

No. B258589

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

**BEATRIZ VERGARA, a minor, by Alicia Martinez,
as her guardian ad litem, et al.,**

Plaintiffs and Appellees,

v.

STATE OF CALIFORNIA, et al.,

Defendants and Appellants.

CALIFORNIA TEACHERS ASSOCIATION, et al.,

Intervenors and Appellants.

From a Final Judgment of the Los Angeles Superior Court
Case No. BC484642, Hon. Rolf M. Treu, Presiding

**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND
[PROPOSED] BRIEF OF *AMICI CURIAE* EDUCATION DEANS,
PROFESSORS, AND SCHOLARS IN SUPPORT OF APPELLANTS**

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TABLE OF CONTENTS

	<u>Page</u>
APPLICATION.....	1
[PROPOSED] BRIEF OF AMICI CURIAE EDUCATION DEANS, PROFESSORS, AND SCHOLARS IN SUPPORT OF APPELLANTS.....	15
I. INTRODUCTION.....	16
II. ARGUMENT.....	22
A. The trial court failed to consider the possible benefits of the tenure, due-process, and reduction-in-force statutes, including their role in recruiting and retaining teachers.	22
B. The trial court likewise failed to consider the potentially negative effects of switching from the current system for making reductions in force to a system of “effectiveness-based” layoffs.	30
C. The trial court’s inability to identify any causal link between the challenged statutes and the alleged constitutional harm reflects the complexity of California’s public-education system.	41
III. CONCLUSION	45
CERTIFICATE OF WORD COUNT	46
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS	47

TABLE OF AUTHORITIES

Page(s)

Case

<i>Butt v. State of California</i> 4 Cal. 4th 668 (1992).....	18, 19, 20, 30, 41
--	--------------------

Statute

Cal. Educ. Code § 44929.21(b)	16
Cal. Educ. Code § 44934	17
Cal. Educ. Code § 44938	17
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Cal. Educ. Code § 44955	17, 31

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TABLE OF AUTHORITIES

	<u>Page(s)</u>
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TABLE OF AUTHORITIES

	<u>Page(s)</u>
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Motoko Rich, <i>Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional)</i> , N.Y. TIMES, Aug. 9, 2015, available at http://nyti.ms/1WaaV7a	24
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TABLE OF AUTHORITIES

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APPLICATION¹

Pursuant to Rule 8.200(c) of the California Rules of Court, the below-identified individuals (“*amici*”) respectfully apply for permission from the presiding justice to file the *Amici Curiae* brief contained herein. The proposed brief explains, based on current social-science research, that the trial court’s judgment striking down five statutes that provide teacher job security failed to take into account the beneficial impact of those statutes in California’s education system and misattributed the retention of so-called “grossly ineffective” teachers to those statutes. The brief will therefore assist the Court in deciding the pending matter.

Amici, identified below in greater detail, are 98 academics with extensive experience researching, writing, and lecturing regarding cutting-edge questions of education policy, including fifteen current and former deans. *Amici* have a strong interest in and familiarity with the issues raised in this appeal and believe that their collective academic experience will help the Court

¹ No party, or counsel for any party, in this petition has authored any part of the accompanying proposed *Amici Curiae* brief. In addition, no person or entity has made any monetary contributions to fund the preparation or submission of this brief.

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* * *

For these reasons, *amici* respectfully request leave to file the brief contained herein.

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I. INTRODUCTION

As students return to classrooms across the state this fall, California school districts face an acute shortage of qualified teachers ready and willing to do the difficult work of educating those students. It is vital that school administrators use all available tools to help recruit effective teachers, retain them once they enter the profession, and foster a supportive environment that promotes student learning.

Unfortunately, the Los Angeles Superior Court's decision in this case, which struck down five important provisions of the California Education Code, will only make those administrators' tasks more difficult. The decision improperly disregarded the beneficial role that the challenged statutes may play in California's education system, while attributing to those statutes ill effects for which no causal connection was shown. For those reasons, the judgment should be reversed.

Plaintiffs, nine students and their guardians, challenged in this lawsuit three categories of statute on the ground that the statutes unconstitutionally result in so-called "grossly ineffective" teachers obtaining and retaining permanent employment: (1) Education Code § 44929.21(b), which establishes a two-year

probationary period during which new teachers may be terminated without cause; (2) Education Code §§ 44934, 44938, and 44944, which together provide due-process protections for non-probationary teachers facing dismissal for cause; and (3) Education Code § 44955, which sets forth procedures for implementing reductions-in-force required for budgetary reasons. Each of these statutes has a role to play in providing California teachers with job security, which in turn attracts people to the profession and provides them with the confidence to teach in innovative ways.

After trial, the trial court held in a cursory sixteen-page opinion³ that the plaintiffs had elicited “compelling” evidence of the “specific effect of grossly ineffective teachers on students” and that there was “no dispute that there are a significant number of grossly ineffective teachers currently active in California classrooms” who have a real, appreciable, and negative impact on a significant number of California students.⁴

But the trial court did not identify any facts suggesting that the challenged statutes are directly responsible for the

³ AA 7293–7308.

⁴ AA 7299.

presence of “grossly ineffective” teachers in California classrooms or for their distribution across different types of schools. The trial court nevertheless concluded that the challenged statutes “impose a real and appreciable impact on students’ fundamental right to equality of education and that they impose a disproportionate burden on poor and minority students.”⁵ The court therefore subjected the statutes to strict scrutiny and invalidated all three on ground that the Legislature had no compelling reasons to enact them.⁶

The trial court’s legal analysis was fundamentally unsound, not only because it cited *no* evidence of a causal link between the statutes and the retention or distribution of “grossly ineffective teachers” before determining that strict scrutiny applied, but also because the court failed to look at the statutes’ total costs and benefits when viewed in the context of the overall educational system in California. Instead, the decision focused single-mindedly on the statutes’ costs, viewed in isolation.

The framework for the trial court’s decision was supplied by *Butt v. State of California*, 4 Cal. 4th 668 (1992), where the

⁵ AA 7300.

⁶ AA 7300–7308.

California Supreme Court held that a school district violated students' equal-protection rights when it decided to close its schools six weeks before the official end of the school year due to lack of funds. *Id.* at 673–74. In reaching that conclusion, the court laid out a number of important principles generally applicable to equal-protection challenges related to the California Constitution's guarantee of a fundamental right to basic educational equality. The court explained that “principles of equal protection have never required the State to remedy all ills or eliminate all variances in service.” *Id.* at 686. Instead, “[a] finding of constitutional disparity depends on the individual facts. Unless the actual quality of the district’s program, *viewed as a whole*, falls *fundamentally below* prevailing statewide standards, no constitutional violation occurs.” *Id.* at 686–87 (emphases added).

Here, the trial court made no attempt to scrutinize the system as a whole as *Butt* instructs. Instead, the court made the following findings about California’s tenure, due-process, and layoff protections:

- That extensive evidence was presented that the two-year probationary period “does not provide nearly

enough time for an informed decision to be made regarding the decision of tenure”;⁷

- That the due-process protections provided to teachers are “so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory”;⁸ and
- That the reduction-in-force statute leads to the “*de facto* separation of students from competent teachers, and . . . the *de facto* retention of incompetent ones.”⁹

In contrast with the Supreme Court’s holistic methodology, the court’s decision lacked any discussion of (1) the possible benefits of the challenged statutes or (2) the possible costs of eliminating them. There is no indication that the trial court considered either of these issues as part of its *Butt* analysis.

The trial court’s invocation of strict scrutiny and invalidation of the challenged statutes was therefore error. The court failed to look at the statutes’ potential to help districts attract and retain qualified teachers; and the court likewise

⁷ AA 7301–7302.

⁸ AA 7305.

⁹ AA 7306.

failed to examine the potentially negative effects of weakening California's existing process for reductions-in-force. As the social-science literature discussed below explains:

- Schools face significant challenges hiring and retaining qualified teachers;
- Statutory protections that provide additional job security can help districts recruit and retain good teachers; and
- Even the most sophisticated standardized test scores alone do not provide an objective way to identify and dismiss ineffective teachers, and a costly and detailed holistic assessment of teacher effectiveness is not well-suited to quickly determining who should be laid off during time-sensitive reductions-in-force.

The trial court's failure to consider these facts in its analysis, combined with its failure to point to any evidence that the challenged statutes directly cause ineffective teachers to remain in California schools, significantly undermines its analysis. The five challenged statutes are the result of complex policy judgments by the Legislature that the Judiciary should not

lightly second-guess. The trial court's judgment should be reversed.

II. ARGUMENT¹⁰

A. **The trial court failed to consider the possible benefits of the tenure, due-process, and reduction-in-force statutes, including their role in recruiting and retaining teachers.**

Teaching jobs in public schools are challenging and high-pressured.¹¹ These positions carry great responsibility for the education of young people, but pay substantially less than other jobs held by adults with similar levels of education.¹² Early tenure, due-process, and seniority protections therefore play an important part in attracting educated people to the profession

¹⁰ *Amici* are concurrently submitting an appendix of the social-science research and literature cited herein.

¹¹ See, e.g., Valerie Strauss, *The real reasons behind the U.S. teacher shortage*, WASH. POST, Aug. 24, 2015, available at <http://www.washingtonpost.com/blogs/answer-sheet/wp/2015/08/24/the-real-reasons-behind-the-u-s-teacher-shortage/> (noting that a 2013 poll showed that 51 percent of teachers “reported feeling under great stress several days a week”).

¹² See Linda Darling-Hammond, *Recruiting and Retaining Teachers: Turning Around the Race to the Bottom in High-Need Schools*, 4(1) JOURNAL OF CURRICULUM & INSTRUCTION 16, 20 (2010) (“Even after adjusting for the shorter work year in teaching, teachers earn 15–30% less than individuals with college degrees who enter other fields, depending on the field and the region of the country.”).

and in encouraging them to stay there. The trial court failed entirely to consider these (and other) positive impacts of the challenged statutes.

The trial court's decision erroneously assumes that there is a limitless pool of talented and committed teachers in California. In reality, it is increasingly challenging to attract qualified individuals to teaching, a fact that counsels in favor of retaining and developing current teachers. Teacher-training enrollment in California has fallen fifty-three percent in the last five years.¹³ Among the possible reasons for that drop is "the erosion of teaching's image as a stable career" as teachers face weakened tenure protections, increased use of test scores to evaluate their performance, and recession-induced budget cuts.¹⁴

With the advent of the new school year, there has been

¹³ Eric Westervelt, *Where Have All The Teachers Gone?*, NATIONAL PUBLIC RADIO (March 3, 2015, 2:03 PM), *available at* <http://www.npr.org/sections/ed/2015/03/03/389282733/where-have-all-the-teachers-gone>.

¹⁴ *See id.*; *see also* *LAUSD Teacher Shortage*, KCRW, Aug. 18, 2015, *available at* <http://www.kcrw.com/news-culture/shows/press-play-with-madeleine-brand/teacher-shortage-firefighter-shortage-and-winning-the-drought> (Professor John Rogers attributing teacher shortage to a political climate in which teachers do not feel they are getting the support they need and to an increased focus on test scores).

ample news coverage of the worsening teacher shortage in California and across the country. School districts in California are struggling to fill positions left empty by recession layoffs. And efforts to fill these positions come at a time when fewer people are training to be teachers.¹⁵ California alone lost 82,000 jobs in schools from 2008 to 2012 and now must fill 21,500 positions while issuing fewer than 15,000 new teaching credentials each year.¹⁶ This academic year, California faces statewide teaching shortages in many disciplines, including English, Drama, and Humanities; History and Social Science; Mathematics and Computer Education; Science; and Special Education.¹⁷ In 2002, when California faced a similarly dramatic shortage of qualified teachers, that shortage affected poorer schools more acutely; and there is every likelihood that it will do so again.¹⁸ Due to the

¹⁵ See Motoko Rich, *Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional)*, N.Y. TIMES, Aug. 9, 2015, available at <http://nyti.ms/1WaaV7a>; Strauss, *supra* note 11; see also Ross Brenneman, *Districts Facing Teacher Shortages Look for Lifelines*, EDUCATION WEEK, Aug. 4, 2015, available at <http://www.edweek.org/ew/articles/2015/08/05/districts-facing-teacher-shortages-look-for-lifelines.html>.

¹⁶ Rich, *supra* note 15.

¹⁷ Strauss, *supra* note 11 (citing U.S. Department of Education Teacher Shortage Area list for the 2015–2016 year).

¹⁸ See LAUSD Teacher Shortage, *supra* note 14.

shortage in trainee teachers, schools and school districts now face a special challenge in recruiting individuals to teaching positions and in filling their basic staffing needs.

Retention as well as recruitment is a pressing issue.

Studies estimate that thirty to fifty percent of teachers leave the profession in their first five years of teaching.¹⁹ In 2007, the National Commission on Teaching and America's Future estimated that the national cost of public-school teacher turnover could be over \$7.3 billion a year.²⁰ The same study found that teacher turnover is highest in high-minority, high-poverty, and low-performing schools, causing those schools to spend significantly more on recruitment, hiring, orientation, and separation.²¹ Those resources could have been used for school improvements, to provide additional support for new teachers, or

¹⁹ See Darling-Hammond (2010), *supra* note 12, at 18 (30 percent); Richard Ingersoll, *Beginning Teacher Induction: What the Data Tell Us*, 93(8) PHI DELTA KAPPAN 47, 49 (2012) (40 to 50 percent).

²⁰ National Commission on Teaching and America's Future, *Policy Brief: The High Cost of Teacher Turnover*, 1 (2007), available at <http://nctaf.org/wp-content/uploads/2012/01/NCTAF-Cost-of-Teacher-Turnover-2007-policy-brief.pdf>.

²¹ *Id.* at 4; see also Darling-Hammond (2010), *supra* note 12, at 18 (attrition is markedly higher in high-poverty and urban schools than in low-poverty and suburban schools).

to pay the salary of an additional specialist teacher.²² And the loss of a talented teacher early in her career because of job dissatisfaction represents a lost investment of time and training.²³ Measures aimed at encouraging qualified teachers to continue teaching therefore would have unquestionable benefits for students and would diminish the need to continually recruit new teachers.²⁴

Difficulties in recruitment and retention are driven by a number of factors, including salaries, working conditions, teacher preparation, and mentoring and support.²⁵ Teachers earn less than college graduates in other fields and are more likely to quit

²² See National Commission on Teaching and America's Future, *supra* note 20, at 4.

²³ See Darling-Hammond, *supra* note 12, at 19–20; see also Gary T. Henry, C. Kevin Fortner, & Kevin C. Bastian, *The Effects of Experience and Attrition for Novice High-School Science and Mathematics Teachers*, 335 SCIENCE 1118, 1120–21 (2012) (observing that novice teachers of high-school science and mathematics courses exhibit high returns to experience early in their careers and that loss of these experienced teachers has the greatest consequences in physics, chemistry, and geometry, which have the steepest teacher effectiveness growth curves).

²⁴ See, e.g., Jeffrey Mervis, *Data Say Retention is Better Answer to "Shortage" Than Recruitment*, 330 SCIENCE 580, 580–81 (Oct. 29, 2010) (reporting on a study finding that the largest source for the hiring pool in science, technology, engineering, and mathematics disciplines was reentrants into the teaching profession).

²⁵ See Darling-Hammond, *supra* note 12, at 20–25.

at the beginning of their career when their salaries are low relative to other opportunities.²⁶ And teachers often cite working conditions as a major factor in their decision to change schools or leave the profession. Low-wealth schools are especially likely to lack desirable working conditions such as updated facilities, small class sizes, and opportunities for teachers to participate in school decisions.²⁷

In this context, job security is an important tool for attracting talented new teachers to public schools and retaining them once they get there. The challenged statutes provide this sort of security for California teachers by providing tenure after two years of teaching experience, due-process protections before dismissal, and enhanced protection from budget-related layoffs for more experienced teachers who have remained committed to teaching in a given school. As Professor Jesse Rothstein of the University of California, Berkeley, testified at trial, the job security earned through tenure and seniority protections provides

²⁶ *Id.* at 20–21.

²⁷ *Id.* at 21–22; *see also* Ingersoll, 2012, *supra* note 19, at 49 (observing that one of the main factors behind beginning teachers' decisions to depart is a lack of adequate support from school administrators).

an incentive to join a profession that is otherwise widely regarded as difficult and underpaid compared to other high-skill jobs.²⁸ In fact, research suggests that in charter schools, which tend to have fewer tenure and due-process protections than public schools, lack of job security promotes attrition.²⁹ Thus, the trial court’s decision to strike down the challenged statutes may remove an important benefit that attracts dedicated individuals to the teaching profession.

In addition, the trial court failed to weigh other benefits that the challenged statutes may provide to schools, teachers, and students. For example, the professional stability provided by

²⁸ See, e.g., RT 5943:23–5944:18 (testifying that offering security of employment helps recruit and retain teachers); RT 6052:22–24 (“I believe that one of the reasons that people are still willing to do the job is that it offers other non-salaried amenities like job security.”); RT 6063:23–6064:14 (testifying that a reverse-seniority system for layoffs offers experienced teachers a higher sense of job security); see also Jesse Rothstein, *Teacher Quality Policy When Supply Matters*, 105(1) AMERICAN ECONOMIC REVIEW 100 (2015) (examining, in part, the interplay between teacher tenure and pay).

²⁹ See Betheny Gross & Michael DeArmond, *Parallel Patterns: Teacher Attrition in Charter vs. District Schools*, National Charter School Research Project (September 2010), 6–7 & 13–14 (observing that Wisconsin charter-school teachers had higher turnover than other Wisconsin public-school teachers and that charter-school teachers “pointed to a lack of job security as an important reason for leaving their school”).

job security allows teachers the leeway to take risks by working in more difficult school environments and by teaching important material that may spark controversy in the community.³⁰

California's two-year tenure track provides the further benefit of forcing school administrators to pay attention to teacher effectiveness early in a new teacher's career. Many tasks and interests compete for the attention of busy administrators, and evaluating individual teachers is a task that tends to get pushed down the priority list unless a deadline is imposed. By imposing a two-year deadline, the challenged California provisions ensure that attention is paid early on to teacher development, and that obviously unsuited teachers are removed from the classroom as soon as they can be identified.³¹ Moreover, regular observation and feedback early in teachers' careers provides them with

³⁰ See, e.g., RT 7449:27–7451:7 (Shannan Brown describing how tenure protections assisted her in speaking out about student needs as a teacher); RT 8016:1–19 (Linda Tolladay testifying that tenure provides a teacher with the ability to advocate for students and experiment with new teaching techniques); RT 8495:3–8496:8, 8508:25–8514:16, 8515:5–15 (Lynda Marie Nichols recounting how tenure provided her with the stability needed to teach controversial historical subject matters, including those touching on religion and evolution).

³¹ RT 5944:19–5945:8 (Professor Rothstein testifying that a two-year probationary period requires decision-makers to remove ineffective teachers from the classroom earlier).

guidance to improve their practices and better serve their students.³²

These potentially significant positive impacts of the challenged statutes—especially their role in providing extra security to gifted, dedicated teachers in a vital, challenging, and underpaid profession—should have been weighed by the trial court in the process of viewing the quality of California’s system as a whole. *See Butt*, 4 Cal. 4th at 686. Because they were not, the trial court’s analysis was flawed and its judgment should be reversed.

B. The trial court likewise failed to consider the potentially negative effects of switching from the current system for making reductions in force to a system of “effectiveness-based” layoffs.

In an ideal world, teacher layoffs due to budget cuts would be unnecessary. But in the real world, school districts need a way to make rapid decisions about which teachers to lay off when external factors like budget shortfalls make it necessary to do so.

³² See Will Dobbie and Roland G. Fryer, Jr., *Getting Beneath the Veil of Effective Schools: Evidence of New York City*, National Bureau of Economic Research, Working Paper No. 17632, 2–3 (2011) (finding that frequent classroom observations are an important practice in effective charter schools).

California's legislature has chosen the following system: generally speaking, when layoffs are necessary for reasons unrelated to performance, school districts must lay off competent and similarly credentialed teachers in order of reverse seniority, with the least senior teacher laid off first. Educ. Code § 44955.³³

The trial court disparaged California's reduction-in-force statute and concluded that it was constitutionally infirm, but failed to consider the negative effects that might follow from the plaintiffs' preferred "effectiveness-based" layoff system. That was error. Crucially, the trial court failed to consider that an "effectiveness-based" layoff system could create uncertainty among teachers and foster fears about arbitrary decision-making. This in turn could exacerbate teacher attrition and impede teacher improvement, ultimately harming students.

Research demonstrates that a positive work environment matters greatly in retaining teachers, especially in minority schools. For example, a recent review of studies on teacher

³³ Importantly, this statute includes exceptions in favor of the retention of more junior teachers under certain circumstances, including where a junior employee has the special training and experience necessary to teach a course for which a district has a specific need, or for purposes of maintaining or achieving compliance with equal-protection requirements. Educ. Code § 44955(d).

turnover in high-poverty schools concluded that those studies collectively suggest that teachers leave such schools because of poor working conditions.³⁴ The working conditions that matter most to those teachers are social in nature, including strong administrative support and collaborative, respectful, and trusting relationships with fellow teachers.³⁵

Another recent study focusing on a nationally representative sample of U.S. kindergarten teachers concluded that a strong school community and a collaborative culture have a significantly positive association with teacher job satisfaction.³⁶ Positive factors included trust and a shared sense of values between teachers and school leadership, and a culture of collaboration between teachers in which teachers build their lessons cooperatively and discuss their students' learning.³⁷

³⁴ See Nicole S. Simon & Susan Moore Johnson, *Teacher Turnover in High-Poverty Schools: What We Know and Can Do*, 117(3) TEACHERS COLLEGE RECORD 1, 1 (2015).

³⁵ *Id.* at 7–11.

³⁶ Elizabeth Stearns, Neena Banerjee, Stephanie Moller, & Roslyn Arlin Mickelson, *Collective Pedagogical Teacher Culture and Teacher Satisfaction*, 117(8) TEACHERS COLLEGE RECORD 1, 17–18 (2015).

³⁷ *Id.* at 5–9.

Teachers also continue to improve for a longer period of time when working in a stable, supportive atmosphere. A recent review of ten years of statewide data on teacher assignments and student achievement showed that teachers working in more supportive environments—marked by higher levels of order and discipline, teacher collaboration, principal leadership, professional development opportunities, respectful and open school culture, and meaningful teacher evaluation—became more effective over time than teachers in less-supportive contexts.³⁸ These results suggest that when teachers work in a stable environment with strong social support, the quality of the teaching staff as a whole is lifted over a longer period of time.

But the trial court failed to consider whether a layoff system based on purported teacher effectiveness might harm such trusting and collaborative school environments by stoking uncertainty. As former El Monte Superintendent Jeff Seymour testified at trial, an effectiveness-based system could demoralize

³⁸ Matthew A. Kraft & John P. Papay, *Can Professional Environments in Schools Promote Teacher Development? Explaining Heterogeneity in Returns to Teaching Experience*, 36(4) EDUCATIONAL EVALUATION & POLICY ANALYSIS 476, 480 (2014).

teachers, decrease cooperation to meet student needs, and harm recruitment of the very best teachers.³⁹

By contrast, California's existing reduction-in-force system is neutral and provides a metric that everyone understands: seniority as a tie-breaker when all other qualifications are equal. Layoffs do not take place in order to cull bad teachers from the school system; they are an unfortunate and temporary response to budget shortfalls and other problems requiring a reduction in the number of employed teachers. Robert Fraisse, a former Superintendent in three different California school districts, explained at trial: "Based on my experience, [using seniority] is a fair method that is perceived as fair. When tight economic times require tough [decisions], an objective basis is required, and I have not seen a better, more objective system than seniority."⁴⁰

³⁹ RT 7145:23–7146:6 (former Superintended Seymour further remarking that "shifting the priority to performance would really destroy, probably, the professional learning community concept that's in place in the schools."). In addition, *any* due-process protections for teachers would make effectiveness-based reductions-in-force very difficult to implement, because layoff decisions must be made in a matter of weeks. For a teacher to appeal her ranking in that time frame would be nearly impossible.

⁴⁰ RT 5767:4–5767:8. In addition, administrators' responsible implementation of tenure protections can strengthen the reverse-

Even if effectiveness could be considered during layoffs without damaging teacher morale, schools probably would revert to seniority-based layoffs because they are neutral and easy to understand and administer.⁴¹

The trial court also failed to consider that effectiveness determinations are complex and time-consuming and therefore difficult to make in the context of layoffs, which often occur rapidly and with little advance notice. Many effective teaching techniques and attributes cannot be easily quantified by student standardized testing alone. For example, teachers can make a marked difference in their students' education by encouraging creativity or reading for pleasure. A teacher also may be effective by helping a student deal with sensitive issues that arise in her home life or by teaching her how to share and work

seniority layoff system. If administrators make timely, well-informed decisions about tenure and continue to assess teacher performance in regular evaluations, then the pool of teachers provided extra protection by reverse-seniority layoffs will be strong.

⁴¹ Professor Susan Moore Johnson of the Harvard Graduate School of Education testified at trial regarding a study of four school districts that had negotiated policies allowing performance-based layoffs. RT 4562:21–4563:22. In practice, the districts did not use the performance-based metric and reverted to seniority, in part because ranking teachers in order of performance undermined trust within the school. *Id.*

collaboratively with other students. It is important to teachers that these qualities of their work—which are valued by parents and the public—are taken into account during evaluations.

The trial court ignored this complexity and instead purported to identify a specific population of “grossly ineffective” teachers in California based solely on testimony about value-added models (“VAMs”).⁴² The court then suggested that California school districts should do the same, identifying and dismissing senior “grossly ineffective” teachers during reductions-in-force, presumably through the use of VAMs.⁴³ VAMs are statistical models that compare student test scores over time and that purport to measure teachers’ or schools’ relative effectiveness in improving those test scores.⁴⁴ While there is “general consensus that a set of VAM scores does contain some useful information that meaningfully differentiates among teachers,”⁴⁵ there is considerable controversy as to whether VAMs, standing alone, provide an acceptable, objective way to

⁴² See AA 7299 (relying on Chetty and Kane testimony).

⁴³ See AA 7305.

⁴⁴ Henry Braun, *The Value in Value Added Depends on the Ecology*, 44(2) EDUCATIONAL RESEARCHER 127, 127 (2015).

⁴⁵ *Id.* at 128.

identify ineffective teachers.

Last year, the American Statistical Association (“ASA”) explained that VAM scores have important limitations that should be kept in mind whenever they are used to evaluate teacher performance.⁴⁶ For example, VAM scores are not a direct and holistic measurement of a teacher’s contributions to a student’s learning over the course of a school year; instead, VAMs employ student test scores to draw indirect inferences about how well the teacher performed over the past year.⁴⁷ Consequently, VAM scores are less valuable if the standardized test itself does not “fully measure student achievement with respect to the curriculum objectives and content standards adopted by the state”—a “stringent standard” that the ASA says “no test meets” in practice.⁴⁸

In addition, the ASA cautions that VAM scores measure correlation—whether a given teacher tends to be associated with better or worse student outcomes—rather than whether the

⁴⁶ American Statistical Association, *ASA Statement on Using Value-Added Models for Educational Assessment* at 1–2, 7 (April 8, 2014), available at http://www.amstat.org/policy/pdfs/asa_vam_statement.pdf.

⁴⁷ See *id.* at 2, 4.

⁴⁸ *Id.* at 4.

teacher actually caused those outcomes.⁴⁹ As a result, VAM scores don't reveal whether positive or negative effects were caused by a given teacher, rather than by other factors not captured in the model.⁵⁰

Noted scholars have concluded that VAM scores are more appropriately used as just one part of an overall comprehensive evaluation of teacher effectiveness.⁵¹ “[T]here is broad agreement among statisticians, psychometricians, and economists that student test scores alone are not sufficiently reliable and valid indicators of teacher effectiveness to be used in high-stakes personnel decisions, even when the most sophisticated statistical

⁴⁹ *Id.* at 2.

⁵⁰ *Id.* In fact, differences in teacher effectiveness account for at most an estimated fourteen percent of the total variation in student test scores. Most factors affecting student test scores are outside of teachers' control, including the students' family background and wealth and the school's curriculum. *See id.* at 7.

⁵¹ *See, e.g.,* Eva L. Baker, Paul E. Barton, Linda Darling-Hammond, Edward Haertel, Helen F. Ladd, Robert L. Linn, Diane Ravitch, Richard Rothstein, Richard J. Shavelson, & Lorrie A. Shepard, *Problems with the use of student test scores to evaluate teachers*, ECONOMIC POLICY INSTITUTE, Briefing Paper #278 (Aug. 27, 2010), *available at* <http://www.epi.org/publication/bp278/> (reviewing the technical evidence and concluding that it would be unwise to “give as much as 50% of the weight in teacher evaluation and compensation decisions to scores on existing tests of basic skills in math and reading,” as some states were then considering doing).

applications such as value-added modeling are employed.”⁵² VAM scores have been shown to be unstable and to fluctuate dramatically from year to year, so that a teacher could appear very ineffective one year and then very effective the next.⁵³ This instability may result from a number of different factors, including small samples of students, other influences on student learning in and outside of school, summer learning loss, and tests that do not line up with the curriculum that teachers are expected to cover.⁵⁴ In addition, there is evidence that administrators themselves prefer to use observation-based assessments of effectiveness rather than simply rely on test scores.⁵⁵

⁵² *Id.*

⁵³ See *id.*; see also RT 6075:5–6077:14 (Professor Rothstein testifying about VAMs’ limitations, including volatility in scores year-over-year); RT 6090:28–6091:23 (Professor Rothstein testifying that teachers perceive VAM scores as “pretty arbitrary” because of their reliability problems).

⁵⁴ Baker, et al. (2010), *supra* note 51. Some examples of the kinds of non-teacher influences on learning that can affect student test scores are: well-educated and supportive parents who help children with homework and secure them additional learning opportunities; time spent at museums and libraries; and learning that takes place in summer programs, online, and in the community. *Id.*

⁵⁵ Ellen Goldring, Jason A. Grissom, Mollie Rubin, Christine M. Neumerski, Marisa Cannata, Timothy Drake, & Patrick

The ASA cautions that “[o]verreliance on VAM scores may foster a competitive environment, discouraging collaboration and efforts to improve the educational system as a whole” and that “[c]ertain schools may be hard to staff if there is a perception that it is harder for teachers to achieve good VAM scores when working in them.”⁵⁶ Academics agree that increasing reliance on VAMs could make it more difficult to fill positions at the schools and in the subjects most in need of staffing; could narrow the curriculum; could discourage shared responsibility for students; and could cause low morale and turnover among teachers.⁵⁷ A recent survey of 1,500 teachers reveals that forty-five percent of those surveyed “have considered quitting because of standardized testing” and that forty-two percent “reported that the emphasis on improving standardized test scores had a ‘negative impact’ on

Schuermann, *Make Room Value Added: Principals’ Human Capital Decisions and the Emergence of Teacher Observation Data*, 44(2) EDUCATIONAL RESEARCHER 96, 96–97 (2015) (studying six school districts in five states that are using new evaluation systems with classroom observation and noting the consistency, transparency, and specificity of teacher observation data as compared to student-test-score-based models).

⁵⁶ American Statistical Association (2014), *supra* note 46, at 6.

⁵⁷ See, e.g., Susan Moore Johnson, *Will VAMS Reinforce the Walls of the Egg-Crate School?*, 44(2) EDUCATIONAL RESEARCHER 117, 120–22 (2015); Baker, et al. (2010), *supra* note 51.

their classroom.”⁵⁸

The trial court ultimately failed to consider the possibility that relying solely or primarily on VAMs as a way to administer reductions-in-force could drive teachers away from the profession and exacerbate the teacher shortage. Because the trial court failed to make a holistic assessment of the California education system—and of the role of the reduction-in-force statute within that system—the court’s invalidation of that statute should be reversed.

C. The trial court’s inability to identify any causal link between the challenged statutes and the alleged constitutional harm reflects the complexity of California’s public-education system.

The trial court further failed to follow the California Supreme Court’s guidance in *Butt* when it subjected the challenged statutes to strict scrutiny without ever identifying a direct causal link between those statutes and the retention of “grossly ineffective” teachers in California classrooms. As a result, the trial court’s decision was nothing more than a second-

⁵⁸ Tim Walker, *NEA Survey: Nearly Half of Teachers Consider Leaving Profession Due to Standardized Testing*, NEA Today (Nov. 2, 2014), available at <http://neatoday.org/2014/11/02/nea-survey-nearly-half-of-teachers-consider-leaving-profession-due-to-standardized-testing-2/>.

guessing of the Legislature’s complex policy judgments about the level of protections due to California teachers. Absent any evidence of a causal link between these statutes and the constitutionally significant harms alleged by the plaintiffs, these issues should be left to the Legislature, to regulatory bodies, and to local school districts—not to the Judiciary.

For example, there is no evidence that the challenged statutes directly cause a disproportionate number of “grossly ineffective” teachers to work at high-minority and high-poverty schools. Poor working conditions make it more difficult for teachers to do their jobs at those schools and thus make it more difficult for those schools to retain good teachers. Research suggests that one effective strategy for lowering turnover rates at minority schools is to promote policies and practices that lead to the appointment of effective school leaders to serve as principals of those schools. Those principals can then help to create school environments conducive to student learning.⁵⁹ A related way to

⁵⁹ Jason A. Grissom, *Can Good Principals Keep Teachers in Disadvantaged Schools? Linking Principal Effectiveness to Teacher Satisfaction and Turnover in Hard-to-Staff Environments*, 113(11) TEACHERS COLLEGE RECORD 2552, 2553, 2577 (Nov. 2011); see also Simon & Johnson (2015), *supra* note 34 (concluding that “improving the caliber of principals in high-

reduce teacher turnover is to adopt measures that improve teachers' working conditions and social environment, including by promoting collegial relationships between teachers.⁶⁰ But weakening teachers' job security or stoking their anxiety about standardized-test-based assessments of their effectiveness will not address these institutional issues and may, in fact, drive teachers away from riskier teaching assignments.⁶¹ Thus, there is no reason to believe that the trial court's decision to strike down teachers' job-security protections will solve the problems that the plaintiffs complain about.

poverty schools" would be an effective approach for districts intent on retaining teachers).

⁶⁰ See Simon & Johnson (2015), *supra* note 34, at 2 ("[T]hese findings suggest that policy makers and practitioners who wish to retain talented, effective teachers in high-poverty, hard-to-staff schools must pursue retention strategies that are designed to improve the teaching environment.").

⁶¹ See, e.g., American Statistical Association (2014), *supra* note 46, at 6. ("Certain schools may be hard to staff if there is a perception that it is harder for teachers to achieve good VAM scores when working in them."); Johnson (2015), *supra* note 57, at 120 (explaining that teachers' "day-to-day experience often suggests that they may be at greater risk if they agree to teach students whose scores on standardized tests tend to be low, thus leading to a negative evaluation for the teacher" and that teachers may therefore seek "safer assignments, where they can avoid the risk of low VAM[] scores").

Troublingly, there is no limiting principle to the logic of the court's decision. The same reasoning could result in the invalidation of any statewide education policy with any disparate impact whatsoever—no matter how indirect or tenuous—on even a single California student. If, as the trial court held, an Education Code provision is subject to strict scrutiny merely because it bears some tangential relation to a downstream effect that negatively impacts some students, all rules regulating education in California are open to constitutional review by the courts, and all such rules are at risk of judicial invalidation.

The court's decision also leaves the Legislature and school districts with the impossible task of figuring out what kind of tenure and reduction-in-force statutes *would* satisfy constitutional requirements. For example, with respect to tenure protections, is a three-year probationary period necessary to satisfy strict scrutiny? A five-year period? Even longer? Because any law regulating the length of a probationary period arguably has *some* impact on the retention of ineffective teachers, it would have to be justified by "compelling" reasons—a difficult test to satisfy. And whatever the Legislature decided, the new statute could prompt a new lawsuit challenging its constitutionality,

leaving California's tenure system in permanent legal limbo.

In sum, the analysis that the trial court employed to invalidate the challenged statutes was both incomplete and overly simplistic. If allowed to stand, it would insert courts with no education-policy expertise into the middle of complex and hotly contested public-policy debates that are inherently legislative and administrative in nature.

III. CONCLUSION

For the reasons set forth above, *amici* respectfully request that the Court reverse the judgment of the trial court.

Respectfully submitted,

Dated: September 16, 2015 KEKER & VAN NEST LLP

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CERTIFICATE OF WORD COUNT

I certify that the text of the brief consists of 5,857 words as counted by the Microsoft Word word-processing program used to generate the brief.

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Respectfully submitted,

Dated: September 16, 2015 KEKER & VAN NEST LLP

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CERTIFICATE OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Kecker & Van Nest LLP, 633 Battery Street, San Francisco, CA 94111-1809.

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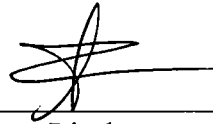
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Executed on September 16, 2015, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

A handwritten signature in black ink, appearing to be 'Laura Lind', written over a horizontal line.

Laura Lind