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# Supreme Court of New Jersey

H.G., a minor, through her guardian TANISHA GARNER; F.G., a minor, through her guardian TANISHA GARNER; E.P., a minor, through his guardian NOEMI VAZQUEZ; M.P., a minor, through her guardian NOEMI VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through his guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., minor, through his guardian IRIS SMITH; M.R., a minor, through his guardian IRIS SMITH; Z.S., a minor, through her guardian WENDY SOTO; D.S., a minor, through his guardian WENDY SOTO,

*Plaintiffs/Petitioners,*

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC SCHOOL DISTRICT;

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See Next Page)*

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J.A.D.

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HON. Mary C. Jacobson, A.J.S.C.

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## BRIEF OF AMICI CURIAE NATIONAL COUNCIL ON TEACHER QUALITY AND TNTP, INC.

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and nominal defendant CHRISTOPHER  
CERF, in his official capacity as  
Superintendent of the Newark Public  
School District,

*Defendants/Respondents,*

-and-

NEW JERSEY EDUCATION ASSOCIATION, a  
New Jersey nonprofit corporation, on  
behalf of itself and its members,

*Intervenor/Respondent,*

-and-

AMERICAN FEDERATION OF TEACHERS, AFL-  
CIO, AFT NEW JERSEY and THE  
NEWARK TEACHERS UNION,

*Intervenors/Respondents.*

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## PRELIMINARY STATEMENT

The undersigned organizations (collectively, "Amici") respectfully disagree with the lower courts' holdings, and ask this Court to grant certiorari, reverse the appellate division's holding, and remand to the trial court, so that yet another structural impediment to a child's right to an adequate education within the State of New Jersey may be dismantled. The Education Clause of the New Jersey Constitution requires the Legislature to provide "for the maintenance and support of a thorough and efficient system of free and public schools for the instruction of all the children in the State." N.J. Const. Art. VIII, Sect. IV, ¶ 1 (the "Education Clause"). In opposition to that constitutional mandate, the statutes at issue require the termination of junior, competent teachers while more senior, grossly ineffective teachers retain their jobs simply because of seniority. Thus, statutes that actively serve to thwart Newark's ability to retain effective teachers cannot survive scrutiny under the Education Clause of the New Jersey Constitution.

For the past 30 years children in New Jersey's poorest urban school districts, Newark included, have had to litigate for their "fundamental right" to a "thorough and efficient" education in what is commonly known as the *Abbott* line of cases. *Abbott v. Burke* (*Abbott XXI*), 206 N.J. 332, 467 (2011) (citing *Robinson v. Cahill*, 69 N.J. 133, 147 (1975)). Yet again, Plaintiffs in



Newark's public schools are required to litigate for the provision of effective teachers - the very individuals who can provide this kind of education. As it stands, New Jersey's LIFO (last-in, first-out) statutes force Newark and other similarly situated districts to retain ineffective teachers, which has the obvious impact of subjecting children to teaching that is wholly inadequate. The LIFO Statute not only syphons off talented teachers, but also syphons much needed funds to what are known as Educators Without Placement Sites or "EWPS" pools, which are pools of ineffective teachers who are paid salaries, as the School District of Newark admits, totaling \$25 million for the 2016-2017 school year alone, even though they do not have full-time classroom placements.

This is unjust, and the LIFO Statute is unconstitutional. New Jersey, which typically holds itself out as a leader in K-12 education, is lagging behind other states that have recognized that LIFO statutes harm students every time a less effective teacher retains his or her position while a more effective teacher is removed from the classroom. This structure further incentivizes newer, talented teachers to avoid districts like Newark even before a reduction in force because junior teachers know full-well that their retention will not be based on their efficacy in the classroom, but will be based on seniority—a risk any rational junior teacher would avoid taking. The Supreme Court

has not hesitated in righting the intergenerational wrongs that have harmed children in this state in the past, and it should not do so here. The appellate court erred in its holding, and this Court should reverse and remand.

**INTEREST OF THE AMICI CURIAE**

The National Council on Teacher Quality ("NCTQ") is a nonprofit research and policy organization led by the vision that every child deserves effective teachers and every teacher deserves the opportunity to become effective. NCTQ recognizes that this vision is not the reality for far too many children and teachers, because all too often the policies and practices of institutions with the greatest authority and power over teachers and schools falls alarmingly short. To that end, NCTQ focuses on the changes that school districts, state governments, and teachers' unions must make to return the teaching profession to a state of excellence, delivering to every child the education needed to ensure a bright and successful future. NCTQ's Board of Directors and Advisory Board are composed of Democrats, Republicans and Independents, all of whom believe that policy changes are long overdue in support of excellent teachers.

TNTP, formerly the New Teacher Project, believes our nation's public schools can offer *all* children an excellent education. A national nonprofit founded by teachers, we help school systems end educational inequality and achieve their goals for students. We

work at every level of the public education system to attract and train talented teachers and school leaders, ensure rigorous and engaging classrooms, and create environments that prioritize great teaching and accelerate student learning. Since 1997, we've partnered with more than 200 public school districts, charter school networks and state departments of education. We have recruited or trained more than 50,000 teachers, redefined critical education issues through acclaimed studies like *The Widget Effect* (2009), *The Mirage* (2015), and *The Opportunity Myth* (2018) and launched one of the nation's premiere awards for excellent teaching, the Fishman Prize for Superlative Classroom Practice. Today, TNTP is active in more than 30 cities.

NCTQ and TNTP (collectively, "Amici") urge this court to reverse the appellate division's holding.<sup>1</sup> New Jersey's Constitution guarantees children a "thorough and efficient" education. N.J. Const. Art. VIII, § IV, para. 1. The *Abbott* line of cases confirm this constitutional guarantee is a fundamental right" of school children of this state. *Abbott v. Burke* (*Abbott XXI*), 206 N.J. 332, 467 (2011) (citing *Robinson v. Cahill*, 69 N.J. 133, 147 (1975)). Other *Abbott* rulings held that "[t]he poor

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<sup>1</sup> *Amici* certify that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no person or entity contributed monetarily toward its preparation or submission.

educational achievement levels evident in inner-city schools results in part from . . . the lack of qualified teachers . . . . Those special needs clearly must be confronted and overcome in order to achieve the constitutionally thorough and efficient education." *Abbott v. Burke (Abbott IV)*, 149 N.J. 145, 177, 179 (1997).<sup>2</sup>

Based on *Amici's* work with states and school districts across the country to improve public education through the recruitment and retention of high quality teachers, *Amici* have found there is no in-school factor more critical to providing a "thorough and

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<sup>2</sup> Other states have found that effective teachers are a required component of an adequate education. See e.g., *Connecticut Coal. For Justice in Educ., Inc. v. Rell*, 2016 WL 4922730, at \*10 (Conn. Super. Ct. Sept. 7, 2016) ("Most of the state's education money is spent on teachers. Both sides agree this is where the money belongs. It is also undisputed that good teachers are key to a good school system."); *Pauley v. Kelly*, 162 W.Va. 672, 706 (1979) (finding provision of constitutionality adequate education "implicit[ly]" requires among other things "supportive services:(2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency"); *Abbeville Cty. Sch. Dist. v. State*, 410 S.C. 619, 633-34 (2014) (noting that "to answer the question of whether each child in the Plaintiff Districts had the opportunity to acquire a minimally adequate education, it was necessary to determine how to measure the presence or absence of that opportunity" and that "the instrumentalities of learning and resources provided to the Plaintiff Districts, including money, curriculum, teachers, and programming" are critical inputs); *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50, 53 (2006) (finding that NYC students "were not receiving the opportunity for a sound basic education," partially because "New York City public schools provided inadequate teaching").

efficient education" than having effective teachers.<sup>3</sup>

Consequently, there is no in-school factor more destructive to a child's education—and thus their access to literacy, earning potential, and the ability to contribute to society as responsible public citizens—than a highly ineffective teacher.<sup>4</sup> N.J. Rev. Stat. §§ 18A:28-10, 18A: 28-12 (collectively, the "Challenged Statutes") force schools like those in Newark to retain teachers solely on the basis of seniority when a reduction-in-force is necessary, even when those schools know they are retaining a less effective teacher than the more junior teacher they are forced to

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<sup>3</sup> See also Raj Chetty, John N. Friedman, and Jonah E. Rockoff, *Measuring The Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104(9) AMERICAN ECONOMIC REVIEW 2633, 2633-34 (2014) (finding that students assigned to an effective teacher are more likely to attend college and higher-ranked colleges, save more for retirement, and less likely to have children as teenagers); TNTP, *THE IRREPLACEABLES* (2012), [http://tntp.org/assets/documents/TNTP\\_Irreplaceables\\_2012.pdf](http://tntp.org/assets/documents/TNTP_Irreplaceables_2012.pdf) (concluding that districts' high-performing teachers generated 5-6 months more student learning than their poor-performing peers).

<sup>4</sup> Adults who cannot read fluently face a litany of problems such as: filling in an order or application form; understanding written jury instructions; comparing and contrasting two types of employee benefits; or writing a brief letter explaining an error made on a credit card bill. See National Assessment of Adult Literacy, NATIONAL CENTER FOR EDUCATION STATISTICS (2003), [https://nces.ed.gov/naal/fr\\_tasks.asp](https://nces.ed.gov/naal/fr_tasks.asp); Irwin S. Kirsch et al., *Adult Literacy in America: A First Look at the Findings of the National Adult Literacy Survey*, NATIONAL CENTER FOR EDUCATION STATISTICS 10 (April 2002), <https://nces.ed.gov/pubs93/93275.pdf>. Low student achievement has lifelong earning costs. See Chetty, *supra* note 3, at 2633 (finding that replacing a highly ineffective teacher with even an average teacher would increase students' lifetime earnings by over \$250,000).

remove. Commonly referred to as a last-in-first-out policy or "LIFO," the Challenged Statutes illogically require schools to fire teachers with complete disregard for their effectiveness. The policy robs children and students of their fundamental right to a "thorough and efficient education," and the statutes are therefore unconstitutional.

Moreover, the Challenged Statutes burden students' fundamental right to education and will further damage students attending districts prone to budget deficits, and thus reductions in force, without furthering a compelling governmental interest. *Abbott v. Burke (Abbott I)*, 100 N.J. 269, 296 (1985) ("[A]fter comparing the education received by children in property-poor districts to that offered in property-rich districts, it appears that the disadvantaged children will not be able to compete in, and contribute to, the society entered by the relatively advantaged children.") The Challenged Statutes continue to harm Plaintiffs in a tangible way, not merely because children in New Jersey are receiving instruction from ineffective teachers, but also because the statute serves as a barrier to entry for less experienced, effective teachers who will choose not to join the talent pool of teachers under RIF rules that screen only for seniority, thus leaving them vulnerable to job loss.

## DISCUSSION

### **I. NEW JERSEY'S "LIFO" STATUTE IS UNCONSTITUTIONAL.**

New Jersey's LIFO statute, N.J. Rev. Stat. §§ 18A: 28-10 (2013) ("LIFO Statute"), interferes with Plaintiffs' constitutional right to a "thorough and efficient" education as mandated by the State Constitution. N.J. Const. Art. VIII, § IV, ¶ 1. In New Jersey, this requires that a statute be struck down unless the means chosen are necessary to promote a compelling governmental interest. *Matthews v. Atlantic City*, 84 N.J. 153, 167 (1980). The LIFO Statute specifically mandates that when public school districts lay off teachers, they must do so by retaining the most senior teachers while laying off the most junior, irrespective of effectiveness. The means chosen, the Challenged Statutes, are not necessary, and in fact are harmful, to achieve the governmental interest at stake.

When districts are forced by budget constraints to conduct an RIF, district leaders should be allowed to keep the most effective teachers. Yet New Jersey's LIFO Statute requires school districts to embrace a last-hired-first-fired policy, where it is actually illegal under the Challenged Statutes to consider a teacher's effectiveness in determining whether to fire them during a

reduction in force.<sup>5</sup> Research consistently demonstrates that teachers' years of experience have little correlation to their effectiveness, especially after a teacher's first few years in the profession.<sup>6</sup> By preventing any assessment of teacher quality, the LIFO Statute serves to thwart districts' efforts to retain their most effective teachers and denies students their fundamental rights to an adequate education. The Challenged Statutes also blatantly violate the Education Clause of the New Jersey Constitution because they actively prevent the fulfillment of a child's right to a "thorough and efficient" education in this State. New Jersey is one of only six states that mandate quality-

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<sup>5</sup> NCTQ, 2017 STATE TEACHER POLICY YEARBOOK: NEW JERSEY.

<sup>6</sup> See e.g., Eric A. Hanushek, John F. Kain & Steve G. Rivkin, *Teachers, Schools, and Academic Achievement*, 73 (2) *ECONOMETRICA* 417, 447-49 (2005) (the most significant improvement in teaching quality occurs within the first three years of a teacher's career, after which the teacher's development plateaus); Donald Boyd, Hamilton Lankford, Susanna Loeb, Jonah Rockoff and James Wyckoff, *The Narrowing Gap in Teacher Qualifications and its Implications for Student Achievement* 15 (Nat'l Bureau of Econ. Research, Working Paper, 2008) (although "[t]eachers continue to improve the achievement outcomes of their students over the first 3 to 5 years of their careers," the most significant improvement in teaching effectiveness occurs in the first year); Douglas N. Harris and Tim R. Sass, *Teacher Training, Teacher Quality and Student Achievement* 19 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research (CALDER), Working Paper, 2007) (effect of teacher experience on student outcomes was most significant in the first year, "with subsequent experience yielding diminishing increases in teacher productivity"); Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, *EDUC. POLICY ANALYSIS ARCHIVES* 7 (2000) (the benefits of experience appear to level off after about five years).



blind reductions in force, prohibiting districts from using teacher effectiveness and performance evaluation to decide which teachers are laid off and which are retained. The layoff decision is made regardless of each teacher's impact on students, and students are harmed each time a more effective last-hired teacher is let go to preserve a less effective, more senior teacher's position.<sup>7</sup>

Unlike New Jersey, many other states have found alternatives to LIFO that have proven effective. The experience of Colorado and Florida, for example, demonstrates that feasible alternatives exist to New Jersey's LIFO Statute. Both of these states require that during a RIF: 1) classroom performance is the top criterion used to identify which teachers to lay off; and 2) that seniority can only be considered after teacher performance is considered. Colorado considers teacher performance—measured by a performance evaluation—as the top criterion for districts to use in determining which teachers are laid off during RIFs.<sup>8</sup> In Colorado, other factors, including the "probationary and non-probationary status and the number of years a teacher has been teaching in the

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<sup>7</sup> NCTQ, 2017 STATE TEACHER POLICY YEARBOOK 118 (2017); *State Policy Issues: Retaining Effective Teachers, Layoffs, NCTQ*, [https://www.nctq.org/dmsView/NCTQ\\_2017\\_State\\_Teacher\\_Policy\\_Yearbook](https://www.nctq.org/dmsView/NCTQ_2017_State_Teacher_Policy_Yearbook)).

<sup>8</sup> NCTQ, 2017 STATE TEACHER POLICY YEARBOOK: COLORADO; *State Policy Issues: Layoffs, NCTQ*, <https://www.nctq.org/yearbook/state/CO-Layoffs-79> (containing state data for 2017). COLO. REV. STAT. §§ 22-9-106, 22-63-202.

school district," may be considered only after a teacher's performance is taken into account.<sup>9</sup>

Florida also requires that teacher performance be a primary factor in determining which teachers are laid off during an RIF.<sup>10</sup> In addition, the state ensures that seniority is not the sole factor in determining which teachers are laid off. Employees with the lowest performance evaluations are the first be released, and school districts "may not prioritize retention of employees based upon seniority."<sup>11</sup>

These changes to state layoff laws have not significantly impacted the number of certified teachers in Colorado or Florida.<sup>12</sup>

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<sup>9</sup> COLO. REV. STAT. §§ 22-9-106, 22-63-202.

<sup>10</sup> FLA. STAT. § 1012.33 (5) ("If workforce reduction is needed, a district school board must retain employees at a school or in the school district based upon educational program needs and the performance evaluations of employees within the affected program areas.").

<sup>11</sup> *Id.*

<sup>12</sup> See *Teachers by Race/Ethnicity and Gender*, COLO. DEP'T OF EDUC., <https://www.cde.state.co.us/cdereval/count-of-teachers-by-district-ethnicity-and-gender-pdf>; *Data Publications and Reports*, FLA. DEP'T OF EDUC., <http://www.fldoe.org/accountability/data-sys/edu-info-accountability-services/pk-12-public-school-data-pubs-reports/archive.shtml>.

	Colorado	Florida
	Tenure reform passed: 2010	Tenure reform passed: 2011
	# of teachers	# of teachers
2009-2010	51,256	166,724
2010-2011	50,654	169,540
2011-2012	50,326	168,135
2012-2013	50,947	171,833
2013-2014	53,910	172,138
2014-2015	52,560	168,342
2015-2016	53,179	170,692
2016-2017	53,568	171,468
2017-2018	54,453	174,193

**II. THE EXPERIENCE OF SCHOOL DISTRICTS NOT SUBJECT TO THE RESTRICTIONS IN THE CHALLENGED STATUTES DEMONSTRATES THAT THOSE RESTRICTIONS ARE NOT NECESSARY TO FURTHER A COMPELLING GOVERNMENT INTEREST.**

The governmental interest at stake is not compelling. To accept the Respondents' position here would require this Court to defend the proposition that New Jersey has a compelling interest in separating students from competent teachers and a like interest in the retention of incompetent teachers. This is irrational.

At base, there are other less restrictive means that demonstrate that the rules under the Challenged Statutes are not necessary to further the government's interest. The experience of school districts not subject to the restrictions in the Challenged Statutes shows that those statutes are not necessary to achieve the state's interests in obtaining a high quality, stable teaching force.

### **A. Shelby County Schools, Tennessee**

Tenure reform in Tennessee has allowed Shelby County Schools ("SCS") to improve the quality of its teaching force and, most important, increase student achievement. Tennessee requires five years of teacher performance and two consecutive years of being rated effective before a teacher may earn tenure. Thereafter, tenured teachers who receive two consecutive ineffective ratings can lose their tenured status.<sup>13</sup> Tennessee state law does not require layoffs based on seniority, but instead gives local school boards discretion to lay off teachers based on their evaluation ratings. Under Superintendent Dorsey E. Hopson, SCS's practice has been to consider teacher performance as one of the first criteria when making layoff decisions.<sup>14</sup> This state framework allows SCS to use data on teacher effectiveness to make retention and dismissal decisions, rather than being forced not to consider those factors in employment decisions as is the case in New Jersey.

The ability to consider teacher effectiveness has enabled SCS to retain high performing teachers while transitioning out

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<sup>13</sup> TENN. CODE ANN. § 49-5-504.

<sup>14</sup> Shelby County recently had to implement this practice in laying off more than 500 educators. See Kayleigh Skinner, *Layoffs Impact More Than 50 Shelby County Educators*, CHALKBEAT TENN., June 18, 2015, <http://tn.chalkbeat.org/2015/06/18/layoffs-impact-about-500-shelbycounty-teachers/#.Ve9VhBFVhHw>.

teachers who consistently perform at low levels. In 2012, the district retained 93 percent of its top performers (as measured by Teacher Evaluation Measure (TEM))<sup>15</sup> while retaining 84 percent of its lower performers. In 2015, the district retained 91 percent of its top performers and 71 percent of its lowest performers.

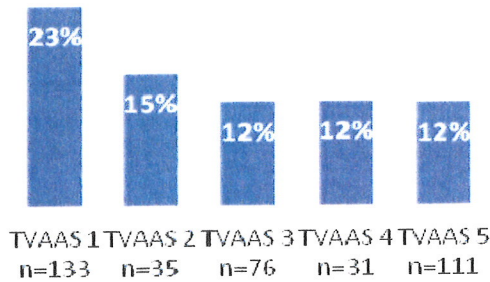
Once these policies were put in place, SCS saw a dramatic increase in the number of teacher candidates applying to the district. In 2010, over 3,000 candidates started applications to teach in SCS. Since then, the four-year average from 2011-2015 is 7,425. That means the number of candidates who applied to teach nearly doubled or tripled each year after these policies were in place than before the policies existed, which suggests that tenure reform actually increased interest in teaching in the district.

SCS has been able to prioritize teacher quality as the single most important factor in all employment decisions, including recruitment, retention, and dismissal. In fact, as low performers are terminated, SCS replaced them with more effective teachers. As illustrated in the chart below, the average TEM score of new hires in SCS is substantially higher than the average rating of the teachers they are replacing.

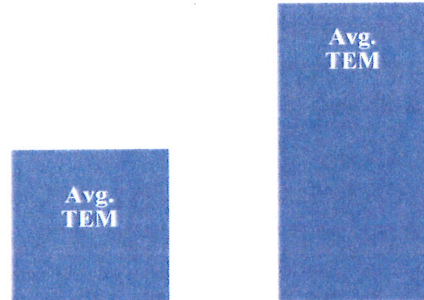
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<sup>15</sup> TEM rates teachers on a scale of 1-5, with TEM 1 as the lowest rating and TEM 5 as the highest rating. High performers are characterized as TEM 4 and TEM 5.

Percentage of Teachers leaving SCS after 2013-2014 SY at each TVAAS Level

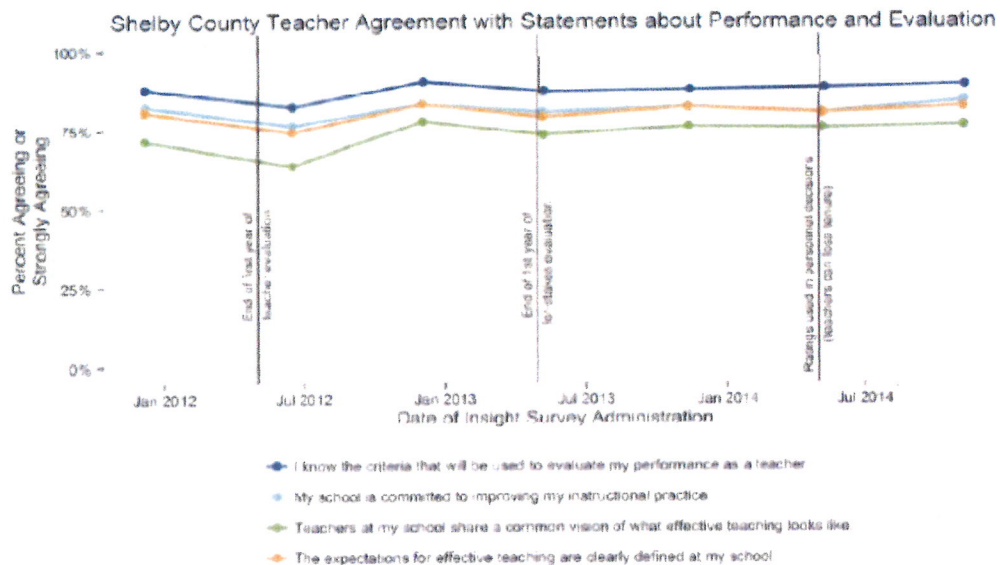


Average TEM score of Low Performers who left after the 2012-2013 SY and the Average TEM score of the teachers hired to replace them.



The use of teacher effectiveness measures for retention and dismissal decisions has not led teachers to feel that they are vulnerable to unfair terminations. To the contrary, teachers report that they feel better-supported by the tenure reforms implemented in Tennessee. Over the last several years, Shelby County Schools has participated in a TNTP-administered diagnostic assessment of school culture, called Instructional Culture Insight ("Insight"). Insight measures the health of schools' instructional environment with a focus on three elements: a common vision of great teaching, clear expectations for effective instruction, and a commitment to developing teachers. Since the passage and implementation of the multiple-measure evaluation system and performance-based personnel policies, Shelby County Schools' longitudinal results on Insight have been overwhelmingly positive.

Over 75 percent of teachers surveyed in Shelby County Schools self-report that they are aware of the criteria of the evaluation system, the expectations of effective practice are clearly defined, and that their school is committed to improving their instructional practice. These results signify that Shelby County Schools has been able to maintain a culture where the majority of teachers in the district understand what is expected of them and feel supported in their practice. The graph below shows that has remained consistent throughout the implementation of performance-based tenure, dismissal, and layoff policies.



In fact, even among teachers who plan to leave the district, only 6.6 percent report dissatisfaction with their evaluation rating as the reason for their departure. This rate is slightly higher (about 8 percent) among teachers with low-performance ratings, which likely indicates that the expectations for

effective teaching are so clear in Shelby County that teachers who are not meeting those expectations choose to leave the district. Even with teachers leaving the district due to low performance ratings, the recruitment pool for teacher candidates remains strong.

It is clear that SCS is an example of a school district that has overcome challenges to improve the academic experience for both students and teachers.

### **B. Washington, D.C. Public Schools**

Similar to SCS, the experience of D.C. Public Schools is instructive. Policy reform has allowed D.C. Public Schools ("DCPS") to improve the quality of its teaching force and, most importantly, increase student achievement. In 2010, after over two years of negotiations, DCPS and the Washington Teachers' Union agreed to a new contract that, like in Tennessee, removed most of the fundamental problems that appear in New Jersey's Challenged Statutes.<sup>16</sup>

With regard to permanent employment, DCPS eliminated tenure through their CBA between the school system and the Washington

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<sup>16</sup> See Bill Turque, *D.C. Public Schools, teachers union reach tentative deal*, THE WASHINGTON POST, Apr. 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040604392.html>; see also Bill Turque, *D.C. Teachers' Union ratifies contract, basing pay on results, not seniority*, THE WASHINGTON POST, June 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/02/AR2010060202762.html>.



Teachers' Union.<sup>17</sup> With regard to dismissals, the CBA indicates that teacher effectiveness—as measured by the teacher's evaluation rating can be considered in dismissal decisions.<sup>18</sup> The district's evaluation handbook states that a rating of ineffective or two consecutive years of minimally effective can result in dismissal.<sup>19</sup> With regards to layoffs, DCPS requires "performance-based excessing and mutual consent" for any reductions in staffing.<sup>20</sup> For DCPS's most recent round of layoffs in 2009, teacher performance and contribution comprised the bulk of ratings used by principals to make elimination decisions.<sup>21</sup>

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<sup>17</sup> Teachers who previously had permanent status did not lose it.

<sup>18</sup> COLLECTIVE BARGAINING AGREEMENT BETWEEN THE WASHINGTON TEACHERS' UNION AND THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS 49-50 (Oct. 1, 2007 - Sept. 30, 2012), available at <http://www.wtulocal6.org/usr/Final%20WTU%20DCPS%20Tentative%20Agreement.pdf> [hereinafter CBA].

<sup>19</sup> IMPACT: THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS EFFECTIVENESS ASSESSMENT SYSTEM FOR SCHOOL-BASED PERSONNEL 62 (2014-2015), available at <http://dcps.dc.gov/sites/default/>.

<sup>20</sup> CBA, *supra* note 16, at 102.

<sup>21</sup> In 2009, DCPS laid off over 200 teachers as part of a budgetary reduction in force. See Editorial, Judge Rejects D.C. Teachers Union's Complaint Over Layoffs, WASHINGTON POST, Nov. 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/24/AR2009112403964.html>. Prior to the layoffs, DCPS circulated a memo to principals explaining that, for the rating used to make layoff decisions, 85% of the rating is based on performance-based criteria defined as "office or school needs" (for example, showing gains in student achievement, supporting positive and student-centered school culture, or creating objective-driven lessons) and "significant relevant contributions, accomplishments, or performance." Seniority only accounted for 5%. See Memorandum from Jesus Aguirre, Director of School Operations, Office of the Chancellor, District of Columbia Public Schools, 2-3, 5-10 (Sept. 18, 2009),

Since it implemented these reforms, DCPS has retained its most effective teachers, those rated highly effective, at nearly double the rate it retained low-performing teachers.<sup>22</sup> In addition, the policies in DCPS did not appear to have any negative impact on the retention of its highly effective teachers. From 2012 to 2017, DCPS has retained 90% or more of its Highly Effective teachers. This number exceeds or is on par with the

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<http://thewashingtonteacher.blogspot.com/2009/09/rif-memo-sent-to-dc-principals-by-rhee.html>.

<sup>22</sup> Much of the analysis from this section relies on two case studies TNTP performed. In 2012, TNTP conducted a case study of DCPS, *Keeping Irreplaceables in D.C. Public Schools: Lessons in Smart Retention*. The case study was a follow-up to an earlier nationwide report titled *The Irreplaceables*. In *The Irreplaceables*, TNTP studied the retention of effective teachers in four other urban school districts and identified a negligent approach to teacher retention resulting in the loss of many effective teachers. TNTP, *THE IRREPLACEABLES* (2012), [http://tntp.org/assets/documents/TNTP\\_Irreplaceables\\_2012.pdf](http://tntp.org/assets/documents/TNTP_Irreplaceables_2012.pdf). The study identified limitations on the use of teacher performance in advancement and staffing decisions as a cause of the retention problem because they hinder school leaders' ability to offer financial incentives to high performers and uphold expectations of high performance. *Id.* at 6.

In *The Irreplaceables*, TNTP defined top performers in the four urban districts studied by examining student growth scores on standardized tests and identifying the teachers whose students exhibited the most significant growth. *Id.* at 36-37. Likewise, TNTP's DCPS case study included surveys of 994 teachers and 144 school leaders. TNTP, *KEEPING IRREPLACEABLES IN D.C. PUBLIC SCHOOLS: LESSONS IN SMART RETENTION* (2012), [http://tntp.org/assets/documents/TNTP\\_DCirreplaceables\\_2012.pdf](http://tntp.org/assets/documents/TNTP_DCirreplaceables_2012.pdf). For the DCPS Case Study, TNTP reviewed the DCPS teacher evaluation ratings for 3,482 teachers in the 2010-2011 school year in addition to student growth scores. *Id.* Determinations of effectiveness in DCPS are based on their district-wide evaluation system, IMPACT. In the 2010-2011 school year, 14 percent of teachers were rated Highly Effective in DCPS, based on IMPACT scores. *Id.*

retention of high performers in other comparable urban districts.<sup>23</sup> And highly effective teachers in DCPS were more likely to report that they were valued by their school leader or district than were top performers in comparable urban districts.<sup>24</sup> This demonstrates not only that tenure reform allowed DCPS to increase the quality of its teaching force, but that reform resulted in higher job satisfaction even with less job security.

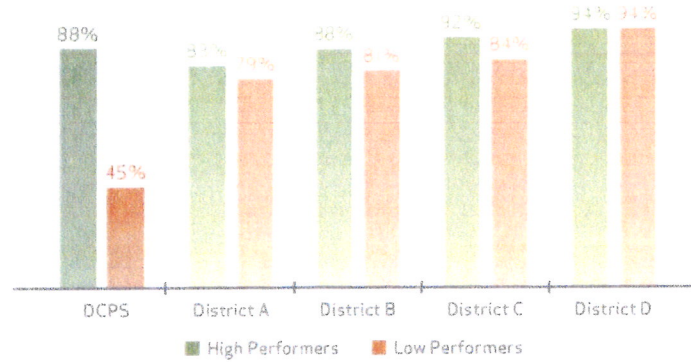
The data indicate that DCPS was able to carry out the policy allowing for the dismissal of twice-rated ineffective teachers while retaining Highly Effective teachers. DCPS retained 45 percent of teachers rated minimally effective or ineffective, whereas other comparable urban districts retained nearly double that amount.<sup>25</sup> The chart below illustrates the retention of top performers compared to low performers in DCPS and comparable urban districts. The policy allowing for dismissal based on performance did not appear to have any detrimental effect on the retention of Highly Effective Teachers in DCPS.

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<sup>23</sup> For example, in 2010-2011, DCPS retained 88% of its high performers, which District A retained 83%; District B retained 88%; District C retained 92%; and District D retained 94%. *KEEPING IRREPLACEABLES*, *supra* note 19, at 6.

<sup>24</sup> 66% of DCPS top performers said they feel valued by their principal compared to 59% in District A, 63% in District B, 58% in District C, and 58% in District D. *Id.* at 9.

<sup>25</sup> District A retained 79% of its lower performers; District B 81%; District C 84%; District D 94%. *Id.* at 6.



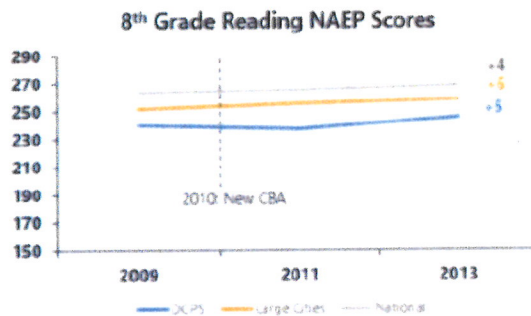
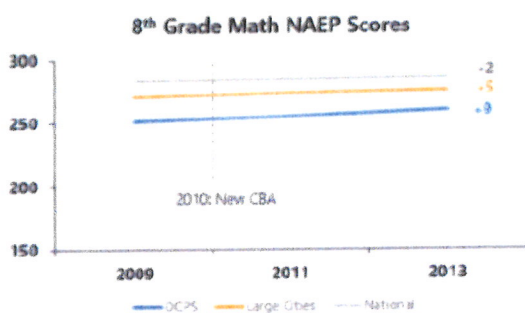
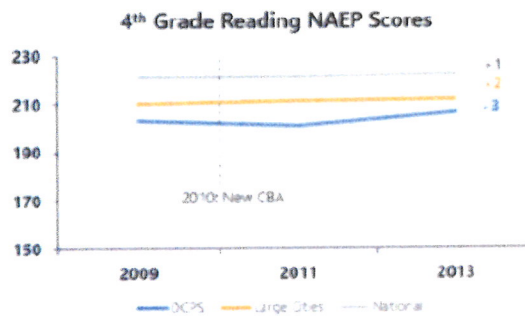
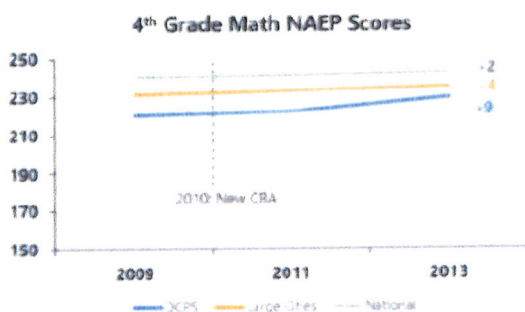
In DCPS, dismissal of a low-performing teacher was likely to result in a replacement with a more effective teacher. This is in large part because DCPS's CBA allowed for the consideration of teachers' classroom performance when making dismissal decisions. The average evaluation score of the 318 DCPS teachers who were rated low performing in the 2010-2011 school year was 245, compared to an average evaluation score of 277 for the district's first-year teachers.<sup>26</sup> First-year teachers were performing better than teachers of a longer tenure with a history of low performance, which suggests a likelihood of replacing a low-performing teacher with a higher performing first-year teacher.

Student achievement in DCPS improved drastically. The 2013 results of National Assessment of Educational Progress (NAEP) show students in DCPS have made greater academic gains than in any state in the country.<sup>27</sup> Since 2011, the same time these policies

<sup>26</sup> *Id.* at 14.

<sup>27</sup> Press Release, 2013 DC NAEP Student Achievement Results, D.C. PUB. SCH. (2013), <http://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/a>

were implemented, DCPS students have improved in each grade and subject tested by NAEP, and their growth exceeds national growth levels in every grade and subject.<sup>28</sup>



### III. THE ISSUE IS OF PUBLIC IMPORTANCE AND RIPE FOR THE COURT TO DETERMINE

The harm caused by the Challenged Statutes is ongoing, not contingent, and thus ripe for the court to hear. Respondents and Intervenor-Respondents' briefs argue that the occurrence of an RIF is the threshold for this Court to determine whether the issue

ttachments/FINAL%202013%20DC%20NAEP%20Results%20One-  
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<sup>28</sup> District Profiles, NAT'L CNTR. FOR EDUC. STATISTICS,  
<http://nces.ed.gov/nationsreportcard/districts/Default.aspx>.

before the Court is ripe.<sup>29</sup> This overly mechanical application of the term "harm" entirely ignores the reality in Newark that less senior, effective teachers are likely avoiding the Newark School District and other similarly situated school districts due to these last-hired-first-fired statutes. What is more, resources are diverted to avoid layoffs which means students lose in terms of quality while the excess pool of ineffective teachers grows.

Consequently, the lack of effective teachers has created a situation in Newark that few would dispute is dire for children in the classroom. Almost half of the students in Newark failed the State's high school proficiency assessment in math; over 20% failed the assessment for language arts. HG Compl. ¶105. We know also that only 19% of Newark's students are on track for college or post-secondary careers. *Id.* ¶106. These statistics, among others, demonstrate that Newark students can ill afford to continue to be taught in schools that are forced to consider teacher seniority in lieu of effectiveness when making layoff decisions.

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<sup>29</sup> "Plaintiffs are unable to direct this Court to any harm they are currently experiencing by virtue of the operation of the LIFO Statute. This is because there have been no layoffs in Newark and no layoffs are planned." Intervenor-Respondents, American Federation of Teachers AFL-CIO, AFT New Jersey and Newark Teachers Union Brief in Opp. to Cert. at 9.

**IV. CONCLUSION**

The Challenged Statutes in this case impact the State of New Jersey's fundamental interest in ensuring that children are provided the fundamental right to an adequate education. For all the foregoing reasons, *Amici* urge the Court to grant certiorari, reverse the Appellate Division's holding, and remand to the trial court.

Dated: September 18, 2018

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