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Court of Appeal, Second Appellate District, Division Two - No. B258589
S234741

IN THE SUPREME COURT OF CALIFORNIA
En Banc

BEATRIZ VERGARA, a Minor, etc., et al., Plaintiffs and Respondents,

v.

STATE OF CALIFORNIA et al., Defendants and Appellants;

CALIFORNIA TEACHERS ASSOCIATION et al., Interveners and Appellants.

The petition for review is denied.

Chin, Liu and Cuéllar, JJ., are of the opinion the petition should be granted.

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Chief Justice

STATEMENT

by Cantil-Sakauye, C. J.

The court, recently having resumed issuing, from time to time, statements by one or more justices dissenting from the denial of a petition for review, has adopted a policy that such statements, when they pertain to an appellate court opinion that has been published in the Official Reports, will also be published, appended to the original appellate court opinion in the Official Reports. With these policies now in place, separate statements will afford members of the court an opportunity to express their views regarding the denial of a petition for review, but of course any separate statement represents the views solely of the authoring justice or any justice signing the statement. In addition, it remains the case that an order denying review does not reflect the views of

the justices voting to deny review concerning the merits of the decision below. Rather, an order denying review represents only a determination that, for whatever reason, a grant of review is not appropriate at the time of the order. (See *People v. Davis* (1905) 147 Cal. 346, 349-350; see also, e.g., *People v. Triggs* (1973) 8 Cal.3d 884, 890-891.) Similarly, that a justice has not prepared, responded to, or joined a separate statement should not be read as reflecting the views of that justice concerning any separate statement that has been filed by any other justice.

Werdegar, Chin, Corrigan, Liu, Cuéllar and Kruger, JJ., concur.

DISSENTING STATEMENT

by Liu, J.

This case concerns the constitutionality of California's statutes on teacher tenure, retention, and dismissal. The plaintiffs are nine schoolchildren — Beatriz Vergara, Elizabeth Vergara, Clara Grace Campbell, Brandon Debose, Jr., Kate Elliott, Herschel Liss, Julia Macias, Daniella Martinez, and Raylene Monterroza — who attend California public schools. They allege that these statutes lead to the hiring and retention of what they call "grossly ineffective teachers" (i.e., teachers in the bottom 5 percent of competence) and that being assigned to a grossly ineffective teacher causes significant educational harm. Plaintiffs further allege that they have suffered or are at risk of suffering these harms and that the harms fall disproportionately on minority and low-income students. After hearing eight weeks of evidence, the trial court ruled that the challenged statutes violate the equal protection clause of the California Constitution (Cal. Const., art. I, § 7, subd. (a)), noting that the evidence of detrimental effects that grossly ineffective teachers have on their students "is compelling" and "shocks the conscience." The Court of Appeal reversed, holding that plaintiffs failed to establish a viable equal protection claim. (*Vergara v. State of California* (2016) 246 Cal.App.4th 619 (*Vergara*).)

Plaintiffs now seek this court's review. One of our criteria for review is whether we are being asked "to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) Under any ordinary understanding of that criterion, our review is warranted in this case. As the trial court observed: "All sides to this litigation agree that competent teachers are a critical, if not the most important, component of success of a child's in-school educational experience. All sides also agree that grossly ineffective teachers substantially undermine the ability of that child to succeed in school." The controversy here is whether the challenged statutes are to blame for the hiring, retention, and placement of grossly ineffective teachers. Because the questions presented have obvious statewide importance, and because they involve a significant legal issue on which the Court of Appeal likely erred, this court should grant review. The trial court found, and

the Court of Appeal did not dispute, that the evidence in this case demonstrates serious harms. The nine schoolchildren who brought this action, along with the millions of children whose educational opportunities are affected every day by the challenged statutes, deserve to have their claims heard by this state's highest court.

I.

As the Court of Appeal explained, this case involves equal protection claims by two groups of students. "Group 1" is "a 'subset' of the general student population, whose 'fundamental right to education' was adversely impacted due to being assigned to grossly ineffective teachers. According to plaintiffs, the students comprising this subset [are] located throughout the state, in all sorts of schools, and [are] of substantially the same age and aptitude as students of the general population. The Group 1 members [are] disadvantaged, however, because they received a lesser education than students not assigned to grossly ineffective teachers." (*Vergara*, *supra*, 246 Cal.App.4th at p. 629; see Cal. Const., art. IX, §§ 1, 5; *Serrano v. Priest* (1971) 5 Cal.3d 584, 607–609 [recognizing fundamental right to education under the Cal. Const.]; *Butt v. California* (1992) 4 Cal.4th 668, 685–686 (*Butt*) [same].) "Group 2" is "made up of minority and economically disadvantaged students. Plaintiffs alleged that schools predominantly serving these students have more than their proportionate share of grossly ineffective teachers, making assignment to a grossly ineffective teacher more likely for a poor and/or minority student." (*Vergara*, at p. 629.)

For reasons discussed by the Court of Appeal, there appear to be significant problems in plaintiffs' case with respect to Group 2. Quoting a report by the California Department of Education that was entered into the record, the trial court found that " '[u]nfortunately, 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 underqualified, inexperienced, out-of-field, and ineffective teachers and administrators. Because minority children disproportionately attend such schools, minority students bear the brunt of staffing inequalities.' " Further, the trial court found that "the churning . . . of teachers" — that is, the recurring transfer of ineffective teachers from school to school — "caused by the lack of effective dismissal statutes and [the seniority-based reduction in force statute] affect high-poverty and minority students disproportionately." However, the record does not appear to include substantial evidence that the concentration of grossly ineffective teachers in poor and minority schools is caused by the challenged statutes as opposed to teacher preferences, administrative decisions, or collective bargaining agreements. The Court of Appeal, finding insufficient evidence of that causal link, held that plaintiffs failed to establish that the challenged statutes on their face violate equal protection by disadvantaging poor or minority students. (*Vergara*, *supra*, 246 Cal.App.4th at pp. 649–651.)

The Court of Appeal's treatment of Group 1 is more problematic. In overturning the trial court's judgment with respect to this group, the Court of Appeal said the group is not "an identifiable class of persons sufficient to maintain an equal protection challenge" because "to claim an equal protection violation [citations], group members must have some pertinent common characteristic other than the fact that they are assertedly harmed by a statute." (*Vergara*, *supra*, 246 Cal.App.4th at p. 646.) On this point, the Court of Appeal likely erred.

In *Butt*, *supra*, 4 Cal.4th 668, this court made clear that an equal protection challenge may be brought and will trigger strict scrutiny "whenever the disfavored class is suspect *or* the disparate treatment has a real and appreciable impact on a fundamental right or interest." (*Id.* at pp. 685–686.) There, the Richmond Unified School District decided to shorten its school year by six weeks because it had run out of money, and a group of parents claimed that this would violate their children's fundamental right to education. We said it is "well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts. The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity." (*Id.* at p. 685.) Observing that the district's "students faced the sudden loss of the final six weeks, or almost one-fifth, of the standard school term originally intended by the District and provided everywhere else in California," we held that this "extreme and unprecedented disparity in educational service and progress" violated the state equal protection guarantee. (*Id.* at p. 687; see *id.* at p. 685 ["Whatever the requirements of the free school guaranty [(Cal. Const., art. IX, § 5)], the equal protection clause precludes the State from maintaining its common school system in a manner that denies the students of one district an education basically equivalent to that provided elsewhere throughout the State."].)

The students in *Butt* suffered a denial of equal protection not because they belonged to any identifiable class but because they were enrolled in a distressed school district. Here, as in *Butt*, students have asserted an equal protection claim on the ground that they are being denied significant educational opportunities that are afforded to others. The inequality in *Butt* arose from the fortuity of attending a school district that, unlike other districts, ran out of money. The inequality in this case arises from the fortuity of being assigned to grossly ineffective teachers who, in comparison to competent teachers, substantially impede their students' educational progress. The Court of Appeal's insistence that "to claim an equal protection violation [citations], group members must have some pertinent common characteristic other than the fact that they are assertedly harmed by a statute" (*Vergara*, *supra*, 246 Cal.App.4th at p. 646) appears inconsistent with *Butt*. The claim asserted by students in Group 1 is simply an instance of a cognizable equal protection claim alleging arbitrary deprivation of fundamental rights. (See, e.g., *People v. McKee* (2010) 47 Cal.4th 1172, 1197–1198 [classifications in

civil commitment laws are subject to strict scrutiny because the fundamental interest in liberty is at stake].)

The Court of Appeal cited *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220 and *Altadena Library District v. Bloodgood* (1987) 192 Cal.App.3d 585 in support of its view. Both of those cases relied on *Gordon v. Lance* (1971) 403 U.S. 1. All three cases involved constitutional challenges to supermajority voting schemes on the ground that voters who were members of a majority but not a supermajority would have their votes diluted. The plaintiffs in *Gordon* challenged a state requirement that any measure to raise taxes or incur bonded indebtedness be approved in a referendum by 60 percent of voters. The high court observed that it is permissible for the federal or state governments to constrain "majoritarian supremacy" in any number of ways. (*Gordon*, at p. 6.) What is constitutionally objectionable, as past cases had held, was "the denial or dilution of voting power because of group characteristics—geographic location and property ownership—that bore no valid relation to the interest of those groups in the subject matter of the election; moreover, the dilution or denial was imposed irrespective of how members of those groups actually voted." (*Id.* at p. 4.) *Guardino* and *Altadena*, both of which involved supermajority voting requirements on local tax measures, relied on *Gordon* in concluding that such requirements do not give rise to an equal protection claim unless the burdened voters comprise an identifiable class. (*Guardino*, at pp. 255–258; *Altadena*, at pp. 590–591.)

It is doubtful that the principle established in *Gordon* can be generalized beyond the context of voting rights. (See Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities* (2007) 156 U.Pa. L.Rev. 313, 327 [explaining that many laws burdening voting rights "receive light-touch judicial review" because "judicial review of election laws presents a distinctive set of challenges"].) The idea that vote dilution through supermajority requirements is constitutionally acceptable so long as no identifiable class is subject to discrimination has no analog when it comes to the fundamental right to education. As several leading constitutional law scholars explained in an amicus curiae letter in support of plaintiffs' petition for review, both state law and federal law have long recognized that plaintiffs asserting an equal protection claim involving a fundamental right need not be identifiable on a basis other than the alleged harm: "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.' "

II.

There is considerable evidence in the record to support the trial court's conclusion that the hiring and retention of a substantial number of grossly ineffective teachers in California public schools have an appreciable impact on students' fundamental right to

education. The trial court credited "a massive study" by Stanford economist Raj Chetty finding that "a single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom." The trial court also cited a four-year study by Harvard economist and education professor Thomas Kane finding that "students in [the Los Angeles Unified School District] who are taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers." Moreover, the trial court found "no dispute that there are a significant number of grossly ineffective teachers currently active in California classrooms" and cited testimony of the state's own expert estimating that 1 to 3 percent of California teachers are grossly ineffective, which translates to 2,750 to 8,250 teachers statewide.

The trial court also found that the challenged statutes substantially contribute to the hiring and retention of grossly ineffective teachers. The evidence is particularly suggestive with respect to the dismissal statutes. These statutes provide extensive procedural protections to teachers subject to dismissal for poor performance. (Ed. Code, §§ 44934, 44938, subd. (b)(1), (2), 44944, 44945.) At the time of trial, the laws required a district to first give a teacher a written statement of specific instances of unsatisfactory behavior, allow the teacher 90 days to improve, and then provide a written statement of charges and intent to dismiss. The teacher then had 30 days to request a hearing, which had to begin within 60 days of the request. The hearing was conducted by a three-member panel comprised of an administrative law judge, one teacher selected by the district, and one teacher selected by the teacher subject to the hearing. The panel had to issue a written decision, and the decision was subject to judicial review. If the district lost, it had to pay the hearing expenses and the teacher's attorney's fee. If the district won, the parties split the hearing expenses and paid their own attorney's fees. (*Vergara*, *supra*, 246 Cal.App.4th at pp. 630–631; see *id.* at pp. 631–632 [discussing 2015 amendments to the dismissal statutes].)

The trial court found that "it could take anywhere from two to almost ten years and cost $50,000 to $450,000 or more to bring these cases to conclusion under the Dismissal Statutes, and that given these facts, grossly ineffective teachers are being left in the classroom because school officials do not wish to go through the time and expense to investigate and prosecute these cases." The trial court did not dispute that providing teachers with due process before dismissal was a legitimate and even compelling interest. But it concluded that this interest could be pursued without what it called the "*über* due process" that leads to retention of grossly ineffective teachers. The trial court observed that classified (i.e., nonteacher) school employees, who are afforded due process rights to notice and a hearing under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, "had their discipline cases resolved with much less time and expense than those of teachers."

The trial court also concluded that other features of the challenged statutes contribute to the hiring and retention of grossly ineffective teachers. California is one of

only five states with a two-year probation period before tenure, in contrast to three or more years in other states. The trial court cited "extensive evidence presented, including some from the defense," that two years "does not provide nearly enough time for an informed decision to be made regarding the decision of tenure (critical for both students and teachers)." Further, California is one of only 10 states that use seniority as the *sole* factor or as a factor that *must* be considered in laying off teachers. (Ed. Code, § 44955, subds. (b), (c); see *id.*, § 44955, subd. (d) [narrow exceptions].) The trial court noted that many other states either treat seniority as one factor that may be considered or leave layoff criteria to the district's discretion. The trial court's findings do not suggest that teacher tenure invariably burdens students' fundamental right to education; instead, they suggest that California's particular scheme does.

III.

Plaintiffs have styled this claim as an equal protection challenge, perhaps because this approach is supported by *Butt* and other cases that have applied strict scrutiny to equal protection claims alleging harms to fundamental rights. With respect to Group 1, however, this lawsuit at bottom states a claim that the teacher tenure and dismissal statutes, to the extent they lead to the hiring and retention of grossly ineffective teachers, violate students' fundamental right to education. Plaintiffs locate the source of that right in sections 1 and 5 of article IX of the California Constitution. These are the same provisions at issue in *Campaign for Quality Education v. State of California* (2016) 246 Cal.App.4th 896, an education adequacy case in which this court also denies review today. The two cases involve different yet complementary claims concerning the importance of resources and reform to improving the education system. Both cases ultimately present the same basic issue: whether the education clauses of our state Constitution guarantee a minimum level of quality below which our public schools cannot be permitted to fall. This issue is surely one of the most consequential to the future of California.

Despite the gravity of the trial court's findings, despite the apparent error in the Court of Appeal's equal protection analysis, and despite the undeniable statewide importance of the issues presented, the court decides that the serious claims raised by Beatriz Vergara and her eight student peers do not warrant our review. I disagree. As the state's highest court, we owe the plaintiffs in this case, as well as schoolchildren throughout California, our transparent and reasoned judgment on whether the challenged statutes deprive a significant subset of students of their fundamental right to education and violate the constitutional guarantee of equal protection of the laws.

I respectfully dissent from the denial of review.

DISSENTING STATEMENT

by Cuéllar, J.

What Beatriz Vergara and eight of her fellow public school students allege in this case is that they, and vast numbers of children in our state's public schools, are burdened by certain statutes governing teacher dismissal, retention, and tenure that create a surplus of grossly ineffective teachers. After a 10-week bench trial, the trial court found that these statutes result in the denial of equal protection not only because they assign grossly ineffective teachers to classrooms where the children are disproportionately minority and poor, but also because the enduring effects of these statutes disproportionately burden an arbitrary subset of children. The evidence supporting this conclusion, according to the trial court, "shocks the conscience." In a public school system responsible for educating millions of children, "a single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom." And students in the Los Angeles Unified School District "who are taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers." Yet the statutes in question make it exceedingly difficult, the trial court concluded, to remove a grossly ineffective teacher from the classroom or properly evaluate a teacher before long-term employment is granted.

Beatriz Vergara and her fellow plaintiffs were part of that arbitrary group of thousands of children attending California public schools that the trial court found to be deprived of equal protection. According to the trial court, plaintiffs had "proven, by a preponderance of the evidence, that the Challenged Statutes impose a real and appreciable impact" to the detriment of these students' fundamental right to equality of education. At no time did the Court of Appeal dispute this conclusion. What was instead fatal to the claim advanced on behalf of the arbitrarily burdened children, according to the appellate court, was plaintiffs' failure to prove the existence of an identifiable group treated differently by the challenged laws, a group separate and apart from the individuals allegedly harmed by those laws.

Nothing in California's Constitution or any other law supports the Court of Appeal's reasoning. When a fundamental right has been appreciably burdened, we apply strict scrutiny. (See *Butt v. State of California* (1992) 4 Cal.4th 668, 685-686 (*Butt*); *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 47 (*Fair Political Practices*); *Serrano v. Priest* (1971) 5 Cal.3d 584, 597 (*Serrano I*).) The appellate court did not. Instead it erected a novel barrier — not only for Beatriz Vergara and her fellow student plaintiffs, but for all California litigants seeking to raise equal protection claims based on a fundamental right. Such a right could be unquestionably burdened, the decision implies, but if that burden is imposed at random rather than on a discrete and identifiable group, then no relief is available under the equal protection provisions of our state Constitution. (See *Vergara v. State of California* (2016) 246 Cal.App.4th 619, 646

(*Vergara*) ["Here, the unlucky subset is not an identifiable class of persons sufficient to maintain an equal protection challenge. Although a group need not be specifically identified in a statute to claim an equal protection violation [citations], group members must have some pertinent common characteristic other than the fact that they are assertedly harmed by a statute" (fn. omitted)].)

Even if one ignores the appellate court's inconsistency with settled law, the question its approach begs is as simple as it is important: Why? Certainly not because we have ever held that arbitrarily denying the fundamental rights of schoolchildren — or any Californian — is acceptable when a burden is imposed more or less at random, by the anodyne machinery of a statutory system's gears and pulleys rather than by any person's deliberate choice to target some people instead of others. Would it make sense to treat as cognizable an equal protection claim to vindicate a fundamental rights violation — but only because *all* the affected children were victimized for wearing purple shirts, or because they happened to live in rural towns in Southern California — even as we cast aside the claims of the children in this case?

Beatriz Vergara and her fellow plaintiffs raise profound questions with implications for millions of students across California. They deserve an answer from this court. Difficult as it is to embrace the logic of the appellate court on this issue, it is even more difficult to allow that court's decision to stay on the books without review in a case of enormous statewide importance. We grant review where necessary to forestall infringement of a fundamental right. (See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 809 [right to marry]; *Fashion Valley Mall, LLC v. National Labor Relations Board* (2007) 42 Cal.4th 850, 865 [right to free speech]; *Gould v. Grubb* (1975) 14 Cal.3d 661, 670 [right to vote].) This, too, is a case that merits review so we can address the problems with the Court of Appeal's approach in a matter of considerable statewide importance, and clarify that an equal protection claim under the California Constitution calls for searching scrutiny where it arises from the imposition of an impermissible burden on a fundamental right. And if the appellate court had addressed the fundamental rights issue perfectly against a legal backdrop that was crystal clear, there still would be compelling reasons to grant review.

I.

We treat certain rights as fundamental under the California Constitution — the right to vote, for example, or to marry, to access our courts, to an expectation of privacy, and to an education — because they are foundational to how we choose to define our personal and civic lives. But it would border on madness to think that because these rights are fundamental, we can routinely expect perfection when the state protects — or through its activities, vindicates — these rights. The nature of any person's actual relationship to his or her fundamental rights is as much affected by ordinary governance – – polling place and school locations, routine agency practices, long-past histories, and

unexpected emergencies — as it is by a shared aspiration articulated in constitutional text or a judicial opinion that government honor such rights. Yet these realities make it even more important to distinguish routine shortcomings of implementation, or instances where government legitimately chooses to harmonize competing goals in a given way, from the infringement of a fundamental right by the imposition of an appreciable burden thereon.

The trial court found that such a burden was shown to exist in this case. The evidence, according to the trial court, established that the quality of education received by California's millions of schoolchildren depends substantially on the quality of instruction. The evidence further established that the existence of a substantial number of grossly ineffective teachers in the California school system — about 1 to 3 percent statewide, or 2,750 to 8,250 teachers — "has a direct, real, appreciable, and negative impact on a significant number of California students." Yet teacher dismissals "could take anywhere from two to almost ten years and cost $50,000 to $450,000 or more to bring these cases to conclusion under the Dismissal Statutes, and that given these facts, grossly ineffective teachers are being left in the classroom because school officials do not wish to go through the time and expense to investigate and prosecute these cases." There was also evidence, which the trial court credited, showing that two years is too short a time to properly evaluate teacher competence, and that California is one of only 10 states that use seniority as the sole factor in determining whether to lay off teachers. The Court of Appeal never disputed these findings.

These findings instead failed to justify a remedy, according to the Court of Appeal, because there was no identifiable group explicitly targeted or uniquely burdened by the statutes. This conclusion is, at best, in stark tension with settled law. We have long recognized 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, supra,* 4 Cal.4th at pp. 685-686.) Strict scrutiny applies to both types of equal protection claims. (See *ibid.*; see also *Fair Political Practices, supra,* 25 Cal.3d at p. 47 ["It is only when there exists a real and appreciable impact on, or a significant interference with the exercise of the fundamental right that the strict scrutiny doctrine will be applied"].)

We can understand plaintiffs' claims here as involving equal protection grounded in a fundamental interest, or as ultimately predicated more directly on the argument that a fundamental interest has been unduly burdened. Under either conception, the Court of Appeal failed to appreciate the distinction we have drawn between claims involving a fundamental interest and those centered on a suspect class. To state a fundamental interest claim sounding in equal protection, the alleged disparate treatment need not be focused on a suspect class. (See *Bd. of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 914; accord, *Bullock v. Carter* (1972) 405 U.S. 134, 144 [finding a denial of equal protection even though the affected group "cannot be described by

reference to discrete and precisely defined segments of the community"].) When a fundamental interest is at stake, the sole preliminary inquiry is whether the challenged law has a real and appreciable impact on the exercise of that interest. (*Butt*, *supra*, 4 Cal.4th at p. 686; accord, *Bullock*, at p. 144; see generally *Engquist v. Oregon Dept. of Agriculture* (2008) 553 U.S. 591, 597 ["It is well settled that the Equal Protection Clause 'protect[s] persons, not groups . . . .' "].) If it does, the law will be invalidated unless the state can show it is necessary to achieve a compelling governmental interest. (*Serrano I*, *supra*, 5 Cal.3d at p. 610.) It is no answer under any standard of review — much less strict scrutiny — that violations of a fundamental right will be tolerated so long as they are felt at random.

And even if the law were more opaque, my doubts are grave about whether one could articulate a reasonable understanding of fundamental rights under the California Constitution that would countenance the imposition of material burdens on those rights without strict scrutiny or even the opportunity for judicial review under any standard, so long as those burdens were imposed largely at random. Invidious classifications deserve strict scrutiny even where fundamental rights are not at issue, while ordinary instances of treatment that could arguably be described as unequal do not merit particularly searching scrutiny where they do not involve fundamental rights. Where fundamental rights are at issue, however, we have never held that an equal protection challenge may proceed without the searching scrutiny that fundamental rights merit. We shouldn't start now simply because those rights may have been burdened arbitrarily. True: Arbitrary selection has at times been considered a means of rendering a governmental decision legitimate. (See Samaha, *Randomization in Adjudication* (2009) 51 Wm. & Mary L.Rev. 1, 24-27.) But where an appreciable burden results — thereby infringing a fundamental right — arbitrariness seems a poor foundation on which to buttress the argument that the resulting situation is one that should not substantially concern us.

Just as the arbitrariness of the alleged injury is no cause to deny review, neither is the nature of the fundamental right so injured. That education is the right at issue has posed no insurmountable bar in the past. (See *Butt*, *supra*, 4 Cal.4th at p. 686 ["education is . . . a fundamental interest for purposes of equal protection analysis under the California Constitution"]; *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' "].) Why should we treat differently the material interference with a fundamental right arising from the challenged statutes — interference the trial court found to exist, and the Court of Appeal did not dispute — from the disruption occasioned by a shorter school year (see *Butt*, at p. 686), or the drastic inequities in funding that undermine equal access to an education (see *Serrano I*, at pp. 590-591)? The harmful consequences to a child's education caused by grossly ineffective teachers — the evidence for which the trial court found compelling — are no less grave than those resulting from a shortened period of instruction or financial shortfalls.

In considering this case, we must respect the role of the representative branches of government and the public itself in shaping education policy. But our responsibility to honor the court's proper constitutional role makes it as important for us to review a case that merits our attention as it is for us to avoid a dispute beyond the court's purview. This case is the former. It squarely presents significant questions of state constitutional jurisprudence that our court, rather than the Legislature or the executive branch, is best suited to address. Moreover, even in a world where we clarify our fundamental rights jurisprudence as this case requires — and address concerns associated with the Court of Appeal's decision — considerable room would remain for the legislative and executive branches to decide how best to address the important balance between honoring the fundamental right to education and addressing other goals, such as retaining protections for public employees from arbitrary dismissal.

Had we accepted our charge to ensure uniformity of decision on legal issues of statewide importance (see Cal. Rules of Court, rule 8.500(b)(1)), and had we declined to adopt the Court of Appeal's approach, I am confident we would have appreciated the practical constraints that sometimes result in different educational inputs or outcomes for different children. Our track record suggests as much. (See *Butt*, *supra*, 4 Cal.4th 668; *Serrano I*, *supra*, 5 Cal.3d 584.) But there is a distinction between such conventional differences and what the trial court concluded was occurring as a result of these statutes — namely, that they resulted in "a direct, real, appreciable, and negative impact on a significant number of California students." That is a difference we should not ignore. For it is certainly possible to conclude that the extent of the interference with students' fundamental right to education has legal consequences, while at the same time acknowledging the role of the Legislature and the importance of maintaining flexibility within the context of the state's constitutional responsibility to honor this most fundamental right.

II.

The Court of Appeal also failed to apply the standard for facial constitutional challenges that ordinarily governs cases involving fundamental rights. (See *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 343 (*American Academy*) [requiring proof of a constitutional conflict in only "the vast majority of [the law's] applications"].) What the appellate court did instead is apply the more stringent "must be unconstitutional in all its applications" standard, without any apparent justification. (See *Vergara*, *supra*, 246 Cal.App.4th at pp. 643, 648.) At a minimum, the court did not wrestle with the "uncertainty" in our case law surrounding the governing standard for facial constitutional challenges. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 218.) By granting review, we could have brought much-needed clarity to this frequently recurring issue of constitutional law.

The court below concluded that a successful facial challenge depends on showing that the challenged law " ' "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions" ' " in all the law's applications. (*Vergara*, *supra*, 246 Cal.App.4th at p. 643; accord, *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 181.) Only rarely have we applied the more stringent standard alone (see *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 709), and not when a fundamental right is involved (see *American Academy*, *supra*, 16 Cal.4th at p. 343 ["a facial challenge to a statutory provision that broadly impinges upon fundamental constitutional rights may not be defeated simply by showing that there may be some circumstances in which the statute constitutionally could be applied"]). In fundamental rights cases, we require a showing of unconstitutionality in only "the vast majority of [the law's] applications." (*Ibid.*) Had the Court of Appeal applied this standard, and properly deferred to the trial court's factual findings on causation, it is difficult to see how it could have rejected the trial court's conclusions.

The Court of Appeal also appears to have confused the question of whether a facially discriminatory statute exists with the question of what showing is required to prove that statute is invalid on its face. "Because plaintiffs did not demonstrate any facial constitutional defect," the appellate court stated in a footnote, "they certainly did not show that such a defect existed in the generality or vast majority of cases." (*Vergara*, *supra*, 246 Cal.App.4th at p. 649, fn. 14.) Not so. Just because a statute does not discriminate on its face — i.e., does not "demonstrate any facial constitutional defect" — does not necessarily mean a facial challenge to that statute does not lie. If this were the case, facial challenges in this day and age would be dead on arrival. Moreover, it cannot be that because plaintiffs failed to satisfy the more stringent standard for bringing a facial challenge they, by necessity, failed to satisfy the less stringent one. What determines instead whether plaintiffs have succeeded in making such a challenge is whether they must prove a constitutional conflict in all of the statute's applications, or in just the great majority of them. This is precisely the uncertainty we could have clarified by granting review.

III.

There is no right without an adequate remedy. And no such remedy exists without review by a court of last resort when the decision of the appellate court, the importance of the case, and the question presented so clearly merit review. Denying review in this case leaves in place a decision that is in considerable tension with existing law and accepts with little explanation the notion of material interference with the fundamental right to an education — interference that the trial court here found was caused by the challenged statutes. The Court of Appeal then concluded that our law permits the wanton imposition of material burdens on or even deprivations of fundamental rights, as long as such imposition is sufficiently wanton that the burden does not fall on an "identifiable group" defined by some characteristic other than the burden imposed by the statutes themselves.

No one should doubt that plaintiffs' lawsuit raises difficult questions and implicates a variety of concerns, including the importance of protecting public employees from arbitrary dismissal. (See *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 335-336 [explaining that because "the state not only has monopolized the process of determining whether permanent public school teachers should be dismissed or suspended, but it also is the entity seeking to deprive teachers of their constitutionally protected liberty and property interests," it is therefore "required by the due process guarantee to provide the teacher a meaningful hearing"].) Public institutions must often reconcile their protection of a fundamental right with the realities of governing, the resolution of competing priorities, and the imperfections of any system forged and adapted by human hands. But here, the trial court concluded that a fundamental right was infringed when it was appreciably burdened by statutes protecting grossly ineffective teachers — and the evidence "shock[ed] the conscience." There is a difference between the usual blemishes in governance left as institutions implement statutes or engage in routine trade-offs and those staggering failures that threaten to turn the right to education for California schoolchildren into an empty promise. Knowing the difference is as fundamental as education itself. Which is why I would grant review.