

MAY 14 2012

John A. Clarke, Executive Officer/Clerk
BY *[Signature]* Deputy
Regina Juliano

1 GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous, Jr. (SBN 132099)
2 *tboutrous@gibsondunn.com*
Theane Evangelis Kapur (SBN 243570)
3 333 South Grand Avenue
Los Angeles, CA 90071
4 Telephone: 213.229.7000, Facsimile: 213.229.7520

5 Enrique A. Monagas (SBN 239087)
Joshua S. Lipshutz (SBN 242557)
6 555 Mission Street, Suite 3000
San Francisco, CA 94105
7 Telephone: 415.393.8200, Facsimile: 415.393.8306

8 Theodore B. Olson (SBN 38137)
1050 Connecticut Avenue, N.W.
9 Washington, DC 20036
Telephone: 202.955.8500, Facsimile: 202.467.0539

10 Attorneys for Plaintiffs Beatriz Vergara, et al.

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF LOS ANGELES

BC484642

14 BEATRIZ VERGARA, a minor, by
15 Alicia Martinez, as her guardian ad litem;
ELIZABETH VERGARA, a minor, by
16 Alicia Martinez, as her guardian ad litem;
CLARA GRACE CAMPBELL, a minor, by
17 Lauren Campbell, as her guardian ad litem;
KATE ELLIOTT, a minor, by Terri Elliott, as
18 her guardian ad litem; HERSCHEL LISS, a
minor, by Lisa Liss, as his guardian ad litem;
19 JULIA MACIAS, a minor, by Jose Macias, as
her guardian ad litem; DANIELLA
20 MARTINEZ, a minor, by Karen Martinez, as
her guardian ad litem; and RAYLENE
21 MONTERROZA, a minor, by Martha
Monterroza, as her guardian ad litem,
22
23 Plaintiffs,

vs.

24 STATE OF CALIFORNIA; EDMUND G.
BROWN, JR., in his official capacity as
25 Governor of California; TOM TORLAKSON,
in his official capacity as State Superintendent
26 of Public Instruction; CALIFORNIA
DEPARTMENT OF EDUCATION; STATE
27 BOARD OF EDUCATION; LOS ANGELES
UNIFIED SCHOOL DISTRICT; and ALUM
28 ROCK UNION SCHOOL DISTRICT,
Defendants.

CASE NO. _____

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Trial Date: None Set

1 Plaintiffs Beatriz Vergara, Elizabeth Vergara, Clara Grace Campbell, Kate Elliott, Herschel
2 Liss, Julia Macias, Daniella Martinez, and Raylene Monterroza complain of Defendants and allege:

3 **PRELIMINARY STATEMENT**

4 1. California has a long and celebrated history of leadership and innovation in educating
5 its children. Unfortunately, recent studies show that California’s public educational system has fallen
6 behind, achieving educational outcomes far inferior to the results achieved by other states.

7 According to the U.S. Department of Education, California’s public schools rank 46th in the nation in
8 fourth-grade reading and 47th in the nation in eighth-grade math. California’s public schools are
9 failing the very children whose interests they are meant to serve.

10 2. Worse, California is inflicting this harm on itself: A handful of outdated laws passed
11 by the California legislature are preventing school administrators from maintaining or improving the
12 quality of our public educational system by denying them the flexibility to make teacher employment
13 decisions driven by the needs of their students. Instead, these laws force school administrators to
14 grant new teachers “permanent employment” after only 18 months on the job—well before the
15 teachers’ effectiveness can be determined—and force school administrators to keep teachers in the
16 classroom long after they have demonstrated themselves to be grossly ineffective. From 2009 to
17 2011, 23 states have started designing teacher evaluation standards that require objective evidence of
18 student growth. California is not on that list.

19 3. This problem affects California public school students statewide. In any given school
20 year, any student might be arbitrarily assigned to a grossly ineffective teacher who should not be
21 teaching. Studies show that students who are unfortunate enough to be assigned to two or more
22 grossly ineffective teachers in a row are unlikely ever to catch up to their peers. But the problem is
23 worse for students at schools that serve predominantly minority and economically disadvantaged
24 populations because those schools have a disproportionate share of grossly ineffective teachers. In
25 certain school districts, students of color are two to three times more likely to have bottom-quartile
26 teachers than their white and Asian peers. Thus, the laws at issue perpetrate and widen the very
27 achievement gap that education is supposed to eliminate.

28

1 8. California’s public-school teachers play a vital role in providing California students
2 with the education to which they are entitled. Recent studies have confirmed what students and
3 parents have always known: The key determinant of educational effectiveness is teacher quality.
4 (See, e.g., Chetty et al., Nat. Bur. of Economic Research, The Long-Term Impacts of Teachers:
5 Teacher Value-Added and Student Outcomes in Adulthood (Working Paper 17699, Dec. 2011).)
6 Students assigned to effective teachers are more likely to attend college, attend higher-quality
7 colleges, earn more, live in higher socioeconomic status neighborhoods, save more for retirement,
8 and are less likely to have children during their teenage years. (*Ibid.*)

9 9. Although the majority of teachers in California are providing students with a quality
10 education, some California K-12 public school students are being taught by teachers who fail to
11 provide their students with the most basic tools necessary to compete in the economic marketplace or
12 to participate as a citizen in our democracy. Although the number of such grossly ineffective
13 teachers may be small, their impact on students is enormous. Even when they are well-intentioned,
14 as most teachers are, such grossly ineffective teachers have an enduring and negative effect on the
15 lives of their students.

16 10. The hiring and continued employment of such grossly ineffective teachers in the
17 California public school system is the direct result of the continued enforcement of five California
18 statutes (the “Challenged Statutes”) that confer permanent employment on California teachers,
19 effectively prevent the removal of grossly ineffective teachers from the classroom, and, in economic
20 downturns, require layoffs of more competent teachers.¹ The Challenged Statutes prevent school
21 administrators from prioritizing—or even meaningfully considering—the interests of their students in
22 having effective teachers when making employment and dismissal decisions. By forcing these
23 critical decisions to be made primarily or exclusively on grounds *other* than students’ need for
24 effective teachers, and therefore perpetuating the employment within the school system of a number
25 of grossly ineffective teachers who do not serve students’ needs and who, in fact, have a real and
26

27
28 ¹ The Challenged Statutes are California Education Code section 44929.21, subdivision (b), section
44934, section 44938, subdivisions (b)(1) and (2), section 44944, and section 44955. (See *infra*,
¶¶ 43-67.)

1 appreciably negative impact on students' education, these laws infringe upon California students'
2 fundamental right to education.

3 11. A series of recent investigative reports is illustrative. The *Los Angeles Times* found
4 that California teachers achieve "permanent employment" status with alarming ease. Following a
5 cursory performance evaluation, or sometimes none at all, probationary teachers in the Los Angeles
6 Unified School District ("LAUSD") secured permanent employment at a staggering rate exceeding
7 98 percent. Once permanently employed, those same teachers become protected by "laborious and
8 labyrinthine" dismissal policies that require administrators to endure "years of investigation, union
9 grievances, administrative appeals, court challenges and re-hearings" before they can terminate any
10 tenured teacher for cause. *LA Weekly* found, for example, that the LAUSD spent \$3.5 million from
11 2000 to 2010 in efforts to dismiss just seven of the district's 33,000 employees for inadequate
12 classroom performance. (Barrett, *LAUSD's Dance of the Lemons: Why Firing the Desk-Sleepers,*
13 *Burnouts, Hotheads and Other Failed Teachers Is All but Impossible*, LA Weekly (Feb. 11, 2010).)
14 The legal battles averaged \$500,000 in cost, sometimes exceeded five years in length, and ultimately
15 resulted in the dismissal of only four employees. (*Ibid.*) Because "[b]uilding a case for dismissal is
16 so time-consuming, costly and draining for principals and administrators," the *Los Angeles Times*
17 found it "rare" for a teacher ever to be dismissed for poor performance. (Song, *Failure Gets a Pass:*
18 *Firing Tenured Teachers Can Be a Costly and Tortuous Task*, L.A. Times (May 3, 2009).) Many
19 principals and administrators do not even attempt to remove ineffective teachers, except in the most
20 egregious cases of illegal or immoral conduct. (*Ibid.*) And even in those egregious cases—for
21 instance, where a teacher mocks an eighth grader recently hospitalized for attempted suicide, tells the
22 suicidal boy to "[c]arve deeper next time," and allows other students to instruct the boy on how to
23 commit suicide—teachers protected by the California statutes at issue remain in the classroom.
24 (*Ibid.*)

25 12. The Challenged Statutes, on their face and as applied, are therefore unconstitutional.
26 California students assigned to grossly ineffective teachers who are employed and continue teaching
27 as a direct result of the Challenged Statutes are denied equal access to the fundamental right to
28 education required by article IX, sections 1 and 5 of the Constitution of the State of California. The

1 presence of grossly ineffective teachers in the California K-12 public school system creates arbitrary
2 and unjustifiable inequality among students: Even within the same school, some students are taught
3 by teachers who fail to teach at a minimally effective level, while other students receive an education
4 from teachers of average or superior effectiveness. As a result of these arbitrary distinctions, children
5 of substantially equal age, aptitude, motivation, and ability do not have substantially equal access to
6 education. Because education is a fundamental interest under the California Constitution, the statutes
7 that dictate this unequal, arbitrary result violate the equal protection provisions of the California
8 Constitution. (Art. I, § 7; *id.* art. IV, § 16.)

9 13. Moreover, as a result of the same Challenged Statutes, grossly ineffective teachers are
10 disproportionately assigned to schools serving predominantly minority and economically
11 disadvantaged students. Those statutes thus make the quality of education provided to school-age
12 children in California a function of race and/or the wealth of a child's parents and neighbors in
13 violation of the equal protection provisions of the California Constitution. (Art. I, § 7; *id.* art. IV,
14 § 16.)

15 14. For these reasons, Plaintiffs ask this Court to declare the Challenged Statutes
16 unconstitutional on their face and as-applied and to permanently enjoin their enforcement.

17 **PARTIES**

18 15. Plaintiff BEATRIZ VERGARA is a California citizen who resides in the Los Angeles
19 Unified School District. She is 13 years old and attends public school in the Los Angeles Unified
20 School District. The Challenged Statutes have a real and appreciably negative impact on Plaintiff
21 Vergara's right to education because, as a direct result of the Challenged Statutes, Plaintiff Vergara
22 has been assigned to, and/or is at substantial risk of being assigned to, a grossly ineffective teacher
23 who impedes her equal access to the opportunity to receive a meaningful education. The parent of
24 Plaintiff Beatriz Vergara has filed simultaneously with this Complaint a petition with the Court to act
25 as Plaintiff's guardian ad litem.

26 16. Plaintiff ELIZABETH VERGARA is a California citizen who resides in the Los
27 Angeles Unified School District. She is 14 years old and attends public school in the Los Angeles
28 Unified School District. The Challenged Statutes have a real and appreciably negative impact on

1 Plaintiff Vergara’s right to education because, as a direct result of the Challenged Statutes, Plaintiff
2 Vergara has been assigned to, and/or is at substantial risk of being assigned to, a grossly ineffective
3 teacher who impedes her equal access to the opportunity to receive a meaningful education. The
4 parent of Plaintiff Elizabeth Vergara has filed simultaneously with this Complaint a petition with the
5 Court to act as Plaintiff’s guardian ad litem.

6 17. Plaintiff CLARA GRACE CAMPBELL is a California citizen who resides in the Los
7 Angeles Unified School District. She is 7 years old and attends public school in the Los Angeles
8 Unified School District. The Challenged Statutes have a real and appreciably negative impact on
9 Plaintiff Campbell’s right to education because, as a direct result of the Challenged Statutes, Plaintiff
10 Campbell has been assigned to, and/or is at substantial risk of being assigned to, a grossly ineffective
11 teacher who impedes her equal access to the opportunity to receive a meaningful education. The
12 parent of Plaintiff Clara Grace Campbell has filed simultaneously with this Complaint a petition with
13 the Court to act as Plaintiff’s guardian ad litem.

14 18. Plaintiff KATE ELLIOTT is a California citizen who resides in the Sequoia Union
15 High School District. She is 15 years old and attends public school in the Sequoia Union High
16 School District. She previously attended public school in the San Carlos School District. The
17 Challenged Statutes have a real and appreciably negative impact on Plaintiff Elliott’s right to
18 education because, as a direct result of the Challenged Statutes, Plaintiff Elliott has been assigned to,
19 and/or is at substantial risk of being assigned to, a grossly ineffective teacher who impedes her equal
20 access to the opportunity to receive a meaningful education. The parent of Plaintiff Kate Elliott has
21 filed simultaneously with this Complaint a petition with the Court to act as Plaintiff’s guardian ad
22 litem.

23 19. Plaintiff HERSCHEL LISS is a California citizen who resides in the Los Angeles
24 Unified School District. He is 8 years old and attends public school in the Los Angeles Unified
25 School District. The Challenged Statutes have a real and appreciably negative impact on Plaintiff
26 Liss’s right to education because, as a direct result of the Challenged Statutes, Plaintiff Liss has been
27 assigned to, and/or is at substantial risk of being assigned to, a grossly ineffective teacher who
28 impedes his equal access to the opportunity to receive a meaningful education. The parent of

1 Plaintiff Herschel Liss has filed simultaneously with this Complaint a petition with the Court to act as
2 Plaintiff's guardian ad litem.

3 20. Plaintiff JULIA MACIAS is a California citizen who resides in the Los Angeles
4 Unified School District. She is 11 years old and attends public school in the Los Angeles Unified
5 School District. The Challenged Statutes have a real and appreciably negative impact on Plaintiff
6 Macias's right to education because, as a direct result of the Challenged Statutes, Plaintiff Macia has
7 been assigned to, and/or is at substantial risk of being assigned to, a grossly ineffective teacher who
8 impedes her equal access to the opportunity to receive a meaningful education. The parent of
9 Plaintiff Julia Macias has filed simultaneously with this Complaint a petition with the Court to act as
10 Plaintiff's guardian ad litem.

11 21. Plaintiff DANIELLA MARTINEZ is a California citizen who resides in the Alum
12 Rock Union School District. She is 10 years old and attends a public charter school in San Jose,
13 California. Although she previously attended traditional public school in the Alum Rock Union
14 School District, Plaintiff Martinez was deterred from continuing to attend traditional public schools
15 because of the substantial risk that she would be assigned to a grossly ineffective teacher who
16 impedes her equal access to the opportunity to receive a meaningful education. Absent that risk,
17 Plaintiff Martinez would have continued to attend traditional public school. Thus, the Challenged
18 Statutes have a real and appreciably negative impact on Plaintiff Martinez's right to education. The
19 parent of Plaintiff Daniella Martinez has filed simultaneously with this Complaint a petition with the
20 Court to act as Plaintiff's guardian ad litem.

21 22. Plaintiff RAYLENE MONTERROZA is a California citizen who resides in the
22 Pasadena Unified School District. She is 14 years old and attends public school in the Pasadena
23 Unified School District. The Challenged Statutes have a real and appreciably negative impact on
24 Plaintiff Monterroza's right to education because, as a direct result of the Challenged Statutes,
25 Plaintiff Monterroza has been assigned to, and/or is at substantial risk of being assigned to, a grossly
26 ineffective teacher who impedes her equal access to the opportunity to receive a meaningful
27 education. The parent of Plaintiff Raylene Monterroza has filed simultaneously with this Complaint
28 a petition with the Court to act as Plaintiff's guardian ad litem.

1 23. As students within the boundaries of the State of California, Plaintiffs have a
2 fundamental, constitutional right to a quality education, which cannot be achieved without effective
3 teachers.

4 24. Defendant STATE OF CALIFORNIA is the legal and political entity required by the
5 California Constitution to maintain and oversee the system of public education in California. It has
6 plenary responsibility for educating all California public school students, including the responsibility
7 to establish and maintain the system of common schools and to ensure that the fundamental right to
8 education is afforded to all California public school students.

9 25. Defendant EDMUND G. BROWN, JR. is the Governor of the State of California. In
10 his official capacity, the Governor is the chief executive officer of the State of California. It is his
11 responsibility to ensure that the laws of the State are properly enforced. The Governor maintains an
12 office in Los Angeles.

13 26. Defendant TOM TORLAKSON is the State Superintendent of Public Instruction for
14 the State of California. In his official capacity, the State Superintendent is obligated to take all
15 necessary steps to ensure that school districts comply with the California Constitution and State laws.

16 27. Defendant CALIFORNIA DEPARTMENT OF EDUCATION is the department of
17 State government responsible for administering and enforcing laws related to education.

18 28. Defendant STATE BOARD OF EDUCATION and its members are responsible for
19 determining the policies governing California’s schools and for adopting rules and regulations for the
20 supervision and administration of all local school districts.

21 29. Defendant LOS ANGELES UNIFIED SCHOOL DISTRICT is a school district
22 organized by the State Legislature and charged with the administration of public schools within its
23 jurisdiction. LAUSD possesses those powers set forth in articles IX and XVI of the California
24 Constitution and as otherwise set forth by the laws of the State of California.

25 30. Defendant ALUM ROCK UNION SCHOOL DISTRICT is a school district organized
26 by the State Legislature and charged with the administration of public schools within its jurisdiction.
27 The Alum Rock Union School District (“ARUSD”) possesses those powers set forth in articles IX
28

1 and XVI of the California Constitution and as otherwise set forth by the laws of the State of
2 California.

3 31. Defendants, and those subject to their supervision, direction, and control, are
4 responsible for the enforcement of the statutes challenged herein. Except where otherwise specified,
5 the relief requested in this action is sought against each Defendant, as well as against each
6 Defendant's officer's employees, and agents, and against all persons acting in cooperation with
7 Defendant(s), under their supervision, at their direction, or under their control.

8 JURISDICTION AND VENUE

9 32. This case raises questions under the Constitution of the State of California. Thus, this
10 Court has jurisdiction over all of Plaintiffs' claims. This Court is authorized to grant declaratory
11 relief pursuant to section 1060 of the California Code of Civil Procedure and to grant injunctive relief
12 pursuant to sections 525, 526, and 526(a) of the California Code of Civil Procedure.

13 33. Venue is proper in this Court pursuant to section 393(b) of the California Code of
14 Civil Procedure. Because this action is brought against public officers and may be commenced in a
15 county where the Attorney General maintains offices and performs its functions (Code Civ. Proc.,
16 § 393, subd. (b)), this action is properly brought in the County of Los Angeles where the Attorney
17 General maintains an office. (*Id.* § 401, subd. (1).) Moreover, venue is proper in Los Angeles
18 County because at least some of the Plaintiffs reside and attend school in the county.

19 FACTS

20 **A. Teacher Quality Is The Key Determinant Of Educational Effectiveness**

21 34. Extensive research over the past 35 years supports one indisputable fact: Teachers
22 matter. Teachers are a key determinant of the quality of education students receive and have a
23 profound impact on students' lifetime achievement. In fact, teacher quality affects student success
24 more than any other in-school factor. According to one of the nation's foremost education
25 economists, "teachers near the top of the quality distribution can get an entire year's worth of
26 additional learning out of their students compared to those near the bottom." As a result, students
27 taught by effective teachers are more likely to attend college, attend higher-ranked colleges, earn
28 higher salaries, reside in higher quality neighborhoods, and save for retirement.

1 35. Conversely, students taught by grossly ineffective teachers—those in approximately
2 the bottom five percent of all educators—suffer lifelong problems and fail to recover from this
3 marked disadvantage. One recent study found that a student who is taught by a single ineffective
4 teacher remains “stuck below grade level” for years to come. Another recent study found that
5 replacing a grossly ineffective teacher with even an *average* teacher—not an above-average or
6 superior teacher—would increase students’ cumulative lifetime income by a total of \$1.4 million per
7 classroom taught by that teacher.

8 36. In light of the substantial and enduring impact that teachers have on their students’
9 achievement, removal of the small number of grossly ineffective teachers currently employed by the
10 California public school system would have a pronounced, life-altering impact on the performance of
11 those students who would otherwise be assigned to those teachers. It would therefore be in the
12 interest of all California public school students to ensure that grossly ineffective teachers are not
13 hired into the California public school system and, if hired, are promptly dismissed upon discovery of
14 their grossly ineffective performance.

15 **B. California’s Schools Hire And Retain Grossly Ineffective Teachers At Alarming Rates**

16 37. Despite the profound impact teachers have on student achievement, grossly ineffective
17 teachers are routinely hired into the California school system and granted effectively lifetime
18 employment. Even after their grossly ineffective performance is discovered, such teachers are not
19 dismissed for their poor performance, instead remaining as teachers in California classrooms.

20 38. Recent reports estimate that, in the LAUSD alone, there are approximately 1,000 or
21 more teachers who are grossly ineffective. These grossly ineffective teachers, or “lemons,” are
22 responsible for teaching approximately 30,000 or more students annually. In a recent survey, 68
23 percent of teachers reported that there are grossly ineffective tenured teachers currently working in
24 their schools who should be dismissed for poor performance.

25 39. The Challenged Statutes make it nearly impossible for school administrators to
26 dismiss grossly ineffective teachers. Unable to remove these grossly ineffective teachers from the
27 California school system, the statutes at issue instead compel school administrators to either leave the
28 grossly ineffective teachers in place or transfer them from school to school within the public school

1 system, a phenomenon sometimes referred to as the “dance of the lemons.” Indeed, in a recent
2 survey, 34 percent of LAUSD principals reported that attempting to dismiss grossly ineffective
3 teachers is futile and prohibitively resource-intensive because the dismissal process established by the
4 statutes at issue is unlikely to result in dismissal of those teachers.

5 40. The grossly ineffective teachers are disproportionately situated in schools that serve
6 predominantly low-income and minority students. A recent study of the LAUSD found that a “low-
7 income student is more than twice as likely to have a low value-added [English-Language Arts
8 (“ELA”)] teacher as a higher income peer, and 66 percent more likely to have a low-value added
9 math teacher.” The data reveals that the “patterns are even more pronounced for students of color,
10 with Latino and African-American students two to three times more likely (in math and ELA,
11 respectively) to have bottom-quartile teachers than their white and Asian peers.”

12 **C. The Challenged Statutes Prevent School Administrators From Making Employment**
13 **And Dismissal Decisions That Benefit Students**

14 41. The hiring and continued employment of grossly ineffective teachers in California’s
15 public schools are a direct result of the Challenged Statutes and cause grave harm to California’s
16 students. Those five statutes comprise a statutory scheme that confers permanent employment on
17 teachers before their effectiveness can readily be determined, makes dismissal nearly impossible or
18 highly impractical once poor performers are identified, and, when layoffs are necessary, forces
19 districts to terminate teachers based on seniority alone, irrespective of their teaching effectiveness.
20 This statutory scheme, enacted by the State of California through its Legislature and enforced by
21 Defendants, inevitably presents a total and fatal conflict with the right to education guaranteed by the
22 California Constitution because it forces an arbitrary subset of California students to be educated by
23 grossly ineffective teachers who fail to provide them with the basic tools necessary to compete in the
24 economic marketplace or participate in a democratic society.

25 42. In the absence of this statutory scheme, school administrators would have the ability to
26 make employment and dismissal decisions that serve the interests of California’s students. School
27 administrators could decline to offer permanent employment to a teacher unless and until they have
28 determined that the teacher’s performance merits such an offer, could dismiss those teachers they

1 believe to be grossly ineffective, could retain only those teachers who they believe to be at least
2 minimally effective, and could reward and incentivize teachers who exhibit superior performance.
3 The Challenged Statutes prevent school administrators from meaningfully considering their students'
4 need for effective teachers when making teacher employment and dismissal decisions. On
5 information and belief, in the absence of the Challenged Statutes, school administrators would make
6 teacher employment and dismissal decisions based, in larger part and/or entirely, on their students'
7 need for effective teachers.

8 California's Permanent Employment Statute

9 43. Pursuant to California Education Code section 44929.21, subdivision (b) (the
10 "Permanent Employment Statute"), California school districts must decide whether to grant
11 permanent employment to new teachers after less than 18 months.

12 44. The Permanent Employment Statute requires that "[e]very employee of a school
13 district of any type or class having an average daily attendance of 250 or more who, after having been
14 employed by the district for two complete consecutive school years in a position or positions
15 requiring certification qualifications, is reelected for the next succeeding school year to a position
16 requiring certification qualifications shall, at the commencement of the succeeding school year be
17 classified as and become a permanent employee of the district." It states that "[t]he governing board
18 shall notify the employee, on or before March 15 of the employee's second complete consecutive
19 school year of employment by the district in a position or positions requiring certification
20 qualifications, of the decision to reelect or not reelect the employee for the next succeeding school
21 year to the position." "In the event that the governing board does not give notice pursuant to this
22 section on or before March 15," the statute provides that "the employee shall be deemed reelected for
23 the next succeeding school year."

24 45. Several studies have shown that it is not possible to determine a teacher's long-term
25 effectiveness with any degree of confidence during the first three years of teaching. In addition,
26 teacher performance reviews used to determine whether a teacher should receive permanent
27 employment do not consider student test data, student work, or any other indication whether the
28

1 teacher's students are actually learning. Nonetheless, within 18 months, California offers more than
2 98 percent of new teachers the full benefits of permanent employment.

3 46. The Permanent Employment Statute, alone and in conjunction with the other statutes
4 at issue, ensures that a certain number of grossly ineffective teachers who are unable to prepare
5 students to compete in the economic marketplace or to participate in a democracy are granted
6 permanent employment in the California school system.

7 47. The Permanent Employment Statute, alone and in conjunction with the other statutes
8 at issue, also ensures that children of substantially equal age, aptitude, motivation, and ability will not
9 have substantially equal access to education. Even within the same schoolhouse, some students will
10 be assigned to teachers who are grossly ineffective, while other students are assigned to teachers who
11 are at least minimally effective.

12 California's Dismissal Statutes

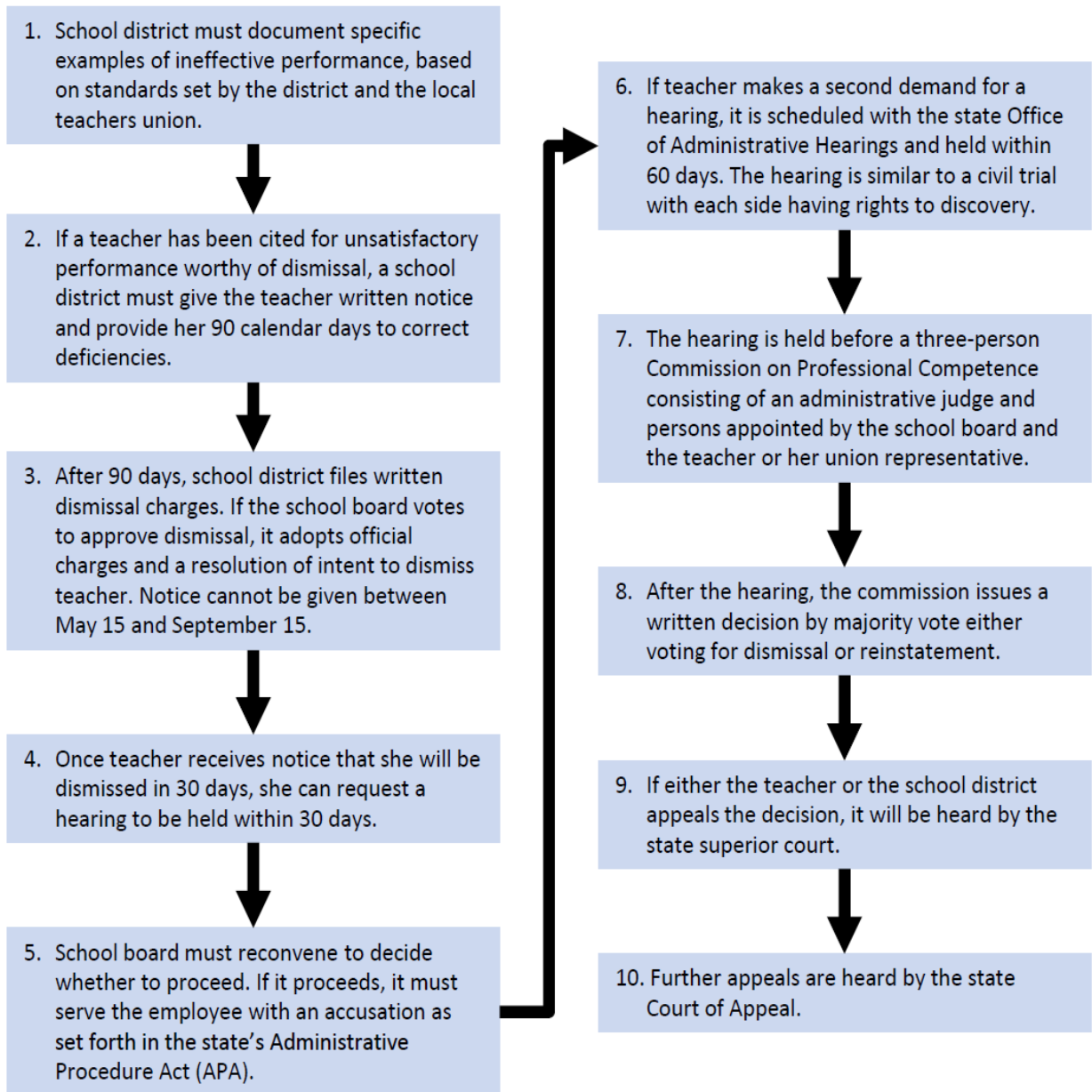
13 48. Unlike employees of private companies, public employees in California must be
14 afforded certain due process rights—known as *Skelly* rights (*Skelly v. State Personnel Bd.* (1975) 15
15 Cal.3d 194)—before being subject to termination or other adverse employment decisions. These
16 *Skelly* due process rights must include “notice of the proposed action, the reasons therefor, a copy of
17 the charges and materials upon which the action is based, and the right to respond, either orally or in
18 writing,” before the proposed discipline or termination can be made effective. (*Id.* at p. 215.)

19 49. California's statutory scheme, however, affords teachers with permanent employment
20 status “super” due process rights—an astounding array of additional rights and privileges, which are
21 significantly greater in scope and content than *Skelly* rights, before they may be terminated for
22 unprofessional conduct or unsatisfactory performance. These rights and privileges are codified
23 primarily in California Education Code section 44934 (the “Written Charges Statute”), California
24 Education Code section 44938, subdivisions (b)(1) and (2) (the “Correct and Cure Statute”), and
25 California Education Code section 44944 (the “Dismissal Hearing Statute”) (collectively, the
26 “Dismissal Statutes”).

27 50. The Dismissal Statutes mandate that more than a dozen hurdles be cleared before a
28 district can dismiss an underperforming teacher. These hurdles result in a labyrinthine dismissal

1 process requiring investigations, hearings, union grievances, administrative appeals, court challenges,
2 and re-hearings—all of which can and often do take multiple years and cost hundreds of thousands,
3 or even millions, of dollars.

4 51. The Dismissal Statutes require the following procedure to be followed in connection
5 with attempting to dismiss a teacher for underperformance:



26
27 52. Recent studies have found that the Dismissal Statutes effectively prevent school
28 administrators from dismissing teachers for poor performance. In the past decade, for example,

1 LAUSD officials spent \$3.5 million trying to dismiss seven of the district's teachers for poor
2 classroom performance. The process endured for an average of five years per teacher, and the
3 average cost of the process to the LAUSD was \$500,000 per teacher. Ultimately, only four of the
4 seven teachers were dismissed, two of the teachers were paid large settlements, and one teacher
5 remained employed.

6 53. In light of the difficulty, complexity, cost, and length of time associated with the
7 removal process under the Dismissal Statutes, these proceedings are rarely initiated for
8 unprofessional conduct or unsatisfactory performance alone. Further, when the dismissal process is
9 initiated based on teacher performance, it rarely results in dismissal. Indeed, 80 percent of dismissals
10 in the LAUSD are due to immoral or illegal conduct, not teaching performance.

11 54. When a school administrator believes a teacher to be grossly ineffective, the Dismissal
12 Statutes often require the administrator to leave the teacher in the classroom for one or more years, in
13 order to attempt to provide the documentation of ineffective performance necessary to initiate and
14 prevail in dismissal proceedings. Even after the dismissal process has been initiated, school
15 administrators are often forced to leave grossly ineffective teachers in the classroom throughout the
16 dismissal process.

17 55. In the absence of the Dismissal Statutes, teachers would retain the same *Skelly* due
18 process rights afforded to other California public employees.

19 56. On information and belief, in the absence of the Dismissal Statutes, school
20 administrators could and would dismiss grossly ineffective teachers that, under the current system,
21 they are compelled to leave in place. Under the current system, on information and belief, less than
22 0.002% of California's hundreds of thousands of teachers are dismissed for unprofessional conduct or
23 unsatisfactory performance in any given year. This compares to the 1% of other California public
24 employees dismissed annually for unprofessional conduct or unsatisfactory performance and the 8%
25 of private employees dismissed annually for cause.

26 57. The Dismissal Statutes, alone and in conjunction with the other statutes at issue,
27 ensure that a certain number of grossly ineffective teachers who are unable to prepare students to
28

1 compete in the economic marketplace or to participate in a democracy retain their employment in the
2 California school system.

3 58. The Dismissal Statutes, alone and in conjunction with the other statutes at issue, also
4 ensure that children of substantially equal age, aptitude, motivation, and ability do not have
5 substantially equal access to education. Even within the same schoolhouse, some students are
6 assigned to teachers who are grossly ineffective, while other students are assigned to teachers who
7 are at least minimally effective.

8 California's Last-In First-Out ("LIFO") Statute

9 59. California Education Code section 44955 (the "LIFO Statute") mandates the selection
10 criteria by which teachers are to be included in any district-wide layoff. The LIFO Statute creates a
11 seniority-based layoff system, irrespective of a teacher's performance, effectiveness, or quality.

12 60. The LIFO Statute requires that layoffs be conducted in accordance with seniority. It
13 states, "[e]xcept as otherwise provided by statute, the services of no permanent employee may be
14 terminated under the provisions of this section while any probationary employee, or any other
15 employee with less seniority, is retained to render a service which said permanent employee is
16 certificated and competent to render." (*Id.* § 44955, subd. (b).)

17 61. The LIFO Statute further requires that reassignments of positions be made based on
18 seniority. It mandates that "[t]he governing board shall make assignments and reassignments in such
19 a manner that employees shall be retained to render any service which their seniority and
20 qualifications entitle them to render." (Ed. Code, § 44955, subd. (c).)

21 62. Seniority, defined as the number of years of teaching experience, is not an accurate
22 predictor of teacher effectiveness, as recent studies have demonstrated. Yet the LIFO Statute
23 mandates that the selection of teachers to be included in any layoff be governed primarily, if not
24 exclusively, by seniority. For all practical purposes, the LIFO Statute prevents teacher effectiveness
25 from being taken into account—to any extent or degree—in connection with layoff decisions.

26 63. In recent years, various school districts in California have been forced to implement
27 district-wide layoffs. Those layoffs have been conducted in accordance with the LIFO Statute,
28 forcing school administrators to lay off top-performing teachers with low seniority, and preventing

1 school administrators from laying off low-performing teachers with high seniority. In 2009, for
2 example, quality-blind layoffs under the LIFO Statute resulted in the retention of thousands of low
3 performing teachers who happened to have more years of experience than the teachers included in the
4 layoffs. One study found that nearly 2,000 ELA teachers and more than 1,500 math teachers in the
5 lowest quartile of teacher performance kept their jobs, while 20 percent of the ELA and math teachers
6 laid off were in the top quartile of teacher performance.

7 64. On information and belief, in the absence of the LIFO Statute, school administrators
8 forced to implement district-wide layoffs would select the teachers to be included in such layoffs
9 based, in larger part or entirely, on the performance and effectiveness of those teachers and the
10 outcome of their students.

11 65. The LIFO Statute also hinders recruitment of new teachers by creating an environment
12 in which newly and recently hired teachers face a heightened risk of being laid off regardless of their
13 performance.

14 66. The LIFO Statute, alone and in conjunction with the other statutes at issue, ensures
15 that a certain number of grossly ineffective teachers who are unable to prepare students to compete in
16 the economic marketplace or to participate in a democracy retain employment in the California
17 school system.

18 67. The LIFO Statute, alone and in conjunction with the other statutes at issue, also
19 ensures that children of substantially equal age, aptitude, motivation, and ability do not have
20 substantially equal access to education. Even within the same school, some students are assigned to
21 teachers who are grossly ineffective, while other students are assigned to teachers who are at least
22 minimally effective.

23 **D. The Challenged Statutes Have A Disproportionate Adverse Effect On Minority And**
24 **Economically Disadvantaged Students**

25 68. The Challenged Statutes, separately and together, have a disproportionately adverse
26 effect upon minority and economically disadvantaged students.

27 69. As described above, as a direct result of the Challenged Statutes, a certain number of
28 grossly ineffective teachers who are unable to minimally prepare students to compete in the economic

1 marketplace or to participate in a democracy obtain and retain employment in the California public
2 school system. Rather than dismiss grossly ineffective teachers for their poor performance, the
3 Challenged Statutes cause school administrators to transfer those teachers to other schools within the
4 district, a phenomenon sometimes referred to as the “dance of the lemons.” Often, and
5 disproportionately to the number of schools within a school district, grossly ineffective teachers are
6 transferred to schools that serve high concentrations of economically disadvantaged students,
7 students of color, and English learners.

8 70. Transfers of teachers from one school to another within a school district often occur
9 *en masse* after district-wide layoffs. Because schools serving low-income students, students of color,
10 and English learners typically have the highest concentrations of teachers with the lowest seniority,
11 those schools are disproportionately affected by district-wide layoffs. As Judge Highberger of the
12 Los Angeles Superior Court recently concluded, “[s]ubstantial evidence . . . has shown how budget-
13 based layoffs devastated the teaching corps at struggling LAUSD schools, removing dedicated
14 teachers who were committed to teaching at those particular schools.” (*Reed v. California* (Feb. 8,
15 2011, No. BC432420) [p. 29].) Judge Highberger also found that “[d]espite the fact that UTLA,
16 LAUSD’s incoming Superintendent, LAUSD administrators, LAUSD teachers, and Plaintiffs’
17 experts all agree that layoffs at already struggling schools destroy students’ educational opportunities,
18 those are exactly the schools that are disproportionally hit in a purely seniority-based layoff.” (*Id.* at
19 p. 32.) One recent study showed that a school in the highest poverty quartile is 65 percent more
20 likely to have a teacher laid off than a school in the lowest poverty quartile. As a result of seniority-
21 based layoffs, the highest poverty schools in California are likely to lose 30 percent more teachers
22 than wealthier schools. The disproportionate number of vacancies in those schools are then filled by
23 transferring lower performing teachers, including grossly ineffective teachers, from other schools.

24 71. The result is that grossly ineffective teachers who are permanently employed by the
25 California school system pursuant to the Challenged Statutes are disproportionately assigned to
26 educate students in schools that serve the largest numbers of minority and economically
27 disadvantaged students. The resulting real and appreciable harm to those students is predictable and
28 well-documented: Although half of all California students are proficient in ELA as measured by

1 California Standards Tests, only 37% of African-American students, 37% of Hispanic students, 36%
2 of economically disadvantaged students, and 20% of English learners are proficient in ELA.
3 Similarly, although 46% of all California students are proficient in Mathematics as measured by
4 California Standards Tests, only 30% of African-American students, 36% of Hispanic students, 37%
5 of economically disadvantaged students, and 32% of English learners are proficient in Mathematics.
6 As the California Committee on Education Excellence summarized: “Students from low income
7 families, many of them children of color and/or English Learners, are losing the most. The State of
8 California has created a pattern of disparities—an achievement gap—in public schools that not only
9 limits the opportunities for these students, but reinforces and enlarges the existing social inequalities
10 confronting them—exactly opposite of the intended function of public education in a democracy.”

11 **E. The Challenged Statutes, Individually And Collectively, Violate California Students’**
12 **Right to Equal Protection**

13 72. As a direct result of the Challenged Statutes, both individually and collectively, a
14 certain number of grossly ineffective teachers obtain permanent employment within the California
15 public school system, and retain employment despite their grossly ineffective performance. In the
16 absence of the Challenged Statutes, most, if not all, of these grossly ineffective teachers would not
17 obtain permanent employment in the California public school system or, if they obtained permanent
18 employment, would be dismissed for their poor performance. In addition, in the absence of the
19 Challenged Statutes, school administrators would have the flexibility to attract teachers of superior
20 performance to California’s public schools, retain high-performing teachers even during economic
21 layoffs, and provide incentives to encourage teachers to become or remain high performers. Instead,
22 the Challenged Statutes prevent school administrators from making employment and dismissal
23 decisions that serve the interest of California’s students in having effective teachers. Such a system
24 has a real and appreciably negative impact on the education that certain California public school
25 students receive.

26 73. Classroom-To-Classroom (Intra-School) Disparity: As a direct result of the
27 Challenged Statutes, both individually and collectively, a subset of K-12 students in California public
28 schools have been, and will continue to be, assigned to teachers who are grossly ineffective. The

1 students comprising that subset attend schools all over the State, including schools that are considered
2 to be average or above-average in overall educational performance. Further, the students comprising
3 that subset are of substantially the same age, aptitude, motivation, and ability as the larger group of
4 students who receive the prevailing statewide standard of teachers who are not grossly ineffective.
5 The Challenged Statutes therefore create an arbitrary distinction between students who receive the
6 prevailing statewide standard education and students who receive their education from one or more
7 grossly ineffective teachers. California has no compelling interest in creating such arbitrary
8 distinctions between students, or in laws that have a real and appreciably negative impact on an
9 arbitrary subset of students' fundamental right to education. In the absence of the Challenged
10 Statutes, few, if any, of the grossly ineffective teachers would retain their employment in the
11 California school system, and students would not face the arbitrary risk of being assigned to those
12 teachers. As such, the Challenged Statutes violate the equal protection provisions of the California
13 Constitution by arbitrarily assigning certain students to one or more grossly ineffective teachers.

14 74. School-To-School (Inter-School) Disparity: As a direct result of the Challenged
15 Statutes, both individually and collectively, a subset of California public schools have more than their
16 proportionate share of teachers who are grossly ineffective. The students attending those schools are
17 of substantially the same age, aptitude, motivation, and ability as the larger group of students who, in
18 accordance with the prevailing statewide standard, attend schools that have a proportionate share (or
19 less than their proportionate share) of teachers who are grossly ineffective. The Challenged Statutes
20 therefore create an arbitrary distinction between schools that provide their students with the
21 prevailing statewide standard education (or better) and schools in which students are more likely to
22 receive their education from one or more grossly ineffective teachers. California has no compelling
23 interest in creating such arbitrary distinctions between the students in different schools, or in laws
24 that have a real and appreciably negative impact on an arbitrary subset of students' fundamental right
25 to education. In the absence of the Challenged Statutes, few, if any, of the grossly ineffective
26 teachers would retain their employment in the California school system, and students would not face
27 the arbitrary risk of being assigned to those teachers. As such, the Challenged Statutes violate the
28 equal protection provisions of the California Constitution.

1 79. Education is a fundamental interest for purposes of evaluating statutes in light of the
2 California Constitution’s provisions guaranteeing equal protection of the laws. (Art. IX, §§ 1 & 5;
3 *Serrano II, supra*, 18 Cal. 3d at pp. 764-65).

4 80. The Permanent Employment Statute violates the equal protection provisions of the
5 California Constitution because it has a real and appreciably negative impact on an arbitrary subset of
6 children of substantially equal age, aptitude, motivation, and ability, depriving them of substantially
7 equal access to an education sufficient to equip them with the critical, fundamental tools minimally
8 necessary to compete in the economic marketplace and to participate in a democratic society.

9 **CLAIM TWO: EQUAL PROTECTION, FUNDAMENTAL INTEREST**
10 **(DISMISSAL STATUTES)**

11 81. Plaintiffs incorporate by reference the foregoing paragraphs as though fully set forth
12 herein.

13 82. The Dismissal Statutes violates the equal protection provisions of the California
14 Constitution (art. I, § 7; *id.* art. IV, § 16), both on its face and as applied to Plaintiffs.

15 83. Education is a fundamental interest for purposes of evaluating statutes in light of the
16 California Constitution’s provisions guaranteeing equal protection of the laws. (Art. IX, §§ 1 & 5;
17 *Serrano II, supra*, 18 Cal. 3d at pp. 764-65).

18 84. The Dismissal Statutes violate the equal protection provisions of the California
19 Constitution because it has a real and appreciably negative impact on an arbitrary subset of children
20 of substantially equal age, aptitude, motivation, and ability, depriving them of substantially equal
21 access to an education sufficient to equip them with the critical, fundamental tools minimally
22 necessary to compete in the economic marketplace and to participate in a democratic society.

23 **CLAIM THREE: EQUAL PROTECTION, FUNDAMENTAL INTEREST**
24 **(LIFO STATUTE)**

25 85. Plaintiffs incorporate by reference the foregoing paragraphs as though fully set forth
26 herein.

27 86. The LIFO Statute violates the equal protection provisions of the California
28 Constitution (art. I, § 7; *id.* art. IV, § 16), both on its face and as applied to Plaintiffs.

1 87. Education is a fundamental interest for purposes of evaluating statutes in light of the
2 California Constitution’s provisions guaranteeing equal protection of the laws. (Art. IX, §§ 1 & 5;
3 *Serrano II, supra*, 18 Cal. 3d at pp. 764-65).

4 88. The LIFO Statute violates the equal protection provisions of the California
5 Constitution because it has a real and appreciably negative impact on an arbitrary subset of children
6 of substantially equal age, aptitude, motivation, and ability, depriving them of substantially equal
7 access to an education sufficient to equip them with the critical, fundamental tools minimally
8 necessary to compete in the economic marketplace and to participate in a democratic society.

9 **CLAIM FOUR: EQUAL PROTECTION, SUSPECT CLASSES**
10 **(PERMANENT EMPLOYMENT STATUTE)**

11 89. Plaintiffs incorporate by reference the foregoing paragraphs as though fully set forth
12 herein.

13 90. The Permanent Employment Statute violates the equal protection provisions of the
14 California Constitution (art. I, § 7; *id.* art. IV, § 16), both on its face and as applied to Plaintiffs.

15 91. Both race and wealth are suspect classes for purposes of evaluating statutes in light of
16 the California Constitution’s provisions guaranteeing equal protection of the laws. (*Serrano II,*
17 *supra*, 18 Cal. 3d at p. 766, fn. 45).

18 92. The Permanent Employment Statute violates the equal protection provisions of the
19 California Constitution because it makes the quality of education for school age children in California
20 a function of race.

21 93. The Permanent Employment Statute violates the equal protection provisions of the
22 California Constitution because it makes the quality of education for school age children in California
23 a function of the wealth of the children’s parents and neighbors.

24 **CLAIM FIVE: EQUAL PROTECTION, SUSPECT CLASSES**
25 **(DISMISSAL STATUTES)**

26 94. Plaintiffs incorporate by reference the foregoing paragraphs as though fully set forth
27 herein.

28

1 95. The Dismissal Statutes violates the equal protection provisions of the California
2 Constitution (art. I, § 7; *id.* art. IV, § 16), both on its face and as applied to Plaintiffs.

3 96. Both race and wealth are suspect classes for purposes of evaluating statutes in light of
4 the California Constitution’s provisions guaranteeing equal protection of the laws. (*Serrano II*,
5 *supra*, 18 Cal. 3d at p. 766, fn. 45).

6 97. The Dismissal Statutes violate the equal protection provisions of the California
7 Constitution because it makes the quality of education for school age children in California a function
8 of race.

9 98. The Dismissal Statutes violate the equal protection provisions of the California
10 Constitution because it makes the quality of education for school age children in California a function
11 of the wealth of the children’s parents and neighbors.

12 **CLAIM SIX: EQUAL PROTECTION, SUSPECT CLASSES**
13 **(LIFO STATUTE)**

14 99. Plaintiffs incorporate by reference the foregoing paragraphs as though fully set forth
15 herein.

16 100. The LIFO Statute violates the equal protection provisions of the California
17 Constitution (art. I, § 7; *id.* art. IV, § 16), both on its face and as applied to Plaintiffs.

18 101. Both race and wealth are suspect classes for purposes of evaluating statutes in light of
19 the California Constitution’s provisions guaranteeing equal protection of the laws. (*Serrano II*,
20 *supra*, 18 Cal. 3d at p. 766, fn. 45).

21 102. The LIFO Statute violates the equal protection provisions of the California
22 Constitution because it makes the quality of education for school age children in California a function
23 of race.

24 103. The LIFO Statute violates the equal protection provisions of the California
25 Constitution because it makes the quality of education for school age children in California a function
26 of the wealth of the children’s parents and neighbors.

1 **CLAIM SEVEN: DECLARATORY RELIEF**

2 **(ALL CHALLENGED STATUTES)**

3 104. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as
4 though fully set forth herein.

5 105. An actual and justiciable controversy exists between the Plaintiffs and Defendants
6 because Plaintiffs contend, and Defendants dispute, that Defendants' actions and inactions as
7 described above have violated the constitutional provisions cited herein.

8 106. Plaintiffs seek a declaration that the Permanent Employment Statute, the Written
9 Charges Statute, the Correct and Cure Statute, the Dismissal Hearing Statute, and the LIFO Statute
10 separately and together violate the right to equal protection, both facially and as applied to Plaintiffs.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiffs pray for judgment as follows:

13 1. Plaintiffs respectfully request that this Court enter a declaratory judgment stating that
14 the Permanent Employment Statute, the Written Charges Statute, the Correct and Cure Statute, the
15 Dismissal Hearing Statute, and the LIFO Statute, separately and together, violate the equal protection
16 provisions of the California Constitution.

17 2. Plaintiffs respectfully request that this Court enter a permanent injunction enjoining
18 the enforcement, application, or implementation of the Permanent Employment Statute, the Written
19 Charges Statute, the Correct and Cure Statute, the Dismissal Hearing Statute, and the LIFO Statute.

20 3. Plaintiffs respectfully request that this Court enter a permanent injunction enjoining
21 Defendants from implementing at any time in the future, by law or by contract, any system of teacher
22 employment, retention and dismissal that is substantially similar to the framework implemented by
23 the Challenged Statutes, in that it (1) vests in teachers greater protections against dismissal than the
24 *Skelly* rights applicable to other California state employees, or (2) prevents school administrators
25 from meaningfully considering teacher effectiveness when making employment, retention and
26 termination decisions about teachers.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4. Plaintiffs respectfully request that this Court retain continuing jurisdiction over this matter until such time as the Court has determined that Defendants have fully and properly complied with its Orders.

5. Plaintiffs respectfully request an award of costs, disbursements, and reasonable attorneys' fees and expenses pursuant to section 1021.5 of the California Code of Civil Procedure.

Dated: May 14, 2012

GIBSON, DUNN & CRUTCHER LLP

By: Theodore J. Boutros, Jr. / LG
Theodore J. Boutros, Jr.

Attorneys for Plaintiffs Beatriz Vergara, et al.