

No. B258589

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

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

v.

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

*and*

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,  
*Intervenors-Appellants.*

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

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**BRIEF OF AMICI CURIAE**  
**AWARD-WINNING CALIFORNIA TEACHERS, AMERICAN-**  
**ARAB ANTI-DISCRIMINATION COMMITTEE, FRED T.**  
**KOREMATSU CENTER FOR LAW & EQUALITY, AND**  
**AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN**  
**SUPPORT OF APPELLANTS**

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## INTRODUCTION

The trial court's opinion striking down the five challenged statutes was sweepingly broad, yet devoted nearly no attention to the specific effects of those statutes. There is much to say on that topic, but this brief will limit itself to discussing two important ways in which students will be harmed if teachers lose the protections of the challenged statutes.

First, by helping to insulate teachers from backlash or retaliation, the challenged statutes allow teachers to act in students' interests in deciding when and how to present curricular material, and to advocate for students within their schools and districts. Without the protections provided by the challenged statutes, public pressure could prompt school administrators to dismiss otherwise effective teachers who present controversial material, even when that material is part of the statewide curricular standards. But while dismissing an effective teacher whose work has resulted in an uproar can be the politically expedient solution, it also harms students. Students are worse off not only when they lose an effective teacher (requiring the school district to attempt to find a replacement, and possibly rely on substitute teachers in the interim), but also when other teachers are chilled in their work.

Second, students are better off when good teachers remain in their classrooms, and the challenged statutes promote teacher longevity and discourage teacher turnover. This is important for many reasons; not least among them, more experienced teachers are on average better teachers, and California (like much of the country) is currently facing an exceptionally severe teacher shortage. Moreover, teacher experience has exponential benefits for students when "seasoned" teachers work collaboratively with and mentor junior teachers, a process that itself is enhanced by tenure protections. Finally, these benefits flowing from the challenged statutes are crucial for students in difficult-to-staff, high-poverty school districts, where

teachers must work creatively, building expertise over time to help students who lack the advantages their more privileged peers enjoy.

The failure to consider the ways that students benefit from teacher tenure led the trial court to issue a decision that will leave students worse off by weakening teachers' abilities to act in students' best interests and to improve over time, as well as their incentives to begin or maintain a career in teaching. In other words, whatever drawbacks the challenged statutes may have (and the trial court's failure to address their causal effects leaves these very much in doubt), they also yield important advantages for students, including the students about whom the trial court was most concerned. The difficulty of striking an optimal balance among these and other competing considerations only illustrates why the precise scope of employment protections for teachers should be left to the legislature.

#### **ARGUMENT**

*Amici* agree with the trial court that quality teachers are critically important to students. However, they strongly disagree with the trial court's conclusion that the challenged statutes harm students by depriving them of effective teachers. To the contrary, the challenged statutes benefit students in two ways: first, by helping to protect good teachers from arbitrary, or discriminatory discharges; and second, by encouraging teachers to remain at their posts, avoiding disruptive and expensive teacher turnover. Accordingly, among the flaws of the trial court's short opinion, its failure to consider how these advantages for students offset any perceived drawbacks of the challenged statutes is particularly striking. Moreover, this lapse led the trial court to erroneously apply strict scrutiny to the challenged statutes, and ultimately to strike them down.

Specifically, the trial court applied strict scrutiny based on its conclusions 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.” *Vergara v. Cal.* (Super. Ct., L.A. County, 2014, No. BC484642), 2014 WL 6478415, at \*4. That conclusion followed a discussion of the importance of quality teachers to students, and the negative impact of so-called “grossly ineffective” teachers on students’ learning. Putting aside the trial court’s vast leaps of logic in connecting the challenged statutes to the employment of some number of “grossly ineffective” teachers in California, its analysis regarding the standard of review fell well short of that called for in *Butt v. Cal.* (1992) 4 Cal.4th 668.

The *Butt* Court observed that heightened scrutiny applies when “disparate treatment has a real and appreciable impact on a fundamental right or interest,” including the right to basic educational equality. *Id.* at 685-86.<sup>2</sup> However, the court hastened to add that this does not mean that any government decision related to education merits strict scrutiny; were that the case, students and parents could constantly call upon the judiciary to engage in chaotic second-guessing of legislative and administrative decisions. *Id.* at 686 (“[D]istinctions [between different districts, schools, or students] arise from inevitable variances in local programs, philosophies, and conditions. ‘[A] requirement that [the State] provide [strictly] ‘equal’ educational opportunities would thus seem to present an entirely unworkable standard[.]’”) (alterations in original). Instead, *Butt* distinguished government actions that constituted “a denial of ‘basic’ educational equality” from those that did not, with decisions falling in the latter camp “entitled to considerable deference.” *Id.* at 686. Moreover,

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<sup>2</sup> The trial court also applied strict scrutiny based on its conclusion that the challenged statutes “impose a disproportionate burden on poor and minority students.” The various problems with this conclusion are beyond the scope of this brief, except to note that, as *amici* discuss below, the benefits of teacher tenure can be especially significant for students in high-poverty school districts, where turnover is an especially significant problem.

whether a constitutional denial of basic educational equality has occurred is to be determined based on a holistic evaluation of “the individual facts” related to the constitutional challenge. *Id.* at 686-87 (“Unless the actual quality of the district’s program, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs.”).

Accordingly, the trial court should not have applied strict scrutiny without first considering whether the challenged statutes deprive students of basic educational equality in light of all relevant factual circumstances, including both benefits and drawbacks to those statutes, plus districts’ mitigation of any potential drawbacks. *See id.* at 688 (shortened school year would not deny basic educational equality if district “compensated by other means,” or even if it did not compensate, but “actual quality” of program “viewed as a whole” did not fall below “prevailing statewide standards”).

Given the importance of the standard of scrutiny to this case, the remainder of this brief turns to two key benefits of the challenged statutes: they help protect teachers as they exercise professional discretion and guard against arbitrary or politically motivated discharges, and they promote teacher longevity. These benefits undermine the trial court’s conclusion that the challenged statutes should be strictly scrutinized, and instead lead to the conclusion that deferential review is appropriate.

**I. The Challenged Statutes Protect Teachers Who Exercise Professional Discretion from Arbitrary or Politically Motivated Dismissals.**

Classroom teachers are tasked with the difficult job of “presenting and explaining the subject matter in a way that is both comprehensible and inspiring.” *Ambach v. Norwick* (1979) 441 U.S. 68, 78 [99 S.Ct. 1589]. Because there is no single formula for accomplishing this task, “teachers by necessity have wide discretion over the way the course material is communicated to students.” *Id.* Teachers’ adaptation of approved

curriculum in a manner targeted to meet the needs of their individual classes and students requires the exercise of “professional discretion,” defined as “the teacher’s freedom to determine the form and content of instruction and teaching materials consistent with professional and curricular standards[.]” Joan DelFattore, *Knowledge in the Making* (2010) p. 142. Likewise, teachers are also sometimes called on to serve as advocates for their students, both inside and outside the classroom.

Yet, teachers and school districts can come under intense pressure for even unquestionably responsible exercises of classroom professional discretion, such as when teachers cover controversial topics that are within approved curriculum. For example, former teacher Lynda Nichols described at trial repeated and prolonged conflict with parents regarding her lessons, which covered state curriculum regarding Catholicism and Islam. RT 8512-13.

Conflicts between parents and state curricular standards can be expected to occur routinely, especially given the division of responsibility for public education between state and local governments. *Compare* Cal. Educ. Code § 35010 (school districts “shall prescribe and enforce rules not inconsistent with law, or with the rules prescribed by the State Board of Education, for its own government.”) *with* Cal. Educ. Code § 60605(a)(1)(A) (requiring development of “statewide academically rigorous content standards”). This division means that state content standards, which include such controversial topics as evolution,<sup>3</sup> may be

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<sup>3</sup> The California State Board of Education’s science content standard for Grade 6 Earth & Space Sciences indicates that students should understand how “rock formations and the fossils they contain are used to establish relative ages of major events in Earth’s history. . . . Examples can include . . . the evolution or extinction of particular living organisms.” Cal. Dep’t of Educ., *NGSS for California Public Schools, K-12*,

vocally opposed by the majority of constituents in individual school districts. *See* Testimony of Lynda Nichols, RT 8515 (testifying that parents complained about the teaching of evolution “pretty regularly”). Where this is the case, teachers without the backstop of the challenged statutes may decide that the safer course is to simply avoid the controversial topics, depriving their students of important content. When they forge ahead against community wishes, school board members—especially those who are locally elected—may decide that the most expedient way to avoid constituent ire is to discipline or terminate a teacher who has done nothing wrong. Yet, students are harmed when effective teachers become collateral damage in conflicts between local values and state curricular standards.

As discussed below, the challenged statutes help insulate teachers from this dynamic. Put simply, teachers are more effective when they know that responsibly exercising their professional discretion in students’ interests will not lead to arbitrary discipline or termination. *See* Margaret S. Crocco & Arthur T. Costigan, *The Narrowing of Curriculum and Pedagogy in the Age of Accountability* (2007) 42:6 *Urb. Educ.* 512, 525-28. Moreover, teachers are more meaningfully and usefully protected by the challenged statutes than they would be by baseline procedural due process protections.

**A. Tenure Insulates Teachers from Arbitrary, Discriminatory, or Baseless Termination.**

Tenured teachers in California receive protections elaborated by a constellation of five statutes, each of which the trial court struck down. First, teachers who successfully complete two years of teaching in a district and who are selected for a third year achieve “permanent employee” status (tenure) within their district. Cal. Educ. Code § 44929.21(b). Then, tenured

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<<http://www.cde.ca.gov/pd/ca/sc/ngsstandards.asp>> (as of Aug. 2, 2015) (click on link titled “Earth Science Course: Grade 6”).

teachers may be dismissed only for cause, such as “unsatisfactory performance,” and are entitled to due process protections, including notice and a hearing, if their districts move to dismiss them. Cal. Educ. Code §§ 44934, 44938, 44944. Finally, § 44955 requires budgetary layoffs to proceed according to reverse seniority, subject to significant exceptions.<sup>4</sup> Cal. Educ. Code § 44955. Thus, the statutory word “permanent” is something of a misnomer—tenured teachers can be fired, including for poor performance; their school districts need only establish that the termination is warranted in compliance with the required procedures. Likewise, tenured teachers may be laid off before their untenured colleagues who teach in areas of need. Accordingly, the statutes represent a balanced approach to preventing districts from dismissing effective teachers, while also ensuring flexibility to terminate teachers who are ineffective or whose services have become unnecessary because of declining enrollments.

The California legislature has made numerous adjustments to these statutes over the last century, but first provided for teacher tenure, including due process protections and reverse-seniority layoffs, in 1921. 1921 Cal. Stat. 1663, 1665-66. That statute, adopted by an overwhelming majority of the state’s legislators,<sup>5</sup> was aimed at combating the “widespread practice of hiring and firing teachers [based on] political patronage . . . rather than on a basis of merit.” *Rep. of the Subcomm. On Extension and Restriction of*

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<sup>4</sup> The statute does not require districts to lay off junior teachers who are needed to “teach a specific course or course of study,” who are credentialed to provide certain school services, or whose dismissal would raise Equal Protection concerns. § 44955(d). Thus, a district need not make across-the-board layoffs; instead, it can identify understaffed subject areas, and make targeted reductions in teaching staff accordingly.

<sup>5</sup> *Teachers’ Bill Passes, 54-17, in Assembly*, S.F. Chron. (Mar. 22, 1921) pp. 2-3; *Teacher Tenure Bill Passed by Senate*, S.F. Examiner (Apr. 13, 1921) pp. 2, 4 (teacher tenure bill passed 25 to 5).



*Tenure*, Assemb. of the State of Cal., No. 13 (1959); *see also Fresno City High Sch. Dist. v. De Caristo* (1939) 33 Cal.App.2d 666, 674 (California teacher tenure laws are intended to “insure an efficient permanent staff of teachers for our school whose members are not dependent upon caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well.”).

California was one of a number of states to enact teacher tenure and due process protections as part of good government reform during the 1910s and 1920s. These states were responding to a set of related problems plaguing teacher hiring and retention: the cronyism, nepotism, and prejudice that often overtook teaching effectiveness as the prime determinants of which teachers would be hired or dismissed. The need for legislatures to protect good teachers from unfounded or arbitrary dismissals—and thereby avert harm to students—is exemplified by the San Diego Board of Education’s 1918 decision to dismiss a group of teachers who had resisted the Board’s request for a statement of the teachers’ loyalty to it. Robert F. Hellbron, *Student Protest at its Best: San Diego, 1918* (1974) 20 J. San Diego Hist. \*1, \*3 <<http://bit.ly/1IZXd37>>. Hundreds of students protested the dismissals by staging a march and a multi-day boycott of their classes, demanding that the Board articulate reasons each teacher had been fired, and reinstate teachers fired for political reasons. *Id.* at \*4. Shortly thereafter, the Board members offered a reason for the teachers’ dismissal: the teachers were allegedly under federal surveillance because of suspected pro-German tendencies. *Id.* However, that charge was flatly denied by the federal government and, amid continuing public scrutiny, the teachers were eventually reinstated. *Id.* at \*6. In sum, a group of qualified (and apparently beloved) teachers narrowly avoided politically motivated dismissal only because the community came to their aid, with the end of hundreds of students’ school years as collateral damage.

Whereas San Diego's invocation of anti-German hysteria was apparently a pretext designed to conceal cronyism, many other teachers were genuinely dismissed for that reason. In 1917, for example, the New York Times argued that New York City schools were at risk of being "transformed into munition factories for the benefit of Germany," and called on every teacher who would not take a loyalty pledge to be fired. *Teachers Who Are Not Loyal*, N.Y. Times (Nov. 18, 1917) p. 33. Soon, New York's teachers were indeed asked to sign such a pledge, and those who refused were fired, including one Quaker teacher whose religious beliefs were inconsistent with signing. Bernard A. Cook, *Women & War* (2006) p. 403 (discussing Mary McDowell). Similar stories of effective teachers being dismissed because of their political beliefs abound. Dana Goldstein, *The Teacher Wars* (2014) pp. 96-98 (collecting examples); see also *Cramp v. Bd. of Pub. Instruction* (1961) 368 U.S. 278 [82 S.Ct. 275, 7 L.Ed.2d 285] (striking down Florida's loyalty oath); *Baggett v. Bullitt* (1964) 377 U.S. 360 [84 S.Ct. 1316, 12 L.Ed.2d 377] (striking down Washington's loyalty oath). In light of this history, it is perhaps unsurprising that even those who have favored weakening teacher tenure have recognized a need to "provide teachers with greater job security and less vulnerability to political pressure than they enjoyed" before tenure protections. John Stull, Assemblyman, Speech to Professional Educators of Los Angeles (March 27, 1971).

Today's teachers are more likely to face threats of a different sort. First, public controversies over teachers' classroom choices—even when those choices are pedagogically responsible and within the scope of approved curriculum—can create perverse incentives for school

administrators to fire or discipline good teachers.<sup>6</sup> Second, internal disputes, especially about scarce resources, can cause tensions between administrators and teachers entirely separate from teachers' classroom performance. School administrators may disapprove of teachers who advocate for more resources for their students, who urge curricular reform, or even whose personal lives differ from the administrators' own. Without tenure and due process protections, these disagreements could lead administrators to fire even excellent teachers.

At trial, teachers testified to the reality of this threat, stating that if not for the challenged statutes, they would make different decisions in and out of the classroom in order to minimize their own risk. For example, seventh grade teacher Lynda Nichols described multiple incidents in which parents complained about social studies lessons on Islam and Christianity; had she lacked permanent status, she continued, she would have been "uncomfortable" teaching these parts of the state curriculum, particularly considering the authority of elected school board members. RT 8509-10, 8512. Remarkably, Nichols further testified that one student was placed in her class specifically because his or her parents were likely to oppose teaching about Islam in school, and it was felt that it would be unfair to place the student with a junior teacher. RT 8509. The implication is clear: an untenured teacher would naturally be fearful that parent complaints would affect his or her career progression. A tenured teacher, however,

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<sup>6</sup> Because, as the trial court noted, at 10, nearly all states have some version of teacher tenure, such incidents are now relatively rare, and when they occur, they are unlikely to reach a courthouse. However, as this section illustrates, they are not non-existent; often, they involve junior teachers who are not yet tenure-eligible, although districts sometimes take retaliatory actions, such as involuntary transfers, against even tenured teachers.

could prioritize state curriculum standards and the well-being of the class as a whole.

Likewise, veteran teacher (and 2013 Teacher of the Year in her district) Linda Tolladay testified that tenure allowed her to be a better educator by allowing her to experiment with new pedagogical techniques and to advocate for her students:

Being a teacher with permanent status gives you the ability to advocate for your students, even when what you advocate for doesn't necessarily agree with what your supervisor might think is the right thing to do. It gives you the ability to bring in new ideas and new teaching techniques and have some of them not work beautifully the first time around.

RT 8004 & 8016. And, for former California Teacher of the Year Shannan Brown, being untenured meant concealing her sexual orientation out of fear that her job prospects would otherwise suffer. RT 7408 & 7450-51. In contrast, she testified that once she was tenured, she was able to speak out to school administrators about how aspects of curriculum failed to meet her students' needs and advocate for changes. RT 7450-51. Finally, from the perspective of an administrator, former Superintendent Jeff Seymour confirmed that the challenged statutes "help[] protect teachers from arbitrary decisions that might be made by a principal or a district for reasons that are not related to their teaching competence." RT 7131.

Case law and news coverage confirm the educators' trial testimony. Two examples in particular illustrate the difference tenure makes. First, in *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.* (6th Cir. 2010) 624 F.3d 332, 335, a second-year (untenured) high school English teacher was denied tenure and dismissed after she taught a unit on government censorship, and assigned Nobel Prize winner Herman Hesse's *Siddhartha*. Parents complained to the school board about her teaching the book because of its "explicit language and sexual themes"—even though

the school board itself had purchased the book for the school. *Id.* at 335. In response to the complaints, Ms. Evans-Marshall supervisor told her she was “on the hot seat” and she received her first negative performance review. *Id.* at 335, 340. At the end of the year and in the face of community pressure, the school board voted unanimously to not renew her contract.<sup>7</sup> *Id.* at 336.

Conversely, tenure and statutory due process can protect teachers whose work results in controversy, as occurred in *Kramer v. New York City Bd. of Educ* (E.D.N.Y. 2010) 715 F.Supp.2d 335. Faith Kramer, a tenured middle school teacher who had received the highest possible rating every year since she began teaching, was tasked with teaching an HIV/AIDS awareness class. *Id.* at 342–43. The class—which Kramer had taught successfully for 15 years—conformed with state-mandated lesson plans, which required teachers to exercise a degree of autonomy in deciding how to teach the material. *Id.* at 344–46. Parents complained after Kramer asked students to brainstorm words they had “heard or used when speaking about sexual acts, body parts, or bodily fluids,” using the resulting list of colloquial or vulgar words to teach more appropriate and accurate ones, just as she had done in prior years. *Id.* at 346–47. As a result of the complaints, the school board denied Ms. Kramer a satisfactory rating, removed her from the classroom for the remainder of the year, and refused her other work. *Id.* at 347–48. She did not, however, lose her job. *Id.* at 341. The due process protections afforded tenured teachers under New York law meant

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<sup>7</sup> The court of appeals observed that: “To deny a causal relationship between Evans–Marshall’s speech and the Board’s actions does not come to grips with this sequence of events or with the imperative at this stage of the litigation that we draw all inferences in favor of the non-moving party: the teacher. Evans–Marshall . . . has shown that her teaching choices caused the school board to fire her.” *Evans-Marshall*, 624 F.3d at 340.

that Kramer retained her job through the investigation into her conduct, and eventually returned to the classroom when the District declined to initiate dismissal proceedings. *Id.* at 347 (describing disciplinary procedures applicable to tenured teachers).

These two examples have in common motivated teachers who were doing what their schools asked of them—that is, using delegated professional discretion to determine how best to teach curricular material—but who nonetheless became targets of intense disapproval by some parents. It defies belief that the two cases would have had such different outcomes—one teacher let go at the beginning of her career; the other retained after an investigation—had Kramer also been an untenured teacher.<sup>8</sup> Moreover, these examples are just the tip of the iceberg. Other instances that have reached the federal courts of appeals include the following; in each case except the last one, the school district’s decision was upheld:

- A tenured high school teacher was transferred to a different school (but not fired) after students in her advanced acting class performed the play *Independence*,<sup>9</sup> winning several inter-scholastic awards. *Boring v. Buncombe Cnty. Bd. of Educ.* (4th Cir. 1998) 136 F.3d 364, 366–67. After a public hearing that reportedly included denunciations of the play as “obscene” and the teacher as “immoral,” the School Superintendent cited the school’s

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<sup>8</sup> While Kramer survived summary judgment on her constitutional due process claim related to the collateral consequences of the school district’s investigation, *Kramer*, 715 F.Supp.2d at 360, procedural due process is no substitute for the statutory employment protections that accompany tenure. *Infra* Part I.C.

<sup>9</sup> The play is a coming-of-age story that depicts family dynamics within a single-parent family, and includes themes related to sexual orientation, pregnancy, and mental health. 136 F.3d at 366.

“controversial materials” policy to support his decision to transfer Boring. *Id.* at 367.

- An elementary school teacher was denied tenure and dismissed after teaching an article about peace protests and the Iraq War in the publication *Time For Kids* (to which the school subscribed), and telling students that she had “honked for peace” in response to local demonstrators’ signs. *Mayer v. Monroe Cnty. Cmty. Sch. Corp.* (S.D. Ind. Mar. 10, 2006) 1:04-CV-1695-SEB-VSS, 2006 WL 693555, at \*2, *affd.* (7th Cir. 2007) 474 F.3d 477. She then told the class that peace was important and that they should seek peaceful resolutions at school and on the playground. *Id.* Several parents complained, and the school board admonished Ms. Mayer that she should not take political positions on the ongoing conflict; it then voted not to renew her contract.<sup>10</sup> *Id.*

- An untenured teacher was dismissed after she taught the Reconstruction Era via a student simulation known as the “Sunshine simulation.” *Kingsville Indep. Sch. Dist. v. Cooper* (5th Cir. 1980) 611 F.2d 1109, 1111. After parents complained, the school principal told the teacher “not to discuss Blacks in American history” and that “nothing controversial should be discussed in the classroom.” *Id.* School Board members testified at trial that they “disapproved of the Sunshine project” and thought “the volume of complaints received diminished Cooper’s effectiveness as a teacher.” *Id.*

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<sup>10</sup> Ms. Mayer pleaded that she was fired for teaching about peace, and both the district court and the court of appeals accepted that as fact for the purposes of the summary judgment before upholding her non-renewal. 474 F.3d at 478. Mayer had no opportunity to prove this factual contention because the Court of Appeals concluded that her classroom speech was unprotected by the First Amendment, leaving the school district free to fire her for her unpopular classroom speech. *Id.* at 480.

Of course, many similar situations unfold without reaching the courts. While it is likely that only a fraction of these receive public attention, some recent exceptions include:

- North Carolina third grade teacher Omar Currie recently resigned after parents complained that he read the picture book *King & King* to his class in response to a playground bullying incident. Michael Biesecker, *Teacher Resigns After Reading Students Book About Gay Couple*, N.Y. Times (June 16, 2015) <<http://nyti.ms/1GrWeUS>>. Describing his decision to read the book to his class, Currie stated, “When I read the story, the reaction of parents didn’t come into my mind . . . My focus then was on the child [who had been bullied], and helping the child.” *Id.* The book, which depicts a royal wedding of two princes, was provided to Currie by the school’s assistant principal (who later also resigned), and the school later approved it for classroom use. *Id.* Still, Currie felt “pressured to leave the school.” *Id.*

- A popular high school creative writing teacher was suspended and later resigned<sup>11</sup> after a student and her parents complained about another student’s essay, which retold the biblical story of Jesus giving loaves and fishes to the poor in terms of giving marijuana to the sick. Jon Swedien, *Classroom Controversy at a Rio Rancho High School*, Albuquerque Journal (Dec. 10, 2014) <<http://bit.ly/1MoVeWW>>. The School Superintendent objected to the teacher’s decision to have students “read other students’ essays and comment on content they found objectionable” because “some

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<sup>11</sup> The teacher was given the option to draft a plan describing how she would be more professional in the classroom instead of leaving the school, but she declined that option, stating that she did not understand how her actions were unprofessional.



parents don't like the idea that other students will read their children's work." *Id.* Yet, another parent later observed that her son "had never shown much interest in writing" until taking the teacher's class, but "now his class has been taught by a string of substitutes." *Id.*

- In Seattle, the Schools Superintendent transferred a popular teacher to another school and then suspended him for two weeks after one parent complained about the teacher's use of the "Courageous Conversations" curriculum, in which minority students described their experiences with racism. Joel Connelly, *Seattle Schools Slap Reinstated Teacher With 2-Week Suspension*, Seattle PI (Jan. 12, 2015) <<http://bit.ly/1Eob7om>>.

- An award-winning high school Advanced Placement English teacher resigned after sharing the Allen Ginsberg poem *Please Master* with his twelfth grade class; the ensuing dispute "divided the community," and the district announced it was considering his termination. Chris Boyette, *Teacher Who Read Homoerotic Ginsberg Poem in Class Resigns*, CNN (May 30, 2015) <<http://cnn.it/1NdHwmw>>.

These examples all involve teachers' classroom decisions to present curricular material in certain ways or to seize "teachable moments." Still other teachers risk administrators' ire by advocating for students outside of the classroom. For example, the U.S. Department of Education found that a Riverside County teacher was constructively discharged after she complained to her supervisors and then filed a complaint with the Department of Education charging that her school district was failing to meet its legal obligation to provide a free appropriate federal education to

its disabled students.<sup>12</sup> *Barker v. Riverside Cnty. Office of Educ.* (9th Cir. 2009) 584 F.3d 821, 823. Sadly, this is far from the only case involving retaliation against teachers who advocate for their students, either on an individual basis or more broadly. *See, e.g., Pickering v. Bd. of Educ. of Township High Sch. Dist. 205* (1968) 391 U.S. 563, 566 [88 S.Ct. 1731, 20 L.Ed.2d 811] (teacher dismissed after publishing “letter to the editor” criticizing School Board’s “bond issue proposals and its subsequent allocation of financial resources between the school’s educational and athletic programs”); *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.* (10th Cir. 2010) 595 F.3d 1126, 1132-35 (reversing summary judgment for district on school speech pathologist’s Rehabilitation Act claim that she was reduced to part time status because of her complaints regarding insufficient special education services); *Bernasconi v. Tempe Elem. Sch. Dist. No. 3* (9th Cir. 1977) 548 F.2d 857, 861-62 (holding that plaintiff, a special education counselor, was transferred at least in part because she complained that English language learners were being wrongly placed in special education classes and urged their parents to consult the Legal Aid Society, and remanding for assessment of mixed-motive defense); *Polonsky-Britt v. Yuba City Unified Sch. Dist.* (E.D. Cal. Nov. 15, 2012) No. 2:10-cv-02951, 2012 WL 5828513, at \*4-8 (denying summary judgment to school district as to special education teacher’s Rehabilitation Act claim that she was transferred after informing school authorities that students were not receiving services to which they were entitled); *Corrales v. Moreno Valley Unified Sch. Dist.* (C.D. Cal. June 10, 2010) No. 08-00040, 2010 WL 2384599, at \*4-9 (denying summary judgment to school

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<sup>12</sup> This teacher was senior and thus presumably tenured. While it is alarming that a school district would retaliate in any way against a teacher advocating for appropriate services for special education students, one wonders whether an untenured teacher would have been dismissed overtly, rather than constructively.

district as to untenured teacher’s Rehabilitation Act claim that she was dismissed after complaining repeatedly about school’s handling of special education students).

Thus, teachers who lack meaningful tenure protections are at risk of dismissal if they “rock the boat” by teaching controversial material, attempting innovative pedagogical approaches, or advocating for their students. As the next section discusses, allowing these risks to proliferate would harm students not only by removing effective teachers from classrooms, but also by chilling other teachers in their work, thereby diminishing their effectiveness.

**B. The Instructional Risk-Taking and Curricular Adaptation that Tenure Protections Enable Are Essential to Effective Teaching.**

Courts, researchers, California’s legislature, and educators have all recognized that effective teaching involves presenting controversial material; rapidly adapting to individual classes, students, or classroom moments; encouraging critical thinking; and advocating for students—each of which may subject educators to retaliation, as described in the previous subsection. Students suffer when teachers are chilled because of fear that they could be dismissed if they present controversial curricular material (such as Social Studies classes about world religions or health classes about human sexuality), adopt teaching methods that some parents disagree with (such as peer review of creative writing assignments), or advocate for students or school policies (such as adequate special education resources).

“It cannot be disputed that a necessary component of any education is learning to think critically about offensive ideas—without that ability one can do little to respond to them.” *Monteiro v. Tempe Union High Sch. Dist.* (9th Cir. 1998) 158 F.3d 1022, 1031; *see also Wieman v. Updegraff* (1952) 344 U.S. 183, 196 [73 S.Ct. 215, 97 L.Ed. 216] (Frankfurter, J.,

concurring) (“It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers . . . cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.”); *McCarthy v. Fletcher* (1989) 207 Cal.App.3d 130, 140 (noting “two essential functions of a school board, exposing young minds to the clash of ideas in the free marketplace and the need to provide our youth with a solid foundation of basic, moral values”). In order to develop critical thinking skills in students, teachers “guide students through the difficult process of becoming educated, . . . help[ing] them learn how to discriminate between good concepts and bad, to benefit from the errors society has made in the past, [and] to improve their minds and characters.” *Monteiro*, 158 F.3d at 1032. That effective teachers must prompt students to confront controversial or even offensive ideas nearly rises to the level of truism, and it is likely that nearly all school administrators and parents accept it in the abstract. Yet, as the previous subsection shows, abstract acceptance does not always mean tolerance of teachers who put this principle into practice.

In addition to challenging students to consider new or controversial ideas, good teachers adjust their materials and methods based on their students’ learning needs. As one researcher wrote:

[D]iscretion over critical matters related to classroom instruction allows teachers to accommodate the varied learning needs of individual students within their classes. To impair the adaptation of curricular content or instructional strategies to improve the fit between what teachers do, on the one hand, and students’ different learning needs, on the other, is unwittingly to program both students and teachers for greater academic frustration and failure.

Susan J. Rosenholtz, *Workplace Conditions that Affect Teacher Quality and Commitment: Implication for Teacher Induction Programs* (1989) 89

Elementary Sch. J. 421, 424 (hereafter *Workplace Conditions*); see also James H. Stronge, *Qualities of Effective Teachers* (2d ed. 2007) pp. 1, 57 (“evidence suggests that effective teachers follow the instructional or lesson plan while continuously adjusting it to fit the needs of different students”); National Board for Professional Teaching Standards, *What Teachers Should Know and Be Able to Do* (1989) p. 8 (observing that “teachers recognize individual differences and adjust their practice accordingly”); Rita Dunn et al., *A Meta-Analytic Validation of the Dunn and Dunn Model of Learning-Style Preferences* (July/August 1995) No. 6, 88 *J. of Acad. Res.* 357 (meta study showing overall academic achievement of students whose learning styles have been matched can be expected to be .75 of a standard deviation higher than that of students whose learning styles have not been accommodated).

This adaptation will often take place “on the fly,” as in Omar Currie’s decision to respond to bullying by reading *King & King*, or Advanced Placement English teacher David Olio’s decision to share *Please Master* with his twelfth graders—that decision came after a student presented him with a copy of the poem. As one commenter put it, it would have been “dreadful, humiliating and disrespectful” for Olio to refuse to read the poem under those circumstances. Boyette, *Teacher Who Read Homoerotic Ginsberg Poem in Class Resigns*, *supra*. But, as both of those examples illustrate, this “real time” adaptation can leave teachers vulnerable. In fact, teachers can be especially vulnerable in adapting their approach to respond to individual students or classroom challenges because districts that later come under pressure from parents can plausibly point to the teacher as bearing sole responsibility for the unpopular decision. Ironically, then, dynamic teachers would be left at greater risk from the loss of the protections provided by the challenged statutes than teachers who stick more rigidly to a prescribed lesson plan.

Witnesses at trial also testified that students benefitted from the freedom to innovate in the classroom that comes with the protections provided by the challenged statutes. As former El Monte School District Superintendent Jeff Seymour put it, “sometimes doing certain things that are out of the norm or out of the ordinary[,] . . . [that] will connect students to learning better[,] involve some risk-taking.” RT 7127. For example, he testified that teachers in his district had devised programs to motivate students who were interested in technology, RT 7128; to help students from impoverished backgrounds achieve cultural literacy, RT 7129; and to help teachers respond positively to students who come out as gay, RT 7128, 7129. However, he also testified that principals in his district sometimes resisted classroom innovation, leaving untenured teachers vulnerable to arbitrary dismissal as discussed in the preceding section. *See* RT 7132-33. Similarly, academic coach Danette Brown testified about her experience helping teachers improve: “[I]f we don’t have [tenure and due process protections] in place, then we don’t have that safe environment for people to really . . . have that self-reflection in their development as a teacher.” RT 7036.

Nowhere is the need for teachers to adapt curriculum to meet student needs greater than in high-poverty districts where students face widely varying challenges in and outside of school. For example, untenured teacher Anthony Mize testified about persistent gun violence in the neighborhood where he taught, as well as how many of his students lacked housing and other essentials. RT 7743-44. Thus, he sought to build trust with students and spent classroom time on “student centered dialog.” RT 7744, 7771–72. Teacher Dawna Watty testified that 22 different languages were spoken at her school, that students’ living conditions ranged from homeless or battered women’s shelters to million-dollar homes, and that 75–80 percent of students at her school qualified for free or reduced price

lunch. RT 7708–09. Unsurprisingly, then, the students in her classroom had widely varying aptitudes and abilities to learn; accordingly, she would “look to where all the kids are,” and “differentiate [her] instruction.” For example, if she had students who had difficulty reading, she would bring in pictures or movies to allow the students to “build their background knowledge.” RT 7711–12.

These classroom approaches may or may not have been the optimal ones—not every classroom risk will pay off. But that is precisely the point: if, on balance, teachers must innovate and adapt to best serve their students, then they also need protections for the occasions where their experiments are unsuccessful. Or, as Linda Tolladay put it, tenure “gives you the ability to bring in new ideas and new teaching techniques and have some of them not work beautifully the first time around . . . and not be concerned that that’s going to just have you gone.” RT 8016. The alternative is the situation that Shannan Brown described: when she could not “deviate from the curriculum” or “provide any supplemented materials,” she felt she was “unable to meet the needs of the students [she] was serving.” RT 7450–51. In her case, the restriction on classroom innovation was an express one imposed by school administrators. But the loss of tenure protections would place similar *de facto* limits on teachers, to the detriment of students.

California’s Education Code itself recognizes the benefits of innovation in teaching for students, especially considering California’s increasingly diverse student body. As established in a legislative finding, “educators closest to pupils should be free, within limits, to create learning environments appropriate to their circumstances,” and school administrators should create “a system that guides and facilitates professionals in their quest for more productive learning opportunities for their pupils.” Cal. Educ. Code § 44666(a); *see also* Cal. Educ. Code § 44667 (calling for “procedures that increase teachers’ decision making

authority” regarding curriculum and other school policies); § 44259.3 (requirements for multiple subject teaching credential include training teachers in “developmentally appropriate teaching methods” for K-3 students “who may be of the same grade level but of vastly different developmental levels”); § 44261.2(a)(3) & (b) (calling for credentialing standards to educate teachers to “serve as active partners with parents and guardians” in light of “changing conditions of childhood and adolescence, . . . changing family structure and ethnic and cultural diversity”); § 44279.1 (beginning teacher support and assessment program should “[e]nable beginning teachers to be effective in teaching pupils who are culturally, linguistically, and academically diverse”); § 44324 (teaching credential programs encouraged to offer field experience programs “under which students work with truant, habitual truant, or other at-risk pupils”). These abstract policies become concrete in individual classrooms, when, for example, teachers assign culturally relevant reading materials in English class, or ask students to confront challenges in their lives in art or journalism classes. Yet these are precisely the kinds of choices that put teachers at risk.

There is rare consensus that enabling teachers to make these and other pedagogical choices are key to effective teaching. Moreover, each of these attributes is especially important in underprivileged schools, where students are likely to bring a tremendous range of skills and abilities to the classroom, and may also face a variety of external barriers to learning. But these aspects of effective teaching are undermined when teachers know that they could be dismissed if they (or their work) become controversial. Finally, for reasons discussed in the next section, the challenged statutes serve these goals more effectively than would a more minimal set of protections. Thus, the challenged statutes contribute in an important way to effective education for California’s diverse student body.



### **C. Alternative Sources of Protection for Teachers Are Less Effective than the Challenged Statutes.**

One response to the foregoing might be that tenure is unnecessary because teachers who responsibly exercise classroom autonomy or advocate for students with school administrators are adequately protected by other sources of law, such as the Due Process or Free Speech clauses of the California or Federal Constitutions.<sup>13</sup> This subsection shows why those sources of law are poor substitutes for the tenure protections embodied in the challenged statutes, and conversely why key aspects of the challenged statutes benefit schools and students. In the context of the *Butt* standard, these benefits illustrate why this Court should evaluate the legislature’s choices deferentially, so that in addition to providing constitutionally mandated due process for teachers, the state can also encourage good teachers to remain in the classroom by providing improved procedural protections.

Public employees who have property interests in their positions are entitled to due process protections before their employment is terminated or certain other types of discipline are imposed. These protections include “preremoval . . . notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.” *Skelly v. State Pers. Bd.* (1975) 15 Cal.3d 194, 215; *see also Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532 [105 S.Ct. 1487] (federal Due Process Clause requires “pretermination opportunity to respond, coupled with a post-termination administrative procedures”). In addition, employees are entitled to a “full evidentiary hearing at some point

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<sup>13</sup> Collective bargaining agreements are not a potential substitute for the challenged statutes, because teachers’ unions in California may not bargain over dismissal procedures. Cal. Gov. Code § 3543.2(a)(1) & (b).

in the termination process,” at which the government bears the burden of proof. *Townsel v. San Diego Metro. Transit Dev. Bd.* (1998) 65 Cal.App.4th 940, 948–49.

As an initial matter, untenured teachers lack a constitutionally cognizable property interest in reappointment from one school year to the next. Accordingly, they are not entitled to any due process protections if they are denied reappointment, and their school districts need not offer any cause for the decision not to reappoint. *Grimsley v. Bd. of Trs.* (1987) 189 Cal.App.3d 1440, 1451 (Education Code does not confer property interest on probationary teachers); *see also Bd. of Regents v. Roth* (1972) 408 U.S. 564, 578 [92 S.Ct. 2701, 33 L.Ed.2d 548] (untenured teacher lacked property interest in reappointment from one year to the next, and thus had no due process rights in connection with non-reappointment). Thus, the trial court’s decision extinguished not just the statutory dismissal process for tenured teachers, but also the primary source through which teachers obtain property interests in their jobs from year to year. Cal. Educ. Code § 44929.21(b). Going forward, it is possible that at least some currently untenured teachers will be able to identify other sources of job protections giving rise to a protected property interest, *see Perry v. Sindermann* (1972) 408 U.S. 593, 602 [92 S.Ct. 2694, 33 L.Ed.2d 570], but one effect of the trial court’s decision is to introduce significant uncertainty as to whether and when experienced teachers will be entitled to constitutional due process protections when they are not reappointed from year to year.

Even beyond that problem, the invalidation of the challenged statutes means the loss of protections that improve upon the constitutional minimum. The challenged statutes do more than comply with Due Process, *Cal. Teachers Ass’n v. State* (1999) 20 Cal.4th 327, 343; they also serve other key educational goals, including the retention of effective teachers. Three examples illustrate this point. First, Cal. Educ. Code § 44938(b)(1)

requires school administrators to give a teacher accused of unsatisfactory performance a 90-day period to “correct his or her faults and overcome the grounds for the charge.” Second, the statutes advance the required evidentiary hearing to the pre-termination phase. Cal. Educ. Code § 44941. Third, Cal. Educ. Code § 44944(c)(5) guarantees that two of the three members of the Commission on Professional Competence (CPC), which typically conducts the evidentiary hearing, will be credentialed educators.

To begin, the 90-day correction period benefits districts, students, and teachers when it serves its intended purpose by obviating the need to terminate a teacher (and then fill the resulting vacancy)—particularly when one considers California’s teacher shortage, discussed in Section II. Moreover, the alternative would permit districts to give teachers opportunities to cure performance problems on an ad hoc basis. Because performance problems will often be at least in part in the eye of the beholder, this dynamic would pose a threat to teachers who have become controversial with parents, who are a thorn in the side of administrators, or even who are victims of bias because of personal characteristics. That is because school administrators may be more inclined to see performance problems among these teachers in the first instance; absent the statutory requirement, they could then compound that problem by rushing to termination, while allowing favored teachers the chance to improve and remain in their jobs.

Similarly, the guarantee of a full pre-termination hearing improves on baseline due process protections by guaranteeing that teachers will not be left in unpaid limbo while the process unfolds. The alternative—the minimum constitutionally required mix of pre- and post-termination procedures—would chill teachers nearly as much as a threat of outright dismissal, at least when their economic standing is too precarious for the prospect of future backpay to offer much present comfort. Put another way,

a teacher faced *ex ante* with a decision about whether to advocate for a student or teach controversial curriculum—especially if that teacher cannot go weeks or months without pay—could hardly be faulted for then failing to make the decision that would best serve students. But the pre-termination hearing alleviates the stress of that decision.<sup>14</sup>

Finally, the composition of the CPC is important because that body “has broad discretion in determining what constitutes unfitness to teach . . . and whether dismissal or suspension is the appropriate sanction.” *Cal. Teachers Ass’n*, 20 Cal.4th at 343. This inquiry demands a realistic understanding of professional norms and standards, as well as of the challenges teachers face in their classrooms on a daily basis, and practical techniques for overcoming them. While *Skelly* allows only “the right to appear personally before an impartial official,” 15 Cal.3d at 208, without requiring that official to have expertise in teaching or pedagogy, the composition of the CPC allows for a better-informed judgment about whether a teacher’s performance is unsatisfactory. The importance of this aspect of the challenged statutes—that teachers will be judged in part by their peers—was underscored by teacher Linda Tolladay at trial. She testified that it “matters . . . very much,” because “teachers know what I do in the classroom day in and day out . . . what goes on with planning lessons, evaluating students, working with children, differentiating lessons.” RT 8015. Importantly, this testimony also suggests that the CPC enjoys greater legitimacy among teachers than would another system.

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<sup>14</sup> Conversely, California law still permits school districts to respond promptly when teachers are alleged to have committed serious breaches. Cal. Educ. Code § 44939(b) (districts may suspend teachers without pay for enumerated reasons, including “immoral conduct, conviction of a felony or of any crime involving moral turpitude, with incompetency due to mental disability, with willful refusal to perform regular assignments without reasonable cause”).

Further, substantive law provides scant protection for teachers' classroom speech or out-of-class advocacy. For example, as the cases discussed in Section I.A. illustrate, constitutional free speech protections offer little hope to teachers. This is especially true as to their work in the classroom, because circuit courts have held that teachers' classroom speech merits no First Amendment protection at all under *Garcetti v. Ceballos* (2006) 547 U.S. 410, 424 [126 S.Ct. 1951] (holding that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities"). See, e.g., *Evans-Marshall*, 624 F.3d at 334 (stating "the right to free speech protected by the First Amendment does not extend to the in-class curricular speech of teacher in primary and secondary schools made 'pursuant to' their official duties"); *Mayer*, 474 F.3d at 479 (classroom speech not protected by First Amendment and presents an "easier case for the employer" than *Garcetti*); *Johnson v. Poway Unified Sch. Dist.* (9th Cir. 2011) 658 F.3d 954, 970 (teacher's selection of materials for bulletin board was unprotected public employee speech under *Garcetti*); *Weintraub v. Bd. of Educ. of City Sch. Dist. of City of NY* (2d Cir. 2010) 593 F.3d 196, 203 (*Garcetti* applies to speech related to maintaining classroom discipline); *Fox v. Traverse City Area Pub. Schs. Bd. of Educ.* (6th Cir. 2010) 605 F.3d 345, 349 (teacher's complaints to supervisor about class size was unprotected public employee speech under *Garcetti*); see also *Bradley v. Pittsburgh Bd. of Educ.* (3d Cir. 1990) 910 F.2d 1172, 1176 (teacher's "in-class conduct" not protected by First Amendment); cf. *Demers v. Austin* (9th Cir. 2014) 746 F.3d 402, 412 & 413 (holding, in context of university professor, that *Garcetti* does not apply to "teaching and academic writing" performed by teachers and professors, but observing that "the degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a

university professor”).<sup>15</sup> Nor does California law offer greater protection for teachers. *Kaye v. Bd. of Trs. of San Diego Cty. Pub. Law Library* (2009) 179 Cal.App.4th 48, 58-59 (holding California Constitution provides no greater First Amendment protection for public employees than Federal Constitution). Even when the First Amendment applies to teachers’ speech on matters of public concern, school districts may still punish teachers for speech that substantially interferes with the district’s functioning, allowing for a kind of heckler’s veto. *See Connick v. Myers* (1983) 461 U.S. 138, 150 [103 S.Ct. 1684, 75 L.Ed.2d 708]. And, a teacher attempting wrongful termination claim under the First Amendment (or another source of law, such as Title VII of the Civil Rights Act) would bear the burden of proof, and could also be required to overcome a district’s mixed-motive or “same decision” defense in order to recover. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 287 [97 S.Ct. 568, 50 L.Ed.2d 471]. Finally, even the possibility of overcoming these barriers would be moot as to teachers who could not afford to hire a lawyer to prosecute a case in state or federal court, or who were unwilling to file suit because of fear of retaliation.

## **II. California’s Teacher Retention and Dismissal Statutes Encourage Teachers to Remain in Teaching, to the Benefit of Students.**

California, like many other states, is facing a severe teacher shortage. Motoko Rich, *Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional)* N.Y. Times (Aug. 9, 2015) <<http://nyti.ms/1IOZdG8>>. In fact, California’s shortage is “particularly acute,” with schools scrambling to fill 21,500 slots with “fewer than 15,000

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<sup>15</sup> Teachers frequently lose even when courts purport to apply the more protective *Pickering* analysis to cases involving teachers’ classroom speech. *See Johnson*, 658 F.3d at 963 (collecting cases).

new teaching credentials” issued last year. *Id.*; see also Valerie Strauss, *The Real Reason Behind the U.S. Teacher Shortage*, Wash. Post (Aug. 24, 2015) <<http://wapo.st/1ExWcxM>> (hereafter *The Real Reason*) (California is facing “statewide shortages in English/Drama/Humanities, History/Social Science/ Math/Computer Education/ Science/Self-Contained Class/Special Education”). Perhaps most alarmingly, the Washington Post reported that some San Francisco students “may find their teacher is a central office staffer, as schools scramble to put an adult in the classroom.” Strauss, *The Real Reason*, *supra*.

Eliminating the opportunity to earn tenure—a valuable employment benefit—will only worsen the shortage by making teaching a less appealing career path for new and experienced teachers alike. The loss of experienced teachers will be especially damaging for students for two reasons. First, robust data shows that more experienced teachers tend to be more effective. Second, experienced teachers mentor new teachers, helping them succeed and creating a virtuous cycle. Finally, the adverse consequences of the trial court’s decision would likely be most acute in high-poverty schools, which already face disproportionate teacher turnover.

**A. The Challenged Statutes Promote Teacher Longevity.**

As discussed above, the challenged statutes were enacted in large part to promote the retention of competent teachers. “[T]he entire purpose of the Teachers’ Tenure Act . . . is to insure an efficient permanent staff of teachers for our school[s] whose members are not dependent upon caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well.” *Fresno City High Sch. Dist.*, 33 Cal.App.2d at 674. The protections provided by the challenged statutes encourage teacher retention in multiple ways.

First, protection against arbitrary termination is a tangible employment benefit that can attract and retain teachers no less than other benefits, like pay, sick leave, and vacation time. Many teachers regard tenure and due process as even more valuable than those other benefits; for example, fewer than ten percent of teachers in the Winston-Salem school district accepted contracts worth \$5,000 more over four years in exchange for giving up tenure; North Carolina teachers' groups then opposed a legislative proposal that would have given teachers an eleven percent raise in exchange for giving up tenure.<sup>16</sup> Arika Herron, *Pay Plan Offers Raise in Exchange for Tenure*, Winston-Salem J. (May 28, 2014) <<http://bit.ly/1Ki8Znw>>. Similarly, when Superintendent Michelle Rhee offered a group of several hundred District of Columbia teachers annual bonuses of up to \$15,000 if they would give up their tenure, twenty to thirty percent of teachers turned down the offer. Goldstein, *The Teacher Wars*, *supra*, at p. 225. Tenure also has intangible benefits; as Danette Brown testified, tenure and due process protections serve as a reflection of a school district's belief in the teacher: "as a professional I've invested . . . resources, time, money into being the best . . . practitioner that I can be . . . And what [tenure and due process protections] say[] to me is that my profession is then investing in me." RT 7037; *see also* RT 8495 (Lynda Nichols) (achieving tenure was important because "I had a mortgage and kids and the whole bit, and it really did offer [] stability").

Second, by protecting teachers' autonomy and professional discretion as discussed in the previous section, the challenged statutes can

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<sup>16</sup> This is especially remarkable when one considers that North Carolina teachers are some of the worst compensated in the nation. *Average Salaries & Expenditure Percentage*, Cal. Dept. of Educ., <<http://bit.ly/1ILQ4jB>> (as of Aug. 13, 2015) (average teacher salary in North Carolina was 46th lowest in the country for 2011-12 and 2012-13, with an average teacher salary of just \$45,737 for 2012-13).



sustain teachers in their work.<sup>17</sup> “Teacher autonomy is a common link that appears when examining teacher motivation, job satisfaction, stress (burnout), professionalism, and empowerment.” L. Carolyn Pearson & William Moomaw, *Continuing Validation of the Teaching Autonomy Scale* (2006) 100 J. of Educ. Res. 44, 44; *see also* L. Carolyn Pearson & William Moomaw, *The Relationship Between Teacher Autonomy and Stress, Work Satisfaction, Empowerment, and Professionalism* (2005) 29.1 Educ. Res. Q. 38, 41 (hereafter *Teacher Autonomy and Stress*) (“[T]eachers and principals must have the authority to make key decisions about the services they render . . .”). Specifically, as curriculum autonomy increases (defined as autonomy in the selection of materials and instructional planning), job stress decreases. Pearson & Moomaw, *Teacher Autonomy and Stress, supra*, at 48. And as general teaching autonomy increases (defined as autonomy in setting classroom standards of conduct and personal on-the-job decision-making), so does empowerment and professionalism, which is in turn correlated with greater job satisfaction. *Id.* Conversely, assaults on autonomy can cause good teachers to leave. “[T]here is substantial evidence that professional independence and discretion bolster motivation, responsibility, and commitment, while a lack of workplace autonomy is frequently cited as a reason for dissatisfaction, absenteeism, and defection.”

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<sup>17</sup> Teacher autonomy has been defined to include not only the extent to which a teacher is able to influence the school environment and general curriculum, but also the extent to which a teacher is able to select the manner in which she delivers prescribed curriculum to her students. L. Carolyn Pearson & William Moomaw, *The Relationship Between Teacher Autonomy and Stress, Work Satisfaction, Empowerment, and Professionalism* (2005) 29.1 Educ. Res. Q. 38, 40-41 (citing Richard M. Ingersoll & Nabeel Alsalam, *Teacher Professionalization and Teacher Commitment: a Multilevel Analysis*, p. viii (1997) <<http://nces.ed.gov/pubs/97069.pdf>>) (defining teacher authority to include “the degree of individual autonomy exercised by teachers over planning and teaching within the classroom”).

Rosenholtz, *Workplace Conditions*, *supra*, at 421, 424; *see also* Pearson & Moomaw, *Teacher Autonomy and Stress*, *supra*, at 42-43 (“Teacher autonomy or the lack thereof, seems to be critical component in the motivation of teachers to stay or leave the teaching profession.”); Richard Ingersoll & Henry May, *Recruitment, Retention and the Minority Teacher Shortage* (2011), p. 7 <[http://www.cpre.org/sites/default/files/researchreport/1221\\_minorityteachershortagereporttr69septfinal.pdf](http://www.cpre.org/sites/default/files/researchreport/1221_minorityteachershortagereporttr69septfinal.pdf)> (noting that among the most important factors influencing minority teachers to leave teaching were level of faculty influence in decision-making and the degree of individual classroom autonomy, more so than salary, professional development, or classroom resources).

**B. The Challenged Statutes Benefit Students Because Teacher Longevity Promotes Strong Communities of Experienced Teachers.**

**1. Experienced Teachers Better Serve Students and Create Strong School Communities.**

Teacher experience has a “clear payoff” in effectiveness, most significantly in the first few years of a teacher’s career.<sup>18</sup> A 2009 study, focused specifically on teachers in low-performing, high-poverty schools, found that teaching experience at the same grade level positively impacted

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<sup>18</sup> *See* Jennifer King Rice, *The Impact of Teacher Experience: Examining the Evidence and Policy Implications* (Aug. 2010) Nat’l Ctr. for Analysis of Longitudinal Data in Educ. Res. <<http://urbn.is/1JWtiI5>> (concluding that experience enhances teacher effectiveness most strongly in a teacher’s early years, after which the correlation levels off); *see also* Gary T. Henry et al., *The Effects of Experience and Attrition for Novice High School Science and Mathematics Teachers* (2012) 335 Sci. 1118, 1120-21 (finding that the effectiveness of novice teachers of high school science and mathematics increases significantly in their first few years of teaching and concluding that “[t]he current churn of the teacher labor market is working against higher student achievement in STEM courses”).

student achievement for up to 20 years of teaching experience.<sup>19</sup> As the National Commission on Teaching and America's Future put it, "[t]his careful study indicates that teaching experience has significant impact on student achievement."<sup>20</sup> And, the benefits of experience are not limited to the classroom presentation of curriculum. "[A]s they collect more experience, teachers also have more opportunity to develop many other attributes crucial to the teaching job, such as how to deal with student behavior problems, how to teach students with diverse backgrounds and abilities, how to work and communicate with parents, how to best promote good work habits in students, and how to nurture students' self-esteem."<sup>21</sup> Thus, it is unsurprising that researchers have concluded that school districts would be best served by adopting "employment practices that promote stability in teacher assignments in particular schools."<sup>22</sup>

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<sup>19</sup> Francis Huang & Tonya Moon, *Is Experience the Best Teacher? A Multilevel Analysis of Teacher Characteristics and Student Achievement in Low Performing Schools* (Aug. 2009) 21 Educ. Assessment, Evaluation & Accountability 209. In their study of the impact of teacher human and social capital on student achievement, Pil and Leana found that a teacher's years teaching in grade and task (teaching mathematics) had a significant, positive correlation to growth of student achievement in math. Frits K. Pil & Carrie Leana, *Applying Organizational Research to Public School Reform: The Effects of Teacher Human and Social Capital on Student Performance* (2009) 52 Acad. of Mgmt. J. 1101, 1114, 1116 (hereafter *Applying Organizational Research to Public School Reform*).

<sup>20</sup> National Commission on Teaching and America's Future, *Who Will Teach? Experience Matters* (2010) p. 12 < <http://nctaf.org/wp-content/uploads/2012/01/NCTAF-Who-Will-Teach-Experience-Matters-2010-Report.pdf> > (hereafter *Who Will Teach?*).

<sup>21</sup> Richard Ingersoll & Lisa Merrill, *Seven Trends: The Transformation of the Teaching Force* (2014) p. 13 <[http://cpre.org/sites/default/files/workingpapers/1506\\_7trendsapril2014.pdf](http://cpre.org/sites/default/files/workingpapers/1506_7trendsapril2014.pdf)> (hereafter *Seven Trends*).

<sup>22</sup> Pil & Leana, *Applying Organizational Research to Public School Reform*, *supra*, at 1117.

A more experienced teacher corps not only benefits students directly, but also provides indirect benefits when seasoned professionals mentor newer teachers. “A solid body of empirical research documents that support and mentoring by veteran teachers has a positive effect on beginning teachers’ quality of instruction, retention, and capacity to improve their students’ academic achievement.”<sup>23</sup> In short, as one researcher reported, there are “direct, positive relationships between student achievement gains in mathematics and teacher tenure at grade level and teacher social capital [defined as the strength of horizontal and vertical relationships among school staff]. This suggests that current political efforts to undercut teacher stability and experience may come at a very steep cost.”<sup>24</sup>

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<sup>23</sup> Ingersoll & Merrill, *Seven Trends, supra*, at 13 (citing Ingersoll & Strong, 2011); *see also* National Commission on Teaching and America’s Future, *Policy Brief: The High Cost of Teacher Turnover* (2007), p. 8 <<http://nctaf.org/wp-content/uploads/2012/01/NCTAF-Cost-of-Teacher-Turnover-2007-policy-brief.pdf>> (hereafter *The High Cost of Teacher Turnover*) (“Transforming a school into a genuine learning organization calls for the creation of a school culture in which novice and experienced teachers work together to improve student achievement.”); Richard Ingersoll & Thomas M. Smith, *Do Teacher Induction and Mentoring Matter?* (2004) 88 NAASP Bulletin 28, 36 fig.2 <[http://repository.upenn.edu/cgi/viewcontent.cgi?article=1134&context=gs\\_e\\_pubs](http://repository.upenn.edu/cgi/viewcontent.cgi?article=1134&context=gs_e_pubs)> .

<sup>24</sup> Carrie Leana, *The Missing Link in School Reform* (2011) 9 Stanford Soc. Innovation Rev. 32, 35; *see also* Carrie Leana & Fritz K. Pil, *Social Capital and Organizational Performance: Evidence from Urban Public Schools* (2006) 17 Org. Sci. 353; Nicole Simon & Susan Moore Johnson, *Teacher Turnover in High-Poverty Schools: What We Know and Can Do* 7 (Harvard Graduate Sch. of Educ. Working Paper, 2013) (hereafter *Teacher Turnover in High-Poverty Schools*) (“[s]ustained and stable relationships . . . allow schools to establish norms for instructional quality, professional conduct, student behavior, and parental involvement—all of which are linked to student achievement—especially for financially impoverished students.”).

Even outside of the tenure statutes, California’s legislature has recognized the importance of experienced teachers to a school’s overall success by facilitating formal structures for senior teachers to mentor their colleagues. Cal. Educ. Code §§ 44279.1, .25. But these programs are also enhanced by tenure. As Linda Tolladay testified, teacher tenure facilitates these mentoring relationships by encouraging experienced teachers like her to invest in long-term programs: “I know I’m going to be with my district and I don’t have to fear for my job, [so] I can build long-term programs . . . . I can work with my colleagues in ways to sustain the teaching of all students.” RT 8018.

## **2. Rapid Teacher Turnover Is Disruptive, Expensive, and Harmful to Students.**

Conversely, teacher turnover is a critical problem—and one that would be likely to worsen if teachers lost valuable tenure and due process protections, and the opportunities to exercise professional discretion, leadership, and autonomy that come with those protections. The National Commission on Teaching and America’s Future warned in 2007 that the growing flight of teachers from the profession “is draining resources, diminishing teaching quality, and undermining our ability to close the student achievement gap.”<sup>25</sup> Then, the national teacher turnover rate was 16.8 percent, with that number remaining relatively constant in subsequent years. U.S. Department of Education, *Teacher Attrition & Mobility: Results From the 2012-13 Teacher Follow-Up Survey* (2014) <<http://nces.ed.gov/pubs2014/2014077.pdf>>. In urban schools, the turnover rate was even higher, and, “in some schools and districts, the teacher dropout rate [was] actually higher than the student dropout rate.” National Commission on Teaching and America’s Future, *Policy Brief: The High Cost of Teacher*

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<sup>25</sup> *The High Cost of Teacher Turnover*, *supra*, at p. 1.

*Turnover* (2007) p. 1 <<http://bit.ly/1gpFTXO>>. Further, it has been estimated that 41% of new teachers leave teaching within five years of entry.<sup>26</sup>

Difficulty in retaining teachers has serious implications for students. First, high teacher turnover results in a tremendous loss of teacher experience and skill. Researchers agree that teacher retention is the main challenge in ensuring the presence of strong teachers in classrooms. “In the years ahead, the chief problem will not be producing more new teachers, as many seem to believe. The main problem is an exodus of new teachers from the profession . . . .”<sup>27</sup> And, the numerous studies showing that teacher effectiveness increases significantly in the first years of teaching mean schools lose this store of ability each time a new teacher leaves.<sup>28</sup> “With the high rate of new teacher turnover, our education system is losing half of all teachers *before* they reach their peak effectiveness.”<sup>29</sup> These new teachers who leave are replaced by other new teachers who will be generally less effective because they are novices. “[T]he constant staff

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<sup>26</sup> Ingersoll & Merrill, *Seven Trends, supra*, at 23 fig.12 (citing David Perda, *Transitions Into and Out of Teaching: A Longitudinal Analysis of Early Career Teacher Turnover* (Jan. 1, 2013) (Ph.D. Dissertation, University of Pennsylvania)); *see also Who Will Teach?, supra*, at p. 4 (estimating that, after five years, over 30% of beginning teachers will have left the profession).

<sup>27</sup> Linda Darling-Hammond & Gary Sykes, *Wanted: A National Teacher Supply Policy for Education: The Right Way to Meet The “Highly Qualified Teacher” Challenge* (2003) 11 *Educ. Pol’y Anal. Archives* 3, 14-15 <<http://epaa.asu.edu/ojs/article/viewFile/261/387>> (hereafter *Wanted: A National Teacher Supply Policy for Education*); *see also The High Cost of Teacher Turnover, supra*, at p. 1 (“Until we recognize that we have a retention problem we will continue to engage in a costly annual recruitment and hiring cycle, pouring more and more teachers into our nation’s classrooms only to lose them at a faster and faster rate.”).

<sup>28</sup> Ingersoll & Merrill, *Seven Trends, supra*, at p. 26.

<sup>29</sup> *The High Cost of Teacher Turnover, supra*, at p. 4.

churn consigns a large share of children in high-turnover schools to a parade of relatively ineffective teachers.”<sup>30</sup>

Second, turnover is an expensive problem. Each time a teacher leaves, there are attendant costs to recruit, hire, and train a new teacher. In 2010, the National Commission on Teaching and America’s Future estimated that “the nation’s school districts spent at least \$7.2 billion a year on teacher turnover and churn.”<sup>31</sup> Its study of teacher turnover in five school districts found that the cost of a teacher’s departure ranged, for example, from \$4,366 per teacher in the rural Jemez Valley Public School District in New Mexico to \$17,872 in the Chicago Public Schools.<sup>32</sup>

Third, teacher turnover impedes schools’ stability, affecting their ability to function. One study found that high turnover “disrupts the team-based organizational structure and functioning of schools” because “[s]chools with high teacher turnover rates have difficulty planning and implementing a coherent curriculum . . . .”<sup>33</sup> Further, professional development efforts often were repeated and occurred piecemeal, and there was less trust among teachers.<sup>34</sup> Worse, turnover disrupts the formation of trusting relationships key to student success: “For schools that are constantly getting new teachers, it is difficult to establish trust because teachers, students and parents are always dealing with strangers, individuals

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<sup>30</sup> Darling-Hammond & Sykes, *Wanted: A National Teacher Supply Policy for Education*, *supra*, at p. 16.

<sup>31</sup> *Who Will Teach?*, *supra*, at p. 4; see also *The High Cost of Teacher Turnover*, *supra*, at p. 1.

<sup>32</sup> *The High Cost of Teacher Turnover*, *supra*, at p. 3-5.

<sup>33</sup> Kacey Guin, *Chronic Teacher Turnover in Urban Elementary Schools* (2004) 12 Educ. Pol’y Archives 1  
<<http://epaa.asu.edu/ojs/article/view/197>>.

<sup>34</sup> *Id.*

with whom they have no experience.”<sup>35</sup> And, the loss of the protections provided by the challenged statutes would exacerbate these problems.

Given all these costs, it is unsurprising that high rates of turnover have been correlated with lower student success. In a study of the effects of teacher turnover on over 850,000 New York City students over an eight-year period, researchers found that students in grade levels with the highest turnover scored lower in language arts and math and that those results were more pronounced in schools with more low-performing and Black students.<sup>36</sup> Another study of more than 1,000 fourth- and fifth-grade teachers at 130 New York schools found that, “the higher the teacher turnover rate at the school, the lower the student achievement gains the following year.”<sup>37</sup> The study concluded, “These results show that teacher [longevity] can have significant positive effects on student achievement.”<sup>38</sup>

### **3. The Problem of Teacher Turnover Is Magnified in Disadvantaged School Districts, and Is Likely to Worsen if Teachers Lose Tenure Protections.**

Teacher turnover is already particularly high in high-poverty school districts.<sup>39</sup> During 2000-2001, for example, the annual teacher turnover in urban, high-poverty schools was 22%, in contrast to 15.1% in all public

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<sup>35</sup> *Id.*

<sup>36</sup> Matthew Ronfeldt et al., *How Teacher Turnover Harms Student Achievement*, (2013) 50 Am. Educ. Res. J. 4 <<http://aer.sagepub.com/content/50/1/4.full>>. As Ronfeldt notes, however, that correlations between teacher turnover and student achievement does not prove that high teacher turnover decreases student achievement. Other factors, such as poverty, working conditions, or poor school leadership, can simultaneously cause both low student achievement and higher turnover. *Id.* at 5.

<sup>37</sup> Leana, *The Missing Link in School Reform*, *supra*, at p. 35; *see also* Simon & Johnson, *Teacher Turnover in High-Poverty Schools*, *supra* (discussing heightened rate of teacher turnover in high-poverty schools).

<sup>38</sup> *Id.*

<sup>39</sup> *See, e.g.*, Ingersoll & Merrill, *Seven Trends*, *supra*, at p. 23.



schools.<sup>40</sup> Because of this flight, disadvantaged schools have disproportionately higher numbers of novice, inexperienced teachers and must invest both the effort and funds to continually rebuild their staffs as they work to educate students under already challenging circumstances.<sup>41</sup>

Moreover, teacher turnover is a particular problem among minority teachers, impairing the ability of schools to maintain a diverse teaching corps, to the particular detriment of students of color. For example, during the 2011-12 school year, while 44% of all elementary and secondary students were members of a racial minority group, only 17.3% of elementary and secondary school teachers were.<sup>42</sup> While there have been recent improvements in the number of minority teachers, they still leave the profession at significantly higher rates than white teachers.<sup>43</sup> In the two decades from the late 1980s through 2009, the annual rate of minority teacher turnover increased by 28%.<sup>44</sup> Because minority teachers are concentrated in schools serving high-poverty, high-minority, or urban

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<sup>40</sup> Richard M. Ingersoll, *Why Do High-Poverty Schools Have Difficulty Staffing Their Classrooms With Qualified Teachers?* (Nov. 2004) 9 fig.3 <<https://www.americanprogress.org/wp-content/uploads/kf/ingersoll-final.pdf>>.

<sup>41</sup> *The High Cost of Teacher Turnover*, *supra*, at pp. 2, 4 (noting that, for example, in Milwaukee, low-performing school had double the teacher turnover rate of high-performing schools, and estimating that a typical low-performing school spends \$67,000 more than other schools on expenses related to teacher turnover).

<sup>42</sup> Ingersoll & Merrill, *Seven Trends*, *supra*, at p. 17.

<sup>43</sup> Ingersoll & May, *Recruitment, Retention and the Minority Teacher Shortage*, *supra*, at pp. i, 23. Any gains in recruiting new minority teachers have been more than offset by attrition. For example, Ingersoll notes that in 2003-04, about 47,600 minority teachers entered the school system, but, the following year, 20% more—about 56,000—left teaching. If the rate of attrition were the same as the rate of white teachers (8.8%), the outflow of minority teachers would have been about the same as the earlier inflow. *Id.* at 25.

<sup>44</sup> Ingersoll & Merrill, *Seven Trends*, *supra*, at p. 18; Ingersoll & May, *Recruitment, Retention and the Minority Teacher Shortage*, *supra*, at p. 23.

schools,<sup>45</sup> the high turnover of minority teachers further impacts those already disadvantaged schools.

Among the main reasons minority teachers leave teaching are low levels of collective faculty influence or individual instructional autonomy in their schools,<sup>46</sup> underscoring the relationship between teacher autonomy and teacher retention. Similarly, a meta-study of teacher turnover in high-poverty schools pointed to working conditions as a critical factor in teachers' decisions to leave their schools, including whether school administrators enabled mentoring relationships between junior and senior teachers, gave teachers autonomy and discretion in their work, and allowed teachers to influence school policies.<sup>47</sup>

The loss of teacher tenure protections offered by the challenged statutes will only worsen these dynamics at schools where resource deficits and other obstacles related to poverty already make it harder for children to succeed. As trial testimony reflects, untenured teachers may be less willing to teach in high-needs schools if they fear that they could easily be fired if their students do not test as well as their more-advantaged peers. RT 8031 (Linda Tolladay) (testifying that, absent tenure protections, she would be less willing to teach special education because of the possibility that lower student test scores could cause her to lose her job). And these districts are among the least likely to be able to “make up” for the loss of tenure protections with increased teacher salaries or other benefits.

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<sup>45</sup> Ingersoll reported that over half of all public school minority teachers were employed in high-poverty school, compared to only one fifth of White teachers, and similar patterns held for urban and high-minority schools. Ingersoll & May, *Recruitment, Retention and the Minority Teacher Shortage*, *supra*, at pp. 18, 20.

<sup>46</sup> *Id.* at 35-36, 43.

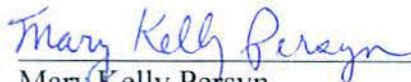
<sup>47</sup> Simon & Johnson, *Teacher Turnover in High-Poverty Schools*, *supra*, at pp. 8-9.

As the foregoing illustrates, teacher tenure is associated with a set of related and mutually reinforcing benefits for students. At one level, it is a valuable employment benefit much like pay or health insurance; on another, it helps attract and retain teachers by enabling them to build mentoring relationships and to innovate in the classroom, building expertise over time. In addition, tenured teachers can have confidence that they will not be fired when they teach unpopular curriculum, refuse to raise a student's grade, or advocate for special education services or curriculum reform. This professional autonomy in turn helps increase teachers' job satisfaction, decreasing turnover. Taken together, these benefits associated with teacher tenure show why the trial court erred in applying strict scrutiny to the challenged statutes.

#### CONCLUSION

For the foregoing reasons, the decision of the trial court should be reversed.

Respectfully submitted,



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