IN THE SUPREME COURT
STATE OF GEORGIA

EUGENE WALKER, et al., Plaintiffs/Appellants v. GEORGIA STATE BOARD OF EDUCATION, et al., Defendants/Appellees.	*	Case no. S13Q0981

BRIEF OF THE GOVERNOR AND THE STATE BOARD OF EDUCATION

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COME NOW the GEORGIA STATE BOARD OF EDUCATION and NATHAN DEAL, in his official capacity as Governor of the State of Georgia, and respond to the certified questions now before this Court as follows:

I. SUMMARY AND BRIEF ANSWERS TO THE CERTIFIED QUESTIONS

The following questions have been certified to this Court by the District Court for the Northern Circuit of Georgia:

> **Does O.C.G.A. § 20-2-73, or any portion thereof, violate the Georgia Constitution, either generally or by an affirmative answer to either of the following questions:**
>
> > **a) Does O.C.G.A. § 20-2-73 violate the Georgia Constitutional doctrine that each school system shall be under the management and control of a board of education, the members of which shall be elected as provided by law?**

b) Does the potential removal of school board members, as provided for by O.C.G.A. § 20-2-73, exceed the General Assembly's authority to enact general laws regarding local boards of education under Article VIII, Section V?

Our constitution expressly provides that the terms of election and the qualifications of members of local boards of education are "as provided by law." Ga. Const. Art. VIII, Sec. V, Para. II. *See also* Ga. Const. Art. VIII, Sec. V, Para. I (school systems continued as provided by the General Assembly). Recently regarding these provisions this Court said in *Roberts v. Deal*, 290 Ga. 705 (2012) (decided on other grounds): "the statement in Article VIII, Section V, Paragraph II that members of boards of education shall have 'additional qualifications as may be provided by law' presumably authorizes the General Assembly to establish a mechanism for the administrative removal of board members …." 290 Ga. at 708.

Unlike the federal Congress, Georgia's General Assembly is not one of limited enumerated powers. The General Assembly, unlike Congress, has the power to act unless explicitly limited by the Georgia or United States constitutions. Ga. Const. Art. III, Sec. VI, Para. I; *Development Auth. of DeKalb County v. State*, 286 Ga. 36, 38 (2009); *Plumb v. Christie*, 103 Ga. 686, 694 (1898) (enunciating principle). One of the fundamental errors in Appellant's argument is that it assumes -- after eliding the Constitution's express

provision governing the qualification of board members as provided by law -- that the General Assembly cannot provide for the suspension and potential removal of board members who do not meet the standards of office unless the magic word "removal" is contained in Article VIII, Section V, Paragraph II of the Constitution. Appellants' argument is backwards. The burden lies on Appellant, under well established Georgia law, to point to an express limitation on the General Assembly's power to act. There is none applicable to this case.

Appellant's brief shotguns a variety of arguments outside of the educational provisions of Article VIII of the Constitution in his attempt to hit O.C.G.A. § 20-2-73 with some pellet of unconstitutionality. He claims that local officials may only be removed from office through a recall petition and election. He cites no authority for this proposition. The Georgia Constitution does not say that recall proceedings are the exclusive method for removal of public officials, *see* Ga. Const. Art. II, Sec. II, Para. IV, and since there are many other provisions both in the constitution and statutorily calling for removal of officials, Appellants' argument would seem dubious at best. It is mistakenly premised, moreover, on the notion that the General Assembly cannot act without explicit authorization, rather the correct law that it can act unless limited. (*See, e.g.,* Appellants' brief at pp. 7-10.)

Likewise Appellant claims that § 20-2-73 violates due process and is

"irrational." (*See, e.g.,* Appellants' brief at pp. 11-17.) Here Appellant ignores the detailed process provided in § 20-2-73, does not mention that the district court has already found he is unlikely to prevail on his due process claim,[1] and seems to think there is no rational basis to want accredited schools run by responsible, qualified leaders. Code section 20-2-73 does not violate Georgia's due process clause.[2]

Appellant Walker claims that § 20-2-73 delegates to a private entity "unbridled discretion" to "decide what school boards may be subject to removal." (*See, e.g.,* Appellants' brief at pp. 20-24.). Appellant frankly misunderstands the law he challenges, since § 20-2-73 does not allow private agencies to remove public officials -- it provides for suspension by the Governor if recommended by the State Board of Education, with potential removal after full administrative proceedings before OSAH that are subject to appeal. Potential loss of accreditation triggers this, and in this case Appellant and his school board elected the private body they sought accreditation through. That, of course, does not mean the statute is unconstitutional and Appellant cites no law that it is.

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[1] The district court addressed due process under federal law, of course, yet this Court has held that due process under the State constitution is coterminous with the right under the federal constitution. *Joiner v. Glenn*, 288 Ga. 208 (2010).

[2] It should be noted that Appellant partially treats his due process claim as an "as applied" claim while the certified questions before this Court on involve the facial validity of § 20-2-73.

Appellant also claims that O.C.G.A. § 20-2-73 violates the separation of powers doctrine. He cites no law for this contention. It is fundamentally part of the legislature's proper role to enact statutes governing the qualifications for office of local board members and directives as to proper conduct of school boards and other officials. It is manifestly part of the executive function of our government to carry those laws into effect. There are numerous State agencies regulating governmental conduct in Georgia (as well as private conduct); they are part of the executive branch. It is puzzling how, if the governor can appoint agents to carry out his executive power, he could not carry out the executive power himself. The fact that he makes the decision (subject to appeal!) is not a violation of any law or constitutional provision.

Georgia's senators and representatives in the General Assembly who enacted § 20-2-73 were elected by the people every bit as much as the members of a board of education are. This case is not somehow about denying citizens their right to vote or overruling their vote. It is not about politics, and politics was nowhere mentioned in this case -- and has no purchase in the record before this Court -- until Appellant made allegations about politics in his brief. It is about assuring that qualified persons are properly holding office on local boards of education. The presumption of Appellant is that he entitled to hold office since he was elected even though he is unqualified, and there supposedly is

nothing the legislative or executive branches of State government can do about that. In that he is mistaken. Section 20-2-73 is a lawful set of procedures for determining qualifications and for suspending and potentially ultimately removing unqualified board members.

II. STATEMENT OF THE CASE

A. The Background of the Case.

Georgia like many other states has accreditation requirements for its various school systems. Among other things, in Georgia accreditation by one or more of several independent organizations allows students to qualify for HOPE and Zell Miller scholarships.[3] *See* O.C.G.A. §§ 20-3-519(6), 20-3-519.2(a)(1)(A). Such scholarships give qualifying students substantial financial assistance in college. Accreditation is also a bellwether of a school or a school system's performance. It is one measure used in Georgia and elsewhere to gauge the quality of the education students are receiving.

Georgia law recognizes accreditation of in-state schools from one or more of the following six independent organizations[4]:

1) The Southern Association of Colleges and Schools ("SACS");

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[3] HOPE stands for "Helping Outstanding Pupils Educationally." *See, e.g.,* O.C.G.A. § 20-3-519(15).

[4] There are eight accrediting organizations for out-of-state schools, six of which are not available to Georgia schools since they are regional accrediting bodies involving other regions of the United States. O.C.G.A. § 20-3-519(6)(b).

2) The Georgia Accrediting Commission;

3) The Georgia Association of Christian Schools;

4) The Association of Christian Schools International;

5) The Georgia Private School Accreditation Council; or

6) The Southern Association of Independent Schools;

O.C.G.A. § 20-3-519(6)(a).

There is no dispute in the present case that the DeKalb County School District elected to seek accreditation from SACS. ("Transcript of Motions Hearing", Doc # 7, p. 11-12.)[5] It is undisputed that it did not seek accreditation from some of the other accrediting bodies. ("Transcript of Motions Hearing," Doc # 7, p. 12.) It is likewise undisputed that it could have chosen one or more of these bodies in lieu of choosing SACS accreditation or in addition to seeking SACS accreditation. ("Transcript of Motions Hearing," Doc # 7, p. 11.) It is also undisputable that neither the DeKalb County School District nor Appellant Walker (nor any other actor on behalf of the district) has ever sued the Governor (nor the State School Superintendent, the State Board of Education, the "Department of Education" or any other State actor or officer) claiming that

[5] The record in this case consists of the documents filed with the Northern District of Georgia in case no. 1:13-cv-544-RSS. The record is not numbered consecutively from beginning to end; this brief will cite to the record with a brief description of the document in the record, its document number from the District Court record, and the page number within that document.

accreditation is illegal or somehow improper. DeKalb County School District voluntarily sought accreditation through SACS and only through SACS.

On December 17, 2012, following months of investigation including, among other things, site visits, review of documents provided by DeKalb County School District, and interviews with educators as directed by the District, the District the was placed on "Accredited Probation" by SACS.[6] ("Order" dated March 15, 2013, Doc # 19, p. 2.) Members of the DeKalb County Board of Education, including Appellant Walker, were then given a "show cause" notice regarding their potential suspension from their positions on the Board pursuant to O.C.G.A. § 20-2-73(a). (Id.)

Appellant and the District then filed suit against the Governor and the State Board of Education, first in superior court, then in federal court seeking to enjoin the hearing.[7] (Id.) A temporary restraining order was not granted in either case. (Id.)

On February 21, 2013, following the denial of the TROs, the State Board

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[6] "Accredited Probation" is the level of accreditation immediately preceding loss of accreditation. ("Consent Order and Agreement," Exhibit 3 to "Brief in Support," Doc. # 12.)

[7] The other eight members of the DeKalb Board and the Board in its own name have not sued and are not parties herein. The District has subsequently voluntarily dismissed itself from the federal suit. (Dekalb Cty. Sch. Dist. v. The Georgia Dept. of Ed., N.D.Ga., 1:13-cv-544, doc # 23.)

of Education conducted a lengthy evidentiary hearing, involving numerous witnesses and documents, on the potential suspension of the DeKalb Board.[8] ("Order" dated March 15, 2013, Doc # 19, p. 2.) After deliberation the State Board recommended that the Governor suspend the six eligible members of the DeKalb Board, including Appellant Walker.[9] ("Order" dated March 15, 2013, Doc # 19, p. 2.)

Plaintiffs then dismissed their Georgia superior court action, electing to proceed in federal district court alone, and again sought a TRO from the federal court. ("Brief in Support of Preliminary Injunction," Doc #12.) The district court found the Governor could make a decision on suspension, delaying, however, the effect of any adverse ruling by the Governor until a full hearing could be held on preliminary injunction in the federal court. ("Order" dated February22, 2013, Doc # 8, p. 2.) On February 25 the Governor accepted the

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[8] The procedure of the hearing was agreed in conference amongst the parties before the hearing. It involved an independent hearing officer who presided over the hearing (which was conducted in front of the State Board) and who made evidentiary rulings in favor of both sides of the matter, and the presentation of witnesses and argument by both a Department of Education attorney and attorneys representing the DeKalb Board and its members. The hearing, which was the subject of great public interest, can be viewed through these links: http://real.doe.k12.ga.us:8080/ramgen/archive/dekalbhearing022113a.rm; http://real.doe.k12.ga.us:8080/ramgen/archive/dekalbhearing022113b.rm; http://real.doe.k12.ga.us:8080/ramgen/archive/dekalbhearing022113c.rm.

[9] DeKalb County's Board of Education consists of nine members but only six of these members were eligible for suspension. (Executive Order, exhibit 2 to "Amended Complaint," Doc. # 10.)

State Board's recommendation and suspended the six members eligible for suspension, including Appellant Walker. ("Order" dated March 4, 2013, Doc #16, p. 3.)

On March 1 after hearing argument and a witness on whether to enjoin the suspensions, the district court denied the Plaintiffs' request for preliminary injunction. ("Order" dated March 4, 2013, Doc. #16, p. 17.) The court, however, certified the issue of the constitutionality under the Georgia Constitution of the suspension statute, O.C.G.A. § 20-2-73, to this Court.[10] ("Order" dated March 15, 2013, Doc. #19.) The matter has been duly docketed and is now before the Court for decision.

B. **The Statutory Framework of O.C.G.A. § 20-2-73.**

Since the question(s) before this Court involve the constitutionality of O.C.G.A. § 20-2-73, an understanding of that statute's requisites is essential.

Code section 20-2-73 involves, first, procedures for suspension of "eligible members" of local boards of education with pay if a local school system is placed on "a level of accreditation immediately preceding loss of accreditation," the State School Board (after a hearing) recommends suspension, and the Governor adopts that recommendation. O.C.G.A. § 20-2-73(a). Second,

[10] Between the denial of preliminary injunctive relief and the certification of questions to this Court the Governor appointed temporary (and potentially permanent) replacements for the suspended DeKalb Board members. (Executive Order, exhibit 2 to "Amended Complaint," Doc. # 10.)

if suspension occurs, individual members of boards who have been suspended can appeal their suspension and seek reinstatement. O.C.G.A. § 20-2-73(b). They are entitled to another full hearing, which is conducted under the Administrative Procedures Act, with an initial administrative decision made to the Governor who then issues a final decision as the executive agency involved. O.C.G.A. § 20-2-73(c); *see* O.C.G.A. § 50-13-13 *et seq.* Any adverse determination to the board member is then subject to appeal to a superior court like any other adverse APA decision would be. *Id.* If a board member elects to not seek reinstatement or if his or her appeal is rejected by the ALJ, Governor and superior court, then the board member is permanently removed from the board. O.C.G.A. § 20-2-73(b), (c).

Petitions for reinstatement are currently pending before the Office of State Administrative Hearings on behalf of several suspended members of the DeKalb Board, including Appellant Walker. The merits of these petitions have not yet been reached.

Appellant refers to O.C.G.A. § 21-2-73 throughout his brief as the "removal statute." This is something of a misnomer as no one was "removed" under the statute at the time he filed his action, and, indeed, Appellant Walker still holds office, with pay, although he is suspended. Since the procedure Appellant objected to throughout the litigation to date was his suspension -- a

matter to which he sought three (3) TROs and a preliminary injunction -- the statute might more properly be called the "suspension statute."

C. **Jurisdiction.**

The parties do not dispute that the Supreme Court of Georgia has jurisdiction pursuant to article VI, section VI, paragraph IV of the Georgia Constitution and Rule 46 of the Court's rules to answer the question(s) certified by the district court.[11]

D. **Standard of Review.**

The issues before this Court are questions of law and are addressed by the Court *de novo*.

III. ARGUMENT AND CITATION OF AUTHORITY

CODE SECTION 20-2-73 DOES NOT VIOLATE THE GEORGIA CONSTITUTION "GENERALLY" NOR UNCONSTITUTIONALLY PREVENT ELECTED BOARD OF EDUCATION MEMBERS FROM SERVING IN OFFICE BUT, RATHER, IS A LAWFUL ENACTMENT BY THE GENERAL ASSEMBLY CONSISTENT WITH ITS POWERS UNDER THE CONSTITUTION.

Members of local boards of education are no more immune from the scope of the law than any other citizens. They are required to comply with the laws that govern their conduct and with determinations as to whether they are qualified to hold office. In this they are not only not different than ordinary

[11] Appellees reserve the right to challenge and address subject matter and personal jurisdiction before the district court and do not consent to such jurisdiction.

citizens, they are not different from other elected officials who are required to meet the commands of the law and the limitations on their offices.

Appellant's brief regarding the certified questions does not track the certified questions in the order they were presented to this Court by the district court.[12] Mindful that this Court must answer the specific certified questions presented, Appellees follow the order of the questions, taking up Appellant's various arguments wherever they fall with references back to Appellant's brief where appropriate.

A. Code Section 20-2-73 Does Not Violate Any "General" Provisions of the Georgia Constitution.

The Georgia Constitution provides as its fundamental statement of the general legislative powers of the General Assembly:

> The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state.

Ga. Const. Art. III, Sec. VI, Para. I.

Long ago in *Plumb v. Christie*, 103 Ga. 686 (1898), in interpreting Art. III, Sec. VI, Para. I, which has remained unchanged from then to now, this Court observed:

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[12] The certified questions as presented were, in fact, the product of negotiation and compromise among the parties.

> [T]he General Assembly of this State is absolutely unrestricted in its power of legislation so long as it does not undertake to enact measures prohibited by the State or Federal constitution. A marked difference between the State legislature and the United States Congress in this particular is, that the former can do all things not prohibited by the constitution, while the latter can exercise no power not delegated to it by the States in the Federal constitution.

103 Ga. at 694.

The broad power of the General Assembly to enact legislation and its presumption of validity has remain unchanged from then until now. Thus, recently in *Development Auth. of DeKalb County v. State*, 286 Ga. 36 (2009), this Court stated:

> At the outset we recognize that "'all presumptions are in favor of the constitutionality of an act of the legislature' [cit.]," *Mayes v. Daniel*, 186 Ga. 345, 350 (1) (198 SE 535) (1938) and that "before an Act of the legislature can be declared unconstitutional, the conflict between it and the fundamental law must be clear and palpable and this [C]ourt must be 'clearly satisfied of its unconstitutionality.' [Cits.]" *City of Calhoun v. North Georgia &c. Corp.*, 233 Ga. 759, 760-761 (213 SE2d 596) (1975). Moreover, because statutes are "presumed to be constitutional until the contrary appears, . . . the burden is on the party alleging a statute to be unconstitutional to prove it." (Citations and punctuation omitted.) *Dee v. Sweet*, 268 Ga. 346, 348 (1) (489 SE2d 823) (1997).

286 Ga. at 38 (citations, notations, and omissions in the original). *See also Fullwood v. Sivley*, 271 Ga. 248, 254 (1999) (stating "[t]here is nothing artificial in judicial deference to the constitutional authority of the General Assembly to

enact legislation" and then discussing the separation of powers doctrine in this context).

Under these cases and the law to which they refer certain principles are axiomatic to examination of the constitutionality of the General Assembly's enactments:

1) Enactments of the General Assembly are presumed to be constitutional and are valid unless they contravene some express limitation in the Georgia or United States constitution;
2) The alleged conflict with the constitution must "clear and palpable" and if possible statutes must not be interpreted in a manner that would render them unconstitutional; and
3) The party alleging the unconstitutionality has the burden of establishing the unconstitutionality and must point to the specific provisions of the Georgia or United States constitutions the statute allegedly contravenes.

See Development Auth. of DeKalb County v. State, 286 Ga. at 38 (quoted above).

Appellant Walker in his brief scatters a variety of arguments outside of Article VIII (governing education, which is discussed, consistent with the order or the certified questions, in sections B and C, below) that might be viewed as

general assertions that § 20-2-73 is unconstitutional. He asserts: (a) that the General Assembly's cannot provide for the suspension or removal of elected officers outside of the Constitution's recall authority in article II, section II, paragraph IV; (b) that removal under § 20-2-73 supposedly violates due process; (c) that § 20-2-73 supposedly delegates the power to remove school board members to Private entities; and (d) that § 20-2-73 supposedly violates the separation of powers doctrine. None of these arguments are correct.

1. The Recall Authority Provided by Article II, Section II, Paragraph IV the Georgia Constitution Does Not Limit Other Authority Possessed by the General Assembly.

The Georgia Constitution provides

> The General Assembly is hereby authorized to provide by general law for the recall of public officials who hold elective office. The procedures, grounds, and all other matters relative to such recall shall be provided for in such law.

Ga. Const. Art. II, Sec. II, Para. IV.

Nothing in this paragraph purports to limit the power of the General Assembly in other matters. Indeed, this paragraph is contained within Article II of the Constitution, which concerns only "Voting and Elections," and is not in Article III, which concerns the powers of the General Assembly to enact legislation. The reason the recall provision is in Article II is because a recall involves a petition to make an elected official stand for reelection before the end

of his or her term. *See* O.C.G.A. § 21-4-1 *et seq.* (governing recall elections). The present case does not involve the recall of public officials.

That Appellant's argument errs can be readily gleaned by the way it is phrased. (*See* Appellant's brief at pp. 2, 7-10.) His argument is that "[t]he Constitution lacks any provision allowing removal of school boards except through the recall process." (*Id.* at p. 7 (emphasis added).) His erroneous assumption is that the General Assembly is a body of limited enumerated powers, like Congress, rather than one of plenary powers as the Georgia Constitution expressly provides. Ga. Const. Art. III, Sec. VI, Para. I ("The General Assembly shall have the power to make all laws ..."). The burden is on Appellant Walker to show where the power of the General Assembly is expressly limited by the Georgia Constitution. *Dee v. Sweet*, 268 Ga. 346, 348 (1) (489 SE2d 823) (1997). That burden is not somehow met by pointing to additional authority the Constitution provides the General Assembly in another area.

The logical weakness of Appellant's recall argument can be seen by the fact that Appellant acknowledges, as he must, that Article VIII of the Constitution explicitly allows the general law to provide both (and separately) for the election of school board members and for the qualifications of school

board members.[13] Ga. Const. Art. VIII, Sec. V., Para. II. The point being that the recall provisions of Article II cannot be exclusive and a sole provision of authority to the General Assembly, as Appellant claims.

The argument that the recall power granted in Article II, Section II, Paragraph IV trumps any other power the General Assembly has (although it does not say it does so), is very similar to the argument of the county commissioner this Court rejected in *Eaves v. Harris*, 258 Ga. 1 (1988). In *Eaves* a county commissioner who was indicted for a felony was suspended from office pursuant to O.C.G.A. § 45-5-6, and he argued that § 45-5-6 was preempted by Article II, Section II, Paragraph III of the constitution (i.e. one paragraph before the recall provision) claiming that it only allowed legislation (and incipient executive action) based on *conviction*. 258 Ga. at 5-6. This Court rejected that argument because the General Assembly was otherwise permitted to provide "other qualifications for office." And so had authority to enact § 45-5-6. *Id.* at 6.

Appellant attempts to buttress his argument by claiming that elected and appointed officers are treated differently by the Constitution. (Appellant's brief

[13] Likewise, that the General Assembly may determine by general law who is qualified to hold office even if they are a "constitutional officer" eliminates any notion that the General Assembly may not determine who is entitled to hold constitutional offices. The power to qualify is *per se* the power to exclude. And it is empty semantics to suggest that O.C.G.A. § 20-2-73 does something other than call for the suspension and removal of boards or board members who are found not qualified to hold office. Engaging in conduct that causes a district to potentially lose accreditation, as was found here, disqualifies one from office.

at pp. 8-10.)That is an interesting theory but it holds no water in light of this Court's ruling in *Eaves*. *Eaves* involved an elected official who was suspended based on O.C.G.A. § 45-5-6 with the potential for removal from office, as in the present case. *Eaves* did not find that the General Assembly was limited in power or that the Governor exceeded his authority, although those claims were made by the official there. *Eaves* treated an elected official in the way Appellant Walker claims only an appointed official can be treated.

Appellant asserts, as well, that the "malpractice" provisions were removed from the 1983 constitution and so this, in his view, means that the recall provisions are exclusive. (Appellant's brief at pp. 8-9, 10.) *Eaves* postdates the enactment of the 1983 Constitution and does not support Appellant's view. To the contrary, what Appellant's cites stand for, if anything, is that there was no intent in enacting the 1983 Constitution to allow elected local board members to act with impunity as Appellant would have it, subject only to recall by citizens. Rather, the language regarding "malpractice" was removed as redundant and unnecessary. Appellant conflates malpractice with impeachment of officials; impeachment was similar to the recall process for officials that came into law. Nonetheless, even then it was established that "malpractice" was not an exclusive means for removal of officials. As stated in *Smith v. Abercrombie*, 235 Ga. 741 (1975), "it does not prohibit the General Assembly from enacting

other valid removal statutes." 235 Ga. at 747; *see also Robitzsch v. State*, 189 Ga. 637 (1940) (collecting cases).

Code section 20-2-73 does not "violate" the recall provisions of the Georgia Constitution, and it is not potentially unconstitutional on this basis.

2. Code Section 20-2-73 Does Not Violate Due Process.

Appellant Walker argues that "[t]he removal and replacement provisions of O.C.G.A. § 20-2-73 exceed any permissible constitutional authority of either the General Assembly or the Governor and violate basic concepts of due process and even rationality." (Appellant's brief at p. 11.) Appellant devotes little effort in this section of his brief (*id.* at pp 11 to 17) to addressing the specific authority of the General Assembly and Governor, which are addressed elsewhere, and focuses on his due process claim. That claim has already been rejected, for the purpose of preliminary injunction, at the district court. (March 4, 2013 order of the district court at pp. 8-11.) Due process rights under Georgia's constitution regarding public employment are interpreted identically with those under the federal constitution. *Joiner v. Glenn*, 288 Ga. 208 (2010).

Appellant's due process and rationality argument has serious flaws. It begins by assuming, without any authority whatsoever, that O.C.G.A. § 20-2-73's principal goal is punitive. The goal of the statute, to the contrary, is to assure that qualified board of education members hold office. The inability to

maintain accredited status is a substantial bellwether that the board is not qualified to do its job. It is rational, at a minimum, to believe that if a board puts its accredited status at risk (from an accrediting board it selected, no less) its members may not be qualified. The statute does not exist to punish but to remove the unqualified from office.

Contrary to Appellant's assertions that every board member is subject to the same grounds for termination, while the eligible members of the board may be initial suspended with pay together, each is given an individual opportunity to press and present his or her case. *See* O.C.G.A. § 20-2-73(b), (c). The board members are entitled to two (2) separate hearings, first under § 20-2-73(a) for suspension and then again under § 20-2-73(c) regarding potential removal. Both are independently conducted. The first, under (a), is in the nature of a expedited process due to the exigencies of the potential threat to accreditation. The second, under (c), allows for a full blown trial and appeal.

Appellant makes little effort to distinguish between subparts (a) and (c) for his due process argument. While Appellees do not doubt he has *some* property right in his position as a school board member, that property interest is not unlimited. Under subpart (a) the effect on it is *de minimis*. He was suspended with pay, a status he still holds. As this Court noted in *Eaves*, "the amount of due process required depends upon the circumstances at hand ...."

258 Ga. at 4 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 334-335 (1976)).

Again, *Eaves* is conclusive and correctly decided on the due process claims. In *Eaves* an elected county commissioner claimed that suspending him denied his right to due process and denied voters their choice of elected official. The process and remedy there (under O.C.G.A. § 45-5-6) was very similar to the process and remedy *sub judice* (under O.C.G.A. § 20-2-73). It involved an initial determination and suspension with pay followed by the possible permanent removal. This Court rejected claims that this process violated due process. It also rejected claim, as Appellant's in the present case, that the voters were being denied their right to vote by the removal. *See* 258 Ga. at 4-5.

Code section provides an extensive pre-termination process as well following suspension. Such an extensive process did not exist in *Eaves*. There can be no question that the process provided by O.C.G.A. § 20-2-73 satisfied due process.

3. Code Section 20-2-73 Does Not Delegate Discretion to a Private Entity to Decide What School Boards May Be Subject to Removal.

Appellant Walker next argues that O.C.G.A. § 20-2-73 unlawfully delegates the right to remove school board members to private entities. This is easily addressed by simply pointing out that the statute does no such thing. The statute, as noted above, has two procedures: for suspension and for removal.

The findings of an independent accrediting body -- and, as voluntarily selected by the DeKalb School Board in this case, a private body -- is a condition precedent to a hearing by the State Board of Education, a public body, and hence for potential suspension by the Governor, the elected chief executive of the State. O.C.G.A. § 20-2-73(a). The accrediting body, even if private, does not make the decision. Likewise removal, if it occurs, is either voluntarily undertaken by the board member, O.C.G.A. § 20-2-73(b), or is determined by an ALJ, a public officer, who makes a recommendation to the Governor, and is subject to appeal to a superior court. Appellant Walker's "decision by a private body" argument has no statutory basis.

4. Code Section 20-2-73 Does Not Violate the Separation of Powers Doctrine.

At the end of his brief Appellant Walker makes one final argument, asserting that "the separation of powers doctrine" is violated by O.C.G.A. § 20-2-73. By this Appellant is asserting, based on the ext of his argument, that permitting the General Assembly to remove school board members who are unqualified allegedly intrudes on the sphere of education entrusted to local governments and exceeds the power of the State. (Appellant's brief at pp. 27-28.) That is not what is normally considered to be a "separation of powers" issue (such an issue usually entailing the distribution of power between the

executive, legislative, and judicial branches), but, regardless, it is substantively mistaken.

Regardless of the wisdom of giving our General Assembly broad power to enact laws, our constitution has expressly gives it that power. Ga. Const. Art. III, Sec. VI, Para. I. Such laws, of course, cannot violate equal protection or due process or numerous other guarantees of the United States and State constitutions, but if they do not violate those guarantees State laws are valid. *Id.* Specifically, our State constitution gives the General Assembly to determine the qualifications of local school board members. Ga. Const. Art. VIII, Sec. V, Para. II. Regardless of whether Appellant Walker believes that is an appropriate role for the State as opposed to local actors, that is what our Constitution provides.

As noted above, it is manifestly part of the executive function of our government to carry our laws into effect including, not incidentally, laws that regulate the conduct of officials. There are many such laws. *See, e.g.,* Title 45 of the Official Code of Georgia. There are numerous State agencies regulating governmental conduct in Georgia. We have a State level ethics commission and a State Board of Elections; we have numerous licensing boards and certifying bodies. These govern many officials called for by the Georgia Constitution as well as some provided only by statutory law. None are free to act above the law.

The Governor is given the power to make the decisions on suspensions and removal, but only after independent hearings and recommendations, and, for removal, subject to appeal. If the governor can appoint agents to carry out his executive power in other circumstances, he can carry out the executive power himself. A law assigning him this power is not unconstitutional. Appellant Walker's separation of powers argument is without merit.

B. Code Section 20-2-73 Maintains a Board of Education for the School System and Does Not Unconstitutionally Prevent Elected Board of Education Members from Serving In Office.

Subpart (a) of the certified question asks:

> **Does O.C.G.A. § 20-2-73 violate the Georgia Constitutional doctrine that each school system shall be under the management and control of a board of education, the members of which shall be elected as provided by law?**

The express terms of § 20-2-73(a) provide for temporary replacement of board of education members if and when they are suspended. Should their suspension become permanent, either voluntarily or after a full hearing, initial and final ruling and appeal, then the temporary replacement becomes permanent only until the completion of the board members term. § 20-2-73(a)(1), (a) (2), (b). Thus based on the explicitly language of the statute the school system remains under the management and control of a local board of education.

The temporary replacements ultimately are subject to election. Such an election would, presumably, be conducted in accordance with the law. There law

and is no reason to believe anything to the contrary; Appellant suggests none.

As discussed above, in *Eaves v. Harris*, , a county commissioner claimed that his suspension and potential removal under O.C.G.A. § 45-5-6 denied the voters with their right to elect and have serve the official of their choice. This court rejected that argument. 258 Ga. at 2-3, 5. As it stated: "we know of no constitutionalright to be continuously represented by a particular elected official. Once elected, such a representative may leave office for a variety of reasons -- one of which is provided under this statute." *Id.* The Georgia Constitution and Georgia statutory law provide for the appointment of officials by the governor once a vacancy arises. Ga. Const. Art. V, Sec. II, Para. VII; O.C.G.A. §§ 45-12-50, 45-12-53. Article VIII, Section V, Paragraph II of the Constitution provides that members of local boards of education shall be elected "as provided by law." Section 20-2-73's replacement for the remainder of the term provision is consistent with this grant of authority to the General Assembly.

Code section 20-2-73 does not violate the Georgia Constitutional doctrine that each school system shall be under the management and control of a board of education, the members of which shall be elected as provided by law.

C. Code Section 20-2-73 Does Not Exceed the General Assembly's Authority to Enact General Laws Regarding Local Boards of Education Under Article VIII, Section V of the Constitution.

Subpart (b) of the certified question asks:

Does the potential removal of school board members, as provided for by O.C.G.A. § 20-2-73, exceed the General Assembly's authority to enact general laws regarding local boards of education under Article VIII, Section V?

Article VIII, Section V, Paragraph III of our State Constitution provides that members of local boards of education have "additional qualifications as provided by law." The "additional" in that phrase means additional to the qualifications provided in the constitution, and "provided by law" means as determined by the General Assembly through general statute. These terms are not in dispute. Appellant Walker disputes, rather, that suspension and removal of school board members whose schools may lose accreditation is not imposing a "qualification" on the members and so is not constitutional.

While not definitive, this Courts recent case *Roberts v. Deal*, 290 Ga. 705 (2012), is instructive on this issue. In *Roberts* the parties were directed to address three issues, the first one being "[d]id the court err in holding that the Governor is authorized to remove Applicants from their positions on the school board? See Ga. Const. of 1983, Art. VIII, Sec. V, Par. II; OCGA §§ 45-10-3 & 45-10-4." (*See* Record in case no. S11A1515.) The issue now before the court was plainly litigated therein. And on the issue this court stated:

> the statement in Article VIII, Section V, Paragraph II that members of boards of education shall have 'additional qualifications as may be provided by law' presumably authorizes the General Assembly to establish a mechanism for the administrative removal of board members ...."

290 Ga. at 708.

Ultimately, however, the Court found that members of local school boards were not subject to O.C.G.A. § 45-10-3 since that statute governs boards created by general statute, a category that does not include local school boards. Appellees do not contend that this court's prior conclusion regarding Article VIII, Section II in *Roberts* is *stare decisis*. It is, however, persuasive authority on the subject.

The ability to maintain accreditation for a school system is a fundamental qualification for those who would control and manage the system. It is reasonable to believe that if your conduct will lead to a loss of accreditation you are not qualified to be in this position. The potential loss of accreditation is the triggering fact that can lead to suspension and removal of local board members. O.C.G.A. § 20-2-73(a). This is imposition of a qualification on their office by the General Assembly.

There can be no question that the General Assembly does have the power to determine such qualifications under the explicit terms of Article VIII, Section V, Paragraph III of our State Constitution. While Appellant Walker would like the State to stay out of his business as a local "constitutional officer," there can be no question that the State has the power to get into it to the extent it involves

his qualifications. The power to determine qualifications is the power to determine who is entitled to hold office.

The Governor does not have unbridled authority to remove or replace whomever he wishes. He is governed by the standards of the statute as well as the fundamental requisites of the rational basis test, nondiscrimination, and equal protection and treatment as required by law, among other things. His authority to act is constrained by recommendation from the State Board and an independent ALJ, as well as appeal. In *Eaves v. Harris* this court rejected the same unbridled discretion arguments the Appellant is making now.258 Ga. at 5.

Eaves is also significant here for, although the qualifications holding in *Roberts v. Deal* may not be binding on this court, the qualifications holding in *Eaves* is. And in *Eaves* this Court found that the power to suspend or remove an elected official was permitted because the Constitution "provides that the legislature may establish *other qualifications for office* and thereby furnishes authority for this act." 258 at 6 (emphasis in original).

"Constitutional officer" or not, the law is well established that all public officials are required to comply with the law and, when they fail to do so, they can be sanctioned or removed from office. *See* Ga. Const. Art. I, Sec. II, Par. I ("Public officers are the trustees and servants of the people and are at all times amenable to them."); *Ianicelli v. McNeely*, 272 Ga. 234 (2000); *Department of*

Medical Assistance v. Allgood, 253 Ga. 370 (1984); *Department of Human Resources v. Sistrunk*, 249 Ga. 543 (1982). (discussing scope of statutory ethical limitations on General Assembly). Code section 20-2-73 is consistent with these requirements and with the Constitution.

IV. CONCLUSION

For the forgoing reasons this Court should answer the certified questions by holding that Code section 20-2-73 does not violate the Georgia Constitution "generally" nor unconstitutionally prevent elected board of education members from serving in office but, rather, is a lawful enactment by the Georgia General Assembly consistent with its powers under the constitution.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the Brief of the Governor and the State Board of Education using the electronic court filing system of the Supreme court of Georgia who will serve a copy on Appellant's counsel

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This 17 day of May, 2013.

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SUPREME COURT OF GEORGIA
Case No. S13Q0981

Atlanta, May 06, 2013

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

DEKALB COUNTY SCHOOL DISTRICT et al. v. GEORGIA STATE BOARD OF EDUCATION et al.

Your request for an extension of time to file the brief of appellee in the above case is granted until **May 17, 2013.**

A copy of this order **MUST** be attached as an exhibit to the document for which the appellee received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Thiina A Bamba, Clerk