No.
(Court of Appeal Nos. A134423, A134424)
(Alameda County Super. Ct. Nos. RG10524770, RG10515768)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CAMPAIGN FOR QUALITY EDUCATION, ET AL.,
Plaintiffs and Appellants,
v.
STATE OF CALIFORNIA, ET AL.,
Defendants and Respondents.

MAYA ROBLES-WONG, ET AL.,
Plaintiffs and Appellants,
v.
STATE OF CALIFORNIA, ET AL.,
Defendants and Respondents,

CALIFORNIA TEACHERS ASSOCIATION,
Intervenor and Appellant.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Do Article IX, Sections 1 and 5 of the California Constitution (a) give public school children the right to an education that meets a minimum qualitative standard and (b) impose a duty on the State to provide for a system of common schools that meets this standard?

2. Does the Article IX, Section 5 duty to "provide for a system of common schools" that shall be "kept up and supported" require the State to furnish the resources necessary to support whatever system the State provides, including the current public school system built upon the State's academic content standards?

INTRODUCTION

There are more than six million students in California's public schools. The State is failing to provide far too many of them the education they need to succeed in the 21st century. Recent data from the National Assessment of Educational Progress ("NAEP"), "the Nation's report card," show that California ranks 45th in the educational achievement of its students, with only 28% of its fourth and eighth grade students at or above proficiency in English and math. *See* http://public-schools.startclass.com/stories/13054/states-ranked-test-scores#6-California (visited 5/26/16). This systemic failure not only puts millions of students at risk; it also endangers the economic, civic, and social well-being of the State. And it denies these students the fundamental right to an education guaranteed by Article IX, Sections 1 and 5 of the California Constitution.

In a 2-1 decision, the Court of Appeal held that these provisions do not require the State to provide California's children with an education that meets *any* qualitative standard, however minimal. This holding misreads the constitutional text and the cases interpreting it. Article IX, Section 1 ("Section 1") explains why public education is of

supreme importance and imposes a duty on the Legislature to "encourage" it by "all suitable means": "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Article IX, Section 5 ("Section 5") explains how the purposes set forth in Section 1 are to be accomplished, and imposes a duty on the Legislature to "provide for a system of common schools" that must be "kept up and supported": "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

These provisions do not come before this Court on a blank slate. Over a century of precedent establishes that Sections 1 and 5 grant Californians an enforceable, fundamental right to an education. *See, e.g.*, *Ward v. Flood*, 48 Cal. 36 (1874) (black children may not be excluded from public schools); *Piper v. Big Pine Sch. Dist.*, 193 Cal. 664 (1924) (exclusion of Indian child violated Section 5). And this right does not vanish once a child walks through the schoolhouse door. In *Serrano v. Priest*, 5 Cal. 3d 584 (1971) ("*Serrano I*"), the Court cited *Piper* in holding that "the right to an education today means more than access to a classroom." *Id.* at 607.

These constitutional principles are well-recognized elsewhere. Although they have articulated a variety of standards, the courts of twenty-five states have recognized that the education articles of their respective state constitutions provide judicially enforceable rights to a constitutionally adequate education. These states include Arizona, Arkansas, Colorado, Connecticut, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio,

North Carolina, Oregon, South Carolina, South Dakota, Texas, Vermont, Washington, West Virginia, and Wyoming.[1] Yet the Court of Appeal majority did not even mention—much less attempt to distinguish—*any* of these decisions. Instead, it relied on a handful of decisions denying such claims, which all arise in states where—unlike California—the right to an education has not been recognized as "fundamental" under the State's constitution.

The majority gave the wrong answer to a critically important question of California constitutional law. Its decision warrants review by this Court.

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[1] *See Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Lobato v. State*, 218 P.3d 358 (Colo. 2009); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206 (Conn. 2010); *Idaho Sch. For Equal Educ. Opportunity v. Evans*, 976 P.2d 913 (Idaho 1998); *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Md. State Bd. of Educ. v. Bradford*, 875 A.2d 203 (Md. 2005); *McDuffy v. Sect. of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Columbia Falls Elem. Sch. Dist. v. State*, 109 P.3d 257 (Mont. 2005); *Guinn v. Nev. State Legislature*, 71 P.3d 1269 (Nev. 2003), *overruled on other grounds by Nevadans for Nevada v. Beers*, 142 P.3d 339 (Nev. 2006); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003); *Leandro v. State,* 488 S.E.2d 249 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Pendleton Sch. Dist. 16R v. State*, 200 P.3d 133 (Or. 2009); *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Davis v. State,* 804 N.W.2d 618 (S.D. 2011); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995).

STATEMENT OF FACTS

A. The Complaints Allege That California's System Of Education Financing Is Constitutionally Deficient.[2]

1. California Students Fare Badly When Compared To The State's Academic Content Standards And Their Counterparts In Other States.

Almost ten years ago, Governor Schwarzenegger's "Getting Down to Facts" commission found that the public school "finance and governance system is broken and requires fundamental reform . . . ." AA-I:49 (¶161). As the Commission stated, the education finance system is "one that has been cobbled together in response to various pressures over the past thirty-some years," "is extraordinarily complex and has no coherent conceptual basis," and "is not intentionally designed for meeting State educational goals or meeting student needs." AA-III:588 (¶148).[3] The Governor's Committee on Education Excellence, based on more than twenty independent state-commissioned studies, was equally blunt: core "funding [for K-12 public education] is based on anachronistic formulas, neither tied to the needs of individual students nor to intended academic outcomes" and "[d]oes not ensure that sufficient resources reach students according to their needs." AA-III:561 (¶59).

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[2] These appeals arise from orders sustaining a demurrer and granting a motion for judgment on the pleadings. Op. 3. Accordingly, the factual allegations in the operative complaints ("Complaints") must be accepted as true. *Id.*

[3] The "Getting Down to Facts" project was commissioned in 2005 by the Governor's Committee of Education Excellence, the Secretary of Education, the Superintendent of Public Instruction and the legislative leadership. The project was led by Stanford University and included research by scholars at thirty-two institutions.

The dismal results produced by this broken system are plain for all to see. The State has developed academic content standards for each subject matter that shall be "based on the knowledge, skills and processes that pupils will need in order to succeed in the information-based, global economy of the 21st century." EDUC. CODE §60602.5(a)(1). These content standards define "the specific academic knowledge, skills, and abilities that all public schools in this state are expected to teach, and all pupils expected to learn in [each of the core curriculum areas], at each grade level tested." *Id.* §60603(i). Every student must be provided instructional materials aligned to the standards for each core academic subject, and all candidates for a California teaching credential must demonstrate proficiency in teaching the standards. *Id.* §§1240(i), 60119, 60605, 14501(b)(2), 44259(b)(3). The Legislature has provided that these standards shall be used for "assessing the academic achievement of pupils, as well as for schools, school districts, and for the California education system as a whole." *Id.* §§60602.5(a)(1), 60603.

These standards are not being met by far too many California students. In 2009, only 50% of public school students demonstrated proficiency in Science and in English-Language Arts. AA-VII:1473 (¶¶80-81). Even fewer (46%) demonstrated proficiency in Mathematics. *Id.* And just 41% of public school students in California were proficient in History-Social Science. *Id.* ("Proficiency" requires a score of only 350 out of 600. *See* http://star.cde.ca.gov/star2011ihelp_scoreexplanations.aspx. (visited 5/26/16)).

Other statistics tell a similar story. Nearly one-third of students who began high school in 2004 failed to graduate four years later, a substantially higher dropout rate than other states. AA-I:26-27 (¶80). Of those California students who do graduate from high school, approximately 75% fail to successfully complete the course requirements needed to even

apply for admission to a California four-year college or university. AA-VII:1476 (¶88). Moreover, 60% of freshmen in the California State University system cannot meet proficiency requirements in either Mathematics or English, or both. *Id.* (¶89).

The numbers for certain subgroups are even worse. In English-Language Arts, just 37% of African-American and Latino students were at or above proficiency, compared to 68% of white students. AA-VII:1474 (¶83). Only 30% of African-American students and 36% of Latino students achieved proficiency in Mathematics, compared to 57% of white students. *Id.* In English-Language Arts, 64% of economically disadvantaged students and 80% of English Learners failed to achieve proficiency. Similarly, 63% of economically disadvantaged students and 68% of English learners failed to reach proficiency in Mathematics. AA-VII:1475 (¶84).

California also ranks among the lowest in the nation on the NAEP. When the Complaints were filed, California was 47th in fourth-grade reading and 46th in eighth-grade math. AA-I:25 (¶75). In 2009, only Mississippi, Alabama and the District of Columbia had statistically significant lower average math scores than California fourth graders. AA-VII:1478 (¶97). These deficiencies affect children from all economic strata. California's economically disadvantaged students ranked 49th in fourth-grade reading and 48th in eighth-grade math when compared to economically disadvantaged students in other states. AA-I:26 (¶77). Their middle-class counterparts did only a little better. California's middle-class eighth grade students ranked 43rd in comparison to middle-class students in other states. AA-VII:1478 (¶98).

2. Despite Recent Legislative Changes, California Schools Are Still Failing Large Numbers Of Students.

These dismal results are due in large part to inadequate resources. In 2005-06, California spent $2,000 less per student than Louisiana and Arkansas and more than $5,000 per student less than New York and New Jersey. AA-VII:1485 (¶121). In 2007, California spent just 77% of the national average for each student. AA-VII:1485 (¶121). In 2008-09, adjusted for regional cost differences, California's K-12 education spending was 47th in the country. AA-III:563 (¶67).

Low funding deprives California students of access to critical educational resources, including sufficient staffing levels and manageable and effective class sizes. AA-I:34 (¶108-109); VII:1451 (¶¶5-6); 1486-88 (¶¶123-25, 127-32). At the time the Complaints were filed, among the 50 states and the District of Columbia, California ranked 50th in total school staff per student, with 70 staff members per 1,000 students (compared to a national average of 124.7 per 1,000); 49th in teachers per student; 49th in principals and assistant principals per student; 51st in guidance counselors per student; and 51st in librarians per student. VII:1487 (¶128). And in 2013-14 California had over 1.2 million more students than Texas, but 75,075 fewer teachers. *Compare* http://nces.ed.gov/programs/stateprofiles/sresult.asp?mode=short&s1=06 (visited 5/26/16) (California statistics) *with* http://nces.ed.gov/programs/stateprofiles/sresult.asp?mode=short&s1=48 (visited 5/26/16) (Texas statistics).[4]

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[4] This under-funding is the State's responsibility. While education was once primarily supported by locally enacted property taxes (*Serrano I*, 5 Cal. 3d at 591 & n.2), Proposition 13 gave the Legislature responsibility for allocating the property tax. CAL. CONST. art. XIIIA, §1(a). Local (. . . continued)

In 2013, the Legislature modified the school funding formula to better address needs based upon differences between school district populations. Stats. 2013, ch. 47; *see* EDUC. CODE, §42238.02; *see generally* Mac Taylor, *Updated: Overview of the Local Control Funding Formula* http://www.lao.ca.gov/reports/2013/edu/lcff/lcff-072913.pdf (visited 5/26/16). However, the new "Local Control Funding Formula" ("LCFF") pertains only to the distribution of state funds among the schools. *See* http://www.cde.ca.gov/fg/aa/lc/lcffoverview.asp (visited 5/26/16). It does not, and was not intended to, change the manner in which the State determines the level of funding for education, much less establish a mechanism for providing the resources necessary to ensure that students have the opportunity to meet the State's academic content standards. *Id.*[5] Consequently, although some additional funds have been appropriated to the public school system, student performance remains dismal. *See* p.1, *supra*.

B. The Court Of Appeal Majority Rejects Plaintiffs' Constitutional Claims.

Plaintiffs in *Robles-Wong v. California* ("*Robles-Wong*") and *Campaign for Quality Education v. California* ("*CQE*") separately filed suit in 2010. AA-I:1-59; AA-V:951-1006. The California Teachers Association ("CTA") intervened as a plaintiff in *Robles-Wong*. AA-I:60-105. Defendants in both cases are the State and various State officials. Op. 2. The

(. . . continued)
governments have extremely limited ability to raise additional revenue to support their schools. *Id.* §§1(b), 4(a).

[5] The same is true for Proposition 98, which provides a floor for General Fund education spending. *See* CAL. CONST., art. XVI, §8. That floor has no relationship to the cost of providing educational services and programs consistent with the State's academic content standards, which were developed after the initiative was adopted in 1988 and amended in 1990.

Superior Court related the two cases. AA-I:110-117, V:1011-1017.

The Complaints alleged, *inter alia*, that the State's education financing system violates Sections 1 and 5. AA-III:590-91; AA-VII:1506-07. Plaintiffs relied on two different, but related, theories. First, they alleged that public school children have a constitutional right under Sections 1 and 5 to an education system that meets some minimum qualitative standard, and that the Legislature was violating their rights by, among other things, failing to provide the public schools with the financial support necessary to provide students with an education which meets that standard. AA-III:559 (¶¶50-51); AA-VII:1506-07 (¶¶223-27). Alternatively, Plaintiffs alleged that Section 5's requirement that the State "provide for a system of common schools" requires the State to support the educational system that the Legislature, in its discretion, has established, including the programs necessary to ensure that all public school students have the opportunity to meet the academic standards that the State has made the cornerstone of its system of public education. AA-III:568 (¶88): 590-91 (Prayer ¶1(a), (b)); AA-VII:1506 (¶¶221, 225-26); *see* p.5, *supra*. The trial court held that these allegations did not state a cause of action, sustaining Defendants' demurrer and granting their motion for judgment on the pleadings. Op. 3.[6]

The Court of Appeal affirmed in a published decision. The majority opinion by Justice Jenkins found that Sections 1 and 5 "do not include qualitative or funding elements that may be judicially enforced by the courts" because the Constitution leaves solely to the Legislature "questions associated with

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[6] The Complaints also included claims under the Equal Protection Clause of the California Constitution. CAL. CONST., art. I, §7. The rulings on those claims were not appealed.

educational adequacy and funding." Op. 2. Justice Siggins joined the majority opinion and issued a short concurrence.

Justice Pollak dissented. Like "the majority of state courts addressing this issue," he reasoned that "if the constitutional provision is to have meaning, it must imply that the system of common schools must provide some minimum qualitative level of education." Dissent 4. He therefore concluded that Sections 1 and 5 "require[] a system that provides students with a meaningful basic education in reality as well as on paper." *Id.* at 14.

REASONS FOR GRANTING THE PETITION

I.

THE ISSUES PRESENTED ARE IMPORTANT.

Review in this case is necessary to "settle an important question of law." CAL. R. CT. 8.500(b)(1). California's public education system is the largest and most diverse in the Nation. In 2014-15, approximately 6.2 million students were enrolled in the State's public education system. *See Fingertip Facts on Education in California,* CalEdFacts http://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp (visited 5/26/16). California educates one in eight of the Nation's public school students.[7]

As the Complaints allege, California has failed to provide millions of students with an education that gives them an opportunity to succeed in the modern economy and meaningfully participate in social and civic life. Compared to other states, California is at or near the bottom in academic

[7] *See* http://nces.ed.gov/fastfacts/display.asp?id=372 (visited 5/26/16) (50.1 million public school students in United States); *Fingertip Facts on Education in California,* CalEdFacts http://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp (visited 5/26/16) (California educated 6.2 million students).

achievement and educational resources. The State itself has confirmed these deficiencies in report after report—which have all demonstrated that the education finance system is irrational and fails to provide the educational resources necessary to provide all students the opportunity to meet the State's educational goals. *See* pp. 4-6, *supra*.

The consequences of these failures are not limited to students and their families. For example, California's educational system will produce a shortfall of more than a million graduates by 2025 compared to the needs of the State's economy.[8] In short, the stakes could not be higher for California or—given the large percentage of the Nation's students in California—for the country as a whole.

Decisions from other states demonstrate the need for Supreme Court review. The issue of whether the state's constitution requires the state to provide a minimally adequate education has been addressed by the appellate courts in thirty-four states. In all but two of these states, the decision was made by the state's Supreme Court. Accordingly, whatever the outcome on the merits, the overwhelming majority of state supreme courts have recognized that the adequacy issue requires a decision by the highest court in each state.[9]

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[8] Hans Johnson & Ria Sengupta, *Pub. Policy Inst. of Cal., Closing the Gap: Meeting California's Need for College Graduates* (2009) at 1, available at http://www.ppic.org/main/publication.asp?i=835.

[9] A few states don't have intermediate appellate courts. But twenty-seven states with intermediate appellate courts have addressed the adequacy issue. Only in Louisiana and Michigan has the issue been addressed by the intermediate appellate court rather than the state supreme court.

II.

THE COURT OF APPEAL MAJORITY WRONGLY DECIDED THESE IMPORTANT ISSUES.

"The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution." *Piper*, 193 Cal. at 669. Moreover, "the unique importance of public education in California's constitutional scheme requires careful scrutiny of state interference with basic educational rights." *Butt v. State*, 4 Cal. 4th 668, 683 (1992). Yet the Court of Appeal majority has held that the State's obligation to provide "basic educational rights" is satisfied once students walk through the schoolhouse door, regardless of whether the school provides an adequate education.

That holding is inconsistent with the purposes served by Sections 1 and 5, which must be the predominant factor in ascertaining their meaning. *See People v. Giordano*, 42 Ca1. 4th 644, 655 (2007) (a constitutional provision must be interpreted "liberally and on broad general lines so that it may accomplish in full measure the objects of its establishment and so carry out the great principles of government"). Those purposes are clear: to give all students the chance to receive an education that enables them to "participate in the social, cultural and political activity of our society" and "to compete successfully in the economic marketplace." *Serrano I,* 5 Cal. 3d at 606, 609. In addition, the decision below conflicts with the text of Sections 1 and 5, the overwhelming majority of out-of-state decisions, and this Court's recognition that "the right to an education today means more than access to a classroom." *Id.* at 607.

A. The Majority Misread The Constitutional Text.

The majority's decision rests on the premise that there is "no explicit textual basis from which a constitutional right to a public school education of a particular quality may be

discerned." Op. 10. Section 1 is "general and aspirational," apparently because "it makes no provision for how the Legislature is to achieve its goal except to use 'all suitable means.'" Op. 9. And while Section 5 requires the Legislature to "provide for a system of common schools," it "does not require the attainment of any standard of resulting educational quality." *Id.* The majority's reading of these sections suffers from at least four defects.

(1) The Majority Ignored Critical Language In Sections 1 And 5. The majority's holding that Sections 1 and 5 "do not include quantitative or funding elements that may be judicially enforced by the courts" (Op. 2) ignores critical language in both provisions.

Section 1 provides that "the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." The word "shall" is unambiguous and imposes a legal duty on the Legislature. Article I, Section 26 provides that the "provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." No such "express words" appear in Section 1.

Moreover, the importance of the duty given to the Legislature by Section 1 is underscored by its text in two different respects. Section 1 imposes a mandatory duty on the Legislature because a "general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people." Nothing "essential to the preservation of the rights and liberties of the people" could have been left entirely to legislative whim. Moreover, the Framers directed the Legislature to use "all suitable means" to encourage education. Section 1 therefore cannot be interpreted to give the Legislature carte blanche to establish any educational system, however minimal.

While Section 1 requires the Legislature to use "all suitable means" to promote education, Section 5 imposes a specific duty. It requires the Legislature to "provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year . . . ." "Provide for" means to "make arrangements for supplying means of support, money, etc."[10] Similarly, "keep up" means to "maintain the good condition of."[11] Finally, "support" means "to pay the costs of" or "maintain . . . by supplying with things necessary to existence."[12] In other words, these words impose an affirmative duty on the State both to establish a free and uniform system of public education *and to provide resources commensurate with that obligation*. Yet the majority ignores this language, and therefore never explains how its holding that Section 5 imposes no obligation on the State to support the public school system can be squared with the constitutional text. Similarly, the majority did not respond to the dissent's contention that "the constitutional mandate to provide a public school system" is similar to "the right to counsel," in that both imply "the need to maintain . . . some minimum level of competence." Dissent 5-6.

(2) The Majority Construed Sections 1 And 5 In Isolation From Each Other. In addition to ignoring key constitutional language, the majority treated Sections 1 and 5 as if they were cabined in watertight compartments. In doing so, it ignored this Court's holding in *Hartzell v. Connell*, 35 Cal. 3d

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[10] *See* http://dictionary.reference.com/browse/provide+for (visited 5/26/16).

[11] *See* http://dictionary.reference.com/browse/keep+up (visited 5/26/16).

[12] *See* http://www.merriam-webster.com/dictionary/support and http://dictionary.reference.com/browse/support (visited 5/26/16)

899 (1984), that Section 5 must be interpreted in the context of "the role played by education in the overall constitutional scheme." *Id.* at 907. Had it followed *Hartzell*, the majority would have recognized the structural relationship between Sections 1 and 5: the former defines the purposes served by California's education guarantee while the latter provides the means by which those purposes are to be furthered. Accordingly, the "system of common schools" that Section 5 requires the Legislature to "provide for" must serve the purposes for which that system was created: to promote "intellectual, scientific, moral and agricultural improvement" and thereby "preserv[e] . . . the rights and liberties of the people." *See* Dissent 2 (while Section 5 "says nothing explicitly about the necessary quality of such schools, its meaning is informed by section 1"). Indeed, the Constitution's recognition that the diffusion of knowledge and intelligence is "essential to the preservation of the rights and liberties of the people" necessarily implies that the Legislature must "provide for a system of common schools" of sufficient quality to enable its citizens to exercise their fundamental rights, such as voting, serving on a jury, and petitioning the government for redress of grievances.

The majority's tunnel-vision reading of Section 5 would permit the Legislature to set up a single school in each school district, devoid of curricular resources, open for only six months a year. Yet this "system" would not comply with the Constitution's command that the Legislature use "all suitable means" to accomplish the purposes set forth in Section 1.

Plaintiffs' interpretation of Sections 1 and 5 is not based on "surmise" or "speculation," as the majority asserted. Op. 11. Instead, it is not only the most natural reading of the constitutional text, but one that (unlike the contrary interpretation) is faithful to both the language of the constitution and its stated purposes. *See Levi v. O'Connell*,

144 Cal. App. 4th 700, 708 (2006) (while the public school system need not "meet every student's particularized educational needs," the "standard system should provide a high quality education for all the students of our state") (Cantil-Sakauye, J.).

(3) The Majority Ignored The Fact That Sections 1 And 5 Are Unique In The Lengthy California Constitution. Sections 1 and 5 are unique. No other provision in the California Constitution requires the Legislature to establish public welfare or social services. Instead, the constitutional clauses concerning other social welfare institutions are permissive, not mandatory. *See* CAL. CONST. art. XVI, §3 ("The Legislature shall have the power to grant aid" to orphans, abandoned children, needy blind persons, and needy physically handicapped persons); *id.* art. XIV, §1 ("Legislature may provide for minimum wages and for the general welfare of employees . . ."); *id.* §4 (granting Legislature "plenary power . . . to create, and enforce a complete system of workers' compensation"). Article IX stands alone in explicitly commanding the Legislature to affirmatively establish a system that provides services to California's citizens. The Court of Appeal majority erred in holding otherwise.

The majority then compounded its error by relying on the principles for determining when statutes violate a constitutional prohibition. *See* Op. 5, 17-18. But these principles—such as the rule that constitutional limitations on the Legislature's power "are to be construed strictly" (Op. 5)—are irrelevant where, as here, the issue is whether the Legislature has fulfilled a constitutional duty rather than run afoul of a constitutional prohibition.[13]

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[13] The majority also cited several cases for the proposition that "our Constitution vests the Legislature with sweeping and (. . . continued)

(4) The Majority's Interpretation Of The Constitution Cannot Be Justified By Separation-Of-Powers Concerns. The majority supported its reading of the constitutional text by claiming that Plaintiffs' interpretation of Sections 1 and 5 would "to a great extent, place the matter outside the arena of public debate and legislative action." Op. 10 (citation and internal quotations omitted). Not so. Plaintiffs do not contend that Sections 1 and 5 "mandate the Legislature to act in a particular manner regarding what precise laws shall be made to implement" its principles. Op. 11. Nor do they seek]relief that "direct[s] the Legislature to take specific action." Op. 17 (citation and internal quotation marks omitted). Instead, Plaintiffs seek no more than the remedy approved in *Serrano v. Priest*, 18 Cal. 3d 728 (1976) ("*Serrano II*"): a declaration (made after trial, of course) that the status quo fails to satisfy the constitution. *See id.* at 776 (trial "court properly determined that . . . the financing system before it was invalid as denying equal protection of the laws as guaranteed by the California Constitution"). That finding will *promote* "public debate" and *spur* "legislative action," not stifle them.

The majority also claimed that "allowing appellants' funding claim to proceed would require the courts to intrude into the Legislature's appropriation powers." Op. 17. Again, the majority did not explain why the relief sought here was different than that approved in *Serrano II*. Nor did the

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(. . . continued)
comprehensive powers in relation to our public schools." Op. 7 (quoting and/or citing *Hall v. City of Taft*, 47 Cal. 2d 177, 179 (1956), *Cal. Teachers Ass'n v. Hayes*, 5 Cal. App. 4th 1513, 1528 (1992), and *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1134-35 (1999)). However, these cases all involved the proper division between state and local control of public schools. They therefore do not address whether Sections 1 and 5 impose affirmative duties on the Legislature that may be enforced by a court.

majority respond to the dissent's assertion that "the court's inability to compel the Legislature to appropriate . . . funds is no reason for the court to refrain from exercising its proper authority to determine whether the state is complying with the constitutional mandate." Dissent 18.

In addition, the majority failed to address the fact that Plaintiffs' alternative "system of common schools" theory leaves the minimum funding obligation for the public school system largely within the Legislature's discretion. This theory leaves the Legislature free to fashion whatever public school system it believes to be appropriate for the State's students, and to devise appropriate metrics for assessing the performance of that system. However, once those legislative determinations are made, the Legislature is bound by Section 5 to "provide for," "ke[ep] up and support[]" a system capable of providing the education it has required. For this reason, too, the majority's concerns about judicial interference with public debate, legislative discretion, and fiscal decision-making are misplaced.

B. The Majority Opinion Conflicts With This Court's Decisions.

Although this Court has never squarely decided whether Sections 1 and 5 require the State to provide students with the opportunity to receive a constitutionally adequate education, the logic of its precedents—which the Court of Appeal majority ignored—compel that conclusion. Indeed, almost a century ago, in the course of invalidating a statute that had excluded from the public schools any Indian child eligible to attend a school financed by the federal government, the Court described the "system of common schools" that Section 5 requires the Legislature to support in expansive terms:

> The public school system of this state is a product of the studied thought of the eminent educators of this and

> other states of the Union, perfected by years of trial and experience. . . . Each grade forms a working unit in a uniform, comprehensive plan of education. Each grade is preparatory to a higher grade, and, indeed, affords an entrance into schools of technology, agriculture, normal schools, and the University of California. In other words, the common schools are doorways opening into chambers of science, art and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his school work. *These are rights and privileges that cannot be denied.* (*Piper*, 193 Cal. at 673 (emphasis added))

The majority opinion ignored this language, although it constitutes this Court's most explicit definition of the rights conferred by Sections 1 and 5. Likewise, the majority attempted to confine this Court's decision in *Hartzell v. Connell*, 35 Cal. 3d 899 (1984), to its facts, ignoring the Court's extensive discussion of the purposes served by Article IX. *See* Op. 11-12 n.6. To be sure, as the majority recognized, *Hartzell* held only that a school district could not levy a fee for extra-curricular activities, and did not decide whether the provision of such activities was constitutionally required. *Id.* But the Court identified "a political, an economic, and a social dimension" to the free school guarantee. 35 Cal. 3d at 907. As the Court recognized, "education prepares students for active involvement in political affairs" (*id.* at 907), "prepares individuals to participate in the institutional structures . . . that distribute economic opportunities and exercise economic power" (*id.* at 908), and "serves as a 'unifying social force' among our varied population, promoting cohesion based upon democratic values." *Id.* (quoting *Serrano I*, 5 Cal. 3d at 608). Accordingly, the Court interpreted Section 5 so as not to "sever the concept of education from its purposes" (*id.* at 909), and therefore adopted an expansive view of the educational activities that are "essential," "integral," or "fundamental"

and thus protected by Section 5's free school guarantee. *Id.* at 909-10.

The majority's crabbed interpretation of Article IX is also inconsistent with *Serrano I* and its progeny. In the course of holding that education is a "fundamental right" under the California Constitution, the Court stated that "[a]lthough *Manjares* [*v. Newton*, 64 Cal. 2d 365 (1964)] and *Piper* involved actual exclusion from the public schools, surely the right to an education today means more than access to a classroom." *Serrano I,* 5 Cal. 3d at 607. Yet, under the majority's decision, the "right to an education" stops being enforceable once a student walks through the schoolhouse door.

The majority opinion seeks to sidestep *Serrano*'s description of "the right to an education" by observing that "*Serrano I* neither addressed nor found a constitutional mandate imposing on the Legislature a duty to fund an education of 'some quality' that appellants seek to enshrine in articles I and 5 of article IX." Op. 16 n.8. But *Serrano*'s logic cannot be so easily evaded.

To begin with, the majority erred in relying on *Serrano III*'s description of *Serrano I* as holding "that there is no constitutional mandate for the Legislature 'to provide funds for each child in the State at some magic level to produce either an adequate-quality educational program or a high-quality educational program.'" Op. 16 (quoting *Serrano v. Priest*, 20 Cal. 3d 25, 36 n.6 (1977) ("*Serrano III*")). The ultimate source of this quote is the trial court's decision on remand after *Serrano I*, when the trial court was tasked with resolving the merits of plaintiffs' Equal Protection Claim. *See Serrano I*, 5 Cal. 3d at 618. The reach of Article IX was no longer at issue. Accordingly, this language has no bearing on Plaintiffs' Article IX claims.

Nor could the majority rely on *Serrano I*'s statement that Section 5 "makes no reference to school financing." Op. 16 (quoting *Serrano I*, 5 Cal. 3d at 596). The *Serrano* plaintiffs' Section 5 claim asserted that "the present financing method produces separate and distinct systems, each offering an educational program which varies with the relative wealth of the district's residents" (*id.* at 595), and thereby violated the Constitution's command that the Legislature create a *single* system of common schools. Accordingly, the *Serrano* plaintiffs argued that Section 5 required "equal school spending" or "uniform educational expenditures." *Id.* at 596. Plaintiffs in these cases make no such claims. Accordingly, when considered "in accordance with the facts and issues before the court" (Op. 16 n.8), *Serrano I*'s discussion of Section 5 does not control this case.

To the contrary, *Serrano* indicates that "the right to an education" can be abridged by inadequate funding that impairs educational quality. The school funding system challenged in *Serrano* did not exclude anyone from the classroom. Yet the Court upheld the *Serrano* plaintiffs' claim that their rights were violated because funding disparities resulted in disparities *in the quality of the education they received*. *See* 5 Cal. 3d at 601 ("To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make *the quality of a child's education* dependent upon the location of private commercial and industrial establishments") (emphasis added). Indeed, *Serrano II* emphasized that funding disparities by themselves did not violate the Constitution; instead, they were relevant "only insofar as it is shown that the system before us . . . results in impermissible disparity in the level of educational opportunity available to the students of the various school districts of this state." *Serrano II*, 18 Cal. 3d at 759 n.38. But

if disparities in "the level of educational opportunity" trigger strict scrutiny under the Equal Protection Clause—because they amount to the denial of a "fundamental right"—some minimal level of educational opportunity" must also be protected by substantive provisions of the California Constitution—i.e., Sections 1 and 5.

The majority acknowledged in passing that education is a "fundamental right" under the California Constitution. Op. 4, 6. But it never explained how an adequate education can be a fundamental right under the Equal Protection Clause but not an enforceable right under Sections 1 and 5. This omission is no accident. A right cannot be "fundamental" for purposes of Equal Protection yet be substantively unenforceable under other provisions of the Constitution. Indeed, "no supreme court has ever found its education clause to contain a substantive right to an education with no corresponding guarantee of quality." Anne D. Gordon, *California Constitutional Law: The Right To An Adequate Education*, 67 HASTINGS L.J. 323, 352 (2016). The majority's refusal to recognize the substantive constitutional right to an adequate education conflicts with *Piper*, *Hartzell* and *Serrano*.[14]

C. The Majority Opinion Conflicts With The Great Majority Of Out-Of-State Decisions.

As props for its decision, the majority relied heavily on three out-of-state cases that have refused to find adequacy standards in their respective state constitutions. Op. 8, 9, 12-

[14] Many cases hold that rights deemed "fundamental" under the Equal Protection Clause are also independently enforceable. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-06 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty").

13 (quoting *Bonner v. Daniels*, 907 N.E.2d 516, 520 (Ind. 2009); *Comm. for Educ. Equality v. State*, 294 S.W.3d 477, 488 (Mo. 2009); *Comm. for Educ. Rights v. Edgar,* 672 N.E.2d 1178 (Ill. 1996)). But the majority failed to acknowledge that, as the dissent recognized, "[m]ost state supreme courts addressing the question have read their state constitution implicitly to mandate a minimum qualitative education system." Dissent 1. Indeed, the majority failed even to mention any of the contrary decisions, much less explain why it decided not to follow them.

The closest the majority came to explaining its decision to rely on a minority of out-of-state cases was its statement that these decisions "have analyzed almost identical constitutional language." Op. 8. However, as the dissent explained (without contradiction from the majority), the "differences in phraseology" between the various state constitutions at issue in these cases "are insignificant." Dissent 1. "The different outcomes result less from differences in the wording of the respective constitutions than from different perceptions of the role properly played by courts in overseeing compliance with the state's basic charter." *Id.* at 2. Accordingly, the majority's heavy reliance on three cherry-picked out-of-state cases cannot be justified on the basis of text—particularly when the court ignored decisions that have interpreted constitutional provisions similar to California's to require minimum educational standards. *See* pp. 25-28, *infra*.

Nor can the majority's reliance on the few out-of-state decisions that support its conclusion be justified by the only other rationale it relies on. The majority opinion reaches back more than a century to quote *Lord v. Dunster*, 79 Cal. 477 (1889), for the proposition that "[i]n determining the meaning of a constitutional provision, it will be presumed that those who framed and adopted it were conversant with the interpretation which had been put upon it under the

constitution from which it was copied; and this is the rule even as to provisions taken from the constitutions of other states—the judicial construction placed upon them in the states from which they are taken will be followed by the courts in the state which adopts them." *Id.* at 485. This principle would justify a court construing a provision of the California Constitution in accordance with the contemporaneous construction of a similar provision in another state's constitution. However, the drafters of the 1849 and 1879 constitutions could hardly have been aware of how provisions in the Indiana and Missouri constitutions would be construed 140 years later.

Plaintiffs recognize, of course, that resort to out-of-state cases is proper when construing the Education Clauses. *See Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 2 Cal. 4th 251, 260-61 (1992). But the majority opinion should not have relied so heavily on the few cases that support its position while utterly ignoring the many more that take the opposite tack.

D. The Majority Erred In Concluding That Sections 1 And 5 Do Not Provide Meaningful Standards For Assessing Educational Adequacy.

The majority opinion concluded that "standards of [educational] quality" cannot "be derived from the constitution in any meaningful sense." Op. 12. This conclusion was the logical result of ignoring critical language in Sections 1 and 5 and the out-of-state cases just discussed. Sections 1 and 5 are replete with language defining the Legislature's obligations vis-à-vis education, and thereby provide a standard against which the State's educational system can be measured. *See* Part II(A), *supra*. Indeed, courts in many other states have developed manageable standards of educational quality based on constitutional language similar to these provisions.

Some courts have relied on "suitability" language.[15] Other courts have looked to the constitutional requirement that education be "generally" diffused.[16] And other courts have relied on the requirement that the State fund a "system of common schools."[17] Yet the majority concluded that Sections 1 and 5 do not contain "standards of quality" without considering either the language of Sections 1 and 5 (which describes in detail the purposes that the "system of common schools" is designed to serve) or the many cases from other states that have construed similar language to promulgate judicially manageable standards to resolve similar claims. Likewise, the majority did not rebut the dissent's statement that "decisions from many other states demonstrate that courts are capable of articulating such a standard, albeit a standard that is general and requires intensive factual analysis to apply." Dissent 9.

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[15] *See, e.g.*, *Montoy v. Kansas*, 120 P.3d 306, 309 (Kan. 2005) (school finance system held unconstitutional for failure to make "suitable provision for finance of public schools" under Article 6, Section 1 of the Kansas Constitution).

[16] *See Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989) (where Texas Constitution requires a "*general* diffusion of knowledge," court held that "[t]he present system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced").

[17] *See, e.g., Davis v. State*, 804 N.W.2d 618, 623-24 (S.D. 2011) (constitutional provision making it "the duty of the Legislature to establish and maintain a general and uniform system of public schools" requires the Legislature "to establish a general system of free public schools, each of the same form, and to employ all appropriate and fitting means to ensure children in South Dakota are afforded the advantages and opportunities of education"); *Campaign for Fiscal Equity v. N.Y.C.*, 655 N.E.2d 661, 666 (N.Y. 1995) ("system of free common schools" provision requires the State to afford "a sound basic education" —i.e., "an education . . . consist[ing] of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury").

Moreover, as other courts have done, the California courts may rely on the state's own academic content standards to help define the education required by Sections 1 and 5.[18] That would comport with the Legislature's express recognition that these standards may be used to assess "schools, school districts, and . . . the California education system as a whole." EDUC. CODE §60602.5(a)(1). And it would complete a constitutional "virtuous feedback loop," because the State's academic content standards were developed pursuant to a legislative mandate that closely tracks *Serrano*'s definition of a constitutionally adequate education. *Compare Serrano I*, 5 Cal. 3d at 609 ("education is essential . . . to compete successfully in the economic marketplace") *with* EDUC. CODE §60602.5(a)(1) (directing development of academic content standards "based on the knowledge, skills and processes that pupils will need in order to succeed in the information-based, global economy of the 21st century").

In addition, under Plaintiffs' alternate theory, these statutes establish the core of the "system of common schools" that the State is obligated to support under Section 5. In *Piper*, this Court held that "[t]he [California Constitution] provide[s] for a uniform system and course of study as adopted and provided by the authority of the state." 193 Cal.

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[18] *See, e.g.*, *Morath v. Tex. Taxpayer & Student Fairness Coal.,*--S.W.3d--, No. 14-0776 (Tex. 2016) ("Deferring to the Legislature's role in providing a general diffusion of knowledge, we have looked to sections . . . of the Education Code . . . through which the Legislature has declared" how its obligation to provide a general diffusion of knowledge is satisfied); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734-35 (Idaho 1993); *Abbott v. Burke*, 693 A.2d 417, 428-29 (N.J. 1997) (state standards "spell out and explain the meaning of a constitutional education"); *Lobato v. State*, 218 P.3d 358, 375 (Colo. 2009) ("The trial court may appropriately rely on the legislature's own pronouncements to develop the meaning of a 'thorough and uniform' system of education").

at 669. Today, that "uniform system and course of study" is defined by the academic content standards, which establish "the specific academic knowledge, skills, and abilities that all public schools in this state are expected to teach, and all pupils are expected to learn . . . at each grade level tested." EDUC. CODE §60603(i). Indeed, the mandatory assessments based on the academic standards assure "a *constitutional* level of cohesion within the curriculum and course of study at each grade level in all schools." *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1138 n.9 (1999) (emphasis added). Accordingly, at the very least, the State's constitutional obligation to "provide for a system of common schools," and ensure that the system is "kept up" and "supported," requires the State to provide a funding scheme sufficient to provide students with an opportunity to learn the knowledge and skills embodied in the State's academic content standards, because those standards define the "uniform system and course of study" that the Constitution requires. *See Lobato*, 218 P.3d at 374 (plaintiffs could proceed on their claims that Colorado's school financing system violated the "thorough and uniform" system clause of the Colorado Constitution because their allegation that "current funding levels do not allow students the opportunity to meet the standards and objectives established in education reform legislation" was justiciable); *Montoy,* 120 P.3d at 308-09 ("we need look no further than the legislature's own definition of suitable education [incorporating academic content and performance standards] to determine that the standard is not being met under the current financing formula"); *Campbell Cnty. Sch. Dist. v. State,* 181 P.3d 43, 67 (Wyo. 2008) (recognizing "the constitutional directive that it is the legislature's duty and prerogative to determine the appropriate standards for our

public schools and to assure sufficient funding is provided to allow the districts to achieve those standards").[19]

As these cases—and many others—demonstrate, nearly every court charged with adjudicating constitutional claims asserting educational inadequacy has determined whether the then-existing public school system provided the resources needed to give students the education required by that state's constitution. There is no reason why the California courts cannot do the same—especially given the status of education as a fundamental right under California's Constitution.

III.

THIS CASE IS THE RIGHT VEHICLE TO RESOLVE THESE ISSUES.

The issues the Petition presents cannot be left to "percolate" in the lower courts. If this Court denies review, it will as a practical matter be the last word on these important constitutional issues. Plaintiffs in these cases represent an unprecedented statewide coalition of school children, parent groups, community-based organizations, school districts, teachers, and administrators. Forming such coalitions takes enormous time and effort. The same is true for drafting detailed, lengthy, and fact-intensive pleadings that adequately frame the constitutional issues. *See* AA-III:537-92; AA-VII:1446-511. Accordingly, if review is denied in these cases, no one will devote the time and effort necessary to bring a similar case in the future on the off-chance that (a) a different Court of Appeal will disagree with the majority

[19] Because Plaintiffs' alternate theory does not assert that the current academic content standards are constitutionally required, the Legislature can change them. However, Plaintiffs do contend that the State must support an educational program that gives students the opportunity to meet whatever standards the Legislature has chosen to adopt.

below, thus creating a conflict in the lower courts, or (b) this Court would grant review in that hypothetical future case after denying review in these cases. In short, the time to resolve these issues definitively is now.

Nor is denial of review warranted by recent legislative enactments. If and when the decision below is reversed, Plaintiffs will of course need to prove their case with respect to the then-existing educational "system of common schools." But the majority's decision that Sections 1 and 5 do not create judicially enforceable rights is not tied to any specific system. As long as it remains good law, that decision will preclude *any* challenge to the educational inadequacy of the State's public school system based on Sections 1 and 5—regardless of recent developments, or how adequately or inadequately that system meets the needs of California's public school students. Consequently, the constitutional issues this Petition presents are ripe for review.[20]

CONCLUSION

The Petition should be granted.

DATE: May 31, 2016.

Respectfully,

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[20] Indeed, recent data suggests that the problems described in the Complaints persist to this day. *See* p.1, *supra*.

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CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.504

Pursuant to California Rule of Court 8.504(d), and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing **Petition for Review** contains 8,342 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: May 31, 2016.

/s/ *Steven L. Mayer*
STEVEN L. MAYER

35992415

PROOF OF SERVICE

I, Gigi Francisco-Ferrer, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Three Embarcadero Center, 10th Floor, San Francisco, California 94111-4024. On May 31, 2016, I served the following document described as **PETITION FOR REVIEW** by placing it in a sealed FedEx envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for delivery on the next business day, June 1, 2016, on the interested parties in this action addressed as follows:

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Counsel for Defendants/Respondents State of California, Governor Edmund G. Brown, Jr., State Controller Betty T. Yee; and Director of Finance Michael Cohen

In addition, on May 31, 2016, I served the following document described as **PETITION FOR REVIEW** by placing it in sealed, postage pre-paid envelope and delivering it to a United States Postal Service mailbox. The envelope was addressed as set forth below:

Clerk of the Court
Superior Court for the County of Alameda
1225 Fallon Street
Oakland, CA 94612
Case Nos. RG10515768; RG10524770

Also, on May 31, 2016, I served the following document describes as **PETITION FOR REVIEW** by submitting electronically through the Court's TrueFiling system on:

Clerk of the Court
Court of Appeal of the State of California
First Appellate District, Division Three
350 McAllister Street
San Francisco, CA 94102-7421

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on May 31, 2016.

Geraldine F Ferrer

Gigi Francisco-Ferrer