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COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	
On certiorari to the Colorado Court of Appeals, Case No. 2018CA2345 Opinion by Lipinski, J.	
Defendants-Petitioners: POUDRE SCHOOL DISTRICT R1 and POUDRE SCHOOL DISTRICT BOARD OF EDUCATION, v. **Plaintiffs-Respondents:** PATRICIA STANCZYK and POUDRE EDUCATION ASSOCIATION.	▲COURT USE ONLY▲
Attorneys for State Board of Education: PHILIP J. WEISER, Attorney General JULIE C. TOLLESON, First Assistant Attorney General, Reg. No. 24885* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 (720) 508-6000 Julie.Tolleson@coag.gov *counsel of record	Case Number: 2020SC269

BRIEF OF *AMICUS CURIAE* COLORADO STATE BOARD OF EDUCATION IN SUPPORT OF PLAINTIFFS-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 3,667 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/ Julie C. Tolleson
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INTEREST OF *AMICUS CURIAE*

The Colorado State Board of Education is an elected body entrusted with the "general supervision of the public schools of the state." COLO. CONST. art. IX, § 1. It has an interest in defending laws the General Assembly adopts to "provide for the establishment and maintenance of a thorough and uniform" public education system. COLO. CONST. art. IX, § 2; *see also Florman v. Sch. Dist. No. 11*, 40 P. 469, 471 (Colo. App. 1895) (Article IX "provides for a general system of public schools, the details to be supplied by legislation"). This case involves construction of one of those laws.

"Nonprobationary portability" is part of a landmark 2010 education reform, Senate Bill 191 (S.B. 191). 2010 Colo. Sess. Laws 1053. S.B. 191 tasked the State Board with creating a statewide teacher evaluation system. *Id.* at 1055-57. From those data-driven evaluations, the bill directed, would flow certain employment consequences—like a teacher's right to transfer nonprobationary status to a new employer. Here, Poudre School District seeks to exempt itself from that consequence.

The General Assembly has reserved to the State Board alone the authority to waive mandates imposed by Title 22 (the Education Code) or administrative rule. § 22-2-117, § 22-32.5-108, C.R.S. Poudre School District did not avail itself of those opportunities, skipping those processes in favor of imposing private hiring preconditions. In so doing, the District denied the State Board the opportunity to determine whether, as statute requires, "[the waiver] would enhance educational opportunities and quality within the district" or whether the costs of compliance "significantly limit educational opportunity." § 22-2-117(1)(a), C.R.S.; *see also* § 22-32.5-108(5)(a), C.R.S. (applying similar standard). Poudre School District cannot use its hiring system to contravene those procedural and substantive requirements.

In its grant of certiorari, this Court asks whether a school district is "prohibited from asking or requiring" that an incoming teacher waive portability. *Order of Court*, *July 27, 2020*. The State Board submits that

districts *may not require*[1] such a waiver. Such balkanization of the statewide system is at odds with the express intent of S.B. 191 and undermines the State Board's careful oversight of uniform teacher quality standards. The State Board thus submits this brief in support of Respondents.

INTRODUCTION

Described as a "landmark" at the time, S.B. 191 came "amid a national debate over how to get the best teachers into the classroom and remove the ones who aren't doing a good job." Eliza Krigman, *Colorado Education Law May Mark a National Shift*, L.A. TIMES, May 23, 2010 *available at* http://tinyurl.com/jcgqxfv. Two years earlier, the National Council on Teacher Quality had given Colorado a C- for the impact tenure policies had on instruction. *2008 State Teacher Policy Yearbook*, NATIONAL COUNCIL ON TEACHER QUALITY, *available at* http://tinyurl.com/hdqy4z8. In 2009, the New Teacher Project termed

[1] The State Board assumes, without formal position, that school districts may request or negotiate a *voluntary* waiver; this brief focuses on the allegation that the district demands one.

the failure to differentiate teacher effectiveness "the widget effect." Weisberg, et al., *The Widget Effect: Our National Failure to Acknowledge and Act on Differences in Teacher Effectiveness*, THE NEW TEACHER PROJECT (2009), *available at* http://tinyurl.com/z955hej. The study drew on data from 12 districts in four states, including Colorado, to explain how using teacher evaluations to inform staffing, retention, and compensation decisions could increase student achievement and improve schools. *Id.*

So, with a stated objective to "improv[e] the quality of education" in the state, § 22-9-102(1)(a), C.R.S., S.B. 191 started by modernizing Colorado's teacher evaluation laws. The bill required teachers to be reviewed annually, using evaluation instruments aligned to state performance standards that heavily weighted student achievement and growth data.

Provisions scaling back employment protections ignited a "firestorm" of controversy, particularly among educators. Jeremy P. Meyer, *Colorado Teacher Bill Ignites Firestorm of Support, Opposition*, THE DENVER POST, April 24, 2010. After S.B. 191 became law, teachers

thus faced demanding quality and performance standards, and districts had more authority than ever before to sideline poor performers. But the law was not without benefits for teachers; it granted them portability of their hard-earned nonprobationary status.

Portability spurs mobility for experienced teachers, a goal aligned with federal priorities. Since the passage of the No Child Left Behind Act in 2002, national policy has emphasized "educational equity"—that experienced teachers be distributed equitably among schools serving different populations. *See* 115 Stat. 1425, 1453-54 (Pub. L. 107-110) (obligating state education agencies "to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers"). Now, teachers may move between districts without starting over as probationary.

ARGUMENT

By mandating high statewide standards for teacher performance and requiring evaluations aligned to those standards, S.B. 191 envisions a kind of comity for nonprobationary status. Poudre School District, however, requires teaching applicants "to relinquish the right

to nonprobationary portability as a condition of employment." *Stanczyk v. Poudre Sch Dist.*, 2020 COA 27, ¶ 3.[2] In unilaterally requiring that forfeiture, the District runs afoul of the statute's plain terms and undermines its legislative objectives.

If, as the District charges, sound student-centered reasons exist to relieve it from the portability statute, § 22-63-203.5, C.R.S., it may apply to the State Board for a waiver under § 22-2-117, C.R.S. Or it may seek waivers as part of an innovation plan. § 22-32.5-108, C.R.S. But it cannot simply excuse itself from the statute by fiat.

I. Nonprobationary portability is part of a statewide system designed to improve instruction.

Portability is part of Colorado's thorough and uniform system of education. *See Lobato v. State*, 2013 CO 30 ("We hold that the phrase 'thorough and uniform' . . . describes a free public school system that is

[2] The trial court's description was more ambiguous: "When Stanczyk applied to work in the District, it was not possible to submit an application through the online application portal without waiving nonprobationary portability." *R. CF, p. 00636* (Order on Summary Judgment, p. 2). The State Board takes no position on any underlying factual dispute. This brief addresses only the legal question on which this Court granted certiorari.

of a quality marked by completeness, is comprehensive, and is *consistent across the state*" (emphasis added)). It is rooted in the legislative belief that statewide standards lead to consistent and reliable results and that districts should thus recognize the status a teacher attains under those standards. The benefits and burdens apply statewide, and they do not yield to the District's constitutional and policy objections.

A. S.B. 191 is a system-wide reform setting high expectations.

For decades, Colorado adhered to a pure tenure system that limited the ability of schools and districts to make employment decisions based on performance metrics. *See* § 123-18-3, C.R.S. (1953); § 123-18-15(1), C.R.S. (1967). Then, in 1990, the Colorado General Assembly laid the groundwork for a seismic shift, deliberately abandoning the concept of "tenure." Ch. 150, 1990 Colo. Sess. Laws 1117. The Teacher Employment, Compensation, and Dismissal Act of 1990 ("TECDA") repealed and replaced the entire system, nixing "tenure" in favor of "nonprobationary status." *Compare* § 123-18-1,

C.R.S. (1967), *with* § 22-63-101, C.R.S. (1990). Nonprobationary status provided teachers with employment protections similar to, but not as strong as, traditional tenure. *School District No. 1 in the Cty. and Cnty. of Denver v. Masters*, 2018 CO 18, ¶¶ 6.[3]

From 1990 to 2010, a teacher earned nonprobationary status through sheer time-in-service; he or she was "probationary" until renewed for a fourth year. *See* § 22-63-103(7), C.R.S. (2009). And once a teacher earned that status, it could not be lost through poor performance. Time-consuming and costly dismissal proceedings were a district's only recourse for substandard teaching. *See* §§ 22-63-301 to 302, C.R.S.

The landscape again changed in 2010. Entitled "Ensuring Quality Instruction Through Educator Effectiveness," S.B. 191 provided a mechanism for removing ineffective teachers while retaining effective

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[3] *Compare* §§ 123-18-12(1) & -15(1), C.R.S. (1967), *with* §§ 22-63-101 to -104, C.R.S. (1990). Among other things, TECDA removed language stating that a "tenure teacher … *shall be entitled* to a position of employment as a teacher in the school district where tenure was acquired." § 123-18-15(1), C.R.S. (1967).

ones, using a standards-based framework to uniformly define those categories. 2010 Colo. Sess. Laws 1053.

S.B. 191 directed the State Board to create a set of research-based comprehensive "quality standards" and "performance standards." § 22-9-105.5(10)(a), C.R.S. The State Board was to do so in consultation with the freshly codified Council for Educator Effectiveness ("the Council"). § 22-9-105.5(3), C.R.S. S.B. 191 charged the Council with making recommendations to "ensure that every teacher is evaluated using multiple fair, transparent, timely, rigorous, and valid methods," in a system in which at least 50 percent of the rating is determined by student academic growth. § 22-9-105.5(3)(a), C.R.S. The Council issued its detailed recommendations in April 2011. *See* State Council for Educator Effectiveness Report and Recommendations, *available at* https://tinyurl.com/govcouncileereport.

Based on those recommendations, the State Board adopted the "Rules for the Administration of a Statewide System to Evaluate the Effectiveness of Licensed Personnel Employed by School Districts and Boards of Cooperative Education Services," at 1 CCR 301-87 (eff. date

Feb. 15, 2012). The General Assembly then gave its imprimatur in a special rule review, as S.B. 191 required. *See* § 22-9-105.5(10)(b), C.R.S.; 2012 Colo. Sess. Laws 2 (H.B. 12-1001). But the hallmarks of a data-driven comprehensive architecture did not end there.

S.B. 191 assigned the Colorado Department of Education to oversee implementation, including by conducting statewide evaluator training and norming evaluation results. § 22-9-105.5(3)-(11), C.R.S. Based on Council recommendations, § 22-9-105.5(3)(j), C.R.S., CDE began piloting the state model system in approximately 30 districts, collecting data and making adjustments.[4] The system was "finalized on a statewide basis" in 2014-15. *See* § 22-9-105.5(10)(a)(V), C.R.S. The result was a thorough, standardized framework that applied to all Colorado teachers.

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[4] The Council's recommendations for a series of pilots may be found at page 20 of its report. https://tinyurl.com/govcouncileereport. Detailed information regarding the pilot studies and analyses is available from the Colorado Department of Education. COLO. DEP'T OF EDUC., INITIAL STATE MODEL EVALUATION SYSTEM PILOT, *available at* https://www.cde.state.co.us/educatoreffectiveness/smes-pilot#smes-initial-pilot.

B. S.B. 191 mandates both benefits and burdens.

Each school district must now either adopt its own evaluation system aligned with the board rules or use the state model system. § 22-9-106(1)-(1.5)(a), C.R.S.[5] Evaluations under this new rubric "provide a basis for making decisions in the areas of hiring, compensation, promotion, assignment, [and] professional development." § 22-9-102(1)(b)(V), C.R.S. The Colorado Department of Education continues to monitor each district's faithful implementation of the new system. § 22-9-106(1.5)(b) and (c), C.R.S.

S.B. 191 formally links quality teaching to earned job protections. New teachers no longer acquire nonprobationary status simply based on years in service. Rather, they must have "three consecutive years of *demonstrated effectiveness*" as reflected in their performance evaluations. *See* § 22-63-203(1)(b), C.R.S. (emphasis added). By tying

[5] *See also* 1 CCR 301-87, Rule 3.02 ("All School Districts . . . shall base their evaluations of licensed classroom Teachers on the full set of Teacher Quality Standards and associated detailed Elements included below, or shall adopt their own locally developed standards that *meet or exceed* the Teacher Quality Standards and Elements." (emphasis added)).

evaluations to student achievement and aligning them with state model quality and performance standards, S.B. 191 made teacher ratings comparable across classrooms and districts.

S.B. 191 also calls for adverse consequences for ineffective teachers. For example, a teacher "displaced" due to factors outside his or her control is no longer entitled to "forced placement" at another district school. Rather, he or she may be reassigned only with the consent of the new school's principal and "after a review of the teacher's demonstrated effectiveness and qualifications." § 22-63-202(2)(c.5)(III)(B) & (VII), C.R.S.; *Sch. Dist. No. 1 v. Masters,* 2018 CO 18, ¶ 8. Most importantly, employment protections are no longer permanent; a teacher reverts to probationary status after two straight years of "demonstrated ineffectiveness." § 22-63-103(7), C.R.S. These changes have not been popular with the teachers' unions, which have brought repeated legal challenges to them.[6]

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[6] *See, e.g.*, *Masters*, 2018 CO 18 (due process and contracts clause challenges to "mutual consent" provision); *Reeves-Toney v. Sch. Dist. No. 1 in the Cty. & Cnty. of Denver*, 2019 CO 40 (charging that "mutual consent" provision violates local control clause); *Johnson v. Sch. Dist. No. 1 in the Cnty. of Denver*, 2018 CO 17 (due process challenge to

For all that S.B. 191 gave districts, it asked something of them as well: that they honor each other's evaluation systems. *See* § 22-63-203.5, C.R.S. The portability statute is phrased as a mandate. When a newly hired teacher can "show two consecutive performance evaluations with effectiveness ratings in good standing, he or she *shall* be granted nonprobationary status in the hiring school district." § 22-63-203.5, C.R.S. (emphasis added).[7] *See, e.g.*, *Boselli Invs., L.L.C v. Div. of Employment*, 975 P.2d 204, 206 (citing *People v. District Court*, 713 P.2d 918 (Colo. 1986) ("By using the word 'shall' in the statute, the General Assembly intended the statutory directive to be mandatory.")).

A statute must be "given the construction and interpretation which will render it effective in accomplishing the purpose for which it

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provision authorizing unpaid leave). The teachers' unions have several current challenges pending under other theories. *Dragoo v. Adams 12 Five Star Schs.*, 2019CA2229; *Kolsky v. Denver Public Schools,* 2020CA1113; *Andersen v. Thompson Sch. Dist.*, 2020CA1018. The State Board is participating as amicus in support of the districts in all.

[7] Had the General Assembly meant to give districts discretion on portability, it knew how to do so. *See* § 123-18-12(2)(c), C.R.S. (1967) (providing that a local board "may," by resolution, grant tenure to a teacher who previously acquired it in another district.).

was enacted." *Zaba v. Motor Vehicle Div., Dep't of Revenue*, 516 P.2d 634, 637 (Colo. 1973). The purpose for which the legislature enacted S.B. 191 is clear. If this court approves a hiring process that requires applicants to forfeit portability, such a ruling would undermine the General Assembly's intent.

C. The District's constitutional objections fail.

In establishing a "general system of public schools," the state constitution assigns roles to both State and local bodies—balancing the State Board's "general supervision of the public schools," COLO. CONST. art. IX, § 1(1), and the General Assembly's obligation to "provide for the establishment and maintenance of a thorough and uniform system of free public schools," COLO. CONST. art. IX, § 2, against local school boards' "control of instruction in the public schools of their respective districts." COLO. CONST. art. IX, § 15.

This Court's decision in *Bd. of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639 (Colo. 1999), is instructive. There, the Court upheld the State Board's authority to order a local district to establish a charter school within the district's boundaries. *Id.* at 656. To reach its

conclusion, the *Booth* court examined the "general supervision" clause. It held that the constitutional framers both "contemplated general supervision to include direction, inspection, and critical evaluation of Colorado's public education system from a statewide perspective" and intended the General Assembly to delegate certain functions to the State Board. *Id.* at 648.

Booth establishes a clear standard. The state may not "usurp[] the local board's decision-making authority or its ability to implement, guide, or manage the educational programs for which it is ultimately responsible," *but* a local board's "discretion can be restricted or limited . . . by statutory criteria." *Id.* at 649. The statutory expectation that hiring districts honor the statewide evaluation system is such a discretion-limiting criterion. As such, it is squarely within *Booth*'s description of the state's power.

The District charges that applying the statute according to its plain terms would "unconstitutionally limit" local authority to select instructional staff. Not so. School districts have always been subject to state mandates that limit hiring and firing discretion. At statehood, the

General Assembly enacted comprehensive legislation to establish a public school system, 1877 Colo. Sess. Laws pp. 807-40, including job protections for teachers. *Id.* at 828. For decades thereafter, tenure laws overrode school boards' common law rights to dismiss teachers. *Marzec v. Fremont Cnty. Sch. Dist.*, 349 P.2d 699, 701 (Colo. 1960). S.B. 191 loosened the reins more than ever before, yet still Poudre School District cries foul.

Portability prevents no one from firing teachers. It merely affects when and how a local school board may do so. Nonprobationary teachers enjoy more due process than probationary ones, but even those protections are not permanent. Nonprobationary teachers now lose job protections after being twice rated as "ineffective" or "partially effective." § 22-63-103(7), C.R.S.; 1 CCR 301-87, Rules 3.03(A) & (B). A district too impatient to give a teacher two years of evaluation, feedback, and formative support may dismiss the teacher even more quickly, after notice and hearing. *See* § 22-63-301, C.R.S. (grounds for dismissal include unsatisfactory performance); § 22-63-302, C.R.S. (dismissal procedures).

Poudre School District's perception that S.B. 191 treads on its authority is illusory, driven by its distaste for giving due process to teachers who, in the legislature's view, have earned the right to it. *See Op. Br.*, p. 26 n. 7. This distaste shows all the more when the District insists that experienced teachers be willing to "take on [the] risk," *Op. Br.*, p.33, of being probationary hires[8]—even while the District refuses to "take on [the] risk" of hiring a proven teacher who can't be fired on a dime (i.e., within the first two years). The District may not like giving experienced hires their due, but this is not a problem of constitutional magnitude.

[8] The State Board is similarly troubled by Poudre School District's alternative strategy—that this case involves a "probationary position." *Op. Br. at 30-31*. Positions are not probationary; people are. All teachers are covered by TECDA. See § 22-63-103(11)(definition of "teacher"); § 22-63-203 (probationary teacher contracts). The individuals in those positions—not the positions themselves—are probationary or nonprobationary based on years of proven effectiveness. § 22-63-203(1)(b) & -203(2)(a), C.R.S.

II. The District's requirement that applicants forfeit portability is an end-run around the State Board's waiver authority.

The District's demand that applicants forfeit their earned status not only voids the portability statute but also circumvents the statutory waiver process. By law, a district may ask the State Board to relieve it from almost[9] any mandate in Title 22. § 22-2-117(1), C.R.S. Once granted, such waivers remain in place until the State Board formally revokes them, either for cause or at the school district's request. § 22-2-117(3), C.R.S.

The waiver process emphasizes public transparency and stakeholder support. In districts like Poudre[10] with more than 3,000 students, the local board begins by proving that the "application has the

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[9] Section 22-2-117 prohibits the waiver of certain enumerated statutes, including the Public School Finance Act, the Exceptional Children's Education Act, and provisions for fingerprinting and criminal history, among others. § 22-2-117(1)(b) and (1.5), C.R.S.

[10] The school year 2019-20 student count was 30,754, according to publicly-available records. *See* Colorado Department of Education 2019-2020 PK-12 and K-12 Pupil Membership by District and County (Jan. 15, 2020), *available at* https://tinyurl.com/SY20bycounty.

consent of a majority of the appropriate accountability committee, a majority of the affected licensed administrators, and a majority of the teachers of the affected school or district." § 22-2-117(1)(d), C.R.S. Other requirements include:

- That the local school board adopt a resolution after a public hearing describing its intent to seek a waiver;
- That for at least 30 days before that hearing, the local board post appropriate notices in at least three places; and
- That also before the hearing, the district publish weekly notices in the local paper.

§ 22-2-117(2), C.R.S. Then, the State Board evaluates the application under a statutorily specified standard:

> The state board shall grant the waiver *if it determines that it would enhance educational opportunity and quality within the school district* and that the *costs* to the school district of complying with the requirements for which the waiver is requested *significantly limit educational opportunity* within the school district.

§ 22-2-117(1)(a), C.R.S. (emphasis added). State Board rules reiterate both the procedural requirements and this substantive standard. 1 CCR 301-35, Rules 2.01 & 2.04.

Alternatively, school districts may seek waivers under the Innovation Schools Act, §§ 22-32.5-101, et seq., C.R.S., which allows a local school board to apply for designation as a "district of innovation" and receive waivers it requests in an innovation plan. § 22-32.5-108, C.R.S. This statute sets certain preconditions, including majority support by teachers. § 22-32.5-104(2)-(3), C.R.S. And like the general waiver statute, the Innovation Schools Act requires the State Board to evaluate whether the waivers would "enhance educational opportunity, standards, and quality" within the innovation zone. § 22-32.5-108(5)(a), C.R.S.

Under either the general waiver statute or the Innovation Schools Act, the District could seek formal approval for adjusting its implementation of S.B. 191 and the portability requirement to its liking. Yet doing so would require majority support from teachers, which the District appears unwilling or unable to procure, and approval from the State Board. In choosing instead to make an end-run around the statutory waiver process, it seeks to retain for itself the benefits of the S.B. 191—such as "mutual consent" and the ability to strip poor

performers of their nonprobationary status—while avoiding the burdens of honoring portability. This it cannot do.

CONCLUSION

Quality teaching is "among the most significant variables in student outcomes." Derek W. Black, The Constitutional Challenge to Teacher Tenure, 104 CAL. L. REV. 75, 83 (2016). To enhance instructional quality for Colorado students, S.B. 191 made nonprobationary status harder to get, harder to keep, and more valuable to the holder. Each component of S.B. 191 works as part of a cohesive system, and no school district can simply cherry-pick which aspects apply to it. If, as the Court of Appeals concluded, Poudre School District has a de facto policy of unilaterally disregarding S.B. 191's portability provision, § 22-63-203.5, C.R.S., this Court should make clear that the District's conduct is unlawful.

Submitted this 10th day of November, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **BRIEF OF *AMICUS CURIAE* STATE BOARD OF EDUCATION** upon all parties listed below via Colorado Courts E-Filing on this 10th day of November, 2020.

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