No. B258589

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION 2

BEATRIZ VERGARA, ET AL.
Plaintiffs/Respondents

vs.

STATE OF CALIFORNIA, ET AL.
Defendants/Appellants

and

CALIFORNIA TEACHERS ASSOCIATION, ET AL.
Intervenors/Appellants

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
THE HON. ROLF M. TREU, JUDGE PRESIDING
CASE NO. BC484642
SERVICE ON THE ATTORNEY GENERAL REQUIRED PER CRC 8.29(C)

RESPONDENTS' BRIEF

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CERTIFICATE OF INTERESTED PARTIES

The undersigned hereby certifies that no entities or persons have a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves. (Cal. Rules of Court, rule 8.208(e)(2).)

DATED: June 24, 2015

Theodore J. Boutrous, Jr.

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Short Cite	Name	Background (at time of trial)	Party Calling Witness
Adam	Larissa Adam	Principal, Oakland Unified School Dist. (RT 1384:2-5)	Plaintiffs
Barrera	Richard Barrera	School Board member, San Diego Unified School Dist.; Secretary-Treasurer, San Diego and Imperial Counties Labor Counsel (RT 6562:25-27, 6540:5-6)	Intervenors
Berliner	Dr. David Berliner	Professor and former Dean of College of Education, Arizona State Univ. (RT 8303:14-16, 8307:13-15)	State Defendants
Bhakta	Bhavini Bhakta	Common Core coach, Arcadia Unified School Dist.; former teacher, Monrovia Unified School Dist. and Arcadia Unified School Dist. (RT 2159:2-2160:24)	Plaintiffs
Boyd	Walter Joseph Boyd	Executive Director, Teachers Association of Long Beach (RT 6977:3-7)	Intervenors
D. Brown	Danette Brown	Teacher, La Habra City School Dist. (RT 7003:14-28)	Intervenors
S. Brown	Shannan Brown	President, San Juan Teachers Association; State Council Delegate, California Teachers Association (RT 7403:5-7, 7410:15-23)	Intervenors
Campbell	Lauren Campbell	Mother of Plaintiff Clara Campbell (AA 6531)	Plaintiffs
Chetty	Dr. Nadarajan "Raj" Chetty	Professor of Economics & Statistics, Harvard Univ.; Member, Panel of Economic Advisers, Congressional Budget Office (RT 1087:2-12; RA 212-216)	Plaintiffs

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Christmas	Troy Christmas	Director of Labor Strategy, Oakland Unified School Dist. (RT 1503:2-14)	Plaintiffs
Clark	Theresa Clark	Director, Professional Services Div., Commission on Teacher Credentialing (RT 7309:18-27)	State Defendants
Darling-Hammond	Dr. Linda-Darling Hammond	Professor of Education Policy, School Improvement, & Teacher Education, Stanford Univ.; former Director of Ed. Research Program, Rand Corp. (RT 8902:23-8903:1, 8904:3-8)	Intervenors
Davies	Beth Davies	Assistant Superintendent, Elementary Education, San Juan Unified School Dist. (RT 7560:18-23)	State Defendants
Deasy	Dr. John Deasy	Superintendent, LAUSD; former Superintendent, Santa Monica-Malibu Unified School Dist. (RT 473:2-4, 473:14-17, 475:4-7)	Plaintiffs
DeBose	Brandon DeBose, Jr.	Plaintiff; Student in Oakland Unified School Dist. (RT 3395:2-2296:28)	Plaintiffs
Decker	Vickie Decker	Teacher, LAUSD (RT 6252:18-19, 6253:9-12)	Intervenors
Douglas	Mark Douglas	Assistant Superintendent of Personnel Services, Fullerton School Dist. (RT 2404:7-22)	Plaintiffs
Ekchian	Vivian Ekchian	Chief Labor Negotiator and former Chief Human Resources Officer, LAUSD (RT 8832:7-11, 8832:20-24)	Intervenors
Fekete	Frank Fekete	School law attorney, represents 50-100 California school districts at any one	Plaintiffs

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		time (RT 4857:8-9, 4859:22-4860:10, 4860:11-19)	
Fraisse	Dr. Robert Fraisse	Former Superintendent, Laguna Beach Unified School Dist., Hueneme Elementary School Dist., Conejo Valley Unified School Dist.; former Assist. Superintendent, Las Virgenes Unified School Dist. (RT 5612:28-5614:3, 5617:19-23)	Intervenors
Goldhaber	Dr. Dan Goldhaber	Professor in Interdisciplinary Arts & Sciences, Univ. of Wash., Bothell; Professor in Economics, Univ. of Wash., Seattle; Director of the Center for Education Data and Research (RT 3702:2-17, 3701:22-3702:1)	Plaintiffs
Futernick	Dr. Kenneth Futernick	Director, School Turnaround Center at WestEd; former Director of K-12 Studies Program at Cal. State Univ. (RT 8643:10-14, 8642:4-8)	State Defendants
Hanushek	Eric Hanushek	Professor in Education & Economics, Stanford Univ.; Fellow, Hoover Institution; former Deputy Director, Congressional Budget Office; former Chair of the Board of Directors, National Board for Education Sciences (RT 9503:10-27, 9506:13-9507:9, 9506:13-9507:9)	Plaintiffs
Jacobs	Sandi Jacobs	Vice President and Managing Director for State Policy, National Council on Teacher Quality (RT 4627:22-4628:3,	Plaintiffs

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		4630:19-27)	
Jawitz-McClellan	Joshua Jawitz-McClellan	Teacher, LAUSD (RT 8227:15-21)	Intervenors
Johnson	Dr. Susan Moore Johnson	Professor of Education and former Dean, Harvard Graduate School of Education (RT 4402:24-26, 4403:25-4404:2)	Intervenors
Kane	Dr. Thomas Kane	Professor in Education & Economics, Harvard Graduate School of Education; former Deputy Director, U.S. Education, Bill & Melinda Gates Foundation (RT 2636:20-24, 2639:7-19)	Plaintiffs
Kappenhagen	William "Bill" Kappenhagen	Principal, San Francisco Unified School Dist. (RT 2292:26-2293:28)	Plaintiffs
Liss	Lisa Liss	Mother of Plaintiff Herschel Liss (AA 6543)	Plaintiffs
Macias	Jose Macias	Father of Plaintiff Julia Macias (RT 3263:22-24, 3264:26-3265:5)	Plaintiffs
Martinez	Karen Martinez	Mother of Plaintiff Daniella Martinez (AA 1091)	Plaintiffs
McLaughlin	Christine McLaughlin	Teacher, Pasadena Unified School Dist. (RT 5819:21-28)	Intervenors
Melvoin	Nicholas Melvoin	Former teacher, LAUSD (RT 3667:2-13)	Plaintiffs
Mills	Susan Mills	Assistant Superintendent, Riverside Unified School Dist. (RT 6802:26-6803:1)	State Defendants
Mize	Anthony Mize	Teacher, LAUSD (RT 7735:5-13)	Intervenors
Monterroza	Raylene Monterozza	Plaintiff; Student in Pomona Unified School Dist. (RT	Plaintiffs

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Short Cite	Name	Background (at time of trial)	Party Calling Witness
		3550:5-16)	
Moss	Jonathan Moss	Former teacher, Compton Unified School Dist. (RT 2949:5-19)	Plaintiffs
Nichols	Lynda Nichols	Education Program Consultant, Cal. Dep't Education; former teacher (RT 8494:4-6, 8500:5-7)	State Defendants
Olson-Jones	Betty Olson-Jones	Teacher, Oakland Unified School Dist.; former President, Oakland Education Association (RT 7252:23-28, 7253:1, 7254:20-25)	Intervenors
Oropeza	Jeannie Oropeza	Deputy Superintendent for Administration, Finance, Technology, Infrastructure, California Dep't Education; former Budget Analyst, Cal. Dep't Finance (RT 8044:12-15, 8046:15-17)	State Defendants
Parks	Susan C. Parks	Former Superintendent, Director of Curriculum, and Director of Elementary Education, Simi Valley Unified School Dist. (AA 6603, 6608, 6611-6614)	Designated by Plaintiffs
Pulley	Maggie Pulley	Teacher, West Covina School Dist.; former LAUSD teacher (RT 3231:35-3232:21)	Plaintiffs
Purdue	Roxann Purdue	Consultant on Teacher Preparation, Commission on Teacher Credentialing (RT 8158:11-14)	State Defendants
Ramanathan	Dr. Arun Ramanthan	Executive Director, Education Trust-West; former Executive Director of Government Relations, Chief Student Services Officer, and	Plaintiffs

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		Special Assistant to the Superintendent, San Diego Unified School Dist. (RT 3862:5-14, 3864:17-3866:7, 3952:27-3954:8)	
Raun-Linde	Dr. Peggy Raun-Linde	Principal, Fremont Union High School Dist. (RT 7618:20-27)	State Defendants
Raymond	Jonathan Raymond	Former Superintendent, Sacramento City Unified School Dist.; former Chief Accountability Officer, Charlotte-Mecklenburg School Dist. (RT 2009:15-25)	Plaintiffs
Rogers	Richard Rogers	Superintendent, Oakley Union Elementary School Dist.; former Assistant Superintendent, Tracy School System, Lincoln Unified School Dist., and Mount Diablo Unified School Dist. (AA 6833-6834)	Designated by Plaintiffs
Rothstein	Dr. Jesse Rothstein	Professor of Economics & Public Policy, U.C. Berkeley; former Senior Economist, U.S. Council of Economic Advisers (RT 5903:5-7, 5906:5-7)	Intervenors
Seymour	Jeffrey Seymour	Adjunct Instructor of Educational Administration, Cal Poly Pomona; former Superintendent, El Monte City School District (RT 7104:8-9, 7105:3-7106:7)	Intervenors
Smith	Dr. Anthony "Tony" Smith	Former Superintendent, Oakland Unified School Dist. and Emery Unified School	Plaintiffs

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Short Cite	Name	Background (at time of trial)	Party Calling Witness
		Dist.; former Deputy Superintendent, San Francisco Unified School Dist. (RT 9685:18-9686:28, 9694:16-9695:15)	
Tolladay	Linda Tolladay	Teacher, Madera Unified School Dist. (RT 8003:6-17)	Intervenors
Tuttle	Ernest Tuttle	Attorney, Tuttle & McCloskey (RT 6504:2-11)	Intervenors
B. Vergara	Beatriz Vergara	Plaintiff; Student in LAUSD (RT 3503:5-6, 3505:7-8)	Plaintiffs
E. Vergara	Elizabeth Vergara	Plaintiff; Student in LAUSD (RT 3505:7-25)	Plaintiffs
Watty	Dawna Watty	Teacher, Alameda Unified School Dist. (RT 7702:21-28)	Intervenors
Weaver	Kareem Weaver	Former principal, Oakland Unified School Dist. (RT 2925:14-2928:4)	Plaintiffs
Webb	James Webb	Instruction Director & Lead Consulting Teacher, William S. Hart Union High School Dist. (RT 8800:24-25)	State Defendants

INDEX OF ABBREVIATIONS

Abbreviation	Document Name
AA	Appellants' Appendix
IB	Intervenors' Opening Brief
IRJN	Intervenors' Request for Judicial Notice
RA	Respondents' Appendix
RRJN	Respondents' Request for Judicial Notice
RT	Reporters' Transcript
SB	State Defendants' Opening Brief

INTRODUCTION

This case is about education, "the lifeline of both the individual and society." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 605 ["*Serrano I*"].) Education "lie[s] at the core of our free and representative form of government." (*Serrano v. Priest* (1976) 18 Cal.3d 728, 767-768 ["*Serrano II*"].) And it serves as "the bright hope for entry of the poor and oppressed into the mainstream of American society." (*Serrano I*, *supra*, 5 Cal.3d at pp. 608-609.) Indeed, education serves such a "distinctive and priceless function" that the Supreme Court has declared it to be a fundamental right guaranteed by the California Constitution. (*Ibid.*; see also Cal. Const. Art. I, § 7; *id*. Art. IV, § 16; *id.* Art. IX, §§ 1 & 5.) At a minimum, the right to education guarantees that "all California children should have equal access to a public education system that will teach them the skills they need to succeed as productive members of modern society." (*O'Connell v. Super. Ct*. (2006) 141 Cal.App.4th 1452, 1482; see also *Serrano I*, *supra*, 5 Cal.3d at pp. 605-607.)

In order to fulfill the constitutional promise of a meaningful education for all California children, "the State itself has broad responsibility to ensure basic educational equality." (*Butt v. California* (1992) 4 Cal.4th 668, 681.) The State must provide a public education system "open on equal terms to all," (*id.* at p. 680), with "substantially equal opportunities for learning." (*Serrano II*, *supra*, 18 Cal.3d at pp. 747-748.) Where "substantial disparities in the quality and extent of availability of educational opportunities" persist, the State has a duty to intervene and ensure "equality of treatment to all the pupils in the state." (*Id.* at p. 747.) And when the State's laws infringe on the fundamental right to educational opportunity, as they do here, it is unquestionably the role of the courts to invalidate those unconstitutional laws. (See, e.g., *Serrano II*, *supra*, 18 Cal.3d at pp. 776-777; cf. *Brown v. Bd. of Educ.* (1954) 347 U.S. 483, 493.)

In this case, the Superior Court struck down five laws—governing California's teacher tenure, dismissal, and layoff procedures—that routinely devastate the educational opportunities of a subset of students throughout California, particularly poor and minority students. As the Superior Court found, the unavoidable consequence of these statutes is that California school districts are stuck with a "significant number" of grossly ineffective teachers—teachers that everyone knows cannot, or will not, teach. (AA 7300.) These grossly ineffective teachers come in a variety of forms: English teachers who cannot spell (RT 3247:4-13 [Pulley]); burned out teachers who show movies and do crossword puzzles instead of teaching (RT 3673:5–3674:2 [Melvoin]); disorganized teachers who let their classrooms devolve "in[to] chaos" (AA 3665-3678); derisive teachers who scare and intimidate children (RT 2957:26–2958:13 [Moss]); or worse (RT 3512:17-19 [B. Vergara] [calling Latino students "cholos"]; RT 3513:15-18 [B. Vergara] [calling female student a "whore"].) But they have one thing in common: their students consistently fail to learn what they need to, and are expected to, learn.

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. (RT 2770:6-16, 3513:15-18 [Kane].) Students who are 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 that are magnified for students stuck with two or more such teachers. (RT 1202:22-1203:1 [Chetty].) Indeed, classrooms of students assigned to grossly ineffective teachers lose $1.4 million in lifetime earnings as compared to classrooms taught by average teachers. (RT 1221:26-1222:6 [Chetty].) In the words of the Superior Court, the severe harm being

suffered by the students of grossly ineffective teachers "shocks the conscience." (AA 7299.)

Moreover, the Superior Court explained exactly *how* the Challenged Statutes cause school districts to be stuck with grossly ineffective teachers. Based on "extensive" and "compelling" evidence presented during a two-month trial (AA 7299, 7301), the court found that:

- The Permanent Employment Statute forces school districts to make tenure decisions after teachers have been on the job for only 16 months—far too little time to be able to predict with accuracy whether a teacher will be effective at teaching students. As a result, districts grant permanent status year after year to some grossly ineffective teachers—teachers who would be screened out if districts had more time to make considered decisions. (AA 7301-7302.)

- Once those grossly ineffective teachers obtain tenure, a series of three Dismissal Statutes makes it virtually impossible for districts to remove them from the classroom. Remarkably, in the *entire* state of California, only *2.2 teachers* are dismissed on average, each year, for unsatisfactory performance —only 0.0008% of the nearly 300,000 teachers statewide. (RT 4913:27-4914:23 [Fekete].) School districts must spend years, and hundreds of thousands of dollars, in order to have any chance of dismissing a single grossly ineffective teacher—and even then, their efforts are likely to fail. As a result, district administrators are left with no choice but to shake their heads, hold their noses, and assign these teachers to classrooms full of unlucky students every year. (AA 7302-7305.)

- Then, when economic downturns or declining enrollment force school districts to conduct layoffs, administrators are *still* prevented from removing these grossly ineffective teachers—forced instead by the Last-In First-Out ("LIFO") Statute to fire some of their best, most beloved, most effective teachers, based almost exclusively on those teachers' lack of

seniority. It is not uncommon for a teacher to be named "teacher of the year" and laid off the same year. (See AA 7305-7306; see also AA 7306 [the "logic" of the LIFO Statute is "unfathomable and therefore constitutionally unsupportable"].)

Even worse, the Challenged Statutes result in a well-known phenomenon called the "Dance of the Lemons," causing disproportionate harm to poor and minority students throughout California. (AA 7307). Because dismissal is not a viable option for districts, principals seeking to improve the teaching staff at their own schools are forced to try to transfer ineffective teachers to other schools within the district. And the schools most often on the receiving end of these "lemon" transfers are schools serving predominantly poor and minority students. As a result, African-American and Latino students in Los Angeles are 43 and 68 percent more likely, respectively, to be taught by grossly ineffective teachers than white students. (RT 2760:17-2764:7, 2779:20-27 [Kane]; Respondents' Appendix ("RA") 269.) LIFO-based layoffs also wreak disproportionate havoc on schools serving poor and minority communities because those schools tend to have teachers with lower seniority levels. In some low-income schools in California, 90% of teachers have received layoff notices in a single year (RT 1400:12-21 [Adam]), massive instability that results in a "significant loss of student achievement." (AA 4810 [CDE Report].)

The overwhelming evidence at trial leaves no doubt that each of the Challenged Statutes has a "real and appreciable impact" on students' educational opportunities (see *infra* at pp. 27-45), and places a disproportionate burden on poor and minority students in particular (see *infra* at pp. 46-51)—two independent reasons for examining the laws under the lens of strict judicial scrutiny, as the Superior Court did. The superintendents of Sacramento City and Oakland school districts perhaps summarized it best:

- Jonathan Raymond (Sacramento City): "We have to spend considerable energy working around, over and through [the Challenged Statutes] as opposed to simply saying, you know what, our energy should be focused on teaching and improving the lives of children. [T]hese laws are simply flawed. They must be changed." (RT 2153:28-2154:4.)

- Dr. Anthony Smith (Oakland): "Our job is to ensure that there are effective teachers in classrooms, and . . . to do everything we can to make sure that we get teachers that are there to meet the needs of kids. The statutes themselves, though, make it unlikely that we [can] be successful . . . ." (RT 9702:22-28.)

On appeal, the State Defendants and Union-Intervenors (collectively "Appellants") offer three principal arguments in defense of the statutes at issue. First, they argue that this Court should allow the statutes to stand because, according to Appellants, the statutes "reflect[] the Legislature's considered judgment" about how school districts should operate. (IB at pp. 2; see also SB at pp. 12-13.) Appellants warn against judicial interference in what they describe as a "quintessentially legislative function." (IB at p. 5.) But, of course, the role of the judiciary *is* to interfere when the Legislature's actions result in constitutional harm—particularly harm to students, who have no seat at the legislative table. (*State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 565 ["[T]he resolution of constitutional challenges to state laws falls within the *judicial* power, not the *legislative* power."] [citation omitted]; *U.S. v. Windsor* (2013) 133 S.Ct. 2675, 2688 ["[I]t is emphatically the province and duty of the judicial department to say what the law is."] [citations omitted].) Indeed, when Appellant California Teachers Association believed certain aspects of the *very same* statutes were violating the constitutional rights of *teachers*, it sought—and obtained—judicial

intervention declaring those provisions unconstitutional. (See *Cal. Teachers Ass'n v. State of Cal.* (1999) 20 Cal.4th 327, 346.)

Second, Appellants take issue with Plaintiffs' legal theories, arguing that Plaintiffs have improperly "cloaked their . . . educational policy arguments in the garb of an equal protection challenge." (IB at p. 2; SB at p. 13.) But Plaintiffs' equal protection challenge follows directly from seminal cases like *Serrano* and *Butt*. In *Serrano*, the Supreme Court found that the constitutional right to educational opportunity compels the invalidation of state laws resulting in substantially unequal access to educational *funding*. (*Serrano II*, *supra*, 18 Cal.3d at pp. 614-615.) In *Butt*, the Supreme Court found that the same constitutional right compels substantially equal access to *time in school*. (*Butt*, *supra*, 4 Cal.4th at p. 692.) Here, the Superior Court closely followed the model set by these cases and ruled that the constitutional right to educational opportunity compels the invalidation of state laws resulting in substantially unequal access to minimally effective teachers. (AA 7294-7295.) There can be no reasonable dispute that all three components—money, time, and effective teachers—are essential components of a meaningful education.

Third, Appellants ask this Court to re-weigh the evidence and find that the Challenged Statutes do not, as a factual matter, impede the educational opportunities of students. (See SB at p. 48 ["[T]he challenged teacher employment statutes have, at most, a highly attenuated connection to any child's classroom experience."]; IB at p. 45 ["[T]he impact of the challenged statutes on any student is at most indirect and attenuated . . . ."].) They argue that the statutes impose no significant burden on school districts and that district administrators would have no difficulty managing their teacher workforces within the confines of the statutes if only they exerted more effort. (IB at p. 18 ["[T]he dismissal process can be completed in a relatively short amount of time and at

reasonable cost."]; SB at p. 11 ["[S]ome local districts . . . make better decisions within the statewide framework."].) And they argue that the importance of this lawsuit for California students has been overblown, going so far as to accuse the Superior Court judge of having "delusions of grandeur." (RRJN, Ex. S [*Sacramento Bee* Article].)

Not long ago, however, when State Defendants and Intervenors were fighting over who should foot the bill for teacher dismissal proceedings, they sang quite a different tune. (See *Cal. Teachers Ass'n*, *supra*, 20 Cal.4th 327.) At that time, the California Teachers Association warned the Supreme Court that dismissal proceedings are a "huge financial burden," costing "an exorbitant amount of money." (RRJN, Ex. A, at p. 21 [Cal. Teachers Ass'n Answer Brief on the Merits], *available at* 1998 WL 35982541.) And the State cautioned the Supreme Court, in arguments echoing precisely what Plaintiffs have proven in this case, that

> [r]equiring individual school districts or the State to pay the entire cost of [dismissal] proceedings will discourage cost-sensitive school districts from attempting to discipline teachers even where such discipline is amply justified. ***That, of course, will harm students*** and may impair employee morale.

(RRJN, Ex. B at p. 13 [State of California's Opening Brief], *available at* 1998 WL 34168701, *25 [italics added].)

Although State Defendants and Intervenors now purport to be unable to see how the Challenged Statutes harm students, the rest of the world has no difficulty seeing the connection. Indeed, when the Superior Court's ruling was announced, 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." (RRJN, Ex. E.) The *Los Angeles Times* editorial board proclaimed that the "*Vergara* ruling offers California an opportunity to change a broken system." (*Id.*, Ex. N.) And *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." (*Id.*, Ex. M at p. 1; see also *id.*, Ex. O at p. 1-2 [*Washington Post* editorial] ["a smart decision for students"]; *id.*, Ex. P at pp. 1-3 [*Wall Street Journal* editorial] ["a school reform landmark"]; *id.*, Ex. Q at pp. 1-3 [*Chicago Tribune* editorial] ["rightly strikes down teacher job protection laws"]; *id.*, Ex. R [*USA Today* editorial] ["To improve schools, end the 'dance of the lemons'"].)

In short, Appellants ask this Court to turn a blind eye to severe educational inequalities that flow inexorably from excessive teacher job privileges—perks secured through the legislative process by "well-funded" (IB at p. 2) and politically connected adults at the expense of children. (See *Turner v. Bd. of Trustees, Calexico Unified School Dist.* (1976) 16 Cal.3d 818, 825 ["Our school system is established not to provide jobs for teachers but rather to educate the young."].) Plaintiffs respectfully request that this Court affirm the judgment below so that *all* California schoolchildren can have an equal opportunity to obtain the education promised to them under the state Constitution.

STATEMENT OF THE CASE

I. THE CHALLENGED STATUTES

Plaintiffs—nine California schoolchildren ranging in age from 7 to 17—challenged the constitutionality of five provisions of the California Education Code[1] under the equal protection clause of the California Constitution. These statutes are (1) Section 44929.21, subdivision (b) (the "Permanent Employment Statute"); (2) Sections 44934, 44938, subdivisions (b)(1) and (2), and 44944 (the "Dismissal Statutes"); and (3) Section 44955 (the "Last-in-First-Out Statute" or "LIFO Statute") (collectively, the "Challenged Statutes").

A. The Permanent Employment Statute

Under the Permanent Employment Statute, a probationary teacher becomes a "permanent employee of [a school] district" after completing "two complete consecutive school years in a position or positions requiring certification." (Section 44929.21(b).) However, each district must notify its probationary teachers whether they will be reelected as permanent employees several months *before* the end of the teachers' second year with the district—no later than March 15th—or else the probationary teachers are automatically reelected as permanent employees, by default. (*Id.*; RT 495:1-2, 496:7-11 [Deasy]; 2026:20-2029:19 [Raymond]; 7120:1-27 [Seymour].)

Because school boards require time to approve or reject their principals' reelection recommendations, and because time is also needed to prepare and serve teachers' reelection and non-reelection notices, principals must, in practice, decide whether to reelect the probationary teachers at

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[1] All statutory citations herein shall refer to the California Education Code, unless otherwise specified.

their school no later than February of the teachers' second year with the district. (RT 495:10-13 [Deasy]; 2429:10-2432:15 [Douglas]; 2308:7-24 [Kappenhagen].) Thus, including the summer months (when school is not in session), principals have no more than sixteen months to decide whether probationary teachers should be reelected to positions of permanent employment within their districts. (RT 2026:20-2029:19 [Raymond] [the "very important" tenure decision must be made in "14 to 16 months"]; 2310:28-2311:15 [Kappenhagen].)

B. The Dismissal Statutes[2]

After a probationary teacher obtains permanent employment with a school district, she can be dismissed on the basis of unsatisfactory performance only if her district adheres to the statutory procedures set forth in the Dismissal Statutes. Appellants contend that these statutory requirements are "straightforward," (IB at p. 12), but witness after witness who testified at trial explained they are anything *but* straightforward. As Oakland Associate Superintendent for Human Resources Brigitte Marshall put it when describing her school district's attempt to dismiss a permanent certificated teacher, "the word permanent speaks for itself." (AA 5898.)

First, under Section 44938(b)(1), a school district that intends to dismiss a permanent certificated teacher for unsatisfactory performance must provide the teacher with a "written notice of unsatisfactory performance." (Section 44938(b)(1).) The notice must specify (1) the

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[2] After the Superior Court had issued its tentative judgment, the Legislature passed, and Governor Brown signed, AB 215, a bill that amended certain provisions of two of the Dismissal Statutes. (IRJN, Ex. 6.) The pre-amendment version of these statutes are described here and the minor amendments implemented by AB 215, many of which have made it *more* difficult for a school district to dismiss a tenured teacher, are discussed *infra* at pp. 12-13.

nature of the teacher's unsatisfactory performance and (2) "specific instances of behavior" with "particularity [so] as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge." (*Ibid*.) In practice, a district must document a teacher's deficiencies over a span of many months, if not years, before issuing the notice of unsatisfactory performance, or else there is virtually no possibility that the teacher's dismissal will be upheld during the ensuing dismissal proceeding. (RT 2032:15-2033:5 [Raymond]; 4890:1-4891:17 [Fekete]; 2420:27-2421:21 [Douglas].)

Then, the district must provide the underperforming teacher with at least 90 days to correct her deficient performance, regardless of whether the district believes the employee to be capable of remediation, and the district may not proceed with the dismissal process until at least 90 days have transpired. (Section 44938(b)(1).) A district may then proceed with the dismissal process only if it issues the written notice of unsatisfactory performance prior to the final one-fourth of the school year—otherwise, it must wait until the following year. (Section 44938(b)(1), (2).)

Next, a district must file a written statement of charges and "give notice to the permanent employee of its intention to dismiss." (Section 44934.) For a dismissal based on unsatisfactory performance, the notice must specify instances of the teacher's behavior and conduct constituting the charge, the statute or rule violated (where applicable), and the "facts relevant to each occasion of alleged . . . unsatisfactory performance." (*Ibid*.)

The teacher then has another thirty days to request a hearing on the dismissal charges. (Section 44934.) The hearing must commence within 60 days after that, although that deadline may be extended "for good cause shown." (*Ibid*.) The dismissal hearing is conducted by an ad-hoc three-member panel called a Commission on Professional Competence ("CPC"), which consists of one administrative law judge and two teachers, both of

whom must have at least five years' teaching experience in the employee's discipline within the past ten years. (Section 44944(b)(2); RT 4881:20-4882:14 [Fekete].) Parties to a CPC hearing are provided discovery rights equivalent to "the rights or duties of any party in a civil action brought in superior court." (Section 44944(a)(1); see also RT 1521:24-1523:19 [Christmas]; 6525:16-6526:5 [Tuttle].) Parties may not, however, introduce evidence (*e.g.*, teacher evaluations demonstrating a teacher's poor performance) if the subject matter of the evidence occurred more than four years prior to the filing of the dismissal action. (Section 44944(a)(5).)

An unspecified amount of time after the CPC hearing has concluded, the CPC must issue "a written decision containing findings of fact, determinations of issues, and a disposition," which is "deemed to be the final decision" of the district. (Section 44944(c)(1), (4).) The parties may appeal the CPC's decision to the Superior Court and, after that, to the Court of Appeal. (Section 44945.) If the CPC (or the Superior Court or Court of Appeal) determines for whatever reason that the teacher should not be dismissed—even if the CPC *agrees* with all of the district's factual allegations—the district is required to pay, *inter alia*, the expenses for the dismissal hearing, expenses incurred by CPC members, and the teacher's attorney's fees. (Section 44944(e)(2); see also RT 630:22-26 [Deasy]; 1528:18-26 [Christmas]; 2036:23-2037:12 [Raymond].)

1. Enactment of AB 215

After the Superior Court issued its tentative decision in this case, Intervenors "craft[ed]" and the Legislature enacted AB 215. (RRJN, Ex. J; IRJN, Ex. 6.) AB 215 did not go into effect until January 1, 2015—after the trial court issued its final statement of decision and judgment. (*Ibid*.) The primary purpose and effect of AB 215 was to "creat[e] a separate hearing process for education employees who are charged with egregious

misconduct including child abuse, sexual abuse, and certain drug offenses"—matters that are not at issue in this case. (RRJN, Ex. J.)

AB 215 left largely untouched the process for dismissing tenured teachers for unsatisfactory performance. It made only a handful of changes to two of the Dismissal Statutes, most of which make it *more* difficult, costly, and burdensome to dismiss a tenured teacher through the formal dismissal process—a process that even the sponsor of AB 215 has described as "outdated and cumbersome." (IRJN, Ex. 7.) For example, AB 215 generally prohibits school districts from being able to amend notices of intent to dismiss less than 90 days before a hearing on the dismissal charges, (Section 44934(d)), and permits teachers to file objections to the members of the three-person CPC panel, (Section 44944(c)4). (IRJN, Ex. 6.) AB 215 also requires the parties to a CPC hearing to make costly and detailed "initial disclosures" and "prehearing disclosures," similar to the types of discovery disclosures that are required of litigants in federal court. (Sections 44944.05(a), (b)(1), (b)(3); IRJN, Ex. 6.)

Worst of all, AB 215 requires that CPC proceedings be completed within seven months from the date of a teacher's hearing demand, but does not state what happens if this deadline is not satisfied. (IRJN, Ex. 6.) As a result, a district likely will be required to *reinitiate* a dismissal proceeding if it is unable to satisfy the deadlines imposed by AB 215. (Section 44944(b)(1); see *infra* at pp. 119-123.) For this reason, the California Senate Appropriations Committee Report on AB 215 warned that the bill could make it "*more* cumbersome or difficult" for school districts to dismiss their failing teachers. (*Ibid*. [italics added].)

C. The "Last-In, First-Out" Layoff Statute

The LIFO Statute governs the process by which school districts, during periods of budget shortfalls, declining student enrollment, and

changes to existing educational programs, may implement teacher layoffs, called reductions in force ("RIFs"). (RT 4040:17-4041:22 [Ramanathan].) California schools districts implemented RIFs, and therefore utilized the LIFO Statute, in every school year for at least the six years leading up to trial. (RT 4045:16-4046:14 [Ramanathan].) School districts, including the Los Angeles Unified School District, have also announced and/or issued RIF layoff notices every year since trial began, including the 2014-2015 school year. (RRJN, Exs. K, L; see also RT 8070:14-17 [Oropeza].) Under the LIFO Statute, school districts must provide teachers with final layoff notices before May 15 in order for the RIFs to take effect the following school year. (Section 44949(a); RT 4020:16-4021:13 [Ramanathan]; 2625:23-2626:8 [Douglas].)

When a school district implements a RIF, the LIFO Statute provides that "the services of no permanent employee may be terminated . . . while any probationary employee, or any employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render"—in other words, teachers must be laid off in reverse seniority order. (Section 44955(b); RT 2965:3-11 [Moss]; 3671:4-16 [Melvoin]; 6517:15-18 [Tuttle].) Seniority is calculated based on the duration of a teacher's employment within a particular school district and does not necessarily reflect the amount of teaching experience a teacher has. (RT 651:11-14 [Deasy]; 2256:5-8, 2256:27-2257:24, 2259:21-2260:15 [Bhakta]; 2436:12-2437:13 [Douglas].) Accordingly, a teacher with a significant amount of teaching experience can have a low seniority level if she has been employed with a particular school district for a short duration of time. (See *ibid.*)

School districts may deviate from strict reverse-seniority RIFs in just two circumstances, neither of which permits districts to consider a teacher's effectiveness in the classroom. A district may "skip" laying off a more

junior teacher: (1) if the district demonstrates a specific need for personnel to teach a specific course or course of study, and the junior teacher possesses a specific credential or specialized training that other teachers with more seniority do not possess, (Section 44955(d)(1)), or (2) to maintain or achieve "compliance with constitutional requirements related to equal protection of the laws," (Section 44955(d)(2)). The evidence at trial showed that no school district has *ever* successfully "skipped" laying off a teacher pursuant to LIFO Statute subdivision (d)(2). (Cf. *Reed v. United Teachers L.A.* (2012) 208 Cal.App.4th 322, 344 [overturning consent decree that had permitted LAUSD to use subdivision (d)(2)].)

II. PROCEDURAL BACKGROUND

Plaintiffs filed a Complaint for Declaratory and Injunctive Relief in the Superior Court for the County of Los Angeles on May 14, 2012 (AA 1), and a First Amended Complaint for Declaratory and Injunctive Relief (the operative complaint) on August 15, 2012 (AA 28). In their complaint, Plaintiffs asserted seven claims against 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 ("State Defendants"), the Los Angeles Unified School District ("LAUSD"), the Oakland Unified School District ("Oakland"), and the Alum Rock Union Elementary School District ("Alum Rock"). They alleged that the Challenged Statutes violate the equal protection clause of the California Constitution, on their face and as applied to Plaintiffs, and requested that the trial court enter declaratory and injunctive relief preventing further enforcement of the Challenged Statutes. (AA 50-55.)

Specifically, Plaintiffs alleged that the Challenged Statutes, individually and collectively, cause grossly ineffective teachers in California to obtain and retain permanent employment at alarming rates

because they (1) compel school districts to make permanent employment decisions "before [teacher] effectiveness can readily be determined," (2) "make[] dismissal nearly impossible or highly impractical once poor performers are identified," and (3) "when layoffs are necessary, force[] districts to terminate teachers based on seniority alone, irrespective of their teaching effectiveness." (AA 40.) Because grossly ineffective teachers impose real and appreciable harm on their students, Plaintiffs alleged that the Challenged Statutes create "arbitrary and unjustifiable inequality among students" in the exercise of their fundamental right to basic educational equality. (AA 32-33.) In addition, and as an independent basis for their claims, Plaintiffs alleged that the Challenged Statutes violate the equal protection clause of the California Constitution because they "have a disproportionately adverse effect on minority and economically disadvantaged students," including six of the nine Plaintiffs. (AA 46-48.)

On August 20, 2012 and September 17, 2012, State Defendants and Alum Rock, respectively, filed demurrers to Plaintiffs' complaint. (AA 56-118.) On November 9, 2012, the Superior Court overruled both of these demurrers and held that: (1) Plaintiffs had sufficiently stated facial equal protection claims arising out of the Challenged Statutes' "actual procedural scheme" [citing *Cal. Assn. of PSES v. Cal. Dept. of Educ.* (2006) 141 Cal.App.4th 360, 371-372]; (2) Plaintiffs had sufficiently alleged that the Challenged Statutes result "in similarly situated children having unequal access to education because *some* students are assigned to 'grossly ineffective' teachers"; (3) the Governor is a proper party because the "Governor is responsible [for] ensur[ing] that the laws of the State are properly enforced"; and (4) the State Defendants are proper defendants because "responsibility for public education lies with the State, even though school districts are agents for local operations." (AA 193-196 [italics added].)

On December 10, 2012, State Defendants filed a petition for writ of mandate, certiorari, and/or prohibition, asking this Court to vacate the trial court's ruling. (RA 63-125.) State Defendants argued, *inter alia*, that: (1) the trial court had erroneously held that the California Constitution "guarantee[s] . . . a specific qualitative level of education"; (2) Plaintiffs had failed to plead that the Challenged Statutes are "causally connected" to students' alleged harm; and (3) the Challenged Statutes do not "classify" students. (RA 91, 97, 100.) On December 18, 2012, this Court stayed proceedings in the trial court but, after full briefing from the parties, summarily denied State Defendants' writ petition on January 29, 2013. (RA 126.)

On March 27, 2013, the California Teachers Association and California Federation of Teachers (together, "Intervenors") filed an unopposed motion to intervene in the case. (AA 228-243.) On May 2, 2013, the Superior Court granted the motion to intervene in order to increase the "range of relevant interested parties" participating in the litigation. (AA 270-273.)

Plaintiffs subsequently voluntarily dismissed the school district-defendants from the action: (1) Alum Rock on September 13, 2013; (2) LAUSD on September 19, 2013; and (3) Oakland on December 23, 2013. (AA 274-275, 276-277, 491-495.)

On September 27, 2013, State Defendants and Intervenors filed motions for summary judgment or, in the alternative, summary adjudication. (AA 278-313, 321-356.) On December 13, 2013, the trial court denied both of Appellants' motions, holding that: (1) "classifications based on suspect classes [can be] invalidated in the absence of discriminatory motivation even when the laws were neutral on their face" [citing *Serrano I*, *supra*, 5 Cal.3d at pp. 601-603; *Butt*, *supra*, 4 Cal.4th at p. 681]; (2) the evidence could support findings that (a) the Challenged

Statutes "'inevitably pose a present total and fatal conflict with applicable constitutional prohibitions'" [citing *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1094]; (b) the Challenged Statutes create "classifications based on the inequality among those students who are assigned grossly ineffective teachers and those who are not"; and (c) there is "a causal relationship between the Challenged Statutes and the assignment of grossly ineffective teachers to students"; and (3) Plaintiffs have standing because the evidence could support a finding that they "have been assigned a grossly ineffective teacher . . . are in substantial danger of being assigned a grossly ineffective teacher . . . and/or decided not to attend traditional public schools because of the risk of being assigned a grossly ineffective teacher." (AA 482-490.)

On December 24, 2013, Appellants filed two separate petitions for writs of mandate and/or prohibition or other appropriate relief, with requests for a stay, asking this Court to vacate the Superior Court's order. (RA 139-207.) On January 14, 2014, for the second time in this case, this Court denied Appellants' writ petitions and allowed the case to proceed to trial. (RA 208-211.)

III. TRIAL

During the two-month trial that ensued, the Superior Court heard testimony from over fifty lay and expert witnesses, including experienced educators at every level of the California education system—teachers, principals, superintendents, board of education members, and CDE officials. The "compelling" and "extensive" evidence that Plaintiffs introduced during their case-in-chief, as well as much of Appellants' evidence, overwhelmingly pointed to an undeniable conclusion: the Challenged Statutes have a devastating impact on students across California, and on poor and minority students in particular. (AA 7299, 7301.)

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

Plaintiffs first set out to prove that students cannot be assured of equal educational opportunities unless they have equal access to effective teachers. After all, teachers are the very vehicle through which students receive their education. In the words of Dr. John Deasy, Superintendent of LAUSD, "[t]he mission of the District is to assure that students learn. That is the only reason we open our doors in the morning . . . . In order to do that, the most important factor is a teacher, a highly effective teacher." (RT 658:26-659:4.) And, as the CDE has acknowledged, "[t]he academic success of California's diverse students is inextricably tied to the quality and commitment of our educator workforce." (AA 4774 [CDE Publication].) This is because "teacher quality is the single most important school-related factor in student success. Ample research supports this principle." (AA 4774 [CDE Publication].)

The evidence at trial overwhelmingly supported the self-evident principle that effective teachers are essential to the provision of education. (See, e.g., RT 8373:6-21 [Berliner] [agreeing that teachers are usually the "in-school factor with the most powerful effect on student achievement"]; 4573:12-15 [Johnson] ["teachers are the most important school level factor affecting student learning"]; 485:23-486:2 [Deasy]; 1385:18-28 [Adam]; 2020:1-5 [Raymond]; 6128:6-8 [Rothstein]; 7458:21-24 [S. Brown]; 9671:17-9672:27, 9677:22-9678:8 [Hanushek].)

But Plaintiffs' evidence went far beyond the basic and indisputable premise that teachers matter. Plaintiffs proved that teacher effectiveness—the ability of a teacher to achieve student learning—can be assessed and measured, such that ineffective teachers in California districts can be (and routinely are) identified when administrators have sufficient time and information. In addition, Plaintiffs proved that the disparity between

effective and ineffective teachers in Los Angeles, California's largest district, is substantial—larger than elsewhere in the country.

All of those findings were supported by voluminous evidence, including testimony from:

- Dr. Raj Chetty, a world-renowned Harvard economist who conducted a groundbreaking study (independent of this litigation) on teacher impact that was recently published in the American Economic Review.[3] His study analyzed the school and tax records of 2.5 million students over a 20-year period, in order to determine whether their life outcomes could be traced back to differences in teacher quality. (RT 1093:8-1094:2.) Using sophisticated statistical analyses of actual student data, Dr. Chetty was able to demonstrate remarkably consistent correlations between individual teachers and life outcomes, proving the undeniable and long-lasting impacts that teachers have on students' lives. (RT 1093:8-1094:2.) As Dr. Chetty explained: "Teacher effectiveness has a profound effect on students' long-term success as measured by a variety of indicators, such as probabilities of attending college, earnings, teenage pregnancy rates, the neighborhoods where children live as adults, and so forth. And so having a highly effective teacher significantly improves children's outcomes and having a highly infective teacher, conversely, does substantial harm." (RT 1202:22-1203:1.) Moreover, Dr. Chetty was able

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[3] Dr. Chetty is a professor of statistics and economics at Harvard University, the co-director of the Public Economics Group at the National Bureau of Economic Research, a member of the Panel of Economic Advisers for the Congressional Budget Office, and the recipient of the John Bates Clark Medal, an award that is given to the Best American Economist Under the Age of 40. (RT 1070:25-1076:26, 1087:2-12 [Chetty]; RA 212-216.) His work—including the study he discussed in this case—was quoted in two recent State of the Union addresses. (RT 1073:28-1074:21, 1090:18-22.)

to quantify the harms suffered by students who get stuck with a grossly ineffective teacher. Even a single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom—a figure that was unrebutted during trial. (RT 1246:5-12.)

- Dr. Thomas Kane, a Harvard education expert who recently concluded a four-year study called the "Measures of Effective Teaching" ("MET") Project, on behalf of the Bill and Melinda Gates Foundation.[4] In this study, Dr. Kane found that it is unequivocally "possible to implement systematic and replicable measures of teacher effectiveness." (RT 2639:27-2642:1, 2644:18-2645:27.) In fact, the MET Project was able to identify effective and ineffective teachers in a variety of ways, including "by combining evidence" of "student achievement gains" with classroom observations and student surveys. (RT 2712:6-12, 2716:19-10.) And when Dr. Kane conducted a statistical analysis of LAUSD—using *actual* data from students and teachers in that district—he found that the disparity in teacher effectiveness in LAUSD is nearly twice as large as every other district he has studied, the result of many years of being stuck under the rule of the Challenged Statutes. (RT 2712:22-2713:4, 2767:15-2768:6, 2771:12-2772:13, 2777:26-2781:1.) Students in LAUSD who are unlucky enough to be in a classroom with a bottom 5% teacher for a single year lose

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[4] Dr. Kane is the Faculty Director for the Center for Education Policy Research at Harvard University, an organization that works with school districts and state agencies to perform quantitative analyses related to public policy questions. (RT 2636:28-2637:10 [Kane].) Previously, Dr. Kane served as a Senior Economist for Labor, Education, and Welfare in President Clinton's Council of Economic Advisors and as the Deputy Director for Research and Data Issues for the Bill and Melinda Gates Foundation. (RT 2638:11-2639:26 [Kane]; RA 243-253.)

between *9 and 12 months* of learning compared to students with average teachers. (RT 2761:8-2768:6, 2770:6-2771:20.)

- Superintendents from across the State, who explained that they use a variety of techniques to determine whether a teacher's students are *actually* learning—from standardized test scores to other types of data and artifacts of student work. (RT 2020:28-2021:4 [Raymond] [objective ways to measure a teacher's impact on student learning include "looking at student work through the use of rubrics, looking at assessment data, both formative and summative assessment data"]; 488:20-489:3, 487:10-16 [Deasy] [LAUSD uses "myriad []sources to make judgments on a teacher's overall effectiveness," including an "algorithm [that] measures student learning gains" and accounts for "other factors so that those students' learning gains . . . can be attributed to the teacher."].) In fact, not a *single* school administrator who testified in this case, on either side, expressed that they have any difficulty identifying their best and worst tenured teachers, given enough time and information.[5]

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[5] There was much discussion at trial about *how* to measure teacher effectiveness, including substantial evidence about standardized test scores and the "value-added methodology" ("VAM") that some of Plaintiffs' experts used in their studies. VAM is a statistical tool designed to quantify how much a given teacher contributes to her students' learning, by comparing how well a teacher's students actually perform on tests relative to how they are expected to perform in light of various control characteristics (*e.g.*, race, parental income, performance on prior tests, etc.). (RT 1110:13-1115:23 [Chetty].) As numerous witnesses explained, VAM is predictable, reliable, and accurate—"as good as a gold-standard scientific experiment." (RT 1121:20-27 [Chetty]; see also RT 9521:22-9525:27 [Hanushek]; 2764:8-2765:13 [Kane].) Indeed, the experts testifying for State Defendants and Intervenors agreed with Plaintiffs' experts that VAM is a useful component for measuring a teacher's effectiveness, even though it (like any other metric) is imperfect. (RT 6229:4-9 [Rothstein] ["Value

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There was also widespread consensus among the witnesses on both sides that "[g]rossly ineffective teachers harm students." (RT 4574:27–4575:4 [Johnson]; 6133:12-6133:20 [Rothstein]; 8375:1-16 [Berliner]; 9085:14-9086:2 [Darling-Hammond]; 621:17-20 [Deasy]; 1221:24–1222:6 [Chetty]; 2958:14-2959:15 [Moss].)[6] The CDE's own documents

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added studies allow us to put a number on things that are not inherently numeric."]; 9099:2-10 [Darling-Hammond] ["One indicator of whether a given teacher is effective is the accomplishment of his or her students, including how well they do on tests."]; 4578:8-18 [Johnson] ["Student test scores should be used in assessing teacher effectiveness to confirm other means of assessing a teacher's performance."].) The experts who testified for State Defendants and Intervenors even use value-added modeling and standardized test scores in their own work to measure teacher effectiveness. (RT 8474:17-8475:18 [Berliner]; 6228:18-6229:3 [Rothstein].) But the subject of *how* to measure teacher effectiveness need not give this Court much pause; suffice it to say, there are many ways to do it, and Plaintiffs have never contended that VAM must be used when making employment decisions.

[6] Appellants contend that the trial court never defined the term "grossly ineffective" and profess to be unclear as to its meaning. (IB at p. 51; SB at p. 44 fn. 14.) But Appellants' own counsel and witnesses used that term at trial without any difficulty. (See, e.g., RT 5643:16-5645:10 [Fraisse] 6221:10-6222:15 [Rothstein]; 7134:14-21 [Seymour]; 1287:5-13 [Appellants' counsel].) Indeed, every witness at trial agreed that a grossly ineffective teacher is someone whose students consistently fail to *learn* the academic materials they are supposed to learn. (See, e.g., RT 602:9-13 [Deasy]; 2409:5-14 [Douglas]; 1388:1-3 [Adam]; 7435:1-4 [S. Brown]; 4455:23-4456:24 [Johnson]; see also AA 7299 ["All sides also agree that grossly ineffective teachers substantially undermine the ability of that child to succeed in school."]; AA 4773 [CDE Report] ["[T]here can be no honest assessment of a teacher's performance without considering what students have learned."]; Section 44662, subds. (a), (b) [requiring California teachers to be evaluated, in part, based on their students' academic progress]; Final Priorities, Requirements, Definitions, and Selection Criteria; Race to the Top – District, 78 Fed. Reg. 47,980, 47,996 (Aug. 6, 2013) [defining teacher

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acknowledge that "[s]tudents who are assigned to a succession of ineffective teachers have significantly lower achievement and gains in achievement than do those who are assigned to a succession of highly effective teachers," (AA 4696 [CDE Publication]), and agree that the "difference between an effective and non-effective teacher can be one full level of achievement in a single school year." (AA 4665 [CDE Presentation].)

Over the course of the trial, Defendants and Intervenors introduced evidence about factors *other* than teachers—including out-of-school factors like poverty and safety—that also affect student achievement. But the evidence, including testimony from witnesses on both sides, showed that the existence of other factors that might affect student achievement, which Plaintiffs do not dispute, does not diminish the importance of *teachers*. (RT 4573:12-18 [Johnson] [agreeing "that teachers are the most important school level factor affecting student learning"].) As former Oakland superintendent Dr. Anthony Smith explained, "every one of our kids deserves and needs an effective teacher, and every kid in California does. There are conditions outside of schools that make it more or less difficult . . . [but] life and experience inside the school has to be first, foremost, and always about the exchange between the teacher and the student and creating the conditions for an effective teacher to be working deeply with children. That's our job." (RT 9714:17-9715:6 [Smith]; see also RT 7461:14-17 [S.

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> (e.g., at least one grade level in an academic year) of student growth]"].) Even in their Opening Briefs, Appellants' use of the term makes plain that they understand its meaning. (SB at p. 56 ["The trial court was obviously concerned about . . . grossly ineffective teachers . . . .' Surely everyone shares that concern."].)

Brown] [challenges faced by high-risk kids outside of school and ineffective teachers in school are "separate issues"].)[7]

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

Because access to effective teachers is so critical to a student's education, the Superior Court concluded that the Challenged Statutes—which ensure that *some* students in California will *not* have access to even minimally effective teachers—have a "real and appreciable impact" on students' fundamental right to equal educational opportunity, and therefore that strict scrutiny applies. (AA 7300.)

1. The Permanent Employment Statute

The Permanent Employment Statute requires school districts to notify teachers whether they will be reelected to permanent teaching positions by March 15th of the teachers' second probationary year (§ 44929.21(b)), giving administrators only 16 months to make a tenure decision. (See *supra* at p. 3.) But the overwhelming evidence at trial proved that 16 months is an insufficient amount of time for administrators to make well-informed tenure decisions because of the limited amount of

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[7] Appellants also introduced evidence about the teacher credentialing process, including evidence showing that, over the past several years, there has been an increase in the percentage of teachers in California who satisfy the "Highly Qualified Teacher" credentialing requirements prescribed by the federal "No Child Left Behind" legislation—evidence that would be relevant only if credentialing equated to effectiveness. But any such argument was belied by Appellants' own witnesses, including the chairwoman of the California Commission on Teacher Credentialing ("CTC"), who admitted that holding a teaching credential "does not guarantee that a teacher will be effective." (RT 9106:11-14 [Darling-Hammond]; see also RT 8760:24-27 [Futernick]; 8617:24-8618:1 [Nichols].)

classroom evaluation data, student and parent input, and student achievement data that can be collected over such a short period. The net result is that ineffective and grossly ineffective teachers earn tenure every year in California, even though a longer probationary period would alleviate the problem. (See, e.g., RT 2030:6-25 [Raymond] [Permanent Employment Statute causes Sacramento City to grant tenure to grossly ineffective teachers]; 1061:14-28 [Deasy] [Permanent Employment Statute adversely impacts the quality of LAUSD's teacher pool].)

Those findings were supported by abundant testimony from Plaintiffs' witnesses and documents, including:

- Various district administrators, such as Mark Douglas from the Fullerton school district, who explained that 16 months "is not a sufficient enough time to grant a teacher tenure . . . . It can be as much as a *crapshoot* . . . whether that [teacher] is going to develop into the person you want." (RT 2428:9-27, 2432:2-4 [Douglas] [italics added].) Superintendent Deasy from LAUSD similarly proclaimed "[t]here is no way that [16 months] is a sufficient amount of time to make . . . that incredibly important judgment." (RT 504:12-505:2; see also RT 9694:17-9695:15 [Smith] ["There is just no way to collect enough information about the effectiveness of those teachers."]; 1408:12-1409:3 [Adam]; 2311:16-2313:13 [Kappenhagen].)

- Expert witnesses like Dr. Kane, who explained the enormous benefits of having even "one . . . additional year[] of student achievement" data before making a tenure decision. (RT 2753:17-2754:26.) Dr. Chetty went even further, *quantifying* the benefit to students of waiting until after a probationary teacher's third year before making a tenure decision: "The amount that students learn and the gain they would achieve . . . would be $163,000 larger if you were to use 3 years of data to estimate teacher effectiveness instead of 16 months." (RT 1254:25-1260:18.)

- A request, submitted jointly by the San Jose Unified School District and the San Jose Teachers' Association in the midst of this trial, asking the State Board of Education "to enable . . . the granting of a third year of probationary status as deemed necessary." (AA 6797.) This request shows that even local teachers' unions recognize that 16 months is insufficient to evaluate probationary teachers accurately.

State Defendants and Intervenors' own witnesses and documents further confirmed that the current 16-month probationary period is too short for school administrators to make accurate decisions. The CDE publication "Greatness By Design" explains that "districts are forced to make decisions about the granting of tenure . . . while candidates are still receiving support" from their new teacher training program (the "induction" program), which lasts two full years, and that "a decision about permanent employment should occur *after* the completion of the [two-year] induction program." (AA 4814, 4819.) CTC employee Terri Clark confirmed the absurdity of the current system, acknowledging that teachers can actually "receive notice that they are being reelected to a tenured teaching position and then subsequently fail to successfully complete the induction program" necessary to obtain a clear credential. (RT 7344:11-16.) And CDE employee Lynda Nichols corroborated that point, stating her view that a teacher "should have the full two-year benefit of induction" prior to the date by which a tenure decision must be made. (RT 8618:23-8620:19.)

Finally, *two* expert witnesses called to the stand by State Defendants and Intervenors *both* expressed their view that the probationary period should be three to five years long in order to benefit both students and teachers. (RT 6145:24-6146:23 [Rothstein] [describing the "optimal amount of time" as three to five years]; 8486:16-26 [Berliner] [agreeing that "a probationary period of three or even five years would be better than two years to make the tenure decision"].)

In defense of the Permanent Employment Statute, State Defendants and Intervenors argued that there are ways for district administrators to work within the 16-month time period, pointing to examples of so-called "well managed districts" whose administrators believe they are able to cope with the existing time limits. But as the evidence showed, however well any particular district administrator thinks he can perform within the constraints of the existing statute, *all* districts would make even better decisions with more time and more information. (RT 2753:17-2754:26 [Kane] ["[I]t becomes easier to see who the effective and the ineffective teachers are as time passes."]); 1254:25-1255:25 [Chetty] ["If you only restrict yourself to effectively using one year of test score classroom observation data . . . you are going to get significantly less reliable estimates than if you have more data . . . ."]; see also RT 2313:6-2314:12 [Kappenhagen] [the Permanent Employment Statute causes "mistakes [] in granting tenure" that could be avoided with "more time"].)[8]

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

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[8] State Defendants and Intervenors also pointed to the fact that some of Plaintiffs' districts, including LAUSD and Oakland, had recently implemented "affirmative" tenure processes whereby administrators take a more active role in deciding which teachers obtain permanent status. (SB at p. 21, IB at p. 46.) But the evidence showed that this is merely a strategy districts employ to do the best they can *within* the confines of the existing statute; it does not change the fact that districts could make far better decisions *without* the confines of the existing statute. Indeed, Dr. Deasy testified that LAUSD's switch to an affirmative tenure process has not "enabled [the district] to avoid granting tenure to any teachers whose performance makes them grossly effective." (RT 936:15-937:7.)

- Some of State Defendants' and Intervenors' school-district witnesses, for example, explained that they simply deny tenure whenever they have doubts about a teacher's effectiveness. But the evidence showed that school administrators have doubts (or *should* have doubts) about *most* teachers after only 16 months. As Oakland principal Larissa Adam explained, "I still have doubts about almost all of my second-year teachers because they are still very much in the steep learning part of the curve and it always feels like a big risk." (RT 1408:12-1409:3; see also RT 755:19-24 [Deasy] ["[Y]ou don't make such a weighty decision on either a single piece of evidence or just a doubt. You need evidence and you need to be able to show that there is a track record of improvement . . . . [T]he statute provides [a] ridiculously short period of time to do that in."].)

- Other witnesses for State Defendants and Intervenors bragged about their hiring practices, claiming that they can predict at the time of hiring which teachers will be effective in the classroom. But as Dr. Kane explained, "it is very hard to know who the effective and ineffective teachers are going to be at the moment that you recruit them . . . . [H]uge differences . . . emerge later." (RT 2720:12-19, 6140:12-6140:26 [Rothstein] [admitting that hiring criteria are "weak[ly] correlated" with effectiveness].) In fact, several witnesses for Appellants testified that teachers do not reach their stride until they have been teaching for *at least* three years. (See RT 4565:6-7 [Johnson] [discussing the literature showing that teachers "plateau in years four, five six, or seven."].)

- Some administrators—particularly those from small districts like El Monte, RT 7116:3-7 [Seymour] [El Monte School District hires, on average, less than five probationary teachers each year]—testified that principals can make well-informed decisions in 16 months if they simply devote more of their time to observing and evaluating probationary teachers. But for larger districts, this is an impractical solution that ignores

the many other responsibilities that principals must juggle. (RT 2431:4-5 [Douglas] ["[P]rincipals have multiple tasks that they're doing."]; 2027:12-14 [Raymond] ["[A] site administrator [can] put their time and their effort in only so many places."]; 1408:12-1409:3 [Adam]; 9694:16-9695:15 [Smith]; see also RT 9063:12-9065:6 [Darling-Hammond] [Principals especially in large schools, rarely have sufficient time . . . for the job of evaluation . . . ."].) Moreover, even *constant* observations over a 16-month period cannot compensate for the lack of student achievement data—data that Appellants' so-called "well-managed" districts ignore when making tenure decisions. (RT 7459:20-24 [S. Brown] [San Juan does not look at student test scores in making tenure decisions]; 6956:15-23 [Mills] [Riverside does not look at student test scores in making tenure decisions].)

Finally, Appellants argued that, at a minimum, *grossly* ineffective teachers can be identified within the probationary period because they are immediately obvious to administrators. Of course, Plaintiffs never disputed that *certain* grossly ineffective teachers will have patent deficiencies that are easily detected. But there are also grossly ineffective teachers—teachers who are simply unable, for whatever reason, to achieve student learning gains—who cannot be identified until sufficient time has passed and sufficient student learning data has been gathered. Sixteen months provides neither. (RT 1255:14-28 [Chetty] ["If you only restrict yourself to effectively using one year of . . . classroom observation data . . . you are going to get significantly less reliable estimates than if you have more data . . . [Y]ou are going to end up hurting students."]; 2104:20-2105:5 [Raymond] [many grossly ineffective teachers cannot be identified in the 16-month probationary period]; see also RT 2428:9-27 [Douglas]; 1408:12-1409:3 [Adam].)

2. The Dismissal Statutes

Overwhelming and undisputed evidence introduced at trial demonstrated that the statutory process to dismiss a single grossly ineffective teacher takes multiple years, costs hundreds of thousands (sometimes millions) of dollars, and even then, the CPC does not rule in favor of dismissal unless the district can show that the teacher in question is "incapable of remediation"—a nearly impossible evidentiary burden. (RT 1518:15-1519:24 [Christmas]; 4892:1-13 [Fekete].) As a result, districts in California rarely seek dismissal of grossly ineffective teachers—teachers they would seek to dismiss if the process took less time, cost less money, required less documentation, and had a higher likelihood of success. As explained by Plaintiffs' expert Frank Fekete, a lawyer with over 40 years of experience litigating teacher dismissal cases, "the procedural complexities, the time frame required within the statute, the resources of time, opportunity costs, and attorney's fees, and the evidentiary burden required, all result in districts being extremely reluctant . . . to use this process to fire grossly ineffective teachers." (RT 4880:10-15; 1533:2-16 [Christmas] [there are grossly ineffective teachers that Oakland does not seek to dismiss because "the bar is sufficiently high and the cost sufficiently large"]; 639:18-24 [Deasy] [the Dismissal Statutes do "not provide for the timely dismissal of teachers who are incompetent, who are unable to teach."]; see also 1397:9-26 [Adam] ["I viewed [dismissal] as not a realistic option."].)

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

Time: Vivian Ekchian, the former chief human resources officer for LAUSD, testified that, to her knowledge, LAUSD has *never* completed a performance-based teacher dismissal hearing in less than two years. (RT 9242:11-9243:2.) Some dismissal cases "have taken slightly less than *ten years*." (RT 530:20-23 [Deasy] [italics added]; see also RT 1525:11-27

[Christmas] [in Oakland, the average time to dismiss a tenured teacher for poor performance is "three, four years"]; 2032:7-2033:5 [Raymond] [in Sacramento, dismissal took "over four years"].) Examples of actual dismissal cases—both from Plaintiffs' districts *and* the so-called "well-managed" districts touted by State Defendants and Intervenors—corroborated this testimony. (AA 3906-3929 [dismissal of LAUSD teacher took more than 3 years]; AA 3832-3848 [dismissal of LAUSD teacher took 10 years]; AA 3051-3091 [dismissal of Riverside teacher took 4 years]; AA 3665-3678 [dismissal of Long Beach teacher took 3 years].) Indeed, State Defendants and Intervenors did not present evidence of a *single* dismissal case litigated through a CPC hearing that took less than 2 years. During that time, grossly ineffective teachers remain in the classroom harming students (and receiving their full salary). (RT 615:10-16 [Deasy]; 2102:24-2103:8 [Raymond].)[9]

- Cost: Plaintiffs' school-administrator witnesses provided remarkably consistent estimates of the exorbitant cost of dismissing a grossly ineffective tenured teacher, ranging from $50,000 to $450,000 per

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[9] In their Opening Brief, Intervenors contend that a dismissal can be completed in a "relatively short amount of time" because, according to Intervenors, dismissal cases that go to a CPC hearing take an average of 310 days to resolve, measured from the date the district files its statement of charges. (IB at p. 18.) But 310 days is anything *but* a "short amount of time." And Intervenors' calculation ignores that the CPC's evidentiary requirements force districts to spend *years* building a dismissal case before they can issue a notice of unsatisfactory performance, let alone file a statement of charges (the starting point for Intervenors' calculation). (See RT 2102:24-2103:8 [Raymond] [building record "takes months and months and months, sometimes years."]; 2341:25-2342:26 [Kappenhagen] ["Simply getting the process started takes two years."]; 2420:27-2421:21 [Douglas].)

teacher. (See RT 542:6-28 [Deasy] [$250,000 to $450,000][10]; 1528:18-1529:1 [Christmas] [$50,000 to $400,000]; 2417:26-2418:15 [Douglas] [approximately $250,000]; 2032:7-2033:5 [Raymond] [approximately $110,000].) And Frank Fekete, who has litigated numerous dismissal actions across California, corroborated these estimates. (RT 4904:7-4905:2.) Not a *single* witness for the State Defendants or Intervenors provided evidence of a *single* dismissal case, litigated through a CPC hearing, whose cost was inconsistent with these estimates. Moreover, by the terms of the Dismissal Statutes, districts that litigate the dismissal of a grossly ineffective teacher through a CPC hearing and are unsuccessful for *any* reason must pay the teacher's attorneys' fees, which can more than double the cost of the effort. (Section 44944(e)(2); see also RT 4892:1-13 [Fekete]; 1528:18-26 [Christmas].)[11]

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[10] Intervenors claim Dr. Deasy's testimony showed that the cost of dismissal "did not deter" LAUSD and other districts "from pursuing a teacher's dismissal when warranted." (IB at p. 18.) But Dr. Deasy testified repeatedly that the costs associated with the dismissal process unquestionably constrain LAUSD's ability to *actually* dismiss its grossly ineffective teachers, regardless of whether Dr. Deasy recommends that the LAUSD board "initiate" such dismissals. (RT 545:7-14 [explaining that not all dismissal recommendations are pursued to completion]; 534:1-20 ["cost[s]" are "a real factor" in determining whether "the District is able to or willing to spend" through the dismissal process]; 534:25-535:10 [it is "unquestionab[le]" that the costs of the dismissal process, coupled with LAUSD's "finite" budget, makes it impossible for LAUSD to dismiss all of its grossly ineffective teachers].)

[11] Intervenors' contention that "Plaintiffs' cost evidence" comes from just "three . . . dismissal proceedings in two districts," (IB at p. 18), is flatly contradicted by the evidentiary record. (See, e.g., RT 4868:18-25 [Fekete] [testimony based on experience litigating a dozen dismissal cases in various districts, including 6 performance-based cases]; 1527:8-1528:9 [Christmas] [testimony based on multiple dismissal cases,

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- Evidentiary burden: The custom and practice of the CPC is to require districts to meet an "incapable of remediation" standard in order to dismiss a teacher, (RT 1518:15-1519:24 [Christmas]), meaning that districts must prove that "nothing more can possibly be done" to improve the teacher's performance. (RT 4892:1-13 [Fekete].) As a result, the CPC sometimes refuses to order dismissal even though the CPC decision contains "an acknowledgement of the poor performance of the teacher, acknowledgment of the ineffectiveness of the teaching, [and] an acknowledgement of efforts at remediation." (RT 1519:11-24 [Christmas].)[12] Moreover, for districts with teacher remediation programs known as Peer Assistance and Review ("PAR") programs, it has become a prerequisite to "demonstrate that the teacher in question has gone through the [year-long] PAR process not only one but . . . several times" to show they cannot be remediated. (RT 4893:7-16 [Fekete].) This adds to the time and cost of dismissal and also diminishes districts' likelihood of success: "We have kids who would have been great witnesses when we first identified ineffective teaching who are no longer with us. They have

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including 1 for unsatisfactory performance]; 2413:9-2420:26 [Douglas] [testimony based on 3 performance-based dismissals]; 9217:23-9220:8 [Ekchian] [testimony based on issuance of 85 statements of charges for unsatisfactory performance over previous five years, five of which proceeded to CPC hearings].)

[12] To give one example, the CPC refused to authorize the dismissal of an Oakland teacher after a *six-year* effort, even though it found that the teacher's "interactions with her colleagues and students were often difficult and problematic," that she "did not consistently create lesson plans," that she "did not implement assigned curricula," and that she "missed or refused to participate in meetings." (AA 2114-2131.)

graduated. They have left. They have moved from the district. That is true of teachers. That is true of administrators." (RT 1526:10-15 [Christmas].)

Ultimately, the numbers speak for themselves: only 2.2 teachers are dismissed on average, each year, for unsatisfactory performance in the *entire* state of California—only 0.0008% of the nearly 300,000 teachers statewide. (RT 4913:27-4914:23 [Fekete]; 8503:9-12 [Nichols].) This is especially distressing, given that there are at least 350 grossly ineffective teachers in LAUSD *alone* that the district believes should be dismissed immediately. (RT 9239:27-9240:4 [Ekchian][13]; see also RT 2409:28-2410:7 [Douglas] [Fullerton knows of more than 10 grossly ineffective teachers it would dismiss immediately]; 2109:14-2110:7 [Raymond] [Sacramento City knows of "at least two dozen"]; 9702:13-9703:12 [Smith].)

Again, State Defendants and Intervenors' own witnesses confirmed the problem. As expert witness Dr. Susan Moore Johnson testified, "[d]ismissals are extremely rare in most districts because administrators believe it is *impossible* to dismiss a tenured teacher." (RT 4589:18-21 [italics added]; see also RT 4589:8-17 [Johnson] [agreeing that "[d]ismissing teachers with tenure is ordinarily a very expensive and time-consuming process which very few districts . . . actively pursue]); 5794:23-

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[13] Intervenors argued at trial that 350 teachers is a small number in light of the fact that LAUSD has removed 786 teachers from classrooms over a recent four-year period. (RT 10025:17-28.) But that argument ignores two critical facts: (1) 350 teachers is not a small number—thousands of children are being harmed every year by those teachers, losing nearly $500 million in lifetime earnings annually. (RT 1221:26–1222:6 [Chetty].) (2) Of the 786 teachers that LAUSD removed, only *five* of them were dismissed through the dismissal process. (RT 9219:20-9220:8 [Ekchian].) The other 781 resigned or retired voluntarily. There is no evidence that *any* of the 350 grossly ineffective teachers identified by Ms. Ekchian are willing to leave voluntarily.

5795:3 [Fraisse] [agreeing that it should be "easier to fire bad teachers"]; 8461:14-20 [Berliner] ["support[s] the dismissal of bad teachers because bad teachers hurt children's life chances"]; 6524:15-19[Tuttle] [conceding that discovery propounded under the Dismissal Statutes is a "waste of money"].)

At trial, State Defendants and Intervenors attempted to defend the Dismissal Statutes *not* by arguing that they work, but by arguing that districts can employ a variety of "workarounds," including resignations and settlement agreements, to avoid having to use the dismissal process. But that very argument concedes the problem—*there would be no need to circumvent a process that works*. In addition, the argument fails because it is undisputed that some grossly ineffective teachers simply refuse to leave their jobs voluntarily. (See, e.g., RT 6527:17-24 [Tuttle] [agrees that "a dismissal hearing may be the only way a district can remove a poorly performing teacher who refuses to resign after failing to improve"]; 1524:27-1525:10 [Christmas] ["We might have a teacher who basically tells their counsel I'm not interested in settling, you know, we're going to go the whole way."]; 6965:19-6966:4 [Mills]; 5650:12-18 [Fraisse].) Moreover, even the workarounds are costly and time-consuming, leaving grossly ineffective teachers in classrooms with students for years. (See RT 9225:16-23 [Ekchian] [LAUSD paid more than $5 million in settlement payments over a 5-year period]; 6508:16-6509:2 [Tuttle] [settlements typically occur one month or less before CPC dismissal hearings—*after* many of the costs associated with teacher dismissal hearings have been incurred]; 2106:19-2107:2 [Raymond].) In fact, the evidence showed that the cost of settlement is driven up by the cost of the dismissal process because teachers know there is a very low likelihood they will be dismissed involuntarily. (RT 627:25-628:13 [Deasy]; 1998:6-7 [Christmas] ["The

longer the [dismissal] process is expected to be, the more [districts] will pay to avoid it."].)

Witnesses for State Defendants and Intervenors also spent a lot of time discussing PAR programs designed to improve teacher performance. Certainly, *all* districts—including districts represented by Plaintiffs' witnesses—endeavor to improve the performance of their struggling teachers. (See RT 622:18-623:3 [Deasy]; 1512:28-1514:7 [Christmas].) But it is undisputed that "even a well-run PAR program must contemplate that some poorly performing teachers may still have to be dismissed." (RT 4605:27-4606:3 [Johnson]; see also RT 5801:19-5802:5 [Fraisse] ["[S]ome teachers are unable to meet the requirements of their PAR Improvement Plans"]; 2903:6-2906:16 [Weaver]; 6963:24-6964:27 [Mills].) Further, even the PAR programs touted by State Defendants and Intervenors are highly expensive and limited in scope. In San Juan Unified School District, for example, an average of only two teachers per year (out of 2,000 certificated staff) complete the PAR program. (RT 7405:12-26, 7443:14-24 [S. Brown].) And in Hart Union High School District, *less* than two teachers per year (out of 1,000) do so. (RT 8798:12-23, 8821:12-25 [Webb].) Yet PAR programs cost districts between $250,000 and $2 million annually. (RT 4611:6-25 [Johnson].)

Finally, State Defendants and Intervenors fell back once again on their "well-managed school districts" argument, asserting that Plaintiffs' districts fail to use the Dismissal Statutes successfully because they are mismanaged. But there was no evidence that LAUSD, Oakland, Sacramento City, Fullerton, and the many other districts represented by Plaintiffs' witnesses were *all* mismanaged. And there was no dispute that even so-called "well-managed" districts still face enormous burdens when they *actually* need to utilize the dismissal process. (RT 4881:10-19 [Fekete] ["You have the same time frames. You have the same evidentiary

burdens. You have the same procedural hoops to jump through whether you are well managed or not."].)

3. The LIFO Statute

The LIFO Statute mandates that, with few exceptions, teacher layoffs necessitated by budgetary shortfalls, declining student enrollment, or changes in district curriculum must be implemented in order of reverse seniority—the last-hired teachers must be laid off first, regardless of how effective they are in the classroom. (See *supra* at pp. 15-16; see also *Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 854: ["When a certificated employee is to be laid off under section 44955, the District must terminate the employee with the least seniority."].)

As a result, when faced with layoffs, districts are once again forced to ignore the best interests of students. Plaintiffs' evidence at trial, which again was largely undisputed, proved that because teacher seniority is not an accurate indicator of teaching effectiveness,[14] the LIFO Statute forces districts to fire bright, enthusiastic, highly effective teachers (see, e.g., RT 2042:12-17 [Raymond]; 2436:12-2437:13 [Douglas]; 657:28-658:3 [Deasy]; 1813:12-16 [Christmas]), in favor of ineffective and grossly ineffective teachers with more seniority (see, e.g., RT 2107:8-12 [Raymond]; 2437:14-17 [Douglas]; 658:8-12 [Deasy]; 1813:17-1814:22

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[14] In their Opening Brief, Intervenors pretend there is a "uniform consensus that [teacher] experience correlates with effectiveness." (IB at p. 5.) But the evidence at trial demonstrated exactly the opposite. (See, e.g., RT 649:26-650:12 [Deasy] ["Seniority in the system is not reflective of a person's ability to teach effectively . . . . The fact that I have being driving for 25 years does not make me an effective driver."]; 2024:22-2025:2 [Raymond] ["[T]here is no correlation."]; 3718:21-3719:11 [Goldhaber] [there is "not a lot of overlap between an effectiveness-based layoff pool and the seniority-based layoff pool"].)

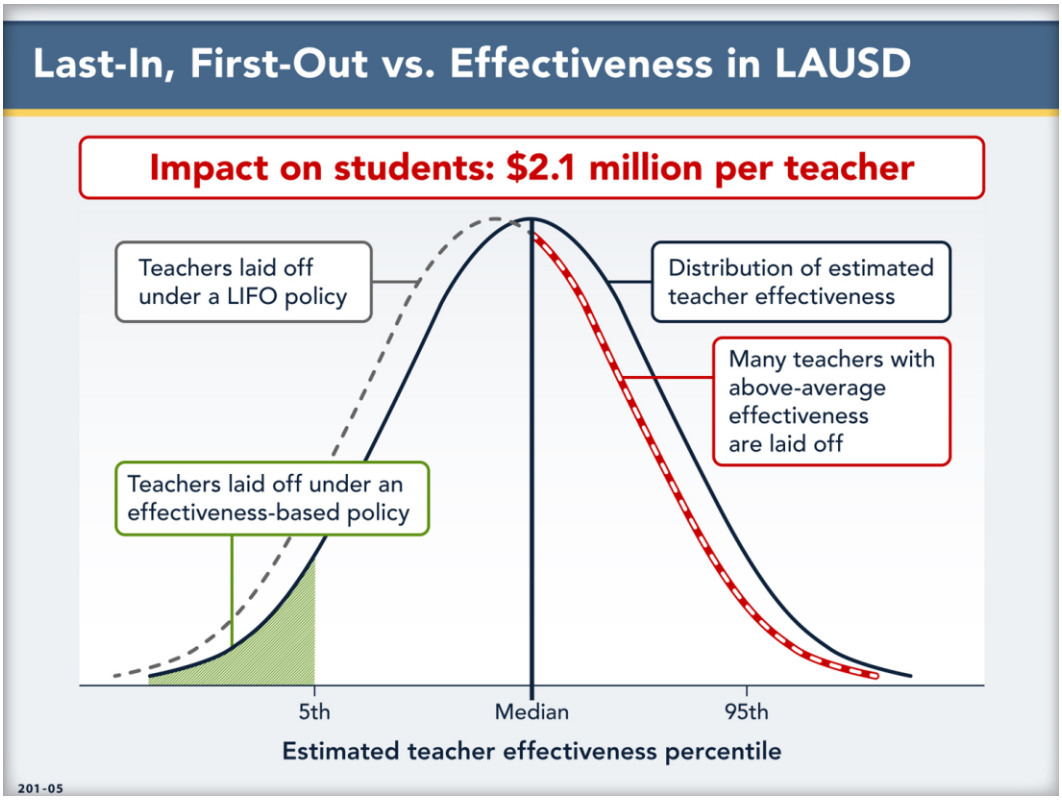
[Christmas]). It also dissuades high-achieving teachers from entering and remaining in the profession, compounding the harm to students. (See RT 2264:1-18 [Bhakta] ["[M]y love for [teaching], none of it mattered . . . all that mattered was my hire date."]; 2965:12-19 [Moss] ["I was extremely committed to my students, I loved my students, I was a leader on campus and none of this mattered."]; 3679:11-24 [Melvoin].)

A model of irrationality, the LIFO Statute means that teachers have been named "teacher of the year" and nevertheless laid off the same year. (RT 2160:11-15 [Bhakta] [Arcadia Unified School District teacher of the year]; see also RT 5824:28-5825:10, 5847:17-28 [McLaughlin] [Pasadena Unified School District teacher of the year received four layoff notices].) In the words of Sacramento City Superintendent Jonathan Raymond, "a system that treats its best teachers this way . . . [and] ultimately doesn't serve children . . . is broken." (RT 2045:12-15.)

The injuries sustained by students as a result of the LIFO Statute are significant and measurable. For example, Dr. Dan Goldhaber, a professor at the University of Washington, analyzed thousands of teacher layoff notices recently issued in hundreds of school districts on the basis of teacher seniority. (RT 3712:5-3713:23; RA 270-276.) From this study of actual student and teacher data, Dr. Goldhaber concluded that very few teachers who are laid off under a seniority-based layoff system would be laid off if teacher effectiveness were instead used to determine layoff order—there is just a 16 percent overlap. (RT 3718:20-3719:27.) In other words, 84 percent of teachers laid off under a seniority-based system are *more* effective than *all* the teachers who would be laid off under an effectiveness-based layoff system. (RT 3732:12-3733:15.)

Using actual student data for hundreds of thousands of LAUSD students, Dr. Chetty was able to quantify the harms that seniority-based teacher layoffs impose on students. (RT 1263:3-1265:23.) Based on this

analysis, Dr. Chetty testified that *48 percent* of the LAUSD teachers who are laid off under a seniority-based layoff system are actually more effective than the *average* LAUSD teacher, and a substantial number of teachers who are laid off are above the *95th percentile* in terms of effectiveness. (RT 1268:6-22.)



(RA 242.)

As a result, seniority-based teacher layoffs—compared to effectiveness-based layoffs—impose severe harms on students, reducing student test scores by *11 percent* and diminishing lifetime student earnings by *$2.1 million* per teacher, per classroom. (RT 1263:3-9, 1272:19-1273:4 [Chetty] [LIFO layoffs "impede[] student learning . . . [and have] measurable important long-term impacts on students in terms of earnings, as well as college attendance rates and myriad other outcomes"].)

The CDE even recognizes the severe damage being caused by the LIFO Statute, calling "extensive layoffs of excellent teachers who may be

lost to the profession" "a significant state problem." (AA 4784.) And defense expert Dr. Berliner acknowledged that he would "always" prefer to use a "better instrument" for conducting layoffs than the LIFO policy—"the better the instrument to use to make decisions about a teachers' competence, the better off everyone is." (RT 8466:1-17.)

State Defendants and Intervenors proffered several irrational and unsupported arguments in defense of the LIFO Statute:

- First, they argued that the LIFO system is justifiable because, they contended, the *average* teacher laid off under a seniority-based layoff system is slightly less effective than the *average* teacher employed in any given district. (IB at p. 20; SB at p. 29..) But even if that were correct, it would not make the LIFO Statute defensible because it assumes that the only alternative to a seniority-based system is *random selection*—a system that *no one* would defend as rational. (See RT 8040:7-17 [Tolladay].) As Dr. Goldhaber explained, "[t]he right question is how effective are the teachers laid off under one criterion"—seniority—"versus a different criterion," such as teacher effectiveness. (RT 3852:12-14.)

- Second, they argued that taking teacher effectiveness into account when conducting layoffs would destroy collaboration among teachers, allegedly harming students. (RT 8029:8-12 [Tolladay] ["I'[d] [be] afraid to give away my secrets, my special super-secret teaching techniques, because my colleagues then might get better than me, and I might lose my job."].) But there was no credible evidence that effective teachers would stop doing what is best for students merely because of a concern that they might, in the event of a layoff, be found to be less effective than their peers and laid off. Indeed, the evidence showed that districts *want* teachers who collaborate with their colleagues. (RT 9709:23-9710:6 [Smith] ["[T]he kind of learning engagement that effective teachers

are doing is about . . . sharing the work, lessons, the activity; they're competing against outcome," not each other].)

- Third, they argued that districts can use the skipping criteria under LIFO Statute subsection (d)(1) to avoid laying off some effective teachers. But it is undisputed that subsection (d)(1) permits districts to skip teachers *only* on the basis of training and credential, *not* effectiveness. (See, e.g., RT 660:1-662:11 [Deasy]; 2042:28-2043:19 [Raymond].) And the defense's own witnesses, including the chairwoman of the California Commission on Teacher Credentialing ("CTC"), admitted that holding a teaching credential "does not guarantee that a teacher will be effective." (RT 9106:11-14 [Darling-Hammond]; see also RT 8760:10-8761:17 [Futernick] ["Credentials don't guarantee that someone will be effective [any] more than a license to practice law or practice medicine guarantees that one will be an effective lawyer or physician"]; 8617:24-8618:1 [Nichols].) Thus, any ability to save *some* effective teachers using (d)(1) would be mere fortuity; that subsection is certainly not a "credible alternative[]" for districts to save *all* of their effective teachers, or release only their ineffective teachers, during a layoff. (RT 4169:16-28 [Ramanathan].) In fact, when districts have attempted to use subsection (d)(1) to save effective teachers from layoffs, their efforts have repeatedly been rejected. (See RT 4027:4-4033:10 [Ramanathan] [discussing failed efforts in Sacramento and San Francisco].)

- Fourth, they argued that districts can use LIFO Statute subsection (d)(2) to avoid laying off some effective teachers in the name of students' equal protection rights. But subsection (d)(2) is so ambiguous that districts cannot—and do not—assume the risk of invoking it. (See RT 8626:6-8627:15 [Nichols].) Indeed, when LAUSD attempted to be the first district to invoke subsection (d)(2), it was mired in years of litigation—and its efforts were ultimately rejected by the Court of Appeal. (*Reed*, *supra*,

208 Cal.App.4th at p. 338.) Moreover, United Teachers Los Angeles, an affiliate of the California Teachers Association, argued in *Reed* that "subsection (d)(2) . . . was intended to permit school districts to accommodate constitutional concerns regarding the race and ethnicity of *teachers*, not . . . students." (RRJN, Ex. C.) Such a hopelessly ambiguous provision cannot save the LIFO Statute from constitutional challenge.[15]

- Fifth, they argued that "well-managed" districts can sometimes avoid layoffs. But officials from the districts touted by Defendants and Intervenors admitted they have been forced to conduct layoffs. (RT 6669:27-6671:15 [Barrera]; 6969:14-6970:5 [Mills]; 7048:7-7049:5 [D. Brown].)

- Finally, they argued early in the trial that layoffs may not occur again in the future, suggesting that Plaintiffs' claims may not be ripe. But later in the trial, CDE employee Jeannie Oropeza admitted that "layoff notices [had] been announced in certain California school districts" for the upcoming school year. (RT 8070:14-17 [Oropeza]; see also RT 4038:17-27 [Ramanathan] [future layoffs are "extremely likely" because of "demographic trends"].) And even more districts, including LAUSD, have announced teacher layoffs during the 2014-2015 school year. (RRJN, Exs. K, L.)

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[15] *Mendoza v. State of Cal.* (2007) 149 Cal.App.4th 1034, 1058 ["[T]he *substance* of the [challenged statute] must be evaluated on its merits, quite apart from any legislative declaration designed to address expressed constitutional concerns."]; *Hunt v. City of L.A.* (C.D. Cal. 2009) 601 F.Supp.2d 1158, 1171 ["[T]he use of part of a legal standard [in a statute] does not, in and of itself, exempt a statute" from constitutional review]; *Nat. People's Action v. City of Blue Island* (N.D. Ill. 1984) 594 F.Supp. 72, 79-80 ["[T]he Constitution does not, in and of itself, provide a bright enough line to guide primary conduct . . . ."] [italics altered] [citation omitted].)

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

At trial, Plaintiffs argued that the Challenged Statutes should be examined under the strict scrutiny standard for the *additional* reason that the harms they impose are magnified for the most vulnerable students—minority and low-income children most in need of the opportunities that education is meant to provide. Plaintiffs' evidence documented at least three ways in which the Challenged Statutes impose disproportionate harm on poor and minority students.

First, the evidence proved that the Challenged Statutes lead to a pernicious and well-documented phenomenon known colloquially as the "Dance of the Lemons." (See AA 7307.) Because dismissal is not a viable option for districts, principals seeking to improve the teaching staff at their own schools are forced to try to transfer ineffective teachers to other schools within the district. (See, e.g., RT 2444:11-25 [Douglas]; see also RT 7134:5-13 [Seymour] [describing the Dance of the Lemons as "simply moving people around"].) Unfortunately, the schools that bear the brunt of these transfers are schools serving predominantly low-income and minority students, for two reasons: (1) Those schools typically have more vacancies to fill, in part because of the LIFO Statute (see *infra* at pp. 47, 52). (See RT 2783:24-2785:19 [Kane] ["[L]ess-effective teachers tend to be shifted into those schools where there are more vacancies. And those are the schools where there are disproportionate numbers of African-American and Latino students."].) (2) Students at those schools typically have "families who aren't used to the education system . . . . don't know what to look for in a great teacher . . . [and] won't complain." (RT 2440:9-28, 2445:1-14 [Douglas].)

Fullerton School District Assistant Superintendent Mark Douglas, for example, testified that principals "use [the] dance of the lemons" to

"mov[e] people of less skill, poor performance" to predominately low-income and minority schools.[16] (RT 2443:20-2444-25, 2447:21-2448:4 [Douglas].) Bill Kappenhagen explained that grossly ineffective teachers in San Francisco "get shuffled around from school to school to school," often ending up at schools serving high-poverty, high-minority communities. (RT 2294:18-2295:6, 2302:20-2303:20, 2334:9-2336:11 [Kappenhagen].) And principal Larissa Adam testified that low-income schools in Oakland's poorer "flat land" region have "more vacancies" than the district's more affluent schools, such that they receive a disproportionately high share of "very ineffective" teachers from the district's transfer list. (RT 1395:2-1396:2, 1409:20-1410:1413 [Adam].) In fact, even the CDE conceded, in a published report, that "transfers *often* function[] as a mechanism for teacher removal" and "poorly performing teachers generally are removed from high-income or higher-performing schools and placed in low-income and low-performing schools." (AA 4726 [italics added].)

Furthermore, many of Plaintiffs' witnesses tied the "Dance of the Lemons" directly to the Challenged Statutes at issue this case. Dr. Kane, for instance, testified that the Challenged Statutes "function like a lemon accumulation machine" in high-vacancy, high-minority schools because "districts have to make tenure[] decisions prematurely and . . . it is difficult to make dismissal decisions later." (RT 2784:10-26, 2852:2-20; see also *ibid.* ["[T]here is a mechanical relationship between premature tenure decisions, difficult dismissal decisions, and the accumulation of ineffective

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[16] State Defendants claim that the "Dance of the Lemons" occurred in Fullerton School District "in the past," but that the district has since "instituted policies to prevent the practice." (SB at p. 25.) However, when asked whether Fullerton's staffing policies have "remediated the problem of the Dance of the Lemons in Fullerton," Mr. Douglas said, "[n]o, I don't believe so." (RT 2448:6-10.)

teachers" in poor and minority schools.]; 2445:17-2446:25 [Douglas] [agreeing that the Dance of the Lemons is tied to the Dismissal Statutes]; 2333:11-2334:26 [Kappenhagen].) In a published report, the CDE *itself* admits that administrators "encourag[e] . . . poorly performing teacher[s] to transfer" to other schools because teacher dismissal proceedings have "a very limited likelihood of success" and transfer is therefore "the most practical course of action at the individual school level." (AA 4726.)

The unrebutted data that Plaintiffs presented at trial bears out this disastrous result for poor and minority students in California: Based on his comprehensive analysis of LAUSD's student and teacher data, Dr. Kane determined that African-American and Latino students in Los Angeles are 43 and 68 percent more likely, respectively, to be taught by teachers in the bottom 5 percent of effectiveness compared to white students. (RT 2760:17-2764:7; 2779:20-27; RA 269.) Dr. Arun Ramanathan likewise testified that low-income LAUSD students are twice as likely as non-low-income students to be taught by a grossly ineffective teacher. (RT 3967:27-3970:26; see also RT 2449:1-6 [Douglas] [80% of grossly ineffective teachers of which he was aware in Fullerton taught in low-income schools].)

In fact, Appellants' evidence once again confirmed that this injustice is occurring in districts across California. A report published by the CDE, for instance, concluded that "the most vulnerable students—those attending high-poverty, low-performing schools—are far more likely than their wealthier peers to attend schools having a disproportionate number of ineffective teachers."[17] (AA 4685.) Appellants' expert witnesses and

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[17] In their Opening Briefs, Appellants try to disclaim this report by stating that they tried to introduce testimony that, if admitted, would have proven that the State "successful[ly] . . . fix[ed] [the] problems"

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"Person Most Knowledgeable" witness acknowledged this as well, explaining that "low-income students have a disproportionate number of ineffective teachers compared to high-income students," (RT 4597:18-23 [Johnson]), and that "effective teachers are the most unequally distributed educational resource." (RT 9109:12-18 [Darling-Hammond]; see also RT 8629:24–8630:5 [Nichols].)

Second, the evidence demonstrated that poor and minority students are more vulnerable to the damages inflicted by grossly ineffective teachers. The evidence at trial was undisputed that there are substantial achievement gaps in California between white students and African American and Latino students, (RT 3991:4-3995:9 [Ramanathan]), and between low-income students and their more affluent peers, (RT 3954:2-3955:21 [Ramanathan], 9511:16-20 [Hanushek]). And while Plaintiffs have never contended that the Challenged Statutes *initiated* the achievement gap, the Challenged Statutes exacerbate this gap. (See RT 2780:24-2781:27 [Kane].)

San Francisco principal Bill Kappenhagen, for example, 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 "lower income families' students don't have the available resources that other or more affluent families have [and] don't have an opportunity to be nearly as

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described in the report. (See IB at p. 71 fn. 41.) However, the testimony that Appellants sought to offer concerned California's efforts to comply with the "Highly Qualified Teacher" requirements prescribed by the federal "No Child Left Behind Act." (RT 8523:2-8524:6 [Nichols].) These federal credentialing mandates have nothing to do with a teacher's *effectiveness*, as State Defendants' "Person Most Knowledgeable" readily admitted. (AA 1467, 1520-1521, 1530; see also RT 8617:24-8618:1 [Nichols]; 9106:11-14 [Darling-Hammond].)

resilient when they have an ineffective teacher, especially when they have a grossly ineffective teacher." (RT 2306:4-14.) Oakland principal Kareem Weaver provided similar testimony: "There is a margin-of-error issue with students with low-income, lots of risk factors . . . . I liken it to standing on a razor's edge . . . . [F]or many students, especially kids of color . . . education can either prop them up or it can blow them down." (RT 2921:2-15; see also RT 1389:6-25 [Adam] ["[W]e are in an impoverished community . . . . [F]or the kids who [get] an ineffective teacher, there is no . . . way for them to gain [academic] skills" that are available to affluent students outside of school].).

Third, the evidence showed that schools serving poor and minority communities "tend to have high[er] proportions of inexperienced teachers" with lower seniority levels. (RT 4594:2-10 [Johnson]; see also AA 4685 [explaining that poor and minority students are disproportionately assigned to inexperienced teachers]; AA 4792 ["[S]ome California districts serving low-income students of color have as many as 50 percent of their teachers both inexperienced and uncertified"].) Thus, because the LIFO Statute forces districts to lay off teachers in order of reverse seniority, layoffs (and layoff notices[18]) are heavily concentrated in schools serving predominantly poor and minority students. (See RT 3716:9-23 [Goldhaber]; 1278:3-1279:16 [Chetty] ["[A] LIFO policy . . . effectively lays off a lot more teachers in high-minority schools relative to schools that . . . are in more

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[18] Even when layoff notices do not ultimately lead to layoffs, they have a significant destabilizing effect on a school. (RT 4020:16-4021:13 [Ramanathan] [layoff notices are "tremendously destabilizing"]; 2625:23-2626:8 [Douglas] [layoff notices are a "morale issue . . . constantly remind[ing teachers] they're . . . walking on eggshells"]; 1404:5-26 [Adam] [layoff notices had a "very negative impact on [the] entire school community"]; 2264:3-18 [Bhakta].)

affluent areas or have fewer numbers of minority students."]; 8469:17-20 [Berliner].)

For example, Dr. Arun Ramanathan, Executive Director of the Education Trust—West, analyzed real-life teacher layoff data obtained from multiple large school districts in California, including (but not limited to) LAUSD and San Francisco, and concluded that schools in the highest quartile of poverty are *65%* more likely than other schools to have a teacher laid off under the LIFO Statute. (RT 3864:17-3866:7, 3952:27-3954, 3963:27-3965:15, 3967:12-18, 4101:21-4102:16; RA 288-292.) Dr. Dan Goldhaber also analyzed thousands of teacher layoff notices issued on the basis of seniority, and found that "African-American students were disproportionately likely to have their teachers receive a [RIF] notice" relative to other students. (RT 3712:5-3716:23.) And *both* Dr. Ramanathan and Dr. Goldhaber testified about the results of a study that examined teacher layoffs in the 15 largest school districts in California—a study confirming that high-minority and high-poverty schools in these districts experience *60%* and *25%* more teacher layoffs, respectively, than schools with lower percentages of minority and poor students. (RT 3729:27-3732:11, 4022:9-23; see also 1400:12-1401:1 [Adam] [testifying that 90% of teachers in some low-income schools in Oakland have received layoff notices compared to only 10% of teachers in more affluent schools]; RA 280-281.)

As a result, the LIFO Statute forces schools with large percentages of poor and minority students to endure a "constant churn of [] faculty and staff." (RT 2116:13-20 [Raymond], 656:26-657:13 [Deasy].) This disproportionate churn is "tremendously destabilizing" (RT 4020:16-4021:13 [Ramanathan]), and, *in and of itself,* "results in significant loss of student achievement." (RT 3684:4-3685:12 [Melvoin]; see also RT 1557:20-1558:25 [Christmas]; 3965:26-3966:26 [Ramanathan]; 1403:9-

1404:12 [Adam].) As the CDE has acknowledged, "teacher turnover results in significant loss of student achievement because of the instability it creates . . . ." (AA 4810 [CDE Report].) In addition, and in a particularly cruel twist of fate, increased layoffs in poor and minority schools result in those schools having more vacancies, which are often filled by grossly ineffective teachers as part of the Dance of the Lemons. (See *supra* at p. 46.)

D. The Challenged Statutes Fail Strict Scrutiny

For both of the reasons set forth above—(1) real and appreciable impact on the fundamental right to education, placing all California students at risk of harm, and (2) disproportionate harm on minority and low-income students—Plaintiffs argued that the Superior Court should examine the Challenged Statutes under strict scrutiny.

State Defendants and Intervenors never seriously attempted to meet their burden under the strict scrutiny standard. Not in their summary judgment papers, nor their motions for judgment, nor during trial did they assert that the Challenged Statutes serve any "compelling" state interests *or* that the laws are "necessary" to serve any interests whatsoever.

Moreover, the interests that they *did* claim are served by the Challenged Statutes were discredited for at least three reasons:

- Some were simply absurd. For example, they asserted that the Permanent Employment Statute serves the interest of providing districts "ample opportunity" to evaluate new teachers, (see SB at p. 41, IB at p. 8), the very opposite of what the statute's 16-month time limit does. Likewise, they asserted that the Dismissal Statutes serve the interest of *avoiding* cost to the public school system, (see IB at p. 14), again the opposite of the statutes' actual effect. They also asserted that the LIFO Statute serves the interest of giving districts "flexibility," (*id*. at p. 63; SB at p. 42), yet a

statute that forces districts to conduct layoffs almost exclusively on the basis of seniority is the very antitheses of "flexibility." Indeed, Intervenors themselves conceded that the LIFO Statute "*limit[s]* districts' discretion in the event of . . . reductions in force . . . ." (See AA 240 [italics added].)

- Some were plainly not important or compelling interests. For example, they asserted that the LIFO Statute serves the interest of providing an "objective" standard for conducting layoffs that is "underst[ood]." (See IB at pp. 19, 35.) But they provided no explanation as to why it is of compelling importance to have an objective standard—plenty of objective standards, such as alphabetical order or height, would be easily understood but still devastating for students and unfair to teachers. (RT 8034:17-8035:13 [Tolladay].)

- And *all* of the purported interests proffered by State Defendants and Intervenors were unsupported by the evidence. For example, they asserted that the Permanent Employment Statute ensures that districts do not "procrastinate" in firing ineffective probationary teachers. (RT 5946:16-23 [Rothstein].) But *all* of the testimony, even from their own witnesses, made clear that districts do *not* procrastinate; to the contrary, they fire probationary teachers as soon as it becomes clear that the teacher should not earn tenure. (RT 6835:20-6838:4 [Mills] [72 percent of non-reelections occur during teachers' first probationary year]; 7622:8-25 [Raun-Linde] [60 percent]; 7585:14-7586:11 [Davies] [80 percent]; see also RT 9541:28-9545:2 [Hanushek]; 492:18-493:24 [Deasy].) They also asserted that the LIFO Statute ensures that teacher layoffs are "fair." (AA 7019; AA 7109; RT 5766:27-5767:8 [Fraisse].) But the evidence at trial overwhelming showed that LIFO layoffs are inherently *unfair*. (RT 2264:1-18 [Bhakta]; 3679:11-24 [Melvoin]; 9712:3-9713:2 [Smith] [the LIFO Statute is "deeply unfair first and foremost to children, . . . it's unfair

to families and communities, and . . . it's unfair to the State of California"].)

Moreover, Defendants' and Intervenors' own expert witnesses were forced to concede that the Challenged Statutes are not *necessary* to serve the interests they proffered.[19] They admitted, for example, that a "tenure[] period [of] three years would [] serve [the] exact same interest[s]" purportedly served by the Permanent Employment Statute. (RT 9070:17-9072:2 [Darling-Hammond]; 6207:25-6209:2 [Rothstein] ["[T]he current two-year probationary period is not the only way that California can serve all of the interests that are purportedly served by the two-year probationary period."].) They admitted there are "other ways to serve the interest of preserving competent teachers than the process contained in the current Dismissal Statutes." (RT 9107:8-14 [Darling-Hammond].) And they admitted that an effectiveness-based layoff system would "continue to serve" all of the interests purportedly served by the LIFO Statute. (RT 9089:2-27 [Darling-Hammond]; 6217:15-19 [Rothstein].

Plaintiffs also proved that there are ample feasible alternatives for *each* of the Challenged Statutes:

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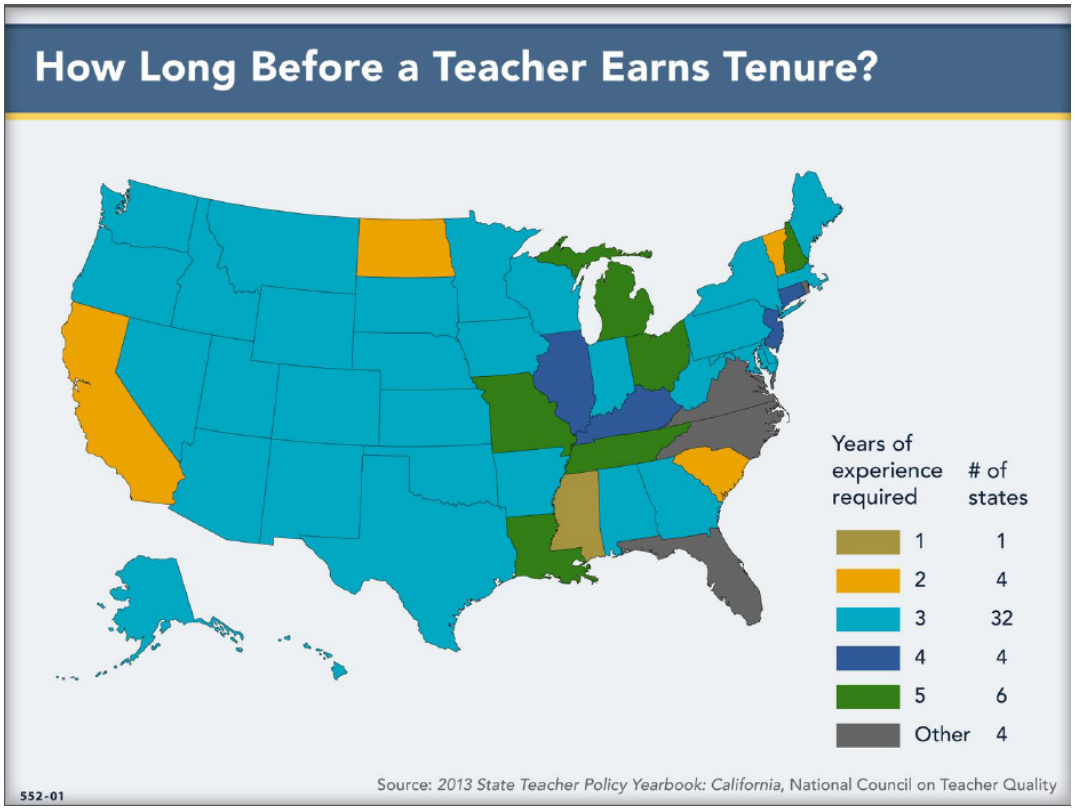
[19] Notably, the experts who testified for Defendants and Intervenors were impeached more than <u>*two dozen*</u> times during trial. Dr. Jesse Rothstein was impeached nine times, (RT 6125:5-6126:20; 6127:3-6128:5; 6136:2-6137:27; 6142:15-6143:21; 6148:14-6150:1; 6150:24-6152:3; 6159:1-6160:3; 6205:28-6207:24; 6222:16-6223:12), Dr. Susan Moore Johnson was impeached eight times, (RT 4568:5-4569:3; 4569:18-4570:10; 4572:5-20; 4580:9-4581:18; 4584:13-4585:8; 4587:7-4588:2; 4588:12-4589:2; 4595:23-4597:17), Dr. Linda Darling-Hammond was impeached six times, (RT 9063:16-9065:6, 9069:20-9072:2, 9078:18-9080:23, 9082:3-23, 9088:14-9089:27, 9091:8-9092:18), and Dr. David Berliner was impeached three times, (RT 8375:24-8377:11, 8461:3-8463:4, 8467:15-8468:27). By contrast, not one of Plaintiffs' seven expert witnesses was impeached a single time.

- With respect to the Permanent Employment Statute, California is one of only five states with a probationary period of two years or less—32 states have three-year probationary periods, nine states have four or five-year probationary periods, and four states have no tenure system at all. (RT 4732:18-4733:13 [Jacobs].)

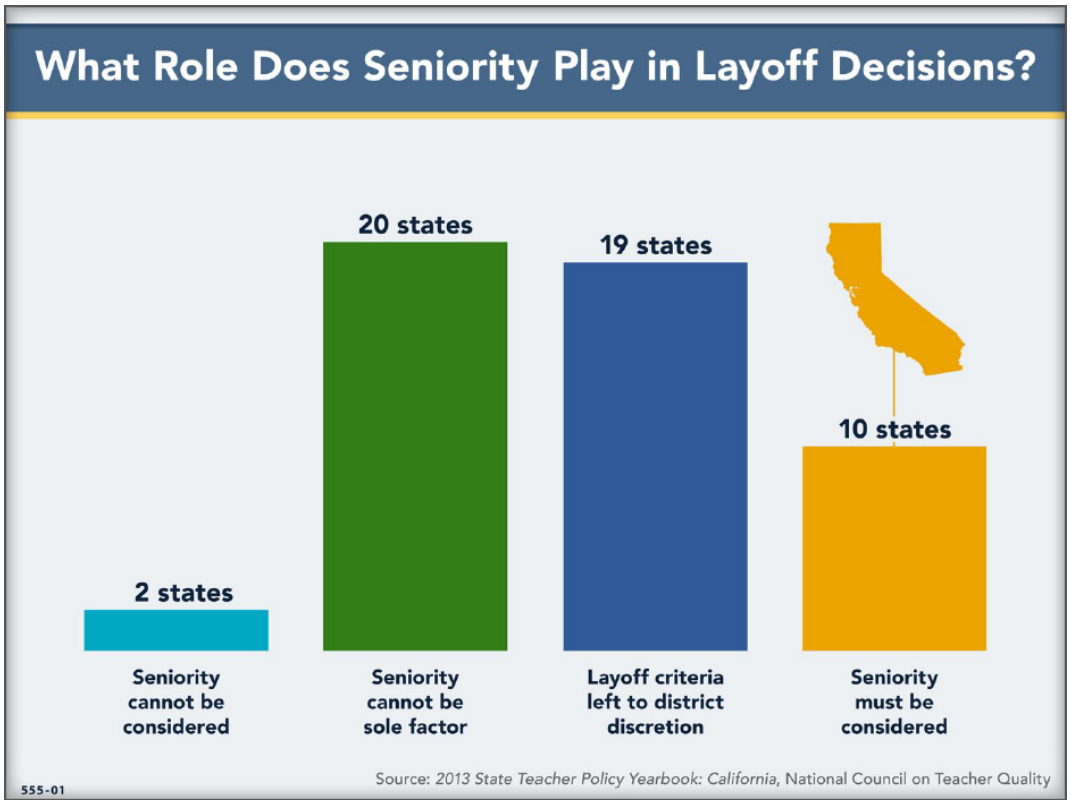


(RA 336.)

- With respect to the Dismissal Statutes, the California public school system itself contains examples of feasible alternatives—namely, "classified" employees like administrators, custodians, bus drivers, security officers, clerical workers, and instructional assistants. (See Sections 45100 et seq.) The "time and burden associated with separating from a classified employee is typically significantly less than separating" from a tenured teacher. (RT 2001:21-2002:6 [Christmas].) LAUSD, for example, spends only $3,400, on average, to dismiss a classified employee, (RT 9244:20-

9245:3 [Ekchian]), and the process takes "not much more than a month, month and a half," (RT 2622:15-19 [Douglas].)

- And with respect to the LIFO Statute, California is one of only 10 states in which seniority must be considered in determining which teachers to lay off—20 states prohibit seniority from being the sole factor, and two states prohibit seniority from being considered at all. (RT 4743:9-25 [Jacobs].)



(AA 339.)

Finally, Plaintiffs demonstrated that striking down the Challenged Statutes will do *nothing* to impair the constitutional due process rights that teachers—like all other public employees in California—enjoy. (See *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215.) Teachers will still have notice and an opportunity to be heard before being dismissed for cause. (*Ibid.*) It will still be illegal in California for teachers to be fired for being gay (see Gov. Code § 12940(a)), despite various witnesses' confusion on

that point. (RT 8016:20-8017:24; 8042:4-7 [Tolladay]; 7451:8-13 [S. Brown].) And teachers will not be fired for teaching controversial subjects that are part of the state-mandated curriculum, like Islam or evolution, despite various witnesses' expressed concerns. (See RT 8495:3-8496:8, 8508:25-8514:16, 8515:5-15 [Nichols].) The evidence proved that the statutes at issue provide excessive and unnecessary protections that go far beyond the requirements of due process, placing teachers in a category all to themselves and harming students in the process.

E. The Challenged Statutes Are Unconstitutional As Applied To Plaintiffs' School Districts

Plaintiffs' evidentiary showing also proved that the Challenged Statutes are unconstitutional as applied to Plaintiffs because of the manner in which they affect Plaintiffs' particular school districts. (See AA 1916-1919 [identifying Plaintiffs' districts].)[20] Abundant evidence demonstrated that students in LAUSD and Oakland, for example, are at substantial risk of being assigned to grossly ineffective teachers because of the constraints imposed on those districts by the Challenged Statutes, and that the grossly ineffective teachers in those districts inflict substantial harm on their students. (See, e.g., RT 1520:4-28 [Christmas]; 621:17-20 [Deasy]; 2772:4-10 [Kane].)

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[20] Plaintiffs seek only relief from threatened future harm, not past injury. Thus, as with their facial challenge, Plaintiffs need not prove that their past teachers were, in fact, grossly ineffective in order to prevail on their as-applied challenge. Nevertheless, the testimony Plaintiffs provided—that they have been harmed by grossly ineffective teachers—was unrebutted with respect to seven teachers. (RT 3266:15-3267:5 [J. Macias] [Teachers A and C]; 3401:12-3402:20 [DeBose] [Teacher B]; 3531:10-19 [E. Vergara] [Teacher B]; 3508:14-23 [B. Vergara] [Teachers A, B, and C].)

Indeed, Plaintiffs themselves testified about some of the teachers who have scarred their educational experiences and stunted their academic progress in inexcusable ways.[21] (See RT 3509:1-11, 3511:27-3512:22, 3513:13-25 [B. Vergara] ["He would call us stupid and tell us that we're going to clean houses for a living"]; 3528:1-2, 3531:27-3532:22 [E. Vergara] ["[H]e would sleep in class . . . ."]; 3402:2-20 [DeBose] ["He just assigned work and he didn't explain [it]."]; 3556:21-3557:22 [Monterroza] ["[S]he would come unprepared with no learning plan . . . ."]; 3279:4-5, 3351:23-3352:11 [Macias] [teacher "wrote off" his daughter].) And all of the Plaintiffs who testified explained that they have a well-founded fear they will be assigned to grossly ineffective teachers in the future, derailing their educational opportunities and threatening their hopes and dreams. (RT 3514:14-19 [B. Vergara]; 3533:10-18 [E. Vergara]; 3405:26-3406:5 [DeBose]; 3550:5-14, 3551:4-16 [Monterroza].) Thus, at a minimum, Plaintiffs proved they are entitled to relief preventing the enforcement of the Challenged Statutes in their particular districts.[22]

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[21] In their Opening Brief, Intervenors repeatedly claim that Plaintiffs "disparaged" their teachers while testifying at trial. (See IB at p. 3; see also *id.* at pp. 15 fn. 11, 53, 77.) That is unequivocally false. Plaintiffs merely provided descriptions of experiences in their teachers' classrooms, both positive and negative. In addition, during their testimony, Plaintiffs used an anonymous naming convention—referring to their teachers as "Teacher A," "Teacher B," "Teacher C," and so forth—in order to conceal the identities of their teachers. (See, e.g., RT 3282:8-20 [DeBose].) *Intervenors*, on the other hand, insisted that these teachers' identities be released. (AA 5713-5714; RRJN, Ex. D.)

[22] In addition, six of the Respondents introduced evidence demonstrating that they are ethnic minorities and/or economically disadvantaged, meaning they are at an especially high risk of receiving a grossly ineffective teacher. (RT 3549:24-3550:4 [Monterroza]; 3395:28-

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IV. THE SUPERIOR COURT'S JUDGMENT

On August 6, 2014, the Superior Court issued a proposed judgment, which became the trial court's final judgment on August 27, 2014. (AA 7293-7308.) In its judgment, the trial court held that the Challenged Statutes are unconstitutional under the equal protection clause of the California Constitution, enjoined enforcement of the Challenged Statutes, and stayed its injunctions pending appellate review. (AA 7302, 7305-7306, 7308.)

At the outset of its judgment, the trial court described Plaintiffs' allegations: Plaintiffs "claim that the Challenged Statutes result in grossly ineffective teachers obtaining and retaining permanent employment, and that these teachers are disproportionately situated in schools serving predominately low-income and minority students." (AA 7295.) Next, the trial court laid out the task before it: to "apply the[] constitutional principles" derived from seminal cases like *Brown*, *supra*, 347 U.S. 483, *Serrano I*, *supra*, 5 Cal.3d 584, *Serrano II*, *supra*, 18 Cal.3d 728, and *Butt*, *supra*, 4 Cal.4th 668, and "decide 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." (AA 7293-7295.) Then, the court announced its ultimate finding, based on the evidence introduced at trial: "Plaintiffs have met their burden of proof on *all* issues presented." (AA 7295 [italics added].)

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3396:15 [DeBose]; 3505:23-3506:5 [B. Vergara]; 3529:25-3530:1 [E. Vergara]; 3264:13-16 [Macias]; AA 1090-1091.)

With respect to the threshold issue—the extent to which grossly ineffective teachers affect students' educational experiences—the trial court found that "grossly ineffective teachers substantially **undermine** the ability of [a] child to succeed in school." (AA 7299.) According to the trial court, "compelling" evidence proved the harmful "effect of grossly ineffective teachers on students." (*Ibid.*; see also *ibid.* ["[I]t shocks the conscience."].) The court cited, for example, Dr. Chetty's testimony explaining that "a single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom," and Dr. Kane's testimony demonstrating that "students who are taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers." (*Ibid.*)

The trial court then noted there was "no dispute" between the parties "that there are a significant number of grossly ineffective teachers currently active in California classrooms," and held that "grossly ineffective teachers [have] a direct, real, appreciable, and negative impact on a significant number of California students, now and well into the future for as long as said teachers hold their positions." (AA 7300.) The trial court even went so far as to quantify—based on estimates provided by the State's own expert witness, among other witnesses—the number of grossly ineffective teachers in California, determining that there are *at least* 2,750 to 8,250 grossly ineffective teachers in the State. (AA 7300.)[23]

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[23] In their Opening Briefs, Appellants claim that the trial court erred when it cited testimony from Dr. Berliner in support of this factual finding, on the basis that Dr. Berliner did not use the precise phrase "grossly ineffective" during this part of his testimony. (IB at p. 55; SB at p. 32 fn. 9.) But Dr. Berliner expressly testified that 1 to 3% of teachers "consistently have strong negative effects on student outcomes no matter what classroom and school compositions they deal with"—the

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Next, the trial court analyzed the constitutionality of the Permanent Employment Statute, and held that "extensive evidence" proved that "the Permanent Employment Statute does not provide nearly enough time for an informed decision to be made regarding the decision of tenure (critical for both students and teachers)." (AA 7301.) The court held that the Permanent Employment Statute "result[s] in grossly ineffective teachers obtaining . . . permanent employment," and that it perversely deprives "teachers of an adequate opportunity to establish their competence" and "students of potentially competent teachers." (AA 7295, 7301-7302.)

Based on this evidentiary showing, the court held that the Permanent Employment Statute "impose[s] a real and appreciable impact on students' fundamental right to equality of education." (AA 730.) It therefore applied strict scrutiny and found that "**both** students and teachers are unfairly, unnecessarily, and for no legally cognizable reason (let alone a **compelling** one), disadvantaged" by the Permanent Employment Statute. (AA 7302.) In its analysis, the trial court noted that two of Appellants' expert witnesses had testified "that 3-5 years would be a better time frame to make the tenure decision for the mutual benefit of students and teachers," and found that "California is one of only five outlier states with a period of two years or less," thus holding that the Permanent Employment Statute was not *necessary* to achieve the state interests supposedly underlying the statute. (AA 7302.) Accordingly, the court held that Appellants had failed to meet

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functional equivalent of a grossly ineffective teacher. (RT 8480:12-22.) In any event, *dozens* of other witnesses testified that there are grossly ineffective teachers with permanent employment in California. (See *supra* at pp. 19-43.) And Plaintiffs' expert witnesses consistently estimated that approximately 5% of California teachers are grossly ineffective. (RT 1117:13-24 [Chetty]; 2769:27-2770:22 [Kane]; 9529:25-9530:23 [Hanushek].)

their burden under the strict scrutiny test and enjoined enforcement of the Permanent Employment Statute. (*Id.*)

Turning to the Dismissal Statutes, the trial court found that it takes "anywhere from two to almost ten years and cost[s] $50,000 to $450,000 or more to bring [teacher dismissal] cases to conclusion under the Dismissal Statutes, and that given these facts, grossly ineffective teachers are being left in the classroom because school districts do not wish to go through the time and expense to investigate and prosecute these cases." (AA 7303; see also *id.* ["LAUSD alone had 350 grossly ineffective teachers it wished to dismiss at the time of trial . . . ."].) As the trial court noted, Appellants' own expert witness testified that "dismissals are 'extremely rare' in California because administrators believe it to be 'impossible' to dismiss a tenured teacher," a fact that was supported by "substantial" additional evidence. (*Id.*) Based on this record, the court held that the dismissal process prescribed by the Dismissal Statutes is "so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory." (AA 7305.)

As with the Permanent Employment Statute, the trial court applied strict scrutiny to the Dismissal Statutes. (AA 7300, 7305.) In its analysis, the court rejected Appellants' argument that the Dismissal Statutes are *necessary* to ensure teachers' due process rights, finding instead that the Dismissal Statutes afford teachers a form of "*über* due process." (AA 7303.) The trial court held that the evidence showed that other public employees, "fully endowed with due process rights," were subject to alternate dismissal processes that required "much less time and expense" than the "tortuous process required by the Dismissal Statutes." (AA 7303-7304.) "[B]ased on the evidence before [the] Court," then, the trial court held that Appellants had failed to meet their burden under the strict scrutiny test and enjoined enforcement of the Dismissal Statutes. (AA 7305.)

With respect to the LIFO Statute, the trial court found that when RIFs occur, the LIFO Statute requires a school district to lay off its last-hired teacher without any consideration as to whether that teacher is effective at teaching his or her students. (AA 7305.) According to the court, districts must adhere to this layoff order, even if the last-hired teacher is "creating a positive atmosphere for his/her students," and even if a grossly ineffective teacher, "who all parties agree is harming the students entrusted to him/her," is left in place. (*Id*.) As a result of this "lose-lose situation," the LIFO Statute "result[s] in grossly ineffective teachers . . . retaining permanent employment" where they otherwise would not. (AA 7295, 7305.)

The court, applying strict scrutiny to the LIFO Statute, held that it is "unfathomable" and thus "constitutionally unsupportable" to suggest that Appellants have an interest in the "*de facto* separation of students from competent teachers, and a like interest in the *de facto* retention of incompetent ones." (AA 7300, 7306.) The court also found that California "is a distinct minority among other states that have addressed this issue," thus impliedly finding that the LIFO Statute is not *necessary* to achieve the state interests proffered by Appellants. (AA 7306; see also *id.* ["[O]nly ten states, including California, provide that seniority is the sole factor, or one[,] that must be considered."].) Accordingly, the court held that Appellants had failed to meet their burden under the strict scrutiny test and enjoined enforcement of the LIFO Statute. (AA 7306.)

Finally, the trial court analyzed Plaintiffs' suspect class claims and held that "substantial evidence" showed that "the Challenged Statutes disproportionately affect poor and/or minority students." (AA 7306.) The court cited, as an example, the CDE report in which the CDE conceded that "the most vulnerable students, those attending high-poverty, low-performing schools, are far more likely than their wealthier peers to attend

schools having a disproportionate number of . . . ineffective teachers," and that "minority students bear the brunt of staffing inequalities" because they "disproportionately attend such schools." (AA 7307.) The trial court also discussed some of the causal factors related to this disparate harm, finding, for example, that "churning" of teachers and the "Dance of the Lemons" "affect high-poverty and minority students disproportionately," and "greatly affect[] the stability of the learning process to the detriment of such students." (*Id*.) As such, the trial court held that Plaintiffs had "met their burden of proof" and proved that "the Challenged Statutes cause the potential and/or unreasonable exposure of grossly ineffective teachers . . . to minority and/or low income students . . . in violation of the equal protection of the California Constitution." (AA 7295.)

For all of these reasons, the court held "that all Challenged Statutes are unconstitutional," enjoined further enforcement of the Challenged Statutes, and stayed its injunctions pending appellate review. (AA 7308.)

STANDARD OF REVIEW

"An appealed judgment is presumed correct, and appellant bears the burden of overcoming [this] presumption of correctness." (*Boyle v. CertainTeed Corp*. (2006) 137 Cal.App.4th 645, 649-650; see also *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611.)

The "determination of a statute's constitutionality is a question of law" that is reviewed "de novo." (*Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 307; see also *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 771.) But the "trial court's findings of fact are reviewed for substantial evidence." (*Haraguchi v. Super. Ct*. (2008) 43 Cal.4th 706, 711–712 [fns. omitted].) Under this deferential standard of review, "the trial court's resolution of [a] factual issue . . . must be affirmed" if it is supported by substantial evidence. (*Winograd v. American Broadcasting*

Co. (1998) 68 Cal.App.4th 624, 632.) And "the 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 [italics added].) "The question is not whether there is substantial evidence that would have supported a contrary judgment, but whether there is substantial evidence supporting the judgment made by the trial court." (*Natalie D. v. State Dept. of Health Care Services* (2013) 217 Cal.App.4th 1449, 1455.)

Moreover, any "attempt" by Appellants "to reargue on appeal those factual issues decided adversely to [them] at the trial level" is a sufficiency of the evidence challenge subject to substantial evidence review, irrespective of the label Appellants give it in their brief. (*Hasson v. Ford Motor Co*. (1982) 32 Cal.3d 388, 398-399; see also *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 737 [appellants' arguments were insufficiency of the evidence challenges because their brief was "devoted almost entirely to rearguing the facts," even though it merely "allude[d] in passing to [] insufficiency of the evidence"]; *Liu v. Liu* (1987) 197 Cal.App.3d 143, 157.)

Faced with a sufficiency of the evidence challenge, "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. Philp Morris, Inc.* (2004) 117 Cal.App.4th 635, 678 [italics in original].) "[W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874; see also *Beck Development Co., Inc. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.)

Appellants claim the substantial evidence standard of review is inapplicable because the trial court supposedly used an erroneous legal standard (by applying strict scrutiny, rather than rational basis review). (See IB at p. 29; SB at p. 35.) But the level of scrutiny that the trial court applied has no bearing on the standard this Court applies in reviewing the trial court's factual findings. The sole decision on which Appellants rely for this argument—*Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1—actually *applied* substantial evidence review, even though the Supreme Court found that the lower court used erroneous legal standards. (*Hill*, *supra*, 7 Cal.4th at p. 51.)

Appellants also contend that substantial evidence review is inappropriate because Appellants filed objections to the trial court's statement of decision and, according to Appellants, the court did not "correct" the supposed "omissions" identified in those objections. (IB at p. 29; SB at pp. 34-35.) But a trial court's statement of decision "need not discuss each question listed in a party's" objection, as Appellants argue here. (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745.) A statement of decision need only "state ultimate . . . facts"—a standard easily satisfied by the trial court's decision in this case. (*Wolfe v. Lipsy* (1985) 163 Cal.App.3d 633, 643 [disapproved on other grounds in *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 36-39].)[24]

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[24] Once again, Appellants' cases do not support their argument. In *Sperber*, this Court *rejected* the appellant's claim that the trial court had issued a deficient statement of decision. (*Sperber*, *supra*, 26 Cal.App.4th at p. 745.) And in *Hardin*, this Court remanded the case for further consideration only because the trial court had "exclu[ded]" evidence that was "necessary to a resolution of disputed material issues" (*In re Marriage of Hardin* (1995) 38 Cal.App.4th 448, 453)—something Appellants do not argue here.

ARGUMENT

During two months of trial, the Superior Court heard testimony from over *50* witnesses—including school district superintendents, administrators, principals, teachers, parents, students, economists, researchers, and distinguished professors, among many others—and considered hundreds of documentary exhibits and studies. Plaintiffs' case alone included testimony from seven of the leading education experts in the world, as well as dozens of witnesses with pertinent experience in the California school system, drawn from 28 school districts across California and covering more than 22% of California students.[25] From these witnesses and documents, the Superior Court concluded that "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." (AA 7295.) This Court should affirm the Superior Court's well-supported decision.

I. The Trial Court Correctly Applied The Legal Standards Governing Facial Equal Protection Challenges

Forty years ago, a group of California public school children and their parents brought a lawsuit against the State of California to rectify harmful inequities in California's public education system. They alleged that a set of state laws was creating "substantial disparities in the quality . . .

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[25] These districts, from largest to smallest, included: Los Angeles, San Diego, Long Beach, San Francisco, Sacramento City, Oakland, Kern, Mount Diablo, Chino Valley, Bakersfield, Pomona, Compton, Pasadena, Simi Valley, Baldwin Park, Tracy, West Covina, Fullerton Elementary, Evergreen Elementary, Alum Rock Union Elementary, Santa Monica-Malibu, Arcadia, Lincoln, Berryessa, San Gabriel, Monrovia, Oakley Union, and Emery. (See Index of Witnesses, *supra* at pp. iii-ix; see also RRJN, Ex. T.)

of educational opportunities." (*Serrano I*, *supra*, 5 Cal.3d at p. 590.) Although the laws being challenged seemed benign on their face, the plaintiffs argued that the statutes had devastating consequences because they "[f]ail[ed] to provide children of substantially equal age, aptitude, motivation, and ability with substantially equal educational resources" and "[p]erpetuate[d] marked differences in the quality of educational services." (*Id.* at p. 590 fn. 1.) Moreover, the statutes had a disproportionately adverse impact on poor and minority students, "mak[ing] the quality of education for school age children in California . . . a function of . . . wealth" and leaving "children belonging to . . . minority groups . . . [with] a relatively inferior educational opportunity." (*Ibid.*)

During the *Serrano* trial, the trial court first examined the educational system itself to determine how the statutes functioned in practice. (*Serrano II*, *supra*, 18 Cal.3d at pp. 736, 744-745.) Next, the court scrutinized the effects of the statutory scheme to determine whether the laws at issue contributed to the disparities being alleged. (See *id.* at pp. 746-748.) Finally, the trial court "assess[ed] the discriminatory effect of the system." (*Id.* at p. 756.) After carefully reviewing all of the evidence, the trial court determined that the statutes at issue "cause[d] and perpetuate[d] substantial disparities in the quality and extent of availability of educational opportunities." (*Id.* at p. 747.) And, "on the basis of substantial and convincing evidence," the court held that the "system . . . suffer[ed] from . . . basic shortcomings"—"to wit, it allow[ed] the availability of educational opportunity to vary" in substantial and unjustified ways. (*Id.* at p. 768.) As a result, the trial court, applying "strict judicial scrutiny," struck down the statutes at issue as unconstitutional and the California Supreme Court affirmed. (*Ibid.*)

In deciding this case, the Superior Court properly employed a two-step analysis appropriate for facial equal protection challenges—the very same analysis the Supreme Court applied in *Serrano*.

First, the court "determine[d] what test is to be applied in its analysis." (AA 7300.) On numerous occasions, the California Supreme Court has held that strict scrutiny applies to any law that inflicts "a real and appreciable impact on, or a significant interference with the exercise of [a] fundamental right . . . ." (*Fair Political Pracs. Com. v. Super. Ct. of L.A. County* (1979) 25 Cal.3d 33, 47; see also *Planning & Conservation League, Inc. v. Lungren* (1995) 38 Cal.App.4th 497, 506; *Choudhry v. Free* (1976) 17 Cal.3d 660, 664.) Although "[n]ot every governmental regulation implicating . . . fundamental rights is subject to strict scrutiny," a "real and appreciable impact" will be found, and strict scrutiny applied, if the law in question has "more than an incidental impact" on a fundamental right. (*Planning & Conservation League, Inc.*, *supra*, 38 Cal.App.4th at pp. 506-507 ["It [is] enough that the legislation place[s] a more than incidental burden" on the constitutional right at issue]; *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1981) 32 Cal.3d 779, 799 ["[T]o *avoid* the strict scrutiny test of equal protection, [the law] must have 'only minimal, if any, effect on the fundamental right'" at issue] [citation omitted], abrogated on another point in *Bd. of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 917-918; see also *Hawn v. County of Ventura* (1977) 73 Cal.App.3d 1009, 1019.) Thus, the trial court examined whether Plaintiffs had proven, by a preponderance of the evidence, that the Challenged Statutes impose a "real and appreciable impact" on students' fundamental right to education. (AA 7300; see also

Butt, *supra*, 4 Cal.4th at pp. 685-686; *Fair Political Pracs. Com. v. Super. Ct. of L.A. County* (1979) 25 Cal.3d 33, 47).[26]

The court also examined whether Plaintiffs had proven, by a preponderance of the evidence, that the Challenged Statutes impose a disproportionate burden on poor and minority students. (*Sakotas v. W.C.A.B.* (2000) 80 Cal.App.4th 262, 271; *Serrano I*, *supra*, 5 Cal.3d at pp. 596-619.) As the California Supreme Court has repeatedly recognized, laws that have a disparate impact on the educational opportunities afforded to minority or low-income students are subject to strict scrutiny because both race and wealth are suspect classifications under the California Constitution's equal protection guarantee. (See, e.g., *Coral Construction, Inc. v. City & County of S.F.* (2010) 50 Cal.4th 315, 332, 338, fn. 20; *Serrano I*, *supra*, 5 Cal.3d at pp. 596-619.)[27]

The Superior Court correctly explained that it would apply strict scrutiny if Plaintiffs proved that the Challenged Statutes met *either* test—real and appreciable impact *or* disproportionate burden. (AA 7300; see also *Butt*, *supra*, 4 Cal.4th at pp. 685-686.) Holding that Plaintiffs easily satisfied *both* tests, the court therefore applied strict scrutiny. (AA 7300.)

Second, applying the familiar strict-scrutiny standards, the Superior Court held that the "*state* bears the burden of establishing not only that [it] has a compelling interest which justifies [the Challenged Statutes] but that the distinctions drawn by the law[s] are necessary to further [their] purpose." (AA 7300; see also *Serrano I*, *supra*, 5 Cal.3d at p. 597 [italics added].) The trial court found that Defendants and Intervenors did not

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[26] This legal theory corresponds to Claims 1-3 of Plaintiffs' complaint, which are referred to herein as Plaintiffs' "fundamental rights" claims.

[27] This legal theory corresponds to Claims 4-6 of Plaintiffs' complaint, which are referred to herein as Plaintiffs' "suspect class" claims.

come remotely close to meeting that heavy burden. (AA 7302, 7305-7306.) Thus, the court declared the laws to be unconstitutional and enjoined their enforcement. (AA 7308.)

Appellants argue that the Superior Court's application of this traditional and well-settled legal framework was improper for two reasons: First, they argue that Plaintiffs did not properly assert a facial challenge to the Challenged Statutes. (SB at pp. 37-39; IB at pp. 32-36.) Second, they argue that the Challenged Statutes are not the proper subject of *any* equal protection challenge. (SB at pp. 56-57; IB at pp. 36-42.) Appellants are mistaken on both counts.

A. Plaintiffs Asserted A Valid Facial Challenge To The Challenged Statutes

A facial challenge to the constitutional validity of a statute or ordinance requires a court to consider "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.) Here, that is precisely what Plaintiffs challenged and what the trial court examined—the complex web of statutory requirements imposed by the Challenged Statutes, including: the deadline for districts to notify probationary teachers of tenure reelection decisions (Section 44929.21); the consequences of failing to meet the reelection notification deadlines (*ibid.*); when districts may issue notices of unsatisfactory performance (Section 44934); when districts may file statements of charges (Section 44938); the timing of CPC dismissal hearings (Section 44944); the composition of the CPC panel (*ibid.*); the evidence that may be introduced at CPC hearings (*ibid.*); teachers' ability to appeal CPC decisions (*ibid.*); the district's obligation to pay a teacher's attorney's fees when dismissal is not achieved (*ibid.*); and the district's obligation to lay off its least senior teachers during RIFs (Section 44955).

Plaintiffs' facial challenge appropriately did not focus on the manner in which the Challenged Statutes affect them in particular. (*Tobe*, *supra*, 9 Cal.4th at p. 1084). Rather, Plaintiffs argued that the statutes "pose a present total and fatal conflict with applicable constitutional prohibitions" (*ibid.*) in their "general and ordinary application" statewide (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307 347-348), requiring them to be "void[ed] . . . [in] whole." (*Tobe*, 9 Cal.4th at p. 1084; see also *Today's Fresh Start, Inc.*, *supra*, 57 Cal.4th at p. 218.) And Plaintiffs proved that the Challenged Statutes are facially unconstitutional because they "inevitably" violate the fundamental rights of an unlucky subset of California's students every year. (*Tobe*, *supra*, 9 Cal.4th at p. 1084.)[28]

1. The Superior Court Correctly Considered The Practical Effects Of The Challenged Statutes

Appellants argue that Plaintiffs' facial challenge is improper because the text of the Challenged Statutes does not *expressly* "require[] school districts to assign students to 'grossly ineffective teachers.'" (IB at p. 36.) And they contend that the Superior Court erred by considering the practical effects that arise from the operation of the Challenged Statutes. (IB at p. 34; SB at pp. 12, 35, 37.) California courts, however, routinely consider evidence beyond the statutory text itself to determine whether the procedural scheme at issue *in fact* results in an unconstitutional deprivation

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[28] The California Supreme Court has explained that the precise standard for facial constitutional challenges is "the subject of some uncertainty." (*Today's Fresh Start, Inc. v. L.A. County Office of Educ.* (2013) 57 Cal.4th 197, 218; see also *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 503 [collecting cases].) But this Court need not resolve that uncertainty here, as the Challenged Statutes fail *all* of the facial-challenge standards.

of fundamental rights. (See *Gould v. Grubb* (1975) 14 Cal.3d 661, 669 fn. 9 ["It is the unequal *effect* flowing from the [challenged law] that gives rise to the equal protection issue in question"] [italics added]; *In re Smith* (1904) 143 Cal. 368, 372 ["[C]ourts are not limited in their inquiry to those cases alone where such a situation is shown upon the reading of the statute. They will consider the circumstances in the light of existing conditions."]; see also *Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 269-270; *Cal. Teachers Assn. v. State of Cal.* (1999) 20 Cal.4th 327, 345.)

Indeed, the California Supreme Court has repeatedly emphasized the importance of external evidence and practical considerations in determining the facial constitutionality of a statute. For example, the statutes that comprised the financing system at issue in *Serrano I* were facially neutral, but the Court examined the real-world effects of the relevant statutes and determined that "*as a practical matter* districts with small tax bases simply [could not] levy taxes at a rate sufficient to produce the revenue that more affluent districts [could] reap with minimal tax efforts." (*Serrano I*, *supra*, 5 Cal.3d at p. 598 [italics added]; see also *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 [a law's] probable impact"]; *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 533-534, affd. *sub nom. Reitman v. Mulkey* (1967) 387 U.S. 369 ["A state enactment cannot be construed for purposes of constitutional analysis without concern for its . . . ultimate effect."].)

Likewise, in *Somers v. Superior Court* (2009) 172 Cal.App.4th 1407, 1411-1412, the plaintiff challenged the constitutionality of a law that required California-born individuals seeking changes of gender on their birth certificates to file petitions in the counties of their present-day residence. Although the statute "on its face [did] not appear to create a class of petitioners that [was] treated differently, the [statute] . . . *act[ed]* to deny" California-born transgendered individuals who lived out-of-state the

right to change the gender listed on their birth certificates. (*Id.* at p. 1414 [italics added].)

Similarly, in *Bullock v. Carter* (1972) 405 U.S. 134, 144-145, the U.S. Supreme Court held that a law requiring *all* political candidates to pay election filing fees was unconstitutional, despite the fact that the statutory language at issue did not expressly distinguish between individuals or groups of individuals. (*Id.* at pp. 141, 144.) It would "ignore reality," the Court held, to overlook the fact that the "limitation [fell] more heavily on the less affluent segment of the community." (*Id.* at p. 144.)

And in *Gould*, the California Supreme Court was asked to "determine the constitutionality of an election procedure which automatically afford[ed] an incumbent, seeking reelection, a top position on the election ballot." (*Gould*, *supra*, 14 Cal.3d at p. 664.) Even though the statute said *nothing* about voters, the Court applied strict scrutiny and struck down the law because it "impose[d] a very real and appreciable impact on the *equality, fairness and integrity of the electoral process*," thereby infringing the equal protection rights of voters. (*Id.* at p. 670 [italics added].) As the Court explained, by providing "advantageous positions" to certain candidates, the election procedure "inevitably discriminate[d] against *voters* supporting all other candidates." (*Id.* at p. 664 [italics added].)

As *Serrano*, *Somers*, *Bullock* and *Gould* make clear, it is immaterial whether the text of the Challenged Statutes expressly harms—or even *mentions*—students; what matters is that a subset of students are being "effectively denied" their fundamental educational rights as a result of the statutes. (*Somers, supra*, 172 Cal.App.4th at p. 1415.) The Superior Court found that Plaintiffs introduced abundant evidence to prove this point: as the court held, the practical and inevitable effect of the Challenged Statutes

is to subject California students to substantially unequal educational opportunities. (AA 7299-7300.)

2. A Facial Challenge Does Not Require All Students In California To Suffer Harm

Appellants also argue that Plaintiffs' facial challenge is invalid because Plaintiffs concede that the majority of teachers in California provide their students with an adequate education. (See SB at pp. 38-39.) Relatedly, Appellants point to trial witnesses who testified that they believe their particular districts can sometimes avoid the harms the Challenged Statutes impose on their districts' students. (IB at pp. 34-36; SB at pp. 39-40.)

There is nothing unusual, however, about a facial equal protection challenge in which a *minority* of citizens is suffering from unequal treatment while the majority is treated in a perfectly satisfactory manner. (See, e.g., *Hunter v. Erickson* (1969) 393 U.S. 385, 391 ["[T]he law's impact falls on the minority. The majority needs no protection against discrimination . . . ."].) In *Serrano*, for example, the public education financing system created disparities in per pupil spending that penalized just a *portion* of California students—those attending schools in poorer districts—and denied them their fundamental right to education. (*Serrano II*, *supra*, 18 Cal.3d at pp. 741-744, 769.) Even though students in approximately half of California's districts—those with a wealthier-than-average tax base—were *benefiting* from the financing scheme, and even though several districts intervened to *defend* the laws being challenged, the Supreme Court nevertheless held that the laws were facially unconstitutional statewide. (*Id.* at 735 fn.3, 744.)

Likewise, in *American Academy of Pediatrics*, *supra*, 16 Cal.4th at p. 314, 342-348, the California Supreme Court held that a statute requiring pregnant minors to secure parental consent or judicial authorization to

obtain an abortion was facially unconstitutional because it violated the fundamental privacy rights of California's pregnant minors. Crucially, the Court reached this conclusion notwithstanding the fact that "the *majority* of pregnant minors [voluntarily] consult[ed] their parents before obtaining an abortion." (*Id.* at p. 355; *id*. at p. 383 ["[M]ost pregnant teenagers consult their parents voluntarily"] [J., Kennard, concurring]; see also *In re Marriage Cases* (2008) 43 Cal.4th 757, 854 [holding that law defining marriage as a union of man and woman was facially unconstitutional because it impaired the fundamental right to marriage of a "minority" of California citizens, even though it "extended [the right] to all others"]; *Cal. Teachers Assn.*, *supra*,,20 Cal.4th at p. 338 [law requiring teachers to pay for part of dismissal proceeding "inevitably pose[d] a present total and fatal conflict with applicable constitutional prohibitions" because it "invariably" chilled teachers' right to a hearing, regardless of whether a teacher ultimately exercised her right to a hearing]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282 [statute authorizing a criminal conviction under clear and convincing standard of proof was facially invalid, even though there would be cases, decided under that standard, in which the proof would satisfy the beyond-a-reasonable-doubt standard].)

Under *Serrano*, *American Academy of Pediatrics*, *In re Marriage Cases*, *CTA*, and *Sullivan*, the relevant question when analyzing the facial constitutionality of the Challenged Statutes is not how *many* students or districts are adversely affected by the Challenged Statutes, or whether *some* districts believe they are able to ameliorate the harm to students, but whether the Challenged Statutes have a "real and appreciable impact" on the public education system that results inexorably in *some* California students being subjected to unequal educational opportunities.

To the extent Appellants are arguing that Plaintiffs' facial challenge fails for a lack of evidence—that Plaintiffs failed to prove that the

Challenged Statutes "lead to constitutional problems" "at least in the generality" of California's school districts, (see SB at pp. 38-39)—such a sufficiency of the evidence challenge fails because substantial evidence supports the trial court's findings that the Challenged Statutes are problematic statewide. (See *supra* at pp. 25-50, 68-69.) Appellants rely on a small number of witnesses from a small number of small school districts who claim to be able to work within and around the Challenged Statutes.[29] But the trial court did not credit those witnesses' testimony and did not believe their experiences to be exemplary of districts statewide. (AA 7305 ["[B]ased on the evidence before this Court, it finds the current system required by the Dismissal Statutes to be so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory."].) There is no reason for this Court to disturb those factual findings. (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1143.)

B. The Challenged Statutes Are The Proper Subject Of An Equal Protection Challenge

Under longstanding U.S. and California Supreme Court precedents, equal protection challenges fall into two categories. Most often, an equal protection claim is premised on a "suspect classification" and alleges

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[29] El Monte School District, where Jeffrey Seymour served as superintendent before his retirement, had just 11,000 students and hired fewer than five probationary teachers per year. (RT 7105:25-7106:7, 7108:18-22, 7116:3-7 [Seymour].) And Hueneme Elementary School District, where Dr. Robert Fraisse served as superintendent, had only 11 schools. (RT 5613:22-5614:3, 5614:18-20 [Fraisse].) By contrast, Appellants' superintendent and deputy superintendent witnesses represented districts with 909,000 students in over 1,000 school sites, (RT 476:18-477:5 [Deasy] [Los Angeles]), 56,000 students (RT 9688:18-9689:20 [Smith] [San Francisco]), 37,000 students at 90 school sites (*ibid.* [Oakland]), and 43,000 students at more than 80 school sites, (RT 2012:10-2013:2] [Sacramento City].)

discrimination against one or more protected minority *groups*. (See, e.g., *Brown*, *supra*, 347 U.S. at p. 493 [race]; *Raffaelli v. Committee of Bar Examiners* (1972) 7 Cal.3d 288, 301-304 [alienage].) But when a law infringes on certain fundamental rights of *individuals*, that too gives rise to an equal protection claim. (See, e.g., *Kramer v. Union Free Sch. Dist. No. 15* (1969) 395 U.S. 621, 632-633; *Harper v. Va. Bd. of Elections* (1966) 383 U.S. 663, 670; *Griffin v. Illinois* (1956) 351 U.S. 12, 18 (plurality op.); *In re Marriage Cases*, *supra*, 43 Cal.4th at p. 814.) As the U.S. Supreme Court has explained, "[e]quality of treatment and . . . the substantive guarantee of liberty are linked in important respects." (*Lawrence v. Texas* (2003) 539 U.S. 558, 575.) Thus, laws that deny individuals their fundamental rights are "directly subversive of the principle of equality at the heart of the Fourteenth Amendment." (*Loving v. Virginia* (1967) 388 U.S. 1, 12.) Plaintiffs in this case properly asserted both types of equal protection challenges.

Appellants claim that the Challenged Statutes cannot be subjected to an equal protection challenge *at all* for two reasons: First, because (according to Appellants) the laws apply "uniformly" to all students and teachers. (IB at pp. 37-38; see also SB at pp. 43.) Second, because (according to Appellants) the laws do not "discriminat[e] between discrete and ascertainable groups of students . . . ." (IB at pp. 38-41, see also SB at pp. 43-45.) Neither of these arguments withstands scrutiny.

1. The Alleged Uniformity Of The Challenged Statutes Does Not Preclude An Equal Protection Challenge

Appellants' first argument—that the Challenged Statutes cannot violate the equal protection clause because they impose "uniform rules applicable to districts throughout California," (IB at p. 38)—is simply a restyled argument that courts are limited to examining the statutory text,

without reference to the statutes' real-world effects. (See *supra* at pp. 73-74.) As described above, however, any law, even a "facially-neutral" law, is the proper subject of an equal protection claim if it results in substantially differential treatment with respect to a fundamental right "as a practical matter." (See *Serrano I*, *supra*, 5 Cal.3d at p. 598; see also *Somers, supra*, 172 Cal.App.4th at pp. 1411-1412; *In re Marriage Cases*, *supra*, 43 Cal.4th at p. 839; *Gould*, *supra*, 14 Cal.3d at p. 664.) Thus, the ostensible uniformity of the rules imposed by the Challenged Statutes cannot insulate them from an equal protection challenge.

2. An Equal Protection Challenge Does Not Require Express Classification Of Students Into Groups

Appellants' second argument—that the equal protection clause is inapplicable because the Challenged Statutes do not discriminate against a fixed, identifiable class of students (IB at pp. 37-42)—fares no better.

As an initial matter, there can be no dispute that, for purposes of Plaintiffs' "suspect class" claims, poor and minority students constitute protected classes under the equal protection clause. (See, e.g., *Serrano I*, *supra*, 5 Cal.3d at p. 614 ["[T]his system . . . classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend . . . ultimately upon the pocketbook of his parents."]; *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 880.) Thus, Plaintiffs' suspect class claims are unquestionably the proper subject of an equal protection challenge.

With respect to Plaintiffs' "fundamental rights" claims, Appellants' argument reflects a misunderstanding of the very nature of such a claim, conflating fundamental rights and suspect class claims. As this Court has acknowledged, equal protection claims are properly asserted where a law "*either* creates classifications *or* affects a fundamental right." (*Moreno v. Draper* (1999) 70 Cal.App.4th 886, 893 [italics added].) The former type

of claim depends on the differential treatment of well-defined *groups*, as it is the nature of the *classification* that determines the level of scrutiny. (See *Hiatt v. City of Berkeley* (1982) 130 Cal.App.3d 298, 309.) The latter, by contrast, focuses on harm to *individuals*; it is the nature of the *right* at issue that determines the level of scrutiny, not the characteristics of the group being harmed. (See *Daniels v. McMahon* (1992) 4 Cal.App.4th 48, 59 ["[T]he level of scrutiny afforded to, and assessment of the constitutionality of, limitations on a constitutional right depends on the nature of the interest at issue."]; see also *Serrano II*, *supra*, 18 Cal.3d at p. 766 [education financing system unconstitutional because it "affect[ed] the fundamental interest of the *students of this state* in education"]; *id.* at p. 759 fn. 38 ["Our task is . . . to determine whether . . . the state school financing system . . . denies equal educational opportunity to the public school students of this state."].)[30]

In any event, the Challenged Statutes *do* result in unequal treatment of different groups of students—students who *are* assigned to grossly

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[30] Indeed, neither of the two federal decisions cited by State Defendants involved *fundamental rights* claims, like those at issue here. (See *Nelson v. City of* Irvine (9th Cir. 1998) 143 F.3d 1196, 1205 ["Nelson has not alleged that the City of Irvine's policy implicates any fundamental rights . . . ."]; *Corey Airport Services, Inc. v. Clear Channel Outdoor, Inc.* (11th Cir. 2012) 682 F.3d 1293, 1298 ["[The class for a *class-based* claim for equal protection purposes cannot be defined solely as those persons who suffered at the hands of the supposed discriminator."] [italics added].) Nor did *Darces v. Woods* (1984) 35 Cal.3d 871, 885, in which the plaintiff challenged a governmental practice that "penalize[d] her . . . children on the basis of their *status* as siblings of undocumented aliens . . . ." And in *Altadena Library Dist. v. Bloodgood* (1987) 192 Cal.App.3d 585, 591, the Court rejected plaintiffs' equal protection challenge to a law requiring supermajority voter approval for new special tax increases, yet expressly held it might well have reached a different result if the law had "singled out education."

ineffective teachers and students who *are not* assigned to grossly ineffective teachers. (See *supra* at pp. 25-43; see also RT 2772:4-10 [Kane] ["[B]eing assigned to a fifth percentile teacher means I lose . . . almost a whole year's worth of learning . . . ."]; 9087:3-7 [Darling-Hammond] [agreeing that a "student who is assigned an incompetent teacher for even one year could suffer harm in terms of not having the building blocks he needs for the rest of his life"]; 8375:1-16 [Berliner] [agreeing that one "teacher can have a negative impact on [a] child . . . that may stick with the child for years . . . ."].)

Intervenors contend that students assigned to grossly ineffective teachers do not constitute a group capable of asserting an equal protection challenge because, according to Intervenors, a group must be "fixed" in order to raise such a claim. (IB at pp. 40-42.) But the very case Intervenors cite for this proposition says exactly the opposite. In *Gould*, *supra*, 14 Cal.3d 661, the California Supreme Court held that because the placement of a candidate's name higher on an election ballot affords him a substantial advantage over candidates placed lower on the ballot, a city ordinance listing candidates in alphabetical order "invariably" imposed a disadvantage on a "fixed class of candidates"—those candidates having last names at the end of the alphabet. (*Gould*, *supra*, 14 Cal.3d at p. 675-676.) But the California Supreme Court *also* held that the ordinance violated the fundamental rights of *voters* who supported these lower-listed candidates, a fact that Intervenors fail to mention in their Opening Brief. (*Id.* at p. 670.) The group of disadvantaged voters, of course, could *not* be identified ahead of time, would *change* depending on which candidates each voter supported, and thus was *not* "fixed" at all. (See *ibid*.)

Likewise, in *Serrano*, there was no "fixed" class of students that was systematically disadvantaged by the school financing statutes at issue. Students, after all, commonly transfer between districts (see, e.g., AA 1102,

1110, 1190-1192), some of which have higher tax bases and tax rates, and some of which have lower tax bases and tax rates. (*Serrano I*, *supra*, 5 Cal.3d at pp. 591-595.) And intra-district tax rates and property values evolve as well, meaning that some districts harmed by the school financing laws one year might well have *benefitted* from the very same laws the following year. (See *Serrano II*, *supra*, 18 Cal.3d at pp. 745-746.) But none of this altered the *Serrano* Court's holding: the laws were facially unconstitutional under the equal protection clause on a statewide basis because they failed to provide *all* students with "substantially equal opportunities for learning." (*Id.* at p. 747-748.)

Appellants also contend that students who are assigned to a grossly ineffective teacher do not constitute a group of individuals capable of asserting an equal protection challenge because there is no way to identify, *ex ante*, *which* students will have their fundamental rights deprived and, relatedly, because the group asserting the equal protection challenge is being defined by reference to the harm it is suffering. (IB at pp. 38-41; SB at p. 45.) But that is no different from the situation in *Bullock* and *Gould*, where there was likewise no way to know in advance *which* voters would have their votes "diluted" by the unfairness of the electoral system and there was nothing—except for the constitutional harm they suffered—unifying the voters. (*Bullock*, *supra*, 405 U.S. at p. 144; *Gould*, *supra*, 14 Cal.3d at p. 670.) The *Bullock* Court, in particular, emphasized that because fundamental rights were at stake, equal protection principles applied even though the injured individuals could not "be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause." (*Bullock*, *supra*, 405 U.S. at p. 144.)

Moreover, *Serrano* itself once again forecloses Appellants' argument. In *Serrano*, the "class" of students being harmed as a result of

the statutes' underfunding of certain school districts was simply the group of students residing in underfunded districts. (*Serrano I*, *supra*, 5 Cal.3d at p. 589 [plaintiffs represented "all public school pupils in California, 'except children in that school district, the identity of which is presently unknown, which school district affords the greatest educational opportunity of all school districts within California.'"].) Nevertheless, the Court held that plaintiffs stated (and ultimately proved) that their fundamental rights were being violated under the equal protection clause of the California Constitution. (*Serrano I*, *supra*, 5 Cal.3d at p. 604 [striking down the laws because they have "a direct and significant impact upon, a fundamental interest,' namely education."]; see also *Serrano II*, *supra*, 18 Cal.3d at p. 776.)

II. The Trial Court's Factual Findings Properly Led To The Conclusion That The Challenged Statutes Must Be Reviewed Under The Strict Scrutiny Standard

The trial court found that Plaintiffs proved *both* of their equal protection theories, holding that the Challenged Statutes (1) have "a real and appreciable impact on students' fundamental right" to equal educational opportunity, *and* (2) "impose a disproportionate burden on poor and minority students." (AA 7300.) For each of those independent reasons, the trial court appropriately applied strict scrutiny. (*Ibid*.)

Appellants argue that the trial court was wrong to apply strict scrutiny, but their arguments amount to nothing more than a disagreement with the trial court's factual findings—classic sufficiency of the evidence challenges that are subject to substantial evidence review.

A. Intervenors Waived Their Sufficiency Of The Evidence Challenges

As an initial matter, this Court should find that Intervenors have waived their ability to assert sufficiency of the evidence arguments. Parties

that assert sufficiency of the evidence challenges, as Appellants have done here, are required to "set forth in their brief[s] *all* the material evidence on [these] point[s] and *not merely their own evidence*." (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [italics in original].) The "burden to provide a fair summary of the evidence 'grows with the complexity of the record.'" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 739.) It is a burden that Intervenors have not come remotely close to satisfying.

Plaintiffs introduced compelling testimony from 30 witnesses and submitted hundreds of documents supporting their claims. Yet in their 82-page Opening Brief, which includes a 15-page Statement of the Case, Intervenors devote just <u>*three sentences*</u> to describing Plaintiffs' evidence. (IB at pp. 16, 21.) Intervenors' distorted representation of the evidentiary record, particularly their wholesale omission of almost all evidence supporting Plaintiffs' claims, violates "fundamental principles of appellate review." (*Doe v. Roman Catholic Archbishop of Cashel & Emily* (2009) 177 Cal.App.4th 209, 218.) As such, this Court should find that Intervenors have waived the sufficiency of the evidence arguments scattered throughout their Opening Brief. (See *id.*; *Myers*, *supra*, 178 Cal.App.4th at p. 749; *Foreman*, *supra*, 3 Cal.3d at p. 881 [collecting cases].)

B. Plaintiffs Proved That The Challenged Statutes Have A Real And Appreciable Impact On Students' Fundamental Right To Equal Educational Opportunity

The trial court found unequivocally that the Challenged Statutes are imposing substantial harm on students, agreeing with Plaintiffs that "the Challenged Statutes result in grossly ineffective teachers obtaining and retaining permanent employment" and that "the Challenged Statutes cause

the potential and/or unreasonable exposure of grossly ineffective teachers to all California students." (AA 7295.)[31]

As the trial court found, "extensive evidence" proved that "the Permanent Employment Statute does not provide nearly enough time for an informed decision to be made regarding the decision of tenure (critical for both students and teachers)" and, "[a]s a result, teachers are being reelected who would not have been had more time been provided for the process." (AA 7301; see *supra* at pp. 10-11, 27-32.) With respect to the Dismissal Statutes, the trial court found that "grossly ineffective teachers are being left in the classroom" due to the "time and expense [required] to investigate and prosecute these cases." (AA 7303; see *supra* at pp. 11-13, 32-39.) And the trial court found that because the "last-hired teacher is the statutorily-mandated first-fired one when layoffs occur" under the LIFO Statute, "[t]he result is classroom disruption on two fronts"—the loss of an effective

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[31] Intervenors contend that the trial court "grossly misconstrued the nature" of the fundamental right to education in California by "transform[ing] the equal protection right to 'basic educational *equality*' into a *substantive* right governing the 'quality of the education [students] are afforded by the state.'" (IB at p. 50 [italics added].) But the trial court did no such thing; it focused properly on educational equality. (See AA 7294 ["[T]he California Constitution . . . prohibits maintenance and operation of the public school system in a way which denies **basic educational equality** to [] students . . . ."] [quoting *Butt*, *supra*, 4 Cal.4th at p. 685][bold in original]; see also AA 7293 ["[The] opportunity [of an education], where the state has undertaken to provide it, is a **right** which must be made available to all **on equal terms**."] [quoting *Brown*, *supra*, 347 U.S. at p. 493] [bold in original]; AA 7300 ["Plaintiffs have proven, by a preponderance of the evidence, that the Challenged Statutes impose a real and appreciable impact on students' fundamental right to *equality* of education and that they impose a disproportionate burden on poor and minority students."] [italics added].)

teacher and the retention of a grossly ineffective teacher. (AA 7305; see *supra* at pp. 15-16, 39-45.)[32]

Appellants argue that the evidence did not support the trial court's findings for several reasons: they contend that (1) effective teachers are not particularly important for student educational outcomes because other factors affect student performance, (SB at p. 23; IB at pp. 31, 35-36, 44); (2) the causal link between the Challenged Statutes and harm to students is attenuated, (SB at pp. 48-49, 51, IB at pp. 44-45, 49); and (3) the trial court did not adequately consider the positive effects that the Challenged Statutes have on students' educational outcomes, (SB at p. 42; IB at pp. 51, 58). All three of these arguments fail.

1. Substantial Evidence Supports The Trial Court's Finding That Effective Teachers Are A Critical Component Of Educational Opportunity

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

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[32] Thus, there is no merit to Intervenors' argument that the court failed to explain *how* the Challenged Statutes impose a real and appreciable impact on students' fundamental right to education. (IB at p. 45.)

everywhere else in California."].) But even if funding and time in school are equal, students *still* cannot be assured of equal educational opportunities unless they have substantially equal access to effective teachers. After all, teachers are the very vehicle through which students receive their education. As the California Supreme Court explained in *Serrano*, "differences in dollars . . . produce differences in pupil achievement," in part, because money allows districts to employ a "higher quality staff"—a clear recognition that effective teachers are an essential component of the right to equal educational opportunity. (*Serrano II*, *supra*, 18 Cal.3d at p. 748.)

In their Opening Briefs, Appellants contend that the evidence did not "support a finding that assignment to a grossly ineffective teacher, standing alone, causes any student's educational experience, 'viewed as a whole,' to fall below prevailing statewide standard.'"[33] (IB at p. 56; see also SB at pp. 47-53.) But the trial court found otherwise. (AA 7299 ["Evidence has been elicited in this trial of the specific effect of grossly ineffective teachers on students. The evidence is compelling. Indeed, it shocks the conscience."]; *id.* [citing a study showing that "students in LAUSD who are taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers"].) Indeed, Appellants' sufficiency-of-the-evidence argument is refuted by virtually every piece of testimonial and documentary evidence presented at trial regarding the importance of teachers. (See *supra* at pp. 20-26.) Even

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[33] State Defendants also take issue with the fact that the trial court did not expressly "define[] . . . the prevailing statewide standard for educational quality." (SB at p. 52.) But *no* court analyzing alleged violations of the fundamental right to equal educational opportunity—not the *Serrano I* Court, the *Serrano II* Court, or the *Butt* court—has found it necessary to *define* the "prevailing statewide standard" for educational quality.

Appellants' own witnesses confirmed that "[g]rossly ineffective teachers harm students" (RT 4574:27–4574:4 [Johnson]), and that an ineffective teacher can cause a student to fall behind his or her peers "a *full level of achievement* in a single school year." (AA 4665 [CDE Slide].)

As they did at trial, Appellants again contend that a number of other factors—including out-of school factors like poverty and safety—*also* affect student achievement. (IB at p. 57.) But the existence of other factors that might affect student achievement—which Plaintiffs have never disputed—does not diminish the importance of *teachers*. (See, e.g., RT 4573:12-15 [Johnson]; 7461:14-17 [S. Brown] [the challenges faced by high-risk kids outside of school and the retention of ineffective teachers in classrooms are "separate issues"].) In fact, a student's assignment to a grossly ineffective teacher is just as devastating (if not *more* devastating) to her educational opportunities as the harm at issue in *Butt*. As in *Butt*, an ineffective teacher prevents students from receiving adequate "instruction . . . essential for academic promotion, high school graduation, and college entrance." (IB at p. 57 [citing *Butt*, *supra*, 4 Cal.4th at p. 687-88 & fn. 16].) But, whereas the premature closure of the district's schools in *Butt* deprived students of just *six weeks* of school, a grossly ineffective teacher can cost her students a *full year* of academic advancement. (*Butt*, *supra*, 4 Cal.4th at p. 687; RT 2770:6-2771:20 [Kane]; AA 4665.)

2. Substantial Evidence Supports The Trial Court's Finding That The Challenged Statutes Cause Harm To Students

Causation is a classic "question of fact" for the trial court. (*Hoyem v. Manhattan Beach City School Dist.* (1978) 22 Cal.3d 508, 520; *Boon v. Rivera* (2000) 80 Cal.App.4th 1322, 1334, *Eric M. v. Cajon Valley Union School Dist.* (2009) 174 Cal.App.4th 285, 298.) Yet Appellants urge this Court to overturn the trial court's findings that the Challenged Statutes

cause harm to students, arguing that various "independent hiring, retention, and assignment decisions by school district administrators" are *more* responsible than the Challenged Statutes for the infringement of students' fundamental right to education. (IB at p. 31; see also SB at p. 48.) Appellants contend that Plaintiffs failed to prove causation because "[n]othing in the statutes dictates which teachers are hired or promoted; whether poor-performing teachers are supported, asked to resign, or terminated, or which teachers are assigned to which students." (IB at p. 48.) But once again, Appellants misrepresent the applicable legal standards and ignore the substantial evidentiary record that supports the trial court's findings.

a. Proof of Causation. As a matter of law, the "real and appreciable impact" test does not demand a showing of strict causation, as Appellants suggest. Plaintiffs were not required to prove, and the trial court was not required to find, that the Challenged Statutes are the sole cause, or even the "but for" cause, of students failing to receive substantially equal educational opportunities. The California Supreme Court clarified this very point in *Gould*:

> The city asserts that because its ballot placement procedure does not ***cause*** or encourage voters to cast their ballots haphazardly, it cannot be held constitutionally responsible for any resulting inequality in the voting procedure. *This argument simply misconceives the nature of the equal protection guarantee*. . . . It is the unequal ***effect*** flowing from the city's decision to reserve the top ballot position for incumbents that gives rise to the equal protection issue in question in this case.

(*Gould*, *supra*, 14 Cal.3d at p. 669 fn. 9 [italics added].) Similarly, in *Serrano II*, the school financing statutes did not *cause* districts to tax themselves at rates that produced disparities in educational opportunity—districts could, after all, select whatever tax rate they desired. (*Serrano II*,

supra, 18 Cal.3d at p. 742.) The court recognized, however, that "the system itself" imposed practical "limitations" on districts' ability to provide their students with equal educational opportunities. (*Id.* at p. 761; see also *Fair Political Practices Com.*, *supra*, 25 Cal.3d at pp. 46, 48 [applying strict scrutiny to statutory provision that did "not directly limit or restrict the right to petition," but still constituted a "significant interference" with a constitutional right].) Notwithstanding the nominal "decisions" that districts could make under the statutes, the court held that the "source of the[] disparities [was] unmistakable." (*Serrano II*, *supra*, 18 Cal.3d at p. 740 [quoting *Serrano I*, *supra*, 5 Cal.3d at p. 594].)

Appellants in this case, like the defendants in *Serrano*, pretend that the harms being suffered by students are the result of independent decisions being made by the school districts, rather than the California Education Code. (IB at pp. 45-49; SB at pp. 48-52.) But, as in *Serrano*, the school districts' discretion with respect to teacher employment and assignment decisions is a "cruel illusion" (*Serrano I*, *supra*, 5 Cal.3d at p. 611) because they are confined by the "limitations" of the Challenged Statutes; it is "the system itself" that is the "source of the[] disparities." (*Serrano II*, *supra*, 18 Cal.3d at p. 740.)

For example, with respect to the Permanent Employment Statute, Appellants argue that districts make "independent" decisions about which teachers should receive tenure, and suggest that districts can avoid violating students' fundamental rights if they simply try harder and make "better" tenure decisions. (SB at pp. 49, 51; IB at p. 46.) But, as many witnesses testified at trial, *no* amount of effort, resources, or dedication can change the "ridiculously short period of time" and inadequate amount of student learning data available to districts prior to the deadline imposed by the Permanent Employment Statute. (RT 754:25-755:24 [Deasy]; 2153:13-18 [Raymond] ["[J]ust simply not enough time. And no matter what we do,

we can't create more time in which to make that important determination."]; 9694:17-9695:15 [Smith]; see also RT 2431:4-8 [Douglas]; 2720:12-17 [Kane]; 4581:26-4583:9 [Johnson].) And as Dr. John Deasy testified, even the so-called affirmative tenure process that LAUSD has implemented has *not* prevented grossly ineffective teachers from obtaining permanent employment in LAUSD, (RT 936:15-937:7; see *supra* at p. 30); it is merely a strategy LAUSD employs to do the best it can *within* the confines of the existing statute.

With respect to the Dismissal Statutes, Appellants do not argue—not even once in their Opening Briefs—that districts can avoid the cost or time required to dismiss an ineffective teacher through the dismissal process. To the contrary, the State Defendants have admitted that the burdens of the dismissal process "*of course, will harm students*." (RRJN, Ex. B at p. 13 [emphasis added].) Instead, Appellants argue that districts can avoid the dismissal process if they devote more "resources and programs . . . to improving teachers' performance." (IB at p. 46; see also SB at p. 49.) But this argument concedes the problem; there would be no need to avoid a process that worked. And, in any event, *all* witnesses agreed that even the most "well-run [remediation] program[s] must contemplate that some poorly performing teachers may still have to be dismissed." (RT 4605:8-4606:10 [Johnson]; see also RT 5794:10-13 [Fraisse]; *supra* at pp. 37-39.)[34]

With respect to the LIFO Statute, Appellants contend that districts are to blame for the harms imposed on students because districts

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[34] Relatedly, Defendants tried to show at trial that teacher ineffectiveness should be attributed to misassignments—for example, an English teacher being assigned to teach a math class. But the State's own witnesses readily admitted that the issue is a red herring; misassigned teachers can still be effective at teaching and properly assigned teachers can be ineffective. (RT 8786:22-28 [Futernick].)

supposedly have "discretion to re-assign and transfer teachers . . . in the manner they believe appropriate."[35] (IB at p. 50.) But there was no evidence presented at trial that districts can effectuate large-scale involuntary transfers of teachers between schools; to the contrary, the evidence showed that involuntary transfers of teachers lead to grievances and litigation. (See, e.g., AA 5539-5545 [challenge to Pasadena layoff plan].) Moreover, a district's ability to transfer ineffective teachers *between* schools following a layoff would not alter the fact that *some* unlucky children in *some* unlucky schools will be stuck with one or more of these failing teachers—who were retained for no reason other than their seniority—and deprived of excellent teachers who were laid off for no reason other than their seniority. (AA 7305-7306.)[36]

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[35] Appellants also claim that districts are responsible for any student harm resulting from layoffs under the LIFO Statute because districts can "skip" junior teachers with "special training and experience" pursuant to LIFO Statute subdivision (d)(1). (IB at p. 50.) But witnesses for *all* parties testified that a teacher's credentials are not correlated with her effectiveness in the classroom; thus, the "credential" exception touted by Appellants is inapposite. (RT 660:1-662:11 [Deasy]; 2042:28-2043:19 [Raymond]; 2721:3-7 [Kane]; 4169:16-28 [Ramanathan]; see also *supra* at pp. 26, 43-44.) As the trial court found, the LIFO Statute "contains no exception or waiver based on teacher effectiveness." (AA 7305.)

[36] Intervenors contend that "Plaintiffs' challenge to [the LIFO Statute] separately fails for lack of ripeness" because, according to Intervenors, future layoffs are too speculative "to permit an intelligent and useful decision to be made." (IB at p. 78 fn. 44 [citations omitted].) California courts, however, do not demand the level of certainty that Intervenors describe. (See *Vandermost v. Bowen* (2012) 53 Cal.4th 421, 463-464; see also *Coral Const. Inc. v. City & County of S.F.* (2004) 116 Cal.App.4th 6, 23-26 [holding that case was "definite and concrete" where evidence showed that contractor would bid on a project "sometime in the relatively near future."]; *Serrano II*, *supra*, 18 Cal.3d

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Indeed, Plaintiffs' evidence of causation is far more compelling than the evidence presented in other cases in which California courts have applied strict scrutiny. In *Gould*, *supra*, 15 Cal.3d at p. 668, for example, the court applied strict scrutiny based on a showing that preferential ballot placement constituted one "factor" affecting the outcome of "municipal elections"—not the sole factor or even the primary factor. And in *Serrano II*, *supra*, 18 Cal. 3d 744, the court held that plaintiffs' evidence warranted strict scrutiny because it demonstrated a "relationship" between the "cost and the quality of educational opportunities afforded," such that the statutes at issue "affect[ed]" and "touch[ed] upon the fundamental interest of education." (*Serrano II*, *supra*, 18 Cal.3d at pp. 748, 766, 776; see also *id.* at p. 745 [the statutes created only a "potential disparity" in educational opportunities].) There can be no dispute that the Challenged Statutes here are a "factor" that "affects" students' fundamental right to education; thus, the trial court properly applied strict scrutiny.

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at p. 757 ["To ask, as defendants do, that we defer our notice of such probable future disparities to the time of their actual occurrence is to ask that we ignore inherent defects in the system which we are called upon to examine."].) There is no question that future layoffs will be conducted under the parameters set forth in the LIFO Statute, harming students in the same manner as prior layoffs. (See RT 4038:17-26 [Ramanathan] [future layoffs are "extremely likely"].) And, in fact, districts throughout California, including LAUSD, announced teacher layoffs during the 2014-2015 school year—just months before Appellants filed their Opening Briefs—for at least the seventh year in a row. (RRJN, Exs. K, L.) The Superior Court also rejected Intervenors' argument, finding it had already "been implicitly rejected by the Supreme Court" and that "Plaintiffs' claims against the LIFO Statute '[are] not merely a general, abstract challenge," as Intervenors suggest. (AA 486-487 [citations omitted].)

b. Local Mismanagement. This Court should also reject State Defendants' effort to blame educational inequalities on local district mismanagement (see SB at p. 51 ["[S]ome local districts better manage their discretion than others."]), as the California Supreme Court has already rejected this argument as a matter of law. (*Butt, supra,* 4 Cal.4th at pp. 684-685). In *Butt*, a group of parents brought an action against the State of California, state officials, and a local school board, alleging that the district's decision to end its school year six weeks early due to a budget shortfall, and the State's failure to intervene and avert this result, violated students' fundamental right to education. (*Butt*, *supra*, 4 Cal.4th at pp 673-674.) The State defendants contended they had "fulfill[ed] [their] financial responsibility for educational equality" by providing equalized funding to the districts and thus could not be held responsible "[i]f local mismanagement cause[d] one district's services to fall seriously below prevailing statewide standards . . . ." (*Id.* at pp. 679-680.) But the California Supreme Court disagreed, holding that the "[m]anagement and control of the public schools is a matter of *state*, not local, care and supervision." (*Id.* at pp. 679-681 [italics added].) Thus, even if "local mismanagement causes one district's services to fall seriously below prevailing statewide standards" (as it did in *Butt*), "strict scrutiny" *still* applies because "[t]he State's plenary power over education includes ample means to discourage [] mismanagement in the day-to-day operations of local districts." (*Id.* at pp. 679-680, 692.)[37]

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[37] See also *Butt*, *supra*, 4 Cal.4th at p. 688 [rejecting the State's argument that "the District's students [should] absorb the consequences of District mismanagement"]; *Assn. of Mexican-American Educators v. State of Cal.* (9th Cir. 2000) 231 F.3d 572, 582 [en banc] ["[I]n addition to controlling local districts' budgets and textbooks and regulating the duties of public school employees, the state dictates whom the districts

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c. Parade of Horribles. Finally, this Court should not be swayed by Appellants' professed concern that upholding the trial court's decision would subject "every provision in the Education Code" and "every decision made in the administration of the schools" to strict scrutiny. (SB at p. 51; IB at pp. 42-43.) The defendants in *Serrano I* pointed to the same parade of horribles, arguing that the court's application of strict scrutiny would result in the "destruction of local government." (*Serrano I*, *supra*, 5 Cal.3d at p. 614.) But the court "unhesitatingly reject[ed] this argument." (*Ibid.* ["We cannot share defendants' unreasoned apprehensions of such dire consequences"]; see also *id.* at p. 599 fn. 13.) As the court explained, the decision whether to apply strict scrutiny must be made on a case-by-case basis, and is appropriate whenever a law "clearly affects the fundamental interest of the children of the state in education." (*Serrano II*, *supra*, 18 Cal.3d at 766 fn. 45.) It is difficult to imagine laws that more "clearly affect[] the fundamental interest of the children of the state in education" (*ibid.*) than the Challenged Statutes, which have a direct and substantial impact on districts' ability to place students in classrooms with effective teachers.[38]

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may and may not hire."]; *id.* ["[W]e have no difficulty concluding that the State of California is in a theoretical *and* practical position to 'interfere' with the employment decisions of local school districts."] [italics in original].

[38] In *California Teachers Association*, *supra*, 20 Cal.4th 327, the State also issued a "grave warning" virtually identical to the one Appellants make in their Opening Briefs, claiming that invalidation of the Education Code provision at issue would imperil "the rest of the educational statutory scheme . . . ." In response, the California Teachers Association correctly (and successfully) argued that "each statute and its scheme must stand on its own two feet . . . ." (RRJN, Ex. A at p. 21.)

3. The Trial Court Did Not Ignore The Alleged Virtues Of The Challenged Statutes

Intervenors also contend that the trial court erred when determining the applicable level of judicial scrutiny because it did not analyze the "net effect" of the Challenged Statutes and did not, at the outset, determine whether the harms imposed by the Challenged Statutes "outweigh[] the statutes' positive effects on the overall quality of students' education . . . ." (IB at pp. 58-63.) But Intervenors conflate two separate analytical steps that a court must undertake when deciding an equal protection claim: (1) "First, [the court] must determine the level of scrutiny to be applied," and (2) "[s]econd, [the court] must apply that scrutiny to the [law] at issue . . . to determine its constitutionality." (*Jonathan L. v. Super. Ct.* (2008) 165 Cal.App.4th 1074, 1101; see also *Gould*, *supra*, 14 Cal.3d at p. 669 ["[A] court must determine at the threshold of any 'equal protection' analysis the 'level of scrutiny' or 'standard of review' which is appropriate to the case at hand."] [citations omitted].)

The very case on which Intervenors rely bears out this distinction. In *Butt*, the California Supreme Court considered whether the State of California could constitutionally refrain from intervening and preventing the early termination of one school district's academic year. (*Butt*, *supra*, 4 Cal.4th at pp. 685-692.) The Court examined the positive attributes of non-intervention (*id.* at pp. 688-690 [considering whether non-intervention "preserv[ed] . . . local autonomy and accountability" and avoided "saddl[ing] [the district] . . . with long-term debt"]), but only *after* concluding that the State's non-intervention had imposed a real and appreciable impact on students' fundamental right to education and therefore should be governed by strict scrutiny. (*Ibid.*; see also *Serrano II*, *supra*, 18 Cal.3d at 753-755 [rejecting defendants' argument that the Court

should consider "the 'adequacy' and 'equality' of educational programs" as a whole and the "overall effect" of the State's school financing statutes].)

In any event, the trial court in this case *did* examine the (scant) evidence of the supposed virtues of the Challenged Statutes, finding (despite these alleged attributes) that the Challenged Statutes "unfairly, unnecessarily, and for no legally cognizable reason (let alone a **compelling** one), disadvantage[]" students, and are founded on a logic that is "unfathomable and therefore constitutionally unsupportable." (AA 7302, 7306.) Once again, there is no basis for this Court to conclude otherwise.

C. Plaintiffs Proved That The Challenged Statutes Impose Disproportionate Harm On Poor And Minority Students

In addition to holding that the Challenged Statutes are subject to strict scrutiny because they impose a "real and appreciable impact" on California students' fundamental right to educational equality, the trial court held that strict scrutiny is warranted for a second reason: the Challenged Statutes impose a disproportionate burden on poor and minority students. (AA 7306-7307.)

Intervenors contend that the trial court erred in reaching this holding because the text of the Challenged Statutes does not expressly draw distinctions between students on the basis of race or wealth, and because the statutes were not enacted with the purpose or intent of discrimination. (IB at pp. 65-68.) These arguments, however, contravene California Supreme Court decisions recognizing that strict scrutiny applies where laws have a disproportionate impact on the educational opportunities afforded to minority or low-income students. Indeed, unlike Intervenors, the State Defendants *concede* that disparate impact is a valid basis for declaring a law unconstitutional in California.

Appellants also argue that the Challenged Statutes do not, in fact, "cause disproportionate harm to poor or minority children." (IB at pp. 65,

69-75; see also SB at pp. 53-56.) Once again, this sufficiency-of-the-evidence challenge ignores the voluminous evidence substantiating the trial court's holding.

1. The California Supreme Court Has Repeatedly Held That Strict Scrutiny Applies to Laws Imposing Disproportionate Harm On Suspect Classes

In their Opening Brief, Intervenors—based largely on standards derived from federal case law—contend that Appellants' suspect class claims fail to trigger strict scrutiny because the Challenged Statutes do not "expressly distinguish[] on the basis of a suspect classification," and "were not enacted for the purpose of discriminating against poor or minority students." (IB at pp. 65-66, 69 [citing *Washington, supra*, 426 U.S. at p. 242; *Village of Arlington Heights v. Metro. Housing Dev. Corp.* (1977) 429 U.S. 252, 265; *Pers. Adm'r v. Feeney* (1979) 442 U.S. 256, 279].) But, whatever the federal rule might be, California courts do *not* require a showing of discriminatory intent in the face of disparate impact. In fact, the California Supreme Court has made clear that the California Constitution "demand[s] an analysis different from that which would obtain if only the federal standard were applicable." (*Serrano II*, *supra*, 18 Cal.3d at p. 764.) In fact, the State Defendants *concede* that disparate impact is a valid equal protection theory under California law and that discriminatory intent is not necessary to trigger strict scrutiny. (See SB at p. 57 ["If . . . [the] statutes inherently created significant disparities . . ., then perhaps no more would have been required to trigger strict judicial scrutiny."].)

In *Serrano I*, the defendants made the same argument that Intervenors make here—that "no constitutional infirmity [was] involved because the complaint contain[ed] no allegation of purposeful or intentional discrimination." (*Serrano I*, *supra*, 5 Cal.3d at pp. 600-601.) But the

California Supreme Court explained that the "whole structure of this argument must fall for want of a solid foundation in law or logic" because, *inter alia*, disparate impact is unconstitutional even where it is "merely de facto." (*Id*. at pp. 602-604 [citing *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 881; *S.F. Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 937].) Accordingly, the *Serrano I* Court held that the plaintiffs had properly asserted constitutional claims based on the "substantial disparities" resulting from the school financing scheme at issue. (*Serrano I*, *supra*, 5 Cal.3d at p. 618.)

Likewise, in *Serrano II*—a decision issued after *Washington v. Davis* (1976) 426 U.S. 229—the California Supreme Court affirmed its earlier holding. (See *Serrano II*, *supra*, 18 Cal.3d at pp. 765-766.) As the Court explained, "the fact that a majority of the United States Supreme Court ha[s] now chosen to contract the area of active and critical analysis under the strict scrutiny test for federal purposes can have no effect upon the existing construction and application afforded our own constitutional provisions." (*Id.* at p. 765; see also *Crawford v. Bd. of Educ. of the City of L.A.* (1976) 17 Cal.3d 280, 296-297 ["[A] school board . . . is not constitutionally free to adopt any facially neutral policy it chooses, oblivious to such policy's actual differential impact on the minority children of its schools."].) In fact, the Court pointed out that, even though the Legislature had made "significant" and well-intentioned "improvements" to the State's school financing laws following *Serrano I*, the amended school financing system *still* was unconstitutional because of its disparate impact. (*Serrano II*, *supra*, 18 Cal.3d at pp. 741, 768.)

Faced with this controlling (and dispositive) case law, Intervenors claim that *Hardy v. Stumpf* (1978) 21 Cal.3d 1—which cited *Washington v. Davis* in a cursory two-sentence analysis—impliedly overturned

California's disparate impact jurisprudence.[39] (IB at p. 68.) But Intervenors' argument is foreclosed for two separate reasons.

First, *Hardy* did not purport to address the legal standards that apply to suspect class claims when laws impose a disparate and adverse impact on students' *educational* opportunities. In fact, *Hardy* and *Washington* involved precisely the same factual circumstances—a police department's employment screening procedure that excluded disproportionately high percentages of minority and female applicants. Neither case addressed the issue presented here. (*McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626 ["[C]ases are not authority for propositions not considered."] [citation omitted]; see also *Crawford*, *supra*, 17 Cal.3d at p. 297 ["[T]he importance of . . . policies which avoid 'racially specific' harm to minority groups takes on special constitutional significance with respect to the field of education.'"] [citations omitted].)

Second, in *Butt*—a case decided well *after* *Hardy*—the California Supreme Court reaffirmed its holding from *Serrano* that strict scrutiny applies when policies result in disparate educational opportunities. (See *Butt*, *supra*, 4 Cal.4th at p. 682; see also *Johnson v. Dept. of Justice* (2015) 60 Cal.4th 871, 887 fn. 9 [law satisfied equal protection, in part, because

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[39] In *Sanchez v. State of California* (2009) 179 Cal.App.4th 467, 487-488, (cited in IB at p. 66), it was undisputed that plaintiffs "ha[d] made no showing that the Regulation and the Statute disproportionately impact[ed] a protected class of people." (*Sanchez, supra*, 179 Cal.App.4th at p. 487.) And in *In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 839-841, (cited in IB at p. 77), the Court never held that disparate impact was insufficient to state a "suspect classification" claim; it merely held that the claims in *that* case were not predicated on disparate impact.

there was "no claim that . . . [it had a] disparate impact on homosexuals."].)[40]

2. Substantial Evidence Supports The Trial Court's Finding That The Challenged Statutes Impose Disproportionate Harm On Poor And Minority Students

The Superior Court found it "clear . . . that the Challenged Statutes disproportionately affect poor and/or minority students." (AA 7306.) Overwhelming evidence at trial, including Appellants' own documents and witnesses, supported this finding. Indeed, Plaintiffs proved three different ways in which the Challenged Statutes place a disparate burden on poor and minority students: by creating a devastating phenomenon known as the "Dance of the Lemons," by exacerbating (or preventing districts from ameliorating) the achievement gap, and by concentrating teacher layoffs in schools serving high-need communities. (See *supra* at pp. 4-5, 46-47, 49-51.) As a result, and as the CDE itself acknowledged, "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." (AA 4685 [CDE Publication].)

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[40] State Defendants—who agree with Plaintiffs that suspect class claims under the California Constitution's equal protection clause need not be predicated on an express statutory classification or discriminatory purpose (see SB at p. 57)—claim that the trial court erred in applying strict scrutiny because the Challenged Statutes supposedly do not "inherently create[]" disparities between students. (*Ibid*.) This fabricated standard finds no support in any of the California Supreme Court decisions that have recognized disparate impact claims. In any event, for the reasons set forth above, see *supra* at pp. 46-52, this standard is satisfied here.

Nevertheless, Appellants once again ask this Court to reweigh the evidence and reject the trial court's well-supported finding. (See IB at p. 71-72.)[41] Appellants contend, for example, that one of their expert witnesses, Dr. Jesse Rothstein, testified at trial that "there is no significant difference in teacher effectiveness between high-minority and low-minority schools." (IB at p. 72.) In fact, Dr. Rothstein testified that he did not *know* whether minority and low-income students in California are taught by grossly ineffective teachers at a higher rate relative to non-minority and non-low-income students. (RT 6204:4-8, 6204:25-6205:1; see also RT 8779:24-8780:11 [Futernick].)

Appellants also argue that "only one witness . . . discussed the transfer of underperforming teachers to high-poverty schools." (SB at p. 55; see also IB at pp. 72-73 [Respondents did not "prove that this phenomenon occurs with any regularity"].) But Appellants are mistaken; *several* witnesses testified about the "Dance of the Lemons" in districts statewide, including (but not limited to) expert Dr. Thomas Kane, (RT 2784-2785, 2852), Fullerton Assistant Superintendent Mark Douglas, (RT 2444:11-25, 2447:21-2448:3), San Francisco principal Bill Kappenhagen (RT 2294:18-2295:6, 2302:20-2303:20, 2334:9-2336:11), and Oakland principal Larissa Adam, (RT 1395:2-1396:2, 1409:20-1410:1413; see also RT 7134:5-21 [Seymour].) Even the CDE conceded, in a published report, that "transfers *often* function[] as a mechanism for teacher removal" and "poorly performing teachers generally are removed from high-income or higher-performing schools and placed in low-income and low-performing schools." (AA 4726 [italics added].)

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[41] This Court should reject Intervenors' sufficiency-of-the-evidence arguments as waived. (See *supra* at pp. 88-89.)

Appellants also claim that "no witness testified that statewide tenure or dismissal procedures . . . *cause* districts to assign 'ineffective' teachers to schools or classes serving low-income or minority students." (SB at p. 55 [italics added].) But once again, the record proves otherwise. Dr. Kane, for instance, testified that the Challenged Statutes "function[ ] like a lemon accumulation machine" in high-vacancy, high-minority schools because "districts have to make tenure[] decisions prematurely and . . . it is difficult to make dismissal decisions later." (RT 2784:25-26, 2852:2-20 [Kane]; see also *id.* ["[T]here is a mechanical relationship between premature tenure decisions, difficult dismissal decisions, and the accumulation of ineffective teachers" in poor and minority schools.]; 2445:17-2446:25 [Douglas] [agreeing that the Dance of the Lemons is tied to the Dismissal Statutes]; 2333:11-2334:26 [Kappenhagen]; *supra* at pp. 4, 46-48, 52, 64, 107.)

Appellants contend that Plaintiffs were required to introduce *direct* evidence of disparate impact in *each and every one* of the "well over 1,000 school districts" in California. (IB at p. 70 n. 40; SB at p. 14.) But that is not the law. Courts evaluating facial equal protection challenges routinely draw inferences regarding the existence of an event or condition in one location based on the existence of that event or condition elsewhere. (See, e.g., *Gould*, *supra*, 14 Cal.3d at pp. 667-668 [affirming order invalidating ordinance based on studies of other jurisdictions because "nothing in the record suggest[ed] that Santa Monica voters differ[ed] significantly from the voters who participated in the numerous elections that were studied."]; *American Academy of Pediatrics*, *supra*, 16 Cal.4th at p. 356 [law was facially invalid, in part, based on testimony regarding witnesses' "experiences in other jurisdictions"]; *Cal. Redevelopment Assn.*, *supra*, 53 Cal.4th at p. 276 [majority] & 293 [J., Cantil-Sakauye, dissenting] [finding that statute requiring payments from communities to community redevelopment agencies was facially unconstitutional, based on evidence

from "seven of California's 482 incorporated cities and only one of its 58 counties."].)[42]

Appellants also attempt (yet again) to blame school districts for the disproportionate harm being imposed on poor and minority students by ineffective teachers—they contend that "well-managed" districts can ameliorate some of the worst harms by transferring their most effective teachers to low-income schools. (see SB at p. 56; see also IB at p. 72.) But there was no evidence presented at trial that such *en masse* teacher transfers are a feasible solution. To the contrary, Dr. Deasy explained that when LAUSD has attempted in the past to "force a teacher to go where a teacher [did] not wish to go," the teachers have "aggressively" filed grievances. (RT 919:11-920:3 [Deasy]; see also RT 9713:13-18 [Smith].) Moreover, as the evidence confirmed, Appellants' argument fails because low-income, high-minority schools require teachers who *want* and *choose* to teach there—not teachers who have been *involuntarily* transferred to such schools. (RT 4184:2-10 [Ramanathan] [it is a "terrible situation" when teachers are "bumped or placed into school[s]" and they "don't want to be there."].)

III. The Trial Court Correctly Held That The Challenged Statutes Fail Strict Scrutiny

For both of the reasons set forth above—(1) the real and appreciable impact on students' fundamental right to education, and (2) the

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[42] Relatedly, Appellants argue that Dr. Goldhaber's study of seniority-based layoffs is irrelevant because it was based on data regarding teacher layoffs in Washington State. (IB at p. 74 fn. 43.) However, Dr. Goldhaber's empirical study is relevant to Plaintiffs' suspect class claims because in Washington, like California, "seniority is the overriding factor driving layoffs." (RT 3723:10-3725:10.)

disproportionate harm imposed by on minority and low-income students—the trial court correctly examined the Challenged Statutes under strict scrutiny. Under this standard, the "state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (*Serrano I*, *supra*, 5 Cal.3d at p. 597.) In order to establish that a law is "necessary," the State must prove it is the "least restrictive means possible" to achieve its compelling interest. (*Bd. of Supervisors v. Local Agency* (1992) 3 Cal.4th 903, 913.) Importantly, "the availability of . . . alternatives—or the failure of the legislative body to consider such alternatives—will be fatal" to the law in question. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 37.) Because strict scrutiny imposes such a "heavy burden of justification," (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 847), "strict scrutiny generally functions as a judicial 'trump card,' invalidating any [law]" to which it applies. (*Hill*, *supra*, 7 Cal.4th at pp. 30-31 [citations omitted].)

The trial court held that Appellants failed to satisfy their burden under the strict scrutiny test as to each of the Challenged Statutes. (See AA 7302, 7305-7306.) The trial court found, based on the extensive factual record before it, that the interests supposedly served by the Challenged Statutes suffer from one or more fatal defects: either (1) they are plainly not compelling, (2) the evidentiary record did not support a conclusion that the laws actually serve such interests, or (3) the laws are not necessary to achieve those interests. Many of the purported interests suffered from all three deficiencies. This Court should reject Appellants' efforts to retry

these questions on appeal, which amount to yet another sufficiency-of-the-evidence challenge.[43]

A. Substantial Evidence Supports The Trial Court's Finding That The Permanent Employment Statute Is Not Necessary To Serve A Compelling State Interest

Appellants contend that the Permanent Employment Statute provides districts with "ample opportunity" to evaluate new teachers. (SB at p. 41, IB at p. 8.)[44] But the evidence at trial proved that the statute does exactly the opposite. (See *supra* at pp. 10-11, 27-32.) Appellants also claim that

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[43] Even if this Court were to analyze the Challenged Statutes under rational basis review, as Appellants urge, it should still hold the Challenged Statutes to be unconstitutional. Rational basis review does not mean no review at all—the Challenged Statutes must still "bear[ ] a rational relation to some legitimate end." (*Romer v. Evans* (1996) 517 U.S. 620, 631.) The State's supposed rationales "must find some footing in the realities of the subject addressed by the legislation," (*Heller v. Doe* (1993) 509 U.S. 312, 321), and must be ones that could "reasonably be conceived to be true by the governmental decisionmaker." (*Vance v. Bradley* (1979) 440 U.S. 93, 111.) Further, the Challenged Statutes themselves must bear at least a rational relationship to the governmental objective—their relationship to the asserted goal may not be so attenuated as to render the Challenged Statutes arbitrary or irrational. (*City of Cleburne v. Cleburne Living Ctr., Inc.* (1985) 473 U.S. 432, 446.) For all of the reasons set forth herein, the Challenged Statutes place arbitrary and irrational constraints on school districts that fail even the more deferential test.

[44] Appellants cite *Bakersfield Elem. Teachers Assn. v. Bakersfield City Sch. Dist.* (2006) 145 Cal.App.4th 1260 for the proposition that the Permanent Employment Statute "provides [] district[s] with ample opportunity to evaluate [an] instructor's ability before recommending a tenured position." (IB at p. 8; SB at p. 41.) But the *Bakersfield* court merely stated that a probationary plan "envisions" that districts will have ample opportunity to evaluate new teachers; it says nothing about whether the Permanent Employment Statute *actually* provides districts with this opportunity. (*Bakersfield Elem. Teachers Assn.*, *supra*, 145 Cal.App.4th at p. 1279.)

the Permanent Employment Statute ensures that districts do not procrastinate when deciding whether to reelect ineffective teachers. (IB at pp. 8-9.) Appellants' witnesses, however, made clear that districts do not (and if teachers' probationary periods were longer, would not) procrastinate when non-reelecting ineffective teachers. (RT 6835:20-6838:4 [Mills]; 7622:8-25 [Raun-Linde]; 7585:14-7586:11 [Davies]; see also *supra* at p. 53.) Appellants further allege that the Permanent Employment Statute helps districts "attract and retain qualified teachers . . . ." (SB at pp. 27, 41; see also IB at p. 9.) But no teacher who testified at trial stated that the Permanent Employment Statute had anything to do with his/her decision to enter or remain in the profession.[45]

Moreover, the evidence showed that the Permanent Employment Statute is not *necessary* to achieve Appellants' purported interests. It is undisputed that 32 states have a three-year probationary period, nine states have a four- or five-year probationary period, and four states have no tenure system at all.[46] (RT 4732:12-4733:3 [Jacobs].) There was no evidence that

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[45] Appellants rely almost exclusively on the testimony of a single witness for this point: Dr. Jesse Rothstein, who—in addition to being impeached <u>*nine*</u> times, see *supra* at p. 54—conceded that: (1) he had never conducted surveys or interviews of California teachers to determine whether a longer probationary period would impact their willingness to enter the profession; (2) he had never conducted a study regarding whether California teachers' behavior would be impacted by a longer probationary period; (3) he does not know whether teachers would behave differently at all if California utilized a longer probationary period; and (4) the very same employment protections that would be attractive to effective teachers would also be attractive to ineffective teachers. (RT 6208:14-6209:20.)

[46] California itself had a three-year probationary period until 1983. (*Cousins v. Weaverville Elem. School Dist.* (1994) 24 Cal.App.4th 1846,

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districts in any of the *45* states with longer probationary periods (or no tenure at all) have difficulties accomplishing any the interests identified by Appellants. To the contrary, as the trial court found, two of Appellants' own expert witnesses "agreed that 3-5 years would be a *better* time frame to make the tenure decision for the mutual benefit of students and teachers." (AA 7302 [italics added]; see also RT 8486:16-25 [Berliner]; 6145:13-6146:23 [Rothstein]; 6207:25-6208:1[Rothstein] ["[T]he current two-year probationary period is not the only way that California can serve all of the interests that are purportedly served by the two-year probationary period."]; 9070:17-9072:2 [Darling Hammond] ["[A] tenure period [of] three years would [] serve [the] exact same interest" purportedly served by the Permanent Employment Statute].)

B. Substantial Evidence Supports The Trial Court's Finding That The Dismissal Statutes Are Not Necessary To Serve A Compelling State Interest

With respect to the Dismissal Statutes, Appellants contend that the laws help districts attract "well-qualified individuals to the profession," foster "academic freedom," and prevent arbitrary and unfair dismissals. (SB at pp. 27, 41; IB at 5-7, 14.) But the witnesses whose testimony Appellants cite in their Opening Briefs merely provided their opinions about the importance of abstract concepts like "tenure," "due process," and "independent decision makers"—not the specific Dismissal Statutes at issue here. (See RT 8508:25-8514:16 [Nichols] [discussing "tenure"]; 7035:21-7036:27 [D. Brown] [discussing "due process"]; see also RT 7448:9-7451:13 [S. Brown] [discussing "independent decision makers"].)

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1851-1852.) Yet there was no evidence presented at trial that California was unable to attract or retain qualified teachers before 1983.

Appellants' evidence did not support a conclusion that the Dismissal Statutes, in particular, further any of these interests. (See *Hays v. Wood* (1978) 144 Cal.Rptr. 456, 465, vacated on other grounds by *Hays v. Wood* (1979) 25 Cal.3d 772.)[47]

In any event, there can be no dispute that the Dismissal Statutes are not *necessary* to achieve the interests Appellants proffer. (RT 9106:28-9108:14 [Darling-Hammond] [there may "be other ways to serve the interest of preserving competent teachers than the process contained in the current Dismissal Statutes."].) With or without the Dismissal Statutes, teachers—like all other public employees in California—will still enjoy constitutional due process rights, including notice and an opportunity to be heard. (See *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215.) And teachers, like *all* California citizens, will still be protected by state and federal anti-discrimination laws (see, e.g., Gov. Code § 12940(a)), constitutional free speech protections, and other protections against arbitrary and retaliatory employment decisions (see *Shimoyama v. Bd. of Educ.* (1981) 120 Cal.App.3d 517, 524 ["It is an established principle that a teacher may not be denied a position in retaliation for his exercise of a First Amendment right."]; *Sunnyvale Unified School Dist. v. Jacobs* (2009) 171 Cal.App.4th 168, 181-182). (See also *supra* at pp. 56-57, 62.)

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[47] Nor did Intervenors' evidence support any of the other interests they now claim—for the first time on appeal—are served by the Dismissal Statutes. For example, Intervenors contend the three-member CPC panel (which includes two teachers) helps "guarantee impartiality" in dismissal proceedings and ensures the "decision-making body will understand the relevant educational practice issues." (IB at p. 15.) Tellingly, however, Intervenors cite no evidence in support of this unsubstantiated claim—because no such evidence exists. To the contrary, the evidence showed that the CPC membership limitations in Section 44944 are merely "another hurdle that slows down the process." (RT 1807:6-1808:16 [Christmas].)

Indeed, this Court need look no further than the California public school system itself to find feasible alternatives to the Dismissal Statutes. Classified employees (*e.g.*, administrative support staff, custodians, and school security officers) are "fully endowed with due process rights," (AA 7303), and yet, under the dismissal process for classified employees, the "time and burden associated with [dismissal] is typically *significantly* less than separating" from a tenured teacher. (RT 2001:21-2002:6 [Christmas] [italics added].) LAUSD, for example, spends only $3,400, on average, to dismiss a classified employee, (RT 9244:20-9245:3 [Ekchian]), and the process takes "not much more than a month, month and a half," (RT 2622:15-19 [Douglas].) As the trial court held, there was "no evidence that a classified employee's dismissal process (i.e., a *Skelly* hearing) violated due process." (AA 7304; see also AA 7303.)

C. Substantial Evidence Supports The Trial Court's Finding That The LIFO Statute Is Not Necessary To Serve A Compelling State Interest

As for the LIFO Statute, Appellants contend that the law serves the interest of providing an "objective" standard for conducting layoffs that is "easily understood." (IB at p. 19.) But Appellants provide no explanation as to why it is of *compelling* importance to have an objective standard—plenty of objective standards, such as alphabetical order or height, would be easily understood but still devastating for students and unfair to teachers. (RT 8040:13-17 [Tolladay]; 2264:1-18 [Bhakta]; see also RT 3679:11-24 [Melvoin]; 9712:3-9713:2 [Smith].) In any event, the evidence at trial proved there is widespread agreement as to the identity of the most ineffective teachers in a school district. (See *supra* at p. 24.) Thus, quality-based layoffs resulting in those teachers' termination would also be "easily understood" by everyone in the district. (IB at p. 19.) And, to the extent a teacher believed she was wrongfully selected for a layoff, the courts would

be open to entertain her wrongful termination claim. (Gov't Code Section 12900 et seq.)[48]

In addition, Appellants contend that the LIFO Statute encourages teachers to "invest in" and make deep "connections" with their schools and districts, (IB at pp. 20-21), but the evidence once against proved exactly the opposite. Because the LIFO Statute premises teacher layoffs on factors unrelated to how well a teacher performs in the classroom or how "connected" a teacher is with her school or community, the LIFO Statute *disincentivizes* such behavior. (See RT 2965:12-19 [Moss] ["I stayed long hours, I was extremely committed to my students, I loved my students, I was a leader on campus and none of this mattered."]; 3687:16-3688:23 [Melvoin] ["[T]he incentives were to seek employment elsewhere rather than going . . . [through another] tumultuous cycle."]; 1416:7-15, 1423:19-1425:13 [Adam]; see also RT 6973:13-26 [Mills]; 6217:11-19 [Rothstein].)

Intervenors also argue that taking teacher effectiveness into account when conducting layoffs would destroy collaboration among teachers, allegedly harming students. (IB at p. 20 fn. 17.) But there was no evidence that effective teachers would stop doing what is best for students, merely because of a concern that they might be selected in the event of a layoff. (Cf. RT 9709:23-9710:7 [Smith].)

Even if the LIFO Statute served any of the interests discussed above, the statute is certainly not *necessary* to achieve those interests. California is one of just 10 states in which seniority must be considered when determining which teachers to lay off—20 states prohibit seniority from

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[48] Further, even if "ease of understanding" and "objectivity" were *compelling* state interests (and they are not), the evidence showed that teachers routinely challenge layoff decisions made on the supposedly "objective" basis of seniority under the LIFO Statute. (See, e.g., RT 4165:15-4166:15 [Ramanathan]; 7301:7-7302:9 [Olson-Jones].).

being the sole factor, and two states prohibit seniority from being considered at all. (RT 4742:23-4743:25 [Jacobs].) In the words of the trial court, "[t]he difficulty in sustaining Defendants'/Intervenors' position may explain the fact that . . . California's current statutory LIFO scheme is a distinct minority among other states that have addressed this issue." (AA 7306.) And Appellants' own expert witness, Dr. Darling-Hammond, admitted that a layoff system based on teacher effectiveness, rather than seniority, would "continue to serve" *all* of the interests purportedly served by the LIFO Statute. (RT 9088:14-9089:27.)

IV. AB 215 Has Not Mooted Plaintiffs' Claims

Intervenors—but not State Defendants—assert that this Court should "vacate [the] judgment and remand for dismissal on the ground that AB 215 . . . moots Plaintiffs'" claims. (IB at p. 64.) Intervenors are incorrect both as a matter of fact and law.[49]

Intervenors helped "craft" AB 215 in the waning days of the 2013-14 Legislative session, after the trial court issued its tentative decision. (RRJN, Ex. J.) Notably, AB 215 was not the first bill Intervenors tried to cram through the Legislature in an attempt to moot this case through superficial changes to the Challenged Statutes. Just days before the briefing deadline for Intervenors and State Defendants' motions for summary judgment, the Legislature passed a CTA-endorsed bill, AB 375,

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[49] Intervenors even argue that AB 215 moots Plaintiffs' claims regarding three Challenged Statutes that AB 215 did *not* amend—the Permanent Employment Statute, the LIFO Statute, and Section 44938. According to Intervenors, it is "difficult to determine whether the court held each of the five statutes unconstitutional on its own or only in combination with the others." (IB at p. 65.) Not so. The trial court's decision unambiguously holds each statute unconstitutional on its own. (See AA 7302, 7305-7306.)

which purported to make the dismissal process "fair and efficient," but (like AB 215) actually would have made it *more* difficult to dismiss a teacher. (See RA 134-136.) In their motion for summary judgment, Appellants contended that AB 375 "[r]ender[ed] Plaintiffs' [c]hallenges [t]o [t]he Dismissal Statutes [m]oot and [u]nripe"—much like they argue now with respect to AB 215. (AA 309.) Despite Intervenors' best efforts to moot Plaintiffs' case with AB 375, however, Governor Brown vetoed the flawed bill, noting that it "could [have] create[d] new problems" and "may [have done] more harm than good." (See AA 130.)

Like AB 375 before it, AB 215 does not "substantially reduce[] the time and expense required to dismiss a teacher for poor performance," as Intervenors contend. (IB at p. 64.) Instead, the primary purpose and effect of AB 215 is to "creat[e] a separate hearing process for education employees who are charged with egregious misconduct such as sexual abuse, child abuse and specific drug crimes"—issues that are not relevant to Plaintiffs' claims. (See *supra* at pp. 14-15; see generally Section 44944.1.)

With regard to performance-based teacher dismissals, AB 215 left the Dismissal Statutes virtually untouched. Indeed, the hallmark features that render the Dismissal Statutes so burdensome, time-consuming, and costly—the 90-day "notice of unsatisfactory performance" requirement, (Section 44938(b)(1)), teachers' right to invoke a 3-member CPC hearing process, (Section 44944(c)), expansive discovery rights (Section 44944.05(a)), and more—remain in effect. (See *Californians for Political Reform Foundation v. Fair Political Pracs. Com*. (1998) 61 Cal.App.4th 472, 480 [no mootness "where a material portion of the statute or regulation is reenacted so that the superior court's judgment subsists after, as well as before, the change."]; *Montalvo v. Madera Unified School Dist. Bd. of Educatio*n (1971) 21 Cal.App.3d 323, 329.)

To the limited extent that AB 215 is relevant to the Challenged Statutes at all, it is relevant only insofar as it has made it *more* difficult for school districts to dismiss grossly ineffective teachers.[50] Indeed, AB 215:

- Prohibits school districts from amending notices of intent to dismiss less than 90 days before a hearing on the dismissal charges, except upon a showing of "good cause," (Section 44934(d));

- Permits teachers to appeal suspensions and seek immediate reversal, (Section 44939(c)(1));

- Requires CPC hearings to be completed within seven months from the date of employees' hearing demands, but does not state what happens if such deadlines are not satisfied, suggesting that districts may be required to re-start dismissal proceedings from the beginning if they do not meet these deadlines, (Section 44944(b)(1));

- Permits parties to file objections to CPC members, (Section 44944(c)(4)); and

- Requires parties to make detailed "initial disclosures" and "prehearing disclosures" similar to those required in federal court. (Sections 44944.05(a), (b)(1), (b)(3)).

For these reasons, AB 215 has been roundly criticized by newspapers and educational organizations alike.[51] It does not moot any part of this case.

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[50] The trial court properly analyzed the constitutionality of the pre-amendment versions of Sections 44934 and 44944. (*City of Whittier v. Walnut Properties* (1983) 149 Cal.App.3d 633, 640 fn. 3 [analyzing facial constitutionality of pre-amendment version of ordinance that was amended after court had issued its tentative ruling, but before court issued its final judgment].) Indeed, AB 215 did not take effect until January 1, 2015—*after* the trial court entered final judgment. (IRJN, Ex. 6; see also RA 635 at 7:21-9:6.)

[51] The San Jose Mercury News Editorial Board, for example, called AB 215 "very flawed legislation" that "does little to address concerns about incompetent teachers." (RRJN, Ex. G.) The California School Boards

(Cont'd on next page)

Finally, in the event this Court finds any merit in Intervenors' mootness argument (which it should not), it should nevertheless decide the "issues of broad public interest" presented by this case. (*Bullis Charter School v. Los Altos School District* (2011) 200 Cal.App.4th 1022, 1034-1035.) Intervenors contend that the Legislature "[r]egularly [r]evises the Challenged Statutes" (IB at p. 22) and there is nothing to stop the Legislature from reinstating the old version of the Dismissal Statutes or making the dismissal process even more burdensome if this case were dismissed on mootness grounds. As such, Plaintiffs' claims present "important issues of substantial and continuing interest that may otherwise evade review." (*Cal. Correctional Peace Officers Assn. v. State of Cal.* (2000) 82 Cal.App.4th 294, 303-304 [citation omitted].)

V. The Trial Court Correctly Held That Plaintiffs Have Standing To Bring Their Claims

Appellants contend that all nine Plaintiffs lack standing to bring their equal protection claims because they allegedly "failed to establish that the application of the challenged statutes caused any past violation of their constitutional rights or poses any imminent threat to their rights." (IB at p.

(Cont'd from previous page)

> Association stated that AB 215 contained "a number of deficiencies that do not adequately address and protect our students, parents and staff." (RRJN, Ex. H.) And the Association of California School Administrators has explained that AB 215 "makes a convoluted dismissal process even worse by creating additional rules, restrictions and arbitrary timelines." (RRJN, Ex. I.) Even the California Senate Appropriations Committee Report on AB 215 stated that the bill could "make certain dismissals *more* cumbersome or difficult to achieve," because, *inter alia*, school districts that are unable to complete their dismissal cases within the statutorily-mandated time period "will have to proceed without having a complete case, or [] drop the case and start again." (RRJN, Ex. F at pp. 6-7.)

76.) The trial court disagreed. (AA 278-313 [citations omitted].) This Court should uphold the trial court's finding.

All nine Plaintiffs unquestionably possess a concrete and "beneficial interest" in this action because, as students (AA 1916-1919), they have a unique interest in the quality of their education. (*Holmes v. Cal. Nat'l Guard* (2001) 90 Cal.App.4th 297, 315; see also *Doe v. Albany Unified School Dist.* (2010) 190 Cal.App.4th 668, 684-685.) For that reason alone, Plaintiffs have standing. (See *Serrano I*, *supra*, 5 Cal.3d at p. 590, fn. 1.)

Here, however, there is more. All nine Plaintiffs have experienced firsthand the significant impact—both positive and negative—that teachers have on students' lives. (See, e.g., RT 3556:21-3557:22 [Monterroza]; 3403:26-3404:21, 3508:17-3509:11 [DeBose]; 3511:27-3512:22 [B. Vergara]; 3266:15-3267:5 [E. Vergara].) And all of them reasonably fear the substantial risk that they will be assigned to grossly ineffective teachers in the future. In addition, six Plaintiffs are ethnic minorities and/or economically disadvantaged, giving them standing to complain about the disproportionate burden that the Challenged Statutes place on those groups. (RT 3549:24-3550:4 [Monterroza]; 3395:28-3396:15 [DeBose]; 3505:23-3506:5 [B. Vergara]; 3529:25-3530:1 [E. Vergara]; 3264:13-16 [Macias]; AA 1090-1091 [Martinez].)

There is no need for Plaintiffs to prove that the Challenged Statutes have caused them harm in the past because standing can be based on "actual or threatened injury." (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 814] [emphasis added]; see also *id.*, 165 Cal.App.4th at p. 816 ["[A] public entity *threatened with injury* . . . may have standing" [italics added]]; *B.C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 948; *Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1349.) In other words, all nine Plaintiffs are "injuriously affected" by the Challenged Statutes, (*San Diego NORML*, *supra*, 165 Cal.App.4th at

p. 814), because the statutes place them at substantial *risk* of being taught by grossly ineffective teachers in the future. (See RT 9238:25-9239:12 [Ekchian]; 1533:2-1534:11 [Christmas]; AA 7300.)

Nor must Plaintiffs demonstrate that they *necessarily* will be harmed in the future, or that they are at *imminent risk* of being harmed in the *immediate* future, as Intervenors argue. (IB at p. 78.) To seek declaratory and injunctive relief, Plaintiffs need only "demonstrate[] . . . that the [statutes] *could* have the effect of infringing [their] rights under the California Constitution." (*Holmes*, *supra*, 90 Cal.App.4th at p. 318 [italics added]; see also *Zubarau*, *supra*, 192 Cal.App.4th at p. 300.) In *Serrano*, for example, the California Supreme Court did not examine whether the named plaintiffs would necessarily be harmed by the amount of funding in their districts; there was no evidence about how those particular plaintiffs' districts were spending the money available to them vis-à-vis the plaintiffs, or whether the districts would have spent more money in ways that specifically benefitted the named plaintiffs. (See *Serrano II*, *supra*, 18 Cal.3d at p. 760.)

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

- Daniella Martinez and Raylene Monterroza currently attend charter schools, but both of those Plaintiffs *would* attend traditional district schools if they were not at risk of being taught by grossly ineffective teachers. (RT 3550:5-14, 3551:4-16 [Monterroza]; AA 1195-1196.) That is sufficient for standing purposes. (See *DiBona v. Matthews* (1990) 220 Cal.App.3d 1329, 1338-1339; see also *Alch v. Super. Ct.* (2004) 122 Cal.App.4th 339, 388 [deterred applicants have standing].)

- Beatriz and Elizabeth Vergara attend "pilot schools" in LAUSD, but the teachers at the pilot schools come from the same LAUSD pool that is shaped by the Challenged Statutes and which includes many

teachers who are grossly ineffective. (AA 695-703.) Moreover, LAUSD pilot schools are still subject to the mandates of the Challenged Statutes, and pilot school teachers retain the same employment protections as their counterparts in other LAUSD schools. (*Ibid.*; RT 808:5-24 [Deasy].)

- Brandon DeBose, Jr. and Kate Elliott attended traditional district schools at the time of trial. (AA 1917; RT 3396:26-28.) Even though Brandon and Kate graduated from high school, it is still appropriate for this Court to consider their claims, which present "important issues of substantial and continuing public interest." (*DeRonde v. Regents of the Univ. of Cal.* (1981) 28 Cal.3d 875, 880, superseded by constitutional amendment on another ground, as recognized in *Strauss v. Horton* (2009) 46 Cal.4th 364, 447 fn. 25; see also *Nathan G. v. Clovis Unified School Dist.* (2014) 224 Cal.App.4th 1393, 1397 fn. 4; *Rebensdorf v. Rebensdorf* (1985) 169 Cal.App.3d 138, 141.)

VI. The Trial Court Correctly Held That Plaintiffs Prevailed On Their As-Applied Equal Protection Claims

Intervenors—but not State Defendants—argue that the "trial court did not [even] address whether the challenged statutes were unconstitutional as applied to [Respondents] themselves . . . ." (IB at p. 76.) That is not true: The trial court's judgment expressly states that "Plaintiffs have met their burden of proof on all issues presented," AA 7295, including their contention that the "Challenged Statutes, . . . as applied, are . . . unconstitutional." (AA 32, 33 50-53.)

In any event, as the California Supreme Court has made clear, "if [a] law is unconstitutional as violating the equal protection clause on its face, and hence incapable of any valid application, there is no need to consider its application to the [party] in question." (*Bd. of Supervisors v. Local*

Agency Formation Com. (1992) 3 Cal.4th 903, 913; see generally *Quinn v. Millsap* (1989) 491 U.S. 95.)

VII. Governor Brown Is A Proper Defendant

State Defendants contend that Governor Brown is an improper defendant because he allegedly lacks an "institutional interest" in the Challenged Statutes, even though he serves as "the State's chief executive officer." (SB at p. 59.) But the State and its officers and administrators, including the Governor, maintain ultimate authority over and responsibility for the public education system in California. (See *Butt*, *supra*, 4 Cal.4th at p. 680 ["Public education is an obligation which the State assumed by the adoption of the Constitution."]; accord Cal. Const. Art. V, § 1; *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 158.) As such, numerous California courts have permitted litigants to proceed against the Governor in constitutional challenges seeking declaratory relief. (See, e.g., *Prof. Engineers in Cal. Government v. Schwarzenegger* (2010) 50 Cal.4th 989; *In re Marriage Cases*, *supra*, 43 Cal.4th 757; *White v. Davis* (2003) 30 Cal.4th 528.)[52]

CONCLUSION

Plaintiffs proved at trial—with overwhelming evidence—that the Challenged Statutes result in substantial and unjustified inequalities, depriving unfortunate California students of the educational opportunities guaranteed to them by the California Constitution. (*Serrano II*, *supra*, 18

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[52] In *Serrano II*, the court considered whether the Governor was an *indispensable* party, not a proper party (see *supra*, 18 Cal.3d at p. 752), and in *San Francisco NAACP*, the court decided whether the *Legislature* was a proper party (see *supra*, 484 F.Supp. at p. 665). And *Nagle v. Superior Court* (1994) 28 Cal.App.4th 1465, 1468, merely addressed the propriety of *deposing* top government officials. (*Nagle*, *supra*, 28 Cal.App.4th at pp. 1468-1469.)

Cal.3d at pp. 746-748, 756, 768.) Plaintiffs respectfully request that this Court affirm the trial court's judgment striking down these broken and harmful laws, so that California's public education system can focus, first and foremost, on serving the interests of students.

DATED: June 24, 2015

Respectfully Submitted,

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By: _____
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CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204, subdivision (c), of the California Rules of Court, the undersigned hereby certifies that the foregoing Respondents' Brief is in 13-point Times New Roman type font and approximately 34,488 words, according to the word count generated by the computer program used to prepare the brief.

DATED: June 24, 2015

Theodore Boutrous Jr /wa

Theodore J. Boutrous, Jr.

PROOF OF SERVICE

I, Robin McBain, 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 St., Ste. 3000, San Francisco, CA 94105 in said County and State. I am employed by Gibson, Dunn & Crutcher LLP and work with Theodore J. Boutrous, Jr., a member of the bar of this Court. On the date indicated below, I served the within:

RESPONDENTS' BRIEF

by placing a true copy thereof in an envelope addressed to the persons named below at the addresses shown:

Susan M. Carson Office of the Attorney General 455 Golden Gate Ave., 11th Floor San Francisco, CA 94102	*Attorneys for Defendants and Appellants State of California, Superintendent of Public Instruction, California Department of Education, State Board of Education, and Governor Edmund G. Brown, Jr.*
Eileen B. Goldsmith Altshuler Berzon LLP 177 Post Street, Suite 300 San Francisco, CA 94108	*Attorneys for Intervenors and Appellants California Teachers Association and California Federation of Teachers*
Hon. Rolph M. Treu c/o Clerk of the Court Los Angeles County Superior Ct. Stanley Mosk Courthouse 111 North Hill Street Los Angeles, CA 90012	*Trial Court Judge*

☑ **BY PERSONAL SERVICE**: I placed a true copy in a sealed envelope or package addressed to the persons at the addresses listed above and gave same to a professional messenger service for delivery before 5:00 p.m. on the below-mentioned date.

On the date indicated below, I also served the same to the address shown below:

Supreme Court of California Earl Warren Building 350 McAllister Street San Francisco, CA 94102	*Supreme Court of California*

☑ **BY ELECTRONIC TRANSMISSION**: I caused a true and correct copy of the document listed above to be sent via electronic transmission through the Supreme Court of California Electronic Document Filing System.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that the foregoing documents were printed on recycled paper, and that this Proof of Service was executed by me on June 24, 2015, at San Francisco, California.

Robin McBain