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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 IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply in Support of Petition for Writ of Certiorari complies with the requirements of C.A.R. 53, which incorporates C.A.R. 32 by reference. Specifically, the undersigned certifies that:

The brief complies with the word limit set forth in C.A.R. 53. It contains 2,434 words.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 53.

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

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Petitioners Poudre School District R-1 and Poudre School District R-1 Board of Education (collectively, "PSD"), by and through their undersigned attorneys, submit this Reply in Support of their Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Certiorari review is imperative to resolve 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. Left to stand, the Court of Appeals' far-reaching decision will negatively affect nonprobationary teachers and all Colorado school districts by shrinking the lateral-hire teaching market. Unable to ask an applicant to waive portability or offer employment on probationary status, districts will be pushed to rule out hiring nonprobationary teachers or compromise their local teaching effectiveness standards. Such a substantial infringement of the constitutional guarantee of control over instruction cannot be justified. Furthermore, there is no legal basis in Colorado law to allow someone to negate a voluntary

waiver, even if they allegedly had unequal bargaining power. Respondents Patricia Stanczyk and Poudre Education Association ("PEA") offer no persuasive response to these special and important reasons for certiorari review.

ARGUMENT

I. The Court of Appeals' Far-Reaching Decision Will Negatively Impact Nonprobationary Teachers and All Colorado School Districts.

Stanczyk and ("PEA") repeatedly try to bolster the Court of Appeals' claim that its holding was "narrow." They protest too much. Negating any such notion is that a majority of all the judges of the Court of Appeals decided to publish the 45-page opinion and set binding precedent. C.A.R. 35(e). Whichever justification in the rule the judges endorsed, it certainly was not a narrow holding without statewide impact, limited to the so-called restrictions of a single school district.[1]

[1] Curiously for a purportedly narrow decision, the Court of Appeals has now ***twice*** issued corrected opinions on its own motion. The most recent, which made a minor correction and was issued just four days ago, is attached to this brief as an updated appendix.

No matter how desperately Stanczyk and PEA may want to disavow it, the pervasive reach of the Court of Appeals' opinion is irrefutable. By granting summary judgment for Stanczyk and PEA, the Court of Appeals prohibited the portability waiver language in the District's online application and probationary teacher contract as "unlawful." *Stanczyk v. Poudre Sch. Dist. R-1*, No. 18CA2345, slip op. at 1, ¶ 3, 34, ¶ 69 (Appendix). In doing so, the Court of Appeals necessarily held a school district can neither ask nor require a teaching applicant to waive portability of nonprobationary status. Indeed, in the Court of Appeals' own words, it broadly held a school district cannot retain for itself "the power to hire only those teachers who surrendered their right to nonprobationary portability." *Id.* at 32, ¶ 64.

As Stanczyk and PEA concede, this holding is poised to dramatically change Colorado's teaching market, because no law says school districts have to hire nonprobationary teachers. While they criticize the District for discouraging qualified nonprobationary teachers from applying for jobs, it's the Court of Appeals that would severely limit

nonprobationary teachers' freedom to contract. That is not how section 22-63-203.5, C.R.S. is supposed to be construed. As Stanczyk herself proves, there are teachers willing to waive portability by applying for and accepting a probationary position.

Stanczyk and PEA nonetheless challenge the District to explain how teachers may obtain portability of their nonprobationary status, and the answer is simple. Consistent with the plain statutory language, it happens when both a qualified "nonprobationary teacher" and "the hiring school district" decide to enter into an employment contract with the term and condition of nonprobationary status. *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."). Portability enables this deal but does not require it.

As explained in the Petition for Certiorari, the purpose of the portability statute is to permit school districts to waive the probationary

period for effective nonprobationary teachers from other Colorado school districts. The Court of Appeals got it backwards when it held—without citation to any authority—that "[b]efore the General Assembly adopted section 22-63-203.5 . . . , [t]he decision whether the teacher would receive nonprobationary status in the hiring school district exclusively belonged to the hiring school district." *Stanczyk*, slip op. at 33, ¶ 66. Unsurprisingly, Stanczyk and PEA make no attempt to defend this glaring error. In fact, a school district had no such authority. *Marzec v. Fremont Cty. Sch. Dist. No. 2*, 349 P.2d 699, 701 (Colo. 1960).

If instead portability is an inalienable "mandate" as the Court of Appeals wrongly concluded, *Stanczyk*, slip op. at 35, ¶ 70, districts would be unable to evaluate experienced teachers on a probationary basis. There is a fundamental difference in job security between nonprobationary and probationary teachers. § 22-63-103(7), C.R.S. (basing distinction on three consecutive years of demonstrated effectiveness). Probationary teachers are on one-year contracts that can be non-renewed "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 a costly and time-consuming administrative hearing. §§ 22-63-301 to -302, C.R.S.[2]

This is the foundation upon which the Court of Appeals would push districts to categorically decline to consider the candidacy of applicants with nonprobationary status. Again, while Stanczyk and PEA concede districts can do so, nowhere do they hint this would be a desirable outcome. For good reason. As they recognize, the legislative discussion around portability was to ***open*** the hiring market for both teachers ***and districts***—not impose additional restrictions. Transcript of Audio Tape:

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[2] It is ridiculous to suggest, as Stanczyk and PEA do, that the statutory process for dismissing nonprobationary teachers is an "inconvenience." When the legislature replaced tenure and merely streamlined the for-cause dismissal process, legislators likened the change to the 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). The dismissal process remains a problematic, uncertain, expensive, and cumbersome means of severing employment with a nonprobationary teacher. *See generally Johnson v. Sch. Dist. No. 1 in the Cty. of Denver*, 413 P.3d 711, 713–14 (Colo. 2018) (describing evolution and survival of dismissal process; *Sch. Dist. No. 1 in City & Cty. of Denver v. Masters*, 413 P.3d 723, 726 (Colo. 2018) (same).

Hearing on SB10–191, H. Comm. Educ., 67th Gen. Ass., 2d Reg. Sess. (Colo. May 6, 2010).

The far-reaching impact of the Court of Appeals' published decision cannot be minimized, and certiorari review is needed to prevent an unfortunate outcome for teachers and districts never intended by the General Assembly.

II. The Lack of a Statewide Uniform Standard of Teacher Effectiveness Undercuts any State Interest in Restricting Local Districts from Hiring Nonprobationary Teachers on Probationary Status.

An unconstitutional infringement of local control over instruction also must be avoided. Although they acknowledge the problem, Stanczyk and PEA emphasize the state's interest in implementing a teacher evaluation system. It is true that when portability was introduced as an amendment during consideration of Senate Bill 191, the legislature envisioned a uniform standard of teacher effectiveness. Yet, that did not come to fruition.

Teacher "effectiveness" is not defined in the final version of the law.

Rather than write its own definition, 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).

The consequence is that contrary to the initial legislative vision quoted by Stanczyk and PEA, a teacher rated effective in one district does not necessarily meet another district's standards. This is critical. The Court of Appeals' construction of portability as an inalienable right effectively usurps a local district's decision-making authority in hiring and firing nonprobationary teachers and setting classroom performance expectations. Any possible justification for such a significant intrusion

into the constitutional guarantee of local control over instruction faded when the legislature abandoned a uniform standard of effectiveness.

Stanczyk and PEA also indirectly try to diminish the District's interest in its evaluation system, arguing there is no evidence that Stanczyk was any less deserving of nonprobationary status than a teacher the District itself had rated effective. They are wrong. Section 22-63-203.5 conditions portability on a teacher's timely provision of "***evidence*** of his or her student academic ***growth data and performance evaluations*** for the prior two years." (emphasis added). Nonprobationary status is only warranted if this "data . . . show[s] two consecutive performance evaluations with effectiveness ratings ***in good standing***." *Id.* (emphasis added). Stanczyk did not meet these requirements.

First, she only submitted incomplete ***summaries*** of her 2014–15 and 2015–16 performance—not the actual evaluations. R. CF, pp. 318; *compare id.* at 322–23, 332–36, *with id.* at 345–59. Second, Stanczyk failed to provide ***evidence*** of student academic growth data from her

prior two years in Thompson School District ("TSD"). The 2015–16 evaluation summary she submitted only references "Student Learning/Outcomes"; nowhere on the document is there any indication of actual student academic growth data. *Id.* at 333–35. The document also admittedly contains no explanation of how the score was calculated or what the score actually means. *Id.* at 319–20, 333–35. Third, neither of the documents Stanczyk submitted show her effectiveness ratings from TSD were "in good standing." *Id.* at 320, 332–36.

The Court of Appeals' decision creates a local control problem without cause, and certiorari review is needed to ensure districts can implement local standards of teacher effectiveness and reach mutually agreed upon terms and conditions of employment with nonprobationary applicants.

III. Colorado Law Does Not Allow a Teacher to Escape a Voluntary Waiver of Nonprobationary Portability by Claiming a Hobson's Choice.

Like the Court of Appeals, Stanczyk and PEA prefer not to squarely address the underlying issue in this case—whether a school district is

prohibited from asking or requiring an applicant to waive portability. Instead, they now seem to concede a waiver could be valid but argue Stanczyk's waiver was not voluntary because her choices were to accept employment on probationary status or not work for PSD.[3] While more transparent than the Court of Appeals' professed dodge, this position is untenable under existing Colorado law and at best, supports certiorari review to resolve the waiver here.

Stanczyk and PEA do not contest that as a matter of ***undisputed fact***, no one 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. To be clear, their complaint is Stanczyk's self-serving impression of a "take it or leave it" job offer. However, this ignores Stanczyk's leverage as an experienced teacher who already had secure employment in TSD. She was in an immeasurably better position than, for example, a newly licensed teacher

[3] In reality, Stanczyk had a third choice—remain with TSD as a nonprobationary teacher.

seeking an initial probationary assignment.[4]

Even so, they cite no Colorado case, and PSD does not believe there is one, which holds waivers by a party with unequal bargaining power cannot be voluntary. The closest precedent is the one Stanczyk and CEA ignore—*University of Colorado v. Derdeyn*, 863 P.2d 929 (Colo. 1993), and it does not advance their argument. At issue in *Derdeyn* was the constitutionality of a drug-testing program for intercollegiate student athletes. *Id.* at 930. 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-blown trial, the district court found a Fourth Amendment

[4] Stanczyk's decision not to use her leverage in pursuit of portability during the hiring process should not be charged to PSD, particularly given that she waited almost an entire school year and then suddenly requested portability ***after*** being notified of her impending nonrenewal. R. CF, pp. 307, 316, 474, 647. PSD maintains Stanczyk's request was untimely and barred by estoppel. Since it held Stanczyk had validly waived portability, the district court did not reach these alternative arguments. *Id.* at 646, 648. The Court of Appeals, in contrast, did not explain why it failed to address the lateness of Stanczyk's request.

violation and concluded the consent was "coerced." *Id.*

Emphasizing the "voluntariness [of a waiver] 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 emphasized, 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. It follows that if a prospective student can waive a Fourth Amendment right to be from unreasonable searches when applying for college, a teacher can waive a far less weighty statutory "right" when applying for a job at another school district while safely ensconced with nonprobationary status.

The validity of a waiver of portability is the core issue in this case. The Court of Appeals claimed to avoid the question but accepted

Stanczyk's cry of coercion, despite her admissions, and prohibited districts from seeking waivers from teachers in job applications and employment contracts. Certiorari review is needed to ensure such a sweeping and ill-advised holding is not made law without any analysis or factfinding.

CONCLUSION

For the reasons stated above, Petitioners Poudre School District R- 1 and Poudre School District R-1 District Board of Education again request that their Petition for a Writ of Certiorari be granted to restore the legislature's policy judgment in section 22-63-203.5 to allow school districts and teachers to reach mutually agreed upon terms and conditions of employment.

Submitted this 27th day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2020, a true and correct copy of the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** was served electronically via Colorado Courts E-Filing on the following:

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