IN THE SUPREME COURT
OF THE STATE OF GEORGIA

No. S18G1419

DEKALB COUNTY SCHOOL DISTRICT and
DEKALB COUNTY BOARD OF EDUCATION,
Appellants,
v.
ELAINE ANN GOLD, AMY JACOBSON SHAYE,
HEATHER HUNTER, and RODERICK BENSON,
on behalf of themselves and all others similarly situated,
Appellees.

AMICUS BRIEF OF THE GEORGIA ASSOCIATION OF EDUCATORS

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IDENTITY AND INTEREST OF AMICUS CURIAE

GEORGIA ASSOCIATION OF EDUCATORS

Amicus Curiae Georgia Association of Educators ("GAE") is a voluntary professional association of over 28,000 certificated educators and educational support personnel, the membership of which includes teachers, administrators, student teachers, and other employees in the DeKalb County School District as well as in every other county and independent school system in the state. GAE is organized to assist its membership in matters pertaining to the terms and conditions of their employment, to their success in the classroom teaching Georgia's public schoolchildren, and to the advancement and success of Georgia's public school systems and Georgia's schoolchildren. To this end, GAE regularly monitors the activities of the Georgia Board of Education and the State Department of Education. GAE also lobbies in the Georgia General Assembly on behalf of public education issues.

In this regard, GAE has an interest in ensuring that school systems not only abide by laws enacted to protect educators, but also by policies of the Local Boards of Education that protect the employment and livelihood of Georgia educators. The enforcement of local school district policies is of importance to GAE because these policies protect the future retirements of employees who have devoted a lifetime of

service to public education. Accordingly, GAE and its members have a substantial, vested interest in the outcome of this litigation.

INTRODUCTION

For decades, thousands of DeKalb County public school employees have educated, and enriched the futures of, DeKalb County's children. Before 1977, District employees received Social Security benefits but in 1979, the District opted-out of Social Security for its employees after having provided the two year notice that was then-required by federal law. V-25/R-7456-66, R-7461; V-30/R-8969. In lieu of Social Security, these dedicated public employees were promised the "Alternative Plan to Social Security" where—together with other benefits—the Board promised to annually fund a Tax Sheltered Annuity Plan ("TSA") through contributions at an established percentage of every employee's compensation. V-25/R-7695; 7492-93. Thirty years later – in July of 2009 – the DeKalb County Board of Education, faced with a budget shortfall, decided to balance the budget on the backs of its hard working educators and stop contributing to the TSA Plan, reducing contributions to zero. Suppl. Record/P87, P176, P456-62.

This funding reduction – with no prior notice – violated the contractually promised, legislatively enacted Board policy requiring a two year notice to employees before reducing the funding for the "Alternative Plan to Social

Security." V-25/R-7492-93. This Board policy remained unchanged, even after the Defendants violated this policy by eliminating the TSA funding without notice in 2009. V-1/R-62 (Answer admitting policy remained in effect until 2010.) After flouting District policy, Defendants admitted, nearly a year later at a 2010 Board meeting that the District was in violation of the two year notice requirement of the policy. V-25/R-7675. In a backdoor attempt to whitewash their wrong, the Board belatedly deleted the provision. V-25/R-7681.

This shocking betrayal would result in the risk of retirement poverty for many educators who had been counting on TSA in lieu of Social Security. Moreover, due to a statutory provision known as the Windfall Elimination Provision, retiree benefits are reduced substantially for those who receive a pension from an organization that did not pay into Social Security, i.e. DeKalb County Schools.[1] 42 U.S.C.A. § 415. Combined with the Windfall Elimination Provision, the Defendants' unlawful suspension of the TSA contributions commits double the harm. Employees not only lose TSA contributions they were promised, they also see a significant reduction in Social Security benefits they would have been entitled to receive elsewhere *from other employers* or even *their spouse's*

[1] The Social Security Administration offers a Windfall Elimination Provision calculator here: https://www.ssa.gov/planners/retire/anyPiaWepjs04.html

employers. Id. Accordingly, this lawsuit seeks redress for the damage done to teachers who were promised a secure retirement but instead saw their trust betrayed.

If given the approval of this Supreme Court, the trial court's backing of the Defendants' decision not only threatens certain DeKalb County School employees, but the retirement funding of other public employees across Georgia.[2] The decision of the Court of Appeals avoids this injustice. Gold v. DeKalb Cty. Sch. Dist., 346 Ga. App. 108 (2018) ("Gold III"). Amicus Curiae urge this Court to affirm Gold III, to validate the trust employees placed in Defendants' legislated promises of a secure retirement after lifetimes of public service in the field of education.

STATEMENT OF THE ISSUE

Amicus Curiae GAE is appearing before the Court to address a central point: the DeKalb County School Board policy DFBA is a legislative act that becomes part of the Plaintiffs' employment agreements which, in turn, creates a contractual obligation to provide a supplemental retirement plan that protects employees with a two year notice before reducing funding to that plan. The notice provision is a material, non-waivable term and condition of employment. V-25/R-7481. GAE

[2] E.g. Georgia State Employees Retirement System O.C.G.A. §47-2-1(16); Superior Court Judges Retirement Fund of Georgia O.C.G.A. §47-8-1 et seq.

respectfully submits that the DeKalb County Superior Court erred in concluding that the Board policy was neither a legislative act (V-33/R-9772-78), nor a contractual obligation (V-33/R-9780-83), essentially letting the District violate its own Board policies. V-33/R-9784.

ARGUMENT AND AUTHORITY

I. School Board Legislatively Promised Employees a Supplemental Retirement Plan that Prohibited Funding Reductions by a Two Year Notice

A. Board Policy DFBA Required Two Year Notice Before Reducing the Funding of the Plan

For decades, the District promised employees TSA benefits that, in compliance with School Board policy, would not be reduced without first providing a two year notice. The promise was enacted through binding Board policy—which is how a Board of Education legislates. This policy, which mandated the "Alternative Plan to Social Security" (coded as Policy "DFBA") and included this very important two year pre-requisite before any funding could be reduced from it, specifically stated:

"***The Board of Education shall give a two-year notice to employees before reducing the funding provisions of the Alternative Plan to Social Security."*** V-25/R-7481, R-7492.

B. Executed TSA Plan and Board Resolutions Also Mandated Compliance With Board Policy DFBA's Two Year Notice Requirement:

The "Alternative to Social Security Plan" mandated by Board policy DFBA included a TSA retirement plan that is also governed by IRS Code § 403(b). V-25/R-7524. The District adopted two successive 403(b) documents (one in 1983 and the other in 2003) "pursuant to [IRS] Code Section 403(b)" V-25/R-7588-89 consistent with the mandate of Policy DFBA. V-25/R-7563. The Superintendent signed the Plan(s) pursuant to Board resolution(s) explicitly placing the TSA plan documents under the auspices of the "general compensation policies of the Board" (V-25/R-7701), which of course would incorporate Board policy DFBA's two year notice requirement.

Notably, even if the Board had not explicitly stated that the Plan must be consistent with Board policies, an administrative document like the TSA Plan, executed pursuant to Board policy DFBA, is subordinate to Board Policy which governs the District operations. E.g. Ayers v. Pub. Sch. Emps. Ret. Sys. Of Ga., 294 Ga. 827, 830 (2014). Also, the TSA Plan document itself specifically acknowledged that "[n]o amendment or termination of the Plan shall reduce or *impair* the rights of any Participant or Beneficiary that have already accrued." V-25/R-7547. (emphasis added).

It was clearly spelled out that the District could not reduce funding or terminate without complying with binding District policy that vested the rights of its employees to a two year notice.

C. Board Policy DFBA Containing the Two Year Notice Requirement Was a Legislative Act and Binding Law of the District

This Court already acknowledged that the "board of education is the governing authority for the political subdivision which makes up a school district, and as such, it has the capacity to act as a legislative body." DeKalb Cty. Sch. Dist. v. Gold, 318 Ga. App. 643 (2012) ("Gold I") (internal quotes omitted). "[T]he **legislative acts of the Board** establishing a retirement plan for the School District employees may become part of the employees contract of employment." See Gold I (emphasis added).

The Board adopted policy DFBA, observing all of the relevant legislative formalities. See Appellees' Brief, pp. 4-6. Defendants themselves have previously admitted that this Court has "held that the School Board's policy and resolution relating to a supplemental benefits plan was a legislative act" and the Court concluded that "policies and rules of a local school board have the force and effect of law in Georgia." See Defendants' Petition for Writ of Certiorari, Case No S13C0514 dated Dec. 10, 2013 at 12, 18, 3 and 9.

Incredibly, the Defendants treat the legislatively enacted policy as meaningless, outrageously denying that the Board Policy was known or was even a legislative enactment. See Appellants' Brief, p. 21; see also id. p. 21, n. 15; id. p. 23 (Board's Policy "did not establish anything").

In addition, Defendants' statements do not comport with well settled law, nor with Defendants' contentions in other cases involving Board Policies.[3] Claiming that Defendants do not know their own Board policy is disingenuous at best, as every DeKalb County School District employee is charged with knowing these policies, is bound by them, and is entitled to rely on them. Tate v. Teachers' Ret. Sys. of Ga., 257 Ga. 365, 366 (1987) ("It is well settled that 'Powers of all public officers are defined by law and all persons must take notice thereof."). DeKalb County School District policies are available to all, disseminated throughout the school district website. V-33/R-9593; V-40/R-17-18; V-25/R7498.[4]

Under Georgia law, school districts are subject to "the control and management" of county boards of education, which have the authority to make

[3] It is no secret that DeKalb County School District's official policies are rules and that employees may be terminated for violating them. E.g. Butler v. DeKalb Cty. Sch. Dist., 2015 WL 4598292, at *7 (N.D. Ga. July 29, 2015) (DeKalb County School employee was informed that she was being demoted due to violation of Board policies. She was then terminated from her position after a hearing.)

[4] https://simbli.eboardsolutions.com/SB_ePolicy/SB_PolicyOverview.aspx?S=4054

"rules to govern the county schools of their county." O.C.G.A. § 20–2–50, –59; Ga. Const. art. VIII, § V, ¶ I; Lightfoot v. Henry Cty. Sch. Dist., 771 F.3d 764, 771 (11th Cir. 2014). Well-established law affirms local school board decisions to terminate employees as a result of an "intentional violation of a known rule ***or policy***…" E.g. Terry v. Houston County Bd. of Ed., 178 Ga. App. 296, 299 (1986) (bold, italics added); Chattooga Cty. Bd. of Educ. v. Searels, 302 Ga. App. 731 (2010).

Similarly, school board policy legislates the conduct of students, who are expected to abide by such policies or face serious discipline, including but not limited to expulsion. E.g. D.B. v. Clarke Cty. Bd. of Educ., 220 Ga. App. 330, 333 (1996) (Board policy permitted a student's permanent expulsion as a result of bringing a weapon to school.) Unsurprisingly, school board policies often face constitutional challenges. E.g. Cuesta v. Sch. Bd. of Miami-Dade Cty., Fla., 285 F.3d 962, 967 (11th Cir. 2002) (Plaintiff asserts that the "zero tolerance" policy of the School Board was the "moving force" behind her allegedly unconstitutional arrest.) Nonetheless, the Eleventh Circuit has held that "a local government body, such as the School Board in this case, is liable under §1983, 'when execution of a government's policy… made by its lawmakers….inflicts the injury...' " Cuesta at 966 (citing Monell v. Dep't of Social Servs., 436 U.S. 658, 694 (1978)).

Defendants contend they can disregard their own policies, even to the detriment of their own employees. But, no less than a student or teacher who is expelled or terminated for policy violations, DeKalb County Board of Education members are not above the law. See Ga. Const. Art. 1, § 2, Par. 1 ("Public officers are the trustees and servants of the people and are at all times amenable to them."); DeKalb Cty. Sch. Dist. v. Georgia State Bd. of Educ., 294 Ga. 349, 353 (2013).

The following passage—extracted from the Supreme Court of Georgia's decision over the DeKalb Board Chair's appellate challenge to the Governor's decision to suspend and replace the majority of this Board's members—is relevant here:

> "First, it is a fundamental principle of our constitutional tradition that no public officer—whether constitutional or only statutory—is above the law. See United States v. Lee, 106 U.S. 196, 220, 1 S.Ct. 240, 27 L.Ed. 171 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."). See also State ex rel. Low v. Towns, 8 Ga. 360, 368 (1850) ("This is a government of laws and not of men...."); Bonner v. State ex rel. Pitts, 7 Ga. 473, 481 (1849) ("Every officer, from the highest to the lowest, in our government is amenable to the laws of his country.... When the voice of the people speaks in the form of a legislative enactment, all are bound to obey the mandate....")

DeKalb Cty. Sch. Dist. v. Georgia State Bd. of Educ., 294 Ga. 349, 353 (2013).

The District cannot disregard their own policies without rendering them meaningless, Scott v. Mayor & Council of Mount Airy, 186 Ga. 652, 653–54

(1938), particularly in their statutorily set "critical role [in the] setting of policies" (O.C.G.A. §20-2-49), as a governing authority for the political subdivision with the capacity to act as a legislative body. Glynn Cty. Bd. of Educ. v. Lane, 261 Ga. 544, 545 (1991).

Defendants' promise to secure funding for the Alternative Plan to Social Security is a legislative action at the school board level. The Brief of Appellants is coy about whether the Board policy was a legislative act (see, e.g., Appellants' Brief, p 21 n. 16), but fails to present a persuasive explanation of how it could be otherwise. According to Black's Law Dictionary, an "act in the law" is defined as "an act that is intended to create, transfer, or extinguish a right and that is effective in law for that purpose; the exercise of a legal power." Black's Law Dictionary (10th ed. 2014). In form, the notice requirement that protected funding of contributions was enshrined and published among the District's official Policies. This explains why this Court previously found "legislative acts of the Board" in "establishing a retirement plan for School District employees." DeKalb Cty. Sch. Dist. v. Gold, 318 Ga. App. 633, 644 (2012), overruled on other grounds by Rivera v. Washington, 298 Ga. 770 (2016). As a matter of substance, however, Policy DFBA evinces the budgetary priorities of the District.

DeKalb Board of Education "acted in the law" in voting to adopt Policy DFBA. V-25/R-7481, R-7492. The Board of Education's contention they can disregard or waive this notice requirement (V-71 video at 4:07) would render it meaningless. There is no such thing as a notice requirement if you can arbitrarily choose to disregard it. Well-established Supreme Court of Georgia precedent rejects such a position, "since 'a legislative body should always be presumed to mean something by the passage of an act,' and an act should not be so construed as to render it 'absolutely meaningless'." Grange Mut. Cas. Co. v. Woodard, 300 Ga. 848, 856 (2017), reconsideration denied (Mar. 30, 2017) (citing Scott v. Mayor & Council of Mount Airy, 186 Ga. 652, 653–54 (1938)).

Under any reasonable construction of Policy DFBA, the clear and specific language imposed a contractual obligation that "[t]he Board of Education ***shall*** give a two year notice to employees before reducing the funding provisions of the Alternative Plan to Social Security." V-25/R-7481 (emphasis added.) The plain meaning of "must" is a command, synonymous with "shall" in construing time notice requirements. State v. Henderson, 263 Ga. 508, 510 (1993).

D. Two Year Notice Within Policy DFBA Is A Contractual Right Protected By the Impairment Clause

Article I, Section I, Paragraph X of the Georgia Constitution provides that "[n]o … laws impairing the obligation of contract … shall be passed."

Defendants have admitted to the Georgia Supreme Court in Gold I that the "Court of Appeals held that the School Board's policy and resolution relating to a supplemental benefits plan was a legislative act that became part of the Gold Plaintiffs' contract." See Defendants' Petition for Writ of Certiorari, Case No S13C0514 dated Dec. 10, 2013 at 12, 18, 3 and 9.

The promise to provide a two year notice, adopted as Board policy and incorporated into the employees' employment contracts, is protected by Georgia's prohibition on retroactive laws and impairment of contracts. See Ga. Const. of 1983, Art. I, Sec. I, Para X. as affirmed by this Court to this case. Gold I, at 633. This Court found that when a government creates a retirement plan for its employees, those benefits become "part of the contract of employment…so that an attempt to amend the statute or ordinance and reduce, or eliminate, the retirement benefits…violates the impairment clause of the state constitution." Gold I, at 643.

In this case, the government made a promise to its employees and broke that promise. For decades, the District provided a supplemental retirement plan offering TSA benefits to its employees with this Board policy that promised a substantive

right – an enforceable, sufficiently clear promise that the District would not reduce their benefits without first providing a two year prior notice of any reduction of the promised retirement funds. See Appellees' Brief, p. 5; see also, Appellees' Brief, p. 25 (right to notice is enforceable contract right); Gold III at 114 n. 13 (sufficiently specific to be enforceable); see also Riley v. H&H Operations, Inc., 253 Ga. 652 (1993) (dram shop statute that hinged liability on word "soon" was not too vague to be enforceable); Shoenthal v. Shoenthal, 337 Ga. App. 515 (2016) (interpretation of notice requirement in DeKalb County ordinance presented a question statutory construction as a matter of law).

The language of the Board Policy governing the Alternative Plan to Social Security is no more vague than the "granting" language in statutes with comparable purposes. C.f., O.C.G.A. § 47-2-1 *et seq* (Ga. State Employees' Ret. Sys.); O.C.G.A. § 47-3-1 *et seq*. (Teachers' Ret. Sys.); O.C.G.A. § 47-8-1 *et seq*. (Superior Court Judges Ret. Fund of Ga.); O.C.G.A. § 47-12-1 *et seq*. (District Attys' Ret. Fund of Ga.); OCGA 47-22-1 *et seq*. (Ga. Defined Contribution Plan).

Moreover, to imply the supplemental retirement plan's promise of a two year notice should not be protected from impairment because it is an unenforceable gratuity is a misguided notion. In City of Athens v. McGahee, this Court stated:

> We conclude that the issue of employee contributions is most properly decided under the reasoning of this court in Dinnan v. Totis, 159 Ga. App.

> 352, 354-355, 283 S.E.2d 321, supra, wherein we stated: "Fringe benefits of numerous sorts have become a substitute for actual direct increases in wages or salaries. They are no longer bonuses in the traditional sense of the term, but part and parcel of the remuneration package.... The applicable principles may be summarized as follows. Fringe benefits are an inherent part of compensation. Payments by employers of employees' pension contributions, and insurance policies, both life and health, have all become vital ingredients of employment. Such payments can no longer be considered as gratuities or voluntary since they are essential elements of most compensation arrangements in that they benefit both the employer and the employee…

City of Athens v. McGahee, 178 Ga. App. 76, 78 (1986).

The TSA plan was not "gratuitous." In the eyes of DeKalb teachers and full-time employees, the TSA Plan induced them to expect and rely upon a promise in exchange for their loyalty and retention. Regardless of whether the employee made a direct monetary contribution or not, Georgia law recognizes that the continued performance of services is a form of bargained-for consideration. See, e.g., Swann v. Board of Trustees of Joint Mun. Employees' Benefit System, 257 Ga. 450, 453 (1987) (retirement benefits were promised benefits, not gratuitous gift); see also Gold I at 642 n. 54 ("fact that [employee] made no contribution to the … plan did not render the pension a gratuity which the county could terminate at will; the performance of services … was consideration giving him a vested right in receiving benefits") (citing Malcom v. Newton County, 244 Ga. App. 464, 467–468 (2000)); see also Atl. Steel Co. v. Kitchens, 228 Ga. 708 (1972). The Brief of Appellants pays little heed to how overturning such precedent would unsettle

Georgia law, to say nothing of the reasonable expectations of public employees across this State.

Defendants' admitted failure to give notice was a substantive, not nominal, breach of Plaintiffs' legal rights. Where lack of notice will result in injury or prejudice to substantive rights, a legal right to notice is substantive, too. See, e.g., Atlanta Pub. Sch. v. Diamond, 261 Ga. App. 641, 641 (2003) (Local Board of Education failed to provide teacher proper notice as statutorily required within 14 days regarding the reasons for her nonrenewal and as such the decision to nonrenew her was reversed); Clayton Cty. Bd. of Educ. v. Wilmer, 325 Ga. App. 637, 647 (2014) (Failure to notify in writing of an administrative decision as required by statute to make the decision "binding" "deprive[d] the decision of any binding effect"); Peddle v. Cobb Cnty. Bd. of Educ., Case No. 1985-31 (Ga. SBE, Nov. 14, 1985), aff'd., Cobb Cnty. Bd. of Educ. v. Peddle, Civil Action No. 86-10093-05 (Cobb Superior Ct., Apr. 29, 1986) (If a local board fails to provide the required notice within fourteen (14) days, then the nonrenewal is ineffective and a teacher's contract is considered to be renewed as if a notice of nonrenewal had not been issued); Walter Boone v. Atlanta Independent School System, Case No. 2003-29 (Ga. SBE, Sept. 2003).

For comparison, under federal law, notice requirements protecting employee retirement benefits are "substantive" legal rights as a matter of law. ERISA law, 29 U.S.C. § 1054(h) prohibits plan sponsors from taking certain actions that reduce benefits without written notice to participants affected by the reduction.

The common sense remedy for a benefit reduction in violation of ERISA's notice requirement is to invalidate the offending action, entitling participants to benefits "without regard to" the reduction. 29 U.S.C. § 1054(h)(6).[5] Thus, the consequence for notice violations under ERISA is the same as that affixed for unconstitutional impairments by Georgia's Constitution. See McGahee at 78 ("[T]he impairment clause of our constitution . . . precludes the application of an amendatory statute or ordinance in the calculation of the employee's retirement benefits if the effect of the amendment is to reduce rather than increase the benefits payable."). "[N]o man ought to be permitted to profit by a failure upon his own part to perform the obligations imposed upon him by the terms of an agreement to which he was himself a party." Finney v. Blalock, 206 Ga. 655, 659 (1950).

[5] See e.g., Hirt v. Equitable Ret. Plan For Employees, Managers & Agents, 441 F. Supp. 2d 516, 531 (S.D.N.Y. 2006), decision supplemented, No. 01 CIV.7920(AKH), 2006 WL 2627564 (S.D.N.Y. Aug. 24, 2006), and decision supplemented sub nom. Hirt v. Equitable Ret. Plan for Employees, 450 F. Supp. 2d 331 (S.D.N.Y. 2006), and aff'd, 533 F.3d 102 (2d Cir. 2008), and aff'd in part, 285 Fed.App'x 802 (2d Cir. 2008).

Denying employees a meaningful remedy for the District's violation of the notice requirement it enacted would reward Defendants for their own wrongdoing.

In this case, the lack of notice was substantive, particularly so because it was for such a significant time period of two years. V-25/R-7481, R-7492. Within a two year period, public comment can transpire; public hearings prior to a passage of such a significant change in legislation can occur; elections of new Board members are held; the free press spotlights key issues; and employee associations contribute input.

None of this *vox populi* had the chance to occur in this rushed and quiet action where Defendants would later admit their mistake, backtrack, and promise (unfaithfully) to correct it. See Appellees' Brief pp. 9-10. Notably, within the two year timespan it would have taken to provide notice, the Superintendent and high-ranking administrators were removed from office, leading to their indictment. Lewis v. State, 330 Ga. App. 412 (2014), aff'd, 298 Ga. 126 (2015). Had the notice been observed as required, the reduction might not have resulted in the costly outcome it did. Such developments prove how, in real life, the two year notice was substantive.

What is irrefutable is that on June 14, 1982, "the board amended the By-Laws and Policies of the DeKalb County Board of Education" to mandate this

"Alternative Plan to Social Security." V-11/R-3514. The purpose of this legislative act was "to ***ensure*** that employees of the DeKalb County School System are provided retirement and insurance plans as alternatives to Social Security." V-25/R-7481, R-7492. It required that the Board "***Shall*** provide all full-time employees with an alternative program to Social Security," a "supplemental retirement plan paid for the Board of Education" and that the Board "***shall*** give two year notice before reducing the funding" to this Alternative plan. V-25/R-7481, R-7492. It is misguided to paint this as less than a legislative mandate establishing a contractual obligation to provide a two year notice.

Defendants suggest prior courts have engrafted an "establishment-of-a-retirement-plan element" upon the Constitution's Impairments Clause that is nonexistent. Defendants extract this so-called test from a dogmatic reading of judicial opinions regarding retirement benefits. See Appellants' Brief at 16 (quoting Ayers, 294 Ga. at 830). However, "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979). It is improbable that the authors of Ayers or Borders imagined they were adding to (or subtracting from) the plain language of the Georgia Constitution. In actuality, prior decisions did not, and could not, restrict the ambit of Georgia's Constitution. The Impairments Clause protects all statutory

promises of rights or benefits to public employees, including but not limited to those regarding "retirement-plan benefits."

To suggest that the 403b plan documents (which were intended to be subordinate to the DFBA policy, supra p. 7), take precedence over a governmental law is absurd. See Defendant/Appellants' Brief p. 29 ("the 1982 Policy expressly yielded to the TSA Plan"). Under the Defendants' reasoning, those 403b plan documents could supersede the rights of public employees and nullify promises of benefits made in a government employer's official and public legislation. Endorsing Defendants' bait and switch argument would lend judicial imprimatur to government benefits fraud practiced upon public employees throughout our state. In reality, such behavior is checked by the Impairments Clause in combination with the Ga. Constitution's express waiver of sovereign immunity for actions on written contracts. Ga. Const. of 1983, Art. I, Sec. II, Para. IX(c). Georgia's Constitution enshrines the Impairments Clause in combination with waiver for actions on written contract. In tandem, these two doctrines underscore the gravity of harm and offense by the trial court adopting the Defendants' legal position. But the trial court's Order turns this on its head. If that result stands, such government benefits fraud would be shielded under the State's cloak of sovereign immunity.

To call contracts for retirement benefits unenforceable "gratuities" cannot be reconciled with the standard of integrity and fair dealing that employees have a right to expect from their government employers. Defendants' characterization ignores the practical benefits—such as workforce loyalty and retention—that government employers receive in exchange for making such promises. Finally, Defendants' argument that policies are insignificant as a matter of law would fundamentally compromise the governing structure from which boards of education and school districts operate under.

The approach suggested by the Brief of Appellants is flawed. The "proper test" is no mystery. Time and again, courts have looked to legislative language (here, a Board Policy), to decide whether a statute or ordinance makes a statutory promise binding upon a government employer. GAE does not endorse a view that would hold public employers "hostage in the administration of employee benefit plans." Appellants' Brief at 29. But that is not what Gold III did and it is not what GAE understands to be at issue.

This case is not about whether a statute "can never be modified or abandoned even if the public employer reserved the right to do so." Appellants' Brief, p. 29. Nor does Gold III hold such a belief. The simple fact is that Defendants made a specific promise governing how and when they could reduce funding for

this retirement benefit. To show how much they meant it, the Board enacted that promise into policy.

Under Georgia's Constitution, the Court of Appeals was right to focus on the language of the legislative act. As Appellees correctly state, government employers are not without options. Appellees' Brief, pp. 1-2. Government employers can specifically reserve the right to terminate or amend employee benefits. Or they can promise certain benefits without reserving a right to terminate or amend. Or they can pass a law regarding benefits promising not to terminate or reduce except under certain conditions. In any of the three scenarios, the parties are entitled only to what was promised.

Trusting courts to decide which option was chosen according to the language enacted by a government is hardly the dangerous legal aberration portrayed by the Defendants. To the contrary, such trust comports with Georgia's Constitution and basic principles of contract law. The Court of Appeals was correct to recognize this.

CONCLUSION

For all of the forgoing reasons, Amicus Curiae GAE respectfully urges this Court to AFFIRM.

Respectfully submitted this 26th day of April 2019,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served a true and correct copy of the foregoing AMICUS BRIEF OF THE GEORGIA ASSOCIATION OF EDUCATORS by filing same with the Court's electronic case management system and also via United States Mail, in a properly addressed envelope with adequate postage affixed thereon upon the following counsel of record:

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