COLORADO SUPREME COURT Colorado State Judicial Building Two East 14th Avenue Denver, CO 80203 Colorado Court of Appeals Opinion by Hawthorne, J.; Taubman, and Berger, JJ., concur Case No. 2014CA1348 Denver District Court Chief Judge Michael A. Martinez Case No. 2014CV30371 **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, vs. **Respondents:** Cynthia Masters, Michelle Montoya, Mildred Anne Kolquist, Lawrence Garcia, Paula Scena, Jane Harmon, Lynne Rerucha, and Denver Classroom Teachers Association. *Attorneys for Amicus Curiae Independence Institute:* Daniel D. Domenico, Atty. Reg. #32038 Kittredge LLC 3145D Tejon Street Denver, Colorado 80211 720-460-1432 | ddomenico@kittredgellc.com	▲ COURT USE ONLY ▲ Case Number: 2015-SC-1062

BRIEF OF AMICUS CURIAE INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 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. 32(h).

☒ It contains 4,683 words (does not exceed 4,750 words).

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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Statutes

Other Authorities

TABLE OF AUTHORITIES

Constitutional Provisions

TABLE OF AUTHORITIES

INTRODUCTION

This is an education case. More specifically, it is a case about the proper relationship between the judicial branch and the General Assembly as the latter carries out its constitutional duty to provide for an effective public education system. Because this Court will see hundreds of pages of briefs discussing decades of statutory revisions, property rights and contractual obligations and all manner of jurisprudential topics, it would be easy to lose sight of these foundational matters. This brief seeks to ensure that does not happen.

With overwhelming, bipartisan support, Colorado's representatives enacted the law challenged here, amendments to the Teacher Employment, Compensation, and Dismissal Act ("TECDA") in Senate Bill 191 ("S.B. 191").[1] C.R.S. § 22-63-202(2)(c.5). Amicus supported that effort, and believes the policies authorized under S.B. 191 are wise and will lead to improved educational outcomes when implemented. *See* Bipartisan Coalition of Business, Civic, and Nonprofit Leaders, *An Open Letter of Support for Colorado's Great Teachers and Leaders Act – Senate Bill 191* (Jan. 22, 2015), *available at* http://goo.gl/i5nYhF.

[1] S.B. 191 passed the Senate 27–8 and the House 36–29.

But whether S.B. 191 is good policy or not is irrelevant here. Whatever one's position on the policy merits of S.B. 191, the relevant fact is that the entities given Constitutional authority to make that judgment—the General Assembly, the Governor, and Denver Public Schools—support it.

The legal question now is whether the court of appeals erred in overriding those policy decisions. It did. This Court should now reject the efforts of Plaintiffs and their amici to use litigation to refight a policy argument they failed to win in the political branches.

INTEREST OF THE AMICUS

Founded in 1985, the Independence Institute is dedicated to the eternal truths of the Declaration of Independence. The Institute is a nonprofit, nonpartisan 501(c)(3) educational organization that seeks to enhance the rights to life, liberty, and the pursuit of happiness through research, advocacy, and education of the public, policymakers, and the courts. The leading subject of the Institute's work has always been improving K–12 education for all Colorado children in all types of schools. The Independence Institute provides bilingual information for all Colorado K–12 families about school options.[2] This case therefore is important to the Institute's mission for at least three reasons: First, S.B. 191 will improve education for Colorado students. Research has

[2] *See, e.g.*, http://www.opcionescolarparaninos.org/spanish.php.

consistently indicated that teachers have a significant impact on student outcomes both in school and throughout life.[3] Second, and more relevant to the issues before the Court, the Plaintiffs' position threatens to constrict the legislature's and local districts' and schools' ability to adopt policies that they believe will improve public education. Third, Plaintiffs' position also threatens to insert the judicial branch into matters of policy that the Constitution leaves to the people and their representatives. Each of these goes to the heart of the Independence Institute's mission.

---

[3] *See* McCaffrey, J.R., et al., *Evaluating value added models for teacher accountability*, xiii, 19–48 (2003), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG158.pdf (teachers have "discernable, differential effects on student achievement, and that these effects appear to persist into the future."); Rivkin, S.G., et al., *Teachers, schools, and academic achievement*, National Bureau of Economic Research (Working Paper W6691), 31 (2000), *available at* http://www.nber.org/papers/w6691.pdf ("[V]ariations among teachers dominate school quality differences."); Wright, S.P., et al.,*Teachers and classroom context effects on student achievement: Implications for teacher evaluation,* 11 J. of Personnel Eval. in Educ. 1, 57–67 (April 1997) *available at* https://www.sas.com/govedu/edu/teacher_eval.pdf (finding teacher effectiveness the "dominant factor affecting student academic gain."); Chetty, R., et al., *The long-term impacts of teachers: Teacher value-added and student outcomes in adulthood*, National Bureau of Economic Research (Working Paper 17699) (Dec. 2011), *available at* http://www.nber.org/papers/w17699.pdf (finding students with effective teachers "are more likely to attend college, attend higher-ranked colleges, earn higher salaries, live in higher SES [socio-economic status] neighborhoods, and save more for retirement").

SUMMARY OF THE ARGUMENT

The Colorado Constitution makes education the pre-eminent affirmative government responsibility. With that great responsibility, must come flexibility to adopt progressive policies, even if controversial. Although education law is fraught with state versus local conflicts, there is no conflict here. The State and District concur that the 2010 statute advances public education. Their policy decision deserves deference from the judiciary.

The 2010 mutual consent law recognizes the contract rights of schools, rather than forcing them to employ individuals who do not meet students' needs. Mutual consent replaced what was called "forced placement." Under that system, some schools were forced to employ teachers whom the schools considered ineffective. In the constitutionally unique context of public education, judicial deference is especially appropriate when the state and local policymakers agree. Here, the state and local education authorities are in full accord and only ask that the right of mutual consent in contract be respected. This Court's precedents show that the district court was correct to defer to that request, and the court of appeals erred in overriding it.

ARGUMENT

I. S.B. 191 furthers the principles of the Colorado Constitution and this Court's precedents.

Public education has been a central purpose of Colorado's government since 1876. The Framers of the Colorado Constitution devoted an entire article to education (Article IX). Although the Framers said many things in generalities, for education they were unusually specific. The 1876 Constitution creates the state school board (§ 1), mandates that the General Assembly provide for public schools throughout the state that are open to all (§§ 2, 7, 8, 11), regulates school funds (§§ 3–5, 9–11), creates a university (§§ 12–14), and provides for locally elected school boards to control instruction (§§ 15, 6, 16). Amendment 23, passed in 2000, obligated the state to increase education funding annually. Colo. Const. art. IX, §17(1).

While this Constitutional structure creates tensions that can require judicial intervention, here there is harmony. The Colorado system preserves flexibility and encourages efforts to continually improve education opportunities for students. The rules of mutual consent specified in S.B. 191 fit well within Colorado's history of affirming the power of Districts and the General Assembly to experiment with progressive education policies.

A. The Education Article of the Colorado Constitution supports S.B. 191.

The foundational provisions of Article IX are found in Sections 2 and 15. Section 2 mandates that the General Assembly "provide for the establishment and maintenance of a thorough and uniform system of free public schools…" Colo. Cost. art. IX, § 2. This is the core of Article IX, the "Education Clause." Section 15, the "Local Control Clause," states that local school district boards "shall have control of instruction in the public schools of their respective districts." Colo. Const. art IX, §15.[4]

The Court's interpretation of those provisions reveals three consistent principles that should determine the outcome here. *First*, public education is among the most important duties and prerogatives our Constitution gives state and local policymakers. *Second*, the judiciary's role in second-guessing policymakers' decisions is limited. *Third*, where the challenged law expands local control, rather than intruding upon it, the courts should be particularly deferential.

This Court recognized these principles from the earliest case interpreting the Education Clause. *See In re Kindergarten Sch.*, 32 P.

---

[4] While a handful of other states have a similar provision, the operative language of local control over instruction is unique to Colorado. See *Bd. of Educ. of Sch. Dist. No. 1 in City & County of Denver v. Booth*, 984 P.2d 639 (Colo. 1999) (listing Florida, Georgia, Kansas, Montana, Virginia as having similar, yet distinguishable, provisions).

422 (Colo. 1893). Only seventeen years after the Constitution was adopted, the legislature asked the Court if establishing kindergarten was beyond the power of the legislature since Section 2 only discusses schoolchildren "between the ages of six and twenty-one years." Colo. Const. art. IX, § 2. If offered, kindergarten would be for children not yet six. The Supreme Court recognized that the General Assembly has wide power to adopt liberal policies to improve education.[5] The case set the pattern of judicial deference to the General Assembly's efforts to support district-based schools with new approaches to education. The court of appeals has likewise recognized this principle. In *Boulder Valley School District RE-2 v. Colorado State Board of Education*, 217 P.3d 918 (Colo. App. 2009), for example, despite disputes about the General Assembly's policy choices, the court deferred to the legislature's judgment on what best provides educational opportunity. *Id.* at 928.

And again, in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982), this Court "recognize[d] unequivocally that

---

[5] As the Court explained, Section 2

> is clearly mandatory, and requires affirmative action on the part of the legislature to the extent and in the manner specified, and is in no measure prohibitory or a limitation of its power to provide free schools for children under six years of age, whenever it deems it wise and beneficial to do so.

In re Kindergarten Sch., 32 P. at 422–23.

public education plays a vital role in our free society." *Id.* at 1117. Accordingly, courts should give *more* deference to the policy choices of elected officials in the education context, not less:

> Judicial intrusion to weigh such considerations and achieve such goals must be avoided. This is especially so in this case where the controversy, as we perceive it, is essentially directed toward what is the best public policy which can be adopted to attain quality schooling and equal educational opportunity for all children who attend our public schools.

Id. at 1018.

This Court repeatedly emphasized the constitutional mandate "to provide to each school age child the opportunity to receive a free education and to establish guidelines for a thorough and uniform system of public schools." *Id.* at 1019. To require schools and districts to employ teachers known to be ineffective would be just the opposite. The Constitution should not be interpreted to require involuntary "contracts" which frustrate the mandate of the Education Clause.

The Court's recent *Lobato* and *Dwyer* decisions reaffirm these principles. In rejecting the argument that an effort to require the legislature to increase education spending is a nonjusticiable political question, this Court noted that "when Colorado became a state, public education was an important and prominent concern." *Lobato v. State*, 218 P.3d 358, 368 (Colo. 2009) ("Lobato I"). So too today, and appropriately so.

Educational progress being so important, constitutionally speaking, the Court should be cautious about thwarting decisions where state and local education authorities are aligned and acting within their respective spheres. Even if the Court believes the legislature's choices are less than optimal, it cannot substitute its judgment for that of State and District representatives empowered by Article IX. *Lobato v. State*, 304 P.3d 1132, 1141 (Colo. 2013) ("Lobato II"). Just last year, in *Dwyer v. State*, the Court recognized that the voters "afford[ed] the General Assembly discretion to modify" the complex formulas used to determine overall state educational funding. 357 P.3d 185, 192 (Colo. 2015). These cases show that the Court has long understood that the Education Clause gives the General Assembly the responsibility and the duty to enact progressive policies to ensure Colorado education does not get stuck in the past.

When the Court's Local Control decisions are added to the scales, the conclusion becomes inevitable. In *Board of Education of School District No. 1 in City & County of Denver v. Booth*, 984 P.2d 639 (Colo. 1999), for example, this Court upheld a state law which "represents an effort by the General Assembly to create opportunities for educational autonomy, innovation, and reform by combining independent initiative from charter applicants with education policy expertise at both local and state levels." *Id.* at 653. As the Court explained, "general statutory or judicial constraints, if they exist, must not have the effect of usurping

the local board's decision-making authority or its ability to implement, guide, or manage the educational programs for which it is ultimately responsible." *Id.* at 649.

Article IX's "local control" protections have consistently been applied to a broad range of education policies that include the manner of providing instruction—i.e., *teaching*. *Booth*, for example, held that "control of instruction requires power or authority to guide and manage both the action and practice of instruction as well as the quality and state of instruction." *Id.* at 648. And the first "guiding principle" specified in *Booth* expressly identifies "teacher employment decisions" as "inherently implicat[ing] its ability to control instruction." *Id.* at 649. The disputed provisions of S.B. 191 are at the core of "local control," for they determine directly how a local school makes teacher employment decisions.

Booth drew on a line of cases beginning early in the state's history, when the legislature sought to address the lack of high schools in certain districts. In *Belier v. Wilson*, 147 P. 255, 256 (Colo. 1915), the Court struck down a law which compelled the use of locally raised tax revenue for the support of a school in a neighboring district. Around the same time, the Court struck down a related statute which made a district liable for tuition charged by a neighboring high school when a pupil attends the neighboring school due to the lack of any high school in the local district. *Sch. Dist. No. 16 in Adams v. Union High*, 152 P.

1149 (Colo. 1915); *see also Hotchkiss v. Montrose Cnty. High Sch. Dist.*, 273 P. 652 (Colo. 1928) (similar statute struck down). Finally, a statute providing funding outside the districts was upheld. *Craig v. People*, 299 P. 1064 (Colo. 1931).

These cases show that when the legislature's actions compel local districts and schools to expend district funds on instruction the district opposes, less deference applies. As the Court recognized in *Booth* after reviewing these cases, laws which unconstitutionally eliminated local control "clearly interfered with the district's control of instruction because no discretion was left in the board of directors of the district as to the character of the high school instruction." *Id.* at 648 (internal quotations and modifications omitted).

But here, the opposite is occurring: S.B. 191 eliminates requirements that forced schools to expend funds on instructors to whom they did not consent. S.B. 191 gives districts and schools *more* "discretion … as to the character of the … instruction" they provide, not less. *See id.*

More recently, the Court commented that "our state-wide system of school finance is designed to preserve local control over locally raised tax revenues, and that control over these funds is essential to maintain the democratic framework created by our state constitution." *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 940 (Colo. 2004). The Court emphasized how "local control provides each district

with the opportunity for experimentation, innovation, and a healthy competition for educational excellence." *Id.* at 941. The Court held that the legislature could not strip local districts of discretion over use of district funds for a particular program. *Id.* at 938.[6]

B. S.B. 191 increases the flexibility of local districts to make critical decisions about teacher placement.

Just as the legislature and people have the discretion to expand the ages that can attend public schools, to add alternatives such as charter schools, and to determine funding formulas, the General Assembly has the ability to protect schools from forced "contract" with ineffective teachers. The judiciary must respect the General Assembly's constitutionally mandated and protected role. Plaintiffs' efforts to judicially tie the legislature, and local districts, to a policy of the 1950s is contrary to the separation of powers. *See Smith v. Miller*, 384 P.2d 738, 740–41 (1963) ("Article III of the Colorado Constitution divides the powers of government into three departments. . . . The departments are distinct from each other, and, so far as any direct control or interference is concerned, are independent of each other. More: they are superior in their respective spheres.'") (quotations and citations omitted).

---

[6] The Court has likewise affirmed the General Assembly's authority to authorize state funds to supplement local tax revenue (which previously had been the exclusive source of education funding). *Wilmore v. Annear*, 65 P.2d 1433 (Colo. 1937). And a district's authority to close a school was affirmed as a valid exercise of local control. *Hawkins v. Cline*, 420 P.2d 400, 403 (Colo. 1966).

S.B. 191 seeks the same goal the Court vindicated in those cases: untying the hands of local districts (and schools) to control the instruction paid for by district funds. At stake in this litigation is the local school's authority to, at a minimum, have a voice in which teachers it employs to provide instruction and educate students. The improvements to Colorado's system of education afforded by S.B. 191 speak directly to the ability of a district, and the schools within a district, to locally control the provision of education as directly as possible. *See, e.g.*, C.R.S. § 22-63-202(2)(c.5)(I) ("for the fair evaluation of a principal…[he or she] needs the ability to select teachers who have demonstrated effectiveness and have demonstrated qualifications and teaching experience that support the instructional practices of his or her school"). Without the ability to consent to which teachers provide education at particular schools, local control of education is dealt a severe blow.

This Court has articulated a remarkably high standard for plaintiffs in a case like this to overcome: *See, e.g.*, *Justus v. State*, 336 P.3d 202, 208 (Colo. 2014) ("[W]e uphold the statute unless it is proved to be unconstitutional beyond a reasonable doubt."). Whether that is the proper burden, or whether it is consistently applied, has been a matter of debate, including within the Court itself. *See Mesa Cnty. Bd. of Cnty. Comm'rs v. State*, 203 P.3d 519, 539 (Colo. 2009) (Eid, J.,

dissenting). Either way, Plaintiffs have failed to carry their burden here.

II. The General Assembly's actions pursuant to its powers and duties under the Education Clause are fully compatible with the Contracts and Due Process Clauses.

The General Assembly's power to enact S.B. 191 in accordance with the Education and Local Control Clauses is wholly consistent with the Contracts and Due Process Clauses. Proper application of the doctrines governing those provisions in cases like *Justus v. State*, 336 P.3d 202 (2014); *Atkins v. Parker*, 472 U.S. 115, 129–30 (1985), and *McInerney v. PERA*, 976 P.2d 348, 353 (Colo. App. 1998), show that Plaintiffs have neither contractual nor property rights that are infringed by S.B. 191's procedures. That doctrinal analysis is ably laid out in the Opening Briefs, as well as the district court's order, and will not be reiterated here.

Amicus instead will highlight the straightforward and important logic behind the Due Process and Contracts Clause doctrine, which inevitably leads to the conclusion that only in the rarest of circumstances can government employees claim statutorily created rights to block future legislative change. Choosing to work for a government entity like a public school district comes with plentiful benefits. Generous pensions, job stability, lack of competition, and in many instances protections from a civil service system are among the

attractions. And to the extent employees' rights or privileges are laid out by statute, they are protected by the inherent difficulty in our system of checks and balances of democratic change. *See, e.g.*, The Federalist No. 10, p.51 (G. Carey & J. McClellan eds. 2001) (explaining the benefits of dividing power among various bodies with different interests in order to prevent hasty actions arising from transitory "passions") (Madison); *id.* No. 70, p.365 (Celebrating the inherent barriers to legislative action, because: "In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.") (Hamilton); *Colo. Gen. Assembly v. Lamm*, 704 P.2d 1371, 1383 (Colo. 1985) (explaining importance of strict construction of separation of powers).

The democratic process is not a one-way ratchet. *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098 (7th Cir. 1995) (rejecting claim that statutory change in employment law for public school principals was an impairment of contracts). Where, as here, an overwhelming, bipartisan consensus recognizes that changes are necessary, government employees, like everyone else, must live under the new laws. Employees simply do not have a right, whether constitutional, statutory, or contractual, to prevent the legislature, governor, and local school boards

from "adopt[ing] a changing program to keep abreast of educational advances." *Malone v. Hayden*, 197 A. 344, 352 (Pa. 1938).

The legislature itself has long made this explicit: "[E]ach 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). This is not a mere technicality; it is a fundamental tenet of representative government that the power to adopt or amend laws belongs to the people and their representatives. *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980) ("'All political power is vested in and derived from the people,' and all government originates from the people.") (quoting Colo. Const. art. II, §. 1); Colo. Const. art. V, § 1. This Court has recognized that the constitutional structure "goes so far as to require each department to refrain from in any way impeding the exercise of the proper functions belonging to either of the other departments." *Smith*, 384 P.2d at 741 (*quoting State ex rel. Schneider v. Cunningham*, 101 P. 962 (Mont. 1909). Failing to do so "is equally a violation of the people's confidence." *Id.*

This is why courts, including this one, have been careful to avoid reading contractual or due process rights into statutory enactments in all but the most extraordinary circumstances.

> This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of the legislative body.

Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465–66 (1985) (quoted in *Justus*, 336 P.3d at 209). The United States Supreme Court has said so repeatedly. In *Atkins*, for example, the challenge did "not concern the procedural fairness of individual eligibility determinations. Rather, it involves a legislatively mandated substantive change in the scope of the entire program." 472 U.S. at 129. As a result, the legislature "had plenary power to define the scope and duration of the entitlement to [continued employment], and to increase, to decrease, or to terminate those [employment] benefits based on its appraisal of the relative importance of the [stakeholders'] needs." *Id.* The Court emphasized that "the Due Process Clause does not impose a constitutional limitation on the power of [the General Assembly] to make substantive changes in the law of entitlement to public [employment]." *Id.* Constitutions and voters control legislators; past legislatures do not.

This lawsuit is directly contrary to this principle. The decision below would effectively block current legislative bodies from adopting the progressive educational policy in S.B. 191 and instead use the courts to lock in place policies from long ago. Neither the Contracts Clause nor Due Process requires such a result. The judicial doctrines under those clauses recognize that doing so would be contrary to the basic principles of representative democracy.

Tying the hands of the General Assembly in this context would be particularly pernicious. Those who seek employment with a public entity cannot reasonably expect that provisions in a statute will never be changed. This is particularly true of public school teachers, who have actual, written, individualized contracts. *See* C.R.S. § 22-63-202(1). It is more than telling that those contracts do not contain provisions protecting employment beyond a given year. *See* Colo. Const. art X, § 20(4)(b) (requiring voter approval for any "multiple-fiscal year direct or indirect district debt or financial obligation whatsoever…"). Those contracts are enforceable; outdated laws that have been superseded by bipartisan consensus are not.

The history of the policies leading to S.B. 191 shows that any belief that state statutes, rather than Plaintiffs' actual contracts, defined Plaintiffs' contractual rights was unreasonable. Indeed, the legislature has steadily moved further and further away from any

suggestion that it was granting binding rights rather than adopting policies.

The 1953 Tenure Act declared that teachers with enough service "shall have stable and continuous tenure as a teacher in such school." C.R.S. § 123-18-3 (1953). In *Marzec*, this Court recognized that this was "in derogation of the common law. Prior to the adoption of teacher tenure legislation, school boards were at liberty to hire and fire at will. The present act…deprives school boards of such privileges…." *Marzec v. Fremont Cty., Sch. Dist. No. 2*, 349 P.2d 699, 701 (Colo. 1960). In 1967 the General Assembly replaced the 1953 Teacher Tenure Act with the Teacher Employment, Dismissal, and Tenure Act of 1967 ("TEDTA"). TEDTA continued the robust language of the 1953 Act: "a tenure teacher…shall be entitled to a position of employment." C.R.S. § 123-18-15(1) (1967).

But by 1990, in passing TECDA and replacing TEDTA, the General Assembly moved away from such language, notably dropping the concept of tenure from the act's title and removing substantive protections for a "tenure teacher." *Compare* C.R.S. § 123-18-2(8) (1967) *with* C.R.S. § 22-63-103 (1990) (definitions). "Tenure" had a specific legal meaning under the 1967 Act. For instance, subsection 12 stated that a teacher would acquire "tenure" automatically upon being hired for a fourth year. C.R.S. § 123-18-12(1) (1967). In TECDA, the General Assembly removed "tenure" and the accompanying guarantee of

continuous employment. *See* C.R.S. § 22-63-101-104 (1990). In 1991, the Legislature made the new reality even more clear, eliminating any notion of tenure from the prior Act. *Compare* C.R.S. §§22-63-202 to -403 (1991) (tenure eliminated), *with* C.R.S. §§22-63-102(11), -112(1) & -115(1) (1988) (providing for tenure under the prior 1967 framework).

Plaintiffs' reliance on pre-TECDA cases, which involved statutory tenure, is inapposite: "In 1990 the Teacher Employment, Dismissal, and Tenure Act of 1967 was repealed and reenacted with substantial changes as the Teacher Employment, Compensation, and Dismissal Act of 1990." *Frey v. Adams Cnty. Sch. Dist.*, 804 P.2d 851, 852 n.2 (Colo. 1991) (emphasis added). The general presumption against a prior legislature binding a modern legislature has not been overcome. *See In re Estate of DeWitt*, 54 P.3d 849, 859 (Colo. 2002) (pervasive prior regulation indicates the party had no legitimate expectation that the statute would not change again and, hence, no binding contractual right in the prior version of the statute). Ultimately, Plaintiffs' desires to bind the General Assembly and the School District to old statutes are contrary to the Education Clauses and this Court's precedents.

Other jurisdictions facing this issue have soundly rejected arguments like those of the Plaintiffs. The Pennsylvania Supreme Court in *Malone* long ago dismissed a Contract Clause claim for just this reason, writing: "[A]ll matters, whether they be contracts bearing upon education, or legislative determinations of school policy or the

scope of educational activity, everything directly related to the maintenance of a 'thorough and efficient system of public schools,' must at all times be subject to future legislative control. One Legislature cannot bind the hands of a subsequent one." 197 A. at 352. Likewise, the Seventh Circuit has held that "What appears to the plaintiffs as 'less generous employment rights' may have seemed to the legislature as increased flexibility for school administrators to take swift action to correct problems." *Hearne v. Bd. of Educ. of City of Chicago*, 185 F.3d 770, 775 (7th Cir. 1999); *see also KT & G Corp. v. Atty Gen. of State of Okla.*, 535 F.3d 1114, 1142 (10th Cir. 2008) (quoting *Atkins*: "the legislative determination provides all the process that is due").

Constitutions create constitutional rights; statutes create statutory rights; and contracts create contractual rights and convey property rights, and each has its own method of amendment. The Court should not blur those distinctions in this case.

CONCLUSION

The opinion of the Court of Appeals should be reversed.

DATED: June 6, 2016

KITTREDGE LLC

/s/
Daniel D. Domenico

CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing **Amicus Brief of the Independence Institute** upon the following parties or their counsel electronically via ICCES, or via electronic mail, on this 6th day of June, 2016, addressed as follows:

Kris Gomez, Esq.
COLORADO EDUCATION ASSOCIATION
1500 Grant Street
Denver, CO 80203
kgomez@coloradoea.org
Counsel for Plaintiffs

Todd McNamara, Esq.
Mathew S. Shechter, Esq.
MCNAMARA ROSEMAN & KAZMIERSKI LLP
1640 E. 18th Avenue
Denver, CO 80218
tjm@18thavelaw.com
mss@18thavelaw.com
Counsel for Plaintiffs

Alice O'Brien, Esq.
Philip A. Hostak, Esq.
NATIONAL EDUCATION ASSOCIATION
1201 16th Street NW
Washington, DC 20036
aobrien@nea.org
phostak@nea.org
Counsel for Plaintiffs

Eric V. Hall, Esq.
Tamara F. Goodlette, Esq.
Hermine Kallman, Esq.
LEWIS ROCA ROTHGERBER LLP
1200 17th Street, Suite 3000
Denver, CO 80202-5855
ehall@LRRLaw.com
tgoodlette@LRRLaw.com
hkallman@LLRLaw.com
Counsel for Defendant School District No. 1 in the City and County of Denver

_____/s/_____
Daniel D. Domenico