No. _____

IN THE
Supreme Court of the United States

BOARD OF SCHOOL TRUSTEES OF
MADISON CONSOLIDATED SCHOOLS
AND STATE OF INDIANA,
Petitioners,

v.

JOSEPH R. ELLIOTT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, during a justifiable reduction in force, Indiana and its public schools may, consistent with the Contract Clause, prefer higher-performing but untenured teachers over lower-rated teachers who reached tenure before the preference law was enacted.

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PETITION FOR WRIT OF CERTIORARI

The State of Indiana respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, App. 1a, is reported at *Elliott v. Board of School Trustees of Madison Consolidated Schools*, 876 F.3d 926 (7th Cir. 2017). The order of the United States District Court for the Southern District of Indiana granting Elliott's motion for summary judgment in part, denying the Board's motion for summary judgment in part, and denying the State's motion for summary judgment, App. 26a, is unreported.

JURISDICTION

A panel of the Seventh Circuit Court of Appeals panel entered judgment on December 4, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 10, clause 1 of the U.S. Constitution provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing

the Obligation of Contracts, or grant any Title of Nobility.

Indiana Code section 20-28-7.5-1 provides:

> (b) A contract with a teacher may be canceled immediately in the manner set forth in sections 2 through 4 of this chapter for any of the following reasons:
>
> (1) Immorality.
>
> (2) Insubordination, which means a willful refusal to obey the state school laws or reasonable rules adopted for the governance of the school building or the school corporation.
>
> (3) Incompetence, including:
>
> (A) for probationary teachers, receiving an ineffective designation on a performance evaluation or receiving two (2) consecutive improvement necessary ratings on a performance evaluation under IC 20-28-11.5; or
>
> (B) for any teacher, receiving an ineffective designation on two (2) consecutive performance evaluations or an ineffective designation or improvement necessary rating under IC 20-28-11.5 for three (3) years of any five (5) year period.
>
> (4) Neglect of duty.
>
> (5) A conviction of an offense listed in IC 20-28-5-8(c).
>
> (6) Other good or just cause.

> (c) In addition to the reasons set forth in subsection (b), a probationary teacher's contract may be canceled for any reason relevant to the school corporation's interest in the manner set forth in sections 2 through 4 of this chapter.
>
> (d) After June 30, 2012, the cancellation of teacher's contracts due to a justifiable decrease in the number of teaching positions shall be determined on the basis of performance rather than seniority. In cases where teachers are placed in the same performance category, any of the items in IC 20-28-9-1.5(b) may be considered.

STATEMENT OF THE CASE

As the Court has emphasized, "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977). Here, the Seventh Circuit's application of an outdated Contract Clause precedent subverted that rule by requiring Indiana to retain previously tenured teachers over better-performing untenured teachers during a reduction in force (RIF), despite a new statute instructing schools to prefer performance over seniority in such situations. The Court should take this case to revisit and overturn the eighty-year-old governing precedent—*Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938)—and allow Indiana to favor better-performing teachers during a RIF, even when that means laying off teachers, such as Respondent Joseph Elliott, who reached tenure before the new preference statute was enacted.

I. Education Reform in Indiana

During its 2011 session, the Indiana General Assembly passed several bills to improve primary and secondary education. These bills limited collective bargaining, S.E.A. 575, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011), expanded charter schools, H.E.A. 1002, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011), and created the choice scholarship school voucher program, H.E.A. 1003, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

As part of this education reform agenda, the General Assembly also passed Senate Bill 1, which aimed to improve teacher quality by using "[o]bjective measures of student achievement and growth" to measure teacher performance. Ind. Code § 20-28-11.5-4(c)(2). Each year, teachers would be evaluated and designated "highly effective," "effective," "improvement necessary," or "ineffective." *Id.* § 20-28-11.5-4(c)(4). Such designations would affect both teacher pay and student placement. *See id.* § 20-28-9-1.5(c) ("Except as provided in subsection (d), a teacher rated ineffective or improvement necessary under IC 20-28-11.5 may not receive any raise or increment for the following year if the teacher's employment contract is continued."); *id.* § 20-28-11.5-7(b) ("A student may not be instructed for two (2) consecutive years by two (2) consecutive teachers, each of whom was rated as ineffective under this chapter in the school year immediately before the school year in which the student is placed in the respective teacher's class.").

Senate Bill 1 also used the new evaluations to modify the process by which public schools may implement a justifiable decrease in the number of teaching positions, requiring that schools make performance, rather than seniority, the determining factor in deciding which teachers to retain. *See id.* § 20-28-7.5-1(d) ("After June 30, 2012, the cancellation of teacher's contracts due to a justifiable decrease in the number of teaching positons shall be determined on the basis of performance rather than seniority."). Now, when teachers are in the same general performance category, schools may consider:

> 1. A combination of years of teaching experience and the attainment of either an additional content area degree or completion of credit hours toward an additional content degree (although these factors cannot account for more than 33% of schools' decision);
>
> 2. The results of an evaluation that complies with the new SB 1 requirements;
>
> 3. "The assignment of instructional leadership roles, including the responsibility for conducting evaluations;" and
>
> 4. "The academic needs of students in the school corporation."

Id. § 20-28-9-1.5(b).

In short, although school boards would still have to adhere to statutory procedures for eliminating teachers' positions, seniority could no longer be the determinative factor in deciding whose position to eliminate.

In accordance with Senate Bill 1, Madison Consolidated Schools amended its policies to carry out these reforms. App. 7a. The amended policy listed several factors the Board would consider in determining which teaching contracts to cancel for reductions in force:

> 1. Work performance;
>
> 2. Length of service in the school system;
>
> 3. Service in extra duty positions and ability to fill such positions;
>
> 4. Other beneficial services provided to the school system; and
>
> 5. Recommendations and advice from the Superintendent, the Superintendent's Designee(s), and principals.

App. 33a. The Board gives "primary consideration" to the first and fifth factors. *Id.*

II. Joseph Elliott's Contract and Dismissal

In 2012, the Madison Consolidated Schools faced difficult financial circumstances. Enrollment and funding dropped, and the Board was forced to close two schools (Anderson Elementary and Dupont Elementary). App 32a. As a result, it had to reduce the number of elementary teachers within the district. *Id.* To decide which teachers to let go, the principals within the district held several meetings where they discussed each teacher's strengths, weaknesses, and formal evaluations. App. 33a. One of the teachers they discussed was Respondent Joseph Elliott. *Id.*

At the time, Elliott was a teacher at Dupont Elementary. App. 6a. He had worked for Madison Consolidated Schools since August 24, 1993. App. 31a. During his first five years of teaching, he signed successive one-year contracts with Madison Consolidated Schools. App. 6a. The sixth year, Elliott signed another contract, which made him a "permanent" teacher with an "indefinite" contract under state law. App. 31a; Ind. Code § 20-28-6-8 (2010). Nonetheless, in keeping with common practice, Elliott continued to sign a series of definite contracts. App. 6a. The definite contract he signed in November 2011 explicitly incorporated the RIF provisions in Senate Bill 1: "This Contract may be cancelled during its term for any of the grounds set forth in Ind. Code 20-28-7.5-1(e) pursuant to the procedures set forth in Ind. Code 20-28-7.5-2 and Ind. Code 20-28-7.5-3." Appellant's App. 41, Jan. 30, 2017.

Ultimately, implementing its new RIF policy, which in turn carried out the directives of Senate Bill 1, the Board determined that six teachers, including Elliott, would be let go, while some better-performing teachers that had not yet reached tenure would be retained. App. 7a, 36a.

III. Elliott's Lawsuit

After the Board canceled his contract, Elliott filed a complaint against Madison Consolidated Schools in the Jefferson Superior Court, alleging Madison violated article 1, section 24 of the Indiana Constitution and article 1, section 10 of the U.S. Constitution by not renewing his contract. *Id.* Madison Consolidated Schools removed the case to the U.S. District Court

for the Southern District of Indiana, invoking jurisdiction under 28 U.S.C. sections 1331 (as to Elliott's federal claims) and 1367 (as to his state claims). *Id.* The State intervened to defend retroactive application of the statute, *i.e.*, application to a teacher who achieved tenure prior to enactment. App. 37a.

The district court ruled for Elliott, holding that, as a tenured teacher, he had the right to be retained over non-tenured teachers. App. 40a. It rejected the argument that any impairment was insignificant because the last contract Elliott signed incorporated Senate Bill 1's RIF provisions. *Id.* And, while the district court acknowledged the State's "important public interest" in "improving teacher quality," App. 47a, it held that SB 1 was not "necessary and reasonable" for achieving that interest. App. 48a, 50a. Characterizing the State's interest as "concern[] about the mandatory retention of poor-performing tenured teachers," the court observed that schools already had the authority to fire poor-performing teachers. App. 50a–51a. Schools could "utilize the procedures already in place" so that "there is no need, in a RIF situation, to have to choose between poor-performing teachers and effective teachers, regardless of their tenure status," it said. App. 53a. The district court awarded Elliott $253,486.00, which included back pay and pre-judgment interest, plus attorney fees. App. 57a.

The Board and State appealed, but the Seventh Circuit affirmed. App. 25a. First, citing *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), it observed that this Court had already held that Indiana's teacher tenure law creates "an enforceable contract." App. 11a. It also relied on *Anderson* in rejecting the

argument that the Act's job-security provisions are not part of the tenure contract but are variable terms that can change in each annual teaching contract. App. 12a–13a. And like the district court, it recognized Indiana's "important public interests" in "[i]mproving teacher quality and public-education outcomes." App. 23a. Nonetheless, the Court concluded it was neither necessary nor reasonable to make "retroactive changes to tenure" in order to advance those interests. App. 24a. Rather, it observed that Indiana could advance those interests simply by "buy[ing] out the tenure rights of more senior" teachers. App. 25a.

REASONS TO GRANT THE PETITION

Across the Nation, public officials agree that every State's public education system must improve in order to create an educated and virtuous citizenry capable of self-governance. But while other States enjoy unfettered flexibility to enact needed educational reforms, Indiana has been hamstrung by a legal anachronism—*Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938)—where the Court held that Indiana's original teacher tenure statute—enacted in *1927*—conferred constitutionally protected contract rights that, once vested, legislators and schools may not modify. Because *Anderson* would almost certainly be decided differently today, and because it is hampering Indiana's efforts to improve public education, it should be overruled.

I. Certiorari is Warranted So that the Court May Consider Overruling *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938)

The decision below is based on an eighty-year-old precedent that restricts Indiana alone and no longer embodies governing Contract Clause doctrine. *Anderson*'s history and reasoning—and its singular droguelike restraint on Indiana—demonstrate that the time has come for it to be overruled.

As the Court has recognized, "[*s*]*tare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). It will not prevent the Court "from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law." *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997). In pondering whether to adhere to its precedents, the Court considers "whether the decision is 'unsound in principle,'" "whether it is 'unworkable in practice,'" and the degree to which "reliance interests" might unfairly be disrupted. *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 783 (1992) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)).

Here, the first two factors decidedly support the State; the third does not weigh so heavily in favor of Elliott that Indiana must be the lone state burdened by outdated doctrine.

A. In defiance of the Indiana Supreme Court's understanding of Indiana law, *Anderson* stopped the clock on Indiana's teacher-tenure law in 1927

The Court's decision in *Anderson* is unsound in principle for several reasons, not least of which is that it overrode the Indiana Supreme Court's interpretation of Indiana statutes by deciding that those statutes created contracts protected by the Constitution.

In 1927, the Indiana General Assembly, concerned about "the removal of capable and experienced teachers at the political or personal whim of changing officeholders," enacted a tenure system to protect educators from the scourge of patronage. *State ex rel. Anderson v. Brand*, 5 N.E.2d 531, 532 (Ind. 1937). The "permanent" teacher statute—later coined the "Teachers' Tenure Law" by the courts—created "a uniform system" for such teacher contracts. *Sch. City of Lafayette v. Highley*, 12 N.E.2d 927, 930 (Ind. 1938).

The tenure law provided that, "[u]pon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period[,] known as an indefinite contract" and "shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided [by statute]." Act of Mar. 8, 1927, Laws of the State of Indiana 259 (1927); *see also* Ind. Code § 20-28-6-8 (2010). At the time, the statute provided that schools could cancel a contract based on immorality, insubordination, neglect of duty, incompetence, reductions in force, convictions for certain criminal offenses, and

any "other good and just cause." Act of Mar. 8, 1927, at 260–61.

In 1933, the legislature voted to exclude township schools from coverage under the "permanent" teacher statute. Act of Mar. 6, 1933, Laws of the State of Indiana 716–17 (1933). When a township school threatened to cancel a teacher's contract as a result, the teacher claimed that the 1933 amendment, by completely eliminating her contractual right to continued employment, violated the Contract Clause. *State ex rel. Anderson v. Brand*, 5 N.E.2d 531, 532 (Ind. 1937).

The Indiana Supreme Court sensibly rejected the claim, holding that "permanent" teachers had no vested right to indefinite contracts. *Id.* at 533. In so doing, it started from the premise that the legislature enjoys plenary authority over education policy and exercises that authority for the benefit of the public rather than of the teachers. *Id.* at 532. It then considered the statutory language and concluded that because it used the word "indefinite," the Teacher Tenure Law "does not purport to give a teacher a definite and permanent contract." *Id.* Rather, "[t]he tenure statute was only intended as a limitation upon the plenary power of local school officials to cancel contracts. It was not intended as, and cannot be, a limitation upon the power of future Legislatures to change the law respecting teachers and their tenures." *Id.* at 533 (citations omitted).

The teacher sought rehearing, but the court denied her petition, reiterating that "[t]he statutes, the Constitution, and the law, must be deemed to be a part of every teacher's contract." *State ex rel. Ander-*

son v. Brand, 7 N.E.2d 777, 778 (Ind. 1937). Otherwise "it would mean that the statute, as it existed at the time a teacher acquired tenure status, could not be changed, even in respect to the grounds of cancelation or removal." *Id.* The court repeated that the General Assembly has the sovereign right to control public education policy, and that right "cannot be contracted away by one Legislature so as to fix a permanent public policy, unchangeable by succeeding Legislatures." *Id.*

2. Notwithstanding the central role played by the Indiana Supreme Court's interpretation of an Indiana statute, however, this Court reversed. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 109 (1938). In its view, the relevant inquiry was whether the Indiana Supreme Court had construed the challenged statute to confer contractual rights. *Id.* at 100. With that in mind, the Court might well have relied on the Indiana Supreme Court's interpretation and understanding of the Indiana Teacher's Tenure Law in the case before it, which would have ended the dispute in the school's favor. Instead, the Court undertook its own survey of Indiana case law and concluded that, prior to the decision under review, the Indiana Supreme Court had "uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the act was contractual." *Id.* at 105–06.

Not only was such analysis an extraordinary effort at second-guessing a state court as to its own state law, it was also flat wrong. *Every* case the Court cited that supposedly recognized contractual tenure rights

actually supported the Indiana Supreme Court's understanding that the teacher "contract" was merely a creature of statute (and subordinate thereto):

- *School City of Elwood v. State*, where the Indiana Supreme Court held that a tenured teacher whose contract was terminated when she got married must be reinstated because "[a] public school teacher who, under a positive provision of the *statute*, has a fixed tenure of employment or can be removed only in a certain manner *prescribed by the statute*, is entitled to reinstatement if he has been removed from his position in violation of his *statutory rights*." 180 N.E. 471, 474 (Ind. 1932) (emphases added).

- *Kostanzer v. State ex rel. Ramsey*, where the court reinstated another tenured teacher who got married as "a duty enjoined *by statute and not by contract*." 187 N.E. 337, 341–42 (Ind. 1933) (emphasis added).

- *State ex rel. Black v. Board of School Commissioners of Indianapolis*, where the court, based on its understanding of the "intention of the legislature," ordered reinstatement of a tenured teacher who signed a new contract because her statutory rights superseded the new contract terms. 187 N.E. 392, 393–94 (Ind. 1933)

- *Arburn v. Hunt*, where the court rejected judicial review of a tenured teacher's termination because the statute provided only for a hearing before the board, stating "[t]he source of authority for the so–called permanent teacher's contract is the statute" and "the entire statute, with all of

> its provisions, must be read into and considered as a part of the contract." 191 N.E. 148, 149 (Ind. 1934)

Justice Black's dissent in *Anderson* confirms this reading. He shared the majority's focus on Indiana Supreme Court decisions, but believed the majority had read those decisions incorrectly: "The Indiana Supreme Court has consistently held . . . that the right of a teacher, under the 1927 act, to serve until removed for cause, was not given by contract, but by statute. Such was the express holding in the two cases cited in the majority opinion[.]" *Anderson*, 303 U.S. at 112 (Black, J., dissenting) (citing *Kostanzer*, 187 N.E. at 341; and *Elwood*, 180 N.E. at 471). His critique continued: "In order to hold in this case that a contract was impaired, it is necessary to create a contract unauthorized by the Indiana Legislature *and declared to be nonexistent by the Indiana Supreme Court*." *Id.* at 113 (emphasis added).

Thus from the very beginning, the Court's decision in *Anderson* was undermined not only by an overly expansive view of the Contract Clause itself but also by misinterpretation of Indiana's own statutes. The nature of that error meant not only that Indiana would continue to carry the burden of its own inadvertent statutory creation of constitutionally protected rights, but also that other states could avoid the same fate with attentive statutory drafting. This is precisely the sort of erroneous precedent the Court should consider overruling.

B. Doctrinal changes suggest *Anderson* would come out differently today

The past eighty years have shown that *Anderson* is a historical relic, both as to Contract Clause jurisprudence and as to the methodology the Court uses when interpreting state statutes. In both ways, it has been left "behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992).

1. Even before *Anderson* was decided, the Court had established that in at least some circumstances, a State's police powers could trump the Contract Clause. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447 (1934) ("[T]he contract clause is not an absolute and utterly unqualified restriction of the state's protective power . . . ."). The circumstances appropriate for such deference expanded as time went on.

For instance, in *Veix v. Sixth Ward Building & Loan Ass'n*, the Court concluded that the police power could override the Contract Clause not only in the realm of "health, morals and safety" but also with respect to "economic needs," "[u]tility rate contracts," and "contractual arrangements between landlords and tenants." 310 U.S. 32, 38–39 (1940). To be sure, in *United States Trust Co. of New York v. New Jersey*, the Court held that the State could not retroactively change the terms of a public bond statute, but it expressly limited that holding to the narrow and specific context of a state obligation contract, where the "promise is purely financial." 431 U.S. 1, 24–25 (1977). Indeed, in *Allied Structural Steel Co. v.*

Spannaus, the Court reiterated the strength of the police power, observing that the State need not be responding to "an emergency of great magnitude" in order to "constitutionally justify a state law impairing the obligations of contracts." 438 U.S. 234, 249 n.24 (1978).

Hence, though the Contract Clause once was viewed as a "muscular restraint on state authority," James W. Ely, Jr., *Whatever Happened to the Contract Clause*, 4 Charleston L. Rev 371, 374 (2010), Contract Clause rights are now more generally subordinate to broadly targeted social and economic legislation. *Id.* at 391–92 ("[T]he marked eclipse of the Clause took place concurrently with the rise of a political climate supportive of the regulatory and welfare state. . . . The protection of contractual rights was assigned less value than effectuating public policy."). As one scholar remarked, "the contract clause is but a pale shadow of its former self." Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 Case W. Res. L. Rev. 597, 598 (1986/1987).

Given that shift in Contract Clause deference to state police power since 1938, it is hard to imagine that the Court, if confronted with *Anderson* today, would take such a restrictive view of Indiana's authority to regulate education.

2. Nor would the Court today so casually override the Indiana Supreme Court's interpretation of its own state's statute.

The very day that the Court handed down its decision in *Anderson*, it heard argument in a case that

would alter federal court methodology for applying state law: *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Three months later, the Court established a fundamental commandment for federal courts adjudicating diversity cases: on questions of state law, defer to the interpretation provided by the state supreme court. *Id.* at 79. That result, while perhaps unremarkable now, shocked the American legal system at the time, all the more so because the Court overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), without the parties' urging. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 Colum. L. Rev. 665, 706 (2012).

Over time, *Erie* more generally became associated with conclusive deference to state supreme courts on matters of state statutory interpretation. In *Commissioner v. Estate of Bosch*, the Court, citing *Erie*, observed that "[t]his is not a diversity case but the same principle may be applied for the same reasons . . . the State's highest court is the best authority on its own law." 387 U.S. 456, 465 (1967). More recent pronouncements have been even more definitive: "There is no doubt that we are bound by a state court's construction of a state statute." *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993) (citations omitted); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997) ("Federal courts lack competence to rule definitively on the meaning of state legislation . . . ." (citing *Reetz v. Bozanich*, 397 U.S. 82, 86–87 (1970))); *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." (citing *New York v. Ferber*, 458 U.S. 747,

767 (1982); *Exxon Corp. v. Dep't of Revenue of Wis.*, 447 U.S. 207, 226 n.9 (1980); *Estate of Bosch*, 387 U.S. at 465)); and *City of Chi. v. Morales*, 527 U.S. 41, 61 (1999) (observing that federal courts have a "duty to defer to a state court's construction of the scope of a local enactment").

Today, then, particularly owing to *Erie*, it is well-established that "[i]n most cases, comity and respect for federalism compel [federal courts] to defer to the decisions of state courts on issues of state law." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). Such deference is warranted because "the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Id.* (citing *Erie,* 304 U.S. at 64).

Indeed, federal courts are now so reluctant to construe state statutes independent of state courts that they have developed multiple doctrines and procedures to avoid doing so. In *Railroad Commission of Texas v. Pullman Co.*, the Court—three years after *Anderson*—decided for the first time that federal courts should abstain from adjudication altogether rather than construe a state statute ahead of the state supreme court. 312 U.S. 496, 500–01 (1941). Abstention recognizes "the role of state courts as the final expositors of state law." *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 415 (1964). However, it also delays resolution of federal cases. Beth A. Hardy, *Federal Courts—Certification Before Facial Invalidation: A Return to Federalism*, 12 W. New Eng. L. Rev. 217, 218 n.11 (1990). Accordingly, federal courts later developed rules and procedures to certify state law

questions to state supreme courts in the midst of federal litigation. *Id.* at 218–19.

The Court in *Anderson*, of course, didn't need abstention or certification to discern the interpretive views of the Indiana Supreme Court concerning the teacher tenure law. It had that court's definitive construction of the statute before it, but rejected that interpretation in favor of its own reading of Indiana precedents. As with application of the Contract Clause doctrine, it is hard to imagine the Court taking such a tack today. This is yet another reason *Anderson* bears revisiting as a decision that is unsound in principle.

C. *Anderson* has proven unworkable as a general doctrine: Courts in other States ignore it, but Indiana remains stuck with it

If the "workable in practice" test is meant to be nationwide in scope, *Anderson* has failed miserably. As alluded to above, the Court's focus in *Anderson* on interpretation of Indiana's particular teacher tenure law has enabled other states to avoid falling into the trap of affording teachers constitutionally protected rights. Indeed, given the critical, core state government interest at stake with respect to improving public education, several state and federal courts have upheld statutes that impaired some aspect of teacher tenure in the face of Contract Clause challenges. These decisions reflect both the doctrinal shift in Contract Clause doctrine and *Anderson*'s idiosyncratic interpretation of an outdated Indiana statute.

For example, the Connecticut Supreme Court in *Connecticut Education Ass'n v. Tirozzi* rejected a Contract Clause challenge to a state law that modified teacher certification—replacing a two-tiered certification system with a three-tiered approach. 554 A.2d 1065, 1073–74 (Conn. 1989). Similarly, in *United Teachers of New Orleans v. State Board of Elementary & Secondary Education*, the court upheld a post-Katrina reform that transferred schools to a new "recovery" school district, where collective bargaining agreements then in existence would not be honored. 985 So. 2d 184, 197–98 (La. Ct. App. 2008). And a Texas court reached the same conclusion in *Texas State Teachers Ass'n v. State*, where it upheld a new law requiring tenured teachers to undergo competency testing to be eligible for continued certification. 711 S.W.2d 421, 425 (Tex. Ct. App. 1986).

The Seventh Circuit itself upheld retroactive application of tenure reform in *Pittman v. Chicago Board of Education*. 64 F.3d 1098, 1104–05 (7th Cir. 1995). There, principals that had achieved "permanent" status after three years challenged a new Illinois law subjecting them to dismissal at the pleasure of local school council, effectively eliminating their tenure rights. *Id.* at 1100. Without even citing *Anderson*—which, of course, interpreted an Indiana statute, not an Illinois statute—the court held the principals had *no* constitutionally protected contractual rights impinged by the new statute. *Id.* at 1104.

Citing *Pittman*, the Arizona Supreme Court reached essentially the same result. In *Proksa v. Arizona State Schools for the Deaf & the Blind*, the court concluded that school employees with "permanent

employment status"—*i.e.,* who were subject to dismissal only for cause—suffered no impingement of contractual rights when the legislature subjected them to termination at the expiration of a definite contract. 74 P.3d 939, 940–41 (Ariz. 2003). It concluded that, despite providing "permanent" status, "nothing in the prior version of the statute . . . express[ed]" any intent by the legislature "to enter into a contract." *Id.* at 942.

Finally, a recent federal district court decision confirms that application of *Anderson* often turns only on geographical differences—*i.e.*, not being from Indiana—or at most terminological differences, rather than substantive effect. In *Leff v. Clark County School District*, a group of teachers challenged a Nevada law that allowed schools to dismiss "postprobationary" teachers—again, teachers subject to dismissal only for cause—after two negative reviews by school administrators. 210 F. Supp. 3d 1242, 1244–45 (D. Nev. 2016). Upholding the change in employment protections, the court distinguished *Anderson* as narrowly addressing only the limited context of Indiana's statute. *Id.* at 1246–47.

The only reasonable inference is that *Anderson* has been reduced to mere formalism, distinguished (or ignored altogether) nearly at will in decisions applicable to states other than Indiana. *See* Annotation, *Constitutionality and Construction of Repeal or Modification by Legislative Action of Teachers' Tenure Statute, as Regards Retrospective Operation*, 147 A.L.R. 293 (1943) (observing *Anderson* "is cited and distinguished on [differences in terminology] in most cases cited in this annotation").

Indeed, in one of the only cases actually following *Anderson*, *N.C. Ass'n of Educators, Inc. v. State*, 776 S.E.2d 1 (N.C. Ct. App. 2015), *aff'd as modified*, 786 S.E.2d 255 (N.C. 2016), a dissenting judge characterized *Anderson* as "somewhat of an outlier" and an "anomaly" because courts have been so eager to limit its holding to the precise language of Indiana's teacher statute, *id.* at 26–27 (Dillon, J., concurring in part and dissenting in part). Judge Dillon faulted the *Anderson* decision because the Court "homed in" on frequent use of the word "contract" in the Indiana statute even though "the mere recognition by such acts of the status of permanency of tenure does not create in the teachers . . . vested contractual rights." *Id.* (quoting 147 A.L.R. 293).

The courts cited above relied on superficial, formalistic differences in terminology to sidestep *Anderson* and permit states greater leeway to effectuate educational policy. So, as other states make changes to personnel retention laws to pursue the best public school educational outcomes, Indiana remains mired in nearly century-old statutory terminology that the Court last considered in a wholly different doctrinal landscape.

These are not the hallmarks of a doctrine that works in practice. The time has come to give Indiana a chance to shed the burden of an outdated Supreme Court holding that it alone must bear.

D. Any reliance interest is post hoc and cannot outweigh the benefits of reversing bad precedent and putting Indiana on a level playing field with other States

To the extent that Elliott may claim a reliance interest in his tenure, that purported interest is post hoc at best and cannot outweigh the broader societal interest in correcting errors of law and ensuring Indiana has the same opportunity to improve education outcomes as other States. As a tenured teacher in Indiana, Elliott could, under *Anderson*, reasonably expect that his contract would not be cancelled for personal or political reasons. But he cannot claim a reasonable expectation of being preferred over untenured teachers in the event of a reduction in force.

Regardless, there are strong countervailing interests at stake in this case. The first is the interest in reversing a decision that is "a positive detriment to coherence and consistency in the law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). The second is the interest in giving Indiana the same chance to effectuate education reforms that other States enjoy. Those outcomes would benefit society as a whole—not just Elliott and his tenured colleagues.

II. Preferring Performance Over Seniority Is a Critical Tool for Improving Educational Outcomes—One Indiana Schools Would Often Utilize if Permitted

Indiana's authority to regulate public schools to maximize student educational outcomes should be no less than that of Arizona, Connecticut, Illinois, Louisiana, Nevada, Texas or other states. Shifting from

seniority to performance as the priority consideration when a school reduces the number of teachers is a necessary component of Indiana's program for quality public education. The Court should take this case so that Indiana public schools, which all-too-frequently face budget shortfalls, will have the best options available for ensuring positive student educational outcomes, even following a reduction in the teaching force.

A. In 2011, the year the legislature enacted Senate Bill 1, Indiana student test scores had lagged over the previous two decades, despite increased funding and other school reforms. *See, e.g.*, Nat'l Ctr. for Educ. Statistics, Inst. of Educ. Sciences, The Nation's Report Card: Indiana Grade 4 Public Schools Reading State Snapshot Report (2009). What is more, fourth grade reading scores had largely plateaued from 1990 to 2008. *Id.*

To fix these and other learning-outcome deficiencies, it was reasonably necessary for the legislature to maximize the efficacy of the teacher workforce at every opportunity. Reputable studies consistently demonstrate that improving teacher quality is the most significant factor for improving student performance and educational outcomes. Measures of Effective Teaching Project, Bill & Melinda Gates Found., Working with Teachers to Develop Fair and Reliable Measures of Effective Teaching 1 (2010) ("A teacher's effectiveness has more impact on student learning than any other factor controlled by school systems, including class size, school size, and the quality of after-school programs—or even which school a student is attending."); Daniel Weisberg et al., The New Teacher

Project, The Widget Effect: Our National Failure to Acknowledge and Act on Differences in Teacher Effectiveness 3 (2009) (observing that teacher effectiveness is "the most important factor for schools in improving student achievement").

Yet prior to 2011, studies gave Indiana low marks in its ability to identify and retain effective teachers. App. 46a (stating that Indiana received a D grade in "[i]dentifying effective teachers" and "[r]etaining effective teachers"). Accordingly, finding ways to retain the best public school teachers, such as by preferring performance ratings over seniority during a reduction in force, became a legislative priority and a reasonably necessary means for improving student learning.

The Seventh Circuit, however, said that applying Senate Bill 1 to tenured teachers was *not* a reasonable and necessary way to improve teacher quality. App. 23a–25a. In the court's view, the State could vindicate its interests by terminating teachers such as Elliott for cause rather than preferring better performing teachers during a RIF. App. 23a–24a. That conclusion stems from a misunderstanding of the State's interests, which the court misjudged to be a matter of "small differences in performance among teachers who are *not* ineffective." App. 24a (emphasis in original).

The issue here is anything but "small." It is instead about allocating limited public school resources to maximize the quality of retained teachers when financial circumstances require a reduction in force. When a school district has limited money to spend on fewer teachers, the State's interest is in maximizing student learning, which means preferring teachers

with better performance evaluations, regardless whether teachers with longer terms of service could be dismissed for cause. In other words, Senate Bill 1 stemmed from "the importance of teacher effectiveness and performance in making decisions about teacher retention and layoffs." App. 44a–45a.

Again, teacher quality drives student achievement. App. 45a (noting the "growing body of research show[ing] a strong correlation between teacher quality and positive educational outcomes"). The better the teacher, the higher the student achievement. *Id.* Therefore, the State's interest is not only in dismissing *ineffective* teachers, but also retaining the *most* effective teachers when resources tighten and some teachers must be let go. Senate Bill 1 values performance over longevity even among teachers that are not subject to dismissal for cause. By misunderstanding this interest, the Seventh Circuit overlooked the narrowness and reasonableness of Senate Bill 1's provisions.

B. In this case, Madison Consolidated Schools faced a difficult situation: it had to eliminate six elementary teaching positions, yet none of its teachers were so poor that they could be dismissed for cause. Madison, seeking to maximize educational opportunities for students, sensibly retained the more effective teachers, regardless of tenure.

This situation is far from unique to Madison. Public schools across Indiana frequently face budget shortfalls that require reductions in their teaching forces. For example, last fall, the Paoli Community Schools offered buyouts to four school employees in an

effort to regain fiscal solvency. Roger Moon, *Financial Distress: Paoli Schools Looking at Budget Woes*, Times-Mail (Nov. 16, 2017), https://www.tmnews.com/news/local/financial-distress-paoli-schools-looking-at-budget-woes/article_39ad79e9-ff33-5427-8c95-382cf9800360.html. And this past summer, the Gary School Board laid off 44 teachers due to financial constraints. Carole Carlson, *44 Gary Teachers Get Pink Slips, 6 Others Retire*, Chi. Tribune (June 29, 2017, 4:17 PM), http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-gary-teacher-pink-slips-st-0629-20170628-story.html. Such circumstances are challenging for everyone involved, but Senate Bill 1 at least provides a way to ensure that student educational outcomes suffer the least when teaching positions must be eliminated.

As things stand, however, tenured teachers will be retained over better-performing teachers during a RIF for decades, until the cadre of teachers that had achieved tenure by 2011 fully retires from the workforce. Consider: the teachers receiving tenure in 2011 could have been as young as their late twenties, meaning that they will not reach retirement age until nearly 2050. Indiana should not have to wait over three decades to implement needed reforms that could help students in classrooms right now.

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When a school must reduce the size of its teaching staff, States and school districts have a compelling interest in retaining the most effective teachers rather than simply those who have been in the job the longest. Without Senate Bill 1, cash-strapped Indiana

schools will have to let go of all their untenured teachers—even if that group includes some of their best teachers—before they can let go of even a single teacher who had achieved tenure before 2011. That fact alone demonstrates that Indiana's law is both reasonable and necessary to ensure that schools can keep their best teachers in the classroom. That *Anderson* frustrates such a reasonable effort to advance student achievement only underscores its unworkability. The Court should take this case so that Indiana, no less than other States, has the opportunity to implement such sensible education reforms.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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