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COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203 On Certiorari to the Colorado Court of Appeals, Case No. 2018CA2345 Opinion by Lipinksy, J., Webb and Dunn, JJ., concurring Larimer County District Court, the Honorable Judge Gregory Lammons, Case No. 2017CV30480	
POUDRE SCHOOL DISTRICT R-1 and POUDRE SCHOOL DISTRICT R-1 BOARD OF EDUCATION, **Petitioners,** v. PATRICIA STANCZYK and POUDRE EDUCATION ASSOCIATION, **Respondents.**	**▲ COURT USE ONLY ▲**
Attorneys for Respondents: Charles F. Kaiser, #8557 Brooke Copass, #45044 Rory Herington, #40024 Colorado Education Association 1500 Grant Street Denver, Colorado 80203 Phone: (303) 837-1500 Fax: (303) 861-2039 email: chkaiser@coloradoea.org bcopass@coloradoea.org rherington@coloradoea.org	Supreme Court Case No: 2020SC269
ANSWER BRIEF	

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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 C.A.R. 28(g).

It contains 5,080 words.

The brief complies with C.A.R. 28(b).

X For each issue raised, the respondent must provide under a separate heading before the discussion of the issue, a statement indicating whether respondent agrees with petitioner's statement concerning the standard of review and preservation for appeal and, if not, why not.

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

/s/ Charles F. Kaiser
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STATEMENT OF THE CASE

1. Nature of the Case

In 2010, the Colorado Legislature enacted § 22-63-203.5, C.R.S., as part of the Teacher Employment, Compensation, and Dismissal Act ("TECDA"). In this statute, teachers who have obtained nonprobationary status in one Colorado school district, which provides such teachers with job security not guaranteed to probationary teachers, may "port", or transfer, that status to another Colorado school district upon being hired by the second school district. The Petitioner, the Poudre School District ("PSD"), required individuals applying for teaching positions with it to agree to waive their statutory right to portability. The online application form used by PSD required an applicant to click, "I agree" to the wavier. If they did not click it, they were unable to submit the application. The form did not explain the nature of the right applicants were required to waive. PSD also required the individuals hired for its teaching positions to sign an employment contract waiving their right to portability, and leaving it with the option to void the contract if the individual attempted to invoke his or her portability rights.

The Opening Brief, at p.2, fn.1, claims that PSD Human Resources Director Victoria Thompson testified "unequivocally" that PSD did not require applicants for teaching positions to waiver portability, and that the District frequently received calls about the application process. Thompson's further testimony, not mentioned in the Opening Brief, was that she was unable to state what would happen if an applicant contacted her office and did want to waive portability. She also admitted that she had no idea whether PSD would have hired someone who was unwilling to waive portability. Thompson, not PSD's Board of Education (Board), was the decision-maker in this case.

This is a case about a school district administration that is unwilling to comply with a state statute that it dislikes.

2. Statement of the Facts

Patricia Stanczyk ("Stanczyk") worked for the Thompson School District ("TSD") from 1995 through 2015-16 school year. She attained non-probationary status with TSD after the start of the 1998-1999 school year. CF, p. 453, p. 378, ¶ 5. Stanczyk sought employment with the PSD for the 2016-2017 school year and began applying for positions through the PSD's online application program called "Applitrack." CF, p. 403, p. 389, lines 35:18-36:8.

Before Stanczyk, or any other individual applying for a position with the PSD, could submit any application, she was required to click a box indicating that she agreed with a number of terms, including:

> "…[a]ny offers of employment extended by Poudre School District to me are conditioned on signing a probationary teacher contract and not asserting the portability of non-probationary status I have acquired in another school district, if any."

CF, p. 412. This "agreement" was followed by a statement that, "I [applicant] acknowledge that I have read, understand, and agree to all the terms above." *Id*. The applicant had to click, "I agree" to these statements; there was no box for the applicant to indicate that they did not agree. CF, p. 413. If the applicant did not click the "I agree" box, they could not submit the application. CF, p. 368, Deposition p. 74:15-17, p. 369, Deposition 78:8-79:1. The form did not explain the nature of the right she was compelled to waive. CF, 412.

Before Stanczyk signed her employment contract with the PSD for the 2016-2017 school year, she went to the PSD's Human Resources office to ask about portability of her nonprobationary status from TSD. CF, p. 370, Deposition pp. 85:16-86:25. She was told by someone in that office, "we don't do that here." *Id.* at lines 86:20-87:5. The form employment contract Stanczyk signed for the 2016-

2017 school year stated that, if she attempted to assert her right to portability of her nonprobationary status, the PSD could void the contract. CF, p. 458.

PSD did not have any school board policy concerning portability of nonprobationary status. CF., p. 387, Deposition p. 18:20-19:1.

PSD's Initial Discovery Responses claimed that it only required applicants to waive portability of non-probationary status when they applied for what the Response characterized as "probationary positions." CF, p. 439-440, Responses to Interrogatories 1 and 2. Victoria Thompson ("Thompson"), PSD's Human Resources Directors, claimed at her deposition that the School District had external job postings for "nonprobationary" positions for the 2016-17 school year. CF, p. 391, Deposition p. 43:19-44:1. However, the PSD subsequently conceded that all external teaching positions for the 2016-17 school year were posted as probationary positions. CF, p. 450, Response to Request for Production No. 2.

Thompson also claimed that if an individual who applies for a position with PSD had questions about the portability of their nonprobationary status, he or she could contact the Human Resources Office. CF, p. 387, Deposition pp. 20:20-21:18. Yet Thompson was not able to state what would happen if an applicant contacted her office and did not want to waive their right to portability or whether the School District would hire someone who did not want to waive their right to

portability, stating she had "no idea" as to the likelihood that the School District would do so. CF, 391-392, Deposition pp. 44:22-46:3. Thompson reluctantly acknowledged that she was PSD's decision-maker in this matter. CF 386, Deposition p. 14:3-9; p. 387, Deposition pp. 18:20-19:9; CF, p. 399, Deposition p. 127:5-9.

On April 3, 2017, a supervisor told Stanczyk that her contract would not be renewed for the 2017-18 school year. CF, pp. 314-315, Deposition pp. 128:24-129:2, 131:9-13. The PSD's Board of Education (Board) did not decide not to renew Stanczyk's contract until April 25, 2017. CF, p. 492.

On April 10, 2017, Stanczyk emailed Thompson requesting portability of her non-probationary status. Attached to the email were Stanczyk's 2014-15 and 2015-16 evaluations from TSD, which rated her "Highly Effective" and "Effective," respectively. CF, p. 474 (email), 475-476 (2015-16 evaluation), and 477-480 (2014-15 evaluation). Included in these evaluations were Stanczyk's student growth scores, which determined 50% of the overall evaluation score as required by § 22-9-105.5(3)(a), C.R.S.

On April 14, 2017, a meeting was held on Stanczyk's request for portability of her non-probationary status. Present were Stanczyk, School District Middle School Director Bryan Davis, Thompson, and two PEA representatives.

Thompson denied Stanczyk's request, pointing Stanczyk to the job posting and contract that stated that Stanczyk's position was probationary. CF, pp. 397-398, Deposition pp. 101:23-103:9.

3. Procedural Statement

The Poudre Education Association (PEA) and Stanczyk filed this action in Larimer County District Court on June 2, 2017. The PEA is a membership organization which was composed of, as of June of 2018, 1,118 teachers and other licensed personnel employed by PSD. CF, p. 381. The District Court and Court of Appeals held that the PEA has associational standing to bring the claims that are currently at issue. *Stanczyk v. Poudre Sch. District. R-1*, 2020 COA 27M2 (February 13, 2020) pp. 22-23, ⁋ 40.

On or about December 11, 2018, Stanczyk and PEA filed an appeal to the Colorado Court of Appeals. The Court of Appeals found that the School District's online application requiring waiver of portability and its employment application with the same requirements, termed "Restrictions" by the Court of Appeals, violated the portability statute, § 22-63-203.5, C.R.S. *Stanczyk* p. 34, ¶ 69. The Defendants have sought this Court's review.

SUMMARY OF THE ARGUMENT

PSD asks this Court to rewrite the portability statute, § 22-63-203.5, C.R.S., to provide that school districts and qualified teachers may enter into contracts allowing such teachers to obtain nonprobationary status in less than the three years of effective teaching otherwise required by § 22-63-203(1)(b), C.R.S. However, the portability statute as written requires school districts to grant probationary status to qualified teachers who ask for it and supply the required documentation.

The Court of Appeals correctly decided this case by holding the PSD cannot deprive teachers of their rights provided by the portability statute by unreasonably restricting their opportunity to seek those rights. For this reason, the Court of Appeals did not find it necessary to address the waiver issue.

The waiver required by the PSD's application, and its contract of employment, was neither knowing, voluntary nor intelligent. Those waivers were, rather, coerced, and are therefore ineffective. Should the Court reach the waiver issue, the Court of Appeals decision holding that PSD's practices were unlawful should be affirmed for this reason, as well.

A coerced waiver is not effective simply because the statute creating the right waived does not prohibit voluntary waivers. Similarly, the lack of an explicit statutory prohibition against waiver does not resolve the question of whether the waiver is against public policy. Were it otherwise, for example, higher level

school district administrators could compel school principals to waive their prerogative not to accept teachers in their schools without their consent, as § 22-63-202(2)(c.5)(I), C.R.S. does not expressly prohibit such waivers. *See Johnson v. Sch. Dist. No. 1*, 413 P.3d 711, 716 (Colo. 2018) for an explanation of how "mutual consent" under the statute works. To give another example, § 22-63-301, C.R.S., does not expressly prohibit school districts from requiring teachers to waive the right to only be fired for just cause as defined by that statute. The rights provided by both statutes would be unenforceable if school district administrators could condition the exercise of those rights through the simple expedient of conditioning the receipt of various benefits on the waiver of those rights.

PSD's public policy arguments are simply excuses for not complying with a statute it does not like. The public policy underlying the portability statute is that, with a statewide evaluation system, teachers who have demonstrated sufficient effectiveness to achieve nonprobationary status in one school district in this state should be able to take that status with them when they go to another district. Like the statutes giving nonprobationary teachers the right only to be dismissed for just cause, portability is a benefit granted to teachers, not, at least primarily, to school district administrators who wish to be able to dismiss teachers as they see fit. PSD's contention that school districts will be unwilling to hire teachers who will

seek portability is simply a tacit admission that it does not wish to comply with the statute.

ARGUMENT

While there may be circumstances where a teacher may choose to waive her right to portability of her nonprobationary status, a school district may not unduly restrict teachers' right to request it

A. Standard of Review and Preservation

The standard of review is as stated at pp. 14-15 of PSD's Opening Brief. The issues raised in that Brief were preserved below.

B. Discussion

i. The Statutory Background

In 1990, the General Assembly enacted the Teacher Employment, Compensation and Dismissal Act, §§ 22-63-101 to 403, C.R.S., ch. 150, sec. 1 1990 Colo. Sess. Laws 1117-1128 (TECDA). TECDA created a distinction between probationary and nonprobationary teachers. *See Johnson* at 726; *Stanczyk* at p. 4, ¶ 7. The contracts of the former may be nonrenewed at the end of every school year, without cause. § 22-63-203(4)(a) and (b), C.R.S. The latter may only be dismissed for good and just cause as defined in § 22-63-301, C.R.S.

The General Assembly created a statewide evaluation system in 2010. SB 10-191, Ch. 241, 2010 Colo. Sess. Laws 1070. The General Assembly linked

nonprobationary status to teacher performance, required that half of teacher evaluations be based on student academic growth, and required that school principals must consent to placement of teachers in the schools that they administer. §§ 22-9-102(1)(a)(V), 22-9-105.5(3)(a) and 22-63-202(2)(c.5)(I), C.R.S., respectively. *See Stanczyk* at ¶¶ 10-12, pp. 5-6. In *Johnson*, the Court interpreted one provision of SB 10-191, § 22-63-202(2)(c.5)(I), C.R.S., to mean that teachers who are displaced from a particular school for any reason, and are unable to find a principal to hire them within one year or two hiring cycles, may be placed on indefinite unpaid leave. *Id.* at 715.

The right to portability of nonprobationary status was the one provision of SB 10-191 that provided a benefit to teachers.

The portability requirement of § 22-63-203.5, C.R.S., was not contained in the original version of SB 10-191. Portability was introduced by Representative Scanlan during the May 6, 2010 hearing of the House Committee on Education.[1] In light of the statewide evaluation system of SB 10-191, the sponsor believed that teachers who had earned nonprobationary status in one school district should be allowed to keep that status when hired by a new school district:

[1] A copy of the proposed amendment is available at: http://www.leg.state.co.us/CLICS/CLICS2010A/commsumm.nsf/91320994cb8e0b6e8725681d005cb995/40cf87f55d7d799a8725771c00531a1c/$FILE/10HseEd0506AttachK.pdf.

Representative Scanlan: Thank you. Now we are back—I move L. 126.
Representative Murray: Second
Unidentified Speaker: I'm working with her
Representative Scanlan: Thank you
Chairman Merrifield: Representative Scanlan
Representative Scanlan: Thank you
Chairman Merrifield: Representative Scanlan 126
Representative Scanlan: Thank you Mr. Chair. Alright, this is something that we think is quite exciting. **This is something no other state in the nation does**. We are—in the words of—of someone at the department of education: **we are all in with believing that this effectiveness system is a vision and it's the right thing for Colorado to do in that a teacher who has earned status as an effective teacher by criteria that is recognized across the state therefore has earned their nonprobationary status and that will now be portable with them to any other district that they might go to**.
Chairman Merrifield: Questions on this amendment? Representative Todd.
Representative Nancy Todd: Thank you Mr. Speaker—Mr. Chair—I'm sorry. So does this mean that they will move in to the salary schedule of whatever district they are moving into?
Chairman Merrifield: Representative Scanlan?
Representative Scanlan: Thank you Mr. –No[2]—thank you Representative Todd. It doesn't translate to salary. Different districts have different ways of calculating how salary—years of experience come across to their salary schedule but **it does give them a nonprobationary status so that they do not have to re-earn that in a new district**. And we think in particular rural districts will find this quite appealing who have trouble attracting experienced teachers often.

Senate Bill 191 (2010) House Education Committee; 5/6/10; JOld Sup Ct 11:36

p.m.–12:37 a.m. CD 19 of 19 (emphasis added).

[2] The "No" at this portion of the transcript is an answer to the question asked by Representative Todd.

ii. The Pertinent Tenets of Statutory Construction and the Plain Language of § 22-63-203.5, C.R.S.

The pertinent tenets of statutory construction are as stated at pp. 15-16, Opening Brief, with one omission.

In *Marzec v. Fremont Cty. Sch. Dist. No. 2,* 379 P.2d 699, 700-701 (Colo. 1960), this Court recognized that teacher tenure laws, being in derogation of common law, are designed to benefit teachers by providing job security to those who have successfully completed a probationary period of employment. While the General Assembly substituted the term "nonprobationary status" for "tenure"[3] when it enacted TECDA, nonprobationary status also grants teachers who have completed a probationary period of employment with the right to be fired only for certain reasons specified in TECDA. While the right to port this status from one school district to another also has collateral benefits, the primary purpose of portability was to benefit teachers.

Hence, the plain language of § 22-63-203.5, C.R.S., grants qualified teachers "the sole discretion to exercise their right to portability". *Stanczyk* at p. 30, ¶ 59. The use of the word "shall" in the statute means that the General Assembly intended the listed action be mandatory. *Stanczyk* at p. 30, ¶ 59. PSD

[3] This Court used the terms "tenure" and "nonprobationary status" synonymously in *Widder v. Durango Sch. Dist. No. 9,* 85 P.3d 518, 525 (Colo. 2004)

administration violated the legislative mandate by engaging in a practice that effectively led any reasonable person to believe that PSD would not allow teachers to apply for portability. This practice is prohibited by the plain language of § 22-63-203.5, C.R.S., which provides that qualified teachers "may" apply for portability. PSD violated the statute by engaging in a practice that told any reasonable teacher that she "may not" do so.

iii. The restrictions and the Court of Appeal's resolution of this case

As noted in the Statement of Facts, teachers could not submit their online applications without waiving their right to apply for portability, and the form contract[4] signed by Stanczyk provided that it was voidable at the option of PSD if she requested portability.

A party opposing a Motion for Summary Judgment must provide evidence that goes beyond a mere assertion to demonstrate the existence of a genuine dispute of material fact. *Coffman v. Williamson*, 348 P.3d 929, 939 (Colo. 2015). Thompson's bald assertion that PSD did not require applicants to waive portability, without explaining how or even if it would have been possible for an applicant to do so, was insufficient to create a genuine dispute of material fact that it effectively

[4] Thompson testified at the deposition that she couldn't speak as to whether PSD would be willing to remove this language from its form contract if asked to do so. CF 250, Deposition, pp. 73:13-76:70.

prevented applicants for teaching positions from exercising their right to portability.

The Court of Appeals did not reach the question of whether portability may be, in theory, waived by an applicant. Rather, it determined that the restrictions PSD placed on applying for portability – specifically the restrictions on portability in the application process and form contract created the public impression that it did not allow teachers to exercise the right to nonprobationary portability. *Stanczyk,* pp. 31-32, ¶¶ 62-64. These restrictions, at best, discouraged teachers from exercising their right to portability. *Stanczyk* p. 34, ¶¶ 64, 65-69. The Court of Appeals held that it was not reaching the question of whether there could be a truly voluntary waiver of portability, or whether school districts can place reasonable restrictions on the exercise of the right to portability, such as an application deadline. *Id.* at ¶ 69.

The Court of Appeals also recognized that:

> 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. *Stanczyk,* p. 33, ¶ 67.

iv. PSD did not seek or obtain waivers that were knowing and voluntary, nor was any corresponding benefit provided for the waivers

At some point in the future, a court may be presented with the following fact patterns raising at least legitimate questions as to whether a school district may require or request a waiver of portability.

1. A school district offers a teaching position to an applicant who is qualified for portability of her nonprobationary status from another district. The offer includes enforceable promises that she will only have to teach advanced placement, small classes and that she will be the head basketball coach with a $5,000 stipend. The offer is conditioned on her agreement to waive portability; or

2. During bargaining with a teachers' union, management offers to give all teachers a ten percent raise, but only if the teachers' bargaining representative agrees to a provision in the collective bargaining agreement waiving portability for all teachers in the district.

In both hypotheticals, the waivers would be knowing and voluntary, and the teacher or applicant would receive a benefit in return for the waiver. In the event of a challenge, the court would have to determine whether the waivers were against public policy, and whether § 22-63-203.5, C.R.S., prohibits all such waivers.

This Court may also wish to consider the following hypothetical:

> A school board offers to promote an assistant principal to a principalship. However, it conditions the promotion on the assistant principal's agreement that she must allow the school board to place teachers in permanent positions in her school without her consent, thereby requiring her

> to waive her right to consent to such placements set forth in § 22-63-202(2)(c.5)(I).

This case does not present the abstract question that would be presented by these hypotheticals. To be effective, a waiver must be knowing and voluntary. A waiver is an intentional relinquishment of a known right. *In re: Marriage of Hill*, 166 P.3d 264, 273 (Colo. App. 2007), *Hinojos-Mendoza v. People,* 169 P.3d 662, 668 (Colo. 2007). The members on whose behalf PEA sought relief in this case were not informed on the right they were waiving when they submitted their applications Applitrack waiver. CF 413-414. The individuals submitting applications did not intentionally relinquish a known right because the required waiver did not describe that right.

The waiver coerced by PSD was not voluntary, and hence, not effective for that reason, as well. In *Univ. of Colorado v. Derdeyn*, 863 P.2d 929, 948 (Colo. 1993), student athletes' waiver of their Fourth Amendment right not to undergo suspicionless drug test as a condition of participating in intercollegiate sports was held to have been unlawfully coerced. This Court cited, with approval, the decision of the district court citing case law that no consent can be voluntary where the failure to consent results in the denial of government benefits. *Id.* at 947. This Court looked at the particular circumstances under which the consent was obtained, and found it particularly persuasive that student would not only be denied

the opportunity to participate in intercollegiate sports, but also denied athletic scholarships, if they did not agree to the testing. It noted that the pressure on prospective athletes to waive their rights was obvious. *Id.* at 948. *Derdeyn* also found the fact that students were not given meaningful information about the drug testing before they had the opportunity to apply to another educational institution important in determining that the waivers were invalid.

In this case, PSD conditioned submitting a job application on waiving portability or, at best, engaged in a practice that would lead reasonable teachers/members of the PEA to believe this was the case. It did not inform applicants of the nature of the right they were waiving. The waivers were coerced, as opposed to being knowing and voluntary.

iv. PSD's arguments about freedom of contract, and the lack of an explicit prohibition against waiver in § 22-63-203.5, do not justify its unlawful actions

PSD argues that Stanczyk, and, presumably, other applicants, were not coerced into waiving their right to portability, because they did not have to apply for and accept teaching positions with PSD in the first place. PSD's argument is inconsistent with the underlying reason that the General Assembly enacted the portability statute: to implement the statewide evaluation system by allowing qualified teachers who obtained nonprobationary status under that system in one

district to take that right to other districts. The legislative purpose of a statewide model would not be served if some public school districts allow teachers to obtain portability, while others either do not, or unreasonably restrict access to it.

Because it involves a coerced waiver of a governmental benefit, and because of the General Assembly's decision that there should be a uniform evaluation system, the waiver in this case differs from the standard, bargained-for waivers of statutory rights in private, commercial contracts upheld in *Vallagio Metropolitan Homes*, 395 P.3d 788 (Colo. 2017) and *Francam Bldg. Corp. v. Fall*, 646 P.2d 345 (Colo. 1982).

The lack of an explicit prohibition on waivers in § 22-63-203.5, C.R.S., does not mean that the General Assembly intended to give school districts such as PSD a green light to unreasonably restrict teachers' right to portability. The General Assembly did not restrict school districts from conditioning employment on teachers' rights to a hearing to contest an evaluation rating that results in the deprivation of their nonprobationary status set forth in § 22-9-106(4.5)(b), C.R.S. Nothing in another provision of SB 10-191, § 22-63-202(2)(c.5)(I), C.R.S., which provides school principals' the right to consent to hire teachers in the schools that they administer, prohibits higher level school administrators from conditioning the decision to promote someone to the position of principal to an agreement to allow

higher level administrators to directly place teachers in long-term positions in the principals' schools. For that matter, nothing in the statute requiring that nonprobationary teachers may only be dismissed for specified reasons, § 22-63-301, C.R.S., prohibits school districts from conditioning applications for employment on the waiver of that right. The General Assembly has created an extensive system of granting teachers' and management's rights. This system was the result of the compromises inherent in a representative system. Allowing management to tip the scales by restricting the rights that have been granted through the legislative process would upset that balance.

In other words, the lack of an explicit statutory prohibition on waiver is the beginning, not the end, of the inquiry into whether the waiver form unduly coerced or violates public policy. In a more analogous case to this one than *Francam* or *Vallagio*, *Martinez v. Continental Enterprises*, 730 P.2d 308, 316 (Colo. 1986), held that a clause in a deed of trust giving the mortgagee the right to possession in the event of default violated the public policy set forth in § 38-35-117, C.R.S., that the mortgagor remains in possession until forfeiture, notwithstanding the absence of an explicit prohibition against a waiver of the mortgagors statutory right to remain possession. In this case, as in *Martinez*, an important right has been taken by coercion.

v. PSD's Local Control Argument finds no support in the law or facts

The Court of Appeals gave short shrift to PSD's local control argument. It held that local control does not permit a school district to ignore a state statute. *Stanczyk,* p. 36, ¶ 73.

The Court of Appeals also held that, if PSD had legitimate concerns about teachers' right to portability it could have sought an exemption from the statutory requirement from the state board of education as provided in § 22-2-117(1)(d)(2), C.R.S. PSD was in a position, had it believed that an exemption was warranted, to demonstrate that the exemption would enhance educational opportunity in the district, and that the costs of complying with the portability statute would significantly limit education opportunity in PSD, as provided by § 22-2-117(a), C.R.S. *Stanczyk* at pp. 8-9, ¶ ¶ 14-16, pp. 35-36, ¶ ¶ 70-71.

PSD's local control argument is also unsupported by the facts. First, although Thompson testified that she discussed the waiver with PSD's Board, she was unable to recall the dates or contents of those discussions. CF p. 387, Deposition pp. 17:12-19:1, CF p. 381; Deposition pp. 33 ll.35.2. There is no Board policy concerning waiver of portability. CF 387, Deposition pp. 18:20-19:1. Thompson was also unable to describe how PSD's teacher evaluation system was

any more rigorous than that of the school district from which Stanczyk had sought to transfer her nonprobationary status, the Thompson School District. CF 393-395, Deposition pp. 64:12-65:9; 69:15-70:19.

The power to hire and fire teachers belongs to the school boards of this state under Colo. Const. Art. IX, § 15. *Fremont Re-1 Sch. Dist. v. Jacobs*, 737 P.2d 816, 818 (Colo. 1987). Since the decision to unlawfully restrict teachers' right to seek portability was not made by the Board, there can be no violation of that school board's constitutional authority. Even had the decision been made by the Board, school board power is not unlimited. Rather, that power must be balanced against the General Assembly's power to establish and maintain a thorough and uniform system of free public schools under Colo. Const. Art. IX, § 2 and the state board of education's constitutional authority to supervise the public schools of this state. Colo. Const. Art. IX, § 1; *See Bd. of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639, 645 (Colo. 1999). There are numerous limitations on school boards' hiring and firing authority such as, for example, the restrictions on firing teachers absent just cause set forth in TECDA. *Booth* at 649. PSD presented no evidence that restricting teachers' right to obtain portability will force it to hire nonprobationary teachers who have achieved that status in another district through any less rigorous means of determining their effectiveness than those used by PSD itself, or that

there are special circumstances in PSD requiring an exemption from the law. If that were the case, its remedy would have been to seek an exemption from the state board.

vi. Stanczyk's application for portability was not untimely

PSD asks this Court to add a deadline for application for portability when no such deadline exists. The statute's reference to the term "hiring" school district is simply a reference to the school district to which the teacher seeks to port her nonprobationary status. If the general assembly intended to create an application deadline in the statute, it would have done so explicitly.

Stanczyk and the PEA recognize that a reasonable deadline by which to apply for portability would not be inconsistent with § 22-63-203.5, C.R.S. Denver Public Schools' employee handbook gives teachers a thirty day grace period to apply for portability after they sign the contracts. [https://hr.dpsk12.org/wp-content/uploads/sites/37/District-Employment-Handbook-1-2017.pdf] Allowing teachers to apply for portability after they are hired would alleviate any concern that school districts will not hire teachers seeking portability. PSD's argument that Stanczyk's application was untimely also overlooks the fact that she did ask about portability at the start of her time with PSD, and that the restrictions on applying discouraged or prevented her from doing so earlier.

Thus, it was PSD's impositions of unreasonable restrictions on Stanczyk's attempts to apply for portability before April of 2017, not any issues of wavier (which the Court of Appeals did not reach) that led to the rejection of PSD's contention that Stanczyk's application for portability was untimely.

vii. PSD's Policy arguments misperceive the policy underlying § 22-63-203.5, C.R.S., and are essentially a tacit admission that this case is about a school district trying to avoid the requirements of a state statute

While portability does provide broader public benefits, the primary purpose of granting teachers job security through limitations on management's right to fire them is to benefit the teachers. *Marzec, supra.* What PSD is essentially saying is that it will not hire teachers seeking portability of their nonprobationary status. This is what the case has always been about, as evidenced not only by the restrictions on applying, but also by Thompson's refusal to commit to how, or even if, a teacher seeking portability would be hired.

CONCLUSION

For the above-stated reasons, the Respondents respectfully request that the Court of Appeals be affirmed.

Dated this 10th day of November 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November 2020, a true and accurate copy of the above and foregoing **ANSWER BRIEF** was electronically filed with service requested as follows:

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