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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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REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with all applicable 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 4,972 words (reply brief does not exceed 5,700 words).

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
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INTRODUCTION

Section 22-63-203.5, C.R.S., plainly allows a school district to ask or require a teacher who earned nonprobationary status in another district to waive portability of that status and accept probationary employment. For many years, a school district could not shorten the three-year probationary period, leaving districts and teachers unable to negotiate nonprobationary employment. In Senate Bill 191, the legislature reopened the lateral-hire market to benefit both districts and teachers by again allowing for the transfer of an experienced teacher's nonprobationary status when changing jobs.

Respondents Patricia Stanczyk and her union, the Poudre Education Association ("PEA"), want to transform this flexible local incentive into a crushing state mandate. The result would be a revised statute, enacted by the Court of Appeals on tenuous policy grounds and sure to lead to the very opposite of what the General Assembly intended—a closed job market with even less opportunity for experienced teachers than what existed before portability was allowed. Districts like

PSD would lose the local control of instruction granted by the Colorado Constitution, as guaranteed portability would prevent districts from exploring employment with an experienced teacher, even when hiring on probationary status was mutually desired.

This Court, as the final arbiter of what the law says, can restore the legislature's chosen balance to allow but not require portability. Had the legislature wanted to prohibit waivers of nonprobationary portability, it would have said so. As plainly written, section 22-63-203.5 provides that 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, just as Stanczyk knowingly and voluntarily did.

ARGUMENT

I. Stanczyk and PEA Concede a Teacher May Waive Nonprobationary Portability.

PSD does not ask this Court to "rewrite" section 22-63-203.5, as Stanczyk and PEA state, *Resp'ts' Answer Br.*, p. 7, or exempt school

districts from the statute's terms, as amici the State Board of Education and the Attorney General charge. As it has throughout this case, PSD simply asks that the statute be applied ***as written***. Portability of nonprobationary status under section 22-63-203.5 is not automatic, indefinite, or inalienable. It can be waived upon request or demand.

Stanczyk and PEA's rhetorical attack is remarkable because they make no effort to construe the statute any differently. They do not challenge that the legislature allowed waiver by plainly putting the onus on a teacher to request portability in the first instance by providing documentation of effectiveness during the hiring process. Stanczyk and PEA agree a teacher "***may***" "ask for it." *Resp'ts' Answer Br.*, pp. 7–8 (emphasis added). They agree a portability request "may" be made "upon ***being*** hired," and they recognize the statute allows a school district to expect a teacher to request portability within "a reasonable deadline." *Id.* at 1, 22 (emphasis added). Stanczyk and PEA also concede "a teacher may choose to ***waive*** her right to portability of her nonprobationary status."

Id. at 9 (emphasis added).[1] They even agree a district can ***ask*** an applicant to waive portability, proposing two hypothetical "knowing and voluntary" waivers prompted by district request. *Id.* at 15.[2]

II. There is no Compelling Reason to Prohibit Teachers from Waiving Portability.

It is Stanczyk and PEA who seek to mold the statute to their liking. Untethered from any statutory construction, they boldly ask the judiciary to rewrite section 22-63-203.5 to restrict how a district may request a waiver and otherwise prohibit a district from requiring one in exchange for employment. This Court should decline for several reasons.

A. The General Assembly Has Given No Indication that it Intended to Restrict Portability Waivers.

First, there must be some "countervailing public policy" to escape a

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[1] The Attorney General likewise concedes portability may be waived and characterizes section 22-63-203.5 as "unambiguous." *Att'y Gen.'s Amicus Br.*, p. 7.

[2] The Attorney General is unequivocal and "takes no issue with the District asking job applicants to waive portability." *Att'y Gen.'s Br.*, p. 12. The State Board "assumes, without formal position, that school districts may request or negotiate a voluntary waiver." *State Bd. Educ.'s Br.*, p. 13 n.1 (emphasis removed).

contract abrogating or limiting a statutory right or benefit. *Francam Bldg. Corp. v. Fail*, 646 P.2d 345, 348 (Colo. 1982), *accord Fox v. I-10, Ltd.*, 957 P.2d 1018, 1022 (Colo. 1998) ("Parties to a contract, therefore, may agree on whatever terms they see fit so long as such terms do not violate statutory prohibitions or public policy.") (citing *Francam Bldg.* and other authority). Stanczyk and PEA repeatedly characterize portability as a "governmental benefit" and an "important right," *e.g.*, *Resp'ts' Answer Br.*, pp. 17, 19, as if that somehow protected Stanczyk from her bargain more than if she had waived a "statutory right[] in [a] private, commercial contract[]," *id.* at 18. Stanczyk and PEA present no applicable precedent that a waiver by a teacher (or other governmental employee) is inherently suspect.

They cite *Martinez v. Continental Enterprises*, 730 P.2d 308 (Colo. 1986), but overstate its holding. In *Martinez*, this Court declined to give effect to a deed of trust, under which a mortgagee could take possession of encumbered property without foreclosure. *Id.* at 316. Although this Court recognized "the public policy favoring possession by the mortgagor

prior to foreclosure," it made clear it was not assuming the role of the legislative branch. *Id.* at 316. State statute already provided that a deed of trust, "***regardless of its terms***," shall not "enable the owner of the obligation secured to recover possession of real property without foreclosure and sale." *Id.* (emphasis added) (citing, *inter alia*, § 38-35-117, C.R.S.). That is why the parties were not held to their bargain. Unlike in section 22-63-203.5, the legislature had expressly evidenced its intent to prohibit a waiver.[3]

B. Restricting Waivers to Protect Teachers Is Inconsistent with the Legislature's Goal of Opening the Lateral Hire Market for School Districts, Too.

To nonetheless imply some protection that they admit is not stated in section 22-63-203.5, Stanczyk and PEA mischaracterize the

[3] Of course, the same thing can be said different ways, and the legislature has shown it is more than capable of expressing an intent to limit waivers. *E.g.*, § 8-4-121, C.R.S.; § 13-22-204(2)(a), C.R.S.; § 38-12-103(7), C.R.S. Another example was at issue in *England v. Amerigas Propane*, 395 P.3d 766, 770 (Colo. 2017) (citing § 8-43-204(1), C.R.S., which provides that employee cannot waive reopening worker's compensation claim for fraud or mutual mistake), cited by the Attorney General.

legislature's goal as a one-sided boon to teachers. Like the Court of Appeals, they completely ignore how section 22-63-203.5 changed the law to ***allow*** school districts to hire experienced teachers on nonprobationary status. *Marzec v. Fremont Cty. Sch. Dist. No. 2*, 349 P.2d 699, 701 (Colo. 1960) (explaining three-year probationary period "cannot be shortened or waived by [a school] board"), *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 Sch. Dist. No. 1 in City & Cty. of Denver v. Masters*, 413 P.3d 723, 729 (Colo. 2018).[4]

Viewed correctly, the statute represented an ***opening*** of the job market that enables new opportunities for ***both*** teachers and districts to form mutually beneficial employment contracts. While the legislature is presumed to have known of *Marzec*, *see, e.g.*, *People v. Cross*, 127 P.3d 71, 76 (Colo. 2006), one of SB 191's sponsors was explicit. When introducing section 22-63-203.5 as an amendment, the sponsor explained, "we think

[4] The Attorney General acknowledges that the rule stated in *Marzec* applied again after TECDA was enacted in 1990 without any allowance for portability. *Att'y Gen.'s Br.*, p. 3 & n.1.

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) (emphasis added) [hereinafter House Hearing], *quoted in Resp'ts' Answer Br.*, p. 11. If the legislature thought, as the Court of Appeals wrongly assumed, that school districts already had the power to grant nonprobationary status to lateral hires, there would have been no need to allow portability to help some districts recruit experienced teachers. Restricting waivers on that basis is revisionist history and would strike a much different balance than the legislature intended.[5]

[5] Stanczyk and PEA's view of the dismissal process is similarly distorted. *See, e.g.*, *Blaine v. Moffat County Sch. Dist. Re No. 1*, 748 P.2d 1280, 1286 (Colo. 1988) (explaining "[t]he purposes of the Teacher Tenure Act are several," including "to provide a school board with the necessary means to carry out its constitutional responsibility for the educational program in the public schools of the district"). The benefits to school districts are not "collateral." *See Resp'ts' Answer Br.*, p. 12.

C. Requiring Districts to Hire Experienced Teachers on Nonprobationary Status Would Frustrate the Legislature's Chosen Policy by Closing the Market for Lateral Hires.

It also would be incredibly counterproductive. No law says school districts have to hire nonprobationary teachers. If portability is a mandate that a teacher and a school district cannot bargain away, districts would be pushed to rule out hiring any nonprobationary teachers. The legislature surely did not want such a result, and no one before the Court argues otherwise. Stanczyk and PEA malign PSD for making this forecast, but the incentives (and disincentives) are not of the District's making. Different job protections for teachers were created by the General Assembly based on demonstrated effectiveness. §§ 22-63-103(7), -203(4)(a), -301 to -302, C.R.S. If experienced teachers always must be hired on nonprobationary status, the market will react by focusing on new or less experienced teachers who can be nonrenewed. To suggest PSD does not want to follow the law trivializes the District's moral imperative to staff classrooms with the most effective teachers.

The State Board suggests PSD simply lacks patience because

nonprobationary teachers can revert to probationary status and be nonrenewed following multiple, consecutive years of ineffective performance. *State Bd. Educ.'s Br.*, pp. 12, 16 (citing § 22-63-103(7), C.R.S.). That is a surprising argument from the entity charged with general supervision of the State's schools. How many students are stuck with a poorly performing teacher for the minimum of three years it would take to undo misplaced trust in the prior employer's effectiveness standards? One is too many.

D. There Is No Uniform Measure of Teacher Effectiveness that Mandates Nonprobationary Portability.

Stanczyk and PEA also seem to believe nonprobationary teachers are interchangeable and should be guaranteed portability "to implement the statewide evaluation system." *Resp'ts' Answer Br.*, p. 17. They have it all wrong. While the initial vision was that effectiveness would be measured uniformly across the state, *see* House Hearing, *quoted in Resp'ts' Answer Br.*, p. 11, the legislature ultimately charged the State Board with rulemaking, and the State Board set ***minimum*** standards of

effectiveness that school districts either may follow or choose to exceed, §§ 22-9-103(2.5), -105.5(3)(a), (d), (10)(a), C.R.S.; 1 CCR 301-87, §§ 3.01–02. Here as an amicus, the State Board blames PSD for "balkanization of the statewide system," *State Bd. Educ.'s Br.*, p. 3, but its own rulemaking—however intentioned—was the source of nonuniformity. The result is that a teacher rated effective in one school district does not necessarily meet another district's standard. Eliminating that inherent discrepancy could promote portability, but the inverse does not follow. Making portability absolute by restricting teachers' and districts' freedom to contract would do nothing to conform local standards of effectiveness.

E. The Local Control Clause Cannot Tolerate Absolute Portability.

The only compelling public policy at stake in this case is the one embedded in the Local Control Clause of the Colorado Constitution, Art. IX, Sec. 15, and it cuts against Stanczyk and PEA. Transforming portability into a mandate would completely usurp district power to even ***negotiate*** employment with an experienced teacher when hiring on

probationary status was desired. *See Bd. of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639, 646, 649 (Colo. 1999) (emphasizing local control is based on "undeniable constitutional authority" that "inherently" includes "teacher employment decisions"). In a landscape of disparate effectiveness standards, coupled with the statutory for-cause dismissal protection enjoyed by nonprobationary teachers, absolute portability would greatly constrain districts into choosing between inexperienced teachers and those with more experience who almost always must be renewed.

Stanczyk and PEA complain there is no "evidence" that restricting portability will "force" districts to hire nonprobationary teachers who would not have met their unique effectiveness standards. *Resp'ts' Answer Br.*, p. 21. This is textbook deflection. Stanczyk and PEA offer no serious counter argument, let alone any evidence of their own, and the systemic pressures of for-cause dismissal protection and disparate effectiveness standards just discussed cannot be disputed. Whether any applicant will be effective is a judgment call a hiring district must make. PSD's point is

simply that foreclosing negotiation of a waiver leaves a district no way to manage the risk of making a poor decision, other than focusing its recruitment on inexperienced teachers who can be hired on probationary status and subsequently nonrenewed if necessary. Although seemingly inevitable, the closure of the lateral-hire market for experienced teachers cannot be proven because there has been no final decision yet in this case. Stanczyk was the first teacher who ever requested portability in PSD. R. CF, p. 323.

The amici also work hard to downplay the negative impact on districts of affirming the Court of Appeals. The Attorney General, for example, states that "no one has argued that a district cannot negotiate over portability." *Att'y Gen.'s Br.*, p. 15. But the envisioned negotiation is really capitulation. As discussed below, PEA, Stanczyk, and the amici seemingly say that if a teacher requests portability, a district ***must*** grant it or provide whatever the teacher might demand for a waiver. Stanczyk and PEA go even further by suggesting a teacher could negotiate a probationary contract and request portability sometime later, as a way

to "alleviate any concern that school districts will not hire teachers seeking portability." *Resp'ts' Answer Br.*, p. 22. These positions underscore how, as a practical matter, guaranteeing portability will severely limit school district hiring.[6]

Stanczyk and PEA's pseudo-exhaustion and -delegation arguments are also unavailing. It makes no difference that PSD's Board of Education had not adopted a portability policy or that the District's Executive Director of Human Resources made the decision to deny Stanczyk's request. The Board hired and fired Stanczyk. § 22-32-109(1)(f)(I), C.R.S.; R. CF, pp. 126, 458–59. There is no authority or logic behind Stanczyk and PEA's suggestion that by allowing a subordinate employee to decide her portability request, the Board somehow forfeited the right to assert its constitutional guarantee of local control in this case. *See Fremont Re-1 Sch. Dist. v. Jacobs*, 737 P.2d 816, 819 (Colo. 1987) ("As school

[6] Stanczyk and PEA's concern about waivers of other statutory provisions is speculative and unripe. *Resp'ts' Answer Br.*, pp. 7–8. The only statute before the Court is section 22-63-203.5, and there is no allegation that PSD or any other district seeks, let alone requires, waivers of just cause dismissal protection or mutual consent.

organizations have grown in size and their functions have become more diverse and complex, the need for administrative delegation has become all the more imperative.").

Otherwise, Stanczyk and PEA's response to the District's local control concern is to take it somewhere else. While there is an avenue for a school district to seek a waiver of a statutory requirement from the State Board, it is quite self-serving to fault PSD for not yet requesting one. Why would PSD ask the State Board to release it from a requirement that is not written in a statute? PSD has long maintained it may ask applicants to waive portability and offer employment on probationary status. In defending its plain interpretation of section 22-63-203.5, PSD has merely emphasized that reading a mandate into the statute should be avoided, in part because doing so would raise real constitutional doubt. *See, e.g.*, *Catholic Health Initiatives Colo. v. City of Pueblo, Dep't. of Fin.*, 207 P.3d 812, 822 (Colo. 2009).

The State Board's waiver process is the wrong remedy for that problem. As this Court explained in *Booth*, local and state authority over

schools are balanced by necessarily competing interests. 984 P.2d at 646. "It is a balance that first must be struck by the legislature . . . ." *Id.* When the legislature strikes an improper balance between state and local authority over schools, a district's remedy is not the State Board. "[I]f challenged," it must be "reviewed by the courts." *Id.* In any event, the State Board's brief makes clear it offers only a hollow remedy that would be futile for PSD or any other district to pursue. *State Bd. Educ.'s Br.*, p. 21 (arguing "no school district can simply cherry-pick which aspects [of SB 191] apply to it.").

III. The Validity of a Waiver Does Not Depend on Bargaining Power or How Much Benefit is Received.

Like the Court of Appeals, Stanczyk and PEA preoccupy themselves with the possibility that a teacher may feel pressure to waive portability in exchange for a new job. They argue "a school district may not ***unduly restrict*** teachers' right to request [portability]," *Resp'ts' Answer Br.*, p. 9 (emphasis added), but that concedes PSD's point. While Stanczyk and PEA do not clearly say what separates due restrictions from undue ones, it cannot be bargaining power. *Cf. Univ. of Colo. v. Derdeyn*, 863 P.2d

929, 949–50 (Colo. 1993) (indicating participation in sports programs can be conditioned on drug testing if student's consent was voluntary). Even so, Stanczyk and PEA do not even try to contest that requiring a waiver of portability is not a "take it or leave it" job offer because nonprobationary teachers have leverage as experienced teachers who already have secure employment.

The most Stanczyk and PEA suggest as a litmus is that a teacher "receive a benefit in return for the waiver." *Resp'ts' Answer Br.*, p. 15. They cite no authority for such a benchmark. And how much benefit is enough for them? In two improbable hypotheticals, they seem to demand something more than the job itself, such as a bargained-for higher wage or special working conditions. *Id.* That would be a very unhelpful test of a waiver, particularly in this context. Comparing two specific jobs can involve many variables, which individuals are sure to value differently. As Stanczyk's situation demonstrates, there are teachers willing to waive portability by applying for and accepting a probationary position. It is easy to understand why. Some districts are considered more desirable

places to work, and sometimes an employee needs a new challenge. They may not need to win some concession in negotiation. The job itself may be valuable enough. Stanczyk herself "was just super excited to have this great opportunity in Poudre School District." R. CF, p. 305.

The Attorney General pushes even further beyond reality, comparing PSD's offer to "diktat." *Att'y Gen.'s Br.*, p. 10. Stanczyk was offered a job—not the World War I Treaty of Versailles. Hyperbole aside, the Attorney General maintains a waiver must be a "choice" to be valid. *Id.* at 9. Stanczyk had multiple options. She could have stayed in the Thompson School District on nonprobationary status. She could have applied to another district, just as she did after being nonrenewed in PSD. She could have asked PSD to accept her application without waiving portability. And she could have negotiated for nonprobationary status before accepting the job or signing a probationary contract. As discussed below, she made a different choice, and it was no less a choice than what either amicus prefers.

At the heart of Stanczyk and PEA's aversion to so-called compelled

waivers is a desire to give nonprobationary teachers ***all*** the bargaining power, to be exercised at their option alone. As discussed in the opening brief, that is not the balance the General Assembly struck in section 22-63-203.5. It did not make portability automatic, indefinite, or inalienable. By conceding that a teacher may waive portability upon a district's request, Stanczyk, PEA, and the amici necessarily concede such a waiver can be required.

The reality is that transforming a request into a requirement does not change the analysis. There is no functional difference between: (1) a nonprobationary teacher who applies for and accepts a probationary position without ever requesting portability; (2) one who agrees to affirmatively waive portability as a condition of applying for a probationary position; (3) one who refuses to apply for or accept probationary employment because they insist on maintaining nonprobationary status; and (4) one who applied for a probationary position, negotiated, and accepted employment with nonprobationary status. In each instance, a teacher ***and*** a district have made a choice.

Both bargaining power and the benefits obtained are relative, and even a so-called Hobson's choice to waive something can be valid.

IV. The Waivers Here Were Knowing and Voluntary.

Unless a fundamental constitutional right is at stake, the validity of a waiver in this State depends on whether it was knowing and voluntary. *See, e.g.*, *Duran v. Hous. Auth. of City & Cty. of Denver*, 761 P.2d 180, 183 (Colo. 1988) ("Waiver has traditionally been defined as the intentional relinquishment of a known right or privilege."). The district court found Stanczyk waived portability, R. CF, pp. 646–48, and she and PEA cannot establish that finding was clearly erroneous, *see, e.g.*, *Brown v. Jefferson Cty. Sch. Dist. No. R-1*, 297 P.3d 976, 979 (Colo. App. 2012) (reciting standard of review of factual findings in context of summary judgment motion); *cf. In re Fisher*, 202 P.3d 1186, 1195 (Colo. 2009) (rejecting party's attempt to characterize challenge to factual findings as legal error subject to de novo review).

A. There Was No Genuine Dispute of Material Fact that Stanczyk and Other Applicants Knowingly Waived Nonprobationary Portability.

Stanczyk and PEA contend every nonprobationary teacher who applied for a job in PSD did not knowingly waive portability because the District's online application "did not ***describe*** that right." *Resp'ts' Answer Br.*, p. 16 (emphasis added). Stanczyk and PEA again stay at a conclusory level, providing no explanation of what else the application should have stated. Even so, exhaustive advisement of the nature of portability demands a much higher standard applied to waivers of fundamental constitutional rights, obviously inapplicable here. *See, e.g.*, *People v. Janis*, 429 P.3d 1198, 1204 (Colo. 2018) (explaining "intelligently" means that person waiving right "must be fully aware of what he is doing and must make a conscious, informed choice to relinquish the known right").

They also are wrong as a matter of undisputed fact. First, the application expressly stated:

> (a) the positions for which I am applying are for licensed probationary teachers . . . . ;
> (b) by applying for these positions I have voluntarily decided to waive my right to assert the

> portability of nonprobationary status I have acquired in another school district, if any; and
> (c) any offers of employment extended by Poudre School District to me for these positions are conditioned on my signing a probationary teacher employment contract and not asserting the portability of nonprobationary status I have acquired in another school district, if any.

R. CF, p. 412. It is hard to imagine a more replete description of what portability is and the consequences of waiving it are. PEA and Stanczyk apparently feel the District must go through section 22-63-203.5 line by line with every applicant. Yet, applicants like Stanczyk were not waiving the right to counsel or to testify in a criminal case while facing a loss of life or liberty. This Court reserves the procedural safeguards Stanczyk and PEA seemingly demand for a very limited class of personal constitutional rights. *See, e.g.*, *People v. Curtis*, 681 P.2d 504, 511 (Colo. 1984).

Second, Stanczyk signed a form "PROBATIONARY TEACHER EMPLOYMENT CONTRACT," in which she expressly agreed she was voluntarily waiving any right under section 22-63-203.5 to assert

portability of her nonprobationary status. R. CF, pp. 304–05, 458–59, 636. The contract stated, "[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. What additional advisement could possibly be required?

Third, when Stanczyk submitted her application, she understood she was applying for a probationary position. *Id.* at 302. She understood that if the District offered her employment, the position would be on probationary status and under a probationary employment contract. *Id.* Moreover, she understood she was voluntarily waiving any right to assert portability of nonprobationary status. *Id.* Stanczyk had the same knowledge when she signed her employment contract. *See id.* at 304–05. While driving to the District's offices that day, she even spoke with a friend who reminded her about portability. *Id.* at 305. There can be no

doubt that Stanczyk and other applicants knew exactly what they were waiving.

B. There Was No Genuine Dispute of Material Fact that Stanczyk and Other Applicants Voluntarily Waived Nonprobationary Portability.

Nor is there any basis to question that Stanczyk or anyone else voluntarily waived portability. Stanczyk maintains she followed her friend's advice and asked the secretary in human resources about portability before signing her contract but was rebuffed. *Id*. Nonetheless, 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. 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.* Again, Stanczyk explained she had no concern about taking a probationary position because she felt she would have a greater growth opportunity in PSD, and she was confident she would

acquire nonprobationary status through the usual route. *See id.* at 305–06.

The District's Executive Director of Human Resources also testified that "[t]he District does not require applicants for teaching positions to waive nonprobationary portability." *Id.* at 322. "If a nonprobationary teacher from another school district wishes to apply for a probationary teaching position at the District but does not want to waive his or her right to nonprobationary portability via the online application, he or she can contact the District's human resources office, who can override that portion of the application . . . ." *Id.* at 322–23; *accord id.* at 242.

Stanczyk and PEA characterize this as a "bald assertion," *Resp'ts' Answer Br.*, p. 13, but the Executive Director testified that PSD "regularly receive[s] phone calls about the application process—resetting passwords, how to respond to questions from applicants—all the time." R. CF, p. 242. Given that none of those applicants ever questioned the waiver, it is no wonder the District did not have a more established process for bypassing it. *Id.* Ultimately, only the District can credibly say

what it will do, and Stanczyk and PEA presented no evidence contradicting the District's position. In sum, evidence in the record conclusively establishes that Stanczyk's and other applicants' waivers were voluntary.

V. Stanczyk Waited Too Long to Request Portability.

Stanczyk and PEA's one earnest, albeit brief, foray in statutory construction, is to argue there is no deadline to request portability in section 22-63-203.5. *Resp'ts' Answer Br.*, p. 22. PSD agrees the omission of any calendar-day deadline is meaningful. The use instead of the present tense when describing the "***hiring*** school district" must be given effect, as it reveals the legislature's intent that portability is 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.

As explained in the opening brief, this makes practical sense because teaching contracts must be in writing, and once a contract is signed, the terms and conditions of employment are set. § 22-63-202,

C.R.S. Allowing teachers to request portability ***after*** starting work on probationary status would allow them to retroactively and unilaterally change perhaps the most important term and condition of their employment. That would be an absurd construction of section 22-63-203.5 and drain all bargaining power from school districts. How can a district even have a meeting of the minds to form a contract if it does not know whether the teacher it is hiring will be on probationary or nonprobationary status? Stanczyk and PEA do not even address these concerns and the black letter law of contract formation.

Instead, they try to shift responsibility to the District, even though Stanczyk waited almost eight months to request portability and only did so after she was told she would be nonrenewed. R. CF, pp. 308, 314–16, 323, 637. Neither Stanczyk's long delay nor her decision to not even try to negotiate was PSD's fault. As already discussed, Stanczyk voluntarily chose to work for PSD as a probationary teacher. In her deposition, she admitted she could have refused to sign the contract that was offered to her. *Id.* at 306. She also could have asked to speak with a supervisor when

a secretary suggested the District would not grant portability. *Id.* at 305. Stanczyk did not "push it" because she was "super excited" about the job and "really wasn't worried about anything." *Id.*

CONCLUSION

PSD respectfully reiterates its request 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 8th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2020, a true and correct copy of the foregoing **REPLY BRIEF** was served electronically via Colorado Courts E-Filing on the following:

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