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June 16, 2016

Chief Justice Tani Cantil-Sakauye and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Vergara et al. v. State of California et al., California Teachers Association et al (Intervenors)* — S234741
Petition for Review Filed May 24, 2016

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW
(Cal. Rules of Court 8.500(g))

To the Chief Justice and the Associate Justices of the California Supreme Court:

The Children's Advocacy Institute (CAI) urges this Honorable Court to grant the petition for review in the above-referenced case, *Vergara v. State of California and California Teachers Association (Intervenors)* (2015) 246 Cal. App. 4th 619 (*Vergara*).

I. The Interest of the Children's Advocacy Institute in Supporting Review

The Children's Advocacy Institute (CAI) is a part of the University of San Diego School of Law. Founded in 1989, the Institute teaches law students as part of a "child rights" concentration offered by the Law School. It also operates a clinic representing children in juvenile court, conducts research, and issues reports on the status of children in California and nationally. CAI also advocates for the interests of children, with offices in Sacramento and Washington, D.C. Its work includes the proposal of state and federal legislation, executive branch rulemaking, and litigation. The last includes both original cases pertaining to child rights, and advocacy at the appellate level through *amicus* contributions. The issues covered by CAI includes major concentration on education efficacy, including the abuses of private for-profit higher education offerings.

CAI is directed by the principal author of this letter, Professor Robert C. Fellmeth, Price Professor of Public Interest Law, author of the text *Child Rights and Remedies* (Clarity Press, 3d Edition, 2011). Fellmeth is former President of the Board of Directors of the National Association

of Counsel for Children and is currently Secretary/Treasurer of the Partnership for America's Children — with offices in 40 state capitols.[1]

II. The Underlying Issue: When Does the Court Act to Check Another Branch?

The judiciary provides a critical check on the other two branches of government — interpreting the law and drawing lines to assure: (a) compliance with constitutional standards entitled to supersession over each branch, and (b) fidelity to basic tenets of legislative intent properly guiding their respective discretionary decisions.

At a primary level, the court upholds constitutional floors preventing governmental incursion into individual rights. It does so in many settings by selecting a criterion to measure factual compliance with applicable standards: Is it "strict scrutiny," "undue burden," "heightened scrutiny," or "rational relation"? The last affords maximum discretion to state acts and to the decisions of the legislative and executive branches.

The issue raised by this case pertains to the "fundamental right to education." Long a part of California jurisprudence, this right is elevated by our state well above any federal floor extant. That distinction accounts for the leading *Serrano* decision prohibiting school financing based on the property tax wealth of a school or school district location.[2] Although it is shamefully not followed at the federal level or in some states, that decision evaluated a system of fund allocation based on the wealth (property tax values) of the respective neighborhoods of the state. Certainly one can argue that local financing has some policy merit — it reflects local control and commitment that is a positive feature of democracy. But making a bright-line allocation of a substantial portion of education financing based on a variable that is not germane to the overall goal of equal opportunity and of assured educational quality did not pass muster.

The variable under review here is arguably just as important to educational quality: the selection of teachers. A child walks into a class room, knowing little about the subject matter which will become a part of most aspects of adult functioning: how to do math, how to read and write, and the substantive knowledge we all need as a society. That teacher decides what is to be read and studied, what questions are important, what substance must be learned. And teaches it, with often varying degrees of success and competence.

Recent research on "on-line" education only underlines the importance of live teachers — where students consistently do better. The California Constitution's education rights inevitably involve, indeed, properly center on teaching competence. That underlying reality properly guides any balancing between "seniority labor rights" and the sacrosanct fundamental rights of all California children to an education. The former are advocated by the California Teachers' Association in betrayal of the purpose and the significance of what its members do. Regrettably, such misguided protectionism is not unique to this private guild, it is symptomatic of a wider problem with such horizontally organized groupings.

We agree that judicial intervention to mandate *optimum* teacher selection is outside the domain of the third branch. And we agree that length of service can be a positive factor in deciding the retention of teachers. But taking one legitimate factor, and making it into a bright-line,

[1] This letter expresses the opinion of the Children's Advocacy Institute and no other entity connected to it or its associates.
[2] *Serrano v. Priest* (1971) 5 Cal.3d 584 (*Serrano* I).

mandatory, and preclusive qualification is a problem. Even under a rational relation test, the most generous criterion for judicial approval, does it pass muster? To what extent is it "arbitrary and capricious" to take one factor of some relevance and transform it into a determinant that trumps virtually all others?

On the one hand, years of experience can be a positive attribute for a teacher, many of whom learn cumulatively over their years of instruction. On the other hand, younger entrants more recently educated, with energy and excitement, may also provide benefits. And we respectfully proffer the underlying priority to properly center on the students — whose interests are front and center under the history and intent of California's assurance of education rights. Perhaps we even confirm giving weight to years of experience as a relevant factor. But there are numerous factors properly considered: expertise in the subject matter taught, individual teaching efficacy, the subject matter instruction that is needed, the prior record as measured by student test improvement or decline, and a host of others. Taking one of them — and one only indirectly and imprecisely related to the most relevant factor (the effective education of students) — and then transforming it into a bright-line determinant is a textbook example of an "arbitrary and capricious" formulation that violates even the most generous "rational relation" review.

We understand the concept of "tenure." Indeed, instant counsel for CAI *amicus* contributor herein has such tenure. But this concept was created to afford "academic freedom" to professors and other teachers so they could teach and advocate based on the merits. unimpeded by popular pressure or the views of their educational superiors. We concede that very few of those with tenure actually experience such a threat, nor do they commonly advance controversial truths requiring job security. This confessor admission applies to professors at the university level as well. The concept is actually the rationalization of privilege borne of more selfish concerns. Its extension from the university level to elementary, middle, and high schools is even more devoid of merit.

The advancement of tenure and employment insulation is rather the byproduct of more mundane and cynical labor advocacy. CAI is part of the Center for Public Interest Law (CPIL), a longstanding consumer advocacy institution monitoring the activities of the major regulatory agencies of the state. That history gives us a great deal of experience with the dynamics of trade and professional trade associations. A typical example is the California Medical Association, which does not advance the highest sensibilities of its physician membership. We would be interested in running a vote on many of the positions it takes relevant to the continued licensing of dangerous doctors. Rather than oriented in such a direction, this association — as do most — defends the least among its membership. It works hard to protect drug-impaired doctors. It seeks to lessen the legal vulnerability of its members to accountability for errors, including the concealment of hospital privilege revocations, *et al.* These associations have become politically powerful, dominating the lobbying of increasingly passive legislatures and agencies. Their members even achieve appointment to public positions actually governing the agencies purportedly regulating them in the interests of the general public.[3]

One of the most powerful is the California Teachers Association. As this Honorable Court may be aware, California law requires that a minimum percentage of the state budget be devoted to public education. In *CTA v. Huff,* this association filed a suit against the Departments of

[3] Note that in February 2015, the U.S. Supreme Court held that any such regulatory board controlled by "active market participants" in the trade or profession regulated could not receive "sovereign status" as a legitimate part of the "state." Hence, federal antitrust law fully applies unless any decision restraining trade is "actively supervised" by the state lacking such control. See *North Carolina Board of Dental Examiners v. FTC* (2015) 547 U.S. __.

Education and Finance to remove all preschool education (even state Head Start programs preparing four-year-olds for kindergarten) from the guaranteed constitutional sum, jeopardizing $400 million in funding for effective kindergarten preparation. CAI intervened on behalf of those providers and the California Court of Appeal held that this exclusion violated relevant constitutional intent (*California Teachers Association v. Huff [Children's Lobby, et al.]* 5 Cal.App.3d 1513). Why did CTA pursue such a course against dispositive evidence of education efficacy? Its members were not the teachers at the preschool level.

CTA follows this regrettable pattern in seeking maximum job security for its members, with total job security based on years of teaching and concomitantly years of membership in its association. CAI does not dispute the right of CTA to make its claims and to seek maximum privilege for its membership. But it crosses a line when it takes a single criterion — years teaching (and membership) — into a single and preclusive factor determining who will teach. Where there is a necessary change, reassignment, or layoff, those decisions are properly made based on the underlying intent behind this sacrosanct "fundamental right to education" in California law. As noted above, even assuming the most permissive review (merely "rational relation" to justify state action), where does it apply there? To preempt the many criteria, including teaching efficacy and subject matter need, and to substitute this bright-line prohibitory factor is arguably the very definition of "arbitrary and capricious." There may be a rational relation between tenure as a factor in making the decision about who is going to teach our children, but how is it rational to make it a sole, exclusive basis as a protected category? How does the elevation of the narrow application of the one CTA-friendly variable as the mandatory and determining factor "rationally relate" to the underlying purpose at issue?

The analysis urged above does not even reach the factual findings of the trial court below. Those findings are entitled to a measure of respect. We have a system of contested litigation that allows exhibits, expert witnesses, cross-examination, and other elements intended to ascertain "what happened" or "what happens." Those factual findings seem to warrant the elevation of a review test beyond "rational relation" and certainly into "heightened scrutiny" if not "strict scrutiny." This Honorable Court should recognize the disparate impact from the current system against the interests of minority and impoverished students. The effects are somewhat different than *Serrano*, but with enough similarity to warrant application of a test that does not elevate an only distantly relevant variable as a single, mandatory test as to whom should teach.

Based on the above considerations, and the protection of the educational rights of California children, CAI urges this Honorable Court to grant review and appropriately revise the decision below.

Respectfully Submitted,

Children's Advocacy Institute

By: Robert C. Fellmeth
Price Professor of Public Interest Law
California Bar #49897

CERTIFICATE OF SERVICE

I, Elisa Weichel, declare as follows:

I am employed in the County of San Diego, State of California. I am over the age of eighteen years and am not a party to this action. My business address is 5998 Alcalá Park, San Diego, CA 92110, in said County and State.

On June 16, 2016, I served the following document:

***AMICUS CURIAE* LETTER IN SUPPORT OF PETITION FOR REVIEW**

on the parties stated below, by the following means of service:

SEE ATTACHED SERVICE LIST

Unless otherwise noted on the attached Service List, **BY MAIL**: I placed a true copy in a sealed envelope or package addressed as indicated on the Service List, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

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

Executed on June 16, 2016 at San Diego, California.

Elisa Weichel

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