DISTRICT COURT, STATE OF COLORADO, CITY AND COUNTY OF DENVER **Court Address:** 1437 Bannock Street Denver, CO 80202 **Court Telephone:** (720) 865-8301	
Plaintiffs: CYNTHIA MASTERS, *et al.* v. **Defendants:** SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER, *et al.*	**▲ COURT USE ONLY ▲**
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MOTION TO DISMISS	

Defendants School District No. 1 in the City and County of Denver ("DPS") and Jane Goff, Elaine Gantz Berman, Debora Scheffel, Pam Mazanec, Marcia Neal, Paul Lundeen and Angelika Schroeder, in their official capacities as members of the Colorado State Board of Education ("SBE"), hereby move the Court to dismiss in its entirety Plaintiffs' Amended Complaint, filed February 19, 2014.

I. INTRODUCTION

During the 2010 legislative session, the General Assembly amended the law governing teachers' employment in Colorado's public schools. Senate Bill 10-191 ("S.B. 191") amended the Teacher Employment, Compensation, and Dismissal Act ("TECDA"). *See* C.R.S. §§ 22-63-101 to -403 (2013). The bill passed with bipartisan support despite Plaintiff Denver Classroom Teachers Association's considerable efforts to defeat it. Having failed to persuade the General Assembly, Plaintiffs now shift their efforts to this Court, filing this lawsuit alleging that one subsection of S.B. 191 violates Colorado's Contract Clause, article II, § 11, and Due Process Clause, article II, § 25.

Many others have traveled this same path. They seek to win in the courthouse what they lost at the statehouse. Very few legislative losses are actually cognizable constitutional claims, and this case is no exception. Plaintiffs' two claims fail as a matter of law because neither the Contract Clause nor the Due Process Clause shackles the Colorado General Assembly to the past. At its core, this case is about whether either of these Clauses prohibited the General Assembly from making relatively modest amendments to TECDA.

In a nearly identical case out of Illinois, the Seventh Circuit rejected Contract Clause and Due Process Clause claims by tenured public school principals who had likewise lost the

political battle at the statehouse. *Pittman v. Chicago Bd. of Educ*., 64 F. 3d 1098 (7th Cir. 1995). The Seventh Circuit first rejected the Contract Clause claim, writing, "To treat statutes as contracts would enormously curtail the operation of democratic government. Statutes would be ratchets, creating rights that could never be retracted or even modified without buying off the groups upon which the rights had been conferred." *Id.* at 1104. Like the tenured principals in Chicago, the Plaintiffs here want the Colorado Constitution to act like a one-way ratchet, permitting legislative amendments that improve or strengthen their employment rights, but forbidding all others.

The Seventh Circuit in *Pittman* also made short work out of the plaintiffs' due process claim. It began by acknowledging that in Chicago "[j]ob tenure is property within the meaning of the due process clauses." *Id.* Colorado teachers, in contrast, have not had tenure for almost 25 years, as discussed below. Even so, the *Pittman* court continued, "The legislature can by amending the statute eliminate the property right." *Id.* In a similar case involving county sheriffs, the Eighth Circuit explained this idea more fully: "[T]he legislature which creates a property interest may rescind it, whether the legislative body is federal or state and whether the interest is an entitlement to economic benefits, a statutory cause of action, or civil service job protections." *Gattis v. Gravett*, 806 F.2d 778, 781 (8th Cir. 1986). Colorado courts have also adopted this due process principle: "When a state alters a state-conferred property right through the legislative process, the legislative determination provides all the process that is due." *McInerney v. Pub. Emps. Ret. Ass'n*, 976 P.2d 348, 353 (Colo. App. 1998) (quoting *Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997)). Colorado teachers did not have a property right in continued employment in

2010; even if they did, however, the Legislature was free to modify or eliminate it by passing S.B. 191.

The public policy implications of Plaintiffs' claims are stark. If they are correct that Colorado's Contract and Due Process Clauses prohibit the Legislature from changing TECDA in a way nonprobationary teachers dislike, then our Constitution truly is a one-way ratchet. And our legislative process would be one in which statutorily-granted rights "could never be retracted or even modified without buying off the groups upon which the rights had been conferred." *Pittman*, 64 F.3d at 1104. Such a system would favor politically powerful groups like Plaintiff DCTA and its state and national counterparts, the CEA and NEA. However, Plaintiffs are wrong. Our Constitution does not act as a one-way ratchet, and each General Assembly has the freedom to amend statutes like TECDA through the democratic process.

Further, Plaintiffs' position undermines more than the integrity of the legislative process. Plaintiffs necessarily ask this Court to override the General Assembly's chosen means of improving Colorado's public schools. The challenged "mutual consent" provisions are designed to give principals the ability to select the best teachers possible for their particular schools. The prior "forced placement" system required principals to accept teachers whose experience or abilities might not align with an individual school's mission. Balancing the various public policy issues inherent in improving Colorado's K-12 education system is a quintessentially legislative decision, not one for the courts.

Plaintiffs must seek relief at the ballot box and in the Legislature, not with this Court. Plaintiffs' claims fail as a matter of law.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(5) allows defendants to test the formal sufficiency of the complaint. *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999). "In evaluating a motion to dismiss under 12(b)(5), all averments of material facts must be accepted as true, and the allegations of the complaint must be viewed in the light most favorable to the plaintiff." *English v. Griffith*, 99 P.3d 90, 92 (Colo. App. 2004). Dismissal is therefore only "proper if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992) (internal quotation and citation omitted).

While this Court is required to accept Plaintiffs' factual averments as true, *English*, 99 P.3d at 92, that deference does not extend to Plaintiffs' legal conclusions, which this Court should evaluate *de novo*. *Qwest Corp. v. Colo. Div. of Prop. Taxation*, 2013 CO 39, ¶ 11. Plaintiffs cannot survive a motion to dismiss with legally inaccurate assertions. *See W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008) (holding that a case "may be dismissed if the substantive law does not support the claims asserted").

Plaintiffs bring both facial and as-applied challenges. An "as-applied" challenge alleges "that the statute is unconstitutional as to the specific circumstances under which a defendant acted." *People v. Ford*, 232 P.3d 260, 263 (Colo. App. 2009). A facial challenge, in contrast, "alleges that there are no circumstances to which a statute can be applied constitutionally." *Id.* The distinction does not matter because, as described below, Plaintiffs allege merely that DPS implemented the legislative changes authorized by S.B. 191. Plaintiffs do not allege any "specific circumstances" in which DPS itself took action that would result in an as-applied

violation. *See Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1085 (Colo. 2011) (explaining that an as-applied challenge considers "whether the challenging party can establish that the statute is unconstitutional under the circumstances in which the plaintiff has acted or proposes to act") (quotation and citation omitted).

Finally, "[s]tatutes are presumed to conform to constitutional standards, and a party challenging the constitutionality of a statute bears the burden of proving the invalidity of a statute beyond a reasonable doubt." *Blood*, 252 P.3d at 1083. Thus, this Court must presume S.B. 191 is constitutional, and Plaintiffs bear a heavy burden to show the contrary.

III. THE PURPOSE OF S.B. 191 AND THE MUTUAL CONSENT PROCESS

The primary purpose of S.B. 191 was to implement a new evaluation system for teachers that is based significantly on student growth scores. C.R.S. §§ 22-9-102, -105.5. Under the new system, which is not yet fully implemented, teachers will be rated as effective or ineffective every year. C.R.S. § 22-9-105.5(3). After two years of ineffective ratings, a teacher will lose nonprobationary status and the accompanying procedural protections. C.R.S. § 22-63-103(7).

The mutual consent provisions create a new process for nonprobationary teachers who have been "displaced." C.R.S. § 22-63-202(2)(c.5). A teacher can be displaced for any number of reasons, including a drop in enrollment, the turnaround or phase-out of a school, a reduction in program, or a reduction in building. C.R.S. § 22-63-202(2)(c.5)(VII). Prior to S.B. 191, if a nonprobationary teacher was displaced from his or her school, the school district was required to find a new position for that teacher – otherwise known as "placing" the teacher. The receiving school did not have a choice about whether to accept the teacher, which is why this system was

called “forced placement.” TECDA now provides that teachers must receive the new school principal’s consent before being placed in that school. C.R.S. § 22-63-202(2)(c.5)(I) & (III)(B).

S.B. 191 outlined a process for displaced teachers to find mutual consent positions and directed each school district to “work with its local teachers association to develop policies for the local school board to adopt.” C.R.S. § 22-63-202(c.5)(III)(B). Displaced teachers now apply to open positions in the school district. *Id.* To assist displaced teachers in finding new positions, the school district provides notice and “a list of all vacant positions for which [the teacher] is qualified, as well as a list of vacancies in any area identified by the school district to be an area of critical need.” *Id.*

In addition, any nonprobationary teacher who does not secure mutual consent placement “shall be a member of a priority hiring pool, which . . . shall ensure the nonprobationary teacher a first opportunity to interview for a reasonable number of available positions for which he or she is qualified in the school district.” C.R.S. § 22-63-202(2)(c.5)(III)(A). However, in the event “a nonprobationary teacher is unable to secure a mutual consent assignment at a school district after twelve months or two hiring cycles, whichever period is longer, the school district shall place the teacher on unpaid leave until such time as the teacher is able to secure an assignment.” C.R.S. § 22-63-202(2)(c.5)(IV). If after being placed on unpaid leave, the nonprobationary teacher “secures an assignment at a school of the school district . . . the school district shall reinstate the teacher’s salary and benefits at the level they would have been if the teacher had not been placed on unpaid leave.” *Id.*

IV. THE ALLEGATIONS IN THE AMENDED COMPLAINT

The following discussion accepts Plaintiffs' allegations as true, and fleshes out Plaintiffs' precise legal arguments to allow the Court to "test the formal sufficiency of [Plaintiffs'] complaint." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996).

A. Plaintiffs' Challenge is Limited to the Mutual Consent Provisions of S.B. 191

Plaintiffs' sole objection is to the mutual consent provisions of S.B. 191. *See e.g.*, Am. Compl. ¶ 1. Specifically, they challenge the constitutionality of subsection c.5 of C.R.S. § 22-63-202(2). *Id.* ¶ 2; *see also id.* ¶¶ 4, 27-35, 63, 65-66, 73-74. Plaintiffs refer to the c.5 provisions rhetorically as "the discharge-without-cause provisions." *Id.* However, they are more properly identified as the "mutual consent provisions" or as simply the "c.5 provisions."

Plaintiffs acknowledge that S.B. 191 "amended TECDA as well as other education statutes, including the Colorado Licensed Personnel Performance Evaluation Act, Colo. Rev. Stat. § 22-9-101, *et seq.*, and the Colorado Education Accountability Act of 2009, *id.* § 22-11-101, *et seq.*" *Id.* ¶ 27. Plaintiffs take special care to note that they are *not* challenging these other aspects of S.B. 191, such as the provisions "relating to the earning and loss of nonprobationary status." *Id.* ¶ 23; *see also id.* ¶ 28. Rather, their only two claims are that the c.5 provisions violate Colorado's Contract and Due Process Clauses. *Id.* ¶¶ 59-77 (citing art. II, § 11 and art. II, § 25).

B. Plaintiffs Do Not Make Specific Allegations to Support an As-Applied Challenge

Plaintiffs assert an as-applied challenge against DPS. *Id.* ¶¶ 1, 3-4, 36-46, 67-68, 75-77. However, Plaintiffs do not allege any particular conduct by DPS except its general implementation of the c.5 provisions. *Id.* For instance, Plaintiffs do not allege that DPS has implemented these provisions in some unique or special way that would give rise to an as-

applied challenge. *See Ford*, 232 P.3d at 263 (explaining that an as-applied challenge is one in which the statute is unconstitutional "as to the specific circumstances under which a defendant acted"). The most Plaintiffs assert is that "[i]mmediately after the passage of S.B. 191, defendant DPS began aggressively implementing the [c.5] provisions." Am. Compl. ¶ 36. However, how soon DPS implemented the c.5 provisions ("immediately after passage") and how fervently it did so ("aggressively") do not provide a basis for an as-applied challenge. Rather, an as-applied challenge must be based on the particular manner in which a defendant implements a law. *See Sanger v. Dennis*, 148 P.3d 404, 410 (Colo. App. 2006).

C. Plaintiffs' Allegations Related to the Contract Clause Claim

Plaintiffs, seven DPS teachers and the Denver Classroom Teachers Association, challenge the constitutionality of the c.5 provisions. Six DPS teachers, Cynthia Masters, Michele Montoya, Jane Harmon, Lynne Rerucha, Lawrence Garcia, and Paula Scena, received nonprobationary status before the c.5 provisions were added to TECDA in 2010. Am. Compl. ¶¶ 8-9, 11-14. The remaining Plaintiff, Mildred Anne Kolquist, achieved nonprobationary status after S.B. 191 went into effect, and therefore does not bring a claim under Colorado's Contract Clause. *Id.* ¶ 10. All seven Plaintiffs achieved nonprobationary status under TECDA, *i.e.*, after 1990, and thus, none of the Plaintiffs ever received "tenure" under the earlier statute.

Plaintiffs claim that TECDA "created contracts between teachers who earned nonprobationary status prior to the enactment of S.B. 191 and their school district employers. *See* [citing pre-TECDA cases]." *Id.* ¶ 25. Plaintiffs continue: "Public school teachers who earned nonprobationary status before the effective date of S.B. 191 therefore have vested contractual rights to all the substantive and procedural protections afforded by TECDA, as they existed prior

[to] the enactment of S.B. 191." *Id.* Defendant DPS, Plaintiffs argue, impairs teachers' vested contracts "by allowing school officials to effectively discharge such nonprobationary teachers in the absence of any showing that [TECDA has been] satisfied . . . ." *Id.* ¶ 63.

D. Plaintiffs' Allegations Related to the Due Process Clause Claim

Plaintiffs allege that TECDA grants nonprobationary teachers "a constitutionally protected property interest in continued employment." Am. Compl. ¶ 4(b). This property interest, they allege, arises from TECDA: "The provisions of TECDA summarized in ¶¶ 18-24 [of the Amended Complaint] create a reasonable expectation of continued employment for nonprobationary teachers, and thus create a constitutionally protected property interest in nonprobationary teachers' continued employment." *Id.* ¶ 26; *accord id.* ¶ 72. They claim "the [c.5] provisions violate Article II, Section 25 of the Colorado Constitution, which requires the state to provide procedural due process before depriving an individual of his or her property." *Id.* ¶ 4(b).

V. ARGUMENT

The Amended Complaint should be dismissed in its entirety because both of Plaintiffs' claims are deficient as a matter of law. As to the Contract Clause claim, Plaintiffs fail to overcome the heavy presumption against a statute creating a contract. There is no support for a statutorily-guaranteed contract in TECDA's language, and Plaintiffs improperly rely on case law interpreting an older, substantively different statute.

There are two reasons Plaintiffs' Due Process Clause claim fails. First, according to Plaintiffs, prior General Assemblies enacted statutes creating a property interest in continued employment for public school teachers. Yet Plaintiffs overlook that in 1990 and 1991 the

Legislature repealed tenure and its guarantee of stable and continuous employment. Since that time, nonprobationary teachers have not enjoyed such a property right. The cases Plaintiffs cite all pre-date the 1990 and 1991 legislative overhaul creating TECDA and are thus inapplicable to the current statutory scheme.

Second, even if through TECDA the 1990 and 1991 Legislatures conferred such a property interest (which they did not), then it follows that the 2010 General Assembly had the power to modify or even eliminate it when it passed S.B. 191. Decades of case law from Colorado and around the country support this proposition. For instance, the Colorado Court of Appeals stated, "When a state alters a state-conferred property right through the legislative process, the legislative determination provides all the process that is due." *McInerney*, 976 P.2d at 353 (quoting *Rea*, 121 F.3d at 485). For both these reasons, Plaintiffs' due process claim fails as a matter of law.

A. Plaintiffs Cannot State a Contract Clause Claim Because TECDA did not Create a Statutorily-Guaranteed Contractual Right

Plaintiffs assert that "[t]he provisions of TECDA . . . created contracts between teachers who earned nonprobationary status prior to the enactment of S.B. 191 and their school district employers." Am. Compl. ¶ 25. According to Plaintiffs, "teachers who earned nonprobationary status before the effective date of S.B. 191 therefore have vested contractual rights to all the substantive and procedural protections afforded by TECDA as they existed prior to the enactment of S.B. 191." *Id.* However, Plaintiffs' Contract Clause claim fails as a matter of law

because TECDA does not overcome the "presumption that a law is not intended to create private contractual vested rights." *Alderton v. State*, 17 P.3d 817, 819 (Colo. App. 2000).[1]

1. Statutes Do Not Create Contracts Absent a Clear Indication That the Legislature Intended to Bind Itself Contractually

Colorado's Contract Clause prohibits the General Assembly from passing a law that impairs contractual obligations. Colo. Const. art. II, § 11. A precondition to such a claim is that a contract exists in the first instance. *See In re Estate of DeWitt*, 54 P.3d 849, 859 (Colo. 2002) (holding that a "threshold requirement of a contract clause claim" is that "a contractual relationship" exists); *see also General Motors Corp. v. Romein*, 503 U.S. 181, 186-87 (1992) (dismissing on the ground that "there was no contractual agreement").

Courts presume "a law is not intended to create private contractual or vested rights." *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) (internal citations and quotations omitted). Instead, when enacting statutes a state "merely declares a policy to be pursued until the legislature shall ordain otherwise." *Id.* (quotation omitted). Colorado courts agree, noting the gravity of finding that a statute creates a contract:

> Finding a public contractual obligation has considerable effect. It means that a subsequent legislature is not free to significantly impair that obligation for merely rational reasons. Because of this constraint on subsequent legislatures, and thus on subsequent decisions by those who represent the public, there is, for the purposes of the Contract Clause, a higher burden to establish that a contractual obligation has been created.

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[1] "The prohibition against impairment of contracts is found in both the Colorado and United States Constitutions." *In re Estate of Dewitt*, 54 P.3d 849, 858 (Colo. 2002). The language in each prohibition is nearly identical and Colorado courts normally consider the clauses together. *See id.*; *Justus v. State*, 2012 COA 169, ¶ 28. Moreover, even when evaluating only the state Contract Clause, Colorado courts rely on federal precedent. *See, e.g.*, *Ahluwalia v. QFA Royalties, LLC*, 226 P.3d 1093, 1100 (Colo. App. 2009).

Justus v. State, 2012 COA 169, ¶ 30 (quoting *Parella v. Ret. Bd. of Rhode Island Emps. Ret. Sys.*, 173 F.3d 46, 60 (1st Cir. 1999)), *cert. granted in part*, 12-SC-906, 2013 WL 4008216 (Colo. Aug. 5, 2013). *Accord Colo. Springs Fire Fighters Ass'n v. City of Colo. Springs*, 784 P.2d 766, 733 (Colo. 1989).

Without this presumption against statutorily-created contracts, "[t]he continued existence of government would be of no great value, [because] by implications and presumptions, [the Contract Clause] would disarm the [General Assembly of] powers necessary to accomplish the ends of its creation." *Keefe v. Clark*, 322 U.S. 393, 397 (1944) (quotation omitted). *See also Pittman*, 64 F. 3d at 1104 ("To treat statutes as contracts would enormously curtail the operation of democratic government. Statutes would be ratchets, creating rights that could never be retracted or even modified without buying off the groups upon which the rights had been conferred.").

As a result, courts require that "[t]o overcome the presumption, the party claiming the contractual right must show that there is a clear indication that the legislature intended to bind itself contractually." *Justus*, ¶ 31. *Accord Colo. Springs Fire Fighters Ass'n*, 784 P.2d at 733; *Kilbourn v. Fire & Police Pension Ass'n*, 971 P.2d 284, 287 (Colo. App. 1998). Here, Plaintiffs fail to overcome this heavy presumption. Their vague citations to TECDA fall far short. Instead, they place almost all their weight on decades-old case law interpreting an older, substantively different statute.

2. Plaintiffs Fail to Overcome the Presumption Against TECDA Creating a Contract

To determine whether a statute creates a contract, "it is of first importance to examine the language of the statute." *Dodge v. Bd. of Educ. of City of Chicago*, 302 U.S. 74, 78 (1937).

Accord Justus, ¶ 31. The only place where Plaintiffs actually cite TECDA to support their claim of a creation of a contract is in Paragraphs 18-24. *See* Am. Compl. ¶ 25. These paragraphs refer to five sections: C.R.S. §§ 22-63-102[2], -202, -203, -301, and -302. None of these sections has any language that would suggest – even remotely – that the Legislature intended TECDA to create a contract that would bind the State contractually. Plaintiffs fail to identify any such language.

To the contrary, the evolution from prior teacher tenure acts to TECDA indicates the Legislature intended to eliminate any suggestion that the Act created contractual rights to continuous employment. These differences begin with the acts' titles. In 1967 the statute was called the Teacher Employment, Dismissal, and *Tenure* Act of 1967 ("TEDTA"), whereas in 1990 the Legislature dropped "tenure" from TECDA's title. *Cf.* C.R.S. § 123-18-1 (1967), *with* C.R.S. § 22-63-101 (1990). This elimination of tenure was reflected in the substantive provisions of the new law. The 1967 Act contained an explicit definition of a "tenure teacher" as a teacher who had acquired "tenure status in a school district pursuant to law." C.R.S. § 123-18-2(8) (1967). The 1990 General Assembly did away with that definition when it passed TECDA. *See* C.R.S. § 22-63-103 (1990) (definitions). "Tenure" had a specific legal meaning under the 1967 Act. For instance, subsection 12 stated that a teacher would acquire "tenure" automatically upon being hired for a fourth year. C.R.S. § 123-18-12(1) (1967). Further, subsection 15 of the 1967 Act provided that "[a] tenure teacher . . . *shall be entitled to a position of employment* as a teacher in the school district where tenure was acquired . . . ." C.R.S. § 123-18-15(1) (1967)

[2] Paragraph 24 of the Amended Complaint quotes TECDA's legislative declaration, which is codified at C.R.S. § 22-63-102. In Paragraph 24, Plaintiffs mistakenly cite to -101.

(emphasis added). When it passed TECDA in 1990, the General Assembly removed "tenure" and the accompanying guarantee of continuous employment. *See* C.R.S. § 22-63-101 to -104 (1990).

Moreover, the 1990 Act created a "teacher employment and compensation committee" who was to "study issues related to teacher employment and compensation and to develop recommendations for legislation." C.R.S. § 22-63-104(1)(a) (1990). Accordingly, a year later, the 1991 Legislature enacted new substantive provisions regarding employment; notably, these eliminated any notion of tenure from the prior Act. *Cf.* C.R.S. §§ 22-63-202 to -403 (1991) (tenure eliminated), *with* C.R.S. §§ 22-63-102(11), -112(1) & -115(1) (1988) (providing for tenure under the prior 1967 Act framework). Through this two-year legislative process, the General Assembly removed any statutorily-guaranteed entitlement to continued employment. *See* BLACK'S LAW DICTIONARY 1608 (9th ed. 2009) (defining "tenure" as "the legal protection of a long-term relationship, such as employment").

Despite the marked changes under TECDA, public school teachers retain substantial legal protections. For instance, "every employment contract entered into by any teacher . . . shall be in writing." C.R.S. § 22-63-202(1). Further, TECDA itself protects teachers through its numerous provisions relating to dismissal, *id.* -301 & 302, layoff, *id.* -202(3), and compensation, *id.* -401 to -403. Indeed, there are hundreds of Colorado cases before and after TECDA in which teachers have invoked these statutory protections. *See e.g., id.* -301 & -302 (annotations to case law). The difference between those cases and this one is that here Plaintiffs are arguing that they have *constitutional* protections that barred the 2010 General Assembly from enacting the mutual consent provisions. There is a world of difference between teachers suing their employing school districts to vindicate their contractual and statutory rights, and this case in which Plaintiffs assert

that the Colorado Constitution prevents all Legislatures from ever amending TECDA in any way Plaintiffs do not like.

3. Pre-TECDA Cases Illustrate the Substantial Difference between the Prior Tenure Acts of 1953 & 1967 and TECDA from 1990-91

Notably, Plaintiffs do not cite to specific language from TECDA for their conclusion that it "created contracts between [nonprobationary] teachers . . . and their school district employers." Am. Compl. ¶ 25. Rather, they cite to four pre-TECDA cases. *Id.* Plaintiffs ignore the fact that these older cases interpret a substantively different statutory scheme, a fact the Colorado Supreme Court recognized explicitly: "In 1990 the Teacher Employment, Dismissal, and Tenure Act of 1967 was repealed and reenacted with substantial changes as the Teacher Employment, Compensation, and Dismissal Act of 1990." *Frey v. Adams Cnty. Sch. Dist.*, 804 P.2d 851, 852 n.2 (Colo. 1991). Far from supporting Plaintiffs' position, these cases highlight how mistaken it is.

The oldest case Plaintiffs cite is *Maxey v. Jefferson County School District*, 408 P.2d 970 (Colo. 1965). This case pre-dates even the 1967 Act and relies on the still older 1953 Teacher Tenure Act. *Id.* at 971. As part of their stipulated facts, the *Maxey* parties agreed that the plaintiff-teacher "had stable and continuous tenure as a teacher . . . within the meaning of the teacher tenure laws of Colorado." *Id.* The *Maxey* Court cited to the 1953 Act and stated that it "has the effect of a contract between teacher and district." *Id.* at 972 (citing *Marzec v. Fremont Cnty. Sch. Dist.*, 349 P.2d 699 (Colo. 1960)). This citation to *Marzec* provides the primary basis for the *Maxey* Court's conclusion, besides the parties' legal stipulation and general references to the 1953 Act.

The Supreme Court in *Marzec* offered more analysis than it did in *Maxey*. It began by noting that the 1953 Tenure Act "is in derogation of the common law. Prior to the adoption of teacher tenure legislation, school boards were at liberty to hire and fire at will. The present act . . . deprives school boards of such privileges . . . ." 349 P.2d at 701. It cited the following section from the 1953 Act: "Any teacher having served . . . three full years, and who shall thereafter be re-employed for the fourth year . . . *shall have stable and continuous tenure as a teacher in such school*." *Id.* at 700 (quoting C.R.S. § 123-18-3 (1953)) (alterations omitted and emphasis added). Based upon this provision, it concluded that the Legislature had decided the teacher would "become a permanent employee of the district, subject to removal only as provided in the act." *Id.* at 701-02. The 1953 Act's provision that a teacher "shall have stable and continuous tenure" parallels that of the 1967 Act which says "a tenure teacher . . . shall be entitled to a position of employment." *Cf.* C.R.S. § 123-18-3 (1953), *with* C.R.S. § 123-18-15(1) (1967). These explicit provisions afford the statutory basis for Colorado courts, pre-TECDA, to conclude that these earlier acts created contracts between teachers and school districts.

The other three cases relied on by Plaintiffs do nothing more than cite prior cases for this same conclusion. *Julesberg Sch. Dist. v. Ebke*, 562 P2d 419, 421 (Colo. 1977) ("*Ebke #1*") (citing *Marzec* and *Maxey*); *Ebke v. Julesberg Sch. Dist.*, 622 P.2d 95, 96 (Colo. App. 1980) (*Ebke #2*") (citing *Maxey* and *Ebke #1*); *Lockhart v. Bd. of Educ.*, 735 P.2d 913, 918 (Colo. App. 1986) (citing *Ebke #2*). None of them conduct any independent legal analysis on the question. None of them evaluate whether the presumption against statutes creating contracts has been overcome. Most importantly, all of them are decided prior to 1990 and the "substantial changes" of TECDA. *Frey*, 804 P.2d at 852 n.2. Accordingly, these pre-TECDA cases do nothing to

support the Plaintiffs' position. They certainly do not overcome the heavy legal presumption that would prevent the 2010 Legislature from passing S.B. 191. *See Justus*, ¶¶ 28, 30-31.

In sum, Plaintiffs' Contract Clause Claim fails as a matter of law because Plaintiffs cannot overcome the heavy presumption that TECDA (before or after S.B. 191) did not create a statutorily-guaranteed contract between nonprobationary teachers and school districts.

B. Plaintiffs' Procedural Due Process Claim Fails As a Matter of Law

Plaintiffs' second claim is that "the [c.5] provisions violate Article II, Section 25 of the Colorado Constitution, which requires the state to provide procedural due process before depriving an individual of his or her property ('the Due Process Clause')." Am. Compl. ¶ 4(b). [3] Plaintiffs allege that they have a "constitutionally protected property interest in continued employment." *Id.* According to Plaintiffs, this property interest in continued employment arises from TECDA: "The provisions of TECDA summarized in ¶¶ 18-24 [of the Amended Complaint] create a reasonable expectation of continued employment for nonprobationary teachers, and thus create a constitutionally protected property interest in nonprobationary teachers' continued employment." *Id.* ¶ 26; *accord id.* ¶ 72.

Plaintiffs are mistaken for two reasons. First, the "substantial changes" to TECDA in 1990 and 1991 eliminated any property right, especially the purported right that new provisions could never be added to TECDA. Second, even if such a property interest did exist post-1991, the 2010 General Assembly could modify or eliminate it.

[3] Plaintiffs bring this claim under article II § 25 of the Colorado Constitution, which states: "No person shall be deprived of life, liberty or property, without due process of law." This language is virtually identical to that in Section 1 of the Fourteenth Amendment of the U.S. Constitution: "[No] State [shall] deprive any person of life, liberty, or property, without due process of law." Accordingly, Colorado courts often look to federal due process case law when interpreting article II § 25. *See Saxe v. Bd. of Trustees*, 179 P.3d 67, 79-80 (Colo. App. 2007).

1. TECDA Fails to Create a Property Right in Continued Employment

As noted above, the Colorado Supreme Court in *Frey* explained that "[i]n 1990 the Teacher Employment, Dismissal, and Tenure Act of 1967 was repealed and reenacted with substantial changes as the Teacher Employment, Compensation, and Dismissal Act of 1990." 804 P.2d at 852 n.2. *Frey* involved a claim of due process. *Id.* at 855-56. Because the relevant facts occurred before the 1990 legislative amendment, the *Frey* Court applied the Teacher Employment, Dismissal, and Tenure Act of 1967. *Id.* at 852. The Court found that "[a] tenure teacher has a property right in continued employment." *Id.* at 855. It based this decision on two factors. First, it quoted a 1979 decision that "a grant of tenure by its nature engenders a reasonable and objective expectancy of continued employment." *Id.* (quoting *Howell v. Woodlin Sch. Dist.*, 596 P.2d 56, 60 (Colo. 1979)). Second, it cited to the critical tenure provision of the 1967 Act: C.R.S. § 22-63-115(1). *Id.* This provision, discussed above, directed that a "tenure teacher . . . shall be entitled to a position of employment . . . ."

A review of *Howell* further confirms the conclusion that post-TECDA teachers no longer have a property right. The *Howell* Court, similarly, relied on two aspects of the 1967 Act to conclude a teacher had a property right in continued employment. 596 P.2d 56, 59-60 (Colo. 1979). First, it cited to subsection 112 – discussed above – which provided that upon being hired for a fourth year a teacher automatically received "tenure." *Id.* at 59 (citing C.R.S. § 22-63-112(1)). Second, it reasoned that "a grant of tenure by its nature engenders a reasonable and objective expectancy of continued employment." *Id.* at 60.[4]

[4] The federal District Court for Colorado distinguished *Howell* precisely because the plaintiff in that case "was a tenured employee under the statute." *Johnson v. Sch. Dist. No. 1,*

However, as discussed herein, when TECDA was passed over a two-year period in 1990 and 1991, the General Assembly eliminated "tenure" and the statutory guarantee that a teacher "shall be entitled to a position of employment." *See* C.R.S. §§ 22-63-101 to -403 (1991). As a result, nonprobationary teachers do not have a "legitimate claims of entitlement" to continued employment, and, hence, no property interest protected by the Due Process Clause. *See Colo. Soc'y of Cmty. and Inst. Pscychologists v. Lamm*, 741 P.2d 707, 713-714 (Colo. 1987) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

The *Lamm* case is instructive. There, like here, the plaintiffs were upset when the Colorado Legislature amended a law such that they could no longer hold themselves out as psychologists or practice psychology. *Id.* at 710. The Court rejected their claim that the Due Process Clause prevented the Legislature from amending the Act. *Id.* at 713-14. It wrote that "the individual plaintiffs have not established an entitlement to practice psychology exempt from the provisions of the Act, but have shown only an inchoate desire to do so. . . . Nothing in the Act establishes a continuing, legitimate expectation or entitlement to practice psychology under repealed exemptions to the Act." *Id.* at 714. Likewise, here, the Plaintiffs have not demonstrated that TECDA provides them a legitimate expectation to employment under an unchanging statutory scheme. Rather, like the plaintiffs in *Lamm*, the Plaintiffs in this case have *statutory* entitlements to TECDA as it is currently written, but they have no *constitutional* entitlement that the statute itself will never change.

The case of *Feldewerth v. Joint School District*, 3 P.3d 467 (Colo. App. 1999), is not to the contrary. In that case, the Court of Appeals found that a nonprobationary teacher had "a

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2013 WL 5371876 at *5 (D. Colo. Sept. 23, 2013). Accordingly, the *Johnson* court rejected a post-TECDA claim to a property interest in continued employment. *Id.*

legitimate claim to continued employment" under the Due Process Clause of the Fourteenth Amendment on the basis of the contrast between how TECDA treats probationary and nonprobationary teachers. *Id.* at 470-71 (contrasting C.R.S. § 22-63-203(1) & (4), with § 22-63-301).[5] As a result, the court held that the plaintiff – who was actually an assistant principal, not a teacher, *id.* at 468 – "be given notice and hearing before any dismissal may take place." *Id.* at 471. Here, however, S.B. 191 did not change anything about the dismissal process, as a review of the dismissal provisions demonstrate. *Cf.* C.R.S. §§ 22-63-301 & -302 (2009), *with* C.R.S. §§ 22-63-301 & -302 (2013) (no change). The 2010 General Assembly added the mutual consent provisions to TECDA, but there is no law – in Colorado or elsewhere – that states the Due Process Clause prevents a legislature from adding new aspects to a complex statutory scheme.

Moreover, the United States District Court for the District of Colorado has already considered this question and held that "dismissal" under TECDA "is distinct from being placed on unpaid leave" pursuant to the mutual consent provisions. *Johnson v. Sch. Dist. No. 1*, 2013 WL 5371876 at *6 (D. Colo. Sept. 23, 2013). The *Johnson* court also rejected the similar argument, which Plaintiffs make here as well, *see* Am. Compl. ¶ 33, that to be put on unpaid leave is to be "effectively dismissed." The court wrote, "Although the effect of being placed on unpaid leave is similar to dismissal, the statute treats the two differently." *Johnson* at *7. This is evident from a review of the statute. Teachers who are "displaced" under the c.5 provisions receive active support from the school district to assist them in finding another placement. *See* C.R.S. § 22-63-202(2)(c.5)(III)(B) (district must provide displaced teachers "a list of all vacant positions for which he or she is qualified, as well as a list of vacancies in any area identified by

[5] Defendants question whether *Feldewerth* is correctly decided but recognize it as binding precedent on this Court.

the school district to be an area of critical need"); *id.* -202(2)(c.5)(III)(A) (displaced teacher who "has not secured a mutual consent placement shall be a member of a priority hiring pool, which . . . shall ensure the nonprobationary teacher a first opportunity to interview . . . for available positions"). In addition, displaced teachers who later secure a mutual consent position are reinstated to their "salary and benefits at the level they would have been if the teacher had not been placed on unpaid leave." *Id.* -202(2)(c.5)(IV). These substantial benefits distinguish "displaced" teachers from those who are "dismissed" or laid off through TECDA's other provisions. *See* §§ C.R.S. 22-63-202(3) (layoff) and -301 & -302 (dismissal). Furthermore, being placed on unpaid leave, rather than dismissed or laid off, avoids the potential stigma of being terminated from one's job. *See e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972) (acknowledging potential stigma); *McGhee v. Draper*, 564 F.2d 902, 911 (10th Cir. 1977) (same for discharged teacher in Oklahoma). Accordingly, given these differences between displacement and dismissal/layoff, this Court should follow the *Johnson* court and find that the Due Process Clause did not prohibit the 2010 General Assembly from adding the mutual consent provisions to TECDA.

In sum, Plaintiffs' second claim fails because Plaintiffs have failed to show that they have a property interest in continued employment under an unchanging TECDA. Plaintiffs' vague references to TECDA and reliance on two, pre-TECDA cases, *Howell* and *Frey*, are woefully insufficient. Accordingly, this claim fails as a matter of law.

2. The Legislature That Created the Property Interest Can Modify or Eliminate It

Even if TECDA does create a property interest in continued employment, the due process claim fails as a matter of law because "[t]he legislative process provides all the process that is

due." *McInerney*, 976 P.2d at 353 (citing *Atkins v. Parker*, 472 U.S. 115, 129-130 (1985); *Rea*, 121 F.3d at 485). Said differently, "the legislature, which creates the property interest in the first place, may also take it away." *McMurtray v. Holladay*, 11 F.3d 499, 502 (5th Cir. 1993) (citing *Atkins*, 472 U.S. at 129). This basic principle of due process jurisprudence has been recognized for decades by courts in Colorado and across the country, both at the state and federal level. For instance, the Eighth Circuit decided a similar case out of Arkansas involving county sheriffs; it dismissed the employees' due process claim, writing, "the legislature which creates a property interest may rescind it, whether the legislative body is federal or state and whether the interest is an entitlement to economic benefits, a statutory cause of action or civil service job protections." *Gattis*, 806 F.2d at 781. To hold otherwise would mean that one legislature – the one who created the property interest – would be able to bind all subsequent legislatures, which runs counter to basic principles of democratic governance stretching back centuries. *See* 1 W. Blackstone, *Commentaries on the Laws of England* 70 (1770) ("Acts of Parliament derogatory from the power of subsequent Parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if [its] ordinances could bind the present parliament."). This principle is declared in Colorado statute: "The general assembly finds and declares, pursuant to the constitution of the state of Colorado, that each general assembly is a separate entity, and the acts of one general assembly are not binding on future general assemblies." C.R.S. § 2-4-215(1).

In many ways, this case is just like the United States Supreme Court case of *Atkins v. Parker*, 472 U.S. 115 (1985). Like in *Atkins*, "[t]his case . . . does not concern the procedural

fairness of individual eligibility determinations. Rather, it involves a legislatively mandated substantive change in the scope of the entire program [TECDA]." 472 U.S. at 129. As a result, "it must be assumed that [the General Assembly] had plenary power to define the scope and duration of the entitlement to [continued employment], and to increase, to decrease, or to terminate those [employment] benefits based on its appraisal of the relative importance of the [stakeholders'] needs . . . . The procedural component of the Due Process Clause does not impose a constitutional limitation on the power of [the General Assembly] to make substantive changes in the law of entitlement to public [employment]." *Id.* In short, what the General Assembly gives, it may modify or take away. Any other result would cripple the democratic process.

The *Atkins* case dealt with a legislative change by Congress to the federal food stamp program. *Id.* at 118. However, the legal principle expressed in *Atkins* – that the same legislature that creates property interests has plenary power to modify or even abolish them through the legislative process – has been understood for decades. Indeed, one of the earliest and most frequently cited cases from the United States Supreme Court, *Dodge v. Board of Education of City of Chicago,* arose in the public school employment context. In *Dodge,* tenured teachers claimed the Illinois legislature's amendment to statutes governing mandatory retirement and pension benefits violated procedural due process.[6] 302 U.S. at 75. The Supreme Court recited the series of statutes and legislative amendments – just like in this case – which culminated in a further amendment in 1935 (notably, during the Great Depression). *Id.* at 76-77. By this amendment, the Illinois legislature lowered the mandatory retirement age and decreased the

[6] As discussed above, they also claimed it violated the Contract Clause of article I § 10. The *Dodge* Court found no violation of either Clause. 302 U.S. at 79-80.

amount of pension benefits. *Id.* at 77. Just like in this case, the plaintiffs-teachers "alleg[ed] that their rights to annuities were vested rights of which they could not be deprived [without violating the Due Process Clause] . . . and pray[ed] that the board be commanded to rescind action taken pursuant to the Act of 1935, and enjoined from complying with its provisions." *Id.* The *Dodge* Court rejected the plaintiffs' claims under both the Contract Clause and the Due Process Clause, writing: "[A]n act merely fixing salaries of officers creates no contract in their favor, and the compensation named may be altered at the will of the Legislature. This is also true of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise." *Id.* at 78-79. The Supreme Court agreed with the Illinois courts who had held, "by a uniform course of decision, . . . that acts indistinguishable from [the one at issue], establishing similar benefit systems, did not create contracts or vested rights, and that the state was free to alter, amend, and repeal such laws, even though the effect of its action was to deprive the pensioner or annuitant, for the future, of the benefits then enjoyed." *Id.* at 80. The Seventh Circuit echoed this idea in an identical teacher-tenure case from 1999: "What appears to the plaintiffs as 'less generous employment rights' may have seemed to the legislature as increased flexibility for school administrators to take swift action to correct problems." *Hearne v. Bd. of Educ. of City of Chicago*, 185 F.3d 770, 775 (7th Cir. 1999).

From Depression-era U.S. Supreme Court cases to modern Colorado cases, the principle remains the same: the Due Process Clause does not limit a legislature's ability to amend or repeal the law – here, TECDA – that creates the property interest. In 1998, the Colorado Court of

Appeals decided *McInerney v. Public Employees' Retirement Association*, 976 P.2d 348 (Colo. App. 1998). The plaintiff, Thomas J. McInerney, was a "full-time, tenured professor at Metropolitan State College of Denver." *Id.* at 349. "In 1994, while he was on sabbatical, the General Assembly amended the PERA benefit scheme." *Id.* He sued, alleging that "he had been denied due process of law because he had not been provided notice of the 1994 amendments to the statutory scheme and an opportunity to elect benefits under the old plan." *Id.* The Colorado Court of Appeals affirmed dismissal of his claim, reasoning that "when a statute . . . merely adjusts a statutory benefit level, procedural due process does not require notice and an opportunity to avoid the impact of the new law. The legislative process provides all the process that is due." *Id.* at 352-53 (citing *Atkins*, 472 U.S. at 129-30; *Rea*, 121 F.3d at 485 ("When a state alters a state-conferred property right through the legislative process, the legislative determination provides all the process that is due.") (internal punctuation omitted)).

The due process principle that the legislature that creates the property interest may later modify or destroy it has been explicitly affirmed by courts across the country. *See Correa-Ruiz v. Fortuno*, 573 F.3d 1, 14 (1st Cir. 2009) (police officers' due process claims dismissed because "no due process violation occurs when the legislature which creates a statutory entitlement (or other property interest) alters or terminates the entitlement by subsequent legislative enactment") (alterations omitted); *Goldsmith v. Mayor & City Council of Baltimore*, 845 F.2d 61, 65 (4th Cir. 1988) (tenured city employee's due process claim rejected because "a legislative body . . . has the unfettered authority to create, alter, and abolish [public employment] positions"); *McMurtray*, 11 F.3d at 502 (former state employees' due process claims without merit because "the legislature, which creates the property interest in the first place, may also take it away");

Pittman, 64 F.3d at 1104 (tenured public school principals have no due process claim because "[t]he legislature can by amending the statute eliminate the property right"); *Gattis*, 806 F.2d at 780 (county sheriffs cannot state a due process claim because "a legislature has the power to modify or rescind property interests previously created"); *Rea*, 121 F.3d at 485 (tenured hearing officer's due process claim fails because "[w]hen a state alters a state-conferred property right through the legislative process, the legislative determination provides all the process that is due") (alterations omitted); *Price v. W. Resources, Inc.*, 232 F.3d 779, 789 (10th Cir. 2000) ("A state may amend or terminate property interests that it has created . . . without depriving the affected individuals of procedural due process") (alterations omitted); *KT & G Corp. v. Attorney Gen. of State of Okla.*, 535 F.3d 1114, 1142 (10th Cir. 2008) ("the legislative determination provides all the process that is due") (quoting *Atkins*); *Proksa v. Ariz. State Sch.*, 74 P.3d 939, 944 (Ariz. 2003) (acknowledging that prior "statutes created a property interest in continued employment for permanent employees of the Schools that was protected by the Due Process Clause," but holding that a subsequent legislature properly eliminated that interest).

In comparison to these other decisions, this case presents a relatively mild legislative change. Most of the above-cited cases apply this due process principle to situations in which the legislative body eliminated tenure entirely or eliminated the employment position itself. In contrast, here, Plaintiffs complain only about the Colorado General Assembly enacting the c.5 provisions, which merely added the mutual consent process alongside the dismissal procedures of TECDA. As discussed above, there are important differences between, on the one hand, being displaced and put on unpaid leave, and, on the other, being dismissed or laid off. Whether these legislative changes will improve the public education system in Colorado "is a judgment for a

legislature to make, not a court." *Pittman*, 64 F.3d at 1103. The Colorado Legislature's passage of S.B. 191 was certainly not a violation of procedural due process under article II § 25 of the Colorado Constitution.

VI. CONCLUSION

For the reasons stated herein, both of Plaintiffs' claims fails as a matter of law. They should be dismissed.

DATED this 31st day of March, 2014.

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CERTIFICATE OF SERVICE

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