every year in California even though a longer probationary period would result in substantially fewer errors. (See, e.g., 2/3/14 R. Tr. at 905:27-906:17 [Raymond] [Permanent Employment Statute causes SCUSD to grant tenure to grossly ineffective teachers]; 1/29/14 R. Tr. at 430:14-27 [Deasy] [Permanent Employment Statute adversely impacts the quality of LAUSD's teacher pool].) Those findings are supported by abundant testimony from Plaintiffs' witnesses and documents submitted by Plaintiffs, including:

- Various district administrators, such as Mark Douglas from the Fullerton school district, who explained that 16 months "is not a sufficient enough time to grant a teacher tenure . . . . It can be as much as a *crapshoot* . . . whether that [teacher] is going to develop into the person you want." (2/5/14 R. Tr. at 1112:3-1115:26 [Douglas].) Superintendent Deasy from LAUSD similarly proclaimed "[t]here is no way that [16 months] is a sufficient amount of time to make in my opinion that incredibly important judgment . . . . [Y]ou don't even have, in my opinion, a reasonable period of time to show growth." (1/27/14 R. Tr. at 133:28-134:19; see also 3/24/14 R. Tr. at 4459:19-4460:17 [Smith] ["There is just no way to collect enough information about the effectiveness of those teachers."].) Bill Kappenhagen, a principal in San Francisco, described one particular teacher he reelected to a tenured position who ended up being a mistake; by the third year, it was apparent that the teacher was ineffective—but by then it was too late. (2/4/14 R. Tr. at 1046:5-1047:23.)

- Expert witnesses like Dr. Kane, who explained the enormous benefits of having even "one . . . additional year[ ] of student achievement gains" data before making a tenure decision. (2/6/14 R. Tr. at 1299:26-1301:7 [Kane].) Dr. Chetty went even further, *quantifying* the benefit to students of waiting until after a probationary teacher's third year before making a tenure decision: "The amount that students learn and the gain they would achieve . . . would be $163,000 larger if you were to use 3 years of data to estimate teacher effectiveness instead of 16 months." (1/30/14 R. Tr. at 566:7-15 [Chetty].)

- A request, submitted jointly by the San Jose Unified School District and the San Jose Teachers' Association in the midst of this trial, asking the State Board of Education "to enable . . . the granting of a third year of probationary status as deemed necessary." (Pls.' Ex. 688 at P0688-9.) This request is proof that even local teachers' unions recognize that 16 months is insufficient to evaluate all probationary teachers accurately.[8]

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[8] Intervenors contended during closing argument that extending the probationary period to give a teacher "more time . . . [to] demonstrate the he or she [i]s an effective teacher . . . has nothing to do with Plaintiffs' case." (3/27/14 R. Tr. at 4645:23-4646:1.) But it has *everything* to do with Plaintiffs' case. Extending the probationary period would benefit *both* teachers *and* students because it would enable more accurate decisions in *both* directions—some effective teachers who are denied tenure under the current system would have time to prove themselves deserving of

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Defendants and Intervenors' own witnesses and documents further confirmed that the current probationary period is too short for school administrators to make accurate decisions. The CDE publication "Greatness By Design" explains that "districts are forced to make decisions about the granting of tenure . . . while candidates are still receiving support" from new teacher training programs, and that "a decision about permanent employment should occur *after* the completion of the [two-year] induction program." (Pls. Ex. 327 at P0327-46, P0327-51.) CTC employee Terri Clark confirmed in her trial testimony the absurdity of the current system, acknowledging that teachers can actually "receive notice that they are being reelected to a tenured teaching position and then subsequently fail to successfully complete the Induction Program" necessary to obtain a clear credential. (3/12/14 R. Tr. at 3350:21-26 [Clark].) And CDE employee Lynda Nichols corroborated that point, stating her view that a teacher "should have the full two-year benefit of induction" prior to the date by which a tenure decision must be made. (3/19/14 R. Tr. at 3972:23-3974:8 [Nichols].) Finally, *two* expert witnesses called to the stand by Defendants and Intervenors *both* expressed their view that the probationary period should be three to five years long in order to benefit both students and teachers. (3/6/14 R. Tr. at 2803:3-2804:2 [Rothstein] [describing the "optimal amount of time" as three to five years]; (3/18/14 R. Tr. at 3890:23-3891:5 [Berliner] [agreeing that "a probationary period of three or even five years would be better than two years to make the tenure decision"].)

In defense of the Permanent Employment Statute, Defendants and Intervenors argue that there are ways for district administrators to work within the 16-month time period, pointing to examples of so-called "well managed districts" whose administrators believe they are able to cope with the existing time limits. As an initial matter, this argument is beside the point—however well any particular district administrator thinks he can perform within the constraints of the existing statute, there can be no dispute that *all* districts would make even better decisions with more time and more information. (2/6/14 R. Tr. at 1300:23-25 [Kane] ["[I]t becomes easier to see who the effective and

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tenure, and some ineffective teachers who are granted tenure under the current system would have time to reveal themselves as *not* deserving of tenure.

the ineffective teachers are as time passes."].)[9] Moreover, even if *some* districts believe they can cope with the existing statute, other districts cannot—an inter-district disparity that is itself an equal protection violation. *See Butt*, *supra*, 4 Cal.4th at p. 692; *Serrano I*, *supra*, 5 Cal.3d at 614.

In any event, Defendants and Intervenors presented no evidence whatsoever to suggest that the strategies being employed by so-called "well-managed districts" are *actually* successful at weeding out all ineffective probationary teachers:

- Some of Defendants and Intervenors' witnesses, for example, explained that they simply deny tenure whenever they have doubts about a teacher. But school administrators have doubts (or *should* have doubts) about *most* teachers after only 16 months. As Oakland principal Larissa Adam explained, "I still have doubts about all of my second-year teachers because they are still very much in the steep learning part of the curve and it always feels like a big risk." (1/30/14 R. Tr. at 652:1-652:20 [Adam]; see also 1/28/14 R. Tr. at 270:26-271:3 [Deasy] ["[Y]ou don't make such a weighty decision on either a single piece of evidence or just a doubt. You need evidence and you need to be able to show that there is a track record of improvement . . . . [T]he statute provides ridiculously short period of time to do that in."].)

- Other witnesses for Defendants and Intervenors bragged about their hiring practices, claiming that they can predict at the time of hiring which teachers will be effective in the classroom. But as Dr. Kane explained, "it is very hard to know who the effective and ineffective teachers are going to be at the moment that you recruit them . . . . [H]uge differences . . . emerge later." (2/6/14 R. Tr. at 1266:25-1267:4; 3/6/14 R. Tr. at 2797:20-2798:5 [Rothstein] [admitting that hiring criteria are at best "weakly correlated" with effectiveness].) Several witnesses for Defendants and Intervenors testified that teachers do not reach their stride until they have been teaching in the

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[9] Defendants and Intervenors also point to the fact that some of Plaintiffs' districts, including LAUSD and OUSD, have recently implemented "affirmative" tenure processes whereby administrators are required to make active decisions to reelect probationary teachers rather than passively allowing probationary teachers to obtain permanent status. Again, however, this is merely a strategy districts employ to do the best they can *within* the confines of the existing statute; it does not alter the amount of data or information available to districts at the time they must make the tenure decision, and does not change the fact that districts could make far better decisions *without* the confines of the existing statute.

classroom for *at least* three years. (See 2/18/14 R. Tr. at 2165:7-8 [Johnson] [discussing the literature showing that teachers "plateau in years four, five six, or seven."].) Thus, the arbitrarily compressed tenure period prevents administrators from truly knowing how effective or ineffective a teacher will become until *after* they have been granted (or denied) permanent employment.

- Some administrators—particularly those from small districts like El Monte—testified that principals can make well-informed decisions in 16 months if they simply devote more of their time to observing and evaluating probationary teachers. (3/12/14 R. Tr. at 3201:19-23 [Seymour] [El Monte School District hires, on average, less than five probationary teachers each year].) But for larger districts, this is an impractical solution that ignores the many other responsibilities that principals must juggle. (2/5/14 R. Tr. at 1114:26-27 [Douglas] ["[P]rincipals have multiple tasks that they're doing."]; 2/3/14 R. Tr. at 903:6-8 [Raymond] ["[A] site administrator [can] put their time and their effort in only so many places."].) Moreover, even *constant* teacher observations over a 16-month period cannot compensate for the lack of student achievement data—data that Defendants and Intervenors' so-called "well-managed" districts ignore when making tenure decisions. (3/13/14 R. Tr. at 3409:1-6 [S. Brown] [admitting that San Juan Unified School District does not look at student test scores in making tenure decisions]; 3/11/14 R. Tr. at 3089:25-3090:5 [Mills] [admitting that Riverside Unified School District does not look at student test scores in making tenure decisions].)

Finally, Defendants and Intervenors argued during their closing arguments that, at a minimum, *grossly* ineffective teachers can be easily identified within the probationary period because they are immediately obvious to administrators. Of course, Plaintiffs do not dispute that *certain* grossly ineffective teachers will have patent deficiencies that are easily detected. But there are also grossly ineffective teachers—teachers who are simply unable, for whatever reason, to achieve student learning gains—who cannot be identified until sufficient time has passed and sufficient student learning data has been gathered. Sixteen months provides neither. (1/30/14 R. Tr. at 562:14-23 [Chetty] ["If you only restrict yourself to effectively using one year of . . . classroom observation data . . . you are going to get significantly less reliable estimates than if you have more data . . . [Y]ou are going to end up hurting students."]; 2/4/14 R. Tr. at 905:22-906:2, 927:6-19 [Raymond] [many grossly ineffective teachers cannot be identified in the 16-month probationary period].)

2. The Dismissal Statutes Harm Students.

The Dismissal Statutes harm students because they prevent school districts from dismissing all of their grossly ineffective teachers, leaving students to languish in classrooms with those teachers year after year. The evidence at trial was overwhelming—and largely undisputed—that when a district is forced to dismiss an ineffective teacher through the process prescribed by the Dismissal Statutes, it takes multiple years, costs hundreds of thousands (or millions) of dollars, and even then, the CPC does not rule in favor of dismissal unless the district can show that the teacher is "incapable of remediation." As a result, districts in California rarely seek dismissal of grossly ineffective teachers—teachers they would seek to dismiss if the process took less time, cost less money, required less documentation, and had a higher likelihood of success. As explained by Frank Fekete, a lawyer with over 40 years of experience litigating teacher dismissal cases, "the procedural complexities, the time frame required within the statute, the resources of time, opportunity costs, and attorney's fees, and the evidentiary burden required, all result in districts being extremely reluctant . . . to use this process to fire grossly ineffective teachers." (2/19/14 R. Tr. at 2326:11-20 [Fekete]; see also 1/30/14 R. Tr. at 641:4-21 [Adam] ["I viewed [dismissal] as not a realistic option."].)

Plaintiffs provided a mountain of unrebutted evidence to support those findings:

- Time: Vivian Ekchian, the former chief human resources officer for LAUSD, testified that, to her knowledge, LAUSD has *never* completed a performance-based teacher dismissal hearing in less than two years. (3/21/14 R. Tr. at 4325:1-20 [Ekchian].) Some dismissal cases in LAUSD "have taken slightly less than *ten years*." (1/27/14 R. Tr. at 159:5-8 [Deasy].) In fact, just building the record required to launch a dismissal effort "takes months and months and months, sometimes years." (2/4/14 R. Tr. at 925:10-22 [Raymond].) Examples of actual dismissal cases—both from Plaintiffs' districts *and* the so-called "well-managed" districts touted by Defendants and Intervenors—corroborate this testimony. (Pls. Ex. 20 at P0020-1949 to 1970 [dismissal of Colleen Kolter in LAUSD took more than 3 years]; *id*. at P0020-1875 to 1890, P0020-2525 to 2541 [dismissal of Gloria Hsi in LAUSD took 10 years]; *id*. at P0020-1094 to 1134 [dismissal of Linda Strong in Riverside took nearly 4 years]; *id*. at P0020-1708 to 1721 [dismissal of Mary Crum in Long Beach took more than 3 years].) Indeed, Defendants and Intervenors did not present evidence of a

single dismissal case litigated through a CPC hearing that took less than 2 years. During that time, grossly ineffective teachers remain in the classroom harming students and continue to receive their full salary. (1/28/14 R. Tr. at 194:28-195:6 [Deasy]; 2/4/14 R. Tr. at 925:10-22 [Raymond].)

- Cost: All of Plaintiffs' school-administrator witnesses provided consistent estimates of the exorbitant cost of dismissing a grossly ineffective tenured teacher, ranging from $50,000 to $450,000 per teacher. (See, e.g., 1/27/14 R. Tr. at 170:16-21 [Deasy] [$250,000 to $450,000][10]; 1/31/14 R. Tr. at 731:9-20 [Christmas] [$50,000 to $400,000]; 2/5/14 R. Tr. at 1101:17-1102:6 [Douglas] [approximately $250,000]; 2/4/14 R. Tr. at 907:27-908:24 [Raymond] [approximately $110,000].) And Frank Fekete, who has litigated countless dismissal actions across California, corroborated these estimates. (2/19/14 R. Tr. at 2350:11-2351:7.) Importantly, not a *single* witness for the Defendants or Intervenors provided evidence of a *single* dismissal case, litigated through a CPC hearing, whose cost was inconsistent with these estimates. Worse, by the terms of the Dismissal Statutes, districts that litigate the dismissal of a grossly ineffective teacher through a CPC hearing and are unsuccessful for *any* reason must pay the teacher's attorneys' fees, which can more than double the cost of the effort. (§ 44944(e)(2); see also 2/19/14 R. Tr. at 2350:29-2351:3 [Fekete].)

- Evidentiary burden: The custom and practice of the CPC is to require districts to meet an "incapable of remediation" standard in order to dismiss a teacher, (1/31/14 R. Tr. at 721:15-722:16 [Christmas]), meaning that districts must prove that "nothing more can possibly be done" to improve the teacher's performance. (2/19/14 R. Tr. at 2338:6-18 [Fekete].) As a result, the CPC sometimes refuses to order dismissal even though the CPC decision contains "an acknowledgement of the poor performance of the teacher, acknowledgment of the ineffectiveness of the teaching, [and] an

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[10] During closing arguments, Intervenors pointed to Dr. Deasy's testimony for the proposition that the cost of dismissal has not affected LAUSD's decision to initiate dismissal proceedings. (3/27/14 R. Tr. at 4653:13-17.) But they distort his testimony. Dr. Deasy testified repeatedly that the costs associated with the dismissal process unquestionably constrain LAUSD's ability to *actually dismiss* all of its grossly ineffective teachers, regardless of whether Dr. Deasy recommends that the LAUSD board "initiate" such dismissals. (1/27/14 R. Tr. at 172:16-173:3 [Deasy] [explaining that not all dismissal recommendations are pursued to completion]; *id.* at 162:22-26 [Deasy] [the "costs" are "a real factor" in determining whether "the District is able or willing to spend" through the dismissal process]; *id.* at 163:3-16, 172:3-7 [Deasy] [it is "unquestionable" that the costs of the dismissal process, coupled with LAUSD's "finite" budget, makes it impossible for LAUSD to dismiss all of its grossly ineffective teachers].)

acknowledgement of efforts at remediation." (1/31/14 R. Tr. at 722:3-16 [Christmas].)[11] Moreover, for districts with Peer Assistance and Review ("PAR") programs, it has become a prerequisite to "demonstrate that the teacher in question has gone through the PAR process not only one but . . . several times" to show they cannot be remediated. (2/19/14 R. Tr. at 2339:12-21 [Fekete].) This adds to the time and cost of dismissal and also diminishes districts' likelihood of success: "We have kids who would have been great witnesses when we first identified ineffective teaching who are no longer with us. They have graduated. They have left. They have moved from the district. That is true of teachers. That is true of administrators." (1/31/14 R. Tr. at 729:1-6 [Christmas].)

Ultimately, the numbers speak for themselves: Only 2.2 teachers are dismissed on average, each year, for unsatisfactory performance in the *entire* state of California—only 0.0008% of the 275,000 teachers statewide. (2/19/14 R. Tr. at 2360:2-28 [Fekete]; 3/18/14 R. Tr. at 3907:19-22 [Nichols].) Even using the low end of Defendants' expert's own estimate that 1% of teachers in California are grossly ineffective, (3/18/14 R. Tr. at 3884:25-3885:3 [Berliner]), that means only 0.08% of the grossly ineffective teachers in California are being dismissed each year. At that rate, it would take *12.5 years* to dismiss all of the grossly ineffective teachers that are currently in the system, not to mention any new ones that earn tenure in the meantime. That is completely unacceptable, especially when considering that LAUSD is aware of at least 350 grossly ineffective teachers that it believes should be dismissed immediately, in that one district alone. (3/21/14 R. Tr. at 4321:15-4322:2 [Ekchian][12]; see also 2/5/14 R. Tr. at 1093:19-26 [Douglas] [Fullerton school district

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[11] To give one example, the CPC refused to authorize the dismissal of Oakland teacher Deborah Payne-Kelly after a *six-year* process, even though it found that the teacher's "interactions with her colleagues and students were often difficult and problematic," that she "did not consistently create lesson plans," that she "did not implement assigned curricula," and that she "missed or refused to participate in meetings." (Pls. Ex. 20 at P0020-157 to 174.)

[12] During their closing argument, Intervenors argued that 350 teachers is a small number in light of the fact that LAUSD has removed 786 teachers from classrooms over a recent four-year period. (3/27/14 R. Tr. at 4666:19-26.) But that argument ignores several critical facts: (1) 350 teachers is not a small number. At least 8,750 children are being harmed every year by those teachers, losing nearly $500 million in lifetime earnings annually. (2) Of the 786 teachers that LAUSD removed, only *five* of them were dismissed involuntarily through the dismissal process. (3/21/14 R. Tr. at 4302:20-26 [Ekchian].) The other 781 resigned or retired voluntarily. There is no evidence that *any* of the 350 grossly ineffective teachers identified by Ms. Ekchian are willing to leave voluntarily. (3) The 350 number that Ms. Ekchian provided represents only teachers who

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knows of more than 10 grossly ineffective teachers it would dismiss immediately]; 2/4/14 R. Tr. at 931:28-932:21 [Raymond] [Sacramento City school district knows of "at least two dozen"]; 3/24/14 R. Tr. at 4467:17-4468:16 [Smith].)

Again, Defendants and Intervenors' own witnesses confirm the problem. As expert witness Dr. Susan Moore Johnson testified, "[d]ismissals are extremely rare in most districts because administrators believe it is *impossible* to dismiss a tenured teacher." (2/18/14 R. Tr. at 2189:13-16 [Johnson]; see also, e.g., 2/18/14 R. Tr. at 2189:3-12 [Johnson] [agreeing that "[d]ismissing teachers with tenure is ordinarily a very expensive and time-consuming process which very few districts . . . actively pursue]); 3/5/14 R. Tr. at 2580:10-16 [Fraisse] [agrees that it should be "easier to fire bad teachers" by, for example, "guaranteeing them work for only a set period of time"]; 3/18/14 R. Tr. at 3865:24-3866:2 [Berliner] ["support[s] the dismissal of bad teachers because bad teachers hurt children's life chances"]; 3/10/14 R. Tr. at 2930:5-23 [Tuttle] [conceding that discovery propounded under the Dismissal Statutes is a "waste of money"].)

Bizarrely, Defendants and Intervenors have attempted to defend the Dismissal Statutes *not* by arguing that they work, but by arguing that districts can employ a variety of "workarounds," including resignations and settlement agreements, to avoid having to use the dismissal process. But that very argument concedes the problem—*there would be no need to circumvent a process that works*. In addition, the argument fails because it is undisputed that some grossly ineffective teachers simply refuse to leave their jobs voluntarily. (See, e.g., 3/10/14 R. Tr. at 2933:7-14 [Tuttle] [agrees that "a dismissal hearing may be the only way a district can remove a poorly performing teacher who refuses to resign after failing to improve" if a "teacher has permanent status and doesn't retire and doesn't resign"]; 1/31/14 R. Tr. at 727:18-728:1 [Christmas] ["We might have a teacher who

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> received *two* below-standard evaluations as of the 2012-13 school year. There are far more grossly ineffective teachers in the district who should be dismissed, including those who received only *one* below-standard evaluation and those who principals have elected *not* to give below-standard evaluations due to the unlikelihood of dismissal. (1/28/14 R. Tr. at 289:22-25 [Deasy] [acknowledging that "principals [in] LAUSD are no longer allowed to transfer a teacher with a below-standard evaluation"]; 2/10/14 R. Tr. at 1525:6-23 [Kappenhagen] [explaining that principals have an incentive to evaluate a teacher as "effective even if they are not" because schools are compelled to keep a teacher rated "unsatisfactory"].)

basically tells their counsel I'm not interested in settling, you know, we're going to go the whole way."].) Moreover, even the workarounds are costly and time-consuming, leaving grossly ineffective teachers in classrooms with students for years. (See 3/21/14 R. Tr. at 4308:7-14 [Ekchian] [LAUSD paid more than $5 million in settlement payments over a 5-year period]; 3/10/14 R. Tr. at 2913:7–11, 2814:15-21 [Tuttle] [settlements typically occur one month or less before CPC dismissal hearings—*after* many of the costs associated with teacher dismissal hearings have already been incurred]; 2/4/14 R. Tr. at 929:5-16 [Raymond].) In fact, the cost of settlement is driven up by the cost of the dismissal process because teachers know there is a very low likelihood they will be dismissed involuntarily; thus, streamlining the dismissal process would greatly reduce the cost of the workarounds as well. (1/28/14 R. Tr. at 207:12-208:28 [Deasy]; (2/3/14 R. Tr. at 874:18-19 [Christmas] ["The longer the [dismissal] process is expected to be, the more [districts] will pay to avoid it."].)

Witnesses for Defendants and Intervenors also spent a lot of time discussing PAR programs. But, again, it is undisputed that "even a well-run PAR program must contemplate that some poorly performing teachers may still have to be dismissed." (2/18/14 R. Tr. at 2205:12-18 [Johnson]; see also 3/5/14 R. Tr. at 2587:2-16 [Fraisse] ["[S]ome teachers are unable to meet the requirements of their PAR Improvement Plans"].) Further, even the PAR programs touted by Defendants and Intervenors are highly expensive and limited in scope. In San Juan Unified School District, for example, an average of only two teachers per year (out of 2,000 certificated staff) complete the PAR program. (3/13/14 R. Tr. at 3360:3-17, 3398:2-12 [S. Brown].) And in Hart Union High School District, *less* than two teachers per year (out of 1,000) do so. (3/19/14 R. Tr. at 4071:16-27, 4094:16-4095:1 [Webb].) Yet PAR programs cost districts between $250,000 and $2 million annually. (2/18/14 R. Tr. at 2210:19-2211:6 [Johnson].) In short, PAR programs—which are not mandated by the Challenged Statutes or any other California law—are insignificant and irrelevant to this case.

Finally, Defendants and Intervenors fall back once again on their "well-managed school districts" argument, asserting that Plaintiffs' districts fail to use the Dismissal Statutes successfully because they are mismanaged. But there is no evidence whatsoever that LAUSD, OUSD, Sacramento City, Fullerton, or the many other districts represented by Plaintiffs' witnesses are all mismanaged. And there is no dispute that even so-called "well-managed" districts still face

enormous burdens when they *actually* need to utilize the dismissal process. (2/19/14 R. Tr. at 2327:15-24 [Fekete] ["You have the same time frames. You have the same evidentiary burdens. You have the same procedural hoops to jump through whether you are well managed or not."].)

3. The "Last-In, First-Out" Layoff Statute Harms Students.

The LIFO Statute harms students because, in the event of a district-wide RIF, it compels school districts to adhere to a senseless reverse-seniority selection process that ignores the best interests of students. Plaintiffs' evidence at trial, which again was largely undisputed, proved that the LIFO Statute forces districts to fire bright, enthusiastic, highly effective teachers (see, e.g., 2/3/14 R. Tr. at 917:22-27 [Raymond]; 2/5/14 R. Tr. at 1120:6-1121:7 [Douglas]; 1/28/14 R. Tr. at 237:16-19 [Deasy]; 2/3/14 R. Tr. at 775:26-776:2 [Christmas]), in favor of ineffective and grossly ineffective teachers with more seniority (see, e.g., 2/3/14 R. Tr. at 929:22-26 [Raymond]; 2/5/14 R. Tr. at 1121:8-11 [Douglas]; 1/28/14 R. Tr. at 237:24-28 [Deasy]; 2/3/14 R. Tr. at 776:3-777:8 [Christmas]). It also dissuades high-achieving teachers from entering and remaining in the profession, compounding the harm to students. (See, e.g., 2/4/14 R. Tr. at 1000:6-24 [Bhakta] ["[M]y love for [teaching], none of it mattered . . . all that mattered was my hire date."]; 2/7/14 R. Tr. at 1500:21-28 [Moss] ["I was extremely committed to my students, I loved my students, I was a leader on campus and none of this mattered."]; 2/11/14 R. Tr. at 1763:2-15 [Melvoin] ["I was laid off as a result of that statute twice . . . I just couldn't go without a paycheck and without health insurance."].) A model of irrationality, the LIFO Statute means that a teacher can be named "teacher of the year" and nevertheless be laid off the same year. (2/4/14 R. Tr. at 994:18-995:4 [Bhakta] [Arcadia Unified School District teacher of the year]; see also 3/5/14 R. Tr. at 2610:14-24 [McLaughlin] [Pasadena Unified School District teacher of the year received four layoff notices].) In the words of Superintendent Raymond, "a system that treats its best teachers this way . . . [and] ultimately doesn't serve children . . . is broken." (2/3/14 R. Tr. at 920:21-24 [Raymond].)

The injuries sustained by students as a result of the LIFO Statute are significant and measurable. As Dr. Chetty explained, the LIFO Statute "reduces student learning relative to a feasible alternative policy and it dismisses highly effective teachers who you absolutely would want to keep in the school system, and that impedes student learning as measured by test scores. And,

more importantly, in my view, it has measurable long-term impacts on students in terms of earnings, as well as college attendance rates and myriad other outcomes." (1/30/14 R. Tr. at 579:8-21.) Specifically, Dr. Chetty calculated that *every teacher* laid off under the LIFO Statute costs students $2.1 million in lifetime earnings as compared to using a layoff system based on effectiveness. (1/30/14 R. Tr. at 569:23-570:1.) The California Department of Education recognizes the severe damage being caused by the LIFO Statute, calling "extensive layoffs of excellent teachers who may be lost to the profession" "a *significant state problem*." (Pls. Ex. 327 at P0327-16 [italics added].) And defense expert Dr. Berliner acknowledged that he would "always" prefer to use a "better instrument" for conducting layoffs than the LIFO policy—"the better the instrument to use to make decisions about a teachers' competence, the better off everyone is." (3/18/14 R. Tr. at 3871:11-27.)

Defendants and Intervenors proffered several nonsensical arguments in defense of this nonsensical statute, all of which should be rejected out of hand:

- First, they argued that teachers laid off under a seniority-based layoff system are less effective *on average* than the teacher workforce as a whole. But that argument answers the wrong question because it assumes that the only alternative to a seniority-based system is *random selection*—a system that *no one* would defend as rational. As Dr. Goldhaber explained, "[t]he right question is how effective are the teachers laid off under one criterion versus a different criterion." (2/13/14 R. Tr. at 1874:27-1875:1.) And the answer to *that* question demonstrates the devastating harm to students being imposed by the LIFO Statute: "48 percent of the teachers who are laid off under a LIFO policy are *more effective* than the average teacher in the L.A. school district. So 48 percent of the time you are laying off someone who's actually better than average when you use a LIFO policy," as compared to *zero* percent of the time when using an effectiveness-based policy. (1/30/14 R. Tr. at 574:25-575:12 [Chetty] [italics added].) In fact, only 16% of the teachers laid off under the LIFO system would be laid off under an effectiveness-based system. (2/11/14 R. Tr. at 1802:26-1803:8 [Goldhaber].) Moreover, the average teacher retained under an effectiveness-based layoff system achieves *eight to nine months* more in student learning compared to the average teacher retained under the LIFO layoff system. (2/14/14 R. Tr. at 2079:10-18 [Ramanathan].)

- Second, they argue that taking teachers' effectiveness into account when conducting layoffs would destroy collaboration among teachers, allegedly harming students. (3/17/14 R. Tr. at 3643:21-3644:2 [Tolladay] ["I'[d] [be] afraid to give away my secrets, my special super-secret teaching techniques, because my colleagues then might get better than me, and I might lose my job."].) But there is no credible evidence that teachers would stop doing what is best for students merely because of a concern that they might, in the event of a layoff, be found to be grossly ineffective. Indeed, any teacher who refuses to collaborate with his colleagues is probably not a teacher that districts would want to employ in any event. (3/24/14 R. Tr. at 4474:25-4475:9 [Smith] ["[T]he kind of learning engagement that effective teachers are doing is about . . . sharing the work, lessons, the activity; they're competing against outcome," not each other].)
- Third, they argue that districts can use the skipping criteria under subsection (d)(1) of the LIFO Statute to avoid laying off some effective teachers. But it is undisputed that subsection (d)(1) permits districts to skip teachers *only* on the basis of training and credential, *not* on the basis of effectiveness. (See, e.g., 1/28/14 R. Tr. at 240:15-241:27 [Deasy].) Thus, any ability to save *some* effective teachers using (d)(1) would be mere fortuity; that subsection is certainly not a "credible alternative[]" for districts to use to save all of their effective teachers, or release only their ineffective teachers, during a layoff. (2/14/14 R. Tr. at 2066:27-2067:11 [Ramanathan].) In fact, when districts have attempted to use subsection (d)(1) to save effective teachers and protect their high-need students from layoffs, their efforts have repeatedly been rejected. (See 2/13/14 R. Tr. at 1965:14-1971:20 [Ramanathan] [discussing failed efforts in Sacramento and San Francisco].)
- Fourth, they argue that districts can use subsection (d)(2) of the LIFO Statute to avoid laying off some effective teachers in the name of students' equal protection rights. But subsection (d)(2) is so ambiguous that districts cannot—and do not—assume the risk of invoking it. (See 3/19/14 R. Tr. at 3979:23-3981:4 [Nichols] [districts have never called to ask the CDE about invoking subsection (d)(2)].) Indeed, when LAUSD attempted to be the first district ever to invoke subsection (d)(2), it was mired in years of litigation that is still ongoing—and its efforts were rejected by the Court of Appeal, which held that a full-blown trial on the merits is required to determine whether the (d)(2) exception can justify violating teachers' statutory "seniority rights." (*Reed v.*

United Teachers L.A. (2012) 208 Cal.App.4th 322, 338.) Moreover, the Los Angeles teachers' union, an affiliate of Intervenor CTA, argued in *Reed* that "subsection (d)(2) . . . was intended to permit school districts to accommodate constitutional concerns regarding the race and ethnicity of *teachers*, *not* . . . students." (Pls. Ex. 375, P0375-31 [italics altered].) Such a hopelessly ambiguous provision cannot possibly save the LIFO Statute from constitutional challenge.[13]

- Fifth, they argue that "well-managed" districts can sometimes avoid layoffs. But even the districts touted by Defendants and Intervenors admit that they have sometimes been forced to conduct layoffs. (3/10/14 R. Tr. at 2995:27-2997:15 [Barrera] [San Diego]; 3/11/14 R. Tr. at 3102:24-3103:15 [Mills] [Riverside]; 3/11/14 R. Tr. at 3181:19-3182:17 [Brown] [La Habra].)

- Finally, they argued early in the trial that layoffs may not occur again in the future, suggesting that Plaintiffs' claims may not be ripe. But later in the trial, CDE employee Jeannie Oropeza admitted that "layoff notices have been announced in certain California school districts" for the 2014-15 school year. (3/17/14 R. Tr. at 3685:8-11 [Oropeza]; see also 2/14/14 R. Tr. at 1976:27-1977:12 [Ramanathan] [future layoffs are "extremely likely" because of "demographic trends"].)[14]

C. The Challenged Statutes Impose Disproportionate Harm On Low-Income And Minority Students.

The great risk of harm that the Challenged Statutes impose on *all* students in California is magnified for the most vulnerable students—minority and low-income children most in need of the opportunities that education is meant to provide. Plaintiffs' evidence documented at least four ways

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[13] (See, e.g., *Mendoza v. State of Cal.* (2007) 149 Cal.App.4th 1034, 1058 ["[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.)

[14] In any event, California courts do not demand certainty. (See *Vandermost v. Bowen* (2012) 53 Cal.4th 421, 463-464; see also *Coral Const. Inc*, *supra*, 116 Cal.App.4th at pp. 25-26 [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."].) There is no question that future layoffs will be conducted under the parameters set forth in the LIFO Statute, harming students in the same manner as prior layoffs.

in which the Challenged Statutes impose disproportionate harm on poor and minority students, yet another reason this Court should apply strict scrutiny.

First, the Challenged Statutes make a bad situation worse because poor and minority students are more vulnerable to the damages inflicted by grossly ineffective teachers. It is undisputed that there is a substantial achievement gap in California between White students and African American and Latino students. (2/13/14 R. Tr. at 1929:18-1930:14 [graduation rates]; 2/13/14 R. Tr. at 1933:14-23 [API].) Likewise, is it undisputed that there is a substantial achievement gap between low-income students and their more affluent counterparts. (3/24/14 R. Tr. at 4349:6-10 [stipulation to "the existence of an achievement gap"]; see also 2/13/14 R. Tr. 1893:6-1894:26 [Ramanathan].) Plaintiffs do not contend that the Challenged Statutes *caused* the achievement gap in the first place, but the Challenged Statutes exacerbate (or, at a minimum, hinder districts' efforts to ameliorate) the gap. San Francisco principal Bill Kappenhagen explained that "when a student from a low-income family has an ineffective teacher, it actually puts them—it puts their life trajectory on hold or even backwards . . . [L]ower income families' students don't have the available resources that other or more affluent families have, they don't have an opportunity to be nearly as resilient when they have an ineffective teacher, especially when they have a grossly ineffective teacher." (2/4/14 R. Tr. at 1040:27-1041:8.) And Oakland principal Kareem Weaver provided similar testimony: "There is a margin of error issue with students with low-income, lots of risk factors . . . I liken it to standing on a razor's edge. . . . [F]or many students, especially kids of color . . . education can either prop them up or it can blow them down." (2/7/14 R. Tr. at 1456:16-28.)[15]

Second, the Challenged Statutes "function[ ] like a lemon accumulation machine" that disproportionately harms poor and minority students. (2/6/14 R. Tr. at 1331:1-22 [Kane]; see also 2/6/14 R. Tr. at 1334:9-27 ["[T]here is a mechanical relationship between premature tenure decisions, difficult dismissal decisions, and the accumulation of ineffective teachers" in poor and minority

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[15] During closing argument, Intervenors argued that "California schools are doing a very good job of educating California's children" and "keep[ing] the American dream alive" for poor and minority students, citing Dr. Chetty's study on upward mobility in the United States. (3/27/14 R. Tr. at 4623:9-12, 4703:4-5.) But Dr. Chetty explained that his study cannot be used to draw that conclusion. (1/30/14 R. Tr. at 606:18-608:2 ["You cannot conclude that."].)

schools.].) Most teacher hiring takes place in low-income schools, where there are more vacancies and higher turnover. As more effective teachers gain seniority and transfer to more affluent schools (which they will tend to do in any system), ineffective teachers (who cannot be dismissed) are left behind in the low-income schools. (See 2/6/14 R. Tr. at 1330:20-1331:22 ["less-effective teachers" tend to accumulate in "the schools where there are disproportionate numbers of African-American and Latino students"].) In addition, ineffective teachers who start out in higher income schools often find themselves on "priority placement" lists (because they cannot be dismissed) and end up in the low-income schools. (See 1/30/14 R. Tr. at 653:19-654:1 [Adam].)

Third, and relatedly, the Challenged Statutes lead to a pernicious and well-documented phenomenon known colloquially as the "dance of the lemons." Because dismissal is not a viable option, principals seeking to improve their own schools try to transfer ineffective teachers to other schools within the district. (2/5/14 R. Tr. at 1128:4-18 [Douglas] [principals "use [the] dance of the lemons" to "mov[e] people of less skill, poor performance . . . to other schools"]; 2/4/14 R. Tr. at 1067:1-1068:15 [Kappenhagen].) Unsurprisingly, the schools that bear the brunt of these transfers are the schools serving "predominantly low-income students," which typically have more vacancies and "families who aren't used to the education system, . . . don't know what to look for in a great teacher . . . [and] won't complain." (2/5/14 R. Tr. at 1125:14; 1128:24-1129:7 [Douglas].)

The unrebutted data that Plaintiffs presented at trial bears out this disastrous result: African American and Latino students in LAUSD are 43% and 68% more likely, respectively, to be stuck with a teacher in the bottom 5% of effectiveness than White students in LAUSD. (2/6/14 R. Tr. at 1326:16-23 [Kane].) And low-income students in LAUSD are nearly twice as likely to have an ineffective teacher than their more affluent peers. (2/13/14 R. Tr. at 1909:9-27 [Ramanathan].) Moreover, once again the CDE *admits* that this injustice is occurring in California: "[T]he 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." (Pls. Ex. 289 at P0289-5.) Defendants and Intervenors' experts also acknowledge that "low-income students have a disproportionate number of ineffective teachers compared to high-income students,"

(2/18/14 R. Tr. at 2197:5-10 [Johnson]), and that "effective teachers are the most unequally distributed resource in the United States," (3/20/14 R. Tr. at 4263:12-18 [Darling-Hammond].)

Finally, the LIFO Statute forces layoffs (and layoff notices[16]) to be concentrated primarily in schools serving high-need communities because—as *everyone* agrees—those schools "tend to have high proportions of inexperienced teachers." (2/18/14 R. Tr. at 2193:20-28 [Johnson]; see also 2/11/14 R. Tr. at 1799:18-1800:4 [Goldhaber]; 1/30/14 R. Tr. at 584:15-585:27 [Chetty]; 3/18/14 R. Tr. at 3873:27-3874:2 [Berliner].) This causes "constant churn of the faculty and staff." (2/4/14 R. Tr. at 938:27-939:6 [Raymond].) In many cases, high-need schools have been forced to lay off *60% or more* of their teachers in a single year. (Pls. Ex. 40 at P0040-4; see also 1/30/14 R. Tr. at 644:04-644:02 [Adam] [90% of teachers in certain low-income schools received layoff notices compared to only 10% of teachers in more affluent schools]; 2/13/14 R. Tr. at 1959:28-1960:1-14 [Ramanathan] [in one high-poverty, high-minority school, 24 out of 26 teachers received layoff notices].) Yet again, the CDE acknowledges that the LIFO Statute causes "minority students [to] bear the brunt of staffing inequities." (Pls. Ex. 289 at P0289-5.) Further, this increased churn in high-need schools contributes to creating the very vacancies that are filled by ineffective teachers, as described above.

At trial, Defendants and Intervenors' *sole* response to the disproportionate harms being imposed on minority and low-income students was to blame the school districts—they contended that "well-managed" districts can ameliorate some of the harms being inflicted by the Challenged Statutes by transferring their most effective and most senior teachers to low-income schools. But there was absolutely no evidence presented at trial that such *en masse* teacher transfers are a feasible solution—to the contrary, Dr. Deasy explained that when LAUSD has attempted in the past to "force a teacher to go where a teacher [did] not wish to go," the teachers have "aggressively" filed grievances. (1/29/14 R. Tr. at 385:5-23 [Deasy]; see also 3/24/14 R. Tr. at 4478:16-19 [Smith].) Moreover, the argument fails because low-income, high-minority schools require teachers who *want* and *choose* to

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[16] Even when layoff notices do not ultimately lead to layoffs, they have a significant destabilizing effect on a school. (2/13/14 R. Tr. at 1958:22-1959:19 [Ramanathan] [layoff notices are "tremendously destabilizing"]; 2/5/14 R. Tr. at 1226:1-15 [Douglas] [layoff notices are a "morale issue . . . constantly remind[ing teachers] they're walking on eggshells"].)

teach there. As Dr. Ramanathan testified about his own experience as an administrator in San Diego, it is a "terrible situation" when teachers are "bumped or placed into school[s]" and they "don't want to be there." (2/14/14 R. Tr. at 2081:3-7 [Ramanathan].)

D. The Challenged Statutes Are Unconstitutional Because They Fail Strict Scrutiny.

For both of the reasons set forth above—(1) real and appreciable impact on the fundamental right to education, placing *all* students at risk of harm, and (2) disproportionate harm on minority and low-income students—this Court should examine the Challenged Statutes under strict scrutiny. Under that standard, the "*state* bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." (*Serrano I*, *supra*, 5 Cal.3d at p. 597 [italics added].) In order to establish that a law is "necessary," the State must prove it is the "least restrictive means possible" to achieve its compelling interest. (*Bd. of Supervisors v. Local Agency* (1992) 3 Cal.4th 903, 913.) Importantly, "the availability of . . . alternatives—or the failure of the legislative body to consider such alternatives—will be fatal" to the law in question. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 37.) Because strict scrutiny imposes such a "heavy burden of justification," (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 848), "strict scrutiny generally functions as a judicial 'trump card,' invalidating any [law]" to which it applies. (*Hill v. Nat. Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, 30-31 [citations omitted].)[17]

In this case, Defendants and Intervenors have never even attempted to meet their burden under the strict scrutiny standard. Not once—not in their summary judgment papers, nor their

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[17] Even if this Court were to analyze the Challenged Statutes under rational basis review, the Court should still hold the Challenged Statutes to be unconstitutional. 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.) For all of the reasons set forth above and below, the Challenged Statutes place arbitrary and irrational constraints on districts that fail even the more deferential test.

motions for judgment, nor during trial, nor in their closing arguments—have they asserted that the Challenged Statutes serve any "compelling" state interests *or* that the laws are "necessary" to serve any interests whatsoever. The interests that they *do* claim are served by the Challenged Statutes are either absurd,[18] plainly not compelling,[19] or entirely unsupported by the evidence.[20] Moreover, their own expert witnesses concede that the statutes are not *necessary* to serve those interests.[21]

In any event, there can be no dispute that feasible alternatives exist for *each* of the Challenged Statutes. With respect to the Permanent Employment Statute, California is one of only five states with a probationary period of two years or less—32 states have three-year probationary periods, nine states have four or five-year probationary periods, and four states have no tenure system at all.

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[18] For example, they assert that the Permanent Employment Statute serves the interest of providing districts "ample opportunity" to evaluate new teachers, (Intervenors' Responses and Objections to Beatriz Vergara's First Set of Special Interrogatories No. 6), the very opposite of what the statute's 16-month time limit does. Likewise, they assert that the Dismissal Statutes serve the interest of avoiding cost to the public school system, (*id*. at Nos. 6–8), again the antithesis of the statutes' actual effect. They also assert that the LIFO Statute serves the interest of giving districts "flexibility," (*id*. at No. 10), when the very problem with the LIFO Statute is inflexibility.

[19] For example, they assert that the LIFO Statute serves the interest of providing an "objective" standard for conducting layoffs that is "understood." (Intervenors' Responses and Objections to Beatriz Vergara's First Set of Special Interrogatories No. 10.) But they provide no explanation as to why it is of compelling importance to have an objective standard—plenty of objective standards, such as alphabetical order or height, would be easily understood but still devastating for students and unfair to teachers. (3/17/14 R. Tr. at 3654:28-3655:10 [Tolladay].)

[20] For example, they assert that the Permanent Employment Statute serves the interest of ensuring that districts do not "procrastinate" in notifying ineffective teachers of non-reelection. (3/6/14 R. Tr. at 2688:15-2689:2 [Rothstein].) But *all* of the testimony from their own witnesses makes clear that districts do not procrastinate; to the contrary, they non-reelect more teachers in the first probationary year than in the second. (3/11/14 R. Tr. at 3049:9-3051:21 [Mills] [72 percent of non-reelections occur during teachers' first probationary year]; 3/13/14 R. Tr. at 3509:14-3510:3 [Raun-Linde] [60 percent]; 3/13/14 R. Tr. at 3472:21-3473:18 [Davies] [80 percent].)

[21] (3/7/14 R. Tr. at 2832:9-13 [Rothstein] ["[T]he current two-year probationary period is not the only way that California can serve all of the interests that are purportedly served by the two-year probationary period."]; 3/20/14 R. Tr. at 4224:28-4226:13 [Darling Hammond] ["[A] tenure period [of] three years would [] serve [the] exact same interest" purportedly served by the Permanent Employment Statute.]; 3/20/14 R. Tr. at 4261:9-15 [Darling-Hammond] [There may "be other ways to serve the interest of preserving competent teachers than the process contained in the current Dismissal Statutes."]; (3/7/14 R. Tr. at 2840:22-2841:2 [Rothstein] [The LIFO Statute "might actually deter prospective teachers from joining the teaching profession."]; 3/20/14 R. Tr. at 4243:8-4244:5 [Darling-Hammond] [An effectiveness-based layoff system would "continue to serve" all of the interests purportedly served by the LIFO Statute.].)

(2/19/14 R. Tr. at 2265:19-2266:10 [Jacobs].)[22] With respect to the Dismissal Statutes, this Court need look no further than the California public school system itself to find feasible alternatives—the "time and burden associated with separating from a classified employee is typically significantly less than separating" from a tenured teacher. (2/3/14 R. Tr. at 878:3-16 [Christmas].) LAUSD spends only $3,400, on average, to dismiss a classified employee, (3/21/14 R. Tr. at 4327:10-21 [Ekchian]), and the process takes "not much more than a month, month and a half," (2/5/14 R. Tr. at 1222:24-28 [Douglas].) And with respect to the LIFO Statute, California is one of only 10 states in which seniority must be considered in determining which teachers to lay off—20 states prohibit seniority from being the sole factor, and two states prohibit seniority from being considered at all. (2/19/14 R. Tr. at 2276:4-2277:7 [Jacobs].)

Finally, striking down the Challenged Statutes will do *nothing* to impair the constitutional due process rights that teachers—like all other public employees in California—enjoy. (See *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215.) Teachers will still have notice and an opportunity to be heard before being dismissed for cause. (*Ibid.*) It will still be illegal in California for teachers to be fired for being gay (see Cal. Gov't Code § 12940(a)), despite various witnesses' confusion on that point. (3/17/14 R. Tr. at 3631:9-3632:13; 3656:25-28 [Tolladay]; 3/13/14 R. Tr. at 3405:24-3506:1 [S. Brown].) And teachers will not be fired for teaching subjects like Islam or evolution that are part of the state-mandated curriculum, despite various witnesses' expressed concerns. (See, e.g., 3/18/14 R. Tr. at 3916:8-28 [Nichols] [Islam]; see *id*. at 3919:11-21 [evolution]; *id*. at 3944:27-3945:6 [admitting that Islam and evolution are both part of the state curriculum].) .) The statutes at issue provide excessive and unnecessary protections that go far beyond the requirements of due process, placing teachers in a category all to themselves and harming students in the process.

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[22] Intervenors asserted during their closing argument that states with longer probationary periods do not allow districts to dismiss probationary teachers without cause, as California does. (3/27/14 R. Tr. at 4646:11-26.) That is incorrect. (See, e.g., 105 Ill. Comp. Stat. 5/24-11; Mich. Comp. Laws 38.83; Nev. Rev. Stat. 391.3197; N.Y. Educ. Law § 3012; Tex. Educ. Code § 21.103.) (See Evid. Code § 452(a); *Gagnon Co. v. Nevada Desert Inn* (1955) 45 Cal.2d 448, 454 [this Court may take judicial notice of other states' laws].)

E. At A Minimum, The Challenged Statutes Are Unconstitutional As Applied To Plaintiffs' School Districts.

Plaintiffs' evidentiary showing also proves that the Challenged Statutes are unconstitutional as applied to Plaintiffs because of the manner in which they affect Plaintiffs' particular school districts. (See Stip. [identifying Plaintiffs' districts].)[23] Abundant evidence has demonstrated that students in LAUSD and OUSD, for example, are at substantial risk of being assigned to grossly ineffective teachers because of the constraints imposed on those districts by the Challenged Statutes, and that the grossly ineffective teachers in those districts inflict substantial harm on their students. (See, e.g., 1/31/14 R. Tr. at 722:24-723:20 [Christmas]; 1/29/04 R. Tr. at 426:2-12 [Deasy]; 2/6/14 R. Tr. at 1316:15-25 [Kane].) Thus, at a minimum, Plaintiffs are entitled to relief preventing the enforcement of the Challenged Statutes in their particular districts.

F. Plaintiffs Have Standing To Assert Their Constitutional Claims.

Finally, there can be no question that Plaintiffs have standing to assert their constitutional claims. All nine Plaintiffs possess a concrete and "beneficial interest" in this action because, as students (see Stip.), they have a unique interest in the quality of their education. (*Holmes v. Cal. Nat'l Guard* (2001) 90 Cal.App.4th 297, 315; see also *Doe v. Albany Unified School Dist.* (2010) 190 Cal.App.4th 668, 684-685.) All of them have experienced firsthand the significant impact—both positive and negative—that teachers have on students' lives. (See, e.g., 2/11/14 R. Tr. at 1719:19-1720:9 [Monterroza]; 2/10/14 R. Tr. at 1648:4-26 [DeBose]; 2/11/14 R. Tr. at 1671:5-25, 1674:14-1675:9 [B. Vergara]; 2/11/14 R. Tr. at 1694:13-1695:8 [E. Vergara].) And all of them reasonably fear the substantial risk that they will be assigned to grossly ineffective teachers in the future, derailing their educational opportunities and threatening their hopes and dreams. In addition, six Plaintiffs are ethnic minorities and/or economically disadvantaged, giving them standing to complain about the disproportionate burden that the Challenged Statutes place on those groups. (2/11/14 R. Tr. at 1712:10-18 [Monterroza]; 2/10/14 R. Tr. at 1640:6-21 [DeBose]; 2/11/14 R. Tr. at 1668:10-20 [B.

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[23] Plaintiffs seek only relief from threatened future harm, not past injury. Thus, as with their facial challenge, Plaintiffs need not prove that their past teachers were, in fact, grossly ineffective in order to prevail on their as-applied challenge.

Vergara]; 2/11/14 R. Tr. at 1692:11-15 [E. Vergara]; 2/10/14 R. Tr. at 1573:5-8 [Macias]; K. Martinez Depo. Tr. at 11:19-12:19.)

There is no need for Plaintiffs to prove that the Challenged Statutes have caused them harm in the past because standing can be based on "actual or threatened injury." (*San Diego NORML*, *supra*, 165 Cal.App.4th at p. 814] [emphasis added]; see also *id.*, 165 Cal.App.4th at p. 816 ["[A] public entity *threatened with injury* . . . may have standing" [italics added]]; *B.C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 948; *Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1349.) In other words, all nine Plaintiffs are "injuriously affected" by the Challenged Statutes, (*San Diego NORML*, *supra*, 165 Cal.App.4th at p. 814), because the statutes place them at substantial *risk* of being taught by grossly ineffective teachers in the future.[24]

Nor must Plaintiffs demonstrate that they *necessarily* will be harmed in the future, or that they are at *imminent risk* of being harmed in the *immediate* future. To seek declaratory and injunctive relief, Plaintiffs need only "demonstrate[] . . . that the [statutes] *could* have the effect of infringing [their] rights under the California Constitution." (*Holmes*, *supra*, 90 Cal.App.4th at p. 318 [italics added]; see also *Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 300.) In *Serrano*, for example, the California Supreme Court did not examine whether the named plaintiffs would necessarily be harmed by the amount of funding in their districts; there was no evidence whatsoever about how those particular plaintiffs' districts were spending the money available to them vis-à-vis the plaintiffs, or whether the districts would have spent more money in ways that specifically benefitted the named plaintiffs. (See *Serrano II*, *supra*, 18 Cal.3d at p. 760 [declining to compare relative costs required to offer substantially equivalent school programs in different districts].)

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[24] Even if Plaintiffs were required to show that they have been assigned to grossly ineffective teachers in the past in order to have standing, the five Plaintiffs who testified (either themselves or through their guardian) meet that requirement. Each of them discussed several teachers who they believed to be grossly ineffective. Although Defendants and Intervenors disputed a few of those allegations by calling *some* of those teachers to provide contrary testimony at trial, they presented *no* evidence to refute the allegations against Plaintiffs' other teachers—including Monterroza's "Teacher B" (2/11/14 R. Tr. at 1719:1-26), Macias's "Teachers A and C" (2/10/14 at 1575:10-25, 1591:4-15); B. Vergara's "Teachers A, B and C" (2/11/14 R. Tr. at 1671:10-25, 1674:11-1675:9, 1675:20-1676:11); E. Vergara's "Teacher B" (2/11/14 R. Tr. at 1693:24-1694:2, 1694:13-1695:3), and DeBose's "Teacher B" (2/10/14 R. Tr. at 1646:8-26).

Finally, none of the Plaintiffs' individual circumstances divest them of standing:

- Daniella Martinez and Raylene Monterroza currently attend charter schools, but both of those Plaintiffs *would* attend traditional district schools if they were not at risk of being taught by grossly ineffective teachers. (2/11/14 R. Tr. at 1713:18-1714:2 [Monterroza]; K. Martinez Depo. Tr. at 116:21-117:8 ["[We] are looking at everything for her."].) That is sufficient for standing purposes. (See *DiBona v. Matthews* (1990) 220 Cal.App.3d 1329, 1338-1339; see also *Alch v. Super. Ct.* (2004) 122 Cal.App.4th 339, 388 [deterred applicants have standing].)

- Beatriz and Elizabeth Vergara attend "pilot schools" in LAUSD, but the teachers at the pilot schools come from the same LAUSD pool that is shaped by the Challenged Statutes and which includes many teachers who are grossly ineffective. (See Intv. Ex. 2031.) Moreover, LAUSD pilot schools are still subject to the mandates of the Challenged Statutes, and pilot school teachers retain the same employment protections as their counterparts in other LAUSD schools. (*Id*. at I2031-001; 1/28/14 R. Tr. at 321:14-322:4 [Deasy].)

- Brandon DeBose, Jr. and Kate Elliott are in the twelfth grade, but they both still attend traditional district schools in which they are assigned to teachers who could turn out to be grossly ineffective. (Stip.; 2/10/14 R. Tr. at 1649:2-23 [DeBose].) If and when Brandon and Kate 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.)

IV. CONCLUSION

The Challenged Statutes "allow[] the availability of educational opportunity to vary" in substantial and unjustified ways, in violation of the California Constitution. (*Serrano II*, *supra*, 18 Cal.3d at pp. 746-748, 756.) For the foregoing reasons, Plaintiffs respectfully request that the Court: (1) enter a declaratory judgment stating that the Challenged Statutes, separately and together, violate the equal protection provisions of the California Constitution; (2) enter a permanent injunction enjoining the enforcement, application, or implementation of the Challenged Statutes; (3) enter a permanent injunction enjoining Defendants from implementing at any time in the future, by law or by

contract, any system of teacher reelection, retention, and dismissal that is substantially similar to the framework implemented by the Challenged Statutes; (4) retain continuing jurisdiction over this matter until such time as the Court has determined that Defendants have fully and properly complied with its Orders; and (5) enter an award of costs, disbursements, and reasonable attorneys' fees and expenses pursuant to § section 1021.5 of the California Code of Civil Procedure.[25]

Respectfully submitted,

Dated: April 10, 2014

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Theodore J. Boutrous, Jr.

Attorneys for Plaintiffs Beatriz Vergara, et al.

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[25] Alternatively, this Court should declare unconstitutional and enjoin the enforcement of any "problematic portions" of the Challenged Statutes, to the extent such portions are severable from the remainder of the laws. (*Ayotte v. Planned Parenthood of N. New England* (2006) 546 U.S. 320, 321; see also *Regan v. Time, Inc.* (1984) 468 U.S. 641, 653 ["[T]he invalid part may be dropped . . . ."].)