No. A21A1421

IN THE GEORGIA COURT OF APPEALS

RONDA WARE, *et al.*,
Plaintiffs-Appellees

v.

MELINDA JEFFERS, *et al.*,
Defendants-Appellants

ON APPEAL FROM THE SUPERIOR COURT OF FLOYD COUNTY

BRIEF FOR APPELLANTS

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PART ONE: STATEMENT OF PROCEEDINGS BELOW AND MATERIAL FACTS

A. Proceedings Below

In this action, Plaintiffs—Ronda Ware, an educator working for the Floyd County School System ("the School District"), the Floyd County Association of Educators ("FCAE"), and the Georgia Association of Educators ("GAE")—challenge the Professional Termination Policy adopted by the School District on August 2, 2016 ("Termination Policy") under the anti-retroactivity and anti-impairment-of-contracts clauses of Article I, Section I, Paragraph X of the Georgia Constitution.

In their Amended Complaint, Plaintiffs aver that the Termination Policy—adopted under the aegis of the School District's conversion into a "charter school system" pursuant to the Charter Systems Act, 2007 Georgia Laws Act 116 (S.B. 39), Section 1—purports to abrogate the employment rights that Ware and other similarly situated members of FCAE and GAE had previously earned under the Fair Dismissal Act, O.C.G.A. §§ 20-2-940 *et seq*. R–424-26. Because those previously earned rights are vested and contractual rights protected by the anti-retroactivity and anti-impairment-of-contracts clauses of Article I, Section I, Paragraph X of the Georgia Constitution, Plaintiffs contend, the Termination Policy violates those constitutional provisions. R–426-29. Plaintiffs accordingly seek a declaration that the Termination Policy violates the constitutional rights of

educators who earned Fair Dismissal Act protections before the adoption of the Termination Policy and injunction ordering the Defendants to rescind that policy as it applies to such educators. R–429.

On March December 2, 2020, the Superior Court dismissed the Amended Complaint on two grounds. First, the court ruled that because the Complaint does not allege that Ware or any similarly situated member of FCAE or GAE was terminated without observing the fair Dismissal Act's protections, the Plaintiffs lack standing. Second, the court dismissed Plaintiffs' claims on the ground that prior decisions of this court—namely *Day v. Floyd County Board of Education*, 333 Ga. App. 144, 775 S.E.2d 622 (2015), and *West v. Dooly County School District*, 316 Ga. App. 330, 729 S.E.2d 469 (2012)—foreclose Plaintiffs' claims that the rights that Ware and other similarly situated members of FCAE and GAE earned under the Fair Dismissal Act were not vested contractual rights protected by the anti-retroactivity and anti-impairment-of-contracts clauses of Article I, Section I, Paragraph X of the Georgia Constitution. R–500-03.

B. 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).

1. Legal Background

(a) 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 three 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; (2) the right to notice, an opportunity for a hearing before the Board of Education; and (3) an 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. R–420-21. These individually earned rights are valuable to educators as they offset the low pay that public school educators earn relative to other professions requiring comparable academic credentials and training. *Id.*

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). In addition, 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. *Id.* § 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 has the right to appeal to the State Board of Education. *Id.* § 20-2-940(f).

(b) The Charter Systems Act of 2007: The Charter Systems Act authorizes the conversion of a public school system into what the law terms a "charter school system." 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 place of many of the laws and regulations that otherwise govern school systems. R–422.

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 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. *Id.* § 20-2-2065(a); R–422-23.

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(b)(5). In *Day v. Floyd County Board of Education*, 333 Ga. App. 144, 147-48, 775 S.E.2d 622, 625 (2015), this court held that the Fair Dismissal Act does not fall within this statutory exception for "statutes relating to civil rights" and thus that a charter executed under the Charter Systems Act waives the protections of the Fair Dismissal Act absent a provision of the charter specifying otherwise.

2. Plaintiff Ware Earns the Fair Dismissal Act's Protections in 2004

Ware is a veteran educator with more than 20 years of experience. Ware earned the protections of the Fair Dismissal Act when the School District offered, and she accepted, a fourth consecutive contract of employment at the beginning of the 2004-05 school year. R–418. The membership of FCAE and GAE includes many other educators working at the School District who also earned the protections of the Fair Dismissal Act before the School District became a charter school system and adopted the Termination Policy at issue here; FCAE and GAE bring this action on behalf of those members. *Id.*

Like other similarly situated educator members of FCAE and GAE, Ware was aware of and relied on the benefits offered by the Fair Dismissal Act in making important career decisions. R–421-22, 428. 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. *Id.* Consequently, the opportunity to earn the law's protections upon satisfying its requirements was an inducement for Ware to accept employment with the school district and to continue that employment. *Id.* Ware, as well as other similarly situated FCAE and GAE members, bargained for and earned the benefits of the Fair Dismissal Act by accepting employment with FCSS, remaining employed during the Fair Dismissal

Act's probationary period, and accepting an employment contract for a fourth consecutive year. *Id.*

3. The School District, Operating as a Charter System, Adopts a Dismissal Policy Purporting to Abrogate the Rights Educators Previously Earned Under the Fair Dismissal Act

The School District first became a charter school system in 2010, when it when it entered into a charter agreement in force from July 1, 2010 to July 30, 2015; that charter was subsequently renewed and has continued in force at all relevant times. R–423. The charter agreement grants the School District "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." R–423-24.

On August 2, 2016, the School District's board, purporting to act under the authority of its charter with the State Board of Education, adopted a "Professional Personnel Termination" policy, which expressly applies to educators who "previously received at least four (4) consecutive written contracts of employment with Floyd County Schools"—*i.e.*, educators who had previously earned the protections of the Fair Dismissal Act. R–424. The policy purports to severely abrogate the substantive and procedural employment protections those educators previously earned under the Fair Dismissal Act. R–424-25.

First, the Termination Policy, unlike the Fair Dismissal Act, provides no substantive standard to govern the dismissal or suspension of educators. The Fair Dismissal Act provides that a school district may dismiss or demote an educator who has earned the Act's protections only if one of the eight reasons specified in the statute is satisfied. *See* O.G.C.A. § 20-2-940(a)(l)-(8). In stark contrast, the Termination Policy provides no standard whatsoever to govern the School District's power to dismiss or suspend educators. R–424.

Second, the Termination Policy's procedures fall far short of what educators previously earned under the Fair Dismissal Act. *Id.* The Fair Dismissal Act requires a school district to provide an educator with a detailed notice and the opportunity for a hearing before the board at which the educator has the right to the assistance of counsel, the right to compulsory process for securing the participation of witnesses, and the right to appeal an adverse decision to disinterested body, *i.e.*, the State Board of Education. *See* O.C.G.A. §§ 20-2-942(b)-(e), 20-2-940(f). The Termination Policy, however, provides no pretermination hearing, but only a "pretermination meeting" with the school district's director of human resources—at which the educator has no right to present evidence, call witnesses, obtain compulsory process, have the assistance of counsel—and for two appeals to other School District officials, rather than to a disinterested body. Only at the final appeal stage—*after* the School District has ruled adversely to the educator at the

initial meeting and the first appeal—is there anything resembling a hearing, and even that is far more restricted than the full pre-termination hearing required by the Fair Dismissal. R–425-26.

PART TWO:
ENUMERATION OF ERRORS AND STATEMENT OF JURISDICTION

A. Enumeration of Errors

I. The trial court erred in dismissing Plaintiffs' claims for lack of standing.

II. The trial court erred in dismissing Plaintiffs' claims on the theory that Ware and other educators who earned the Fair Dismissal Act's protections before the School District adopted its Termination Policy have no vested, contractual rights to those 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.

B. Statement of Jurisdiction

Although Plaintiffs' Complaint raises claims under the anti-retroactivity and anti-impairment-of contracts clauses of Article I, Section I, Paragraph X of the Georgia Constitution, this court, and not the Georgia Supreme Court has jurisdiction over this appeal. Plaintiffs initially filed their appeal with the Georgia Supreme Court, which transferred the appeal to this court on the ground "that the trial court's order did not constitute a ruling by necessary implication on the merits

of appellants' constitutional question regarding the proper interpretation of Ga. Const. of 1983 Art. I, Sec. I, Par. X" but instead rested on the conclusion "that [Plaintiffs'] claim as to their vested rights under the Fair Dismissal Act had been addressed and resolved adversely to appellants by the Court of Appeals, thereby foreclosing the need for any specific constitutional ruling." *Ware v. Jeffries*, Case No. S21A0822 (Ga. April 1, 2021).

PART THREE: ARGUMENT AND CITATION OF AUTHORITY

This court reviews the grant of a motion to dismiss under O.C.G.A. § 9-11-12(b)(6) *de novo*, applying the same standard as the trial court. *Grant v. Byrd*, 265 Ga. 684, 684, 461 S.E.2d 871, 871 (1995). Such a motion should be granted only if a defendant "shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claim." *Property Pickup v. Morgan*, 249 Ga. 239, 240, 290 S.E.2d 52 (1982). 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 DISMISSING THE AMENDED COMPLAINT FOR LACK OF STANDING

The Superior Court dismissed this action for lack of standing on the reasoning that the Amended Complaint does not allege that "Ware or any member of the Floyd County Association of Educators or Georgia Association of Educators has ever been denied any rights in connection with the [Termination Policy], nor

has any teacher been denied any [Fair Dismissal Act] rights." R–500. Although the Superior Court's decision does not elaborate on the basis for this standing theory, much less cite any authority, by all indications, the court adopted the Defendants' argument (R–148-49, 356-57) that because neither Ware nor any other members of FCAE or GAE had been dismissed or suspended under the Termination Policy, they have suffered no injury in fact that would support standing, despite the fact that the Plaintiffs' Fair Dismissal Act rights were nullified by the Defendants' actions. There is no merit to this theory.

"As a general rule," a plaintiff has standing to bring a constitutional challenge to governmental action if it "has an adverse impact on that litigant's own rights," *Feminist Women's Health Center v. Burgess*, 282 Ga. 433, 651 S.E.2d 36 (2007), and, in the case of associational standing as invoked by FCAE an GAE here, those of the association's members, *Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta*, 281 Ga. 342, 344, 638 S.E.2d 307, 312 (2006). In determining whether a complaint sufficiently alleges such an adverse impact, the Georgia courts generally follow federal standing principles, pursuant to which a plaintiff must allege "an injury in fact." *Manlove v. Unified Gov't of Athens-Clarke Cty.*, 285 Ga. 637, 638, 680 S.E.2d 405, 406 (2009) (citing *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988)). In other words, "to challenge a statute or an administrative action taken pursuant to a statute, the plaintiff must normally show

that it has interests or rights which are or will be affected by the statute or the action." *Atlanta Taxicab Co. Owners Ass'n*, 281 Ga. at 345, 638 S.E.2d at 312 (citation, quotation marks, and emphasis omitted). Plaintiffs easily meet that standard here.

As detailed above, educators who have earned the protections of the Fair Dismissal Act gain valuable employment protections, namely, protection from dismissal for reasons other than those specified in the statute and, in the event of a dismissal decision, procedural protections including the right to notice and a hearing with the right to present evidence and call witnesses as well as an appeal to a disinterested party that is subject to appeal. R–420-21. Those are valuable rights to Ware, and to other similarly situated educator members of FCAE and GAE as well, who relied on the availability of those rights making their decisions to accept employment with the School District and continue that employment. R–421-22, 428. They are therefore bargained-for rights that constitute important and valuable employment benefits. The Termination Policy abrogates those rights by eliminating any standard for dismissal and providing vastly inferior hearing and appeal procedures, and it expressly applies that abrogation to educators who had previously earned the protections of the Fair Dismissal Act. R–424-26.

Hence, prior to the School District's August 8, 2016, adoption of the Termination Policy, Ware and other similarly situated members of FCAE and GAE

had protection against dismissal for any reasons other than those set forth in the Fair Dismissal Act, as well as a number of procedural safeguards; and after that date, they lacked those protections. By stripping away these important employment rights, the Termination Policy works materially adverse changes to Ware's terms and conditions of employment, and those of other similarly situated educator members of FCAE and GAE. Those adverse changes to Plaintiffs' terms and conditions of employment unquestionably amount to "interests or rights which are … affected by the … the action," *Atlanta Taxicab Co. Owners Ass'n*, 281 Ga. at 345, 638 S.E.2d at 312, challenged here.

While Georgia's appellate courts have not addressed the question whether the stripping away of previously earned statutory employment protections constitutes an injury for standing purposes, federal courts—which apply standing principles that are at least as stringent as those applied by this state's courts—have consistently held that adverse changes to material terms and conditions of employment like those at issue here constitute actionable injuries.

The federal courts have recognized that employment protections of the kind afforded by the Fair Dismissal Act, often referred to as "tenure," constitute, as the Amended Complaint details, a significant and valuable employment benefit. "Tenure is a material condition of employment because it provides long-term job security." *Tolbert v. Smith*, 790 F.3d 427, 435 (2d Cir. 2015). *See also See Mt.*

Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977) ("The long-term consequences of an award of tenure are of great moment both to the employee and to the employer.").

That being the case, federal courts have consistently held that a decision to deny an employee tenure rights is an adverse employment action—defined as "a materially adverse change in the terms and conditions of employment," *Tolbert*, 790 F.3d at 435 (citation and quotation marks omitted)—that supports a claim under federal civil rights laws. In *Tolbert*, for instance, the Second Circuit followed a line of circuit precedents to hold that a school district's "denial of tenure is an adverse employment action" that provides a basis for suit under Title VII of the Civil Rights Act of 1964. *Id.* at 435. *See also Donnelly v. Greenburgh Cent. Sch. Dist. No. 7*, 691 F.3d 134, 147 (2d Cir. 2012) (holding that school district's denial of tenure was "adverse employment action" that is actionable under the Family and Medical Leave Act); *Gillis v. Georgia Dep't of Corr.*, 400 F.3d 883, 887 (11th Cir. 2005) ("'[T]enure-related decisions affect an important term of employment'" and hence "'are adverse employment actions'" actionable under federal law (citation omitted)); *Thomas v. E.I. DuPont de Nemours & Co.*, 574 F.2d 1324, 1331 n.10 (5th Cir. 1978) (noting that changes to "job security" can support a claim under federal anti-discrimination laws").

Given that federal courts have consistently held that an initial denial of tenure rights is an "adverse employment action" that is actionable under federal civil rights statutes—a statutory prerequisite that is over and above the injury-in-fact requirement for federal standing—it follows *a fortiori* that a school district's stripping away of previously earned tenure rights constitutes an injury that satisfies standing requirements. *See Manlove*, 285 Ga. at 638, 680 S.E.2d at 406 (recognizing that state standing requirements track federal standing law).

Federal courts have recognized that the diminution of job protections constitutes an injury for standing purposes in other contexts as well. In *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718 (D.C. Cir. 1996), for instance, the court addressed labor unions' standing to challenge a Surface Transportation Board decision that it lacked jurisdiction over a trackage rights agreement between two railroads, a decision that had the effect of nullifying mandatory "labor-protective arrangements" that previously applied to the union's members. *Id.* at 723-24.[1] The Board argued, much as the Defendants in this case have, that the unions lacked standing to challenge its action because they had not

[1] The "labor-protective arrangements" in question are measures that the Interstate Commerce Commission requires "to protect workers harmed by" transactions entered into by their employers, such as mergers or consolidations. *Id.* at 720. They include both job-security and income-security protections. *See Ass'n of Am. Railroads v. Surface Transp. Bd.*, 162 F.3d 101, 102 (D.C. Cir. 1998).

shown that any of their members had suffered job losses as a consequence of the Board decision. The court rejected that argument, reasoning as follows:

> We think the Board misconstrues the nature of the injury that arguably provides the basis for the Unions' standing in these cases. The injury at issue is not the job loss resulting from the transactions, but rather the loss of coverage by labor-protective arrangements flowing from the [Board's] determination that the transactions fall outside its jurisdiction. *Even where the prospect of job loss is uncertain, we have repeatedly held that the loss of labor-protective arrangements may by itself afford a basis for standing.*

Id. (emphasis added) (citing *Redden v. ICC*, 956 F.2d 302 (D.C. Cir. 1992), and *Simmons v. ICC*, 934 F.2d 363 (D.C. Cir. 1991)). *See also Simmons*, 934 F.2d at 367 ("[T]he possibility" that one characterization of a railroad transaction could lead to greater labor protection than another "yields sufficient potential for greater protection to [the affected] employees to provide a justiciable injury.").

In sum, based on the principles of standing enunciated by the Georgia Supreme Court, and on the persuasive federal authority applying the same principles to suits challenging actions denying or diminishing similar employment protections to those at issue here, the Superior Court's conclusion that Plaintiffs lack standing should be reversed.

II. THE SUPERIOR COURT ERRONEOUSLY CONCLUDED THAT PLAINTIFFS HAVE NO VESTED OR CONTRACTUAL RIGHTS PROTECTED BY ARTICLE I, SECTION I, PARAGRAPH X OF THE GEORGIA CONSTITUTION

The Superior Court also dismissed Plaintiffs' constitutional claims on the ground that prior precedents of this court foreclose Plaintiffs' claim that Ware and other similarly situated members of FCAE and GAE have vested rights protected by anti-retroactivity and anti-impairment-of-contracts clauses of Article I, Section I, Paragraph X of the Georgia Constitution. R–501-02. As shown in the following, that ruling, too, is erroneous.

A. The Superior Court's Ruling is Contrary to this Court's Precedents

The Superior Court's ruling that Ware and other similarly situated members of FCAE and GAE have no vested, contractual rights arising from the Fair Dismissal Act is based on two decisions from this court: *Day v. Floyd County Board of Education*, 333 Ga. App. 144, 775 S.E.2d 622 (2015), and *West v. Dooly County School District*, 316 Ga. App. 330, 729 S.E.2d 469 (2012). As we show in the following, not only do those decisions have no application here, this court has already ruled that the *Day* decision does not hold that educators who have earned the protections of the Fair Dismissal Act have no vested or contractual rights to those protections protected by Article I, Section I, Paragraph X of the Georgia Constitution.

As this court recently made clear in *Barnes v. Bearden*, 357 Ga. App. 99, 850 S.E.2d 181 (2020), a case raising the same constitutional challenges to a school district's purported retroactive waiver of Fair Dismissal Act rights, the *Day* decision does not hold that the Fair Dismissal Act confers no vested contractual rights on educators under the anti-retroactivity or anti-impairment-of-contracts provisions of the Georgia Constitution. Rather than resolving that constitutional law question, *Day* dealt solely with the statutory interpretation of the waiver provisions of the Charter Systems Act. For exactly that reason, this court in *Barnes* reversed a Fulton County Superior Court's dismissal, based on the *Day* decision, of an educator's claim that her school district employer violated the anti-retroactivity or anti-impairment-of-contracts provisions of the Georgia Constitution by denying her the Fair Dismissal Act rights that she had earned prior to the school district's becoming a charter school system. As this court explained:

> *Day* did not arise under the anti-impairment-of-contract or anti-retroactivity clauses of the Georgia Constitution. And in general, the simple fact that the legislature enacted a law—here, the Charter Systems Act—that provided that the Fair Dismissal Act did not apply to charter school systems does not mean that the legislation complies with Paragraph X. For example, "[e]ven 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."

357 Ga. App. 99, 105, 850 S.E.2d 181, 186-87 (quoting *Deal v. Coleman*, 294 Ga. 170, 175, 751 S.E.2d 337, 343 (2013)).

The Superior Court's reading of *Day* is thus flatly contrary to the *Barnes* decision. While this alone is dispositive, we pause to stress that this court's decision in *Barnes* is plainly correct. *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 but rather 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.

The *Day* court rejected this statutory-interpretation argument. Interpreting the text of the exception to the Charter Systems Act's waiver provision, the court of Appeals 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.

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. It was therefore error for the Superior Court to conclude that *Day* forecloses Plaintiffs' constitutional claims.[2]

Equally unavailing is the Superior Court's reliance on *West v. Dooly County School District*, 316 Ga. App. 330, 729 S.E.2d 469 (2012), for the proposition that this court has already held that the Fair Dismissal Act does not create vested or contractual rights protected by the anti-retroactivity and anti-contractual-impairment provisions of the Georgia Constitution. As with the *Day* decision, the court held nothing of the kind.

West arose under an amendment to the Fair Dismissal Act that excluded school administrators (as distinguished from school teachers) from its protections while providing a grandfather clause protecting the rights of administrators who had earned Fair Dismissal Act protections before the amendment's effective date, April 7, 1995, 316 Ga. App. at 331-32, 729 S.E.2d at 472, a provision was almost certainly enacted to prevent any conflict with the anti-retroactivity and anti-impairment-of-contracts provisions of the Georgia Constitution.

[2] The Superior Court also made general reference to an unpublished order in *Georgia Association of Educators v. Atlanta Independent School System*, No. A18A1038 (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.

In its decision, the Court of Appeals rejected the administrator plaintiff's claim that he was entitled to the due process protections of the Fair Dismissal Act on two grounds, namely (1) that he had not in fact earned the protections of the Fair Dismissal Act under the grandfather provision because he "did not obtain tenure rights before April 7, 1995"; and (2) that a 1996 school board vote to grant him tenure rights was ineffective because the school board had not "follow[ed] the law that conferred on it the power to establish policies for administrators." 316 Ga. App. at 332, 337, 729 S.E. at 475.

Thus, the *West* court—like the *Day* court—was not called upon to consider, and did not consider, any question as to whether a teacher who has earned Fair Dismissal Act protections has vested contractual rights protected by the anti-retroactivity or anti-contractual-impairment provisions of the Georgia Constitution. Rather, the *West* court held, the plaintiff's due process claim failed because the plaintiff had never lawfully earned those protections in the first place. The Superior Court therefore erred in reading that decision as holding that educators who *have* lawfully earned the protections of the Fair Dismissal Act have vested contractual rights to those protections.

In sum, the Superior Court erred in concluding that this court's precedents foreclose Plaintiffs' claims that Ware and other similarly situated members of FCAE and GAE earned the protections of the Fair Dismissal Act prior to the

School District's becoming a Charter School District and adopting the Termination Policy have vested contractual rights to those protections.

B. Educators Who Earned the Protections of the Fair Dismissal Act Before the School District Waived Those Rights Under the Charter Systems Act Have Vested and Contractual Rights to Those Protections

The foregoing is dispositive regarding the legal basis for Superior Court's order of dismissal, *i.e.,* in the words of the Supreme Court's transfer order, the ruling that "the claim as to [Plaintiffs] vested rights under the Fair Dismissal Act had been addressed and resolved adversely to appellants by the Court of Appeals, thereby foreclosing the need for any specific constitutional ruling Plaintiffs' claims." That said, the Superior Court also suggested in passing, by way of a footnote, the broader and more far-reaching proposition that "'teacher tenure' is subject to legislative amendment and does not create contractual property rights or an expectation of continued employment, even where a teacher's tenure was already vested." R–502-03. This footnote appears to be a makeweight rather than an independent basis of the Superior Court's decision, and also veers into the merits of Plaintiffs' constitutional claims and thus outside the scope of the Supreme Court's transfer order and this court's jurisdiction. Thus, while it is highly doubtful that this court has authority to pass on this issue, in an abundance of caution, we show that, contrary to the Superior Court's passing suggestion otherwise, case law from the Georgia Supreme Court, the United States Supreme

Court, and other state and federal courts overwhelmingly supports Plaintiffs' claims that Ware and other similarly situated educators gained vested, contractual rights—rights that that are safeguarded by the anti-impairment-of-contract and anti-retroactivity clauses of the Georgia Constitution—when they earned the protections of the Fair Dismissal Act before the School District became a charter system and purported to abrogate those protections by adopting its Termination Policy.

The Georgia Supreme Court has made clear that where a statute creates employment benefits for public employees who satisfy the statutes' preconditions, employees who meet those preconditions gain contractual rights that are protected by Article I, Section I, Paragraph X of the Georgia Constitution. In *Swann v. Bd. of Trustees*, 257 Ga. 450, 454, 360 S.E.2d 395 (1987), the court invalidated a municipal ordinance amendment that excluded certain former officials from coverage under a public-employee retirement plan, insofar as they affected former officials who had earned those benefits before the amendment:

> Where a statute or ordinance establishes a retirement plan for government employees, and the employee contributes toward the benefits he is to receive and performs services while the ordinance or statute is in effect, the ordinance or statute becomes part of the contract of employment and is a part of the compensation for the services rendered so that an attempt to amend the statute or ordinance and reduce, or eliminate, the retirement benefits the employee is to receive violates the impairment clause of the state constitution.

257 Ga. at 454, 360 S.E.2d at 398.

The court has repeatedly reaffirmed this principle in subsequent cases. *See Parrish v. Employees' Ret. Sys. of Georgia*, 260 Ga. 613, 613, 398 S.E.2d 353, 354 (1990) ("Since each retiree contributed to the retirement system and performed services while the law exempting retirement benefits from state income taxation was in effect, that law became part of the contract of employment of the retiree."); *City of E. Point v. Elam*, 257 Ga. 704, 704-05, 362 S.E.2d 369, 370 (1987) ("Government employees who have attained vested rights in benefits pursuant to retirement plans may not be denied those rights by amendments to plans that reduce or eliminate such benefits."); *Withers v. Register*, 246 Ga. 158, 159, 269 S.E.2d 431, 432 (1980) ("[I]f the employee performs services during the effective dates of the legislation, the benefits are constitutionally vested, precluding their legislative repeal as to the employee.").

While neither this court nor the Georgia Supreme Court has had occasion to consider the application of this principle to other employment benefits, such as the protections of the Fair Dismissal Act, we submit that the statutory protection of the Fair Dismissal Act are fully analogous to the retirement benefits at issue in *Swann.* As is the case with a statute providing for retirement benefits, the Fair Dismissal Act offers prospective employees valuable employment benefits (here, benefits that offer some assurance of job security by limiting the causes for discharge or suspension and providing due process procedures in such cases) as an inducement

to accept and continue employment with Georgia school districts by providing that employees can enjoy those benefits if they satisfy a statutory years-of-service requirement (here, the three-year probationary period, followed by acceptance of a school district's offer of a contract for further employment). *See N.C. Ass'n of Educators, Inc. v. State*, 776 S.E.2d 1, 10-11 (N.C. Ct. App. 2016) ("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.") (citation and quotation marks omitted), *aff'd as modified*, 368 N.C. 777, 786 S.E.2d 255 (2016).

Equally to the point, the United States Supreme Court and courts in other jurisdictions that have considered this issue have 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 (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 protected by the anti-impairment-of-contracts clause of the United States Constitution. In reaching that conclusion, 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." *Id*. at 100.

The court found that the Indiana tenure statute was just such a law based on the meaning of the relevant statutory provisions and the policy undergirding them. 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.*

More recently, the Seventh Circuit relied on *Brand* to hold that the elimination of retention priority for tenured teachers during layoffs was unconstitutional, reasoning that "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 likewise 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 Teacher Tenure Act or of the North Carolina Career Status Law. 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* O.C.G.A. §§ 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).

Consequently, like the laws at issue in *Brand*, *Elliott*, and *North Carolina Association of Educators*, the Fair Dismissal Act offers educators and prospective educators a bargain: if you accept employment with a Georgia school district, remain employed throughout a years-long probationary period, and are offered—and accept—employment for a fourth year, then you earn those valuable job protections. Ware and other similarly situated members of FCAE and GAE rely on those promises in making important career decisions, and those protections in

exchange for a course of performance involving acceptance of employment contracts and the considerable investment of three years of work, with the attendant opportunity costs, all of which forms the consideration exchanged for the protections offered by the law. R–420-22. The bargain offered by the Fair Dismissal Act as an inducement to educators, and the reliance it engenders, are precisely the features that courts have looked to in finding that educators gained contractual rights under similar statutes. *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); *Elliott v. Bd. of Sch. Trustees of Madison Consol. Sch.*, 876 F.3d 926, 934–35 (7th Cir. 2017) (observing that the "promise of job security. . . lies close to the core of teacher tenure," is "a central term to induce people to become teachers," and "is a term with significant value to teachers, who as a matter of economics have traded higher salaries for the protections that tenure offers over the course of a career"), *cert. denied*, 138 S. Ct. 2624 (2018).[3]

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[3] The Superior Court cited the statement in *Dodge v. Board of Education*, 302 U.S. 74 (1937), that there is a presumption that legislation "'is not intended to create a private contractual or vested right but merely declares a policy to be pursued until the legislature declares otherwise.'" But that statement from *Dodge* (a decision, it must be noted, that predated the Supreme Court's decision in *Brand*, *supra*) in no way supports the proposition that Plaintiffs have no vested contractual rights here.

(footnote continued ...)

In sum, contrary to the Superior Court's suggestion otherwise, the relevant precedents fully support the proposition that Ware and other similarly situated educators who earned Fair Dismissal Act protections before the school district became a charter system and adopted the Termination Policy at issue here have vested, contractual rights to those protections that are safeguarded by Article I, Section I, Paragraph X of the Georgia Constitution.

CONCLUSION

For the foregoing reasons, the Superior Court's December 2, 2020 order of dismissal should be reversed.

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Rather, it merely states a background *presumption* that operates when considering whether a statute creates contractual rights; it manifestly does not resolve whether that presumption is in fact overcome in any particular case. Indeed, the presumption that statutes are not usually read as creating contractual rights was, as noted above, also stated by the Court in its subsequent decision in *Brand.* But the *Brand* Court went on to conclude that the provisions of Indiana's Teacher Tenure Act (which, as we have shown, are not distinguishable in any material respect from those of the Fair Dismissal Act) are such that when those provisions are "accepted as the basis of action by individuals, [they] become contracts between them and the State or its subdivisions." 303 U.S. at 100. Hence, the presumption referenced in *Dodge* merely asks the question presented here, it does not answer it. And the answer to that question is to be found in the discussion of *Swann*, *Brand*, *Elliott*, and *North Carolina Association of Educato*rs above.

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

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