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July 1, 2016

Hon. Tani Cantil-Sakauye, Chief Justice
Hon. Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: *Campaign for Quality Education, et al. v. State of California, et al.; Maya Robles-Wong, et al. v. State of California, et al. and California Teachers Association;* No. S234901 (Court of Appeal Nos. A134423 & A134424)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, as amicus curiae, respectfully requests that the Court grant the petition for review. The questions presented are of statewide and national importance, and include: (1) whether Article IX, Sections 1 and 5 of the California Constitution guarantee a fundamental right to a minimum qualitative level education and, (2) whether those provisions impose a duty on the State to provide a system of common schools that complies with that right, and (3) whether Section 5 imposes a judicially enforceable duty on the State to furnish the necessary resources to support the state provided system.

IDENTITY AND INTEREST OF AMICUS 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. LCCR has an interest in this case because the Court of Appeal's decision threatens to impair California students' fundamental right to an adequate education. LCCR has a longstanding commitment to ensuring that all California students are guaranteed their fundamental, judicially enforceable right to an adequate education, as promised under constitutional provisions and this Court's precedents in *Serrano v. Priest* (1971) 5 Cal.3d 584, 607, in holding that "the right to an education today means more than access to a classroom," and *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 320-321, in ruling that mandamus and injunctive relief may be available to protect such rights. The decision below threatens this fundamental right by affirming the trial court's rulings on these critical issues that are contrary to the State Constitution and California precedent, and the vast majority of sister states' precedents.

REASONS FOR GRANTING REVIEW

The Petition for Review, Court of Appeal Opinion decision, Answer, and Reply describe the relevant background and issues presented. LCCR therefore does not repeat that discussion but provides additional reasons why the Court should grant review.

A. Despite Recent Funding Increases, California's Students Are Being Deprived Of The Constitutionally Mandated Right To An Adequate Education

Pointing to the State's partial recovery from the Great Recession, the Legislature's modifications to California's school funding system in 2013 (the "Local Control Funding Formula," or "LCFF"), and isolated statistics concerning student achievement, Defendants claim review is unwarranted because of recent "significant improvements" in California's public education system. (Ans. at 12

n.4; *accord id.* at 6.) These generalizations—even if true—are irrelevant to the issues presented. As Justice Pollak noted in his dissent, because this appeal arises from a judgment of dismissal following the sustaining of a demurrer, the issues presented are purely legal ones and pertain to the scope and judicial enforceability of Sections 1 and 5 of Article IX of the California Constitution. (Diss. at 19-20) The record contains no evidence about LCFF's impact on school district operations, student achievement, or the vastly disparate levels of resources among school districts. Even if such a record existed, it would be relevant only to the factual question of whether Defendants are complying with their defined constitutional obligations, not to the legal questions inherent in determining the scope of the constitutional guarantees in Sections 1 and 5. Thus, Defendants' reliance on these developments is misplaced.

Even if the Court considered these arguments, it should conclude that Defendants' rosy, self-serving characterizations of such material are misleading. Defendants cite page 12 of a recent Legislative Analyst's Office ("LAO") report for the proposition that California students have demonstrated "significant improvements in academic performance and readiness" because "[f]or example, the percent[age] of eighth grade students scoring proficient or above on English language arts almost doubled ... from 2003 to 2013." (Ans. at 12 n.4)

But Defendants fail to draw attention to the more telling statistics on the *very next page* of the same LAO report—that refute their claim. As that report makes clear, California fourth graders ranked 49th in reading and 48th in math (LAO Report at 13), while eighth graders ranked 44th in reading and 41st in math according to the most recently available national statistics. (*Id.* at 13; *see also id.* at 14 (in 2014 less than half of California's high school graduates were prepared to enter the University of California or California State University systems)) Indeed, the California Department of Education has acknowledged that last year, the *majority* of California schoolchildren tested in English literacy (56%) and math (67%) failed to demonstrate mastery of state standards in those subjects. California Dep't of Educ., News Release, "State Schools Chief Torlakson Calls First Year of CAASPP Results California's Starting Point Toward Goal of Career

and College Readiness" at tbl. 1 (Sept. 9, 2015), available at http://www.cde.-ca.gov/nr/ne/yr15/yr15rel69.asp. ("News Release"). These statistics belie any suggestion that all is well in California's public schools.

Even more problematic is Defendants' failure to acknowledge the existence of the "achievement gap" between well-resourced, largely white and some Asian-American student communities, on the one hand, and low-income, largely African-American, Latino, and other Asian-American student communities, on the other. Defendants again avoid the full implications of the LAO Report they cite, which states that the most recent (2015) student achievement assessments available demonstrate a "significant 'achievement gap'" between those student populations. (LAO Rpt. at 13) The California Department of Education has acknowledged this gap: Last year, 31 percent of economically-disadvantaged children met state standards in English. The number of non-economically-disadvantaged children meeting those standards was more than twice that figure—64 percent. The numbers for math are even starker, with 21 percent of economically-disadvantaged children meeting those standards compared to 53 percent of non-economically-disadvantaged children doing so. *See* News Release, at tbls. 4&5.

Furthermore, while LCCR agrees with Defendants that student achievement scores are not the only metric relevant to determine the quality of education in California, any analysis of "inputs" into California's public schools shows the State's failure to provide adequate resources—and in particular, to schools serving high-need, low-income children. Teacher staffing levels provide a telling example. The LAO Report from which Defendants selectively quote acknowledges that California's student-teacher ratios are among the highest in the country and that California has suffered from a shortage of special education, science, and math teachers every year since 1990. (LAO Rpt. at 8, 64) The Report also notes that urban and high-poverty California schools are "more likely to be staffed by underprepared teachers" compared to suburban schools serving middle class students. (*Id.* at 65) Indeed, a California Department of Education-commissioned taskforce on the teaching profession has observed that teacher shortages in critical areas like special education, mathematics, physical science, and English language

development—along with a similar shortage of qualified principals—are most acute in schools serving low-income and minority students. Taskforce on Educator Excellence, *Greatness by Design: Supporting Outstanding Teaching to Sustain a Golden State* 8 (Sept. 2010) (available at http://www.cde.ca.gov/eo/in/documents/-greatnessfinal.pdf.). Augmenting resources in underserved schools positively affects student achievement and reduces the achievement gap. *See* Linda Darling-Hammond, *The Flat World and Education, How America's Commitment to Equity Will Determine our Future* 111 (2010). That augmentation is precisely the type of quantitative input that is amenable to judicial review.

Defendants' similar spurious suggestion that the State's adoption of LCFF and an increase in General Fund spending on education in recent years are relevant to the issues presented is also misplaced. To be sure, LCFF—a complex and detailed funding formula that reallocates some education funding to school districts in proportion to the number and concentration of high-need students attending any given district—marks a welcome and sorely-needed adjustment to California's school financing system. And while 2015-2016 is the first year in which California's *overall* expenditures on K-12 education have recovered to the level expended before the Great Recession, this "paper victory" obfuscates how little money California expends on educating each public school student.

Defendants also state that education funding is up 42 percent compared to 2009-2010. (Ans. at 6) This statement merely observes that the State has partially restored some education funding in the aftermath of the cuts made as a result of the Great Recession. In 2008-2009, as the Great Recession was beginning, California spent $9,657 per pupil, 30th in the nation in terms of per-pupil expenditure. By contrast, in fiscal year 2014, the most recent year for which Census Bureau statistics are available, California expended slightly *less*—$9,595 per pupil—causing California to fall to 35th in public school system funding for pupils in the nation.[1] This belies Defendants' suggestion that California has made meaningful

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[1] *Compare* U.S. Census Bureau, *Public Education Finances: 2009* (May 2011) at p. 8 (noting California's 2008-09 expenditures), *available at*

progress in increasing education funding *either* in longitudinal terms *or* in comparison to other states.

In short, the very data Defendants offer to show the adequacy of students' education in California shows the State has not discharged its constitutional duty to provide an adequate education. This Court's review is necessary to vindicate Plaintiffs' rights to an adequate education.[2]

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http://www2.census.gov/govs/-school/09f33pub.pdf *with* U.S. Census Bureau, *Public Education Finances: 2014* (June 2016) at p. 8 (noting California's fiscal year 2014 expenditures), *available at* http://www.census.gov/content/dam/Census/-library/publications/2016/econ/g14-aspef.pdf.

[2] As of this writing, there is pending before the Court a petition for review in *Vergara v. State of California*, No. S234741, which presents the issue of whether the Court of Appeal correctly reversed a judgment invalidating California's teacher tenure statutes. This case, and not *Vergara*, is the appropriate vehicle to address educational inequity and the fundamental right to education. *Vergara* presents those issues only in the context of the constitutional challenge to those statutes, while this case presents them cleanly and squarely in seeking access to an adequate education via a judicially enforceable constitutional right. *Vergara* also involves the complex and multi-faceted issue of causation—whether the teacher tenure statutes are a substantial factor in causing inequities in access to public education, while this case presents no such issue. (*See* Amicus Curiae Brief 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, filed in *Vergara v. State of California*, No. B258589 (filed Sept. 16, 2015) at 19-24)

B. Access To An Adequate Education Is A Constitutionally Required, Judicially Enforceable Right Even In The Absence Of The Availability Of Damages

The Court of Appeal majority's acknowledgment that "there can be no doubt that the fundamental right to a public school education is firmly rooted in California law" is irreconcilable with its ruling that the provisions at issue do "not provide for ... an enforceable right." (Op. at 3, 5) Nor can the decision be squared with this Court's rulings holding that education plays "an indispensable role," whose "importance ... is undeniable," as the "lifeline of both the individual and society." *Serrano*, 5 Cal.3d at 605. Furthermore, in California jurisprudence, education has long constituted "a legal right—as distinctively so as the vested right in property owned ... and as such it is protected, and entitled to be protected by all the guarantees by which other legal rights are protected and secured." *Ward v. Flood*, (1874) 48 Cal. 36, 50.

The majority's decision below is inconsistent with this Court's recognition that access to a quality education is a fundamental—and judicially enforceable—right that the State Constitution guarantees.

In *Katzberg*, this Court ruled that courts are not limited to monetary damages to ensure access to a state constitutional right. Although it rejected the claim that a violation of the state due process clause (Cal. Const., art. I, §7(a)) provides a direct *damages* remedy, it noted that such a violation is "enforceable ... through an action for injunctive or declaratory relief," thus disagreeing with the plaintiff that "this constitutional provision is ... innocuous or empty." *Katzberg*, 29 Cal.4th at 320-321. The Court thus held that, while the alleged due process violation (there, the plaintiff's removal from an administrative position at the University of California) did not entitle him to damages, it noted that he had—but failed to pursue—other remedies, such as "a writ of mandate under ... [Code of Civil Procedure] section 1085 ... compelling defendants to provide a name-clearing hearing." *Id.*

This Court has reinforced the notion that there are remedies short of damages to enforce fundamental constitutional rights. *See, e.g., Degrassi v. Cook*, 29 Cal.4th 333, 338 (2002) (city council member "had meaningful alternative remedies," and "could have sought mandate or an injunction" for alleged violations of the California Constitution's free speech clause (Cal. Const., art. I, § 2(a)); *MHC Fin. Ltd. P'ship Two v. City of Santee*, 182 Cal.App.4th 1169, 1176-78 (2010) (denying plaintiff's damages claim, but finding that "landlord had alternative remedies available and did, in fact, obtain declaratory and injunctive relief," under state constitutional right to petition city for unconstitutional rent ordinance (Cal. Const., art. I, § 3(a))).

In their Answer, Defendants claim review is unwarranted because Sections 1 and 5 of Article I of the California Constitution do not create enforceable rights but instead are "'properly resolved ... in the halls of the Legislature." (Ans. at 14; see Op. at 8) Defendants' reliance on *Clausing v. San Francisco Unified School Dist.*, 221 Cal.App.3d 1224 (1990) and *Bautista v. State*, 201 Cal.App.4th 716, 723-733 (2011) is misplaced. In fact, *Clausing* merely determined that school safety and privacy constitutional provisions did not provide a *damages* remedy for a disabled student, and concluded that "the privacy provision affords only a right to injunctive relief." 221 Cal.App.3d at 1238. Similarly, *Bautista* declined to essentially rewrite safety regulations under the workers' compensation system, which has historically been an area heavily regulated solely by administrative agencies. 201 Cal.App.4th at 734. There is no corresponding record of deference in matters involving the fundamental right to education, however. Courts have routinely determined whether a state's educational standards satisfied constitutional guarantees. (Pet. at 11 (citing decisions by courts of 34 states))

As Justice Pollak noted in his dissent, the majority's decision represents an illogical departure from those rendered by courts in the vast majority of other states, which, through judicial intervention, have articulated adequacy standards to vindicate the constitutional right to education. (Diss. at 14-16) He was correct in noting that "the provisions of our state Constitution requiring the state to support a system of common schools is not without substance, and ... requires a system that

provides students with a meaningful basic education in reality as well as on paper and articulated standards for a minimally adequate education." (*Id.* at 16) Justice Pollak also noted that "plaintiffs have alleged [constitutional] violations," and it is the "responsibility of the courts to adjudicate the merits," because the possibility of "meaningful relief" cannot lightly be discounted. (*Id.* at 19-20) Indeed, while this Court's holding in *Butt v. State of California*, 4 Cal.4th 668 (1992), sounds in equal protection, its ultimate analysis centered on the *quality* of education provided to the affected children, and the Court's disposition of the case provided those children meaningful relief. *Id.* at 686-87 (assessing the "actual quality of the district's program" in comparison to prevailing statewide standards).

Given that *Katzberg*, *Degrassi*, and *MHC* affirm that courts possess the authority to enforce the state constitutional right to an adequate education in affording non-damages relief—which plaintiffs sought here—this Court should follow the lead of the state courts who have considered this issue and grant review to ensure that California students have access an adequate education.

CONCLUSION

California students are not receiving the education the state Constitution requires. It is shortsighted and incorrect to claim that the courts cannot enforce Sections 1 and 5 of Article I of our State Constitution and that funding increases have obviated the need for this Court's intervention. Glaring deficiencies remain in the education offered in California's classrooms today. The Court of Appeal majority's decision is at odds with this Court's precedents and the decisions of the majority of state courts that have addressed the fundamental right to an adequate education. This Court should grant review.

Respectfully submitted,
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By _____

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PROOF OF SERVICE

Campaign for Quality Education, et al. v. State of California, et al. and
Maya Robles-Wong, et al. v. State of California, et al.,
California Supreme Court No. S234901,
First Appellate District, Division Three No. A134423 & A134424
Alameda County Superior Court No. RC10524770 & RG10515768

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105-3659. On July 1, 2016, I served the following document(s) by the method indicated below:

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW

☒ 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.

☐ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below.

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I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on July 1, 2016, at San Francisco, California.

Eileen Kroll