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** ▲
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BRIEF OF AMICUS THE INDEPENDENCE INSTITUTE AND READY COLORADO IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all the requirements of C.A.R. 28, 29, 32, and 53. 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. 32. I certify that this Amicus Brief in Support of Petition for Writ of Certiorari (including headings and footnotes but excluding the caption, table of contents, table of authorities, signature blocks, and certificate of service) contains 3,766 words. This brief does not exceed the word limit for a certiorari petition. C.A.R. 53(a) or an amicus brief C.A.R. 29(d). Specifically, this brief complies with the word requirements under Rule 29 because it is not longer than "one-half the maximum length authorized by these rules for a party's principal brief," (it does not exceed 4,750 words). C.A.R. 29(d).

SQUIRE PATTON BOGGS (US) LLP

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

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INTEREST OF AMICI CURIAE

This case has important ramifications for Colorado public schools' ability to manage, evaluate, and employ teachers. This Court should grant review of the Court of Appeals' published opinion below to clarify the application of the Contract Clause in this State.

This case arises out of Senate Bill 191 ("S.B. 191"), which amended the Teacher Employment, Compensation, and Dismissal Act ("TECDA"). S.B. 191 included a "mutual consent" provision. C.R.S. § 22-63-202(2)(c.5). Mutual consent replaced the "forced placement" system whereby a receiving school did not have control over which teachers it employed. *See* C.R.S. § 22-63-202(2)(c.5)(I) & (III)(B). Plaintiffs below challenge that legislative change. The court below upheld their argument that TECDA creates a legislative contract.

Ready Colorado appears as *amicus* in this matter because of the potentially devastating impact of the Court of Appeals decision on education reform. The decision will stifle the General Assembly's reform efforts and paves the way for future challenges. *See* C.R.S. §22-63-103(7) (moving "ineffective" teachers to probationary status "after two consecutive years" of ineffective teaching). Ready Colorado is committed to increasing educational opportunities for citizens of this State and weighs in here to further that mission.

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. The leading subject of the Institute's work has always been to improve K-12 education for all Colorado children in all types of schools. In addition to publishing research and educating state and local leaders on education policy, the Institute provides immediately relevant information to Colorado's K-12 families.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should review the lower court's erroneous application of Colorado's Contract Clause. Colo. Const. art. II, § 11.[1] The court below correctly identified the three-part Contract Clause test this Court most recently articulated in *Justus v. State*, 2014 CO 75, ¶19. But the Court of Appeals erred in applying that precedent because it determined that a legislative contract existed between public school teachers and school districts. The court's holding was based on inapplicable dicta from case law outside the context of the Contract Clause. *See Masters v. School Dist. No. 1*, 2015 COA 159, ¶20 (opining that the court had not

[1] Colorado's Contract Clause provides that no "law impairing the obligation of contracts . . . shall be passed by the general assembly.

"found any Colorado case holding that TECDA creates any contractual rights," but nonetheless holding that a legislative contract exists). [2]

This Court should review the Court of Appeals published decision because: (1) that court decided an important legal issue concerning the Contract Clause in a way not in accord with this Court's decisions; and (2) this case presents the best vehicle for resolving the critical legal question presented.

I. By incorrectly relying on the *Marzec* line of cases, the lower court decided a legal issue concerning the Contract Clause in a way not in accord with this Court's decisions.

The court below first 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 [the predecessor statute to TECDA] created contracts between school districts and their teachers." *Id.* (citing, *inter alia*, *Marzec v. Fremont Cty., Sch. Dist. No. 2*, 349 P.2d 699, 701 (1960)). It followed, the lower court reasoned, "that 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.

[2] This brief does not address the lower court's opinion concerning the Due Process Clause. *Masters*, ¶¶27-31.

Nonetheless, "[a]s an intermediate appellate court, we are, of course, bound by the supreme court's prior precedents." *Id.* (citation omitted).

The lower court followed the wrong precedent. *Marzec* is not a Contract Clause case and so it was not the type of "controlling precedent" the Colorado Court of Appeals must follow. *See Averyt v. Wal-Mart Stores, Inc.*, 2013 COA 10, ¶35 (noting that "the supreme court concluded" the precise question at issue and the "holding is binding on use here"). Moreover, *Marzec* was decided before this Court's modern Contract Clause cases, *DeWitt* and *Justus*. In erroneously relying on *Marzec*, the lower court misunderstood this Court's more recent, controlling holdings directly addressing Colorado's Contract Clause. *E.g.*, *Justus*, ¶¶19-23.

In Colorado, "Contract Clause analysis involves three inquiries: (1) does a contractual relationship exist; (2) does the change in the law impair that contractual relationship; and if so (3) is the impairment substantial?" *Justus*, ¶19 (citations omitted). The controlling precedent from this Court requires a Colorado court conducting the first step in this analysis to closely examine the statutory language: "To determine whether the legislature intended to bind itself contractually, we examine both the language of the statute itself and the circumstances surrounding its enactment or amendment." *Justus*, ¶21; *see Colo. Springs Fire Fighters Ass'n v. Colo. Springs*, 784 P.2d 766, 773 (Colo. 1989) (rejecting a Contract Clause

claim because "[t]he 1966 city ordinance involved here contained no words of contract").

The lower court did not perform this analysis and thus erred in a published opinion implicating nearly $6 billion of the State budget.[3]

a. Colorado's General Assembly could not operate without a presumption against legislative contracts.

Colorado's Contract Clause prohibits the General Assembly from passing a law that impairs contractual obligations. Colo. Const. art. II, § 11. The language in Colorado's Contract Clause is nearly identical to the federal provision[4] and Colorado courts consider the clauses together. *See Ahluwalia v. QFA Royalties, LLC*, 226 P.3d 1093, 1100 (Colo. App. 2009).

A precondition to a Contract Clause claim is that a contract exists. *In re Estate of DeWitt*, 54 P.3d 849, 858 (Colo. 2002). For constitutional purposes, "[i]t is presumed that a law 'is not intended to create private contractual vested rights.'" *Colo. Springs Fire Fighters Ass'n*, 784 P.2d at 773 (citation omitted). This precondition protects state sovereignty. *See id*. (opining legislation "was to remain in effect until the council, in the exercise of its discretionary legislative powers, elected to modify it"). Otherwise, every legislative enactment would stagnate in

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[3] In budget year 2014-15, the Public School Finance Act provided for over $5.9 billion in funding of Colorado school districts. *See* *https://www.cde.state.co.us/cdefinance*.

[4] U.S. Const. art. I, § 10.

place, "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) ("A statute is not a commitment by the legislature never to repeal the statute.")

Like this Court, Justice Holmes recognized over 100 years ago that any Contract Clause claim requires language evidencing "an actual intent on the part of the State" before it can be determined that the State "has parted with a great attribute of sovereignty beyond the right of change." *Wis. & M.R. Co. v. Powers*, 191 U.S. 379, 386 (1903). Without language clearly evidencing a contract, a legislature "simply indicates a course of conduct to be pursued, until circumstances or its views of policy change." *Id.* at 387.

This Court recently explained that there is a "well-established presumption . . . 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 (quoting *Nat. R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co*., 470 U.S. 451, 465-66 (1985)); *see also Dodge v. Bd. of Educ*., 302 U.S. 74, 79 (1937). *Justus* did not break new ground in Colorado. As this Court explained in 1989 a law presumptively "is not 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 a presumption against

legislative contracts, "[t]he continued existence of government would be of no great value if, by implications and presumptions, [the Contract Clause] disarmed [the legislatures] of the powers necessary to accomplish the ends of its creation." *Keefe v. Clark*, 322 U.S. 393, 397 (1944) (quoting *Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837)); *see Justus*, ¶21.

b. History underscores the importance of the presumption against legislation creating a contract.

This Court's strict construction of legislation to avoid finding a legislative contract is not a recent development. William Blackstone, "whose works constituted the preeminent authority on English law for the founding generation,"[5] explained that "[a]cts of parliament derogatory from the power of subsequent parliaments bind not." 1 William Blackstone, Commentaries *90. Chief Justice Marshall imported this commonsense principle in one of the first Contract Clause cases: "one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S (6 Cranch) 87, 135 (1810); *see also Rector v. Cnty. of Philadelphia*, 65 U.S. 300, 302-303 (1861) (rejecting a

[5] *Alden v. Maine*, 527 U.S. 706, 715 (1999).

Contract Clause claim and opining that the benefits of the law exist "bene placitum,[6] and may be revoked at the pleasure of the sovereign").

In *Fletcher*, the State of Georgia attempted to rescind land grants made by a previous legislature. 10 U.S. at 135. The Supreme Court struck down the subsequent legislation because the land grants plainly constituted contracts between the grant-holders and Georgia. *See id.* at 139. Chief Justice Marshall explained the narrow reach of the Court's holding that the rescission of the conveyances violated the Contract Clause because "those conveyances have a vested legal estate," and because the Georgia statute for land sales was "a law in its nature a contract," then "a repeal of the law cannot devest those rights." *Id.* at 135.

Building on Chief Justice Marshall's reasoning, subsequent decisions from the Founding Era to the modern day articulated the canon of construction in essentially its current form: 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). Thus, "[n]othing can be taken against the State by presumption or inference." *The Delaware Railroad Tax*, 85 U.S. 206, 225 (1874).

More recently, the United States Supreme Court articulated the same idea like this: "A requirement that the government's obligation unmistakably appear

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[6] At discretion. Literally, "good pleasure."

[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." *U.S. v. Winstar Corp.*, 518 U.S. 839, 875 (1996) (citations omitted). It is that principle—expressed in different parlance over the centuries—that this Court invoked in *Justus* when it emphasized: "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).

Cases from other jurisdictions to address the issue make it clear that laws governing teachers do not create immutable legislative contracts.[7] Modern contract clause decisions in the context of teacher tenure apply the same presumption that informed these early cases. *See, e.g.*, *Wash. Fed'n of State Emps. v. Wash.*, 682 P.2d 869, 872 (Wash. 1984) (explaining that statutes do not create a private contractual right to tenure but instead that "tenure is regulated by legislative policy"). And—consistent with that presumption—the majority of courts across jurisdictions have refused to interpret laws governing teachers as

[7] James Rapp, Education Law, Ch. 6, § 6.06[h] ("Tenure rights, in general, may be amended, modified, or repealed . . . because tenure is usually [considered] a legislative or regulatory grant." (gathering cases)).

immutable legislative contracts. *See, e.g., Proska v. Az. State Schs.*, 74 P.3d 939 (Ariz. 2003).[8]

The lower court erred in this case by failing to analyze TECDA's language to determine whether it creates a legislative contract. With that flawed approach, the lower court's decision creates the very problem that the founding generation—and every generation since—sought to avoid through its presumption against legislative contracts.

c. TECDA does not contain language creating a contractual relationship, as required by this Court's precedent.

The starting point for determining "whether the legislature intended to bind itself contractually" is "the language of the statute itself." *Justus*, ¶21 (citation omitted).

In the teacher tenure context, the United States Supreme Court determined that a statute creates a contract with public school teachers where the statute at issue provides that it: "shall be deemed to continue in effect for an indefinite

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[8] *See also Campbell v. Aldrich*, 79 P.2d 257, 260-61 (Or. 1938); *Steck v. Bd. of Educ.*, 8 A.2d 120, 123 (N.J. 1939); *Morrison v. Bd. of Educ.*, 297 N.W. 383, 385 (Wis. 1941); *Crawford v. Sadler*, 34 So. 2d 38, 39 (Fla. 1948); *Goves v. Bd. of Educ.*, 10 N.E.2d 403, 405 (Ill. 1937); *LaPolla v. Bd. of Educ.*, 15 N.Y.S.2d 149, 151-53 (N.Y. Sup. Ct. 1939), *aff'd* 258 App. Div. 781; *Taylor v. Bd. of Educ.*, 89 P.2d 148, 153 (Cal. App. 1939); *but see. Bruck v. State ex rel. Money*, 91 N.E.2d 349 (Ind. 1950). Indiana's teacher tenure law is an outlier; in stark contrast to most states, that law explicitly states that it is intended as a contract. *See State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 105 (1938).

period and shall be known as an indefinite contract." *Brand*, 303 U.S. at 105. The statutory language in that case articulated an unmistakable legislative contract; in addition to the title, the word "contract" appeared 25 times in the statute. *Id.* In contrast, the United States Supreme Court in *Dodge* determined that language fixing teacher retirement benefits "annually and for life from the date of such retirement" did not create a contract. *Dodge*, 302 U.S. at 78. Thus, teachers are no different than any other constituency: legislation only creates a contract where that intent "unmistakably" appears in the statute. *Winstar Corp.*, 518 U.S. at 875.

TECDA contains no language suggesting a contract exists between school districts and teachers. To start, 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. *See Taylor*, 89 P.2d at 153-54 (explaining that a "contract" exists between school districts and teachers, but that the governing law "is statutory and not contractual").

Moreover, the court below did not cite a single sentence from TECDA indicating the existence of a legislative contract. *See Masters*, ¶¶18-24. In fact, the lower court did not analyze the language of the statute at all, as required by *Justus*. Thus, while the court articulated the presumption against legislative contracts, *id.* at ¶18, it failed to heed that presumption and analyze the statutory language at issue, even though *Justus* mandates such analysis. *Id.* at ¶¶19-21.

d. The lower court erred when, instead of analyzing TECDA's language, it relied on dicta from *Marzec* and its progeny.

The lower court's entire Contract Clause analysis rested upon "the *Marzec* line of cases." *Id.* at ¶21. In keeping with this Court's precedent, *Justus*, ¶21, and the critical public policy—legislative autonomy—informing that precedent, the lower court erred in resting its decision on *Marzec*.

Marzec and its progeny did not involve the Contract Clause. 349 P.2d at 700-01. Any reference to a "contract" in the *Marzec* cases 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. *See Justus*, ¶¶20-21; *accord Campbell*, 79 P.2d at 260 (Rejecting Contract Clause challenge to statutory change in Oregon teacher tenure law; explaining that "Cases cited wherein school boards, in dismissing teachers, have improperly exercised authority under the statute are not in point. This case deals solely with the power of the legislature."). *Marzec* 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 . . . 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 (capitalization omitted) (emphasis added).

This Court in *Marzec* did not have occasion and did not purport to analyze TECDA's predecessor statute for evidence of an immutable legislative contract. *See id.* Instead, interpreting and applying the existing statute, this Court determined that Marzec did not qualify for the existing statutory protections available to a tenured teacher. *See id.* at 702.

Likewise, *Julesburg School District No. RE-1 v. Ebke*, concerned whether C.R.C.P. 106 was the correct vehicle for hearing a breach of contract claim between a school district and eighteen school teachers concerning a salary increase that was supposed to have taken effect, in accord with the existing statute. 562 P.2d 419, 421 (1977). The Court's analysis in that case did not implicate the Contract Clause, but instead addressed the correct procedural vehicle for the teachers' challenge to the school district's improper application of the statute. *Id. Julesburg*, then, like *Marzec*, 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.

Similarly, *Maxey v. Jefferson County School District No. R-1*, involved a claim for a teacher's back-due salary. 408 P.2d 970, 972 (1965). As this Court framed the issue, "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 on or about

April 8, 1960." *Id.* at 970-71. Mr. Maxey's estate, like the plaintiffs in *Marzec* and *Julesburg*, argued the school district had misapplied the existing statute. The only question addressed on appeal was whether Mr. Maxey qualified for the salary schedule "then in effect." *Id.*

In *Maxey*, as in *Julesburg* and *Marzec*, the use of the word "contract" was always as part of the analysis of whether the plaintiff teachers had "vested" rights pursuant to the statute; none of those cases asserted that the Contract Clause had any relevance—or that the Clause impeded future legislatures from statutorily changing the terms of teacher employment. Rather, the school district in *Maxey* had simply failed to pay the deceased teacher the "full salary to which he was entitled." *Id.* at 972-73.

Tellingly, the lower court's quotation from *Marzec*: "The Teacher Tenure Law . . . makes a contract for the parties by operation of law, where otherwise none would exist" is a direct quote from an Illinois case. *Masters*, ¶20 (quoting *Anderson v. Bd. of Educ.*, 61 N.E.2d 562, 567 (Ill. 1945)). But, like *Marzec*, that case also did not concern the Contract Clause. *Anderson*, 61 N.E.2d at 572 (noting that it "becomes unnecessary to determine the constitutional questions raised"). That Illinois case dealt with the proper application of the existing statute. *See id.* The teacher in that case argued that the teacher tenure law provided her with a right

to continued employment. *Id.* at 570-72. The Illinois Supreme Court did not mince words rejecting that argument:

> Under the prior decisions of this court, no person has a right to demand that he or she shall be employed as a teacher. The school board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever.

Id. at 572.

Moreover, when presented with the Contract Clause question directly, the Illinois Supreme Court has squarely rejected any notion that laws governing teachers are immutable: "The claim of appellants that their tenure of office became a fixed and vested right which neither the State nor the board of education could later deprive them of . . . [is] untenable." *Groves*, 10 N.E.2d at 405 (explaining that *Dodge* "is conclusive on the point raised").[9] The lower court's quotation from *Marzec*—the entirety of its Contract Clause analysis—is an error that contradicts both this Court's precedent and the Illinois precedent on which it tenuously relies.

[9] More recently, in *Fumarolo v. Chicago Board. of Education*, 566 N.E.2d 1283, 1287-88, (Ill. 1990), school principals challenged the "Chicago School Reform Act" as a violation of the Contract Clause. The court rejected that argument, and explained that "the status of tenured teachers is really dependent on a statute . . . which the legislature at will may abolish, or which emoluments it may change." *Id.* at 1305.

II. This important litigation provides the correct vehicle for addressing the lower court's legal error.

The lower court's legal error reaches this case in the best possible procedural posture to address the issue. The first step in the Contract Clause analysis is a legal determination. *Justus*, ¶¶19-21. "In the first part of the inquiry, where a court finds no contract, there is no need to complete the following two steps." *Id.* at ¶20 (citing *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)).

Here, this case reaches this Court at the pleadings stage. *Masters*, ¶10. Addressing the Contract Clause at this stage allows this Court to further clarify the law without having to address a myriad of unrelated legal issues that may infect the litigation on remand. *Id.* at ¶9 n.2 (noting that the trial court will need to address class certification on remand). This approach preserves judicial resources by allowing the lower court to avoid the unnecessary and fact-intensive inquiry under the third prong of the Contract Clause. *Justus*, ¶19 (whether the impairment is "substantial").

Furthermore, analyzing the Contract Clause at this stage allows this Court to resolve the issues flagged by Justice Coats in his concurrence to *Justus*. Specifically, Justice Coats expressed his concern that this Court should more plainly articulate that "statutory contracts . . . can be judicially recognized to exist only in the face of an unmistakable indication of legislative intent to contract[.]" *Justus*, ¶48.

The lower court's error concerning the Contract Clause impacts the smooth operation of public education across the State; the issue is of great public importance. The error in the lower court's published opinion is not in accord with this Court's decisions. And the procedural posture of this case favors granting certiorari now.

CONCLUSION

This Court should grant the petitions.

RESPECTFULLY SUBMITTED this 18th day of December, 2015.

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