Case No. B258589

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

BEATRIZ VERGARA, *et al.*,
Plaintiffs-Appellees,

v.

STATE OF CALIFORNIA, *et al.*,
Defendants-Appellants,

and

CALIFORNIA TEACHERS ASSOCIATION and CALIFORNIA FEDERATION OF TEACHERS,
Intervenors-Appellants.

Appeal from Final Judgment of the Superior Court of California,
County of Los Angeles, Case No. BC484642
Honorable Rolf M. Treu, Dept. 58 (T: (213) 974-5689)

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

[PROPOSED] BRIEF OF CONSTIUTIONAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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APPLICATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLANTS

Pursuant to CRC 8.200(c), *amici curiae* constitutional law professors respectfully apply for permission to file the attached amicus curiae brief in support of appellants.

Interest of Amici Curiae

Amici curiae are professors and scholars of constitutional law who believe strongly in the role of courts in enforcing constitutional rights, particularly where majoritarian democratic processes cause violations of the rights of disfavored minorities. At the same time, *amici* recognize that such judicial interventions are subject to important constitutional limitations that protect the constitutional separation of powers by ensuring that courts do not revisit the wisdom of the other branches' choices, and instead overturn the decisions of legislatures, elected officials, and local administrators only where doing so is necessary to protect and vindicate the constitutional rights of the actual parties before the court. *Amici* have been immersed in the study of these core principles of judicial review through our scholarship and teaching, and submit this brief to explain how these principles apply to the issues presented by this appeal.

Reasons Why the Proposed Amicus Brief Will Assist the Court

The trial court's decision disregarded well-established principles of California and United States constitutional law which require that state action invalidated by a court be the *cause* of the constitutional violation and that any constitutional remedy be narrowly tailored to *redressing* an identified constitutional violation. The trial court's finding of a denial of equal protection was based on the conclusion that the challenged laws have

a discriminatory impact against poorer and minority students. But, as we explain, under neither California nor federal constitutional law may a court hold state action unconstitutional solely because it results in a racially disproportionate impact.

The trial court's approach makes almost every aspect of public education subject to a constitutional challenge. In a society with great inequalities a wide range of school policies would be unconstitutional because may all disparately affect students based on racial or ethnic background or socioeconomic status. If affirmed, the trial court's ruling would make innumerable laws and policies governing the schools vulnerable to constitutional challenge and effectively transfer control of the schools from educators to courts.

CRC 8.200(c)(3) Disclosure

No party or counsel for a party in the pending appeal authored the proposed brief or made a financial contribution intended to fund the preparation or submission of the brief. No person or entity made a financial contribution intended to fund the preparation or submission of the proposed brief, other than the *amici curiae* and their counsel.

Conclusion

For the foregoing reasons, the attached brief of constitutional law professors should be filed.

September 16, 2015

Respectfully submitted,

CATHERINE L. FISK
Attorney for Amici Curiae
Constitutional Law Professors

BRIEF OF CONSTIUTIONAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

INTRODUCTION

Amici are professors and scholars of constitutional law who believe strongly in the role of courts in enforcing constitutional rights, particularly where majoritarian democratic processes cause violations of the rights of disfavored minorities. At the same time, *amici* recognize that such judicial interventions are subject to important constitutional limitations that protect the constitutional separation of powers by ensuring that courts do not revisit the wisdom of the other branches' choices, and instead overturn the decisions of legislatures, elected officials, and local administrators only where doing so is necessary to protect and vindicate the constitutional rights of the actual parties before the court. *Amici* have been immersed in the study of these core principles of judicial review through our scholarship and teaching, and submit this brief to explain how these principles apply to the issues presented by this appeal.

In the proceedings below, the trial court invalidated five provisions of the California Education Code in effect in some form since 1921 (Stats. 1921, ch. 878, sec. 1) that provide California teachers with a limited degree of job security. The five statutes provide a general framework for granting tenure to new teachers (Cal. Ed. Code § 44929.21(b)), just cause for dismissal of tenured teachers (§§ 44934, 44938(b)(1),(2), 44944), and seniority as a criterion in layoffs in cases of budget shortfall or declining enrollment (§ 44955). Accepting the plaintiffs' theories in full, the court concluded that the challenged statutes are facially invalid under the California Constitution's equal protection provisions and enjoined their further application. The trial court reasoned, in a single paragraph, that

these five job security statutes result in ineffective teachers remaining in the classroom and "affect high-poverty and minority students disproportionately," and are therefore unconstitutional as denying equal protection and the fundamental right to equal education. (Tentative Decision at 15; the trial court's tentative decision became the final judgment without material change. AA 7293-7308.) In doing so, however, the trial court disregarded numerous well-established principles of constitutional adjudication that delimit the proper scope of judicial review.

In striking down each of the challenged statutes on its face, the trial court ignored the difficult burden plaintiffs must satisfy to establish any statute's facial invalidity. Such relief is warranted only where the plaintiff challenging a law "establish[es] that no set of circumstances exists under which the Act would be valid." *United States v. Salerno* (1987) 481 U.S. 739, 745. The trial court, however, premised its decision on the statutes' application in a tiny subset of applications, while disregarding the evidence that the statutes can be and are applied constitutionally in the vast majority of circumstances. In stripping *all* California teachers of the statutory rights established by the challenged statutes based upon a small number of purportedly unconstitutional applications, the trial court vastly exceeded the proper scope of its constitutional role.

Everyone agrees about the desirability of improving education for students from poor families and for minority children. But in order to declare these laws facially unconstitutional the trial court would have needed to conclude that "provisions inevitably pose a present and total fatal conflict" with the constitution and that there is *no* circumstance in which a school district could ever use a two-year tenure clock, the statutory process for performance-based termination, and the consideration of seniority in

budget-driven layoffs, because a law's validity "must be sustained unless it cannot be applied without trenching upon constitutionally protected rights." *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1102. The trial court also would have needed to find that the challenged statutes cause the inequalities in educational opportunity and that invalidating the laws would remedy the constitutional violations. And to prove that the statutes deny equal protection, a plaintiff must be show that they either are facially discriminatory or that they are motivated by a discriminatory purpose against a specific group.

As explained below, none of these requirements are met: there is no finding that the law is unconstitutional in all of its applications as is required for a facial challenge; there are insufficient findings and evidence to demonstrate that these statutes are the cause of a constitutional violation; there are no findings and no evidence that declaring these laws unconstitutional will improve education (and it well could make it worse); and the challenged laws neither are facially discriminatory nor are motivated by a discriminatory purpose. Absent proof of a classification or policy that causes a denial of the right to equal education and that judicial action will redress the inequality, almost any school district or individual principal's decision on matters of education policy would be subject to a constitutional challenge as denying equal education to some students.

The trial court disregarded well-established principles which require that any constitutional remedy be narrowly tailored to redressing an identified constitutional violation. The most fundamental such principle is that the state action challenged by the plaintiff be the *cause* of the purported violation of that plaintiff's constitutional rights, such that the court's remedy will *redress* that violation. In that respect, the plaintiffs' evidence in this case failed in multiple respects. First, plaintiffs' claims were

premised solely upon the California Constitution equal protection provisions that protect individuals against arbitrary or unfair discrimination by state actors. The challenged statutes, however, establish uniform *non-discriminatory* standards for tenure, for-cause dismissals, and budgetary layoffs, and thus do not cause the discriminatory treatment of particular groups of students. To the extent that some students are assigned to more effective teachers while other students are assigned to less effective teachers, the evidence showed that the challenged statutes are not the cause of those assignments. Instead, assignment decisions are made by individual school districts acting at their own discretion, and are influenced by numerous other factors such as individual teacher preferences and poor working conditions in particular schools. Notably, none of the plaintiffs even attempted to prove that he or she had ever been assigned to a poor teacher *because of the challenged statutes*, or that eliminating the challenged statutes would prevent them from being assigned to such a teacher in the future.

Because it disregarded the principles governing proper judicial review of the Legislature's decisions, the trial court's analysis of the challenged statutes amounted to no more than an analysis of their merits as education policy. The court's policy analysis was significantly skewed, however, because it refused to consider any of the positive effects of the statutes or the negative consequences of striking them down and thereby making teaching a less attractive profession. But at a more fundamental level, the court erred by even undertaking such an analysis. Courts are ill-equipped to resolve such difficult educational policy questions, which is why those matters are properly assigned to other branches of government in our constitutional system.

Ultimately, recognizing and applying well-established principles of constitutional adjudication to plaintiffs' claims and reversing the decision below on that basis will not prevent courts from intervening where such a remedy is actually necessary, as in *Brown v. Board of Education* (1954) 347 U.S. 483; *In re Marriage Cases* (2008) 43 Cal.4th 757; *Butt v. State of California* (1992) 4 Cal.4th 668; and *Serrano v. Priest* (1971) 5 Cal.3d 584. Instead, doing so will simply ensure that the courts interfere with the actions of the other co-equal branches of government only where doing so is constitutionally warranted and necessary. Accordingly, *amici* respectfully urge this Court to reverse the decision below.

I. The Requirements for Declaring the Statutes Facially Unconstitutional Have Not Been Met.

The law is clear that "[a]ll presumptions favor the validity of a statute. The court may not declare it invalid unless it is clearly so." *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1095 (citing *Calfarm Ins. Co. v. Dukemejian* (1989) 48 Cal.3d 805, 814-15). An especially strong presumption exists against the facial invalidity of a statute. As the United States Supreme Court explained, a facial challenge to a statute is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno* (1987) 481 U.S. 739, 745. As often has been noted, "California courts apply a *Salerno*-type approach to facial constitutional challenges in general." *Sanchez v. City of Modesto* (2006) 145 Cal. App. 4th 660, 679 (citing *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 709; *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th at 1084).

California law is thus clear that "[f]acial invalidation is justified only where the statute could be validly applied under *no* circumstances." *Sanchez v. City of Modesto*, 145 Cal. App. 4th at 689 (emphasis in original). And the California Supreme Court recently insisted that "as applied challenges, as opposed to broad facial challenges, is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." *In re Taylor* (2015) 60 Cal.4th 1019, 1039. As the Court cautioned, "it is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop," and "[f]or this reason, as applied challenges are the basic building blocks of constitutional adjudication." *Id.* (internal punctuation omitted). The trial court's 15-page decision declares five California statutes to be facially unconstitutional, but never explains or even finds that the five laws "can be validly applied under no circumstances." *Id.* at 679. "To support a determination of facial unconstitutionality, voiding a statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute …. Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180-81. The evidence shows that teacher tenure, dismissal, and layoffs operate constitutionally in many of California's 1,000 school districts and 10,000 schools. Thus, it cannot be said that there is a "total and fatal conflict" between the challenged statutes and equal protection in California.

As explained by the State of California in its briefs and echoed by the Intervenors in theirs, many school districts and principals manage to tenure and assign teachers and reduce the ranks of the teacher corps when the budget necessitates it without depriving poor and minority students of

their fundamental right to education. It is impossible based on the findings by the trial court, or on the record of this case, to say that these five laws are unconstitutional in all circumstances, or even for all poor or minority students. Indeed, the evidence before the trial court demonstrates that school districts and principals find the time adequate to tenure teachers and fire incompetent teachers under the statutory regime. (RT 6831:17-6834:1, 6837:2-6838:9 [Mills], 4434.8-16 [Moore Johnson], 5647:14-5651:5, 5658.2-13, 5660:5-8 [Fraisse], 7000:28-70001.17 [Boyd], 7116:27-7118:1, 7134:5-7137:9 [Seymour], 7626:10-7633:17 [Raun-Linde]) This is not a case, like *In re Marriage Cases* (2008) 43 Cal.4th 757, or the de jure racial segregation in schools that was invalidated in *Brown v. Board of Education* (1954) 347 U.S. 483, in which a state law treats every same-sex couple seeking to marry differently than every opposite-sex couple or every child of color differently than every white child. Some school districts and some school principals recruit, tenure, and retain teachers in a way that weeds out poor teachers over time and some school districts and principals struggle to recruit and retain good teachers and are using a variety of methods to weed out poor ones, but it is simply not the case that in no school and in no district can the five statutes be applied without violating the equal protection rights of poor and minority students or any other identifiable group of students. Thus *amici* respectfully suggest that under settled principles of California and United States constitutional law the plaintiffs did not satisfy the requirements for a facial equal protection challenge and that should decide this case.

II. The Evidence Fails to Prove that the Challenges Statutes Cause Poor Quality Education.

The trial court's decision must be reversed because it failed to adequately demonstrate that the tenure, dismissal, and layoff statutes were the *cause* of any educational disparities or whatever wealth-based or race-

based inequities exist in some school districts. In order to declare a law unconstitutional, it is necessary to prove that the challenged statute causes an injury to a constitutional right. The Supreme Court has noted that throughout constitutional law it "has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused." *Mt. Healthy School Dist. Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 286; *see also Borunda v. Richmond* (9th Cir. 1989) 885 F.2d 1384, 1390; *Jones v. City of Chicago* (7th Cir. 1988) 856 F.2d 985, 993 (recognizing that "elementary principles of legal causation ... are as applicable to constitutional torts as to common law torts."). It is important in constitutional adjudication for courts to insist on proof that government actin causes an unequal result in order that courts observe their limited role in our constitutional system.

The trial court's principal finding on the effect of statutes on poor and minority students consisted of a block quote from a single exhibit, the 2007 California Department of Education Report noting that minority students are more likely to attend high-poverty schools with a "disproportionate number of underqualified, inexperienced, out-of-field, and ineffective teachers and administrators." Tent. Dec. at 15. The court's sole finding on causation was the following single sentence after that block quote: "The evidence was also clear that the churning (aka 'Dance of the Lemons') of teachers caused by the lack of effective dismissal statutes and LIFO affect high-poverty and minority students disproportionately." *Id.* These two sentences are not findings that five statutes, neutral on their face, cause a denial of equal protection in education, and they are not a basis on which a court to enjoin the enforcement of several longstanding statutes regulating public education.

As to the statute providing for tenure decisions to be made within two years, the trial court found some teachers receive tenure "who would not have been had more time been provided for the process," and also that others are denied tenure who might have received it if they had "an adequate opportunity to establish their competence." Tent. Dec. at 10. The trial court also found that a majority of states grant tenure after three years, and California is one of only five states with a two-year tenure period. In the trial court's view, "both students and teachers are unfairly … disadvantaged by" a two-year tenure clock and "3-5 years would be a better time frame to make the tenure decision." *Id.*

This is all the court found with respect to how teacher tenure violates the constitutional rights of students, and on that basis enjoined the tenure statute. None of these findings show that a two-year tenure period causes any group or class of students to suffer a denial of an equal right to education. The law applies equally to all California public school teachers and students. The reality is what the record evidence showed: many factors cause poorer children to do worse in schools, including their peer group, school facilities, curriculum, enrichment programs, and the students' family and living conditions; it is entirely speculative as to whether the statutes declared unconstitutional by the trial court are the cause of this serious problem. (RT 8655:28-8656:13 [Futernick], 8324:25-8325:9, 8334:5-7 [Berliner], 4552:27-4553:7 [Johnson])

The same absence of findings about causation plagues the court's analysis of the other four challenged statutes. As to the three statutes regulating the process for dismissing teachers, the court found that "the current system [is] so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory." Tent. Dec. at 13. The court did not, however, make a single finding about whether the dismissal process causes any class of students to

be treated worse than any other. With respect to the reduction in force statute, the trial court similarly made no finding that considering seniority in budget-driven layoffs causes any group of students to have an unequal education. The court's analysis of the use of seniority as a factor in budget-driven layoffs consisted entirely of hypothesizing that it is better to retain a "junior/efficient teacher" rather than "a senior/incompetent teacher," and noting that only two states prohibit consideration of seniority, while the other 48 either permit or require it. *Id*. at 14. The court made no findings that the use of seniority as a factor in reductions in force harms education for any particular group of students. Absent findings that the statutes *cause* the constitutional violations suffered by the plaintiffs, the trial court's decision must be overturned.

The evidence in the record of this case simply does not show that the challenged statute cause poor quality education for any identifiable group of students. Some schools and school districts attract and retain high quality teachers in high-poverty and minority schools. For example, Riverside prevents a disparity in teacher quality between its impoverished and affluent schools by putting "stronger leaders at [high-poverty] schools, and people want to work for them," (RT 6842:22-6843:13 [Mills]), and by establishing various enrichment programs at high-poverty schools "that make it a school of choice … which is internationally known for [] underrepresented students to go to college." (RT 6822:5-6823:6 [Mills]). Schools that prioritize professional development and collaboration among teachers (as in San Diego and La Habra RT 6550:21-6551:5 [Barrera] 7012:12-24 [D.Brown]), reduce class sizes (San Diego), improve facilities and instructional materials (RT 9059:11-17 [Darling-Hammond]), and/or encourage teachers to seek help with difficulties in getting students to learn (in San Juan Unified School District, RT 7447:12-20 [S. Brown]) manage

to improve student achievement, recruit and retain talented teachers, and avoid huge disparities between more and less affluent schools. Given this evidence, there is no basis in the record for invalidating the tenure, dismissal, and layoff statutes governing all 10,000 California public schools serving six million students and employing 277,000 teachers. (RT 8503:13-15, 8501:12-8502:21, 8503:9-12).

Education equity litigation, like all other litigation, must establish that state policy causes a denial to an identifiable group of students the right to equal education. In particular, plaintiffs must show two things: that a state policy is causally connected to local policy, practice or resources, *and* that local policy, practice, or resources are have a causal and substantial effect on educational outcomes for identifiable groups of students. *See* Derek W. Black, The Constitutional Challenge to Teacher Tenure, 104 Cal. L. Rev. __, 28-29 (forthcoming 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569118 (collecting cases). Causation matters, lest state courts take over the management of local schools. The plaintiffs failed to show either step of causation in this case, and for that reason the trial court's decision must be reversed.

III. There is No Basis in the Record for Finding that Invalidating These Statutes Will Improve Education and, In Fact, it Could Make It Worse.

Even if the record supported and the trial court found that the statutes caused the harms to the education of poor and minority students, that would not be sufficient to find the statutes invalid on their face and enjoin their enforcement. There also would need to be proof that striking down these statutes would remedy the harms and improve the education for these students. The law is clear that, plaintiffs always must prove that they are "presently … suffering some adverse impact of the law *which the court has the power to redress." Tobe,* 9 Cal.4th at 1085 (emphasis added); *see*

also New York Times Co. v. Superior Court (1990) 51 Cal.3d 453, 466 (looking to "whether the petitioner has incurred an injury capable of redress"); *Harman v. City & Cnty. of San Francisco* (1972), 7 Cal.3d 150, 159 (stressing the question of "the amenability of the issue raised to judicial redress."); *see also Allen v. Wright* (1984) 484 U.S. 737, 753 n.19 (explaining that causation and redressability are distinct requirements in that "it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested"). As the Court said in *Allen v. Wright*, "Cases such as this, in which the relief requested goes well beyond the violation of law alleged, illustrate why it is important to keep the inquiries separate"; the redressability analysis "is to focus on the requested relief." 484 U.S. at 753 n.19.

There is no basis in the trial court's decision, or in the voluminous record of an eight-week trial, for concluding that education of any identifiable group of students would be improved by the elimination of tenure, the prohibition on considering seniority in layoffs, or the injunction against enforcement of the procedural requirements for performance-based dismissal. Even if the trial court's decision goes into effect, and California becomes – by court order – one of three states in the country with no teacher tenure and one of three that prohibits the consideration of seniority in making budget-based layoffs, there is no evidence in the record to suggest that many, most, or all poor teachers will be fired or laid off and that this will result in improvement in students' education. In fact, there is reason to fear that eliminating teacher job security protections could harm recruitment and retention of competent teachers and make education worse.

First, there is no evidence that eliminating tenure will improve learning. If the plaintiffs were correct, similarly situated students in states with weak protection of teachers – such as Texas, Alabama, and Mississippi -- would have higher levels of achievement and the racial achievement gap would be less in those states. But the exact opposite is true, even controlling for per-pupil spending. In fact, every year the states with the highest student performance are states like Maryland and Massachusetts with robust job protections for teachers. Lala Carr Steelman, *et al.,* Do Teacher Unions Hinder Educational Performance? Lessons Learned from State SAT and ACT Scores (2000) 70 Harvard Educational Review 437, 456 (finding that students in states with teachers unions perform better on national standardized tests, and holding constant other factors such as race, family education level, and wealth).

Second, the evidence shows that many principals use seniority as a basis for layoffs, and both school administrators and academic experts think it would be costly, contentious, and infeasible to consider only some assessment of merit. Laying off on the basis of seniority avoids subjective assessments of comparative merit, reduces dissention among teachers, and promotes collaboration. (RT 5765:23-5767:8 [Fraisse], 6065:12-6069:21, 6070:16-28 [Rothstein], 8960:10-20, 8963:10-25 [Darling-Hammond], 6866:18-6867:21 [Mills]) Indeed, the evidence showed that school districts in jurisdictions that allow consideration of performance usually rely on seniority when conducting layoffs because it is one of the fairest and most efficient ways to choose teachers for layoff. (RT 4562:15-4564:15 [Moore Johnson]) The trial court's admittedly hypothetical example of a "junior/efficient teacher remaining and a senior/incompetent teacher being removed" was entirely speculative; there is no evidence that eliminating the statutes will lead principals and school districts to use budget-based layoffs to terminate teachers whom they deem ineffective.

Third, the trial court ignored the various other laws that require proof of incompetence in order to terminate a nonprobationary government employee. Under the California and United States Constitutions, see *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, public employees, including teachers, are entitled to due process in punitive personnel actions. The trial court acknowledged that school districts must conduct *Skelly* hearings before terminating certain employees, and said that "the independent judiciary of this state is no less dedicated to the protection of reasonable due process rights of teachers than it is of protecting the rights of children to constitutionally mandated equal educational opportunities," and insisted that "the Dismissal Statutes" present the issue of *uber* due process." Tent. Dec. at 13, 12. Although the court's meaning is not entirely clear, it appears that it contemplates nonprobationary teachers continuing to have due process rights to *Skelly* hearings before termination. As a consequence, even if the five statutes are invalidated, tenured teachers will still have a due process rights and there is no reason to believe that this will cause principals and school districts to bring more removal proceedings or that they will be successful. Only those teachers hired in the future would not have property interests in their job and could constitutionally be terminated at will, and the court made no findings to suggest that school districts would terminate future teachers at will or that making them at-will employees would improve education for students.

Moreover, even if the dismissal statutes were invalidated and teachers had no due process rights to a hearing before termination, teachers would still be protected by the agreements negotiated by the school district and their union under the Educational Employment Relations Act (EERA), Cal. Ed. Code § 3540 et seq. To the extent that those agreements give rise to some expectation of continued employment, the trial court's decision, of course, leaves these untouched.

The record does not support, and the trial court did not find, that striking down the five statutes will lead to removal of more teachers, especially in light of all of the other procedural protections that exist, or that this will improve any child's education. The trial court did not find that but for the dismissal statutes, all, most, many, or even any school districts would identify weak teachers and terminate them, or that but for the layoff statute school districts would choose to lay off weaker rather than younger teachers during budget crises. And the academic literature on teacher evaluation shows that it is difficult to identify which teachers are ineffective, because it depends on which measure one uses. One study showed that almost 20 percent of Texas teachers who rank as the most effective based on student scores on one Texas test of student knowledge and skills ranked at or near the bottom of effectiveness based on student scores on a different national test. Sean P. Corcoran, et al., Can Teachers Be Evaluated by Their Students' Test Scores? Should They Be? The Use of Value-Added Measures of Teacher Effectiveness in Policy and Practice 13 (2010). The evidence in this case showed that several of the teachers whom the plaintiffs had testified had been poor had been nominated for or received awards for teaching excellence and there was no evidence that the teachers they identified were ineffective as measured by the schools' standards. (RT 5846:14-5848:2 [McLaughlin], 6256:7-6257:4, 6259:11-6261:15 [Decker], 7714:7-7715:1, 7716:11-7719:25, 7724:12-18, 7726:18 [Watty], 7735:18-7736:4, 7738:12-23, 7744:20-7745:10, 7760:16-21 [Mize]). The witnesses who presented statistical evidence showing that poor and minority were more likely to have "low value-added" teachers or teachers scoring low on VAM measures did not testify that the five challenged statutes caused this correlation, and, indeed the plaintiffs' witness Dr. Deasy testified that the tenure and dismissal statutes "have

nothing to do with the assignment of teachers to classes or schools." (RT 817:12-21, 818:15-17 [Deasy])

That is why all the equal protection, fundamental rights, and due process cases cited by the plaintiffs are distinguishable; in all of those cases the elimination of the law would clearly eliminate the constitutional violation. Striking down the law limiting marriage to a man and a woman redressed the inequality to every same-sex couple, *In re Marriage Cases* (2008) 43 Cal.4th 757, 763-64. Similarly, eliminating the fee charged to teachers seeking a hearing or candidates seeking to be listed on a ballot redressed the wealth-based inequality in access to a hearing or to elected office. *California Teachers Ass'n v. State of Cal.* (1999) 20 Cal.4th 327, 345; *Bullock v. Carter* (1972) 405 U.S. 134, 143-44. Eliminating exclusive reliance on local property taxes to fund education and requiring the state to ensure equal per-pupil expenditures statewide redressed the inequality between rich and poor districts that existed pre-*Serrano*.

By sharp contrast, in this case, it is purely speculative whether declaring these laws unconstitutional actually will make it easier to fire teachers in light of the other procedural requirements, whether school districts and principals will dismiss the teachers, and whether doing so will remedy the harm of inadequate education for poor and minority children. In the absence of such evidence and findings, the trial court's decision must be reversed.

The fundamental problem with the trial court's analysis is that it focuses only on the evidence that job security for teachers may result in some teachers remaining on the job when they should not, but it entirely overlooks what might happen if teaching became a job in which the teacher could be fired at will. Firing a poor teacher will not result in an excellent teacher taking his place if excellent teachers are not applying for jobs in the "high-poverty, low-performing schools" that poor and minority students

disproportionately attend. Ironically, the one piece of evidence the trial court cited as proof that teacher job security disproportionately harms poor and minority students emphasizes that the "disproportionate number of *underqualified, inexperienced*, out-of-field, and ineffective teachers." Tent. Dec. at 15. Making it easier for a district or principal to replace a struggling inexperienced teacher with a new hire will not necessarily improve the situation of students, particularly in the high-poverty schools that already have an attrition rate 50 percent higher than more affluent schools. (RT 8659:28-8660:2 [Futernick])

Indeed, there is a real risk that the trial court's remedy could make education worse, not better. Without the protections for job security, fewer highly qualified individuals may enter or stay in the teaching profession. Students have challenged school reforms in New Mexico that lowered requirements to remove teachers precisely on this basis: eliminating job protections makes it harder to recruit and retain high quality teachers in districts and schools with higher concentrations of minority and impoverished students, and thus less job security disproportionately harms poor and minority students. *Martinez v. State* No. D-101-CF-201400793 (D.N.M. filed April 1, 2014), cited in Derek W. Black, The Constitutional Challenge to Teacher Tenure, 104 Cal. L. Rev. __, 7 n.32 & 43 nn.265-67 (forthcoming 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569118. Similarly, the evidence described above shows that Oakland Unified School District has a hard time recruiting and retaining teachers in its high-poverty schools because of difficult conditions and high levels of administrator turnover, but that other school districts operating under the same laws, including Riverside, Long Beach, and San Juan, manage to recruit and retain high-quality teachers to their high-poverty and high-minority schools. If the

problem in Oakland, for example, is that "the turnover rate [among teachers] is about 50 percent, even higher … in some schools" because Oakland schools have "very few counselors, nurses, one librarian left, high class size … and "children coming hungry to school" (RT 7271:6-23 [Olson-Jones]), it seems unlikely that eliminating tenure and protections against unfair dismissal are not going to remedy the problem of turnover, but will exacerbate it.

Indeed, it is entirely possible that the adverse effect of eliminating tenure and making teaching an at-will job will be the greatest in high-poverty or predominantly minority schools because teachers may be most concerned about losing their jobs there if their students fail to improve standardized test scores annually. In a world in which teacher job security rests heavily on how students score on standardized tests, teachers may prefer to work in schools in which the out-of-school factors that affect student performance, like family wealth and education and neighborhood stability and safety, are less of a hindrance. The truly pernicious effect of the trial court's decision is that it may lead even more teachers to flee high-poverty schools because individual teacher's jobs will be at risk if students score poorly.

Whether the job protections found in these five statutes, on balance, improve or hinder education is an enormously difficult policy question. It is quintessentially of a type of decision best made by the legislature. *See, e.g., Ex parte Blaney* (1947) 30 Cal.2d 643, 666 ("these are considerations for the lawmaking power, not for courts.")

The trial court's holding can be affirmed only if it is clear that it would redress the harms of inadequate education for poorer and minority students. The trial court's findings and the record of this case do not support such a conclusion.

IV. The Trial Court Erred in Finding A Violation of Equal Protection Based on the Evidence in the Record.

The guarantees of equal protection in the United States and the California constitutions above all exist to ensure that the government does not act with the purpose of discriminating against racial minorities. *Washington v. Davis* (1976) 426 U.S. 229, 239. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. . . . But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." *Id.* For this reason, the U.S. Supreme Court repeatedly has emphasized that unless a law on its face discriminates against a particular group, an equal protection violation exists only if there is proof that the legislature acted with the purpose of disadvantaging a group based on an impermissible consideration. *See, e.g., McCleskey v. Kemp* (1987) 481 U.S. 279, 298; *Personnel Administrator v. Feeney* (1979) 442 U.S. 256, 279 ("'[d]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

California equal protection law, like federal equal protection law, requires that a plaintiff show that a statute or other state action treats a class of people differently. In cases in which a facially neutral policy does not classify anyone and government action does not discriminate, courts have not found an equal protection violation absent evidence that the statute causes unequal treatment of some class. Thus, in *Citizens for Parental Rights v. San Mateo County Bd. of Ed.* (1975) 51 Cal. App. 3d 1, the court

found no equal protection violation in the administration of a sex education program and a statute authorizing students to be excused from the program upon request. Rejecting the contention that the statute disparately affected students from religious families by requiring them to opt out, the court reasoned: "As the program on its face applies to all students equally and is taught to all students of mixed religious beliefs without discrimination, there is no denial of equal protection." *Id.* at 27. Similarly, in *Stocks v. City of Irvine* (1981) 114 Cal. App. 3d 520, the court determined that plaintiffs had sufficiently alleged that Irvine's zoning and residential development policies caused them, as a class of low-income people, to be unable to afford to live in Irvine and they therefore had standing to challenge the city's affordable housing policies. But the court cautioned that the plaintiffs must prove that their "injuries are the result of a breach of duty by the defendant." *Id.* at 532.

A crucial flaw in the trial court's decision is that it found five statutes unconstitutional for discriminating against poor and minority students even though they are facially neutral and they apply equally to all teachers and all students, and without any finding that they were motivated by a discriminatory purpose. No California decision, or for that matter no ruling of the United States Supreme Court, allows a finding of an equal protection violation without the challenged law either being facially discriminatory or motivated by a discriminatory purpose. In fact, it even is unclear from the trial court's ruling as to what specific groups are denied equal protection by the challenged statutes.

The prior California decisions concerning equality of educational opportunity are thus easily distinguishable. In the two *Serrano* cases, the local property tax funding system treated *all* students in districts with low property tax revenues differently than *all* students in wealthier districts. *Serrano I* (1971) 5 Cal.3d 584; *Serrano II* (1976) 18 Cal.3d 728. In *Butt*,

the plaintiffs established that students in the Richmond Unified School District received six weeks less instruction than students in every other district. 4 Cal.4th 668. The state thus classified students into two groups: those receiving the normal amount of instruction and those in Richmond who received six weeks less. In *Gould v. Grubb* (1975) 14 Cal.3d 661, the plaintiffs showed that listing the incumbent first on the ballot always treated the incumbent better than other candidates and that listing candidates alphabetically always treated those whose names begin with a letter higher in the alphabet better than others. In all of these cases, the statute classified people in a way that inevitably caused some to be treated differently than others, and that was the basis for the constitutional violation.

In contrast, in *Arcadia Unified School District v. State Dept. of Ed.* (1992) 2 Cal.4th 251, 267, the Supreme Court rejected a facial equal protection and right to education challenge to a law authorizing school districts to charge for pupil transportation because there was no evidence that the statute could only be applied "in such a way as to discriminate against poor students or affect their ability to obtain an education." Because school districts could apply the statute constitutionally, as by allowing poor students a fee waiver or by providing free transportation to all, it was constitutional. *Id.*

The trial court's finding of a denial of equal protection was based on the conclusion that the challenged laws have a discriminatory impact against poorer and minority students. But "official action will not be held unconstitutional solely because it results in a racially disproportionate impact" *See, e.g., Village of Arlington Heights v. Metropolitan Development Corporation* (1976) 429 U.S. 252, 269. Yet, as the trial court's decision said, that the five statutes "disproportionately affect poor

and/or minority students" is the entire basis for the trial court's conclusion that the challenged statutes discriminate against any suspect class. Tent. Dec. at 15.

The grave risk with the trial court's approach is that it makes literally every aspect of public education subject to a constitutional challenge. For example, the length of school vacations likely has a disproportionate adverse effect on poorer students because those from wealthier families are more likely to provide their children educational enrichment programs during school holidays. Similarly, a longer school day probably would benefit poorer students more than those from more well off backgrounds, because poor students rely on school for all their education and wealthier students may use after-school hours for tutoring, music or other instruction, or supervised sports practice, science exploration, and so forth. Allowing high-performing teachers to transfer between schools would be unconstitutional if teachers elected to transfer to high-performing schools or schools in safer neighborhoods. Allowing parents to raise money to support enrichment programs would be unconstitutional because wealthier parents can raise more money and therefore provide more programming. Allowing parents to volunteer to tutor in the classroom would be unconstitutional if it results in more classroom aides in wealthier schools. Decisions about which textbook to adopt, what curriculum to teach, whether to have the school orchestra play classical, jazz, or pop music, or whether students should play soccer or basketball in P.E. may all disparately affect students based on racial or ethnic background or socioeconomic status. All of these decisions would be subject to a constitutional challenge under the trial court's approach to equal protection and the fundamental right to equal education.

Unfortunately, in a society with great inequalities, countless policies concerning the schools have an effect of benefiting those who are more affluent and disadvantaging those who are poorer, often racial minorities. If affirmed, the trial court's ruling would make all of these laws and policies governing the schools vulnerable to constitutional challenge and effectively transfer control of the schools from educators to courts. It is for exactly this reason that the Supreme Court has held that proof of discriminatory impact, the entire basis for the trial court's ruling, is insufficient to demonstrate a denial of equal protection. *Washington v. Davis*, 426 U.S. at 249 ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.").

As professors and scholars of constitutional law, *amici* believe strongly in the role of courts in enforcing constitutional rights where majoritarian democratic processes and government policy decisions cause violations of the rights of disfavored minorities. Yet we believe that the constitutional separation of powers requires that judges overturn the policy choices of legislatures, elected and appointed officials, and federal, state, and local administrators only where doing so is necessary to protect and vindicate the constitutional rights of the actual parties before the court. In this case, the trial court substituted its judgment about desirable education policy and the best way to improve education for students without regard to the harms its policy choice might cause and without regard to the evidence or the law about the cause of educational inequities and the likelihood that

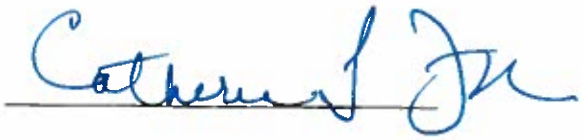
the court's injunction would redress it. The trial court exceeded its role in our constitutional system and its ruling must be reversed.

CONCLUSION

For these reasons, the ruling of the trial court should be reversed.

Respectfully submitted,

September 16, 2015



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CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that the attached BRIEF OF CONSTIUTIONAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF APPELLANTS is proportionally spaced, has a typeface of 13 points or more, and contains 6, 994 words, excluding the cover, the certificate of interested entities or persons, the tables, the signature block, and this certificate. Counsel relies on the work count of the word processing program used to prepare this brief.

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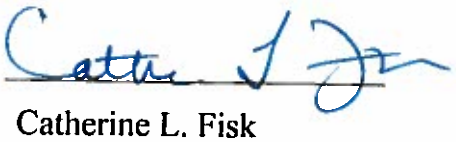
By: 

Catherine L. Fisk

PROOF OF SERVICE

CASE: Beatriz Vergara, et al. v. State of California, et al.

CASE NO: California Court of Appeal, Second District, no. B258589

I am employed in the City of Irvine and County of Orange, California. I am over the age of eighteen years and not a party to the within action; my business address is 401 E. Peltason Drive, Irvine, CA 92697-8000.

On September 16, 2015, I served the following documents:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

[PROPOSED] BRIEF OF CONSTIUTIONAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

A. By U.S. First Class Mail: I am readily familiar with the practice of the University of California, Irvine for the collection and processing of correspondence for mailing with the United States Postal Service. I placed each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. Mail in Irvine, California, for collection and mailing to the office of the addressee on the date shown herein.

B. By E-Filing: I submitted the document via the California Court of Appeal, Second Appellate District electronic submission system at http://www.courts.ca.gov/2dca-efile.htm, per C.R.C 8.212(c)(2).

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed September 16, 2015, at Irvine, California.

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