No. _____

In The Supreme Court of the United States

DENNIS DEMAREE, *et al.*,

Petitioners,

v.

FULTON COUNTY SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Mendoza* this Court held that nonmutual offensive collateral estoppel based on a prior federal court adjudication may not be applied against the federal government. The questions presented are:

When a plaintiff in federal court seeks to invoke nonmutual offensive collateral estoppel against a state or local government based on a prior state adjudication,

(1) Is the availability of collateral estoppel governed by state or federal law?

(2) If federal law controls, does *Mendoza* bar use of collateral estoppel in such cases?

PARTIES

The petitioners are Dennis Demaree, Megan Humphreys, Allison Jones, Clare Mansell, Mary McCoy, Tim McKinney, Mike Mitchell, Janet Stalling, Ray Splawn and Sandy Wade.

The respondent is the Fulton County School District.

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Petitioners Dennis Demaree, *et al*., respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on April 8, 2013.

OPINIONS BELOW

The April 8, 2013 opinion of the court of appeals, which is unofficially reported at 2013 WL 1395791 (11th Cir. April 8, 2013), is set out at pp. 1a-12a of the Appendix. The October 9, 2012 opinion of the district court, which is not reported, is set out at pp. 13a-28a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on April 8, 2013. On June 26, 2013, Justice Thomas extended the time within which to file the petition to and including September 5, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1738 of Title 28 provides in pertinent part "[t]he ... judicial proceedings of any court of any ... State ... shall have the same full faith and credit in every court within the United States ... as they have

by law or usage in the courts of such State ... from which they are taken."

STATEMENT OF THE CASE

This is a case about the preclusive effect of a state court decision on a subsequent federal court proceeding brought by different plaintiffs against the same defendant. The specific question is whether nonmutual offensive collateral estoppel may be used against a state or local government defendant.

This litigation arose out of a reduction in force ("RIF") that occurred at the Fulton County schools in 2010. The School District adopted a RIF plan under which a five-step standard was used to select the employees to be laid off. That standard considered a variety of factors, including a worker's performance and tenure. Almost all the District employees who lost their jobs were selected for termination on that basis. The District also identified 219 workers whose positions were deemed "non-essential." That group consisted of two types of employees: elementary school instrumental music teachers and certain grades of paraprofessional employees. The paraprofessional workers were still evaluated under the five-step standard. Unlike all the other School District employees, however, the instrumental music teachers were all dismissed, regardless of their performance record or tenure status. There were 54 such teachers. (App. 2a-4a, 13a-16a).

The constitutionality of the manner in which the District selected the music teachers for termination was first challenged in an action brought in state court in 2010 by one of those music teachers, Don Lee. Prior to initiating that action, Lee asked the State Board of Education to hold that his dismissal violated the Equal Protection Clauses of the federal and state constitutions. After the State Board rejected Lee's constitutional claims, he appealed that decision to the Fulton County Superior Court, alleging that the defendant's action violated the Equal Protection Clauses of the United States and the Georgia Constitutions. In August 2011 the Superior Court upheld Lee's constitutional challenge to the manner in which teachers had been selected for termination. (App. 32a-34a).[1] The Superior Court concluded that Lee was

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[1] App. 32a-34a:

> Appellant claims that he was denied his equal protection rights when compared to the ... Paraprofessionals.... "[U]nder the equal protection clauses of the United States and Georgia Constitutions, the government is required to treat similarly situated individuals in a similar manner." *Edmonds v. Board of Regents of University System of Georgia*, 302 Ga.App. 1 (2009). Because the classification at issue here ... does not involve a suspect classification or fundamental rights, the "rational relationship" test is appropriate for the Court's equal protection analysis. *Jackson v. Marine Exploration Co., Inc.,* 583 F.2d 1336 (5th Cir. 1978).... Appellant asks only to be treated like the ... Paraprofessionals and compared to other music teachers using the 5-Step Criteria. The Court agrees he is so entitled under the equal protection clause....

(Continued on following page)

entitled to reinstatement if he would not have been laid off under the five-step analysis used for other teachers. The Fulton County Board sought rehearing in the state Superior Court. After rehearing was denied, the Board asked the Court of Appeals of Georgia to review the Superior Court's decision. On October 13, 2011, the Court of Appeals denied that application for discretionary appeal. (App. 36a).

Several months after the decision in this state court litigation became final, the plaintiffs in the instant case, ten other laid-off music teachers, commenced this action in federal district court against the Fulton County School District. They asserted, as had Lee in the earlier state court action, that the treatment of the music teachers violated the Equal Protection Clauses of both the United States and Georgia Constitutions. The complaint specifically alleged that "[t]he Fulton County Superior Court has previously found, in *Lee v. Fulton County Board of Education*, ... that Defendant's actions were without any rational basis and were therefore a violation of the equal protection rights at issue."[2] The complaint contended that "the ruling in *Lee* ... that Defendant violated Mr. Lee's equal protection rights by not applying the five-step criteria to him as an elementary instrumental music teacher ... estops Defendant from

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> [T]he State Board erred in finding no violation of equal protection....

(Footnote omitted).

[2] Doc. 1, p. 6.

rearguing the equal protection issue...."[3] A copy of the Fulton County Superior Court decision was attached to the complaint. In the Federal district court litigation the plaintiffs and defendants were represented by the same law firms that had represented the plaintiff and defendant, respectively, in the earlier state court proceedings.

The District moved for judgment on the pleadings. It argued, inter alia, that federal law barred the plaintiffs from invoking the state court decision in *Lee v. Fulton County Board of Education* to collaterally estop that District from relitigating the federal and state equal protection issues.

> Mr. Lee is not a party to this lawsuit and the Supreme Court has ruled that non-mutual collateral estoppel may not be applied against a governmental entity. *United States v. Mendoza*, 464 U.S. 154, 160 ... (1984); *Hercules Carriers, Inc. v. Claimant State of Fla., Dept. of Transp.*, 768 F.2d 1558, 1577-1578 (11th Cir. 1985). Hence, collateral estoppel is not permitted against the Defendant because it is a government entity.

Motion and Memorandum of Law in Support of Defendant's Motion for Judgment on the Pleadings, pp. 12-13. In *Mendoza* this Court held that nonmutual collateral estoppel could not be applied to claims against the United States based on a prior

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[3] *Id.* at 7.

decision of a federal court. 464 U.S. at 157-64. In *Hercules Carriers* the Eleventh Circuit, relying on this Court's decision in *Mendoza*, ruled that federal law also bars use of nonmutual collateral estoppel against a state defendant based on a prior decision by a state court or administrative agency. 768 F.2d at 1578-80.

The district court held that the Eleventh Circuit's *Hercules* decision applied to the defendant District, and permitted the District to litigate the federal and state constitutional issues that had earlier been litigated in *Lee*. "*Hercules Carriers* would appear to be directly applicable to this case as county school systems are considered political subdivisions of the state of Georgia." (App. 22a). The district court ruled that *Hercules Carriers* would apply even if a Georgia school district were a local government body, rather than an arm of the state. "[T]he court finds that *Mendoza/Hercules Carrier*[*s*] bar to the exercise of non-mutual collateral estoppel against government entities applies to the School District...." (App. 24a). The district court reached the merits of the Board's motion, and dismissed plaintiffs' federal and state constitutional claims. (App. 16a-22a).[4]

On appeal the Eleventh Circuit held that under its decision in *Hercules Carriers* the rule in *Mendoza*, barring use of nonmutual collateral estoppel against

[4] The district court also declined on other grounds to apply collateral estoppel. (App. 24a-27a). The court of appeals did not reach those issues.

the federal government, applies to attempts to invoke nonmutual collateral estoppel, based on an earlier state court determination, against a school board.

> We have extended *Mendoza* to hold that state governments are not subject to offensive, non-mutual collateral estoppel. *Hercules Carriers*.... Several district courts in this Circuit have similarly extended *Mendoza* and *Hercules* to bar offensive, non-mutual collateral estoppel from applying to local government entities.... We agree.

(App. 8a-10a). The court of appeals addressed the merits of the plaintiffs' claims, and rejected both their federal and state constitutional claims. (App. 4a-8a).

REASONS FOR GRANTING THE WRIT

This case presents a multi-faceted circuit conflict regarding whether, and if so how, this Court's decision in *United States v. Mendoza* affects the preclusive effect of state adjudication on subsequent federal litigation against state and local government defendants. In *Hercules Carriers* the Eleventh Circuit established, and in the proceedings below the court of appeals applied, a *federal* rule based on *Mendoza* that governs the preclusive effect of such state adjudications. The creation and application of such a federal rule is inconsistent with decisions in the Sixth and Ninth Circuits, and with this Court's longstanding interpretation of the Full Faith and Credit Statute.

Mendoza concerned the preclusive effect on the federal government of a federal court decision in an earlier case involving a different opposing party. Mendoza challenged the constitutionality of a provision of the Nationality Act of 1940. The lower courts in *Mendoza* held that the United States was precluded from litigating that constitutional issue in Mendoza's own case because of an earlier unappealed district court decision, involving a different plaintiff, which had held that statute invalid. This Court recognized that in federal litigation involving only private parties a plaintiff may invoke nonmutual offensive collateral estoppel. But in *Mendoza*, the Court held that nonmutual offensive collateral estoppel may not be used against the federal government. The reasoning in *Mendoza* relied heavily, although not exclusively, on the practical problems that applying nonmutual collateral estoppel to the federal government would pose for the Executive Branch and for this Court. 464 U.S. at 572-74.

The courts of appeals disagree about the significance of *Mendoza* where a plaintiff in federal court, relying on an earlier state adjudication, seeks to invoke nonmutual offensive collateral estoppel against a state or local government. The Second and Eleventh Circuits hold that the availability of nonmutual offensive collateral estoppel is a question of federal law; they disagree, however, about the answer to that question. In the court below, the Eleventh Circuit applied its long-established rule that, under *Mendoza*, nonmutual offensive collateral estoppel may not

be used against a state government defendant. The Sixth and Ninth Circuits, on the other hand, insist that the preclusive effect of an earlier state court decision turns on state preclusion law, including whether the state whose court issued that earlier decision has chosen to follow *Mendoza*. Whether federal or state law controls is of particular importance because the states have adopted widely divergent positions regarding the applicability of nonmutual offensive collateral estoppel to state and local governments.

The extent to which federal courts must give preclusive effect to state court or administrative decisions raises important issues of federalism. This Court has repeatedly granted review to resolve conflicts about that issue,[5] and should do so here.

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[5] *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005); *Matsushita Electrical Industrial Co., Ltd. v. Epstein,* 516 U.S. 367 (1996); *Astoria Federal Savings and Loan Ass'n,* 501 U.S. 104 (1991); *University of Tennessee v. Elliott,* 478 U.S. 788, 796-99 (1986); *Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. 518 (1986); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Migra v. Warren City School District Bd. of Ed.*, 465 U.S. 75 (1984); *Haring v. Prosise,* 462 U.S. 306 (1983); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

I. THERE IS A MULTI-FACETED CIRCUIT CONFLICT REGARDING THE AVAILABILITY AGAINST STATE AND LOCAL GOVERNMENTS OF NONMUTUAL OFFENSIVE COLLATERAL ESTOPPEL

A. The Eleventh Circuit Treats The Applicability of *Mendoza* As An Issue of Federal Law and Holds That *Mendoza* Bars Use of Nonmutual Offensive Collateral Estoppel Against State and Local Governments

In *Hercules Carriers, Inc. v. Claimant State of Florida, Department of Transportation*, the Eleventh Circuit held that *Mendoza* bars use of nonmutual offensive collateral estoppel against a state defendant. The litigation in *Hercules Carriers* arose out of the allision of a vessel owned and operated by Hercules Carriers with a state bridge in Tampa Bay. Following that accident, a state agency brought an administrative proceeding to revoke the license of the pilot who was piloting the vessel at the time of the allision. The Florida Board of Pilot Commissioners ruled that the pilot was not negligent in the incident. Hercules Carriers subsequently filed suit in federal court against the state Department of Transportation, seeking a declaration that it was not liable for the damage to the state bridge. In the course of that litigation, Hercules Carriers argued that the decision of the Board of Pilot Commissioners precluded the

state Department of Transportation from litigating whether the pilot was negligent. 768 F.2d at 1578.[6]

The Eleventh Circuit held that this Court's decision in *Mendoza* was determinative of that issue, and compelled the conclusion that nonmutual collateral estoppel based on an earlier state adjudication may not be invoked in federal court against a state defendant.

> We hold that the rationale outlined by the Supreme Court in *Mendoza* for not applying non-mutual collateral estoppel against the government is equally applicable to state governments. Indeed, we take notice that the Supreme Court in reaching its holding did not differentiate between federal government interests and state governmental interests, nor was there anything to suggest that the concerns expressed by the Supreme Court were peculiar to the federal government.... [I]n each instance the concerns expressed by the Supreme Court are applicable here.... [I]f *Mendoza* stands for anything, it must stand for the proposition that a government's agencies in pursuing their stated goals must not be put in the untenable

[6] In appropriate circumstances administrative determinations may be given preclusive effect. *Kremer v. Chemical Construction Corp.,* 456 U.S. 461 (1982).

> position of collaterally estopping one another when they pursue the same issue....

768 F.2d at 1579-80. "[T]he circumstances of this case present stronger reasons than those in *Mendoza* for not applying non-mutual collateral estoppel." *Id.* at 1580. District courts in the Eleventh Circuit have repeatedly applied *Hercules Carriers*.[7]

In the instant case the Eleventh Circuit concluded that its decision in *Hercules Carriers* compelled the conclusion that the plaintiffs could not invoke nonmutual offensive collateral estoppel against the District. In holding that the rule in *Mendoza* should apply to suits against school boards, the Eleventh Circuit relied on its own evaluation of the burdens which nonmutual collateral estoppel might impose on a school district. First, it reasoned that a school district "must sometimes promote educational policy through the courts.... [T]hus, offensive, nonmutual collateral estoppel would prevent development of educational policy through litigation." (App. 11a). Second, it expressed concern that the availability of nonmutual collateral estoppel "would force the school district to spend more on litigation because each claim would have to be utterly exhausted." (*Id.*).

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[7] *E.g., Petchem, Inc. v. Canaveral Port Authority*, 2005 WL 1862412 at *3 (M.D.Fla. Aug. 2, 2005); *Tugz International, L.L.C. v. Canaveral Port Authority*, 2005 WL 6046066 at *7 (M.D.Fla. Feb. 2, 2005); *In re Employment Discrimination Litigation Against the State of Alabama,* 453 F.Supp.2d 1323, 1330 (M.D.Ala. 2001).

Third, the court of appeals reasoned that because the District had contracts with vendors across the country, it is "in situations in which litigation outside of Fulton County could result"; applying nonmutual collateral estoppel to decisions outside Fulton County, the court reasoned, would deprive the District of litigation flexibility. (App. 12a).

B. The Second Circuit Treats The Applicability of *Mendoza* As An Issue of Federal Law and Holds That *Mendoza* Does Not Bar Use of Nonmutual Offensive Collateral Estoppel Against State and Local Governments

The Second Circuit also treats the applicability of *Mendoza* to claims against state government defendants as a matter for federal courts to resolve, but holds that *Mendoza* does not bar use of nonmutual offensive collateral estoppel against state government defendants. *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990), *cert. denied,* 498 U.S. 951 (1990). In *Benjamin* several inmates in New York prisons challenged the constitutionality of a prison rule requiring that all incoming inmates have their hair cut; the plaintiffs, Rastafarians, argued that the rule violated their rights under the Free Exercise Clause. In two prior actions against state prison officials, New York state courts had held the rule violated the First Amendment. The Second Circuit upheld a federal injunction against the state practice, holding that nonmutual collateral estoppel applied. In *Benjamin* the

"[d]efendants urge[d] that nonmutual offensive collateral estoppel cannot be invoked against the government[, relying on] *Mendoza*...." 905 F.2d at 576. The Second Circuit rejected that contention.

> The major policy interests outlined in *Mendoza* were avoidance of premature estoppel and assurance of an opportunity for the government to consider the administrative concerns that weigh against initiation of the appellate process.... Here, the issue percolated through the state courts and was decided by the New York Court of Appeals during the pendency of the case at bar. Decisions by several state courts assured defendants that preclusion was not premature, that proper review of the issues occurred prior to the application of preclusion principles, and that the [defendant agency] had the opportunity to consider appeal of the state court decisions in light of the pending federal action.

Id. The defendants in *Benjamin* expressly relied, unsuccessfully, on the Eleventh Circuit decision in *Hercules Carriers*. See *Benjamin v. Coughlin*, 708 F.Supp. 570, 573 (S.D.N.Y. 1989) (rejecting defendants' contention that court should apply *Hercules Carriers*).

A Washington appellate court, citing the Eleventh Circuit decision in *Hercules Carriers* and the Second Circuit decision in *Benjamin*, correctly noted that "[c]ourts have disagreed about whether the *Mendoza* rationale applies to state and local governments." *City of Seattle, Executive Services Department*

v. Visio Corp., 108 Wash. App. 566, 576, 31 P.2d 740, 745 (Ct.App. Div. 1 2002). See Note, *Nonmutual Issue Preclusion Against States*, 109 Harv.L.Rev. 792, 793 (1996) ("[L]ower courts have split over the use of nonmutual issue preclusion against state governments.").

C. The Sixth and Ninth Circuits Hold That The Availability of Nonmutual Offensive Collateral Estoppel Against State and Local Governments Is Governed By State Preclusion Law

The Sixth and Ninth Circuits hold that where a plaintiff in a federal action relies on an earlier state adjudication and seeks to invoke nonmutual offensive collateral estoppel against a state or local government, whether the state adjudication precludes relitigation of the underlying issue in federal court is governed by state law. *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004); *Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir. 1998).

In *Coeur D'Alene Tribe* the central substantive issue was whether a federal law, the Hayden-Cartright Act, abrogated tribal immunity from state taxation of motor fuel sales on Indian reservations. In 2001 the Supreme Court of Idaho held that the Act did not abrogate tribal immunity. *Goodman Oil Co. v. Idaho State Tax Comm'n*, 136 Idaho 53, 28 P.3d 996 (Idaho 2001), *cert. denied*, 534 U.S. 1129 (2002). The defendants in the state and federal proceedings were

essentially the same: the state Tax Commission in *Goodman* and the Commissioners of that Commission in *Coeur D'Alene*. Although the defendants in *Coeur D'Alene Tribe* invoked *Mendoza*, the Ninth Circuit did not (like the Eleventh Circuit) simply decide whether *Mendoza* should apply to state defendants. Instead, the Ninth Circuit insisted that

> [w]e "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist.,* 465 U.S. 75, 81 ... (1984) (interpreting 28 U.S.C. § 1738). We ask whether the state of Idaho would give preclusive effect to the ruling against the Commission in *Goodman Oil*.

384 F.3d at 688. The Ninth Circuit concluded that it was unclear whether Idaho courts would apply nonmutual collateral estoppel against a government litigant. "[T]he Supreme Court of Idaho has never applied nonmutual offensive collateral estoppel against a *state* party on a question of *law*...." *Id*. (emphasis in original). Only after determining that Idaho law itself did not provide an answer to this question did the Ninth Circuit look to other sources of law.

> Given the dearth of Idaho state precedent on the applicability of nonmutual offensive collateral estoppel against a state party, we look to general state law to divine the preclusive force of such judgments in this context, ... and we look to the law as generally applied in other jurisdictions.... Absent clearly

> applicable state law governing the preclusive effect against the Commissioners, we are guided by the general law recited in the *Restatement (Second) of Judgments*....

Id. As part of its analysis of the law in other jurisdictions, the Ninth Circuit found this Court's decision in *Mendoza* to be a useful "analogy." *Id*. Because there was "no state law precedent [that] compels [application of nonmutual collateral estoppel]," the Ninth Circuit relied on the reasoning of the *Restatement* and *Mendoza* to conclude that nonmutual collateral estoppel should not be applied against a state agency regarding "an important legal issue." *Id.* at 689-90.

Chambers involved a dispute about the proper interpretation of federal Medicare Catastrophic Coverage Act. The same issue had been resolved against the state defendant in two prior state court cases brought by different plaintiffs. 145 F.3d at 17. The Sixth Circuit concluded that the preclusive effect in federal court of those prior Ohio decisions was controlled by Ohio preclusion law.

> Appellees argue that the doctrine of issue preclusion bars our consideration of the matters raised in this appeal, because of the two prior judgments by the Ohio appellate courts. We recognize that we are required to give the same effect to a state court judgment that would be given by a court of the state in which the judgment was rendered.

145 F.3d at 18 n.14. The court of appeals concluded that Ohio courts would decline to give those earlier

state court decisions preclusive effect because "[i]n Ohio, the general rule is that mutuality of parties is a prerequisite to the offensive use of issue preclusion." *Id*. The Sixth Circuit also relied on the reasoning in *Mendoza*, but only because there was no specific Ohio precedent on that question.

> The *Mendoza* rationale provides further support for our conclusion that the use of offensive non-mutual issue preclusion is not appropriate in this case. While Ohio law is silent in this respect, given its restrictive views on mutuality, we anticipate that the Ohio Supreme Court would not use offensive non-mutual issue preclusion against the state.

Id. (Emphasis omitted).

II. THIS CASE RAISES IMPORTANT ISSUES OF FEDERALISM

This circuit conflict raises important issues of federalism. The states are free to adopt, for litigation in their own courts, whatever rule they see fit regarding the preclusive effect on a state or local government of a prior state judicial or administrative adjudication. The states have taken a variety of approaches to this issue, and most have not adopted the rigid rule in *Mendoza*. The fashioning of a *federal* rule regarding the preclusive effect of such state adjudications, to be applied when preclusion is sought in federal court litigation, disrupts the proper relationship between federal and state courts.

A. The States Have Adopted Divergent Standards Regarding The Applicability of Nonmutual Collateral Estoppel To State and Local Governments

The states are free to adopt differing rules regarding the preclusive effect of their judicial and administrative adjudications. Unsurprisingly, the states differ about whether to apply nonmutual offensive collateral estoppel to state and local governments.[8]

The Alaska Supreme Court has refused to apply the rule in *Mendoza* to state court proceedings.

> We decline to adopt the *Mendoza* exception which would preclude in all cases, the offensive use of collateral estoppel against the State. The exception to this doctrine which the *Mendoza* court created was one especially fashioned for the federal government as a litigant.... We think [the plaintiffs'] arguments distinguishing state litigation from federal litigation in the context of the[ ].... factors [relied on in *Mendoza*] are persuasive.... We conclude that the State's argument for adoption of the *Mendoza* exception for the state government to the application of nonmutual collateral estoppel should be rejected.

State v. United Cook Inlet Drift Ass'n, 895 P.2d 947, 951-52 (1995) (footnote omitted). The Supreme Court

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[8] Some of those differences were noted in *Gould v. Department of Health and Social Services*, 216 Wis. 2d 356, 369, 576 N.W.2d 292, 288 (Wis. App. 1998).

of Pennsylvania has concluded that "the policy concerns undergirding *Mendoza* do not have inexorable application to state governments." *In re Stevenson*, 40 A.3d 1212, 1222 n.8 (Pa. 2012). The Kentucky Supreme Court has also refused to adopt the *Mendoza* per se rule.

> The United States Supreme Court has held that the Federal Government is not in the same position as a private litigant and should not be bound by collateral estoppel. *United States v. Mendoza*.... In *Revenue Cabinet, Commonwealth of Kentucky v. Samani*, 757 S.W.2d 199 (1988), the Court of Appeals stated that the application of *res judicata* and collateral estoppel is best served on a case by case basis as opposed to an automatic imposition of a doctrine. The court pointed out that the doctrines of *res judicata* and issue preclusion are based on rule of justice and fairness. We would not say that the government should not be bound by collateral estoppel.

City of Covington v. Board of Trustees of the Policemen's and Firefighters' Retirement Fund, 903 S.W.2d 517, 522 (Ky. 1995).

In *City of Seattle, Executive Services Department v. Visio Corp.,* 108 Wash. App. 566, 31 P.2d 740 (Ct.App. Div. 1 2002), a Washington appellate court declined to adopt a general prohibition applying *Mendoza* to state litigation. Noting that courts have disagreed regarding whether to apply *Mendoza* to

state and local governments, it declined to hold that

> the *Mendoza* rationale should apply generally to local governments. Indeed, it would not be advisable to do so because it should be a case-specific determination. We hold that collateral estoppel was proper under the circumstances here....

108 Wash. App. at 577, 31 P.2d at 746.

On the other hand, the Connecticut Supreme Court has expressly adopted the rule in *Mendoza*.

> The same policy reasons that guided the United States Supreme Court [in *Mendoza*] in concluding that nonmutual collateral estoppel should not be applied against the federal government persuade us that it should not apply against the state.

Sikorsky Aircraft Corp. v. Comm'r of Revenue Services, 297 Conn. 540, 546, 1 A.3d 1033, 1038 (2010).

A number of states have adopted some form of hybrid rule, applying the rationale of *Mendoza* in some but not all cases. In *A & H Vending Co. v. Commissioner of Revenue*, 608 N.W.2d (Minn. 2000), the Supreme Court of Minnesota concluded that in some circumstances nonmutual collateral estoppel should not be available against the government, noting that denying preclusion would be "consistent with" the decision in *Mendoza*. 608 N.W.2d 547. But the state court refused to adopt the per se rule in *Mendoza* itself. "[W]e decline to adopt a blanket rule that there

must always be mutuality of parties before collateral estoppel can apply against the government...." *Id.* A Wisconsin appellate court applied *Mendoza* in the circumstances before it, but expressly emphasized that there could be exceptions to that rule.

> We conclude that a state agency's position as a litigant is sufficiently different from that of a private litigant that the economy of interests underlying a broad application of issue preclusion do not, as a general rule, justify the non-mutual offensive application of the doctrine against the agency. We need not decide whether there are any circumstances that might justify applying the doctrine against a state agency and, if so, what they are....

Gould v. Department of Health and Social Services, 216 Wis. 2d 356, 370, 576 N.W.2d 292, 298 (Wis. App. 1998).

Appellate decisions in Arizona have found the reasoning in *Mendoza* persuasive in fashioning the state preclusion rule.

> *Mendoza* ... noted that ... ["][a] rule allowing nonmutual collateral estoppel against the Government ... would substantially thwart the development of important questions of law...." ... The application of offensive collateral estoppel to the present case would present the state government with similar problems.

First Interstate Bank of Arizona v. State Dept. of Revenue, 185 Ariz. 433, 436, 916 P.2d 1149, 1152 (Ct.App.

Div. 1 1996). However, appellate decisions in that state hold only that "offensive collateral estoppel *generally* is unavailable against the government." *Tostado v. City of Lake Havasu*, 220 Ariz. 195, 198 n.5, 204 P.3d 1044, 1047 n.5 (Ct.App. Div. 1 2009) (emphasis added); see *Calpine Constr. Finance Co. v. Arizona Dept. of Revenue*, 221 Ariz. 244, 250, 211 P.3d 1228, 1234 (Ct.App. Div. 1 2009) (quoting *Tostado*). It is so far unclear what exceptions the Arizona courts might recognize to that limitation. In Missouri nonmutual collateral estoppel is usually, but not necessarily always, unavailable against the government.

> As this Court stated in *Shell Oil Co.* [*v. Director of Revenue*, 732 S.W.2d 178, 182 (Mo. Banc 1987)], "sound policy suggests that estoppel should *rarely* be applied to a governmental entity and then only to avoid a manifest injustice." ... That "sound policy" has been articulated by the United States Supreme Court ... [in] *United States v. Mendoza*....

Board of Education of the City of St. Louis v. City of St. Louis, 879 S.W.2d 530, 532 (Mo. en banc 1994) (emphasis added).

Several states have adopted a rule, which in some instances predates *Mendoza*, that bars application of nonmutual collateral estoppel regarding issues of substantial public importance. Although this rule is not expressly about use of collateral estoppel against government defendants, it is likely as a practical

matter that application of this rule would occur most often, although not exclusively,[9] in cases with government litigants. In *Bogle Farms, Inc. v. Baca*, 122 N.M. 422, 925 P.2d 1184 (1996), the New Mexico Supreme Court noted that *Mendoza* established a rule regarding all claims against federal defendants in federal courts, 112 N.M. at 428, 925 P.2d at 1190, but chose instead to adopt a narrower state court rule limited to matters of important public interest. 112 N.M. at 429, 925 P.2d at 1191. "Because ... strong public interests are at issue, the need to reexamine this question outweighs the interests of judicial economy embodied in the collateral estoppel doctrine." *Id.* See *City of Berkeley v. Superior Court of Alameda County*, 26 Cal.3d 515, 520 n.5 (1980) ("The issue in this case involves a matter of great public importance, and it is settled that the doctrine of collateral estoppel does not apply under such circumstances"). In states applying this standard, nonmutual offensive collateral estoppel could be invoked against a state or local government if the underlying dispute did not meet the applicable state standard of "public importance."

[9] This rule was applied in a dispute between private litigants in *Chern v. Bank of America*, 15 Cal.3d 866, 873 (1976).

B. Federal Courts Should Not Adopt A Federal Rule Regarding Whether Nonmutual Offensive Collateral Estoppel May Be Used Against State and Local Governments

It is wholly inappropriate for federal courts to attempt to fashion a *federal* rule regarding the preclusive effect of state adjudications, even when the preclusion issue arises in federal court. The existence of a distinct federal standard regarding the applicability of *Mendoza* to such cases will inevitably result in forum shopping; even in the absence of a clear state rule differing from the standard used by a particular federal court, a litigant might well be able to anticipate whether the federal or state courts would be more likely to adopt the rule in *Mendoza*.

More importantly, the decision whether to allow or reject nonmutual offensive collateral estoppel requires a court to assess the practical implications of that rule for state or local government litigants. In *Mendoza* itself this Court was well-equipped to evaluate the implications of such preclusion for federal agencies, the Solicitor General, and the Court itself. But federal judges have no similar degree of expertise regarding state or local agencies, courts and practices. In the instant case, for example, the Eleventh Circuit attempted to assess the impact of nonmutual offensive collateral estoppel on a Georgia school district, speculating that such districts might be forced to defend suits brought by vendors in distant counties, or even in other states. (App. 12a). Georgia

courts are obviously better suited to evaluate such intensely local issues, as the Alaska Supreme Court did, for example, in *United Cook Inlet.*

The decision whether to permit nonmutual offensive collateral estoppel against state and local government defendants also rests to a significant degree on policy considerations which the states are entitled to make for themselves. Even where such preclusion imposes significant burdens on government litigants, a state might conclude that those burdens they are outweighed by the fairness to individual litigants, or by the increased efficiency that preclusion often affords. It is for the states themselves to decide what balance to strike among these competing state interests. See *Johnson v. Fankell*, 520 U.S. 911 (1997) (states need not provide for interlocutory appeals of qualified immunity issues).

In *Hercules Carriers* and the instant case, the Eleventh Circuit concluded that the interests of the Florida Department of Transportation and of Georgia school districts, respectively, would best be served by precluding use of nonmutual offensive collateral estoppel. But that was a decision which should be made by, or guided by the decisions of, the Florida and Georgia courts.

III. THE DECISION OF THE ELEVENTH CIRCUIT IS INCORRECT

The Eleventh Circuit clearly erred when it assumed in *Hercules Carriers* that federal courts have

the authority to establish a federal standard regarding the preclusive effect of state adjudications, and when it applied the rule in *Hercules Carriers* to the instant case.

The preclusive effect in federal court of a prior state court adjudication is governed by the Full Faith and Credit Statute. 28 U.S.C. § 1738. Section 1738 provides that "[t]he ... judicial proceedings of any court of any ... State ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." "That statute ... reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources." *Migra v. Warren City School District Bd. of Ed.*, 465 U.S. 75, 84 (1984).

"It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." 465 U.S. at 81.

> [T]hough the federal courts may look to ... the policies supporting ... collateral estoppel in assessing the preclusive effect of decisions of other *federal* courts, Congress has specifically required all federal courts to give preclusive effect to *state*-court judgments whenever the courts of the State from which the judgments emerged would do so....

Allen v. McCurry, 449 U.S. 90, 96 (1980) (emphasis added). "Section 1738 embodies concerns of comity and federalism that allow the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts." *Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 380 (1985).

The creation of a federal preclusion standard by the Eleventh Circuit in *Hercules Carriers*, and the application of that federal standard in the instant case, conflict with this Court's repeated interpretation of section 1738.

> It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.

Kremer v. Chemical Construction Corp., 456 U.S. 461, 481-82 (1982); see *Matsushita Electrical Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 373 (1996) (quoting *Kremer*); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986) (quoting *Kremer*); *Marrese*, 470 U.S. at 380 (quoting *Kremer*). The Eleventh Circuit's "own rule" regarding the applicability of nonmutual offensive collateral estoppel to state and local governments is inconsistent with section 1738 and the decisions of this Court.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case presents an excellent vehicle for resolving this issue. The Eleventh Circuit relied solely on *Mendoza* and its prior decision in *Hercules Carriers* in refusing to apply nonmutual offensive collateral estoppel in this case.[10]

When the Eleventh Circuit decided *Hercules Carriers* in 1985, review by this Court might not have been appropriate. But the subsequent decisions in the Second, Sixth and Ninth Circuits, and in numerous state courts, have created conflicts which only this Court can resolve. Although the opinion in the instant case is unpublished, it applies the officially reported decision in *Hercules Carriers,* which remains binding precedent governing district courts and appellate panels in the Eleventh Circuit.

[10] In the court below the District raised other objections to the application of collateral estoppel; the court of appeals did not address those additional issues. If this Court were to grant review and overturn the Eleventh Circuit's application of *Mendoza* and *Hercules Carriers*, the District would be free to renew those arguments on remand.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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515 Fed.Appx. 859

NOTICE: THIS IS AN UNPUBLISHED OPINION.

United States Court of Appeals,
Eleventh Circuit.

Denise DEMAREE, Megan Humphreys,
Allison Jones, Clare Mansell, Mary Mccoy,
Tim McKinney, Mike Mitchell, Janet Stalling,
Ray Splawn, Sandy Wade, Plaintiffs-Appellants,
v.
FULTON COUNTY SCHOOL DISTRICT,
Defendant-Appellee.

No. 12-15900
Non-Argument Calendar.
April 8, 2013.

Before MARCUS, MARTIN and FAY, Circuit Judges.

Opinion

PER CURIAM:

Plaintiffs-Appellants Denise Demaree, Megan Humphreys, Allison Jones, Clare Mansell, Mary McCoy, Tim McKinney, Mike Mitchell, Janet Stalling, Ray Splawn, and Sandy Wade, elementary school orchestra and band teachers, appeal from the district court's final order dismissing their suit against the Fulton County School District ("School District"). Plaintiffs' complaint alleged that the School District violated their rights (and those of about 40 others) under the Equal Protection Clause of the United States and Georgia Constitutions when the teachers lost their jobs during a reduction in force ("RIF")

implemented by the School District in 2010. On appeal, Plaintiffs argue that the district court erred in holding that: (1) there was a rational basis for the School District's different treatment of Plaintiffs and all other employees; (2) the exception to the application of non-mutual offensive collateral estoppel delineated in *United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984), extended to the School District; and (3) the equal protection issue was not "actually litigated" in *Lee v. Fulton County Board of Education*, 2010-CV-193987 (Ga.Sup.Ct.2011). After thorough review, we affirm.

We review a judgment on the pleadings *de novo*. *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir.2001). "Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Id.* We may affirm the district court's judgment on any ground that the record supports. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir.2001).

The relevant allegations, for purposes of the motion for judgment on the pleadings, are these. Plaintiffs were employed by the School District as elementary instrumental (band and orchestra) music teachers during the 2009-2010 school year. Plaintiffs' teaching contracts were all non-renewed at the conclusion of the 2009-2010 school year, as the result of a RIF instituted by the Fulton County Board of Education in the spring of 2010. The RIF described a five-step analysis considering factors of performance and

tenure. The first step eliminated employees who did not have tenure and who had performance issues. Each step in the process went further into non-tenured and tenured positions, culminating in the fifth step which eliminated employees based on tenure if not enough positions were eliminated by the first four steps.

The positions of elementary orchestra and band school teachers, however, were not eliminated through this five-step analysis. Instead, the School District voted to non-renew all elementary band and orchestra teachers because those positions were deemed "non-essential" functions. These positions were described as "programs/functions eliminated." The non-renewal of the elementary school band and orchestra teachers reduced the School District staff by 54 positions.

One group besides elementary orchestra and band teachers was also placed in the "programs/functions eliminated" – Grades 1 through 3 paraprofessionals. However, the 165 Grades 1 through 3 paraprofessionals were not eliminated as a group like the elementary orchestra and band teachers; rather, they were analyzed through the five-step RIF process. This resulted in some of the Grades 1 through 3 paraprofessionals' continued employment in other paraprofessional positions. Both the paraprofessionals and the orchestra and band teachers are certified to teach Pre-K through 12th grade.

In this action, Plaintiffs alleged that they were similarly situated with the Grades 1 through 3 paraprofessionals and that the School District had no rational basis for treating the two groups differently. The district court rejected their claims, and this timely appeal follows.

First, we reject the merits of the Plaintiffs' Equal Protection claim. The Fourteenth Amendment of the federal Constitution provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. xiv, § 1. Thus, "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440, 105 S.Ct. 3249. "This standard is easily met." *Leib v. Hillsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir.2009); *Deen v. Egleston*, 597 F.3d 1223, 1230 (11th Cir.2010) ("rational review" standard gives states "wide latitude" when crafting "social or economic" legislation). However, the "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446-47, 105 S.Ct. 3249. The Supreme Court has further held that:

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of

> legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

FCC v. Beach Commc'ns, 508 U.S. 307, 313-14, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *see also Panama City Med. Diagnostic, Ltd. v. Williams*, 13 F.3d 1541, 1545 (deference must be given to legislature "because lawmakers are presumed to have acted constitutionally despite the fact that, in practice, their laws result in some inequality") (quotation omitted).

On a "rational-basis review" the classification bears a "strong presumption of validity" and a party challenging the classification must "negative every conceivable basis which might support it." *Beach Commc'ns*, 508 U.S. at 314-15, 113 S.Ct. 2096 (quotation omitted). A legislature need not articulate its reasons for enacting a statute. *Id.* at 315, 113 S.Ct. 2096. The Court continued:

> Defining the class of persons subject to a regulatory requirement – much like classifying governmental beneficiaries – inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter

> for legislative, rather than judicial, consideration.

Id. at 315-16, 113 S.Ct. 2096 (quotation omitted).

It is undisputed that the RIF and its application to Plaintiffs does not involve a suspect class or a fundamental right. Therefore, Plaintiffs' claims are analyzed under a rational basis review. The rational basis test asks "(1) whether the government has the power or authority to regulate the particular area in question, and (2) whether there is a rational relationship between the government's objective and the means it has chosen to achieve it." *Leib*, 558 F.3d at 1306. Plaintiffs argue that the School District did not have rational basis for treating the two groups of employees within the RIF's "programs/functions eliminated" differently with regard to which employees would be retained.

However, it is clear that under Georgia law, "teachers" and "paraprofessionals" are treated differently. There are different educational and background requirements for the positions and different protections once an individual is in the position. For instance, teachers have a state-mandated salary scale, are required to have an annual employment agreement, and have certain due process rights if terminated. O.C.G.A. §§ 20-2-212, 20-2-211(b), & 20-2-942. Georgia law defines a paraprofessional as "a person who may have less than professional-level certification . . . and does a portion of the professional's job or tasks under the supervision of the professional, and

whose decision-making authority is limited and regulated by the professional." O.C.G.A. § 20-2-204(a)(1). Paraprofessionals are not required to be issued an annual employment agreement, have no state-mandated salary scale, and have no Fair Dismissal Act rights. As the School District also notes, after the RIF, there were no more elementary band/orchestra teaching positions for which Plaintiffs may have been retained, whereas there were remaining elementary paraprofessional positions. Further, no party disputes that each elementary music teacher position eliminated generated a cost savings $68,536 for the School District; while each paraprofessional position saved $27,246. There is also no dispute that the Fulton County School District faced a $140 million budget shortfall which led to the implementation of the RIF.

Based on these circumstances, a multitude of rational bases could be adduced in support of the two groups' differing treatment under the RIF. For example, given that the elementary orchestra and band teachers must have an annual employment agreement and have certain due process rights if terminated, the School District court certainly have found it more efficient to eliminate this group as a whole, without giving them the opportunity to be retained. Paraprofessionals, on the other hand, do not need annual contracts and have no due process rights if terminated, which suggests that rehiring them on an individualized basis might be less involved. Plaintiffs do not rebut these differences.

Moreover, since paraprofessionals are supervised, the School District could have found that their transition to other grades would be relatively easy. Elementary orchestra and band teachers, however, as teachers, are not supervised in the same way, and their transition to other kinds of music instruction, or different grades, may not be as easy. Indeed, while Plaintiffs have said that they are certified to teach Pre-K through 12th grade, no where have they mentioned that they could actually easily teach in other positions. Because Plaintiffs have failed to meet their burden of negating "every conceivable basis which might support" the RIF's classification, *Beach Commc'ns*, 508 U.S. at 315, 113 S.Ct. 2096 (quotation omitted), the district court did not err in rejecting their Equal Protection claim.

We also are unpersuaded by Plaintiffs' argument that the School District is collaterally estopped from defending against Plaintiffs' Equal Protection claims due to the decision of the Fulton County Superior Court in *Lee*. Offensive, nonmutual collateral estoppel is a doctrine under which a plaintiff asserts that a defendant is barred from litigating an issue based on a decision rendered in a case in which the plaintiff was not involved. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-28, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). In *Mendoza*, 464 U.S. at 162, 104 S.Ct. 568, the United States Supreme Court held that the federal government is not subject to offensive, nonmutual collateral estoppel. We have extended *Mendoza* to hold that state governments are not subject to

offensive, non-mutual collateral estoppel. *Hercules Carriers, Inc. v. Claimant State of Fla. Dep't of Transp.*, 768 F.2d 1558, 1579 (11th Cir.1985).

In *Mendoza*, the Supreme Court reasoned that government litigation differs significantly from private litigation, and those differences merit exemption from the doctrine. 464 U.S. at 160, 104 S.Ct. 568. For instance, government litigation frequently involves interpreting the Constitution – a task often only achieved in government litigation. *Id.* Stifling the litigation of constitutional issues with offensive, nonmutual collateral estoppel would therefore prevent the development and clarification of constitutional law. *Id.* In addition, the government has limited litigation resources, which may dictate litigation strategy. *Id.* at 161, 104 S.Ct. 568. Further, the government creates public policy through litigation, which may justify alternative legal positions. *Id.* The Supreme Court also said that offensive, non-mutual collateral estoppel would frustrate judicial economy because it would force government to vigorously defend every claim to the point of exhaustion to avoid the doctrine, creating more litigation than it alleviates. *Id.* at 163, 104 S.Ct. 568.

We have likewise held that offensive, non-mutual collateral estoppel does not apply against a state government for many of the same reasons. *Hercules*, 768 F.2d at 1579. In so doing, we recognized the differences in litigation considerations between the government and private litigants, as detailed by *Mendoza*. *Id.* at 1578. Several district courts in this

Circuit have similarly extended *Mendoza* and *Hercules* to bar offensive, non-mutual collateral estoppel from applying to local government entities. *Tugz Int'l, L.L.C. v. Canaveral Port Auth.*, 2005 WL 6046066 (M.D.Fla.2005); *Petchem v. Canaveral Port Auth.*, 2005 WL 1862412 (M.D.Fla.2005).

In *Tugz*, the district court held that a captain, who wrecked a ship, could not use the administrative law decision, regarding his pilot's license, in litigation against the local port authority. 2005 WL 6046066, at *7. In *Petchem*, the district court applied *Mendoza* and *Hercules,* holding that "whatever differences there may be between the litigation burdens faced by the Port Authority and the federal government or the Port Authority and a state government, they are, in the main, a matter of degree and not of kind." *Petchem*, 2005 WL 1862412, at *3.[1] The *Petchem* court further noted that a local government agency, such as a port authority, is likely to be more financially restricted than the federal or state government, making application of the exclusion even more important. *Id.*

We agree. In the case at hand, excluding a school district from offensive, non-mutual collateral estoppel

[1] In so holding, the court observed that: "there is no basis in this case for concluding that the Port Authority is a state government in the sense contemplated by the court in *Hercules Carriers* and certainly is, in no sense, the federal government, there is no question that it is a governmental entity." 2005 WL 1862412, at *3. The same is true here of the School District.

is based on the same reasoning in *Hercules* and *Mendoza*. To begin with, a school district is a political subdivision of the State of Georgia. *Greene County School Dist. v. Circle Y Const., Inc.*, 291 Ga. 111, 728 S.E.2d 184, 185 n. 2 (2012) (noting that a local school system is a political subdivision of the state); *accord Thornton v. Clarke County School Dist.*, 270 Ga. 633, 514 S.E.2d 11, 12 n. 1 (1999). Additionally, the litigation at hand involves constitutional interpretation; thus, applying offensive, non-mutual collateral estoppel would hinder the court from developing and clarifying essential constitutional law. It is also true that school districts must sometimes promote educational policy through the courts, which may merit alternative interpretations of a law or case; thus, offensive, non-mutual collateral estoppel would prevent the development of educational policy through litigation.

Most importantly, a school district has a limited litigation budget, much more limited than the federal or state government. As a result, offensive, non-mutual collateral estoppel would force the school district to spend more on litigation because each claim would have to be utterly exhausted. Furthermore, this kind of claim exhaustion would actually increase the overall litigation, thus exhausting government resources, instead of promoting judicial economy as estoppel is intended to do.

Plaintiffs argue that offensive, non-mutual collateral estoppel should apply here because unlike a federal or state government, a local government

entity is not subject to suit in a vast geographic area, the nature of litigation is more limited, and there is no U.S. Supreme Court certiorari process in place to resolve conflicts amongst the courts. However, as the School District notes, a local government entity may be sued outside of its geographical borders. For example, the School District regularly contracts with vendors from across the country, sends students and employees outside of its borders, and is regularly in situations in which litigation outside of Fulton County could result. As for any difference between the nature of the federal government's litigation and of a local government agency's litigation, it is merely a matter of degree, not kind. Notably, this particular case casts the School District as an employer, but the School District must wear numerous litigation hats ranging from providing special education to local taxation to procurement. As a result, the School District, like the federal and state governments, needs litigation flexibility, so, for example, they are not forced to completely exhaust every administrative hearing, which wastes resources and increases litigation. Finally, given all of the similarities between federal, state and local governments highlighted above, the fact that there is no certiorari process to resolve circuit splits on the local level does not demand application of offensive, non-mutual collateral estoppel.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

Denise Demaree, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION FILE NO. 1:12-cv-01277-JOF
Fulton County School District, Defendant.	:	

ORDER

This matter is before the court on Defendants' motion to dismiss [5] and Defendants' motion for judgment on the pleadings [22].

I. Background

A. Procedural History

Plaintiffs, Denise Demaree, Megan Humphreys, Allison Jones, Clare Mansell, Mary McCoy, Tim McKinney, Mike Mitchell, Janet Stalling, Ray Splawn, and Sandy Wade, filed suit against the Fulton County School District ("School District") on April 13, 2012, alleging that the School District violated their rights under the Equal Protection Clause of the United States and Georgia Constitutions during a reduction in force implemented by the School District at the conclusion of the 2009-2010 school year. Plaintiffs intend for their suit to be a

class action involving approximately 50 elementary school music teachers who lost their jobs in the reduction in force.

Defendants filed a motion to dismiss Plaintiffs' original Complaint. *See* Docket Entry [5]. Plaintiffs then filed an Amended Complaint. In light of the Amended Complaint, the court DENIES AS MOOT Defendants' motion to dismiss [5]. The court now considers Defendants' motion for judgment on the pleadings with respect to Plaintiffs' Amended Complaint.

B. Facts Alleged in Amended Complaint

Plaintiffs were employed by the School District as elementary instrumental (band and orchestra) music teachers during the 2009-2010 school year. *See* Am. Cmplt., ¶ 8. Plaintiffs' teaching contracts were all non-renewed at the conclusion of the 2009-2010 school year, as the result of a reduction in force instituted by the Fulton County Board of Education in the spring of 2010. *Id.*, ¶¶ 9-10. The Fulton County Board of Education is a "final policymaker" for the Fulton County School District. *Id.*, ¶ 11.

The reduction in force described a five-step analysis considering factors of performance and tenure. *Id.*, ¶ 15. For example, the first step eliminated employees who did not have tenure and who had performance issues. *Id.* Each step in the process went further into non-tenured and tenured positions, culminating in the fifth step which eliminated

employees based on tenure if not enough positions were eliminated by the first four steps. *Id.*

The positions of elementary music school teachers, however, were not eliminated through this five-step analysis. *Id.*, ¶ 16. Instead, the School District voted to non-renew ***all*** music teachers who were serving as elementary band and orchestra teachers because those positions were deemed "non-essential" functions. *Id.* These positions were described as "programs/functions eliminated." *Id.*, ¶ 17. The non-renewal of the elementary school band and orchestra teachers reduced the School District staff by 54 positions. *Id.*, ¶ 25.

One other group was also placed in the category of "programs/functions eliminated" – Grades 1 through 3 paraprofessional positions. *Id.*, ¶ 18. However, the 165 Grades 1 through 3 paraprofessional positions were not eliminated as a group like the elementary music teachers, rather, they were analyzed through the five-step reduction in force process. *Id.*, ¶ 19. This resulted in some of the Grades 1 through 3 paraprofessionals continued employment in other paraprofessional positions. *Id.*, ¶ 20. Both the paraprofessionals and the music teachers are certified to teach Pre-K through 12th grade. *Id.*, ¶¶ 21-22.

Plaintiff music teachers allege that they are similarly situated with the Grades 1 through 3 paraprofessionals and that the School District had no rational basis for treating Plaintiffs differently than the Grades 1 through 3 paraprofessionals. *Id.*,

¶¶ 23-24. Plaintiffs further contend that had the School District applied the five-step process to the music teachers, Plaintiffs would ***not*** have been non-renewed and would still have their positions. *Id.*, ¶ 26.

Don Lee, a music teacher who is not a Plaintiff in this case, challenged his non-renewal through the administrative process. The Fulton County Superior Court in *Lee v. Fulton County Board of Education*, Civil Case No. 2010CV193987, reversed the non-renewal decisions of the Fulton County Board of Education and the State Board of Education and remanded the case to the Fulton County Board of Education for a determination of whether Mr. Lee should be non-renewed under the five-step analysis described above. *Id.*, ¶ 22 (second) and Exh. B.

Plaintiffs allege that the decision of the School District to eliminate their positions violates the Fourteenth Amendment to the United States Constitution (Count I) and the Equal Protection Clause of the Georgia Constitution (Count II). *Id.*, ¶¶ 27-32.

C. Contentions

Plaintiffs allege that the School District violated their equal protection rights by eliminating their positions altogether rather than processing them through the five-step criteria used for other employees in the reduction in force, including the Grades 1 through 3 paraprofessionals. Plaintiffs also argue that Defendants cannot defend against these claims

because the Fulton County Superior Court has already determined that the School District's decision to eliminate the music, band and orchestra positions violates equal protection in comparison to the Grades 1 through 3 paraprofessionals.

Defendants respond that there is no equal protection violation under a rational basis review because the elementary band and orchestra music position were eliminated altogether in order to offer the most budgetary savings. Defendants further contend that the court cannot apply non-mutual collateral estoppel against the local school board so Plaintiffs cannot rely on any preclusive effect of the Fulton County Superior Court in *Lee* in this case.

II. Discussion

A. Equal Protection

The constitutional question in this case is not difficult. The Fourteenth Amendment of the federal Constitution states: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. xiv, cl. 1. Thus, "all persons similarly situated should be treated alike." *See*, *e.g.*, *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. "This standard is easily met." *See*, *e.g.*, *Leib v. Hillsborough County Pub. Transp. Comm'n*, 558 F.3d

1301, 1306 (11th Cir. 2009); *Deen v. Egleston*, 597 F.3d 1223, 1230 (11th Cir. 2010) ("rational review" standard gives states "wide latitude" when crafting "social or economic" legislation). However, the "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *See City of Cleburne*, 473 U.S. at 446-47.

The Supreme Court has further held that:

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for classification. . . . The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993); *see also Panama City Medical Diagnostic, Ltd. v. Williams*, 13 F.3d 1541, 1545 (deference must be given to legislature "because lawmakers are presumed to have acted constitutionally 'despite the

fact that, in practice, their laws result in some inequality' ").

On a "rational-basis review" the classification bears a "strong presumption of validity" and a party challenging the classification must "negate every conceivable basis which might support it." *See Beach Communications*, 508 U.S. at 314-15. These "restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing." *Id.* at 315. A legislature need not articulate its reasons for enacting a statute. *Id.* The Court continued:

> Defining the class of persons subject to a regulatory requirement – much like classifying governmental beneficiaries – inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Id. at 315-16.

It is undisputed that the reduction in force and its implementation with respect to Plaintiff music teachers does not involve a suspect class or a fundamental right. Therefore, the court analyzes Plaintiffs' claims under a rational basis review. The rational basis test asks "(1) whether the government has the power or authority to regulate the particular area in question, and (2) whether there is a rational

relationship between the government's objective and the means it has chosen to achieve it." *Lieb* [sic], 558 F.3d at 1306 (citing *Cash Inn of Dade, Inc. v. Metro. Dade County*, 938 F.2d 1239, 1241 (11th Cir. 1991)).

It is clear that under Georgia law, "teachers" and "paraprofessionals" are treated differently. There are different educational and background requirements for the positions and different protections once an individual is in the position. As this case demonstrates, there is also a substantial difference in pay for the positions. No party disputes that each elementary music teacher position eliminated generated a cost savings $68,536 for the School District; while each paraprofessional position saved $27,246. *See* Am. Cmplt., Exh. A, at 1 (Executive Summary of Staffing Reduction). There is also no dispute that the Fulton County School District faced a $140 million budget shortfall which led to the implementation of the reduction in force. *Id.* Under a "rational basis" test, cost savings is a sufficient basis upon which a governing body can make a distinction. *See Estate of McCall ex rel. McCall v. United States*, 642 F.2d 944, 951 (11th Cir. 2011) (noting that reduction of cost of medical malpractice premiums and health care is legitimate governmental purpose).[1]

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[1] For the same reasons as the court has stated for treating music teachers and paraprofessionals differently, the court also finds that to the extent Plaintiffs might be asserting a "class of one" claim, it, too would fail. *See*, *e.g.*, *Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1032 n.1 (11th Cir. 2008) (in

(Continued on following page)

Plaintiffs argue it "is irrational and arbitrary to non-renew better and longer-serving employees and renew lower performing and short term employees." *See* Resp., Docket Entry [25], at 14. But this was not the only choice facing the governing body. The School Board eliminated the elementary music teachers because to do so would save them more money. That is a rational reason. One might disagree with this reason or find it shortsighted, but it is certainly rational to eliminate the positions that cost the most money when a governing body is designing a program to eliminate a $140 million budget shortfall.

Plaintiffs also contend that the School District's own reduction in force put the music teachers and the paraprofessionals in "the same classification." *See* Resp., Docket Entry [25], at 16. The elementary music teachers and paraprofessionals elementary grades 1 through 3 were slated for the same consequence – total elimination of the program. This does not mean that the reduction in force "classified" these positions as similar.[2]

"class of one" equal protection claim, plaintiff must show (1) he was treated differently from other similarly situated individuals and (2) defendant unequally applied facially neutral ordinance for purpose of discriminating against plaintiff).

[2] Plaintiffs' argument that *Gosney v. Sonora Independent School District*, 603 F.2d 522 (5th Cir. 1978) is "applicable" "precedent" is equally without merit. In *Gosney*, the court found that the school district violated the Equal Protection Clause because it refused to renew the contract of two teachers based on their violation of the policy against outside employment by

(Continued on following page)

For these reasons, the court grants Defendants' motion for judgment on the pleadings as to the equal protection claims.

B. Collateral Estoppel

Plaintiffs contend that the School District is collaterally estopped from defending against their equal protection claims due to the decision of the Fulton County Superior Court in *Lee v. Fulton County Board of Education*, Civil Case No. 2010CV193987. Because Mr. Lee is not a plaintiff in the instant litigation, it is undisputed that this case presents a circumstance of non-mutual collateral estoppel.

In *United States v. Mendoza*, 464 U.S. 154 (1984), the Supreme Court held that non-mutual collateral estoppel could not be applied against an agency of the federal government. The court reached this conclusion because to find otherwise would deprive the Supreme Court of the benefit of "permitting several courts of appeals to explore a difficult question before

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school district employees. The non-renewed teachers had worked as both cattle ranchers and operated a retail dry goods store. But the school district renewed the contract of other teachers who were employees in business enterprises, such as ranching, bookkeeping for a physician, or collecting tickets a local drive in theater. *Id.* at 527. There, the court found that the school district could not offer a rational reason for treating the outside employment of retail store differently from the outside employment of ranching. Here, in contrast, the School District does have a rational reason for treating elementary music school teachers differently from paraprofessionals Grades 1 to 3.

[the Supreme Court] grants certiorari." *Id.* at 160. The Court also discussed the "geographic breadth" of litigation in which the federal government must be involved, as well as the fact that the Solicitor General has to consider limited resources and crowded dockets when deciding which cases to appeal. *Id.* at 159-60.

In *Hercules Carriers, Inc. v. Claimant of Florida, Department of Transportation*, 768 F.3d 1558 (11th Cir. 1985), the Eleventh Circuit broadened the bar against non-mutual collateral estoppel to also include state government entities. The court found that the "policy rationale behind *Mendoza* applies" to a case involving state government. *Id.* at 1578. *Hercules Carriers* would appear to be directly applicable to this case as county school systems are considered to be political subdivisions of the state of Georgia. *See Holloway v. Dougherty County School System*, 157 Ga. App. 251 (1981).

Even if the School District is not considered a state governmental actor in these circumstances, the concern for the limited resources of the government is a feature common to local, state, and federal governments. The court finds that particularly under the circumstances here, it would be imprudent to allow non-mutual collateral estoppel against the School District. The administrative and state court proceedings that resulted in *Lee* arose out of the Fair Dismissal Act and a question of whether Mr. Lee was rightfully non-renewed. The *Lee* court considered Mr. Lee's allegations under an "any evidence" standard. Plaintiffs now attempt to piggy-back the claims of 53

Plaintiffs on the order obtained by Mr. Lee. Had the School Board been aware that the outcome of 53 additional cases rested on the *Lee* decision, it might have made a different decision on the allocation of its resources. For these reasons, the court finds that *Mendoza/Hercules Carrier* bar to the exercise of non-mutual collateral estoppel against government entities applies to the School District under these circumstances.

Even if the court were to allow non-mutual collateral estoppel, the court would have to find (1) the issue at stake to be identical to the one in the prior litigation, (2) the issue to have been "actually litigated" in the prior suit, (3) the determine [sic] of the issue in the prior suit to have been an essential part of the judgment in that prior suit; and (4) plaintiff had a full opportunity to litigate the issue. *See Community State Bank v. Strong*, 651 F.3d 1241, 126365 [sic] (11th Cir. 2011) (noting that federal court must apply state law of issue preclusion and describing elements of Georgia collateral estoppel); *see also Body of Christ Overcoming Church of God, Inc. v. Brinson*, 287 Ga. 485 (2010).

Here, most relevant is whether the issue was "actually litigated" or "necessarily decided" in the *Lee* case. An issue is considered "actually litigated" when the "issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." *See Community State Bank*, 651 F.3d at 1267-68. An "issue must have been squarely addressed, or 'directly decided' in the former suit before

it can be held as conclusive for subsequent litigation." *Id.* at 1268.

As the court has alluded to above, the procedural posture of *Lee* is quite different than the direct constitutional challenge presented in the instant case. In *Lee*, the court was reviewing the decision of a "local board of education" when discharging a teacher under the "any evidence" rule pursuant to O.C.G.A. § 20-2-940(e)(4). *See Lee*, Slip Op., at 2. The *Lee* court considered the non-renewal of Mr. Lee's position under O.C.G.A. § 20-2940(a)(6) and found that under that section alone, Mr. Lee's non-renewal was "authorized." *Id.* at 3. The court then considered Mr. Lee's argument that he was denied his equal protection rights when compared to the Grades 1 through 3 paraprofessionals because the School District did not use the five-step criteria for his non-renewal. *Id.*

The court held – without citation – that "[u]nder the rational relationship test, the Court must determine that the decision is not arbitrary or discriminatory and that a legitimate government interest is promoted by treating similarly situated groups differently." *Id.* at 4. (As discussed above, this is not an accurate description of "rational basis" review under Constitutional law and improperly places the burden of defending the decision on the governing body.)

The *Lee* court then stated that the "record is devoid of an answer" to the question of why the School District eliminated the music positions altogether and ran the paraprofessionals through the

five-step criteria. *Id.* (Again, a governing body need not articulate any reason for making distinctions under rational basis review.) The *Lee* court found that Mr. Lee was "entitled under the equal protection clause" to be "treated like" the paraprofessional. *Id.* at 4-5. The court then remanded Mr. Lee's case to the Fulton County Board of Education for determination of whether he should be non-renewed under the five-step criteria. *Id.* at 5.

The *Lee* opinion is permeated with the language of agency review. For example, Mr. Lee argued that the School District's decision was "arbitrary and capricious" and the court also utilized that language. This is language drawn from cases brought against the local and state boards of education under O.C.G.A. § 20-2-940(e)(4). This language also reinforces the fact that a different burden of proof existed at the agency level than does in a direct constitutional challenge. This is another reason for the court to decline to apply collateral estoppel. *See*, *e.g.*, *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689 (11th Cir. 1984) (citing Restatement (Second) of Judgments, § 28 (1980)) (holding collateral estoppel should be denied based on equity and fairness where burden of proof is allocated differently in two proceedings), *reh'g granted on other grounds*, 779 F.2d 1485 (11th Cir. 1986).

In fact, much of the briefing at the state level involved whether Mr. Lee had a right to subpoena information concerning the performance reviews of other band and orchestra teachers. The litigants and

the court were not focused on an Equal Protection Clause analysis as the *Lee* opinion does not cite either the United States Constitution or any Supreme Court authority on the equal protection claim. It cites only one Fifth Circuit case from 1978. *See Jackson v. Marine Exploration Co., Inc.*, 583 F.2d 1336 (5th Cir. 1978) (addressing Florida compulsory pilotage statute which required registered vessels with draft of six feet or more to pay local pilotage fees).

Furthermore, the *Lee* decision provided no monetary damages to Mr. Lee nor made any determination of whether the School District was liable under *Monell*. Rather, it simply remanded Mr. Lee's case to the Fulton County Board of Education. Under these circumstances, the court finds that the question of the School District's liability for an equal protection claim was not "actually litigated" or "necessarily decided." Whether the School District's policies with respect to elementary school band and orchestra teachers in the reduction in force violated equal protection is simply not an issue that was "fully and fairly litigated" in the administrative and superior court proceedings. Therefore, the court finds that Defendant is not barred from asserting in this case that the implementation of its reduction in force does not violate the Equal Protection Clause of the U.S. or Georgia Constitutions.

III. Conclusion

The court DENIES AS MOOT Defendants' motion to dismiss [5] and GRANTS Defendants' motion for judgment on the pleadings [22].

The Clerk of the Court is DIRECTED to DISMISS WITH PREJUDICE Plaintiffs' complaint.

IT IS SO ORDERED this 9th day of October, 2012.

S/ J. Owen Forrester
J. OWEN FORRESTER
SENIOR UNITED STATES
DISTRICT JUDGE

**IN THE SUPERIOR COURT
OF FULTON COUNTY
STATE OF GEORGIA**

DON LEE,	*	
Petitioner,	*	Civil Case No.
	*	2010-CV-193987
v.	*	
FULTON COUNTY BOARD OF EDUCATION,	*	
	*	
	*	
Respondent.	*	

I. BACKGROUND

A. Procedural History

Petitioner requested a hearing before the Fulton County Board of Education (the "FCBOE") tribunal pursuant to O.C.G.A. § 20-2-940, following a decision to non-renew his contract. During the FCBOE hearing, the hearing officer quashed portions of Petitioner's subpoena that requested performance evaluations for all music teachers in all grades (the "Subpoena"). The FCBOE tribunal recommended that Petitioner's contract be non-renewed. The FCBOE adopted this finding.

Petitioner appealed to the State Board of Education ("SBOE"). On October 14, 2010, the State Board of Education sustained the FCBOE decision for the stated reasons that the FCBOE decision was not arbitrary or capricious and Petitioner was not denied due process because the Subpoenas were quashed.

B. Record Evidence.

In March 2010, the FCBOE instituted a reduction-in-force ("RIF") because of projected budgetary shortfalls. The RIF involved the elimination of hundreds of wide ranging positions within the school system. A five-step analysis of performance and tenure was utilized, generally, for determining who was subject to termination under RIF (the "5-Step Criteria"). Under the 5-Step Criteria, tenured employees without records of poor performance were the last to be non-renewed.

Appellant is a tenured teacher, certified to teach grades K-12. The record indicates that he has worked for the FCBOE for 15 years and has a clean performance record. During the 2009-2010 school year, Appellant served as an elementary school band director. As such, he participated in a program of elementary instrumental music teachers that was not part of the State-required curriculum (the "Elementary Instrumental Music Teachers"). This program was entirely funded locally. The FCBOE determined that Elementary Instrumental Music Teachers constituted a non-essential program and decided to non-renew that position across the board, without consideration of performance and tenure. As a result, Appellant was terminated from the FCBOE.

The FCBOE also determined that the Grade 1-3 paraprofessional program was a nonessential function (the "Elementary Paraprofessionals") and cancelled it. However, instead of non-renewing the Elementary

Paraprofessionals across the board, FCBOE applied the 5-Step Criteria to this non-essential group.

DISCUSSION

A. Standard of Review

A local board of education has the burden of proof when it seeks to discharge a teacher. OC.G.A. § 20-2-940(e)(4). The standard of review on appeal is the "any evidence" rule. *Johnson v. Pulaski Board of Education*, 231 Ga. App. 576 (1998); *Ransum v. Chattooga County Board of Education*, 144 Ga. App. 783 (1978). A local board of education can adopt any reduction-in-force program it desires, provided the program does not violate the law or result from a gross abuse of discretion. *Hinton v. Warren Cnty. Bd. Of Educ.*, Case No. 2004-19 (Ga. SBE, Dec. 11, 2003); *Roderick J. v. Hart Cnty. Bd.of Educ.*, Case No. 1991-14 (Ga. SBE, Aug. 8, 1991); *Antone v. Green County Bd. Of Educ.*, Case No. 1976-11 (Ga. SBE, Sept. 8, 1976).

B. Findings of Fact

O.C.G.A. § 20-2-940(a)(6) provides, in relevant part,

> Except as otherwise provided in this subsection, the contract of employment of a teacher, principal, or other employee having a contract for a definite term may be terminated or suspended for the following reasons: (6) To

reduce staff due to loss of students or cancellation of programs.

The decision to eliminate Appellant's position as an Elementary Instrumental Music Teacher falls under the umbrella of O.C.G.A. § 20-2-940(a)(6) and, standing alone, was authorized. *Curry v. Dawson County Bd. Of Educ.*, 212 Ga. App. 827 (1994).

Appellant argues, however, that he should have been treated the same as others in "nonessential" programs that were cancelled. Appellant claims that he was denied his equal protection rights when compared to the Elementary Paraprofessionals, whom the FCBOE also deemed "non-essential." In contrast to its treatment of Elementary Instrumental Music Teachers, the FCBOE used the 5-Step Criteria, weighing the performance and seniority of Elementary Paraprofessionals against all paraprofessionals to determine who went and who remained.

"[U]under the equal protection clauses of the United States and Georgia Constitutions, the government is required to treat similarly situated individuals in a similar manner." *Edmonds v. Board of Regents of University System of Georgia*, 302 Ga. App. 1 (2009).[1] Because the classification at issue here,

[1] "The person who is asserting the equal protection claim has the burden to establish that he is similarly situated to members of the class who are treated differently from him." *Edmonds v. Board of Regents of University System of Georgia*, 302 Ga. App. 1 (2009).

Elementary Instrumental Music Teachers, does not involve a suspect classification or fundamental rights, the "rational relationship" test is appropriate for the Court's equal protection analysis. *Jackson v. Marine Exploration Co., Inc.,* 583 F.2d 1336 (5th Cir. 1978). Under the rational relationship test, the Court must determine that the decision is not arbitrary nor discriminatory and that a legitimate government interest is promoted by treating similarly situated groups differently. The record evidence supports a conclusion that the Elementary Instrumental Music Teachers and the Elementary Paraprofessionals are similarly situated. Both groups were deemed "non-essential" and had their programs cancelled.

As applied to these facts, is there a rational basis for assessing performance and tenure to determine whether which Paraprofessionals were to be terminated while ignoring those criteria as applied to Music Teachers? The record is devoid of an answer to this question. In fact, the State Board admits that the record contains nothing to establish the reason why the Elementary Paraprofessionals were not eliminated across the board. Moreover, the State Board's finding that the Elementary Paraprofessionals are a disparate group from the Elementary Instrumental Music Teachers is conclusory and lacks evidentiary support. Furthermore, the record contradicts the State Board's finding that the 5-Step Criteria was "only applied in those instances where a program was

not being eliminated." The Elementary Paraprofessionals, whose position, like Appellant's, was eliminated, were subjected to the 5-Step Criteria.

Appellant asks only to be treated like the Elementary Paraprofessionals and compared to other music teachers using the 5-Step Criteria. The Court agrees that he is so entitled under the equal protection clause and in light of the manner in which the Elementary Paraprofessionals were treated. The record evidence establishes that both groups were similarly situated, yet treated differently. Accordingly, the State Board erred in finding no violation of equal protection where the FCBOE presented no evidence for the different treatment.

By deciding that the 5-Step Process was not applicable to Appellant, the SBOE found the Subpoenas to be "irrelevant" to these proceedings. In light of the findings above, the Court finds that the Subpoena are [sic] relevant to determine whether Appellant would have been retained if the 5-Step Criteria had been applied to him, as it was to the Elementary Paraprofessionals. Any issues of confidentiality can be addressed with redactions of information not essential to the application of the 5-Step Criteria and an appropriately drawn Protective Order. O.C.G.A. 9-11-26(c); *Sechler Family Partnership v. Prime Group, Inc.*, 255 Ga. App. 854 (2002) ("When parties or nonparties contend that discovery requests unduly invade their privacy, suitable protective orders insuring confidentiality may be sought").

II. CONCLUSION

For the reasons set forth above, the Court reverses the decisions of the FCBOE and SBOE. The Appellee is hereby **ORDERED** to produce the information sought by the Subpoenas within thirty days of this Order.

FURTHER ORDERED, the Board of Review's decision is **REVERSED**. This matter is **REMANDED** to the Fulton County Board of Education for a determination of whether Appellant should be non-renewed under the 5-Step Analysis. This matter is **CLOSED**.

SO ORDERED this 16th day of August, 2011.

KELLY A. LEE
JUDGE, SUPERIOR COURT
FULTON COUNTY

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Court of Appeals

of the State of Georgia

ATLANTA. OCTOBER 13, 2011

The Court of Appeals hereby passes the following order:

APPLICATION NO. A12D0046

FULTON COUNTY BOARD OF EDUCATION V. DON LEE

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby DENIED.

96004

2010CV193987

Court of Appeals of the State of Georgia

Clerk s Office, Atlanta **OCT 13 2011**

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

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

Clerk.