COLORADO COURT OF APPEALS 2 East 14th Avenue, Suite 300 Denver, CO 80203	
Appeal from District Court, City and County of Denver, the Honorable Martin F. Egelhoff Case No. 2024CV31993	
Plaintiffs-Appellants, ADAMS-ARAPAHOE SCHOOL DISTRICT 28J, ADAMS COUNTY SCHOOL DISTRICT 14, ENGLEWOOD SCHOOL DISTRICT NO. 1, HARRISON SCHOOL DISTRICT 2, ARAPAHOE COUNTY SCHOOL DISTRICT NO. 6, ESS WEST, LLC, and KELLY SERVICES, INC. v. Defendant-Appellee, COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION.	▲ **COURT USE ONLY** ▲ Case No. 2024CA001957
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BRIEF OF THE COLORADO LEAGUE OF CHARTER SCHOOLS AS AMICUS CURIAE

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 29(d). It contains 4,684 words (does not exceed 4,750 words).

The brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ William P. Bethke
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INTEREST OF AMICUS

Amicus Colorado League of Charter Schools (the "League") is the leading advocacy organization for Colorado charter schools and a membership organization representing over ninety percent of Colorado's 264 charter schools. In connection with a Public Employee Retirement Association ("PERA") rule that every substitute teacher in Colorado is a PERA member the League fielded dozens of concerns over the impact and impropriety of this across-the-board rule and interacted at length with schools to understand the impact of PERA's actions. The summary below is grounded in that interaction.

I. Substitute Teaching

Traditionally, school districts kept lists of substitute teachers to be hired as needed. Substituting had limited educational value, as the continuity of student-teacher relationships, instructional pace, and other aspects of education were disrupted by the absence of the primary teacher. Substitutes were nonetheless hired to provide proper oversight of children and some kind of instruction. Like many Colorado public schools, the three charter schools discussed below are attempting to provide high quality education in a historically tight labor market. Difficulties in finding and hiring qualified substitutes have become pronounced, in turn prompting use of fully lawful but nontraditional arrangements.

II. The PERA System & The Rule

PERA is a "social security replacement" system for Colorado public employees. PERA is not a pension supplemental to social security. Including private independent contractors of public entities within PERA is improper (more below).

On June 30, 2023, PERA announced by email to public school actors that all substitute teachers working with public school students "are considered employees of the" school entity and members of PERA — without regard to any circumstance related to who they contract with, or their vetting, hiring, firing, supervision or the like ("the rule").[1] PERA retirement contributions would thus be required for all substitutes effective July 1, 2024. The sole rationale for the rule is that substitute teaching is a "core function" of public-school bodies.[2] The result of this rule, detailed below, is that some charter schools have been financially or educationally harmed, and others are being deterred by pricing from forming a relationship that would provide needed substitute teaching.

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[1] Email from Colorado PERA, *Important Update from Colorado PERA* (June 30, 2023), 12:45 p.m.

[2] See, e.g., PERA Membership of Substitutes Employed by a Third-Party Employment Agency | Colorado PERA (most recently accessed 2/13/2025). Read directly, the email and web posting offer *no* reason — the rule is the rule because it's the rule. "Core function" can be teased out of the web posting as *perhaps* the reason. We spot PERA that possibility in the balance of this brief.

III. Examples of Relevant Charter School Experience

The League's interest is best understood in light of examples it uncovered while working with members. Below are summaries from three schools: Highline Academy ("Highline"), the Thomas MacLaren School ("MacLaren") and New Legacy Charter School ("New Legacy").

A. Highline Academy

Highline operates two Denver Public School ("DPS") charter schools. These are "schools of the district,"[3] and Highline itself is a public entity.[4] Due to the substitute shortage, Highline assistant principals and principals were at times the only people available to cover classes; a PE teacher covered two combined non-PE classes; unlicensed teacher's assistants provided adult supervision to an untaught and otherwise unsupervised class. On one occasion with every available employee, regardless of licensing, supervising students, the charter network[5] chief executive officer ran one school's front desk for the day.

To deal with this unsustainable difficulty, Highline took several steps. Highline attempted to manage its own list of directly employed *ad hoc* substitutes

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[3] C.R.S. § 22-30.5-104(2)(b).

[4] See, e.g., C.R.S. §§ 22-30.5-104(4)(a) & 22-30.5-104.9.

[5] A charter network is a single school organization with more than one school for state accreditation purposes. See C.R.S. § 22-30.5-104.7.

who were, of course, within PERA. Highline retained six full-time employees, three at each campus, as permanent staff substitutes. That is, Highline paid far above the ordinary cost of *ad hoc* substitute teachers, making higher PERA contributions, simply to assure onsite substitute capacity. This effort provided stronger substitute-student relationships, instructional consistency, and improved teaching quality. While providing needed substitute coverage on many days, full-time in-house substitutes, combined with the internal sub list, did not solve the problem. Waves of illness and associated absences still created an unmet episodic need to surge substitute capacity. On those days, scarcity continued.

Circumstances forced Highline to turn to Tagg Education, LLC ("Tagg") a private independent contractor that identifies, vets, and places its substitutes at multiple schools and districts. Highline is expressly authorized by law to contract for any needed service.[6] Tagg's model for placing substitutes allows it to sign up qualified substitutes, many of whom are only interested in teaching at limited times under limited circumstances. For example, Tagg attracts people who may have one day a week on which they are willing and able to substitute, only in certain grades. By attracting many such people, Tagg is able to maximize the positions it can fill across many schools. Initially, Tagg slightly reduced but did not eliminate Highline's problem. But Tagg's fill rate during 2023-2024 dramatically reduced

[6] See, C.R.S. § 22-30.5-104(7). See also C.R.S. §§ 22-32-122 (similar district authority) & 22-30.5-507(8) (same; Colorado Charter School Institute ("CSI") schools).

the number of occasions on which instruction and supervision was disrupted.

Notably, Tagg offers Highline the opportunity, for a fee, to hire a Tagg substitute. When Highline exercises this option that substitute becomes Highline's employee, and her work falls under PERA.

B. Thomas MacLaren School

MacLaren is a Colorado public charter school, authorized by Colorado Springs School District No. 11, though previously authorized by CSI. MacLaren operates one k-12 charter school. As with Highline, MacLaren is a "school of the district," and MacLaren is a public entity and PERA employer.[7] Some time ago, MacLaren secured authority to expand from a high-school-only program to a k-12 program, occupied a site capable of accommodating a much larger school, and expanded enrollment to fill the new facility.

As a relatively small high school operating under CSI, MacLaren had managed its own small substitute list. Even with very limited substitute teaching needs, MacLaren had found it necessary to internally reassign staff, often consuming teacher planning time to supplement its substitute system. Realizing that the planned dramatic expansion in grades and size would stress its ability to hire substitutes past the breaking point, MacLaren contracted to obtain substitutes

[7] nn. 3 & 4, above.

through Tagg. MacLaren also created roughly 1.5 internal teacher positions for "in house" substitute capacity, retained at much higher pay than *ad hoc* substitutes. These are employees of MacLaren and within PERA.

After finding Tagg's work and fill rates an acceptable solution to its residual substitute teaching needs, MacLaren approached its small pool of substitutes and gave them the opportunity to work with the larger school clientele pool through Tagg. Several MacLaren substitutes took this opportunity. Several elected to stop substitute teaching in favor of other pursuits. More recently, MacLaren re-created a small pool of MacLaren-hired substitutes who only want to work at MacLaren. These substitutes are in PERA. Most are college-aged MacLaren alumni who tend to work for MacLaren only during breaks in their post-secondary academic schedule. Several times each year, MacLaren pays Tagg's "headhunting" fee and hires a Tagg substitute who enjoys MacLaren, and MacLaren views as capable, as a MacLaren employee, enrolled in PERA.

MacLaren does not have sufficient administrative staffing to stand up a substitute system that would meet its needs. Despite all of its other efforts, MacLaren relies on Tagg's *ad hoc* substitutes.

C. Highline's and MacLaren's Relationship with Tagg

Neither Highline's nor MacLaren's relationship with Tagg and the Tagg substitutes renders either Highline or MacLaren the employer of the Tagg

substitutes under any recognized test (much less the legally required test, more below). Neither Highline nor MacLaren is engaged in attempting to evade PERA contributions. Both schools have incurred increased PERA contributions through a strategy of hiring regular teaching staff as in-house substitutes while also using an internal list of substitutes. Both schools offer (MacLaren more commonly) jobs to Tagg substitutes; pay the headhunting fee; and turn these individuals into school employees with full PERA participation.

Tagg's *ad hoc* substitutes provide student supervision and mitigate educational losses when Highline or MacLaren's employed full-time regular education teachers are absent in numbers exceeding the absenteeism covered by Highline's and MacLaren's dedicated substitute staff and limited internal lists for casual substitutes.

Tagg identifies applicants, conducts background checks, confirms substitute teacher licenses, and otherwise determines who it retains or releases from its substitute list. Highline and MacLaren provide Tagg information on their needed substitutes. Tagg distributes the information to potential substitutes, who confirm their interest in the assignment. After a substitute teacher accepts the assignment, the schools confirm that the substitute fulfilled the assignment. Tagg contracts with a third-party payment platform to process payment and provides that platform with needed information. The third-party platform pays the substitute and Tagg's fee, drawing on a school account. Each school receives an after-the-fact monthly

itemization of the amounts drawn by the third-party platform.

Tagg manages its own business, and creates policies and practices, without input from Highline or MacLaren. Substitutes assigned to Highline or MacLaren are routinely assigned by Tagg to other schools or districts. The schools are unaware of assignments outside their school and do not attempt to influence those other school systems, nor do the schools discourage Tagg from cultivating this separate business activity. Highline and MacLaren are not participants in, did not organize, and are not aware of the business structure of Tagg.

D. New Legacy Charter School

New Legacy is a Colorado public charter school authorized by CSI. New Legacy operates a single charter school in Aurora, Colorado. As a CSI school, New Legacy is a "public school within the state unaffiliated with a school district,"[8] and is itself a public entity.[9] New Legacy is also recognized by the Colorado Department of Education as an "alternative education campus" ("AEC").[10] AECs enroll a supermajority of "high risk" students. Specifically, New Legacy enrolls pregnant and parenting teens, and also operates on-site infant-toddler care and a preschool. New Legacy has a very small enrollment and staff.

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[8] C.R.S. § 22-30.5-507(1)(b).

[9] C.R.S. §§ 22-30.5-507(4)(a) & 22-30.5-104.9.

[10] C.R.S. § 22-7-604.5.

It relies heavily on the strength of relationships and trust between instructors and students. Given this social-emotional and instructional need, New Legacy has struggled to find an appropriate approach to substitute teaching.

New Legacy does not have capacity to create a substitute list, nor does it have a contractor to provide substitutes. Instead, New Legacy relies on internal staff (cannibalizing teacher planning periods or assigning teacher aides, clinical staff, and administrators) to cover teacher absences. A surge of illness would break this system and make proper student instruction or even supervision unworkable, causing cancellation of classes. New Legacy would like the opportunity to retain an affordable contract service that also allowed it to make repeated use of a small number of substitutes who could then form some workable relationships with New Legacy students. New Legacy has explored using independent contractors to assign substitutes. The current fees for such services, due to a thirty percent price hike caused by the PERA rule, are not affordable for New Legacy.

IV. Conclusion

The League's interest in this matter begins with supporting Colorado charter schools that need to maintain independent contracting relationships as a strategy for securing adequate substitute teaching. It extends, however, to the recognition that PERA's ham-handed approach to this issue threatens a disturbingly wide range

of independently contracted services within the public school system.

STATEMENT OF ISSUES AND OF THE CASE

The League accepts the statements of issues and of the case of plaintiffs-appellants.

SUMMARY OF ARGUMENT

Exhaustion of administrative remedies ("exhaustion") is not required.

Exhaustion is a matter of sound judicial discretion, not jurisdiction. PERA's plea for exhaustion confuses quasi-legislative rule making with quasi-judicial rule application. There is no factual dispute over application here, rendering exhaustion of a quasi-judicial process futile.

PERA's suggestions that the districts shift the rule-promulgation dispute itself into a rule-adjudication process would evade PERA's obligation to justify its rule; improperly shift the burden of proceeding and justification from itself to the districts and improperly diminish the districts' procedural protections. Such back-door promulgation creates futility as a matter of law and need not be exhausted.

PERA's rule is legislative and void for lack of promulgation. PERA's rule unlawfully impairs the statutory power of districts to perform educational services with private independent contractors. PERA's rule violates the statutory prohibition on conscripting independent contractors into PERA and is contrary to

binding precedent. The court owes *no* deference to PERA's rule. The rule is facially unlawful and exhaustion through quasi-judicial fact finding is futile.

ARGUMENT

DISMISSAL OF THIS ACTION FOR FAILURE TO EXHAUST WAS IN ERROR

I. Exhaustion is Not a Jurisdictional Issue

"Jurisdiction is a word of many, too many, meanings…. This Court, no less than other courts, has sometimes been profligate in its use of the term."[11] Many issues too-loosely labeled "jurisdictional" are instead "claims-processing" rules that do "not deprive the judge of her power" and are subject to equitable exceptions.[12] Exhaustion is "quintessential[ly]" a "claims processing" rule.[13] Mistaken "[j]urisdictional treatment of exhaustion [can] undo the benefits of exhaustion."[14] When "litigants must slog through preliminary nonjudicial proceedings even when … a court finds it would be pointless,"[15] exhaustion loses its appeal, and a court is allowed to dispense with it: that is, the court has "jurisdiction." The statute at issue here does not say "a court may not hear a case unless …." And in the absence of such unmistakable and explicit direction, there

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[11] *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006)(citation and internal quotation marks omitted).

[12] *McIntosh v. United States*, 601 U.S. 330, 342 (2024).

[13] *Santos-Zacaria v. Garland*, 598 U.S. 411, 417 (2023).

[14] *Id* at 417-418.

[15] *Id* at 418.

is no loss of judicial power.[16] Indeed, PERA and the lower court both treat exhaustion as non-jurisdictional when they recognize that "futile" procedures need not be exhausted. Futility is an equitable consideration and applies because exhaustion is an equitable, discretionary, and prudential doctrine.

The issue is whether it makes sense to require exhaustion, or whether the disadvantages and inefficiencies of that process render it inadequate or, in the lingo of exhaustion, "futile." That issue concerns sound discretion, not judicial power.

II. PERA Confuses Quasi-Legislative with Quasi-Judicial Action

A. Quasi-Legislative versus Quasi-Judicial

With the sole exception of impeachment, legislatures do not adjudicate. And courts do not legislate (though that principle is sometimes honored in the breach). The same sharp division runs between quasi-legislative and quasi-judicial administrative actions. The point was stated succinctly by Justice Holmes in a case in which a Colorado board of equalization raised the valuation of taxable property in Denver across-the-board. A claim that quasi-judicial individual notice and hearing was required in relation to this general rule was turned away:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution

[16] See C.R.S. § 24-51-205(1). Note that the federal trial courts discussed in the cited cases are subject to plenary Congressional regulation of their *limited* jurisdiction. Colorado district courts have constitutional general jurisdiction that cannot be impaired by the General Assembly. See Colo. Const., art. VI, § 9.

> does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.[17]

In other words, quasi-legislative processes create general rules through one process; quasi-judicial processes resolve fact-bound or individualized disputes through another.[18] The two are not to be confused with each other; that's not how administrative law works.

A schema of how administrative law is supposed to work may help. The ordinary course for adoption and enforcement of a rule is:

1. An agency studies a problem, formulates a draft rule with the required or desired support in the legally required form (e.g., cost-benefit analysis, plain language drafting, etc.). Agencies often consult stakeholders in this process.

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[17] *Bi-Metallic Inv. Co. v. State Bd. of Equalization,* 239 U.S. 441, 445 (1915).

[18] In the trial court, PERA construed plaintiff's reference to "persons" being subject to a hearing under PERA Rule 2.20 as if that rule excluded a district as a party. Districts are legal "persons." The point of plaintiff's argument below was not that only *natural* persons could adjudicate. It was that "due process" hearings are about rule application. The application may be to a district, a district-vendor relationship, several identically situated natural persons, etc. A rule describes the principle an agency will apply in enforcement against all comers. To say that all substituting is a "core function" of public schools; that performing a "core function" makes one an employee; and that every substitute is a PERA employee/member is not adjudication or interpretation. It is a binding rule.

2. The agency posts official public notice of the proposed rule.

3. The agency receives written comments and comments through a public hearing.

4. The agency drafts and publicly posts a final rule, with any amendments, and addresses the comments it received, agreeing, disagreeing, and indicating how its approach has been adjusted.

STEPS 1-4 are the quasi-legislative process required by the Administrative Procedures Act ("APA").[19]

5. [Optional] A party challenges the rule through the court system, under the comparatively generous standards applicable through the APA.[20]

6. Once a final, lawful rule is in place, the agency applies the rule to different discrete factual circumstances.

7. If action of the agency harms a party that disputes the factual grounding of the agency action, that party can request a quasi-judicial hearing.

8. After a fair "due process" hearing, the agency determines whether its application of the rule was proper.

STEPS 6- 8 are the quasi-judicial process for application of a rule.

9. [Optional]: If the outcome of the hearing remains adverse, the party may seek the sharply limited judicial review provided by "certiorari."[21]

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[19] See C.R.S. § 24-4-103.

[20] See C.R.S. § 24-4-106(7)(b)(I) – (IX).

[21] C.R.C.P. 106(a)(4)(I).

B. No Fact-Finding is Warranted

PERA argues that the districts should have responded to the rule by invoking step 7. The *ordinary* reason to invoke step 7 would be to dispute the *application* of the rule. But here there is no factual dispute. The districts concede that substitutes are substitutes. PERA's rule classifies *all* substitutes as PERA members — no ifs-and-or-buts. Simply PERA has defined the vocational category of substitutes to be PERA "members." Who hires, fires, compensates, evaluates, supervises … is irrelevant. The only factual question is "are these substitutes?" The answer to that question is "yes." There is no point to an administrative hearing over whether "yes" means "yes." Such a hearing is utterly wasteful, which is to say "futile."

C. PERA's Backdoor Promulgation Creates Futility

PERA proposes another purpose. The district should have used the quasi-judicial hearing — PERA says — to demand the quasi-legislative process PERA ignored. This inverts the proper course of rulemaking and application by starting at step 7 above to insist on jumping back to step 1. That is, an agency that has refused to go through rulemaking invites us to use a fact-finding hearing to demand it go through rulemaking. That — not at all how administrative law "works" — should, for the reasons that follow, make exhaustion "futile" as a matter of law.[22]

[22] We recognize that an individual adjudication could by happenstance entail a failure-to-promulgate issue. See nn. 23 and 33 for an example. That does not

PERA's effective back-door rule-making subtly undermines its own responsibilities even as it degrades the districts' legal opportunities under two layers of "exhaustion" (the first being what is normally second, and the second first — to no doubt be followed by a third). More important, by refusing to engage in rulemaking PERA is (1) shifting the burden from an agency justifying a rule to districts adjudicating facts; (2) depriving the districts of the APA standard for review of rules; and (3) narrowing judicial review to the thin gruel of Rule 106(a)(4). This mutilation of ordinary process and the way in which it evades proper responsibility for rulemaking, while unduly disadvantaging the districts, is distinctive to Colorado administrative law. Its inefficiency, confusion, misdirection, and inadequacy is clear. And when PERA dances around the APA obligation to justify a rule; shifts the burden of proceeding and persuasion to the districts; and dilutes the standard of court review — in each instance loading the dice in PERA's favor — *that* process is "futile" *per se,* excusing exhaustion.

III. The Rule is Legislative and Thus Void

There is no question PERA adopted a legislative rule. The rule that every single substitute is a public employee — *perhaps* because all instruction is a "core

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mean adjudication is the only way a failure-to-promulgate case comes before a court, nor that it is proper and advisable, much less mandatory, here.

function" — invites no exception.[23] Thousands of people are subject to one categorical rule, based solely on vocational label. As such, there is no question the rule could only be *procedurally* valid if promulgated; the only party that has failed to exhaust a required administrative process is PERA. No new fact or process will make this rule not void. As to failure to promulgate the law is clear and exhaustion is futile.

IV. The PERA Rule Contradicts the District's Statutory Authority to Contract for Services, Including Educational Services

PERA's single factor-test has absurd implications. One of the "core functions" of all public schools (all of which are subject to a plethora of regulations) is to abide by school law. Many school districts and some charter schools hire in-house counsel, who are district or school employees and PERA members. Many districts (including some of those with in-house counsel) hire attorneys like the undersigned and counsel for the districts here. By PERA's reasoning, all such private lawyers have been, unbeknownst to everyone, "employees" of districts or charter schools all along, and therefore PERA members. The notion is risible.

As the legal services example illustrates, districts are authorized by law to *retain independent contractors.* That statute calls out independent contractors used

[23] *Hammond v. PERA*, 219 P.3d 426, 428 (Colo. App. 2009) ("PERA's policy is a legislative rule because it … achieves a particular result … in all applicable cases") ("*Hammond*").

to "perform … *an educational service.*"[24] Substitutes likely provide the least "central" *educational* service in a school. We do not demean substitutes, whose job is difficult. Yet substitutes *are* the bench-warmers, the under-study, the break-glass-in-case-of-emergency option. Regular teachers, teacher's aides, special-education teachers, related-service providers (psychologists, speech therapists, etc.), educational and behavioral interventionists, and, many athletic coaches are more "central" to education than substitutes. If PERA's rule is correct, the implication is that not one of these "educational services" can be performed through independent contractors.[25] In other words, the PERA rule implies the erasure of statutory language (resulting in legal and educational chaos, including major disruption of special education). Even limited to substitutes, PERA's rule contradicts the statute. PERA has no authority to revise or repeal statutes. Again, the rule's illegality is clear. The futility of exhaustion follows.

V. The Rule is Contrary to The PERA Statute and Binding Precedent

By statute "independent contractors" cannot be PERA members.[26] The Colorado Supreme Court has addressed an agency that, in the context of administering governmentally created employment benefits, mis-defined

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[24] C.R.S. § 22-32-122(1) (emphasis ours). See also n. 6 above.

[25] To be sure, PERA states that "[f]or *other* outsourced positions" it is not today applying a categorical rule. See n. 2. That assurance merely defines the rule's scope, offering cold comfort regarding future PERA actions.

[26] C.R.S. § 24-51-310(1)(h).

"independent contractor."[27] That case, *Softrock,* is directly on point and fatal to PERA's rule.

In *Softrock* the legislature provided nine factors "indicative of … important distinctions between employees and independent contractors."[28] Nine was not enough: "we find that other factors may also be relevant."[29] The court held —

> whether an individual is customarily engaged in an independent business is a question that can only be resolved by applying a totality of the circumstances test that evaluates the dynamics of the relationship between the putative employee and the employer; *there is no dispositive single factor or set of factors*.[30]

Under the PERA statute's prohibition on enrolling independent contractors *and* the *Softrock* holding that no factors that bear on independent contractor status can be ignored, the PERA rule is indefensible. Exhaustion is futile.

A. The Rule is Due No Judicial Deference

There is more. Colorado agencies no longer receive deference to their plausible interpretations of a statute. The Colorado Supreme Court dispensed with

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[27] *Industrial Claims Appeals Office v. Softrock Geological Services, Inc.,* 2014 CO 30. ("*Softrock*").

[28] *Softrock* at ¶ 15.

[29] *Id* at ¶ 16.

[30] *Id* at ¶ 19 (emphasis ours).

deference under the *Chevron* and *Brand X* decisions in 2021.[31] Whatever deference might previously have been due PERA is no longer appropriate, as a matter of law.

B. Factual Hearing on a Rule Contrary to Statute *and* Precedent *and* Due No Deference is Futile

PERA would have this court believe that with a statutory prohibition on enrolling independent contractors; the *Softrock* court dissatisfied with only nine factors defining "independent contractor"; *and Chevron* deference gone,[32] PERA is entitled to define the term with a "*dispositive single factor.*" That argument is bootless.[33] And exhaustion of pure rules of law is futile.

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[31] *Nieto v. Clark's Market,* 2021 CO 48, ¶¶ 37 & 38 (faced with an ambiguous statute, a Court does not "defer" to agency interpretation but determines what the "better" interpretation is) ("*Nieto").* *Nieto* ruled that neither *Chevron v. Nat. Res. Def. Council,* 467 U.S. 837 (1984) ("*Chevron*") nor *National Cable & Tele. Ass'n v. Brand X Internet,* 545 U.S. 967 (2005) ("*Brand X*) applied in Colorado administrative law. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), subsequently overruled *Chevron* for federal purposes.

[32] In years past this would technically be a *Brand X* case. *Brand X* allowed agencies to contradict court rulings (as PERA contradicts *Softrock*), provided the agency identified a different reasonable resolution of statutory ambiguity. *Brand X* is no longer law (in Colorado, or federally). And even under *Brand X* an every-substitute-is-a-public-employee rule — mere *ipse dixet* — is not reasonable.

[33] *Hammond*, above n. 23, decided a failure-to-promulgate question and then decided the underlying merits issue. 219 P.3d at 429. The same is advisable here. To be sure, *Hammond* was a fact-intensive adjudication. But in this case as in that case, judicial efficiency suggests recognizing crystal-clear legal issues.

CONCLUSION

We emphasize that the permission to engage independent contractors does not excuse efforts to disguise real employees. Such evasions can be corrected.[34] Proper correction is *not* for PERA to ignore teacher shortages, evade the APA, contradict laws permitting contracting, ignore the law forbidding contractor membership in PERA, and elide by rule all inquiry into the facts of each independent-contractor relationship — hiding it all behind the veil of a futile prospect of exhaustion.

Neither the issue of promulgating the rule nor the issue of whether the rule is defensible will be materially informed by jumping through the wrong hoops for the wrong reason in a manifestly inefficient display of exhaustion rendered exhausting to even contemplate. The court should either decide or instruct the district court to decide the procedural and substantive status of the PERA rule — because exhaustion is not a bar.

The decision below should be reversed.

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[34] See, e.g., *Day v. Prowers Cty. Sch. Dist.*, 725 P.2d 14 (Colo. App. 1986). There, a district attempted to evade a teacher achieving tenure by offloading their written contract to a board of cooperative services. The district identified, supervised, evaluated, compensated, hired, fired (and rehired) the teacher. This court found the teacher to be a tenured employee of the district. The line is enforced by examining facts, not by evading factual inquiry. PERA's shortcut here was no doubt tempting. It is also untenable.

Respectfully submitted,

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Certificate of Service

I certify that that on the 17th day of February, 2025, a true and correct copy of the foregoing Brief of the Colorado League of Charter Schools as Amicus Curiae was sent via Colorado Courts E-filing, with copies by email, to the following:

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