2nd Civil No. B258589

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

BEATRIZ VERGARA, ET AL.,
Plaintiffs and Respondents,

vs.

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

and

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

Appeal from Final Judgment of the Superior Court of California,
County of Los Angeles, Case No. BC484642
Hon. Rolf M. Treu, Dept. 58

APPLICATION TO FILE AMICUS CURIAE OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND PROPOSED AMICUS CURIAE BRIEF IN THE MATTER OF BEATRIZ VERGARA, ET AL. v. STATE OF CALIFORNIA, ET AL.

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APPLICATION TO FILE AMICUS CURIAE OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN THE MATTER OF BEATRIZ VERGARA, ET AL. v. STATE OF CALIFORNIA, ET AL.

TO: THE HONORABLE PRESIDING JUSTICE OF THE SECOND APPELLATE DISTRICT, DIVISION TWO

I. INTRODUCTION

Pursuant to California Rules of Court, rule 8.200 (c), the Education Legal Alliance of the California School Boards Association ("Amicus") respectfully requests permission to file the accompanying amicus curiae brief ("Amicus Curiae Brief") in the matter of Plaintiffs/Respondents Beatriz Vergara, et al. ("Respondents") v. State of California, et al., ("Defendants").

Amicus will address each issue raised by the trial court's ruling related to the Challenged Statutes from the perspective of the school districts' governing boards charged with employing teachers and meeting their due process rights while also ensuring students receive the public education to which they are entitled. Governing boards must meet these important obligations within the confines of the Challenged Statutes. Amicus wishes to be heard on the application of the Challenged Statutes, the impacts of the Challenged Statutes, and the analysis of the trial court ruling.

II. INTEREST OF AMICUS CURIAE

The California School Boards Association ("CSBA") is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of

education throughout California. CSBA supports local board governance and advocates on behalf of school districts and county offices of education.

As part of CSBA, the Education Legal Alliance ("ELA") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The ELA represents its members by addressing legal issues of statewide concern to school districts. The ELA's activities include joining in litigation where the interests of public education are at stake.

In the instant case, Amicus Curiae represents the interests of its school district board members. While CSBA supports California's teachers and the concept of due process to which they are entitled, consistent with the goals of CSBA to retain the authority to fully exercise the responsibilities vested in local school boards, including the responsibility to ensure students' fundamental right to education is not impaired by ineffective teachers, Amicus supports the trial court's ruling.

III. AMICUS CURIAE BRIEF WILL ASSIST THE COURT

Amicus has reviewed the briefs and is familiar with the questions involved in this case and the scope of their presentation. Amicus believes that its brief will assist the Court by addressing relevant points of law and arguments not discussed in the briefs of the parties and demonstrating that this case is a matter of general statewide importance affecting school districts across the state. Presentation of such legal argument is the very reason for affording amicus curiae status to interested and responsible parties such as the ELA. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405 fn. 14.)

IV. CONCLUSION

For the foregoing reasons, Amicus respectfully requests that the Court accept the accompanying Amicus Curiae Brief for filing in this case.

Dated: September 15, 2015

CALIFORNIA SCHOOL BOARDS ASSOCIATION
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By: _____
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CERTIFICATE OF INTERESTED PARTIES

There are no interested entities or persons that must be listed in this certificate. (Cal. Rules of Court, rule 8.208, subdivision (e)(3).)

Dated: September 15, 2015

CALIFORNIA SCHOOL BOARDS ASSOCIATION
KEITH J. BRAY
JOSHUA R. DANIELS

By: _____
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PROPOSED AMICUS CURIAE BRIEF OF THE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN THE MATTER OF BEATRIZ VERGARA, ET AL. v. STATE OF CALIFORNIA, ET AL.

COMES NOW Amicus Curiae, the Education Legal Alliance of the California School Boards Association, to offer the following Argument regarding the above captioned matter.

INTRODUCTION

As this Court is undoubtedly aware, this case has attracted significant attention throughout California and the nation. Yet, by finding that the Challenged Statutes - the Permanent Employment Statute (Ed. Code, § 44929.21, subd. (b)[1]), the Dismissal Statutes (§§ 44934, 44938, subds. (b)(1)-(2), and 44944), and the Last-In-First-Out ("LIFO") Statute (§ 44955) - violated the equal protection rights of the nine student plaintiffs ("Plaintiffs" or "Respondents"), Judge Treu's decision simply reaffirms the important precedent that teachers matter.

Moreover, the outcome of the trial was squarely in line with previous California Supreme Court holdings, particularly *Serrano v. Priest* (1971) 5 Cal.3d 584 ("*Serrano I*"), *Serrano v. Priest* (1976) 18 Cal.3d 728 ("*Serrano II*," together with *Serrano I*, "*Serrano*"), and *Butt v. California* (1992) 4 Cal.4th 668. In those cases, the Supreme Court enforced the right to an education guaranteed by California's Constitution. As is demonstrated by this brief, *Serrano* is a particularly apt parallel here - like in the present case, the *Serrano* plaintiffs asserted that the State (rather than local school districts) is responsible for an equal protection violation arising from an unconstitutional statutory scheme. And here, as in *Serrano*, the plaintiffs successfully prayed

[1] All statutory code citations are to the Education Code unless otherwise specified.

for a remedy that would declare the statutory scheme unconstitutional and then relied on the Legislature to enact a new scheme. In fact, Judge Treu followed the holding of the Supreme Court by "unsympathetically examin[ing] any action of a public body which has the effect of depriving children of the opportunity to obtain an education." (*Serrano I*, *supra,* 5 Cal.3d at pp. 606-7, quotations and citations omitted.)

The relief for which the Plaintiffs pray properly respects the separation of powers between the judiciary and the Legislature. However, Amicus is also mindful of the experience in *Serrano* wherein the Supreme Court was forced to nullify the Legislature's initial attempt to fix the statutory scheme because it failed to satisfy the Supreme Court's constitutional framework. Thus, in addition to (i) summarizing Judge Treu's constitutional analysis and (ii) offering the experience that school board members have with implementing the Challenged Statutes, Amicus will describe an alternative statutory scheme that would satisfy Judge Treu's constitutional standard. While Amicus hopes that such an alternative may be helpful as this Court considers the important issues raised by this case, it does not expect or desire this Court to direct the Legislature to adopt the alternative scheme nor does Amicus believe that this scheme is the only constitutional alternative to the Challenged Statutes.

BACKGROUND

I. Procedural History

In deference to this Court's procedural requirements for the permissible length of amicus briefs (Cal. Rules of Court, rule 8.204, subd. (c)(1)), Amicus incorporates the procedural history included in the parties' briefs.

II. Judge Treu's Constitutional Analysis

While Judge Treu's Final Judgment ("Judgment") stands on its own, the constitutional framework established by Judge Treu is best viewed in light of the Judgment together with his decisions denying Defendants' demurrers ("Demurrer Ruling") and Defendants' and Intervenors' (together, "Appellants") motion for summary judgment ("MSJ Ruling").

A. Classification

In an equal protection case, "the threshold question is whether the legislation under attack somehow discriminates against an identifiable class of persons. Only then do the courts ask the further question of whether this identifiable group" is "being denied some fundamental interest" or "is a suspect class." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 258, quotations and citations omitted.) If either is true, then "the discrimination [is] subjected to close scrutiny." (*Ibid,* quotations and citations omitted.)

In *Serrano*, the Supreme Court found the statutory school finance scheme classified students based on wealth. In differentiating between "wealthy" and "non-wealthy" students, the Supreme Court did not require a specific monetary threshold in order to delineate the necessary classification.[2] Instead, the Supreme Court simply noted that tax bases for districts vary "widely throughout the state" (*Serrano I*, *supra*, 5 Cal.3d at p. 592), and found the contention "that the school financing system classifies on the basis of wealth" to be "irrefutable" because "the wealth of a school district, as measured by its assessed valuation, is the major determinant of educational expenditures." (*Id.* at p. 598.)

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[2] While the Supreme Court did discuss two districts (Baldwin Park and Beverly Hills) in some detail, this was simply to illustrate the most egregious problems with the statutory scheme. (See *Serrano I*, *supra*, 5 Cal.3d at pp. 594, 598.)

A similar classification exists here. Judge Treu described this classification clearly in this MSJ Ruling: the classification in this case is between "those students who are assigned grossly ineffective teachers and those who are not." (MSJ Ruling, p. 7.) Like in *Serrano*, the classification of (i) those students who are taught by grossly ineffective teachers ("GITs") and (ii) those students who are not taught by GITs sufficiently defines the identifiable class of persons for purposes of equal protection.

B. Strict Scrutiny[3]

Having properly defined the classification, Judge Treu then considered whether strict scrutiny applied, which is required when an identifiable group (i) "is being denied some fundamental interest" or (ii) "is a suspect class." (*Guardino*, *supra*, 11 Cal.4th at p. 258.) Here, Judge Treu found both.

1. Fundamental Interest

Education is a fundamental right under Article IX of the California Constitution. (*Serrano I*, *supra*, 5 Cal.3d at pp. 608-09 ["We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest'"]; see also Judgment, p. 2 ["Supreme Court held education to be a 'fundamental interest'" in *Serrano*].) Subsequent court decisions have interpreted this to mean, as Judge Treu noted, that Article IX "prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts." (*Butt*, *supra*, 4 Cal.4th 668, 685; *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1475.) Based on this established principle, Judge Treu focused on the components of "basic educational equity."

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[3] The Challenged Statutes cannot survive strict scrutiny. (See Judgment, pp. 9-15.) Thus, Amicus only focuses on whether strict scrutiny applies.

In his MSJ Ruling, Judge Treu noted that the Plaintiffs had introduced evidence of the following: "Teachers are a key determinant for student achievement and success, both in school and outside of school. California school districts employ [GITs] who harm students' education and whose removal would benefit those students who would otherwise be assigned such teachers." (MSJ Ruling, p. 4, citations omitted.) The MSJ Ruling also made it clear that he was not opining at that time on whether he found these facts to be true or false. (MSJ Ruling, p. 4 ["The Court does not find these facts to be true nor untrue, but merely recites them in the limited context of these motions"].) In his Judgment, however, Judge Treu did reach the conclusion that the evidence did sufficiently prove these statements. "Plaintiffs have proven by a preponderance of the evidence, that the Challenged Statutes impose a real and appreciable impact on students' fundamental right to equality of education." (Judgment, p. 8.)

Judge Treu gave credence to two studies submitted into evidence by the Plaintiffs. One study found that "a single year in a classroom with a [GIT] costs students $1.4 million in lifetime earnings" while the other study found that students in Los Angeles Unified School District (which educates one out of every ten students in California[4]) lost more than nine and a half months of learning in a single year when taught by a GIT. (Judgment, p. 7.) As a result, Judge Treu found that teacher quality was central to basic educational equity. "[C]ompetent teachers are a critical, if not the most important, component of *success* of a child's in-school educational experience" and that GITs "substantially undermine[d] the ability of that child to succeed in school." (Judgment, p. 7, emphasis in original; see also *ibid.* [quoting Appellants exhibit 1005 for same proposition].)

[4] See data from note 20, *post*.

Judge Treu's conclusion is similar to the trial court decisions upheld by the Supreme Court in *Serrano* and *Butt*. In *Serrano I*, *supra*, the Supreme Court endorsed the trial court's *evidentiary* determination that the school finance system "allow[ed] the availability of educational opportunity to vary as a function of the assessed valuation per ADA of taxable property within a given district." (5 Cal.3d at p. 590 [quotations omitted].) Similarly, the Supreme Court in *Butt*, *supra*, stated: "Faced with evidence of such extensive educational disruption, the trial court did not abuse its discretion by concluding that the proposed closure would have a real and appreciable impact on the affected students' fundamental California right to basic educational equality." (4 Cal.4th at pp. 687-88.) Like financial resources as found in *Serrano* and instructional days as found in *Butt*, Judge Treu found teacher quality to be central to basic educational equity. (See, e.g., Judgment, p. 8.) Indeed, it is difficult to conceive how it could not be central. Thus, strict scrutiny applied.

2. Suspect Class

Judge Treu similarly applied strict scrutiny because the identifiable group was a suspect class.[5] First, in his MSJ Ruling, Judge Treu found - again without ruling on the veracity of the facts - that the Plaintiffs presented evidence that could show that "minority and low-wealth students have a disproportionate number of [GITs]" and that "schools with high percentages of minority and low-wealth students have a disproportionate number of teachers with low levels of experience, resulting in such schools losing a greater percentage of their teaching staff during [layoffs]." (MSJ Ruling, p. 4, citations omitted.) In the Judgment, Judge Treu concluded that "substantial evidence

[5] Appellants' claim that the only "classes" created by the Challenged Statutes are "groups of teachers" (Defendants Reply Brief, pp. 17-18) ignores the constitutional right to education vested *in students* (not teachers) and the clear impact that the Challenged Statutes have on students, particularly poor and minority students.

presented makes it clear . . . that the Challenged Statutes disproportionately affect poor and/or minority students." (Judgment, p. 14.)

After finding that the Plaintiffs established the necessary evidentiary support to demonstrate a disproportionate impact on a suspect class, Judge Treu determined that *Serrano* did not require discriminatory intent. (See MSJ Ruling, p. 8.) For example, *Serrano I*, *supra*, considered and rejected the State's argument that "no constitutional infirmity [was] involved because the complaint contain[ed] no allegation of purposeful or intentional discrimination." (5 Cal.3d at p. 601.) There, the Supreme Court relied on a number of prior decisions that "invalidated classifications . . . even in the absence of discriminatory motivation." (*Id.* at p. 602, quotations omitted.) This approach was then reaffirmed in *Serrano II*, *supra*. (See, e.g., 18 Cal.3d at p. 756 ["The 'criteria' utilized by the trial court in assessing the discriminatory effect of the system before it were those enjoined upon the court by our opinion in *Serrano I*. Clearly there was no error in this respect"].) And this holding has not been directly overturned since *Serrano II*. (See, e.g., *Tinsley v. Palo Alto Unified School District* (1979) 91 Cal.App.3d 871 ("*Tinsley I*") [allegations of racial segregation based on district boundaries do not require discriminatory intent under *Serrano*][6]; cf. *Sanchez v. State of California* (2009) 179 Cal.App.4th 467, 488-489 [although requiring "discrimination or a discriminatory intent," the court failed to acknowledge the *Serrano* holding at all]).

C. Responsibility of the State

Having established that the Plaintiffs were being denied the equal protection of the laws, Judge Treu next considered the question of what

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[6] The *Tinsley I* decision itself was overturned by the passage of Proposition 1 in 1979. (*Tinsley v. Superior Court* (1983) 150 Cal.App.3d 90 ("*Tinsley II*").) However, Proposition 1 had no effect on the general principal in *Tinsley I* that discriminatory intent is not required in all cases.

governmental entity was responsible for remedying this denial. Given that "the unique importance of public education in California's constitutional scheme requires careful scrutiny of state interference with basic educational rights" (*Butt*, *supra*, 4 Cal.4th at p. 683), he properly concluded that the State was responsible, notwithstanding the impact of local decisions by districts. (Judgment, p. 8; MSJ Ruling, p. 6.) Indeed, as *Serrano* and *Butt* demonstrate, the fact that local decisions may be the most direct cause of a violation of a fundamental right in no way excuses or permits the State to operate or maintain an unconstitutional statutory scheme. "[T]he existence of [a] local-district system has not prevented recognition that the State itself has broad responsibility to ensure basic educational equality under the California Constitution." (*Butt*, *supra*, 4 Cal.4th at 681.)

Under the challenged school finance scheme in *Serrano*, state law "authorized the governing body of each county . . . to levy taxes on the real property within a school district at a rate necessary to meet the district's annual education budget," although there was a limit to such rates. (*Serrano I*, *supra*, 5 Cal.3d at p. 592.) However, voters could "override" this limit, and almost all districts had apparently voted to do so. (*Ibid*.) The State also provided every district with "basic aid"- a fixed amount per student. (*Id*. at p. 593.) Finally, the State provided equalization aid to "particularly poor school districts" on the condition that district voters were "willing to make an extra local tax effort." (*Ibid*.) In other words, although the exact per pupil spending amount for a particular district was set by the county and the local voters, the Supreme Court still found the financing scheme and its impact to be the responsibility of the State.

The State in *Serrano* disputed the strength of the link between the wealth of an individual student or the assessed value of an individual district and district spending. (See, e.g., *Serrano I*, *supra*, 5 Cal.3d at p. 599.) Additionally, the State attempted to extinguish any causal link between the

statutory scheme and per pupil spending because a district's total expenditures were at least "partly determined by the district's [locally determined] tax rate." (*Ibid*.) Yet the Supreme Court rejected these arguments and found a solid link between the State's statutory scheme and per pupil spending because "the system *as a whole* generate[d] school revenue in proportion to the wealth of the individual district." (*Id.* at p. 598, emphasis added.) In sum, local decision making, although a component of school finance, was subjugated to the superior lawmaking of the State.

Here, Appellants made similar arguments before the trial court and Judge Treu rejected them on similar grounds. For instance, Judge Treu noted that Appellants "argue[d] that the effect of the Challenged Statutes on students is attenuated, noting that the Challenged Statutes do not [directly] provide for the assignment of teachers. Additionally, [Appellants] submit that the Challenged Statutes permit and have resulted in school districts declining to reelect and successfully dismissing some teachers." (MSJ Ruling, p. 5.) Judge Treu rejected these arguments, finding - as in *Serrano* - that the Challenged Statutes enable a violation of equal protection because

> [T]the Permanent Employment Statute prevents informed decisions with respect to granting permanent employment, . . . the Dismissal Statutes prevent effective action with respect to dismissal of teachers, . . . [and] the LIFO Statute prevents considered decisions with respect to which teachers are subject to layoffs.

(*Ibid.*)

Judge Treu held that the State cannot dodge responsibility by blaming poor administrators or pointing to poorly-run districts as the cause. Nor, according to Judge Treu, can Appellants save the Challenged Statutes merely because "some" school districts have declined to reelect or have dismissed "some" GITs. What matters is whether, as a whole, the State's own statutory scheme resulted in GITs obtaining and retaining permanent employment.

(*Serrano I*, *supra*, 5 Cal.3d at p. 598 [constitutional violation occurred because school finance system "*as a whole* generates school revenue in proportion to the wealth of the individual district," emphasis added].) Based on the evidence presented at trial, Judge Treu correctly found that it did.

ARGUMENT

I. The Trial Court Correctly Held the Permanent Employment Statute is Unconstitutional

A. Legislative History Confirms that Student Impacts were not Considered in Enacting the Permanent Employment Statute

It has been stated that striking the balance among competing concerns is a quintessentially legislative function and that the Challenged Statutes, including the Permanent Employment Statute, "reflect[] the Legislature's considered judgment." (Intervenors' Opening Brief ("IOB"), p. 2.) However, Amicus' review of the legislative history of California's teacher tenure law (also referred to herein as the "Permanent Employment Statute") does *not* reveal any discussion of student impacts resulting from such legislation. While cases have considered employment rights under the tenure law, neither the Legislature nor the courts have examined the *effect* of the Challenged Statutes generally, or the Permanent Employment Statute specifically, on the Plaintiffs' fundamental right to education.

The National Education Association started political action as far back as 1886 to seek tenure for teachers. In 1939, the California Legislature passed Assembly Bill No. 587 ("AB 587") providing tenure of certificated employees "at the beginning of the third consecutive year." (Assem. Bill No. 587 (1939 Reg. Sess.) Ex. 7, p. 95.) Notably, the legislative history of AB 587 does not identify any reasoning for instituting tenure and is devoid of

discussion of impacts upon students resulting from a law granting permanent employment status after three consecutive years of service. (*Id.*, Exs. 1-8.) Although not discussed in the legislative history, the need for employment protections is said to have stemmed from the need to protect predominantly female teachers from abusive practices and discrimination prevalent in the early twentieth century.[7] California now has extensive employment protections ranging from anti-discrimination to protection against restrictions upon political activity that were not in place when tenure was established by AB 587 in 1939 and which have been strengthened since the most recent tenure provision was enacted in 1983.

From 1927 to 1982, California had a three-year probationary period for K-12 teachers. Before amendment in 1983, former section 44949 also required that a governing board's decision not to reemploy a probationary employee "shall be for cause only." (*Grimsley v. Board of Trustees* (1987) 189 Cal.App.3d 1440, 1444-45.) Although "the determination of the governing board as to the sufficiency of the cause . . . shall be conclusive . . . the cause shall relate solely to the welfare of the schools and pupils thereof." (*Ibid*.) While this prior statute made reference to the welfare of the schools and pupils, neither the prior statute nor its legislative history described teacher readiness or effectiveness to be within the meaning of "welfare of the

[7] See Bathen, *Tracing the Roots of Teacher Tenure*, California Journal (May 1999) p. 10-18 <http://www.cde.ca.gov/nr/re/hd/documents/yr1999hd05.pdf> (as of Sept. 9, 2015).

schools and pupils thereof." Instead, the apparent intent was to preclude a decision based upon discrimination.[8]

After the Hughes-Hart Educational Reform Act of 1983, teachers obtained permanent employment "after having been employed by the district for *two* complete consecutive school years." (Stats. 1983, ch. 498, § 63, emphasis added.) The Hughes-Hart Act also established the March 15 notice: "The governing board shall notify the employee, on or before March 15 of the employee's second complete consecutive year of employment by the district . . . of the decision to reelect or not reelect the employee." (*Ibid.*) Failure to provide notice by March 15 deems the employee reelected. (*Ibid*.) Currently, under what is now section 44949.21 (i.e., the Permanent Employment Statute), the school board's decision to nonreelect probationary teachers may be for any lawful reason regardless of the sufficiency of the cause. (*McFarland Unified Sch. Dist. v. Pub. Employment Relations Bd*. (1991) 228 Cal.App.3d 166, 169.)

This change in the law - to reduce the time needed to obtain tenure to "two years" and to default to such permanent status absent notice of nonreelection by March 15 - was made without any written record of an analysis of teacher readiness, effectiveness, or the impacts on students' education resulting from obtaining permanent status after two years. As noted by Intervenor California Teachers Association in opposing Assembly Bill No. 1761 (2007-2008 Reg. Sess.), a bill that would have extended the time needed

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[8] "There was a time, for instance, when a female school teacher who dared to marry would get for a wedding present a dismissal from her post. Women were not allowed to wear pants, have bare legs under their skirts, be out on the streets after a certain hour of the evening, and so on. For disobeying any of these rules - or, as most people would see it, for exercising basic freedoms - teachers could be fired on the spot. It wasn't long before teachers joined forces to secure more rights in the workplace and bring an end to practices that discriminated against women and others." (Bathen, *supra*, at p. 13.)

to obtain tenure to between two and four years, there was "no published research on the effects of tenure policies on recruitment, retention, *teacher quality or student achievement*." (Assem. Com. on Education, Analysis on Assem. Bill No. 1761 (2007-2008 Reg. Sess.) as amended Mar. 24, 2008, p. 5, emphasis added.) As a result, the legislative record is silent as to impacts on students and student learning in enacting or amending the Permanent Employment Statute.

However, the Supreme Court has recognized that the impact upon the students' education, and thus teacher readiness and effectiveness, must be a cornerstone consideration in teacher employment laws. In *Turner v. Board of Trustees* (1976) 16 Cal.3d 818, which held that the right of probationary teachers to be rehired for the next school year is not a vested right, the Supreme Court observed:

> In considering the student's need for education, the teacher's need for job security, and the school board's need for flexibility in evaluating and hiring employees who may remain 40 years, the Legislature may determine whether a teacher's vested right shall be granted, postponed or denied. . . . *Our school system is established not to provide jobs for teachers but rather to educate the young. Establishing a test period for teachers to prove themselves is essential to a good education system.*

(*Id.* at p. 825, emphasis added, citation omitted.)[9]

[9] *Turner*, *supra*, 16 Cal.3d at page 825 also cites to Comment, *Probationary Teacher Dismissal* (1974) 21 UCLA L.Rev. 1257, pages 1260-1264, which document the history of the Permanent Employment Statute, the changes over time, the competing interests of the local school board and employee rights, as well as the role of judicial review of dismissal decisions and yet does not address students' fundamental right to education, the permanent employment process, or the impacts of ineffective teachers obtaining permanent employment under the Statute.

As reflected in *Turner, supra*, state education laws, such as the Permanent Employment Statute, must consider students' need for education, because the State's primary responsibility is to educate the young. (16 Cal.3d at p. 825.) The purpose of the "test period for teachers" (i.e., the probationary period) is to provide the opportunity to evaluate teacher readiness and effectiveness. (*Ibid.*) As the evidence established at trial, however, the current "test period" to obtain tenure is simply inadequate. This results in GITs obtaining tenure, thereby undermining school boards' ability to deliver on the fundamental right to education. (Judgment, pp. 8-10.)

As the record reflects, numerous witnesses testified as to the impacts of the Permanent Employment Statute and the inability of school districts to make informed decisions on teacher effectiveness under the limitations of the Statute. As a result, tenure is granted to GITs and this has a real and appreciable impact upon students' education. (See, e.g., Reporter's Transcript ("RT") 2030:6-25 [Raymond: Permanent Employment Statute causes Sacramento City Unified School District to grant tenure to GITs], 1061:14-28 [Deasy: Permanent Employment Statute adversely impacts the quality of Los Angeles Unified School District's teacher pool].) Under the current statutory scheme, there is simply not enough time or information available to determine whether every probationary teacher will be an effective teacher.

The evidence also showed that student achievement data is a critical component of these decisions but is not readily available in the timeline provided under the tenure law. Review of student work through the use of rubrics, assessment data, and standardized test results are all important data points to determine whether students are learning. (RT 2105:17-2106:1 [Raymond]; 500:22-503:5 [Deasy].) In the sixteen month period that a district realistically has to assess a teacher's performance before making a decision on whether to grant tenure, a district does not have the capability to

evaluate multiple years of test results or other measures to determine whether students are progressing - classroom observation, by itself, is simply not enough to determine a teacher's effectiveness. (RT 1255:14-28 [Chetty: "If you only restrict yourself to effectively using one year of . . . classroom observation data . . . you are going to get significantly less reliable estimates than if you have more data . . . [Y]ou are going to end up hurting students."], 2428:24-2432:15 [Douglas], 1408:12-1409:3 [Adam].)

Respondent's experts, Drs. Chetty and Kane, both testified to what Amicus members well know - having additional testing and observation data significantly improves the accuracy of knowing whether a teacher is a GIT. (RT 2753:17-2754:26 [Kane], 1254:25-1255:25 [Chetty].) Reflecting common experience and sentiment, a principal testified that she still has "doubts about almost all of my second-year teachers because they are still very much in the steep learning part of the curve and it always feels like a big risk." (RT 1408:12-1409:3 [Adam].) A similar sentiment was expressed by the former Superintendent of the Los Angeles Unified School District: "[Y]ou don't make such a weighty decision on either a single piece of evidence or just a doubt. You need evidence and you need to be able to show that there is a track record of improvement . . . . [T]he statute provides [a] ridiculously short period of time to do that in." (RT 755:19-24 [Deasy].)

B. Time Period to Obtain Permanent Employment under the Permanent Employment Statute is Inconsistent with the Legislative Intent to Ensure Effective Teachers for Students

As recognized by Judge Treu, tenure is granted before a teacher has even met the statutory minimum requirements to obtain a teaching credential. (Judgment, p. 9.) This is contrary to the Legislature's expressed intent to have a full two year induction period to develop effective teachers and remove those unlikely to succeed. (See Stats. 1988, ch. 1355, § 16.)

> Intensive professional development and assessment are necessary to build on the preparation that precedes initial certification, to transform academic preparation into practical success in the classroom, to retain greater numbers of capable beginning teachers *and to remove novices who show little promise as teachers*.

(§ 44279.1, subd. (a), emphasis added.)

The Legislature enacted Senate Bill No. 2042 ("SB 2042") (1997-1998 Reg. Sess.), which was the first reform to teacher preparation and credentialing in more than 30 years. (See §§ 44279.1 *et seq*.) SB 2042 established a *two year* induction program built upon California Standards for the Teaching Profession. Successful completion of these programs is required to obtain a clear credential - the minimum license to teach. (See §§ 44259, 44279.1, subd. (b)(1).[10]) Under the Legislature's plan, teacher effectiveness cannot be determined absent, at minimum, compliance with the two year statutory induction program. To grant tenure before completion of the minimum qualifications to teach and before initial certification conflicts (i) with the Legislature's intent expressed in section 44279.1 to ensure that teachers are prepared to be effective and (ii) with the stated intent to "remove novices who show little promise as teachers." (§ 44279.1, subd. (a).) As a result, tenure is being obtained without regard to teacher readiness, teacher effectiveness, or the impacts upon student learning.

[10] See also the California Commission on Teacher Credentialing, Induction Program Standards (Adopted June 2008) section 4 <http://www.ctc.ca.gov/educator-prep/standards/Induction-Program-Standards.pdf> (as of Sept. 9, 2015).

C. The Permanent Employment Statute Provides For Permanent Employment by Default Without Sufficient Time to Establish Competency

As discussed above, probationary teachers of a school district with an average daily attendance ("ADA") of at least 250 become permanent employees *unless* the district provides proper notice of nonreelection before March 15 of the teacher's second probationary year. (§ 44929.21.) Due to the lack of information available under this timeline, permanent employment may be granted by default and *not* through the exercise of the discretion vested in the local governing board. This is demonstrated, in part, by the failure of the Legislature to align its two-year induction program with the timing for tenure.

As the timeline below reflects, a district governing board must take action and provide notice by March 15 to nonreelect a teacher. This means that the initial decision to *pursue* nonreelection must occur no later than January or February to ensure that the decision can be approved by the governing board and can be implemented by statutory notice no later than March 15. This must be done before the induction program is complete, before a second year's test results are available to assess whether the teacher's students have made annual progress, and without the benefit of two annual evaluations.

Date	Months Teaching	Description
August or September	10 months (no teaching in summer)	Second school year begins
December	15 months	Winter break
January-February	15-16 months	Information to administration to start pursuing nonreelection
February-March	16-17 months	Board action to approve nonreelection
February-March	16-17 months	Preparation and service of notice of nonreelection

Date	Months Teaching	Description
March 15	17 months	Notice of nonreelection
April-May	Tenure granted	Student testing undertaken when school completes 85 percent of its instructional days
May-June	Tenure granted	School year ends
August or September	Tenure granted	State testing results (CAASPP)

While Appellants assert the answer to the difficulty posed by the statutory timeline is to simply nonreelect teachers should there be "any doubt" (see, e.g., Defendants' Opening Brief ("DOB"), p. 28), this approach ignores the documented problems with teacher turnover and unnecessarily hinders the retention of teachers that could otherwise become highly effective. This proposition also ignores statistics showing that California had fewer than 20,000 student teachers enrolled in teacher preparation programs in 2013, less than half the number in 2008.[11] Yet under the approach instituted by SB 2042, every new teacher would be deemed ineffective because as of March 15 of their second year, they are not qualified to receive their certificate.

Amicus agrees with the trial court that the Permanent Employment Statute unnecessarily disadvantages both students and teachers. (Judgment, p. 10.) Because the timeline of the Permanent Employment Statute obstructs a district's ability to make data driven, reasoned decisions regarding tenure, the Statute "end[s] up hurting students." (RT 1255:14-28 [Chetty].)

[11] See California Commission on Teacher Credentialing, Professional Services Committee, Action 3D: Annual Report Card on California Teacher Preparation Programs for the Academic Year 2012-2013 as Required by Title II of the Higher Education Act (Oct. 2015) pp. 5-6 <http://www.ctc.ca.gov/commission/agendas/2014-10/2014-10-3D.pdf> (as of Sept. 9, 2015).

D. The Stated Reasons for Granting Tenure So Quickly are no Longer Valid

As discussed in section I.A, *ante*, at the time tenure was first enacted in 1939 there were few, if any, laws to protect teachers from being fired for reasons other than performance. Teachers could be fired for any reason or no reason including race, creed, gender, politics, pregnancy, or favoritism. However, there are now multiple state and federal statutory protections to address employment wrongs - whether it be discrimination, harassment, restrictions on political activity, or retaliation.[12] As stated in California's Fair Employment and Housing Act:

> It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

(Gov. Code, § 12920.)

This language - together with the various statutes protecting employee rights, and with civil redress available through wrongful termination complaints - makes clear that granting permanent employment status is not necessary to protect the rights of employees from unlawful employment decisions. Notably missing is the same litany of protections for a student's right to education.

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[12] In addition to federal protections, California has extensive employee protections: the Fair Employment and Housing Act (Gov. Code, § 12900 *et seq*.); the Unruh Civil Rights Act (Civ. Code, § 51); Reporting by School Employees of Improper Governmental Activities Act (§ 44110 *et seq*.); and section 7050 *et seq*. (providing school district employees with protection against restriction on political activities).

Appellants argue that "highly qualified" individuals cannot be incentivized to become teachers without the protection of tenure. However, testimony at trial reflected that permanent employment status did not serve as an incentive. (See, e.g., RT 3669:18-3670:5 [Melvoin: "Q: And did the teaching protections that you were aware of (including permanent employment status) play any factor in deciding whether to become a teacher? A: None whatsoever."].) As noted by Judge Treu, the Permanent Employment Statute is just as readily considered a *disincentive* to becoming a teacher. (Judgment, p. 10.) Under a statutory system that calls for termination should there be "any doubt" of effectiveness after only 16 months of service and before the induction training is even complete, it is difficult to see the incentive to enter the profession. Moreover, by the State's own measure there is inadequate information to determine if the teacher should receive initial certification, let alone to determine teacher effectiveness, by the March 15 deadline. (§§ 44259, 44279.)

E. Obtaining Tenure After Four Years Would Be Constitutional and Would Meet the Needs of Teachers, Students, and School Districts

As explained by the Supreme Court in *Turner, supra*, teacher employment statutes must consider "the student's need for education, the teacher's need for job security, and the school board's need for flexibility in evaluating and hiring employees who may remain 40 [or more] years." (16 Cal.3d at p. 825.) Again, Amicus does not expect or desire this Court to legislate; rather, it offers an alternative to demonstrate there are realistic policy alternatives that are constitutional and that effectively balance competing interests with a focus on ensuring effective teachers for California's students.

As the evidence established at trial, the Permanent Employment Statute is an outlier. California is one of only five states with a probationary period of

two years or less. (RT 4732:18-4733:13 [Jacobs].) Additionally, experts testified for both Appellants and Respondents that a three to five-year term was appropriate to evaluate whether to grant tenure. (RT 8486:16-25 [Berliner], 6145:13-6146:23 [Rothstein], 6207:25-6208:1 [Rothstein].) Where, as here, real and appreciable harm to students' fundamental right to education has been established by the evidence, the need for change is not a difference of opinion on different policy alternatives as suggested by Appellants - it is a constitutional mandate. (See, e.g., DOB, p. 12.) Policy determinations that abridge equal protection rights simply cannot stand. (See, e.g., *Butt, supra*, 4 Cal.4th at p. 688 [where "the State fail[ed] to demonstrate a policy of local control so compelling as to justify State tolerance of the extreme local educational deprivation"].) And, as acknowledged by the Appellants' experts, a two year period is *not* necessary and a longer period is actually "better." (RT 8486:16-25 [Berliner]; see also RT 6145:13-6146:23 [Rothstein], 6207:25-6208:1 [Rothstein], 9070:17-9072:2 [Darling-Hammond].)

Amicus proposes a four year period for granting tenure. Under this proposal, a teacher would remain a probationary teacher during his or her first three years of service unless the governing board takes action to nonreelect the employee by the end of each school year. Before the conclusion of the teacher's fourth, complete, consecutive year of service, the governing board would decide whether to grant tenure or nonreelect the probationary teacher. Re-employment decisions would be based on a teacher's annual evaluations (which would include student achievement data) and the recommendation of the superintendent.[13]

This proposal is consistent with Legislative intent set forth in the teacher induction and credentialing statutes, both of which are designed to

[13] The Stull Act requires measures of pupil progress, along with several other mandated elements, to be included in job performance evaluations of certificated staff. (§§ 44660 *et seq*.)

develop teacher effectiveness and remove teachers with little promise after a full two year training period. Moreover, it allows school boards to make thoughtful decisions whether to affirmatively grant tenure to a teacher based upon observation over time, multiple annual evaluations, and year-to-year student achievement data. Four years provides more time for the district to provide support to probationary teachers, more time for teachers to receive instruction in conformity with the state standards, more time to obtain a clear credential, and more time to develop and demonstrate effective teaching skills. This approach reflects a proper balancing of interests while ensuring California's students' fundamental right to education is protected.

II. The Trial Court Correctly Held the Dismissal Statute is Unconstitutional

As the Supreme Court declared in *Turner*, *supra*, "[o]ur school system is established not to provide jobs for teachers but rather to educate the young." (16 Cal.3d 818, 825.) Yet the Dismissal Statutes are fundamentally at odds with this declaration. The evidence demonstrates that the Dismissal Statutes provide job protections so expansive as to cause a real and appreciable impact on the education of California's students. Contrary to Appellants' arguments - that the statutory framework for dismissing GITs in California is not only constitutional, but a straightforward and effective process (see, e.g., IOB, p. 12) - the experience of Amicus' members in applying the statutory framework demonstrates that this framework is not focused on educating the young and impairs their constitutional rights.

While the Dismissal Statutes do not impose an explicit prohibition against terminating GITs, these Statutes effectively strip districts of their local decisionmaking authority to terminate GITs, which leads to the

serious and long-term detriment of California students, particularly poor and minority students.

As Respondents' appellate brief adequately describes the steps that must be followed to dismiss a teacher for unsatisfactory performance (Respondents' Brief, pp. 10-12), there is no need to do so here. However, there is a need to explain the actual impact of the Dismissal Statutes because while the dismissal process may be "straightforward" in theory (IOB, p. 12), the practical reality is much different.

A. The Length of the Dismissal Process Effectively Strips Districts of Their Ability to Terminate Most GITs

Districts witness firsthand the negative impact GITs have on students, particularly poor and minority students, as the Dismissal Statutes force districts to wait years before they can remove GITs from the classroom for unsatisfactory performance and even longer before they can actually dismiss them. (RT 529:26-530:23 [Deasy: dismissal cases have taken slightly less than ten (10) years to resolve], 1525:19-27 [Christmas: noting that it takes on average three (3) to four (4) years to complete the dismissal process].)

1. It Takes Years Just to Serve Written Charges of Dismissal on a GIT

The negative impact of section 44938, subdivision (b)(1),[14] is significant. First, it precludes the district from filing charges of unsatisfactory performance against a GIT without first providing prior written notice of at least 90 days.

[14] Section 44938, subdivision (b)(2), provides a district with a second notice option. However, Amicus is not aware of any districts having utilized this option.

Additionally, contrary to Appellants' contention that "[t]he only time *required* by the statutory dismissal process . . . is the 90-day cure period" (Intervenor's Reply Brief ("IRB"), p. 27, n. 22, emphasis in original), the dismissal process requires completion of *at least* one school year in order for the evaluation to identify the unsatisfactory performance that forms the basis for the notice. Moreover, proving unsatisfactory performance requires that districts demonstrate that a GIT is wholly incapable of remediation to justify dismissal based on unsatisfactory performance. (See *In the Matter of the Accusation Against Deborah Payne-Kelley* (Com. on Prof. Competence [OAH No. 2009050315]) [Commission on Professional Competence refused to dismiss teacher after years of remediation attempts]; see also RT 1518:23-1519:24 [Christmas], 4892:1-13 [Fekete].) Because of this excessive standard, administrators must spend years documenting the GIT's poor performance, failure to benefit from additional training and support (e.g., conferences, classroom walkthroughs, counseling, and mentoring), and completion of the district's progressive discipline steps. (See RT 4892:1-13 [Fekete].) This timeframe is further extended if a district offers a peer assistance and review (PAR) program as another requisite means for improving teacher performance. In fact, as a result of such support and remediation efforts, districts often need to issue multiple 90-day notices of the course over many years. (RT 2416:2-2417:6 [Douglas].)

The staffing needed to properly support and evaluate GITs places a considerable burden on districts. While the impact is felt most acutely in small districts, even larger districts are negatively impacted. For example, an administrator from Fullerton Elementary School District, which is larger than 85% of all districts in California, testified at trial that his district is only able to dismiss one or two GITs at a time because of the length of the dismissal process. (See RT 2414:7-18 [Douglas].)

Lastly, removing a GIT from the classroom *prior* to filing written charges for unsatisfactory performance may be used to show that the district did not give the GIT the "opportunity to correct his or her faults and overcome the grounds for the charge." (§ 44938, subd. (b)(1).) In *Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251, 258, the appellate court vacated the dismissal of a teacher by the Commission on Professional Competence ("CPC") for "unsatisfactory service" (the statutory predecessor to unsatisfactory performance) because the district's decision to remove the teacher "from his teaching assignment deprived him of the opportunity to correct his deficiencies alleged to constitute incompetency" in violation of section 13407 (the statutory predecessor to section 44938, subdivision (b)(1)). (See also *Achene v. Pierce Joint Unified School Dist.* (2009) 176 Cal.App.4th 757.)

Thus, in the years during which this evaluation and remediation process is occurring, the GIT is still teaching - causing direct harm to students by, among other things, impacting their future earnings. (See, e.g., RT 1263:3-9 [Chetty].) Additionally, keeping the GIT in a classroom impacts employee morale and creates disincentives for other teachers to perform well. (RT 618:17-620:20 [Deasy: teachers "are very uncomfortable with having an incompetent teacher next door to them or on their team" and "do not wish to work with an individual who is either on dismissal track or who has been remanded back to the school after an acknowledgement of a problem but not enough to fire them" and "teachers' morale in the school" are impacted.].)

2. After Serving Written Charges of Dismissal, It May Take a Year to Get a Decision

After a GIT has finally failed to demonstrate improvement during a 90-day period, the district can then serve written charges for dismissal on

the teacher pursuant to section 44934.[15] The GIT then must request a hearing within 30 days; in the instance of unsatisfactory performance, the GIT almost always requests a hearing.

After the GIT requests a hearing, the parties engage in discovery pursuant to section 44944, subdivision (a), which includes the right to depositions and written discovery akin to a civil trial. Section 44944, subdivision (a), also requires that discovery "be completed prior to seven calendar days before the date upon which the hearing commences" and requires the hearing to start "within 60 days from the date of the employee's demand for a hearing." However, a continuance is explicitly permitted and almost always granted. (§ 44944, subd. (a).) Thus, discovery can take months, if not much longer.[16]

Furthermore, the hearing itself can be spread out over a month or more even if the actual number of hearing days are limited. Further still, the CPC can take months to issue the decision. In total - the 30 days to request a hearing, discovery, the hearing itself, and writing the decision - it can take up to a year, if not more, from when written charges of unsatisfactory performance are filed to get a decision from the CPC.

A district is finally able to remove a GIT from the classroom after filing charges but usually continues to pay the employee. Additionally a district must also hire a replacement teacher during this phase of the

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[15] AB 215, discussed *post* in section II.E, amended sections 44934 and 44944 (but not section 44938). However, given that AB 215 was passed after the Judgment was issued, the statutory references herein to sections 44934 and 44944 are to the Dismissal Statutes as they existed prior to AB 215.

[16] Discovery itself also has a direct negative impact on students. Not only do students often need to participate in discovery, depositions consume a large amount of time and resources, often requiring several district staff be taken from their positions to be deposed. (See RT 528:8-21 [Deasy], 1522:24-1523:5 [Christmas].)

dismissal process; while the district could hire a probationary teacher as the replacement, this is risky given that the dismissal effort might fail and the GIT would have the right to return to the classroom.[17] Thus, districts often opt to use a substitute teacher without the same skill and training as a regular teacher. The cost salary and benefits of the replacement teacher as well as the GIT on paid leave, adds to the exorbitant costs of the dismissal process.

B. The Cost of the Dismissal Process Effectively Strips Districts of Their Ability to Utilize the Statutory Dismissal Process to Terminate Most GITs

Regardless of the outcome of the dismissal process, a district can expect to incur at least $100,000 in its own legal costs. (RT 4904:19-4904:12 [Fekete: district legal fees alone can range from $100,000 to $200,000], 2420:2-26 [Douglas] approximately $250,000], 1528:1-9 [from $50,000 to $100,000].) This cost can increase dramatically if the CPC rejects the district's attempt to dismiss a GIT because the district must then pay for the GIT's attorneys' fees.[18] (§ 44944, subd. (f)(2); RT 630:22-26, 1528:18-1529:1 [Christmas: payment of employee's attorneys' fees can increase costs up to $400,000].) Given that the average teacher salary alone

[17] Probationary teachers have certain rights to due process as well. (See, e.g., *Bakersfield Elementary Teachers Assn. v. Bakersfield City Sch. Dist*. (2006) 145 Cal App 4th 1260, 1301.)

[18] Intervenors are currently attempting to further expand this provision by claiming they are entitled to attorneys' fees based on market rates, not the fees actually "incurred." (See *Glaviano v. Sacramento City Unified Sch. Dist.* (Super. Ct. Sac. County, 2014, No. 80001662), appeal pending before Third Appellate District [No. C077743].)

is approximately $85,000,[19] it is reasonable to estimate the average cost of pursuing and then losing a dismissal proceeding at approximately $500,000, especially when the cost of a replacement teacher is included.

School district resources are finite and carefully budgeted. (See RT 607:20-608:13 [Deasy].) Thus, the prospect of incurring a financial loss of $500,000 in a single fiscal year is untenable for most districts. This is particularly true for the hundreds of small school districts that often do not have budgets sufficient to pay attorneys for the dismissal process, much less the GIT's attorneys' fees. There are over 300 school districts with annual budgets of less than $5 million.[20] An unbudgeted loss of $500,000 is at least 10% of the total budget for those districts. To put such a financial loss in context, education funding during the Great Recession dropped 12%.[21] Those unprecedented cuts to education caused significant layoffs and reductions in programs. Spending unbudgeted funds on teacher dismissals requires that those funds be pulled from other sources to which they were previously allocated, including employee salaries, student programs, maintenance of school facilities, and many other purposes

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[19] See Ceasar, New Database Details Pay of California Public School Employees, L.A. Times (July 24, 2014) <http://www.latimes.com/local/lanow/la-me-ln-database-public-school-20140723-story.html> (as of Sept. 9, 2015). This cost does not include the cost of other compensation including health benefits and retirement contributions.

[20] This information is based on 2013-14 "SACS" data available from the California Department of Education. It is available online at http://www.cde.ca.gov/fg/ac/ac/.

[21] See California Budget and Policy Center (formerly California Budget Project), California's Public Schools have Experienced Deep Cuts in Funding Since 2007-08 (June 7, 2011) <http://calbudgetcenter.org/wp-content/uploads/110607_K12_Cuts_by_District.pdf> (as of Sept. 9, 2015) [noting a cut of $6.3 billion from $50.3 billion].

central to the education process. (See RT 607:20-608:13 [Deasy], 611:7-26 [Deasy], 2106:2-18 [Raymond].)

Districts in California are unique in facing significant costs to terminate grossly ineffective employees. To the best of Amicus' knowledge, no other private or public sector employee termination process requires an employer to pay an employee's attorneys' fees if dismissal is not obtained. This unique provision of the Dismissal Statutes does not apply to faculty or staff of the California State University, the University of California, or of California community colleges does not apply to employees of cities, counties, or other local public agencies, and does not even apply to school district classified personnel. (See § 45100 *et seq.* [classified], § 70900 *et seq.* [community colleges], § 89000 *et seq.* [CSU], § 92000 *et seq.* [UC].)

In *California Teachers Association v. California* (1999) 20 Cal.4th 327, the Supreme Court struck down a statute that required a teacher to pay half the cost of the administrative law judge in a CPC hearing if the teacher did not prevail. In applying its analysis, the Supreme Court found this requirement "deter[red] teachers with colorable claims from obtaining a hearing and vigorously presenting their side of the case." (*Id.* at p. 349.) The same deterrent applies to districts, but on a larger scale because the consequences of losing are so costly. The prospect of paying a GIT's attorneys' fees on top of the district's legal bills presents a clear deterrent to pursuing a hearing and vigorously presenting its side of the case. The possibility of not having to pay the GIT's attorneys' fees if the district prevails does little to reduce the concern given that the district will still need to pay hundreds of thousands of dollars to its own attorneys under the existing process.

For governing boards of small districts with few resources, the Dismissal Statutes present them with a Hobson's choice: dismissal is

simply not an option as they cannot afford its cost and risk. For the governing boards of other districts, they are presented with a Sophie's choice. On the one hand, allowing a GIT to remain in the classroom impairs the district's ability to provide quality instruction to students. On the other hand, a loss of $500,000 would have a serious impact on a district's finances and on its ability to provide quality instruction to students. (RT 534:21-535:10 [Deasy], 607:20-608:13 [Deasy], 611:7-26 [Deasy], 2106:2-18 [Raymond].) As a result, districts often stop short of pursuing full dismissal. (See RT 630:22-631:21 [Deasy], 2113:7-15 [Raymond].)

C. The Commission on Professional Competence Effectively Strips Districts of Their Ability to Terminate Most GITs

The structure of the CPC provides protections to GITs that no other public employees in California or the nation receive. The result is that it is extremely difficult for districts to terminate most GITs regardless of the impacts upon student learning.

To select an individual to sit on the CPC in any given case, districts must find someone outside of the district with the statutorily defined years of experience in the same general discipline as the GIT. This proves problematic for many school districts as it is often difficult to find someone who fits the required criteria, particularly in remote geographical areas. Further, the district that employs the potential CPC member must be willing to release that person for several days or potentially weeks and find a substitute. (See RT 4883:14-4884:27 [Fekete].) Even the Supreme Court has noted the "unusual nature of the commission on professional competence" when describing its structure and selection of members. (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208, 224.)

The structure of the CPC itself leads to a panel with limited objectivity because the Dismissal Statutes requires a majority of CPC

members to have taught in the subject area of the GIT; this leads, as the evidence at trial established, to a bias built into the CPC favorable to teachers. (See RT 4887:24-4888:12 [Fekete].) In fact, Intervenor California Teachers Association "actually trains people to be teacher advocates on these panels." (RT 4888:4-6 [Fekete].) It is as if a criminal or civil defendant were allowed to train jurors.

Thus, while boards can recommend that an employee be dismissed, the final decision rests in the hands of outsiders, one of whom is trained by the teachers' union, a majority of whom are naturally biased against the district, none of whom are elected to represent the interests of the district's constituents, and all of whom are unfamiliar with the district's students and community and their unique needs. Therefore, while districts are expected to exercise local control to develop programs to meet the needs of their unique student populations, the Dismissal Statutes strip their authority to dismiss GITs who are unable to effectively carry out those programs.

Evidence of these structural problems is seen in the CPC decisions themselves. Given the difficulty and expense in actually completing the dismissal process, it is logical to assume that districts only move to dismiss the worst of the worst - those that are beyond grossly incompetent. Yet rather than a high success rate, the CPC only rules in favor of districts approximately 60 percent of the time. (RT 4914:14-23 [Fekete: teacher was dismissed in 22 of 36 cases where unsatisfactory performance was alleged].)

Individual decisions by the CPC also demonstrate the problem. There are numerous instances where the CPC found that the teacher was incompetent - i.e., the teacher's performance was unsatisfactory - while nonetheless declining to dismiss the teacher. *In the Matter of the Dismissal of Inocencio* (Com. on Prof. Competence [OAH No. L2004070347]) is a

quintessential example.[22] There, the accused kindergarten teacher, Ms. Inocencio, was incapable of properly teaching the required reading curriculum. Over a period of two school years, two separate administrators observed Ms. Inocencio dozens of time, providing her explicit and direct feedback each time. (*Id.*, pp. 5-12.) Ms. Inocencio was also given substantial support, including one-on-one assistance, additional professional development, and model teaching. (*Ibid*.) She was also assigned to the district's PAR program where she was provided with a consulting teacher who met with Ms. Inocencio "about two dozen times." (*Id*., p. 11.)

The CPC agreed, in substantial part, with the allegations as the district presented them. (*Inocencio*, *supra*, pp. 13-14.) Additionally, the CPC praised the administrators for their efforts, writing that they "were dedicated, hardworking concerned administrators. They were likely superior elementary school teachers when they were in the classroom. Their concern, enthusiasm and competency likely results in critical attention being paid to those they supervised, particularly Ms. Inocencio." (*Id.*, p. 13.) Yet despite these serious concerns, the CPC still found that "Ms.

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[22] Another example is *In the Matter of the Dismissal of Shirley Loftis* (Com. on Prof. Competence [OAH No. L2001060534]), where the CPC found that the teacher's teaching "was deteriorating . . . . She shows signs of burnout. She would often retreat from student relationship problems, rather than confront them . . . . She would select students who were docile and with whom she felt comfortable, and teach them, ignoring the remainder of her class." (*Id.*, p. 4.) Simply put, the teacher could not teach. Yet the CPC kept her in the classroom because the district failed to reassign her to a different job to which she was more suited. (See also *In the Matter of the First Amended Accusation Against Mary Ann Blume* (Com. on Prof. Competence [OAH No. L2004110595], p. 16 [where the CPC unanimously found that the teacher "engaged in unsatisfactory performance" yet unanimously concluded that "cause [did] not exist to dismiss" the teacher because, in the words of the CPC, "we feel a suspension would be the appropriate discipline"].)

Inocencio was and is fit to teach." (*Id*., p. 14.) "[W]hile there were certainly several areas where Ms. Inocencio could certainly improve, that would be true for all teachers. There are many teaching styles as there are teachers. Each style has its advantages and disadvantages." (*Id*., p. 13.)

Inocencio demonstrates the inherent flaws with the CPC. The governing board, acting on the recommendation of its administrators, sought to dismiss a GIT with a proven inability to effectively deliver the district's required curriculum. Yet the CPC wrote-off her incompetence as "her style," holding that the district must continue to employ the GIT. The result was that the district not only incurred significant unbudgeted legal costs, it was forced to keep employing a GIT to the detriment of the district's students.

In contrast to almost every other school board decision - which is reviewed under the most deferential standard of "abuse of discretion" - there is a lack of any guidance, from both the Dismissal Statutes and the courts, as to the proper standard to use in assessing the correctness of a district's unsatisfactory performance determination. As a result, the CPC is not required to give *any* deference to the district's decision in dismissal matters and effectively exercises complete discretion in determining whether performance is sufficiently unsatisfactory to justify dismissal. Thus, districts often attempt to find other justifiable bases for dismissal, including evident unfitness to service under section 44932, subdivision (a)(6), which requires the districts to demonstrate that a teacher is "incapable" of remediation. (*Woodland Joint Unified School Dist. v. Com. on Prof. Competence* (1992) 2 Cal.App.4th 1429, 1447.)

D. The Dismissal Statutes are Unconstitutional Regardless of District Management Quality

Appellants make the claim that a "well-managed" school district can easily dismiss ineffective teachers. (See, e.g., DOB, p. 51, IOB, pp. 45-47.) This is simply not true. It would still take years for such districts to evaluate and identify the performance concerns for the GIT, give the GIT the required notice of unsatisfactory performance and afford them the required 90-day period to remediate their performance, serve a GIT with written charges of dismissal on the grounds of unsatisfactory performance, go through a CPC hearing, and then receive a decision from the CPC. (See, *ante*, sections II.A-C.) Then the same district could incur approximately $500,000 in potential costs if it loses the case. Because of this, a well-managed district may decide that the harm to the district and its student from incurring such costs outweighs the harm of keeping the GIT in the classroom, particularly if GIT could be transferred to a different position, with less impact on students. In fact, Amicus would posit that this is what a well-managed district would do in many cases as part of being "well-managed."

Yet even if good management could fix some of the problems, it would not matter from a constitutional perspective. Appellants' argument is simply the flipside of their argument that poor administrators are the reason why GITs still teach. What matters is whether, *as a whole*, the Dismissal Statutes effectively prevents districts from dismissing GITs. (See *Serrano I*, *supra*, 5 Cal.3d at p. 598.)

E. AB 215 Does Not Cure The Dismissal Statutes of Their Unconstitutional Flaws

After the trial in this matter, Assembly Bill No. 215 ("AB 215") (Stat. 2014, ch. 55) was passed with the apparent intention of "updat[ing]

the teacher discipline and dismissal process, saving school districts time and money while at the same time ensuring due process." (See Sen. Comm. on Ed., Analysis of Assem. Bill. No. 215 (2014-15 Reg. Sess.) April 30, 2014, p. 10.) Appellants incorrectly argue that the passage of AB 215 somehow renders Plaintiffs' challenge to all the Challenged Statutes. (See, e.g., IRB, pp. 42-45.) AB 215 maintains the fundamental components of the existing "uber" due process provided to GITs (Judgment, p. 11) by failing to address the constitutional problems with the Dismissal Statutes and is wholly inapplicable to the Permanent Employment and LIFO Statutes. Specifically, AB 215 failed to decrease the amount of time and cost required to dismiss a GIT and made no significant structural changes to the CPC.

Critically, AB 215 did not amend section 44938, which requires a 90-day notice that details the nature of the unsatisfactory performance and an opportunity to correct his or her faults and restart the entire process. Thus, under AB 215, it will still take years to serve written charges of dismissal on a GIT, during which time the GIT will be ineffectively teaching students.

AB 215 did not significantly reduce the time period between when charges are filed and the CPC renders its decision. Under AB 215, a hearing must start within six months and the record must be closed within seven months. (§ 44944, subd. (a).) However, the close of the record is not the same as when a decision is rendered. Moreover, it is yet to be seen whether these deadlines will be strictly adhered to, especially given the opportunity for a continuance. (§ 44944, subds. (a)-(b).) Even with AB 215, it will still take up to a year between when the GIT requests a hearing and when a decision is issued.

AB 215 did nothing to decrease the cost to districts in pursuing dismissal. For instance, the attorneys' fees provision in section 44944 was

unchanged. (See AB 215, § 15.) In fact, AB 215 has made the dismissal process more expensive. AB 215 amended section 44939 to provide for the opportunity for a GIT to challenge the district's decision to suspend them after filing written charges. This challenge is brought before an Administrative Law Judge ("ALJ") and, while not as extensive as the hearing before the CPC, imposes significant costs on any district that attempts to place a GIT on unpaid status pending the outcome of the termination.

Finally, AB 215 does nothing to solve the main problems districts face regarding the CPC. The composition of the CPC remains unchanged. (§ 44944, subd. (c)(5).) Additionally, there is no prohibition on training CPC members to be partial towards the GIT. Thus, the biased outcomes from the CPC are unlikely to change.

F. Dismissing GITs Using the Classified Dismissal Process Would Be Constitutional and Effective

Amicus believes that the process used to dismiss classified employees, which stems from various sections in Article 1 (commencing with section 45100) of Chapter 5 of Part 25 of Division of Title 2, is a constitutional and effective alternative to the GIT dismissal process.

To start, the classified employee dismissal process is clearly constitutional. *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215 established the minimum level of due process that requires a written notice of the intent to dismiss, the reasons for the dismissal, a copy of the charges for material and the material upon which it is based, the opportunity to respond, and an evidentiary hearing to challenge the dismissal. However, the classified employee dismissal process established in the Education Code goes beyond this threshold. For instance, under section 45116, "[a] notice of disciplinary action stating one or more causes or grounds for

disciplinary action established by any rule, regulation, or statute in the language of the rule, regulation, or statute, is insufficient." Rather, a district's "notice of disciplinary action shall contain a statement in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based, a statement of the cause for the action taken and, if it is claimed that an employee has violated a rule or regulation of the public school employer, such rule or regulation shall be set forth in said notice." (§ 45116.)

Furthermore, classified employees of merit districts - districts that opt to create a personal commission - enjoy additional protections. (See §§ 45220-45320 [e.g., the commission hears dismissal appeals and defines *for the district* what constitutes reasonable cause justifying dismissal].) Districts and unions may also negotiate additional protections if they choose. Finally, all classified employees have significant protections afforded under both state and federal laws, including anti-discrimination, anti-retaliation laws, free speech laws, and civil rights protections. (See, *ante*, note 12.)

In other words, the classified dismissal processes are fair, impartial, and effective. (See RT 631:22-637:10 [Deasy], 2109:23-2114:11 [Raymond].) It is used by other local public agencies and would be a good constitutional substitute to the current Dismissal Statutes. However, there are other constitutional alternatives and Amicus is not requesting this Court to opine on any of them. Rather, the intent here is simply to show that there are realistic, constitutional policy alternatives to the "uber" due process Dismissal Statutes that could be enacted by the Legislature if Judge Treu's decision was upheld.

III. The Trial Court Correctly Held the LIFO Statute is Unconstitutional

Amicus can state with certainty that its members will continue to be forced to utilize the LIFO Statute to lay off teachers. Not only will there be another recession and cuts to school funding, but it is unclear whether Proposition 30, which has provided additional income to schools, will be renewed.[23] Indeed, some districts even were forced to utilize the LIFO Statute during the pendency of this appeal.[24]

Teacher layoffs are devastating. As a result of seniority, districts lose employees who are dedicated to the district and in whom the district has invested significant resources. Schools lose employees who served as integral parts of each school's culture. Students lose high quality teachers and teachers lose their livelihood.

Under subdivision (b) of the LIFO Statute, "[t]he services of no permanent [teacher] may be terminated under the provisions of this section while any probationary [teacher], or any other [permanent teacher] with less seniority, is retained." This language creates the general rule that last-hired teachers are laid off first. This scheme usurps local decisionmaking by forcing districts to make layoff decisions that are not in the best interest of the district, its teachers, or its students.

Additionally, subdivision (c) the LIFO Statute requires districts to provide each teacher with a preliminary notice or "pink slip" that he or she

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[23] Ewers, CA Fwd Report: Financing California's Future Means Thinking Beyond Prop 30, California Forward (Feb. 2, 2015) <http://www.cafwd.org/reporting/entry/cafwd-report-financing-california-future-means-thinking-beyond-prop30> (as of September 10, 2015).

[24] See Blume, LAUSD Board OKs $7.8-billion Budget that Includes Hundreds of Layoffs, L.A. Times <http://www.latimes.com/local/education/la-me-lausd-budget-20150624-story.html> (as of Sept. 9, 2015).

may be laid off by March 15, with a final decision made before May 15. However, before this final layoff decision is made, each teacher is entitled to challenge his or her potential layoff at a hearing before the Office of Administrative Hearing ("OAH").[25]

A plain reading of the LIFO Statute removes a district's ability to consider teacher effectiveness in making layoff decisions. (RT 653:21-24 [Deasy], 657:1-6 [Deasy], 2043:9-19 [Raymond].) This can lead to absurd results, including laying off a district's best teacher. Former Sacramento City Unified School District Superintendent Jonathan Raymond cited the example of a junior first-grade teacher who he deemed "one of the top five best teachers I have ever seen in my career anywhere in the country." (RT 2044:17-18 [Raymond].) Despite "her ability to engage and motivate children, to push, to love them, to collaborate with her employees, her work ethic," the LIFO Statute caused her layoff. (RT 2044:19-21 [Raymond].)[26]

A. The Two Exceptions to the LIFO Statute Do Not Allow Districts to Consider Teacher Effectiveness

While the LIFO Statute does contain two limited exceptions to the general rule that newer teachers are laid off first, neither exception permits - even indirectly- the ability of districts to consider teacher effectiveness.

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[25] Unlike the dismissal for cause hearing that requires a three-person panel, a layoff hearing is presided over by a single ALJ. (§§ 44949, 44955.)

[26] See also HuffingtonPost.com, Michelle Apperson, Teacher of the Year, Gets Lay-Off Notice From Sacramento School District Amid Budget Cuts, HuffingtonPost.com (June 15, 2012) <www.huffingtonpost.com/2012/06/15/michelle-apperson-teacher_n_1601015.html> (as of Sept. 2015).

1. The Skipping Exception Does Not Save the LIFO Statute from Being Unconstitutional

Subdivision (d)(1) of the LIFO Statute provides for skipping and retaining a teacher with less seniority (thereby laying off a teacher with more seniority) if there is "a specific need for personnel to teach a specific course or course of study . . . and that the [teacher] has special training . . . necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess."

Appellants would have this Court believe that skipping allows districts to, in practice, consider teacher effectiveness when making layoff decisions. (See, e.g., DOB, pp. 29-30; IOB, p. 21.) Unfortunately, this assertion is without merit.[27] The touchstone opinion regarding skipping is *Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127. There, the appellate court established a test with which districts must comply in order to skip junior teachers and instead lay off more senior teachers. To skip a teacher, a district must "demonstrate[] a specific need for personnel to teach a specific course or course of study . . . and that the [teacher] has special training . . . necessary to teach that course or course of study . . . which others with more seniority do not possess." (*Id.* at p. 137.)

Under *Bledsoe*, it does not matter whether a higher level of teacher training is more beneficial to students. This inquiry is limited to whether such training is needed for a specific course of study. Moreover, nothing in the *Bledsoe* test permits a district to consider a teacher's effectiveness. This question was addressed in *In the Matter of the Layoffs of Certain Certificated Employees of the Pasadena Unified School District* (OAH No.

[27] Intervenors neglect to mention their history of vigorously challenging, without exception, districts' attempts to use the skipping exception as a means to retain valuable junior teachers working in programs aimed at improving student performance.

2013030309) ("*Pasadena* OAH Decision"). There, the district attempted to skip two teachers who were "highly qualified" under the federal No Child Left Behind Act ("NCLB") and instead lay off two more senior teachers who were not "highly qualified." (*Id.*, pp. 2-6.) The district argued that being "highly qualified" under NCLB satisfied the skipping exception, pointing to the fact that "federal law and state Board of Education guidelines have required all teachers of NCLB core academic subjects . . . to demonstrate that they [are 'highly qualified'] in the subject areas being taught." (*Id.*, p. 4.) Additionally, NCLB allows parents to demand that the district transfer their child to a classroom taught by a "highly qualified" teacher. (*Id.*, p. 5.) Nonetheless, the ALJ, citing *Bledsoe*, invalidated the district's decision because the district had failed to show "that only teachers who are ['highly qualified'] may provide instruction in . . . core academic subjects." (*Id.*, p. 7.) In other words, under the LIFO Statute, a minimally qualified teacher (regardless of effectiveness) must always be retained over a more junior teacher even if the latter is highly qualified (and highly effective).[28]

The *Pasadena* OAH Decision was not an isolated decision. In *In the Matter of Accusations Against Karen Brown et al.* (OAH No. 2012030305) ("*Karen Brown* OAH Decision"), for instance, the district had skipped and retained a junior teacher with a Bilingual, Crosscultural, Language and Academic Development ("BCLAD") certificate in Hmong. (*Id.*, pp. 2-11.) Hmong students made up 31% of the district's student body and the district was failing to meet minimum standards for its English Language Learners. (*Id.*, pp. 9-10.) The district argued that it needed teachers with BCLADs in Hmong to provide these students with English Language Development

[28] An earlier OAH decision reached the opposite conclusion. (See *In the Matter of the Accusations Against 2230 Full Time Equivalent Certificated Employees* [OAH No. 2010031441].)

("ELD") instruction and to help "bridge the cultural gap" and increase support and engagement of one of the district's most challenged student populations. (*Id.*, p. 10.) Yet the ALJ still invalidated the skip on the grounds that the district had not established that a BCLAD was needed because actual ELD reading and writing instruction provided to these students in the classroom was in English rather than in their native language. (*Id.*, pp. 12-13.) In other words, a school district's exercise of local control was overridden by a decision made by an ALJ wholly unfamiliar with the unique needs of the district and its students.

Even in those rare instances where a district has been able to successfully skip and retain junior teachers, the process requires an extraordinary amount of time and resources that districts simply cannot commit on an ongoing basis. In *Acquisto v. Sacramento City Unified School District* (Super. Ct., Sac. County, 2012, No. 80001173), the Superior Court allowed the district to skip and retain junior teachers where it had "dedicated substantial resources to . . . provide intensive training and support" to those teachers. (*Id.* at p. 3.) However, the Superior Court also required the district to individually evaluate the training of each junior teacher against each senior teacher subject to layoff. (*Id.* at pp. 17-22.) This "individual assessment" requirement imposes an untenable burden on districts to essentially defend, at a significant cost, their local determination as to what teachers should be skipped based only on their unique training and experience.

2. The Equal Protection Exception is so Rarely Used as to Render it Irrelevant

Subdivision (d)(2) permits a district to "deviate from terminating a certificated employee in order of seniority" in order to "maintain[] or achiev[e] compliance with constitutional requirements related to equal

protection of the laws." However, Amicus is aware of no cases in California that have successfully utilized this exception. Therefore, this subdivision has not provided - and, practically speaking, does not provide - districts with the ability to consider teacher effectiveness when making layoff decisions.[29]

B. The LIFO Statute Causes Significant Harm in Other Ways

As noted above, the LIFO Statute requires districts to issue preliminary layoff notices by March 15, which is three months before the deadline to approve the state budget (Cal. Const., art. IV, § 12, subd. (c)(3) ["Legislature shall pass the budget bill by midnight on June 15 of each year"]) and almost two months before the Governor's May Revise is released. This uncertainty forces districts to give preliminary notices to more teachers than would otherwise be necessary. Districts are also forced to give even more preliminary notices because the burdensome and complex LIFO hearing process often invalidates some layoffs. As a result, many preliminary notices are rescinded.

The impact of these preliminary notices on teachers is significant. The job uncertainty often compels junior teachers to seek employment in other districts out of fear of being laid off. (RT 1558:11-18 [Christmas].) This costs the district and its students, who lose their teacher even if the notice is eventually rescinded. (*Ibid*.) Even for teachers that do stay and the preliminary notices are rescinded, the impact of such uncertainly causes serious harm to teacher moral and school cohesion. (RT 1558:19-25 [Christmas].)

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[29] Alternately, if this Court were to hold that subdivision (d)(2) does permit (or even require) districts to consider teacher effectiveness when making layoff decisions, Plaintiffs will have succeeded in their ultimate goal.

The impact on governing boards of issuing these preliminary notices is also significant. Governing boards invest heavily in building and maintaining a trusting relationship with their employees and their bargaining units. Not surprisingly, the need to issue more preliminary notices than would otherwise be necessary can seriously undermine that trust.

These impacts are not hypothetical. In recent years, the uncertainly regarding state funding forced school districts to issue preliminary layoff notices to large percentages of their teachers.[30] The damage to teachers and governing boards from these preliminary notices, many of which were eventually rescinded because of Proposition 30 and other state fiscal maneuvers, was significant and is still being felt today.[31]

The serious impacts that result from the LIFO Statute are not spread equally throughout the schools in any given district. (RT 1278:3-1279:16 [Chetty], 3729:27-3732:11 [Goldhaber], 4594: 2-10 [Johnson].) For instance, when Oakland Unified School District was recently forced to lay off significant numbers of teachers, the LIFO Statute resulted in about 10 percent of teachers in the district's wealthier areas receiving March 15 layoff notices while sixty-five to ninety percent of teachers in schools in the poorer areas received such notices. (RT 1400:12-1401:1 [Adam], 1404:5-9 [Adam].) Principal Adam testified that just the mere issuance of possible layoff notices to these teachers, particularly at the schools in poorer

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[30] See, e.g., California's Fourth Year of Teacher Layoffs Spurs Concern, USA Today (March 5, 2012) <http://usatoday30.usatoday.com/news/nation/story/2012-05-05/california-teacher-layoffs/54767514/1> (as of September 10, 2015).

[31] See Rich, Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional), N.Y. Times (Aug. 9, 2015) <http://www.nytimes.com/2015/08/10/us/teacher-shortages-spur-a-nationwide-hiring-scramble-credentials-optional.html> (as of Sept. 10, 2015).

communities, created significant stress on the school community with the prospect of losing over a majority of their teachers. (RT 1404:11-21 [Adam].)[32]

C. Appellants' Arguments in Support of the LIFO Statute are Not Convincing

Intervenors assert that experience positively correlates with teacher effectiveness. Yet Dr. Raj Chetty testified that students would gain over $2.1 million over their lifetime if districts were able to use effectiveness-based layoffs over seniority-based layoffs. (RT 1263:3-9 [Chetty].) This could not be true if seniority was highly correlated with effectiveness.

Intervenors argue that eliminating seniority as the sole basis for layoffs would "destroy . . . the professional learning community concept that's in place in the schools," that "[t]eachers would be far less willing to work cooperatively to meet student needs in that context," and that "teachers would be reluctant to teach students who tend to test poorly." (IOB, p. 20, fn. 17 [quoting and paraphrasing witness testimony].) The experience of the hundreds of Amicus members suggests otherwise. In fact, teachers are arguably just as likely to be motivated to effectively perform their duties if districts are able to consider performance as a factor for layoffs.

Intervenors claim that elimination of purely seniority-based layoffs "would be very demoralizing" to more senior teachers. (IOB, p. 20, fn. 17 [quoting witness testimony].) This argument discounts the importance of

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[32] Moreover, even when applied successfully, the skipping exception fails to ensure equal opportunity in education for low-income minority students because it cannot protect districts from being forced to lay off teachers who are effective in improving educational outcomes among these student populations. (RT 656:11-19 [Deasy], 2042:12-2043:4 [Raymond].)

morale among districts' more junior teachers, who often dedicate themselves to communities of poverty but whose job security remains at the whim of the state budget and their date of hire.

While Intervenors suggest that the LIFO Statute encourages teachers to invest in their "schools and districts" (IOB, pp. 20-21), the LIFO Statute arguably serves as a disincentive for junior teachers to do the same. (RT 2965: 12-19 [Moss], 3687:16-3688:23 [Melvoin].) As stated by one teacher at trial: "I just felt like no matter what work I did in the classroom or how hard I worked, that [] none of it mattered because a seniority date mattered way more than how much I did for kids or what principals would say about me or what parents would say about me and my love for . . . none of it mattered." (RT 2264:1-18 [Bhakta].)

In attempting to justify the LIFO Statute, Appellants disregard the needs of students, particularly those in the high-poverty minority communities most impacted by seniority-based layoffs. Notably, in Sacramento City Unified School District - one of a few districts that has successfully skipped junior teachers based on specialized training and experience (although not effectiveness) in recent years - students taught by the skipped teachers have experienced learning gains of two to four years in one year. (RT 2115: 3-15 [Raymond].)

D. Using a Modified Version of the LIFO Process for Classified Employees would be Constitutional and Effective

Amicus believes that the LIFO process for classified employees provided for in section 45117 would be, with some modifications, a constitutional and effective alternative to the current LIFO process for teachers.

The classified dismissal process requires districts to issue a preliminary notice 60 days prior to the layoff itself. (§ 45117, subds. (a)-

(c).) This is similar to the approximately 60 days between March 15 and May 15 found in the teacher LIFO process, but there is no fixed deadline for issuing the preliminary layoff notices. Even a fixed deadline for the preliminary notice of June 30 would help as it would (i) allow districts to make the preliminary layoff notice decisions *after* the state budget was passed, (ii) give districts significantly more time to determine whom to lay off, and (iii) occur after the school year ends and, thus, not have a direct effect on students. Additionally, unlike the current uncertainty cause by the LIFO Statute, this later deadline of June 30 would give much greater certainty to those noticed that they are more likely to be laid off.

Moreover, the classified LIFO process provides an important exception to the preliminary notice requirement where there is "a lack of funds" due to "an actual and existing financial inability to pay the salaries of classified employees" or "a lack of work" due to "causes not foreseeable or preventable by the governing board." (§ 45117, subd. (d).) Section 44955.5, subdivision (a), does offer an exception to the preliminary notice requirement in the LIFO Statute "[d]uring the time period between five days after the enactment of the Budget Act and August 15 . . . if the governing board . . . determines that its total revenue limit per unit of average daily attendance for the fiscal year of that Budget Act has not increased by at least 2 percent." However, not only is this exception limited in time and scope, but the Legislature actually has made it inoperative during the depths of the two most recent recessions. (See § 44955.5, subd. (b).)

To avoid a successful constitutional challenge, any application of the classified LIFO process to a new teacher LIFO process would need to be modified to allow districts to exercise discretion when making layoff decisions. This modification would allow districts to, for instance, retain "highly qualified" teachers under NCLB and retain bilingual teachers due

to the simple factor of their expertise and implied effectiveness based on their expertise. (Cf. *Pasadena* OAH Decision, *supra*; *Karen Brown* OAH Decision, *supra*.) While allowing a district to exercise discretion during a layoff process might necessitate keeping the option of a hearing before an ALJ to protect a teacher's due process rights, such a hearing would be less cumbersome than the hearing over skipping required by the LIFO Statute because the complicated *Bledsoe* test would not apply and the burden would be on the GIT who has been laid off to demonstrate that the district abused its discretion.

School boards have struggled under the LIFO Statute to make good layoff decisions for their students when faced with budget reductions. Most districts outside California do not struggle with this as there are very few states that require layoff decisions to be made strictly based on seniority without considering effectiveness in the classroom. In fact, 41 states allow schools to consider other factors or prohibit consideration of seniority altogether. (See Judgment, p. 14; RT 4742:23-4743:25 [Jacobs].) As stated by Los Angeles Unified School District Superintendent John Deasy: "Students come to us and we make the promise that they will graduate college and be workforce ready . . . . If students are not given the right to be in front of a highly effective teacher every day, that is not in the best interest of that . . . . That is what we are in the business for." (RT 659: 1-8 [Deasy].)

CONCLUSION

Amicus respectfully submits these arguments and the perspective of its membership for the Court's consideration.

Dated: September 15, 2015

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204, subdivision (c), of the California Rules of Court, this Amicus Curiae Brief was produced using 13-point Roman type including footnotes and contains approximately 13,957 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 15, 2015

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 115 Pine Avenue, Suite 500, Long Beach, CA 90802.

On the date set forth below I served the foregoing document described as **APPLICATION TO FILE AMICUS CURIAE OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND PROPOSED AMICUS CURIAE BRIEF IN THE MATTER OF BEATRIZ VERGARA, ET AL. v. STATE OF CALIFORNIA, ET AL.** on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

☐ **(VIA U.S. MAIL)** I caused such document to be placed in the U.S. Mail at Long Beach, California with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

☒ **(VIA OVERNIGHT MAIL)** I caused such envelope to be deposited at an authorized "drop off" box on that same day with delivery fees fully provided for at 115 Pine Avenue, Suite 500, Long Beach, CA 90802, in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing September 15, 2015 at Long Beach, California.

Ila Friend

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