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COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203 On Certiorari to the Colorado Court of Appeals 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▲**
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OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word requirements set forth in C.A.R. 28(g):

It contains 8,493 words (principal brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement (1) of the applicable standard of appellate review with citation to authority and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or C.A.R. 32.

s/Jonathan P. Fero
Jonathan P. Fero, No. 35754

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Whether a school district is prohibited from asking or requiring a teacher who earned nonprobationary status in another district to waive portability of that status.

STATEMENT OF THE CASE

I. Nature of the Case

This case concerns the scope of a school district's ability to hire experienced teachers. In Colorado, public school teachers have either probationary or nonprobationary status. A new teacher starts on probationary status and earns nonprobationary status with three consecutive years of effective performance. For decades, a school district could not shorten the probationary period. Section 22-63-203.5, C.R.S., changed state law by opening the lateral-hire market to allow for the transfer of an experienced teacher's nonprobationary status when changing jobs. Yet, portability is neither automatic nor indefinite. It depends on the teacher to invoke it by providing documentation of effectiveness before being hired. And like most statutory provisions,

portability is not an inalienable right; it can be waived.

Petitioner Poudre School District R-1 ("PSD" or "the District") asked Respondent Patricia Stanczyk to waive portability and accept probationary employment. She voluntarily agreed. In erroneously releasing Stanczyk from her bargain, the Court of Appeals issued a sweeping opinion that invalidates waivers of nonprobationary portability across the state under virtually all circumstances. PSD asks that this Court restore the General Assembly's chosen policy to allow districts and teachers to mutually agree to employment on probationary status.

II. Relevant Facts

Stanczyk worked for the Thompson School District ("TSD") from 1995 through the 2015–16 school year. R. CF, pp. 453, 636. During that time, she obtained nonprobationary status. *Id.* at 378, 636.

On May 23, 2016, Stanczyk applied for a probationary teaching position with PSD through its online application portal. *Id.* at 291, 403, 636. When she submitted her application, Stanczyk certified she had voluntarily decided to waive the ability to seek a transfer of her

nonprobationary status. *Id.* at 302–03, 412, 646. While this language is embedded in the application, PSD does not require applicants to waive portability, and Human Resources staff can accept applications without a waiver. *Id.* at 322–23, 391.[1]

PSD ultimately offered, and Stanczyk accepted, a job as a ***probationary*** teacher on special assignment/coordinator for the 2016–17 school year. *Id.* at 323, 369, 371, 636, 646. She then resigned her nonprobationary position in TSD. *Id.* at 295–96. Stanczyk had no concern about leaving that job security for a probationary position because she felt she would have a greater growth opportunity in PSD, and she was confident it would not matter. *Id.* at 305–06. Accordingly, on August 12, 2016, Stanczyk signed a "PROBATIONARY TEACHER EMPLOYMENT CONTRACT," in which she expressly agreed she was voluntarily waiving

[1] Victoria Thompson, PSD's Executive Director of Human Resources, testified unequivocally that "[t]he District does not require applicants for teaching positions to waive nonprobationary portability," and all an applicant needs to do is call human resources for assistance. *Id.* at 322–23. Ms. Thompson also explained that the District "regularly receive[s] phone calls about the application process—resetting passwords, how to respond to questions from applicants—all the time." *Id.* at 391.

any right under section 22-63-203.5 to assert portability of her nonprobationary status. *Id.* at 304–05, 458–59, 636.[2] Stanczyk unequivocally testified in her deposition that no one required her to accept a probationary position in PSD, and no one compelled her to waive portability. *Id.* at 302–05, 648.[3]

Nearly eight months later on April 3, 2017, Stanczyk was notified that the District intended to nonrenew her employment. *Id.* at 314–15. She sought guidance from her union, Respondent the Poudre Education Association ("PEA"), which suggested nonprobationary portability as a way for Stanczyk to try to keep her job. *Id.* at 308. Stanczyk then requested nonprobationary portability on April 10, 2017. *Id* at 316, 323,

[2] The contract states, "[t]he TEACHER is employed as a probationary teacher under C.R.S. § 22-63-203, and has voluntarily waived the right under C.R.S. § 22-63-203.5 to assert the portability of nonprobationary status acquired in another school district, if any." *Id.* at 458. Directly above Stanczyk's signature are the words "Probationary Teacher Employment." *Id.* at 459.

[3] Specifically, when deposed, Stanczyk stated, "No one required me to accept employment. That was my decision." *Id.* at 304. When asked, "[n]o one compelled you to waive your rights under 22-63-203.5, correct? That was your decision?" she answered, "Correct." *Id.*

637. The District, however, denied Stanczyk's request. *Id.* at 398, 637.[4] At that time, Stanczyk was the only employee in PSD who had requested nonprobationary portability. *Id.* at 323.

III. Procedural History

On June 2, 2017, Stanczyk and PEA filed suit against the District and its governing Board, Petitioner Poudre School District R-1 Board of Education (collectively, "PSD" or "the District"), asserting six separate causes of action. Among their claims, Stanczyk and PEA sought declaratory judgments that the refusal to grant Stanczyk nonprobationary status violated section 22-63-203.5, *id.* at 11–12, and the alleged practice of requiring waivers was preempted by state law, *id.* at 13. Following discovery, both sides moved for summary judgment. *Id.* at 496–550.

[4] It is disputed whether the information Stanczyk submitted in support of her portability request met the statutory requirements of evidence of student academic growth data and actual performance evaluations for the prior two years. *Id.* at 647–48. PSD also has maintained throughout this case that Stanczyk's request was untimely, given that it came eight months after she had been hired. *Id.* at 34–37, 513–15.

The district court granted summary judgment in favor of PSD on all of Stanczyk and PEA's claims and denied their cross motion for summary judgment. *Id.* at 653. The district court found that because Stanczyk validly waived her right to request nonprobationary portability from PSD, she did not have the right under section 22-63-203.5 to submit a request for nonprobationary portability eight months later. *Id.* The district court further found that local school boards have the right under section 22-63-203.5 to require teachers to waive any right to request nonprobationary portability as a condition of applying to work with a school district. *Id.* Because it found Stanczyk's waiver valid, the district court did not reach several other arguments PSD raised—namely, the lateness of her portability request, *id.* at 648, the inadequacy of her request, *id.*, and the application of equitable estoppel to bar Stanczyk's claims, *id.* at 646, 653.

IV. Direct Appeal

Stanczyk and PEA sought appellate review and primarily argued waivers of nonprobationary portability may not be compelled. The Court

of Appeals reframed the question to "whether a school district may ***restrict*** a teacher's ability to exercise the ***right*** of nonprobationary portability . . . [by] ***requir[ing]*** the teacher to relinquish the right to nonprobationary portability as a condition of employment." *Stanczyk v. Poudre Sch. Dist. R-1*, No. 18CA2345, slip op. at 1, ¶ 3 (Colo. App. Apr. 23. 2020) (emphasis added).[5] Although it disclaimed any decision as to whether portability can ever be waived, the Court of Appeals characterized PSD's online application and probationary employment contracts as "the Restrictions" and held section 22-63-203.5 had been violated. *Id.* at 28, ¶¶ 54–55 & 34, ¶ 69.

First, believing the statute was a major change in the law to ***create*** both an ***individual*** "***right***" to transfer nonprobationary status, *id.* at 30–31, ¶¶ 59–60 (emphasis added), and a ***state*** "***mandate***" on local districts to grant it, *id.* at 35, ¶ 70, the Court of Appeals rejected any notion that PSD retains the "power to hire only those teachers who

[5] The Court of Appeals' initial opinion was released on February 13, 2020. It subsequently issued two corrected opinions on its own motion.

surrendered their right to nonprobationary portability," *id.* at 32, ¶ 64. According to the Court of Appeals:

> Before the General Assembly adopted section 22-63-203.5, if an experienced teacher who had achieved nonprobationary status wanted to accept a position with a different school district, the teacher had no choice but to relinquish his or her nonprobationary status (and the associated protections)—and start anew as a probationary teacher—***unless the hiring school district offered the teacher a nonprobationary position. The decision whether the teacher would receive nonprobationary status in the hiring school district exclusively belonged to the hiring school district.***
>
> Section 22-63-203.5 changed the law by giving the teacher the sole power to exercise the right of portability. But the statute has significance only if teachers retain this power.

Id. at 33, ¶¶ 65–66 (emphasis added).

Second, the Court of Appeals felt the District somehow had compelled nonprobationary teachers to waive portability, concluding "there is no dispute that the Poudre Defendants used the Restrictions to ***require*** teachers to relinquish the right to nonprobationary portability as a condition of employment." *Id.* at 32, ¶ 64 (emphasis added). In the

Court of Appeals' view, "[t]he Poudre Defendants' use of the Restrictions enable[d] them to choose which of the School District's teachers, if any, may enjoy the benefits of 22-63-203.5 or even deny employment to all teachers who try to exercise their right to nonprobationary portability." *Id.* at 34, ¶ 68.

From these two conclusions, the Court of Appeals decided "[t]he Poudre Defendants' use of the Restrictions [wa]s unreasonable because it revert[ed] the portability decision from the teacher back to the school district, thereby writing section 22-63-203.5 out of the statute book." *Id.* at 33, ¶ 65. Thus, based on its perceptions of section 22-63-203.5 as change in the law that only benefited teachers and PSD's online application and probationary employment contract as unreasonably coercive, the Court of Appeals reversed the district court and granted summary judgment to PEA and, in part, Stanczyk. *See generally id.* at 37–39, ¶¶ 74–79.

Finding a factual dispute the district court did not reach regarding the adequacy of the performance documentation Stanczyk submitted

with her portability request, the Court of Appeals remanded for a trial on the merits. *Id.* at 38–39, ¶¶ 76–77 & 44–45. The Court of Appeals also did not address the timeliness of Stanczyk's request and whether "a school district may place reasonable restrictions, such as a deadline to request nonprobationary status." *Id.* at 34–35, ¶ 69.

The Court of Appeals designated its opinion for official publication. *See generally id.* This Court subsequently granted PSD's request to review the Court of Appeals' far-reaching and impactful decision, which calls into question waivers of nonprobationary portability by teachers like Stanczyk throughout the state.

SUMMARY OF THE ARGUMENT

Portability of nonprobationary status under section 22-63-203.5 is neither automatic nor indefinite. A teacher must request it by providing documentation of effectiveness before being hired. And, like most statutory provisions, portability is not an inalienable right and can be waived. State law therefore plainly allows school districts to ask applicants for teaching positions to waive portability of their

nonprobationary status, offer probationary employment to teachers who have earned nonprobationary status in another district, or require a waiver of portability as a condition of accepting that employment.

The purpose of section 22-63-203.5 was to relax the mandatory probationary period and open the labor market for experienced instructional staff, as a benefit to both nonprobationary teachers and districts. Reading waiver restrictions into the statute, as the Court of Appeals did, would frustrate that legislative goal and lead to the absurd result of closing the lateral hire market by pushing districts to only hire less experienced probationary teachers.

Such a construction also would raise significant constitutional doubt. Being able to reach mutually agreed upon terms and conditions of employment with teaching candidates is an imperative of the Local Control Clause in the Colorado Constitution. Misreading section 22-63-203.5 to create a right and mandate of nonprobationary portability that neither a teacher nor a school district can escape would usurp school districts' power to select instructional staff under local standards of

teacher effectiveness.

It does not matter whether a waiver of portability was requested or required. There is no functional difference between a nonprobationary teacher who applies for and accepts a probationary position without ever asking for portability, and one who agrees to affirmatively waive portability as a condition of applying for a probationary position. Section 22-63-203.5 imposes no restrictions whatsoever on waivers, and even a so-called Hobson's choice can be voluntary.

As for Stanczyk, her suggestion of coercion is both unfounded and ineffective. It is undisputed that she voluntarily waived portability of her nonprobationary status and accepted employment in PSD under a probationary contract. She could have pursued portability during the hiring process but chose not to on her own accord. Her subsequent request for portability, which came eight months later after she was notified of nonrenewal, was properly denied. When applied to section 22-63-203.5, these undisputed facts are fatal to Stanczyk and PEA's claims.

Alternatively, Stanczyk's request was untimely. Nonprobationary portability is not available for an indefinite time. Under the plain language of section 22-63-203.5, portability is only available when a teacher is applying for work in another school district and before they have accepted a new position. Once there has been a job offer and an acceptance, the contractual employment relationship is set. It would be absurd to allow a teacher to retroactively and unilaterally change their probationary status under a written employment contract. Stanczyk's request for portability came long after she agreed to waive nonprobationary status and began working for the District on probationary status. Nothing about the waiver language in PSD's online application or probationary employment contract can excuse her delay.

For these reasons, PSD remains entitled to summary judgment, and the order of the Court of Appeals should be reversed.

ARGUMENT

PSD Was Properly Granted Summary Judgment Because State Law Allows a School District to Ask or Require an Applicant for a Teaching Position to Waive Portability of Nonprobationary Status, and Stanczyk Voluntarily Did So.

A. Standard of Review and Preservation

The district court and the Court of Appeals' rulings on the parties' summary judgment motions are subject to de novo review. *E.g.*, *Oasis Legal Fin. Grp., LLC v. Coffman*, 361 P.3d 400, 405 (Colo. 2015). Statutory interpretation presents a question of law also subject to de novo review. *E.g.*, *Sch. Dist. No. 1 in City & Cty. of Denver v. Masters*, 413 P.3d 723, 728 (Colo. 2018). Summary judgment is appropriate when the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *E.g.*, *Oasis Legal*, 361 P.3d at 405; *accord* C.R.C.P. 56. "The purpose of the summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with a trial when, as a matter of law, based on

undisputed facts, one party could not prevail." *Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 548 (Colo. 2006) (internal quotation omitted).

PSD's entitlement to summary judgment based on the meaning of section 22-63-203.5 and the validity of Stanczyk's waiver were preserved in the district court and the Court of Appeals. R. CF., pp. 509–15, 575, 580–86, 624–28; *Pet'rs' Answer Br.*, No. 2018CA2345, pp. 10–26, 35–39.

B. Section 22-63-203.5 Inherently Allows Waivers of Nonprobationary Portability.

To ascertain the General Assembly's intent, this Court always starts with the plain language of the statute. *E.g.*, *Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 661 (Colo. 2011). A special rule of construction applies to teacher employment statutes; because they are in derogation of a school district's common law power to hire and fire at will, such laws must be "strictly construed" in favor of a school district. *Tyler v. Sch. Dist. No. 1*, 493 P.2d 22, 23 (Colo. 1972) (applying rule to Teacher Employment, Dismissal, and Tenure Act of 1967) (citing *Marzec v. Fremont Cty. Sch. Dist. No. 2*, 349 P.2d 699, 701 (Colo. 1960), *recognized as superseded by statute on other grounds in Johnson v. Sch. Dist. No. 1*

in Cty. of Denver, 413 P.3d 711, 713–14 (Colo. 2018) *and Masters*, 413 P.3d at 729)); *see also N.Y. Life Ins. Co. v. West*, 82 P.2d 754, 756 (Colo. 1938) (declaring that statutes limiting "the general right of contract . . . are strictly construed," and "[i]n case of doubt they are resolved in favor of the right" to contract).

Section 22-63-203.5 provides in full:

> Beginning with the 2014–15 school year, a nonprobationary teacher, except for a nonprobationary teacher who has had two consecutive performance evaluations with an ineffective rating, who is employed by a school district and is subsequently hired by a different school district may provide to the hiring school district evidence of his or her student academic growth data and performance evaluations for the prior two years for the purposes of retaining nonprobationary status. If, upon providing such data, the nonprobationary 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.

(emphasis added).

The one inescapable conclusion from the legislature's use of the word "may" in the first sentence of the statute is that portability is neither automatic nor absolute. Nonprobationary status does not necessarily follow a teacher from one school district to another. Rather, a transfer of nonprobationary status is clearly conditioned on a teacher's decision in the first instance to request it. *See, e.g.*, *Yellow Jacket Water Conservancy Dist. v. Livingston*, 318 P.3d 454, 457 (Colo. 2013) (reciting well-established plain meaning rule); *see also St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 325 P.3d 1014, 1022 (Colo. 2014) (emphasizing no words should be "rendered superfluous"); *Dep't of Transp. v. Stapleton*, 97 P.3d 938, 943 (Colo. 2004) ("presum[ing] that the General Assembly . . . intends that meaning should be given to each word"). A teacher who does not request portability simply has no claim to it.

A teacher also may choose to accept probationary status when starting work in another school district by not requesting portability. The ability to waive portability necessarily follows from section 22-63-203.5's unambiguously permissive language. A similar statute allowing a

criminal defendant to request the in-person testimony of a lab technician was at issue in *Hinojos-Mendoza v. People*, 169 P.3d 662, 665 (Colo. 2007). This Court held that a defendant's failure to do so effectively waived the constitutional right to confront adverse witnesses. *Id.* at 668–70; *see also People v. Wiedemer*, 852 P.2d 424, 438 (Colo. 1993) ("It is the defendant's choice either to file such a challenge or to allow the limitations period to lapse with the result that use of Crim. P. 35(c) is foreclosed as an avenue of relief."). If the word "may" in a criminal evidentiary statute means such a fundamental right can be waived by inaction, there can be no doubt that portability likewise is waived when not requested.

C. Nothing in Section 22-63-203.5 Prohibits Waivers of Nonprobationary Portability.

Further revealing the General Assembly's intent is the absence of any language in section 22-63-203.5 restricting waiver. As the district court correctly recognized, the statute does not state a district is prohibited from asking or requiring an applicant to waive portability. R. CF, pp. 650–52. It also does not preclude a district from offering probationary employment with a probationary contract. Teacher

employment statutes from other states illustrate how some legislatures have chosen stricter restrictions on portability. Michigan, for example, limits a school district to subjecting a transferring teacher with tenure to no more than two years of probation, instead of the otherwise mandatory five years. Mich. Comp. Laws §§ 38.81, 38.92.

Colorado's legislature likewise knows how to regulate waivers. In other statutes, it expressly states when some legally protected or cognizable interest cannot be waived. *E.g.*, § 8-4-121, C.R.S. (disallowing waiver of employee's rights under Colorado Wage Act); § 13-22-204(2)(a), C.R.S. ("Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not: (a) Waive or agree to vary the effect of the requirements of section 13-22-205(1), 13-22-206(1), 13-22-208, 13-22-217(1) or (2), 13-22-226, or 13-22-228."); § 38-12-103(7), C.R.S. ("Any provision, whether oral or written, in or pertaining to a rental agreement whereby any provision of this section for the benefit of a tenant or members of his household is waived shall be deemed to be against public policy and shall be void.").

This Court has long recognized that its role is to interpret the law and not rewrite it to accomplish a different policy preferred by a litigant. *See, e.g.*, *Shelter*, 246 P.3d at 661 ("We will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate."). As succinctly stated in *Yellow Jacket*, this Court will "not add words to a statute." 318 P.3d at 457; *accord Sooper Credit Union v. Sholar Grp. Architects, P.C.*, 113 P.3d 768, 772 (Colo. 2005) ("[W]e will not read in such a requirement that the General Assembly plainly chose not to include.").

There is nothing unique about waivers that calls for a different standard of statutory interpretation. As the district court correctly recognized, R. CF, p. 651, "it is well established that, in the absence of an ***express*** statutory provision barring waiver or countervailing public policy, parties may enter into contracts ***abrogating*** or ***limiting statutory provisions*** which confer a right or benefit." *Francam Bldg. Corp. v. Fail*, 646 P.2d 345, 348 (Colo. 1982) (emphasis added). This is because "the right of private contract is no small part of the liberty of the

citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation." *Francam Bldg.*, 646 P.2d at 349 (quoting *Baltimore & Ohio S.W. Ry. v. Voight*, 176 U.S. 498, 505 (1900)).

Faced with an analogous application of these rules of construction in *Vallagio v. Metropolitan Homes, Inc.*, this Court held the statutory right to file a "civil action" under section 6-1-113, C.R.S., could be waived because the legislature did not make it non-waivable. 395 P.3d 788, 796 (Colo. 2017). In so holding, this Court squarely rejected any notion of an embedded public policy against waiving the right to sue and emphasized that "[t]he absence of particular language is usually considered an indication of legislative intent, not a mere oversight." *Id.* (citing *Triple Crown at Observatory Vill. Ass'n, Inc. v. Vill. Homes of Colo., Inc.*, 328 P.3d 275, 278 (Colo. App. 2013)).

The same result must follow here. Had the General Assembly intended to prevent a teacher from waiving nonprobationary portability, it would have said so. Given that section 22-63-203.5 must be strictly

construed in school districts' favor (and therefore against teachers), *Tyler*, 493 P.2d at 23, as well as in furtherance of both parties' freedom to contract, *N.Y. Life*, 82 P.2d at 756, what the legislature did not say in section 22-63-203.5 is doubly meaningful. With no language in section 22-63-203.5 restricting waiver, it must be concluded that school districts can seek a waiver of nonprobationary portability.

D. Construing Section 22-63-203.5 as Written Furthers its Purpose of Expanding the Labor Market for Public School Teachers.

While there is no need to look beyond the plain language of section 22-63-203.5, *see, e.g.*, *Sooper Credit Union*, 113 P.3d at 772, the legal context upon which it was passed and the purpose it was intended to serve confirm the General Assembly intended portability to be waivable. Such background is particularly pertinent, given that the Court of Appeals fundamentally misunderstood how section 22-63-203.5 changed the law.

The Court of Appeals believed that before the statute was enacted, a "hiring school district" could decide whether an experienced teacher

"would receive nonprobationary status." *Stanczyk*, slip op. at 33, ¶ 66. It was wrong. Colorado law long ***required*** that teachers complete a probationary period in every school district. As this Court explained in 1960, "three full years of teaching followed by re-employment thereafter" was necessary to acquire tenure (subsequently supplanted by nonprobationary status in 1990, *see Johnson*, 413 P.3d at 718), and that requirement "***c[ould] not be shortened or waived*** by [a school] board." *Marzec*, 349 at 701 (emphasis added), *recognized as superseded by statute on other grounds in Johnson*, 413 P.3d at 713–14 *and Masters*, 413 P.3d at 729.[6] Consequently, and contrary to the Court of Appeals' mistaken belief, for many decades a district could ***not*** "offer" an applicant "a nonprobationary position." *Stanczyk*, slip op. at 33, ¶ 65. The law was clear that if a tenured or nonprobationary teacher changed jobs and began work for a different school district, the teacher had to start over on probationary status.

[6] This rule is common in the United States. *See generally* 16B McQuillan Mun. Corp. § 46:57 (3d. ed.); 78 C.J.S. Schs. & Sch. Dists. § 354.

That is the rule section 22-63-203.5 changed. Beginning with the 2014–15 school year, *id.*, it finally became possible for a district to hire an experienced teacher from another district and recognize a transfer of nonprobationary status. Teachers were not the sole beneficiaries as the Court of Appeals wrongly assumed. *See Stanczyk*, slip op. at 33, ¶ 66. Indeed, the statute represented an ***opening*** of the job market that enables new opportunities for both teachers ***and districts*** to form mutually beneficial employment contracts. As a legislative sponsor explained, teachers could benefit from not having to "re-earn" nonprobationary status if they did not want to, and "we think in particular rural districts will find this quite appealing who have trouble attracting experienced teachers often." Transcript of Audio Tape: Hearing on SB10–191, House Comm. Educ., 67th Gen. Ass., 2d Reg. Sess. (Colo. May 6, 2010) [hereinafter House Hearing], *quoted in Resp'ts' Opening Br.*, No. 2018CA2345, pp. 16–17.

Teacher employment laws, "like all statutes, reflect a balance of interests." *Fleice v. Chualar Union Elem. Sch. Dist.*, 254 Cal. Rptr. 54, 57

(Cal. App. 1988) (holding school district could not waive or shorten statutory two-year probation period). The public "school system is established not to provide jobs for teachers, but rather to educate the young." *Id.*; *accord Blaine v. Moffat County Sch. Dist. Re No. 1*, 748 P.2d 1280, 1286 (Colo. 1988). Construing section 22-63-203.5 as written to allow teachers and districts to reach mutually acceptable terms of employment, which can include a waiver of nonprobationary portability, furthers the legislative purpose of opening the labor market to the benefit of both teachers and districts.

E. Conversely, Misreading Section 22-63-203.5 as a Mandate would Frustrate the Legislature's Purpose by Closing the Market for Experienced Teachers.

"[S]tatutory interpretations that defeat legislative intent or lead to absurd results" must be "avoid[ed]." *Mosley v. People*, 392 P.3d 1198, 1202 (Colo. 2017) (citing cases). Misreading section 22-63-203.5 as a one-sided boon to teachers would ignore that the legislature chose to change the law to benefit districts, too. Doing so also would have the counterproductive effect of ***closing*** the market for experienced teachers.

If nonprobationary portability is a mandate that neither a teacher nor a school district can bargain away, Colorado's teaching market would look dramatically different. Districts would be pushed to rule out hiring nonprobationary teachers altogether. This is because of the fundamental distinction between the status of nonprobationary and probationary teachers. § 22-63-103(7), C.R.S. (separating teacher status based on three consecutive years of demonstrated effectiveness). Probationary teachers are on one-year contracts that can be nonrenewed "for any reason [a superintendent] deems sufficient," § 22-63-203(4)(a), C.R.S., while nonprobationary teachers only may be dismissed for cause, subject to an administrative hearing, §§ 22-63-301 to -302, C.R.S.[7]

[7] The dismissal process is an uncertain, expensive, and cumbersome means of severing employment with a nonprobationary teacher. *See generally Johnson*, 413 P.3d at 713–14 (describing evolution and survival of dismissal process); *Masters*, 413 P.3d at 726 (same). When the legislature replaced tenure and merely streamlined the for-cause dismissal process 30 years ago, legislators likened the change to the recent fall of the Berlin Wall. Transcript of Audio Tape: Hearing on HB90-1159, S. Comm. Educ., 57th Gen. Ass., 2d Reg. Sess. (Mar. 1, 1990).

No law says school districts have to hire nonprobationary teachers. Faced with an inability to hire an experienced teacher on probationary status, the resulting preference for new or less experienced teachers who can be nonrenewed is obvious. As Stanczyk herself proves, there are teachers willing to waive portability by applying for and accepting a probationary position. Such opportunities, however, are sure to evaporate if portability were transformed judicially into an inalienable right. That would be an absurd outcome the General Assembly never intended.

F. Compelling a School District to Hire Teachers on Nonprobationary Status would Unconstitutionally Limit Authority to Select Instructional Staff.

The Colorado Constitution guarantees school districts "control over instruction." Art. IX, Sec. 15. Such local control is based on an "undeniable constitutional authority" that "inherently" includes "teacher employment decisions." *Bd. of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639, 646, 649 (Colo. 1999). Even "general statutory or judicial constraints . . . must not have the effect of usurping the local board's decision-making

authority or its ability to implement, guide, or manage the education programs for which it is ultimately responsible." *Booth*, 984 P.2d at 649.

Properly construing section 22-63-203.5 to confer school districts the authority to grant portability requests would be compatible with local control. In contrast, making portability a mandate would fully usurp district power to even ***negotiate*** employment with an experienced teacher when hiring on probationary status was desired. Coupled with the statutory for-cause dismissal protection enjoyed by nonprobationary teachers, districts would be greatly constrained into choosing between inexperienced teachers and those with more experience who must be renewed absent just cause for dismissal.

The resulting diminishment of local authority would be magnified by differing standards of teacher effectiveness. Section 22-63-203.5 was enacted as a part of Senate Bill 10-191, and teacher "effectiveness" is not defined in the final version of the law. Initially, it was envisioned that effectiveness would be measured uniformly across the state. *See* House Hearing, *quoted in Resp'ts' Opening Br.*, No. 2018CA2345, p. 16. Rather

than write its own definition, however, the legislature ultimately directed the Colorado State Board of Education to promulgate a standard based on recommendations from the state Council for Educator Effectiveness. § 22-9-105.5(3)(a), (d), (10)(a), C.R.S.; *see also* § 22-9-103(2.5), C.R.S. ("'Performance standards' means the levels of effectiveness established by rule of the state board pursuant to section 22-9-105.5(10)."). The State Board then set minimum standards of effectiveness, which school districts either may follow or choose to exceed. 1 CCR 301-87, §§ 3.01–02. This expressly includes the weight of student academic growth evidence in scoring teacher effectiveness. *Id.* at § 3.03(A).

Consequently, a teacher rated effective in one school district does not necessarily meet another district's standard. Disallowing a district to offer and a teacher to accept employment on probationary status would raise serious constitutional doubt by eviscerating a district's inherent right to meaningfully evaluate teachers. As underscored by this Court's numerous teacher employment cases, the authority to select the best available teaching candidate under local effectiveness standards lies at

the heart of a district's guarantee of control over instruction. *See Booth*, 984 P.2d at 649.

As a matter of sound statutory construction, this Court has an "obligation" to avoid such "constitutional deficiencies." *Catholic Health Initiatives Colo. v. City of Pueblo, Dep't. of Fin.*, 207 P.3d 812, 822 (Colo. 2009) (quoting *Adams Cty. Sch. Dist. No. 50 v. Heimer,* 919 P.2d 786, 792 (Colo. 1996)); *see also Owens v. Colo. Congr. Parents, Teachers & Students*, 92 P.3d 933, 940 (Colo. 2004) (explaining the Supreme Court has "scrupulously honored the framer's preference . . . for local control"). Section 22-63-203.5 should be applied as written to allow waivers of nonprobationary portability.

G. There is Nothing Unlawful in Requiring Teachers to Waive Nonprobationary Portability when Applying for a Probationary Position.

The Court of Appeals clearly viewed PSD's hiring practices as coercive and preoccupied itself with even the possibility of pressure, using words like "relinquinsh[ed]" and "surrendered" to describe the decisions of nonprobationary teachers, as if they faced a Hobson's choice

and somehow were robbed of their status and forced to take a job against their will. *See, e.g.*, *Stanczyk*, slip op. at 31–32, ¶¶ 63–64. That concern was unfounded as a matter of law. Whether a waiver is made following a request or a requirement does not change the analysis.

There is no functional difference between a nonprobationary teacher who applies for and accepts a probationary position without ever asking for portability, and one who agrees to affirmatively waive portability as a condition of accepting a probationary position. By not prohibiting a teacher from waiving portability, section 22-63-203.5 necessarily allows a school district to request—or even require—a teacher to do so. The resulting waiver by a teacher does not void state law or create some exemption from it, as the Court of Appeals suggested. Again, had the legislature intended to restrict waivers in any way, it would have said so in the statute.

This Court has recognized that a waiver by a party with even patently ***unequal*** bargaining power can be voluntary. In *University of Colorado v. Derdeyn*, the constitutionality of a drug-testing program for

intercollegiate student athletes was at issue. 863 P.2d 929, 930 (Colo. 1993). The program "was mandatory in the sense that if an athlete did not sign a form consenting to random urinalysis pursuant to the program, the student was prohibited from participating in intercollegiate athletics," which could include loss of scholarship. *Id.* After a full trial, the district court found a Fourth Amendment violation and concluded the consent was "coerced." *Id.*

Emphasizing the "voluntariness [of a waiver of a constitutional right] is a question of fact to be determined from all the circumstances," this Court found the "pressure" on a student to "consent" was "obvious." *Id.* at 946, 949. Yet, it stopped well short of saying participation in sports programs can never be conditioned on consent to drug testing. *Id.* at 949–50. The University had failed to prove the consent was voluntary because, as this Court explained, prospective student athletes could have been given information about the testing requirement at a time when they had a meaningful opportunity to apply for admission to another educational institution. *Id.* at 949.

If a prospective student can waive a Fourth Amendment right to be free from unreasonable searches when applying for college, a teacher with greater bargaining power who is safely ensconced with nonprobationary status can waive a far less weighty statutory "right" when applying for a job in another school district. Requiring a waiver of portability is not a "take it or leave it" job offer. Nonprobationary teachers have leverage as experienced teachers who already have secure employment. They are in an immeasurably better position than, for example, a newly licensed teacher seeking an initial probationary assignment (or a young student trying to secure a college athletic scholarship). Moreover, a non-probationary teacher may be licensed in a high-demand content area that makes them an even more desirable candidate. If a job opportunity is not to a nonprobationary teacher's liking and they are unwilling to take on any risk of nonrenewal, they can negotiate, choose to stay in their current position, or accept a more secure position in another district that more highly values their experience.

While a decision to accept the terms and conditions of an offer may not be free from any and all pressure, the law in this state is clear that the decision still may be made voluntarily. The Court of Appeals wrongly concluded that teachers must have less bargaining power than school districts and therefore never can waive portability of their nonprobationary status upon request. That faulty premise cannot support summary judgment for Stanczyk and PEA.

H. PSD's Online Application and Offer of Probationary Employment Did Not Compel Anyone to Waive Portability.

The Court of Appeals' underlying premise is also wrong as matter of fact. Throughout this case, PSD has steadfastly disputed any notion that its online application and probationary employment contract were coercive. If a teacher did not want to work in PSD on probationary status, they could have said so and negotiated for nonprobationary status; failing that, they could have stayed in their secure position or pursued nonprobationary employment in another school district. Neither

Stanczyk nor anyone else was forced to take a job in PSD against their will.

Indeed, Stanczyk unequivocally testified that no one in the District forced her to apply for a job in PSD, accept a position on probationary status, or sign a probationary employment contract that expressly waived portability. R. CF, pp. 302–05. When deposed, Stanczyk stated, "No one required me to accept employment. ***That was my decision***." *Id.* at 304 (emphasis added). Similarly, she agreed that "[n]o one compelled [her] to waive [he]r rights under 22-63-203.5." *Id.* Stanczyk also agreed she could have said, "No, thanks, I don't want to accept the job offer in the Poudre School District." *Id.* at 369. She further agreed she could have said, "I want the job, but I want it on nonprobationary status." *Id.* At the time, Stanczyk knew she could request portability, but she had no concerns about taking the position on probationary status because she did not think it was going to be an issue and was excited about the growth opportunity. *Id.* at 305–06.

Nor has there been any genuine dispute that the District does not have a so-called practice of requiring job applicants to waive portability of their nonprobationary status. As PSD's Executive Director of Human Resources testified, "[t]he District does not require applicants for teaching positions to waive nonprobationary portability." *Id.* at 322. When Stanczyk submitted her online application to PSD, she certified she had voluntarily decided to waive the ability to seek a transfer of her nonprobationary status. *Id.* at 302–03, 412, 646. While this language is embedded in the application, Human Resources staff can accept applications without a waiver. *Id.* at 322–23, 391. Applicants call with questions "all the time," and no one has asked to submit an application without the waiver. *Id.* at 391. Stanczyk is the only teacher who has ever indicated any desire for nonprobationary portability. *Id.* at 323.

It is not PSD's fault that Stanczyk chose not to contact Human Resources staff when she applied or failed to use her leverage as an experienced teacher before signing her contract. She admittedly could have pursued portability during the hiring process before reaching

agreement on the terms and conditions of probationary employment. But she waited almost an entire school year of working on a probationary contract, requesting portability only ***after*** being notified of her impending nonrenewal. *Id.* at 307, 316, 474, 647.[8] Stanczyk's subsequent and self-serving plea of coercion is unsupported by the record and cannot be used to invalidate her lawful waiver of nonprobationary portability.

I. Alternatively, Stanczyk's Portability Request Was Untimely.

The Court of Appeals apparently felt its concerns about Stanczyk's waiver somehow excused the untimeliness of her request. *See Stanczyk*, slip op. at 34–35, ¶ 69 (suggesting "a deadline to request nonprobationary status" would be a "reasonable restriction[]"). Regardless, Stanczyk cannot dispute that her request for portability of nonprobationary status came almost eight months after she formed a probationary employment

[8] PSD maintains that even if the Court of Appeals' decision stands, the doctrine of equitable estoppel should be applied on remand to bar Stanczyk's claims. *See generally* R. CF., pp. 521–22.

relationship with PSD. The district court's grant of summary judgment against Stanczyk may be properly affirmed on that basis alone.

Nonprobationary portability is not available for an indefinite time. Under section 22-63-203.5, portability depends on a teacher's timely provision "to the ***hiring*** school district" of the requisite evidence of effective performance "for the ***prior*** two years." (emphasis added). Once an offer of employment has been made and the teacher accepts, they have been hired; the act of hiring is complete.

The legislature's use of the present tense when describing the "hiring school district" reveals its intent that portability is only available when a teacher is applying for work in another school district and before they have accepted or started working a new position—that is, ***during the hiring process***. *See, e.g.*, *Yellow Jacket*, 318 P.3d at 457. Such a plain reading of the statute also honors this Court's directive that TECDA be "strictly construed" in favor of a school district. *Tyler*, 493 P.2d at 23.

Reading the statute to allow teachers to invoke portability ***after*** they have begun working would fail to credit the legislature's use of the words "hiring school district" and "prior two years." *See, e.g.*, *St. Vrain*, 325 P.3d at 1022; *Stapleton*, 97 P.3d at 943. It also would make no sense. *E.g.*, *Mosley*, 392 P.3d at 1202.

Once a teacher begins working in the hiring school district, the terms and conditions of employment have been set by contract. *See generally* § 22-63-202, C.R.S. (requiring written contracts for teachers and specifying numerous required terms and conditions); *see also Linder v. Midland Oil Ref. Co.*, 40 P.2d 253, 254 (Colo. 1935) ("An offer and an assent thereto manifested by act or conduct constitute a contract."). As discussed above, there is a significant difference in job security between nonprobationary and probationary status. It makes no sense that with one hand, the legislature would separate teachers into two classes and require their contracts to be in writing, while with the other, it somehow would intend that teachers could change perhaps the most important term and condition of their employment ***retroactively***.

Yet, that is the construction the claims here require to avoid summary judgment. Stanczyk entered into a probationary employment contract with the District, beginning work in August 2016. R. CF, pp. 304, 458–59. As a matter of law, she was subject to nonrenewal. § 22-63-203(4)(a). Stanczyk waited until April 2017 to request portability—eight months after she formed an employment agreement with the District. R. CF, pp. 316, 323, 637.

Allowing her to prevail on an untimely claim of portability would rewrite her contract into a nonprobationary one, removing the important term and condition that she could be nonrenewed for any reason deemed sufficient and effectively adding a new term and condition that she could only be dismissed for cause. That would be an absurd result.

It also would violate the well-established rule that changes to contracts are not made unilaterally. "The consensus of both parties is required in order to modify or to supplant a valid contract." *Colowyo Coal Co. v. City of Colo. Springs*, 879 P.2d 438, 443 (Colo. App. 1994). Allowing a teacher to request portability any time after he or she has been hired

would mean the initial acceptance of probationary status was nothing more than a sham, and the school district's understanding would be so frustrated that there no longer is a meeting of minds sufficient to maintain any contract. Thus, even if section 22-63-203.5 could be construed to allow indefinite portability requests, the employment agreement between Stanczyk and PSD would not survive and could not be reformed as a nonprobationary contract.

CONCLUSION

Had the legislature wanted to prohibit waivers of nonprobationary portability, it would have said so. School districts are not and should not be prohibited from asking a job applicant to waive portability, let alone offering or even conditioning employment on probationary status.

Reading such restrictions into section 22-63-203.5 would narrow the candidate pool for both teachers and districts, frustrating the General Assembly's goal of opening the labor market and substantially infringing districts' constitutional guarantee of control over instruction, which must include a meaningful opportunity to determine the best candidates for a

classroom position consistent with local standards of teacher effectiveness.

Whether a waiver is requested or required does not change the analysis, regardless of how bargaining power may vary between districts and experienced teachers. While a decision to accept terms and conditions of an offer may not be free from any and all pressure, the decision still may be made voluntarily.

It is undisputed here that Stanczyk voluntarily waived portability and began work for PSD under a probationary contract. She could have pressed to transfer her nonprobationary status during the hiring process, but she chose to accept probationary employment without trying to negotiate. No one forced her to take the job, and her subsequent suggestion of coercion is hollow and does not offer an escape from her waiver.

Alternatively, Stanczyk's request was untimely. Nonprobationary portability is not available for an indefinite time. It is only available during the hiring process. Stanczyk's request for portability came long

after she agreed to waive nonprobationary status and began working for the District on probationary status.

PSD therefore respectfully requests that this Court reverse the Court of Appeals, reinstate summary judgment for PSD, and restore the legislature's policy judgment by allowing school districts and teachers to reach mutually agreed upon terms and conditions of employment.

Submitted this 22nd day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2020, a true and correct copy of the foregoing **OPENING BRIEF** was served electronically via Colorado Courts E-Filing on the following:

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