No. _____

IN THE SUPREME COURT OF CALIFORNIA

BEATRIZ VERGARA, A MINOR, ETC., ET AL.,
Plaintiffs and Petitioners,

v.

STATE OF CALIFORNIA, ET AL.,
Defendants and Respondents,

and

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Intervenors and Respondents.

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division Two, Case No. B258589

The Superior Court of Los Angeles County, Case No. BC484642
The Honorable Rolf M. Treu, Presiding

PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

This Court's review is critical to protect children's fundamental right to education, a precious constitutional guarantee that the Court of Appeal has reduced to a nullity. Following a ten-week trial, the Superior Court found that public school students across California are being "unfairly, unnecessarily, and for no legally cognizable reason … disadvantaged" each year by the statutes at issue in this case, that the harm being imposed on students "shocks the conscience," and that "the challenged statutes disproportionately affect poor and/or minority students." As a result, the Superior Court, invoking *Serrano v. Priest* and other decisions from this Court, applied strict scrutiny under the equal protection clause of the California Constitution and struck down the laws as unconstitutional. But the Court of Appeal reversed, concluding that Plaintiffs' claims and evidence do not trigger equal protection review *at all* and refusing to apply *any* standard of scrutiny. The issues presented for review are as follows:

1. In a facial constitutional challenge based on the infringement of the fundamental right to basic educational equality, where the plaintiffs have proven that the laws impose significant and disproportionate harm on low-income and minority students, is such a showing sufficient to trigger review under the equal protection clause of the California Constitution?

2. When a trial court, sitting as finder of fact, finds that a statute has a disparate adverse impact on low-income and minority children, disproportionately harming their educational opportunities as compared to their peers, is that factual finding entitled to deference on appeal?

3. In a facial constitutional challenge based on the infringement of a fundamental right, where the plaintiffs have proven that the laws in question have a "real and appreciable" negative impact on the rights of a subset of Californians, is such a showing sufficient to trigger review under the equal protection clause of the California Constitution?

WHY REVIEW SHOULD BE GRANTED

The Court of Appeal's opinion in this case breaks sharply with this Court's proud history of protecting the educational opportunities of California schoolchildren. As this Court declared in its landmark *Serrano* decision, education is "the bright hope for entry of the poor and oppressed into the mainstream of American society." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 608-609 (*Serrano I*).) Because "'[u]nequal education … leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society,'" this Court has held that California 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, citations omitted.) Indeed, where "substantial disparities in the quality and extent of availability of educational opportunities" persist, this Court has repeatedly intervened to ensure "equality of treatment to all the pupils in the state." (*Serrano v. Priest* (1976) 18 Cal.3d 728, 747 (*Serrano II*).) The Court of Appeal's ruling disregards these principles, conflicts with the decisions of this Court and other appellate courts, and raises issues of widespread importance for this State and the Nation.

When faced with "extensive evidence" that California's teacher tenure, dismissal, and layoff statutes impose severe harm on tens of thousands of students every year, and disproportionate harm on low-income and minority students in particular, the Superior Court adhered to *Serrano* and struck down the laws as unconstitutional. (28 Appellants' Appendix ("AA") 7300-7301, 7306.) The Superior Court's groundbreaking decision was a powerful victory for California students—the first in the Nation to acknowledge that excessive teacher job protections can have a profoundly detrimental effect on children. Indeed, when the Superior Court's ruling was announced, it drew national attention and bipartisan praise. Then-U.S.

Secretary of Education Arne Duncan heralded the decision as "a mandate to fix these problems" and expressed his hope that the ruling would present "an opportunity for a progressive state with a tradition of innovation to build a new framework for the teaching profession that protects students' rights to equal educational opportunities while providing teachers the support, respect and rewarding careers they deserve." (*Statement From U.S. Secretary of Education Arne Duncan Regarding the Decision in Vergara v. California* (June 10, 2014) Press Release.) The *Los Angeles Times* editorial board proclaimed that the "*Vergara* ruling offers California an opportunity to change a broken system." (Editorial (June 10, 2014) L.A. Times.) Similarly, *The New York Times* declared that the court's decision "underscores a shameful problem that has cast a long shadow over the lives of children." (*A New Battle for Equal Education* (June 11, 2014) N.Y. Times.) And *The Wall Street Journal* called the decision "[a] school reform landmark" giving "disadvantaged students … a claim to petition the judiciary to protect their rights as much as in the days of Jim Crow." (Editorial (June 10, 2014) Wall Street Journal; see also *California tenure system ruling is smart decision for students* (June 13, 2014) Washington Post.)

Yet, despite this Court's mandate to protect "equality of treatment to all the pupils in the state" (*Serrano II*, *supra*, 18 Cal.3d at p. 747), and despite the Superior Court's amply supported findings that the Challenged Statutes inflict severe *inequality* on the pupils in the State (28AA7295, 7300-7307), the Court of Appeal reversed the Superior Court's ruling and upheld the Challenged Statutes without conducting *any* equal protection review *at all*—not even rational basis review, let alone the strict scrutiny this Court's precedents require. This Court should grant review because the Court of Appeal's ruling ignores the vital role of the California Constitution in protecting disenfranchised children from laws that exacerbate

educational inequality, and abdicates the long-standing duty of California courts to serve as the guardian of educational opportunity for all.

Specifically, this Court's review is necessary to "settle [] important question[s] of law" and "to secure uniformity of decision" (Cal. Rules of Court, rule 8.500(b)(1)) with respect to three important issues pertaining to facial challenges under the equal protection clause of the California Constitution:

First, the Court of Appeal's decision creates a split of authority regarding the validity of equal protection claims predicated on disparate impact, rather than intentional discrimination. (Compare Typed Opn. ["Opn."] at p. 31, fn. 13 [holding that, in certain circumstances, "strict scrutiny … applies to a facially neutral statute that has a disproportionate impact on members of minority groups … irrespective of motive or intent"], with *Sanchez v. California* (2009) 179 Cal.App.4th 467, 487 ["'neither explicit discrimination nor discrimination by "disparate impact" is unconstitutional unless motivated at least in part by purpose or intent to harm a protected group'"], citation omitted.) Moreover, if disparate impact *is* a viable legal theory for equal protection claims under the California Constitution, the Court of Appeal's decision creates substantial confusion regarding the requirements for *proving* such claims. The Court of Appeal in this case established an unprecedented causation requirement that makes it nearly impossible to prove disparate impact—a holding that has far-reaching implications for all types of disparate-impact cases. Indeed, under the Court of Appeal's flawed test, *Serrano* itself would have come out the other way.

Second, the Court of Appeal improperly ignored the trial court's factual findings regarding disparate impact. The trial court found that the Challenged Statutes "cause" low-income and minority students to suffer disproportionate harm, depriving those students "in particular" of

educational opportunities. (28AA7295.) And the Court of Appeal acknowledged these findings. (Opn. at p. 23.) Yet it gave those well-supported findings no deference whatsoever, substituting instead its own (inaccurate) assessment of causation. (*Id*. at p. 35 ["the constitutional infringement is the product of staffing decisions, not the challenged statutes"].) The Court of Appeal's approach conflicts with the approach taken by this Court and other appellate courts in disparate-impact cases, casting into doubt the purpose of a trial—and the role of a factfinder—in disparate-impact litigation.

Third, the Court of Appeal misapplied the equal protection analysis governing fundamental rights claims, holding that there can be no equal protection violation unless the injured individuals share a "common characteristic" beyond the harms they suffer at the hands of the State. (Opn. at p. 29.) The Court of Appeal's holding conflates fundamental-rights claims with suspect-classification claims, conflicts with equal-protection decisions from this Court and the U.S. Supreme Court, and establishes an unwarranted hurdle for plaintiffs. Where fundamental rights are concerned, the equal protection clause of the California Constitution concerns itself with unequal treatment of *all* kinds—not just unequal treatment of discrete and insular groups.

This Court should grant review to settle these important questions of law, secure uniformity in California equal protection jurisprudence, and—most importantly—ensure that all schoolchildren in this State have equal educational opportunities as guaranteed by the California Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Challenged Statutes and Plaintiffs' Complaint

Plaintiffs are nine California schoolchildren who challenged the constitutionality of five provisions of the California Education Code under the equal protection clause of the California Constitution.

A. The Tenure Statute

Under the Tenure Statute (Section 44929.21, subdivision (b)), a probationary teacher "becomes a 'permanent employee of [a school] district' after finishing 'two complete consecutive school years in a position or positions requiring certification qualifications ….'" (Opn. at p. 9 [citing § 44929.21(b)].) Each district must notify a probationary teacher whether she will be reelected as a permanent teacher on or before March 15th of the teacher's second year with the district; otherwise, the teacher becomes a permanent employee by default. (§ 44929.21(b).) In other words, districts have only 16 months to decide whether to make a teacher a permanent employee. (Opn. at p. 14.)

B. The Dismissal Statutes

Under the Dismissal Statutes (Sections 44934, 44938, subdivisions (b)(1) and (2), and 44944), a district that intends to dismiss a permanent teacher for unsatisfactory performance must first provide the teacher a written notice specifying, *inter alia*, "specific instances of [unsatisfactory] behavior" with "particularity." (§ 44938(b)(1).) After then providing the teacher at least 90 days to correct her performance, the district may file a formal "written statement of charges." (Opn. at p. 10 [citing § 44934].) The teacher then "has another 30 days to request a hearing," which allows for robust discovery and must be conducted by a three-member panel "made up of one administrative law judge and two teachers, one selected by

the teacher subject to the hearing and the other selected by the district." (Opn. at p. 10 [citing §§ 44934, 44944(b)(1), (2)].) The panel "must issue 'a written decision containing findings of fact, determination of issues, and a disposition'" to retain, suspend, or dismiss the teacher, a decision that "is deemed the 'final decision' of the district." (*Ibid.* [citing § 44944(c)(1), (4)].) If the panel "determines that the teacher should not be dismissed or suspended, the district is required to pay the expenses for the dismissal hearing and the teacher's [attorney] fees." (*Id.* [citing § 44944(e)(1), (2)].) Parties may appeal the panel's decision to the Superior Court and, after that, to the Court of Appeal. (§ 44945.)[1]

C. The LIFO Layoff Statute

"When a school district must 'decrease the number of permanent [teachers] in the district'" due, for example, to a budget shortfall, the Last-In First-Out ("LIFO") Layoff Statute (Section 44955) provides that "'the services of no permanent employee may be terminated … while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render'"—in other words, a teacher "cannot be terminated unless all teachers with less seniority have been terminated." (Opn. at pp. 11-12 [citing § 44955(b), (c)].)

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[1] After the Superior Court issued its tentative decision, the Legislature enacted Assembly Bill No. 215 (2013-2014 Reg. Sess.) (Stats. 2014, ch. 55 §§ 3, 15). As the Court of Appeal held, the amended Dismissal Statutes "do not significantly differ from the dismissal statutes in effect at the time of trial." (Opn. at p. 26, fn. 10.)

D. Plaintiffs' Complaint

Plaintiffs asserted seven claims against the State Defendants,[2] alleging that the Challenged Statutes violate the equal protection clause of the California Constitution. (1AA50-55.) Plaintiffs alleged that the Challenged Statutes cause grossly ineffective teachers to obtain and retain permanent employment at alarming rates, because they (1) compel districts to make permanent employment decisions before teacher effectiveness can be determined, (2) make dismissal of poor performers nearly impossible, and (3) when layoffs are necessary, force districts to terminate teachers based on seniority, irrespective of effectiveness. (1AA40.) Because grossly ineffective teachers impose real and appreciable harm on students, and districts are left with no choice but to assign *some* students each year to the grossly ineffective teachers trapped in the school system, the Challenged Statutes create "arbitrary and unjustifiable inequality among students" in the exercise of their fundamental right to education. (1AA32-33.) As an independent basis for their claims, Plaintiffs alleged that the Challenged Statutes "have a disproportionately adverse effect on minority and economically disadvantaged students." (1AA46-48.)

II. The Trial Evidence Proves That The Challenged Statutes Deprive Students Of Their Fundamental Right To Education

The Superior Court conducted a ten-week bench trial, during which "[o]ver 50 lay and expert witnesses testified, including teachers, principals,

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[2] State Defendants include the State of California, Governor Edmund G. Brown, Jr., the California Department of Education ("CDE"), the State Board of Education, and State Superintendent of Public Instruction Tom Torlakson. The California Teachers Association and California Federation of Teachers (together with State Defendants, "Defendants") later intervened into the case. (1AA270-273.)

superintendents, and CDE employees." (Opn. at p. 12.) Below is a short summary of the key evidence introduced at trial.

A. The Challenged Statutes Impose Real And Appreciable Harm On A Subset Of Students Statewide

Studies show that a single grossly ineffective teacher can cost her students up to a *full year* of learning—a deprivation the students will never recover. (Reporter's Transcript ("RT") 2770:6-16, 3513:15-18.) Students stuck with even *one* grossly ineffective teacher have lower graduation rates, lower college attendance rates, higher teenage pregnancy rates, and lower lifetime earnings and savings rates than their peers—life-altering consequences. (RT1202:21-1203:1.) Thus, the Challenged Statutes—which ensure that *some* students each year will have grossly ineffective teachers—have a "real and appreciable impact" on students' fundamental right to equal educational opportunity.

- Tenure Statute: "Various witnesses testified that the period provided for in the tenure statute is too short for administrators to make a reasoned determination of a probationary teacher's effectiveness when deciding whether to reelect the teacher as a permanent employee." (Opn. at p. 13.) For example, Dr. "John Deasy, then-superintendent of LAUSD, testified that there is 'no way' the time provided by the statute is 'a sufficient amount of time to make'" a reelection decision. (*Id.* at p. 14; see also *ibid.* ["several witnesses" testified that "the tenure statute's short probationary period prevented administrators from making adequately informed reelection decisions, resulting in highly ineffective teachers being retained as permanent employees"].) In fact, even "[t]wo expert witnesses called by *defendants* … agree[d] that a probationary period of three to five years would be superior to the current timeline for identifying teachers worthy of reelection." (*Ibid.*, italics added.) And "California [is just] one

of five states nationwide with a probationary period of two years or fewer." (*Id.* at p. 13, fn. 4.)

- Dismissal Statutes: As the Superior Court found, the process to dismiss a single grossly ineffective teacher "last[s] anywhere from one to 10 years before completion, and costs range[] from $50,000 to $450,000." (Opn. at p. 14; see also RT542:6-28, 530:20-23 [LAUSD: dismissal costs $250,000 to $450,000 and takes upwards of "ten years."]; 1525:11-27, 1528:18-1529:1 [Oakland: dismissal takes "three, four years" and costs $50,000 to $400,000]; 2032:7-2033:5 [Sacramento: dismissal takes "over four years" and costs $110,000].)

"Because of these issues, districts rarely proceed[] with formal dismissal proceedings against highly ineffective teachers." (Opn. at p. 14.) As Plaintiffs' expert Frank Fekete explained, "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." (RT4880:10-15; see also RT1533:2-16.) Defendants' experts agreed, testifying that dismissal "is ordinarily a very expensive and time-consuming process," so much so that it is "extremely rare in most districts because administrators believe it is impossible to dismiss a tenured teacher." (RT4589:8-21.)

Ultimately, the numbers speak for themselves: "[F]rom 2003 to 2013, approximately two teachers statewide were dismissed on average per year for unsatisfactory performance"—only *0.0008* percent of the 277,000 teachers statewide. (Opn. at p. 14.) This statistic is particularly shocking in light of the *thousands* of grossly ineffective teachers in California today (AA7300), including at least 350 grossly ineffective teachers in LAUSD alone that the district believes should (but cannot) be dismissed. (RT9239:23-9240:4, 8480:12-22.)

- LIFO Statute: Numerous "witnesses testified that the [LIFO] seniority system often resulted in highly effective teachers being terminated, while grossly ineffective teachers kept their jobs." (Opn. at p. 15.) For instance, expert witness Dr. Raj "Chetty calculated that 48 percent of teachers terminated during reductions-in-force [under LIFO] were *more effective* than the average teacher in the district, while approximately 5 percent of teachers terminated were above the *95th percentile* in terms of effectiveness—meaning that retentions under the seniority system have little if any correlation with effectiveness." (Opn. at p. 15, italics added.) Seniority-based layoffs reduce student test scores by 11 percent and diminish lifetime student earnings by $2.1 million per teacher laid off (as compared to quality-based layoffs). (RT1263:3-9, 1272:19-1273:4.) As Sacramento Superintendent Jonathan Raymond testified, "a [layoff] system that treats its best teachers this way" and "ultimately doesn't serve children … is broken." (RT2045:12-15.)

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

Plaintiffs also proved that the Challenged Statutes cause disproportionate harm to low-income and minority students, in at least three independent ways:

- Dance of the Lemons: First, the Challenged Statutes trap within the school system grossly ineffective teachers, who inevitably concentrate in schools serving poor and minority communities—in part through a process called the "Dance of the Lemons." As expert witness Dr. Thomas Kane explained, grossly ineffective teachers have to teach *somewhere*, and schools serving poor and minority communities invariably have "more vacancies" than other schools. (9RT2784:10-2785:11; Opn. at 16, fn. 7.) Thus, "there is a mechanical relationship between premature

tenure decisions, difficult dismissal decisions, and the accumulation of ineffective teachers" in poor and minority schools. (9RT2852:2-20; see also *ibid*. ["in any system where districts have to make tenure[] decisions prematurely and where it is difficult to make dismissal decisions later, [] ineffective teachers will tend to accumulate, sort of an inevitable result of those two factors"]; 18AA4726 [State Report] [explaining that the Dance of the Lemons occurs because teacher dismissal proceedings have "a very limited likelihood of success"].)

Moreover, districts are powerless to avoid this outcome by, for example, transferring grossly ineffective teachers to wealthier schools. As LAUSD's Superintendent explained, districts cannot "force a teacher to go where the teacher does not wish to go." (4RT919:11-920:3.) And when Fullerton enacted policies "to try to stop [the] Dance of Lemons," it took place anyway. (8RT2445:16-2448:10.)

- Vulnerability to Harm: Second, the Challenged Statutes disproportionately harm poor and minority students because those students are more vulnerable to the impact of grossly ineffective teachers—teachers who would not be employed but-for the Challenged Statutes. San Francisco principal Bill Kappenhagen explained that "when a student from a low-income family has an ineffective teacher, it … puts their life trajectory on hold or even backwards" because such students "don't have the available resources" to make up for the loss of in-school learning. (7RT2306:4-14.) Oakland principal Kareem Weaver provided similar testimony, explaining that low-income and minority students have "lots of risk factors" and stand on a figurative "razor's edge …. [E]ducation can either prop them up or it can blow them down." (9RT2921:2-15; see also 5RT1389:6-25.)

- Disproportionate Layoffs: Third, schools serving poor and minority communities "tend to have high[er] proportions of inexperienced

teachers" with lower seniority levels, and therefore "experience more layoffs" under the LIFO Statute. (RT4594:2-10; Opn. at p. 16.) For example, expert witness Dr. Arun Ramanathan "testified that … students attending schools in the highest poverty quartile [are] 65 percent more likely to experience a teacher layoff than those in the lowest poverty quartile." (Opn. at pp. 16-17; see also RT3712:5-3716:23 ["African-American students [are] disproportionately likely to have their teachers receive a [layoff] notice"].) During a recent round of layoffs, for example, certain low-income schools in Oakland experienced layoff notices for 90 percent of their teachers, while wealthier schools in the district had almost no layoffs at all. (RT1399:10-1401:1.) This causes "'a constant churn of the faculty and staff' at high-poverty, high-minority schools due to the seniority-based reduction-in-force statute." (Opn. at p. 17.) And it creates more vacancies in low-income schools, which are then filled through the Dance of the Lemons. (*Supra* at 11-12; RT1409:4-1410:13.)

The unrebutted evidence bears out these disastrous results for poor and minority students. As the State itself admitted, "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 …. Because minority children disproportionately attend such schools, minority students bear the brunt of staffing inequities." (18AA4685; see also RT2760:17-2764:7; 2779:20-27 [African-American and Latino students in LAUSD are 43 and 68 percent, respectively, more likely than white students to have grossly ineffective teachers]; RT3967:27-3970:26 [low-income students are twice as likely to have grossly ineffective teachers].)

III. The Superior Court Holds That The Challenged Statutes Are Unconstitutional

The Superior Court held that the Challenged Statutes are unconstitutional under the equal protection clause of the California Constitution. (28AA7302-7308.)

At the outset of its judgment, the Court "found that competent teachers are a critical component of the success of a child's educational experience, and that grossly ineffective teachers substantially undermine the ability of a child to succeed in school." (Opn. at p. 21; *ibid.* [the harm imposed by grossly ineffective teachers "shocks the conscience"].) The Court then concluded that the Challenged Statutes *both* "(i) impose a 'real and appreciable impact' on students' fundamental rights to equality of education, and (ii) 'impose a disproportionate burden on poor and minority students'"—two independent bases for triggering strict scrutiny. (*Id*. at pp. 21-22.)

With respect to the Tenure Statute, the Court held that "the [Tenure] Statute does not provide nearly enough time for an informed decision to be made" about whether to grant tenure. (28AA7301.) "As a result, teachers are being reelected who would not have been had more time been provided for the process." (*Ibid.*) Accordingly, "both students and teachers are unfairly … disadvantaged by the [Tenure] Statute." (*Ibid.*)

Under the Dismissal Statutes, the Court held that the "time and costs" to obtain dismissal "cause districts to be very reluctant to commence dismissal procedures." (Opn. at p. 22.) "Substantial evidence" proved that "grossly ineffective teachers are being left in the classroom" because of the "time and expense to investigate and prosecute these cases." (28AA7304.) As the Court explained, the Dismissal Statutes afford teachers "*über* due process" rights and create a procedural morass "so complex, time

consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory." (28AA7303-7305.)

As for the LIFO Statute, the Court held that the statute separates students "from competent junior teachers while incompetent teachers with seniority remain in the classroom" (Opn. at p. 22), a "lose-lose situation" that is "unfathomable and therefore constitutionally unsupportable" (28AA7305-7306).

Finally—as an independent basis for applying strict scrutiny—the Superior Court found that "substantial evidence showed the challenged statutes disproportionately affect poor and/or minority students." (Opn. at p. 23.) In particular, the Superior Court explained that "the 'dance of the lemons' … [is] caused by the lack of effective dismissal statutes and the [LIFO] statute, and that it affect[s] high-poverty and minority students disproportionately." (*Ibid.*)

Because Defendants failed to satisfy their burden of proof under the strict scrutiny standard of review, the Court held that the Challenged Statutes are unconstitutional. (28AA7308.)

IV. The Court Of Appeal Reverses The Superior Court's Judgment

In a published opinion, the Court of Appeal reversed the judgment without applying *any* standard of equal protection review.

First, with respect to Plaintiffs' claim that the Challenged Statutes have a real and appreciable impact on the fundamental rights of a subset of students across California, creating educational disparities that violate the equal protection clause, the Court of Appeal held that the equal protection clause is inapplicable because the students being harmed have no "shared trait other than the violation of a fundamental right." (Opn. at 29.) In the absence of "some pertinent common characteristic," the Court of Appeal held that "the unlucky subset is nothing more than a random assortment of

students" and, on that basis alone, refused to conduct any equal protection analysis. (*Id.* at pp. 29, 31.)

Second, with respect to Plaintiffs' claim that the Challenged Statutes impose disproportionate harm on low-income and minority students, the Court of Appeal acknowledged the trial court's finding "that substantial evidence showed the challenged statutes disproportionately affect poor and/or minority students." (Opn. at p. 23.) Yet the Court of Appeal refused to apply equal protection scrutiny based on its own conclusion that the statutes "do not inevitably cause poor and minority students to receive an unequal, deficient education." (*Id.* at p. 32.) Rather, the Court of Appeal decided that "the constitutional infringement is the product of staffing decisions, not the challenged statutes." (*Id.* at p. 35.) The Court of Appeal also refused to credit testimony from Plaintiffs' expert witnesses, who testified that the Challenged Statutes cause grossly ineffective teachers to be disproportionately concentrated in schools serving low-income and minority communities, reasoning that it is "not required to defer to expert opinion regarding the ultimate issue in a case." (*Id.* at p. 34.)

Plaintiffs filed a petition for rehearing, which the Court of Appeal denied with immaterial modification on May 3, 2016.

DISCUSSION

I. This Court Should Resolve The Split Of Authority Regarding The Existence Of, And Requirements For Proving, Facial Constitutional Claims Predicated On Disparate Impact

This Court should grant review to resolve the substantial uncertainty in California regarding the viability of, and requirements for proving, a facial constitutional challenge under the equal protection clause of the California Constitution, where the plaintiffs allege disproportionate harm to a protected group.

A. In 1976, the U.S. Supreme Court held that disparate-impact allegations are typically insufficient to state an equal protection claim under the U.S. Constitution. (*Washington v. Davis* (1976) 426 U.S. 229, 239 (*Davis*) ["our cases have not embraced the proposition that a law … without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact"].) In the years since *Davis*, this Court has suggested that disparate-impact claims *are* still available in California, at least under certain circumstances. (See *Serrano II*, *supra*, 18 Cal.3d at p. 765 ["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"]; see also *id.* at pp. 741, 765-768.) Some of this Court's decisions, however, seem to go the other way. (See *Hardy v. Stumpf* (1978) 21 Cal.3d 1, 7 ["'Standing alone, disproportionate impact does not trigger the rule … that racial classifications are to be subjected to the strictest scrutiny.'"] [quoting *Davis*, at p. 242].)

After the decision below in this case, the Courts of Appeal are now divided on the question. (Compare Opn. at p. 31, fn. 13 [holding that, in

certain circumstances, "strict scrutiny … applies to a facially neutral statute that has a disproportionate impact on members of minority groups … irrespective of motive or intent"], with *Sanchez*, *supra*, 179 Cal.App.4th at 487 ["'neither explicit discrimination nor discrimination by "disparate impact" is unconstitutional unless motivated at least in part by purpose or intent to harm a protected group'"] [quoting *Kim v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 1357, 1361-1362].)

Indeed, one of the central questions in dispute throughout this case has been whether the California Constitution permits claimants to raise equal protection claims predicated solely on a law's disparate impact on a protected group (here, low-income and minority students). Even our opponents are divided on the question: State Defendants agree with Plaintiffs that disparate-impact claims are viable (State Defendants' Opening Brief at p. 57 [acknowledging that laws "creat[ing] significant disparities" may trigger strict scrutiny irrespective of discriminatory intent]), whereas the Union Defendants contend they are not (Unions' Opening Brief at pp. 66-68). This important constitutional question has far-reaching consequences and requires prompt resolution by this Court. And this case—in which disparate impact is the *only* type of suspect-classification claim at issue—presents an ideal vehicle through which to resolve this split of authority.

B. To the extent disparate-impact claims are available in California (as Plaintiffs and the State Defendants contend), the Court of Appeal's decision creates considerable confusion regarding the requirements for proving such claims.

In its opinion, the Court of Appeal repeatedly expressed its view that facial challenges cannot succeed unless the challenged statute leads "inevitably" to constitutional harm. (Opn. at pp. 6, 31-35.) As a result, the Court of Appeal held that the standard for Plaintiffs' disparate-impact

claims is whether the Challenged Statutes "*inevitably* cause poor and minority students to receive an unequal, deficient education." (*Id.* at p. 32, italics added.) But that is a very different question from asking whether the statutes have a *disparate impact* on poor and minority students in light of the real-world conditions in which those statutes operate—the question this Court and others routinely ask in disparate-impact cases.

For example, the Court of Appeal acknowledged that the LIFO Statute has a disparate impact on poor and minority students (Opn. at p. 34)—it forces the least experienced teachers, who are (in California as elsewhere) disproportionately concentrated in low-income and minority schools, to be laid off first, resulting in massive layoffs in those schools while wealthier schools experience almost no layoffs whatsoever. (See *id.* at pp. 16-17; see also *supra* at 14-15.) But the Court of Appeal nevertheless refused to apply equal-protection review because, in a hypothetical, counter-factual world in which less experienced teachers are *not* concentrated in poor and minority schools, the Challenged Statutes might not have a disparate impact on poor and minority students—meaning, in the Court of Appeal's view, that the Challenged Statutes do not "inevitably" harm such students. (Opn. at pp. 34-35.) The Court of Appeal then blamed local school districts for the concentration of inexperienced teachers in poor and minority schools. (*Ibid.*) In other words, the court required a showing that the Challenged Statutes are the *exclusive* cause of disproportionate harm to protected groups and will *always* cause harm to the protected groups under any circumstances—a standard that cannot be squared with other disparate-impact decisions.

As this Court recently noted, "[t]he standard for a facial constitutional challenge to a statute" is "the subject of some uncertainty." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 218; see also *Zuckerman v. State Bd. of Chiropractic*

Examiners (2002) 29 Cal.4th 32, 39 ["The precise standard governing facial challenges 'has been a subject of controversy within this court'"] [quoting *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502].) On certain occasions, this Court has required a plaintiff to demonstrate that a law "'inevitably pose[s] a present total and fatal conflict with applicable constitutional provisions.'" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1102, citations omitted.) The Court of Appeal extracted the word "inevitably" from this test in formulating its heightened causation standard for disparate-impact claims. (Opn. at 25.)

Frequently, however, this Court has held that a statute may be invalidated as facially unconstitutional so long as it "create[s] [constitutional] problems in at least 'the generality' … or 'vast majority' … of cases …." (*Today's Fresh Start*, *supra*, 57 Cal.4th at p. 218 [citing *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 347; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 343; *Kasler*, *supra*, 23 Cal.4th at p. 502; *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126].) Had the Court of Appeal used these tests (as it should have), it would have been clear that its "exclusive causation" standard is flawed—by definition, a statute can only impose constitutional harm in "the generality" or "vast majority" of cases (rather than *all* cases) if there is some other contributing factor.

This Court's jurisprudence illustrates this important distinction. As this Court has explained, when faced with a constitutional challenge, courts must "consider the circumstances in the light of existing conditions." (*In re Smith* (1904) 143 Cal. 368, 372; *Parr v. Mun. Ct. for the Monterey-Carmel Jud. Dist. of Monterey County* (1971) 3 Cal.3d 861, 865, 868 [a court "may not overlook [the] probable impact" of a law when analyzing its constitutionality].) That is because a law "cannot be construed for purposes of constitutional analysis without concern for its … ultimate effect."

(*Mulkey v. Reitman* (1966) 64 Cal.2d 529, 533-534, affd. *sub nom*. *Reitman v. Mulkey* (1967) 387 U.S. 369.) Time and again, this Court has applied this principle to invalidate laws that inflict constitutional harms ***given the realities of the world in which those laws operate***.

In *Serrano I*, for example, this Court struck down the State's seemingly benign education financing laws because, in practice, those laws "[f]ail[ed] to provide children of substantially equal age, aptitude, motivation, and ability with substantially equal educational resources …." (*Serrano I*, *supra*, 5 Cal.3d at p. 590, fn. 1.) Even though "the amount of money raised locally [was] [partly] a function of the rate at which the residents of a district [were] willing to tax themselves," the Court found the laws facially unconstitutional because "as a practical matter districts with small tax bases simply [did not] levy taxes at a rate sufficient to produce the revenue that more affluent districts [could] reap with minimal tax efforts." (*Id.* at p. 598.) Under the Court of Appeal's reasoning, however, this Court could not have reached that conclusion; the blame would have fallen on poorer school districts for failing to tax themselves at a rate sufficient to close the expenditure gap between their districts and affluent districts. (See *id.* at p. 603.) Or the blame would have fallen on Californians' residential preferences, whereby wealthier families tend to self-segregate in wealthier communities. But *Serrano* rejected this approach, recognizing the *practical* reality that "fiscal freewill [was] a cruel illusion for the poor school districts …." (*Id.* at p. 611.)

Likewise, in *Gould v. Grubb* (1975) 14 Cal.3d 661, this 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." (*Id.* at p. 664.) The superior court found that a candidate's top-ballot placement afforded the candidate an advantage at the polls, infringing on the fundamental rights of *voters* who supported other

candidates. (*Id.* at p. 666.) On appeal, the defendant argued that the procedure was not facially invalid because it did "not *cause* or *encourage* voters to cast their ballots haphazardly …." (*Id.* at p. 669, fn. 9, italics added.) Under the Court of Appeal's flawed causation theory in this case, that argument would have won the day—*voters* who absentmindedly cast their votes for candidates at the top of the ballot would have been blamed for diluting the impact of voters who supported other candidates. This Court rejected that argument, however, holding "[i]t [was] the *unequal effect* flowing from the city's decision to reserve the top ballot position for incumbents that [gave] rise to the equal protection issue …." (*Ibid.*, italics added.)

And in *Bullock v. Carter*, the U.S. Supreme Court considered the constitutionality of a law requiring a candidate to pay a filing fee to appear on a primary election ballot. (*Bullock v. Carter* (1972) 405 U.S. 134, 135.) *Bullock* affirmed a trial court's finding that the law was facially unconstitutional because it "tend[ed] to limit the field of candidates from which voters might choose" and there was an "obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system." (*Id.* at pp. 143-144.) Here, too, the Court accepted the empirical reality that lower-income candidates are more likely to champion the causes of lower-income voters. In fact, as the Court explained, it is "essential" for courts "to examine in a realistic light the extent and nature of [a law's] impact" when analyzing a law's disparate impact. (*Id.* at p. 143.)

The Court of Appeal's heightened causation standard also stands in tension with many decisions analyzing *statutory* disparate-impact claims. As courts analyzing Fair Employment Housing Act claims have explained, a showing of "statistical disparities alone may constitute prima facie proof

of discrimination" for purposes of establishing a disparate-impact claim. (*City & County of S.F. v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976, 987, not followed on other grounds by *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798; see also *Farrakhan v. Washington* (9th Cir. 2003) 338 F.3d 1009, 1011-1012 [Voting Rights Act plaintiff need not prove that a law, "by itself," causes disparate impact because "factors outside the election system can contribute to a particular voting practice's disparate impact"].)

Under this jurisprudence, the dispositive question is whether the Challenged Statutes, in light of the *realities* in which those laws operate, disproportionately deprive low-income and minority students of equal educational opportunity. (*Serrano I*, *supra*, 5 Cal.3d at p. 606.) Here, it is a well-documented empirical reality that schools serving predominately poor and minority students have more vacancies that are routinely filled with the least experienced and least effective teachers in the district. (See Opn. at p. 17 ["Teachers with … option[s] often choose not to teach at schools predominantly serving low-income and minority children"]; 18AA4726 [State Report].) Those realities make it inevitable that low-income and minority students *will* be disproportionately harmed by laws that trap grossly ineffective teachers in the school system and require layoffs to be conducted on the basis of seniority. Such real-world circumstances do not defeat disparate-impact causation; they are the backdrop against which causation must be measured.

II. This Court Should Clarify The Standard of Review That Applies To A Trial Court's Finding Of Disparate Impact

The Court of Appeal's decision also creates confusion over the standard of review that applies to a trial court's finding of disparate impact.

In this case, the trial court found that the Challenged Statutes cause the disproportionate harm being imposed on low-income and minority students. (28AA7300 ["Plaintiffs have proven … that the Challenged Statutes … impose a disproportionate burden on poor and minority students"]; see also 28AA7307 ["[T]he churning (aka 'Dance of the Lemons[']) of teachers caused by the lack of effective dismissal statutes and LIFO affect high-poverty and minority students disproportionately"].) Despite acknowledging this finding, the Court of Appeal nevertheless decided that school administrators are the cause of the disproportionate harm. (See Opn. at pp. 23, 34-35.) According to the Court of Appeal, neither the trial court's finding of causation, nor the expert testimony or other evidence underlying that finding, deserved deference because disparate-impact causation is "a predominantly legal mixed question of law and fact." (*Id*. at p. 34.) That erroneous pronouncement, which aggrandizes the power of appellate courts and casts doubt on the importance of trials, will have far-reaching effects on all disparate-impact cases—not just constitutional claims, but claims alleging employment and housing discrimination as well.

Under the "substantial evidence" standard of review, a "trial court's findings of fact are reviewed for substantial evidence," not de novo. (*Haraguchi v. Super. Ct.* (2008) 43 Cal.4th 706, 711-712, fns. omitted.) Thus, "the power of an appellate court *begins and ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678.) "[T]he reviewing

court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143.)

Rather than abide by this deferential standard, the Court of Appeal cast aside the "substantial evidence" test, acted as trier of fact in the first instance,[3] and found—in direct contradiction to the Superior Court's findings and the evidence at trial—that factors *other* than the Challenged Statutes (namely, the staffing decisions of school administrators) are to blame for the disproportionate injury to poor and minority students. (See Opn. at p. 33 ["the reason for higher concentrations of ineffective teachers" in minority and low-income schools is "the 'counterproductive hiring and placement practices' of local administrators"].)

In concluding that it had authority to conduct a de novo review of these quintessentially factual determinations, the Court of Appeal stated that causation is "[a] mixed question of law and fact" that is "the ultimate issue" in this case. (Opn. at p. 34.) But causation is *not* the "ultimate issue" in this (or any other equal protection) case; the "ultimate issue" is whether the Challenged Statutes violate the California Constitution. (See *Serrano II*, *supra*, 18 Cal.3d at p. 757, fn. 35; see also *Gould*, *supra*, 14 Cal.3d at p. 669 ["ultimate" issue was "whether by according disparate treatment…, the city [had] denied nonincumbent candidates, or their supporters, the equal protection of the law"].) Indeed, a showing that the Challenged Statutes cause disparate harm is insufficient to declare the

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[3] Although the Court of Appeal claimed to apply the "substantial evidence" standard of review (Opn. at p. 24), "[t]he proof lies not in closely parsing what the Court of Appeal said about the standard of review, but in what the Court of Appeal actually did …." (*Haraguchi*, *supra*, 43 Cal.4th at p. 712, fn. 6.)

statutes unconstitutional; it merely triggers strict scrutiny. (*Serrano I*, *supra*, 5 Cal.3d at p. 610.) And causation is a classic "question of fact," as courts have held in a variety of contexts—including disparate-impact litigation. (*Hoyem v. Manhattan Beach City School Dist.* (1978) 22 Cal.3d 508, 520; *Boon v. Rivera* (2000) 80 Cal.App.4th 1322, 1334; *Stockwell v. City & County of S.F.* (9th Cir. 2014) 749 F.3d 1107, 1116 ["whether there is a disparate impact … is 'a single significant question of … fact,'"], italics altered.)

For example, in *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, the Court of Appeal considered a claim alleging that the Los Angeles Fire "Department's disciplinary policy had a disproportionately adverse impact on African-Americans." (*Id.* at p. 1405.) In contrast to the Court of Appeal here, the court applied the "substantial evidence" standard to the trial court's finding that the challenged policy had a disparate impact. (*Id.* at pp. 1405-1406; see also *Gould*, *supra*, 14 Cal.3d at pp. 667-668 [giving deference to trial court's factual determination that top-ballot placement for incumbents disproportionately harms certain voters].) And the U.S. Supreme Court, when analyzing disparate impact (under the Voting Rights Act, for example), has agreed that causation is a factual question requiring deferential appellate review. (See, e.g., *City of Rome v. United States* (1980) 446 U.S. 156, 183-185, abrogated on another issue in *Shelby County Ala. v. Holder* (2013) 133 S.Ct. 2612 [applying "clearly erroneous" standard].)

By breaking with this precedent, the Court of Appeal has carved out an unwarranted exception to the "substantial evidence" standard for disparate-impact claims. The Court of Appeal's rule ignores this Court's admonition that "trial courts are in a better position than appellate courts to assess witness credibility, make findings of fact, and evaluate the consequences of a potential conflict in light of the entirety of a case," and

improperly shifts power to appellate courts that "encounter the case in the context of a few briefs, a few minutes of oral argument, and a cold and often limited record." (*Haraguchi*, *supra*, 43 Cal.4th at p. 713.) This Court should grant review to settle this important issue of law and confirm the proper role of appellate courts in disparate-impact litigation.

III. Review Is Warranted Because The Court Of Appeal Ignored The "Real And Appreciable Impact" Test This Court Applies To Equal Protection Claims Predicated On The Infringement Of A Fundamental Right

As this Court has repeatedly held, strict scrutiny applies to any law that inflicts "a real and appreciable impact on … [a] fundamental right." (*Fair Political Pracs. Com. v. Superior Court* (1979) 25 Cal.3d 33, 47; see also *Choudhry v. Free* (1976) 17 Cal.3d 660, 664.)

Here, the Court of Appeal acknowledged that the Challenged Statutes impose a real and appreciable impact on California students—to the great detriment of an "unlucky" group of students each year. (Opn. at pp. 21-22, 28-31, 35.) Yet the Court refused to apply *any* standard of review—indeed, refused to conduct any equal protection analysis whatsoever—because, in its view, the individuals being harmed by the statutes do not share a "common characteristic" apart from the harm itself. (*Id.* at p. 29.) This invented test imposes an improper hurdle on equal protection claims that finds no support in this Court's jurisprudence and allows significant inequalities to escape constitutional scrutiny. Indeed, under the Court of Appeal's test, the Legislature could pass a law intentionally infringing the fundamental rights of California citizens—depriving them, for example, of the right to vote, or access to courts—provided the individuals being harmed are selected at random. That cannot be, and is not, the law.

According to the Court of Appeal, Plaintiffs' fundamental-rights claim fails because "the defining characteristic of the … students, who are allegedly harmed by being assigned to grossly ineffective teachers, is that they are assigned to grossly ineffective teachers," a "circular premise that is an insufficient basis for a proper equal protection claim." (Opn. at p. 29; see also *ibid.* [citing *Altadena Library Dist. v. Bloodgood* (1987) 192 Cal.App.3d 585, 590-591 (*Altadena*)].) But the Court of Appeal's holding misapprehends equal protection claims predicated on the infringement of fundamental rights, rather than suspect classifications. As the U.S. Supreme Court has explained, fundamental-rights claims can be established even though the harmed group cannot "be described by reference to discrete and precisely defined segments of the community …." (*Bullock*, *supra*, 405 U.S. at p. 144.) That is because fundamental-rights claims turn on the nature of the *right* at issue, whereas suspect-classification claims turn on the nature of the *group* being harmed. (Compare *Hiatt v. City of Berkeley* (1982) 130 Cal.App.3d 298, 309 with *Daniels v. McMahon* (1992) 4 Cal.App.4th 48, 59.)

In fact, the *first* and *only* "preliminary question" (Opn. at p. 28) California courts ask when confronted with fundamental rights-based equal-protection claims is whether the law imposes a "real and appreciable impact" on a fundamental right; if so, strict scrutiny applies. (See *Fair Political Pracs. Com.*, *supra*, 25 Cal.3d at p. 47, citations omitted.) Under this governing legal standard, which the Court of Appeal did not even discuss (except when describing the Superior Court's judgment), a "real and appreciable impact" will be found, and strict scrutiny applied, whenever a law has "more than an incidental impact" on a fundamental right. (*Planning & Conservation League, Inc. v. Lungren* (1995) 38 Cal.App.4th 497, 506-507; see also *Butt v. California* (1992) 4 Cal.4th 668, 687.) The characteristics of the law's victims are simply irrelevant.

For example, in *Gould*, this Court explained that its duty was to "determine *at the threshold* of [its] 'equal protection' analysis the 'level of scrutiny' or 'standard of review'" that applied, which in turn required the Court to decide whether the law "impose[d] a very 'real and appreciable impact' on the equality, fairness, and integrity of the electoral process." (*Gould*, *supra*, 14 Cal.3d at pp. 669-670.) This Court did not conduct any inquiry into whether the voters at issue shared a common characteristic. And, in fact, the voters shared no extrinsic trait; they were simply an ever-shifting assortment of voters who happened to be supporting a non-incumbent candidate in any particular race. (*Id.* at p. 670.)

Likewise, in *Serrano*, this Court simply referred to the relevant group as "the students of this state." (*Serrano II*, *supra*, 18 Cal.3d at p. 766 [applying strict scrutiny because the laws "affect[ed] the fundamental interest of the students of this state in education"]; see also *Serrano I*, *supra*, 5 Cal.3d at p. 588.) Indeed, *Serrano* acknowledged that the group being harmed could *not* be identified by a common trait like "residency" (Opn. at p. 30) because *some* residents of low-tax-base districts received an education superior to *some* residents of high-tax-base districts. (*Serrano I*, at p. 599, fn. 14 [finding that "high per-pupil spending" in certain districts may be "a paper statistic, which is unrepresentative of significant differences in educational opportunities"]; see also *Serrano II*, at p. 760.) Thus the only "defining characteristic" of the students being harmed in *Serrano* was that they were receiving inferior educational opportunities. (Opn. at p. 29.)

As *Gould* and *Serrano* demonstrate, this Court has *not* imposed a "common characteristic" requirement when analyzing fundamental rights claims like those at issue here. Insofar as *Altadena* and other lower-court decisions imply otherwise, however, that is all the more reason for this

Court to grant review and "secure uniformity of decision" throughout California. (Cal. Rules of Court, rule 8.500(b)(1).)

CONCLUSION

The Court should grant review to resolve these important legal questions and preserve its long-standing tradition of safeguarding the educational opportunities of millions of California children.

DATED: May 24, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned certifies that this Petition for Review contains 8,280 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the court of appeal's order, the cover information, the signature block, and this certificate.

DATED: May 24, 2016 By: _____
Theodore J. Boutrous, Jr.

Filed 4/14/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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.

B258589

(Los Angeles County
Super. Ct. No. BC484642)

APPEALS from a judgment of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Reversed and remanded.

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In this lawsuit, nine students who were attending California public schools sued the State of California and several state officials, seeking a court order declaring various provisions of California's Education Code unconstitutional. According to plaintiffs, these provisions, which govern how K-12 public school teachers obtain tenure, how they are dismissed, and how they are laid off on the basis of seniority, violate the California Constitution's guarantee that all citizens enjoy the "equal protection of the laws." (Cal. Const., art. I, § 7, subd. (a).) The matter went to trial. After hearing eight weeks of evidence, the trial court issued a ruling declaring five sections of the Education Code—sections 44929.21, subdivision (b), 44934, 44938, subdivisions (b)(1) and (b)(2), 44944, and 44955[1]— unconstitutional and void. Defendants have appealed this judgment.

We reverse the trial court's decision. Plaintiffs failed to establish that the challenged statutes violate equal protection, primarily because they did not show that the statutes inevitably cause a certain group of students to receive an education inferior to the education received by other students. Although the statutes may lead to the hiring and retention of more ineffective teachers than a hypothetical alternative system would, the statutes do not address the assignment of teachers; instead, administrators—not the statutes—ultimately determine where teachers within a district are assigned to teach. Critically, plaintiffs failed to show that the statutes themselves make any certain group of students more likely to be taught by ineffective teachers than any other group of students.

With no proper showing of a constitutional violation, the court is without power to strike down the challenged statutes. The court's job is merely to determine whether the statutes are constitutional, not if they are "a good idea." (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 388.) Additionally, our review is limited to the particular constitutional challenge that plaintiffs decided to bring. Plaintiffs brought a facial equal protection challenge, meaning they challenged the statutes themselves, not how the statutes are implemented in particular school districts. Since plaintiffs did not

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[1] Unless otherwise indicated, all further statutory references are to the Education Code.

demonstrate that the statutes violate equal protection on their face, the judgment cannot be affirmed.

BACKGROUND

I. California's educational system

The California Constitution requires "[t]he Legislature [to] provide for a system of common schools." (Cal. Const., art. IX, § 5.) Pursuant to this command, the state is obligated to provide a free public education. (*Los Angeles Unified School Dist. v. Garcia* (2013) 58 Cal.4th 175, 182.) "'[M]anagement and control of the public schools [is] a matter of state[, not local,] care and supervision. . . .'" (*Butt v. State of California* (1992) 4 Cal.4th 668, 681 (*Butt*).)

The California Constitution also provides for the incorporation and organization of school districts by the Legislature. (Cal. Const., art. IX, § 14.) Local school districts, as agents of the state, are responsible for implementation of educational programs and activities. (*Ibid.*; *Butt*, *supra*, 4 Cal.4th 668, 681.) "[T]he Legislature has assigned much of the governance of the public schools to the local districts." (*Butt*, at p. 681.)

School districts are expected to operate as "strong, vigorous, and properly organized local school administrative units." (§ 14000.) To this end, the Legislature has granted each district (through its governing board) the power to hire teachers (§§ 44830-44834), to dismiss teachers (§§ 44932-44944), to fix teachers' compensation (§§ 45022, 45032), and to accept their resignations (§ 44930). (See generally *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 871; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916-918.)

The power to assign teachers to specific schools or to transfer teachers between schools within a district belongs to the district's superintendent (§ 35035, subds. (e), (f)), subject to conditions imposed by collective bargaining agreements (see Gov. Code, § 3543.2; *United Teachers of Los Angeles v. Los Angeles Unified School Dist.* (2012) 54 Cal.4th 504, 515 [teacher transfer and reassignment policies are proper subjects of collective bargaining]), and by statute (see § 35036, subd. (a) [prohibiting transfer of a teacher to a low-performing school when principal objects]).

II. The operative complaint

In their operative first amended complaint against defendants,[2] plaintiffs claimed that the challenged statutes negatively impacted their right to an education by causing "grossly ineffective" teachers to become employed and retain their employment in the school system. Specifically, plaintiffs contended that: (1) the "tenure statute" (§ 44929.21, subd. (b)) forced school districts to decide whether new, probationary teachers should be granted tenure before the teachers' effectiveness could be determined; (2) the "dismissal statutes" (§§ 44934; 44938, subds. (b)(1), (2); 44944) made it nearly impossible to dismiss poorly performing teachers; and (3) the "reduction-in-force statute" (§ 44955) required school districts, in the event of layoffs, to terminate teachers based on seniority alone, regardless of their teaching effectiveness.

The first amended complaint identified two groups of students who allegedly were denied equal protection because of the challenged statutes. The first group (Group 1) was 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 were located throughout the state, in all sorts of schools, and were of substantially the same age and aptitude as students of the

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[2] At the time of trial, defendants were: The State of California; Edmund G. Brown, Jr., in his official capacity as Governor of California; the California Department of Education (CDE); the State Board of Education; and Tom Torlakson, in his official capacity as State Superintendent of Public Instruction (the State defendants); as well as California Teachers Association and the California Federation of Teachers (the intervener defendants), who were granted leave to intervene as defendants prior to trial. The State defendants and the intervener defendants filed separate briefs on appeal. Because the positions taken by the two sets of defendants are, for the most part, essentially identical, we generally refer to defendants collectively in this opinion. We reject the State defendants' contention that the governor is an improper defendant. Because public education is ultimately a state obligation (*Butt, supra,* 4 Cal.4th 668, 680) and "[t]he supreme executive power of this State is vested in the Governor" (Cal. Const., art. V, § 1), the Governor is a proper defendant in this lawsuit mounting a facial challenge to five statutes of state-wide application. (See also *In re Marriage Cases* (2008) 43 Cal.4th 757 [Governor named as defendant]; *White v. Davis* (2003) 30 Cal.4th 528 [same].)

general population. The Group 1 members were disadvantaged, however, because they received a lesser education than students not assigned to grossly ineffective teachers.

The second group (Group 2) allegedly impacted by the challenged statutes was 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.

The operative complaint sought a judgment (i) declaring the challenged statutes unconstitutional for violating equal protection provisions of the California Constitution and (ii) enjoining their enforcement.

III. The challenged statutes

A. Tenure statute

Under the tenure statute, in districts with more than 250 students, a probationary teacher becomes a "permanent employee of the district" after finishing "two complete consecutive school years in a position or positions requiring certification . . . ." (§ 44929.21, subd. (b).) Each such district must notify a probationary teacher, on or before March 15 of the teacher's second consecutive school year, whether he or she will be reelected as a permanent employee. (*Ibid.*) If a probationary teacher is not provided notice by March 15, the teacher is deemed reelected. (*Ibid.*)

B. Dismissal statutes

1. Statutes at time of trial

At the time of trial,[3] the dismissal statutes operated as follows:

Under section 44938, subdivision (b)(1), a school district that intends to dismiss a permanent certificated teacher for "unsatisfactory performance" must provide the teacher

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[3] In 2014, the Legislature enacted Assembly Bill No. 215 (2013-2014 Reg. Sess.) (Stats. 2014, ch. 55, §§ 3, 15), which made several changes to two of the dismissal statutes, sections 44934 and 44944. These changes took effect on January 1, 2015, after judgment was entered in this matter.

with a "written notice of the unsatisfactory performance" specifying instances of unsatisfactory behavior with enough particularity to allow the teacher an opportunity to correct his or her faults. In order for the district to proceed with the dismissal process in the same school year, it must issue the written notice prior to the last quarter of the school year. (§ 44938, subd. (b)(2).) After the written notice is issued, the teacher is provided at least 90 days to attempt to correct his or her deficient performance and overcome the grounds for the charge. (§ 44938, subd. (b)(1).)

Then, after the 90-day period has lapsed, the district must file a written statement of charges and "give notice to the permanent employee of its intention to dismiss . . . ." (Former § 44934.) The statement of charges of unsatisfactory performance must specify instances of the teacher's behavior and the conduct constituting the charge, the statutes and rules violated (where applicable), and "the facts relevant to each occasion of alleged . . . unsatisfactory performance." (*Ibid.*)

The teacher then has another 30 days to request a hearing on the dismissal charges. (Former § 44934.) The hearing shall commence within 60 days of the teacher's request. (Former § 44944, subd. (a)(1).) The dismissal hearing is conducted by a three-member panel called a "Commission on Professional Competence" (CPC), made up of one administrative law judge and two teachers, one selected by the teacher subject to the hearing and the other selected by the district. (Former § 44944, subds. (b)(1), (2).) Parties to a CPC hearing have discovery rights generally equivalent to those of a party to a civil action brought in superior court. (Former § 44944, subd. (a)(1).)

Following the conclusion of the CPC hearing, the CPC must issue "a written decision containing findings of fact, determination of issues, and a disposition" to either dismiss the subject teacher, suspend the teacher for a specific period of time, or not suspend or dismiss the teacher. (Former § 44944, subd. (c)(1).) The written decision is deemed the "final decision" of the district. (Former § 44944, subd. (c)(4).) If the CPC determines that the teacher should not be dismissed or suspended, the district is required to pay the expenses for the dismissal hearing and the teacher's attorney fees. (Former § 44944, subd. (e)(2).) If the teacher is dismissed or suspended, the parties split the

expenses of the hearing and pay their own attorney fees. (Former § 44944, subd. (e)(1).) A party may seek judicial review of the CPC's decision. (§ 44945.)

2. 2015 changes

Aside from altering the order and notation of subdivisions, the 2015 revisions to the dismissal statutes made several other changes.

Among other changes, section 44934, subdivision (d), amending former section 44934, now requires a showing of "good cause" to amend written charges less than 90 days before the dismissal hearing. Section 44944, subdivisions (b)(1)(A) and (B), amending former section 44944, subdivision (a)(1), now require a CPC hearing to generally be commenced within six months of an employee's demand for a hearing, and for the hearing to generally be completed "by a closing of the record" within seven months of the demand for a hearing, unless these deadlines are extended by the administrative law judge. Section 44944, subdivision (c)(4), now allows a party to object to the member of the CPC selected by the opposing party. Alternatively, under the revised section 44944, subdivision (c)(1), if the parties mutually agree, they may waive the right to convene a three member CPC and instead have the matter be determined by a single administrative law judge. Discovery provisions, formerly found in section 44944, subdivision (a), were also revised. Newly enacted section 44944.05 requires parties to make initial disclosures of witnesses and documents, restricts parties to five depositions per side absent good cause, and provides that discovery disputes be resolved by the administrative law judge. (§ 44944.05, subds. (a), (c), (d).)

C. Reduction-in-force statute

When a school district must "decrease the number of permanent employees in the district" pursuant to section 44955, "the services of no permanent employee may be terminated . . . while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render." (§ 44955, subd. (b).) This seniority system requires that permanent teachers be terminated in "the inverse of the order in which they were

employed" (§ 44955, subd. (c)), meaning that a permanent teacher generally cannot be terminated unless all teachers with less seniority have been terminated.

Two exceptions allow a district to deviate from the seniority system in certain circumstances: (1) if "[t]he district demonstrates a specific need for personnel to teach a specific course or course of study" and the junior certificated teacher has special training and experience that teachers with more seniority do not possess (§ 44955, subd. (d)(1)), or (2) to maintain or achieve "compliance with constitutional requirements related to equal protection of the laws" (§ 44955, subd. (d)(2)).

IV. Trial

Plaintiffs initially sued three school districts (Los Angeles Unified School District, Oakland Unified School District, and Alum Rock Union) in addition to the State defendants. Prior to trial, plaintiffs dismissed these districts as defendants, opting to pursue a facial challenge to the statutes instead of one focusing on implementation.

The trial court conducted a bench trial. Over 50 lay and expert witnesses testified, including teachers, principals, superintendents, and CDE employees.

A. Plaintiffs' evidence

1. The importance of effective teachers

At trial, plaintiffs elicited testimony from numerous witnesses who agreed that effective teachers are vital to a child's education. Along these lines, plaintiffs introduced into evidence a CDE publication stating, "The academic success of California's diverse students is inextricably tied to the quality and commitment of our educator workforce."

Plaintiffs called expert witnesses who testified that a teacher's effectiveness can be assessed and measured, and that ineffective teachers can be identified. Raj Chetty, a professor of economics at Harvard University, conducted a voluminous analysis of school and tax records, and concluded that teacher effectiveness has a profound effect on students' long-term success, including whether they attend college and how much they earn as adults. Chetty opined, based on studies he conducted using "VAM"—"value-added" modeling or methodology—that having a highly effective teacher significantly improves a child's outcomes, while having a highly ineffective teacher does substantial

harm. According to Chetty, highly ineffective teachers, which he defined as the worst 5 percent of teachers (based on value-added measurements), had long-term negative impacts. He estimated that the lifetime aggregate earnings of a classroom of students taught for one year by a highly ineffective teacher was $1.4 million less than a classroom taught by an average teacher.

Thomas Kane, a professor of education and economics at the Harvard Graduate School of Education, conducted a study concluding that effective and ineffective teachers could be identified by measures including student achievement gains, as well as classroom observations and student surveys. Based on a study of Los Angeles Unified School District (LAUSD), which included data on 58,000 teachers and 3.9 million student test scores (but did not include classroom observations or student surveys), Kane determined that students assigned to teachers in the lowest 50th percentile of effectiveness lost an estimated nine and one-half to 11 and one-half months of learning when compared to students assigned to an average teacher.

Numerous other witnesses testified that highly ineffective teachers impede a child's access to a reasonable education. Furthermore, although a host of factors, including child poverty and safety, affect student achievement, teachers nevertheless have a highly important and significant impact on student learning.

2. Difficulties with the challenged statutes

Various witnesses testified that the period provided for in the tenure statute is too short for administrators to make a reasoned determination of a probationary teacher's effectiveness when deciding whether to reelect the teacher as a permanent employee. The statute requires that a probationary teacher be notified of any reelection decision by March 15 of the teacher's second year (§ 44929.21, subd. (b)), but, because the process of evaluating a reelection decision takes time, principals generally must determine before March whether a teacher should be reelected.[4]

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[4] Evidence showed that California was one of five states nationwide with a probationary period of two years or fewer.

Witnesses familiar with the process estimated that, including summer months, principals have approximately 16 months to make a reelection decision. One witness, John Deasy, then-superintendent of LAUSD, testified that there is "no way" the time provided by the statute is "a sufficient amount of time to make . . . that incredibly important judgment" of reelection. Another witness, Mark Douglas, assistant superintendent in the Fullerton School District, stated that most teachers do not "hit full stride" until three to five years of teaching, and that it could be a "crapshoot" determining whether a beginning teacher would develop into an effective one. Two expert witnesses called by defendants testified consistently, both agreeing that a probationary period of three to five years would be superior to the current timeline for identifying teachers worthy of reelection. According to several witnesses called by plaintiffs, the tenure statute's short probationary period prevented administrators from making adequately informed reelection decisions, resulting in highly ineffective teachers being retained as permanent employees.

Plaintiffs also presented evidence relevant to their assertion that the process of dismissing a teacher for unsatisfactory performance is time-consuming and expensive. Performance-based teacher dismissal proceedings lasted anywhere from one to 10 years before completion, and costs ranged from $50,000 to $450,000. In addition to the proceeding itself, the process of documenting a teacher's deficiencies could take years. Witnesses familiar with the dismissal process testified that the time and cost of the proceedings were a significant disincentive to initiating dismissal proceedings. Because of these issues, districts rarely proceeded with formal dismissal proceedings against highly ineffective teachers. Plaintiffs presented evidence showing that, from 2003 to 2013, approximately two teachers statewide were dismissed on average per year for unsatisfactory performance by completion of the full formal dismissal process, out of an approximate total K-12 public school teacher population of 277,000. Meanwhile, the chief labor negotiator and former chief human resources officer of LAUSD, Vivian Ekchian, testified that during the 2012-2013 school year alone, LAUSD would have

sought to dismiss approximately 350 teachers for unsatisfactory performance if the dismissal process were streamlined.

Regarding the reduction-in-force statute, plaintiffs' witnesses testified that the seniority system often resulted in highly effective teachers being terminated while grossly ineffective teachers kept their jobs.[5] According to Douglas, this situation occurred because, "The layoff process is denoted by seniority, not on skills." A further effect of the seniority system was that it could lead local administrators to replace a laid-off teacher with one unfamiliar with the subject matter. Using data on LAUSD student test scores and teacher assignments, Chetty calculated that 48 percent of teachers terminated during reductions-in-force were more effective than the average teacher in the district, while approximately 5 percent of teachers terminated were above the 95th percentile in terms of effectiveness—meaning that retentions under the seniority system have little if any correlation with effectiveness.

3. Low-income and minority students

Plaintiffs presented evidence that ineffective teachers are often transferred into and concentrated in schools that predominantly serve minority[6] and low-income children. Douglas testified about a phenomenon, referred to colloquially as the "dance of the lemons," in which certain principals, seeking to improve the quality of their own schools' teacher pool, attempt to transfer poorly performing teachers to other schools within the district. According to Douglas, the poorly performing teachers often end up at schools serving poor and minority students because, unlike schools serving more affluent

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[5] Plaintiffs' evidence demonstrated California was one of 10 states that mandate seniority be considered when conducting teacher layoffs.

[6] The minority children referred to at trial included Latino and African-American students. From evidence presented in the case, it appears that Latino students constitute approximately 50 percent of California public school children, making the term "minority" a possible misnomer in this context. Nevertheless, for purposes of consistency with the record and the appellate briefs, our use of the term "minority" includes reference to Latino students.

students, students at schools impacted by the transfers generally have "families who aren't used to the education system . . . [and] don't know what to look for in a great teacher . . . . And so sometimes they won't complain about a teacher that [is] at low-end schools because they are not familiar and [do not] know how to navigate through the system. And so a teacher can exist without parent pressure at a lower-end school."[7] Bill Kappenhagen, a principal in the San Francisco Unified School District, also spoke of the "dance of the lemons" and how grossly ineffective teachers are "shuffled around from school to school," often landing in schools serving poor and minority students. A 2007 CDE publication corroborated this testimony, stating: "[T]ransfers often functioned as a mechanism for teacher removal. . . . Not surprisingly, the poorly performing teachers generally are removed from higher-income or higher-performing schools and placed in low-income and low-performing schools."

Plaintiffs' expert witness Kane testified that ineffective teachers in LAUSD are disproportionately assigned to African-American and Latino students. According to Kane, Latino and African-American students in LAUSD are, respectively, 68 percent and 43 percent more likely than white students to be taught by a teacher in the lowest 5 percent for effectiveness. Kane testified that this disproportionate distribution "could" be a result of the requirement of determining teacher effectiveness quickly due to the short probationary period, and the difficulties of dismissing ineffective teachers under the dismissal process. Kane further stated that, in a system where tenure decisions are made prematurely and dismissals are difficult to obtain, ineffective teachers will "tend to" accumulate in schools with the most teacher vacancies, which often are those serving Latino and African-American students.

Plaintiffs also presented evidence that schools in some districts serving low-income and minority students have higher proportions of inexperienced teachers and experience more layoffs. Arun Ramanathan, an expert witness retained by plaintiffs and

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[7] Evidence showed that transfers of poorly performing teachers also had a disproportionate impact on such schools because they tended to have more vacancies.

executive director of an organization called Education Trust-West, testified that his organization conducted a study of three large California school districts and found that students attending schools in the highest poverty quartile were 65 percent more likely to experience a teacher layoff than those in the lowest poverty quartile. And Jonathan Raymond, former superintendent of the Sacramento City Unified School District, observed "a constant churn of the faculty and staff" at high-poverty, high-minority schools due to the seniority-based reduction-in-force statute.

4. Teacher assignment decisions

Witnesses called by plaintiffs acknowledged that decisions on how and where to assign and transfer teachers are made by local administrators, and that such decisions are often influenced by collective bargaining agreements between the districts and the teachers. Some collective bargaining agreements allow certain teachers to choose where they want to teach within a district. Teachers with such an option often choose not to teach at schools predominantly serving low-income and minority children because the schools can have challenging working conditions.

B. Defendants' evidence

1. Teacher effectiveness

David Berliner, an educational psychologist and professor emeritus from Arizona State University, testified that in-school effects on children's achievement were generally overstated when compared to out-of-school effects. Berliner opined that student test scores were rarely under a teacher's control, and were more often determined by peer-group composition of the group tested, including students' social class and their parents' educational level. Berliner estimated that teachers account for approximately 10 percent of variation in aggregate scores, with the remaining 90 percent attributable to other factors. Berliner further stated that VAM was "notoriously unreliable and therefore invalid" in assessing educational outcomes. Under cross-examination, however, Berliner acknowledged that a VAM analysis utilizing four years of data should be able to identify "very bad" teachers. He agreed that a small percentage of teachers—approximately

1 to 3 percent—consistently have strong negative effects on student outcomes, regardless of the classroom and school composition.

Linda Darling-Hammond, a professor of education at Stanford University, testified that there were several problems with using test scores as a definitive indicator of a teacher's effectiveness, including that tests often do not measure the material taught by a teacher, and that test score improvements or declines may be attributable to factors other than the teacher.

2. Purpose and implementation of the statutes

Several witnesses called by defendants testified that, in theory and practice, the challenged statutes protect teachers from arbitrary discipline and dismissal, and that they promote academic freedom. Jesse Rothstein, a professor of economics and public policy at the University of California, Berkeley, conducted a study regarding effects of the tenure and dismissal statutes, and found that the statutes help districts attract and retain teachers, because the statutes provide job security. Lynda Nichols, an education program consultant with the CDE and a former teacher, testified that during her teaching career, parents complained when she taught about subjects including Islam and Catholicism. Nichols believed that her status as a permanent employee, because it provided job protections, insulated her from potential retribution by parents and the local school board.

With regard to the probationary period provided by the tenure statute, Susan Mills, assistant superintendent of personnel for the Riverside Unified School District, testified that the period provided sufficient time to make a permanent employee reelection decision. Other witnesses called by defendants testified consistently. Deasy and Douglas, witnesses called by plaintiffs, stated that if administrators had any doubt about the effectiveness of a teacher prior to reelection, tenure would be refused. Deasy further acknowledged that when LAUSD moved from a "passive" tenure system to an "affirmative" one, requiring a more thorough review of a probationary teacher's abilities, the rate of tenure dropped from being "virtually automatic" to 50 percent. Darling-Hammond, defendants' expert witness, opined that the relatively short probationary period forced districts to make reelection decisions quickly, and that lengthening the

period could result in highly ineffective probationary teachers remaining in the classroom longer.

Multiple school administrators called by defendants testified that, under the dismissal statutory scheme, they are able to remove poorly performing teachers. Robert Fraisse, former superintendent of Laguna Beach Unified School District, Conejo Valley Unified School District, and Hueneme Elementary School District, testified that he was able to use various strategies for resolving dismissals short of the formal dismissal process. These included: letting poorly performing teachers know that there were serious concerns, which often led to resignation; paying a small amount of compensation in return for a resignation; and working with teachers' associations that could counsel suspect teachers to resign. Other administrators testified that the majority of potential teacher dismissals are resolved through resignation, settlement, retirement, or remediation rather than a CPC hearing.

Records from LAUSD showed that a larger number of teachers resigned to avoid the formal dismissal process than those who elected to go through the process. These records also showed that the number of teachers dismissed or resigning to avoid dismissal increased from a total of 16 in 2005-2006 to a total of 212 in 2012-2013. This change was due in part to an LAUSD policy of initiating the dismissal process whenever a teacher received two below-standard evaluations. From May 2007 through April 2013, LAUSD negotiated 191 settlements to informally resolve dismissal cases, with a total payout of slightly more than $5 million, approximately $26,000 per teacher.

As for the reduction-in-force statute, Fraisse testified that "it is a fair method that is perceived as fair," and that he was not aware of "a better, more objective system than seniority."[8] Defendants' expert Rothstein agreed, and believed that there were a number of advantages to a seniority-based system when compared to a performance-based one: it

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[8] Various witnesses testified that schools had utilized the skipping exception to the seniority requirement found in section 44955, subdivision (d)(1), to retain certain less-senior teachers.

was easier and less costly to administer, it allowed teachers to focus on teaching rather than test scores, and it was not subject to dubious evaluations of effectiveness. Other witnesses testified that incorporating effectiveness rankings into layoff decisions would deter cooperation among teachers. Susan Moore Johnson, a professor of education at the Harvard Graduate School of Education, conducted a study of four school districts in other jurisdictions with policies allowing for performance-based layoffs, and found that the districts opted to use seniority instead, because ranking for effectiveness was difficult and contentious.

3. Teacher distribution

Witnesses called by both plaintiffs and defendants testified that decisions on how and where to assign and transfer teachers are determined by local school district administrators and collective bargaining agreements.

Defendants also presented evidence that societal circumstances pose challenges to the retention and assignment of teachers. According to a 2006 study, 22 percent of new teachers in California leave the profession within their first four years, and according to a 2001 study, the attrition rate nationally is 50 percent greater in high-poverty schools when compared to more affluent ones. Several witnesses stated that difficult working conditions impaired districts' efforts to recruit or retain experienced teachers at disadvantaged schools. Rothstein testified that, over the past half-century, teacher salaries had fallen a significant amount when compared to jobs requiring a similar degree of educational attainment.

Some districts attempted to address discrepancy between low- and high-income schools by assigning higher performers to lower income schools. Mills, the Riverside assistant superintendent, testified that there was no disparity in teacher quality between schools in her district serving low-income and higher-income students. Part of the reason was that the district tended to assign its "stronger leaders" to the poorer schools. Fraisse testified that during his years at Hueneme Elementary School District in the late 1990's, the district assigned its "best principals" to the highest-need schools, which encouraged highly effective teachers to migrate to those schools "because of the leadership."

V. Statement of decision and judgment

On June 10, 2014, the trial court issued a 16-page tentative decision, finding the challenged statutes unconstitutional under the equal protection clause of the California Constitution.

In its decision, the trial court noted that in *Serrano v. Priest* (1971) 5 Cal.3d 584 (*Serrano I*) and *Serrano v. Priest* (1976) 18 Cal.3d 728 (*Serrano II*), our Supreme Court held education to be a fundamental interest and struck down the then-operative school financing system for violating the equal protection provisions of the California Constitution (Cal. Const., art. IV, § 16; art. I, § 7). (See *Serrano II*, *supra*, 18 Cal.3d 728, 776.) The trial court also discussed *Butt*, in which the Supreme Court held that students in the Richmond Unified School District would be deprived of their right to basic educational equality if the district closed its schools six weeks early due to a budgetary shortfall. (See *Butt*, *supra*, 4 Cal.4th 668, 685, 692.) In light of this legal authority, the trial court characterized its task as determining whether the challenged statutes "cause the potential and/or unreasonable exposure of grossly ineffective teachers to all California students in general and to minority and/or low income students in particular, in violation of the equal protection clause of the California Constitution." Answering this question affirmatively, the court determined that plaintiffs "met their burden of proof on all issues presented."

The trial court found that competent teachers are a critical component of the success of a child's educational experience, and that grossly ineffective teachers substantially undermine the ability of a child to succeed in school. It further found that evidence presented at trial on the effects of grossly ineffective teachers was compelling and "shocks the conscience." The court wrote there was "no dispute" that a significant number of grossly ineffective teachers are active in California classrooms and, based on the testimony of defendants' expert Berliner, estimated this number to comprise 1 to 3 percent of California teachers—or approximately 2,750 to 8,250 teachers. Based on its determination that the challenged statutes (i) impose a "real and appreciable impact" on students' fundamental rights to equality of education, and (ii) "impose a disproportionate

burden on poor and minority students," the court employed a "strict scrutiny" examination of the challenged statutes.

With respect to the tenure statute, the trial court found "extensive evidence" that the probationary period "does not provide nearly enough time for an informed decision to be made regarding the decision of tenure." As a result, "teachers are being reelected who would not have been had more time been provided for the process," and students "are unnecessarily, and for no legally cognizable reason (let alone a compelling one), disadvantaged by the current [tenure statute]." The court determined that defendants had not met their burden under the strict scrutiny standard and declared the tenure statute unconstitutional.

Turning to the dismissal statutes, the trial court found that, based on the evidence presented, the dismissal process's time and costs cause districts to be very reluctant to commence dismissal procedures. Due to this situation, "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 court further found that due process for tenured teachers is a legitimate concern, but the dismissal statutes "present the issue of über due process." In concluding that defendants failed to meet their burden under the strict scrutiny standard, the court wrote: "There is no question that teachers should be afforded reasonable due process when their dismissals are sought. However, based on the evidence before this Court, it finds the current system . . . to be so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory."

Regarding the reduction-in-force statute, the trial court noted it contained no exception based on teacher effectiveness. Therefore, the court found, because the "last-hired" teacher is statutorily mandated to be "first fired" when layoffs occur, students are separated from competent junior teachers while incompetent teachers with seniority remain in the classroom. "The result is classroom disruption on two fronts, a lose-lose situation." Again, the court found that defendants did not carry their burden under the strict scrutiny test, and deemed the reduction-in-force statute unconstitutional.

Finally, the trial court determined that substantial evidence showed the challenged statutes disproportionately affect poor and/or minority students. Citing to the 2007 CDE report, it found that students attending high-poverty, low-performing schools were far more likely than wealthier peers to attend schools with a disproportionately high number of underqualified, inexperienced, and ineffective teachers. The court further found that the "dance of the lemons"—where poorly performing teachers are transferred from school to school—was caused by the lack of effective dismissal statutes and the reduction-in-force statute, and that it affected high-poverty and minority students disproportionately.

After the trial court issued its tentative decision, the parties each requested a statement of decision pursuant to Code of Civil Procedure section 632. In their request, defendants sought rulings on a broad set of subjects, including (i) whether plaintiffs, in bringing an equal protection challenge, were required to prove that the statutes classified students in an unequal manner; (ii) whether plaintiffs were required to prove that the statutes inevitably posed a total and fatal conflict with the right to basic educational equality; and (iii) whether school districts had the authority to decide where teachers would be assigned to teach. The trial court did not respond to these questions, but instead ruled that defendants' requests for statement of decision were improper because they covered matters going beyond the principal controverted issues at trial. The court ordered that its tentative decision become the proposed statement of decision and judgment. Defendants filed objections to the proposed statement of decision and judgment. The trial court overruled these objections, and issued the final statement of decision and judgment (the judgment) on August 27, 2014.

The judgment replicated the earlier-issued tentative decision, concluding that the challenged statutes are unconstitutional. The trial court ordered the statutes enjoined, and stayed all injunctions pending appellate review.

DISCUSSION

I. Key principles

A. Review

The constitutionality of a statute is a question of law, which we review de novo. (*Sanchez v. State of California* (2009) 179 Cal.App.4th 467, 486 (*Sanchez*); *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 360.) De novo review is also the general standard of review when a mixed question of law and fact implicates constitutional rights. (*People v. Cromer* (2001) 24 Cal.4th 889, 894; *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448-449.) Mixed questions of law and fact arise when "'"historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."'" (*People v. Cromer*, *supra*, 24 Cal.4th at p. 894, quoting *Ornelas v. United States* (1996) 517 U.S. 690, 696-697, *Pullman-Standard v. Swint* (1982) 456 U.S. 273, 289, fn. 19.) De novo review is generally appropriate in such circumstances "'"because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles."'" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 385.) To the extent our review requires us to analyze factual determinations based on evidence presented at trial, we review the trial court's findings of fact for substantial evidence. (*Serrano II*, *supra*, 18 Cal.3d 728, 776; *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1127-1130.)

As with any legislative act, statutes relating to education are provided a presumption of constitutionality, and doubts are resolved in favor of a finding of validity. (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 260 (*Arcadia Unified*).) Our obligation as the court is to "enforce the limitations that the California Constitution imposes upon legislative measures" and determine if a statute violates constitutional protections. (*In re Marriage Cases*, *supra*, 43 Cal.4th 757, 849-850.) Policy judgments underlying a statute are left to the Legislature; the judiciary does

not pass on the wisdom of legislation. (*Estate of Horman* (1971) 5 Cal.3d 62, 77 ["Courts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature"]; *Gassman v. Governing Board* (1976) 18 Cal.3d 137, 148; *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1219.)[9]

B. Facial challenge

Both plaintiffs and defendants characterize this case—which seeks to enjoin any enforcement of the tenure, dismissal, and reduction-in-force statutes—as a facial challenge to the constitutionality of the subject statutes. "A facial challenge to the constitutional validity of a statute . . . considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (*Tobe*); see also *id.* at pp. 1087-1088 [action, which sought to enjoin "*any* enforcement" of ordinance, was a facial attack].) In contrast, an "as applied" constitutional challenge seeks "relief from a specific application of a facially valid statute or ordinance," or an injunction against future application of the statute or ordinance in the manner in which it has previously been applied. (*Id.* at p. 1084; see also *Sanchez v. Modesto* (2006) 145 Cal.App.4th 660, 665.) A plaintiff seeking to void a statute as a whole for facial unconstitutionality "'cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute . . . . Rather, [the plaintiff] must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.'" (*Arcadia Unified, supra*, 2 Cal.4th 251, 267.) A person may bring a facial challenge by showing that "the subject of [the] particular challenge has the effect of infringing some constitutional or statutory right" (*Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 315), but need not necessarily show that he or she has personally suffered this infringement (see *ibid.*; *Arcadia Unified, supra*, 2 Cal.4th at p. 267; *In re M.S.* (1995) 10 Cal.4th 698, 709-710).

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9 The intervener defendants' request for judicial notice, filed on May 1, 2015, is granted except as to exhibit 3. Plaintiffs' request for judicial notice, filed on June 24, 2015, is denied except as to exhibits F, K, L, and T.

Plaintiffs did not attempt to establish that the statutes were applied unconstitutionally to a particular person, the type of challenge made in an as-applied case. (See *Tobe*, *supra*, 9 Cal.4th 1069, 1084.) Instead, plaintiffs' challenge "sought to enjoin *any* application of the [statutes] to *any* person in *any* circumstance." (See *id.* at p. 1087.) Plaintiffs' case, therefore, is properly characterized as a facial challenge.[10]

C. Equal protection

The right to equal protection is guaranteed by the California Constitution. (Cal. Const., arts. I, § 7, subds. (a), (b), IV, § 16, subd. (a);[11] *Butt*, *supra*, 4 Cal.4th 668, 678.)

As its name suggests, equal protection of the laws assures that people who are "'similarly situated for purposes of [a] law'" are generally treated similarly by the law. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 (*Cooley*).) Thus, "'[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.'" (*Ibid.*, italics omitted.) The equal protection clause applies to laws that "'discriminate explicitly between groups of people,'" as well as laws that, "'though evenhanded on their face, in operation have a disproportionate impact on certain groups.'" (*Sanchez*, *supra*, 179 Cal.App.4th 467, 487; see also *Arcadia Unified*, *supra*, 2

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[10] Defendants contend that the 2015 amendments to the dismissal statutes render the plaintiffs' entire lawsuit moot. A lawsuit does not become moot on appeal when a statutory amendment leaves "a material portion of the statute" untouched. (*Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472, 480.) The 2015 amendments to the dismissal statutes do not impact either the tenure statute or the reduction-in-force statute and do not significantly differ from the dismissal statutes in effect at the time of trial, at least with respect to the claims at issue here. Thus, they do not moot plaintiffs' case.

[11] Article I, section 7, subdivision (a), of the California Constitution provides, in pertinent part, "[a] person may not be . . . denied equal protection of the laws. . . ." Article I, section 7, subdivision (b), provides "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. . . ." Article IV, section 16, subdivision (a), states: "All laws of a general nature have uniform operation."

Cal.4th 251, 266 [claim that school transportation fees discriminated against poor may have had merit if not for payment exemption for indigent children]; *Hardy v. Stumpf* (1978) 21 Cal.3d 1, 7-8 (*Hardy*) [examining facially neutral physical agility test under equal protection inquiry]; *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256 [employing equal protection review of a veterans' preference statute that operated to the disadvantage of women].)

When a statute affects similarly situated groups in an unequal manner, the court examines whether the Legislature has a constitutionally sufficient reason to treat the groups differently. (*In re Marriage Cases*, *supra*, 43 Cal.4th 757, 831.) One of two standards can apply to this analysis. (*Id.* at p. 832.) The first, "'rational relationship'" or "'rational basis'" review, is "'"the basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals."'" (*Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 298 (*Hernandez*)). Under this test, a statutory classification will be upheld if it "'bear[s] some rational relationship to a conceivable legitimate state purpose.'" (*California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 209.) The second standard, "'strict scrutiny'" review, is employed when the "distinction drawn by a statute rests upon a so-called 'suspect classification' or impinges upon a fundamental right." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 783.) When a statutory classification impinges a fundamental right (and does not involve a suspect classification), strict scrutiny will apply unless the effect on the fundamental right is merely "incidental," "marginal," or "minimal." (*Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 47; *In re Flodihn* (1979) 25 Cal.3d 561, 568; *Gould v. Grubb* (1975) 14 Cal.3d 661, 670 (*Gould*).) Under the strict scrutiny 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."'"'" (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 832; *Serrano I*, *supra*, 5 Cal.3d 584, 597.)

II. Analysis

As explained above, plaintiffs contend that the challenged statutes create an oversupply of grossly ineffective teachers because (i) the tenure statute's probationary period is too short, preventing the identification of grossly ineffective teachers before the mandated deadline for reelection; (ii) when grossly ineffective tenured teachers are identified, it is functionally impossible to terminate them under the overly burdensome and complicated dismissal statutes; and (iii) when reductions-in-force are required, the statute requires the termination of junior, competent teachers while more senior, grossly ineffective teachers keep their jobs only because they have seniority. Plaintiffs argued, and the trial court agreed, that two distinct classes of students—Group 1 (an "unlucky subset" of students within the population of students at large) and Group 2 (poor and minority students)—were denied equal protection because the challenged statutes led members of these groups to be assigned to grossly ineffective teachers.

We examine whether plaintiffs demonstrated that the challenged statutes cause a certain class of students to suffer an equal protection violation.

A. Group 1: No identifiable class under equal protection analysis

Plaintiffs describe Group 1 as an "unlucky subset" of the general student population that is denied the fundamental right to basic educational equality because students within this subset are assigned to grossly ineffective teachers. According to plaintiffs, the students comprising Group 1 are, in all pertinent respects, similar to the population of students at large, except for their exposure to grossly ineffective teachers. In the judgment, the trial court found that the challenged statutes are unconstitutional because they lead students within Group 1 to be assigned to grossly ineffective teachers and thereby have a real and appreciable impact on these students' fundamental right of education.

The trial court's judgment, however, omits analysis of a key preliminary question: Is the unlucky subset of students comprising Group 1 a sufficiently identifiable group for purposes of an equal protection action? "In equal protection analysis, the threshold question is whether the legislation under attack somehow discriminates against an

identifiable class of persons. [Citation.] Only then do the courts ask the further question of whether this identifiable group is a suspect class or is being denied some fundamental interest, thus requiring the discrimination to be subjected to close scrutiny." (*Altadena Library Dist. v. Bloodgood* (1987) 192 Cal.App.3d 585, 590 (*Altadena Library*); quoted approvingly in *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 258 (*Guardino*).)

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[12] to claim an equal protection violation (see *Butt, supra*, 4 Cal.4th 668, 673; *Somers v. Superior Court* (2009) 172 Cal.App.4th 1407, 1414 (*Somers*)), group members must have some pertinent common characteristic other than the fact that they are assertedly harmed by a statute (see *Altadena Library, supra*, 192 Cal.App.3d 585, 590-591; *Guardino*, *supra*, 11 Cal.4th 220, 258).

The defining characteristic of the Group 1 students, who are allegedly harmed by being assigned to grossly ineffective teachers, is that they are assigned to grossly ineffective teachers. Such a circular premise is an insufficient basis for a proper equal protection claim. (See *Nelson v. City of Irvine* (9th Cir. 1998) 143 F.3d 1196, 1205 [dismissing an equal protection claim as "tautological" when the defining characteristic of the alleged class harmed was that they were allegedly harmed].) To avoid this circularity, a group must be identifiable by a shared trait other than the violation of a fundamental right.

Plaintiffs argue that a class need only be identifiable when the asserted equal protection violation stems from the differential treatment of a suspect class, rather than the infringement of a fundamental right. For support, they cite *Moreno v. Draper* (1999)

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12 Plaintiffs' "subset" of students is not identified in the text of the challenged statutes. Rather, the subject of the statutes is teachers and, although the text of the statutes may create classifications on their face, these classifications pertain to teachers: i.e., (i) the tenure statute classifies between probationary and tenured teachers; (ii) the dismissal statutes classify teachers by whether they are facing dismissal hearings; and (iii) the reduction-in-force statute classifies based on teachers' seniority.

70 Cal.App.4th 886, 893 (*Moreno*). But *Moreno* does not support their argument. The statute at issue in *Moreno*, which the plaintiff claimed infringed the fundamental right to raise one's children, "create[d] two classes of parents paying child support—those with children receiving public assistance and those with children *not* receiving public assistance." (*Id.* at p. 888.) Indeed, every equal protection case based on the infringement of a fundamental right has involved a class identified by some characteristic other than asserted harm. In *Butt*, the classes were the students of the Richmond Unified School District, who would be harmed by the closing of schools, and the students outside that district. (4 Cal.4th 668, 687.) In the *Serrano* cases, the impairment of the fundamental right to education was suffered by students living in relatively poor school districts, which had less taxable wealth and therefore, under the then-existent financing systems, lower levels of educational expenditures. In other words, students were impacted by the system based on their residency. (*Serrano I*, *supra*, 5 Cal. 3d 584, 592-595, 614; *Serrano II*, *supra*, 18 Cal.3d 728, 756-759, 765-766.) In *In re Marriage Cases*, the classes were defined by sexual orientation. (43 Cal.4th 757, 839.) And in *Gould*, which examined the constitutionality of an election procedure affording incumbents the top ballot position, the classes were defined by candidates (and their supporters) listed first on the ballot and those listed later. (14 Cal.3d 661, 664.)

In contrast, the unlucky subset constituting Group 1 is definable only by the characteristic that group members have assertedly suffered constitutional harm. What is more, the statutes do not assist plaintiffs with their definitional deficiency because they do not specify which students will be the "unlucky ones." In *Gould*, our Supreme Court held that a system that assigned ballot position randomly would not violate equal protection because, since all candidates had an equal chance of obtaining the top position, it would not "continually work a disadvantage upon a fixed class of candidates." (14 Cal.3d 661, 676.) The claimed effect on students here is analogous. Under plaintiffs' Group 1 theory, an unlucky subset of students will inevitably be assigned to grossly ineffective teachers. The chance that this will happen to any individual student, however, is random, as the challenged statutes do not make any one student more likely to be

assigned to a grossly ineffective teacher than any other student. Thus, the unlucky subset is nothing more than a random assortment of students. Moreover, because (according to the trial court's findings) approximately 1 to 3 percent of California teachers are grossly ineffective, a student in the unlucky subset one year will likely not be the next year, meaning that the group is subject to constant flux.

The claimed unlucky subset, therefore, is not an identifiable class sufficient to maintain an equal protection claim, and the judgment, insofar as it is based on plaintiffs' Group 1 theory, cannot be affirmed.

B. Group 2: No inevitable constitutional violation

The trial court also found that poor and minority students (Group 2) suffered disproportionate harm from being assigned to grossly ineffective teachers. Race is generally considered a "suspect classification" under equal protection analysis.[13] (See *In re Marriage Cases*, *supra*, 43 Cal.4th 757, 843; *Weber v. City Council* (1973) 9 Cal.3d 950, 959.) In the context of education, under California law, wealth is considered a suspect classification as well. (See *Serrano I*, *supra*, 5 Cal.3d 584, 617; *Serrano II*, *supra*, 18 Cal.3d 728, 766.) Based on its finding of disproportionate harm, the trial court determined that strict scrutiny of the challenged statutes was appropriate. In making this determination, however, the trial court bypassed an initial question of the required analysis: Did the *challenged statutes* cause low-income and minority students to be disproportionately assigned to grossly ineffective teachers?

A statute is facially unconstitutional when the constitutional violation flows "inevitably" from the statute, not the actions of the people implementing it. (*Pacific*

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[13] Some cases have held that strict scrutiny only applies to a facially neutral statute that has a disproportionate impact on members of minority groups if discriminatory purpose or intent is shown. (See *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 568-569; *Sanchez*, *supra*, 179 Cal.App.4th 467, 487.) When such a statute impinges a fundamental right, however, strict scrutiny will apply, irrespective of motive or intent. (See *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 297; *Hardy*, *supra*, 21 Cal.3d 1, 7-8.)

Legal Foundation v. Brown (1981) 29 Cal.3d 168, 180-181; *Arcadia Unified*, *supra*, 2 Cal.4th 251, 267.) This can occur when (1) the text of the statute mandates the constitutional violation (see *Serrano I*, *supra*, 5 Cal.3d 584, 603 [noting how the unequal "school funding scheme is mandated in every detail by the California Constitution and statutes"]); or (2) the constitutional violation, while not mandated by the statute's text, "inevitably" flows from the statute regardless of the actions of those administering it (see *Serrano II*, *supra*, 18 Cal.3d 728, 768-769 [noting how, in light of property-tax based school funding scheme, a poor school district "cannot freely choose to tax itself into an excellence . . ."]; *Serrano I*, *supra*, 5 Cal.3d 584, 611 [same]; *Sanchez*, *supra*, 179 Cal.App.4th 467, 487 [equal protection concerns apply to textually neutral law that has disproportionate impact]).

It is clear that the challenged statutes here, by only their text, do not inevitably cause poor and minority students to receive an unequal, deficient education. With respect to students, the challenged statutes do not differentiate by any distinguishing characteristic, including race or wealth.

Plaintiffs still could have demonstrated a facial equal protection violation, however, by showing that the challenged statutes, regardless of how they are implemented, inevitably cause poor and minority students to be provided with an education that is not "basically equivalent to" their more affluent and/or white peers. (See *Butt*, *supra*, 4 Cal.4th 668, 685.) It is possible, though not certain, that plaintiffs could have made such a showing by proving that any implementation of the statutes inevitably resulted in the consequential assignment of disproportionately high numbers of grossly inefficient teachers to schools predominantly serving low-income and minority students.[14]

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14 We need not determine whether or how plaintiffs would actually meet their ultimate burden by such a hypothetical showing. The "exacting" standard for a facial constitutional challenge requires a showing of a constitutional defect "in at least '"the generality"' [citation] or 'vast majority' of cases [citation]." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218.) Because plaintiffs

No such showing was made. Instead, the evidence at trial firmly demonstrated that staffing decisions, including teacher assignments, are made by administrators, and that the process is guided by teacher preference, district policies, and collective bargaining agreements. This evidence is consistent with the process set forth in the Education Code, which grants school district superintendents the power to assign teachers to specific schools or to transfer teachers between schools within a district, subject to conditions imposed by collective bargaining agreements, district policies, and by statute. (See § 35035, subds. (a), (e), (f).) Further, the evidence at trial showed what the text of the challenged statutes makes clear—that the challenged statutes do not in any way instruct administrators regarding which teachers to assign to which schools. Thus, it is administrative decisions (in conjunction with other factors), and not the challenged statutes, that determine where teachers are assigned throughout a district.

The trial court's conclusions do not support a contrary finding. In determining that the challenged statutes disproportionately affect Group 2 students, the trial court (i) cited to a CDE report stating that students attending high-poverty, low-performing schools are far more likely than wealthier peers to attend schools with a high number of underqualified, inexperienced, and ineffective teachers, and (ii) found that the "dance of the lemons" is caused by the lack of effective dismissal statutes and the reduction-in-force statute, and that it affects high-poverty and minority students disproportionately. Neither of these findings supports a conclusion that the challenged statutes determine where grossly ineffective teachers work. The CDE report relied on by the court does not suggest that the challenged statutes cause disparities in the assignment of poor or minority students to grossly ineffective teachers. Instead, it repeatedly documents the reason for higher concentrations of ineffective teachers in schools serving such students—the "counterproductive hiring and placement practices" of local administrators. Nor did the trial evidence show the "dance of the lemons" is inevitably caused by the

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did not demonstrate any facial constitutional defect, they certainly did not show that such a defect existed in the generality or vast majority of cases.

statutes. Instead, as described at trial, the dance of the lemons is a process driven by local administrators. According to trial testimony, some principals rid their schools of highly ineffective teachers by transferring them to other schools, often to low-income schools. This phenomenon is extremely troubling and should not be allowed to occur, but it does not inevitably flow from the challenged statutes, and therefore cannot provide the basis for a facial challenge to the statutes. (See *Tobe, supra*, 9 Cal.4th 1069, 1102 [ordinance that did not inevitably conflict with constitutional right was not subject to valid facial challenge].)

Plaintiffs contend that the testimony of their expert witnesses supports their position that the challenged statutes cause grossly ineffective teachers to be disproportionately assigned to schools with large low-income and minority populations. These witnesses opined that grossly ineffective teachers "tend to" accumulate in schools serving minority students, and that the challenged statutes "could" be a cause. We are not required to defer to expert opinion regarding the ultimate issue in a case, particularly when the issue is a predominantly legal mixed question of law and fact. (See *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178 ["There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law"].) In any event, these opinions do not sustain plaintiffs' burden. The first opinion does not explain why grossly ineffective teachers "tend to" accumulate at certain schools, and the second opinion only indicates the statutes "could be" a cause, not that they are or, more importantly, *inevitably* are.

Nor have plaintiffs demonstrated that the challenged statutes inevitably lead to greater disruption at schools serving poor and minority students during reductions-in-force. Plaintiffs presented evidence that certain schools serving these students have higher numbers of inexperienced teachers and go through more layoffs than other schools. Witnesses for plaintiffs testified that this "constant churn" of staff is destabilizing. Again, while plaintiffs have identified a troubling problem, they have not properly targeted the cause. The challenged statutes do not inevitably lead to the assignment of more inexperienced teachers to schools serving poor and minority children.

Rather, assignments are made by administrators and are heavily influenced by teacher preference and collective bargaining agreements.

It is possible that the challenged statutes—in the way they pertain to teacher tenure and seniority—lead to a higher number of grossly ineffective teachers being in the educational system than a hypothetical alternative statutory scheme would. This possibility may present a problem with policy, but it does not, in itself, give rise to an equal protection violation, which requires a classification affecting similarly situated groups in an unequal manner. (*Cooley, supra*, 29 Cal.4th 228, 253.)

Assuming that poor and minority students encounter more grossly ineffective teachers and that this impacts their constitutional right to "basic educational equality" (*Butt, supra*, 4 Cal.4th 668, 681), the constitutional infringement is the product of staffing decisions, not the challenged statutes. Even if the statutes were struck down, the harm at issue—the disproportionate assignment of inferior teachers to poor and minority students—could still occur as before. (Any system will have some teachers who are not as effective as others.) And, since the challenged statutes, on their face and in effect, do not dictate where teachers are assigned, declaring the statutes facially unconstitutional would not prevent administrators from assigning the worst teachers to schools serving poor and minority students.

In sum, the evidence presented at trial highlighted likely drawbacks to the current tenure, dismissal, and layoff statutes, but it did not demonstrate a facial constitutional violation. The evidence also revealed deplorable staffing decisions being made by some local administrators that have a deleterious impact on poor and minority students in California's public schools. The evidence did not show that the challenged statutes inevitably cause this impact. Plaintiffs elected not to target local administrative decisions and instead opted to challenge the statutes themselves. This was a heavy burden and one plaintiffs did not carry. The trial court's judgment declaring the statutes unconstitutional, therefore, cannot be affirmed.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to enter judgment in favor of defendants on all causes of action. Each party shall bear its own costs on appeal.

CERTIFIED FOR PUBLICATION.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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.

B258589

(Los Angeles County Super. Ct. No. BC484642)

ORDER MODIFYING OPINION

[No Change in Judgment]

THE COURT:

It is ordered that the opinion filed herein on April 14, 2016, be modified as follows:

Page 8, footnote 2, add the following language to the last sentence of the footnote immediately preceding the citations to *In re Marriage Cases* and *White v. Davis*: that affect the very fabric of personnel decisions for teachers throughout California.

Footnote 2 now reads in its entirety:

At the time of trial, defendants were: The State of California; Edmund G. Brown, Jr., in his official capacity as Governor of California; the California Department of Education (CDE); the State Board of Education; and Tom Torlakson, in his official capacity as State Superintendent of Public Instruction (the State defendants); as well as California Teachers Association and the California Federation of Teachers (the intervener

defendants), who were granted leave to intervene as defendants prior to trial. The State defendants and the intervener defendants filed separate briefs on appeal. Because the positions taken by the two sets of defendants are, for the most part, essentially identical, we generally refer to defendants collectively in this opinion. We reject the State defendants' contention that the governor is an improper defendant. Because public education is ultimately a state obligation (*Butt*, *supra*, 4 Cal.4th 668, 680) and "[t]he supreme executive power of this State is vested in the Governor" (Cal. Const., art. V, § 1), the Governor is a proper defendant in this lawsuit mounting a facial challenge to five statutes of state-wide application that affect the very fabric of personnel decisions for teachers throughout California. (See also *In re Marriage Cases* (2008) 43 Cal.4th 757 [Governor named as defendant]; *White v. Davis* (2003) 30 Cal.4th 528 [same].)

This modification does not effect a change in judgment.

CERTIFICATE OF SERVICE

I, Susanne Hoang, 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 555 Mission Street, San Francisco, CA 94105-0921, in said County and State.

On May 24, 2016, I served the following document(s):

PETITION FOR REVIEW

on the parties stated below, by the following means of service:

SEE ATTACHED SERVICE LIST

Unless otherwise noted on the attached Service List, **BY MAIL:** I placed a true copy in a sealed envelope or package addressed as indicated above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 24, 2016, at San Francisco, California.

Susanne Hoang

SERVICE LIST

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