

No. B258589

In the Court of Appeal of the State of California
Second Appellate District, Division Two

BEATRIZ VERGARA, ET AL.,

Plaintiffs-Respondents,

v.

STATE OF CALIFORNIA, ET AL.,

Defendants-Appellants,

and

CALIFORNIA TEACHERS ASSOCIATION and
CALIFORNIA FEDERATION OF TEACHERS,

Intervenors-Appellants.

**APPLICATION OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF
THE SAN FRANCISCO BAY AREA, EDUCATION LAW CENTER,
EQUAL JUSTICE SOCIETY, SOUTHERN POVERTY LAW CENTER,
AND ASIAN AMERICANS ADVANCING JUSTICE – LOS ANGELES,
FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS
CURIAE BRIEF IN SUPPORT OF APPELLANTS STATE OF
CALIFORNIA, ET AL.**

Appeal from Judgment of the Los Angeles County Superior Court
No. BC484642, The Honorable Rolf M. Treu

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TO BE FILED IN THE COURT OF APPEAL

APP-008

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Date: September 16, 2015

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**APPLICATION FOR PERMISSION TO FILE
AMICUS CURIAE BRIEF**

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Education Law Center, Equal Justice Society, Southern Poverty Law Center, and Asian Americans Advancing Justice – Los Angeles (Amici) apply for permission to file the attached amicus curiae brief in support of Defendants and Appellants The State of California et al. (The State), and Intervenors and Appellants California Teachers Association and California Federation of Teachers.

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR), founded in 1968, is a civil rights and legal services organization that protects and promotes the rights of communities of color, low-income individuals, immigrants, and refugees. Assisted by hundreds of pro bono attorneys, LCCR provides free legal assistance and representation to individuals on civil legal matters through direct services, impact litigation and policy advocacy. LCCR's work is based on the premise that equal access and treatment under the law must be vigilantly protected. LCCR's advocacy challenges racial and economic disparities that remain ensconced in financial institutions, corporations, educational settings, the criminal justice system, and immigration courts. The organization has a longstanding commitment to ensuring that *all* California students are guaranteed their fundamental right to an education, as promised under the California Constitution. LCCR served as co-counsel in the landmark *Williams v.*

State of California case, the settlement of which resulted in legislation ensuring that all students have equitable access to textbooks and safe and clean schools as well as increased State monitoring over low-performing schools. LCCR's current education work focuses on assuring equal access to education for immigrant and minority students, students with special needs, and students involved in school discipline.

Education Law Center ("ELC") is a non-profit organization established to advocate, on behalf of public school children, for access to fair and adequate educational opportunity under state and federal laws through policy initiatives, research, public education, and legal action. ELC represented the plaintiff school children in the landmark case *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), and continues to advocate on their behalf to ensure effective implementation of the *Abbott* remedies, which have "enabled children in Abbott districts to show measurable educational improvement." *Abbott v. Burke*, 971 A.2d 989, 995 (N.J. 2009) (internal citation omitted). In states across the nation, ELC advances children's opportunities to learn and assists advocates promoting better educational opportunities. ELC provides analyses and other support on relevant litigation, high quality preschool and other proven educational programs, resource gaps, education cost studies, and policies that help states and school districts gain the expertise needed to narrow and close achievement gaps. As part of its work, ELC has participated as *amicus curiae* in state educational opportunity cases in California, Colorado, Connecticut, Indiana, Maryland, Oregon, South Carolina, and Texas.

The Equal Justice Society (“EJS”) is a national legal organization focused on restoring constitutional safeguards against discrimination. EJS works to restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, by combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies. It aims to broaden conceptions of present-day discrimination to include unconscious and structural bias by using cognitive science, structural analysis, and real-life experience. Currently, EJS targets its advocacy efforts on school discipline, special education, the school-to-prison pipeline, and inequities in the criminal justice system.

The Southern Poverty Law Center (“SPLC”) is a civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of our society. Since SPLC’s founding in 1971, it has won numerous landmark victories to attack institutional racism in the South, toppling some of the nation’s most violent white supremacist groups and overcoming barriers to equality for women, vulnerable children, the LGBT community, and people with disabilities. Through its Children’s Rights practice area, SPLC works throughout the Deep South to reform educational systems in an effort to ensure that all children—particularly poor children of color—have equal access to quality public education, and that children are not funneled from schools into the juvenile and criminal justice systems. SPLC has represented thousands of public school children in an effort to reduce inequity and to increase access to quality public education throughout the Deep South.

The Asian Americans Advancing Justice - Los Angeles (Advancing Justice - LA), formerly the Asian Pacific American Legal Center, is the nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders (NHPI). Advancing Justice - LA serves more than 15,000 individuals every year, including Asian Americans and NHPIs who are limited English proficient and/or face other barriers to equal access to public benefits including quality education. Through direct services, impact litigation, policy advocacy, civic engagement and leadership develop, Advancing Justice - LA focuses on vulnerable members of Asian American and NHPI communities while also building a strong voice for civil rights and social justice. Advancing Justice - LA has a long history of advocating for equal educational access as well as educational equity in both K-12 and higher education for all communities of color. Together with its civil rights partners, it recently successfully litigated *D.J. et al v. State of California et al.*, which resulted in the State of California's allocating greater resources to better monitor whether English language learners are receiving constitutionally mandated quality language instructional services.

**THE AMICUS CURIAE BRIEF WILL ASSIST THIS COURT
IN DECIDING THIS MATTER**

Amici have collectively litigated dozens of education equity and access cases around the country. Amici can assist the Court in deciding this matter by placing it within the larger context of equal education opportunity jurisprudence, as well as the extensive body of

social science literature regarding the inputs necessary to improve education and narrow the achievement gap.

Since at least the 1947 decision in *Westminster School District of Orange County v. Mendez*, 161 F.2d 774 (9th Cir. 1947), which held that several school districts unconstitutionally segregated Latino students from their white peers, civil rights organizations have turned to the courts to vindicate students' "fundamental interest" in obtaining an equal public education. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 609 (*Serrano I*.) Working in concert with affected communities, education advocates have challenged California's school finance system as inequitable and inadequate, the disproportionate application of school discipline policies to minority students, the over-representation of minority students in special education, and unequal access to adequate facilities, curriculum and educational programs.

Civil rights organizations and education advocates continue to challenge inequitable access for low-income and minority students to school facilities, instructional materials, instructional time, and effective teachers. For example, in *Williams v. State of California*, many civil rights organizations sought, on behalf of children and parents, to ensure that all students had equal access to textbooks, clean and safe school facilities, and appropriately credentialed teachers. The State settled the *Williams* case by enacting and implementing a robust statutory scheme designed to equalize educational opportunity throughout the State. (Notice of Proposed Settlement (Aug. 13, 2004), *Williams v. State of California*, San Francisco Co. Super. Ct. No.

312236.) The *Reed v. State of California* litigation resulted in a settlement addressing the effect of disproportionate teacher layoffs within the Los Angeles Unified School District. (*Reed v. State of California* (2010) Los Angeles Co. Super. Ct. No. BC 432420.)

In *Cruz v. State of California* (2014) Alameda Co. Super. Ct. No. RG14727139, plaintiffs are challenging a practice in several school districts of systematically providing minority students with less instructional time than other schoolchildren, thereby depriving them of equal educational opportunity. And, in the most recent school finance litigation, a consolidated appeal currently pending in this Court, seeks to demonstrate that the State's school funding system remains inadequate even decades after *Serrano I*. (*Campaign for Quality Education v. State of California*, No. A134423 (First Appellate Dist., Div. Three); *Robles-Wong v. State of California*, No. A134424 (First Appellate Dist. Div. Three.) Specifically, the plaintiffs in these cases claim that school funding is insufficient and not based on what it costs to deliver to all children a meaningful education, including the education needed for children to reach proficiency on the State's own academic content standards and succeed in a 21st century society and economy.

Many of these challenges to educational inequality focus on the direct impact adequate funding (or the lack thereof) has on access to a quality and equal education. In addition to the perspective they provide regarding civil rights and education litigation, amici also present decades of social science research and literature that establish

the futility of attempting to remedy educational disparities by singling out tenure statutes as a cause. This is particularly true given the effects of chronic state and local underfunding of education. Indeed, research and experience shows that the persistent achievement gaps in California could be remedied by providing schools with the funding and resources that would permit them to attract and retain effective and qualified teachers, particularly in schools where current poor conditions and lack of support present staffing challenges.

RULE 8.200(c)(3)(B) DISCLOSURE

Consistent with California Rule of Court 8.200(c)(3)(B), Amici state that no party has funded the preparation and submission of this amicus curiae brief.

CONCLUSION

For these reasons, Amici respectfully request permission to file the attached amicus curiae brief.¹

DATED: September 16, 2015.

¹ The Amicus Brief cites to a number of secondary source authorities. For the Court's convenience, we have submitted an appendix with copies of those authorities. The remaining citations in the brief are to the reporter's transcript ("RT") and the appellants' appendix ("AA"), by volume and page number.

AMICUS CURIAE BRIEF

I.

INTRODUCTION

The California constitution guarantees all children access and a meaningful opportunity to an equal and adequate education. Amici and others in the civil rights community have worked to vindicate this fundamental right for California public school children, particularly those in the state's high poverty school districts by bringing legal challenges to address deficiencies that impair access to a meaningful educational opportunity. Those deficiencies include unequal and inadequate school funding; uneven access to school programs, curriculum and other basic education resources; inadequate and unsafe school facilities; disproportionate suspension and expulsion of minority students; over-representation of students of color in special education; and assignment of under-qualified teachers to schools predominantly serving low-income students and students of color.² Each of these legal challenges entails a demonstration, via a solid evidentiary record,

² See, e.g., *Westminster School Dist. of Orange Cty. v. Mendez* (9th Cir. 1947) 161 F.2d 774 [segregation of Latino students]; *Serrano v. Priest* (1976) 18 Cal.3d 728, 748 [inequities in school funding]; *Tinsley v. Superior Court* (1983) 150 Cal.App.3d 90 [school boundaries that cause de facto segregation].

More recent cases have challenged policies that caused disparities in instructional time, access to resources, and application of exclusionary discipline. See, e.g., *Campaign for Quality Education v. California*, No. A134423 (pending); *Robles-Wong v. State of California*, No. A134424 (pending); *Cruz v. State of Cal.* (2014) Alameda Co. Super. Ct. No. RG14727139; *Williams v. State of Cal.* (2000) San Francisco Co Super. Ct. No. 312236; *Sanders v. Kern High Sch. Dist.* (2014) Kern Co. Super. Ct. No. S1500CV283224.

of a causal link between the challenged state statute or district practice and the denial of students' rights to education.

That causal link is wholly absent from the record below. Plaintiffs asked the trial court to overturn duly-enacted tenure statutes, claiming that they and related protections are causing the widespread assignment and retention of teachers who are so incapable and ineffective in delivering curriculum and instruction that they are depriving students of their right to a constitutional education. Plaintiffs further asserted that if the court invalidated these laws, student outcomes would improve and achievement gaps would shrink significantly.

Plaintiffs, however, did not support this contention with evidence of causation—that is, a direct link between the teacher tenure laws and the deprivation of a constitutional education for students in some defined subset of California districts or schools. California Supreme Court precedent demands a clear showing of a causal link between a policy claimed to be unconstitutional and the alleged harm. Without that clear showing, the matter is better left to the Legislature—the branch best equipped to balance all the relevant considerations and to craft an appropriate solution.

Plaintiffs failed to meet their requisite burden of proving that the statutes affording teachers tenure and other related employment protections are causally connected to a deprivation of education that violates students' constitutional rights. As amici further explain,

plaintiffs also ignore the overwhelming research documenting the connection between adequate school funding and the availability of effective, highly qualified teachers, particularly in high poverty districts and schools. Because the requisite showing of causation was absent, this Court should reverse the judgment, since without that showing, the judgment represents an inappropriate judicial foray into the policy debate over the wisdom and effectiveness of California’s tenure statutes—a matter within the Legislature’s sole province.

**II. PLAINTIFFS FAILED TO PROVE THE TENURE
STATUTES HAVE CAUSED A VIOLATION OF
STUDENTS’ CONSTITUTIONAL RIGHTS**

California has a rich history of legal challenges by civil rights organizations to state and district policies that impair low-income and at-risk students’ right to an equal and adequate education. These challenges have resulted in well-established judicial precedent defining the scope of the constitutional right to an education in California. The *Serrano v. Priest* litigation challenged the state’s school finance system that allocated more money to districts serving higher-income students than to districts that serve low-income children. Striking down this facially discriminatory system, the California Supreme Court noted that “[t]here is a distinct relationship between cost and the quality of educational opportunities afforded,” and that “differences in dollars do produce differences in pupil achievement.” (*Serrano v. Priest* (1976) 18 Cal.3d 728, 748.) The Court held that the plaintiffs had established a direct causal relationship between the unequal funding policies and

“the quality of educational opportunities afforded” in those districts.
(*Ibid.*)

Butt v. State (1992) 4 Cal.4th 668 addressed the issue of unequal educational opportunity resulting from a district’s abrupt shortening of the school year. *Butt* arose out of an announcement by the Richmond School District that budget issues were forcing the shortening of the school year by six weeks. (*Id.* at p. 673.) The Supreme Court ordered the State to intervene to keep schools open. The Court based its holding on the plaintiffs’ showing of a direct linkage between the challenged district policy – closing schools well before the end of the school year – and a “real and appreciable impact” on students’ rights to educational equality. (*Id.* at pp. 687-688.) The plaintiffs thus showed that the closure of the schools “would cause an extreme and unprecedented disparity in educational service and progress.” (*Ibid.*)

In this matter, plaintiffs had the burden of showing by a preponderance of the evidence that the challenged statutes impose a “real and appreciable impact” on students’ fundamental right to equality of education. (*Butt, supra*, 4 Cal.4th at pp. 687-688.) That is, they had to proffer evidence demonstrating that the challenged statutes resulted in the hiring and retention of ineffective and unqualified teachers to such a degree—and at such levels—as to have a real and appreciable impact on equal access to quality education of students in one or more California school districts.

Plaintiffs did not meet this causation burden. They did not show, nor can they show, that the challenged statutes *require* the retention of clearly ineffective teachers or that those statutes resulted in assignment of teachers incapable of delivering curriculum and instruction to students in particular classrooms, schools, or districts. That is, plaintiffs did not show that the “Permanent Status Statutes,” and in particular, Education Code section 44929.21, subdivision (b), requires districts to reelect ineffective teachers at the expiration of their two-year probationary period. Similarly, plaintiffs did not show that the dismissal statutes (Ed. Code, §§ 44934, 44938, 44944) require districts to retain ineffective teachers.

Plaintiffs focused on the processes for dismissing teachers and for reducing the teacher workforce due to budgetary, funding and other fiscal constraints. While plaintiffs critiqued these processes as a matter of public policy, they did not produce sufficient record evidence establishing that the statutes required districts to retain unqualified and ineffective teachers. For example, plaintiffs did not make the requisite showing that reductions in force pursuant to the “Last-In-First-Out” statute (Ed. Code, § 44955) caused the replacement of effective teachers with ineffective ones, depriving students in certain districts and schools of a constitutional education.

At best, plaintiffs presented anecdotal evidence that in some instances, the challenged statutes could contribute to retention of ineffective teachers. However, the trial court’s analysis, given the record below, does not show or support a causal connection between

these statutes as compared to the many other factors linked to teacher quality, and the deprivation of a constitutional education in specific California districts or schools.³

The trial court limited its causation analysis to a cursory discussion of the number of ineffective teachers in California. It ruled that ineffective teachers *can* deprive a student of a quality education. (28AA/7299-7300) The trial court then summarily concluded, without any causal analysis or record evidence showing the requisite causal link, that these deprivations were a result of the challenged statutes. The court improperly reached that conclusion because the record does not show that the challenged statutes do, in fact, have a “real and appreciable” impact on quality education. On the contrary, there is no research-based evidence, to date, to show that teacher tenure policies cause the assignment of teachers determined to be ineffective in classrooms, schools and districts. (See Black, *The Constitutional Challenge to Teacher Tenure* (Feb. 24, 2015), p. 35 (“Black”).) Thus, the trial court simply leaped past the causation analysis to find that the

³ The trial court based its judgment in part on a finding of disparate impact—i.e., that the challenged statutes “disproportionately affect poor and/or minority students.” (28AA/7306) But as with their education article claim, plaintiffs failed to establish that the challenged statutes—as opposed to other factors like inadequate funding, school district policies, or individual teacher preferences—were a cause of disparities among student subgroups in accessing a constitutional education. While a claim of disparate impact is cognizable under California jurisprudence, plaintiffs did not carry their burden of establishing causation as to that claim, and this Court should similarly reject the trial court’s unsupported conclusions as to equal protection.

challenged statutes impose a real and appreciable impact on students' constitutional rights.

The North Carolina Court of Appeals recently rejected arguments that repeal of tenure laws would improve teacher quality and student performance based on a lack of evidence to support causation. (*N.C. Ass'n of Educators, Inc. v. State* (N.C. App. June 2, 2015) No. COA 14-998, at pp. 31-32 (2015 Bloomberg Law 174083), *petn. for discretionary review granted* (Aug. 20, 2015) No. 228A15 (2015 Bloomberg Law 270853).) The court found that the state could not rely on generalizations and conclusory opinions to establish that repeal of teacher contracts was “reasonable and necessary to serve the important public purpose of improving the educational experience” of students. (*Id.* at p. 30) Thus, the court concluded that the state had failed to show that repeal of tenure would improve the quality of education in the state. (*Id.* at pp. 31-32.)

Plaintiffs here similarly failed to demonstrate the required nexus between the challenged statutes, ineffective teachers, and inadequate and unequal education to students in specific districts. Indeed, as in the North Carolina case, the court below relied not on a solid evidentiary record, but rather on generalizations and conclusory opinions. Further, plaintiffs and the trial court ignored other crucial factors, especially the availability of adequate school funding, that cause deficiencies and disparities in educational outcomes. Plaintiffs' challenge to teacher tenure statutes was an attempt to shift the focus away from the larger picture—the mix of policies and practices that

impact the quality and quantity of effective teachers—and thus did not show that those statutes have a “real and appreciable” impact on equal access to quality education. (See *Butt, supra*, 4 Cal.4th at pp. 687-688.)

III. ADEQUATE FUNDING IS ESSENTIAL TO PROVIDE A HIGH QUALITY TEACHER WORKFORCE IN CALIFORNIA’S SCHOOL DISTRICTS

A. The Lack Of Adequate Funding Directly Affects Students’ Access To Quality Teaching

It is undisputed that all school districts—and, in particular, poor ones—must have adequate funding to attract, support and retain a high-quality corps of teachers in their schools. Equal educational opportunity means ensuring schools have the resources they need to provide real and meaningful opportunities for all students to succeed regardless of family income, race, English language proficiency, or disability. While California recently has made strides in its efforts to make school funding more equitable by providing additional resources to the neediest students, student spending still falls below 2007-2008 levels and significantly below the spending that nearly every other state commits. (See Baron, “*Report: Californians make more, but pay less toward education than those in other states*” EdSource (Oct. 8, 2013) available at <http://edsource.org/2013/report-californians-make-more-but-pay-less-toward-education-than-those-in-other-states/40027> (visited Sept. 10, 2015).))

The lack of sufficient funding means that students are denied essential programs and services, needed instructional materials, and diverse course offerings; attending school in crumbling buildings; sitting in classes with more than thirty students; receiving less instructional time because of cuts in the school day, week, or year; and being educated by teachers who are not being given the support they need to be successful in the classroom. For example, California ranks last among all fifty states in the number of students per teacher. (See California Budget Project, *Rising to the Challenge: Why Greater Investment in K-12 Education Matters for California's Students* (Oct. 2013), at p. 4.) In 2012-13, California had a student-to-teacher ratio of 24.7-to-1, a level more than two-thirds (69.5%) higher than the average ratio nationwide (14.5 students per teacher). (*Ibid.*) This high ratio means that many teachers lack sufficient time to address individual student needs.

In addition, funding among school districts remains unequal. Districts in wealthy areas, serving mostly non-minority students, are substantially better funded than districts that serve mostly minority or low-income students. Wealthier districts use the extra money for essential school opportunities, such as smaller class sizes, additional adults in the classroom, libraries and arts programs, counseling, and building upgrades. (See UCLA/IDEA (Institute for Democracy, Education, and Access), *Funding Essentials for California Schools*, available at <http://justschools.gseis.ucla.edu/crisis/funding/index.html> (visited Sept. 10, 2015).)

Researchers examining education finance reforms and their effects on educational attainment and long-term adult outcomes have found that additional funding increases academic achievement and economic attainment in adulthood for children from low-income families. (See Sciarra and Hunter, *Resources Accountability: Enforcing State Responsibilities for Sufficient and Equitable Resources Used Effectively to Provide All Students a Quality Education* (2015) 23 Education Policy Analysis Archives 21, 22 (“Sciarra and Hunter”); see also Darling-Hammond, *The Flat World and Education: How America’s Commitment to Equity Will Determine Our Future* (2010), p. 105 (“Flat World”); Baker, *Revisiting the Age Old Question: Does Money Matter in Education?* (Jan. 15, 2015) The Shanker Institute, <http://www.shankerinstitute.org/images/doesmoneymatter-final.pdf> (“Does Money Matter?”).)

In a thirty-year, twenty-eight state analysis of the effects of school finance changes on low-income children born between 1955 and 1985, researchers found that a twenty percent increase in per-pupil spending each year for twelve years of public school was associated with numerous long-lasting benefits. These benefits included:

- A twenty-three percent increase in high school completion rates;
- Nearly a full additional year of completed education;
- Twenty-five percent higher adult earnings;
- Fifty-two percent higher annual family income; and
- Twenty percent reduction in the annual incidence of poverty in adulthood.

(See Stanford Center for Opportunity Policy in Education, Research Brief, (2014) *How Money Makes a Difference: The Effects of School Finance Reforms on Outcomes for Low Income Students*, at 1-2.) The researchers concluded that the “impacts indeed reflect the causal effect of school spending.” (Jackson, et al. (2014) *The Effect Of School Finance Reforms On The Distribution Of Spending, Academic Achievement, And Adult Outcomes*, Nat. Bur. of Econ. Rsch. (NBER) Working Paper 20118, at p. 35.)

Augmenting resources in underserved school districts positively impacts student achievement and reduces the achievement gap. (*Flat World*, at p. 111.) In fact, test scores rose in reading and mathematics in the fourth and eighth grades in thirty poor urban districts in New Jersey targeted for judicial intervention (the “Abbott districts”), with gaps narrowing between students in these and other districts. (Sciarra and Hunter, at p. 23.) From 1999 to 2007, the achievement gap in fourth grade mathematics between Abbott districts and all other school districts in New Jersey was reduced by eleven percentage points. (Goertz, *Assessing Success in School Finance Litigation: The Case of New Jersey*, Education, Equity and the Law (2009) 23.) Massachusetts likewise increased investments in low- and middle-spending districts between 1993 and 2000 in schools with higher proportions of low-income students and English language learners, also generating positive results.

B. Adequate Funding Is A Prerequisite For Providing Effective Teaching For All Students

Salary and working conditions also strongly influence teacher quality and turnover—conditions that invalidating the challenged statutes will not remedy. (See *Flat World*, at p. 110.) High quality instruction cannot occur in an environment in which lacks essential curriculum materials and supplies, has prohibitively large class sizes, and has limited opportunity for collaboration with other teachers to create a coherent curriculum. Teachers who work in the hardest-to-staff schools require even greater support to succeed.

1. Funding For Competitive Salaries Is Necessary To Attract And Retain Effective Teachers.

Plaintiffs did not show that available qualified teachers would replace those dismissed in school districts that serve primarily minority and low-income communities. (Black, at p. 38.) The pool of qualified teachers from which to hire is limited. In the absence of a sufficient supply of qualified teachers, disadvantaged schools will struggle to hire and retain such teachers. (*Ibid.*) Moreover, salary strongly influences teachers' decisions to enter and remain in the profession, and higher salaries attract more qualified teachers. (See *Does Money Matter?*, at p. 8-9.) Low salaries contribute to attrition, making it especially likely teachers in high-demand fields like math and science will resign if their districts offer non-competitive compensation. (*Flat World*, at p. 110.)

Some scholars attribute teacher inequities to macro-level labor market problems, precipitated by budget cuts that since 2008, have caused a sharp reduction in the California K-12 teaching population despite increased enrollment. (Taskforce on Educator Excellence, *Greatness by Design: Supporting Outstanding Teaching to Sustain a Golden State* (Sept. 2012) at p. 7 (“*Greatness by Design*”).) As a result, teacher shortages exist in critical areas, including special education, mathematics, physical science, and English language development, and are most acute in schools serving low-income and minority students. (*Id.* at p. 8.) Limited availability is compounded by a precipitous drop in teacher preparation enrollment—from 77,700 in 2001-02 to 19,933 in 2012-13. (Freedburg, “*Teacher Preparation Enrollments Plummet*,” EdSource (Oct. 9, 2014) available at <http://edsource.org/2014/teacher-preparation-enrollments-plummet/68380#.VLBM3dZxU> U. (visited Sept. 11, 2015).) Credentials awarded from teacher preparation programs have dropped from 17,797 in 2008-09 to 11,081 in 2012-13, a 38% decline in four years, due to budget cuts, forced enrollment caps, and a decrease in the demand for teachers triggered by layoffs and reduced entry into the profession. (*Ibid.*)

Large differentials in salary levels for educators across California pose a serious problem for hiring and retaining quality teachers. The 2009 figures reveal that the salaries offered by higher-spending districts were nearly three times higher than the lower-spending districts, even excluding the top five percent of the highest-paying districts. (*Greatness by Design*, at p. 20.) Across all

experience levels, educators in the highest salary districts earned more than twice those in the lowest ones, and adjusting for cost-of living differences results in a three-to-one disparity. (*Ibid.*) In the San Francisco Bay Area, the average teacher salary in Portola Valley, a wealthy district, is \$90,000, while in Oakland, San Francisco, and low-wealth districts like Laguna and Pacifica, the overall average teacher salaries are thirty percent lower. (*Id.* at p. 22.)

Money and race influence competition for qualified teachers, with high minority and low-income schools at a disadvantage because schools in these districts have fewer hiring resources than wealthier districts do. (Wiener and Pristoop, *Education Trust: Funding Gaps, How States Shortchange the Districts That Need the Most Help* (2006) 5-7, tbl. 4.) Plaintiffs alleged in their complaint that “grossly ineffective teachers are disproportionately situated in schools that serve predominantly low-income and minority students,” [1AA/39, ¶ 42], but the thrust of their lawsuit was that tenure is the causal factor, ignoring the overwhelming evidence that the lack of resources, poor working conditions, challenging teaching environments, and segregation strongly influence teachers’ school preferences and affect teacher quality. (See Frankenberg, *The Segregation of American Teachers: Teacher Recruitment Incentives* (2006) The Civil Rights Project at Harvard.)

Plaintiffs also ignored evidence that increasing teacher salaries across schools and school districts can improve the distribution of teaching quality, which in turn affects student outcomes. (*Does Money*

Matter?, at p. 8.) For example, in high need schools, New York City significantly raised salaries, greatly reduced emergency hiring, and took steps to improve teacher retention, which reduced by twenty-five percent the gap in achievement between the schools serving the poorest and the most affluent students. (Boyd, et al. *Changes in Entry Requirements Alter the Teacher Workforce and Affect Student Achievement* (2006) 1 Education Finance and Policy 176-216.)

2. Reasonable Class Size Will Improve The Quality Of Teaching For Students.

Smaller class sizes allow teachers to adequately understand their students' needs so educators can tailor their instruction. Class sizes below a threshold level (i.e., below seventeen students) increase achievement, especially for younger and low-achieving students. (Finn, et al., *The "Whys" Of Class Size: Student Behavior In Small Classes* (2003) 73 Rev. of Ed. Rsch 321-368. See also Mosteller, *The Tennessee Study of Class Size in the Early School Grades* (1995) Critical Issues for Children and Youths, 113-127.) Furthermore, class size, like salary, attracts—and increases retention of—qualified teachers in a school district. Yet, based on a 2012 survey by the Legislative Analyst's Office, the average K-3 class size in California was twenty-six, and some classes had more than thirty students. (Taylor, California Legislative Analyst's Office, *Year-Three Survey: Update on School District Finance in California* (2012) p. 9 ("Year-Three Survey").) These problems are persistent and emblematic of the myriad forces that hinder teacher quality. Invalidation of the challenged statutes will not lessen the effect of these realities on the

quality of education. (See 5RT/1409:20-1410:13 (Adam); 23AA/6012.)

Reducing class size may also decrease racial or socio-economic achievement gaps. For example, in Project STAR, reduction in Tennessee class size increased performance on standardized tests by an average of four percentile points the first year and one percentile point per year in subsequent years. (Krueger, *Experimental Estimates of Education Production Functions* (1999) *The Quarterly Journal of Economics* 497-532.) A reevaluation of the data showed that “[l]onger periods in small classes produced higher increases in achievement in later grades for all types of students” and the lasting benefits of small classes “may reduce the achievement gap in reading and science in some of the later grades.” (Konstantopolous and Chung, *What are the Long-Term Effects of Small Classes on the Achievement Gap? Evidence from the Lasting Benefits Study*” (2009) 116 *American Journal of Education* 125-154.)

3. Resources For Mentoring And Professional Development Will Improve Teacher Quality.

Teacher quality also suffers in the absence of experienced and effective colleagues and other professional development resources. Student achievement increases with more experienced and better qualified teachers, fostered by coordinated efforts to improve individual practices and the school as a whole. (Jackson & Bruegmann, *Teaching Students And Teaching Each Other: The Importance Of Peer Learning For Teachers* (2009) NBER Working

Paper 15202.) It is critical for districts to provide sustainable, ongoing, and responsive professional educator development, yet more than half of California school districts have eliminated or significantly reduced professional development offered to educators, and one-third have reduced paid professional development days. (*Year-Three Survey* at 23, 25.) These reductions have eliminated or reduced professional growth opportunities and guidance from skilled educators for many California teachers, who, compared to their foreign counterparts have significantly less time for collaborative learning and often only three to four hours a week of individual planning time. (*Greatness by Design*, at pp. 6, 50.)

Strong school leadership is also critical to recruiting and retaining teachers, as the principal's ability to create a productive environment, access resources, minimize distractions, motivate adults, and support students' learning is paramount to teachers' satisfaction and efficacy. (*Flat World*, at p. 110.) Plaintiffs acknowledged these problems, but they did not show that invalidation of the challenged statutes would solve them. (23RT/9055:7-9057:4)

C. Providing Adequate Resources Has Yielded Demonstrable Results

In the trial court, appellants adduced substantial evidence indicating that "resources spent on improving the working conditions, putting in place good leadership, adequate supplies, materials, equipment, smaller class sizes did result in a stable teaching force,

experienced teachers staying in the school, raising achievement and narrowing of the gap.” (23RT/9055-57) Nations leading international rankings of student achievement like Finland, South Korea, and Singapore attribute their success to numerous reforms, including:

- Universal government subsidized teacher education, and a living stipend;
- Mentoring, reduced teaching load and shared planning time in the first year;
- Ongoing professional learning embedded in fifteen to twenty-five hours a week of planning and collaboration;
- Additional professional learning time to attend seminars, visit other schools and classrooms, conduct lesson research, and participate in school retreats;
- Leadership opportunities for experts in curriculum and professional development; and
- Competitive salaries, often with additional stipends comparable to other professions offered at hard-to-staff schools.

(*Greatness by Design*, at p. 5.)

Studies in the United States demonstrate that similar reforms can greatly increase teacher quality, improve student outcomes, and reduce the achievement gap. A North Carolina study found that students’ achievement growth was significantly higher if they were taught by a teacher who graduated from a competitive college, scored higher on the licensing test, was certified in his or her field, and had more than two years’ experience or National Board Certification. (Clotfelter, et al., *How And Why Do Teacher Credentials Matter For Student Achievement?* (2007) NBER Working Paper 12828.) A Massachusetts

survey in disadvantaged schools revealed greater student achievement growth in the schools where teachers reported increased support and better working conditions. (13RT/4424, 4428) The study also demonstrated that school culture, the principal's leadership, and relationships among colleagues were the most significant factors predicting teachers' job satisfaction and career plans, and that a supportive environment contributed to improved student achievement. (*Ibid.*) In California, school districts have reduced teacher turnover and increased student achievement through similar reforms. For example, when the San Francisco Unified School District improved leadership, increased professional development, provided adequate equipment, and reduced class size, the teaching force in certain high poverty/high minority schools became more stable, and the achievement gap narrowed. (23RT/9057-59)

Seven high poverty, high minority Sacramento schools participated in a priority school initiative providing extra resources to improve teaching, learning and leadership, leading to significant growth in academic achievement (by California standardized assessments), reductions in suspensions, increases in parent engagement, and increases in school attendance in every school. (7RT/2118; 2124-25) Further, all but one of these schools substantially improved Academic Performance Index (API) scores (the other made modest improvements) and one school had a 200-point increase. (7RT/2125)

Similarly, the El Monte City School District attracted teachers to the most challenging schools by adding resources including instructional assistants, innovative interactive programs, lower class sizes, strong professional learner teams, and talented principals. (18RT/7124-7126) The San Diego Unified School District likewise substantially improved student achievement on multiple measures (i.e., standardized tests, API scores, and exit exam) and significantly reduced the achievement gap by hiring strong principals and promoting collaboration among teachers and between teachers and administrators. (17RT/6548-50) The district found that when it assigned the most qualified principals to the schools with the highest needs, “teachers migrated to those schools because of the leadership.” (15RT/5636)

Thus, both the record evidence and a substantial body of research show that teacher quality in underserved schools can be improved in a variety of ways that do not include invalidating the challenged statutes.

IV. CONCLUSION

Plaintiffs did not show that the tenure system embodied in the challenged statutes produces ineffective teachers, depriving students of their access to a constitutionally adequate education. Nor did they prove that the tenure system has a deleterious effect on student outcomes. Plaintiffs’ attempt to lay blame at the feet of the tenure system for deficits in teaching and learning that are the product of other factors, including chronically inadequate funding for education,

was misguided, since those other factors play too substantial a role to uphold the trial court's conclusion that the challenged statutes are unconstitutional in producing such effects. Simply put, the record does not support a finding of causation from the challenged statutes, and ignored other factors, particularly the lack of adequate funding, that impacts the delivery of a constitutional education in California's most impoverished schools and communities. Rather than exercising judicial restraint in the face of a deficient record, the trial court advanced its preferred policy position. This Court should therefore reverse the judgment and direct entry of judgment for appellants.

DATED: September 16, 2015.

Respectfully submitted,

REED SMITH LLP

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS OF SAN
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WORD COUNT CERTIFICATE

The foregoing Amicus Curiae Brief contains 4,607 words (including footnotes, but excluding the application, certificate of interested entities or persons, tables of contents and authorities, signature block, and this certificate). In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2010.

Executed on September 16, 2015, at San Francisco, California.

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PROOF OF SERVICE

Vergara, et al. v. State of California, et al./California Teachers Association and California Federation of Teachers (Intervenors),
Second Appellate District, Division Two, No. B258589,
Los Angeles Superior Court No. BC484642

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105-3659. On September 16, 2015, I served the following document(s) by the method indicated below:

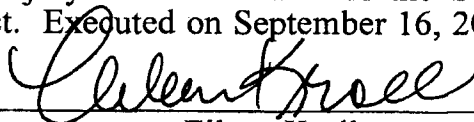
APPLICATION OF LAWYERS’ COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, EDUCATION LAW CENTER, EQUAL JUSTICE SOCIETY, SOUTHERN POVERTY LAW CENTER, AND ASIAN AMERICANS ADVANCING JUSTICE – LOS ANGELES, FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS STATE OF CALIFORNIA, ET AL.

<input checked="" type="checkbox"/>	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm’s practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 16, 2015, at San Francisco, California.



Eileen Kroll