

**B258589**

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

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

*v.*

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

*v.*

**CALIFORNIA TEACHERS ASSOCIATION et al.**  
*Intervenors and Appellants.*

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APPEAL FROM LOS ANGELES COUNTY SUPERIOR COURT  
ROLF M. TREU, JUDGE • CASE No. BC484642

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**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF;  
*AMICI CURIAE* BRIEF OF  
SILICON VALLEY LEADERSHIP GROUP,  
CALIFORNIA BUSINESS ROUNDTABLE,  
FOUNDATION FOR EXCELLENCE IN EDUCATION,  
ORANGE COUNTY BUSINESS COUNCIL,  
CALIFORNIA CHAMBER OF COMMERCE AND  
VALLEY INDUSTRY & COMMERCE ASSOCIATION  
IN SUPPORT OF RESPONDENTS BEATRIZ VERGARA et al.**

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**APPLICATION FOR LEAVE TO FILE  
AMICI CURIAE BRIEF OF  
SILICON VALLEY LEADERSHIP GROUP,  
CALIFORNIA BUSINESS ROUNDTABLE,  
FOUNDATION FOR EXCELLENCE IN EDUCATION,  
ORANGE COUNTY BUSINESS COUNCIL,  
CALIFORNIA CHAMBER OF COMMERCE AND  
VALLEY INDUSTRY & COMMERCE ASSOCIATION  
IN SUPPORT OF RESPONDENT BEATRIZ VERGARA**

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Under California Rules of Court, rule 8.200(c), the Silicon Valley Leadership Group, the California Business Roundtable, the Foundation for Excellence in Education, the Orange County Business Council, the California Chamber of Commerce and the Valley Industry & Commerce Association request permission to file

the attached amici curiae brief in support of respondents Beatriz Vergara et al.

The Silicon Valley Leadership Group is a public policy business trade organization that was founded in 1978 by David Packard of Hewlett-Packard and represents more than 390 of Silicon Valley's most respected employers on issues, programs and campaigns that affect the economic health and quality of life in Silicon Valley. The Leadership Group members collectively provide nearly one of every three private sector jobs in Silicon Valley and contribute more than \$3 trillion to the worldwide economy. One of the Leadership Group's core missions is to promote and champion quality public education through partnerships with local, state, and federal decision makers, to ensure that the educational system in California and Silicon Valley fosters academic excellence and high quality instruction, while producing world class graduates, particularly armed with 21st century skills. The Leadership Group's Education Policy Team initiates outreach and advocacy to inform internal and external stakeholders and policymakers that a desirable, accessible and affordable education system ensures Silicon Valley and California can remain competitive in the innovation economy.

The California Business Roundtable is a non-partisan organization comprised of the senior executive leadership of the major employers throughout the state—with a combined workforce of more than half a million employees. For more than 35 years the Roundtable has identified the issues critical to a healthy business climate and provided the leadership needed to strengthen

California's economy and create jobs. One of the Roundtable's key missions is to leverage the power and voice of the business community to inform educators and policymakers about ways to improve education systems and practices through a business-like approach to education reform.

The Foundation for Excellence in Education was founded to help reverse the declining competitiveness of American students in the global economy. The 21st century economy is the most competitive in world history. It is an economy that requires a growing number of educated and skilled workers. Yet, on international assessments, American students rank 21st in science and 27th in math, behind their peers in countries like Singapore, Japan and Canada. The Foundation believes our states' leaders, educators, parents, and students are ready and able to reverse the trend of declining competitiveness and achieve the goal of returning America to its dominant role.

Orange County Business Council (OCBC), through its predecessor organizations, has for more than 120 years, served as a nonpartisan association of business members, working with government and academia, to enhance economic prosperity while maintaining a high quality of life for America's sixth largest county. OCBC's members employ over 250,000 people in the Southern California region, and over 2,000,000 people worldwide. OCBC focuses on four core initiatives: enhancing the state's infrastructure, preparing a workforce for a 21st century global economy, assuring housing is available for that workforce, and promoting economic development for California, including the attraction and retention of

business and good-paying jobs in a high cost-of-living state. Members of OCBC find it increasingly difficult to secure well-educated, basic-skilled California workers to fill jobs at every level.

The California Chamber of Commerce (CalChamber) is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before federal and state courts by filing amicus curiae briefs and letters in cases, like this one, involving issues of paramount concern to the business community.

The Valley Industry & Commerce Association (VICA) is a leading business advocacy organization in Southern California's San Fernando Valley. VICA is committed to ensuring access to quality education, which plays an important role in preparing the greater San Fernando Valley's workforce for the 21st century economy.


As counsel for amici, we have reviewed the briefs filed in this case and believe this court will benefit from additional briefing. We have attempted to supplement, but not duplicate, the parties' briefs.

This application is timely. It is being submitted within 14 days of the filing of appellant's reply brief. (See Cal. Rules of Court, rule 8.200(c)(1).)

Accordingly, amici request that this court accept and file the attached amici curiae brief.

September 14, 2015

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COMMERCE AND VALLEY INDUSTRY  
& COMMERCE ASSOCIATION**

## ***AMICI CURIAE BRIEF***

### **INTRODUCTION**

Today's students are tomorrow's workforce. California is one of the top ten largest economies in the world. To maintain that status, it is critical that California prepare its future workforce to remain competitive in an increasingly globalized, technological, and knowledge-based economy. Preparing California's workforce for the 21st century requires increasing the educational achievement of all California's children, but most importantly, low-income and minority children, who provide the diversity of experience our globalized economy needs and are the largest source of underutilized human capital in the state. Yet a disproportionate number of low-income and minority students are falling behind as a result of unequal access to the most important educational resource schools provide: effective teachers.

Although numerous factors influence educational outcomes, the evidence at trial (as well as common sense) establishes that teachers are the principal in-school factor that influences student achievement. Any policy that hinders schools from promoting effective teachers and removing ineffective teachers interferes with our students' equal access to the educational training they need and deserve. The trial court found, based on "compelling" evidence, that the combined effect of Education Code sections 44929.21(b), 44934, 44938(b), 44944, and 44955 is to arbitrarily protect the jobs of teachers regardless of their ability to do that job, and to

disproportionately deprive low-income and minority students of equal educational opportunity. Such a system is contrary to both the fundamental civil rights of students, who are constitutionally entitled to equal educational opportunity, and California’s vital economic interests. The trial court’s decision enjoining enforcement of the challenged statutes should be affirmed.

## LEGAL ARGUMENT

### I. A STUDENT’S FUNDAMENTAL RIGHT TO EDUCATION INCLUDES PREPARATION TO SUCCEED IN THE MODERN ECONOMY.

Under the California Constitution, “education is a fundamental interest.” (*Serrano v. Priest* (1976) 18 Cal.3d 728, 766 (*Serrano II*); see also *Serrano v. Priest* (1971) 5 Cal.3d 584, 589 (*Serrano I*.) One of the central reasons the California Supreme Court recognizes education as a fundamental right is because of the “indispensable role which education plays in the modern industrial state,” including that it is “a major determinant of an individual’s chances for *economic* and social success in our competitive society.” (*Serrano I*, at p. 605, emphasis added.) Education is “essential” in “preserving an individual’s opportunity to compete successfully in the economic marketplace.” (*Serrano I*, at p. 609.) In other words, education is a fundamental right because, among other reasons, it is necessary to preparing students for work—to making them



productive citizens who contribute to and share in the economic bounty of a great state.

The notion that the fundamental right to education includes preparation for participation in the economy dates back to the very origins of the American public school system. (See *Conn. Coalition for Justice in Educ. Funding, Inc. v. Rell* (2010) 295 Conn. 240, 293 [990 A.2d 206] (*Conn. Coalition*) [Connecticut’s Code of Laws from 1650 recognized the importance of educating children for “ ‘some honest lawfull . . . labour or [e]mployment, either in husbandry, or some other trade proffitable for themselves and the Commonwealth’ ”]; see also, e.g., *Paynter v. State* (2003) 100 N.Y.2d 434, 455 [797 N.E.2d 1225] [in 1793 New York, education was recognized as being necessary to enable children “when they come forward in active life, to transact with accuracy and despatch the business arising from their daily intercourse with each other”]; *McDuffy v. Sect. of Executive Office of Educ.* (1993) 415 Mass. 545, 545-548 [615 N.E.2d 516] (*McDuffy*) [Massachusetts’s constitution, adopted in 1779-1780, included a provision for public schools to promote “agriculture, arts, sciences, commerce, trades, manufactures”]; *Edgewood Independent School Dist. v. Kirby* (Tex. 1989) 777 S.W.2d 391, 395-396 [legislators at 1875 Texas Constitutional Convention recognized the importance of education “for the growth of the economy”]; *Pauley v. Kelly* (1979) 162 W.Va. 672, 685 [255 S.E.2d 859] [recounting enactment by Minnesota Constitutional Convention in 1857 of constitutional provision for public schools to promote “Agriculture, Arts, Science, Commerce, Trade, Manufactories”].)

This early understanding of education was confirmed by the United States Supreme Court in its seminal case *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873] (*Brown*). In *Brown* the Supreme Court explained that public education is “perhaps the most important function of state and local governments” because it “is a principal instrument in . . . preparing [a child] for later professional training.” (*Id.* at p. 493.)

In the decades since *Brown*, state courts have nearly universally recognized that the right to a sound basic education includes preparation for economic productivity. (See, e.g., *Davis v. State* (S.D. 2011) 804 N.W.2d 618, 627 [state constitutional right to an education includes training to function as “competitors both economically and intellectually”]; *Conn. Coalition, supra*, 990 A.2d at p. 212 [state constitution requires educational standards that will prepare students for productive employment and to contribute to the state’s economy]; *Londonderry School Dist. SAU No. 12 v. State* (2006) 154 N.H. 153, 157 [907 A.2d 988] (*Londonderry*) [constitutionally adequate education includes teaching “[s]kills for lifelong learning, including interpersonal and technological skills, to enable them to learn, work, and participate effectively in a changing society”]; *Campaign for Fiscal Equity, Inc. v. State* (2003) 100 N.Y.2d 893, 905 [801 N.E.2d 326] (*Campaign for Fiscal Equity*) [a sound basic education includes preparation for employment]; *Abbott by Abbott v. Burke* (1997) 149 N.J. 145, 166-167 [693 A.2d 417] (*Abbott*) [constitutionally adequate education “will prepare public school children for a meaningful role in society, one that will enable them to compete effectively in the economy and to contribute and to

participate as citizens and members of their communities”]; *DeRolph v. State* (1997) 78 Ohio St.3d 193, 197 [677 N.E.2d 733] [the mission of education includes preparing students to enjoy productive employment]; *Leandro v. State* (1997) 346 N.C. 336, 345 [488 S.E.2d 249] [“[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate”]; *Campbell County School Dist. v. State* (Wyo. 1995) 907 P.2d 1238, 1259 [the state constitution requires students be given the opportunity to become economically competitive]; *Unified School Dist. No. 229 v. State* (1994) 256 Kan. 232, 258 [885 P.2d 1170] [same]; *Roosevelt Elementary School Dist. No. 66 v. Bishop* (1994) 179 Ariz. 233, 245 [877 P.2d 806] [the state constitution guarantees educational opportunity designed to enable students to compete successfully in the economic marketplace]; *Seattle School Dist. No. 1 of King County v. State* (1978) 90 Wash.2d 476, 518 [585 P.2d 71] [a constitutionally adequate education includes preparation for competing in the labor market]; see also, *Leandro*, at p. 347 [a constitutionally adequate education requires “sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and . . . sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society”]; *McDuffy, supra*, 615 N.E.2d at p. 554] [same]; *Opinion of the Justices* (Ala. 1993) 624 So.2d 107, 107-108 [same]; *Rose v. Council for Better Educ., Inc.* (Ky. 1989) 790 S.W.2d 186, 212 [same].)

Thus, in California, as throughout the United States, a public school system that fails to provide students with a fair and equal opportunity to develop the skills necessary to compete in the labor market and contribute to the economy burdens the fundamental rights of students.

## **II. CALIFORNIA’S STUDENTS NEED AND DESERVE TO BE PREPARED TO ENTER THE 21ST CENTURY WORKFORCE.**

### **A. Teaching 21st century skills is critical for students individually and California as a whole.**

“[A] sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in *contemporary* society.” (*Campaign for Fiscal Equity, supra*, 801 N.E.2d at p. 330, emphasis added.)

The economy of the developed world in the 21st century is characterized by an increasingly service-oriented, technological, and globalized marketplace “driven by information, knowledge, innovation and creativity.” (American Assn. of Colleges of Teacher Education & the Partnership for 21st Century Skills, *21st Century Knowledge and Skills in Educator Preparation* (Sept. 2010) p. 7 <<http://goo.gl/ynRqpa>> [as of June 1, 2015] (hereafter AACTE).) This “knowledge-based economy” requires skilled—often highly skilled—workers, as compared to the economy of half a century ago which was dominated by unskilled labor. (Organization for

Economic Co-operation and Development, *The Knowledge-Based Economy* (1996) pp. 7, 10 <<http://goo.gl/cz3NCY>> [as of June 2, 2015]; see AACTE, at p. 6; U.S. Dept. of Commerce et al., *21st Century Skills for 21st Century Jobs* (Jan. 1999) p. 6 <<http://inpathways.net/21stjobs.pdf>> [as of June 2, 2015] (hereafter USDC); Carnevale et al., *Help Wanted: Projections of Jobs and Education Requirements Through 2018* (June 2010) Georgetown Univ. Center on Education and the Workforce, pp. 15-16 <<http://goo.gl/PFPiyK>> [as of June 2, 2015] (hereafter Carnevale, Help Wanted).)

Workers in the “knowledge-based economy” need not only basic skills like reading, writing, and arithmetic, but also technical, organizational, and interpersonal skills, such as computer literacy, creative and analytical thinking, and the ability to communicate effectively with others from diverse backgrounds. (USDC, *supra*, at p. 2; Nat. Education Assn., *Preparing 21st Century Students for a Global Society: An Educator’s Guide to the “Four Cs,”* pp. 5, 9 <<http://goo.gl/s0x6dd>> [as of June 2, 2015] (hereafter NEA).) In short, workers in the “knowledge-based economy” of the 21st century need *knowledge* in order to compete and be productive.

Thus, to prepare California’s future workers for the 21st century economy, our schools must teach students 21st century skills and impart the knowledge students need to succeed in the modern, global labor market. These skills include reading, writing, math, geography, social studies, science, art, and foreign language, as well as communication, creativity, critical thinking, collaboration, life skills, and technological skills. (NEA, *supra*, at p.

5; see also *Abbott, supra*, 693 A.2d at p. 425 [“ ‘workplace readiness standards’ ” “incorporate career-planning skills, technology skills, critical-thinking skills, decision-making and problem-solving skills, self-management, and safety principles’ ”]; *Londonderry, supra*, 907 A.2d at p. 991 [equitable education includes skill in reading, writing, English, math, science, social studies, geography, arts, language, wellness, technology, communication, cooperation, and creative and critical thinking]; Microsoft, *Building a 21st Century Workforce*, at p. 1 <<http://goo.gl/KnNSaJ>> [as of June 2, 2015] (hereafter Microsoft) [more than three-quarters of American jobs will require some level of technology and computer skills].) Although these skills have always been part of a good education, today, “changes in our economy and the world mean that collective and individual success [now] *depends* on having such skills.” (Rotherham & Willingham, *21st Century Skills: The Challenges Ahead*, Teaching for the 21st Century (Sept. 2009) vol. 67, No. 1, available at <<http://goo.gl/Q9UhQu>> [as of June 2, 2015] (hereafter Rotherham)); see also AACTE, *supra*, at p. 7 [“While skills like self-direction, creativity, critical thinking, and innovation may not be new to the 21st century, they are newly relevant in an age where the ability to excel at non-routine work is not only rewarded, but expected as a basic requirement”].)

Further, if California is to prosper economically in the 21st century, more of its future workers will need to hone their 21st century skills through higher education. (Johnson & Sengupta, *Closing the Gap: Meeting California’s Need for College Graduates*, Public Policy Inst. of Cal. (2009) p. 1 <<http://goo.gl/H58OMa>> [as of

May 22, 2015] (hereafter Johnson); see also Bohn, *California's Need for Skilled Workers*, Public Policy Inst. of Cal. (Sept. 2014) p. 4 <<http://goo.gl/kSxYot>> [as of June 2, 2015] (hereafter Bohn) ["It is clear that education beyond high school will play a pivotal role in preparing workers for the jobs of the future"].) The fastest-growing occupations in California include jobs in healthcare, research and marketing, construction, and science and technology. (See Lopez & Wilson, *Ten Fastest-Growing Jobs in California*, L.A. Times (Aug. 2, 2013) <<http://goo.gl/CE0fet>> [as of June 2, 2015].) Most of these jobs require an advanced education, or at the very least a meaningful high school education. (See Carnevale et al., *Recovery: Job Growth and Education Requirements Through 2020*, Georgetown Univ. Center on Education and the Workforce (June 2013) pp. 16-17 <<http://goo.gl/N4QgNO>> [as of June 2, 2015].) Indeed, projections estimate that over the next decade, California will need 61% of its workforce to have at least completed high school and taken some post-high school training, and 41% of its workforce to have a college degree. (Johnson, at pp. 6-7; see also Microsoft, *supra*, at p. 1 [the "vast majority of newly created jobs" this century will require college or other post-high school training]; Carnevale et al., *Help Wanted: Projections of Jobs and Education Requirements Through 2018: State-Level Analysis* (June 2010) Georgetown Univ. Center on Education and the Workforce, p. 19 <<http://goo.gl/6KKfXC>> [as of June 2, 2015].)

Therefore, California's K-12 schools must prepare students academically to graduate from high school—with the actual skill level commensurate with that diploma—and then to succeed in

college so they can then, in turn, succeed in filling the jobs of the 21st century. Both the personal development of our children and the prosperity of our state as a whole depends on it. Only with a highly-educated populace armed with 21st century skills will California be able to reinvigorate and build its economy and tax base, compete nationally and internationally, and address some of the most critical, complex issues it is expected to face over the next few decades, from delivering water to developing infrastructure to providing healthcare in the face of rising costs. (AACTE, *supra*, at p. 6; Tatum et al., *Unsustainable California: The Top 10 Issues Facing the Golden State*, Cal. Common Sense (June 11, 2014) p. 4 <<http://cacs.org/pdf/52.pdf>> [as of June 2, 2015].)

**B. Too many California students are not receiving training in the basic skills necessary to satisfy the needs of California businesses and to compete in the 21st century labor market.**

Despite the *Brown* Court’s admonition that “[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education,” (*Brown, supra*, 347 U.S. at p. 493), “[t]here is widespread consensus . . . that our education systems are failing to adequately prepare all students with the essential 21st century knowledge and skills necessary to succeed in life, career and citizenship” (AACTE, *supra*, at p. 6).

Although, as stated above, California will need 41% of its workforce to have a college degree by the year 2025, current



projections indicate that only 35% of the workforce will have such a degree. (Johnson, *supra*, at p. 1.) Today in California, the rate of high school students who directly enroll in a four-year college is among the lowest in the country. (*Id.* at pp. 1-2.) Of those who enroll, many do not graduate. Graduation rates in the University of California system are about 80%, but graduation rates in the larger California State University (CSU) system hover at around 50%. (*Id.* at p. 19; Public Policy Institute of Cal., *California's Future* (Feb. 2015) p. 27 <<http://goo.gl/zAZ5qr>> [as of June 2, 2015] (hereafter PPIC); see generally OECD, *Education at a Glance 2013: OECD Indicators* (2013) p. 64 <<http://goo.gl/vzQWnw>> [as of June 2, 2015] [United States college graduation rates are about 50%, well below the OECD average of about 70%.])

A key factor in the low college success rate is the failure of K-12 schools to prepare students for college-level work. (See Johnson, *supra*, at p. 12 [many students who drop out of college do so because they are not succeeding academically; better preparation in elementary and secondary school will reduce the college dropout rate]; PPIC, *supra*, at p. 27 [*Lack of preparation for college-level work* and lack of financial resources keep many students from moving ahead in the higher education system,” emphasis added]; see also Reed, *California's Future Workforce: Will There Be Enough College Graduates?*, Public Policy Institute of Cal. (2008) p. 13 <<http://goo.gl/5sE4RC>> [as of June 2, 2015] [“The quality of education in the public K–12 system is a precursor to success in college”].) According to CSU, only 57.3% of its 2013 incoming freshmen were proficient in both math and English. (Cal. State

Univ., *Fall 2013 Final Regularly Admitted First-time Freshmen Proficiency Systemwide* (2013) <<http://goo.gl/G3YiqP>> [as of June 2, 2015].)

And the lack of proficiency in basic subject areas is apparent long before students reach high school graduation. In 2013, of the students who took the California Standards Test, 56.3% scored proficient in English-language arts, 49.3% were proficient in history, 51.2% were proficient in math, and 59.1% were proficient in science. (Cal. Dept. of Education Assessment and Accountability Division, *2013 STAR Test Results* <<http://goo.gl/7CDXMJ>> [as of June 3, 2015].) In other words, nearly 40-50% of students in middle and high school are below grade level.

It goes without saying that students who have not mastered basic reading, writing, math, social studies, and science skills are far behind in developing the advanced applied skills required to succeed in college and the 21st century workplace. (Zinshteyn, *The Skills Gap: America's Young Workers Are Lagging Behind*, The Atlantic (Feb. 17, 2015) <<http://goo.gl/DNUdWu>> [as of June 3, 2015] [testing company “analysis found that more than half of U.S. millennials lack proficiency when it comes to applying reading and math skills at the workplace”].) Employers report that even many high school graduates are deficient in basic reading, writing, math, critical thinking, and work ethic. (The Conference Board et al., *Are They Really Ready to Work? Employers' Perspectives on the Basic Knowledge and Applied Skills of New Entrants to the 21st Century U.S. Workforce* (2006) p. 11 <<http://goo.gl/xDxrJN>> [as of June 3, 2015]; Klien et al., *Independent Task Force Report No. 68: U.S.*

*Education Reform and National Security*, Council on Foreign Relations (March 2012) ix, 3 <<http://goo.gl/FWAo58>> [as of June 3, 2015] (hereafter Klien).)

Between the students who never graduate high school and those who do graduate but without actually having mastered the skills required to succeed in college, California students will struggle to find productive employment and California businesses will lack qualified employees who can keep California competitive in the global economy. For instance, an OECD study from 2006 found that 15-year-olds in the United States ranked 25th out of 30 countries in applied math skills and 24th out of 30 in applied science skills. (McKinsey & Co., *The Economic Impact of the Achievement Gap in America's Schools: Summary of Findings* (Apr. 2009) pp. 7, 18 <<http://goo.gl/oX6Gu8>> [as of June 3, 2015] (hereafter McKinsey).) California contributes to this international skills gap. Indeed, even between California and other states with similar demographics, California students are being outmatched. (See Mongeau, *California Students Among Worst Performers on National Assessment of Reading and Math*, EdSource (Nov. 7, 2013) <<http://goo.gl/ZvQn9a>> [as of June 3, 2015] [on the National Assessment of Educational Progress test in 2013, California was “among the 10 lowest performing states in the country”]; McKinsey, at p. 14 [as between California and Texas, Texas students performed better in math despite similar demographic challenges]; Klien, *supra*, at pp. 20 [California is “below average” in math scores]; see *id.* at p. 22 [California has a 70 percent high school graduation rate—the 10th lowest].) As a result, Californians, like

other Americans, are losing out on access to the high-value jobs that countries with top performing students, such as Finland and Korea, are taking. (McKinsey, at p. 7.) Strikingly, this achievement gap between American students and international students causes more harm to the American economy than did the recent recession. (*Id.* at pp. 5-6, 18; Auguste et al., *The Economic Cost of the US Education Gap*, McKinsey & Co. (June 2009) <<http://goo.gl/eXaoxF>> [as of June 2, 2015] (hereafter Auguste).)

California schools must take steps to give all students equal and better opportunities to develop the 21st century skills necessary to closing this achievement gap, both as a matter of the fundamental rights of students and practical economic necessity.

**III. THE CHALLENGED STATUTES SHOULD BE ENJOINED BECAUSE THEY ARE CONTRIBUTING TO OUR SCHOOLS' FAILURE TO PROVIDE ALL STUDENTS EQUAL OPPORTUNITIES TO OBTAIN THE EDUCATION THEY NEED FOR THE ECONOMY OF TODAY AND TOMORROW.**

**A. Effective teachers are critical to teaching students 21st century skills.**

The evidence at trial established that the most important in-school factor affecting student achievement is the quality of the student's teacher. (See RB 19; see also Ambassador School of Global Leadership & L.A. Unified School Dist., *Qualities of a 21st*

*Century Teacher* <<https://goo.gl/XplrII>> [as of June 3, 2015] [in preparing students for a 21st century environment, “[t]eachers are all-important not only to ensure student achievement, but also to create a school culture of equity, excellence and relevance”].) If our students are going to master 21st century skills, then, the teachers must be able and prepared to teach those skills. (See Nat. Education Assn., *Statement of Principles: 21st Century Skills and the Reauthorization of the NCLB/ESEA* <<http://www.nea.org/home/17154.htm>> [as of June 3, 2015] [students cannot master 21st century skills unless their teachers are able to provide appropriate instruction in those skills]; AACTE, *supra*, at p. 2 [“new teacher candidates must be equipped with 21st century knowledge and skills and learn how to integrate them into their classroom practice for our nation to realize its goal of successfully meeting the challenges of this century”].)

A classroom that teaches 21st century skills may not look like a traditional classroom. Teaching the skills for this century requires students to practice problem-solving, project-based learning, and collaboration, which can pose classroom management problems for unskilled teachers. (See Rotherham, *supra*.) Indeed, being a highly-effective teacher in that kind of classroom is “demanding.” (*Ibid.*) But unfortunately, not all teachers are willing and able to effectively adapt their teaching methods to incorporate these skills into the curriculum. (See *ibid.*) Indeed, some teachers are grossly ineffective even when it comes to teaching basic academic skills. (See RB 2, 58.)

Professional development is one way to prepare our teachers to be effective in teaching 21st century skills and incorporating more collaborative learning in the classroom. (AACTE, *supra*, at pp. 3, 6; Rotherham, *supra*.) But improved professional development will not work “without broader reforms in how teachers are recruited, selected, and deselected.” (Rotherham, *supra*.) Simply put, if our students are going to learn 21st century skills, schools need the ability to encourage those teachers who are effective in teaching those skills—and eliminate those teachers who are not.

**B. The combined effect of the challenged statutes is to entrench teachers who are unsuccessful and turn away those who can best prepare students for the 21st century workforce.**

This lawsuit challenges three aspects of the Education Code: the provision requiring tenure decisions to be made by March 15 of the teacher’s second year (Ed. Code, § 44929.21(b)); the provisions governing tenured teacher termination (Ed. Code, §§ 44934, 44938(b), and 44944); and the provision requiring layoffs to be based on seniority (Ed. Code, § 44955). Under these statutes, schools are required to decide whether to grant a teacher tenure, thus triggering onerous dismissal rules that are impracticable and costly for schools to satisfy, with fewer than two years of information about that teacher—in other words, before the school has reliable information about that teacher’s effectiveness. (RB 3,

9-12, 25-38, 59-60.) Additionally, when schools must conduct reductions in force, they do not have the power to choose to dismiss the least effective teachers first. (RB 3-4, 13-15, 38-40, 60.) Thus, through the combined effect of these statutes, grossly ineffective teachers too easily can become essentially permanent fixtures in our schools. (See RB 3, 44; see generally Levin & Quinn, *Missed Opportunities: How We Keep High-Quality Teachers Out of Urban Classrooms*, The New Teacher Project (2003) pp. 5-8, 10-17, 20-27 <<http://goo.gl/VqILl6>> [as of June 3, 2015].) And, schools are prevented from selecting the most qualified teachers to actually teach students. (See RB 3-4, 38-39.)

As explained *ante* Part II.B, the most important step our schools can take to help close the achievement gap, ready our students for college, and prepare our students for work in the 21st century, is to ensure that all students have equal access to effective teachers. These statutes operate counter to that goal by elevating seniority over the ability to improve student achievement, and undermining our schools' ability to impose quality controls on their staff. Such quality controls are necessary for ensuring that all students have equal access to the sorts of teachers that are capable of teaching the 21st century skills students deserve to learn and need to succeed.

**C. The challenged statutes disproportionately burden minority and low-income students who have much to offer California businesses in an increasingly diverse and global economy.**

If the irrationality of a scheme that protects a teacher's job irrespective of the teacher's ability to teach were not enough, the evidence demonstrated, and the trial court found, that low-income and minority students are assigned to grossly ineffective teachers in disproportionate numbers as a result of the challenged statutes. (RB 4, 45-50.) Specifically, the challenged statutes compel school districts to retain grossly ineffective teachers who will not leave voluntarily. Those teachers then accumulate in schools with high poverty and high minority populations because the challenging environments in such schools lead to high teacher turnover rates, leaving vacancies to be filled by those grossly ineffective teachers who refuse to leave the district but have nowhere else to go. (RB 4, 44-50, 61-62.)

As a consequence of this accumulation of the least effective teachers in the schools with the highest poverty rates and largest minority populations, low-income and minority students are most likely to be assigned to grossly ineffective teachers. (RB 46, 49-50.) Because every year a student is assigned to a grossly ineffective teacher results in learning deficits (see RB 2, 21-24, 58, 86), the consequences of being assigned to grossly ineffective teachers compound over time, causing students at the schools where those teachers accumulate to fall too far behind to ever really catch up.



(See *ibid.*) The ultimate result is that the low-income and minority students are less likely to make it to high school graduation, let alone enroll in and graduate from college. (See RB 2, 40.) In addition to being fundamentally unjust, causing poor and minority students to suffer disproportionately from ineffective academic instruction is devastating to our economy.

A substantial contributing factor to the skills gap described above (see *supra*, Part II.B) is the underperformance of low-income and minority children compared to their more privileged peers. On average, African American and Latino students are several grade levels behind their white counterparts. (McKinsey, *supra*, at p. 9.) In 2011 in California, the high school dropout rate was 8.9% for white students, but 17.7% for Latino students and 24.7% for African American students. (Cal. Dept. of Education, *Cohort Graduation and Dropout Rate Results 2009-10 to 2010-11* (June 27, 2012) <<http://goo.gl/UYn9Ou>> [as of June 3, 2015].)

The achievement gap between white and Latino students in California is particularly significant. Although 51% of California's K-12 students are Latino, that demographic has among the lowest average math and reading scores in the nation. (The Education Opportunity Monitoring Project, Center for Educational Policy Analysis, Stanford University, *Racial and Ethnic Achievement Gaps* <<http://goo.gl/dJ9JMk>> [as of June 3, 2015]; Bergmann, *Racial Gap in Education Puts Drag on Economy*, CA Economic Summit (Oct. 2, 2014) <<http://goo.gl/8PhLnu>> [as of June 3, 2015] (hereafter Bergmann); Rich, *Test Scores of Hispanics Vary Widely Across 5 Most Populous States, Analysis Shows*, N.Y. Times (Feb. 21, 2013)

<http://goo.gl/fiQ3rr> [as of June 3, 2015].) Given that, it is no surprise that this demographic also has among the lowest college enrollment rates. (Johnson, *supra*, at p. 7.)

It is these underperforming students who provide the most promising source for expanding California's ability to fill 21st century jobs. (See Bergmann, *supra* [closing the racial achievement gap would enable Californians to fill the high-paying technology jobs employers currently must fill with foreign workers]; Bohn, *supra* [although Latinos have been making gains in entering higher education, under current conditions their "educational attainment is not projected to accelerate enough to meet future employer skill needs"].) Indeed, if the achievement gap between students of different ethnic, racial, and income backgrounds could be closed, it would enrich the American economy—of which California is the largest part—by *hundreds of billions* of dollars. (Auguste, *supra*; McKinsey, *supra*, at pp. 5-6; Center for Continuing Study of the California Economy, *Numbers in the News: California Once Again the World's 8th Largest Economy* (July 2014) <http://goo.gl/3aYW3U> [as of June 3, 2015].) California cannot afford to allow the inequitable distribution of teachers to impede the educational advancement of low-income and minority students, upon whose educational success our state's future economic prosperity depends.

Moreover, beyond providing the most promising source of new human capital, the students disproportionately burdened by the challenged statutes are the same students who can add value to their workplaces by bringing diverse perspectives to the conference

room table. “[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” (*Grutter v. Bollinger* (2003) 539 U.S. 306, 330 [123 S.Ct. 2325, 156 L.Ed.2d 304].) Today, businesses “can no longer dictate to consumers in this increasingly globalized and diversified world;” they must diversify internally in order to understand and meet the needs of their diverse consumer base. (Gupta, *Understand the Importance of Diversity*, Bloomberg Business (Jan. 12, 2011) <<http://goo.gl/2vbN0f>> [as of June 3, 2015]; see also Smedley, *The evidence is growing—there really is a business case for diversity*, Financial Times (May 15, 2014) [American Sociological Association study found that a one percent increase in ethnic diversity leads to a nine percent rise in sales revenue].) And they must diversify internally in order to generate new ideas for economic development; businesses are increasingly recognizing that diversity is “a key driver of innovation” that “is a critical component of being successful on a global scale.” (Forbes Insights, *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce* (July 2011) p. 3 <<http://goo.gl/EDUvC>> [as of June 3, 2015].) Thus, unless students with diverse perspectives are given equal opportunities to develop the basic skills necessary to qualify for the jobs California businesses need to fill, California businesses will be deprived of the diverse workforce critical to taking their businesses to the next level.

**D. Given that the challenged statutes systematically deprive students of equal opportunities to obtain 21st century skills, they should be enjoined.**

Because of “the unique importance of public education in California’s constitutional scheme” (*Butt v. State of California* (1992) 4 Cal.4th 668, 683 (*Butt*)), and the relative lack of political power wielded by students, who cannot vote, the courts play an important role in ensuring that statutes affecting education first and foremost promote educational objectives. Education statutes that arbitrarily protect the jobs of adults at the expense of student learning should not be countenanced under any standard of review.

Here, because the challenged statutes result in systematically unequal educational opportunities for students in schools with high student poverty rates and large numbers of minority students, the statutes should be enjoined on equal protection grounds.

The California Constitution guarantees to all California public school students a fundamental right to “basic equality of educational opportunity.” (*Butt, supra*, 4 Cal.4th at p. 685.) State classifications impacting this fundamental right are subject to strict and searching judicial review. “[I]n applying our state constitutional provisions guaranteeing equal protection of the laws we shall . . . apply strict and searching judicial scrutiny’ to claims of discriminatory educational classifications.” (*Id.* at p. 683, quoting *Serrano II, supra*, 18 Cal.3d at p. 767.)

“Because access to a public education is a uniquely fundamental personal interest,” a disparate impact in access to

education can violate this equal protection guarantee “even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents.” (*Butt, supra*, 4 Cal.4th at p. 681.) No further showing of state action is required. (See *ibid.*)

The trial court found that the combined effect of the challenged statutes is to deprive students in schools with high student poverty rates and large minority populations of equal access to the most important in-school educational resource available: teachers. (See *ante*, Part III.C.) The challenged statutes substantially burden the students in those suspect classes by depriving them of the opportunity to learn the skills they need to prosper in the 21st century marketplace. By doing so, the statutes violate the equal protection guarantee of the California Constitution.

**CONCLUSION**

For the foregoing reasons, this court should affirm the decision of the trial court.

September 14, 2015 **HORVITZ & LEVY LLP**  
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**CERTIFICATE OF WORD COUNT  
(Cal. Rules of Court, rule 8.204(c)(1).)**

The text of this brief consists of 6,266 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: September 14, 2015



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Emily V. Cuatto

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

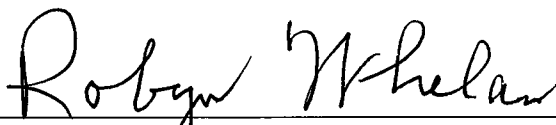
On September 14, 2015, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF; *AMICI CURIAE* BRIEF OF SILICON VALLEY LEADERSHIP GROUP, CALIFORNIA BUSINESS ROUNDTABLE, FOUNDATION FOR EXCELLENCE IN EDUCATION, ORANGE COUNTY BUSINESS COUNCIL, CALIFORNIA CHAMBER OF COMMERCE AND VALLEY INDUSTRY & COMMERCE ASSOCIATION IN SUPPORT OF RESPONDENTS BEATRIZ VERGARA et al.** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 14, 2015, at Encino, California.

  
\_\_\_\_\_  
Robyn Whelan



## SERVICE LIST

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Court of Appeal No. B258589

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