COLORADO SUPREME COURT Address: 2 East 14th Avenue Denver, CO 80203	
Appeal from the Court of Appeals, State of Colorado, Case No. 2014CA1348 Opinion Issued by Judge Hawthorne (Taubman and Berger, JJ., concurring)	
Defendants/Petitioners: School District No. 1 In The City and County Of Denver; Jane Goff, Valentina Flores, Debora Scheffel, Pam Mazanec, Joyce Rankin, Steve Durham, and Angelika Schroeder, in their official capacities as members of the Colorado State Board Of Education, v. **Plaintiffs/Respondents:** Cynthia Masters, Michelle Montoya, Mildred Anne Kolquist, Lawrence Garcia, Paula Scena, Jane Harmon, Lynne Rerucha, and Denver Classroom Teachers Association.	▲ **COURT USE ONLY** ▲
Attorneys for Amici Curiae: Brent Owen, Atty. Reg. No. 45068 E. Rayner Mangum, Atty. Reg. No. 47733 SQUIRE PATTON BOGGS (US) LLP 1801 California Street, Suite 4900 Denver, CO 80202 Email: brent.owen@squirepb.com Email: rayner.mangum@squirepb.com Tel.: (303) 894-6111	Case No. 2015SC1062

BRIEF OF AMICUS THE COLORADO CHILDREN'S CAMPAIGN, EDUCATION REFORM NOW, AND READY COLORADO IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all the requirements of C.A.R. 28(a)(2)-(3), C.A.R. 29, and C.A.R 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d) because it contains 4,685 words. C.A.R. 29(d).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29(2)-(3) and C.A.R. 32.

SQUIRE PATTON BOGGS (US) LLP

By: */s/ Brent R. Owen*
Brent R. Owen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTERESTS OF AMICI CURIAE

Colorado public schools work better when school leaders have authority to manage, evaluate, and employ teachers of their choosing. The General Assembly adopted that fundamental policy when it enacted Senate Bill 191 ("SB 191"), including the mutual consent provisions under attack here. This Court should reverse the Court of Appeals below and reinstate the trial court's decision dismissing Plaintiffs' claims.

The Colorado Children's Campaign appears as *amicus* in this matter as a nonpartisan research and advocacy non-profit committed for 31 years to serving as the leading voice for Colorado's children at the State Capitol and in communities across the state. The Children's Campaign continues to support SB 191 as passed because of the critical link between educator quality and student achievement, and the law's role in helping to ensure that all students in Colorado have access to the quality K-12 education they need to graduate from high school prepared for college, careers, and life.

Ready Colorado appears as *amicus* in this matter as the leading conservative advocacy group fighting to improve Colorado's education system for all students. Ready Colorado supports SB 191 because we believe Colorado's education system should be accountable to parents and taxpayers—teachers, schools, and districts must be held accountable for student performance outcomes. To allow school

leaders the ability to shape the culture and performance of their schools they must be able to reward good teachers and remove bad ones. SB 191 is a cornerstone of Colorado's school accountability system, and it stands as one of the most important bipartisan accomplishments of the Colorado General Assembly in the last 25 years.

Education Reform Now appears as *amicus* in this matter as the leading progressive advocacy group fighting for the future of Colorado's public school children. Education Reform Now continues to support SB 191 as passed over six years ago because we believe that quality teachers are the single most important factor in a child's educational success. We support policies that allow school principals and their teams of educators, to make building level hiring decisions, holding them accountable for student performance and allowing them flexibility to exercise sound, professional judgment.

INTRODUCTION

This Court should reverse the Colorado Court of Appeals decision interpreting the Contract Clause in *Masters v. School Dist. No. 1*, 2015 COA 159. Though the court of appeals in *Masters* correctly identified the three-part Contract Clause test this Court most recently articulated in *Justus v. State*, 2014 CO 75, ¶19, the court erred in applying *Justus*. It erroneously held that a legislative contract existed between public school teachers and school districts under the Teacher Employment, Compensation, and Dismissal Act ("TECDA"). This brief focuses

on that particular error, but Amici Curiae urge this Court to reverse the decision below, reinstate the trial court's order, and dismiss this case.

Left intact, the lower court's error undermines Colorado's ability to manage its education policy. As this Court's decisions recognize, the Colorado Constitution gives the General Assembly—not this Court—primary responsibility for Colorado's public education. Education policy necessarily changes as the needs of Colorado's citizens change, and the Contract Clause is no roadblock. The Contract Clause is for contracts; there isn't one in this case.

The General Assembly enacted SB 191—and the mutual consent provisions at issue here—after it heard testimony from educators, school leaders, community members, and education policy experts. The law sought to fix, among other things, Colorado's achievement gap: the fact that less affluent and minority students in Colorado lag behind their more affluent white peers. This celebrated legislation passed only after multiple 10-hour committee hearings, and with significant bi-partisan support. When the dust settled, the students of Colorado had a better education system where adults were held accountable for serving them well, and educators were empowered to make choices about employment to serve students' best interests.

This case is a political fight masquerading as a legal claim. But Colorado's judiciary is not a super-legislative body; the Contract Clause is not an invitation to

re-hash lost political battles; and Plaintiffs' remedy is in the voting booth, not with this Court.

ARGUMENT

I. The Colorado Court of Appeals erred when it relied on dicta from *Marzec*—TECDA does not contain contractual language.

Colorado's Contract Clause prohibits the General Assembly from passing a law that impairs contractual obligations. Colo. Const. art. II, § 11. For a Contract Clause claim to exist, then, there must be a contract as evidenced by the language in the statute. *Justus*, ¶¶19, 21. And because the alternative would effectively undermine representative democracy, "[i]t is presumed that a law 'is not intended to create private contractual vested rights.'" *Colo. Springs Fire Fighters Ass'n v. Colo. Springs*, 784 P.2d 766, 773 (Colo. 1989) (quoting *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79 (1937)). If the language of a statute makes it clear that no contractual relationship exists then there is no Contract Clause violation. *See id.* (holding that a party's Contract Clause claim failed because the "city ordinance involved here contained no words of contract"). "In the first part of the inquiry, where a court finds no contract, there is no need to complete the following two steps." *Justus*, ¶20 (citing *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)).

a. The Court of Appeals' Contract Clause analysis is wrong: TECDA does not contain language creating a contractual relationship, as required by this Court's precedent.

The Colorado Court of Appeals misread this Court's Contract Clause precedent. That court acknowledged that "Plaintiffs have not cited, nor have we found, any Colorado case holding that TECDA creates any contractual rights." *Masters*, ¶20. The court continued, "[h]owever, the supreme court has repeatedly stated that TEDTA [TECDA's predecessor] created contracts between school districts and their teachers." *Id.* (citing, among others, *Marzec v. Fremont Cty., Sch. Dist. No. 2*, 349 P.2d 699, 701 (Colo. 1960)). Expressly relying on *Marzec's* dictum, the lower court erroneously concluded: "the *Marzec* line of cases is dispositive of the first inquiry under the *Justus/DeWitt* test. It is unclear precisely *why* the supreme court concluded that TEDTA created contracts between school districts and teachers." *Id.* at ¶21 (emphasis added). But "[a]s an intermediate appellate court, [the lower court decided it was] bound by the supreme court's prior precedent." *Id.*

The *why* the Colorado Court of Appeals glossed over is the plain-language analysis that this Court requires before finding a legislative contract exists. *Marzec* is not a Contract Clause case, so it was not the type of controlling precedent that could bind that tribunal—or inform this one. Colorado's Contract Clause "accords no room for a public policy exception." *Justus*, ¶28.

The starting point for determining "whether the legislature intended to bind itself contractually" is "the language of the statute itself." *Id.* at ¶21 (citation omitted). The United States Supreme Court has instructed that a statute creates a contract with public school teachers where the statute provides that it "shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract." *State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 105 (1938). TECDA contains no such language. In contrast, in language more analogous to TECDA's, the United States Supreme Court has explained that a statute fixing teacher retirement benefits "annually and for life from the date of such retirement" does not create a legislative contract. *Dodge*, 302 U.S. at 78. A legislative contract occurs only where that intent "unmistakably" appears in the statute. *U.S. v. Winstar Corp.*, 518 U.S. 839, 875 (1996).

In addition to lacking contract language, the circumstances surrounding the legislation provide no indicia of a contract. The General Assembly, not the school districts, promulgated TECDA; it makes no sense, then, to infer a contract where one of the parties—the school district—is absent. *E.g., Taylor v. Bd. of Educ.*, 89 P.2d 148, 153 (Cal. App. 1939) (explaining that a "contract" exists between school districts and teachers, but that the governing law "is statutory and not contractual"). Also, the General Assembly has amended TECDA numerous times—further undercutting any indicia of contractual intent.

Lacking any basis in the statute's plain language or the context surrounding its enactment (the things this Court demanded in *Justus*) the court below instead put all its chips on "the *Marzec* line of cases"; it went so far as to say that "it makes no difference that the *Marzec* line of cases does not conduct a contract clause analysis." *Masters*, ¶23. But that is not Colorado law. In *Justus*, this Court rejected the lower court's exact approach—reliance on dictum from old case law: "we overrule any implication in [language from 40-year-old precedent] that pension legislation is not subject to the presumption that the legislature does not intend to bind itself contractually and does not intend to create a contractual right unless the legislature provides a clear indication of its intent to be bound." *Justus*, ¶28. So too here.

Marzec and its progeny did not involve the Contract Clause. 349 P.2d at 700-01. Any reference to a "contract" in *Marzec* or cases after *Marzec* is merely a description of the teacher's relationship with the school district and not an analysis of the statutory language for purposes of the Contract Clause. *Justus*, ¶¶20-21. *Marzec*, for example, involved a teacher's claim that he fell within the then-existing statutory protection for teachers because he claimed he had worked for the school district for "three full years." 349 P.2d at 700. This Court clarified that "[t]he only question presented [to] this court is: Does the period of employment of Marzec, as set forth in his complaint, *bring him within the terms of the statute*

providing for teacher tenure benefits?" *Id.* at 700 (emphasis added). That case thus does not help this Court answer the Contract Clause question here. *See id.*

"*Marzec*'s progeny" also offer no guidance. In *Julesburg School District No. RE-1 v. Ebke*, this Court resolved whether C.R.C.P. 106 provided the correct procedural vehicle for resolving a breach of contract claim between a school district and eighteen teachers. 562 P.2d 419, 421 (1977). *Julesburg*, then, like *Marzec*, also only involved teachers seeking to enforce their existing rights under the existing statute; it did not address the General Assembly's authority to amend the statute under the Contract Clause.

Maxey v. Jefferson County School No. R-1, resolved a teacher's claim for back-due salary: "The sole issue on this writ of error is whether Clyde A. Maxey, now deceased, was entitled to be paid as a tenured teacher under teacher salary schedules in force from September 1, 1953 to the date of his death[.]" 408 P.2d 970, 970-72 (Colo. 1965). Mr. Maxey's estate, like the plaintiffs in *Marzec* and *Julesburg*, argued that the school district had misapplied the existing statute; there, too, the court did not address the General Assembly's authority to amend the statute.

In *Marzec*, *Julesburg*, and *Maxey*, the court mentioned "contract" as part of the analysis of whether the plaintiff-teachers had an existing right under the existing statute. None of those cases asserted that the Contract Clause had any

relevance. Nor did any case even suggest that the Contract Clause forbade future Colorado legislatures from changing the law.

Tellingly, the lower court's quotation from *Marzec* that Colorado's teacher tenure law "makes a contract for the parties" is itself a direct quote from an Illinois decision, *Anderson v. Board of Education*, 61 N.E.2d 562, 567 (Ill. 1945). That case also did not address the Contract Clause. *See id.* (declining to address the "constitutional questions raised"). Like its Colorado counterpart, that court's analysis is only useful guidance on the proper application of the then-existing Illinois statute.

Consistent with TECDA's plain language and Colorado precedent, other courts analyzing similarly worded statutes governing teachers almost never find a legislative contract. *See, e.g.*, *Proska v. Az. State Schs.*, 74 P.3d 939 (Ariz. 2003) (rejecting plaintiffs' reliance on decades-old case law and its "progeny": "case law thus rejects the general notion that statutes create a contractual right to tenure in office, and instead adopts the rule that 'tenure is regulated by legislative policy'" (quoting *Wash. Fed'n of State Emps. v. Washington*, 682 P.2d 869, 872 (Wash. 1984)).[1] Neither the court below nor Plaintiffs can cite any language suggesting a

[1] *See also Taylor v. Bd. of Educ.*, 89 P.2d 148, 153 (Cal. App. 1939); *Crawford v. Sadler*, 34 So. 2d 38, 39 (Fla. 1948); *Goves v. Bd. of Educ.*, 10 N.E.2d 403, 405 (Ill. 1937); *Steck v. Bd. of Educ.*, 8 A.2d 120, 123 (N.J. 1939); *LaPolla v. Bd. of Educ.*, 15 N.Y.S.2d 149, 151-53 (N.Y. Sup. Ct. 1939), *aff'd* 258 App. Div. 781;

legislative contract exists. So Plaintiffs' claim fails as a matter of law and this case should end here.

b. This Court must continue to strictly observe the presumption against legislative contracts.

The presumption against treating legislation as an immutable contract is grounded in common sense—a republican form of government is a hollow promise if one General Assembly can immobilize public policy in perpetuity. The Colorado Court of Appeals' decision thus threatens a cornerstone of Colorado sovereignty: Legislation remains "in effect until the [law making body,] in the exercise of its discretionary legislative powers, elect[s] to modify it." *Colo. Springs Fire Fighters Ass'n*, 784 P.2d at 773. Otherwise, every legislative enactment would fester, "creating rights that could never be retracted or even modified without buying off the groups upon which the rights had been conferred." *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995); *Justus*, ¶¶18-21.

Two years ago, this Court explained in *Justus* "that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state." *Justus*, ¶20. Before that, this Court explained that a law "is not

---

Campbell v. Aldrich, 79 P.2d 257, 260-61 (Or. 1938) ; *Morrison v. Bd. of Educ.*, 297 N.W. 383, 385 (Wis. 1941). *But see Bruck v. State ex rel. Money*, 91 N.E.2d 349 (Ind. 1950).

intended to create private contractual vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Colo. Springs Fire Fighters Ass'n*, 784 P.2d at 773. Without that presumption, "[t]he continued existence of government would be of no great value [because] by implications and presumptions" the Contract Clause would "disarm" the General Assembly "of the powers necessary to accomplish the ends of its creation." *Keefe v. Clark*, 322 U.S. 393, 397 (1944).

This Court's decision in *Justus* rested on a very solid foundation of common law precedent; upholding the lower court's decision means renouncing that reasoning (and the centuries of public policy informing that reasoning) to obey a few stray sentences of dictum from cases that did not address the issue. William Blackstone, "whose works constituted the preeminent authority on English law for the founding generation,"[2] explained that "[a]cts of parliament derogatory from the power of subsequent parliaments bind not."[3] 1 William Blackstone, Commentaries *90. Chief Justice Marshall—no doubt informed by Blackstone—articulated the same rule in an early Contract Clause case: "one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature

---

[2] *Alden v. Maine*, 527 I.S. 706, 715 (1999).

[3] Colorado law makes the same point: "The general assembly finds and declares, pursuant to the constitution of the state of Colorado, that each general assembly is a separate entity, and the acts of one general assembly are not binding on future general assemblies." C.R.S. § 2-4-215(1).

cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). The benefits of the law "may be revoked at the pleasure of the sovereign." *Rector v. Cnty. of Philadelphia*, 65 U.S. 300, 302-303 (1861).

For hundreds of years courts have emphasized that statutes are to be construed against creating a contract unless they use "express words" supporting that conclusion. *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 563 (1830). And "[n]othing can be taken against the State by presumption or inference." *The Delaware Railroad Tax*, 85 U.S. 206, 225 (1874); *Wis. & M.R. Co. v. Powers*, 191 U.S. 379, 386 (1903). That express-word requirement serves "the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power." *Winstar Corp.*, 518 U.S. at 875.

It is that principle that this Court invoked in *Justus*—and that the lower court ignored—when it emphasized that: "State statutory enactments do not of their own force create a contract relationship with those whom the statute benefits because the potential constraint on subsequent legislatures is significant." *Justus*, ¶21 (citation omitted). The lower court's Contract Clause analysis is wrong. This Court should reverse it.

II. The Court of Appeal's error will undermine the General Assembly's authority in educating Colorado's children.

Senate Bill 191 reformed one of the most important and high-profile policy issues in Colorado: public education. This legislation thus provides a concrete example of why the General Assembly retains plenary authority to modify statutes without violating the Contract Clause. As this Court recognized in *Lobato v. State*, Colorado's Education Clause[4] tasks the General Assembly with maintaining "a free public school system that is of a quality marked by completeness, is comprehensive, and is consistent across the state." 2013 CO 30, ¶16. Colorado's Education Clause "affords the General Assembly an opportunity to reform Colorado's education policy[.]" *Id.* at ¶46. Given *Lobato*'s instruction, the lower court's error is particularly problematic.

Three important reasons support reversing the lower court's erroneous Contract Clause interpretation: (1) The General Assembly should not be artificially restrained from revising Colorado's education policy; (2) SB 191, particularly mutual consent, is an important tool for narrowing Colorado's achievement gaps between various groups of students; and (3) public school teachers still have express contractual protections under their collective bargaining agreement.

---

[4] Colo. Const. Art. IX, § 2.

a. Given the stakes, the General Assembly should not be artificially restricted from changing Colorado's education policy.

If this Court upholds the lower court's application of the Contract Clause, it will undermine the General Assembly's ability to craft legislative solutions to one of the State's most complex issues: education policy. Education-related expenditures account for more than $6 billion each year, nearly a quarter of the State's budget.[5]

Among a myriad of important issues implicated by education policy is the General Assembly's efforts to narrow Colorado's achievement gap. The achievement gap describes how one group of students from a certain ethnicity or socio-economic background outperforms another group in a statistically significant manner.[6] Lower-income students, often minorities, attain lower levels of academic proficiency, graduate at lower rates, and are then employed in lower-paying jobs.[7]

In Colorado, legislative initiatives have helped the state inch towards closing the gaps in racial and socio-economic educational disparities. But that progress has been slow, inconsistent, and uneven. Colorado's achievement gap between

---

[5] *See https://www.cde.state.co.us/cdefinance/schoolfinancehowdoesitwork*
[6] C.R.S. § 22-11-103(3) (defining "Achievement and growth gaps"); *see* National Center for Education Statistics, *Achievement Gaps, available at https://nces.ed.gov/nationsreportcard/studies/gaps/* (last accessed April 23, 2016).
[7] University of Colorado Publications, *The Achievement Gap, available at* http://www.ucdenver.edu/academics/colleges/SPA/researchandoutreach/Buechner%20Institute%20for%20Governance/Centers/CEPA/Publications/Documents/CEPA%20achievementgap.pdf.

students who are low-income and their more affluent peers is one of the largest in the country.[8] And that achievement gap is just one of numerous problems implicated by Colorado's education policy. *E.g.*, *Lobato*, ¶16-19.

Given the stakes, it is important that the General Assembly wield a free hand in crafting bespoke education policy to suit the current needs of Colorado's students. The lower court's approach would stifle that legislative freedom and prevent the General Assembly from changing education policy to meet changed circumstances. The General Assembly's decisions on education policy impact Colorado in areas outside the classroom. A study by consultants at McKinsey & Company, for example, found that the United States GDP could have been $1.3 trillion to $2.3 trillion higher with a more effective education system.[9] It is difficult to understate the importance of education policy on Colorado citizens' well-being. Faced with such a complex and important issue, the General Assembly—not this Court—has the requisite expertise, resources, and political will to create effective solutions.

---

[8] *Id.*

[9] McKinsey & Company, *The Economic Impact of the Achievement Gap in America's Schools* at 5 (2009) (explaining that the achievement gap is "the economic equivalent of a permanent national recession").

b. Senate Bill 191 and mutual consent embody a bi-partisan and effective policy solution designed to equitably address Colorado's achievement gaps.

A review of the evidence that informed the General Assembly's decision to pass SB 191 provides additional context to appreciate the magnitude of the lower court's error. Led by Senator Mike Johnston—an expert in education policy—the legislators who designed SB 191 sought to increase educational equity in Colorado's school system. The General Assembly included the mutual consent provisions in SB 191, in part, to narrow Colorado's achievement gaps.

As the General Assembly heard during the debates on SB 191, the research is clear: an effective teacher and an effective principal are the two most important in-school variables in improving student achievement. To increase educational achievement and equity, then, Colorado schools must recruit, develop, and retain great teachers and leaders.[10] Those teachers, in turn, must work well in the school system where they are placed. Adding mutual consent eliminated the inequitable situation where a displaced teacher was force placed into a school where that teacher did not belong, harming every party involved, particularly the students.

In education policy terms, SB 191 attempted to eliminate the "Widget Effect." Before SB 191, the quality-blind system treated all educators as if they

---

[10] *E.g.*, Edutopia, *Teacher Development is Key to Closing the Achievement Gap*, (July 2011), *available at* *http://www.edutopia.org/blog/digital-divide-achievement-gap-teacher-development*.

were interchangeable parts.[11] Forced placement embodied the Widget Effect because it required principals to accept teachers regardless of fit for the school's culture. That approach encouraged inequitable educational results because it undermined principals' ability to provide their staff with meaningful feedback and personalized professional development. In functional terms, the Widget Effect demands school principals implement their vision using a staff they did not choose.

Teachers were most often force placed in hard-to-serve schools with students facing the most challenges. After SB 191, mutual consent ensures that a teacher at a given school is committed to that school's mission, vision, and educational approach. In the long run, that policy benefits Colorado's students.

Driven by expert testimony and strong evidence, the General Assembly passed the law knowing it would make a difference for Colorado students. The General Assembly created mutual consent after hearing evidence from educators, school leaders, community members, and education policy experts. During deliberations about SB 191, Denver Public Schools Superintendent Tom Boasberg explained how forced placement hurt high-needs students the most:

> The schools. . . that serve very high-needs students—these schools are extraordinarily mission-driven organizations with that sense of mission of coherence and

---

[11] Weisberg, D., Sexton, S., Mulhern, J., & Keeling, D., *The Widget Effect: Our National Failure to Acknowledge and Act on Teacher Differences.* Brooklyn, NY: The New Teacher Project (2009).

> a common culture. The fit of the individual teacher in that organization is paramount to the school's success.
>
> But under the system of force[d]-placement, again, we put teachers forcibly in those schools who may not have a good fit, who may not ascribe to that culture. And historically in places like Denver, and indeed, in districts nationwide, forced-placement has disproportionately impacted our highest-poverty schools because it is those schools that have had the most—the greatest openings.[12]

Echoing Mr. Boasberg's concerns, numerous civil rights organizations wrote in support of SB 191. Among others, the Colorado NAACP, the Colorado Black Chamber of Commerce, the Colorado Black Women for Political Action, and the Metropolitan Urban League of Denver, all wrote to voice their support for SB 191—knowing their constituents suffered under the forced placement regime.[13]

The General Assembly also heard directly from the school leaders serving high-needs students. Antonio Esquibel, principal of Lincoln High School—a high-poverty school with the highest population of second-language learners in Colorado—explained how mutual consent is particularly important for schools that serve our most challenged students: "We want to make sure at Lincoln High School [that we] interview and select the highest-qualified teachers[.] We've had

---

[12] Ex. A April, 22, 2010, Senate Education Committee Second Reading, 72:24-73:13.
[13] *Id.*, 145:1-9.

many force-placed teachers" and they are often "not effective."[14] Mr. Esquibel's testimony provided the General Assembly with one of many concrete examples for why Colorado needed mutual consent.

Likewise, Kathleen Boyd, a second-year Colorado teacher, explained why she supported the legislation: "This bill ensures that all schools over our state will be fully committed to the excellence of their teachers."[15] Consistent with Ms. Boyd's unequivocal support, "three national teachers of the year" submitted "a letter of support"; likewise, "teachers from all around the state" wrote the General Assembly in support of SB 191.[16]

The General Assembly passed mutual consent only after it considered decades of research and evaluated testimony from all the leaders in the field. Mutual consent provides a mechanism to close achievement gaps by matching up teachers and principals in schools where they will thrive. This Court should not permit the legislature's nuanced policy solution—one piece of the broader reforms contained in SB 191—to unravel through the lower court's blunt, erroneous application of Colorado's Contract Clause.

---

[14] *Id.*, 160:8-25.
[15] *Id.*, 48:18-19.
[16] *Id.*, 93: 12-94:3.

c. A contract still governs teachers' employment with the school district, and teachers displaced through mutual consent retain significant advantages in their job hunt.

The General Assembly retains plenary authority to amend statutes governing teachers' employment. But that does not mean that Colorado teachers have no contractual rights after SB 191. Denver Public Schools' ("DPS") implementation of the mutual consent provisions is instructive. That a contract continues to govern the parties' relationship provides more practical evidence favoring the correct legal conclusion: Plaintiffs' claims must fail.

A comprehensive "Agreement and Partnership" between DPS and the Denver Classroom Teachers Association, including a 2012 "Supplement," govern the relationship between DPS and its teachers ("Collective Bargaining Agreement").[17] The important contractual rights guaranteed to nonprobationary teachers under that Collective Bargaining Agreement provides still more evidence that the General Assembly did not violate any contract when it amended the law with SB 191.

To start, consistent with the law as amended by SB 191, DPS uses a system of hiring fairs to ensure that nonprobationary teachers who have not secured a

---

[17] *See* *http://hr.dpsk12.org/wp-content/uploads/2014/07/20082011DCTAAgreementwProCompAddendum.pdf*; Supplement to Agreement, *available at* *http://hr.dpsk12.org/wp-content/uploads/2014/06/DCTA-Agreement-Supplement-through-8.31.15.pdf*.

mutual consent placement are members of a priority hiring pool. C.R.S. § 22-63-202(2)(c.5). This provides every nonprobationary teacher with the first opportunity to interview for a reasonable number of available positions for which that teacher is qualified in the school district. Under their contract, and in compliance with state law, nonprobationary teachers are guaranteed at least two interviews for all positions for which they apply and are qualified.

Furthermore, under the Collective Bargaining Agreement, decisions on selecting teachers for a vacancy at the school are made by a Personnel Committee, including at least three teachers chosen by the faculty. Similarly, the reduction-in-building decisions are informed with input by the Personnel Committee after reviewing the teacher's effectiveness and qualifications. A contract with negotiated protections for teachers continues to govern the teachers' relationship with DPS.

In practice, too, these important contractual protections help displaced teachers. DPS has a significant number of vacancies every year. In the three-year period from 2010-2013 unassigned teachers could apply for 5,134 posted vacancies. During those three years only fifty nonprobationary teachers out of a work force of 5,000 teachers were unable to secure mutual consent assignments. The contract, in other words, continued to protect DPS's teachers. Under SB 191, those displaced teachers were only placed on unpaid leave after a full year of paid

employment. Given the contractual protections that remain in place, it makes no sense for this Court to hold that a legislative change somehow breached the teachers' contractual rights. SB 191 is a statute, not a contract.

CONCLUSION

This Court should reverse the lower court's erroneous decision, reinstate the trial court's judgment, and dismiss this lawsuit.

RESPECTFULLY SUBMITTED this 6th day of June, 2016.

SQUIRE PATTON BOGGS (US) LLP

By: */s/ Brent R. Owen*
Brent R. Owen, #45068
E. Rayner Mangum, #47733
Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on the 6th day of June, 2016, the foregoing was filed with the Clerk of the Court and served on all counsel of record electronically through the ICCES E-Filing System.

/s/ Charlotte Bocquin Scull
Charlotte Bocquin Scull
Senior Paralegal