No. 17-1259

IN THE

Supreme Court of the United States

BOARD OF SCHOOL TRUSTEES OF MADISON CONSOLIDATED SCHOOLS, ET AL.,
Petitioners,

v.

JOSEPH R. ELLIOTT,
Respondent.

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

BRIEF IN OPPOSITION

ERIC HYLTON
Riley Bennett & Egloff, LLP
141 E. Washington St.
Fourth Floor
Indianapolis, IN 46204
(317) 636-8000

ALICE O'BRIEN
Counsel of Record
JASON WALTA
KRISTEN HOLLAR
ZACHARY CHASE
National Education Association
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 822-7035
aobrien@nea.org

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INTRODUCTION

The Contract Clause of the United States Constitution provides that no state shall pass any "law impairing the obligation of contracts." U.S. Const. art. I, § 10. Although this prohibition is far from absolute, it "long has been established" that it imposes meaningful limits on "the power of the States to modify their own contracts." *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977). The court below found that Petitioners violated their duties under the Contract Clause when Respondent Joseph Elliott was terminated from his position as a tenured teacher based on a newly enacted Indiana law purporting to override existing protections for tenured teachers during layoffs.

Those protections arose from the Indiana Tenure Law, which this Court construed in *Ind. ex rel. Anderson v. Brand*, 303 U.S. 95 (1938). *Anderson* held that the distinctive features of the Law conferred binding contractual rights on teachers who had earned tenure. In the many years since *Anderson* was decided, other jurisdictions have looked to the decision as a guide to drafting their own laws. Some have done so to ensure that teacher tenure is only a statutory—not contractual—right. Indiana, by contrast, has ratified and adopted *Anderson*'s contractual view of the Tenure Law, both by expanding the categories of teachers entitled to the Law's protections and by declining to modify the Law's core contractual provisions in response to this Court's decision.

The petition, which asks that *Anderson* be overruled, does not raise an issue fit for this Court's consideration. The Seventh Circuit correctly applied the governing precedent to the case at hand, and that governing precedent should not be revisited or dis-

turbed. The petition raises no important federal question, given that Indiana is the only state to which *Anderson* has direct application and the State has long embraced its holding. Moreover, *Anderson* is correct on its merits (indeed, it is difficult to imagine legislation that could express an intent to create binding contractual rights more clearly than the Tenure Law). And, in all events, *stare decisis* counsels strongly against revisiting long-standing precedent that governs contract rights on which parties are likely to rely. The petition should therefore be denied.

STATEMENT OF THE CASE AND FACTS

I. The Contractual Nature of Teacher Tenure in Indiana

A. Indiana first enacted its Tenure Law in 1927. 1927 Ind. Acts 259. The Law mandated that teachers serving under contracts with a public-school district for five successive years be classified as "permanent" teachers[1] who continue to serve thereafter under "indefinite contracts" that allow them to be fired only for statutorily-specified grounds. *Anderson*, 303 U.S. at 101–03 & n.14 (quoting the 1927 Law). The "primary legislative intent" of the Tenure Law was to promote "the public good through the creation of a competent cadre of teachers in the state . . . by preventing the removal of capable and experienced teachers at the political or personal whim of changing officeholders." *Stewart v. Fort Wayne Cmty. Sch.*, 564 N.E.2d 274, 278 (Ind. 1990) (cleaned up[2]).

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[1] This "permanent" status is frequently referred to as "tenure." *See, e.g., Watson v. Burnett*, 23 N.E.2d 420, 423 (Ind. 1939).

[2] *See generally* Jack Metzler, *Cleaning Up Quotations*, J. App. Prac. & Process (forthcoming 2018), https://perma.cc/43XE96W5.

B. In 1933, the Indiana General Assembly passed an amendment to the Tenure Law that purported to remove existing tenure protections for teachers in more rural "township" schools, while leaving them in place for teachers in other municipalities. 1933 Ind. Acts 716. A township school teacher who had obtained tenure under the 1927 Law, but was subsequently discharged without cause pursuant to the 1933 amendment, challenged the action as a violation of the Contract Clause. The Indiana Supreme Court rejected her claim, reasoning that tenure rights were wholly statutory in nature and that the amendment removing those rights therefore impaired no contract for purposes of Article I, Section 10. *See State ex rel. Anderson v. Brand*, 5 N.E.2d 531, 532–33 (Ind. 1937), *rev'd,* 303 U.S. 95 (1938).

By a seven-to-one majority, this Court reversed the state court's decision and held that the 1933 amendment unconstitutionally impaired contractual rights created by the 1927 Tenure Law. *See Anderson*, 303 U.S. at 104. While noting that the "principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent Legislature shall determine to alter that policy," this Court recognized that legislation may nevertheless "contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection" of the Contract Clause. *Id.* at 100.

On the question of whether such a contract exists, this Court confirmed that the issue was one of federal law that the Court was "bound to decide for" itself, while still giving "respectful consideration" to the views of a state's highest Court. *Id.* at 100 & n.9 (citing *Phelps v. Bd. of Educ.*, 300 U.S. 319, 322 (1937)).

A careful examination of both the text of the Tenure Law and the Indiana Supreme Court's decisions construing the Law convinced this Court that teachers who satisfied the requirements for tenure were "assured of the possession of a binding and enforceable contract against school districts." *Id.* at 105.

With respect to the Tenure Law's text, this Court observed that both the title and body of the Law were "couched in terms of contract" and that the Law's repeated references to the term "contract" in defining the relationship between the teacher and school board were "not used inadvertently or in other than its usual legal meaning." *Id.* Of the key section of the Tenure Law—which provided that the "contract of a permanent teacher 'shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract'"—this Court said, "[n]o more apt language could be employed to define a contractual relationship." *Id.* (quoting the 1927 Law). This Court also noted that such express contractual language distinguished the case before it from *Phelps*, decided just a year prior, in which the Court unanimously concluded that the terms of a New Jersey tenure statute were insufficient to create a contract for purposes of the Contract Clause. *See id.* at 107.

With respect to decisions from Indiana's highest court construing the Tenure Law, this Court noted that, "[u]ntil its decision in the present case," the state 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. Thus, in deciding which of the state court's decisions was deserving of "respectful consideration" in determining the contractual status of teacher tenure under Indiana law, this Court ultimately concluded that the decision before it ran coun-

ter to the "explicit mandate" of the Tenure Law, to "the policy evinced by" the Law, and to the state court's "earlier decisions construing its provisions." *Id*. at 100, 107.

Having determined that the Tenure Law creates contract rights protected by Article I, Section 10, this Court then examined whether the 1933 amendment's impairment of those rights was nevertheless justified as "a proper exercise of the police power . . . for an end which is in fact public" and by a means "reasonably adapted to that end." *Id*. at 107–09 & n.17 (citing *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 438 (1934)). As this Court concluded, the 1933 amendment fell short of that standard. Because the Tenure Law's existing grounds for cancelling a permanent teacher's contract covered "every conceivable basis for such action growing out of a deficient performance of the obligations undertaken by the teacher," there were already "ample reservations in aid of the efficient administration of the school system," thereby making the 1933 repeal of tenure protections for township school teachers an unreasonable impairment of protected contract rights. *Id.* at 108.

C. Although the Indiana legislature could have responded to *Anderson* by modifying the Tenure Law to eliminate or alter the contractual nature of its protections, it did not do so.[3] On the contrary, the Tenure

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[3] The contrast between this Court's decisions in *Anderson* and *Phelps* provided Indiana and other state legislatures a clear line distinguishing between legislative language that creates binding contractual rights and language that creates only statutory rights that are subject to later revision. *See*, *e.g.*, *Sch. Dist. No. 1 v. Masters*, 413 P.3d 723, 728–29 (Colo. 2018) (comparing Colorado law regarding the termination of teachers with the language of the Indiana Tenure Law and concluding, based on

(*continued* . . .)

Law's provisions regarding the employment and dismissal of teachers remained fundamentally unchanged between 1927 and 2011. *Compare* Ind. Code § 26-6967.1 *et seq*. (1927), *and* Ind. Code § 20-6.1-4-1 *et seq*. (1997), *with* Ind. Code. §§ 20-28-6-1 through 20-28-7-15 (2010). Under longstanding principles of Indiana law, such inaction in the face of a judicial decision interpreting a statute is understood to mean that the *Anderson* Court "correctly interpreted the will of the legislature," *Durham ex rel. Estate of Wade v. U-Haul Int'l*, 745 N.E.2d 755, 759 (Ind. 2001), or at least that the legislature had effectively adopted *Anderson*'s holding by acquiescence, *see Heffner v. White*, 47 N.E.2d 964, 965 (Ind. 1943).

Moreover, the changes the legislature did make to the Tenure Law during this period served to further reinforce Indiana's commitment to tenure as a contractual obligation. Most notably, in 1965, the legislature reinstated the full protections of the Tenure Law for teachers at the very township schools affected by the 1933 amendment at issue in *Anderson*. *See* 1965 Ind. Acts 131. This sort of reenactment of the "features of [a] law after the Supreme Court had given it a construction" operated under Indiana law as a "legislative adoption of the construction" this Court gave to the Tenure Law. *State v. Miller*, 141 N.E. 60, 61 (Ind. 1923); *see also Pierce v. Underwood*, 487 U.S. 552, 567 (1988) ("[R]eenactment, of course, generally includes the settled judicial interpretation.").

Anderson, that the former did not create contractual rights because its provisions are not couched in terms of contract).

II. The Impairment of Elliott's Contractual Tenure Rights

A. Joseph Elliott worked as a teacher for Petitioner Madison Consolidated Schools ("Board"). In August of 1998, he entered into his sixth successive contract with the Board, making him a "permanent" —or tenured—teacher under the Tenure Law. Ind. Code § 20-6.1-4-9 (1997).

Just as it did when this Court decided *Anderson*, the Tenure Law in place in 1998 provided that a teacher's indefinite contract could only be cancelled for specified reasons, including a "justifiable decrease in the number of teaching positions." *Id.* § 20-6.1-4-10 (1997). In order for the Tenure Law's purpose to be "fully realized," the Indiana Supreme Court had long construed this ground for cancellation to mean that, before a school can remove a tenured teacher during a reduction-in-force, it must first remove any non-tenured teachers from positions in which the tenured teacher is licensed to teach.[4] *Stewart*, 564 N.E.2d at 278; *see also Watson v. Burnett*, 23 N.E.2d 420, 423 (Ind. 1939). As that court has explained, any alternative rule would "be contrary to the entire spirit and purpose" of the Tenure Law and would permit school board trustees to "nullify" the Law's protections by using reductions-in-force as a pretext to fire tenured teachers "without cause." *Watson*, 23 N.E.2d at 423.

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[4] This feature of Indiana's Tenure Law is far from unique. *See*, *e.g.*, *Coats v. Bd. of Educ., Unified Sch. Dist. No. 353*, 662 P.2d 1279, 1284–85 (Kan. 1983) (adopting a similar standard of priority for tenured teachers in school layoffs and collecting cases from other jurisdictions that do the same); *Babb v. Indep. Sch. Dist. No. I-5.*, 829 P.2d 973, 975–76 & n.11 (Okla. 1992) (same).

This rule does not mandate that reductions-in-force be conducted by seniority. If a layoff necessitates the removal of tenured teachers, the rule does not preclude a school board from for considering or even prioritizing issues of performance in selecting which tenured teachers' contracts to cancel.

B. During his nineteen years of employment with the Board, Elliott received a series of ten written evaluations that assessed his performance in various categories. (Elliott's Evaluations, COA Dkt. 12 at 53–72.) Throughout these evaluations, Elliott was consistently rated in either the highest ("strengths") or next-highest ("satisfactory") rating category. Following each of these evaluations, he was recommended for renewal.

There was only one instance where Elliott received a rating below "satisfactory" in any category. In his 2002 evaluation, he received "needs improvement" ratings in three "interpersonal relationships" categories of his evaluation; in the other eleven performance categories of the evaluation he received ratings of either "strength" or "satisfactory." (*Id.* at 63.) His principal at the time praised Elliott in the comments to the evaluation as "very dedicated to education," and she commended Elliott's "extensive knowledge" of the subject matter that he "brings . . . to the classroom." (*Id.* at 64.) The principal also noted that Elliott sometimes had "difficulty accepting, graciously, a different point of view," but she recommended that his contract be renewed. (*Id.*)

Subsequent to that, Elliott continued to receive ratings of at least "satisfactory" in every performance category on his evaluations, and in 2009 he received "strengths" ratings in two "interpersonal relationships" categories. (*Id.* at 69–70.)

C. In 2011—more than a dozen years after Elliott earned tenure—the Indiana General Assembly enacted Senate Bill 1 ("SB 1"), which made a variety of changes to laws concerning the employment of public school teachers. *See* 2011 Ind. Legis. Serv. P.L. 90 (West). These changes included adding a provision to the Tenure Law ("the RIF Provision") mandating that "[a]fter 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." *Id.* at § 31 (codified at Ind. Code § 20-28-7.5-1(d)).

The "performance" requirement in the RIF Provision was linked to changes SB 1 made to teachers' performance evaluations. The new law mandated that school boards annually evaluate teachers based in significant part on "[o]bjective measures of student achievement and growth." Ind. Code § 20-28-11.5-4(a), (c)(2). SB 1 further required that the evaluations sort employees into one four performance "categories": "Highly effective," "Effective," "Improvement necessary," or "Ineffective."[5] *Id.* § 20-28-11.5-4(c)(4).

Taken together, these changes meant that teachers placed in lower-rated performance categories under the new evaluation system could not be retained over teachers in higher-rated categories during a reduction-in-force. *Id.* § 20-28-7.5-1(d).

C. On June 7, 2012—that is, after SB 1 had passed but before its RIF Provision had formally gone

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[5] Although most of SB 1's provisions went into effect on July 1, 2011, and the RIF provision became effective on June 30, 2012, Ind. Code § 20-28-7.5-1(d), the new law's evaluation mandates were not required to be implemented until the 2012-13 school year, *see id.* § 20-28-11.5-4(a).

into effect, *see* Ind. Code § 20-28-7.5-1(d)—Elliott received a letter from the Board notifying him that his permanent contract had been cancelled due to a "justifiable decrease in the number of teaching positions." (Non-renewal Notice, DCT Dkt. 41-6.) Exercising his rights under the Tenure Law, Elliott requested a full evidentiary hearing with the Board. (Elliott Hearing Request, DCT Dkt. 41-19.)

In support of its termination decision, the Board cited the 2002 evaluation that assigned Elliott ratings of "needs improvement" in the three "interpersonal relationships" categories, and a comment on his 2012 evaluation advising him to "be compassionate and nurturing." (Board Findings of Facts and Conclusions of Law, COA Dkt. 12 at 103–105.) Apart from these comments and the decade-old evaluation, the Board relied entirely on *post-hoc* statements from principals who that had voted to select Elliott for termination. (*Id.*)

Because it had not yet implemented SB 1's requirement for annual teacher evaluations, the Board made no effort to rank Elliott or other teachers for layoff using assessments based in significant part on "[o]bjective measures of student achievement and growth." Ind. Code § 20-28-11.5-4(c)(2). Nor did the Board endeavor to show that, even based on pre-SB 1 evaluations, Elliott's performance was inferior to that of other teachers who were retained. And no such showing could have been made because, in reality, the Board retained no fewer than sixteen teachers—including two non-tenured teachers—who held positions for which Elliott was licensed and whose evaluations in 2012 were objectively inferior to Elliott's. (COA Dkt. 28 at 39–107.)

Despite these facts, and despite Elliott's status as a tenured teacher with protected contract rights un-

der the Tenure Law, the Board voted to uphold Elliott's termination as part of the reduction-in-force. (COA Dkt. 12 at 103–05.)

III. Proceedings Below

A. Elliott filed a state-court action against the Board in 2013, which the Board subsequently removed to federal court. (COA Dkt. 12 at 106–08.) Elliott's amended complaint alleged that his termination was unlawful because the Board's application of SB 1's RIF Provision impaired his contractual tenure rights in violation of the United States and Indiana Constitutions. (COA Dkt. 12 at 96–101.) In addition, the complaint alleged that the Board's termination decision was not authorized as a matter of state law. (*Id*.) The State of Indiana intervened in the district court to defend the constitutionality of SB 1 as applied to Elliott. (COA Dkt. 12 at 95.)

The parties submitted cross-motions for summary judgment, and on March 12, 2015, the district court granted judgment in Elliott's favor on his claim that the Board's application of SB 1 violated the Contract Clause and the cognate provision of the Indiana Constitution. (Pet. App. 26a–56a.) Petitioners moved to certify those issue for interlocutory appeal under 28 U.S.C. § 1292(b). (DCT Dkt. 95.) The district court granted the motion (COA Dkt. 12 at 5–7), but the Seventh Circuit denied the petition and directed the district court to resolve the outstanding issue of a remedy. (COA Dkt. 12 at 4.) The district court did so on November 21, 2016, with an award of damages and attorney fees, resulting in a final judgment. (Pet. App. 57a.)

Petitioners appealed that judgment to the Seventh Circuit, a panel of which unanimously affirmed the district court. *See Elliott v. Bd. of Sch. Trustees of*

Madison Consol. Sch., 876 F.3d 926 (7th Cir. 2017). The panel concluded that, while statutes typically do not create contracts, the Indiana Tenure Law used "contractual language" that induced "public reliance" and therefore created a contract under this Court's decision in *Anderson*. *Id.* at 932. It further concluded that applying SB 1's RIF provision to Elliott was a substantial impairment of his tenure contract because it represented an "unforeseeable backtracking by the State" on a "central term" that induced teachers to work in Indiana for less money in exchange for greater job security. *Id*. at 934–36.

The panel also concluded that the impairment of Elliott's contract was neither reasonable nor necessary, given that the State had a multitude of options for meeting its stated policy goals without impairing the contracts of tenured teachers. *Id*. at 936–39. In response to Petitioners' suggestion that ruling in Elliott's favor would prevent the State from enacting desirable education reforms, the Seventh Circuit explained:

> The Contract Clause does not saddle the State forever with a teacher-tenure system that its policymakers have come to think is bad for public education. The Constitution does not prevent the State from changing the promises it makes on a prospective basis to new teachers. Also, if the State were to conclude that retroactive changes to tenure are necessary, the Contract Clause would give the State the option (much like the Takings Clause) of paying the individuals who would otherwise lose out from the change. (After all, a party to a contract is ordinarily free to breach the contract as long as it is willing to pay damages to the other party.) The State

> can make the changes it wants, but it cannot foist the costs onto private parties, other than through general taxes. Having restricted tenure for new teachers, the State and its school districts were and are free to buy out the tenure rights of more senior ones.

Id. at 938.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Present a Compelling Question that Merits Review Under This Court's Standards for Granting Certiorari

"A petition for a writ of certiorari will be granted only for compelling reasons," S. Ct. R. 10, none of which are present here. The decision below faithfully applied this Court's long-standing precedent to undisputed facts. No further review is warranted.

A. The most common grounds for a grant of certiorari are obviously not present here. Petitioners do not claim that the Seventh Circuit's decision in any way conflicts with that of another court. Nor do they claim that this case involves any unsettled but important question of federal law. Instead, in a tacit concession that the lower court correctly applied this Court's governing precedent, they now ask for that precedent to be overruled.[6]

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[6] Petitioners do, however, devote a portion of their submission to arguing that, in conducting the standard Contract Clause analysis, the lower court failed to properly balance the State's interest in altering its education laws against Elliott's contractual rights created by the Tenure Law. *See* Pet. at 24–29. Even if such a charge had merit, certiorari is not appropriate for a routine complaint of a "misapplication of a properly stated rule of law." S. Ct. R. 10.

But Petitioners' call to overrule *Anderson* does not present an "important federal question." S. Ct. R. 10. By Petitioners' own admission, *Anderson*'s direct application is confined to a single state. *See* Pet. at 10. Moreover, Petitioners' claims that *Anderson* has "stopped the clock" on Indiana's Tenure Law and left the State "hamstrung" in efforts to improve educational outcomes are vastly overstated.

If Indiana had desired to make teacher tenure a statutory rather than contractual commitment, it had more than six decades in which to do so between this Court's decision in *Anderson* and when Elliott earned tenure in 1998. Instead, as noted *supra* at 5–7, the State effectively ratified and adopted *Anderson*'s holding in the years that followed, both by re-enacting the Tenure Law's protections to apply to township teachers and by declining to modify the Law's core contractual provisions in response to this Court's decision. *See Durham*, 745 N.E.2d at 759; *Miller*, 141 N.E. at 61.

Furthermore, if Indiana now wants to substantially modify the contours of contracts under the Tenure Law, or even abandon tenure as a contractual commitment altogether, it has a range of options for doing so that do not require this Court's intervention. First, it can enact those changes prospectively, just as it has done with other educational reforms. *See*, *e.g.*, *Bruck v. State ex rel. Money*, 91 N.E.2d 349 (Ind. 1950) (construing a newly enacted statute requiring all tenured teachers' indefinite contracts to expire at age of 66 to apply only to teachers who attain tenure after the new law's passage). Indeed, that approach is already in effect for the RIF Provision at issue here, for there is no dispute that the provision continues to apply to teachers who had not yet earned tenure at the time of SB 1's enactment.

Second, the State can apply whatever contract changes it desires to currently tenured teachers, provided it compensates them for any loss occasioned by the change. "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else." Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897); *see also Elliott*, 876 F.3d at 938 ("Having restricted tenure for new teachers, the State and its school districts were and are free to buy out the tenure rights of more senior ones.").

Finally, the State can enact even substantial alterations to a teacher's indefinite contract, without any corresponding obligation to pay compensation, if the changes are both reasonable and necessary for the accomplishment of an important public purpose. *See U.S. Trust*, 431 U.S. at 25. Such modifications are generally permissible when "subsequent changes" in circumstances cause the original contract "to have a substantially different impact" than anticipated and the state avoids imposing "a drastic impairment when an evident and more moderate course would serve its purpose equally well." *Id.* at 31–32. Although the RIF Provision at issue here did not satisfy that standard, there is ample reason to think that more moderate or focused policy interventions would do so.

The holding of *Anderson* that Petitioners complain about here is limited in its scope, and it can be redressed through legislation in any event. This is not a situation that calls out for this Court to intervene.

II. The Court Should Decline Petitioners' Invitation to Grant Certiorari for the Purpose of Overruling *Anderson*

Even if the effects of *Anderson*'s holding were more far-reaching, the decision should still not be revisited. To begin with, *Anderson* is plainly correct under current Contract Clause principles, and this Court does not need to grant review just to reaffirm it. Moreover, *Anderson* is long-settled law on a question involving reliance-inducing contract rights, and *stare decisis* demands that it remain settled. In any event, this case does not present a clean vehicle for considering the question presented, since a raft of state-law and fact-bound issues would complicate the Court's examination of the Contract Clause question.

A. *Anderson* is correctly decided

1. Under this Court's long-standing precedent, the Contract Clause does not operate as a categorical prohibition on laws that modify existing contractual obligations. Instead, it calls for a balancing of private contractual rights against the States' "necessarily reserved" sovereign power to protect the general welfare. *U.S. Trust*, 431 U.S. at 21. To that end, a plaintiff seeking to establish a violation of the Contract Clause must show not only that a change in state law has substantially impaired a contractual relationship, but also that the impairment was not reasonable and necessary to serve an important public purpose. *See Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–13 (1983).

In both its reasoning and outcome, *Anderson* is fully consistent with that standard. First, although legislation ordinarily does not create contract rights,

Anderson was correct to hold that the Tenure Law speaks with unusual clarity on this topic by declaring that school boards must enter a binding contract with a teacher who satisfies the requirements for tenure.

The *Anderson* Court explained how the intent to create contract rights thoroughly suffused the text of the 1927 Law:

> The title of the act is couched in terms of contract. It speaks of the making and canceling of indefinite contracts. In the body the word 'contract' appears ten times in section 1, defining the relationship; eleven times in section 2, relating to the termination of the employment by the employer, and four times in section 4, stating the conditions of termination by the teacher.

303 U.S. at 105.

Such repeated references to "contract" rights, this Court observed, were "not used inadvertently or in other than its usual legal meaning." *Id.* On the contrary, this Court focused on the core provisions of the Law—which establish that the "contract of a permanent teacher 'shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract"—and found that "[n]o more apt language could be employed to define a contractual relationship." *Id.*[7]

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[7] By contrast, the New Jersey tenure statute at issue in *Phelps* eschewed any references to contract and provided only that after three years of continuous employment with a school district, a teacher shall not "be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause." 300 U.S. at 320–21 (quoting 4 N.J. Comp. Stat. § 106a (1910)). This Court therefore had little difficulty concluding that the law "did

(*continued* . . .)

Petitioners do not dispute the settled principle that statutes can, under proper circumstances, create contract rights protected by Article I, Section 10. They also decline to engage the actual text of Tenure Law and do not argue that the Law's plain language speaks in anything other than explicitly contractual terms. As a result, Petitioners fail to mount any meaningful challenge to *Anderson*'s conclusion that the Tenure Law creates contractual rights.

The fact is that *Anderson* is fully consistent with contemporary precedent, which recognizes that the ordinary presumption against legislative contracts must be disregarded in the face of a "clear indication that the legislature intends to bind itself contractually." *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–66 (1985) (citing *Anderson*, 303 U.S. at 104–105). And here there is the clearest indication possible: not only was the 1927 Law completely "couched in terms of contract," *Anderson*, 303 U.S. at 105, but the Indiana legislature added a new category of school districts to the coverage of the Law in 1965, knowing that it had been definitively construed to protect contract rights. 1965 Ind. Acts 131.

Second, *Anderson* correctly took account of the State's sovereign interest by asking whether the 1933 amendment was "a proper exercise of the police power . . . for an end which is in fact public" and by a means "reasonably adapted to that end." *Id.* at 108–09 & n.17 (citing *Blaisdell*, 290 U.S. at 438). The rejection of the governmental interests asserted there

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not amount to a legislative contract with the teachers of the state and did not become a term of the contracts entered into with employes [*sic*] by boards of education." *Id.* at 322–23.

was particularly appropriate given both the degree of the impairment and the State's self-interest. As this Court's subsequent cases have recognized, both of these are factors that raise the applicable level of scrutiny. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) ("The severity of the impairment measures the height of the hurdle the state legislation must clear."); *U.S. Trust*, 431 U.S. at 25–26 ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.").

2. Petitioners try to discredit *Anderson* by casting it as a relic from a bygone era in which the application of legislation to existing contracts was routinely invalidated. *See* Pet. at 16–17. That effort withers under scrutiny: although a significant doctrinal shift has undoubtedly taken place in this Court's Contract Clause jurisprudence, that shift was complete by the 1938 *Anderson* decision.

The scholarly literature relied on by Petitioners proves the point. It acknowledges that this Court's use of the Contract Clause as "a muscular restraint on state authority" through much of the 19th Century had already begun a "slow retreat" by the turn of the 20th Century, which accelerated even more during World War I, and resulted in a "near-fatal punch" in 1934 with *Blaisdell*, the decision that forms "the basis for the modern reading of the Contract Clause." James W. Ely Jr., *Whatever Happened to the Contract Clause?*, 4 Charleston L. Rev. 371, 374–88 (2010); *see also* Brief of Amicus James W. Ely Jr. at 10–18, *Sveen v. Melin*, 138 S. Ct. 542 (No. 16-1432) (recounting the same timeline).

This Court has also recognized that the pre-*Anderson* decision in *Blaisdell* operated as a sea-change in this Court's Contract Clause jurisprudence.

In *United States Trust*, this Court called *Blaisdell* "the leading case in the modern era of Contract Clause interpretation." 431 U.S. at 15. And in *City of El Paso v. Simmons*, *Blaisdell* was described as "a comprehensive restatement of the principles underlying the application of the Contract Clause." 379 U.S. 497, 508 (1965).

Anderson fully incorporates *Blaisdell*'s modern approach to the Contract Clause. Upon finding that the Tenure Law creates contract rights protected by Article I, Section 10, the *Anderson* Court made clear that its analysis was not yet at an end. Citing *Blaisdell*'s more generous allowance for legislation promoting the general welfare, this Court proceeded to examine whether the state's impairment of the teacher's contractual tenure rights was nevertheless justified as "a proper exercise of the police power . . . for an end which is in fact public" and by a means "reasonably adapted to that end." 303 U.S. at 108–09 & n.17.

To be sure, the State fell short of meeting this standard of justification in *Anderson*. But, contrary to what Petitioners seem to suggest, *Blaisdell* and its progeny are not a guarantee that the government will always prevail. "[T]he Contract Clause remains part of the Constitution. It is not a dead letter." *Spannaus*, 438 U.S. at 241.

3. Similarly flawed is Petitioners' suggestion that *Anderson* is the product of a time in which this Court routinely deemed legislation to create contractual rights. Pet. at 16–20. That claim cannot be squared with this Court's decision in *Phelps*, which was decided just a year before *Anderson* and yet found that a New Jersey tenure statute conferred only statutory, rather than contractual, rights. 300 U.S. at 322–23. Even more to the point, a strong presumption against

recognizing legislative contracts that would bind the body's successors has been part of this Court's law since the middle of the 19th century. *See United States v. Winstar Corp.*, 518 U.S. 839, 874 (1996) (plurality opinion). In other words, *Anderson*'s conclusion that the Tenure Law creates contract rights was not the result of outmoded legal principles, but of the unmistakable clarity with which the Indiana legislature wrote those rights into the statute.

4. Petitioners are badly mistaken in claiming that, because *Anderson* reversed the Indiana Supreme Court's conclusion that the Tenure Law does not create contractual rights for purposes of Contract Clause, the case is somehow in tension with this Court's seminal decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See* Pet. at 17–20.

Erie deals with adjudication of *state*-law claims in federal court under its diversity jurisdiction. In that context, giving conclusive deference to a state's highest court is necessary to vindicate fundamental principles of federalism.

The Contract Clause, by contrast, is a *federal* constitutional guarantee, where *Erie* has no application. *See* 304 U.S. at 78 ("*Except in matters governed by the Federal Constitution or by acts of Congress*, the law to be applied in any case is the law of the state.") (emphasis added). Accordingly, this Court has long recognized that the underlying determination "whether a contract was made is a *federal* question for purposes of Contract Clause analysis." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) (emphasis added). That is so even when the existence of a contract question "turns on issues of general or purely local law," because this Court cannot "surrender the duty to exercise [its] own judgment" on federal questions. *Id.* (cleaned up). *See also Atl. Coast Line R.*

Co. v. Phillips, 332 U.S. 168, 170 (1947) ("A claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or what were its obligations.").

Anderson was correct when it was decided in 1938, and it remains correct today. The Seventh Circuit's decision below faithfully applied *Anderson* to the facts before it. There is nothing here that warrants this Court's review.

B. Considerations of *stare decisis* strongly counsel against revisiting *Anderson*

Of course, correct judgments have no need for the principle of *stare decisis* "to prop them up." *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015). And, here, we have shown that *Anderson* is correct and need not be revisited. But even if this Court harbors some doubt about whether *Anderson* remains correctly decided, this is an instance where the values of *stare decisis* are at their very strongest and should therefore be followed in denying this petition.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tenn.*, 501 U.S. 808, 827 (1991). Thus, "an argument that [this Court] got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble*, 135 S. Ct. at 2409. Instead, to revisit a prior decision, this Court generally requires a "special justification—over and above the belief that the precedent was wrongly decided." *Id.* (cleaned up).

Those special justifications are lacking here. And even more than that, there are countervailing considerations make the case far stronger for leaving *Anderson* untouched.

1. This Court is particularly reluctant to review cases, like *Anderson*, that have remained on the books for an extended period of time. *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009) (noting that the "antiquity of the precedent" factors in favor of *stare decisis*). And the considerations favoring *stare decisis* reach their very "acme" in cases, also like *Anderson*, that determine contract rights. *Kimble*, 135 S. Ct. at 2410 (cleaned up). The reason for adhering to long-standing precedent involving contractual rights is straightforward: "parties are especially likely to rely on such precedents when ordering their affairs." *Id.*

Those contract-based reliance interests come into play here because there is more than a "reasonable possibility" that the guarantees created by the Tenure Law would influence how Indiana teachers made their career choices. *Id.* As the Seventh Circuit explained below, "teachers rely on a stable job-security scheme to plan their personal and professional lives, their investments of time and money, and their retirements." *Elliott*, 876 F.3 at 935. They "cannot have do-overs in their careers, either to earn more money to make up for the lost job security or to find better job security in another school district or in another field entirely." *Id.*

That sort of reliance is entirely sensible. For more than seven decades following this Court's decision in *Anderson*, the Indiana legislature left the Tenure Law's substantive provisions fundamentally unchanged and even expanded the categories of teachers covered by those provisions. Moreover, since *Anderson*, Indiana courts have consistently recognized

that "teacher tenure is wholly contractual," such that tenure contracts "must be held to remain valid and enforceable to the end, under the laws in force at the time of [their] execution, no matter what changes the law has undergone in the lifetime of the contract." *Bruck*, 91 N.E.2d at 352–54 (cleaned up). Indiana teachers had every reason to believe this would remain true and to plan their affairs accordingly.

2. This is not an instance where the constitutional nature of the decision in *Anderson* should diminish the force of *stare decisis*. To be sure, the imperative to follow to a prior decision is weaker when its effects can be "altered only by constitutional amendment or by overruling . . . prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). But when it comes to the holding of *Anderson* that Petitioners ask to have overruled here—namely, that the provisions of the 1927 Indiana Tenure Law created a binding contractual commitment for teachers who satisfy the requirements for earning tenure—it is far "more important that the applicable rule of law be settled than that it be settled right," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

Notwithstanding *Anderson*'s holding, Indiana has always possessed a broad range of legislative options to modify or eliminate the contractual nature of rights under the Tenure Law. *See supra* at 14–15. Thus, this is hardly a situation where *stare decisis* must yield because "correction through legislative action is practically impossible." *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting).

But more than that, following *stare decisis* here gives effect to those steps the Indiana legislature did take—not to correct a perceived mistake in the decision—but to ratify and adopt *Anderson*'s holding. *See*

supra at 5–7. The State unquestionably has the authority to enact legislation creating binding contractual rights for tenured teachers. And, for the decades that followed *Anderson*, their response to the decision would have been deemed to do just that. *See Durham*, 745 N.E.2d at 759; *Miller*, 141 N.E. at 61. As a result, this Court cannot overrule *Anderson* without effectively nullifying Indiana's long-standing embrace of its holding. This provides all the more reason to respect and maintain the decision as precedent. *See Kimble,* 135 S. Ct. at 2409–10; *see also Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 257–58 (1970) (Black, J., dissenting) ("When the law has been settled by an earlier case then any subsequent 'reinterpretation' of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that [the legislature] itself placed in the statute.").

3. There is also no merit to Petitioners' claim that *Anderson* has become unworkable as precedent. On the contrary, the decision "is simplicity itself to apply," *Kimble*, 135 S. Ct. at 2411, and operates as "an established guidepost" for subsequent legislative developments, *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 423 (1986).

Anderson completes a series of decisions this Court issued in the late 1930's that establish the metes and bounds for when state statutes conferring employment benefits on teachers will be understood to create contracts for purposes of the Contract Clause. In *Phelps*, this Court affirmed a judgment of the New Jersey Supreme Court holding that a 1909 teacher tenure law "did not amount to a legislative contract with the teachers" because the lower court's decision was consistent with the overall statutory scheme. 300 U.S. at 322–23.

The following term, in *Dodge v. Board of Education*, 302 U.S. 74 (1937), this Court found that a statute creating a retirement annuity paid in addition to teachers' pensions did not create contractual rights both because the statute did not use the "normal language of a contract" and because Illinois Supreme Court decisions had found similar programs to be non-contractual.

And, of course, in *Anderson* this Court found that the clarity of the contractual commitment in Indiana's Tenure Law defeated the ordinary presumption that statutes do not create contracts. In reaching that conclusion, the *Anderson* Court explicitly distinguished both *Phelps* and *Dodge* based on the statutory language at issue in both cases and prior court decisions. *Anderson*, 303 U.S. at 100–08.

Taken together, the decisions in *Phelps, Dodge,* and *Anderson* draw a clear line: legislation will create contractual rights for purpose of Article I, Section 10 only where the statutory scheme is clearly "couched in terms of contract." *Anderson,* 303 U.S. at 105. That line provides invaluable assistance to state legislatures drafting or revising their laws. Those states wishing to treat tenure as a purely statutory matter may do so through legislation that hews closer to *Phelps* and *Dodge* by using non-contractual language. *See, e.g., Campbell v. Aldrich*, 79 P.2d 257, 214–17 (Or. 1938); *Malone v. Hayden*, 197 A. 344, 353–54 (Pa. 1938); *Morgan v. Potter*, 298 N.W. 763 (Wis. 1941). And those states wishing to create a contractual commitment can model their legislation on the Indiana Tenure Law. *See, e.g., Minnesota Ass'n of Pub. Schs. v. Hanson*, 178 N.W.2d 846, 852 (Minn. 1970) (noting that the Minnesota law at that time was "very similar" to the Indiana law at issue in *Anderson*).

The line drawn by *Phelps, Dodge,* and *Anderson* has application beyond the context of the teacher tenure laws, as well. For example, in noting that a change to a statutory transportation covenant was subject to Contract Clause scrutiny in *United States Trust,* this Court specifically referenced *Dodge* and *Anderson* as examples of how the Court determines when legislation creates—or does not create—contractual obligations. 431 U.S. at 17 n.14. And in *National Railroad Passenger Corp.,* this Court relied heavily on *Dodge* and *Anderson* in explaining why a statute regulating railroad employee passes did not create contract rights. 470 U.S. at 465–66.

Petitioners fail to acknowledge *Anderson*'s role in demarcating when legislation does or does not create contractual rights. As a result, they do not come to grips with the potential for confusion that could arise if *Anderson* were overruled. After all, states have a strong interest in maintaining the capacity to order their affairs through contract when they wish to do so. Yet, if *Anderson* is overruled, even the clearest and most explicit contractual commitments in legislation might be treated as revocable by later action of the legislature. Such an expansion of the state's "abilities for contractual abrogation" would have the "certain result of undermining [its] credibility at the bargaining table and increasing the cost of its engagements." *Winstar*, 518 U.S. at 884 (plurality opinion). This Court should be reluctant to disregard precedent in a manner "that would weaken the Government's capacity to do business." *Id*. at 886.

This case presents no "special justifications" for overruling the long-standing precedent in *Anderson*. On the contrary, all of the relevant considerations point strongly in the opposite direction. *Stare decisis* therefore demands that *Anderson* be let alone.

C. This case would be a poor vehicle for revisiting *Anderson*

As a final matter, even if this Court believes that *Anderson* should be revisited, this case presents a poor vehicle for doing so.

In asking this Court to reverse the Seventh Circuit's judgment, Petitioners stake a great deal of their argument on the overarching importance of the educational reforms contained in SB 1. Pet. at 24–29. Indeed, the efficacy of these reforms, and the manner in which the legislature intended they be accomplished, are the lynchpin of Petitioners' claim that any contractual impairment was reasonable and necessary to improve educational outcomes in the State. *Id*. Yet, this case presents a raft of issues that would muddle this Court's consideration of that question.

Most significantly, this Court would have to consider the legislative interest advanced by SB 1 on a record in which it is not even clear that the key portion of the law at issue, the RIF Provision, was meant to apply to Elliott's termination. On its very face, the RIF Provision did not go into effect until after June 30, 2012, *see* Ind. Code § 20-28-7.5-1(d), while Elliott was given notice of his termination more than three weeks before that, on June 7, 2012. (DCT Dkt. 41-6.) And the Board's decision to apply the RIF Provision before its effective date sowed further confusion that is hard to reconcile with SB 1's stated aims and its interlocking requirements.

In particular, because the Board had not yet implemented SB 1's requirement for annual performance assessments based on objective measures of student achievement, it could not follow the law's requirement for using those assessments to sort teachers into performance categories for purposes of mak-

ing layoff decisions. Instead, it based its layoff decision on little more than a freewheeling kibitzing session among school principals, which resulted in a decision to remove Elliott despite the fact that his pre-SB 1 performance ratings were superior to those of many of the teachers the Board retained. (COA Dkt. 12 at 103–105; Dkt. 28 at 39–107.) So, whatever the merits might be of the policy that animated SB 1 generally and the RIF Provision in particular, it is far from clear that they are truly implicated in Elliott's layoff.

Such complicating factors make this a poor vehicle for re-examining *Anderson*. This Court should therefore deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERIC HYLTON
Riley Bennett & Egloff, LLP
141 E. Washington St.
Fourth Floor
Indianapolis, IN 46204
(317) 636-8000

ALICE O'BRIEN
Counsel of Record
JASON WALTA
KRISTEN HOLLAR
ZACHARY CHASE
National Education Association
1201 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 822-7035
aobrien@nea.org

Counsel for Respondent Joseph R. Elliott

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