June 9, 2016

VIA U.S. MAIL

The Honorable Tani Cantil-Sakauye, Chief Justice
Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Amici Curiae Letter in Support of Petition for Review
Vergara v. California, California Supreme Court Case No. S234741

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Under California Rule of Court 8.500(g), former Governors of California Arnold Schwarzenegger and Pete Wilson respectfully submit this letter in support of the nine student Plaintiffs’ Petition for Review filed in Vergara v. California.

Review of Vergara v. California is crucial for all students across California. The challenged statutes in this case, California Education Code sections 44929.21(b) (“Permanent Employment Statute”); 44934, 44938(b)(1),(2), and 44944 (collectively, “Dismissal Statutes”); and 44955 (“Last In, First Out Statute”), together allow grossly ineffective teachers to remain in California’s classrooms, sustaining an educational environment harmful to California’s public school system students. The damaging impact of grossly ineffective teachers is being felt today and will be felt long into the future. The implications of this Court’s review on the individual lives of California’s students and society as a whole cannot be overstated.

The California Supreme Court is the most fitting forum and the only remaining means to remedy the constitutional injustices engendered by the challenged statutes. If this case is to end with the Court of Appeal’s decision—a decision that failed to adequately address the case’s relevant equal protection issues—the Plaintiffs’ constitutional right to a quality education will be effectively denied. The California Supreme Court is now eminently situated to affect real positive change to California’s public school system.

**Interest of Amici Curiae**

*Amici* are former Governors of California. Both served two consecutive terms: Governor Schwarzenegger from 2003 to 2011, and Governor Wilson from 1991 to 1999. During their respective terms, both Governors were responsible for ensuring that California’s children received their constitutionally-protected right to a quality education. Toward this end, the Governors worked to institute policies and reforms in support of this responsibility, including trying to amend and overturn the challenged statutes. These efforts demonstrate that the Governors’ appreciation for the troubling conditions caused by the challenged statutes existed long before they became a matter of judicial concern. Despite this, the challenged statutes remain essentially unchanged, harming California’s children year
after year. The Governors now hope that by accepting review, the California Supreme Court will help ensure that each student in our state receives the highest quality education California is able to provide.

**Reasons This Court Should Grant Review**

More than forty years ago, the California Supreme Court recognized that a child’s right to education is a fundamental interest guaranteed by the California Constitution. *Serrano v. Priest*, 5 Cal. 3d 584, 609 (1971); see also *CAL. CONST.* art. I, § 7; *id.* art. IX, § 1. By accepting review of the Court of Appeal’s decision, the California Supreme Court would not only follow this constitutional imperative, but would also acknowledge its long-established judicial duty to examine any threat to this fundamental right. *See Serrano*, 5 Cal. 3d at 606-07 (citations omitted). As previous stewards of the California Constitution, these former Governors know that the guarantee of a quality education for all of California’s students is sacrosanct and critically important for the future of the state. It is the province of the judiciary to ensure this fundamental interest, like any other constitutional protection, is preserved.

The California Supreme Court should now exercise its inherent constitutional authority, regardless of any action or inaction by the legislative and executive branches, to remedy the constitutional harms the challenged statutes inflict on California’s public school students and school system. While the judicial branch “accord[s] appropriate deference to the legislative and executive exercise of political prerogatives . . . deference does not mean complete forbearance.” *Schabarum v. Cal. Leg.*, 60 Cal. App. 4th 1205, 1215 (1998). A constitutional challenge “‘is inherently a judicial rather than political question and neither the Legislature, the executive, nor both acting in concert can validate an unconstitutional act or deprive the courts of jurisdiction to decide questions of constitutionality.’” *Id.* (quoting *Cal. Radioactive Mgmt. Forum v. Dep’t of Health Servs.*, 15 Cal. App. 4th 841, 869 (1993). Because constitutional questions lie at the heart of this case, this Court has an independent constitutional prerogative and responsibility to grant review. The California Supreme Court is best situated to remedy the constitutional infirmities the challenged statutes create, and to thereby improve the educational experience for all students in California.

The trial court properly exercised its authority to address the constitutionality of the challenged statutes. In holding that the challenged statutes violate the equal protection clause of the California Constitution as defined in *Serrano v. Priest*, 5 Cal. 3d 584 (1971), the trial court fulfilled its “duty and function as dictated by the Constitution of the United States, the Constitution of the State of California, and the Common Law [] to avoid considering the political aspects of the case and focus only on the legal ones.” *Vergara v. California*, No. BC484642, at 5 (Cal. Super. Ct. 2014). In contrast, the California Court of Appeal’s decision improperly applied California equal protection jurisprudence, warranting this Court’s review. The California Supreme Court should accept review of the Court of Appeal’s decision under the state’s well-established jurisprudence and this Court’s constitutional authority.

Accepting and acting upon its constitutional authority will allow this Court to address the disappointing realities that have taken shape because of the challenged statutes—realities that the Governors believe must be reversed. The challenged statutes have weakened California’s teaching force: they allow for hasty tenure decisions after a teacher has worked only two short years; they outline an onerous, cumbersome dismissal process that fails to remove problem teachers; and they direct reductions in force to follow a scheme based first on seniority with few exceptions.

California students have suffered, and continue to suffer, devastating harms because of the challenged statutes. These effects have been extensively detailed throughout the *Vergara v. California* litigation. Instruction under a grossly ineffective teacher can cause students to fall behind their peers by up to one
whole year of academic growth, which could be an insurmountable gap in educational attainment. Pet’s Br. 9. Classrooms taught by grossly ineffective teachers have lower lifetime earnings compared to classrooms taught by average teachers. Id. Students under grossly ineffective teachers suffer lower graduation rates, lower college attendance rates, and higher teenage pregnancy rates than their peers learning under more effective teachers. Id. The scale of impact extends well beyond the lives of individual students: research shows correlations between a state’s education system and its economic prosperity, implicating California’s socioeconomic vitality and global competitiveness. See, e.g., Noah Berger & Peter Fischer, A Well-Educated Workforce Is Key to State Prosperity, ECONOMIC POLICY INSTITUTE (Aug. 22, 2013), http://www.epi.org/publication/states-education-productivity-growth-foundations/. Grossly ineffective teachers have enormous societal consequence this Court should not ignore.

Change is overdue. The notion that the challenged statutes are destructive to California’s school system is not novel. The Permanent Employment Statute, the Dismissal Statutes, and the Last In, First Out Statute have a history of controversy in some ways unparalleled to that of any other state law. California’s state government, at the center of this ongoing controversy, has been unable to make significant change. The legislature has failed time and time again to amend the challenged statutes: the California State Assembly and Senate combined to draft more than thirty bills over the last sixteen years attempting to modify the challenged statutes, but no meaningful action has occurred. Instead, the legislature oversaw years of introduced bills, neglect, second attempts, and failures. Not a single bill proposing changes that would have ameliorated the problems of grossly ineffective teachers ultimately became law. The few bills that did pass were limited in scope, cosmetic in nature, and did not address the challenged statutes’ inherent failings.

On seven occasions, the California legislature attempted to extend the probationary period under the Permanent Employment Statute to three years or four years before tenure could be granted. None of those bills became law. Some were abandoned in revisions, some died in committee, and none ever crossed the standing Governor’s desk. Assemb. B. 1248, 2015-2016 Sess. (Cal. 2016); Assemb. B. 1761, 2007-2008 Sess. (Cal. 2008); S.B. 124, 2003-2004 Sess. (Cal. 2004); S.B. 1097, 2001-2002 Sess. (Cal. 2002); Assemb. B. 36, 1999-2000 1st Ex. Sess. (Cal. 2000); Assemb. B. 723, 1999-2000 Sess. (Cal. 2000); Assemb. B. 292, 1999-2000 Sess. (Cal. 2000). The most recent of these failed attempts, in 2015, sought to award tenure only to teachers who completed a three-year probationary period with three consecutive years of “evaluation ratings of effective or better.” Legis. Counsel’s Digest on Assemb. B. 1248, 2015-2016 Sess. (Cal. 2015). As the Vergara v. California litigation was ongoing, the California legislature had an opportunity to affirmatively tie tenure to performance, but it did not. Today, the Permanent Employment Statute continues to rush teachers into tenure.

The California legislature also tried and failed to amend the Last In, First Out Statute on six occasions. Assemb. B. 1044, 2015-2016 Sess. (Cal. 2016); Assemb. B. 2240, 2013-2014 Sess. (Cal. 2014); Assemb. B. 947, 2013-2014 Sess. (Cal. 2014); S.B. 453, 2013-2014 Sess. (Cal. 2014); S.B. No. 355, 2011-2012 Sess. (Cal. 2012); S.B. 955, 2009-2010 Reg. (Cal. 2010). One of these bills was even drafted with the express purpose of “achieving compliance with constitutional requirements related to equal protection of the law as it applies to pupils,” but it failed to become an actual law. Bill Analysis, Hearing on Assemb. B. 2240 Before the Assemb. Comm. on Educ., 2013-2014 Sess. (Cal. 2014). The most recent of these failed attempts, in 2015, aimed to wipe the slate clean on the Last In, First Out Statute; it would have repealed California Education Code section 44955 and directed each school district to adopt new policies regarding reductions in workforce, “requir[ing] those adopted policies to include as a significant factor in determining the order of dismissal the evaluation rating” of the teacher. Legis. Counsel’s Digest on Assemb. B. 1044, 2015-2016 Sess. (Cal. 2015). As with others, however, one more of the
The legislature’s attempts to promote the value of teaching effectiveness died in committee. Seniority—not performance—remains the primary measure of determining teacher workforce reductions.

There have been more failed attempts to amend or repeal the Dismissal Statutes than similar attempts to the Last In, First Out and the Permanent Employment Statutes. Five separate attempts to streamline the dismissal process by truncating the filing and notification processes failed. Assemb. B. 375, 2013-2014 Sess. (Cal. 2014); Assemb. B. 1221, 2013-2014 Sess. (Cal. 2014); S.B. 531, 2013-2014 Sess. (Cal. 2014); S.B. 453, 2013-2014 Sess. (Cal. 2014); Assemb. B. 2028, 2011-2012 Sess. (Cal. 2012). Four attempts to consolidate the necessary dismissal hearing commission to be run by just one administrative judge disappeared into legislative purgatory. Assemb. B. 1221; S.B. 531; Assemb. B. 2028; S.B. 1059, 2011-2012 Sess. (Cal. 2012). The Dismissal Statutes continue to guarantee that the dismissal process for grossly ineffective teachers remains instead a guarantee that ineffective teachers will be protected from evaluation and accountability by their seniority.

In 2005, legislators even appealed directly to voters with a ballot measure meant to improve the tenure and dismissal procedures the statutes addressed. After a contentious, approximately $300 million public battle showcased with aggressive campaigning by teachers’ unions against the proposition—including some tactics later found to be unconstitutional—the measure eventually failed in the special election. Knox v. Serv. Emps. Int’l Union Local 1000, 132 S. Ct. 2277 (2012) (compulsory fundraising methods used by a labor union violated the First Amendment rights of certain state employees).

The legislature’s routine inaction and business-as-usual infighting toward the challenged statutes have demonstrated over and over again that the political process is unfit to provide a remedy for the broken tenure and dismissal procedures. The ineptitude of the political process to address the challenged statutes should be reason enough for this Court to accept review.

**Conclusion**

The challenged statutes underlie alarming and critical realities for all students across California. Because the California Supreme Court is equipped with a unique responsibility to address California’s constitutional issues, this Court should now accept review of the Court of Appeal’s decision in Vergara v. California and address the important questions of equal protection that affect California’s students. Governors Schwarzenegger and Wilson urge this Court to grant Plaintiffs’ Petition for Review for the good of the students, the school, and the entire state of California. Otherwise, still more generations of California children will be cheated out of the education they deserve, the education which the California Constitution promises them, by ineffective teachers in the classrooms of our public schools.

Respectfully submitted,

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cc: All parties of record (see attached service list)
PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 555 South Flower Street, Suite 2700, Los Angeles, CA 90071. I am employed by a member of the Bar of this Court at whose direction the service was made.

On Thursday, June 09, 2016, I served the foregoing document(s) described as: Amici Curiae Letter in Support of Petition for Review on the person(s) below, as follows:

I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed below and placed the envelope for collection and mailing at 555 South Flower Street, Suite 2700, Los Angeles, California, following our ordinary business practices. I am readily familiar with White & Case LLP’s practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

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Executed **Thursday, June 09, 2016**, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Hector M. Córdova