IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

J. DOE (a pseudonym), J. ROE (a pseudonym), GEORGIA ASSOCIATION OF EDUCATORS, and ATLANTA ASSOCIATION OF EDUCATORS, *Petitioners/Plaintiffs*, v. ATLANTA INDEPENDENT SCHOOL SYSTEM, *Respondent/Defendant*.	CIVIL ACTION 2016CV279349 NO. _____

PLAINTIFFS' BRIEF IN SUPPORT OF MANDAMUS NISI

INTRODUCTION

Plaintiffs are education employees working for the Atlanta Independent School System, also known as Atlanta Public Schools ("APS"), and membership organizations representing the interests of education employees. In this lawsuit, Plaintiffs are seeking to remedy two actions by APS: (1) APS's decision to delegate its constitutional duties by contracting out the entire operation and management of five of its schools to private parties, and in so doing terminating the employment of all staff at those five schools; and (2) APS's conversion into a "Charter School System" without preserving the rights that tenured education professionals previously earned under the Fair Dismissal Act ("FDA").

These actions by APS are unlawful on separate grounds, each of which warrants particular relief.

First, as we will show, APS's decision to delegate its constitutional duties by contracting out the entire operation and management of five public schools to private charter school operators—without specific statutory authority and entirely outside of the statutorily prescribed process by which public schools are converted into privately managed charter schools—is *ultra vires*. Accordingly, Plaintiffs seek a preliminary injunction prohibiting APS from implementing contracts that purport to turn over all operation and management to private charter school operators. But because the *ultra vires* issue is fundamentally a question of law as to which there are no material facts subject to dispute, Plaintiffs have no objection to consolidating a preliminary injunction hearing on this issue with the hearing on the merits.

Second, APS's conversion into a "charter school system" will, by operation of the Charter Systems Act and the terms of APS's charter, eliminate tenured APS educators previously earned rights under the Fair Dismissal Act. Those previously earned rights are private and contractual rights and their elimination by APS violates the anti-retroactivity and anti-impairment-of-contracts clauses of Art. I, Sec. I, Par. X of the Georgia Constitution. Because tenured educators have vested private rights protected by the Georgia Constitution, APS has the clear, mandatory and non-discretionary duty to honor those rights. Plaintiffs therefore seek mandamus relief compelling APS to honor its tenured education professionals' earned and vested rights under the Fair Dismissal Act.

STATEMENT OF FACTS

The facts that follow are supported by Plaintiffs' Verified Complaint and will be further supported by the evidence presented at the preliminary injunction/mandamus hearing.

A. Facts Relating to the *Ultra Vires* Issue

1. The Charter Schools Act of 1998

In the Charter Schools Act of 1998, O.C.G.A. §§ 20-2-2060 *et seq.*, the legislature authorized the creation of charter schools, which are taxpayer-financed schools operated and managed by private parties within the public school system pursuant to contracts, or "charters," between school boards, as authorizers, and the charter school operators. The law provides for two distinct types of charter schools: "conversion charter schools" and "startup charter schools" and prescribes particular requirements that prospective charter school operators must meet in order to be granted the authority to operate such charter schools and receive public education funds.

A startup charter school is a charter school that opens as a new school within a school system and is operated privately pursuant to a charter with the school system. A charter petitioner seeking to create a start-up charter school must submit a petition meeting specified requirements to the local board of the local school system in which the proposed charter school will be located. O.C.G.A. § 20-2064(b),

A conversion charter school is a charter school that previously existed as a traditional public school but has converted to private management. For the conversion of traditional public schools into charter schools, the law mandates that stringent safeguards, over and above those required for startup charters, be observed. A private may petition a school board to convert an existing school only if the conversion of the school:

> Has been freely agreed to, by secret ballot, by a majority of the faculty and instructional staff members of the petitioning local school at a public meeting called with two weeks' advance notice for the purpose of deciding whether to submit the petition to the local board for its approval; and
>
> Has been freely agreed to, by secret ballot, by a majority of the parents or guardians of students enrolled in the petitioning local school present at a public

> meeting called with two weeks' advance notice for the purpose of deciding whether to submit the petition to the local board for its approval.

O.C.G.A. § 20-2-2064(a).

A petition for a startup or conversion charter school must also comply with rules and regulations requiring the submission of detailed information regarding, *inter alia*, the proposed conversion school's goals and objectives, intended use of waivers, educational programs, assessment methods, school operations, fiscal feasibility and controls, and governance structure. *See* O.C.G.A. § 20-2-2063(b); Ga. Comp. R. & Regs. §160-4-9-.05(2). The rules go on to specify further requirements for conversion petitions, which must also include, *inter alia*, the following:

> A statement detailing the innovations that shall materially distinguish the conversion charter from the school's pre-conversion model and that require the flexibility offered through the charter model.
>
> … A statement detailing the conversion charter's plan to operate with substantial autonomy. This statement shall include a description of how financial resources will be managed, how human resources will be managed, how personnel will be evaluated; and a description of school governance and the extent to which parents, community members, and other stakeholders will participate in the governance of the school. The petition shall describe all policies, procedures, and practices that will materially distinguish the conversion school from the school's pre-conversion model.

Ga. Comp. R. & Regs. §160-4-9-.05(3).

2. APS Seeks to Delegate the Entire Operation and Management of Five Public Schools to Private Charter School Operators Without Following the Requirements of the Charter Schools Act

In late 2015, APS issued a Request for Quotations ("RFQ") soliciting bids from private entities to provide what APS Superintendent Meria Carstarphen called "turnaround services." In late January 2016, APS announced that it considered two charter school operators—Kindezi Schools and Purpose Built Schools—to be "finalists from the RFQ." Superintendent Carstarphen admitted that the RFQ and vendor selection process as satisfying the requirements for creating charter schools set forth in the Charter Schools Act, stating, "This RFQ is <u>not</u> a charter school

application process." And the RFQ did not in fact satisfy the requirements for creating conversion charter schools set forth in the Charter Schools Act.

APS later announced a "Turnaround Plan" for a number of APS schools, which was adopted by the Atlanta Board of Education on March 7, 2016. Of relevance here, the plan involves contracting out the entire operation and management of five APS schools to the private charter operators Purpose Built Schools and Kindezi Schools. In adopting the plan, the Atlanta Board of Education authorized Superintendent Carstarphen to enter into a contract with Purpose Built Schools for the operation and management of four schools (Thomasville Heights Elementary School, Slater Elementary School, Price Middle School, and Carver Comprehensive High School) as well as a contract with Kindezi Schools for the operation and management of Gideons Elementary School.

The plan states that "[a]ll staff of the partner schools," with the exception of certain special education placement staff, "shall be employees of [the private operators] or its partner organizations" and that the private charter operators "shall have sole discretion on all hiring decisions." The plan contemplates that APS will dismiss all of its staff at the five schools and that the private operators will "interview all current APS employees … who are interested in" working for the private operators.

At its May 2 meeting, APS approved the purported "abolishment" of all positions at Thomasville Heights Elementary by reason of APS's contracting out scheme—notwithstanding that APS is not closing Thomasville Heights Elementary but instead is purporting to delegate all responsibility for operating and managing the school to Purpose Built Schools. Upon learning that APS was abolishing all positions at Thomasville Heights Elementary, dismissing all staff at the school, and turning over all future employment decisions at the school to Purpose Built Schools, many teachers and education support professionals at the school resigned or retired

earlier than they otherwise would have. Some who resigned managed to secure jobs at other APS schools. Those employees at Thomasville Heights Elementary who did not resign or retire received termination notices from APS stating that its decision to contract out the operation and management of Thomasville Heights Elementary, and to purportedly "abolish" all positions at the school, amounts to the "cancellation of a program" justifying their dismissal under the Fair Dismissal Act.

APS has since entered into a contract with Purpose Built Schools that calls for the operator to take over the operation and management of Thomasville Heights in the 2016-17 school year, of Slater and Price in the 2017-18 school year, and of Carver Comprehensive in the 2018-19 school year. The contract provides that Purpose Built Schools will receive essentially the full per-pupil allotment of taxpayer funds that APS schools ordinarily receive, less the cost of certain special services provided directly by APS and an administrative fee of less than 1 percent. The contract purports to be for a one-year term but provides for automatic annual renewals and states that the parties intend for it to remain in place until June 2030. And APS has stated that it will contract with Kindezi to take over the operation and management of Gideons Elementary in the 2017-18 school year.

Consistent with the Turnaround Plan, APS intends to abolish all positions, and terminate the employment of all staff, at Slater Elementary School, Price Middle School, Carver Comprehensive High School, and Gideons Elementary School in a similar manner over the next two years.

B. Facts Relating to the Constitutional Issues

1. The Fair Dismissal Act

Pursuant to the Fair Dismissal Act, a teacher who accepts employment with a Georgia school system, successfully completes a probationary period of 3 years' continuous employment,

and is rehired by the school system's board of directors for a fourth year earns two basic employment protections: (1) protection against discharge for any reason other than those provided in the statute and (2) the right to notice, the opportunity for a hearing, and an appeal in the event that a school board decides to discharge the teacher for one of the statutory reasons. These individually earned rights are valued by educators which help to offset the low pay that public school educators earn relative to other professions requiring comparable academic credentials and training.

The FDA 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 only for eight reasons:

> (1) Incompetency;
> (2) Insubordination;
> (3) Willful neglect of duties;
> (4) Immorality;
> (5) Inciting, encouraging, or counseling students to violate any valid state law, municipal ordinance, or policy or rule of the local board of education;
> (6) To reduce staff due to loss of students or cancellation of programs and due to no fault or performance issue of the teacher, administrator, or other employee.…;
> (7) Failure to secure and maintain necessary educational training; or
> (8) Any other good and sufficient cause.

O.C.G.A. §§ 20-2-942(b)(1), 20-2-940(a).

Before a school board may discharge or demote a teacher who has earned the protections of the FDA, 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. 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. O.C.G.A. § 20-2-942(b)-(e). The teacher has the right to appeal any adverse board decision to the State Board of Education. *Id.* § 20-2-940(f).

Plaintiff Doe, like many other APS teachers, earned the protections of the Fair Dismissal Act. Like other tenured educators, Plaintiffs Doe relied on the benefits offered by the Fair Dismissal Act in making important career decisions. One of the reasons why Plaintiff Doe chose to accept a position with APS, and to remain in that positions to this day, was that the law offered the opportunity to earn the protections of Fair Dismissal Act. The protections under the Fair Dismissal Act—which provide a measure of security against arbitrary or wrongful discharge—constitute a valuable employment benefit that helps offset the low pay that public school educators in Georgia receive. Plaintiff Doe and many other APS teachers bargained for and earned these benefits in accepting employment with APS and remaining employed while they fulfilled the Fair Dismissal Act's requirements.

2. The Charter Systems Act of 2007

In 2007, the legislature enacted the "Charter Systems Act." 2007 Georgia Laws Act 116 (S.B. 39), Section 1, thereby creating an alternative scheme for regulating school systems. The Charter Systems Act authorized the conversion of public school systems into what the law terms "charter school systems." Despite the terminology, such "charter school systems" do not involve charter schools proper—*i.e.*, public schools managed by private parties pursuant to the authority of the Charter Schools Act. Rather, the Charter Systems Act sets up a process by which an entire public school system can apply to the State Board of Education for a "charter"—a contract between the school system and the State Board of Education that governs the school system and waives a significant portion of the laws and regulations that otherwise govern school systems.

The law defines a "charter school system" as a local school system that is "operating under the terms of a charter pursuant to Code Section 20-2-2063.2." O.C.G.A. § 20-2-2062(3.1).

That provision, in turn, authorizes the State Board of Education "to enter into a charter with a local board to establish a local school system as a charter system" and sets out the requirements that a local system must follow in order to become a charter school system. O.C.G.A. § 20-2-2063.2. When a school system successfully petitions the state board to become a charter school system, it enters into a contract with the state board in which the school system agrees to meet specified performance goals and undertake various accountability responsibilities for the duration of the charter.

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).

According to the decision of the Georgia Court of Appeals in *Day v. Floyd Cty. Bd. of Educ.*, 333 Ga. App. 144, 147-48, 775 S.E.2d 622, 625 (2015), the "plain and unambiguous import of the [Charter Systems Act]" is that the Fair Dismissal Act "is among the provisions of Title 20 generally waived" when a school system converts to a charter system pursuant to the Charter Systems Act, absent any provision in the charter specifically providing that the Fair Dismissal Act is not waived.

When a school system becomes a charter school system, the individual schools within the system are designated as "system charter schools," but they are distinct from charter schools proper. While duly authorized charter schools are operated independently by private parties pursuant to a charter between the private parties and the relevant school systems, system charter

schools are simply traditional public schools that remain under the direct control of an elected school board that has been designated as a charter school system. Indeed, if any charter schools exist within a school system that becomes a charter school system, all those existing charter schools are automatically excluded from the charter system unless any of the private operators of charter schools within the system elect to surrender their charters with the school systems. *See* O.C.G.A. § 20-2-2063.2(g).

3. APS's Conversion to a Charter System

On September 25, 2015, the State Board of Education approved APS's petition to become a charter school system pursuant to the Charter System Act and on December 15, 2015, APS and the State Board executed a charter agreement for a five-year period beginning on July 1, 2016. The charter grants APS "the maximum flexibility allowed by state law from the provisions of Title 20 of the [Georgia Code] and from any state or local rule, regulation, policy, or procedure established by the Local Board or the Georgia Department of Education."

The Charter does not specifically exempt the Fair Dismissal Act from the "maximum flexibility" waiver to be granted to APS. Thus, absent a judicial remedy, all tenured APS educators, including Plaintiff~~s~~ Doe, will, lose the protections that they previously earned under the Fair Dismissal Act by operation of the charter and the Charter Systems Act.

ARGUMENT

I. APS'S DELEGATION OF ITS CONSTITUTIONAL DUTIES TO MANAGE AND CONTROL ITS SCHOOLS TO PRIVATE CHARTER OPERATORS IS *ULTRA VIRES*, WARRANTING INJUNCTIVE RELIEF

The court may issue an interlocutory injunction where the party seeking the injunction has ~~a~~ made a clear showing that the party will succeed on the merits. While "a trial court is not *required* to find that a movant is likely to succeed on the merits before granting an interlocutory injunction," if other equitable factors compel such relief, *Toberman v. Larose Ltd. P'ship*, 281

Ga. App. 775, 778, 637 S.E.2d 158, 161 (2006), a strong case on the merits is, in the absence of evidentiary conflicts, sufficient to support preliminary relief. *See Haygood v. Tilley*, 295 Ga. App. 90, 93, 670 S.E.2d 800, 804 (2008). Indeed, where, as here, there are no material facts subject to dispute—making the ultimate issue one of law—"the judge's discretion in granting or denying the interlocutory injunction becomes circumscribed by the applicable rules of law." *Zant v. Dick*, 249 Ga. 799, 799, 294 S.E.2d 508, 509 (1982). Accordingly, we focus here on the merits, for Plaintiffs have a sufficiently strong case on the merits as to warrant interlocutory relief on this ground alone. For these reasons, Plaintiffs consent to the consolidation of the preliminary injunction hearing with the hearing on the merits pursuant to O.C.G.A. 9-11-65(a)(2).[1]

As we now show, APS's actions in seeking to turn over the entire operation and management of five of its schools to private charter school operators, and thereby attempting to delegate APS's core constitutional duties to manage and control its schools, are *ultra vires* and void.

The Georgia Constitution vests local school boards with the power and responsibility to "manage and control" public school systems. Ga. Const. art. VIII, § 5, ¶ II. That power and responsibility does not include the authority to turn the entire operation and management of public schools over to private hands by the simple expedient of entering into contracts with charter operators. "Without specific legislative authorization, a school board has no authority, by contract or otherwise, to delegate to others the duties placed on the board by the Constitution and laws of Georgia." *Chatham Ass'n of Educators, Teacher Unit v. Bd. of Pub. Ed. for City of*

[1] *Budlong v. Graham*, 488 F. Supp. 2d 1245, 1248-50 (N.D. Ga. 2006) (Consolidating a preliminary injunction with a trial on the merits without the necessity of a hearing appropriate when materials facts will not be in dispute)

Savannah & Chatham Cty., 231 Ga. 806, 807, 204 S.E.2d 138, 139-40 (1974). *See also Family Ltd. P'ship v. City of Villa Rica*, 278 Ga. 819, 819-20, 607 S.E.2d 883, 885 (12005) ("[I]f a local government enters a contract in abrogation of its delegated power or in excess of its authority to enter contracts, then the contract is deemed *ultra vires* and void.").

In *Chatham Association of Educators*, *supra*, the Georgia Supreme Court invalidated a delegation of school board duties to a private party that was much less far-reaching than APS's effort to contract out the entire operation and management of five public schools here. In that case, the school board entered into a contract with an association representing its teaching staff that provided for $339,600 in increased benefits for teachers, and granted the association the right to decide exactly how to allocate those funds for employee benefits. 231 Ga. at 807, 204 S.E.2d at 139. The local board also passed a resolution to amend its budget to reflect this arrangement regarding benefits. *Id.* The Court had no difficulty voiding this arrangement. Stressing that the school board had a constitutional duty "to control and manage … the schools within the system," the court held "that the contract and resolution were void, being illegal attempts by the board to delegate its powers and authority to provide the conditions of employment of its teachers and to determine the manner in which the public funds for the operation of the schools shall be allocated." *Id.*

The Court's reasoning in *Chatham Association of Educators* applies with even greater force here. In this case, APS has not just delegated to a private party the allocation of a certain sum earmarked for employee benefits; it seeks to delegate its entire constitutional responsibility of "control and management" of its schools to private charter operators, including not only complete control over "the conditions of employment of its teachers and … the manner in which the public funds for the operation of the schools shall be allocated," *id.*, but also over the entire

instructional program of five schools. This is plainly an unlawful delegation and is therefore void.

This conclusion is further reinforced by the Charter Schools Act, which provides the only statutorily prescribed method for a local school board to turn over the operation and management of public schools to private charter operators – a process which was not followed here. The Charter Schools Act's detailed provisions governing the conversion of traditional district-operated public schools into charter schools managed by private charter school operators, demonstrates that the legislature did not intend for school districts to turn over their schools to private charter operators except through the statutorily mandated process.

As detailed above, the Charter Schools Act authorizes local school boards to grant charters to private parties for the conversion of traditional public schools into privately managed charter schools, provided that the law's safeguards, accountability, public input and requirements are satisfied. Notably, those safeguards and requirements include:

- the submission of a charter conversion application to the school board by the private party desiring to convert the school, the contents of which must comply with the requirements of the statute and of the relevant regulations;
- a free agreement to the conversion among the school's faculty and instructional staff by means of a secret ballot election held at a public meeting;
- and a free agreement to the conversion among the parents and guardians of students enrolled in the school, also by means of a secret ballot election held at a public meeting.

The Charter Schools Act, in sum, provides a comprehensive and reticulated set of requirements and procedures for converting traditional public schools into privately managed schools. The law's carefully defined procedures, roles, and safeguards demonstrate that the legislature considers such conversions to be serious matters that cannot be accomplished without,

inter alia, the consent of stakeholders as expressed in secret ballot elections. Under the statutory scheme, a school system's role in converting an existing school into a charter school is sharply circumscribed. A school system does not have the authority to convert community schools into charter schools on its own initiative. Rather, the school system's role is limited to considering whether charter conversion petitions submitted by interested private parties comply with the Act's requirements and approving those that meet the requirements of the statute, rules, and regulations while denying those that do not.

APS followed none of the safeguards and requirements that the Charter Schools Act prescribes for converting traditional public schools into privately managed conversion charter schools.

- No petitions to convert the five schools into schools managed by charter operators were ever submitted to APS by Kindezi Schools or Purpose Built Schools, let alone ones that comply with the requirements of the law and regulations. Instead, APS itself solicited "turnaround services" from private parties through its ordinary procurement process and chose among private charter operators using its own criteria.
- Neither a majority of the faculty and instructional staff at these five schools nor a majority of the parents or guardians of students enrolled in the five schools ever freely agreed to the conversion by secret-ballot elections at public meetings. Instead, APS unilaterally chose to hand over five of its schools to private operators. APS has sought to accomplish the same result as a charter school conversion of five of its schools by the simple expedient of issuing a RFQ and contracting out the entire operation and management of the five schools in the same manner as it would enter into an ordinary procurement contract for office supplies or textbooks.

This APS cannot do. "'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *Nat'l R. R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974), quoting *Botany Worsted Mills v. U.S.*, 278 U.S. 282, 289 (1929). This principle derives from the canon of statutory construction *inclusion unis est exclusion alterius*, on which Georgia courts have relied in rejecting claims by local government officials that they possess powers not specifically provided for in their governing statutes. *See Bd. of Commissioners v. Glasgow*, 86 Ga. 358, 12 S.E. 747, 747 (1890), *Mousetrap of Atlanta, Inc. v. Blackmon*, 129 Ga. App. 805, 808, 201 S.E.2d 330, 333 (1973). APS's conversion of traditional public schools into schools privately managed by charter school operators was an end-run around the stringent legislative requirements and safeguards is *ultra vires.*.[2]

II. THE CONVERSION OF APS INTO A CHARTER SYSTEM WITHOUT PRESERVING TENURED EDUCATORS' RIGHTS UNDER THE FAIR DISMISSAL ACT VIOLATES ARTICLE I, SECTION I, PARAGRAPH X OF THE GEORGIA CONSTITUTION, WARRANTING MANDAMUS RELIEF

Mandamus relief is appropriate to compel public officials to perform clear and well defined duties that are imposed by law and do not involve the exercise of discretion. *Bland*

[2] This conclusion is further reinforced by the fact that the only authority granted by the Education Code for a public entity to unilaterally turn a public school's governance over to a private party comes in Section 20-2-84.1 of the Code, which reserves that authority *to the state alone* and only in serious and well-defined circumstances. This provision is part of separate statute authorizing the state board to enter into contracts with school systems allowing them greater flexibility in exchange for meeting certain accountability requirements. The statute provides that if one or more schools within a system covered by such a contract fail to satisfy the accountability requirements of the law or violate the agreement, "[t]he State Board of Education shall mandate the loss of governance of one or more of its nonperforming schools. ." O.C.G.A. § 20-2-84.1(a). This "loss of governance may include … [c]onversion of a school to charter status" or "[o]peration of a school by a private entity, nonprofit or for profit, pursuant to a request for proposals issued by the department." *Id.* § 20-2-84.1(a)(1) and (3). Clearly, the legislature knows how to authorize a public body to unilaterally transfer school governance into private hands, and it has done so only with respect to the state and only in this particular circumstance. This further supports the conclusion that the legislature did not intend that local school boards should be permitted to turn their schools over to private hands by simply signing contracts with charter operators.

Farms, LLC v. Ga. Dep't of Ag., 281 Ga. 192, 193, 637 S.E.2d 37, 39 (2006). As detailed above, absent a judicial remedy, APS's conversion to a charter system, without preserving tenured educators' previously earned rights under the Fair Dismissal Act, will result in the loss of those rights. As we will show, those rights are protected by the anti-retroactivity and anti-impairment-of-contracts clauses of Art. I, Sec. I, Par. X of the Georgia Constitution. Accordingly, Plaintiffs seek to compel APS to perform clear, mandatory and non-discretionary duties to honor its tenured education professionals' vested rights under the Fair Dismissal Act, thus warranting mandamus relief.

A. APS's Conversion to a Charter System Without Preserving Tenured Educators Rights under the Fair Dismissal Act Violates Tenured Teachers' Vested Private Rights Against the Retroactive Application of Legislation

The anti-retroactivity clause of the Georgia Constitution forbids the application of statutes so as to "injuriously affect the vested rights of citizens." *Deal v. Coleman*, 294 Ga. 170, 175, 751 S.E.2d 337, 343 (2013). This provision protects private, substantive rights. *See id.*, 294 Ga. at 178, 751 S.E.2d at 345 ("Private rights may become vested in particular persons, and when they are vested, our Constitution does not permit those rights to be denied to those persons ….").

Teachers such as Plaintiff Doe, who earned the substantive protections of the Fair Dismissal Act before the July 1, 2016 conversion of APS into a charter school system, have vested private rights in those protections. It is settled that the Fair Dismissal Act "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). It is equally settled that "that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Id.* at 1551 (citation omitted). And the Georgia Supreme Court has made it clear

that "[a] property interest protected by the due process clauses of the federal and state constitutions meets [the Court's] definition of 'vested rights,'" *Goldrush II v. City of Marietta*, 267 Ga. 683, 694, 482 S.E.2d 347, 358 (1997), for the purposes of the anti-retroactivity clause of the Georgia Constitution.

The Charter between APS and the State Board of Education grants APS "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." As nothing in the Charter specifically exempts the Fair Dismissal Act from the "maximum flexibility" waiver to be granted to APS, absent a remedy, all APS teachers who earned tenure rights under the Fair Dismissal Act before the July 1, 2016 effective date of the Charter, including Plaintiff Doe, will lose the protections that they previously earned under the Fair Dismissal Act.

All this being so, APS's failure to preserve the Fair Dismissal Act rights of teachers who previously earned those rights, by refusing to exempt those rights from the waiver provisions of the Charter, constitutes the retroactive application of a law—the Charter Systems Act—in such a way as to have injurious effects on tenured teachers' vested, private rights under the Fair Dismissal Act. Accordingly, mandamus relief is warranted, in the form of an order that APS abide by its non-discretionary duty to honor the Fair Dismissal Act rights of those teachers who earned those rights prior to the July 1, 2016 conversion of APS into a charter school district.

B. APS's Conversion to a Charter System Without Preserving Tenured Educators' Rights under the Fair Dismissal Act Impairs Tenured Teachers' Contracual Rights In Violation of the Georgia Constitution's Prohibition Against Laws Impairing Contractual Rights

Art. I, Sec. I, Par. X of the Georgia Constitution provides that "[n]o … laws impairing the obligation of contract … shall be passed." As we show below, teachers who earned the

protections of the Fair Dismissal Act before the July 1, 2016 have contractual rights to those protections and that APS's conversion of APS into a charter school district without preserving those rights is an application of the Charter Systems Act that impairs those teachers' contractual rights in violation of the Georgia Constitution.

The Georgia Supreme Court has made clear that public employee retirement statutes create contractual rights protected by the Constitution when public employees perform services for their public employers and make required contributions. 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 retirement plan, insofar as they affected former officials who had earned those benefits:

> 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. *See also Withers v. Register*, 246 Ga. 158, 159, 269 S.E.2d 431 (1980) ("It is not necessary for an application of this rule that the rights of the employee shall have become vested under the terms of the retirement plan while the amendment is in effect. Rather, if the employee performs services during the effective dates of the legislation, the benefits are constitutionally vested, precluding their legislative repeal as to the employee ….").

The Georgia courts have not yet had occasion to consider whether the Fair Dismissal Act creates contractual rights that vest in those teachers who satisfy the law's prerequisites. But the conclusion that the Fair Dismissal Act does create contractual rights follows from two fully on-point decisions arising under the anti-impairment-of-contracts clause of the United States

Constitution, one from the United States Supreme Court and one from the North Carolina Supreme Court.

In its decision in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), the United States Supreme Court held that the fair-dismissal protections of Indiana's Teacher Tenure Act conferred contract rights on teachers who had earned the law's protections, and went on to hold that a law partially repealing those already earned protections violated the federal Contracts Clause.

For the purposes of this case, *Brand*'s importance lies in its holding on the question of whether the law created contractual rights. On this question, the *Brand* Court explained that although "the principal function of a legislative body is not to make contracts but to make laws that declare the public policy of the state and are subject to repeal," a special case is presented where legislation "contain[s] provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions." 303 U.S. at 100. In concluding that the Indiana tenure statute was just such a law, the Court examined the text and meaning of the law, considered in light of the policy undergirding it.

The Court began its analysis noting that "the cardinal inquiry is as to the terms of the statute supposed to create a contract." *Id.* at 104. The tenure statute, the Court observed, provided that teachers, after serving at-will for five years under annual contracts and being re-employed for a further year, could be terminated "only upon compliance with the terms of the statute"—*i.e.*, only "after notice and hearing" and only "for incompetency, insubordination, neglect of duty, immorality, justifiable reduction in the number of teaching positions, or other good and just cause, but not for personal or political reasons." *Id.* at 103-04. The Court went on to note that the statutory scheme referred frequently to contracts between school districts and employees. *Id.*

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.* "The policy which induced the legislation evidently was that the teacher should have protection against the exercise of the right, which would otherwise inhere in the employer, of terminating the employment at the end of any school term without assigned reasons and solely at the employer's pleasure." *Id.* at 104.

Similarly, the North Carolina Supreme Court recently struck down a retroactive repeal of that state's fair dismissal law (entitled "the Career Status Law") under the federal impairment-of-contracts provision. *See N.C. Ass'n of Educators, Inc. v. State*, 786 S.E.2d 255 (N.C. 2016). The court found that the statute gives rise to contractual rights when teachers are offered and accept re-employment after successfully completing their probationary service:

> Before receiving career status, plaintiffs entered individual contracts with the local school boards. Implied as a part of each of these contracts was the Career Status Law. As the State concedes in its brief, the "applicable statutory terms must be read into the contracts" and the contracts "[i]ncorporat[ed] the statutory body of 'school law' applicable to Plaintiffs as teachers." The statutory system that was in the background of the contract between the teacher and the board set out the mechanism through which the teachers could obtain career status. 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. Thus, vesting stems … from the teacher's entry into an individual contract with the local school system. 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 Georgia's Fair Dismissal Act are indistinguishable in any material respect from those of the Indiana Tenure Act at issue in *Brand* or the North Carolina Career Status Law at issue in *North Carolina Association of Educators*.

As detailed above, the Fair Dismissal Act, a teacher who successfully completes a three-year period of probationary employment with a Georgia school system, and then accepts the school system's offer of a contract for a fourth year, earns two valuable job protections: (1) protection against non-renewal of his or her employment contract for any reason other than the eight causes specified by the law, see Ga. Code Ann. §§ 20-2-942(b)(1), 20-2-940(a)(1)-(8); and (2) the right to notice, the opportunity for a hearing, and an appeal in the event that a school system decides to non-renew a teacher's contract or demote the teacher, see *id.* § 20-2-942(b)-(f). Thus, like the laws at issue in *Brand* and *North Carolina Association of Educators*, the law offers teachers and prospective teachers a bargain: If you successfully complete a years-long probationary period and are offered—and accept—employment for a fourth year, then you earn these job protections. These job protections are valuable to teachers, which helps offset their low pay, and teachers rely on the offer of these benefits in making their career decisions. *See* pp. __-__ *supra*.

The legislation offers teachers a valuable employment benefit, which serves as a material inducement for teachers' and prospective teachers' career choices. *See N.C. Ass'n of Educators*, 786 S.E.2d at 264 (noting that fair-dismissal protections "have value to prospective teachers," which "makes up for not having better monetary compensation,'" and that teachers rely on the availability of those protections in making career decisions). Teachers achieve that benefit in exchange for a course of performance involving acceptance of employment contracts and the considerable investment of three years of work, with all the attendant opportunity costs. These

are, in *Brand* terms, manifestly "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.[3]

In sum, the Fair Dismissal Act creates contractual rights that vest when teachers fulfill the law's requirements. That being the case, the only question remaining is whether APS's actions impair those contractual rights. See Winter v. Jones, 10 Ga. 190, 195-96 (1851) ("[T]he objection to a law, on the ground of its impairing the obligation of a contract, does not depend upon the extent of the change which the law may make in it. … [A]ny deviation from its terms, by imposing conditions not expressed in the contract, however minute and apparently immaterial in their effect, is within this constitutional prohibition. … [A] constitutional Act of the Legislature, which is equivalent to a contract when performed, is a contract executed, and whatever rights are thereby created, a subsequent Legislature cannot impair.").

As noted above, the Charter between APS and the State Board of Education grants APS "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," and does not specifically exempt the Fair Dismissal Act from the "maximum flexibility" waiver to be granted to APS. Hence, absent a remedy, all APS teachers who earned tenure rights under the Fair Dismissal Act before the July 1, 2016 effective date of the Charter, including Plaintiff Doe, will lose the protections that they previously earned under the Fair Dismissal Act.

[3] It also is worth noting that the Fair Dismissal Act, like the tenure law at issue in *Brand*, in extensively regulating employment contracts between school districts and their teachers, repeatedly refers to contracts throughout its provisions. *See* O.G.C.A. § 20-2-940 (governing the grounds for termination; referring to teacher employment contracts 7 times); *id.* § 20-2-942 (governing the procedures required for non-renewal or demotion; referring to teacher employment contracts 37 times); *id.* § 20-2-943 (governing school board powers under the preceding sections; referring to teacher employment contracts 4 times).

APS's failure to preserve the Fair Dismissal Act rights of teachers who previously earned those rights, by refusing to exempt those rights from the waiver provisions of the Charter, constitutes an impairment of those teachers' contractual rights under the Fair Dismissal Act. Accordingly, mandamus relief is warranted, in the form of an order that APS abide by its non-discretionary duty to honor the contractual Fair Dismissal Act rights of those teachers who earned those rights prior to the July 1, 2016 conversion of APS into a charter school district.

CONCLUSION

Respectfully submitted this 26th day of August, 2016 by:

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IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

J. DOE (a pseudonym), J. ROE (a pseudonym), GEORGIA ASSOCIATION OF EDUCATORS, and ATLANTA ASSOCIATION OF EDUCATORS, *Petitioners/Plaintiffs*, v. ATLANTA INDEPENDENT SCHOOL SYSTEM, *Respondent/Defendant*.	CIVIL ACTION NO. 2016CV279349

CERTIFICATE OF SERVICE

I have on this day served a copy of Plaintiffs' Brief in Support of Mandamus NiSi to counsel for Defendant via U.S. Mail, and served electronic copies of the same documents by electronic mail on August 26, 2016, addressed as follows:

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