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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JILL LEFF, CLAUDIA KRAUSE, KRISTA SHIELDS, CHRISTOPHER STEWART, NEKISHA SIMPSON, CARRIE CHAPPELL, CAROLYN DOYEL, KODZO ATTILA, JOSEPH PORTILLA, AMANDA LA FORTE, PATRICIA WEBB, MARY RICE, BARBARA GAMMAGE, FRANCIS SIMONE BOJAR, GLEN ROWLEY, and CLARK COUNTY EDUCATION ASSOCIATION, an employee organization,

Plaintiffs,

v.

CLARK COUNTY SCHOOL DISTRICT, a county school district,

Defendant.

Case No: 2:15-cv-001155-RFB-GWF

STATE OF NEVADA'S PROPOSED *AMICUS* BRIEF IN SUPPORT OF DEFENDANT CLARK COUNTY SCHOOL DISTRICT'S MOTION TO DISMISS

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Plaintiffs seek to undo a legislative effort that their own union representatives supported four years ago. In 2011, Assembly Bill 225 was enacted to address the problem of ineffective teachers. The Bill enjoyed bipartisan support and even praise from the Nevada State Education Association, a teacher-union organization, during the legislative process. Now, four years later, Plaintiffs argue that AB 225 violates the U.S. Constitution's (1) Contracts Clause, because Plaintiffs had "contractual" rights under previous versions of the statute; and (2) Due Process Clause, because Plaintiffs lost what they believed was permanent status as "postprobationary" employees.

These are repackaged policy arguments thinly disguised as constitutional claims. They fail as a matter of law. On the contracts claim, Plaintiffs cannot show (1) that Nevada's Legislature "clearly" and "unequivocally" intended to contractually bind the State to teachers; and (2) that Plaintiffs suffered a severe or substantial impairment. On the due process claim, Plaintiffs cannot show that their procedural due process rights were violated because they received all the process they are entitled to in their opportunity to participate in the legislative process.

I. Background: NRS 391.3129's reform of public-school teacher employment law.

In 2011, a wide-ranging, bipartisan effort led Nevada to reform its teacher-employment law in Nevada Revised Statute 391. The law has been amended over the years, but this endeavor was the first time in four decades, according to testimony from an executive at the Nevada Association of School Administrators, that so many stakeholders cooperated in change.[1] "[I]t is distressing to hear," explained the chairman whose committee initiated the effort—expressing a sentiment that unified all sides—that Nevada's education record "ranks near the bottom."[2] The drafters sought to better serve Nevada's 440,000 public K-12 students in many ways, but one measure in particular is now under attack—Assembly Bill 225 (codified as NRS 391.3129).

AB 225 addressed the enduring problem of ineffective teachers. "The quality of teaching," testified one superintendent, on behalf of the official Education Reform Blue Ribbon Task Force, "is

[1] Assem. Comm. on Educ., Mar. 2, 2011 hearing, at 33 (testimony of Lonnie Shields, Nevada Association of School Administrators); *see also id.* at 40 (testimony of Samuel P. McMullen, Las Vegas Chamber of Commerce), *id.* at 48 (testimony of Alison Turner, Nevada Parent Teacher Association).

[2] *Id.* at 3.

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the number one determination of how we are going to be able to see student success."[4] AB 225's purpose, he continued, was to separate the "majority of our teachers," whose talents and devotion "make a tremendous difference," from those who "cannot improve their job performance to a level worthy of the children."[5]

Nevada's K-12 teachers, unlike university professors, do not have "tenure."[6] NRS 391 never uses that word. Plaintiffs, too, take care not to use it, referring instead to their "status." Compl. at ¶¶ 1, 2, 5-19.[7] There are two such statuses for teachers: "probationary" and "postprobationary." Teachers begin on "probationary" status—this entails limited protection from termination and no right to reemployment. After teachers like Plaintiffs completed one satisfactory year of performance, they could be granted "postprobationary" status and certain job protections.[8] Before AB 225, a "postprobationary" teacher could generally not be terminated but upon statutorily enumerated grounds—including insubordination, neglect of duty, or physical incapacity—after a full-blown formal hearing, with witnesses and evidence, before an impartial hearing officer. NRS 391.3192. AB 225—in what we call the Redesignation Provision—changed this. It provides:

> A postprobationary employee who receives an unsatisfactory evaluation…for 2 consecutive school years shall be deemed to be a probationary employee…and must serve an additional probationary period.

NRS 391.3129. In short, teachers with persistently poor performance lose their postprobationary status and must demonstrate their ability to teach at a satisfactory level before regaining it.

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[4] Assem. Comm. on Educ., Mar. 2, 2011 hearing, at 22 (testimony of Heath Morrison, Superintendent, Washoe County School District).

[5] *Id.* at 22.

[6] *Id.* at 21 (statement of Assemblywoman Smith) ("[W]e often hear the term *tenure* talked about. In the K-12 system this is not tenure. It is either probationary or postprobationary status"); *id.* at 47 (testimony of Mark Coleman, Clark County Association of School Administrators) ("Tenure is not something we believe exists in K-12").

[7] NRS 391 is quoted as relevant here in this case, i.e., as it stood in 2011 after AB 225's reforms and as it stood when it was applied to the Plaintiff-teachers in this case. The argument does not reflect post-2011 amendments. We use the present tense for simplicity's sake. A copy of that statute is attached as Attachment 2 to this proposed brief.

[8] In 2011, the period by which a teacher obtains postprobationary status was extended to three years, but Plaintiffs in this case all allege that they obtained postprobationary status before 2011.

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The 2011 amendments to NRS 391 demonstrate the Legislature's concern for protecting children from incompetent and unmotivated teaching. But the reform also evinces the body's determination to help stumbling educators recover their footing. Normally a postprobationary teacher gets at least one evaluation a year, but the year after an "unsatisfactory" evaluation, the teacher gets three. NRS 391.3125(4). This was added in 2011. *See* Nevada Laws Ch. 379 (AB 229) (2011). The evaluations must include "recommendations for improvements in the performance of the teacher," *id*. at 5(e), and the school district, at teacher request, must "assist the teacher to correct those deficiencies reported," *id*. at 6.[9] Only when, despite this commitment to their rehabilitation, the teacher *still* cannot do his or her job is the teacher exposed to non-renewal without a hearing—*exposed*, because job loss is not automatic, even though by this time students will have faced *three continuous years* of inadequate teaching at the teacher's hands. In other words, it took these Plaintiff-teachers three years to earn their so-called "summary" dismissal, though they got probationary status after a single year. These dismissals did not happen lightly; they occurred as Clark County School District, in desperate need of teachers, was offering signing bonuses and recruiting teachers from abroad.[10]

The Nevada Legislature, by this act, ensured that teacher job security is not a one-way ratchet, earned once and kept forever. Instead, "postprobationary status" reflects what its name implies: a *presumption* of satisfactory work after a trial period. A teacher's job is not imperiled by an "off" year, illness, or a particularly unruly class. Under the pre-AB 225 system, termination effectively required discrete, termination-worthy incidents, like yelling at students or failing to show up on time. AB 225 moved Nevada's teacher-employment law from a misconduct-based system to a

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[9] The desire to help teachers was continually expressed in legislative hearings. *See* Assem. Comm. on Educ., Mar. 2, 2011 hearing, at 24-25 (testimony of Heath Morrison) ("The evaluation system is the first opportunity to explain to the employee that there are performance concerns and there is an expectation for them to improve"); *id.* at 28 (statement of Assemblywoman Smith) ("Everything we do in our education world needs to tie back to… Is it helping to make our teachers better teachers?"); *id* at 35 (testimony of James W. Penrose) (the statutory process is designed to "ensure that [teachers] get some modicum of assistance in an effort to make their performance satisfactory"). *See also* Sen. Comm. on Educ., May 18, 2011 hearing, at 3 (statement of Assemblywoman Smith) ("We are trying to keep the trained person who wants to stay in the profession and be successful").

[10] Sen. Comm. on Educ., May 9, 2011 hearing, at 3 (statement of Assemblywoman Smith).

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performance-based one, focused on true quality of instruction. Neighboring states have enacted similar reforms. Ariz. Rev. Stat. Ann. § 15-538.01(C); Colo. Rev. Stat. Ann. § 22-63-103(7).

Plaintiffs do not conceal their intent. This is not a case in which a teacher complains that process was disregarded in an individual adjudication, *see, e.g., Eldridge-Murphy v. Clark Cnty. Sch. Dist.*, 13-cv-02175-JCM, 2015 WL 224416, at *2 (D. Nev. Jan. 15, 2015) (suspension without hearing), *Clark Cnty. Sch. Dist. v. Harris*, 112 Nev. 285, 289 (1996) (dispute about time worked), *Boyle v. Bd. of Trustees of Clark Cnty. Sch. Dist.*, 101 Nev. 591, 595 (1985) (improper notice). This is a straightforward facial attack on the law's validity. Despite feints toward the language of "as-applied" challenges, Compl. at ¶ 2, Plaintiffs do not suggest that the Redesignation Provision can be interpreted or applied in any way other than as Clark County School District did. They do not allege that the school district misunderstood the law, ignored its provisions, or applied it in some special manner. To the contrary, Plaintiffs claim that the Redesignation Provision cannot be used with *any* postprobationary teachers, ever, under any circumstances. Compl. at ¶ 2. This is why Plaintiffs identify "statutory change" as the cause of their injury, Compl. at ¶ 26. They assert that the "amendment to Nevada's teacher employment statute" served to "strip" them of job security. *Id.* at ¶ 2. And they seek a return to the status quo "[p]rior to AB 225's July 2011 effective date." *Id.* at ¶ 22. Plaintiffs' claims succeed or fail based on this constitutional attack.

The U.S. Supreme Court explains that when parties disagree over whether a challenge is facial or as-applied, the "label is not what matters." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). What controls is the substance of the claim and the relief sought. *Id.* When, as here, a law is blasted as unconstitutional and a blanket injunction against its enforcement sought, that "reach[es] beyond the particular circumstances of these plaintiffs" and constitutes a facial attack. *Id.* Here, 15 Plaintiff-teachers ask this Court to bar enforcement of NRS 391.3129 in a school district with some 16,000 teachers.[11] *See* Prayer for Relief, at 4. When 0.09% of teachers seek to prevent the application of a law to *all* similarly situated teachers, that is hardly as "as-applied" challenge. *See, e.g., Masters v. Sch.*

[11] Clark County School District, *2014-15 Comprehensive Annual Budget Report*, "Schedule Of Staff Positions—2013-14 Actual," 188, *available at* http://www.ccsd.net/resources/budget-finance-department/pdf/publications/cabr/2015/statistical-data.pdf.

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Dist. No. 1, City and Cnty. of Denver, No. 14-cv-30371, Dist. Court of Colo., Denver Cnty. (Jun. 6, 2014) (recognizing that purported "as-applied" teacher challenge was actually facial).

The Nevada State Education Association (or NSEA), the teacher unions' umbrella group, at legislative hearings, argued for amendments to AB 225 but otherwise *approved* of the bill. The group's president said the organization had the "pleasure" of participating in the bill's drafting and was "supportive of this legislation and excited to see this work move forward."[12] (At present, there are 32 board members of the NSEA; 13 hail from the Clark County Education Association, a plaintiff here.[13]) An ex-partner at Plaintiffs' counsel's firm appeared for the NSEA, and in one of the longest single committee testimonies, described his client's concern about aspects of the general reform—but breathed not a word about the supposed constitutional defects now alleged, four years later.[14] Later the NSEA, before the Senate, said that it "supports the concept of AB 225—i.e., redesignation as probationary after two years' of "unsatisfactory" evaluations—and though it sought an entitlement for teachers to contest unsatisfactory evaluations, it never proclaimed any fatal constitutional defect.[15]

This legislative history—which Nevada asks the Court to take judicial notice of[16]—lays bare the nature of this suit: an attempt, in litigation, to upend the extensive work of policymakers out of later dislike for the policy. But the Supreme Court warns that facial challenges are "disfavored" because they "threaten to short circuit the democratic process." *Washington State Grange v.*

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[12] Assem. Comm. on Educ., Mar. 2, 2011 hearing, at 34 (testimony of Lynn Warne).

[13] NSEA, "NSEA Leaders; Board of Directors," *available at* http://www.nsea-nv.org/home/204.htm (*last accessed* Sept. 7, 2015); Clark County Education Association, "Executive Board," *available at* https://ccea-nv.org/dev/wordpress/team-view/ccea-executive-board-its-make-up (*last accessed* Sept. 7, 2015).

[14] Assem. Comm. on Educ., Mar. 2, 2011 hearing, at 34-37 (testimony of James W. Penrose).

[15] Sen. Comm. on Educ., May 9, 2011 hearing, at 10 (testimony of Craig Stevens) & Exhibit F ("NSEA Suggested Amendments to AB 225").

[16] Fed. R. Evid. 201; *Anderson v. Holder*, 673 F.3d 1089, 1094 (9th Cir. 2012) ("Legislative history is properly a subject of judicial notice"); *Chaker v. Crogan*, 428 F.3d 1215, 1223 n.8 (9th Cir. 2005); *U.S. ex rel. Calilung v. Ormat Indus., Ltd.,* 14-cv-00325-RCJ, 2015 WL 1321029, at *8 (D. Nev. Mar. 24, 2015); *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1024 (N.D. Cal. 2014) ("Proper subjects of judicial notice when ruling on a motion to dismiss include legislative history reports"); *Rocky Mountain Farmers Union v. Goldstene*, 719 F. Supp. 2d 1170, 1184 (E.D. Cal. 2010). The cited legislative history is attached to this proposed brief as Attachment 1.

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Washington State Republican Party, 552 U.S. 442, 450-51 (2008). Intelligently balancing the rights of K-12 students and the entitlements of their educators is a quintessential legislative judgment, not a question of federal constitutional law.[17]

II. The Redesignation Provision is constitutional under the Contracts Clause.

1. Standard of review.

To establish a violation of the Contracts Clause, art. I, § 10, cl. 1, a plaintiff must show (1) a valid contract, (2) that a change in law impairs contractual rights, and (3) that the impairment was substantial. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186-87 (1992); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978). Even if a contract is impaired, the impairment may be upheld if reasonable and necessary to serve an important public purpose. *U.S. Trust Co. of New York v. New Jersey,* 431 U.S. 1, 25 (1977). There is no need to reach the reasonable and necessary test here, since the Plaintiffs' inability to show a contract or a substantial impairment disposes of their Contracts Clause claim.

2. The Nevada Legislature did not intend to bind the State contractually through NRS 391.

Claims by teachers that contractual rights were impaired by legislative reform are a staple in American courtrooms. But in these very cases the U.S. Supreme Court has maintained consistently for nearly eight decades—beginning in a trio of landmark rulings from the late 1930s—that (1) laws presumptively do not create contractual rights, but declare policies to be followed until the legislature declares otherwise, and that (2) a plaintiff asserting the creation of a contract with the State has the burden of overcoming a deep presumption that a contract was *not* created. *Dodge v. Bd. of Educ. of City of Chicago*, 302 U.S. 74, 79 (1937); *Phelps v. Bd. of Educ. of Town of W. New York*, 300 U.S. 319, 322 (1937); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938). Teacher-

[17] Some legislators felt the Redesignation Provision did not go far *enough*, since unsatisfactorily performing teachers could "still be in the system for several years." Assem. Comm. on Educ., Mar. 25, 2011 hearing, at 10 (statement of Assemblyman Kirner); *id.* at 10 (statement of Assemblyman Hansen) ("[T]his is a very minor step forward…. [W]e seem to be more concerned with protecting the teachers than educating the students").

employment laws take a bewildering variety of shapes, so the "cardinal inquiry is as to the terms of the statute supposed to create such a contract." *Id.* at 104.

To find a contract, a "legislature's intent that the State be contractually bound" must be "clearly and unequivocally expressed," *Robertson v. Kulongoski*, 466 F.3d 1114, 1117-18 (9th Cir. 2006). Federal courts defer to state-court determinations as to the "existence" of the purported contract. *Id.* Nevada, in cases where public employees assert contract rights, likewise observes a strong and long-standing presumption against finding a contract:

> [T]he contract must be shown to exist…. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend either in scope or duration beyond what the terms of the concession clearly require. There must have been a deliberate intention, clearly manifested, on the part of the state to grant what is claimed. Such a purpose cannot be inferred from equivocal language.

Esser v. Spaulding, 30 P. 896, 897 (Nev. 1883) (citations omitted). To misread contracts into statutes, the court added, would "compel the continuance of laws, demanded under certain circumstances, but detrimental under others." *Id.* at 900. The rationale was put strikingly in *National R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985):

> This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body. Indeed, the continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation. Thus, the party asserting the creation of a contract must overcome this well-founded presumption, and we proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation.

(Citations and quotations omitted.) The Court in *National Railroad* relied on two of the three key teacher Contracts Clause cases. *Id.* (citing *Brand,* 303 U.S. at 104-105, *Dodge,* 302 U.S. at 79). The practical danger of conflating statutes and contracts, the Seventh Circuit explained, in another school-employment case, is that "[s]tatutes 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." *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995).

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In *Dodge*, 302 U.S. at 81, and *Phelps*, 300 U.S. at 324, the Court rejected claims by teachers that statutory benefits equaled an inviolable contract with the States themselves (Illinois and New Jersey). In both cases the Court noted that the state supreme courts had not interpreted their statutes to create contracts. *Dodge,* 302 U.S. at 79; *Phelps*, 300 U.S. at 322. In *Phelps,* for instance, the Court said that in New Jersey the "status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the Legislature at will may abolish, or whose emoluments it may change." *Id*. Second, the Court found in both cases that the Court itself, independently, could not construe the statutory language to form a contract. *Dodge,* 302 U.S. at 81; *Phelps*, 300 U.S. at 323-24. By contrast, the leading case in which a teacher-employment statute *was* found to have petrified into a contract is *Brand*. That case, like *Dodge* and *Phelps,* turned on the same two decisive facts: the state-court decisions and the law's text. In *Brand*, (1) Indiana courts had "uniformly" interpreted the Indiana statute at issue to create contractual rights and (2) the statute was deliberately "couched" in terms of "contract" between State and teacher. 303 U.S. at 105-07.

This case is firmly in the *Phelps* and *Dodge* class. First, like those cases, and unlike *Brand*, no Nevada precedent holds that NRS 391 creates *contractual* rights for teachers, though NRS 391 has existed in various forms for decades and been heavily litigated during that time. This is decisive, since the State's view of its own law largely controls. *Phelps* 300 U.S. at 322; *Dodge*, 302 U.S. at 79; *Brand*, 303 U.S. at 105. (*Brand*, incidentally, has never appeared in any reported Nevada decision.[18]) Plaintiffs cannot overcome the no-contract presumption with such a dearth of support. Quite the contrary, case law shows NRS 391 being used, as it was intended, to define the *conditions* under which teachers are employed and procedures for hiring, firing, and evaluating them. *See, e.g., Clark Cnty. Sch. Dist. v. Harris*, 112 Nev. at 289; *Boyle v. Bd. of Trustees of Clark Cnty. Sch. Dist.*, 101 Nev. at 595; *Rust v. Clark Cnty. Sch. Dist.*, 100 Nev. 372, 374 (1984). When, for instance, the Nevada Supreme Court explained that NRS 391's for-cause provisions show that the "legislature

[18] Ninth Circuit opinions cite *Brand* three times. In each case, no contract was found to exist. *Robertson*, 466 F.3d at 1118; *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147, 1161 (9th Cir. 2004); *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.,* 899 F.2d 814, 821 (9th Cir. 1990).

wanted to protect qualified teachers from arbitrary decisions regarding their continued employment," *Harris*, 112 Nev. at 289, the "arbitrary decisions" referenced were those of principals, superintendents, and school boards, vis-à-vis individual teachers—the parties subject to the law—not policy decisions of the *Legislature* for teachers statewide.

Second, NRS 391 only uses the word "contract" in connection with agreements, generally lasting for a single year, signed by teachers with *school districts*, *see, e.g.,* NRS 391.3196(1), (5); *id.* at 391.3197(5)(b), (6); *id.* at 391.31216(2), (6), 10(b); *id.* at 391.314, or collective-bargaining agreements between by teachers and *school boards*, *id. at* 391.3116. NRS 391 reveals not the language of establishing contracts with the State—or what the Plaintiffs call the "statutory promise," Compl. at ¶ 24, 26—but policies or conditions, set by the State, for contracts between third parties. NRS 391 merely *authorizes* these contracts. Impairment of *these* contracts is not alleged. Many Nevada laws authorize or define contractual rights, liquidate meanings, or prohibit terms as against public policy—but this does not make Nevada a *party* to any contracts reached under those laws. *See, e.g.,* NRS 111.170 ("grant, bargain and sell" conveys in "fee simple" unless otherwise agreed); *In re T.M.C.*, 118 Nev. 563, 569 (2002) (NRS 128 prohibits certain agreements voluntarily to terminate parental rights). The principle, explained in *National Railroad*, 470 U.S. at 467, is that "[l]egislation outlining the terms on which private parties may execute contracts does not on its own constitute a statutory contract, but is instead an articulated policy that, like all policies, is subject to revision or repeal."

Plaintiffs specify two provisions supposedly creating their contractual rights. Compl. at ¶ 35. The first is NRS 391.312 (now NRS 391.31297), which sets out causes for which schools can terminate teachers. The Legislature is not in the business of handling firings; instead it fixes the grounds for termination, in order to limit the discretion of *schools* as a matter of legislative will. It was not curtailing its *own* discretion (or if it did, it abrogated that limitation with AB 225). The Legislature can add disciplinary grounds—as it did in 2011, for failure to report cyber-bullying, *see* 2011 Nevada Laws Ch. 376 (SB 276)—or eliminate them. The second provision cited by Plaintiffs, NRS 391.317, provides for notice and opportunity for a pre-termination hearing for postprobationary

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employees. Here, too, the Legislature commands superintendents to provide this process; it does not command *itself*.

Nevada law is equally clear that words like "probationary" and "postprobationary" do not themselves magically create a contract. One court explained that the "phrase 'probationary employee' does not necessarily mean that the employee may be terminated without cause at any time during the probationary period." *Stone v. Mission Bay Mortgage Co.,* 99 Nev. 802, 804 (1983). Another held that even though an employee had "long since completed her probationary employment period," nothing in her agreement served to "modify…her at-will employment contract." *Smith v. Cladianos*, 104 Nev. 67, 69 (1988). A third held that a term like "permanent" was used simply to distinguish "probationary" employees, but that these "permanent" employees remained nonetheless "at will." *Beales v. Hillhaven, Inc.,* 108 Nev. 96, 102 (1992).

Finally, laws, unlike contracts, are presumed to be subject to unilateral change by the Legislature. In Nevada, public employees are deemed to know that employment law can be altered in exercises of the police power, never more so than with a frequently amended law like NRS 319. *Esser,* 30 P. at 900. Pervasive regulation helps defeat an expectation that a statute creates unchanging contractual rights. *National Railroad*, 470 U.S. at 469; *Energy Reserves Group v. Kan. Power & Light,* 459 U.S. 400, 412–13, 416 (1983). In this case, the for-cause provision in NRS 391.31297 was added in 1967 and amended in 1973, 1987, 1999, 2001, 2011, and 2013. The notice-and-hearing provision in NRS 391.317 was added in 1967 and amended in 1973, 1979, 1985, 1987, 1989, 2005, 2011, and 2013. These amendments came at times from teacher lobbying, at others against it, but never as a bargained-for exchange between State and teacher.

In the end, Plaintiffs cannot show, as is their burden, that the statutory language contains the clear and unequivocal indication to rebut the old, formidable presumption—one essential to democratic governance—that a statute created a contract instead of declaring a policy.

3. Plaintiffs cannot show, supposing a contract, a substantial impairment of it.

In addition to their burden to demonstrate the existence of a contract, Plaintiffs also must show that the impairment is "severe." *Spannaus*, 438 U.S. at 245. A "[m]inimal alteration of contractual obligations," the Court explained, can "end the inquiry." *Id.*

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This case does not involve, as in *Brand*, an attempt at total, instant abolition of tenure. 303 U.S. at 104-07. It involves an entitlement to earn postprobationary status from a period of satisfactory work. The status, while possessed, largely immunizes the teacher against discharge for reasons other than statutorily defined causes and confers a right to notice and a hearing. This presumption of competence only lasts for a year in any event. NRS 391.3197(2) (schools notify probationary employees of employment as a postprobationary employee "for the next school year"); *id*. at (3) (employees who complete probationary period are "entitled to be a postprobationary employee in the ensuing year of employment"). But when it is lost, it is forfeited through the teacher's own failings. This supposed contractual right would not be impaired by the State.

Even supposing impairment, the impairment is not substantial. The Redesignation Provision itself does not cause a loss of job, money, or benefits; the true and proximate cause of lost postprobationary status is the teacher's inability to educate children adequately. Plaintiffs acknowledge this: the Redesignation Provision supposedly "strip[s]" them of postprobationary status, they write, "*in the event that such postprobationary teachers receive unsatisfactory evaluations for two consecutive school years*." Compl. at ¶ 2 (italics added). They concede, in other words, that their injury is enabled but not caused by the law. It is a consequence of their own persistent deficiency. This is logical and equitable: a teacher gains protections through satisfactory performance; a teacher loses them through unsatisfactory performance. The false premise of Plaintiffs' argument is that postprobationary status, once obtained, is perpetual. Nothing in NRS 391 or Nevada case law says it is. On the contrary, even before AB 225 was enacted, NRS 391.3197(2) and (3) stated that postprobationary status was only provided for the "next school year" and "in the ensuing year of employment." Nothing in Nevada law guaranteed teachers that they would receive postprobationary status in perpetuity.

Moreover, contrary to Plaintiffs' allegations, NRS 391 as amended by AB 225 creates a *years-long* process by which schools are required to repeatedly notify teachers of their failings and required to work to lift them back up. NRS 391.3125(5)(e) & (6). This is nothing like instant or "summary" termination. It is not the stuff of substantial or severe impairment.

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Finally, the change in status from postprobationary to probationary is not a demotion. NRS 391.311 (defining "demotion"). The loss of status is a spur to restore lapsed performance. No reduction in pay is alleged to occur; no loss of teaching opportunities; no class reassignment. Indeed, each Plaintiff-teacher here willingly continued as a probationary employee for a year after losing that status. NRS 391.3197(3). Nor is the requirement to recomplete a probationary period a demotion, NRS 391.311, or an infringement of rights. It is the same opportunity to prove their ability that all teachers have when they accept public-school teaching work in Nevada.

III. The Redesignation Provision is constitutional under the Due Process Clause.

1. Standard of review.

To establish a violation of procedural due process under the Fourteenth Amendment, Amdt. XIV, § 1, Plaintiffs must show (1) a deprivation of a constitutionally protected property interest and (2) denial of adequate procedural protections. *Krainski v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, 616 F.3d 963, 970 (9th Cir. 2010). The existence of a property right in continued public employment is a question of state law, *Brady v. Gebbie*, 859 F.2d 1543, 1547-48 (9th Cir. 1988), but the Court can avoid the first prong of the due-process inquiry because of the rule that, in Due Process Clause challenges, legislation itself provides all the process due.

2. Plaintiffs, by law, received the due process afforded by legislative action.

Plaintiffs identify the legislation as the cause of injury. Compl. at ¶ 26 ("statutory change"); ¶ 2 (the statute's "amendment" "strip[ped]" them of their job protections); ¶ 22 (seeking a return to the status quo "[p]rior to AB 225's July 2011 effective date").

As Justice Holmes famously explained a century ago, procedural due process means something different when applied to legislation, binding on all, and adjudications, applying to one. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 244-45 (1973). Unless "all public acts [are] to be done in town meeting or an assembly of the whole," general laws, even ones that injure individual property rights, offer precisely one form of notice and hearing: a chance to petition lawmakers before the enactment and vote against the enactors afterward. *Bi-Metallic*, 239 U.S. at 445. The adjudicative/legislative

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line distinguishes procedural fairness in individual determinations and legislative changes to larger statutory schemes. *Atkins v. Parker*, 472 U.S. 115, 129 (1985).

This basic concept applies to claims by public-sector workers that legislation affected their rights. A leading case in the Ninth Circuit is *Rea v. Matteucci*, 121 F.3d 483, 484 (9th Cir. 1997), where a Nevada state worker complained under the Due Process Clause that the Legislature reclassified her position so to "remov[e] the permanent status of the job." The circuit held, as a matter of both U.S. and Nevada Supreme Court precedent, that the "legislative process is sufficient to comport with minimal federal due process requirements." *Id* at 485. Nevada controlled the positions it created and may "modify or abolish any state office." *Id.* (citing *Shamberger v. Ferrari*, 73 Nev. 201 (1957)). The sole exceptions to the due-process rule are where the law is "wholly arbitrary or irrational" or the lawmaking process was "defective" (say, by "targeting" individuals). *Id*.

Plaintiffs do not allege any such exceptions. *Rea*'s holding is settled law. *Bowers v. Whitman*, 671 F.3d 905, 913 n.3 (9th Cir. 2012) ("when a state alters a state-conferred property right through a legislative process, the legislative determination provides all the process that is due") (citations omitted); *Ileto v. Glock, Inc*., 565 F.3d 1126, 1142 (9th Cir. 2009) (same); *Austin v. City of Bisbee, Ariz.*, 855 F.2d 1429, 1436 (9th Cir. 1988) ("When, as here, the statute authorizing the benefits is amended or repealed, the property right disappears") (citations omitted); *Rosas v. McMahon*, 945 F.2d 1469, 1475 (9th Cir. 1991) ("The procedural component of the Due Process Clause does not impose a constitutional limitation on the power of [a legislature] to make substantive changes in the law of entitlement to public benefits") (citations and quotations omitted). If this rule applies when the Legislature *abolishes* positions, surely it applies to lesser adjustments to mere *conditions* of employment.

Plaintiffs treat the Due Process Clause like a second Contracts Clause. The latter *is* designed to prevent general laws from impairing rights of constitutional sanctity. Yet the danger that such contract claims, even in that limited class, could hamstring future legislative action—leaving lawmakers unable to alter policy for rational reasons—freights Contracts Clause jurisprudence with presumptions against finding a contract or requires any impairment to be severe. No such limitations apply to procedural due process challenges to legislative action because no challenges lie in the first

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place. *Pittman*, 64 F.3d at 1104. Instead it is a "familiar principle" that a State's legislative power, so far as due process is concerned, is "at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service." *Higginbotham v. City of Baton Rouge*, 306 U.S. 535, 538 (1939) (citing *Phelps*, 300 U.S. at 322 and *Dodge*, 302 U.S. at 78).

By contrast, suits where school employees challenge individual adjudications by school administrators, hearing officers, boards of regents, or other fact-finders, *are* appropriate for Due Process claims. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 535 (1985); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 566 (1972); *Perry v. Sindermann*, 408 U.S. 593, 595 (1972); *Miller v. Clark Cnty. Sch. Dist.*, 378 F. App'x 623, 625 (9th Cir. 2010); *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1177 (9th Cir. 1998). These cases involve claims that legal procedures were not observed or that facts were misconstrued by decision-makers; they do not involve attacks on the very validity of procedures themselves or their enabling statutes.

Plaintiffs in this case received all the process due to them. The legislation was passed in the ordinary course. They, and their representative organizations, had the opportunity to attend open hearings, file submissions with committees (as many citizens did), call legislators, write op-eds, and so on. Indeed, their representative organizations *supported* this legislation. By way of illustration, Connecticut's high court applied federal due-process precedents to dismiss a suit by a teachers' union against a licensing requirement. *Connecticut Educ. Ass'n, Inc. v. Tirozzi*, 210 Conn. 286, 288 (1989). The court acknowledged that denying a license could be tantamount to denying a livelihood, *id.* at 295, but held that when a legislature "alter[s] substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute." *Id*. at 298. The court noted that teachers' unions "participated in the committee hearings leading up to the act." *Id*. So, too, here. The implications of a contrary rule are staggering. Courts regularly reverse improper terminations of individual teachers, but if a legislature, because of budget needs, was forced to eliminate hundreds of jobs at once, can a court order them all reinstated or heard individually?

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The action challenged here is undoubtedly legislative. In *Gallo v. U.S. Dist. Court For Dist. of Arizona*, 349 F.3d 1169, 1181-82 (9th Cir. 2003), the Ninth Circuit explained that the "line between legislation and adjudication" turns on "(1) whether the government action applies to specific individuals or to unnamed and unspecified persons; (2) whether the promulgating agency considers general facts or adjudicates a particular set of disputed facts; and (3) whether the action determines policy issues or resolves specific disputes between particular parties." *Id*. (citations omitted). Plaintiffs here challenge a law applying to all teachers, present and future, irrespective of any specific set of facts, promulgated as a matter of state policy. They attack the decisions of the Legislature, not those of Clark County School District.

Although not required to do so, the Legislature still ensured that the Plaintiffs enjoyed considerable time and opportunity to avoid redesignation. Plaintiffs acknowledge that they lost their "status" only after "two negative performance evaluations." Compl. at ¶ 26. That is, the loss of status was driven by the teachers' own bad performance, after proving in previous years that they *could* teach at a satisfactory level. The U.S. Supreme Court has held that a legislature can, without violating the Due Process Clause, "condition" retention of vested employment rights on performance. *United States v. Locke*, 471 U.S. 84, 104 (1985); *Bishop v. Wood*, 426 U.S. 341, 345 (1976). And, again, in year two after an unsatisfactory review, each Plaintiff-teacher could demand a different evaluator. NRS 391.3125(4).

The Nevada Supreme Court recognizes the Legislature's power to "ensure that unqualified teachers are not vested with the protections of postprobationary status imprudently, thereby ensuring that only quality teachers educate our youth." *Harris*, 112 Nev. at 290. After receiving the considered support from teacher-union representatives, and many others, the Legislature exercised this power. When it did, Plaintiffs received all the notice and opportunity to be heard due to them. Indeed, they received much more under AB 225: a regime that countenances, even for ineffective teachers, years of continued employment with multiple evaluations, a chance to respond by requesting assistance, and a guarantee that their school must try to help them address their deficiencies.

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IV. Conclusion.

What Plaintiffs see as ungenerous loss of entitlement, the citizens of Nevada and their Legislature saw as a necessary advance to protect Nevada's future. This Court recognizes the prerogative of that lawmaking body to "create a novel solution to the education needs of this state," including by "increasing teacher accountability," and this Court declines invitations, like this one, to "legislate from the bench." *Nelson v. Halima Acad. Charter Sch.*, 05-cv-171-LRH-RAM, 2006 WL 1994878, at *3-4 (D. Nev. July 14, 2006). The U.S. Constitution does not disable Nevada from enacting incremental, carefully vetted, and necessary education reforms like the one challenged here. Both of Plaintiffs' claims fail as a matter of law and should be dismissed.

DATED this 16th Day of September, 2015.

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