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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Case No. 2018CA2345 Opinion by Lipinsky, J., Webb and Dunn, JJ., concurring	
Petitioners, POUDRE SCHOOL DISTRICT R-1 and POUDRE SCHOOL DISTRICT R-1 BOARD OF EDUCATION, v. Respondents, PATRICIA STANCZYK and POUDRE EDUCATION ASSOCIATION.	▲ **COURT USE ONLY** ▲
Attorneys for the Colorado Attorney General: PHILIP J. WEISER, Attorney General JENNA ZERYLNICK, Assistant Attorney General, Reg. No. 42553* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6178 Email: Jenna.Zerylnick@coag.gov *Counsel of Record	Case No. 2020SC269

BRIEF OF AMICUS CURIAE THE COLORADO ATTORNEY GENERAL IN SUPPORT OF RESPONDENTS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d). It contains 3,301 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Jenna Zerylnick
Jenna Zerylnick, No. 42553
Assistant Attorney General

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INTEREST OF AMICUS CURIAE

Petitioner Poudre School District continues to claim that Respondents' construction of § 22-63-203.5, C.R.S. infringes upon article IX, section 15 of the Colorado Constitution, known as the "local control clause." *Opening Br.* at 27-30. The Colorado Attorney General has a duty to defend the duly enacted laws of the State. As a result, the Attorney General is "entitled to be heard" whenever a statute "is alleged to be unconstitutional." § 13-51-115, C.R.S.; *see also* C.R.C.P. 57(j); C.A.R. 44. Though no party has filed a notice of unconstitutionality, Petitioner claims that Respondents' construction conflicts with the Colorado Constitution, implicating the Attorney General's interest.

Among the parties' many disputes, only one issue reached certiorari: whether a school district is prohibited from asking or requiring a teacher who earned nonprobationary status in another district to waive that status. Amicus's position is that school districts can *ask* but cannot *require* teachers to waive portability as a condition of employment. Political subdivisions of the state cannot evade state

law by fiat, and mandatory waiver lacks the essential element of voluntariness. Accordingly, Amicus submits this brief in support of Respondents.

INTRODUCTION

At issue is § 203.5 of the Teacher Employment, Compensation, and Dismissal Act (TECDA), §§ 22-63-101 to -403, C.R.S., titled "Nonprobationary portability." It is part of legislation enacted in 2010 known as Senate Bill 191. 2010 Colo. Sess. Laws, ch. 241.

Senate Bill 191 built on an earlier reform that had converted the State's "tenure" system to one of "probationary" and "nonprobationary" status. *See generally Johnson v. Sch. Dist. No. 1*, 2018 CO 17; *Sch. Dist. No. 1 v. Masters*, 2018 CO 18. The new reform ties that status more closely to performance evaluations, based on a statewide framework of teacher effectiveness. *Stanczyk v. Poudre Sch. Dist. R-1*, 2020 COA 27M, ¶¶ 7-12. In this new statewide system, teachers who have proven effective and thus earned nonprobationary status in one school district may take that status with them to other school districts. *Id.* ¶ 13. The ability to transfer one's protected status is known as "portability."

Before the demise of tenure, school districts had the option to grant tenure to new hires who had received tenure elsewhere. § 123-18-12(2)(c), C.R.S. (1967). After the transition from tenure, however, State law had no explicit provision for such "lateral" hires. *See* 1990 Colo. Sess. Laws, ch. 150 (first enacting TECDA). The portability statute in Senate Bill 191 thus restores explicit permission for lateral hiring—but makes the transfer of protected status nondiscretionary, in light of the new statewide rules for evaluating teacher effectiveness.[1]

Here, Respondents Poudre Education Association and Patricia Stanczyk charged that the Poudre School District compels every job applicant to waive his or her right to nonprobationary portability. CF, p. 7 (Complaint, ¶ 19); CF, p. 527 (Plaintiffs' Motion for Summary

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[1] The District claims that Colorado has long required teachers to complete a probationary period in every employing district, citing *Marzec v. Fremont Cnty., Sch. Dist. No. 2,* 349 P.2d 699, 701 (Colo. 1960). *Opening Br.* at 23. *Marzec* was statutorily superseded by provisions in the Teacher Employment, Dismissal, and Tenure Act of 1967 (TEDTA), 1967 Colo. Sess. Laws, ch. 435. TEDTA expressly gave local boards discretion to grant tenure to any teacher who previously acquired it in another district. *See* § 123-18-12(2)(c), C.R.S. (1967). Courts have not revisited the question in the TECDA era.

Judgment, p. 4.) Without making factual findings on this allegation, the district court held that nothing "prohibits a school district from requiring teachers to waive their right to request nonprobationary portability as a condition to submitting an application for employment." CF, p. 588 (Order for Summary Judgment, p. 17).

The court of appeals disagreed, holding that school districts "may not unreasonably restrict a teacher's exercise of" portability. *Stanczyk*, 2020 COA 27M, ¶ 65. The court of appeals found in the record "no dispute" that the District imposed certain restrictions on all job applicants. *Id.* ¶ 61. The restrictions included an online job application that required waiver, *id.* ¶¶ 18-19 & 61-62, a form employment contract that also required waiver, *id.* ¶¶ 22 & 63, and no notice to applicants that they have any choice in the matter, *id.* ¶¶ 20-21 & 64. Based on these undisputed efforts to compel waiver, the court of appeals held that the District unlawfully obstructed § 203.5 of TECDA, and Respondents deserved summary judgment. *Id.* ¶¶ 69 & 74.

The District now describes the court of appeals opinion as a "sweeping opinion that invalidates waivers of nonprobationary

portability across the state under virtually all circumstances." *Opening Br.* at 2. Yet the court of appeals went out of its way to avoid saying any such thing. *Stanczyk*, 2020 COA 27M, ¶ 69 ("Because we conclude the Poudre Defendants' use of the Restrictions is unlawful, we [do not address whether] a teacher—undeterred by the Restrictions—can voluntarily waive the right to nonprobationary portability."). The only question presented here is whether a school district can enact a policy, or its practical equivalent, of overriding State law by compelling every job applicant to waive their rights as a condition of employment.

ARGUMENT

The General Assembly mandated that school districts grant nonprobationary status to teachers who prove themselves effective. The District tries to evade this law by claiming that the statute must be narrowly construed against teachers, that if taken seriously the statute would violate the Colorado Constitution, and that the District has no contrary policy in any event. Each argument fails.

I. The statute does not permit the District to require "waiver" of nonprobationary status.

The District maintains that § 203.5 need not ever apply except when the District agrees by contract to be bound by it. The District rests this claim on a "special rule of construction" requiring that teacher-employment statutes "be strictly construed in school districts' favor (and therefore against teachers)." *Opening Br.* at 15, 21-22 (citing *Tyler v. Sch. Dist. No. 1*, 493 P.2d 22, 23 (Colo. 1972)). But there is no "against teachers" rule of statutory construction,[2] and there is no basis in Colorado law for the District's sweeping assertion of power to nullify State statutes.

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[2] Statutes in derogation of common law are to be narrowly construed in favor of the burdened party. *Tyler v. Sch. Dist. No. 1*, 493 P.2d 22, 23 (Colo. 1972). Unlike the law at issue in *Tyler*, however, the District here maintains that the portability statute benefits districts just as it does teachers. *See Opening Br.* at 22-25 (arguing the statute serves a "legislative purpose . . . to the benefit of both teachers and districts"). This is true, and it means the District is not the burdened party—obviating the rule of narrow construction.

A. A school district cannot evade State law by mandating its inapplicability.

When interpreting a statute, the Court's primary task is to give effect to the intent of the General Assembly, *Jefferson Cnty. v. Kiser*, 876 P.2d 122, 123 (Colo. App. 1994), and the purpose of the legislative scheme, *McCallum v. Dana's Housekeeping*, 940 P.2d 1022, 1024 (Colo. App. 1996). To discern legislative intent, the Court looks to the plain language. *Colo. State Bd. of Med. Exam'rs v. Roberts*, 42 P.3d 70, 72 (Colo. App. 2001).

The text of § 203.5 is unambiguous. As the District appears to concede, the statute vests teachers with the right to claim portability and sets plain terms for when districts must grant it. The District emphasizes the "may" in the first sentence of the statute, *see Opening Br.* at 16-17, which Amicus agrees plainly shows that teachers can waive their right to portability. Yet the District ignores the "shall" in the second sentence—which equally plainly shows that school districts are not free to disregard the right once invoked.

There is nothing new about local governments disagreeing with State policy. In *Johnson v. Jefferson County Board of Health*, 662 P.2d 463 (Colo. 1983), the county wished to protect its public health officer with personnel protections as a matter of local ordinance, where a State statute mandated at-will employment. *Id.* at 470-71. This Court rejected the effort, relying on "the general rule" that local governments (as political subdivisions created by State law in the first place) "may not forbid that which the state has explicitly authorized." *Id.*

Similarly, in *Cummings v. Arapahoe County Sheriff's Department*, the county did not wish to provide deputies with notice and a hearing prior to termination, and it foisted waiver upon its deputies by placing a disclaimer in its employee manuals. 440 P.3d 1179, 1187 (Colo. App. 2018). The court of appeals found the disclaimers unlawful as against public policy. *Id.* At bottom, local governments are not allowed to adopt policies negating the statutes duly enacted by the General Assembly.

School districts are not immune to this rule. *See, e.g.*, *Denver Classroom Teachers Ass'n v. Sch. Dist. No. 1*, 911 P.2d 690, 694-96. (Colo. App. 1995) (rejecting a party's attempt to forge a construction of a

collective bargaining agreement that would nullify State statute). As the District points out, the "school system is established not to provide jobs for teachers, but rather to educate the young." *Opening Br.* at 25. The General Assembly has determined that granting portability to teachers who have proven themselves effective furthers that statutory purpose. The District does not get to second guess the legislature's determination and conclude, in effect, "not here, not now, not ever."

B. A school district must give teachers a choice if it wishes to claim common law waiver.

Amicus agrees that a teacher can waive his or her right to carry nonprobationary status to a new district. But waiver must be intentional and voluntary. *See Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984); *Vogel v. Carolina Int'l, Inc.*, 711 P.2d 708, 711 (Colo. App. 1985). Intent is an essential element. *Cole v. Colorado Springs Co.*, 381 P.2d 13, 17 (Colo. 1963). And the element of intent "assumes the existence of a choice between the relinquishment and the enforcement of the right." *Id.*; *see also People v. Harris*, 914 P.2d 434, 438 (Colo. App. 1995) (in criminal procedure context, "[n]o such waiver

will be considered voluntary, however, unless the defendant is afforded this 'clear choice' between the two options").[3]

A waiver is not valid where it is presented as a diktat to be obeyed rather than a choice to be made. *See Costello v. Bd. of Educ. of East Islip Union Free Sch. Dist.*, 673 N.Y.S.2d 468, 469 (N.Y. App. Div. 1998) (recognizing tenure rights as waivable but finding it unlawful for a school board to eliminate the statutory tenure system by compelling waiver as a condition of employment); *Cf. England v. Amerigas Propane*, 395 P.3d 766, 770 (Colo. 2017) (holding that a form settlement agreement promulgated by a State agency cannot waive statutory rights).

The District tries to avoid this inevitable conclusion by discussing *University of Colorado Regents v. Derdeyn*, 863 P.2d 929 (Colo. 1993).

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[3] Out-of-state courts routinely apply this principle in the context of teacher contracts. *See, e.g.*, *Bd. of Educ. of Cnty. of Wood v. Airhart*, 569 S.E.2d 422, 428-29 (W. VA. 2002); *Rochester Educ. Ass'n v. Indep. Sch. Dist. No. 535*, 271 N.W.2d 311, 315 n. 6 (Minn. 1978); *Moore v. Bd. of Educ. Smithtown Cent. Sch.*, 500 N.Y.S. 2d 710, 714 (N.Y. App. Div. 1986); *Lambert v. Bd. of Educ. of the Middle Country Cent. Sch. Dist.*, 664 N.Y.S.2d 422, 423-24 (N.Y. Sup. Ct. 1997); *Sakal v. Sch. Dist. of Sto-Rox*, 339 A.2d 896, 898 (Pa. Commw. Ct. 1975).

There, this Court suggested the University could condition student athletic participation upon drug testing. *Id.* at 949-50. But the decision iterated that consent to such testing must be voluntary and that voluntariness necessitates choice. Student participation in athletics is still a choice—an extracurricular—even when a scholarship rests on that participation. This Court never implied that drug testing could be mandated for *all students as a condition on attendance in the first place*, simply because students could choose to attend a different college—a mandate that would have been considerably more germane here.

As it is, the District's position appears to be that it can compel job applicants to waive any statutory right the legislature has not expressly forbidden. If this is correct, then the District can not only compel applicants to waive portability, but also (each year as it renews contracts) compel nonprobationary teachers to waive their right to be dismissed only for cause. *See* §§ 22-63-301, *et seq.*, C.R.S. It can likewise compel every job applicant to disclose sealed criminal records and forego all other protections of the Ex-Offenders' Rights Act, despite that act's clear statement of the State's public policy. *See* § 24-5-101, C.R.S. So far

as the District's brief would reveal, a school district can even compel all job applicants to waive their rights to be free of invidious discrimination—because nothing in Colorado's anti-discrimination statutes, §§ 24-34-401, *et seq*., C.R.S., expressly places such waivers off limits. This is not how waiver works.

Amicus takes no issue with the District asking job applicants to waive portability as one option (among others). But to make waiver mandatory for all applicants—and then claim it is a voluntary choice because an applicant can choose to work elsewhere, *Opening Br.* at 33-34 (arguing that teachers can "choose to stay in their current position, or accept a more secure position in another district")—is to say that portability will not exist in the Poudre School District. And that is unlawful.

II. The local control clause is not a free pass for school districts to evade State law.

The District's constitutional theory fails for two independent reasons. First, it misstates the law; there would be nothing

unconstitutional about prohibiting waiver. Second, it misstates the key question presented; no party has argued that waiver is prohibited.

On its own terms, the District's constitutional argument fails. As the District concedes, the State may impose regulations so long as it does not "usurp[] the local board's decision-making authority or its ability to implement, guide, or manage the education programs for which it is ultimately responsible." *Bd. of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639, 649 (Colo. 1999). The State does so to carry out its duty of general supervision, *see id.*, as well as its duty to create a thorough and uniform system of public education, *see Lobato v. State*, 304 P.3d 1132, 1138 (Colo. 2013) ("We hold that the phrase 'thorough and uniform' . . . describes a free public school system that is of a quality marked by completeness, is comprehensive, and is *consistent across the state*." (emphasis added)).

The paradigmatic example of such regulation is—of course—teacher employment. Under those statutes, districts can hire only teachers licensed by the State, § 22-63-201 & §§ 22-60.5-101 *et seq.*, C.R.S., and can fire them only for cause after an impartial hearing,

§§ 22-63-301 *et seq*., C.R.S. These statutes reflect legislative intent to "harness" the "previously unrestricted power" of local boards to dismiss teachers, *Lovett v. Blair*, 571 P.2d 731, 733 (Colo. App. 1977), *aff'd in relevant part, sub. nom. Blair v. Lovett*, 582 P.2d 668 (Colo. 1978). Such protections have existed since Statehood, *see* 1877 Colo. Sess. Laws, ch. 92 ("No teacher shall be dismissed without due notice, and upon good cause shown."), and for nearly half of Colorado's history they included full-blown State-mandated "tenure" protections, *see, e.g*., 1921 Colo. Sess. Laws, ch. 215 (An Act Relating to the Tenure of Service of Teachers in the Public Schools); 1949 Colo. Sess. Laws, ch. 230; 1953 Colo. Sess. Laws, ch. 212; 1967 Colo. Sess. Laws, ch. 435.

In contrast to full-blown tenure, the portability statute confers only nonprobationary status. The statute applies only if a new hire exceeds State-minimum standards of effectiveness—and even these proven-effective teachers can be dismissed for cause or (after two years of poor evaluations) can lose nonprobationary status. The new system is so district-friendly, compared to the old, that the District itself trumpets the benefits to school districts. *Opening Br.* at 22-25. As the District

sees it, making it easier for school districts to hire experienced teachers is both a salutary statutory purpose and, if actually applied, a constitutional bridge too far.

The District's constitutional law theory rebuts an argument no one has made. In the District's telling, "making portability a mandate would fully usurp district power to even *negotiate* employment with an experienced teacher when hiring on probationary status was desired." *Opening Br.* at 28. Yet no one has argued that a district cannot negotiate over portability. The issue in this case—and the holding of the court of appeals—is that a school district *must actually negotiate*, consistent with the common law of waiver. *See Stanczyk*, 2020 COA 27M, ¶ 69 ("Because we conclude the Poudre Defendants' use of the Restrictions is unlawful, we [do not address whether] a teacher—undeterred by the Restrictions—can voluntarily waive the right to nonprobationary portability.").

No case cited by the District suggests that, due to Colorado's commitment to local control of instruction, school districts need not be expected to follow such ordinary rules of employment contracting.

Inquiry about waiving portability must be part of an arms-length negotiation—not a rigid edict from on high. In short, any waiver of portability must be truly voluntary and negotiated for, not mandated.

III. On its factual arguments, the District's position might lead to remand—but not reversal.

The District takes pains to repeat that it may lawfully "require" waiver just as it can lawfully "ask" for it. *Opening Br.* at 10-11 ("State law therefore plainly allows school districts to ask … or require a waiver of portability as a condition of accepting that employment."); *id.* at 18 ("[T]he statute does not state a district is prohibited from asking or requiring an applicant to waive portability."); *id.* at 30-34 (argument section on this point). Yet the District also denies that it does any such thing. *Id.* at 34-37 ("If a teacher did not want to work in PSD on probationary status, they could have said so and negotiated for nonprobationary status[.]").

The District's factual position contradicts the record. The court of appeals found in the record "no dispute" that the District used an online application requiring waiver, that it did not accept paper applications,

that it gave no notice of any option to submit the online application without agreeing to waiver, that it used a form employment contract requiring waiver, and that—when asked directly about portability—a human resources official said, "we don't do that here." *Stanczyk*, 2020 COA 27M, ¶¶ 18-22 & 61-64. If, as the District asserts, there has never "been any genuine dispute" on this point, *Opening Br.* at 36, it is because the record is clear that the District in fact required waiver—until it got caught.

Meritless or not, the District's factual position is of dispositive importance. If the District did not effectively and systematically require waiver of any statutory rights, then the question of required waiver is not properly before this Court. And Amicus's interest in this case is solely in the question of required waiver. If there remains a credible dispute over whether the District in fact requires waiver, the proper remedy is to remand for further fact finding.

CONCLUSION

Through the portability statute, the legislature provided for comity of nonprobationary status among every school district in the

State. But the District's position renders the statute meaningless. The Court should hold that school districts may not nullify State law by effectively and systematically requiring all job applicants to waive § 22-63-203.5, C.R.S. Absent an actual negotiation of different rights, if a teacher meets the statutory criteria for portability, the hiring district must grant the teacher nonprobationary status.

Respectfully submitted this 10th day of November, 2020.

PHILIP J. WEISER
Attorney General

/s/ Jenna Zerylnick
JENNA ZERYLNICK,*
Assistant Attorney General
K-12 Education Unit
State Services Section

Attorney for the Colorado Attorney General

*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **BRIEF OF AMICUS CURIAE THE COLORADO ATTORNEY GENERAL IN SUPPORT OF RESPONDENTS** upon all parties herein electronically by e-filing on November 10, 2020 as follows:

M. Brent Case
Jonathan P. Fero
Mary B. Gray
Semple, Farrington, Everall & Case, P.C.
1120 Lincoln Street, Suite 1308
Denver, CO 80203

Counsel for Petitioners

Charles F. Kaiser
Brooke Copass
Rory Herington
Colorado Education Association
1500 Grant Street
Denver, Colorado, 80203

Counsel for Respondents

/s/ Carmen Van Pelt