

June 7, 2016

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

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CLERK SUPREME COURT

Re: **Amici Curiae in Support of Petition for Review**
Beatriz Vergara, et al. v. State of California, et al.
Case No. S234741
Court of Appeal decision filed April 14, 2016

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court the undersigned Constitutional law scholars: Laurence H. Tribe, Tristan L. Duncan, Michael W. McConnell, L. Lawrence Lessig III, Cruz Reynoso, Dawinder S. Sidhu, Rachel F. Moran, Kermit Roosevelt III, and Paul G. Cassell (collectively "Amici"),¹ respectfully submit this letter urging the Court to grant review in the above-referenced case.

The Court of Appeal failed to apply strict scrutiny to laws infringing on the fundamental right of education, notwithstanding the California Constitution's express guarantee of public education for primary and secondary school children and this Court's recognition of equal educational opportunities as a fundamental right. Heightened scrutiny is especially warranted in a case such as this where the challenged statutes pose a systemic, institutionalized barrier to both equal educational opportunities and accomplishment of the explicit purpose of the California Constitution's Education Articles, *i.e.* "improvement" of the educational interests of students. The challenged statutes do the opposite. They guarantee educational ineffectiveness without regard to the educational rights of students.

The Court of Appeal's decision erected a new barrier to Equal Protection claims implicating fundamental rights protected by the California Constitution in direct contradiction to binding precedent interpreting that constitution. In particular, the Court of Appeal held that, to bring an Equal Protection challenge, even one alleging impermissible abridgment of a fundamental right, the plaintiffs must demonstrate that they share "some

¹ Additional information regarding the undersigned Constitutional law scholars is included in the attached Appendix.

pertinent common characteristic other than the fact that they are assertedly harmed by a statute.” But in codifying a right to education in the Constitution, the people of California eliminated any basis the Court of Appeal might have had for imposing a “common characteristic” requirement of the sort that makes sense only in equal protection challenges grounded in claims of discrimination against insular minorities or anti-discrimination claims invoking notions of suspect classifications.

If permitted to stand, the Court of Appeal’s decision will make it unjustifiably harder for plaintiffs in California to obtain relief for violations of their state constitutional rights to education, including rights to educational equality, in conflict with recent precedent in this Court. It will diminish the significant importance that California places on education, all to the great detriment of California’s students. To make matters worse, these constitutional and educational harms are wholly unnecessary: the teacher job security objectives of the statutes at issue are easily achieved in alternative ways that would not unconstitutionally burden students’ educational rights.

1. **Review Should Be Granted to Protect the Fundamental Educational Rights At Issue.**

The Court of Appeal’s decision diminishes the high importance that the people of California and this Court have placed on the fundamental right to education. Article IX of the California Constitution is dedicated solely to education, and thus expressly supports application of strict scrutiny. The Constitution establishes that education is “essential to the preservation of the rights and liberties of the people” and that legislative action shall be calculated for “intellectual, scientific, moral, and agricultural improvement.” Cal. Const. art. IX, § 1. If fundamental rights without *explicit* textual roots are accorded strict scrutiny², it stands to reason that heightened scrutiny applies with equal, if not greater, force here given the *express* education rights guaranteed in the State constitution.

For more than 40 years, the California Supreme Court has zealously guarded the fundamental right to education on an equal basis to all of California’s youth. Education “lie[s] at the core of [California’s] free and

² See *In re Marriage Cases* (2008), 43 Cal.4th 757, 820 (“In light of the fundamental nature of the substantive rights embodied in the right to marry – and their central importance to an individual’s opportunity to live a happy, meaningful, and satisfying life as a full member of society – the California Constitution properly must be interpreted to guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation.”) (emphasis original); cf. *Obergefell v. Hodges* (2015), 135 S. Ct. 2584, 2600 (“right to marry... safeguards children and families and thus draws meaning from related rights of childrearing, procreation and *education*”, all of which are a “central part” of protected liberty (emphasis added) (quoting *Zablocki v. Redhail* (1978), 434 U.S. 374, 384).

representative government.” *Serrano v. Priest* (1976), 18 Cal. 3d 728, 767-68. Immediately after explaining that heightened scrutiny applies both to class-based claims and to fundamental rights claims, this Court in *Butt* stated in the very next sentence that education is such a fundamental right for purposes of equal protection analysis under the California Constitution. *Butt v. State of California* (1992), 4 Cal. 4th 668, 686; see also *Warden v. State Bar* (1999), 21 Cal. 4th 628, 653 (characterizing *Butt* as holding that “education is fundamental right for equal protection purposes under state Constitution”) (dissenting on other grounds, J. Kennard). This Court has repeatedly held that a facial challenge to a State deprivation of the right to equal educational opportunity triggers heightened scrutiny under the California Constitution. See, e.g., *Butt*, 4 Cal. 4th at 685; *Hartzell v. Connell* (1984), 35 Cal. 3d 899; *Serrano v. Priest* (1971), 5 Cal. 3d 584, 608-15; *Serrano*, 18 Cal. 3d at 767.

The Court of Appeal erred by refusing to apply strict scrutiny to the statutes challenged in this case. The challenged statutes are decidedly dissimilar from the economic and social welfare laws that receive only rationality review. The statutes in question directly implicate and adversely impact fundamental educational and expressive rights at the heart of the Education and Free Speech Clauses of the California Constitution. Cal. Const. art. IX, § 1.³ To analyze the challenged statutes under mere rational basis review would read out of the California Constitution the People’s choice to give heightened protection to expressive and educational activities.

The statutes at issue impair the fundamental right to education. They categorically prioritize the job security of teachers—regardless of their competence—over the educational needs, interests, and rights of California school children. They do so despite the existence of other ways, more consistent with the educational rights of the State’s schoolchildren, to protect legitimate interests in teacher job security. The upshot of handicapping the ability to efficiently identify and remove grossly ineffective teachers, and

³ Indeed, the state’s Free Speech Clause also protects the expressive and educational interests of California school children because it protects the dissemination of knowledge and instruction, and education likewise, directly involves the communication of ideas and information. Education, by definition, is expressive activity. Accordingly, a growing chorus of courts and commentators support application of strict scrutiny to laws structuring public education through analogy to decades of First Amendment jurisprudence. In particular, the line of precedent springing from *Meyer v. Nebraska* (1923), 262 U.S. 390 and *Pierce v. Society of Sisters* (1925), 268 U.S. 510 emphasizes that the First Amendment protects anyone who attempts to provide or receive more and better education and forbids the State from “contract[ing] the spectrum of available knowledge.” See *Griswold v. Connecticut* (1965), 381 U.S. 479, 482. In addition, the United States Supreme Court has recognized, “vigilant protection of constitutional freedoms is *nowhere more vital* than in the community of American schools.” *Shelton v. Tucker* (1960), 364 U.S. 479, 487 (emphasis added).

providing institutional bias in favor of incompetent teachers, is to contract the marketplace of ideas within public schools by institutionalizing educational mediocrity. The California Constitution, however, establishes public schools for the benefit of *children*, not *teachers*, and the Education Clause talks about the right to public education as “essential to the preservation of the rights and liberties of the people,” not as a right essential to the economic security of the teachers selected by the State to make that right a reality. *Turner v. Bd. of Trustees, Calexico Unified Sch. Dist.* (1976), 16 Cal. 3d 818, 825 (“Our school system is established not to provide jobs for teachers but rather to educate the young.”). For this reason, the Court of Appeal’s suggestion that random teacher assignments immunize the laws at issue from an Equal Protection claim also misses the mark. A harm of the statutes -- that they entrench teacher employment interests above the educational interests of students -- is not insulated from review because that harm may be randomly distributed among students.

This case is doubly appropriate for heightened review because the State seeks to justify the statutes’ adverse impact on educational rights by invoking ideals of academic freedom – a concern embodied not only in the First Amendment of the U.S. Constitution but in the text of the California Constitution. U.S. CONST. amend. I; Cal. Const. art. IX, § 1. But the State cannot have it both ways, claiming, on the one hand, that laws about teacher job security amount to nothing but garden-variety economic and social welfare legislation while claiming, on the other, that those laws are not about the economic interests of the teachers but about their freedom of speech. To the extent that academic freedom is implicated, it certainly cannot include, in defiance of the California Constitution, the freedom to enjoy job security at the expense of student educational development.⁴

As in the classic federal precedents involving state-created *obstacles* to the education of children, like *Meyer* and *Pierce*, all that plaintiffs seek in this litigation is the removal of an unwarranted State-created obstacle to plaintiffs’ constitutionally guaranteed educational opportunity. Thus, applying strict scrutiny is appropriate here. The educational and expressive rights at issue are firmly enshrined in the California Constitution, not only

⁴ Heightened review is proper for yet another reason. Unlike teachers, students are unable to directly ensure that their educational interests are protected by the legislature and school boards during collective bargaining negotiations. This contract-negotiation context creates the risk of governmental self-dealing, which requires more searching judicial scrutiny to ensure constitutional duties are fulfilled and correlative rights protected. *United States v. Winstar Corp.* (1996), 518 U.S. 839, 896 (because governmental fiscal self-interest in contract negotiations can create a danger of self-dealing on the state’s part, heightened judicial scrutiny is warranted); *United States Trust Co. of N.Y. v. New Jersey* (1977), 431 U.S. 1, 26 (same); *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.* (1983), 459 U.S. 400, 412-413, n.14 (same).

mirroring but notably expanding upon their reflection in the First and Fourteenth Amendments to the United States Constitution. These rights belong to every child in the State, but they matter to none quite so much as to those for whom a quality public education is the exclusive path to the American Dream.

2. Review Should Be Granted to Clarify that No “Common Characteristic” Prerequisite Exists in Fundamental Rights Cases Such as This.

The Court of Appeal’s decision strays from well-established precedent by requiring proof of a “common characteristic” other than the alleged constitutional injury even when the nub of the Equal Protection claim is the challenged law’s abridgment of a right enshrined as fundamental in the California Constitution. There is no basis in law or in logic for the Court of Appeal’s central holding in this case that, without a showing that all the students injured by the challenged state laws share a “common characteristic,” the Equal Protection claim they make is not “meritorious” and cannot be “maintained.”

This Court has repeatedly held that Equal Protection challenges may be brought “whenever the disfavored class is suspect *or* the disparate treatment has a real and appreciable impact on a fundamental right or interest.” *Butt*, 4 Cal. 4th at 685-86 (emphasis in original). Not only are such challenges plainly viable, but these challenges are entitled to heightened scrutiny. *Id.* at 685.

If the law were otherwise, countless decisions by this Court would need to be revisited, because state and local statutes discriminating against particular political viewpoints or religious beliefs, although perhaps subject to challenge under other provisions of the California Constitution, would no longer be vulnerable to the stronger attack made possible by focusing on the inequalities built into those statutes. The law of this State, like the law of the United States,⁵ has never required litigants to strip their challenges to discriminatory measures that implicate fundamental rights of arguments

⁵ It bears noting that the Supreme Court of the United States in 2008 dismissed any suggestion that the federal Equal Protection Clause is breached *only* when the alleged mistreatment is class-based. See *Engquist v. Or. Dep’t. of Agr.* (2008), 553 U.S. 591, 601-02. While the Supreme Court acknowledged that class-based claims are “typical,” *id.* at 601, they are not the only type of Equal Protection violations. The Court specifically recognized that “an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination,” *id.* and emphasized that “[i]t is well settled that the Equal Protection Clause ‘protect[s] persons, not groups,’” *Id.* at 597 (quoting *Adarand Constructors, Inc. v. Peña*, (1995) 515 U.S. 200, 227). The Court of Appeal, however, seems to have wholly ignored this category of Equal Protection harms.

focused not only on the degree to which those measures infringe such rights in absolute terms but also on their specifically discriminatory purpose or effect.

In insisting that plaintiffs share a “common characteristic” beyond suffering a constitutional harm, the Court of Appeal ignored the “or” in the sentence quoted above from *Butt*, collapsed the two parts of the sentence into one, and demanded a “common characteristic” of plaintiffs across the board. Requiring a “common characteristic” in the context of bringing a *class-based* Equal Protection claim (i.e., a claim based on the suspect way the law plaintiffs challenge *classifies* people into groups or *differentially injures* the group to which plaintiffs belong) makes sense. But imposing a “common characteristic” requirement here lacks support in the text of *Butt* and neglects differences in the qualitative nature of the challenged wrongdoing: at its core, the plaintiffs’ allege harm to a fundamental right and interest.

The Court of Appeal’s ruling not only distorts this Court’s Equal Protection and Education Rights doctrines and defies logic but also, as a practical matter, makes it much more difficult for injured plaintiffs to assert their constitutional rights. Such results should not be tolerated, particularly when the rights are those of *every* child in the State.

Conclusion

This Court should grant review because application of strict scrutiny is fully supported by the well-established principles of California’s constitutional law upon which the Los Angeles County Superior Court based its decision, but which the Court of Appeals wrongly ignored.

Moreover, this case is an excellent vehicle for supplying much needed doctrinal clarity and coherence to fundamental rights analysis in the education context:

- The factual record establishes that the statutes, as their very terms make plain, operate systemically to protect underperforming teachers from pressure to improve their teaching to an acceptable level.
- The State’s defenses, whether cast in terms of the job security of teachers or framed in terms of academic freedom, do not come close to justifying the means the State has chosen to achieve its supposed ends, either under strict scrutiny or under some less stringent form of judicial review.
- And the case reaches this Court at a particularly opportune time in its history, given recent developments in Equal

Protection, Fundamental Rights and First Amendment thinking throughout the nation. Indeed, a proper reading of California constitutional law finds parallel support in principles articulated by the United States Supreme Court in its recent jurisprudence under the First and Fourteenth Amendments—support that should give this Court added confidence that it would be offering useful guidance to the courts of other states and to the federal judiciary even as it interprets the meaning and advances the purposes of California’s Constitution.

At stake is nothing less than perpetuating the real and appreciable harm the California Teacher Tenure scheme inflicts on students’ fundamental right to education under the California Constitution.

This Court should grant review of the *Vergara* decision to settle these important questions of constitutional law.

Sincerely,



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Appendix

Laurence H. Tribe is the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard.

Tristan L. Duncan is the chairperson of the Constitutional Law Practice Group at Shook, Hardy & Bacon, L.L.P and has published and presented on constitutional and education law.

Michael W. McConnell is the Richard and Frances Mallery Professor of Law and Director of the Constitutional Law Center at Stanford University, and Senior Fellow of the Hoover Institution. From 2002 to 2009, Professor McConnell served as a Circuit Judge on the United States Court of Appeals for the Tenth Circuit.

L. Lawrence Lessig III is the Roy L Furman Professor of Law and Leadership at Harvard Law School. His scholarship includes Comparative Constitutional Law.

Cruz Reynoso is a Professor of Law Emeritus at the University of California, Davis School of Law and specializes in Civil Rights and Constitutional Law. Professor Reynoso served as an Associate Justice of the California Supreme Court from 1982-1987 and as an associate Justice on the California Third District Court of Appeal from 1976-1982.

Dawinder S. Sidhu is an Associate Professor of Law at the University of New Mexico and currently is a visiting scholar at Georgetown University Law Center. He teaches and writes on Constitutional Law.

Rachel F. Moran is Dean Emerita and Michael K. Connell Distinguished Professor of law at UCLA School of Law. Professor Moran focuses her scholarship on Constitutional Law and Education Policy.

Kermit Roosevelt III is a Professor of Law at the University of Pennsylvania Law School. His scholarship focuses on Constitutional Law.

Paul G. Cassell is the Ronald N. Boyce Professor of Criminal Law and University Distinguished Professor of Law at the University of Utah, College of Law. Professor Cassell served as a United States District Judge for the District of Utah from July 2002 through November 2007.

PROOF OF SERVICE

I, Elisabeth Gonsalves, declare as follows:

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and am not a party to this action. My business address is One Montgomery St. Suite 2700 in said County and State. June 7, 2016 indicated below, I served the within:

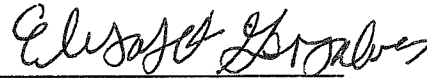
CONSTITUTIONAL SCHOLARS' AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW

I enclosed the document(s) in a sealed envelope or package addressed to the persons listed below by placing the envelope(s) for collection and mailing following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

<p>Susan M. Carson Office of the Attorney General 455 Golden Gate Ave., 11th Floor San Francisco, CA 94102</p>	<p><i>Attorney for Defendants and Respondents State of California, Superintendent of Public Instruction, California Department of Education, State Board of Education, and Governor Edmund G. Brown, Jr.</i></p>
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that the foregoing documents were printed on recycled paper, and that this Proof of Service was executed by me on June 7, 2016, at San Francisco, California.



Elisabeth Gonsalves