No. S23A0821

IN THE SUPREME COURT
STATE OF GEORGIA

RICHARD WOODS, *et al.*,

Defendants-Appellants

v.

REBECCA BARNES, *et al.*,

Plaintiffs-Appellees.

On Appeal from the Superior Court of Fulton County
Case No. 2018cv301254

REVISED BRIEF FOR APPELLEES

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INTRODUCTION AND STATEMENT OF THE CASE

Plaintiff-Appellee Rebecca Barnes is a veteran educator who earned the protections of Georgia's Fair Dismissal Act ("FDA"), O.G.C.A. §§ 20-2-940 *et seq.*, in 2003, while she was employed by the Fannin County School System ("FCSS"). R. 5-6. Those FDA protections include "rights under this Code section to continued employment as a teacher," *id.* §§ 20-2-942(d), a limitation of the grounds on which a school system may dismiss the educator, *id.* § 20-2 940(a) & (b)(1), and procedural rights, including the right to a hearing to contest the grounds for such dismissal and the right to an appeal to the State Board of Education, *id.* § 20-2-942(e)-(f).

In 2015, FCSS applied for, and the State Board of Education granted, a charter pursuant to the Charter Systems Act of 2007, O.G.C.A. § 20-2-2063.2 *et seq.*, that waived the protections of the FDA. And in 2017, FCSS applied the Charter Systems Act by dismissing Barnes without honoring her FDA rights, despite the fact that she had earned those rights before FCSS's conversion to a charter system and indeed before the Charter Systems Act went into effect. R. 10.

In this action, Plaintiffs-Appellees Barnes and the Georgia Association of Educators ("GAE"), suing on behalf of its similarly situated FCSS educator members, challenge this application of the Charter Systems Act to deny Barnes's

previously earned FDA rights and those of similarly situated members of GAE. R. 15-17. Barnes and GAE contend that the waiver provision of the Charter Systems Act cannot constitutionally be applied to Barnes and other similarly situated FCSS educators who earned FDA protections before the charter came into effect, because such educators have vested and contractual rights safeguarded by Georgia Constitution clauses prohibiting "laws impairing the obligation of contract" and "retroactive law[s]," Ga. Const. art. I, Sec. I, para. X. R. 5.

Barnes seeks a declaration and injunctive relief ordering the members of the FCSS board to reinstate her and to honor her FDA rights, as well as prohibiting the members of the State Board of Education from denying her right to appeal any dismissal or demotion decision by FCSS going forward. R. 18. GAE, invoking associational standing, seeks a declaration and an injunction requiring the School District Defendants and the State Board of Education Defendants to honor the FDA rights of all educators working for FCSS who earned those rights before FCSS entered into its charter with the State Board of Education. *Id.*

On the parties' cross-motions for summary judgment, the Superior Court, in a 23-page opinion and order, entered judgment for Plaintiffs. R. 739-761. The judgment declares that the waiver provision of the Charter Systems Act is unconstitutional as applied to FCSS educators who have earned FDA rights prior to FCSS's conversion into a charter school system under both the retroactivity and

impairment-of-contracts provisions of Article I, Section I, Paragraph X of the Georgia Constitution and permanently enjoins the Defendants from applying that waiver to deny Barnes and other similarly situated FCSS educators. R. 760-61. This appeal by Superintendent Richard Woods and other members of the State Board of Education ("the Board Defendants"), and a separate appeal of the judgment by members of the FCSS board, Case No. S23A0822, followed.

* * * *

The Board Defendants open their brief with an introduction that obfuscates the law that is the object of Plaintiffs' as-applied challenge. Because that obfuscation of the relevant law is misleading, and because it permeates the arguments throughout the State Defendants' brief, we address it at the outset.

The State Defendants erroneously suggest that the law at issue here is the Charter Schools Act, first piloted in 1993 and then comprehensively revamped in 1998, Ga. Laws 1998, 1080, § 3 (codified as amended at O.G.C.A. § 20-2-2060 *et. seq.*). But in reality, the relevant law—the law that purportedly authorized the stripping of Barnes's FDA rights—is the Charter *Systems* Act of *2007*, Ga. Laws 2007, Act 116 (codified at O.G.C.A. § 20-2-2063.2 *et. seq.*), which is a related but

distinct act with its own distinct provisions, and which came into effect well after Barnes earned the FDA's protections.[1]

The Board Defendants' conflation of the two laws is an evident attempt to back-date the relevant change in the law to a date *before* Barnes earned her FDA protections, to suggest that Barnes and similarly situated educators had no FDA rights predating the relevant law, and also to suggest that the Superior Court's decision upended a venerable law from the last century. Brief at 1 ("[A] superior court held that the Charter Schools Act, a law first enacted in 1993, is somehow unconstitutionally retroactive 'as applied' to conduct that occurred in … the twenty-first century.") (ellipsis in original)). Both suggestions are misleading. As the Superior Court correctly recognized, this case involves the application of the

[1] For the sake of clarity, the Charter Schools Act authorizes start-up and conversion charter *schools*, with a charter school defined as a school within a public school system that is operated by a private non-profit corporation and is under the supervision and direction of that corporation's board of directors, pursuant to a charter issued by a local board of education. *Id.* § 20-2-2065(3) & (3.1). If the charter with the local board of education so provides, the charter school is exempted from the laws, regulations and policies relating to non-charter public schools within the relevant school systems. *Id.* §§ 20-2-2065(a). The Charter Systems Act, on the other hand, authorizes *public school systems* to become "charter systems" by entering into charters with the State Board of Education. *Id.* § 20-2-2063.2(a). While both acts share the "charter" terminology, involve waivers, and are codified alongside each other in the same Article, they operate differently. A charter system is a public school system that remains operated and managed by its elected board of education, albeit under a "charter" granted by the Board that governs the system and can waive, as to all schools in the system, many of the laws and regulations that otherwise govern schools. *Id*. §§ 20-2-2062(3.1), 20-2-2063.2, and 20-2-2065(a).

provisions of the 2007 Charter Systems Act, a law enacted and operationalized by FCSS and the Board to convert FCSS into a charter system well after Barnes earned her FDA rights.

STATEMENT OF FACTS

A. Barnes Earns the Protections of the Fair Dismissal Act in 2003

Barnes began working as an elementary school teacher for FCSS in 2000 and earned the protections of the FDA when, after three years of continuous FCSS employment, the FCSS Board of Education offered, and Barnes accepted, a contract for the 2003-04 school year. R. 346, 409-10.

The opportunity to earn the protections of FDA was an important motivating factor in Barnes's decisions to become a teacher, to accept employment with FCSS, and to remain employed at FCSS. R.346. Like other similarly situated FCSS educators, Barnes relied on the availability of that valuable employment benefit when she accepted employment with FCSS, continued working for the FCSS in satisfaction of the FDA's conditions, and accepted the school district's offer of an employment contract for a fourth consecutive year at the beginning of the 2003-2004 school year. *Id*. GAE's members include many educators working at FCSS schools who also earned the protections of the FDA before FCSS converted into a charter system who likewise relied on the benefit offered by the FDA in making important career decisions. R. 347.

Educators' rights under the FDA, "commonly referred to as 'tenure' rights," *Patrick v. Huff*, 296 Ga. App. 343, 345 (2009), constitute a valuable employment benefit because they provide a measure of security against arbitrary or wrongful discharge, which helps offset the low pay that public school educators earn relative to other professions that require comparable academic credentials, licensure, and training. R. 347. The FDA bargain offered to educators is this: if a qualified teacher accepts employment with a Georgia school system, completes a period of 3 years' continuous employment (during which the teacher may be demoted or dismissed at will at the end of a school year), and accepts the school system's offer of an employment contract for a fourth year earns the following valuable benefits: "rights … to continued employment," O.C.G.A. § 20-2-942(d), and employment protections both substantive and procedural, namely: (1) protection against dismissal or demotion for any reason other than the eight grounds specified in the statute; and (2) in the event the school system decides to dismiss or demote a tenured teacher, the rights to (a) written notice stating the reasons for the board's intended action which lists the witnesses that the board intends to call, along with summaries of the evidence that may be used against the educator; (b) an opportunity for a hearing before the school system's board of education; and (c) an appeal to the State Board of Education in the event that a school board decides to

dismiss the teacher after a hearing, *id.* §§ 20-2-940(a), 20-2-942(b)(1), 20-2-942(e)-(f).

B. The Charter Systems Act is Enacted in 2007, and FCSS Becomes a Charter System in 2015

As noted above, the Charter Systems Act of 2007 authorizes the conversion of a public school system into what the law terms a "charter system." O.G.C.A. § 20-2-2062(3.1). The Charter Systems Act authorizes the Board, upon a school system's petition, "to enter into a charter with a local board to establish a local school system as a charter system." O.C.G.A. § 20-2-206(3.2). The charter obligates the school system to meet certain performance goals and to undertake various responsibilities for the duration of the charter. O.C.G.A. § 20-2-2065(a), in exchange for a waiver of laws, regulations, and policies that otherwise apply to school systems, including the provisions of the FDA. *Id.* Only "statutes relating to civil rights," as well as laws concerning matters such as health and safety, are statutorily exempt from such a waiver, *id.* § 20-2-2065(b)(5).

On June 11, 2015, FCSS and the State Board of Education entered into a charter agreement granting 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." R.348-49, 409.

C. FCSS Dismisses Plaintiff Barnes in 2017 Without Honoring the Rights She Previously Earned Under the Fair Dismissal Act.

Barnes continued teaching for FCSS for more than a decade before FCSS informed her, in a brief letter dated May 12, 2017, that it was terminating her employment. *Id*. Contrary to Barnes's previously earned rights under the FDA, FCSS's summary dismissal letter did not provide Barnes the statutorily required notice of the grounds for her termination and did not provide Ms. Barnes any opportunity for a hearing to challenge the school board's decision. R. 349, 412. Having been given no opportunity for a hearing before the school board, Barnes perforce had no opportunity to appeal any post-hearing dismissal decision to the State Board of Education pursuant to the FDA. *Id.*

ARGUMENT

I. DEFENDANTS' APPLICATION OF THE CHARTER SYSTEMS ACT PURSUANT TO A DELEGATON OF LEGISLATIVE AUTHORITY IS A "LAW" UNDER THE ANTI-RETROACTIVITY AND ANTI-IMPAIRMENT PROVISIONS OF THE GEORGIA CONSTITUTION

The Board Defendants first argue (Brief at 15) that the anti-retroactivity and anti-contractual-impairment provisions of the Georgia Constitution are inapplicable here because, in their view, "those provisions restrict only the *passage* of retroactive *laws* or the *passage of laws* impairing the obligation of contracts," while the charter that purports to waive Barnes's previously earned FDA rights here is merely "a contract" between the Board and FCSS.

This contention is specious. The Board and FCSS could only enter into the charter that purports to retroactively strip Barnes and similarly situated educators of their FDA rights because the General Assembly, in enacting the Charter Systems Act, *delegated* to the Board the legislative power to approve applications by school systems to become charter systems, see O.C.G.A. §§ 20-2-2063.2(a), and enter into charters with those school systems waiving, with the narrow exceptions noted above, every section of the 18 chapters that make up Title 20 of the Georgia Code, as well as any rule, regulation, or policy related to education that would otherwise apply to the school, see *id.* at 2065(a). The scope of the Board's delegated authority under the Charter Systems Act to override state and local statutes, regulations, and policies is breathtakingly broad and leaves no room for the notion that a charter issued by the Board is merely a "contract":

> Except as provided in this article or in a charter, … each school within the 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. [*Id.*]

It is difficult to conceive of a more quintessentially legislative power than the power to set aside entire swathes of laws that were duly enacted by the General Assembly, along with state and local rules, regulations, and policies concerning schools.

The charter that governs FCSS is thus the result of a specific delegation of legislative authority by the General Assembly to the Board, and it derives its legal force from that delegation. It is well settled that an act of an agency pursuant to delegated legislative authority is every bit as much a "law" as an act of a legislature. The U.S. Supreme Court has long held that the phrase "the Laws of the United States" in the Supremacy Clause, U.S. Const. art. VI, cl. 2, includes actions by "federal agenc[ies] acting within the scope of [their] congressionally delegated authority," *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 357 (1986). *See also DeHart v. Town of Austin, Ind.*, 39 F.3d 718, 721 (7th Cir. 1994) ("[T]he phrase 'Laws of the United States' of Article VI, Clause 2 encompasses both federal statutes and federal regulations that are properly adopted in accordance with statutory authorization."). And the same holds true for similar language in statutes. *See Henderson v. Carlson,* 812 F.2d 874, 879 (3d Cir. 1987) (administrative agency "regulation [that] was promulgated pursuant to authority delegated by Congress ... is … a 'law of the United States' for purposes of the habeas corpus statute"); *Samuels v. District of Columbia*, 770 F.2d 184, 199 (D.C. Cir. 1985) ("[42 U.S.C. §]1983 provides a legal remedy for the violation of all valid federal laws, including at least those federal regulations adopted pursuant to a clear congressional mandate that have the full force and effect of law.").

The Board's exercise of delegated legislative authority to take an action that waives statutory rights is therefore subject to challenge under the provisions of the Georgia Constitution prohibiting "laws impairing the obligation of contracts" and "retroactive laws." The rule could hardly be otherwise, else the legislature could end-run these constitutional restrictions by enacting statutes authorizing agencies of the state retroactively injure vested rights and impair contractual rights without there being any recourse for persons injured by such actions.

The decision in *Buffalo Teachers Fed'n v. Tobe*, 446 F. Supp. 2d 134 (W.D.N.Y. 2005), *aff'd*, 464 F.3d 362 (2d Cir. 2006), makes this same point. There, the court held that a plaintiff may bring an as-applied challenge under the cognate provision of the U.S. Constitution prohibiting "any … Law impairing the Obligation of Contracts," U.S. Const. art. I, sec. 10, cl. 1, to actions by local officials that were authorized, but not required, by a statutory delegation of authority. The labor union plaintiffs in *Tobe* brought their federal impairment-of-contracts challenge to a wage freeze imposed by a fiscal control board pursuant to a statute authorizing the appointment of such boards to stabilize the finances of cities in financial distress and granting them broad authority over fiscal policy. *Id.* at 138-39. Thus, as is the case here, the *Tobe* plaintiffs challenged, as a "law" impairing contractual rights, an act by public officials that was authorized, but not compelled, by a statute delegating legislative authority to an agency of the state.

Noting the distinction between facial challenges to statutes and challenges to state action that is alleged to be "unconstitutional as applied in a particular way or as applied to a particular person or group," the court concluded the plaintiffs' claims were appropriately framed as an "as-applied" challenge:

> Plaintiffs are limited to "as applied" challenges. This is because the [statute] itself does not diminish or eliminate Plaintiffs' contractual rights, nor does it alter or affect in any way Plaintiffs' collective bargaining agreements with the city of Buffalo school district. Thus, the [statute], standing on its own, does not substantially impair Plaintiffs' contractual rights. .... [Plaintiffs] challenge the [statute] in the sense that it is the source of the Control Board's authority to freeze wages, but they ultimately challenge the Wage Freeze Resolution because it is the act that caused them injury. [*Id.* at 141.]

The circumstances here are the same: Plaintiffs challenge the Board Defendants' exercise of authority delegated to them by the Charter Schools Act as an impairment of Plaintiffs' vested and contractual rights under the FDA. Like the *Tobe* plaintiffs, Plaintiffs here do not facially challenge the Charter Systems Act, nor could they: although the statute is the source of the Board's authority, it does not itself impair Plaintiffs' rights.[2] The Board Defendants' exercise of authority

[2] There is no merit to the Board Defendants' assertions (Brief at 17) that "Plaintiffs' complaint does not so much as hint that the waiver provision of the Charter Systems Act is unconstitutional, whether on its face or as applied—and for good reason, because the relevant provisions of the Charter Systems Act have been in place since 1993, well before anything relevant to this case occurred." First, it obvious from Plaintiffs' Amended Complaint that Plaintiffs' challenge focuses on the Defendants' application of the Charter Systems Act to retroactively strip Barnes of her FDA rights. *See* R. 98-106. And if that were not enough, Plaintiffs made the as-applied nature of their challenge abundantly clear, in their 2018

delegated to them by the legislature is therefore a "law"—and the application of a statute—that is the appropriate subject of Plaintiffs' challenge under Article I, Section I, Paragraph X of the Georgia Constitution.

II. EDUCATORS WHO EARN THE FDA'S PROTECTIONS GAIN CONTRACTUAL RIGHTS TO THOSE PROTECTIONS

The predicate for Plaintiffs' impairment-of-contracts claim—and the only other contested issue on the merits of that claim raised in this appeal—is that when Barnes and similarly situated FCSS educators earned the protections of the FDA, they gained contractual rights safeguarded by the prohibition against "laws impairing the obligation of contract," Ga. Const. art. I, sec. I, para. X. As we detail

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memorandum in opposition to the Board Defendants' original motion to dismiss, R. 173, 184-186, and again in Plaintiffs' 2022 memorandum in opposition to the Board Defendants' cross-motion for summary judgment and renewed motion to dismiss R.710-713. Nowhere in any of the Board Defendants' replies to those memoranda did the Board Defendants express confusion, complain, or claim surprise at Plaintiffs' presentation of their claims as as-applied claims targeting the application of the Charter Systems Act. This case has been pending for more than five years and has reached a final judgment. Even if it were the case that the Amended Complaint provided insufficient notice that the Defendants' application of the Charter Systems Act was at issue, which it is not, it is far too late to raise this issue now. *See Pfeiffer v. Georgia Dep't of Transp.*, 275 Ga. 827, 829 (2002) ("Fairness to the trial court and to the parties demands that legal issues be asserted in the trial court."); O.C.G.A. § 9-11-15 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Second, once again, the relevant statutory provisions here—the ones against which Plaintiffs' as-applied challenge is directed—are (and have been throughout this litigation) those of the Charter *Systems* Act of 2007, and never the 1993 iteration of the Charter Schools Act (a law for which the Board Defendants fail to even provide a citation).

below, that predicate is supported by fully on-point decisions from other jurisdictions (including the U.S. Supreme Court, the North Carolina Supreme Court) and by analogous decisions of this Court and the Georgia Court of Appeals. The Board Defendants' efforts to avoid the necessary implications of those decisions for the FDA and Plaintiffs' claims here are meritless.

Because the question whether the FDA gives rise to contractual rights on the part of educators who meet its requirements is an issue of first impression for this Court, we begin with analysis of on-point authority from other courts, including the U.S. Supreme Court, and then turn to authority from this Court and the Court of Appeals in analogous statutory settings, all of which supports the conclusion that the FDA does give rise to contractual rights.

(1) In *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), the U.S. 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, rights that are safeguarded by the provision of the U.S. Constitution prohibiting state laws "impairing the Obligation of Contracts," U.S. Const. art. 1, sec. 10, cl. 1. 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 (emphasis added). The Court found that the Indiana tenure statute was just such a law based on an analysis of the law's text and of what the text demonstrated as to the policy undergirding the law.

Beginning its analysis with "the cardinal inquiry … as to the terms of the statute," the Court placed primary emphasis on provisions of the tenure law establishing that a teacher, after serving at-will for five years under annual contracts and entering a contract for a further year, earned an "indefinite contract" that 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 also noted that the statutory scheme referred frequently to contracts between school districts and employees, observing that "the word 'contract' appears ten times in § 1, defining the relationship; eleven times in § 2, relating to the termination of the employment by the employer, and four times in § 4, stating the conditions of termination by the teacher. *Id.* at 105.

Based on these provisions of the law, the Court concluded that "the teacher was … assured of the possession of a binding and enforceable contract against school districts," and that the Indiana Supreme Court had therefore erred in holding

that "there is no contractual right to be continued as a teacher from year to year." under the tenure law. *Id.* at 99, 105. More recently, the Seventh Circuit applied *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 also 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 U.S. Constitution. *See N.C. Ass'n of Educators v. State ("NCAE")*, 786 S.E.2d 255 (N.C. 2016). In so doing, the court concluded 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.]

The provisions of the FDA are indistinguishable from those of the Indiana Tenure Act at issue in *Brand* and *Elliot* and those of the North Carolina Career Status Law at issue in *NCAE*. Under the FDA, 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, "acquire[s] rights under this Code section to continued employment as a teacher," O.C.G.A. § 20-2-942(d), and earns: (1) protection against dismissal, suspension or demotion for any reason other than the eight reasons specified by the law, *see id.* §§ 20-2-942(b)(1), 20-2-940(a)(1)-(8); and (2) the right to notice, the opportunity for a hearing before the school board, and an appeal to Board in the event that a school board decides to dismiss a teacher, *see id.* § 20-2-942(b)-(f).

Like the laws at issue in *Brand*, *Elliott*, and *North Carolina Association of Educators*, the FDA offers teachers and prospective teachers a bargain: if you accept employment with a Georgia school district, remain employed throughout a years-long period of at-will employment, and accept a school system's offer of employment for a fourth year, then you earn "rights to continued employment," *id.* § 20-2-942(d), and those valuable job protections. Teachers acquire those protections in exchange for their performance, which involves their acceptance of employment contracts and a three-year investment of labor, with all the attendant opportunity costs of remaining in the same position during that time. These

constitute the consideration teachers exchange for the protections offered by the FDA. *See NCAE*, 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).

The Board Defendants attempt to distinguish *Brand* on the ground that the law at issue there referred to "'indefinite contracts'" giving "rise to a 'contractual' right to 'continued employment'" and thus "explicitly *said* as much." Brief at 26. And they endeavor to distinguish *NCAE* by contrasting the language of the North Carolina Career Status Law stating that a teacher who earned its protections is "'not subjected to the requirement of annual appointment.'" *Id.* This contention fails because it ignores the critical language of the FDA, which explicitly and repeatedly "*says* as much" in providing that the rights that educators "acquire" and "retain" under the FDA are "rights to continued employment." O.C.G.A. § 20-2-942(c)(1) (three references); *id.* § 20-2-942(c)(2) (two references); *id.* § 20-2-942(d) (two references). And as was true of the tenure law at issue in *Brand*, the FDA is saturated with the language of contract: the term "contract" is referenced 39 times in § 20-2-942 alone.[3]

[3] It also is important to note that in contrast to the "right to continued employment" language that applies to tenured teachers, the FDA refers to a non-tenured educator as one "having a contract for a definite term." O.C.G.A. § 20-2-940(a), (b) & (g).

The crux of the question is whether the law at issue conveys an intent to establish a "teacher's right to continued employment," *Brand*, 303 U.S. at 105, as the *NCAE* court also recognized:

> Retroactively revoking this status from those whose career status rights had already vested deprives career teachers of *the promise of continuing employment*, as well as the right to a hearing in circumstances in which their … contracts may not be renewed. Plaintiffs' affidavits indicate they relied both *on the promise of continued employment* as a form of added compensation to supplement their lower salaries and on the benefits of career status when deciding to continue teaching in the public school systems. Elimination of these benefits substantially deprives current career status teachers of the value of their vested contractual rights. [786 S.E.2d at 265 (emphasis added).]

Here, the FDA answers that question in the clearest of terms.

The FDA's express grant of "rights to continuing employment" to teachers who earn its protections also demonstrates the futility of the Board Defendants' reliance (Brief at 26-28) on this Court's decision in *Newsome v. Richmond County*, 246 Ga. 300 (1980), and the U.S. Supreme Court's pre-*Brand* decision in *Phelps v. Board of Education*, 300 U.S. 319 (1937). In neither case did the law at issue contain language indicating that it conferred a right to continued employment. The civil service ordinance at issue in *Newsome* lacked any suggestion that it conferred a right to continued employment and in fact expressly reserved the county's right to abolish "any position." 246 Ga. at 300. Similarly, in *Phelps* the Court rejected a teacher's claim that a New Jersey tenure law created a contractual right against any

reduction in his salary because there was "nothing in the record to indicate that the board was bound by contract with the teacher for more than the current year." 300 U.S. at 321. Again, the FDA, in express terms, repeatedly makes clear that teachers "acquire" and "retain" "rights to continued employment" by satisfying the Act's requirements. O.C.G.A. §§ 20-2-942(c)(1), 20-2-942(c)(2), 20-2-942(d).

Nor is there any merit to the Board Defendants' passing suggestion (Brief at 27) that FDA provisions prescribing annual school-year contracts somehow defeat the express rights to continued employment and employment safeguards that the FDA expressly grant to teachers who satisfy its requirements. Annual contract procedures for educators, including those with tenure, are commonplace, but those annual contracts do nothing to negate any *rights to continuing employment* created by a tenure statute. Indeed, the Indiana tenure statute at issue in *Brand* included provisions for annual contracts, and shortly before the *Brand* decision, the Indiana Supreme Court had expressly rejected the contention that such annual contracts somehow negated continuing tenure rights:

> we hold that the execution of a new contract for the [school] year … did not terminate the tenure of [the teacher]. The legislative purpose in authorizing a new contract to be entered into by a tenure teacher and the employing school corporation was not to provide a means of terminating tenure, but to enable school corporations and their tenure teachers to adjust the provisions of indefinite contracts to current needs. [*Stiver v. State* ex rel. *Kent*, 1 N.E.2d 592, 593 (Ind. 1936).]

Provisions relating to annual teacher employment contracts remain in the Indiana tenure law to this day, and courts have uniformly continued to reject the argument that those contracts can derogate from the tenure law. Most recently, in *Elliott* the Seventh Circuit made clear that this argument is inconsistent with *Brand* and with the entire point of a tenure law:

> If the grounds of cancellation were subject to change through annual teaching contracts, the Court in [*Brand*] could not have concluded that repealing job-security provisions impaired the tenure contract. The Act—not the annual contracts—granted Elliott his contractual tenure rights. Under [*Brand*], these rights became enforceable the year Elliott earned tenure. A decrease in job security necessarily impairs his rights under that contract. [876 F.3d at 933.]

See also 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."). The obviously correct rule that a teacher's entry into an individual annual employment contract cannot defeat tenure rights conferred by statute has been widely embraced by courts in other jurisdictions as well.[4]

[4] *See, e.g.*, *State ex rel. Nobles v. Bienville Par. Sch. Bd.*, 4 So. 2d 649, 695 (La. 1941) ("The fact that the school board employed the plaintiff by the year or for a period of a year is of no moment" to teacher's claim of dismissal in violation of the tenure statute, and that "[t]o conclude otherwise would defeat the purpose of the Teachers' Tenure Act"); *State ex rel. Rose v. Bd. of Ed. of Ohio Rural Sch. Dist.*, 57 N.E.2d 609, 615 (Ohio Ct. App. 1944) ("The acceptance of employment from year to year is not inconsistent with claiming the benefits of the tenure act."); *La Shells v. Hench*, 276 P. 377, 380 (Cal. Ct. App. 1929) ("The mere entering into

(2) We have thus far considered only persuasive authorities because they are closely on point with this case. But this Court has repeatedly held that analogous statutes establishing benefits for public employees who satisfy specified preconditions create contractual rights. In *Swann v. Bd. of Trustees*, 257 Ga. 450, 454(1987), this Court invalidated amendments to a legislatively created retirement plan that purported to exclude former officials from coverage:

> 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.]

This Court has reaffirmed the *Swann* principle in subsequent cases concluding that not only laws creating retirement benefits but also laws exempting retirement benefits from taxation and laws establishing workers compensation benefits create contractual rights. *See Parrish v. Employees' Ret. Sys. of Georgia*, 260 Ga. 613, 613 (1990) ("law exempting retirement benefits from state income taxation … became part of the contract of employment of the retiree" when that retiree performed services while the law was in effect); *City of E. Point v. Elam*, 257 Ga.

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contracts after the time when the law had classified the petitioner as a permanent teacher cannot be held to prevent the operation of the [the teacher tenure law].").

704, 704-05(1987) (same); *Withers v. Register*, 246 Ga. 158, 159(1980) (The principle that "a statute or ordinance establishing a retirement plan for government employees becomes a part of an employee's contract of employment" is one that "cannot, at this late date, be placed in doubt."); *Spengler v. Employers Commercial Union Ins. Co.*, 131 Ga. App. 443, 446 (1974) (workers' compensation statute created contract governing "the relation between the employer and employee … in derogation of the common law rights of each").[5]

The statutory protections of the FDA are analogous to the retirement benefits at issue in *Swann* and other cases in its line of authority. As is true of a public employee retirement statute, the FDA offers prospective employees valuable employment benefits as an inducement to accept employment and to remain employed (here, benefits that offer some measure of job security) by providing that employees can receive those benefits if they satisfy a statutory years-of-service requirement (here, the three-year probationary period, followed by acceptance of a

[5] This principle applies regardless of whether the employee makes any monetary contributions toward pension benefits. It is enough for the employee to perform services while the plan is in effect, thereby providing consideration for the promise of benefits. *See, e.g.*, *Malcolm v. Newton Cnty.*, 244 Ga. App. 464, 467, 535 S.E.2d 824, 827 (2000) ("Because Malcom became a participant in the amended plan established by Newton County … during his tenure as Sheriff, he obtained a vested contractual right in the plan in consideration for his performance of services as Sheriff until he retired …. The fact that Malcom made no contribution to the County-funded plan does not render the pension a gratuity which the County could terminate at will.").

school district's offer of a subsequent contract). And as is the case with retirement benefits (see note 5 above) the employees' performance of services while the law is in effect provides consideration for those benefits.

Indeed, in the *NCAE* case discussed above, the North Carolina Court of Appeals expressly recognized the "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." *N.C. Ass'n of Educators v. State*, 776 S.E.2d 1, 10-11 (N.C. Ct. App. 2016) (citation and quotation marks omitted), *aff'd* 786 S.E.2d 255 (2016).

Finally, there is no merit to the Board Defendants' contention that if the FDA does create contractual rights, the contract would necessarily incorporate changes to the law made by the Charter Systems Act *after* an educator earns the protections of the FDA. Brief at 29 ("[I]f Barnes did have a contractual right to indefinite tenure under the [FDA], it would still be subject to the condition that the school could convert into a charter system."). This contention betrays a fundamental failure to come to grips with the nature and purpose of the prohibition against laws impairing contractual obligations.

The impairment-of-contact analysis, by its very nature looks, to the "the law when the original contract was made," *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 894 (7th Cir. 1998), which is of course *before* the legislative act that is alleged to impair those rights: "the question is whether the State granted a valuable right which it subsequently essayed to take away." *Wood v. Lovett*, 313 U.S. 362, 371 (1941). Likewise, the question in an impairment-of-contracts challenge "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.

Hence, Plaintiffs are not attempting to "pick and choose what parts of a statute she wants to be part of [their] 'contract.'" Brief at 29. The law that applies to the contract is "the law when the original contract was made," *Chrysler Corp.*, 148 F.3d at 894, which did *not* include any law providing for the conversion of a school system to a charter system. This is not, as the Board Defendants would have it, "nonsensical" Brief. at 29. This is simply how the impairment-of-contracts prohibition works. What is nonsensical is the notion that every contract is deemed to incorporate and conform to every subsequent law that is enacted—a notion that would swallow the prohibition against laws impairing contracts whole.

Nor are the Board Defendants helped by their return to the shell game regarding Charter Schools Act of 1993 and the Charter Systems Act of 2007.

Perhaps tacitly admitting that there is no basis for incorporating the Charter Systems Act of 2007—the statute at issue here—into Barnes's 2003 FDA contract, the Board Defendants shift again to the Charter *Schools* Act, claiming that "Georgia's statutory scheme has for thirty years permitted schools to convert into charter schools and extinguish any [FDA] rights." Brief at 30. This argument fails at the outset for the simple reason that Plaintiffs are not challenging the conversion of Barnes's school into a charter school under the Charter Schools Act but the application of the Charter *Systems* Act to retroactively deny Barnes's FDA rights. The existence of the Charter Schools Act—and the counterfactual that Barnes's school might have converted to a charter school under the Charter Systems Act—are irrelevant to the claim that Barnes's 2003 FDA contract did *not* "incorporate" the 2007 Charter Systems Act, much less the conversion of FCSS into a charter system under that Act in 2015 or the Defendants' retroactive application of the waiver provisions of that Act in 2017.

Undaunted, the Board Defendants suggest that the mere existence of the Charter *Schools* Act somehow defeats Plaintiffs' as-applied challenge to the Charter *Systems* Act, on the notion that the mere fact that a different law predating her FDA contract hypothetically could have affected Barnes's FDA rights means that her FDA rights can be revoked by *subsequent* legislation without raising an impairment-of-contracts issue. This makes no sense. Even assuming that FDA

rights can be "extinguish[ed]" (Brief at 30) by the conversion of a school to a charter school, that would just mean that Barnes's contract meant that she retains her FDA rights unless she is dismissed in compliance with the FDA or her school converts to a charter school.[6] That is not what happened here.

The defects in the Board Defendants' reasoning are further illustrated by the fact that the cases they attempt to harness in support of this theory (Brief at 29-30) do nothing of the sort. Those cases hold that where a statute provides employment benefits, and the "statute *itself* provides that it is subject to legislative change it may be amended" without offending the impairment-of-contracts provision "because no 'vested right' to unchanged benefits was created." *Murray Cnty. Sch. Dist. v. Adams*, 218 Ga. App. 220, 222 (1995) (emphasis added). *See also Pritchard v. Bd. of Comm'rs of Peace Officers Annuity & Ben. Fund of Ga.*, 211 Ga. 57, 58 (1954) (holding that pension act did not create vested rights because it

[6] That said, we stress that the conversion of a single public school into a charter school does not necessarily "extinguish" FDA rights as the Charter Systems Act does. That is because a teacher earns tenure rights system-wide, and a teacher at a school that initiates the process of conversion can seek a transfer to another system school, which would be with tenure intact. Indeed, because a charter conversion results in a certain loss of benefits (FDA rights) as well as a likely reduction in pay, a school district that refuses such a transfer request would be demoting the teacher, which would trigger the FDA's protections. *See Hatcher v. Bd. of Pub. Educ. & Orphanage for Bibb Cnty.*, 809 F.2d 1546, 1551-52 (11th Cir. 1987) (holding that tenured principal displaced by school closing had right to assignment to comparable position at another system school, and that school district's assignment of plaintiff to non-comparable position at another system school was a demotion that violated the FDA).

provided that "all rights and benefits provided herein shall be subject to future legislative change or revision and no beneficiary herein provided for shall be deemed to have any vested right to any annuities or benefits provided herein"); *City of Waycross v. Bennett*, 356 Ga. App. 713, 718-19, 849 S.E.2d 33, 37 (2020) ("[W]here a statute itself provides that it is subject to legislative change it may be amended, because no 'vested right' to unchanged benefits was created."). Here, "the statue itself," the one providing the benefits, is the FDA, and it does *not* provide that it is subject to legislative change. The fact that another statute authorizes the waiver of the FDA n a conversion charter school is immaterial.

III. FDA RIGHTS EARNED BY PLAINTIFFS BEFORE FCSS'S CONVERSION INTO A CHARTER SYSTEM ARE VESTED RIGHTS UNDER THE ANTI-RETROACTIVITY PROVISION OF THE GEORGIA CONSTITUTION

The Board Defendants make a similar argument to the one refuted above in aid of their erroneous assertion that Plaintiffs' FDA rights are not vested because they were already "divested" (Brief at 13) by the Charter Schools Act before Barnes earned the protections of the FDA. This argument fails with respect to the retrospective laws analysis for the largely same reasons as fails for the purposes of the contract-impairment analysis.

"[T]he term 'vested rights,' which cannot be interfered with by retrospective laws, means interests which it is proper for the state to recognize and protect and of which the individual cannot be deprived arbitrarily without injustice." *Hayes v.*

Howell, 251 Ga. 580, 584, (1983). On this definition, it is plain that FDA rights are vested because, besides being contract rights as shown above, they also are property rights. It is settled law that the FDA "creates a property interest in continued employment for tenured teachers" by virtue of the statute's directive that "a teacher may be demoted or terminated only for cause." *Hatcher v. Bd. of Pub. Educ. & Orphanage for Bibb Cnty.*, 809 F.2d 1546, 1550 (11th Cir. 1987) (Kravitch, J.). *See also Ellis-Adams v. Whitfield Cnty. Bd. of Educ.*, 182 Ga. App. 463, 464(1987) (adopting the "excellent analysis provided [in *Hatcher*]"). And it is equally settled that "[a] property interest protected by the due process clauses of the federal and state constitutions meets our definition of 'vested rights.'" *Goldrush II v. City of Marietta*, 267 Ga. 683, 694 (1997).

The Board Defendants nonetheless try to resist this conclusion by returning once again to their contention that the existence of the Charter Schools Act means that FDA rights are inherently divestible and citing the same inapposite cases standing for the very different proposition that when a statute provides for employment benefits, and the "statute itself provides that it is subject to legislative change[,] it may be [constitutionally] amended, because no 'vested right' to unchanged benefits" is created." Brief at 19 (quoting *City of Waycross*, 356 Ga. App. at 718-19). Because, as shown above, the statute here (the FDA) does not

provide for legislative change, this argument is as meritless here as it is in the impairment-of-contracts setting.

CONCLUSION

For these reasons, the Superior Court's judgment should be affirmed.

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