No. A19A1665

IN THE GEORGIA COURT OF APPEALS
STATE OF GEORGIA

REBECCA BARNES, *et al.*,
Plaintiffs-Appellees

v.

BOBBY BEARDEN *et al.*,
Defendants-Appellants

ON APPEAL FROM THE SUPERIOR COURT OF FULTON COUNTY

BRIEF FOR APPELLANTS

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PART ONE

PROCEEDINGS BELOW

This action was brought by Plaintiffs Rebecca Barnes, a veteran teacher who had 18 years of classroom experience before her dismissal by Fannin County School System ("FCSS"), and the Georgia Association of Educators ("GAE"), a membership organization representing the interests of public education employees throughout the state. In their Amended Complaint, plaintiffs challenge, under the anti-retroactivity and anti-impairment-of-contract clauses of Article I, Section I, Paragraph X of the Georgia Constitution, the defendants' application of the Charter Systems Act (O.G.C.A. § 20-2-2063.2 *et seq.*) to deny Barnes and other similarly situated educator members of GAE the employment protections that those educators previously earned under Georgia's Fair Dismissal Act (O.G.C.A. §§ 20-2-940 *et seq*.).

More specifically, plaintiffs maintain that while the FCSS and the State Board of Education entered into a charter, pursuant to the Charter Systems Act, that waives the provisions of the Fair Dismissal Act, that waiver cannot constitutionally be applied to educators like Barnes who earned the Fair Dismissal Act's protections before the charter came into effect. That is because such educators have vested, contractual rights to the Fair Dismissal Act's protections

that are safeguarded by the anti-retroactivity and anti-impairment-of-contracts clauses of Article I, Section I, Paragraph X of the Georgia Constitution. The denial of those rights by reason of the charter in general, and FCSS's dismissal of Barnes without complying with the Fair Dismissal Act in particular, violate the Georgia Constitution's prohibitions against laws that impair contractual rights and retroactively injure vested rights. Amended Complaint ¶¶ 48-62. Barnes seeks a declaration that her dismissal violated Article I, Section I, Paragraph X of the Georgia Constitution and injunctive relief ordering her reinstatement with backpay. GAE, invoking associational standing, seeks a declaration that the charter cannot waive the Fair Dismissal Act rights of educators working for FCSS who earned those rights before FCSS entered into its charter with the State Board of Education and an injunction requiring the members of the FCSS Board and of the State Board of Education to honor those rights. Complaint at 15-16.

The defendant members of the State Board of Education moved to dismiss the Amended Complaint, and the Superior Court heard that motion on February 4, 2019. At the close of the hearing, the Superior Court issued an oral ruling dismissing the Amended Complaint with respect to all defendants, which the Superior Court memorialized in a written order the same day. Two holdings in the oral ruling are relevant to this appeal. First, the Superior Court concluded that this

Court's decision in *Day v. Floyd County Board of Education*, 333 Ga. App. 144, 775 S.E.2d 622 (2015), forecloses plaintiffs' constitutional claims. Tr. at 6-7. On that basis, the Superior Court found it "settled that the rights of educators are determined by statute and are to be looked at at the time of the entry into their employment contracts" and that under the Charter Schools Act, "the rights which might exist under the Fair Dismissal Act cease to exist upon entry into a contract with a charter school system." Tr. at 6. Second, the Superior Court concluded that Barnes's claims were barred by official immunity on the theory that because Barnes's employment was terminated, "her rights and the position of the defendants have all been finalized and [accrued]," such that "she would not be entitled to proceed as to the issues of either declaratory or injunctive relief." Tr. at 4-5.

MATERIAL FACTS

The Amended Complaint alleges the following material facts, which are assumed to be true for the purposes of reviewing the trial court's grant of the motion to dismiss. *See Ass'n of Guineans in Atlanta, Inc. v. DeKalb Cty.*, 292 Ga. 362, 363, 738 S.E.2d 40, 41 (2013).

A. Statutory Background

1. The Fair Dismissal Act

Under the Fair Dismissal Act, a teacher who accepts employment with a Georgia school system, successfully completes a probationary period of 3 years' continuous employment, and accepts the school system's offer of an employment contract for a fourth year earns two basic employment protections: (1) protection against dismissal for any reason other than those specified in the statute; and (2) the right to notice, an opportunity for a hearing before the Board of Education, and a right to appeal to the State Board of Education in the event that a school board decides to dismiss the teacher for one of the statutory reasons. These individually earned rights are valued by educators and offset the low pay that public school educators earn relative to other professions requiring comparable academic credentials and training. Amended Complaint ¶ 26.

Specifically, the Fair Dismissal Act provides that after a teacher "accepts a school year contract for the fourth consecutive school year from the same local board of education," the teacher may be non-renewed or demoted for eight reasons, including "[i]ncompetency," [i]nsubordination," "[w]illful neglect of duties," and "to reduce staff due to loss of students or cancellation of programs." O.C.G.A. §§ 20-2-942(b)(1), 20-2-940(a). Before a school board may dismiss a teacher who

has earned the protections of the Fair Dismissal Act, the school board must provide the teacher with written notice stating the reasons for the board's intended action and listing the witnesses that the board intends to call, along with summaries of the evidence that may be used against the educator. O.C.G.A. § 20-2-942(b)(2). The school board also must provide the teacher with an opportunity for a hearing before the board at which the teacher has the right to counsel and the right to compulsory process for securing the participation of witnesses. *Id.* § 20-2-940(e). In the event of an adverse decision, the teacher may appeal to the State Board of Education. *Id.* § 20-2-940(f).

Barnes earned the protections of the Fair Dismissal Act in 2003, when, after having successfully completed her three-year probationary employment period, was offered a contract for the 2003-04 school year and accepted that offer. Complaint ¶ 2. GAE's members include many educators working at FCSS schools who also earned the protections of the Fair Dismissal Act before FCSS converted into a charter system on July 1, 2015. Barnes and other similarly situated educators relied on the benefits offered by the Fair Dismissal Act in making important career decisions. The Fair Dismissal Act's protections furnish educators with a measure of security against arbitrary or wrongful discharge and thus constitute a valuable employment benefit that helps offset the low pay that Georgia

public school educators receive. Consequently, the opportunity to earn the law's protections upon satisfying its requirements was an inducement to accept employment with FCSS and to remain employed. Barnes—as well as other similarly situated GAE members—bargained for and earned these benefits in accepting employment with FCSS, remaining employed during the Fair Dismissal Act's probationary period, and accepting an employment contract for a fourth consecutive year. Amended Complaint ¶ 29.

2. The Charter Systems Act of 2007

The Charter Systems Act authorizes the conversion of public school systems into what the law terms "charter school systems." Such "charter school systems" are not school systems composed of charter schools. Rather, a "charter school system" is a school system that operates under a "charter" granted by the State Board of Education, which is a contract between the school system and the State Board of Education that governs the school in lieu of many of the laws and regulations that otherwise govern school systems. Amended Complaint ¶ 31.

The Charter Systems Act authorizes the State Board of Education "to enter into a charter with a local board to establish a local school system as a charter system" and sets out the requirements that a local system must follow in order to become a charter school system. O.C.G.A. § 20-2-2063.2. When a school system

successfully petitions the state board to become a charter school system, it enters into a contract with the state board in which the school system agrees to meet certain goals and undertake various responsibilities for the duration of the charter. Amended Complaint ¶ 32.

In exchange for these undertakings, the school system is exempted from many of the laws and regulations that otherwise apply to school systems:

> Except as provided in this article or in a charter, … each school within the [charter school] system, shall not be subject to the provisions of this title or any state or local rule, regulation, policy, or procedure relating to schools within an applicable school system regardless of whether such rule, regulation, policy, or procedure is established by the local board, the state board, or the Department of Education.

O.C.G.A. § 20-2-2065(a). The next subsection sets forth a number of exceptions, *i.e.* laws and regulations that a charter cannot waive—providing that each school within a charter school system shall be:

> [s]ubject to all federal, state, and local rules, regulations, court orders, and statutes relating to civil rights; insurance; the protection of the physical health and safety of school students, employees

Id. § 20-2-2065(a). In *Day v. Floyd County Board of Education*, 333 Ga. App. 144, 147-48, 775 S.E.2d 622, 625 (2015), this Court, interpreting the latter provision held that the Fair Dismissal Act does not fall within the statutory exception for "statutes relating to civil rights" and thus is waived by a charter

absent a provision of the charter specifying that that the Fair Dismissal Act is not waived.

B. FCSS Becomes a Charter School System

In the fall of 2014, FCSS petitioned the State Board of Education to become a charter school system; the members of the State Board of Education voted to approve the FCSS petition at their April 2, 2015 meeting. On June 11, 2015, FCSS and the State Board of Education entered into a charter agreement in force from July 1, 2015 until June 30, 2020. Amended Complaint ¶¶ 36-37. The charter agreement grants FCSS "the maximum flexibility allowed by state law from the provisions of Title 20 of the [Georgia Code] and from any state or local rule, regulation, policy, or procedure established by the Local Board or the Georgia Department of Education." The charter does not specifically exempt the Fair Dismissal Act from this waiver. Amended Complaint ¶ 38.

C. FCSS Dismisses Plaintiff Barnes Without Honoring the Rights that She Previously Earned Under the Fair Dismissal Act

By letter dated May 12, 2017, FCSS informed Barnes that it was terminating her employment, stating, "You are hereby notified that your contract of employment with the Fannin County Board of Education will not be renewed for the 2017-2018 school year." Amended Complaint ¶ 42. Contrary to Barnes's

previously earned rights under the Fair Dismissal Act, FCSS did not provide Barnes notice of the reasons for her termination and did not provide Ms. Barnes any opportunity for a hearing to challenge the school board's decision. Amended Complaint ¶¶ 43-44.

PART II

ENUMERATION OF ERRORS

I. The trial court erred in concluding that plaintiffs' claims are foreclosed by this Court's decision in *Day v. Floyd County Board of Education*.

II. The trial court erred in dismissing Barnes's claim as barred by official immunity on the theory that Barnes's dismissal from employment made her ineligible for prospective relief.

STATEMENT OF JURISDICTION

Plaintiffs appeal to this Court under the recent amendments to O.C.G.A. § 15-3-3.1 (effective Jan. 1, 2017). Those amendments provide that "the Court of Appeals rather than the Supreme Court shall have appellate jurisdiction," with exceptions not relevant here, "in … [a]ll equity cases" and "[a]ll cases involving extraordinary remedies." *Id.* § 15-3-3.1(a)(2) and (4). This case falls within the literal terms of these provisions, inasmuch as the Complaint seeks the equitable remedy of permanent injunctive relief.

That said, plaintiffs' claims arise under the Georgia Constitution, and neither this Court nor the Supreme Court has yet construed the amendments to § 15-3-3.1 as they apply to cases such as this one, where plaintiffs seek equitable and extraordinary relief in connection with constitutional claims. Given that the Georgia Supreme Court has exclusive jurisdiction over appeals in which the constitutionality of a law has been challenged or involving the construction of Georgia Constitution, Ga. Const. art. VI, § 6, ¶ II, there is some tension between the Supreme Court's exclusive jurisdiction and the application of the literal terms of the amendments to § 15-3-3.1 in cases raising constitutional claims.

In the absence of an authoritative construction of the amendments § 15-3-3.1, we submit that while there may be some cases in which this Court should yield to the Supreme Court given this tension, this may not be such a case given that it involves no novel issue of constitutional law and raises no facial challenge to the Charter Systems Act, but instead challenges the constitutionality of defendants' particular application of that law under constructions of the Georgia Constitution already rendered by the Georgia Supreme Court. That said, however, the question whether the Court of Appeals has jurisdiction under these circumstances is a novel one, the answer to which is one on which reasonable minds can certainly differ. Consequently, we ask that the Court consider this

question in light of the parties' arguments on the merits. Should the Court, after such review, conclude that the Supreme Court does have exclusive jurisdiction over this appeal, we respectfully request that this Court transfer the case to the Supreme Court pursuant to Rule 11(b) and (c) of the Georgia Court of Appeals Rules.

PART THREE: ARGUMENT

This Court reviews the grant of a motion to dismiss *de novo*, applying the same standard as the trial court, to wit that a motion to dismiss may be granted only where a complaint shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proven in support of the claims. *Ardizonne v. Dep't of Human Res.*, 258 Ga. App. 858, 858, 575 S.E.2d 738, 739 (2002). For the following reasons, that standard was not met here, and the Superior Court's dismissal of the Amended Complaint must be reversed.

I. THE SUPERIOR COURT ERRED IN CONCLUDING THAT PLAINTIFFS' CLAIMS UNDER ARTICLE I, SECTION I, PARAGRAPH X OF THE GEORGIA CONSTITUTION ARE FORECLOSED BY THIS COURT'S DECISION IN *DAY V. FLOYD COUNTY BOARD OF EDUCATION*

Plaintiffs' claims arise under the clauses of Article I, Section I, Paragraph X of the Georgia Constitution prohibiting "retroactive law[s], or laws impairing the obligation of contract." In brief, plaintiffs claim that Barnes and other similarly

situated teachers who earned the protections of the Fair Dismissal Act before FCSS's conversion to a charter system gained vested, contractual rights to the Fair Dismissal Act's protections that are safeguarded by the anti-retroactivity and anti-impairment-of-contracts clauses of the Georgia Constitution and that the denial of those rights by reason of the charter in general—and FCSS's dismissal of Barnes without complying with the Fair Dismissal Act in particular—therefore rest on an unconstitutional application of the Charter Systems Act.

The Superior Court dismissed plaintiffs' claims as foreclosed by *Day v. Floyd County Board of Education*, 333 Ga. App. 144, 775 S.E.2d 622 (2015), on the theory that the rights plaintiffs are asserting here "are determined by the statute and are to be looked at at the time of the entry of their employment contracts," a theory that the trial court derived from this Court's decision in *Day*. Tr. at 5-7. This ruling is erroneous as it is based on a misreading of the *Day* decision and a misunderstanding of the nature of the constitutional claims at issue. As we detail below, (a) *Day* does not speak at all to the claims raised here because it did not arise under the anti-impairment-of-contract or anti-retroactivity clauses of the Georgia Constitution but instead was concerned only with the interpretation of a statutory exception to the Charter Schools Act; and (b) claims that arise under the anti-impairment-of-contracts and anti-retroactivity provisions of the Georgia

Constitution by their very nature concern rights that vested *prior to a change in the governing law that purports to take those rights away*, that is to say, it is the very application of the current law to defeat previously vested rights that constitutes the constitutional violation asserted here.

(a) The Superior Court erred, first of all, in concluding that *Day v. Floyd Cty. Bd. of Educ.*, 333 Ga. App. 144, 147-48, 775 S.E.2d 622, 625 (2015), applies here and forecloses plaintiffs' constitutional claims. That is because *Day* did *not* address any claim that a change in governing law violated the anti-retroactivity or anti-impairment-of-contracts provisions of the Georgia Constitution but instead dealt solely with the interpretation of a statutory exception to the Charter Systems Act.

Day involved a school counselor whose contract was non-renewed by the school district after the district had converted into a charter school district. As is the case here, the charter under which the district was operating contained a "maximum flexibility" waiver provision that did not preserve educators' rights under the Fair Dismissal Act. After receiving the notice of non-renewal, the counselor, Gilda Day, requested a hearing pursuant to the Fair Dismissal Act. The school board granted a hearing but upheld Day's dismissal. Day then appealed her dismissal to the State Board of Education pursuant to the Fair Dismissal Act. The

State Board of Education took jurisdiction over the appeal and ruled in Day's favor, finding that the Fair Dismissal Act applied and that her dismissal was unwarranted. The school district then sought judicial review, arguing that the charter under which it was operating had waived the provisions of the Fair Dismissal Act. 333 Ga. App. at 144-46, 775 S.E.2d at 623-24.

In that judicial review action, Day argued that she retained her Fair Dismissal Act rights after the conversion of the school district into a charter system not by reason of any vested or contractual rights safeguarded by the Georgia Constitution. Rather, Day's appeal was based on an interpretation of the Charter Systems Act itself. Specifically, Day argued that the "Fair Dismissal Act is among the 'statutes relating to civil rights'" that O.C.G.A. § 20-2-2065(b)(5) references, and consequently that her Fair Dismissal Act rights were statutorily exempted from the general waiver provision of the school district's charter. 333 Ga. App. at 148, 775 S.E.2d at 625.

This Court rejected Day's statutory-interpretation argument. Based on an examination of the text of the Charter Systems Act, this Court held that the Fair Dismissal Act "plainly is not one of the 'statutes relating to civil rights' referenced in OCGA § 20-2-2065(b)(5)" and thus that "the General Assembly has provided that, absent a provision in the charter to the contrary, charter schools and charter

systems shall not be subject to the Fair Dismissal Act." 333 Ga. App. at 148-49, 775 S.E.2d at 625-26.

As is clear from the *Day* opinion, this Court plainly did *not* consider, much less decide, the question at issue here—namely, whether a teacher who has earned Fair Dismissal Act rights prior to a school system's conversion into a charter system has vested contractual rights to the Fair Dismissal Act's protections for the purposes of the anti-retroactivity and anti-impairment-of-contracts provisions of the Georgia Constitution. Indeed, the *Day* Court expressly acknowledged that the appeal raised no constitutional issues and that the Court was not deciding any constitutional issues. 333 Ga. App. at 149 n.5, 775 S.E.2d at 625 n.5. Thus, to the extent that any of the language in the *Day* opinion concerning the plaintiff's lack of tenure protections after she accepted employment with a charter system could be read as having any broader significance beyond the decision's narrow statutory holding, that language must be considered *dicta*.

In sum, because the *Day* decision did not address, much less decide, the constitutional issues raised here, it was error for the Superior Court to conclude that *Day* is controlling authority.[1] This conclusion is all the more clear upon closer

[1] We note that the Superior Court also cited to the unpublished order in *Georgia Association of Educators v. Atlanta Independent School System*, No. A18A1038

examination of the issues raised by the Amended Complaint, to which we now turn.

(b) Contrary to the Superior Court's reasoning, plaintiffs' constitutional claims are *not* assessed on the basis of the law in effect when Barnes and other similarly situated educators entered into annual employment contracts *after* FCSS became a charter system, but instead on the basis of the law when Barnes and other similarly situated teachers earned the protections of the fair Dismissal Act, which was *before* FCSS became a charter system.

While arising under two separate constitutional prohibitions, plaintiffs' claims share a common legal theory, to wit that educators, like Barnes, *who earned the protections of the Fair Dismissal Act before FCSS converted into a charter system on July 1, 2015* gained vested, contractual rights to those protections that are safeguarded by the anti-impairment-of-contract and anti-retroactivity clauses of the Georgia Constitution and therefore that the defendants' application of the FCSS charter to deny those educators' Fair Dismissal Act rights is unconstitutional. That underlying theory is fully supported by the relevant precedents.

(Ga. Ct. App. Oct. 17. 2018). But, as an unreported decision, that order "is neither physical nor binding precedent." Ga. Ct. App. R. 33.2(b); *Spurlock v. Dep't of Human Res.*, 286 Ga. 512, 514, 690 S.E.2d 378, 381 (2010). That order therefore cannot in any way support the Superior Court's decision.

With respect to the constitutional prohibition against impairing contracts, the Georgia Supreme Court has repeatedly held that statutes creating benefits for public employees operate as contracts and that when an employee's rights under those statutory contracts are vested, those rights cannot be impaired by subsequent legislative acts. *See Withers v. Register*, 246 Ga. 158, 159, 269 S.E.2d 431 (1980) (holding, with respect to public-employee retirement benefits statute, that "a constitutional Act of the Legislature, which is equivalent to a contract when performed, is a contract executed, and whatever rights are thereby created, a subsequent Legislature cannot impair"); *Swann v. Bd. of Trustees*, 257 Ga. 450, 454, 360 S.E.2d 395 (1987) (same). *See also Spengler v. Employers Commercial Union Ins. Co.*, 131 Ga. App. 443, 446, 206 S.E.2d 693, 696 (1974) (workers' compensation statute created contract governing "the relation between the employer and employee … in derogation of the common law rights of each").

The key question in contract-impairment cases arising under such legislation "is whether there was a vested right" under the law that existed *before* the "subsequent legislative act" that purports to impair that right. *Spengler*, 131 Ga. App. at 450, 206 S.E.2d at 698. In the case of statutes creating public-employee retirement benefits, employees' contract rights vest when they become participants in the plan by performing valuable services for their public employer:

> It is not necessary for an application of this rule that the rights of the employee shall have become vested under the terms of the retirement plan ... Rather, if the employee performs services during the effective dates of the legislation, the benefits are constitutionally vested, precluding their legislative repeal as to the employee.

Withers v. Register, 246 Ga. 158, 159, 269 S.E.2d 431 (1980).[2]

In sum, the anti-impairment-of-contact analysis, by its very nature looks to the state of the law at the time that a plaintiff's rights were allegedly vested, which is of course *before* the legislative act that is alleged to impair those rights. As the Supreme Court of the United States held, in a case arising under the anti-impairment-of-contract clause of the United States Constitution, "the question is whether the State granted a valuable right which it subsequently essayed to take away.". *See Wood v. Lovett*, 313 U.S. 362, 371 (1941)); *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 894 (7th Cir. 1998) (Anti-impairment-of-contracts analysis focuses on "the law when the original contract was made").

[2] This vesting principle applies regardless of whether the employee makes any monetary contributions to the retirement plan; as retirement benefits are part of an employee's compensation for services rendered, it is the employee's performance of services that supplies the consideration necessary for vesting. *See Malcolm v. Newton Cty.*, 244 Ga. App. 464, 467, 535 S.E.2d 824, 827 (2000) (Employee "obtained a vested contractual right in the plan in consideration for his performance of services …. The fact that [he] made no contribution to the County-funded plan does not render the pension a gratuity which the County could terminate at will.").

The same holds true for the anti-retroactivity clause. The question presented under this provision, by its very nature, concerns whether the plaintiff has a private right that vested *before the act challenged as a retroactive injury to that right*: "Even when the General Assembly clearly provides that a law is to be applied retroactively, our Constitution forbids statutes that apply retroactively so as to 'injuriously affect the vested rights of citizens.'" *Deal v. Coleman*, 294 Ga. 170, 175, 751 S.E.2d 337, 343 (2013). *See also Fulton Cty. v. Action Outdoor Advert., JV*, 289 Ga. 347, 351, 711 S.E.2d 682, 686 (2011) ("[T]he creation of the new cities by the General Assembly and the annexation of property could not constitutionally and retroactively divest these companies of their vested rights to construct signs pursuant to the applications they filed in Fulton County at a time when Fulton County had no valid sign regulations and the cities did not yet exist.").

All this being so, the Superior Court's theory that plaintiffs' rights are to be determined by the legal regime in force *after* FCSS converted into a charter system could hardly be more wrong. It is that very conversion—which applied the Charter Systems Act to take away the Fair Dismissal Act protections of educators such as Barnes, who earned those protections before FCSS's conversion—that is challenged here as an unconstitutional impairment of contract rights and an

unconstitutionally retroactive application of the Charter Systems Act. To say that the FCSS charter waives those protections merely poses the question presented here; it does not answer it.

Under the proper constitutional analysis, it is plain that the Amended Complaint states claims under the anti-impairment-of-contracts and anti-retroactivity clauses of the Georgia Constitution. The Amended Complaint establishes that Barnes—who earned the protections of the Fair Dismissal Act in 2003, prior even to the enactment of the Charter Systems Act in 2007—and all other FCSS educators who earned the protections of the Fair Dismissal Act before July 1, 2015, had contractual and vested, private rights prior to the 2015 conversion of FCSS into a charter system.

Although the Georgia Supreme Court has not yet had occasion to consider whether the public-employee benefits provided by the Fair Dismissal Act constitute vested contractual rights under Article I, Section I, Paragraph X of the Georgia Constitution, its reasoning in statutory-retirement-benefits cases such as *Withers* and *Swann* apply with full force in this context. Like the retirement benefits statutes at issue in those cases, the Fair Dismissal Act offers prospective employees valuable employment benefits as an inducement (here, benefits that offer some assurance of job security by limiting the causes for discharge and

providing due process procedures in discharge cases) and provides that employees can enjoy those benefits if they accept employment and satisfy certain conditions (here, completing a three-year probationary period, followed by acceptance of a school district's offer of a contract for further employment). Amended Complaint □□ 29, 57-58. Those valuable employment benefits are part of the overall package of compensation and benefits available to educators who choose to work for Georgia public school systems, for which educators provide consideration by performing valuable services for Georgia public school systems. *Id.* Once Barnes and other similarly situated educators satisfied the Fair Dismissal Act's requirements, and thereby earned its protections before the 2015 conversion of FCSS into a charter system, those educators had vested and contractual rights protected by Article I Section I, Paragraph X of the Georgia Constitution every bit as much as the public employees in the *Withers* and *Swann* line of cases had in their retirement plans.

Equally to the point, the United States Supreme Court and courts in other jurisdictions have considered this issue and held that teacher tenure statutes that are indistinguishable from the Fair Dismissal Act create contractual rights that vested in teachers who had satisfied their requirements before subsequent legislation purported to take those rights away.

In *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), the United States Supreme Court held that the fair-dismissal protections of Indiana's Teacher Tenure Act conferred contract rights on teachers who had earned the law's protections, and went on to hold that later-enacted law repealing those already-earned protections violated the anti-impairment-of-contracts clause of the United States Constitution. For the purposes of this appeal, *Brand*'s importance lies in first ruling. On this question, the *Brand* Court explained that although "the principal function of a legislative body is not to make contracts but to make laws that declare the public policy of the state and are subject to repeal," a special case is presented where legislation "contain[s] provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions." 303 U.S. at 100.

In concluding that the Indiana tenure statute was just such a law, the Court examined the text and meaning of the law, considered in light of the policy undergirding it. The Court began its analysis noting that "the cardinal inquiry is as to the terms of the statute supposed to create a contract." *Id.* at 104. The tenure statute, the Court observed, provided that teachers, after serving at-will for five years under annual contracts and being re-employed for a further year, could be terminated "only upon compliance with the terms of the statute"—*i.e.*, only "after

notice and hearing" and only "for incompetency, insubordination, neglect of duty, immorality, justifiable reduction in the number of teaching positions, or other good and just cause, but not for personal or political reasons." *Id.* at 103-04. The Court went on to note that the statutory scheme referred frequently to contracts between school districts and employees. *Id.* Based on these provisions, the Court concluded that the tenure law "announced a … policy that a teacher who had served for 5 years under successive contracts, upon the execution of another was to become a permanent teacher and the last contract was to be indefinite as to duration and terminable by either party only upon compliance with the conditions set out in the statute." *Id.* And more recently, the Seventh Circuit relied on *Brand* to hold that the elimination of retention priority for tenured teachers during layoffs was unconstitutional, stating "when a legislature uses contractual language that induces public reliance, it can create an enforceable contract, as the Supreme Court held Indiana's teacher tenure law did." *Elliott v. Bd. of Sch. Trustees of Madison Consol. Sch.*, 876 F.3d 926, 932 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2624 (2018).

The North Carolina Supreme Court also recently struck down a retroactive repeal of that state's fair dismissal law (entitled "the Career Status Law") under the anti-impairment-of-contract provision of the United States Constitution. *See N.C.*

Ass'n of Educators, Inc. v. State, 786 S.E.2d 255 (N.C. 2016). In so doing, the court found that the teacher plaintiffs had gained contractual rights prior to the repeal of the Career Status Law when they satisfied the law's requirements by accepting school districts' contract offers after successfully completing their probationary service:

> *A teacher's career status rights under the Career Status Law become vested only upon completing several consecutive years as a probationary teacher and then receiving approval from the school board. …. At the time the parties made the contract, the right to career status vested*. At that point, the General Assembly no longer could take away that vested right retroactively in a way that would substantially impair it.

Id. at 264 (emphasis added).

The provisions of Georgia's Fair Dismissal Act are indistinguishable from those of the Indiana Tenure Act at issue in *Brand* or the North Carolina Career Status Law at issue in *North Carolina Association of Educators*. As detailed above, under the Fair Dismissal Act, a teacher who successfully completes a three-year period of probationary employment with a Georgia school system, and then accepts the school system's offer of a contract for a fourth year, earns two valuable job protections: (1) protection against non-renewal of his or her employment contract for any reason other than the eight causes specified by the law, *see* Ga. Code Ann. §§ 20-2-942(b)(1), 20-2-940(a)(1)-(8); and (2) the right to notice, the

opportunity for a hearing, and an appeal to a disinterested party in the event that a school system decides to non-renew a teacher's contract or demote the teacher, *see id.* § 20-2-942(b)-(f). Thus, like the laws at issue in *Brand* and *North Carolina Association of Educators*, the law offers teachers and prospective teachers a bargain: If you successfully complete a years-long probationary period and are offered—and accept—employment for a fourth year, then you earn those valuable job protections. *See N.C. Ass'n of Educators*, 786 S.E.2d at 264 (noting that fair-dismissal protections "have value to prospective teachers," which "makes up for not having better monetary compensation,'" and that teachers rely on the availability of those protections in making career decisions). Teachers achieve those protections in exchange for a course of performance involving acceptance of employment contracts and the considerable investment of three years of work, with all the attendant opportunity costs, which forms the consideration exchanged for the protections offered by the law.

What is more, the Fair Dismissal Act scheme is analogous in all material respects to the statutory retirement benefit schemes at issue in *Swann* and *Withers*. Indeed, the North Carolina Court Appeals, in the decision affirmed in *North Carolina Association of Educators*, *supra*, made this very point: "There is a useful parallel between job security that derives from [fair-dismissal protections] and the

economic value of retirement benefits," inasmuch as "the prospect of earning career protections, and the job security that comes with them, has economic value to teachers, and is an important part of the package of pay and benefits that individuals consider when deciding whether to become teacher " in the same way that retirement benefits do. *N. Carolina Ass'n of Educators, Inc. v. State*, 776 S.E.2d 1, 10-11 (N.C. Ct. App. 2016) (citation and quotation marks omitted), *aff'd as modified*, 368 N.C. 777, 786 S.E.2d 255 (2016).

In sum, the Superior Court erred in concluding that this Court's statutory interpretation decision in *Day* applies to the constitutional question here. Moreover, the Superior Court erred in deriving from *Day* the proposition that plaintiffs' constitutional claims must be assessed on the basis of the law in effect when Barnes, along with other similarly situated teachers, entered into annual employment contracts *after* FCSS converted into a charter system rather than when the Amended Complaint alleges that their rights under the Fair Dismissal Act vested, which was *before* FCSS converted into a charter system.[3]

[3] To the extent that the Superior Court's ruling may be understood to have given controlling weight to the fact that tenured teachers enter into contracts from year to year, that, too, was error. The annual-contract procedure is customary under teacher tenure statutes, but the contracts created by the tenure laws themselves are *continuing contracts*. *See Brand*, 303 U.S. at 102 (When teacher, upon completing probationary employment, "thereafter enters into a contract for further service with

II. THE TRIAL COURT ERRED IN DISMISSING BARNES'S CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF AS BARRED BY OFFICIAL IMMUNITY

The Superior Court also dismissed Barnes's claims as barred by official immunity. The basis for this ruling, as to which the court offered no authority, was that Barnes was not entitled to any prospective relief on the erroneous theory that Barnes's injury has been "finalized" and that there is no "continuing" injury to be

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the school corporation," the contract "shall be deemed to continue in effect for an indefinite period."). The decision of the North Carolina Court of Appeals in the case discussed in text makes this point. The court there flatly rejected the State's argument that the plaintiffs' entry into individual contracts each year defeated their impairment-of-contracts claim, stating:

> The State's argument fundamentally misconstrues the basis for Plaintiffs' claims under the Contract Clause. Put simply, Plaintiffs are not suing based on their individual contracts, but instead based on the State's statutory promise … that teachers who satisfied the requirements of the Career Status Law and earned that status would be entitled to its protections, and it is that contractual promise … that Plaintiffs allege was substantially impaired by the Career Status Repeal.

North Carolina Ass'n of Educators, 241 N.C. App. at 300, 776 S.E.2d at 12, *aff'd as modified*, 368 N.C. 777, 786 S.E.2d 255 (2016). As the Indiana Supreme Court has held, a tenure contract "must be held to remain valid and enforceable to the end, under the laws in force at the time of its execution, no matter what changes the law has undergone in the lifetime of the contract." *Bruck v. State ex rel. Money*, 91 N.E.2d 349, 352-54 (Ind. 1950) (quotation marks and citations omitted). *See also Chambers v. Cent. Sch. Dist. Sch. Bd. of Greene Cnty.*, 514 N.E.2d 1294, 1297 (Ind. Ct. App. 1987) (A tenured teacher's annual "written contract does not preempt a teacher's rights secured by the statutes.").

addressed through the award of prospective relief. Tr. a 4-5. That ruling is wrong and is due to be reversed.

It is common ground that official immunity does not bar claims against state officers in their individual capacities, so long as those claims seek equitable relief that is "prospective in nature." *Lathrop v. Deal*, 301 Ga. 408, 434–35, 801 S.E.2d 867, 886 (2017). And that is precisely what Barnes seeks in this action against state and school board officials in their individual capacities. In the Amended Complaint, Barnes prays for a declaration and injunctive relief "compelling FCSS to reinstate Plaintiff Barnes with backpay" and prohibiting the members of the FCSS Board and State Board, on an ongoing basis, "from denying Barnes's rights under the Fair Dismissal Act." Complaint at 15.

This relief is prospective in nature and is the appropriate relief for a public employee who was wrongfully terminated in violation of the constitution. That the request for an injunction prohibiting the defendants from denying Barnes's Fair Dismissal Act rights in the future is prospective in nature is evident on the face of things. Accordingly, we focus the following discussion on the request for reinstatement and backpay.

While the Georgia Supreme Court has recognized that an order of reinstatement with backpay is an appropriate remedy for public employees who are

wrongfully dismissed, *see Wayne Cty. v. Herrin*, 210 Ga. App. 747, 755, 437 S.E.2d 793, 801 (1993), and *Atlanta City Sch. Dist. v. Dowling*, 266 Ga. 217, 218, 466 S.E.2d 588, 590 (1996), it does not appear that the Court has yet had occasion to consider whether reinstatement with backpay is a prospective remedy for official immunity purposes. The federal courts, however, have addressed the question of whether reinstatement is barred by Eleventh Amendment immunity, which calls for an analysis of the very same distinction between prospective and retrospective relief that the Georgia courts apply in official immunity cases. And every federal court of appeals that has done so has ruled that reinstatement is a prospective remedy for employees who were unlawfully dismissed in violation of the constitution or laws of the United States that is not barred by Eleventh Amendment immunity.[4]

[4] *See State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 96-98 (2d Cir. 2007); *Koslow v. Commonwealth of Pa.*, 302 F.3d 161, 179 (3d Cir. 2002); *Coakley v. Welch*, 877 F.2d 304, 307 n.2 (4th Cir. 1989); *Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996); *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002); *Elliott v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986); *Murphy v. State of Ark.*, 127 F.3d 750, 754 (8th Cir.1997); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 840-42 (9th Cir. 1997); *Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1232–33 (10th Cir. 2004); *Lassiter v. Ala. A & M Univ.*, 3 F.3d 1482, 1485 (11th Cir. 1993).

That is because, as the Seventh Circuit explained, an "alleged wrongful discharge is a continuing violation; as long as the state official keeps [plaintiff] out of his allegedly tenured position the official acts in what is claimed to be derogation of [plaintiff's] constitutional rights." *Elliott*, 786 F.2d at 302. Hence, "[t]he goal of reinstatement … is not compensatory; rather, it is to compel the state official to cease her actions in violation of federal law and to comply with constitutional requirements." *Id. See also Doe v. Lawrence Livermore Nat, Lab.*, 131 F.3d 836, 841 (9th Cir. 1997) ("[Plaintiff's] reinstatement would not serve as compensation for any past harm, unlike a damages award. Reinstatement would …. would simply prevent the prospective violation of [Plaintiff's] rights which would result from denying him employment in the future.").

The question of backpay is, to be sure, a closer one. While federal courts have found backpay awards to be barred by the Eleventh Amendment, *see e.g., Dwyer v. Regan*, 777 F.2d 825, 836 (2d Cir. 1985), modified, 793 F.2d 457 (2d Cir. 1986), in the statutory civil rights context, federal courts uniformly treat backpay as "an integral part of the equitable remedy of reinstatement" that "is not comparable to damages in a common law action." *Harmon v. May Broadcasting Co.*, 583 F.2d 410, 411 (8th Cir. 1978). *See also Harkless v. Sweeny Indep. Sch. Dist.*, 427 F.2d 319, 324 (5th Cir. 1970) ("The prayer for back pay is not a claim

for damages, but is an integral part of the equitable remedy of injunctive reinstatement."); *Smith v. Hampton Training School for Nurses*, 360 F.2d 577, 581 n.8 (4th Cir. 1966) (same). *Cf. Bertot v. Sch. Dist. No. 1, Albany Cty., Wyo.*, 613 F.2d 245, 248 (10th Cir. 1979) (holding that backpay award is not barred by qualified immunity). We submit that the latter analysis is appropriate here. But in any event, even if a backpay order were barred by official immunity, that would not justify dismissing Barnes's claims *in toto* as barred by official immunity, as the Amended Complaint plainly seeks other forms of clearly prospective relief.

CONCLUSION

For the foregoing reasons, the trial court's order of dismissal should be reversed.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief complies with all requirements of Georgia Court of Appeals Rules, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that this brief has fewer than 8,400 words and is in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 6, I certify that there is a prior agreement with **Susan R. Haynes, Assistant Attorney** to allow documents in a .pdf format sent via email to suffice for service. I certify that I have thus served a copy of *Appellant's Brief* to counsel for Appellees via email on May 1st, 2019, addressed as follows:

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