In the

Court of Appeal

of the

State of California

SECOND APPELLATE DISTRICT
DIVISION TWO

B258589

BEATRIZ VERGARA,

Plaintiff and Respondent,

v.

STATE OF CALIFORNIA, SUPERINTENDENT OF PUBLIC INSTRUCTION, CALIFORNIA DEPARTMENT OF EDUCATION, STATE BOARD OF EDUCATION and EDMUND G. BROWN, JR., GOVERNOR,

Defendants and Appellants

CALIFORNIA TEACHERS ASSOCIATION and CALIFORNIA FEDERATION OF TEACHERS,

Intervenors and Appellants.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HON. ROLF M. TREU · CASE NO. BC484642

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; PROPOSED BRIEF OF AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF INTERVENORS-APPELLANTS AND DEFENDANTS-APPELLANTS

STEVEN D. ATLEE (151025)
*CHRISTINE E. ELLICE (276181)
STROOCK & STROOCK & LAVAN LLP
2029 Century Park East, 18th Floor
Los Angeles, California 90067-3086
(310) 556-5800 Telephone

Attorneys for Amicus Curiae, American Federation of Teachers, AFL-CIO

Additional Counsel Listed Inside Cover

COUNSEL PRESS · (800) 3-APPEAL PRINTED ON RECYCLED PAPER

†CHARLES G. MOERDLER
†ALAN M. KLINGER
†BETH A. NORTON
†DINA KOLKER
†DAVID J. KAHNE
†NATHAN H. STOPPER
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038-4982
(212) 806-5400 Telephone

†DAVID STROM
AMERICAN FEDERATION OF TEACHERS, AFL-CIO
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 393-6385 Telephone

Attorneys for Amicus Curiae,
American Federation of Teachers, AFL-CIO

†***Application for Leave to Appear Pro Hac Vice pending***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

BEATRIZ VERGARA, *et al.*,	)	Court of Appeal No. B258589
	)	
Plaintiffs/Appellants,	)	
	)	
v.	)	Superior Court No. BC484642
	)	
STATE OF CALIFORNIA, *et al.*,	)	
	)	
Defendants/Respondents	)	
	)	
and	)	
	)	
CALIFORNIA TEACHERS ASSOCIATION and CALIFORNIA FEDERATION OF TEACHERS,	)	
	)	
Intervenors/Appellants.	)	
	)	

On Appeal from the California Superior Court, County of Los Angeles
Hon. Rolf Treu, Judge

APPLICATION OF AMERICAN FEDERATION OF TEACHERS, AFL-CIO FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF INTERVENORS-APPELLANTS AND DEFENDANTS-APPELLANTS

STROOCK & STROOCK & LAVAN LLP
STEVEN D. ATLEE (Bar No. 151025)
CHRISTINE E. ELLICE (Bar No. 276181)
2029 Century Park East, 18th Floor
Los Angeles, CA 90067-3086
(310) 556-5800
(Additional counsel listed on next page)

Attorneys for
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

STROOCK & STROOCK & LAVAN LLP
CHARLES G. MOERDLER*
ALAN M. KLINGER*
BETH A. NORTON*
DINA KOLKER*
DAVID J. KAHNE*
NATHAN H. STOPPER*
180 Maiden Lane
New York, NY 10038-4982
(212) 806-5400

AMERICAN FEDERATION OF TEACHERS, AFL-CIO
DAVID STROM*
555 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 393-6385

*Application for leave to appear *Pro Hac Vice* pending.

Pursuant to Rule 8.200(c) of the California Rules of Court, the American Federation of Teachers ("AFT") respectfully requests leave to file the accompanying [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF INTERVENORS-APPELLANTS AND DEFENDANTS-APPELLANTS in the above-captioned matter.

Undersigned counsel certifies that there are no parties, counsel, entities or other individuals to identify under Rule 8.200(c)(3) of the California Rules of Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

The AFT, an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.6 million members in more than 3,500 local affiliates nationwide. Since its founding, the AFT has been a crucial and prominent force for preserving and strengthening America's democratic commitment to public education and public service by championing educational improvement for the schools in which our members serve and their student bodies, including English language learners and other historically disadvantaged groups, in California and across the United States. The AFT represents approximately 850,000 pre-K–12 public school teachers, a majority of whom work in traditional public schools, with many working in challenging urban districts. In California, AFT's affiliate, Intervenor-Appellant California Federation of Teachers, represents over 120,000 educational employees working at every level of the education system,

from Head Start to the University of California, many of whom would be adversely impacted by the decision below. This submission is funded by the AFT.

THE ACCOMPANYING BRIEF WILL ASSIST THE COURT IN DECIDING THIS MATTER

The AFT is familiar with the parties' briefs and is in a unique position to assist the Court in better understanding the historical and practical nature of the statutes challenged herein, the adverse impact of the erroneous decision below, particularly upon students, and how the supposed shortcomings of meaningful due process protections—commonly termed tenure—and other statutory and collectively bargained rights do not abridge any Constitutional strictures, let alone Equal Protection guarantees.

To minimize undue judicial burden, we will not repeat Appellants' submissions, other than to endorse and adopt them.

For all these reasons, the AFT respectfully requests leave to file the accompanying [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF INTERVENORS-APPELLANTS AND DEFENDANTS-APPELLANTS.

Dated: September 16, 2015 Respectfully Submitted

STROOCK & STROOCK & LAVAN LLP
STEVEN D. ATLEE
CHARLES G. MOERDLER*
ALAN M. KLINGER*
CHRISTINE E. ELLICE
BETH A. NORTON*
DINA KOLKER*
DAVID J. KAHNE*
NATHAN H. STOPPER*
and
AMERICAN FEDERATION OF
TEACHERS, AFL-CIO
DAVID STROM*

By: /s/ Steven D. Atlee
Steven D. Atlee

Attorneys for
AMERICAN FEDERATION OF
TEACHERS, AFL-CIO

* Application for leave to appear *Pro Hace Vice* pending

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

BEATRIZ VERGARA, *et al.*,	)	Court of Appeal No. B258589
	)	
Plaintiffs/Appellants,	)	
	)	
v.	)	Superior Court No. BC484642
	)	
STATE OF CALIFORNIA, *et al.*,	)	
	)	
Defendants/Respondents	)	
	)	
and	)	
	)	
CALIFORNIA TEACHERS ASSOCIATION and CALIFORNIA FEDERATION OF TEACHERS,	)	
	)	
Intervenors/Appellants.	)	
	)	

On Appeal from the California Superior Court, County of Los Angeles
Hon. Rolf Treu, Judge

[PROPOSED] *AMICUS CURIAE* BRIEF OF AMERICAN FEDERATION OF TEACHERS, AFL-CIO, IN SUPPORT OF INTERVENORS-APPELLANTS AND DEFENDANTS-APPELLANTS

STROOCK & STROOCK & LAVAN LLP
STEVEN D. ATLEE (Bar No. 151025)
CHRISTINE E. ELLICE (Bar No. 276181)
2029 Century Park East, 18th Floor
Los Angeles, CA 90067-3086
(310) 556-5800
(Additional counsel listed on next page)

Attorneys for
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

STROOCK & STROOCK & LAVAN LLP
CHARLES G. MOERDLER*
ALAN M. KLINGER*
BETH A. NORTON*
DINA KOLKER*
DAVID J. KAHNE*
NATHAN H. STOPPER*
180 Maiden Lane
New York, NY 10038-4982
(212) 806-5400

AMERICAN FEDERATION OF TEACHERS, AFL-CIO
DAVID STROM*
555 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 393-6385

*Application for leave to appear *Pro Hac Vice* pending.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

Alter, *Teacher Tenure Under Assault*, TIME (June 11, 2014) <http:time.com/2857458/teacher-tenure-under-assault> 3, 4

Biddle & Berliner, *What Research Says About Small Classes and Their Effects*, <http://www.wested.org/online_pubs/small_classes.pdf> 17, 18

Broke, *Raise The Status of Schoolteachers, Say Stanford Leaders*, Stanford Report (October 31, 2013) <http://news.stanford.edu/news/2013/ october/teacher-career-roundtable-103113.html> 2

CA Commission on Teacher Credentialing, Teacher Supply in CA, A Report to the Legislature, Annual Report 2013-2014 <http://www.ctc.ca.gov/reports/TS-2013-2014-AnnualRpt.pdf> 14

Campbell Brown Talks Teacher Tenure, YouTube [posted by American Enterprise Institute, Oct. 2, 2014] <http://www.youtube.com/watch?v=7RLFO9bYgSM#t=50m48s> 4

Coolidge, *Address to the Convention of the National Education Association Education: The Cornerstone of Self Government*, The American Presidency Project (July 4, 1924) <http://www.presidency.ucsb.edu/ws/print.php?pid=24188> 1

Finn, Pannozzo & Achilles, *The Why's of Class Size: Student Behavior in Small Classes*, Review of Educational Research (Fall 2003) <http://rer.sagepub.com/content/73/3/321.full.pdf+html> 6

Gagnon & Mattingly, *Beginning Teachers are More Common in Rural, High-Poverty and Racially Diverse Schools* (2012) Carsey Institute, Issue Brief No. 53 ..... 39, 40

Inside City Hall: Campbell Brown & Keoni Wright Discuss Teacher, Partnership for Educational Justice (Aug. 6, 2014) <http://edjustice.org/inside-city-hall-campbell-brown-keoni-wright-discuss-teacher-tenure/> 2

Jackson & Bruegmann, *Teaching Students And Teaching Each Other* (2009) Working Paper 15202, Cambridge: National Bureau of Economics Research 9

INTRODUCTION

Until recently, America's attitude toward teaching and teachers was aptly summarized by President Calvin Coolidge not long after California enacted its first teacher due process protections, commonly referred to as tenure, in 1921:

> …[T]he main factor of every school is the teacher. Teaching is one of the noblest of professions. It requires an adequate preparation and training, patience, devotion, and a deep sense of responsibility. Those who mold the human mind have wrought not for time, but for eternity. The obligation which we all owe to those devoted men and women who have given of their lives to the education of the youth of our country that they might have freedom through coming into a knowledge of the truth is one which can never be discharged. They are entitled not only to adequate rewards for their service, but to the veneration and honor of a grateful people.[1]

By 2012, however, Stanford University President John Hennessy and a panel of experts, including Dean Claude Steele of the Stanford Graduate School of Education, had concluded that efforts to undermine teachers and teaching had reached the point that:

> Society needs to place more value on teaching and schools need to help revamp the teaching career as part of an effort to attract the most talented students in the field ….
>
> …

[1] (Coolidge, *Address to the Convention of the National Education Association Education: The Cornerstone of Self Government*, The American Presidency Project (July 4, 1924) <http://www.presidency.ucsb.edu/ws/print.php?pid=24188> [as of Sept. 13, 2015].)

> The panelists agreed that low pay and low prestige discourage many high-achieving students from going into careers in education, particularly teaching. Other formidable obstacles include how poorly funded some schools are, Steele said, which leads to difficult teaching experiences.[2]

This suit was filed in 2012. Contemporaneously, a well-funded campaign was launched by some self-styled "reformers" to besmirch teachers and teaching, ranging from full page advertisements in USA Today soliciting the commencement of litigation aimed at teachers and their union representatives,[3] to the filing of lawsuits in several states[4] and to attendant media events.[5] Professor Diane Ravitch of the New York University School of Education aptly summarized the thesis they expounded:

> Teachers are to blame for the ills of American society. Bad teachers are the ones whose students don't get higher test scores year after year. If we fire bad teachers, our economy will gain trillions of dollars in productivity. If we fire bad teachers, our schools will rise to the top of international

---

[2] (Broke, *Raise The Status of Schoolteachers, Say Stanford Leaders*, Stanford Report (October 31, 2013) <http://news.stanford.edu/news/2013/october/teacher-career-roundtable-103113.html> [as of Sept. 13, 2015].)

[3] (See, Advertisement Page, *Center For Union Facts*, USA Today (June 12, 2014) <http://teachersunionexposed.com/ads.php> [as of Sept. 13, 2015].)

[4] (See, e.g., *Davids v. State of New York*, (March 12, 2015, Sup. Ct. Richmond County, Index No. 101105/14) N.Y.L.J. 1202720648124, at *1.)

[5] (See, e.g., Video Clip, Inside City Hall: Campbell Brown & Keoni Wright Discuss Teacher, Partnership for Educational Justice (Aug. 6, 2014) <http://edjustice.org/inside-city-hall-campbell-brown-keoni-wright-discuss-teacher-tenure/> [as of Sept. 14, 2015].)

> rankings. If we fire bad teachers, all students will be prepared for college or careers. If we fire bad teachers, we can eliminate poverty.
>
> …
>
> Use test scores to identify bad teachers and fire them. Why waste billions on anti-poverty programs, on early childhood education, on health clinics or anything else? Now we know who the culprits are and we can solve our problems by firing them.
>
> …
>
> …. By now everyone should realize that scores can be raised by intensive preparation, by cheating, by excluding or avoiding low-performing students and by other clever strategies for gaming the system. Once upon a time, educators frowned upon test prep, realizing that it led to short term gains but sacrificed larger goals, such as critical thinking, creativity, originality and conceptual understanding.[6]

The debate, however, has not been limited to legislatures, campuses, educational fora or the media, with proponents of these so-called educational "reforms" determined to turn the courts into their bully pulpit. Utilizing these proceedings as the "poster child," these self-styled education reformers have advocated for litigation, which has resulted in multiple suits and threats of prospective litigation in a host of jurisdictions.[7] However, as

---

[6] (Ravitch, *The Teacher Accountability Debate*, Bank Street Occasional Papers 27, Part I (2012) <https://www.bankstreet.edu/occasional-paper-series/27/part-i/teacher-accountability-debate/> [as of Sept. 13, 2015].)

[7] (See fns. 3-5, *supra*.) Thus, in the flush of victory below, Plaintiffs' counsel identified New Jersey, Connecticut, Maryland, Minnesota, New Mexico and Oregon as states whose laws his group was considering challenging. (Alter, *Teacher Tenure Under Assault*, TIME

the "reformers" have acknowledged, their true purpose has been to seek through the courts that which, in their opinion, the Legislature has failed to accomplish[8] —that is not legally proper.

As we show below, this policy dispute in fact *belongs* in the legislative arena, not in the courts (*see, infra*, pp. 28-41). California has a long history of legislative action to address these issues consistent with contemporary views of educational policy.[9] Indeed, California's Legislature has focused and acted upon provisions carefully calibrated to permit expeditious and effective teacher discipline, including legislation enacted last year (following the decision below) that specifically

---

(June 11, 2014) <http:time.com/2857458/teacher-tenure-under-assault> [as of Sept. 13, 2015].) There now are, for example, reported decisions implicating tenure not just in New York and California, but in North Carolina and Indiana. (See *North Carolina Ass'n of Educators, Inc. v. State* (June 2, 2015, No. COA14-998) __S.E. 2d__ [2015 WL 3466263] (*North Carolina Ass'n of Educators, Inc.*) [statutory attack on tenure held unconstitutional]; *Elliot v. Board of School Trustees of Madison Consol. Schools*, (March 12, 2015, No. 1:1- CV-319) 2015 WL 1125022, *16-17 (*Elliot*), *motion to certify appeal granted*, (May 13, 2015, No. 1:13-CV-319-WTL-DML) 2015 WL 2341226 [holding teacher's tenure rights are protected under Contracts Clause of U.S. Constitution].)

[8] Indeed, to quote the public face of these protagonists, Campbell Brown, a former television commentator, such litigation forays may be "… just the hammer that breaks through sort of the logjam that has existed in our legislature or in other states…." (Campbell Brown Talks Teacher Tenure, YouTube [posted by American Enterprise Institute, Oct. 2, 2014] <http://www.youtube.com/watch?v=7RLFO9bYgSM#t=50m48s> [as of Sept. 13, 2015].)

[9] (See, e.g., *Wilson v. State Bd. of Educ.* (1999) 75 Cal. App. 4th 1125 (*Wilson*).)

streamlined the entire disciplinary process. (*see*, *infra*, p. 22). Thus, the five challenged statutes (the "Challenged Statutes"), like other provisions of the Education Code, have repeatedly been amended, particularly with regard to teacher discipline and the Legislature has demonstrated it is alert to public concerns and will act where it deems them merited.[10]

Today, more than ever, it is critical that *all* of our students have high quality, experienced teachers who are able to meet students' diverse needs, not a revolving door of inexperienced or unqualified educators.[11] However, the shrill utterances and actions of some of the purported "reformers" have consequences, perhaps unintended, but counterproductive nonetheless.

---

[10] (See, e.g., *Ibid.; California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 350.)

[11] (See, e.g., Ost, *How Do Teachers Improve? The Relative Importance of Specific and General Human Capital* (2013) p. 4 <http://tigger.uic.edu/~bost/grade_specific.pdf>[as of Sept. 14, 2015] ["While the impact of many teacher characteristics is still debated, there exists an emerging consensus that teacher experience positively contributes to student learning, particularly for younger grades. Using data on middle school and elementary school students in Texas, Hanushek et al. (2005) find that students perform relatively worse when their teacher has less than three years of experience. Rockoff (2004) finds consistent results using matched teacher-student data from two New Jersey elementary school districts. Similarly, Clotfelter, Ladd and Vidgor (2007) and Jackson and Bruegmann (2009) use the same North Carolina matched teacher-student data used in this paper and find that elementary teachers improve with experience, especially in the first several years."]; Wiswall, *The Dynamics of Teacher Quality* (2011) p. 32 ["An upper bound on the importance of experience to teacher quality is that average quality would increase by about 1/3 of a standard deviation if school districts were able to provide sufficient incentives to teachers to remain in teaching for their entire working life."] <https://aefpweb.org/sites/default/files/webform/wiswall_teacher_dynamics.pdf> [as of Sept. 14, 2015].)

Teacher shortages have emerged, as has the evidence of an increase in the exit rate on the part of young teachers (*see*, fn. 2). Enrollment in teacher preparation programs at both the undergraduate and graduate school levels has begun to decline markedly, thus portending even greater shortages (*see infra*, at pp. 13-15*)*. In the final analysis, that dire, but predictable, outcome from the orchestrated campaign to demonize teachers impacts not only on teachers, but, more importantly, on our children, who are our first concern.

As the available teacher population decreases (and earlier this year it was estimated that California had some 21,000 teacher vacancies to fill for the 2015-2016 school year), the outreach to inexperienced, non-credentialed, unqualified teachers to fill the void increases (with the only other logical option being an increase in class size). At a time when teachers are being called upon to do more and more, this not only significantly decreases the opportunities for our children to obtain the quality education they deserve, but also betrays the fundamental social compact, codified in the No Child Left Behind Act ("NCLB"), to place a high quality teacher in every classroom (see, *infra*, p. 15). These are outcomes that *Amicus* finds wholly unacceptable. As Randi Weingarten, the President of the AFT, noted in the October 27, 2014 issue of TIME Magazine:

> Yes, there is a real problem facing America's teaching profession but it has nothing to do with tenure. The problem

> is in recruiting, retaining and supporting our teachers, especially at the hardest-to-staff schools.
>
> Every time we lose a teacher, it costs us. Literally. More than one-third of teachers leave before they've taught for five years. The National Commission on Teaching and America's Future estimates that the high rate of teacher turnover nationwide costs more than $7 billion per year. This only exacerbates the greatest challenge facing our public schools: underfunding and inequity.
>
> ….
>
> So, how do we recruit, retain and support great teachers? Certainly not by bashing them. There is no evidence that wiping out due process –more widely known as tenure – for K-12 teachers is going to make a more effective teaching corps. In fact it will do the opposite. We know that states with the highest academic performance have the strongest due process protections for teachers *[see graph, infra, p.15]*. Research shows that our most at-risk kids need more experienced teachers. But why would these teachers stay at schools with few tools, little support and no ability to voice their concerns?[12]

One final point merits emphasis: tenure —the principal point of contention here —is not and does not ensure "lifetime employment," the yarn spun by Plaintiffs. Rather, tenure provides some assurance that a teacher who has passed muster at the probationary level is thereafter afforded due process in terms, essentially, of notice of the charges that have been leveled and a reasonable opportunity to address them before an impartial adjudicator. That said, the question often is posed by those

---

[12] (Weingarten, *Randi Weingarten Responds to TIME's Cover, TIME, Teacher Tenure - Opinion Education* (October 27, 2014) <http://time.com/3541200/randi-weingarten-time-cover/> [as of Sept. 13, 2015].)

uncomfortable with due process, why is that necessary or appropriate? The answer is succinctly illustrated in the TIME magazine feature just cited:

> Due process means the teacher at a high-poverty, low-resourced school can fight for new schoolbooks or needed services for her kids. It's a shield for the teacher who tells her boss that her special needs students deserve art and music. It's a safeguard for the teacher who wants to get creative and use "Mean Girls" to explain the power dynamics in Julius Caesar. It's what teachers—who aren't paid enough or praised enough—need to do their jobs well.[13]

POINT I

THE DECISION BELOW DIRECTLY HARMS THE ABILITY TO ATTRACT AND RETAIN HIGH QUALITY TEACHERS

A high quality educational system is essential to the future growth and development of our country and its children, and teachers are, obviously, a critical factor. This has never been more true than today, when the California and national economies are driven more and more by knowledge and expertise.[14] Increasingly, computers are taking over the tasks that involve merely following rules (*e.g.*, filing, typing, assembly line processing), leaving today's workers to engage in higher level skills that involve problem solving and unscripted communication. To compete in this knowledge-based global economy, our students must be able to think critically, solve problems by asking the right questions, influence others

---

[13] (*Id.*)

[14] (Murnane, Sawhill & Snow, Literacy Challenges for the Twenty-First Century: Introducing the Issue, (Fall 2012) 22 Literacy Challenges for the Twenty-First Century, no. 2 at pp. 3,4 ("Literacy Challenges").)

though collaboration and leadership, take risks, and adapt to change.[15] Students need to accomplish more than simply having the ability to read and write; they must also be able to manage ever-increasing-amounts of information, evaluate arguments and learn totally new subjects.[16] To keep pace with these needs, the art of teaching itself has changed, now requiring not only a deep knowledge of the subject matter being taught but also the ability to ask the right questions of students so as to be able to redirect their investigation of the subject matter, thereby supporting the development of a deeper understanding.[17] Indeed, the Common Core Learning Standards (the "Common Core") so widely employed today represent a colossal shift not only in the content of instruction but also the pacing of delivery and instructional methods utilized. Properly implementing the Common Core—or, for that matter, any new set of standards—and preparing students for success in a knowledge-based economy require, among other things, that teachers work more cohesively, both within grades and across grades, to ensure consistent instruction so as to maximize student potential.[18]

---

[15] (*Id.* at 4-6.)

[16] (*Id.* at 6-8.)

[17] (*Id.* at 8-10.)

[18] (*Id.* at 8-10; see also Jackson & Bruegmann, *Teaching Students And Teaching Each Other* (2009) Working Paper 15202, Cambridge: National Bureau of Economics Research, pp. 21-23.)

These realities, together with the challenges faced by many California students, create a far more complicated role for teachers than existed in the past.[19] Teachers need to be better equipped to meet these demands, making it critical that the State of California, as well as the individual school districts within California, take the necessary steps to attract, support and retain increasingly higher quality teachers. Instead, Plaintiffs here seek to strip teachers of fundamental protections, thereby making the profession less appealing.

As Susan Moore Johnson, Professor of Education at Harvard University and Director of the Project on the Next Generation of Teachers, testified during the trial, there are three key factors in teacher retention: (i) fair, knowledgeable principals who encourage teachers to participate in decision-making in their schools; (ii) colleagues who are helpful and engaging, share best practices and provide useful feedback; and (iii) a school culture that enables everyone to focus on teaching and learning.[20] Prof. Moore Johnson explained that fairness is one of the most important factors for teachers. Educators want to be assured that teaching assignments, evaluation processes and disciplinary processes, among other things, are executed fairly. The due process protections afforded to

[19] (Literacy Challenges, at pp. 8-10.)

[20] (Reporter's Transcript (RT) 4416:3-14 [Johnson].)

teachers provide this sense of fairness. Teachers rely on these protections for assurances that they cannot be fired summarily based on inappropriate non-pedagogical factors, thereby allowing them to focus on teaching and learning.[21] This is particularly true in high-poverty schools, where teachers are charged with the education of students who face myriad obstacles to achievement—most of which (2/3 or more) arise outside of the school setting[22]—and, as a result may not perform as well on standardized assessments as other students. Due process protections, including tenure, allow dedicated, high quality teachers to know that they can work in these schools without fear of unwarranted repercussions.[23]

Instead of receiving the necessary support, teachers in California and across the country are confronted with criticism and condemnation. The commencement of this litigation, and certainly the decision below, was the precursor to attacks on the rights of teachers across the country.[24] As AFT

---

[21] (RT 4450: 3-8 [Johnson]. See also, *North Carolina Association of Educators, Inc.*, *supra*, 2015 WL 3466263 at *24.)

[22] (See, e.g., Rothstein, *How To Fix Our Schools*. Economic Policy Institute (2010) <http://www.epi.org/publication/ib286/> [as of Sept. 15, 2015] ("Decades of social science research have demonstrated that differences in the quality of schools can explain about one-third of the variation in achievement. But the other two-thirds is attributable to non-school factors.").)

[23] (Kahlenberg, *Tenure: How Due Process Protects Teachers And Students* (2015) American Educator 39.2 at 6-8.)

[24] (See fn. 7, *supra*.)

President Weingarten stated in a recent letter to the New York Times editor, "[w]e have always asked teachers to be a combination of Albert Einstein, Mother Teresa, Mom and Dad. Now, we judge them by a faulty, narrow measure—one standardized test in English and one in math—and then blame them for not being saviors."[25] Educators have been hit with a barrage of new mandates but given little or no support or training to make them work. Now, on top of all that, we are looking to eliminate any job protections that may have existed. Teachers can no longer be confident that they will not be summarily dismissed for reasons that might have nothing to do with their instructional performance. Prior to the instant litigation, teachers did not have to worry about due process protections; they could, at the very least, assume that this was one of the benefits of their work provided that they acted appropriately.[26] That is no longer the case.

Yet, job security is a key policy choice in a school district's ability to recruit and retain highly qualified teachers.[27] Indeed, as explained during the trial by Dr. Jesse Rothstein, labor economist and Assoc. Professor of Public Policy at the University of California, Berkeley, without the due process protections afforded by the statutes at issue here, districts would be

---

[25] (*The Teacher Shortage*, The New York Times (Aug. 16, 2015) p. SR8.)

[26] (RT 4450: 3-8 [Johnson].)

[27] (RT 5917:6-17, 6236:2-7 [Rothstein].)

required to pay higher salaries to compensate for the risk of arbitrarily losing one's job.[28] This is particularly true in today's politically charged climate where teachers are under heightened scrutiny and critique. Absent tenure, the politically-connected parents (not to mention the media, philanthropists or other so-called education reformers) can exert irresistible influence on a supervisor to act in ways that are not in the best interest of children, particularly given the current pressure to raise test scores by any means necessary. Likewise, in this polarized climate, exposing students to both sides of controversial subjects in an effort to expand their critical thinking skills would become an equally risky proposition for teachers.

Cumulatively, the efforts to obliterate the rights of teachers, the lack of respect, insufficient compensation and increasing regulatory oversight have resulted not only in the demoralization of educators but also a nationwide teacher shortage.[29] Nowhere is this shortage more striking than in California. The California Department of Education estimated in advance of the 2015-2016 school year that more than 21,000 teachers

---

[28] (RT 5916:20-5917:17 [Rothstein].)

[29] (See, Rich, *Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional),* The New York Times (Aug. 9, 2015) <http://www.nytimes.com/2015/08/10/us/teacher-shortages-spur-a-nationwide-hiring-scramble-credentials-optional.html> [as of Aug. 31, 2015].)

would be needed in California.[30] The number of new teacher credentials issued in California, however, has decreased by over 25% since the 2009 school year and enrollment in teacher preparation programs in California has dropped by more than 55% since 2008.[31]

The impact of this teacher shortage can only mean two things: (i) standards for entering the profession will be lowered; and/or (ii) class sizes will increase. As Dr. Rothstein testified, "if the terms of employment are not attractive enough to bring good people into the profession, we'll have to hire teachers on emergency credentials or other people who don't meet…the desired qualifications."[32]

This is precisely what is transpiring in California and a legitimate policy consideration for the Legislature in setting the terms and conditions of teacher employment. In 2013-14 (the last year for which data is available), nearly 25% of all new teaching credentials issued in California were for internships, allowing candidates to work as full-time teachers while enrolled in education courses (*i.e.*, prior to receiving full

---

[30] (<http://dq.cde.ca.gov/dataquest/TchHires1.asp?RptYear=2015-16&TheRpt=TchHires&Submit=1.> [as of Aug. 31, 2015].)

[31] (CA Commission on Teacher Credentialing, Teacher Supply in CA, A report to the Legislature, Annual Report 2013-2014 (Teacher Supply in CA), pp. 4, 17 <http://www.ctc.ca.gov/reports/TS-2013-2014-AnnualRpt.pdf> [as of Aug. 31, 2015].)

[32] (RT 5918:6-11 [Rothstein].)

certification).[33] Likewise, the number of emergency temporary permits that allow non-credentialed staff members to fill teaching posts increased by more than 36% from 2012 to 2013.[34] At a minimum, federal law defines "highly qualified" teachers as those with a college degree, teaching certificate and competence in their subject (demonstrated by having a major, an advanced certificate or passing a test in a subject).[35] As discussed *supra*, however, effective teaching in the current educational climate requires much more. Teachers are being asked to redefine their practice in accordance with a knowledge-based economy by engaging in more collaborative teaching, possessing a deeper knowledge of a subject area so as to facilitate inquiry-based learning and become a teacher of literacy, regardless of their content area.[36] Such an arduous task requires teachers to have significant content area knowledge as well as the classroom management skills necessary to enable students to work in groups, utilizing the scientific method of inquiry to support students in becoming critical thinkers and problem solvers while also fostering creativity and intellectual

[33] (Teacher Supply in CA at 5-6.)

[34] (*Id.* at 22.)

[35] (34 CFR § 200.56.)

[36] (Literacy Challenges, generally.)

curiosity.[37] When teachers lack the basic qualifications required by the State, how can they be expected to achieve this mandate, and who would take on the task with no protection against arbitrary employment action or inducement for greater and continuing service?

Increased class sizes have also been shown to have a negative impact on student achievement.[38] It is unsurprising that students in smaller classes are more engaged and suffer from less disruption.[39] Small classes provide increased opportunities for inter-personal interactions between teachers and students.[40] These factors, both academic and social engagement, have

---

[37] (Partnership for 21st Century Skills, Learning For The 21st Century, A Report And MILE Guide for 21st Century Skills (2003), pp. 8-9.)

[38] (See, e.g., Mosteller, *The Tennessee Study Of Class Size In The Early School Grades*, The Future Of Children, 5.2 (1995) [finding smaller classes produced substantial improvement in early learning, particularly for minority children] pp. 117-23; Achilles, *et al.*, Class-size Policy: The Star Experiment and Related Class-Size Studies, NCPEA Policy Brief, 1.2 (2012) p. 2 [finding small class sizes in early elementary school provided short and long-term benefits for students, with increased benefits for students who are economically disadvantaged, male or minority]; Schanzenbach, *Does Class Size Matter?*, National Education Policy Center Policy Brief (2014) [summarizing the academic literature on the impact of class size and finding impact on a variety of student outcomes, including student test scores and raising the achievement levels of economically disadvantaged and minority children].)

[39] (Finn, Pannozzo & Achilles, *The Why's of Class Size: Student Behavior in Small Classes*, Review of Educational Research (Fall 2003) p. 351 <http://rer.sagepub.com/content/73/3/321.full.pdf+html> [as of Sept. 4, 2015].)

[40] (*Id.*)

"consistent, strong correlations with academic performance."[41] Indeed, in perhaps the most influential study on the impact of class size, the Student Teacher Achievement Ratio ("STAR") study in Tennessee, students who were randomly assigned to smaller classes outperformed their peers who were randomly assigned to larger classes by about 0.22 standard deviations over four years—the equivalent of approximately three additional months of schooling.[42] Significantly, students from traditionally disadvantaged backgrounds—the very students Plaintiffs purport to represent—demonstrated some of the largest positive impacts after extended exposure to smaller classes, particularly in the upper grades.[43]

Thus, even assuming, *arguendo*, the Superior Court was correct in its assertion that 1-3% of California's teachers are ineffective, (Judgment of Judge Rolf M. Treu dated August 6, 2014, the "Decision", at 8) which the AFT disputes (see, *infra*, p. 27), the impact of that 1-3% must be considered in the context of the consequences of stripping the teaching

---

[41] (*Id.*, at 323.)

[42] (Krueger, *Experimental Estimates of Education Production Functions* (May 1999) 114(2) The Quarterly Journal of Economics, 497–532.)

[43] (Biddle & Berliner, *What Research Says About Small Classes and Their Effects*, pp. 10-11, <http://www.wested.org/online_pubs/small_classes.pdf> [as of Sept. 4, 2015].)

profession of all protections and thus creating a recruitment and retention crisis that would have significant impact on *all* children across the State.

Further weight for this balance is found in states with strong teacher protections on average achieving higher scores on the National Assessment of Educational Progress ("NAEP") than those with little or no teacher protections. The NAEP is the largest nationally representative and continuing assessment of student achievement in the United States.[44] Because the NAEP is administered uniformly, the results serve as a common metric for all states.[45]

To compare the impact, if any, of the protections for teachers on student performance, data on such protections, obtained from the Education Commission of the States website, was reviewed and analyzed.[46] States were sorted on the basis of three criteria: status of collective bargaining, tenure laws and whether seniority was a requirement in reduction in force decisions. States were then identified as having either strong, weak or moderate laws that govern these teacher protections based on a totality of the circumstances. Generally, states were characterized as "strong" if they

---

[44] (National Center for Education Statistics, NAEP Overview <http://nces.ed.gov/nationsreportcard/about/> [as of Sept. 9, 2015].)

[45] (*Id.*)

[46] (State Legislation Database, <http://www.ecs.org/html/statesTerritories/state_policy_developments.htm> [as of Sept. 9, 2015].)

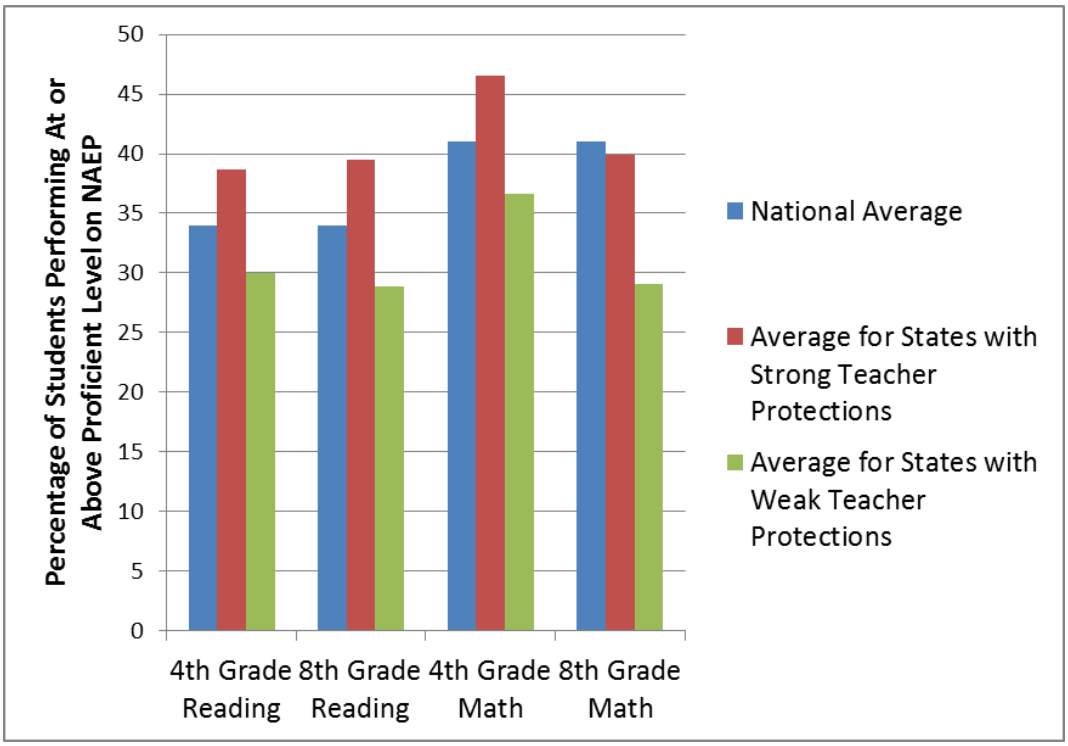
permitted collective bargaining, provided due process protections for tenured teachers and permitted or required the use of seniority-based layoffs in the event of a reduction in force. States were characterized as "weak" if collective bargaining was illegal, due process protections were limited or non-existent and/or seniority-based layoffs were not permitted. States that fell in the middle were characterized as "moderate." The 14 states[47] that were identified as "strong" and the 11 states[48] that were identified as "weak" were chosen for the comparison (excluding any states that implemented changes in the relevant laws after 2012).

On average, those states with stronger protections in place are, as the graph below suggests, actually more likely to have a higher percentage of students achieving proficient status on the NAEP, with some individual states outperforming the national average by 10% or more, while those with weak protections in place are more likely to have lower than average

[47] The 14 states identified as having "strong" protections for teachers are Connecticut, Hawaii, Idaho, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, South Dakota, Vermont and West Virginia.

[48] The 11 states identified as having "weak" protections for teachers are Georgia, Mississippi, South Carolina, Texas, Virginia, Arizona, Arkansas, Florida, Louisiana, Nevada and Tennessee.

student results on the NAEP, with some individual states falling behind the national average by more than 10%. [49]



These comparisons do not consider the myriad factors that impact student achievement and do not purport to demonstrate a causal link between due process protections and increased test scores. Importantly, however, the comparisons add considerable doubt to the already dubious notion that due process protections cause lower student achievement, as

[49] Appendix A sets forth the complete data set used to calculate the averages represented in the above graph, including a description of the protections in place in each state and the statewide average for each NAEP subtest (4th grade reading, 4th grade math, 8th grade reading and 8th grade math). For convenience, those states where the percentage of students at or above the proficient level exceed the national average are highlighted in green while those that fall below the national average are highlighted in yellow.

Plaintiffs would have this Court believe.[50] Instead, they suggest that stripping educators of supports and due process is the wrong remedy to the very legitimate issue of how to ensure all students, especially those at the center of this lawsuit, have qualified educators

The job of a teacher is becoming increasingly difficult. As indicated above, gone are the days of the three R's. Instead, teachers today are asked to have both a wide and deep knowledge base such that they can facilitate inquiry-based learning, thereby fostering intellectual curiosity within their students. They are required to accomplish this task in an environment of constant scrutiny and criticism. Yet, rather than support and admire those who have chosen to shape the next generation, we charge teachers with mitigating the negative impacts of all of society's ills—racism, poverty, hunger, homelessness, to name but a few and all of which have been demonstrated to have a far greater impact on student achievement than teacher quality[51]—while we fail to provide them the necessary funding and support to facilitate student achievement. Then, when scores on a single standardized test fail to meet our expectations who do we blame? Teachers. We claim they are not worthy, we strip them of their rights and we vilify them. It should come as no surprise that there are increasingly fewer

[50] Compare, for example, the data in Appendix A pertaining to Texas and Louisiana, with Minnesota and Massachusetts, or Arizona with Nevada.

[51] (See, Rothstein, fn. 22 *supra*.)

people looking to enter this once universally deemed noble profession. It is time we restore educators to the respected status they deserve, beginning with legislators, other elected officials, employee representatives and families making policy decisions that are based in research and that provide the job security necessary to allow teachers to focus on the task at hand—namely teaching our children.

POINT II

SCHOOL DISTRICTS ALREADY HAVE THE ABILITY TO REMOVE INEFFECTIVE TENURED TEACHERS

Further complicating the policy and political landscape of the issues raised here is the fact that Plaintiffs' stated public purpose for invaliding the laws – the need to remove ineffective teachers – is already provided for in the existing laws. In fact, the trial record demonstrates that when the administrators of the Los Angeles Unified School District ("LAUSD") began to seriously scrutinize tenure determinations, the number of teachers granted tenure dropped almost 50%[52] and, similarly, when it began to enforce discipline, the rate of dismissals increased almost tenfold.[53] The conclusion thus is compelled that if vice there be it lies, at least primarily,

[52] (RT 771:6-15; 774:1-12 [Deasy].)

[53] (RT 774:23-775:15 [Deasy].)

with district administrators, whose responsibility it is to hire, discipline and fire.

Plaintiffs attempt to mask this fact by their politically infused use of the word "tenure," which, the way they use it, is a misnomer. It is not a guarantee of lifetime employment or even employment for a term of years, as the Superior Court presupposes. It is, instead, the shorthand term used to describe an aspect of employment –*viz.*, the right to due process. It simply means that teachers who have successfully navigated a prescribed probationary term and then are found qualified are thereafter entitled to the due process right to notice of charges and an opportunity to be heard before an impartial adjudicator prior to being discharged. Thus, however long a teacher's post-probationary employment history may be, he or she may be discharged where a disciplinary proceeding finally concludes that removal is warranted. That critical point, that there are procedures already in place, short of the abolition of tenure, to accomplish the goal of dismissal of "ineffective" teachers was fatally missed below.

That Plaintiffs believe that eliminating due process will make the work of school administrators easier and, thus, more likely to be done properly, is not a basis for voiding legislatively enacted policies. This tension between those seeking an excuse or a path of least resistance for administrators who fail to avail themselves of existing statutory authority and the rights of teachers is not novel. Most recently, in *Elliot v. Board of*

School Trustees of Madison Consol. Schools, (March 12, 2015, No. 1:13-CV-319-WTL-DML) 2015 WL 1125022, *16-17, *motion to certify appeal granted,* (May 13, 2015, No. 1:13-CV-319-WTL-DML) 2015 WL 2341226, a federal district court explicitly held that a state could not justify striping teachers of a key aspect of tenure in the name of getting rid of allegedly ineffective teachers because, *inter alia*, administrators already had the ability to remove ineffective teachers through utilizing the statutory due process.

There, the Court was confronted with a Contracts Clause challenge to legislative action adopting a reduction in force statute that permitted removing tenured teachers ahead of untenured teachers based upon perceived merit. The state defended the impairment on the ground that Indiana had a legitimate right to rid itself of poor performing teachers. The *Elliott* court rejected the claim, holding:

> … Specifically, Indiana was concerned that retaining poor-performing, tenured teachers would have a negative impact on student achievement…. Thus, when forced to reduce its workforce, Indiana wanted school boards to be able to terminate the worst teachers—regardless of their tenure status.
>
> The problem is that school boards *have always had the ability to fire poor-performing tenured teachers; in fact, school boards did not—indeed, they still do not—have to wait for a RIF in order to terminate poor-performing tenured teachers.* …a tenured teacher's contract could be cancelled on grounds of immorality, insubordination, neglect of duty, incompetence, a justifiable decrease in the number of teaching positions, a conviction, or for a good and just cause.

> [Citation.] Indeed, the Supreme Court noted that these reasons "cover every conceivable basis for such action growing out of a deficient performance of the obligations undertaken by the teacher, and diminution of the school requirements." *Brand*, 303 U.S. at 108.

Id. at *11(emphasis added).[54]

In lockstep with the *Elliot* analysis is the decision of the Court of Appeals of North Carolina this past June invalidating legislation designed to abolish tenure in that State. In *North Carolina Ass'n of Educators, Inc. v. State*, (June 2, 2015, No. COA14-998), __S.E. 2d__ [2015 WL 3466263], tenured teachers challenged the abolition of tenure, in part because it was not reasonable and necessary to improving the educational experience for North Carolina's public school children. The record, there, "was replete with less drastic available alternatives" including expanding the definition of "inadequate performance" or attempting to create greater consistency in the tenure determination and disciplinary removal processes.

[54] Indeed, California case law suggests that the Contract Clause of the State Constitution may provide similar protection to California teachers. It has been held, that while there may be no protected right to remain in office or to the tenure of an office the term of which is not constitutionally prescribed (e.g., *Risley v. Board of Civil Service Com'rs of City of Los Angeles* (1943) 60 Cal. App. 2d 32); "public employment gives rise to certain obligations which are protected by the contract clause of the [California] Constitution…." (*California League of City Employee Associations v. Palos Verdes Library District* (1978) 87 Cal. App. 3d 136 [quoting *Kern v. City of Long Beach* (1947) 29 Cal. 2d 848, 852-853].) The Due Process Clause of the United States Constitution may also provide further independent protections. (See generally *Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532.)

The parallel between the policy dispute in *Elliot* and *North Carolina Ass'n of Educators, Inc*. and that presented here is striking. It is heightened by the fact that, as in *Elliot* and *North Carolina*, California's Legislature has recently addressed the disciplinary process, mindful of claims that that those procedures were viewed by some as too protracted to facilitate addressing the issue of teacher quality (long a vital priority for the AFT). Indeed, because opinions concerning the most effective way to educate our children are many, varied, vociferously expressed and, seemingly, in constant flux, the California Legislature has, since the initial enactment of the tenure-due process system in 1921, repeatedly addressed such concerns, particularly in respect of the issues that underlie the Challenged Statutes.[55] The latest review by the California Legislature generated a significant overhaul of the processes for dismissing so-called ineffective teachers, streamlining and abbreviating the disciplinary hearing and adjudication process for the dismissal of "tenured" teachers for "unsatisfactory performance," and requiring the State to bear half the school districts' cost where dismissal is sustained (thus mitigating the claim of a costly and burdensome process). Apt, therefore, is the *Elliott* court's conclusion that the concerns and changes there (and here) expressed were "not necessary to

[55] (See e.g., *Wilson*, *supra*, 75 Cal. App. 4th at 1129-33. See also Intervenors-Appellants Main Brief at 22-24.)

improving the goal of improving teacher quality, as there are already adequate measures to address the concerns …." *Elliot, supra* at *13.

Once that point is recognized, the proper remedy is plain (as it has been in LAUSD, with significant positive results): enforce, where warranted, the challenged disciplinary statutes and regulations (*Id*. at *22), but do not embark upon an inappropriate and legally baseless onslaught on teachers and the very legislation designed to secure precisely the remedy that all parties to this litigation earnestly seek—quality teachers for quality schools in an appropriate environment to make possible a sound education for our children.

Even more to the point, the bedrock issue tendered is a policy dispute. Plaintiffs here and the Superior Court below believe that the number and impact of so-called "grossly ineffective" teachers—an undefined and unsupported accusation that was the centerpiece of the decision below[56]—was such as to warrant sweeping away historic due process protections and legislative enactments designed to advance educational excellence and other concerns. By contrast, the *Elliott* decision

[56] The record reveals that the sole testimonial or other support for that conclusion was hollow; the cited testimony did not state whether (or what percentage of) the cited "ineffective" teachers were probationary as contrasted with tenured, where in California the statistic focused, or even whether the figure even focused on California at all. (RT 8480:20-21 [Berliner]; see also <http://www.slate.com/articles/business/moneybox/2014/06/judge_strikes_down_california_s_teacher_tenure_laws_a_made_up_statistic.html)> [as of Sept. 13, 2015].)

and the writings of leading educators demonstrate a sharply differing view that the effective yet judicious enforcement by administrators of existing and carefully considered disciplinary standards and procedures can achieve the same result without scuttling efforts to attract and retain qualified teachers. This is a classic policy question best suited for the Legislature.

POINT III

THE SUPERIOR COURT IMPERMISSIBLY INTRUDED UPON NON-JUSTICIABLE ISSUES

The appropriate policy decisions to tackle the multifaceted challenge of improving our schools and student achievement are just that—policy decisions that require input from academic experts, legislators, teachers, administrators, parents and other similar stakeholders. The Superior Court's ruling both dramatically oversimplifies the steps required to tackle this challenge and, as case law makes clear, improperly treads upon the core of legislative and executive policy making.[57] To be sure, true equal protection claims, like those ostensibly relied upon by the Superior Court, fall within the ambit of the court system. But when the substance of the Superior Court's decision is carefully considered and parsed—relying not

[57] (See *Marine Forests Soc. v. California Coastal Com'n.* (2005) 36 Cal. 4th 1, 25 ["The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function."] [Citation.])

merely on a few buzz words comprising its shaky legal foundations—it becomes evident that the Court strayed far beyond the careful balance of governmental powers animating the political question doctrine.

The Decision below was predicated upon a finding that the equal protection strictures of the California Constitution were abridged. However, the Decision is flawed in at least one fundamental respect. As held repeatedly by the courts and recently confirmed by another panel in this District, equal protection applies only where two groups, similarly situated, are treated differently:

> [t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.[58]

Yet the Superior Court can point to no classification created by the Challenged Statutes—which apply equally to all covered districts and do not themselves create any discernable categories or classes.[59] As explained herein, the Decision below itself is premised upon the Court's conclusion that "*all*" California schools in covered school districts suffered from

---

[58] (*Marzec v. California Public Employees Retirement System* (2015) 236 Cal. App. 4th 889, 917 [finding that plaintiffs in that case were not similarly situated and relying on *People v. Brown* (2012) 54 Cal. 4th 314, 328].)

[59] The Challenged Statutes cover only those districts with more than 250 students. While they certainly would apply to most of the districts in California, any references herein to the application of the Challenged Statutes refers only to those covered districts.

"grossly ineffective" teachers; it is not based upon classifications. The recognized undifferentiated application of the Challenged Statutes is the critical distinction between this case and those relied upon by the court below.

To reach its faulty holding that the Challenged Statutes violate California's equal protection guarantees, the Superior Court misapplied cases where the challenged statutes demonstrated facially apparent disparities between districts. In *Serrano I and Serrano II,*[60] the California Supreme Court held that the State's school funding system violated equal protection guarantees because it allowed "the availability of educational opportunity to vary as a function of the taxable property within individual school districts." *Serrano II*, at 768. Adhering to the proper limits of judicial review, *Serrano I* and *Serrano II* sought only to eliminate the disparities caused by the funding system's explicit reliance on a community's level of wealth to determine levels of education funding, not to prescribe an amount of funding the courts believed would be adequate. Neither in *Serrano I* or *Serrano II* did the Court delve into what level of education funding was either desirable or adequate, generally. Rather, the equal protection issue entertained by the *Serrano* Courts was whether the reliance on property values to determine the bulk of education funding

[60] (*Serrano v. Priest* (1971) 5 Cal. 3d 584 (*Serrano I*) and *Serrano v. Priest* (1976) 18 Cal. 3d 728 (*Serrano II*)).

resulted in a disparity of funding based upon the wealth of the residents in a district[61]

Contrast the decisions in *Serrano I* and *Serrano II*, addressing funding inequality, with that of Third District Court in *Grossmont Union High Sch. Dist. v. California Dep't of Educ.*,[62] and the distinction becomes clear:

> The allegation that the Legislature is not providing enough funding for special education is not a basis for a lawsuit. How much money to collect and how to spend it are matters entrusted to the Legislature, not the judiciary . . . . If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.[63]

Similarly, in *Butt v. State of California*,[64] the last of the cases relied upon by the Superior Court, the California Supreme Court held that a school district's plan to reduce the school year length due to funding shortfalls violated equal protection guarantees not because a shorter year

---

[61] (*Serrano I*, *supra*, 5 Cal. 3d at 614-15; *Serrano II*, *supra*, 18 Cal. 3d at 766.)

[62] (*Grossmont Union High Sch. Dist. v. California Dep't of Educ.* (2008) 169 Cal. App. 4th 869 (*Grossmont*).)

[63] (*Id.* at 886 [holding that decision to reduce special education funding entailed a policy claim properly resolved by the legislature, not a constitutional claim for judicial review].)

[64] (*Butt v. State of California* (1992) 4 Cal. 4th 668.)

was *per se* an ill-advised policy decision, but instead because it would cause a disparity between that school district and others, which were able to complete a full year. *Id.* at 686. The *Butt* Court did not purport to assess whether the overall length of the school year was either adequate or advisable. The Court limited the analysis to whether it was a violation of rights that one district should be forced to shorten the year due to lack of funding while others were spared that burden.

In contrast, here, the Superior Court expressly passed judgment on the desirability or, in the Court's view, lack thereof, of each of three substantive policies—probation, due process and seniority-based layoffs—without any reference to a legislative classification or category created by the policies themselves, let alone a finding that the statutes caused any disparity between one stated group of school districts or students and another. Even if the Court had identified a specific inequality, the method by which any such inequality is addressed is a policy determination that should be made by other branches of government with relevant stakeholders. There is no indication in the record or the Decision that invalidating the Challenged Statutes would have any direct impact on the vaguely stated inequities the Court relied upon, let a alone that such act of judicial legislation is the only course. Put simply, the Court confused "equality" of education with its own view of "quality" education. Indeed, the crux of the decision is that the lower court believes the Challenged

Statutes are generally unwise and harm all children. The Court frames the issue in overly simplified, but clear terms:

> [the Court] must decide whether the Challenged Statutes cause the potential and/or unreasonable exposure of grossly ineffective teachers to *all* California students in general and to minority and/or low income students in particular, in violation of the equal protection clause of the California Constitution.

Decision at 4. (Emphasis added)

The first component of this inquiry, which drives the rest, expressly invites the Court to ask whether legislative policies are wise, not whether they distinguish between groups or create suspect classes. The issue explicitly asks whether ineffective teachers harm "all California students in general." While Plaintiffs have attempted (baselessly) to frame this as a disparity issue; the Superior Court has turned it into a concern for the perceived quality of education received by "all California students" in covered schools. That is not a constitutionally-protected equal protection concern. Moreover, none of the Challenged Statutes address where a teacher is assigned, hired or able to transfer. That is a local administrative prerogative. It is local administrative policies and procedures that determine where any given teacher actually teaches, not the Challenged Statutes. Yet the Court does not even consider those policies.

Similarly, in its analysis of the policy providing for a two-year probationary period, the Court simply concludes that that policy results in "grossly ineffective" teachers (a term conveniently left undefined) being

more likely to be assigned to a higher need school without ever explaining its *ipse dixit*, how these statutes make that more likely. The Court does not even attempt this connective analysis in assessing the Statutes. Instead, the Court uses qualitative, policy-making language at every step.

The resolution of the policy disputes discussed *supra* were not for the Superior Court below; rather, they are legislative prerogative under traditional separation of powers principles:

> Such a resolution of competing goals is precisely the sort that is best left to the legislative process. The courts may not gainsay the wisdom of such a legislative resolution where, as here, it is rationally based. [Citation].[65]

Stated otherwise:

> It is the proper role of the Legislature, not the court, to fashion laws that serve competing public policies. The legislative process involves setting priorities, making difficult decisions, making imperfect decisions and approaching problems incrementally, and rational basis analysis does not require that a legislature take the ideal or best approach. [Citations.][66]

By encroaching upon these legislative prerogatives, the Superior Court violated the "political question" doctrine. As case law makes clear,

---

[65] (*Rittenband v. Cory* (1984) 159 Cal. App. 3d 410, 432. See also *Superior Court v. County of Mendocino* (1996) 13 Cal. 4th 45, 53 (*Mendocino*); *Altariste v. Cesar's Exterior Designs, Inc*. (2010) 183 Cal. App. 4th 656, 672 (*Altariste*) ["[c]ourts may not evaluate the desirability of the policies embodied in legislation" and the "choice among competing policy considerations in enacting laws is a legislative function"].)

[66] (*In re Marriage Cases* (2006) 49 Cal. Rptr. 3d 675, 725, *reversed on other grounds*, (2008) 43 Cal. 4th 757.)

the political question doctrine "compels dismissal of a lawsuit when complete deference to the role of the legislative or executive branch is required and there is nothing upon which a court can adjudicate without impermissibly intruding upon the authority of another branch of government."[67] At every step of its inquiry, the Superior Court overreached into qualitative policy-making.

The Superior Court viewed its task as being a qualitative analysis of the educational system on one specific issue, not whether a particular district or districts fell fundamentally below practices prevailing in the remainder of the State. Instead, the Court stated at the outset of its decision that it would "… directly assess how the Challenged Statutes affect the educational experience" generally. Decision, at 5. But setting overall education policy is the responsibility of the legislative branch, which upon taking that measure may amend, modify, or repeal in its ongoing efforts to calibrate the policies that make for a vibrant public school system and increased student achievement.

This is demonstrated by the Superior Court's own analysis. The Court does not conclude that due process protections are either inherently bad, illegal or different in any particular district. In fact, the Court admits

[67] (*National Tax-Limitation Committee v. Schwarzenegger* (2003) 8 Cal. Rptr. 3d 4, 17; see, *Rippon v. Bowen* (2008) 160 Cal. App. 4th 1308, 1320.)

that some due process protection is required by law. *See* Decision, at 12. It is the Court's view, however, that the current level of protection is more than needed, and something closer to the due process protections enjoyed by non-pedagogical staff would strike a better balance between the "protection of reasonable due process rights of teachers" and "protecting the rights of children to constitutionally mandated equal educational opportunities." *Id.* at 13. Even in this overly simplified construct, the analysis plainly contemplates the balancing of competing policies or interests within a spectrum of lawful options, an analysis properly within the domain of the Legislature. [68]

Striking the appropriate balance between the benefits of due process protections for teachers—a critical element to attracting and retaining teachers, particularly in a time of shortage (*see* discussion *supra*, at pp. 10-13)—and the time it takes to accurately identify ineffective teachers and the real possibility that, with additional support, struggling teachers can succeed, is precisely the type of practical and politically complex question upon which a court should be particularly hesitant to intrude.

Similarly, in its discussion of the California probationary period, the Court did not reject the notion of a probationary period nor find that having a probationary period violates law. Rather, the Court agreed with the

[68] (See cases cited at fn. 56, *supra.*)

personal view of one of the State Defendants' witnesses, quoting that "it would *theoretically* be great" to have a longer period. Decision, at 9 (emphasis added). The Court further relied upon State Defendants' experts' testimony that a three to five-year period would be "better." *Id.*, at 10. Finally, the Court looked to the practices of other states as a guide, finding that five states, including California, use a two-year period, 32 states have a three-year period and some nine states have a longer period. Thus, in the Court's view, the matter distilled to the need to properly calibrate the length of the probationary period to allow both for sufficient teacher induction and an adequate opportunity to evaluate a teacher's quality. While the competing interests and best practices identified by the Court may be a reasonable approach to policy-making, and likely had been and will again be considered by the Legislature, they are not proper subjects for judicial determination. Such details of administration, including creating policies, prioritizing issues and allocating resources, are properly left to the Legislature and elected officials of the state and local governments. As the Court held in *Grossmont*, policy questions of how much or how little of a particular policy is enough—in *Grossmont,* funding, here, length of probationary period—are "entrusted the Legislature, not the judiciary…" [69]

[69] (*Grossmont*, *supra*, 169 Cal. App. 4th at 886-87.)

Underscoring the general applicability of the Superior Court's policy analysis to all students (as opposed to any suspect class), it concludes that "both students and teacher are unfairly, unnecessarily, and for no legally cognizable reason (let alone a compelling one), disadvantaged by the current Permanent Employment Statute." Decision, at 10. The "disadvantage" referenced in the Court's conclusion is not a comparison of one group of students to another statutorily distinguished group—as would be appropriate under true equal protection analysis—but disadvantaged, in the Superior Court's view, by not having a longer state-wide probationary period. That assessment plainly intrudes into the political question of which policy is best, not which policy is equal.

The Court's review of California's seniority-based layoff statute in the final portion of its analysis is even more fraught with bald assumptions and characterization in lieu of legal analysis. The Superior Court simply does not approve of conducting economic layoffs based on a purely objective criteria such as seniority, believing that every portion of the state statutory scheme need address the comparative effectiveness of teachers and be a tool for weeding out those the Court summarily deems undesirable: the hypothetical "senior/incompetent" teacher. *See* Decision, at 14. This view was implicitly rejected by the federal district court in *Elliot*, discussed *infra*, at p. 24.

The Superior Court permits no consideration of the use of seniority rights as a means to encourage experience, which is one of the critical factors necessary to meet the needs of students who attend high-poverty schools,[70] or stability, which is an attractive and objective component of the employment package offered by the school districts. For the Court, the provision is unconstitutional because it is illogical and because seniority is the primary statutory criteria in only 10 states. The Court did not consider that school districts and teachers may, and do, establish the same system through collective bargaining. In any event, this results-driven analysis makes no mention of a suspect classification or, indeed, any classification. Teachers across the State are subject to the same rule. It also conveniently ignores substantial record evidence that California suffers from a qualified teacher shortage and that protections like seniority-based layoffs may be important to attracting candidates by infusing a sense of objective fairness into the sometimes volatile universe of local government budget-making. *See* discussion *supra* at pp. 10-13. As with the other Challenged Statutes, the needed multifaceted analysis and setting of priorities within the teacher

[70] (See, e.g., Gagnon & Mattingly, *Beginning Teachers are More Common in Rural, High-Poverty and Racially Diverse Schools* (2012) Carsey Institute, Issue Brief No. 53, pp. 2-3.

recruitment and retention process, is properly performed by the Legislature.[71]

It was not for the Superior Court to substitute its opinion in a manner that alters the substance of California's education system simply because the Court does not agree with the policy determinations that have been made. That is not the standard for preserving equal protection under law. The exceedingly difficult issues of identifying ineffective teachers, the terms and conditions of employment, how long it takes to evaluate teacher performance in a probationary period or what makes for the optimal method of terminating teachers during district-wide layoffs—as they are all applied across the State—are precisely the types of issues courts have sought to avoid; they are not judicial issues. This is a case about broadly applied political preferences, not personal constitutional harm. This Court should prudently stem the rising tide of lobbying through litigation nationwide engendered by the Superior Court's decision and re-center the debate over education policy where it properly belongs, in the legislative and executive branches of government.

[71] (See *Mendocino*, *supra*, 13 Cal. 4th at 53; *Alatriste*, *supra*, 183 Cal. App. 4th at 672.)

CONCLUSION

For the foregoing reasons, the Superior Court's decision should be reversed.

Dated: September 16, 2015 Respectfully Submittted

STROOCK & STROOCK & LAVAN LLP
STEVEN D. ATLEE
CHARLES G. MOERDLER*
ALAN M. KLINGER*
CHRISTINE E. ELLICE
BETH A. NORTON*
DINA KOLKER*
DAVID J. KAHNE*
NATHAN H. STOPPER*
and
AMERICAN FEDERATION OF
TEACHERS, AFL-CIO
DAVID STROM*

By: /s/ Steven D. Atlee
Steven D. Atlee

Attorneys for
AMERICAN FEDERATION OF
TEACHERS, AFL-CIO

* Application for leave to appear *Pro Hace Vice* pending

CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.360

The text of Amicus Curiae's Brief consists of 10,210 words as counted by the Microsoft Word program used to generate this brief.

Dated: September 16, 2015 Respectfully Submittted

STROOCK & STROOCK & LAVAN LLP
STEVEN D. ATLEE
CHARLES G. MOERDLER*
ALAN M. KLINGER*
CHRISTINE E. ELLICE
BETH A. NORTON*
DINA KOLKER*
DAVID J. KAHNE*
NATHAN H. STOPPER*
and
AMERICAN FEDERATION OF TEACHERS, AFL-CIO
DAVID STROM*

By: /s/ Steven D. Atlee
Steven D. Atlee

Attorneys for
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

* Application for leave to appear *Pro Hace Vice* pending

ADDENDUM

APPENDIX A – NAEP PROFICIENCY COMPARISON CHART

MYMOENA DAVIDS, et al. vs. THE STATE OF NEW YORK, et al. -
DECISION & ORDER

ELLIOT V. BOARD OF SCHOOL TRUSTEES OF MADISON CONSOL. SCHOOLS,
2015 WL 1125022

ELLIOT V. BOARD OF SCHOOL TRUSTEES OF MADISON CONSOL. SCHOOLS,
2015 WL 2341226

NORTH CAROLINA ASS'N OF EDUCATORS, INC. V. STATE,
2015 WL 3466263

APPENDIX A

NAEP PROFICIENCY COMPARISON CHART[1]

State	Teacher protections	NAEP Results 2013			
		4th grade reading	8th grade reading	4th grade math	8th grade math
National Average (public schools) percentage of students at or above proficient		34	34	41	34
Connecticut	Strong •Right to collectively bargain •Tenure earned after 30 months on the basis of effective practice •Tenured teachers laid off on basis set forth in CBA or board policy	43	45	45	37
Hawaii	Strong • Right to collectively bargain • Tenure earned in accordance with CBA • Tenured teachers laid off in reverse seniority order	30	28	46	32
Idaho	Strong • Right to collectively bargain • Tenure earned after 3 years • Permissible to layoff tenured teachers in reverse seniority order	33	38	40	36
Iowa	Strong • Right to collectively bargain • Tenure earned after 3 years, may be extended to a 4th year • Permissible to layoff tenured teachers in reverse seniority order	38	37	48	36

[1] Data on the teacher protections in each state was obtained from the Education Commission of the States website, State Legislation Database, available at http://www.ecs.org/html/statesTerritories/state_policy_developments.htm. NAEP performance data was obtained from the National Center for Education Statistics website, State Profiles Database, available at https://nces.ed.gov/nationsreportcard/states/

State	Teacher protections	NAEP Results 2013			
		4th grade reading	8th grade reading	4th grade math	8th grade math
Maryland	Strong • Right to collectively bargain • Tenure earned after 3 years • Permissible to layoff tenured teachers in reverse seniority order	45	42	47	37
Massachusetts	Strong • Right to collectively bargain • Tenure earned after 3 years but Supt. can award after 1 year • Currently permissible to layoff tenured teachers in reverse seniority order	47	48	58	55
Minnesota	Strong • Right to collectively bargain • Tenure earned after 3 years • Permissible to layoff tenured teachers in reverse seniority order but may be negotiated differently	41	41	59	47
New Jersey	Strong • Right to collectively bargain • Tenure earned after 4 years (beginning in 2012) provided teachers complete mentorship program and are rated effective for 2 years within 3 • Layoffs of tenured teachers required to be in reverse seniority order	42	46	49	49
New York	Strong • Right to collectively bargain • Tenure earned after 3 years upon supt. recommendation • Layoffs of tenured teachers required to be in reverse seniority order	37	35	40	32

State	Teacher protections	NAEP Results 2013			
		4th grade reading	8th grade reading	4th grade math	8th grade math
Pennsylvania	Strong • Right to collectively bargain • Tenure earned after 3 years • Layoffs of tenured teachers required to be in reverse seniority order	40	42	44	42
Rhode Island	Strong • Right to collectively bargain • Tenure earned after 3 years of effective teaching within a 5 year period • Layoffs of tenured teachers required to be in reverse seniority order	38	36	42	36
South Dakota	Strong • Right to collectively bargain • Tenure earned after 3 years • Permissible to layoff tenured teachers in reverse seniority order, but reductions in force considered a mandatory subject of bargaining	32	36	40	38
Vermont	Strong • Right to collectively bargain • Tenure earned after 2 years • Permissible to layoff tenured teachers in reverse seniority order	42	45	52	47
West Virginia	Strong • Right to collectively bargain • Tenure earned after 3 years • Layoffs of tenured teachers required to be in reverse seniority order	27	25	35	24

State	Teacher protections	NAEP Results 2013			
		4th grade reading	8th grade reading	4th grade math	8th grade math
Georgia	Weak • Collective bargaining illegal • Tenure earned after 3 years • Layoffs in reverse seniority order are prohibited	34	32	39	29
Mississippi	Weak • Collective bargaining illegal • Tenure earned after 3 years • Layoffs in reverse seniority order are prohibited	21	20	26	21
South Carolina	Weak • Collective bargaining illegal • Tenure earned after 3 years, after participation in formal induction program, then annual contracts not to exceed 4 years • Layoffs are conducted in accordance with local policy	28	29	35	31
Texas	Weak • Collective bargaining illegal • Tenure earned after 3 years, may also enter into term contracts for a period of no more than 5 years after probation and before granting tenure • Layoffs in reverse seniority order are prohibited	28	31	41	38
Virginia	Weak • Collective bargaining illegal • Tenure earned between 3 and 5 years • Layoffs may not be based *solely* on the basis of seniority	43	36	47	38
Arizona	Weak • No collective bargaining statute • Tenure earned after 3 years but teachers may not be in the lowest level of evaluation system • Layoffs in reverse seniority order are prohibited	28	28	40	31

State	Teacher protections	NAEP Results 2013			
		4th grade reading	8th grade reading	4th grade math	8th grade math
Arkansas	Weak • Right to collectively bargain • Tenure earned after 3 years but may be extended to 4 years • Layoffs are based on local policy	32	30	39	28
Florida	Weak • Right to collectively bargain • No tenure • Layoffs in reverse seniority order are prohibited	39	33	41	31
Louisiana	Weak • Right to collectively bargain • Tenure earned after 5 years, but must be rated "highly effective" for 5 of 6 years • Layoffs in reverse seniority order are prohibited, must be based on performance	23	24	26	21
Nevada	Weak • Right to collectively bargain • Tenure earned after 3 years but must be rated effective for at least 2 consecutive years • Layoffs based *solely* on reverse seniority order are prohibited, criteria may be negotiated	27	30	34	28
Tennessee	Weak • Right to collectively bargain • Tenure earned between 5 and 7 years if overall effectiveness is rated as "above expectations" or higher during the last 2 years – tenure can be taken away based on performance • Layoffs in reverse seniority order are prohibited	34	33	40	28

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 6

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, *et al.*, and JOHN KEONI WRIGHT, *et al.*,

Plaintiffs,

-against-

THE STATE OF NEW YORK, *et al.*,

Defendants,

-and-

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers; PHILIP A. CAMMARATA, MARK MAMBRETTI, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendants.

HON. PHILIP G. MINARDO

DECISION & ORDER

Index No. 101105/14

Motion Nos.[1] 3580 - 008
3581 - 009
3593 - 010
3595 - 011
3598 - 012

[1]The motions have been consolidated for purposes of disposition.

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

The following papers numbered 1 to 12 were fully submitted on the 14th day of January, 2015.

Papers Numbered

Notice of Motion to Dismiss by Defendant THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION, with Exhibits and Memorandum of Law, (dated October 28, 2014) 1

Notice of Motion to Dismiss by Intervenor-Defendant MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, with Exhibits and Memorandum of Law, (dated October 28, 2014) 2

Notice of Motion to Dismiss by Intervenor-Defendants PHILIP CAMMARATA and MARK MAMBRETTI, with Exhibits and Memorandum of Law, (dated October 23, 2014) 3

Notice of Motion to Dismiss by Intervenor-Defendants SETH COHEN, *et al.*, with Exhibits and Memorandum of Law, (dated October 27, 2014) 4

Notice of Motion to Dismiss by Defendants STATE OF NEW YORK, *et al.*, with Affirmation and Supplemental Affirmation of Assistant Attorney General Steven L. Banks, Exhibits and Memorandum of Law, (dated October 28, 2014) 5

Affirmation in Opposition of Plaintiffs MYOMENA DAVIDS, *et al.* to Defendants and Intervenor-Defendants' Motions to Dismiss, with Exhibits and Memorandum of Law, (dated December 5, 2014) 6

Affirmation in Opposition by Plaintiffs JOHN KEONI WRIGHT, *et al.*, to Defendants and Intervenors-Defendants' Motions to Dismiss, with Exhibits and Memorandum of Law, (dated December 5, 2014) 7

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

Upon the foregoing papers, the above-enumerated motions to dismiss the complaint pursuant to CPLR 3211(a)(2), (3), (7), and (10), by the defendants and intervenor-defendants in each action are denied, as hereinafter provided.

This consolidated action, brought on the behalf of certain representative public school children in the State and City of New York, seeks, *inter alia*, a declaration that various sections of the Education Law with regard to teacher tenure, teacher discipline, teacher layoffs and teacher evaluations are violative of the Education Article (Article XI, §1) of the New York State Constitution. The foregoing provides, in relevant part, that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (NY Const. Art. XI, §1). As construed by plaintiffs, the Education Article guarantees to all students in New York State a "sound basic education", which is alleged to be the

key to a promising future, insofar as it adequately prepares students with the ability to realize their potential, become productive citizens, and contribute to society. More specifically, plaintiffs argue that the State is constitutionally obligated to, *e.g.* systemically provide its pupils with the opportunity to obtain "the basic literacy, calculating, and verbal skills necessary to enable [them] to eventually function productively as civic participants capable of voting and serving on a jury" (Campaign for Fiscal Equity, Inc. v. State of New York (86 NY2d 307, 316), *i.e.*, "to speak, listen, read and write clearly and effectively in English, perform basic mathematical calculations, be knowledgeable about political, economic and social institutions and procedures in this country and abroad, or to acquire the skills, knowledge, understanding and attitudes necessary to participate in democratic self-government" (*id.* at 319). More recently, the Court of Appeals has refined the constitutionally-mandated minimum to require the teaching of skills that enable students to undertake civic responsibilities meaningfully; to function productively as civic participants (Campaign for Fiscal Equity, Inc. v. State of New York, 8 NY3d 14, 20-21). Plaintiffs further argue that the Court of Appeals has recognized that the Education Article requires adequate teaching by effective personnel as the "most important" factor in the effort to provide children with a "sound basic education" (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d 893, 909). With this as background, plaintiffs maintain that certain identifiable sections of the Education Law foster the continued, permanent employment of ineffective teachers, thereby falling out of compliance with the constitutional mandate that students in New York be provided with a "sound basic education". Finally, it is claimed that the judiciary has been vested with the legal and moral authority to ensure that this constitutional mandate is honored (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d 902).

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

At bar, the statutes challenged by plaintiffs as impairing compliance with the Education Article include Education Law §§1102(3), 2509, 2510, 2573, 2588, 2590-j, 3012, 3013(2), 3014, and 3020. To the extent relevant, these statutes provide, *inter alia*, for (1) the award of, *e.g.*, tenure of public school teachers after a probationary period of only three years; (2) the procedures required to discipline and/or remove tenured teachers for ineffectiveness; and (3) the statutory procedure governing teacher lay-offs and the elimination of a teaching positions.[2] In short, it is claimed that these statutes, both individually and collectively, have been proven to have a negative impact on the quality of education in New York, thereby violating the students' constitutional right to a "sound basic education" (*see* NY Const, Art. XI, §1).

As alleged in the respective complaints, sections §§2509, 2573, 3012 and 3012(c) of the Education Law, referred to by plaintiffs as the "permanent employment statutes", formally provide, *inter alia*, for the appointment to tenure of those probationary teachers who have been found to be competent, efficient and satisfactory, under the applicable rules of the board of regents adopted pursuant to Education Law §3012(b) of this article. However, since these teachers are typically granted tenure after only three years on probation, plaintiffs argue that when viewed in conjunction with the statutory provisions for their removal, tenured teachers are virtually guaranteed lifetime employment regardless of their in-class performance or effectiveness. In this regard, it is alleged by plaintiffs that three years is an inadequate period of time to assess whether a teacher has demonstrated or earned the right to avail him or herself of the lifelong benefits of tenure. Also

2. The present statutes require that probationary teachers be furloughed first, and the remaining positions be filled on a seniority basis, *i.e.*, the teachers with the greatest tenure being the last to be terminated. For ease of reference, this manner of proceeding is known as "last-in, first-out" or "LIFO".

drawn into question are the methods employed for evaluating teachers during their probationary period.

In support of these allegations, plaintiffs rely on studies which have shown that it is unusual for a teacher to be denied tenure at the end of the probationary period, and that the granting of tenure in most school districts is more of a formality rather than the result of any meaningful appraisal of their performance or ability. For statistical support, plaintiffs argue, *e.g.*, that in 2007, 97% of tenure-eligible teachers in the New York City school districts were awarded tenure, and that recent legislation intended to implement reforms in the evaluation process have had a minimal impact on this state of affairs. In addition, they note that in 2011 and 2012, only 3% of tenure-eligible teachers were denied tenure.

With regard to the methods for evaluating teacher effectiveness prior to an award of tenure, plaintiffs maintain that the recently-implemented Annual Professional Performance Review ("APPR"), now used to evaluate teachers and principals is an unreliable and indirect measure of teacher effectiveness, since it is based on students' performance on standardized tests, other locally selected (*i.e.*, non-standardized) measures of student achievement, and classroom observations by administrative staff, which are clearly subjective in nature. On this issue, plaintiffs note that 60% of the scored review on an APPR is based on this final criterion, making for a non-uniform, superficial and deficient review of effective teaching that generally fails to identify ineffective teachers. As support of this postulate, plaintiffs refer to studies that have shown that in 2012, only 1% of teachers were rated "ineffective" in New York (as compared to the 91.5% who were rated as "highly effective" or "effective"), while only 31% of students taking the standardized tests in English Language Arts and Math met the minimum standard for proficiency. As a further example,

plaintiffs allege that only 2.3% of teachers eligible for tenure between 2010 and 2013 received a final rating of "ineffective", even though 8% of teachers had low attendance, and 12% received low "value added" ratings. Notably, these allegations are merely representative of the purported facts pleaded in support of plaintiffs' challenge to the tenure laws, and are intended simply to illustrate the statutes' reliance on some of the more superficial and artificial means of assessing teacher effectiveness, leading to an award of tenure without a sufficient demonstration of merit. Each of the above are alleged to operate to the detriment of New York students.[3]

With regard to plaintiffs' challenge to those sections of the Education Laws which address the matter of disciplining or obtaining the dismissal of a tenured teacher, it is alleged that they, too, operate to deny children their constitutional right to a "sound basic education". As pleaded, these statutes are claimed to prevent school administrators in New York from dismissing teachers for poor performance, thereby forcing the retention of ineffective teachers to the detriment of their students. Among other impediments, these statutes are claimed to afford New York teachers "super" due process rights before they may be terminated for unsatisfactory performance by requiring an inordinate number of procedural steps before any action can be taken. Among the barriers cited are the lengthy investigation periods, protracted hearings, and antiquated grievance procedures and appeals, all of which are claimed to be costly and time-consuming, with no guaranty that an underperforming teacher will actually be dismissed. As a result, dismissal proceedings are alleged to be rare when based on unsatisfactory performance alone, with scant chance of success. According to plaintiffs, the cumbersome nature of dismissal proceedings operates as a strong disincentive for

[3] Also worthy of note in this regard is plaintiffs' allegation that most of the teachers unable to satisfactorily complete probation are asked to extend their probation term.

administrators attempting to obtain the dismissal of ineffective teachers, the result of which is that their retention is virtually assured.

Pertinent to this cause of action, plaintiffs rely upon the results of a survey indicating that 48% of districts which had considered bringing disciplinary charges at least once, declined to do so. In addition, it was reported that between 2004 and 2008, each disciplinary proceeding took an average of 502 days to complete, and between 1995 and 2006, dismissal proceedings based on allegations of incompetence took an average of 830 days to complete, at a cost of $313,000 per teacher. It is further alleged that more often than not these proceedings allow the ineffective teachers to return to the classroom, which deprives students of their constitutional right to a "sound basic education".

Finally, plaintiffs allege that the so-called "LIFO" statutes (Education Law §§2585, 2510, 2588 and 3013) violate the Education Article of the New York State Constitution in that they have failed, and will continue to fail to provide children throughout the State with a "sound basic education". In particular, plaintiffs maintain that the foregoing sections of the Education Laws create a seniority-based layoff system which operates without regard to a teacher's performance, effectiveness or quality, and prohibits administrators from taking teacher quality into account when implementing layoffs and budget cuts. In combination, these statutes are alleged to permit ineffective teachers with greater seniority to be retained without any consideration of the needs of the students, who are collectively disadvantaged. It is also claimed that the LIFO statutes hinder the recruitment and retention of new teachers, a failure which was cited by the Court of Appeals (albeit on other grounds) as having a negative impact on the constitutional imperative (Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d at 909-911).

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

In moving to dismiss the complaints, defendants and intervenor-defendants (hereinafter collectively referred to as the "movants") singly and jointly, seek dismissal of the complaints on the grounds (1) that the courts are not the proper forum in which to bring these claims, *i.e.*, that they are nonjusticiable; (2) that the stated grievances should be brought before the state legislature; and (3) that the courts are not permitted to substitute their judgment for that of a legislative body as to the wisdom and expediency of legislation (*see e.g.* Matter of Retired Pub Empl Assoc, Inc. v. Cuomo, – Misc3d –, 2012 NY Slip Op 32979 [U][Sup Ct Albany Co]). In brief, it is argued that teacher tenure and the other statutes represent a "legislative expression of a firm public policy determination that the interest of the public in the education of our youth can best be served by [the present] system [which is] designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors" (Ricca v Board of Edu, 47 NY2d 385, 391). Thus, it is claimed that the policy decisions made by the Legislature are beyond the scope of the Judicial Branch of government.

It is further claimed that if these statutes violated the Education Article of the Constitution, the Legislature would have redressed the issue long ago. To the contrary, tenure laws have been expanded throughout the years, and have been amended on several occasions in order to impose new comprehensive standards for measuring a teacher's performance, by, *e.g.* measuring student achievement, while fulfilling the principal purpose of these statutes, *i.e.*, to protect tenured teachers from official and bureaucratic caprice. In brief, it is movants' position that "lobbying by litigation" for changes in educational policy represents an incursion on the province of the Legislative and Executive branches of the government, and is an improper vehicle through which to obtain changes in education policy. Accordingly, while conceding that there may be some room for judicial

encroachment, educational policy is said to rest with the Legislature.

Movants also argue that the complaints fail to state a cause of action. In this regard, it is claimed that in order to state a valid cause of action under Article XI, a plaintiff must allege two elements: (1) the deprivation of a sound basic education, and (2) causes attributable to the State (*see* New York Civ Liberties Union v. State of New York, 4 NY3d 177, 178-179). Moreover, the crux of a claim under the Education Article is said to be the failure of the state to "provide for the maintenance and support" of the public school system (Paynter v. State of New York, 100 NY2d 434, 439 [internal quotation marks omitted]; New York State Assn of Small City School Dists Inc. v. State of New York, 42 AD3d 648, 652). Here, it is claimed that the respective complaints are devoid of any facts tending to show that the failure to offer a "sound basic education" is causally connected to the State, rather than, as claimed, administered locally.

The movants also argue that the State's responsibility under the Education Article is to provide minimally adequate funding, resources, and educational supports to make basic learning possible, *i.e.*, the requisite funding and resources to make possible "a sound basic education consisti[ing] of the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (Paynter v. State of New York, 100 NY2d at 439-440). On this analysis, it is alleged to be the ultimate responsibility of the local school districts to regulate their curriculae in order to effect compliance with the Education Article while respecting "constitutional principle that districts make the basic decision on ... operating their own schools" (New York Civ Liberties Union v. State of New York, 4 NY3d at 182). Thus, it is the local districts rather than the State which is responsible for recruiting, hiring, disciplining and otherwise managing its teachers. For example, the APPR,

implemented to measure the effectiveness of teachers and principals, reserves 80% of the evaluation criteria for negotiation between the local school district and its relevant administrator and unions. Movants argue that these determinations do not constitute state action.

In addition, movants argue that both complaints fail to state a cause of action because they are riddled with vague and conclusory allegations regarding their claim that the tenure and other laws combine to violate the Education Article, basing their causes of action on (1) alleged "specious statistics" regarding the number of teachers receiving tenure, (2) the alleged cost of terminating teachers for ineffectiveness, (3) inconclusive surveys of school administrators on the reasons why charges often are not pursued, and (4) a showing that the challenged statutes result in a denial of a "sound basic education". According to the movants, none of these allegations are sufficient to establish the unconstitutionality of the subject statutes, *i.e.*, that there exists no rational and compelling bases for the challenged probationary, tenure and seniority statutes.

Also said to be problematic are plaintiffs' conclusory statements that students in New York are somehow receiving an inadequate education due to the retention of ineffective educators because of the challenged statutes. Moreover, while plaintiffs argue that public education is plagued by an indeterminate number of "ineffective teachers", they fail to identify any such teachers; the actual percentage of ineffective educators; or the relationship between the presence of these allegedly ineffective teachers and the failure to provide school children with a minimally adequate education. Accordingly, movants claim that merely because some of the 250,000 teachers licensed to teach in New York may be ineffective, is not a viable basis for eliminating these basic safeguards for the remaining teachers. In brief, movants maintain that aside from vague references to ineffective teachers and "cherry-picked" statistics without wider significance, the plaintiffs have done little to

demonstrate that the alleged problem is one of constitutional dimension.

Movants also argue that the action should be dismissed for the failure to join necessary parties as required by CPLR 1001 and 1003. In this regard, it is claimed that since the relief which plaintiffs seek would affect all school districts across the state, this Court should either order the joinder of every school district statewide, or dismiss the action. In addition, the movants argue that plaintiffs have failed to allege injury-in-fact, and that the claims which they do make are either not ripe or fail to plead any imminent or specific harm. More importantly, the complaints fail to take into account the recent amendments to these statutes, which are claimed to render all of their claims moot (*see generally* Hussein v. State of New York, 81 AD3d 132). In the alternative, it is alleged that the subject statutes are meant, *inter alia*, to protect school district employees from arbitrary termination rather than the general public or its students (*but see* Chiara v. Town of New Castle, – AD3d –, 2015 NY Slip Op 00326, *21-22 [2d Dept]).

Finally, defendants the STATE of NEW YORK, the BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York; and JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York, argue that complaints as against them should be dismissed since they were not involved in the enactment of the challenged statutes and cannot grant the relief requested by plaintiff.

The motions to dismiss are granted to the extent that the causes of action against MERRYL H. TISCH and JOHN B. KING, in their official capacities as Chancellor and Commissioner are

severed and dismissed, the balance of the motions are denied.[4]

The law is well settled that when reviewing a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, a court "must accept as true the facts as alleged in the complaint and any submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and [without expressing any opinion as to whether the truth of the allegations can be established at trial], determine only whether the facts as alleged fit within any cognizable legal theory" (Sokoloff v. Harriman Estates Dev. Corp., 96 NY2d 409, 414; *see* Sanders v. Winship, 57 NY2d 391, 394). Accordingly, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations [can be] discerned which taken together manifest any cause of action cognizable at law the motion ... will fail" (Guggenheimer v. Ginzburg, 43 NY2d 268, 275). However, where evidentiary material is considered on the motion, "the criterion [becomes] whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and, unless it can be said that no significant dispute exists regarding it", the motion must be denied (*id.*). Here, it is the opinion of this Court that the complaints are sufficiently pleaded to avoid dismissal.

The core of plaintiffs' argument at bar is that school children in New York State are being denied the opportunity for a "sound basic education" as a result of teacher tenure, discipline and seniority laws (*see* Education Laws §§2573, 3012, 1103(3), 3014, 3012, 3020, 2510, 2585, 2588,

---

[4] Claims against municipal officials in their official capacities are really claims against the municipality and are therefore, redundant when the municipality is also named as a defendant (*see* Frank v. State of NY Off. of Mental Retardation & Dev. Disabilities, 86 AD3d 183, 188).

3013). While the papers submitted on the motions to dismiss undoubtedly explain that the primary purpose of these statutes is to provide employment security, protect teachers from arbitrary dismissal, and attract and keep younger teachers, when afforded a liberal construction, the facts alleged in the respective complaints are sufficient to state a cause of action for a judgment declaring that the challenged sections of the Education Law operate to deprive students of a "sound basic education" in violation of Article XI of the New York State Constitution, *i.e.*, that the subject tenure laws permit ineffective teachers to remain in the classroom; that such ineffective teachers continue to teach in New York due to statutory impediments to their discharge; and that the problem is exacerbated by the statutorily-established "LIFO" system dismissing teachers in response to mandated lay-offs and budgetary shortfalls. In opposition, none of the defendants or intervenor-defendants have demonstrated that any of the material facts alleged in the complaints are untrue.

It is undisputed that the Education Article requires "[t]he legislature [to] provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (NY Const. Art. XI, §1). Moreover, this Article has been held to guarantee all students within the state a "sound basic education", which is recognized by all to be the key to a promising future, preparing children to realize their potential, become productive citizens, and contribute to society. In this regard, it is the state's responsibility to provide minimally adequate funding, resources, and educational supports to make basic learning possible, *i.e.*," the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (Paynter v. State of New York, 100 NY2d at 440), which has been judicially recognized to entitle children to "minimally adequate teaching of reasonably up-to-date basic curricula ... by sufficient personnel adequately trained to teach those

subject areas" (Campaign for Fiscal Equity, Inc. v. State of NewYork, 86 NY2d at 317). Further, it has been held that the state may be called to account when it fails in its obligation to meet minimum constitutional standards of educational quality (*see* New York Civ Liberties Union v. State of New York, 4 NY3d at 178), which is capable of measurement, as alleged, by, *inter alia*, sub-standard test results and falling graduation rates (*id.*) that plaintiffs have attributed to the impact of certain legislation.

More to the point, accepting as true plaintiffs' allegations of serious deficiencies in teacher quality; its negative impact on the performance of students; the role played by subject statutes in enabling ineffective teachers to be granted tenure and in allowing them to continue teaching despite ineffective ratings and poor job performance; a legislatively prescribed rating system that is inadequate to identify the truly ineffective teachers; the direct effect that these deficiencies have on a student's right to receive a "sound basic education"; plus the statistical studies and surveys cited in support thereof are sufficient to make out a prima facie case of constitutional dimension connecting the retention of ineffective teachers to the low performance levels exhibited by New York students, *e.g.*, a lack of proficiency in math and english (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d at 910). Once it is determined that plaintiffs may be entitled to relief under any reasonable view of the facts stated, the court's inquiry is complete and the complaint must be declared legally sufficient (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 86 NY2d at 318).

The Court also finds the matter before it to be justiciable since a declaratory judgment action is well suited to, *e.g.*, interpret and safeguard constitutional rights and review the acts of the other branches of government, not for the purpose of making policy decisions, but to preserve the constitutional rights of its citizenry (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100

NY2d at 931).

With regard to the issue of standing, in the opinion of this Court, the individually-named plaintiffs clearly have standing to assert their claims as students attending various public schools within the State of New York who have been or are being injured by the deprivation of their constitutional right to receive a "sound basic education", which injury, it is claimed will continue into the future so long as the subject statutes continue to operate in the manner stated. Further details regarding the individual plaintiffs' purported injuries can certainly be ascertained during discovery. Moreover, since these children are the intended beneficiaries of the Education Article, in the opinion of this Court, they are clearly within the zone of protected interest.

Only recently have the courts recognized the right of plaintiffs to seek redress and not have the courthouse doors closed at the very inception of an action where the pleading meets the minimal standard to avoid dismissal (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 86 NY2d at 318). This Court is in complete agreement with this sentiment and will not close the courthouse door to parents and children with viable constitutional claims (*see* Hussein v. State of New York, 19 NY3d 899). Manifestly, movants' attempted challenge to the merits of plaintiffs' lawsuit, including any constitutional challenges to the sections of the Education Law that are the subject of this lawsuit, is a matter for another day, following a further development of the record.

The balance of the arguments tendered in support of dismissal, including the joinder of other parties, have been considered and rejected.

Accordingly, it is

ORDERED that the motion (No. 3598 - 012) of defendant-intervenors MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New

York, and JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York is granted; and it is further

ORDERED that the causes of action against said individuals are hereby severed and dismissed; and it is further

ORDERED that the balance of the motions are denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

ENTER,

J.S.C.

Dated: MAR. 12, 2015

GRANTED

MAR 17 2015

STEPHEN J. FIALA

2015 WL 1125022
Only the Westlaw citation is currently available.
United States District Court,
S.D. Indiana,
Indianapolis Division.

Joseph R. ELLIOTT, Plaintiff,
v.
BOARD OF SCHOOL TRUSTEES OF MADISON CONSOLIDATED SCHOOLS, Defendant.

Cause No. 1:13–cv–319–WTL–DML. | Signed March 12, 2015.

Attorneys and Law Firms

Alice O'Brien, Jason Walta, Kristen L. Hollar, National Education Association, Washington, DC, Eric M. Hylton, Riley Bennett & Egloff LLP, Indianapolis, IN, for Plaintiff.

Karen G. Sharp, Michelle Lynn Cooper, Lewis & Kappes PC, Indianapolis, IN, for Defendant.

ENTRY ON CROSS–MOTIONS FOR SUMMARY JUDGMENT

WILLIAM T. LAWRENCE, District Judge.

***1** Before the Court are three motions: the Plaintiff's motion for summary judgment (Dkt. No. 82); the Defendant's cross-motion for summary judgment (Dkt. No. 56); and the Intervenor–Defendant's motion for summary judgment (Dkt. No. 59). The motions are fully briefed, and the Court rules as follows. [1]

1 The Court commends counsel for their briefing on the issues in this case. In light of the well-written and thorough briefs, the Court does not believe oral argument is necessary. Accordingly, the Plaintiff's Motion Requesting Oral Argument (Dkt. No. 83) is **DENIED.**

I. *STANDARD*

Federal Rule of Civil Procedure 56(a) provides that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, the admissible evidence presented by the non-moving party must be believed and all reasonable inferences must be drawn in the non-movant's favor. *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 490 (7th Cir.2007); *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir.2009) ("We view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor."). However, "[a] party who bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Id.* Finally, the non-moving party bears the burden of specifically identifying the relevant evidence of record, and "the court is not required to scour the record in search of evidence to defeat a motion for summary judgment." *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir.2001).

The fact that the parties have filed cross-motions for summary judgment does not alter the standard set forth in Federal Rule of Civil Procedure 56. When evaluating each side's motion, the Court simply "construe[s] all inferences in favor of the party against whom the motion under consideration is made." *Metro Life. Ins. Co. v. Johnson*, 297 F.3d 558, 561–62 (7th Cir.2002) (quoting *Hendricks–Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir.1998)).

II. *BACKGROUND*

This case arises out of the termination of Plaintiff Joseph Elliott, a tenured [2] teacher, by Defendant Board of School Trustees of Madison Consolidated Schools ("the Board"). Before delving into the specific facts of this case, a brief background of Indiana law regarding teacher contracts is necessary.

2 The Court understands that the statutes in Indiana refer to "tenured" teachers as "permanent" or "established" teachers. Like Mr. Elliott, however, the Court will use the term "tenure" for the sake of clarity throughout this Entry, as it is the term used by most courts. *See* Pl.'s Br. at 1, n. 1.

In 1927, Indiana enacted the Teachers' Tenure Act ("the Act"), "the principal purpose of [which] was to secure permanency in the teaching force." *Watson v. Burnett*, 216 Ind. 216, 23 N.E.2d 420, 423 (Ind.1939); *see State ex rel. Anderson v. Brand*, 214 Ind. 347, 5 N.E.2d 531, 532

(Ind.1937), *rev'd on other grounds by State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685 (1938) (noting that the purpose of the Act was "to promote good order and the welfare of the state and of the school system by preventing the removal of capable and experienced teachers at the political or personal whim of changing officeholders"). A key cog in the Act was the provision for teacher tenure:

> ***2** Any person who has served or who shall serve under contract as a teacher in any school corporation in the State of Indiana for five or more successive years, and who shall hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation.... [S]uch contract shall be known as an indefinite contract.

Dkt. No. 41–2, Act of Mar. 8, 1927, Laws of the State of Indiana 259. The Act provided that an "indefinite contract" could only be cancelled on grounds of immorality, insubordination, neglect of duty, incompetence, a justifiable decrease in the number of teaching positions, a conviction, or for a good and just cause. Dkt. No. 41–4, Ind.Code § 20–28–7–1(a)(1)-(7) (2010).

Prior to 2011, in a reduction in force ("RIF") situation, the Act was interpreted to mandate the retention of tenured teachers over non-tenured teachers.

> If a justifiable decrease in the number of teaching positions should be held to give to the trustee the power to choose between tenure [and] non-tenure teachers, both of whom are licensed to teach in the teaching position which remains, he is thereby given the power to nullify the Teachers' Tenure Act, and to discharge without cause a teacher who has, by reason of having served satisfactorily as a teacher during the specified period, secured a tenure status and an indefinite permanent contract.

Watson, 23 N.E.2d at 423; *see also Stewart v. Fort Wayne Cmty. Sch.*, 564 N.E.2d 274, 278 (Ind.1990) ("Indiana Code § 20–6.1–4–10 and our decision in Watson protect [the plaintiff] from being fired before non-tenured teachers due to a reduction in force only as long as her qualifications make her eligible for the job she seeks."). From 1927 through 2010, the Act remained substantively unchanged.

In 2011, however, Indiana embarked on a series of educational reforms. On April 30, 2011, legislation known as SB 1 was signed into law, affecting the employment, evaluation, and dismissal of Indiana teachers. Among some of the most significant changes was the redesignation of "permanent" teachers as "established" teachers. Ind.Code § 20–28–6–8(a). SB 1 also mandated, beginning in the 2012–2013 school year, annual performance evaluations for all teachers, rating them in one of four categories: highly effective; effective; improvement necessary; or ineffective. Ind.Code § 20–28–11.5–4. In conducting these evaluations, SB 1 requires that "[o]bjective measures of student achievement and growth [ ] significantly inform the evaluation." Ind.Code § 20–28–11.5–4(c) (2). Further, under SB 1, teachers may be deemed "incompetent"—and subject to dismissal—if they receive an "ineffective" or "improvement necessary" rating in any three years out of a five-year period, or if they receive an "ineffective" rating for two consecutive years. Ind.Code § 20–28–7.5–1(3)(4).

However, most relevant to the case at bar is SB 1's RIF provision: "After June 30, 2012, the cancellation of teacher's contracts due to a justifiable decrease in the number of teaching positions [a RIF] *shall be determined on the basis of performance rather than seniority."* Ind.Code § 20–28–7.5–1(d) (emphasis added). Thus, under SB 1, a tenured teacher rated as "ineffective" or "improvement necessary" cannot be retained over a non-tenured teacher rated as "effective" or "highly effective" during a RIF. If teachers are placed in the same performance category, the following criteria may be considered: the number of years of a teacher's experience; if the teacher has additional content area degrees beyond the requirements for employment; the assignment of instructional leadership roles to the teacher; and the academic needs of students in the school corporation. *Id.;* Ind.Code § 20–28–9–1.5(b).

***3** With this background in mind, the Court turns to the specific facts of this case, which are undisputed.

Plaintiff Joseph Elliott is a licensed teacher in the state of Indiana and certified to teach kindergarten and general elementary education. He also has an elementary

administrator's license. On August 24, 1993, Mr. Elliott was hired by the Board to teach at Dupont Elementary School. In August 1998, Elliott entered into his sixth successive contract with the Board, making him a permanent teacher with an indefinite contract under then-Indiana law, i.e., a tenured teacher. Mr. Elliott remained employed with the Board for fourteen more years.

Mr. Elliott received ten written evaluations during his nineteen years as an employee of the Board. *See* Dkt. Nos. 41–8 thought 41–17. Mr. Elliott primarily received ratings of "strength" and "satisfactory" in all categories; however, in 2002, he received "needs improvement" ratings in the "interpersonal relationship" category from his then-principal, Karla Gauger. Dkt. No. 4113. This category including the following: demonstrates effective interpersonal relationships with students; demonstrates effective interpersonal relationships with others; and promotes positive self-concept of students. Ms. Gauger explained that Mr. Elliott "is very dedicated to education ... At times, however, he has difficulty accepting, graciously, a different point of view." Mr. Elliott received ratings of "strength" and "satisfactory" in all categories in 2012, his final evaluation before his termination. *See* Dkt. No. 41–17.

In 2012, Madison Consolidated Schools ("MCS") was forced to reduce its workforce due to enrollment decline and financial struggles; two elementary school buildings, including Dupont Elementary School, were also being closed. In deciding which individuals' contracts should be cancelled, MCS followed its RIF Policy which provided, in pertinent part, the following:

> The purpose of this policy is to establish a procedure for reduction of licensed teachers due to a justifiable decrease in the number of teaching positions in the school system. When a reduction in force is determined to be needed under this policy, the provisions of I.C. 20–28–7.5 will be followed regardless of past practice.
>
> **...**
>
> The primary consideration in any reduction in force will be the maintenance of a sound and balanced educational program that is consistent with the functions and responsibilities of the school system. The following factors will be considered in determining which employees shall be included in the reduction in force:
>
> 1. Work performance;
> 2. Length of service in the school system;
> 3. Service in extra duty positions and ability to fill such positions;
> 4. Other beneficial services provided to the school system; and
> 5. Recommendations and advice from the Superintendent, the Superintendent's Designee(s) and principals.
>
> Among the above factors, primary consideration will be given to factors (1) and (5). In assessing an employee's work performance for purposes of this policy, the school system may consider performance evaluations, improvement plans, past disciplinary actions, and other relevant factors as determined by the Superintendent.

***4** Dkt. No. 41–25, MCS Policy 6.20. MCS principals had several meetings to determine which teachers would be recommended for contract cancellation; ultimately, six teachers, including Mr. Elliott, were initially selected.

On June 7, 2012, Dupont Elementary School Principal Alvin Sonner sent a letter to Mr. Elliott informing him that he had "made a preliminary decision to decline to continue [Mr. Elliott's] teaching contract at the end of the 2011–2012 school year" due to a "[j]ustifiable decrease in the number of teaching positions." Dkt. No. 41–6. After receiving the letter, Mr. Elliott requested a private conference with Interim Superintendent Steve Gookins in accordance with Indiana Code § 20–28–7.5–2; this conference was held on June 11, 2012. Following this conference, Mr. Gookins recommended to the Board that Mr. Elliott's contract be cancelled effective at the end of the 2011–2012 school year. Mr. Elliott also requested a conference with the Board, which was held on August 2, 2012. At the conference, four members of the Board were present. Both Mr. Elliott and MCS were represented by legal counsel and had the opportunity to present evidence.

On August 8, 2012, the Board held its regular meeting. The following "Findings of Fact" were made regarding Mr. Elliott:

> 25. Joe Elliot is sometimes too hard on students and is too rigid. His classroom is sterile and his students do not speak unless spoken to. This creates a negative effect on education due to the children's fear of being ridiculed.

There are parents who insist that their students be placed in other classrooms because of Mr. Elliot's rigidity.

26. Joe Elliott is moody. He creates turmoil, makes sarcastic comments towards other people, and is not respectful towards others at times. He does not get along well with others and sometimes gives certain teachers and administrators the silent treatment.

27. A past evaluation indicated that Mr. Elliott needed improvement in the following areas: demonstrating effective interpersonal relationships with students; demonstrating effective personal relationships with others; and promoting positive self-concept of students.

28. A past evaluation suggested that Mr. Elliott make improvements by being compassionate and nurturing and by working on fostering teamwork and comradery with all Dupont staff members.

29. A past evaluation suggested that Mr. Elliot make improvements by always demonstrating compassion for students indicating that he was not demonstrating appropriate compassion for students.

30. A past evaluation noted that Mr. Elliott has, at times, difficulty accepting graciously a different point of view.

31. The Board saw no reason that the comments in the evaluations referred to would have been made if not true and accepted and found the same to be true.

32. Mr. Elliott had difficulties working well with at least one consultant.

33. Mr. Elliott coordinated the Spell Bowl program for several years. Coaches involved in the program had difficulty getting materials from Mr. Elliott and Mr. Elliott would not meet with the coaches as requested. When he was relieved from the position, he disposed of materials which had been developed for the program. It was difficult to find a replacement for Mr. Elliott because prospective teachers were afraid of Mr. Elliott's wrath.

***5** 34. At various times, Mr. Elliott made comments to at least 3 teachers which so upset the teachers that they came to the principal and cried.

35. Collegiality and collaboration are required for a good school, and discourse among employees has a negative effect on students. Future ventures will require the staff to get along and cooperate to reach goals.

36. Principals who testified at the Board conference were aware of the opinion that Mr. Elliott would create poor morale in their buildings and supported the recommendation that his contract not be continued.

Dkt. No. 41–1, August 8, 2012, Board Minutes. It was therefore ordered that "because of a justifiable decrease in the number of teaching positions, the indefinite teaching contract of Joseph Elliott is cancelled effective the end of the 2011/2012 school year." *Id.* Six teachers who were not permanent teachers with indefinite contracts, i.e. non-tenured teachers, were retained in positions for which Mr. Elliott was licensed. Dkt. No. 41–26.

Mr. Elliott filed suit in Jefferson County Superior Court on January 23, 2013, and the Board removed the suit to this Court on February 26, 2013.

III. *DISCUSSION*

Mr. Elliott's Amended Complaint sets forth five counts against the Board. He alleges that as applied to him, SB 1's RIF provision is unconstitutional under the Indiana and United States Constitutions, that the Board's actions violated Indiana law, and that substantial evidence does not support the Board's decision to cancel his teaching contract. On September 19, 2013, this Court granted the State of Indiana's motion to intervene to defend the constitutionality of SB 1's RIF provision. The Court now turns to the present motions, beginning with the parties' arguments regarding Count One.

A. The Constitutionality of SB 1

As noted above, Count One alleges that, as applied to Mr. Elliot, SB 1's RIF provision violates both the United States and Indiana Constitutions. Specifically, Mr. Elliott argues that it

> violate[s] Article 1, § 24 of the Indiana Constitution which provides that "No ex post facto law, or law impairing the obligation of contracts shall ever be passed" and Article 1, § 10 of the United States Constitution which states in part that, "No state shall ... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts or grant any title of nobility."

Dkt. No. 21, Amend. Compl. ¶ 13. Mr. Elliott, the Board, and the State all agree on the relevant analysis. To prove a violation of either the United States or Indiana Constitutions, Mr. Elliott has to demonstrate that the new law substantially impairs his contractual rights. *See Sweeney v. Pence*, 767 F.3d 654, 667 (7th Cir.2014) ("The relevant inquiry has three components: 1) whether there is a contractual relationship; 2) whether a change in law impairs that contractual relationship; and 3) whether the impairment is substantial."). If so, the Court then determines if SB 1's RIF provision was reasonable and necessary to serve an important public interest. *See Chicago Bd. of Realtors, Inc. v. City of Chi.*, 819 F.2d 732, 736 (7th Cir.1987) ("[W]e must inquire whether the city has a significant and legitimate public purpose justifying the Ordinance [and] ... whether the effect of the Ordinance on contracts is reasonable and appropriate given the public purpose behind the Ordinance.") (citing *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983)); *Girl Scouts of S. Illinois v. Vincennes Indiana Girls, Inc.*, 988 N.E.2d 250, 257 (Ind.2013) ("Legislation [that] invade[s] freedom of contract can only be sustained ... if it both relates to the claimed objective and employs means which are both reasonable and reasonably appropriate to secure such objective."). With this standard in mind, the Court turns to the first step in the analysis.

1. Contractual Rights

***6** In Indiana, it is undisputed that teacher tenure is a contractual right. Indeed, in 1938, the Supreme Court, in interpreting the Act, noted that "[n]o more apt language could be employed to define a contractual relationship." *Brand*, 303 U.S. at 105. Since the Supreme Court held that tenured teachers obtained contractual rights under the Act, Indiana courts have recognized that "[a] permanent tenure teacher's indefinite contract is a protected contractual right entitling the teacher to a succession of definite contracts with terms meeting the requirements of the pertinent statutes[.]" *Lost Creek Sch. Twp., Vigo Cnty. v. York*, 215 Ind. 636, 21 N.E.2d 58, 64 (1939). This much is clear.

What the parties disagree on is what the contours of that right are. Mr. Elliott argues that part of his contractual right as a tenured teacher was the "right in the event of a reduction in force to be retained above non-tenured teachers for positions for which he was certified." Pl.'s Br. at 11. The Board and the State disagree. They opt for a more limited view of what contractual right Mr. Elliott obtained when he achieved tenure: "the 'concept of tenure' does not at its core refer to the right of [ ] tenured teachers to be retained over [ ] non-tenured teachers in the event of a reduction in force. Rather, it is more broadly defined as the 'right to continued employment by virtue of the indefinite contract[.]' " State's Resp. at 9. Thus, the Board and the State argue that Mr. Elliott, as a tenured teacher, simply had the contractual right to continuous, definite contracts. And, based on *York*, those definite contracts incorporate "the requirements of the pertinent statutes," i.e., SB 1's RIF provision. *York*, 21 N.E.2d at 64.

In the Court's view, the State and the Board's arguments regarding the limited scope of "tenure" are untenable. The Indiana Supreme Court in *Watson* was "presented [with] an early opportunity to explore the reach of the teacher tenure law's protections." *Stewart v. Fort Wayne Cmty. Sch.*, 564 N.E.2d 274, 278 (Ind.1990). In holding that the Act required the retention of tenured teachers over non-tenured teachers during a RIF, the Indiana Supreme Court noted that "[t]o hold otherwise would be *contrary to the entire spirit and purpose of the Act* [and would] *nullify* the Teachers' Tenure Act ... [it would] permit the trustee to do indirectly that which the law *expressly forbids* him to do directly." *Watson*, 23 N.E.2d at 423 (emphasis added). Indeed, later courts have noted that "*Watson* bestowed a powerful sword on tenured teachers [.]" *Stewart*, 564 N.E.2d at 278.

In the Court's view, *Watson* specifically interpreted the "right to continued employment by virtue of the indefinite contract" to include the right of tenured teachers to be retained over non-tenured teachers in a RIF, lest the Act be nullified. Indiana courts have held that "[a] written contract does not preempt a teacher's rights secured by the statutes," *Chambers v. Cent. Sch. Dist. Sch. Bd. of Greene Cnty.*, 514 N.E.2d 1294, 1297 (Ind.Ct.App.1987); *see also Stiver v. State ex rel. Kent*, 211 Ind. 370, 1 N.E.2d 592, 593 (Ind.1936) (holding that "the execution of a new contract for the [school] year ... between the [teacher] and [school corporation] did not terminate the tenure of [the teacher]. The legislative purpose in authorizing a new contract to be entered into by a tenure teacher and the employing school corporation was not to provide a means of terminating tenure."). In light of this, the Court finds that Mr. Elliott has asserted a contractual right that is protected by the Contracts Clause. *See* Pl.'s Resp. at 3 ("[T]enure rights cannot be supplanted by a definite contract, lest the very concept of

tenure be rendered meaningless."). The Court thus proceeds to the next step in the Contracts Clause analysis.

2. Substantial Impairment

***7** Mr. Elliott next argues "that SB 1 impaired [his] contractual tenure rights and that such an impairment is substantial enough to violate the Contracts Clause." Pl.'s Br. at 13. There is no doubt that SB 1's RIF provision, as Mr. Elliott notes, "is plainly the source of [the] impairment of Elliott's contractual rights." *Id.* Disagreement exists as to whether that impairment was *substantial.*

Mr. Elliott argues that in *Watson*, the Indiana Supreme Court held that the contractual rights given to permanent teacher under the Act included the right to be retained over non-tenured teachers in a RIF. *See Watson*, 23 N.E.2d at 423 ("If a justifiable decrease in the number of teaching positions should be held to give to the trustee the power to choose between tenure [and] non-tenure teachers, both of whom are licensed to teach in the teaching position which remains, he is thereby given the power to nullify the Teachers' Tenure Act [.]"). Thus, Mr. Elliott argues that SB 1's RIF provision, which expressly mandates that *performance* is the only criterion to be considered in a RIF situation,[3] regardless of a teacher's tenure status, is a "total destruction" of his contractual right. Pl.'s Resp. at 9. The Board and the State disagree.

3 The Court understands that if teachers are placed in the same performance category, other criteria may be considered. *See* Ind.Code § 20–28–7.5–1(d); Ind.Code § 20–28–9–1.5(b).

The main thrust of the Board's argument is that SB 1 only made "limited" changes to Indiana's teacher laws. *See* Board's Br. at 12 ("The limited changes made by the Indiana General Assembly to the teacher tenure statutes do not rise to the level of a substantial impairment."). For example, it correctly notes that "the right to an indefinite contract continues following amendment" and that "the same grounds for cancellation of an indefinite contract [still] exist [.]" *Id.* Moreover, it notes that SB 1 still provides that "a teacher with an indefinite contract is entitled to notice, a statement of the reasons for the cancellation, an opportunity to meet with the Board to offer evidence opposing the cancellation, the Superintendent's recommendation on cancellation, and a majority vote of the Board before the contract can be cancelled." *Id.* at 16, 23 N.E.2d 420. While these are all true statements, the Court fails to see their import. In arguing this way, the Board focuses on what SB 1 *in general did not do* instead of focusing on what SB 1's *RIF provision did do.*

In directly addressing SB 1's RIF provision, the Board notes that SB 1 did not change the language of the Act, but rather simply "added language to clarify the General Assembly's intent that performance be the primary consideration in a reduction-in-force." Board's Br. at 3. Therefore, in the Board's opinion, "[b]ecause the amendment was done to clarify legislative intent due to the absence of any criteria for a RIF in the former statute, this is not a substantial impairment." *Id.* The Court believes that the General Assembly's desire for performance to be the primary determiner in RIF situations is best addressed in the next step of the Contracts Clause analysis; the reasons why the General Assembly amended the Act, however, do not address the issue of whether it substantially impaired Mr. Elliott's contractual right in doing so.

***8** For its part, the State makes a similar argument to that which it made above. It argues that Mr. Elliott could not have reasonably relied on the right to be retained over non-tenured teachers in a RIF because the definite contract he signed in November 2011, incorporated SB 1's RIF provision. *See* State's Br. at 14 ("Because Elliott could not have reasonably relied on the rights he asserts in entering into his contracts with Madison Schools, the State's legislative revocation of those 'rights' did not ... substantially impair those rights."). As noted above, the Court interprets *Watson* to incorporate the right of tenured teachers to be retained over non-tenured teachers into the contractual "tenure" right espoused in *Brand.* Accordingly, the State's argument are without merit.

The Court cannot fathom a more substantial impairment than the one in the case at bar. Had SB 1 not been enacted, the Board would have been required to retain Mr. Elliott over any non-tenured teachers for positions in which he was qualified to teach, save any other grounds it might have had to cancel Mr. Elliott's contract. As there were six non-tenured teachers who were retained in MCS in positions for which Mr. Elliott was qualified to teach, this means that had SB 1 not been enacted, Mr. Elliott's contract would have been renewed. SB 1's RIF provision completely destroyed Mr. Elliott's contractual right.

3. Reasonable and Necessary to Serve an Important Public Interest

Having determined that SB 1's RIF provision was a substantial impairment of Mr. Elliott's contractual right, the Court now turns to whether SB 1's RIF provision was reasonable and necessary to serve an important public interest.

> If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem.... The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.

Energy Reserves, 459 U.S. at 411–12 (internal citations omitted). To begin, both the Board and the State note that in Indiana, the duty of the General Assembly to provide an education to the citizens of the state is contained in the Constitution: "it should be the duty of the General Assembly to ... provide, by law, [ ] a general and uniform system of Common Schools [.]" Ind. Const. Art. 8, § 1. In accordance with this charge, both the Board and the State note that the goal of SB 1—including SB 1's RIF provision—was to improve teacher quality. The Board explains that

> the language [of SB 1] demonstrates an emphasis on teacher effectiveness, including student achievement and growth.... Thus, the statutory language evidences the General Assembly's intent to exercise its police power to ensure the education of its citizens was based upon teacher effectiveness and student achievement and not seniority.

***9** Board's Br. at 9; *see also* Dkt. No. 58–2, Schlegel Aff. ¶ 12 ("The primary concerns for policymakers at the time were how to modify the Teacher Tenure Act to improve the quality of education being provided to students by ensuring schools appropriately measure teacher effectiveness/performance, emphasizing the importance of teacher effectiveness and performance in making decisions about teacher retention and layoffs, and providing school administrators with greater flexibility and discretion in making reduction-in-force decisions."). [4] Similarly, the State explains that "[t]he goal of SB 1 was to raise teacher quality by valuing teacher performance over longevity." State's Br. at 17.

4 In his Reply, Mr. Elliott moved to strike this affidavit as well as the corresponding evidentiary submissions (Dkt. Nos. 58–4 through 58–11) that the Board relied on in its Cross–Motion for Summary Judgment. *See* Pl.'s Resp. at 10–14. His primary argument was that he did not have the opportunity to depose Mindy Schlegel, a former Indiana Department of Education employee, because during discovery, the Board did not list Ms. Schlegel as a potential witness; Mr. Elliot also filed a Motion for Additional Discovery and to Amend the Briefing Schedule arguing the same (Dkt. No. 76). His motion was granted by the Magistrate Judge (Dkt. No. 78). Mr. Elliott has since deposed Ms. Schlegel and filed a Surreply (Dkt. No. 84). Accordingly, his motion to strike Ms. Schlegel's affidavit and the attached evidentiary submissions is denied.

The State notes that percolating in the years leading up to the 2011 educational reforms was "a long-developing public consensus, founded on objective data, that traditional public schools had not been successful over the past several decades." *Id.* It argues that Indiana's graduation rates were low, drop-out rates were high, and scores on national assessments remained static. Juxtaposed to this was the "growing body of research show[ing] a strong correlation between teacher quality and positive educational outcomes." *Id.* at 19.

Perhaps most relevant to SB 1's emphasis on teacher quality, was the grade Indiana received in the State Teacher Policy Yearbook, published by the National Council on Teacher Quality ("NCTQ"). [5] For the years 2008, 2009, and 2010, Indiana received an overall grade of

5 "The National Council on Teacher Quality advocates for reforms in a broad range of teacher policies at the federal, state and local levels in order to increase the number of effective teachers." http:// www.nctq.org/about/ (last visited February 3, 2015).

'D' in the following categories: delivering well prepared teachers; expanding the teaching pool; identifying effective teachers; retaining effective teachers; and exiting ineffective teachers. Dkt. Nos. 58–3 through 58–5. Further, in 2010,

the top three "Critical Attention Areas" identified by the NCTQ for Indiana were to "ensure that teacher evaluations assess effectiveness in the classroom"; to "connect teacher tenure decisions to teacher effectiveness"; and to "prevent ineffective teachers from remaining in the classroom indefinitely." Dkt. No. 58–5. Thus, the State argues, there was a need to change Indiana's education laws to specifically emphasize teacher quality.

For his part, Mr. Elliott argues that the state of education in Indiana was not nearly as dire as the State argues. He challenges the statistics on graduation rates and notes that the State distorts the data from the national assessments. He also argues that the NCTQ's studies have "been roundly criticized as biased and lacking in rigor and its conclusions contradict those reached by venerated organizations." Pl.'s Resp. at 18. Essentially, Mr. Elliott disagrees that the education system in Indiana needed to be reformed and disagrees with the chosen means to do so-emphasizing teacher quality. *See id.* at 22 ("[E]ven if student performance were seriously deficient in Indiana ... [E]ven if teachers can, in theory, have as large an impact on that performance as the highly questionable research presented by the Defendants claims ..."). Mr. Elliott may feel that the education reforms were not needed; however, this does not mean that SB 1 does not serve an important public interest. *See, e.g.*, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987) ("The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation[.]") (internal quotation marks omitted).

***10** Mr. Elliott's disagreements aside, in all, the Court finds that providing a quality education—specifically, improving teacher quality—was an important public interest underlying SB 1. As expressed by the Defendants: "the statutory language [of SB 1] demonstrates that the General Assembly had concerns about assessing teacher effectiveness, retaining the most effective teachers, and measuring teacher effectiveness based on student growth and achievement. This certainly is a 'significant and legitimate' public purpose for the statutory amendments." State and Board's Surreply at 7–8. Thus, the crux of this case will turn on whether the Indiana General Assembly's decision to enact SB 1's RIF provision was reasonable and necessary to improve teacher quality.

Initially, the Court notes that deference is usually given to the legislature's conclusion as to what is necessary and reasonable. *See Energy Reserves*, 459 U.S. at 413 (noting that in reviewing social regulations, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure"). Mr. Elliott, however, argues that the Court must apply heighted scrutiny because Indiana abrogated *its own* contractual obligations in enacting SB 1's RIF provision.

In *U.S. Trust Co of New York v. New Jersey*, the Supreme Court held as follows:

> As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, *complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.*

U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 25–26, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (emphasis added). This approach was also noted in Energy Reserves: "Unless the State itself is a contracting party ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves*, 459 U.S. at 412–13 (emphasis added); *see also Peick v. Pension Ben. Guar. Corp.*, 724 F.2d 1247, 1270 (7th Cir.1983) ("*Energy Reserves Group* very clearly indicates that the Court continues to view the contract clause as requiring two different levels of analysis depending upon whether a State is one of the contracting parties.").

The State disagrees that heightened scrutiny is appropriate in this case. It argues that the heightened scrutiny espoused in *U.S. Trust* only applies when a state has entered into some sort of financial contract, and thus the heightened scrutiny is only applicable when the State's *financial* interest is at stake. [6] Mr. Elliott correctly argues that this distinction has not been expressly made in any case law; moreover, he notes that "the Seventh Circuit has suggested that the heightened scrutiny standard does apply in cases involving contractual tenure rights." Pl.'s Resp. at 15. Indeed, in *Pitman v. Chicago Bd. of Educ.*, 64 F.3d 1098 (7th Cir.1995), the Seventh Circuit, noted that "[i]f tenure for principals were a term in a contract between the principals and the board of education, the state could not abrogate the term without a greater showing of justification than has been attempted." *Id.* at 1104. The Court,

therefore, will apply heightened scrutiny to this analysis as suggested by the Seventh Circuit.

6 For its part, the Board argues that SB 1 should not be subject to heightened scrutiny "because the contracts at issue are not between the State and another party. Rather, the contracts are between a teacher and a school corporation[.]" Board's Br. at 9–10. The Court disagrees. As noted above, Mr. Elliott's contractual right to be retained over non-tenured teachers in a RIF is part of his contractual tenure right given to Mr. Elliott via statute by the State. Thus, the contractual right at issue is between Mr. Elliott and the State.

***11** The State notes that all of the 2011 education reforms, including SB 1's RIF provision, were "aimed at improving student performance through retaining skilled teachers: performance-based raises; an overhaul of the evaluation system that based teacher performance reviews on a combination of student performance, administrators' observations, and district-specific factors; and limitations on the scope of collective bargaining." State's Resp. at 18. It thus argues that "SB 1's alteration of retention factors is essential to the efficacy of the 2011 reform package." *Id.*

The Court disagrees that it was "essential" and/or necessary to enact SB 1's RIF provision to accomplish the asserted state interest. What SB 1's RIF provision eliminated was the mandatory retention of tenured teachers during a RIF situation. Of course, however, Indiana was not concerned with the mandatory retention of *all* tenured teachers; Indiana was concerned about the mandatory retention of *poor-performing* tenured teachers. Specifically, Indiana was concerned that retaining poor-performing, tenured teachers would have a negative impact on student achievement. Indeed, both the State and the Board highlight this throughout their briefs. *See, e.g.*, State's Br. at 19 ("A growing body of research shows a strong correlation between teacher quality and positive educational outcomes."); State's Resp. at 18 (quoting an educational journal that concluded that "[t]he policy of eliminating the least effective teachers is very consistent with ... the policies found in high-performing school systems around the world"); *Id.* at 20 (arguing that it would be a disservice to "Hoosier children [to] subject[ ] them to the instruction of ineffective teachers, who may not retire for another thirty years"). Thus, when forced to reduce its workforce, Indiana wanted school boards to be able to terminate the worst teachers—regardless of their tenure status.

The problem is that school boards have *always* had the ability to fire poor-performing tenured teachers; in fact, school boards did not—indeed, they still do not—have to wait for a RIF in order to terminate poor-performing tenured teachers. As noted above, prior to 2011, a tenured teacher's contract could be cancelled on grounds of immorality, insubordination, neglect of duty, incompetence, a justifiable decrease in the number of teaching positions, a conviction, or for a good and just cause. Dkt. No. 41–4, Ind.Code. § 20–28–7–1(a)(1)-(7) (2010). Indeed, the Supreme Court noted that these reasons "*cover every conceivable basis* for such action growing out of a deficient performance of the obligations undertaken by the teacher, and diminution of the school requirements." *Brand*, 303 U.S. at 108 (emphasis added). These reasons remained the same after SB 1 was enacted; the only change SB 1 made is that "incompetence" now includes receiving a rating of "ineffective" for two consecutive years or receiving a rating of "ineffective" or "improvement necessary" for three years in a five year period. *See* Ind.Code § 20–28–7.51(e)(4). Thus there was-and still is-a means of getting rid of ineffective teachers: terminate their contracts for incompetence. Not only was this an option pre-SB 1, but now that SB 1 has been enacted, there are *objective means*, specifically tied to the annual performance ratings, to measure whether a teacher is "incompetent." Moreover, under SB 1, annual evaluations are mandatory, giving school boards ample opportunity to thoroughly evaluate the quality of their tenured teachers.

***12** Also troubling is that SB 1's RIF provision seems to be unconnected to the reports and publications the IDOE considered in drafting SB 1. *See* Board's Br. at 21–22 ("Ms. Schlegel, who worked under then-Superintendent of Public Instruction Tony Bennett, recalls that they considered the 2008, 2009, and 2010 NCTQ Reports when proposing the statutory amendments to the Teacher Tenure Law. Additionally, they reviewed several reports published by The New Teacher Project ("TNTP") ... and two publications by the Measures of Effective Teaching ("MET") Project launched by the Bill and Melinda Gates Foundation.") (internal citations omitted).[7] Both the Board and the State are correct that, in general, these reports emphasize the importance of teacher quality, yet none focus on RIF situations as the means to do so.

7 The Court fully understands that "the State need not prove what was *actually* considered by the members of the General Assembly" and that "the Indiana General Assembly keeps no legislative history." Board and

> State's Surreply at 4. Nevertheless, Ms. Schlegel, "who served as the Indiana Department of Education Senior Advisor for Educator Effectiveness and Policy from May 2009 to May 2012," and who "was involved in the research and policy considerations that led to [SB 1]" identified these reports as being considered. Board's Br. at 21–22.

For example, as noted above, the NCTQ 2009 State Teacher Policy Yearbook graded Indiana in five broad categories related to teacher quality, including identifying effective teachers, retaining effective teachers, and exiting ineffective teachers. Dkt. No. 58–4. Certain "goals" were also identified for Indiana in order for it to improve its teacher quality, and indeed, many of the NCTQ's "Goals" for Indiana were implemented by SB 1. *See id.* at 9 ("The state should require annual evaluations of all teachers and multiple evaluations of all new teachers"; "The state should require instructional effectiveness to be the preponderant criterion of any teacher evaluation"; "The state should support performance pay."). Notably absent is any reference to RIFs.[8] This seems to suggest, as the Court has indicated, that eliminating ineffective teachers in RIF situations is not necessary to improve teacher quality.

[8] Interestingly, a "Goal" was for Indiana to "articulate consequences for teachers with unsatisfactory evaluations, including specifying that teachers with multiple unsatisfactory evaluations are eligible for dismissal." *Id.*

Unfortunately, neither the State nor the Board explain why the former cancellation procedures were inadequate to address teacher quality such that SB 1's RIF provision was necessary. Their arguments are mostly focused on addressing the reasonableness of SB 1 and contesting Mr. Elliott's suggested alternatives. Nevertheless, in the Court's view, if school boards utilize the procedures already in place, there is no need, in a RIF situation, to have to choose between poor-performing teachers and effective teachers, regardless of their tenure status. Utilizing the cancellation procedures already provided for is adequate to accomplish both the goal of "getting rid of" ineffective teachers *and* retaining effective teachers. There simply is no basis for the repeated assertion of the State and Board that SB 1's RIF provision is necessary, lest Indiana students be subjected to "ineffective" teaching. *See, e.g.*, State's Resp. at 20 (warning of the "the potential harm" to students being taught by "ineffective teachers"). Indeed, even Mr. Elliott himself acknowledges that "if the Board truly believed that [he] was an ineffective teacher, it could have employed these procedures to terminate him at any time during his 19 years of employment." Pl.'s Resp. at 24.

***13** Accordingly, the Court finds that SB 1's RIF provision is not necessary to accomplish the goal of improving teacher quality—as there are already adequate measures to address the State's concerns—and, as applied to Mr. Elliott, it is unconstitutional. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978) ("[T]here is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem."); *U.S. Trust*, 431 U.S. at 29–31 ("[I]t cannot be said that total repeal of the covenant was essential; a less drastic modification would have permitted the contemplated plan ... a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."). Mr. Elliott's motion for summary judgment (Dkt. No. 82) is therefore **GRANTED** as to Count I, and the Board's motion for summary judgment (Dkt. No. 56) is **DENIED** as to Count I. The State's motion for summary judgment (Dkt. No. 59) is also **DENIED.**

B. Mr. Elliott's State Law Claims

Counts II through IV of Mr. Elliott's Amended Complaint allege violations of Indiana state law, *see* Amend. Compl. ¶ 19, 26, 34 (all asserting that the Board's action in cancelling Mr. Elliott's teaching contract violated Indiana law); Count V asserts that the Board's selection of Mr. Elliott for nonrenewal was not supported by substantial evidence. *See id.* ¶ 36 ("There was no substantial evidence to demonstrate that Elliott's teaching contract should be cancelled based on performance and the School Board's decision to cancel Elliott's teaching contract was arbitrary and capricious").[9] The relief Mr. Elliott seeks in these Counts is the same as what he seeks in Count I: "that judgment be entered for the Plaintiff and that the School Board be ordered to pay damages for lost wages and benefits, that the Court order that Plaintiff be reinstated to his teaching position, and for all other relief proper in the premises." *Id.* ¶¶ 17, 24, 28, 34, 37. The Court has ruled in favor of Mr. Elliott on his constitutional claim (Count I); thus, it need not consider the remaining state law claims, as they appear to be mooted by the complete relief Mr. Elliott is entitled to under Count I. Counts II through V are therefore **DISMISSED WITHOUT PREJUDICE.**

9 As noted above, the State intervened solely to defend the constitutionality of SB 1's RIF provision; accordingly, it did not address Mr. Elliott's state law claims (Counts II through V) in its briefs.

IV. *CONCLUSION*

For the foregoing reasons, Mr. Elliott's motion for summary judgment (Dkt. No. 82) is **GRANTED IN PART.** The Board's motion for summary judgment (Dkt. No. 56) is **DENIED IN PART.** The State's motion for summary judgment (Dkt. No. 59) is **DENIED. Within 21 days of the date of this Entry,** the parties shall file either a joint notice, or if they cannot agree, separate notices setting forth what issues, if any, remain to be resolved before final judgment is issued consistent with this Entry and what the final judgment should include, given Mr. Elliott's prayer for relief.

***14** SO ORDERED.

All Citations

Slip Copy, 2015 WL 1125022

End of Document

2015 WL 2341226
Only the Westlaw citation is currently available.
United States District Court,
S.D. Indiana,
Indianapolis Division.

Joseph R. ELLIOTT, Plaintiff,
v.
BOARD OF SCHOOL TRUSTEES OF MADISON CONSOLIDATED SCHOOLS, Defendant.

Cause No. 1:13–cv–319–WTL–DML. | Signed May 13, 2015.

Attorneys and Law Firms

Alice O'Brien, Jason Walta, Kristen L. Hollar, Washington, DC, Eric M. Hylton, Riley Bennett & Egloff LLP, Indianapolis, IN, for Plaintiff.

Karen G. Sharp, Michelle Lynn Cooper, Lewis & Kappes PC, Indianapolis, IN, for Defendant.

ENTRY ON MOTION FOR CERTIFICATION OF INTERCLOCUTORY APPEAL

WILLIAM T. LAWRENCE, District Judge.

***1** This cause is before the Court on the Defendant's and the Intervenor–Defendant's motion for certification of interlocutory appeal (Dkt. No. 95). The motion is fully briefed and the Court, being duly advised, **GRANTS** the motion for the following reasons.

This case involves the constitutionality of an Indiana statute, Indiana Code § 20–28–7.5–1(d) ("SB 1"). SB 1 was enacted in 2011 and provides the following: "After June 30, 2012, the cancellation of teacher's contracts due to a justifiable decrease in the number of teaching positions [a RIF] shall be determined on the basis of performance rather than seniority." Plaintiff Joseph Elliott's teaching contract was terminated in August 2012 pursuant to SB 1. He filed suit in this Court alleging that as applied to him, SB 1's RIF provision violated both the United States and Indiana Constitutions.

On March 12, 2015, this Court granted, in part, Mr. Elliott's motion for summary judgment, ruling that "SB 1's RIF provision is not necessary to accomplish the goal of improving teacher quality—as there are already adequate measures to address the State's concerns—and, as applied to Mr. Elliott, it is unconstitutional." Dkt. No. 90 at 21–22. The Defendants—the State of Indiana and the Board of School Trustees of Madison Consolidated Schools—now move this Court to certify its March 12, 2015, Order.

28 U.S.C. § 1292 "permits an appeal only if the district judge finds, 'in writing,' that the 'order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.' " *Metrou v. M.A. Mortenson Co.*, 781 F.3d 357, 359 (7th Cir.2015); *see also Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 675 (7th Cir.2000) ("There are four statutory criteria for the grant of a section 1292(b) petition to guide the district court: there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation. There is also a nonstatutory requirement: the petition must be filed in the district court within a *reasonable time* after the order sought to be appealed."). The Defendants argue that all of the criteria are satisfied in this matter; ultimately, the Court agrees.

To begin, the matter clearly involves a controlling question of law. As the Defendants note, the Court's Order on summary judgment squarely addresses "[t]he contours of the Contract Clause[.]" Def .'s Mtn. at 4; *see also Ahrenholz*, 219 F.3d at 677 (noting that a "question of law means an abstract legal issue"). Moreover, despite the Plaintiff's argument to the contrary, the Court also agrees with the Defendants that the Order is contestable. The Court certainly believes there is room for reasonable minds to differ. Finally, there is no doubt that the Defendants' motion is timely; it was filed less than a month after the Court's Order on summary judgment.

***2** This leaves the question of whether granting the Defendants' motion will speed up or materially advance the litigation, the main point of contention between the parties. The Plaintiff correctly notes that "[a]ll that remains of this case is the limited issue of the proper remedy for the Defendants' violation of the Plaintiff's rights under the Contracts Clause." Pl.'s Resp. at 3. As noted in the Order, the Plaintiff requests monetary damages and reinstatement; he notes that "[t]here is nothing complicated—either factually or legally—about the remedy" that he seeks. *Id.* The Defendants strongly disagree. To begin, they do not agree that the Plaintiff is entitled to reinstatement, nor do they believe that

reinstatement would be "a wise course of action[.]" Def.'s Reply at 2. Moreover, they note that discovery is needed to determine the amount of damages, if any, that the Plaintiff may be entitled to. All this is to say that resolving the remedy in this matter is likely to be a somewhat lengthy process, and may indeed require a trial if the parties cannot agree (which seems likely given their positions in their briefs).

In all, the Court finds that the speedy resolution of the constitutional question at issue in the Court's Order will either "end the litigation or [ ] settle the chief claim." Def.'s Br. at 6. The Court believes the best, and most practical, course of action in this matter would be to certify the summary judgment Order for an interlocutory appeal so it can be resolved as quickly as possible. [1]

[1] While not directly relevant to the Plaintiff's case, the Court also notes that there are several pending state court cases in which plaintiffs bring similar claims against other Indiana school corporations. As the Defendants note, speedy resolution of the constitutional question in this case will provide clarity to all Indiana school corporations and likely resolve the pending cases as well.

Accordingly, the Court **GRANTS** the Defendant's motion (Dkt. No. 95).

SO ORDERED.

All Citations

Slip Copy, 2015 WL 2341226

End of Document

2015 WL 3466263
Only the Westlaw citation is currently available.
Court of Appeals of North Carolina.

NORTH CAROLINA ASSOCIATION OF EDUCATORS, INC., Richard J. Nixon, Rhonda Holmes, Brian Link, Annette Beatty, Stephanie Wallace, and John Deville, Plaintiffs,
v.
The STATE of North Carolina, Defendant.

No. COA14–998. | June 2, 2015.

Synopsis

Background: Association of educators, career status teachers, and probationary teacher filed complaint against state for declaratory and injunctive relief, arguing that state's enactment of legislation repealing career status teachers' benefits under Career Status Law constituted a taking of property without just compensation under state constitution and an unconstitutional impairment of their contractual rights under federal Contracts Clause. The Superior Court, Wake County, Robert H. Hobgood, J., 2014 WL 4952101, granted association and teachers partial summary judgment as to claims related to career status teachers, permanently enjoined state from implementing portion of legislation, and granted state partial summary judgment as to claims related to probationary teacher. State appealed and association and teachers cross-appealed.

Holdings: The Court of Appeals, Stephens, J., held that:

[1] Law created contractual obligations as to career status teachers;

[2] repeal substantially impaired career status teachers' contractual rights;

[3] repeal was not reasonable and necessary to serve important public interest;

[4] repeal violated Law of the Land Clause of state constitution as applied to career status teachers;

[5] trial court was not required to strike portions of summary judgment affidavits submitted by teachers and administrators;

[6] any error in failing to strike portions of affidavits was harmless; and

[7] probationary teacher did not have contractual rights to career status protections under Law.

Affirmed.

Dillon, J., filed separate opinion concurring in part and dissenting in part.

***1** Cross-appeals by Plaintiffs and Defendant from orders entered 6 June 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 22 January 2015.

Attorneys and Law Firms

Patterson Harkavy LLP, by Burton Craige, Raleigh, and Narendra K. Ghosh, Chapel Hill, and National Education Association, by Philip A. Hostak, for Plaintiffs.

Attorney General, Roy Cooper, by Special Deputy Attorney General, Melissa L. Trippe, for the State.

Opinion

STEPHENS, Judge.

Defendant State of North Carolina ("the State") argues that the trial court erred in granting summary judgment in favor of Plaintiffs North Carolina Association of Educators, Inc. ("NCAE"), Nixon, Holmes, Beatty, Wallace, and deVille based on the court's conclusion that the State's enactment of legislation repealing career status teachers' benefits under section 115C–325 of our General Statutes violated Article I, Section 10 of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. The State also argues that the trial court erred in failing to strike certain portions of the affidavits Plaintiffs submitted in support of their motion for summary judgment. Plaintiffs cross-appeal, arguing that the trial court erred in denying summary judgment to Plaintiff Link based on the court's conclusion that, as a probationary teacher who had not yet earned career status, he lacked standing to challenge the General Assembly's repeal of section 115C–325. After careful consideration, we hold that the trial court did not err and we consequently affirm its orders.

I. Background and Procedural History

A. Legislative Background

In 1971, our General Assembly enacted a statutory scheme ("the Career Status Law") to govern the employment and dismissal of our State's public school teachers. *See* An Act to Establish an Orderly System of Employment and Dismissal of Public School Personnel, 1971 N.C. Sess. Laws ch. 883. For more than four decades following its passage, the Career Status Law, codified in its most recent form at N.C. Gen. Stat. § 115C–325 (2012), provided all public school teachers in North Carolina with certain procedural guarantees regarding the terms of their employment and the reasons they could be terminated.

Under the Career Status Law, teachers who were employed by a public school system for fewer than four consecutive years on a full-time basis were deemed to be "probationary" teachers. *Id.* § 115C–325(a)(5). These probationary teachers were employed from year to year pursuant to annual contracts, which school boards could choose to "non-renew" at the end of a school year for any cause the boards deemed sufficient, so long as the non-renewal was not "arbitrary, capricious, discriminatory, or for personal or political reasons."*Id.* § 115C–325(m)(2). After a probationary teacher completed four consecutive years as a full-time teacher, that teacher became eligible for career status, which was granted or denied by a majority vote of the local school board. *Id.* § 115C–325(c)(1). Teachers who achieved career status would "not be subjected to the requirement of annual appointment."*Id.* § 115C–325(d)(1). Instead, career status teachers were employed on the basis of continuing contracts and could only be dismissed, demoted, or relegated to part-time status for one of fifteen statutorily enumerated reasons, including, *inter alia,* "[i]nadequate performance," "[i]nsubordination," and "[n]eglect of duty." *Id.* § 115C–325(e)(1). Moreover, the Career Status Law further provided that, before a career status teacher could be dismissed, demoted, or relegated to part-time status, the school board was required to provide that teacher with notice, an explanation of the charges, and, if requested, a hearing before the board or an impartial hearing officer. *Id.* § 115C–325(h)(2), (3). In those cases in which a career status teacher chose to have a hearing before a hearing officer, that teacher had the right "to be present and to be heard, to be represented by counsel and to present through witnesses any competent testimony relevant to the issue of whether grounds for dismissal or demotion exist or whether the procedures set forth in [the statute] have been followed."*Id.* § 115C–325(j)(3).

***2** On 24 July 2013, our General Assembly repealed the Career Status Law, both prospectively and retroactively, by enacting Sections 9.6 and 9.7 ("the Career Status Repeal") of the Current Operations and Capital Improvements Appropriations Act of 2013, which Governor Pat McCrory subsequently signed into law as S.L. 2013–360. Under the Career Status Repeal, as of 1 August 2013, any teacher who had not achieved career status before the beginning of the 2013–14 school year will never be granted career status, but will instead, with limited exceptions, be employed on the basis of one-year contracts until 2018. *See* 2013 N.C. Sess. Law 360 § 9.6(f). Further, as of 1 July 2018, the Career Status Repeal revokes the career status of all teachers who had previously earned that status pursuant to the Career Status Law. *Id.* § 9.6(i). Instead, all teachers will be employed on one-, two-, or four-year contracts that can be non-renewed at their school board's discretion on any basis that is not "arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law."*Id.* § 9.6(b). Moreover, the Career Status Repeal provides no right to a hearing for former career status teachers; although such teachers will be permitted to request a hearing after receiving notice of non-renewal, local school boards will have unfettered discretion to decide whether or not to hold one. *Id.* Finally, the Career Status Repeal's "25% Provision" mandates that before the beginning of the 2014–15 school year, school districts must select one quarter of their teachers with at least three years of experience and offer them four-year contracts, providing for a $500 raise in each year of the contract, in exchange for their "voluntarily relinquish[ing] career status." *Id.* § 9.6(g), (h).

B. Procedural History

On 17 December 2013, NCAE and six public school teachers filed a complaint in Wake County Superior Court seeking declaratory and injunctive relief based on their allegations that the Career Status Repeal amounts to both a taking of property without just compensation in violation of Article I, Section 19 of the North Carolina Constitution, and an unconstitutional impairment of their contractual rights under Article I, Section 10 of the United States Constitution. The State filed an answer and motion to dismiss pursuant to N.C.R. Civ. P. 12 on 17 January 2014. Plaintiffs then filed a

motion for summary judgment pursuant to N.C.R. Civ. P. 56 on 10 March 2014.

In support of their Rule 56 motion for summary judgment, Plaintiffs submitted affidavits from:

- NCAE president Rodney Ellis, whose nonprofit organization's membership includes thousands of public school teachers, administrators, and education support personnel who either had already attained career status or would have been eligible for it in the coming years, and who, Ellis explained, relied on the Career Status Law for "peace of mind because they know that any issues implicating their jobs will be handled fairly and with due process;"

***3** • Plaintiffs Nixon, Holmes, Beatty, Wallace, and deVille, each of whom are public school teachers who relied on the statutory promise of career status rights in exchange for meeting the requirements of the Career Status Law in accepting their teaching positions, had already attained career status prior to the Law's repeal, and considered its protections to be a fundamental part of their overall compensation that offsets their relatively low pay and allows them the opportunity to grow and improve by being innovative in the classroom, as well as the ability to advocate for their students by raising concerns about instructional issues to administrators without fear of losing their jobs;

- Plaintiff Link, a public school teacher who had not yet attained career status before the Career Status Repeal but would have been eligible for it by the end of the 2013–14 school year and who relied on the statutorily promised opportunity to earn the protections career status provides when he chose to accept a teaching position here in North Carolina over a job offer in Florida;

- eight public school administrators who explained that career status protections help attract and retain teachers despite the relatively low salaries established by State salary schedules; that the Career Status Law's four-year probationary period provided more than adequate time for school districts to evaluate teachers and make informed decisions that ensure career status is only granted to teachers who have proven their effectiveness; that the Career Status Law already provided school administrators with sufficient tools to discipline and/or dismiss teachers who have already earned career status and thus did not impede their ability to remove such teachers for inadequate performance; and that although, in the vast majority of cases when a school district seeks removal of a career status teacher, the teacher agrees to resign without a hearing, on the few occasions when hearings do occur, the process is not onerous for the district;

- Representative Richard Glazier, who represents North Carolina's 44th district in the State House of Representatives and explained that before the Career Status Repeal was enacted as part of the Appropriations Act, the House had already passed legislation aimed at reforming the Career Status Law in the form of House Bill 719, which would have "added definitions of teacher performance evaluation standards, teacher performance ratings, and teacher status, thus creating greater consistency in the determination of career status and revocation of career status based on evaluation ratings," by a bipartisan and nearly unanimous vote of 113–to–1; and

- labor economist Jesse Rothstein, who explained that the job security afforded by career status functions as a valuable employment benefit for North Carolina's teachers insofar as it offsets their lower salaries relative to other professions and other teachers in almost every other state in the country, and also serves the State's interest in running an efficient system of public education by helping to recruit and retain experienced and effective teachers who might otherwise leave the profession; by ensuring that non-retention decisions are made in a timely way in order to remove ineffective teachers from the classroom more quickly; and by reducing the need for expensive and disruptive annual retention evaluations for career status teachers, thereby enabling school districts to focus their resources, and teachers to focus their time and energy, on classroom instruction.

***4** In addition, Plaintiffs also submitted resolutions adopted by the Boards of Education of Brunswick, Carteret, Chatham, Cleveland, Craven, Cumberland, Guilford, Haywood, Jackson, Lee, Lenoir, Macon, Onslow, Orange, Person, Robeson, Rockingham, Rowan, Transylvania, Tyrrell, Wake, and Washington Counties calling on our General Assembly to repeal the Career Status Repeal's 25% Provision because it is too vague to provide any discernible standard for determining who should qualify for the four-year contracts and bonuses and also provides no funding beyond the first year.

In opposition to Plaintiffs' motion for summary judgment, the State submitted affidavits from Terry Stoops, a policy analyst at the John Locke Foundation, and Eric A. Hanushek, a senior fellow at the Hoover Institute. Citing North Carolina students' low scores on standardized tests and arguments by Hanushek and other researchers that raising the quality of the teacher workforce is the key to raising student achievement, Stoops defended the Career Status Repeal because it "will make it easier for public school administrators and school boards to remove ineffective tenured teachers from the classroom" and "will likely produce a much-needed surge in student performance, particularly for public school students in low-income and low-performing schools."For his part, Hanushek described how his research demonstrated that the quality of teachers is the most important factor in maximizing student learning but that teacher quality is difficult to measure and new metrics for best assessing teacher quality are ever-evolving, which means that granting teachers tenure not only makes it more difficult to remove ineffective teachers but also "severely restricts the ability of the schools to use updated teacher performance information in making personnel decisions."Hanushek took issue with aspects of Rothstein's analysis of the Career Status Law's systemic benefits but provided no specific evidence that career status protections adversely impact the quality of education North Carolina's public school children receive.

On 12 May 2014, the trial court held a hearing on Plaintiffs' Rule 56 motion for summary judgment. During that hearing, the State submitted a document entitled "Inadmissible Provisions of Affidavits Submitted in Support of Plaintiffs' Motion for Summary Judgment," which asked the trial court to disregard portions of Plaintiffs' affidavits consisting of hearsay statements, conclusions as to the legal issues in the case, and statements regarding the impact of career status and its repeal on all teachers that the State contended could not have been based on any individual affiant's personal knowledge. In an order entered 6 June 2014, the trial court explained that it had treated the State's request as a motion to strike, which it granted with regard to the portions of Plaintiffs' affidavits that consisted of legal conclusions or inadmissible hearsay, but otherwise denied.

***5** That same day, the trial court entered a separate order granting in part and denying in part Plaintiffs' motion for summary judgment. In support of its order, the trial court found as an undisputed material fact that

> [Plaintiffs] were statutorily promised career status rights in exchange for meeting the requirements of the Career Status Law. When they made their decisions both to accept teaching positions in North Carolina school districts and to remain in those positions, they reasonably relied on the State's statutory promise that career status protections would be available if they fulfilled those requirements. The protections of the Career Status Law are a valuable part of the overall package of compensation and benefits for [P]laintiffs and other teachers, benefits that they bargained for both in accepting employment as teachers in North Carolina school districts and remaining in those positions. From the perspective of school administrators, career status protections help attract and retain teachers despite the low salaries established by State salary schedules.

After additional findings that the four-year probationary period "ensure[s] that career status is only granted to teachers who have proven their effectiveness" and that the Career Status Law does not impede school administrators' ability to remove career status teachers whose performance is inadequate, the court found as an undisputed material fact that "[t]here is no evidence that the Career Status Law prevents North Carolina school districts from achieving the separation of teachers when they believe dismissal is necessary. School administrators are able to make all necessary personnel changes within the framework of the Career Status Law."

In light of these undisputed material facts, the trial court concluded that the Career Status Repeal violated Article I, Section 10 of the United States Constitution. The trial court based this conclusion on its application of the three-factor test articulated by the United States Supreme Court in *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) to determine whether a state law violates the Contract Clause. As to the first factor, the trial court concluded based on the United States Supreme Court's holding in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685 (1938), and our Supreme Court's holdings in *Faulkenbury v. Teachers' & State Employees' Retirement Sys. of N.C.*, 345 N.C. 683, 483 S.E.2d 422 (1997), *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), and *Wiggs v. Edgecombe Cnty.*, 361 N.C. 318, 643 S.E.2d 904

(2007), that "[a]ll teachers who earned career status before the [26 July 2013] enactment of the Career Status Repeal have contractual rights in that status and to the protections established by the Career Status Law."As to the second factor, the trial court concluded that "[b]y eliminating those protections, the Career Status Repeal substantially impairs the contractual rights of career status teachers."As to the third factor, the trial court concluded that this impairment of contractual rights "was not reasonable and necessary to serve an important public purpose," given that the "Career Status Repeal does not further any public purpose because the undisputed facts demonstrate that, under the Career Status Law, school administrators already have the ability to dismiss career status teachers for inadequate performance whenever necessary."After noting that "eliminating career status hurts North Carolina public schools by making it harder for school districts to attract and retain quality teachers," the trial court also concluded that "[e]ven if there was an actual need for school administrators to have greater latitude to dismiss ineffective career status teachers, that objective could have been accomplished through less drastic means, such as by amending the grounds for dismissing teachers for performance-related reasons."

***6** As a separate and independent ground for concluding that the Career Status Repeal is unconstitutional, the trial court also determined that it violated the Law of the Land Clause found in Article I, Section 19 of North Carolina's Constitution, which "has long been interpreted to incorporate a protection against the taking of property by the State without just compensation."In light of our Supreme Court's holding in *Bailey* that "[c]ontract rights, including those created by statute, constitute property rights that are within the Law of the Land Clause's guarantee against uncompensated takings," the trial court concluded that by eliminating career status teachers' contractual rights, "the Career Status Repeal constitutes a taking of property without compensation that violates the Law of the Land Clause beyond a reasonable doubt."

Consequently, the trial court granted summary judgment to Plaintiffs NCAE, Nixon, Holmes, Beatty, Wallace, and deVille, declared that Sections 9.6 and 9.7 of S.L. 2013–360 "are unconstitutional with regard to teachers who had received career status before [26 July 2013]," and —after concluding those teachers had no other adequate remedy at law and would suffer irreparable harm otherwise —permanently enjoined the State from implementing and enforcing the Career Status Repeal. The trial court also permanently enjoined the State from implementing and enforcing the 25% Provision, which it concluded "violates the constitutional vagueness doctrine because it provides no discernible, workable standards to guide local school districts in its implementation" and is "inextricably tied" to the Career Status Repeal because it is "predicated on the revocation of career status as of 2018" and thus "cannot be severed from the unconstitutional revocation of career status."However, the trial court denied summary judgment on Plaintiff Link's claims, and therefore granted summary judgment to the State against all claims on behalf of teachers who had not yet earned career status, reasoning that such teachers lacked standing to bring these claims because "[p]robationary teachers who have not yet received career status do not have contractual rights that are protected by the Contract Clause or the Law of the Land Clause."

The State gave written notice of appeal on 3 July 2014, and, on 7 July 2014, Plaintiffs also gave written notice of appeal.

II. The State's Appeal

A. The Career Status Repeal violates the Contract Clause of the United States Constitution

The State argues that the trial court erred as a matter of law when it granted summary judgment to NCAE and the five teachers who had already earned career status based on its conclusion that the Career Status Repeal violated the Contract Clause. We disagree.

"The standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law."*Hyatt v. Mini Storage on Green,* —N.C.App. ——, ——, 763 S.E.2d 166, 169 (2014) (citation, internal quotation marks, and brackets omitted). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."*Id.* (quoting N.C. Gen.Stat. § 1A–1, Rule 56). This Court applies a *de novo* standard of review to orders granting or denying a motion for summary judgment. *Id.*

***7** **[1]** To determine whether a state law violates the Contract Clause of the United States Constitution, our State's appellate courts apply a three-factor test that examines: "(1)

whether a contractual obligation is present, (2) whether the [S]tate's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose."*Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (citation omitted).

(1) The Career Status Law creates contractual obligations

[2] In the present case, as to the first factor, the State argues that the trial court erroneously concluded that Plaintiffs Nixon, Holmes, Beatty, Wallace, and deVille had contractual rights under the Career Status Law that were substantially impaired by the Career Status Repeal based on a misapplication of the relevant federal and state precedents the court relied on. Specifically, the State contends that *Brand*, *Faulkenbury*, and *Bailey* are easily distinguishable from the present facts because those cases involved benefits that were automatically conferred on public employees by express statutory promises, whereas here, career status depends upon completion of a four-year probationary period and a majority vote of the local school board. According to the State, this makes it more relevant to focus on Plaintiffs' individual employment contracts with their local school boards, which the State is quick to emphasize contain provisions stating that the contracts are, for example, "subject to the availability of federal and local funds" and "subject to the allotment of personnel by the State Board of Education and subject to the condition that the amount paid from State funds shall be within the allotment of funds."Thus, the State contends that even if Plaintiffs did have contractual rights to career status protections, those rights were not substantially impaired by the Career Status Repeal because Plaintiffs were always subject to termination due to the conditional language in their contracts. Our review of the relevant case law leads us to conclude that this argument is totally baseless.

In *Brand*, the United States Supreme Court reviewed a challenge to legislation that partially repealed Indiana's Teachers' Tenure Law, which provided that teachers who had served under annual contracts for five or more successive years and then entered into a new contract would be considered "permanent" teachers with indefinite, continuing contracts which could be terminated only after notice and a hearing and only for statutorily enumerated reasons. 303 U.S. at 102–03, 58 S.Ct. at 447, 82 L.Ed. at 692. Indiana's legislature subsequently amended the Teachers' Tenure Law to exclude teachers employed by "township school corporations." *Id.* The plaintiff, who had been employed as a teacher by a township school for long enough to earn "permanent" status prior to the partial repeal, brought suit after her contract was terminated. In holding that the repeal violated the Contract Clause, the Court noted that "it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions."*Id.* at 100, 58 S.Ct. at 446, 82 L.Ed. at 690.

***8** In *Faulkenbury*, our Supreme Court held that legislation reducing teachers' and other State employees' retirement benefits violated the Contract Clause. As the Court explained, "[a]t the time the plaintiffs' rights to pensions became vested [after they had been employed more than five years], the law provided that they would have disability retirement benefits calculated in a certain way. These were rights that they had earned and that may not be taken from them by legislative action."345 N.C. at 690, 483 S.E.2d at 427. In so holding, the Court rejected the State's argument that the statute the plaintiffs relied on only announced a policy subject to change by a later legislature. The Court focused instead on the terms of the statute to conclude:

> We believe that a better analysis is that at the time the plaintiffs started working for the state or local government, the statutes provided what the plaintiffs' compensation in the way of retirement benefits would be. The plaintiffs accepted these offers when they took the jobs. This created a contract.

Id.

Similarly, in *Bailey*, our Supreme Court held that legislation capping the tax exemption for public employee retirement benefits violated the Contract Clause. After tracing the "long demonstrated [ ] respect" our State's judiciary has shown "for the sanctity of private and public obligations from subsequent legislative infringement," 348 N.C. at 142, 500 S.E.2d at 61, the Court made clear that "[t]he basis of the contractual relationship determinations in these and related cases is the principle that where a party in entering an obligation relies on the State, he or she obtains vested rights that cannot be diminished by subsequent state action."*Id.* at 144, 500 S.E.2d at 62. Furthermore, as the Court noted in rejecting the State's argument that the exemption constituted an unconstitutional contracting away of its power of taxation,

> [t]he rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. In this case, the State created the exemption and then proceeded for decades to represent it as a portion of retirement benefits and to reap its contractual benefits. It is clear from the record evidence that the State used these representations as inducement to employment with the State, and employees relied on these representations in consideration of many years' valuable service to and with the State. The State's attempt to find shelter under the North Carolina Constitution must be compelling indeed after such a long history of accepting the benefits of the extension of the exemption in question. We find no such compelling case here.

Id. at 147, 500 S.E.2d at 64 (citation and internal quotation marks omitted). Thus, given that the tax exemption benefit had "helped attract and keep quality public servants in spite of the generally lower wage paid to state and local employees,"*id.* at 150, 500 S.E.2d at 65, the Court concluded that the State's retroactive imposition of a cap on the exemption "is not acceptable in a government guided by notions of fairness, consent and mutual respect between government and man, and certainly not between the government of this State and its employees."*Id.* at 150, 500 S.E.2d at 66.

***9** More recently, in *Wiggs*, our Supreme Court again determined that a retroactive change to a statutory employment benefit for public employees violated the Contract Clause. There, the plaintiff was a deputy sheriff who retired early after three decades of service and received a "special separation allowance" pursuant to N.C. Gen.Stat. § 143–166.42 from the county that employed him. He then obtained part-time employment as a police officer with the Raleigh–Durham Airport Authority, which prompted his former county employer to adopt a resolution providing that special separation allowance payments would terminate upon a retiree's re-employment with another local government entity. 361 N.C. at 319, 643 S.E.2d at 905. Drawing on its prior holding in *Faulkenbury*, the Court recognized that the special separation allowance was an employment benefit that was contractual in nature, and concluded that although the county could have acted within its authority "to pass a resolution which would apply prospectively to those whose rights to the special separation allowance had not yet vested," it could not retroactively apply such a resolution "to [the] plaintiff's vested contractual right" to receive the allowance. *Id.* at 324, 643 S.E.2d at 908.

Based on the record and our review of the case law made relevant by the actual arguments of the parties, we conclude that the trial court did not err in its determination that career status rights constitute a valuable employment benefit and that by satisfying the requirements of the Career Status Law prior to the Career Status Repeal, Plaintiffs Nixon, Holmes, Beatty, Wallace, and deVille earned vested contractual rights to the valuable employment benefit that career status protections represent. While the benefits at issue here may not be identical to those at issue in *Faulkenbury*, *Bailey*, and *Wiggs*, we conclude that those cases demonstrate our Supreme Court's long-standing recognition that when the General Assembly revokes valuable employment benefits that are obtained in reliance on a statute and that offset the relatively low salaries of public employees, it violates the Contract Clause. In reaching this conclusion, we find highly persuasive the affidavit Plaintiffs submitted from labor economist Rothstein, who observes that "[t]here is a useful parallel between job security that derives from a career status award and the economic value of retirement benefits."As Rothstein explains:

> It has long been recognized that the prospect of earning future retirement benefits, including pensions and retiree health coverage, has economic value to workers, even those who are not themselves near retirement age. Workers often choose careers based in part on the retirement benefits that are offered. In the same way, the prospect of earning career protections, and the job security that comes with them, has economic value to teachers, and is an important part of the package of pay and benefits that individuals consider when deciding whether to become teachers.

***10** [ ] There are several aspects of the teacher employment relationship that make career status protections more valuable than they might otherwise be. First, teachers are relatively poorly paid. Nationally, the average teacher earned about $56,643 in 2011–12 per year, only 67% of the salary earned by the average full-

> time, full-year college-educated worker. In North Carolina, teacher salaries are even lower than this—the average public school teacher's salary in 2011–12 was $46,605, down over 12% in real terms since 1999–2000. The 2013–14 North Carolina salary schedule for a teacher with a bachelor's degree specifies a maximum salary of $53,180 for a teacher with 36 or more years of experience, less than the average teacher's salary nationally, and even teachers with master's degrees do not reach the national average until they have accumulated 35 years of experience.
>
> [ ] Second, teacher salaries are typically backloaded. Entering teacher salaries are very low relative to other occupations, as are those with few years of experience, but the growth rate is typically higher than in non-teaching jobs. In North Carolina, teacher salaries rise by a total of only 2.8% over the first seven years, then grow by 15.8% over the next four years. Total compensation is even more strongly backloaded than are salaries. Teacher pensions do not vest until ten years (for those hired after 2011), and the pension benefit grows with experience much faster than the base salary. Salary-experience profiles are typically much smoother in the economy at large than is the North Carolina teacher's salary schedule. Backloaded salaries mean that it can be quite costly for an experienced teacher to lose his or her job, as he or she has already borne the cost of teaching through the low-compensation early years but will never be able to amortize this through higher earnings in the later part of the career.
>
> ....

Based on Rothstein's analysis, we conclude that career status protections have a financial impact that is strongly analogous to, and in some ways directly implicates, the vested contractual rights to benefits as a form of deferred compensation that were at issue in *Faulkenbury*, *Bailey*, and *Wiggs*.We consequently conclude that our Supreme Court's consistent pattern of refusing to allow the State to renege on its statutory promises, after decades of representing the valuable employment benefits conferred by those statutes as inducements to public employment, supports, and even compels, the result we reach here. *See, e.g.*, *Bailey*, 348 N.C. at 147, 500 S.E.2d at 64.

In the present case, the record indicates a similar pattern of inducement and reliance, given Plaintiffs' affidavits describing how they relied on the availability of career status protections when they chose to work as teachers in North Carolina's public schools, as well as affidavits from eight public school administrators describing how they have relied on the Career Status Law to attract and retain qualified teachers. Based on this uncontradicted evidence, we cannot escape the conclusion that for the last four decades, the career status protections provided by section 115C–325, the very title of which—"Principal and Teacher Employment Contracts"—purports to govern teachers' employment contracts, have been a fundamental part of the bargain that Plaintiffs and thousands of other teachers across this State accepted when they decided to defer the pursuit of potentially more lucrative professions, as well as the opportunity to work in states that offer better financial compensation to members of their own profession, in order to accept employment in our public schools. We therefore conclude further that, as in *Faulkenbury*, *Bailey*, and *Wiggs*, the State has reaped benefits by using the Career Status Law as an inducement by which to attract and retain public school teachers in spite of the relatively low wages it pays them. Thus, although the dissent cites our Supreme Court's prior observation in *Taborn v. Hammonds*, 324 N.C. 546, 556, 380 S.E.2d 513, 519 (1989), that the purpose of the Career Status Law was "to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary or discriminatory reasons," in support of its conclusion that career status protections were intended merely to advance a policy of providing good teachers "for the children" rather than to provide contractual rights for the teachers, we cannot and will not ignore the thousands of North Carolinians who ended up on the other side of that equation by relying on the inducement of a statutory promise to gain vested rights to valuable employment benefits.

***11** The State's attempt to distinguish the career status protections at issue here from the contractual rights to benefits under the statutory schemes at issue in *Brand*, *Faulkenbury*, and *Bailey* is wholly unpersuasive. Indeed, the State's description of those benefits as being automatically conferred by express statutory guarantees conveniently overlooks striking similarities those statutes share with the Career Status Law. In *Brand*, for example, the granting of tenure, or "permanent" status, was contingent on the teacher successfully completing at least five years of probationary employment and then entering into a new contract. Although the statute did not expressly require approval by the local school board, we can infer that a public school teacher's contract would only be renewed after review by some governmental body or agent with knowledge of Indiana's Teachers' Tenure Law, and we therefore see no meaningful

difference between its operation and the procedures by which Plaintiffs earned career status protections under the Career Status Law. In a similar vein, the statutes at issue in *Faulkenbury*, *Bailey*, and *Wiggs* required employees to remain employed for a minimum vesting period before they were entitled to receive any benefits at all; here again, it stands to reason that those employees' performances were evaluated at regular intervals by supervisors with knowledge of the statutory vesting process for retirement benefits and strong incentives to terminate inadequately performing employees before those benefits vested. Therefore, because the State's purported distinctions make no difference, we conclude that these Plaintiffs who relied on the statutory promise offered by the Career Status Law and satisfied its requirements before the Career Status Repeal earned a vested right to career status protections that is every bit as contractual in nature as the plaintiffs' rights in *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs*.Indeed, we believe that to hold otherwise would go against nearly two centuries of respect our State's judiciary has shown for the sanctity of private and public contractual obligations and would thus "not [be] acceptable in a government guided by notions of fairness, consent and mutual respect between government and man, and certainly not between the government of this State and its employees."*Bailey*, 348 N.C. at 150, 500 S.E.2d at 66.

The State's emphasis on Plaintiffs' individual employment contracts with their local school boards is similarly misplaced. First, the State's argument fundamentally misconstrues the basis for Plaintiffs' claims under the Contract Clause. Put simply, Plaintiffs are not suing based on their individual contracts, but instead based on the State's statutory promise, contained in section 115C–325 of our General Statutes, that teachers who satisfied the requirements of the Career Status Law and earned that status would be entitled to its protections, and it is that contractual promise—just like the statutory promises at issue in *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs*—that Plaintiffs allege was substantially impaired by the Career Status Repeal. Therefore, the boilerplate disclaimers the State relies on from Plaintiffs' individual employment contracts with local school boards—which do not purport to address the revocation of career status protections in any way but instead merely, and sensibly, recognize that a teacher's salary and continued employment depend on the State not running out of the funds necessary to honor its obligations—have no bearing whatsoever on this litigation.

***12** The State also puts heavy emphasis on a similar provision contained in a sample contract from the Durham Public Schools ("DPS") Board of Education, included in the record with the affidavit from DPS Chair Heidi H. Carter, that specifically refers to the contract as being "subject to the provisions of the school law applicable thereto, which are hereby made a part of this contract."The State contends this language evidences a clear reservation of rights that is consistent with the long-held proposition that one legislature cannot bind another, *see, e.g.*, *Town of Shelby v. Cleveland Mill & Power Co.*, 155 N.C. 196, 71 S.E. 218 (1911), and therefore demonstrates that career status protections have always been subject to termination by the General Assembly. But this argument also fails. On the one hand, as noted *supra*, our Supreme Court has already rejected a similar argument in *Faulkenbury*. *See* 345 N.C. at 690, 483 S.E.2d at 427. On the other hand, given the State's intense focus on individual employment contracts, it certainly bears noting that none of these Plaintiffs who had already earned career status worked for DPS, which means that none of them would have been bound by this vague caveat. The State further contends that the sample contract is relevant because Plaintiffs' complaint purported to seek relief on behalf of all teachers and the trial court's order likewise applies to all teachers, but here again, the State's argument is unavailing because it misconstrues the basis for Plaintiffs' claims under the Contract Clause.

(2) The Career Status Repeal substantially impairs contractual obligations

[3] Having determined that Plaintiffs have contractual rights to career status protections, we turn next to the question of whether those rights were substantially impaired. This is not a difficult question. Under the Career Status Law, these Plaintiffs would have continuing contracts; under the Career Status Repeal, their contracts will be limited to a maximum duration of four years. *Compare*N.C. Gen.Stat. § 115C–325(d)(1), *with* 2013 N.C. Sess. Law 360 § 9.6(b). Moreover, under the Career Status Law, if these Plaintiffs were terminated, demoted, or otherwise disciplined, they would be entitled to a hearing with full due process rights; under the Career Status Repeal, there is no guarantee of a hearing. *Compare*N.C. Gen.Stat. § 115C–325(h), (j), *with* 2013 N.C. Sess. Law 360 § 9.6(b). Thus, in light of the relevant state and federal decisions discussed *supra*, we have no trouble concluding that the trial court was correct in its determination that the Career Status Repeal substantially impairs Plaintiffs' vested contractual rights.

For its part, the State argues that Plaintiffs' vested contractual rights to career status protections are not substantially impaired by the Career Status Repeal based on a misapplication of the Fourth Circuit's recent decision in *Cherry v. Mayor & Balt. City*, 762 F.3d 366 (4th Cir.2014). There, the plaintiffs sought to challenge a municipal ordinance that made actuarial adjustments to a pension plan by replacing a variable benefit with a cost-of-living adjustment. *Id.* at 369. The Fourth Circuit concluded that the city's modification of its pension plan fell within a state-law contract doctrine permitting "reasonable modifications" to pension plans, which would allow the plaintiffs to challenge the reasonableness of the modification by bringing a breach of contract action for damages. *Id.* at 372–73. Because a city does not commit a Contract Clause violation "merely by breaching one of its contracts," the plaintiffs could not maintain a Contract Clause action in the absence of a showing that the city had somehow foreclosed them from pursuing a breach of contract action for damages. *Id.* at 371. In the present case, the State suggests that *Cherry* should control because the Career Status Repeal was merely a contract modification and Plaintiffs have not asserted any breach of contract claims. There are several reasons why this argument lacks merit. First, the State's claim that the Career Status Repeal is merely a "modification" authorized by Plaintiffs' individual employment contracts based on the boilerplate disclaimers discussed *supra* once again misconstrues the basis for Plaintiffs' claims under the Contract Clause, and consequently fails. Moreover, the State points to no state-law remedy comparable to the "reasonable modification" doctrine in *Cherry* that would permit Plaintiffs to bring a breach of contract action for damages here. We therefore conclude that *Cherry* is not even remotely applicable to the present facts.

(3) The Career Status Repeal was not reasonable and necessary to serve an important public purpose

***13** **[4]** **[5]** **[6]** **[7]** Finally, the State has the burden of establishing that the Career Status Repeal was a reasonable and necessary means of furthering an important public purpose. *See Bailey*, 348 N.C. at 151, 500 S.E.2d at 66. Our review as to this third factor involves two steps. First, legislation that substantially impairs contractual rights must have "a legitimate public purpose," which essentially means the State must produce evidence that the purported harm it seeks to address actually exists. *See, e.g., Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 704, 74 L.Ed.2d 569, 581 (1983). Second, if the legislation has a legitimate public purpose, we then examine whether the impairment of contractual rights is a "reasonable and necessary" way to further that purpose or whether the State's objective could have been accomplished through a "less drastic modification" because the State "is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *U.S. Trust Co.*, 431 U.S. at 30–31, 97 S.Ct. at 1521–22, 52 L.Ed.2d at 114–15. While the State is typically granted a degree of deference as to what is reasonable and necessary when legislation impairs purely private contracts, *see Energy Reserves Grp., Inc.*, 459 U.S. at 412–13, 103 S.Ct. at 704–06, 74 L.Ed.2d at 581, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate" where, as here, public contracts are at issue "because the State's self-interest is at stake." *U.S. Trust Co.*, 431 U.S. at 26, 97 S.Ct. at 1519, 52 L.Ed.2d. at 112.

[8] In the present case, the State contends that even if the Career Status Repeal substantially impaired Plaintiffs' contractual rights, such an impairment is reasonable and necessary to serve the important public purpose of improving the educational experience for North Carolina's public school children. Specifically, citing the North Carolina Constitution's guarantee that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right," N.C. Const. art. I, § 15, the State argues that it is imperative for local school boards to be able to dismiss ineffective teachers, and that the Career Status Repeal is therefore crucially important because it gives local school boards more flexibility in managing their pool of teachers and increasing the overall quality of the teachers in the pool. The State also urges this Court to consider the Career Status Repeal as just one plank in a broader raft of reforms aimed at improving public education. However, as demonstrated by our review of the record and the relevant case law, this argument is without merit.

While no one can deny the general proposition that improving North Carolina's public schools is an important public purpose, the State's purported rationale for the Career Status Repeal is flatly contradicted by the terms of the Career Status Law itself and the affidavits both parties submitted in response to Plaintiffs' motion for summary judgment. Before its repeal, the Career Status Law already explicitly permitted school districts to terminate career status teachers for "inadequate performance," which the statute defined as "the failure to perform at a proficient level on any standard

of the evaluation instrument" or "otherwise performing in a manner that is below standard."N.C. Gen.Stat. § 115C–325(e)(1), (e)(3). Furthermore, Plaintiffs submitted affidavits from eight North Carolina public school administrators, who each confirmed that the Career Status Law is an asset for attracting and retaining quality teachers to serve in our State's public schools; that the four-year probationary period provides more than adequate time for school districts to evaluate teachers, identify performance issues early, provide constructive feedback for improvement, and make informed decisions that ensure career status is only granted to teachers who have proven their effectiveness; and, most importantly, that the Career Status Law effectively provided school administrators with sufficient tools to discipline and/or dismiss teachers who have already earned career status and thus did not impede their ability to remove such teachers for inadequate performance. By contrast, the State submitted affidavits from experts who believe that granting tenure to teachers creates insurmountable obstacles to dismissing ineffective teachers, and that removing those obstacles will therefore help improve student performance. Yet the only support that the State's affidavits offer for this premise consists of vague and sweeping generalizations about tenure as an abstract concept, rather than specific facts regarding the operation of North Carolina's Career Status Law or its allegedly adverse impact on our public schools. Given this Court's prior recognition that "conclusory statements standing alone cannot withstand a motion for summary judgment,"*see, e.g.*, *Midulla v. Howard A. Cain Co.*, 133 N.C.App. 306, 309, 515 S.E.2d 244, 246 (1999), we conclude that the vague and conclusory assertions contained in the State's affidavits are plainly insufficient to meet its burden here. Therefore, in light of the unrebutted affidavits concerning real North Carolina school administrators' actual experiences implementing the Career Status Law, and the statute's explicit inclusion of "inadequate performance" as a ground for dismissal, we conclude that the substantial impairments the Career Status Repeal imposes on Plaintiffs' vested contractual rights for the purported rationale of making it easier to dismiss ineffective teachers serves no public purpose whatsoever.

***14** Moreover, even assuming *arguendo* that making it easier to dismiss ineffective teachers was an important public purpose, we are not persuaded that the Career Status Repeal was a reasonable and necessary means to advance that purpose. Our Supreme Court's prior decisions make clear what a high bar this represents. For example, *Bailey* established that in this context, "[l]egislative convenience is not synonymous with reasonableness" when it comes to legislation that impairs the vested rights of public employees to whom the State has made promises in consideration of their years of public service, and that "necessary" basically means "essential." 348 N.C. at 152, 500 S.E.2d at 67 ("Thus, we hold the Act which placed a cap on tax-exempt benefits was not necessary to a legitimate state or public purpose, *i.e.*, it was not 'essential' because 'a less drastic modification' of the State's exemption plan was available.") (citation omitted; italics added). In *Faulkenbury*, the State argued that lowering the plaintiffs' retirement benefits was reasonable and necessary to ensure the State pension plan's correct operation. 345 N.C. at 694, 483 S.E.2d at 429. In rejecting that argument, the Court explained that "[w]e do not believe that because the pension plan has developed in some ways that were not anticipated when the contract was made, the state or local government is justified in abrogating it. This is not the important public purpose envisioned which justifies the impairment of a contract."*Id.* In *Bailey*, the Court went even further when it rejected the State's argument that capping the tax exemption for public employee retirement benefits was "necessary" to comply with a decision by the United States Supreme Court because there were "numerous ways that the State could have achieved this goal without impairing the contractual obligations of [the] plaintiffs."348 N.C. at 152, 500 S.E.2d at 67.

In the present case, we are compelled by *Faulkenbury* and *Bailey* to reach a similar conclusion. On the one hand, if ensuring the correct operation of the State's plan was not a sufficient basis for the *Faulkenbury* Court to conclude the substantial impairment of contractual rights was necessary and reasonable, then surely here, the State's decision to totally abolish its plan based on vague generalizations supported by no direct evidence whatsoever must also fail. Moreover, just because the Career Status Repeal might be a convenient way to further the General Assembly's broader efforts to reform public education does not make the abrogation of Plaintiffs' vested contractual rights reasonable. Further, the record is replete with evidence of less drastic available alternatives. The legislative history of the Career Status Law demonstrates that its provisions have been amended numerous times over the last four decades, most recently in 2011 to expand the definition of "inadequate performance." *See* An Act to Modify the Law Relating to Career Status for Public School Teachers, 2011 N.C. Sess. Law 348. If it had been truly necessary to further augment the ability of local school boards to dismiss teachers for performance-related reasons, our General Assembly could have done so through further reforms; indeed, Plaintiffs' affidavit from Rep. Glazier clearly

demonstrates that there was a less drastic alternative available here in the form of H.B. 719, which would have "added definitions of teacher performance evaluation standards, teacher performance ratings, and teacher status, thus creating greater consistency in the determination of career status and revocation of career status based on evaluation ratings," an alternative which enjoyed nearly unanimous bipartisan support. We therefore conclude that the trial court did not err in granting partial summary judgment in favor of NCAE and the five teachers who had already earned career status based on its determination that the Career Status Repeal violated the Contract Clause of the United States Constitution.

B. The Career Status Repeal violated the Law of the Land Clause of the N.C. Constitution

***15** **[9]** The State also argues that the trial court erred in concluding that the Career Status Repeal violated the Law of the Land Clause found in Article I, Section 19 of the North Carolina Constitution as a separate and independent basis for the court's partial grant of summary judgment to Plaintiffs. We disagree.

The Law of the Land Clause provides in relevant part that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."N.C. Const. art. I, § 19. North Carolina's appellate courts have long held that the clause protects against the taking of property by the State without just compensation. *See, e.g., Long v. City of Charlotte,* 306 N.C. 187, 196, 293 S.E.2d 101, 107–08 (1982) ("We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of the 'law of the land' within the meaning of Article I, Section 19 of our State Constitution.") (citations omitted); *State ex rel. Utilities Comm'n v. Buck Island, Inc.,* 162 N.C.App. 568, 580, 592 S.E.2d 244, 252 (2004) ("Though the clause does not expressly prohibit the taking of private property for public use without just compensation, our Supreme Court has inferred such a provision as a fundamental right integral to the law of the land.") (citation and internal quotation marks omitted). In *Bailey,* our Supreme Court recognized that because "[t]he privilege of contracting is both a liberty and a property right,"348 N.C. at 154, 500 S.E.2d at 68 (citation omitted), the Law of the Land Clause guarantees that contractual rights, including those created by statute, constitute property rights and are therefore protected against uncompensated takings. *Id.* ("[I]f the Legislature had vested an individual with the property in question, ... [the Law of the Land Clause] would restrain them from depriving him of such right.") (citation and emphasis omitted).

In the present case, the State contends that, in light of this Court's prior holding in *Shipman v. N.C. Private Protective Servs. Bd.,* 82 N.C.App. 441, 346 S.E.2d 295, *appeal dismissed and disc. review denied,*318 N.C. 509, 349 S.E.2d 866 (1986), all that is required for a challenged statute to comport with the Law of the Land Clause is that the statute must serve a legitimate purpose of State government and be rationally related to that purpose. Thus, given its duty imposed by Article I, Section 15 of the North Carolina Constitution to guard and maintain the right of the people to public education, the State argues that the Career Status Repeal is rationally related to the legitimate purpose of improving our children's educational experience by providing tools for local school boards to more easily dismiss underperforming teachers in order to serve the paramount goal of staffing the public schools with the best teachers possible. The State also heavily emphasizes the great deference and strong presumption of constitutionality that North Carolina's appellate courts typically afford to legislation enacted by our General Assembly, *see, e.g., Baker v. Martin,* 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) ("In determining the constitutionality of a statute we are guided by the following principle: [e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.") (citations, internal quotation marks, and brackets omitted), and implies that by ignoring these presumptions, the trial court violated the doctrine of separation of powers by improperly substituting its views for those of the Legislature. Indeed, while acknowledging that there are differing views on how best to improve public education in North Carolina, the State characterizes the present lawsuit as the sort of partisan policy dispute that is for the people's elected representatives, rather than the courts, to resolve. Furthermore, the State argues that Plaintiffs cannot meet their burden of proving the Career Status Repeal is unconstitutional beyond reasonable doubt because the statutory grounds for termination remain largely the same as under the Career Status Law and because teachers whose contracts are not renewed can still petition the local school board for a hearing.

***16** There are many reasons why this argument fails. First, the State's reliance on the standard of review this Court utilized in *Shipman* is wholly misplaced. There, we reviewed a challenge to our General Assembly's enactment of legislation to regulate "those professions which charge members of the public a fee for engaging in many activities which overlap the functions of our public police" by, *inter alia*, requiring that private detectives obtain licenses from a state agency. 82 N.C.App. at 443, 346 S.E.2d at 296. Because we determined that regulating such an occupation is clearly a legitimate purpose of state government, and that licensing is rationally related to that purpose, we rejected the plaintiff private investigator's argument that the statute violated the Law of the Land Clause. *Id.* at 444–45, 346 S.E.2d at 297. Significantly, however, *Shipman* did not involve any takings claim by the plaintiff, whose arguments focused exclusively on whether the statute authorizing the Private Protective Service Board to grant, suspend, or revoke licenses violated his right to due process, and we therefore find *Shipman* inapplicable to the present facts.

[10] Instead, we turn for guidance to the model our Supreme Court established in *Bailey*.As the *Bailey* Court made clear, a statutory promise of employment benefits, once vested, confers a contractual right, which is also a property right, the uncompensated impairment of which by subsequent legislation can constitute a taking in violation of the Law of the Land Clause. 348 N.C. at 154–55, 500 S.E.2d at 68–69. Having already determined that the challenged legislation violated the Contract Clause, the *Bailey* Court had no trouble in concluding that

> it is clear that the State has taken [the] plaintiffs' private property by passage of the Act. [The p]laintiffs contracted, as consideration for their employment, that their retirement benefits once vested would be exempt from state taxation. The Act now undertakes to place a cap on the amount available for the exemption, thereby subjecting substantial portions of the retirement benefits to taxation. This is in derogation of [the] plaintiffs' rights established through the retirement benefits contracts and thus constitutes a taking of their private property. The State fails to compensate them for such taking through the Act. As such, the act is unconstitutional under the [Law of the Land Clause].

348 N.C. at 155, 500 S.E.2d at 69. Similarly here, having already determined that the Career Status Repeal substantially impairs Plaintiffs' vested rights to career status protections in violation of the Contract Clause, the only remaining issue for our analysis is whether this derogation of Plaintiffs' rights constitutes an unconstitutional taking of property without just compensation. Consistent with *Bailey*, we conclude that it does. Here, as in *Bailey*, Plaintiffs contracted, as consideration for their employment, that after fulfilling the Career Status Law's requirements, they would be entitled to career status protections. Here, as in *Bailey*, the Career Status Repeal purports to abrogate those protections and thus constitutes a taking of Plaintiffs' private property. Here, as in *Bailey*, the Career Status Repeal offers no compensation for this taking. Thus, here, as in *Bailey*, the Career Status Repeal violates the Law of the Land Clause.

***17** The State's argument that Plaintiffs' constitutional rights have not been violated because they retain the same due process protections under the Career Status Repeal fails because it is patently false. While the State may be correct that the statutorily enumerated bases for termination remain largely unchanged, as already discussed *supra*, under the Career Status Law, a teacher who earned career status and was subsequently dismissed or disciplined was entitled to a hearing, whereas under the Career Status Repeal, there is no entitlement to a hearing. *Compare*N.C. Gen.Stat. § 115C–325(h)(2), (3), *with* 2013 N.C. Sess. Law 360 § 9.6—9.7; *see also Crump v. Bd. of Educ. of Hickory Admin. School Unit*, 326 N.C. 603, 613–14, 392 S.E.2d 579, 584 (1990) (holding that "a career teacher under [section] 115C–325... ha[s] a cognizable property interest in his continued employment," and is "entitled to a hearing according with principles of due process.") The State's argument also ignores the fact that it is not merely the Career Status Law's due process protections that are at issue here, since the Career Status Repeal also deprives Plaintiffs of their vested rights to continuing employment. Furthermore, the Career Status Repeal makes no provision for justly compensating Plaintiffs for the derogation of their rights to vested career status protections. The 25% Provision might have provided some degree of compensation to a small minority of career status teachers, but its own explicit terms would provide nothing to at least 75% of teachers who had already earned career status. *See* 2013 N.C. Sess. Law 360 § 9.6(g), (h). In any event, the State makes no argument that the trial court erred in permanently enjoining the 25% Provision's implementation

and enforcement based on the court's determination that the provision is inextricably tied to the unconstitutional revocation of career status, as well as unconstitutionally vague.

In light of the preceding analysis, we have no trouble concluding that Plaintiffs have met their burden of proving the Career Status Repeal unconstitutional beyond reasonable doubt and thereby have successfully rebutted the strong presumption of constitutionality this Court typically affords to legislation enacted by our General Assembly. Moreover, contrary to the State's argument, our review of the record and relevant case law makes clear that Plaintiffs are seeking vindication of their constitutional rights, rather than attempting to litigate a partisan policy dispute over education. As such, we hold that the trial court did not err in concluding that the Career Status Repeal violated the Law of the Land Clause of the North Carolina Constitution as a separate and independent basis for its partial grant of summary judgment to Plaintiffs.

C. The trial court did not err in declining to strike certain portions of Plaintiffs' affidavits

Additionally, the State argues that the trial court erred in failing to strike certain portions of Plaintiffs' affidavits that it contends were not properly admissible because they were not based on the affiants' personal knowledge. We disagree.

***18** **[11]** **[12]** As this Court has previously recognized, because Rule 56(e) of the North Carolina Rules of Civil Procedure provides in relevant part that affidavits supporting and opposing summary judgment "shall be made on personal knowledge," when an affidavit contains statements not based on an affiant's personal knowledge, the trial court "may not consider" those portions of the affidavit. *Moore v. Coachmen Indus., Inc.*, 129 N.C.App. 389, 394, 499 S.E.2d 772, 776 (1998) (citation omitted); *see also*N.C. Gen.Stat. § 1A–1, Rule 56(e) (2013). In the present case, the State complains that there is no possible way that any of Plaintiffs' affiants could have personal knowledge of what motivates the decisions of every public school teacher in North Carolina. Thus, the State contends that the trial court erred by failing to strike those portions of each of these Plaintiffs' affidavits that included statements about the impact of career status on all teachers in the State, as well as certain portions of the affidavits from school administrators that purported to describe what all teachers in the State "relied upon" or "viewed as important" in making their career decisions.

[13] This argument is without merit. On the one hand, we are not convinced that the statements the State contests are beyond the personal knowledge of the affiant teachers and administrators, all of whom are experienced North Carolina educators and are thus sufficiently familiar with the Career Status Law to competently describe its benefits and protections in general terms, as well as the basic economic assumptions that motivate members of their profession. On the other hand, even assuming *arguendo* that the trial court should have excluded these contested statements, in light of the fact that the State is unable to specifically identify any aspect of the court's order that relied on them, we conclude that any error in its failure to strike them was entirely harmless. Indeed, the only portion of the order that deals with the Career Status Law's impact on teachers' motivations and career decisions was the trial court's finding that

> [Plaintiffs] were statutorily promised career status rights in exchange for meeting the requirements of the Career Status Law. When they made their decisions both to accept teaching positions in North Carolina school districts and to remain in those positions, they reasonably relied on the State's statutory promise that career status protections would be available if they fulfilled those requirements. The protections of the Career Status Law are a valuable part of the overall package of compensation and benefits for [P]laintiffs and other teachers, benefits that they bargained for both in accepting employment as teachers in North Carolina school districts and remaining in those positions. From the perspective of school administrators, career status protections help attract and retain teachers despite the low salaries established by State salary schedules.

***19** Our review of the record demonstrates that this finding of fact is well supported by statements in each of the named Plaintiffs' affidavits about how they personally relied on the Career Status Law's statutory promise, and by statements in each of the administrators' affidavits about how they

recognized the Career Status Law's benefits based on their own personal experiences.

The premise for the State's argument here appears to be that because these Plaintiffs do not speak for every teacher in North Carolina, the trial court erred by permanently enjoining the State from implementing and enforcing the Career Status Repeal. But here again, the State misconstrues the basis for Plaintiffs' lawsuit. While the State's argument might have some merit if this were a class action, it is totally inapplicable to the present litigation, in which Plaintiffs contend that the Career Status Repeal is unconstitutional as applied to them, given their vested contractual and property rights in the Career Status Law's protections. Despite the State's claims to the contrary, that does not mean that the trial court erred when it concluded that the Career Status Repeal is equally unconstitutional as applied to all similarly situated public school teachers who have already earned career status. Accordingly, we hold that the trial court did not err in granting summary judgment to NCAE and Plaintiffs Nixon, Holmes, Beatty, deVille, and Wallace.

D. The arguments raised by the dissent are neither persuasive nor properly before this Court

[14] Finally, we are compelled to note that "[i]t is not the role of the appellate courts ... to create an appeal for an appellant."*Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*,359 N.C. 643, 617 S.E.2d 662 (2005); *see also Hammonds v. Lumbee River Elec. Membership Corp.*, 178 N.C.App. 1, 13, 631 S.E.2d 1, 9, *disc. review denied*,360 N.C. 576, 635 S.E.2d 598 (2006). We find this well-established maxim especially applicable where, as here, the appellant is the State and the litigation before us involves the State's attempts to revoke the statutorily vested contract and property rights of thousands of North Carolinians.

In the present case, as demonstrated *supra*, the State's appellate brief asks this Court to reverse the trial court's decision based on its arguments that: (1) all acts of our General Assembly are accompanied by a (rebuttable) presumption of constitutionality; (2) the Career Status Repeal did not violate the North Carolina Constitution's Law of the Land Clause because it was enacted for the legitimate government purpose of "fixing" our public schools; and (3) although teachers do have contracts with their local school boards, the Career Status Repeal did not violate the Contract Clause of the United States Constitution because it did not substantially impair those contract rights in light of: (a) conditional language contained in boilerplate disclaimers in Plaintiffs' employment contracts and a sample contract from the DPS Board of Education, (b) purported distinctions between the Career Status Law's vesting mechanism and those of the statutes at issue in *Brand*, *Faulkenbury* and *Bailey*, and (c) the Fourth Circuit's recent decision in *Cherry*.The State also argues that the trial court erred in failing to strike certain portions of Plaintiffs' affidavits. In its reply brief to Plaintiffs' appellee brief, the State reiterated these arguments. Shortly before this case was orally argued, the State submitted a memorandum of additional authority to call this Court's attention to Article I, Section 15 of the North Carolina Constitution, which obligates the State to guard and maintain its citizens' right to public education, and the United States Supreme Court's decision in *Nixon v. Shrink Missouri Gov't PAC et al.*, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000), which dealt with campaign finance reform. During oral arguments, this Court and both parties properly focused primarily on the issues raised in the State's appellate brief. As discussed *supra*, these arguments are wholly unpersuasive.

***20** Nevertheless, our learned colleague dissents in part from the majority opinion of this Court based on his view that the trial court erred in concluding that the Career Status Repeal violates the Contract Clause for the reasons articulated in the United States Supreme Court's decision in *Brand*.Instead, our learned colleague would resolve this case in the State's favor based on that Court's prior holdings in *Phelps v. Bd. of Educ.*, 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674 (1937) and *Dodge v. Bd. of Educ.*, 302 U.S. 74, 58 S.Ct. 98, 82 L.Ed. 57 (1937). As neither of these cases was cited by either of the parties at any point in this litigation, we do not believe it would be appropriate to resolve this case by essentially constructing the State's argument for it, as to do so would violate the rationale behind our Supreme Court's holding in *Viar* and this Court's subsequent decision in *Hammonds* by leaving Plaintiffs, as appellees, "without notice of the basis upon which [this Court] might rule."*Hammonds*, 178 N.C.App. at 13, 631 S.E.2d at 9 (quoting *Viar*, 359 N.C. at 402, 610 S.E.2d at 361). While we recognize that *Viar* and *Hammonds* dealt with technical violations of N.C. R.App. P. 10 and 28, we find their rationales equally applicable to the substantive errors of omission committed by the State as the appellant here. Rule 28 of our Rules of Appellate Procedure provides in pertinent part that

> [t]he function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and *to present the arguments and authorities upon which the parties rely* in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.

N.C. R.App. P. 28(a) (emphasis added). Moreover, Rule 28(b) mandates that an appellant's brief shall include, *inter alia*,"[a]n argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."N.C.R.App. P. 28(b)(6). In the present case, we conclude that, if the analysis in our learned colleague's dissent is correct, the State has violated Rule 28 by failing to raise any argument on the issue of whether the outcome of this case should be determined based on *Brand* or based on *Phelps* and *Dodge*.We conclude further that to disregard the arguments the State actually made in order to substitute a potentially stronger argument that Plaintiffs have never been given any opportunity to address would fundamentally violate the substance of our Rules and the spirit of basic fairness they aim to preserve, as well as thrust this Court into the improper position of performing as an advocate for one of the parties to this dispute.

[15] Although our Supreme Court held in *Viar* that an appeal that fails to comply with Rule 28 is subject to dismissal, *see* 359 N.C. at 402, 610 S.E.2d at 361, in *Hammonds* this Court made clear that we do not treat violations of our Rules of Appellate Procedure "as grounds for automatic dismissal" but instead apply appropriate sanctions based on the results of a three-factor test that weighs "(1) the impact of the violations on the appellee, (2) the importance of upholding the integrity of the Rules, and (3) the public policy reasons for reaching the merits in a particular case."178 N.C.App. at 15, 631 S.E.2d at 10. Here, we conclude that the State's failure as the appellant to raise either *Dodge* or *Phelps* as a basis for distinguishing Plaintiffs' and the trial court's reliance on *Brand* substantially prejudiced Plaintiffs as appellees by denying them sufficient notice of the issues to be contested and the basis upon which this Court might rule. Given the circumstances, we believe that the appropriate sanction here is to apply Rule 28's provision that the issue of whether *Dodge* and *Phelps* control the outcome of this case, which was neither presented nor discussed by the State at any point in this litigation, should be deemed abandoned.

***21** In any event, we are also not persuaded by the substantive merits of our learned colleague's dissent. On the one hand, although he attempts to distinguish the Career Status Law from the statute at issue in *Brand* by emphasizing the Supreme Court's finding that the latter was "couched in terms of contract," 303 U.S. at 105, 58 S.Ct. at 448, 82 L.Ed. at 693, while the former is not, his analysis overlooks, and for reasons discussed *supra* is significantly undermined by, the fact that the title of section 115C–325 of our General Statutes is "Principal and Teacher Employment Contracts." Furthermore, we are not persuaded by the dissent's efforts to bolster its conclusion that it is within the General Assembly's power to rescind Plaintiffs' vested rights to career status protections based on the Career Status Law's legislative history. Although the Career Status Law has indeed been amended several times since its enactment in 1971, these amendments focused not on the protections it offers—*i.e.*, a career status teacher's right to a continuing contract and a mandatory hearing—but instead on the performance-based reasons that a career status teacher can be dismissed. Thus, while the dissent is correct that these amendments in some ways increased the discretion of local school boards, they did so in ways that did not substantially impair the benefits the Career Status Law provided to teachers who earned vested rights to career status protections, and their implications were far less drastic than the wholesale elimination of those rights represented by the Career Status Repeal.

Moreover, in reaching its holding in *Phelps*, the United States Supreme Court noted that "where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state."300 U.S. at 322, 57 S.Ct. at 485, 81 L.Ed. at 677. Thus, while we are certainly impressed by the breadth of our learned colleague's painstaking research into how courts in other states have addressed this issue, we are equally certain that those cases are beside the point. In the present case, we know of no instance in which our Supreme Court has ever previously answered or even been directly asked the question of whether or not teachers who have already earned the protections of the Career Status Law have obtained vested contractual and property rights that, when violated, implicate the Contract Clause of the United

States Constitution or the Law of the Land Clause of the North Carolina Constitution.

We are not persuaded by the dissent's suggestion that we base our decision on our Supreme Court's conclusory assertion in *Taborn v. Hammonds*, 324 N.C. 546, 380 S.E.2d 513 (1989), that the purpose of the Career Status Law was "to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary, or discriminatory reasons."*Id.* at 556, 380 S.E.2d at 519. In *Taborn*, the Court addressed the issue of how much process is due when a special education teacher is terminated due to budget cuts necessitating a system-wide workforce reduction, which the then-extant version of the Career Status Law explicitly authorized as one of the reasons a career status teacher could be terminated. The quote the dissent relies on was offered in passing, with scant analytic support apart from a citation to where it originally appeared in the case of *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975), in order to focus the *Taborn* Court's interpretation of the requirement contained in subsection (e)(1)*l* that any decrease in the number of teaching positions due to a decrease in funding be "justifiable." 324 N.C. at 556, 380 S.E.2d at 519. Moreover, *Taylor* addressed a lawsuit by a public school principal whose situation in some ways mirrors that of Plaintiff Link in the present case: when the Career Status Law was originally enacted, he had completed three years of probationary employment as a public school principal, and thus was only a year away from potentially earning career status protections, but his local school board voted against the recommendations of his superintendent and declined to renew his contract for a fourth probationary year. 286 N.C. at 493–94, 212 S.E.2d at 384–85. The plaintiff's challenge centered on whether or not the school board should be bound by the superintendent's recommendation, and that is the context in which the Court opined, without any citation or support, on the purpose of the Career Status Law. *Id.* at 496, 212 S.E.2d at 386. Because neither *Taborn* nor *Taylor* addressed any claims under the Contract Clause, we decline to adopt our learned colleague's conclusion, especially when our Supreme Court, as demonstrated by its holdings in *Faulkenbury*, *Bailey*, and *Wiggs*, has repeatedly held that the State violates the Contract Clause when it attempts to revoke public employees' vested rights to valuable employment benefits provided by statutes that the State has encouraged reliance on as an inducement to public employment.

***22** We also take issue with the dissent's conclusion that even if the Career Status Law does give rise to individual contract rights, the Career Status Repeal does not substantially impair those rights except insofar as it fails to provide for a hearing. We do not believe this conclusion is supported by the record given the affidavits from Plaintiffs, public school administrators, and labor economist Rothstein describing how the Career Status Law's protections provide North Carolina's public school teachers with the valuable employment benefit of job security by providing them with continuing contracts. The dissent insists that although the Career Status Repeal eliminates Plaintiffs' continuing contracts in favor of one-, two-, or four-year terms, their rights have not been substantially impaired because the reasons they can be terminated or non-renewed at the end of each term remain largely unchanged. But this argument totally ignores the obvious fundamental differences between a continuing contract of indefinite duration and a contract that must be renewed every one, two, or four years, as well as the constrictive impact that the latter will have on the opportunities North Carolina's teachers will have to grow and improve by being innovative in the classroom, as well as their abilities to advocate for their students by raising concerns about instructional issues to administrators without fear of losing their jobs. To put this point in another context, consider the differences in the relative levels of job security enjoyed by North Carolina's appellate judges, who must face reelection at the end of each term, and federal judges, who are appointed for life: while reasonable minds may differ over the wisdom of lifetime tenure, no one would dispute that it is a valuable employment benefit and that federal judges therefore enjoy far more job security than their counterparts in our State's elected appellate judiciary. To take this example a step further, imagine what would happen if our General Assembly decided, for whatever reason, to enact legislation purporting to strip all federal judges within our State's borders of their lifetime tenure and force them to stand for reelection periodically just like state judges. A reviewing court would undoubtedly find such a flagrant violation of Article III and basic premises of federalism unconstitutional—and it would also violate the Contract Clause because the revocation of lifetime tenure would substantially impair the affected judges' rights under their employment contracts. This is an imperfect and perhaps absurd example, offered for purely illustrative rather than substantive analytical purposes, but we nevertheless find it broadly analogous to the predicament North Carolina's teachers face regarding the sense of job security they enjoyed prior to the Career Status Repeal by virtue of their vested contractual rights to career status protections. We therefore decline to join the dissent in its

conclusion that career status rights are not substantially impaired by a law that explicitly repeals career status rights.

III. Plaintiffs' Appeal

***23** **[16]** Plaintiffs contend that the trial court erred in denying summary judgment to Plaintiff Link based on its conclusion that, as a probationary teacher who had not yet earned career status, he lacked standing to challenge the Career Status Repeal. The central thrust of Plaintiffs' argument here is that the logic of *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs*—which the trial court relied on for its determination that teachers who have already earned career status have contractual rights to its protections—should apply with equal force to probationary teachers. Specifically, Plaintiffs argue that all teachers who accepted employment while the Career Status Law was in full effect, and relied upon the availability of career status protections when accepting employment with a school district and remaining employed, gained a contractual right to the continuing *availability* of those protections upon satisfaction of the requirements of section 115C–325. Thus, Plaintiffs insist that the trial court erred in concluding that under the Career Status Law, probationary teachers do not have contractual rights to career status protections. We disagree.

Our review of the relevant case law demonstrates that Plaintiffs' reliance on *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs* is misplaced. While these cases do support Plaintiffs' general argument that statutory promises of benefits that public employees can earn as part of their overall compensation packages by satisfying certain requirements are contractual in nature, they also fatally undermine Plaintiffs' claim that probationary teachers have contractual rights when, by definition, they have not yet satisfied the Career Status Law's requirements. Put simply, *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs* only dealt with plaintiffs whose contractual rights had already vested before the Legislature changed or repealed the statutes from which those rights arose. Indeed, it was the vesting of those rights that proved determinative in each case.

In *Brand*, the United States Supreme Court concluded that the plaintiff had a contractual right to "permanent" teacher status because she had already satisfied the statutory requirement of teaching for five years and then entering into a new contract prior to the partial repeal of the Teachers' Tenure Law. 303 U.S. at 104, 58 S.Ct. at 447–48, 82 L.Ed. at 693. Likewise, in *Faulkenbury*, our Supreme Court's conclusion that the legislation at issue violated the Contract Clause was based on the fact that "*[a]t the time the plaintiffs' rights to pensions became vested*, the law provided that they would have disability retirement benefits calculated in a certain way. These were rights that they had earned and that may not be taken from them by legislative action." 345 N.C. at 690, 483 S.E.2d at 427 (emphasis added). The *Faulkenbury* Court further explained that

> [w]e believe that when the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits if those persons fulfilled the conditions. When they did so, the contract was formed.

***24** *Id.* at 691, 483 S.E.2d at 427. Moreover, in assessing whether the plaintiffs in *Bailey* had contractual rights that were substantially impaired by the General Assembly's enactment of legislation to cap tax exemptions on public employee retirement benefits, the Court provided an extensive analysis of nearly two centuries' worth of state and federal decisions "rooted in the protection of expectational interests upon which individuals have relied through their actions, thus gaining a vested right."348 N.C. at 145, 500 S.E.2d at 62–63. Ultimately, the *Bailey* Court held that the legislation at issue violated both the Contract Clause and the Law of the Land Clause because, before the General Assembly enacted it, the plaintiffs had already earned vested contractual rights to receive tax-exempt retirement benefits based on their having satisfied the statutory requirement preconditioning their receipt of those benefits on working for a minimum term of years. *Id.* at 150, 500 S.E.2d at 66. Perhaps most damning for Plaintiffs' argument here, our Supreme Court's decision in *Wiggs* clarified that although the government cannot retroactively abrogate an employee's vested contractual right to benefits, it would not violate the Contract Clause "to pass a resolution which would apply prospectively to those whose rights [to benefits] had not yet vested."361 N.C. at 324, 643 S.E.2d at 908.

In the present case, the Career Status Law preconditions a public school teacher's right to career status protections on working four consecutive years as a probationary teacher and

then passing a majority vote by the local school board. N.C. Gen.Stat. § 115C–325(c)(1). Our review of the relevant case law demonstrates that only then can a teacher's contractual right to career status protections be considered vested. As such, we conclude that *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs* provide no support for Plaintiffs' argument that despite the Career Status Repeal, a probationary teacher has a vested right in the opportunity to earn career status. We are sympathetic to Plaintiff Link's argument that he relied on the availability of career status protections upon satisfaction of the Career Status Law's requirements when he chose to work as a public school teacher in North Carolina instead of accepting a job in another state, and we empathize with the thousands of other similarly situated probationary teachers across this State who no doubt share his skepticism regarding the wisdom of legislation that purports to enhance the educational experience of our State's public school children by essentially yanking the rug out from beneath the feet of those most directly responsible for educating those children in a manner that experienced educators have warned will make it more difficult for North Carolina school districts to attract and retain quality teachers in the future. Nevertheless, this Court may not substitute its views for those of our General Assembly, and we are bound by the aforementioned precedents from our Supreme Court. We therefore hold that the trial court did not err in granting partial summary judgment to the State based on its conclusion that, as a probationary teacher, Plaintiff Link lacked standing to challenge the Career Status Repeal because he had not yet acquired a contractual right to career status protections. Accordingly, the trial court's order is

***25** AFFIRMED.

Judge GEER concurs.

Judge DILLON concurs in part and dissents in part by separate opinion.

DILLON, Judge, concurring in part and dissenting in part.

This case involves an issue important to the educational system of our State. However, as our Supreme Court has stated, "[a]s to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts —it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts."*State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960).

The majority holds that the Career Status Repeal is constitutional as applied to probationary teachers. I concur fully with this holding and, therefore, do not address any issues raised in that portion of the majority opinion.

The majority also holds that the Career Status Repeal is unconstitutional *in toto* as applied to teachers who have attained career status under the Career Status Law ("career teachers"). I concur in part and dissent in part with this holding for the reasons stated in this opinion.

I. Summary of Opinion

I disagree with the majority's conclusions that the Career Status Law created a constitutionally protected *contractual right* to continued employment (i.e., tenure) for career teachers and that the Career Status Repeal impermissibly impairs that contract right, in violation of the Contract Clause of the United States Constitution.

Notwithstanding, based on our Supreme Court's decision in *Crump v. Bd. of Educ.*, 326 N.C. 603, 392 S.E.2d 579 (1990), career teachers do have a constitutionally protected *property interest* in continued employment under the Career Status Law. *Id.* at 614, 392 S.E.2d at 584. Therefore, I conclude that N.C. Gen.Stat. § 115C–325.3(e) of the Career Status Repeal is *un* constitutional to the extent that it allows a local school board to deprive a career teacher of this property interest without a hearing. However, I do not believe that the Career Status Law is, otherwise, unconstitutional on its face.

II. Analysis

It has long been recognized in this State that courts have the power to declare an act of the General Assembly unconstitutional. *See Dickson v. Rucho*, 367 N.C. 542, 549, 766 S.E.2d 238, 244 (2014), *vacated and remanded on other grounds*, —— U.S. ——, 135 S.Ct. 1843, —— L.Ed.2d —— (2015); *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). However, it has also long been recognized "that great deference will be paid [by courts] to the acts of the legislature," see *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989), and that "where a statute may be construed [in a way] ... which would make it

constitutional, [our courts] will give it that construction rather than a contrary one[.]"*Commissioners v. Ballard*, 69 N.C. 18 (1873).

***26** In this opinion, I address my conclusions that (A) the Career Status Law does not create a constitutionally protected *contract right* to continued employment (i.e., tenure); (B) the Career Status Repeal is unconstitutional to the extent that it grants local school boards the authority to strip career teachers of their constitutionally protected *property interest* without first holding a hearing; and (C) the Career Status Repeal, on its face, is not otherwise unconstitutional.

A. The Career Status Law Did Not Create Contract Rights

The United States Supreme Court has stated: "[t]he presumption is that ... [a statute enacted by a legislature] is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise,"*see Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 58 S.Ct. 98, 100, 82 L.Ed. 57 (1937), and further that generally "an act fixing the term or tenure of ... an employe[e] of a state agency" is the type which "may be altered at the will of the Legislature."*Id.* at 78–79, 58 S.Ct. at 100. 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."*Nat'l R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985)."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."*Id.*

In the same year that *Dodge* was decided, the Supreme Court followed this presumption by concluding that a New Jersey statute establishing tenure rights for teachers who had completed a number of years of service [1] did *not* create a contract right and, therefore, was not subject to the protections of the Contract Clause. *Phelps v. Bd. of Educ.*, 300 U.S. 319, 323, 57 S.Ct. 483, 485, 81 L.Ed. 674 (1937). Accordingly, the Court held that this New Jersey tenure statute could be changed by a subsequent legislature:

> Although the [A]ct of 1909 prohibited [a local school board] ... from reducing [a] teacher's salary or discharging him without cause, we agree with the courts below that this was *but a regulation of the conduct of the [local school] board* and not a term of a continuing contract of indefinite duration with the individual teacher.

Id. (emphasis added). The Court found no error in the lower court's conclusion that the New Jersey statute "established a legislative status for teachers" rather than "a contractual one that the Legislature may not modify [.]"*Id.* at 322, 57 S.Ct. at 484 (emphasis added).

I find the *Phelps* decision by the United States Supreme Court extremely persuasive, if not controlling, in deciding the Contract Clause issue in the present case. [2] Like the statute at issue in *Phelps*, language in the Career Status Law is simply not presented in clear and unequivocal language to overcome the strong presumption against finding contract rights. For example, there is no language in the Law which states that contracts with career teachers must contain a provision which grants those teachers the right to continued employment. In fact, the word "contract" almost never appears in the Law—and never in N.C. Gen.Stat. § 115C–325(c1), the section in the Law which established tenure. Rather, the language in the Law is clearly couched in terms of establishing a "legislative status for teachers," *see Phelps*, 300 U.S. at 322, 57 S.Ct. at 484, prominently employing the phrase "career status" all throughout as a label for teachers retained after four years of service.

***27** I am also persuaded by the decisions from the highest courts of the other states which have seemingly universally concluded that statutes establishing tenure for public employees do not create constitutionally protected contract rights. *See, e.g.*, *Proksa v. Arizona State Sch. for the Deaf and Blind*, 205 Ariz. 627, 74 P.3d 939, 943–44 (2003) (Arizona Supreme Court); *Fumarolo v. Chicago Bd. of Educ.*, 142 Ill.2d 54, 153 Ill.Dec. 177, 566 N.E.2d 1283, 1306 (1990) (Illinois Supreme Court); *Pineman v. Oechslin*, 195 Conn. 405, 488 A.2d 803, 808–10 (1985) (Connecticut Supreme Court); *Washington Fed. of State Emps., AFL–CIO v. State*, 101 Wash.2d 536, 682 P.2d 869, 872 (1984) (Washington Supreme Court); *Crawford v. Sadler*, 160 Fla. 182, 34 So.2d 38, 39 (1948) (Florida Supreme Court); *Morrison v. Bd. of Educ. of City of West Allis*, 237 Wis. 483, 297 N.W. 383, 386 (1941) (Wisconsin Supreme Court); *State ex rel. Munsch v. Bd. of Comm'rs of Port of New Orleans*, 198 La. 283, 3 So.2d

622, 624–25 (1941) (Louisiana Supreme Court); *Lapolla v. Bd. of Educ. of City of New York*, 282 N.Y. 674, 26 N.E.2d 807 (1940) (New York Court of Appeals, that state's highest court); *Malone v. Hayden*, 329 Pa. 213, 197 A. 344, 352–53 (1938) (Pennsylvania Supreme Court).

The majority and the trial court below rely on what seems to be one of the only—if not the only—reported cases in America where the repeal of a tenure statute was declared unconstitutional based on the Contract Clause, the case of *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685 (1938), decided by the United States Supreme Court during the same term it decided *Dodge* and the year after it decided *Phelps*. *Id.* at 107–08, 58 S.Ct. at 449. However, I believe *Brand* is clearly distinguishable.

In *Brand*, the Court determined that an Indiana tenure statute for teachers *did* create a *contract right* to continued employment, subject to the protections of the Contract Clause. *Id.* at 105, 58 S.Ct. at 448. After recognizing the presumption that statutes do not create contracts, the Court concluded that the particular language of the Indiana statute did evince an intention to create contract rights. *Id.* at 104–05, 58 S.Ct. at 448. The Court homed in on the fact that the Indiana statute—unlike the Career Status Law—was "couched in terms of contract," pointing out that the word "contract" appears more than 25 times therein. *Id.* at 105, 58 S.Ct. at 448. The Court quoted much of the Indiana statute, which described the contract itself, including that the contract "shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract."*Id.* Also, the Court found persuasive that the Indiana Supreme Court had held on a number of occasions that the Indiana statute created contract rights. *Id.* at 100, 58 S.Ct. at 446 (stating that "respectful consideration and great weight [should be given] to the views of the state's highest court"). [3]

Brand is still "good law" in that a state *could* employ statutory language which "unequivocally and clearly" demonstrates an intent to create contract rights rather than merely providing for a status. However, the result reached in *Brand* is somewhat of an outlier, due to the language employed in the Indiana statute at issue. An American Law Reports annotation on this issue cites *Brand*, along with *Phelps*, *Dodge*, and many of the state cases cited above and describes the holding in *Brand* as an anomaly:

> ***28** It is quite generally conceded that a teachers' tenure statute may be so worded as to disclose a legislative intention to confer upon the teachers coming within the provisions of the act contractual rights which may not be taken away from them by subsequent legislation.... (See, for example, [*Brand*], *which is cited and distinguished on this ground in most of the cases cited in this annotation.*)
>
> *On the other hand it is almost unanimously recognized* that in the absence of any language in the act evincing an intention to confer upon the teacher a contractual right, the mere recognition by such acts of the status of permanency of tenure does not create in the teachers ... vested contractual rights immune from legislative encroachment by subsequent repealing or modifying statutes, but merely declares a legislative policy, to continue so long as the legislature may ordain, for the protection of such teachers[.]

147 A.L.R. 293 (1943) (emphasis added). In fact, the article does not cite to a single case reaching the same result as was reached in *Brand*. *See id.*

Based on my conclusion that the language of the Career Status Law is clearly more analogous to the statute at issue in *Phelps* than the statute at issue in *Brand;* and on the presumption against finding contractual rights in statutes; and on the overwhelming weight of authority from across the country, I do not believe that the General Assembly was prohibited *by the Contract Clause* to modify or repeal the laws enacted concerning career status of teachers established by that body in 1971. [4]

In addition to relying on *Brand*, the majority and the trial court rely on decisions from our Supreme Court which held that statutes allowing public employees to earn deferred compensation benefits in various forms (e.g., pension and benefits) created contract rights and were, therefore, protected by the Contract Clause, citing *Faulkenbury v. Teachers' and State Emps.' Ret. Sys. of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997), *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), and *Wiggs v. Edgecombe Cnty.*, 361 N.C. 318, 643 S.E.2d 904 (2007). However, those cases are clearly distinguishable. In my view, a statutory right to deferred compensation which has vested based on work performed is fundamentally different from statutory tenure status (the right to continue to work in the future and earn additional compensation for that future work).*See Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (stating that pension benefits are "a deferred portion of the compensation earned for services rendered"). In *Faulkenbury*, for example, the Supreme Court held that disability benefits provided by a

statute were benefits that were promised in exchange for five years of service. 345 N.C. at 691, 483 S.E.2d at 427. Under the Career Status Law, however, teachers did not "earn" a benefit of continued employment by completing four years of service. They only *became eligible* to be elected to "career status" at the end of four years.

***29** I find persuasive that other states have treated statutes defining deferred compensation differently from statutes defining tenure rights in the context of the Contract Clause. *See, e.g., Washington Fed. of State Emps.,* 682 P.2d at 872 (Washington Supreme Court—distinguishing between pension statutes, which do create contract rights and tenure statutes, which do not); *Kern v. City of Long Beach,* 29 Cal.2d 848, 179 P.2d 799, 801–03 (1947) (California Supreme Court—same).

In conclusion, in my view the presumption—that the Career Status Law was "not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise"—has not been overcome. *Dodge,* 302 U.S. at 79, 58 S.Ct. at 100. In fact, the language of the Career Status Law compels a conclusion that a status was created for career teachers rather than a contract right. As such, I believe the General Assembly is not restricted by the Contract Clause from modifying the Law as it has done so on several occasions since its passage in 1971. [5]

B. Property Interest—The Right to a Hearing

Our Supreme Court has held that a career teacher has a property interest in continued employment. *Crump,* 326 N.C. at 613–14, 392 S.E.2d at 584. *See also Peace v. Emp't Sec. Comm'n of North Carolina,* 349 N.C. 315, 321–22, 507 S.E.2d 272, 281–82 (1998) (citing *Board of Regents v. Roth,* 408 U.S. 564, 570–71, 92 S.Ct. 2701, 2705–06, 33 L.Ed.2d 548 (1972)). Therefore, I conclude that N.C. Gen.Stat. § 115C–325.3(e) (2013)—which is part of the Career Status Repeal—is unconstitutional in that it does not provide a career teacher the right to a hearing *before* a local school board may act on a decision not to retain the teacher, but rather grants a local school board *the discretion* whether to conduct a hearing.

Regarding the *timing* of the hearing, there are situations where the United States Supreme Court has held that a hearing can be held *after* the deprivation of certain property rights has occurred. *See, e.g., Dixon v. Love,* 431 U.S. 105, 113–15, 97 S.Ct. 1723, 1727–29, 52 L.Ed.2d 172 (1977) (truck drivers' license). However, that Court has held that where a public employee's job is at stake, the hearing must come *before* the employee is deprived of his right to continued employment. *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 542–44, 105 S.Ct. 1487, 1493–94, 84 L.Ed.2d 494 (1985). Therefore, a career teacher is entitled to a hearing before a local school board acts not to renew that teacher's contract. *See id.*

C. The Career Status Repeal is Otherwise Constitutional

Except for its failure to provide a career teacher a hearing, as described above, I believe the Career Status Repeal is constitutional.

Under the Career Status Repeal, career teachers will no longer have contracts with an unspecified duration, but rather their contracts will be subject to renewal at the end of a 1, 2 or 4 year term, as approved by their respective local school boards. N.C. Gen.Stat. § 115C–325.3(a) (2013). At the end of any contract term, a local school board has some discretion not to renew a teacher's contract. However, prior to the Repeal, the local school board already had a measure of discretion to terminate a career teacher. Any increase in this discretion as a result of the enactment of the Repeal appears slight. Specifically, under the Repeal, local school boards do not have the discretion to dismiss a career teacher (by choosing not to renew the contract) for any reason which would be considered "arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law."N.C. Gen.Stat. § 115C–325.3(e) (2013). As such, I do not believe the Repeal is unconstitutional on its face. Of course, legitimate "as applied" challenges to the Law may be raised in the future. However, that is not the case before us today.

III. Conclusion

***30** My vote would be to uphold the Career Status Repeal except for that portion of N.C. Gen.Stat. § 115C–325.3(a) that provides a local school board the discretion whether to hold a hearing before depriving a career teacher of his or her property interest in continued employment. In my view, local school boards *must* provide pre-deprivation hearings for career teachers.

1 The New Jersey statute at issue was very similar to the Career Status Law, providing that any teacher completing three years of service would not be subject to a contract for a specific term but rather could only be dismissed for cause. *See Phelps,* 300 U.S. at 320–21, 57 S.Ct. at 484.

2 The majority is troubled by my reliance on *Phelps* and *Dodge* since these cases were not cited or argued by the State. However, the State does argue that the Repeal does not violate the Contract Clause, and I believe it is appropriate for this Court to rely on Supreme Court opinions and other legal authority which may be controlling or relevant in determining the law on a constitutional issue raised by a party.

3 Our high court has never held that the Career Status Law creates a *contract right* in continued employment subject to the Contract Clause of the United States Constitution, but rather that the Law creates a property interest subject to the Due Process Clause of the Fourteenth Amendment. *See Crump,* 326 N.C. at 613–14, 392 S.E.2d at 584.

4 Indeed, prior to enactment of the Career Status Repeal, the General Assembly had amended the Career Status Law on a number of occasions, some in ways to increase the discretion of local school boards, as has been done in the Repeal. For example, the General Assembly originally only provided 12 grounds for which a local school board could dismiss a career teacher. N.C. Gen. Stat. § 115–142(e)(1) (1971). Over the next several decades, however, the General Assembly expanded the local school board's power by adding three additional grounds—bringing the total to 15—most recently, in 1991. N.C. Gen.Stat. § 115C–325(e) (2013). Plaintiffs' counsel conceded during oral argument that *all* 15 grounds applied equally to *all* career teachers, even teachers who attained career status prior to 1991.

5 Assuming, *arguendo,* that the Career Status Law did create individual contract rights, I do not believe that the Career Status Repeal significantly impairs those rights. Our Supreme Court has held that the purpose of the Career Status Law was "to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary or discriminatory reasons."*Taborn v. Hammonds,* 324 N.C. 546, 556, 380 S.E.2d 513, 519 (1989). It could be argued that this purpose statement supports the conclusion that the Law was intended as a regulation of the local school boards to advance a policy of providing good teachers "for the children," rather than to create contract rights for the teachers. In any event, assuming that the Law created a contract right, the Repeal does not substantially impair this right. Specifically, under the Repeal, a career teacher is still not subject to dismissal except for reasons which are not "political, personal, arbitrary or discriminatory." *See*N.C. Gen.Stat. § 115C–325.3(e) (2013) (local school board is powerless in choosing not to retain a teacher for a reason which is "arbitrary, capricious, discriminatory, [or] for personal or political reasons").

All Citations

--- S.E.2d ----, 2015 WL 3466263

End of Document

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action. My business address is: 2029 Century Park East, Los Angeles, CA 90067-3086.

On September 16, 2015, I served the foregoing document(s) described as:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF INTERVENORS-APPELLANTS AND DEFENDANTS-APPELLANTS

PROPOSED *AMICUS CURIAE* BRIEF OF AMERICAN FEDERATION OF AFL-CIO IN SUPPORT OF INTERVENORS-APPELLANTS AND DEFENDANTS-APPELLANTS

on the interested parties in this action as follows:

See Attached Service List

☐ **(VIA PERSONAL SERVICE** By causing the document(s), in a sealed envelope, to be delivered to the person(s) at the address(es) set forth above.

☐ **(VIA U.S. MAIL)** In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth above.

☐ **(VIA E-MAIL)** Based on a court order or an agreement of the parties to accept service by e-mail, I caused the documents to be sent to the persons at the e-mail addresses listed in the attached Service List.

☑ **(VIA OVERNIGHT DELIVERY)** By causing the document(s), in a sealed envelope, to be delivered to the office of the addressee(s) at the address(es) set forth above by overnight delivery via Federal Express, or by a similar overnight delivery service.

I declare that I am employed in the office of a member of the bar of this court, at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 16, 2015, at Los Angeles, California.

Regina Harcourt	/s/ Regina Harcourt
[Type or Print Name]	[Signature]

SERVICE LIST

Party	Attorney
Beatriz Vergara : Plaintiff and Respondent	Marcellus A. McRae Theodore J. Boutrous Theano Evangelis Enrique Antonio Monagas Gibson Dunn & Cruthcher LLP 333 South Grand Avenue Los Angeles, CA 90071-3197
State of California : Defendant and Appellant	Susan Marie Carson Nimrod Pitsker Elias Office of the Attorney General 455 Golden Gate Ave 11th Floor San Francisco, CA 94102
California Teachers Association : Intervener and Appellant	Glenn Rothner Rothner, Segall & Greenstone 510 South Marengo Avenue Pasadena, CA 91101 Eileen Beth Goldsmith Michael Rubin Stacey Monica Leyton Patrick Casey Pitts Altshuler Berzon et al LLP 177 Post Street, Suite 300 San Francisco, CA 94108
California Federation of Teachers : Intervener and Appellant	Glenn Rothner Rothner, Segall & Greenstone 510 South Marengo Avenue Pasadena, CA 91101 Eileen Beth Goldsmith Altshuler Berzon et al LLP 177 Post Street, Suite 300 San Francisco, CA 94108

Superintendent of Public Instruction : Defendant and Appellant	Susan Marie Carson Nimrod Pitsker Elias Office of the Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102
California Department of Education : Defendant and Appellant	Susan Marie Carson Nimrod Pitsker Elias Office of the Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102
State Board of Education : Defendant and Appellant	Susan Marie Carson Nimrod Pitsker Elias Office of the Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102
Edmund G. Brown, Jr. Governor : Defendant and Appellant	Susan Marie Carson Nimrod Pitsker Elias Office of the Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102
Los Angeles County Superior Court	Los Angeles County Superior Court Stanley Mosk Courthouse Clerk of the Court 111 North Hill Street Los Angeles, CA 90012