No. 16-_____

In the Supreme Court of the United States

ANTHONY S. TRICOLI,

Petitioner,

–v–

ROB WATTS ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Anthony Tricoli was terminated as President of Georgia Perimeter College after discovering financial improprieties and subsequently being blamed for a $16 million deficit. University of Georgia records later showed that Respondents actively hid the existence of this deficit and obstructed any investigation of it. The Board of Regents failed to provide Tricoli a required hearing upon his termination. Tricoli brought suit in Georgia Superior Court, alleging that Respondents' actions in falsifying financial records and concealing misappropriation of funds, combined with the failure to provide a hearing, constituted a RICO Conspiracy and violation of his Due Process rights. A split Georgia Court of Appeals converted Respondents' motion to dismiss on sovereign immunity grounds and granted summary judgment with no notice or opportunity to respond, with the dissenting Justice holding that the conversion was improper and Tricoli's allegations constituted a pattern of criminal predicate acts, and thus were not barred by sovereign immunity. The questions presented are:

1. May Respondents, under a claim of sovereign immunity, deprive Anthony Tricoli of his right to a hearing required by the Due Process Clause of the Fourteenth Amendment, as well as by State constitutional provisions, rules, and statutes?

2. Should this Court rescind implied waivers of the Constitutional right to Due Process that were unknowing, involuntary and admittedly procured by compulsion and trickery?

3. May the executive and judicial branches of the State of Georgia, in the name of sovereign immunity, ignore laws duly enacted by the Georgia legislature to protect the right to Due Process, as well as to authorize remedies against state agencies and officials—and, by doing so, have they committed additional Due Process violations?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Anthony S. Tricoli was the Plaintiff in The Superior Court of DeKalb County, Georgia and Appellant in the Georgia Court of Appeals. The Georgia Supreme Court denied certiorari and refused Tricoli's appeal by right under OCGA § 9-11-56(h).

Respondents

Rob Watts, Ron Carruth, James Rasmus, Mark Gerspacher, Sheletha Champion, Henry Huckaby, John Fuchko, Steve Wrigley, Ben Tarbutton, Sam Olens, and Robin Jenkins, the Attorney General of Georgia and the Board of Regents of the Univerfsity System of Georgia were defendants in DeKalb Superior Court and Appellees in the Georgia Court of Appeals. Of those defendant/appellees, Rob Watts, Ron Carruth, James Rasmus, Mark Gerspacher, Sheletha Champion, Henry Huckaby, John Fuchko, Steve Wrigley, Ben Tarbutton, Sam Olens, and Robin Jenkins were defendants sued in their individual capacities under the Georgia RICO Act. The Board of Regents of the University System of Georgia and the Office of Attorney General are state agencies that were defendants in DeKalb Superior Court and Appellees in the Georgia Court of Appeals. For purposes of the Georgia Tort Claims Act and the Georgia Open Records Act, the Board of Regents is the named defendant/appellee with respect to the actions of Watts, Carruth, Rasmus, Gerspacher, Champion, Huckaby, Fuchko, Wrigley, Tarbutton and Jenkins, while the Attorney General's office is

the named defendant/appellee with respect to the actions of Olens. For purposes of the Georgia RICO Act, the Board of Regents has respondeat superior liability under OCGA § 16-14-4(b) for the actions of Watts, Carruth, Rasmus, Gerspacher, Champion, Huckaby, Fuchko, Wrigley, Tarbutton and Jenkins, while the Office of the Attorney General has respondeat superior liability for the actions of Olens. The Board of Regents is the named defendant/ appellee for all of Petitioner's breach of contract claims pursuant to OCGA § 50-21-1.

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The order of the Supreme Court of Georgia denying a Petition for Writ of Certiorari is reproduced blow at App.1a. The opinion of the Court of Appeals of Georgia is reproduced below at App.2a, along with the dissenting opinion of Justice Miller, which is at App.9a The order of the Superior Court granting a motion to dismiss in favor of the Defendant is reproduced at App.13a.

JURISDICTION

A timely petition for rehearing was denied by the Supreme Court of Georgia on December 8, 2016. (App.21a) This Court granted an extension of the time to file a petition for writ of certiorari through April 7, 2017. This Court has jurisdiction 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

- **U.S. Const. amend. XIV, § 1**

  All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

> nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

This case concerns a systematic pattern of Due Process Clause violations under the pretext of sovereign immunity that threatens to undo the tension that has developed between the two interests through cases such as *Alden v. Maine*,[1] sending the States completely on their own way, detached from the notion that their sovereignty is tempered by the Fourteenth Amendment when it comes to the taking of property and liberty interests. It is no coincidence that the State of Georgia is the first to jump completely off the tracks in response to an issue of first impression involving the use of the Georgia RICO Act,[2] against state officials to fight government corruption. It has resulted in due process violations originating in the reviewing courts themselves, as they ignore statutes, switch them for another, or give them interpretations "clearly at variance with the statutory language." *Bouie v. City of Columbia*, 378 U.S. 347, 356 (1964).

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[1] 527 U.S. 706 (1999)

[2] OCGA § 16-14-1 *et seq.*

While it has been spurred by the novel use of a legal theory, it occurs in a familiar, though still volatile context. Respondents have reawakened an issue this Court must have considered settled until another State Board of Regents, this time from Georgia, attempted a walk-around of *Board of Regents v. Roth*[3] and *Perry v. Sindermann*.[4] Georgia's sidestep allows that State to take impunity towards protected constitutional rights to a whole new level. Respondents are not merely asserting they have the right to play political hardball against anyone who does not fit their corrupt system, they are actually claiming the prerogative to commit criminal acts with impunity, to advance or protect their own interests, under cover of sovereign immunity.

Thus, they are attempting to pit the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution against the doctrine of sovereign immunity. Worse, they are manipulating the state's own sovereign immunity doctrines in their extreme efforts to deny one of the most fundamental tenets on which the social contract of this country is based. And they are doing it in defense of criminal corruption in government.

Meanwhile, as Respondents protest that this strong wall of sovereign immunity is necessary to protect the functioning of the state and its finances, this case proves that the expansion of sovereign immunity Georgia is pioneering poses the greatest threat yet to the public treasury.

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[3] 408 U.S. 564 (1972).

[4] 408 U.S. 593 (1972).

Respondents and the courts below pretend they are protecting the State of Georgia from the disruption of all orderly government administration and the danger of the public treasury being sucked up into a vacuum. R120. That is what they say will happen if Petitioner Anthony Tricoli were treated fairly, following the State's own statutes, rules and constitutional provisions, consistent with fundamental principles of Due Process of Law. Specifically, in this case, Respondents and the courts below are protecting the dubious prerogative of state officials to commit felonies, including the knowing falsification of state agency financial reports to hide the theft of public funds, and the falsification of investigative reports to conceal their own culpability, either in the theft or the failure to prevent it. App.50a-70a.

Ironically, it is Anthony Tricoli who—while pursuing his rights and remedies under the law, and defending his even more fundamental right to fair procedures in that pursuit—is actually protecting the best interests of Georgia, as contemplated in the legislative intent of the Georgia RICO Act. OCGA § 16-14-2, as well as any other state that might fall into this trap. The Georgia Court of Appeals[5] majority wrote that this is "an imaginative theory," the idea that a cause of action can be asserted against state agencies and officials to induce them to keep the State's written contracts and refrain from

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[5] The Georgia Court of Appeals is the highest court to rule on the issues in this case, granting summary judgment against Petitioner, without notice or opportunity to be heard, on the appeals court's own motion. The Georgia Supreme Court thrice declined to hear the case despite a statute making appeal of a grant of summary judgment mandatory. OCGA § 9-11-56(h).

abusing their positions of power to commit felonies that harm both Petitioner Tricoli and the State of Georgia. App.7a.

Tricoli is in a position to hold Respondents accountable, over their protests of sovereign immunity, because statutes enacted by the Georgia legislature empowered him to do so in a civil action. OCGA § 50-21-1 & OCGA § 16-14-1 *et seq.* Tricoli has standing to make an appeal for this Court to aid him, and his fellow citizens in Georgia and across the country, because Respondents and the courts below have repeatedly and systematically trampled his fundamental right to Due Process under the Fourteenth Amendment. Why? To keep him from asserting his "imaginative theory" that state officials are accountable, under duly enacted laws, to the People, and not free to undo valid contracts, ignore their own binding policies, and commit criminal RICO predicate acts with impunity.

Tricoli is uniquely positioned to represent the cause of Americans from across the political spectrum who are crying out against the "rigged system" because of his protected property and liberty interests that demand this Court's protection. This Court can do much more than that. It can take a concrete step toward addressing the plague of government corruption our country is truly fed up with.

B. The Backdrop of the Litigation

Petitioner Tricoli was fired as president of Georgia Perimeter College (GPC) when it was discovered, after Respondents' long-time pattern of misrepresentations to Tricoli concerning the school's

finances, that the school was in a financial crisis with a budget deficit of over $10 million.

No discovery was ever allowed in this case before summary judgment was granted against Tricoli, but the possible alleged motives for the malicious misrepresentations leading to his termination are, one, that Tricoli had actually discovered, just two months before his abrupt termination, and tried to put a stop to payments of up $1.5 million a year that Respondents had been funneling to an outside contractor without anything to show for the money, an allegation that has been repeated at schools throughout the University System of Georgia (USG).[6] R43. Another possible motive alleged is that Tricoli opposed a pet project of the then-Chairman of the Board of Regents (BOR),[7] benefitting the Chairman's family and home town of Sandersville, Georgia—a project to convert the entire USG payroll system that wasted tens of millions of taxpayer dollars before it was abandoned as the failure Tricoli predicted it would be when he opposed it. R44. Then, of course, is the embarrassment to the USG, including Respondents with financial and administrative responsibilities,

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[6] Similar schemes are now reportedly under FBI investigation. CBS News, *KSU Corruption Case Handed Over to FBI*. Nov. 7 2016 , at http://www.cbs46.com/story/33652019/ksu-corruption-case-handed-over-to-fbi

[7] The Board of Regents is officially the governing body of the University System of Georgia, with its members appointed by the Governor, purportedly to oversee the extensive staff of the 300,000 student University System with some 30 campuses across the state and a budget of over $10 billion.

that millions in taxpayer money was able to leak from GPC's coffers on their watch.

These are allegations concerning the possible motives for Respondents' actions against Tricoli because no reason was ever given. Although, at the time, Respondents conveyed to the media that Tricoli was personally responsible for the missing millions, they later had to admit in the face of extensive documentation that Tricoli had been actively misled about the school's finances. R36, 288. That admission came, however, five months after Tricoli had already been terminated. R59.

As alleged in the Complaint, Tricoli twice made a demand to USG Chancellor Hank Huckaby for a hearing and a statement for the reasons he was terminated, and twice his demand was ignored. R70. This, by itself, constitutes a violation of Tricoli's Due Process rights, as he had a concrete expectancy in continuing in his position as president of GPC or, as we will see, at least in some position in the University System.

C. Tricoli's Protected Interests

Tricoli was hired as president of GPC in 2006, pursuant to a written contract with the Board of Regents.[8] App.46a. The contract explicitly incorporated BOR Policies. *Id.* These included annual submission

[8] At the time he filed suit, Tricoli did not have a copy of the contract in his possession, but alleged that the written contact was in the possession of Respondents. No discovery was ever allowed in the action before it was first dismissed by the trial court, then terminated by summary judgment without notice by the appeals court.

of his name at the Board of Regents April meeting to consider renewal of the appointment[9], and an annual performance evaluation bearing on that renewal decision.[10] BOR policy called for a president to be notified immediately after the April meeting if not approved for renewal.[11]

Most importantly, BOR Policy required, where a president requested within 10 days of being terminated, that the BOR furnish a statement of charges within 10 days of the request, and to hold a hearing on the reasons for the dismissal before the Board.[12] Since Tricoli served for more than five years, from 2006 to 2012, Tricoli was also eligible for up to two year's compensation upon leaving his position,[13] for which he was never considered.

At the time he was hired, in 2006, GPC and the entire USG were experiencing financial nightmares. The first directive Tricoli received from the USG's Chief Operating Officer, Respondent Rob Watts, was to let 300 people go in order to meet a revenue shortfall. R26. Instead, Tricoli stepped up promotion and doubled the school's enrollment and revenues, balanced the budget without letting anyone go, and built a reserve fund of $20 million by 2009, while

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[9] BOR 2.4.2

[10] BOR 2.3

[11] BOR 2.4.2

[12] BOR 2.4.3

[13] BOR 2.4.4

other schools in the University System were still struggling financially. R27.

Tricoli was called a "rising star," won national awards as a college president, and was mentioned for a number of high profile positions, including the presidency of the University of Georgia. Every year from 2007 to 2011 he was enthusiastically renewed by the Board of Regents with accolades from the Chancellor. R28-29.

D. The Very Public Backstabbing Behind Closed Doors

That all changed in 2012. USG records show that from January through March of that year emails were flying among the Respondents, with Tricoli excluded, about the total depletion of GPC's reserves. R274. In March of 2012, Respondents shared among themselves a report detailing a $12.8 million deficit, again excluding Tricoli. App.59a-60a. Yet Respondents' claim that they were not aware of GPC's financial crisis until April 26, 2012, a claim that is demonstrably false according to USG records and the email communications. App.50a.

According to documents not available until after Tricoli's case was dismissed by the Georgia courts, Respondents began meeting at a private location, Lakeside Accounting, without Tricoli's knowledge. USG Chancellor Henry Huckaby was supposed to perform Tricoli's annual performance evaluation prior to the April 2012 Board of Regents meeting,[14] but never did. R330. The April Board of Regents

[14] BOR Policy 2.3

meeting came and went, with its deadline in the BOR Policy to consider re-appointments and give notice of any non-renewal decision,[15] but nothing happened. Respondent Ron Carruth, GPC's Vice President for Fiscal Affairs, reported to the President's Cabinet, according to official minutes of the March 2012 meeting, that GPC was experiencing a fiscal surplus and a "normal budget process." R285. Chancellor Huckaby and other Respondents engaged in numerous financial and budget discussions, such as a discussion of raising faculty salaries, and never mentioned the $12.8 million time bomb they were sitting on.

The silence was broken on April 26 with an announcement by the USG of a newly discovered $16 million deficit. According to the $12.8 million deficit report in March, and other documents that were not available before the case was terminated in the Georgia courts,[16] the claim that the financial crisis was discovered on April 26 was demonstrably false. App.59a, 62a.Yet Respondent repeated the same report he made in March, of a $4 million surplus and normal budget process, on April 15, less than ten days before the deficit announcement. App.61a.

The same day, without any independent investigation, Chancellor Huckaby, who had delayed Tricoli's performance evaluation while withholding the $12.8 million deficit report, demanded Tricoli's resignation. R50. When Tricoli refused, the USG

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[15] BOR 2.4.2

[16] No discovery was ever allowed in the case before the Georgia Court of Appeals granted summary judgment, without notice or an opportunity to be heard, on its own motion.

began releasing to the media information that Tricoli was personally to blame for the shocking deficit the USG had "just learned of." R333, App.62a-63a.

With public pressure mounting from the news reports and Tricoli still refusing to resign, Chancellor Huckaby offered Tricoli an alternate job in the USG central office in downtown Atlanta if Tricoli would resign quietly as GPC president and not raise a stink about financial corruption in the USG. R53-54.

On May 7, 2012, the day before the Board of Regents was scheduled to meet and tardily consider the presidential reappointments, Tricoli was still refusing to resign and asking for a criminal investigation. Huckaby then forced Tricoli's hand by sending out a press release saying that Tricoli had already been transferred to the USG central office. App.64a.

On the afternoon of May 7, even as the USG release was already being reported by the Atlanta media, Tricoli accepted, in writing, the new position offered, that had been announced by the USG to the media. However, Tricoli never resigned his position as GPC president. App.43a.

Unknown to Tricoli, though, his name was never presented to the BOR at their May 8-9 meeting. Rather, Watts' name was presented for approval instead.[17] App.64a-65a. The only recently obtained USG records further show that the Regents were falsely informed, as a reason for the substitution, that Tricoli had resigned—as Huckaby had tried hard to coerce, cajole and trick Tricoli into doing.

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[17] Board of Regents Meeting Minutes, May 8, 2012.

Then, on May 10, Huckaby informed Tricoli that he was being terminated because the Board of Regents did not vote to renew his appointment. Huckaby said nothing about the alternate job Huckaby had offered and Tricoli had accepted, that had been announced in the Atlanta Journal-Constitution. App.35a.

This is all matter documented in USG records that Tricoli could have presented upon his termination—except he was denied a hearing.

E. Due Process of Law Precedents

Given the terms of Tricoli's written contract, including the Board of Regents policies governing his employment and potential termination, and the offer of an alternate USG position announced to the media, Tricoli had an expectation of continued employment. That expectancy entitled Tricoli to the hearing denied by Respondents. *Perry v. Sindermann*, 408 U.S. 593 (1972).

In addition, according to this Court's precedent, Tricoli has a well-defined liberty interest that triggers a right to hearing that the Board of Regents denied him, contrary to its own policy. *Board of Regents v. Roth*, 408 U.S. 564 (1972). *Roth* makes it clear that such a liberty interest is implicated by the charges made against Tricoli "that might seriously damage his standing." *Roth*, 408 U.S. at 573.

Moreover, the courts below backed up these due process denials with claims of sovereign immunity. That wold seem to set up a conflict between the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and the common law doctrine of

sovereign immunity. *Alden v. Maine*, 527 U.S. 706 (1999).

That conflict does not quite pan out, however, as the Georgia courts failed to properly state the rule of law to be applied, substituted inapplicable statutes, and failed to address some claims, such as the Board of Regents denying Tricoli his due process hearings, altogether.

Along with the denial of notice and opportunity to be heard, this theory substitution, where there is no basis for pre-emption, is one of the oldest Due Process violations recognized by this Court's jurisprudence. *Windsor v. McVeigh*, 93 U.S. 274, 282 (1876); *Reich v. Collins*, 513 U.S. 106 (1994).

In particular, the courts below stated the wrong rules under Georgia law for the application of sovereign immunity to bar Tricoli's claims under both the statute waiving sovereign immunity for breach of written contracts with the State and the Georgia RICO Act.

That is an attempt to hold state agencies and officials unaccountable and above the law. *See U.S. v. Nixon*, 418 U.S. 683 (1974). It is a variation on the theme, but one that is more pernicious than anything seen since *NAACP v. Alabama*, 357 U.S. 449, 455 (1958) (attempt to rely on independent state ground, "without any fair or substantial support," to avoid federal constitutional review).

It is interesting that, in this radical departure from government accountability and increase in arbitrary action by the courts below, the implications of using the RICO Act as a tool to address a criminal

entity within or composed of a governmental entity itself are always lurking in the background while other issues such as deprivation of due process hearings or contract rights are in the forefront of the courts' decisions. It is, however, the idea of a civil action that knocks the so-called rigged system off balance that has driven Georgia to such extremes in this case. That is why it is important for this Court to preserve such a tool for future use against government consolidation of abuse of power.

F. Denial of Hearings and Due Process

For months prior to announcing a $16 million budget deficit at Georgia Perimeter College (GPC) on April 26, 2012, Respondents traded emails and reports about an impending financial crisis, while misrepresenting the school's financial position to Petitioner Tricoli. R274, 283. Documents obtained since Petitioner Tricoli's case was finally dismissed in the courts of Georgia show that Respondents determined to terminate Tricoli prior to the May 2012 Board of Regents meeting, at which the Regents considered that year's presidential reappointments. In fact, Tricoli's replacement had already been picked and submitted to the Board.[18]

One of the Respondents, University System of Georgia (USG) Chancellor Henry Huckaby, had been demanding Tricoli's resignation, though aware Tricoli had been misled about GPC's finances, since the day of the deficit announcement. Respondents also released information to the media blaming Tricoli

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[18] Board of Regents Minutes, May 8-9, 2012.

for the fiscal meltdown. Tricoli, however, refused to resign, arguing that criminal fraud had been committed. R50-53, 331-47.

On May 7, 2012, the day before the Board meeting, Respondents sent out a press release announcing that Tricoli had stepped down as GPC President and been reassigned to a position in the USG central office. After reading this in the press and fearing for his position, Tricoli accepted in writing for the job in the USG central office, but he did not resign. App.64a.

Nonetheless, Respondents reported to the Board of Regents that Tricoli had resigned, as Chancellor Huckaby had been demanding since the day of the deficit announcement.[19] Therefore Tricoli's name was not presented to the Board for reappointment, and the name of his replacement was. On May 10, 2012, Huckaby wrote to Tricoli informing Tricoli that the Board had not reappointed him and therefore his employment was terminated. This was apparently done to avoid a statement of charges, a hearing, and other procedures required if a president was terminated for cause.

Though Respondents' actions were not clear at the time Tricoli filed this action, and no discovery has ever been allowed, it is now clear that Tricoli was fired on May 10, 2012, subsequent to a prior decision to not even submit his name to the Board of Regents for the annual consideration of renewing presidential appointments. App.63a-66a.

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[19] BOR Minutes, *Id.*

On May 15, 2012, Tricoli's then-attorney submitted a letter to the Board of Regents, within 10 days of his termination in compliance with the policy demanding the statement of charges within days to be followed by a hearing required by BOR Policy 2.4.3 and Constitutional Due Process. App.36a. No such undertaking was received. However, correspondence obtained since the case was closed in the courts of Georgia show that the Attorney General actively opposed the requested hearing, failed to investigate the claims of criminal fraud—leaving $9 million in GPC spending in 2012 unaccounted-for—and also made material misrepresentations to Tricoli's then-attorney to dissuade him from pursuing the case. App.39a. That attorney did, in fact, drop the representation, which is why some of these records were not available until after the case was closed.

Unaware of his former attorney's correspondence, Tricoli made two additional requests for a hearing, which were ignored, before filing suit in May of 2014. The original complaint contained claims for denying due process, including by denying the hearing. R70.

Tricoli's complaint also included claims for breach of his written contract with the Regents, though as alleged the contract was in the possession of Respondents at the time of filing. Respondents moved for dismissal for lack of a written contract to waive the State's sovereign immunity under OCGA § 50-21-1. Though no discovery was ever allowed, Petitioner procured a copy of the contract and submitted it with other materials related to the motion to dismiss to the trial court. The trial court

acknowledged the written contract but in its eventual dismissal order held that Tricoli's contract ended with the termination of his employment, which the trial court understood to be a resignation induced by coercion and trickery. App.16a.

Tricoli did serve Requests for Admissions on Respondents, and upon receiving admissions that the financial information was misrepresented to Tricoli, filed a motion for a preliminary injunction under the Georgia RICO Act, based on the criminal predicate acts under OCGA § 16-10-20. R600.

The same day Tricoli filed that motion, November 19, 2014 the trial court signed an order dismissing the entire action, which was entered by the clerk two days later. The order did not mention the motion filed before the case was dismissed in the trial court. The order did not mention a reason for dismissing the due process claims for denying a hearing. The order dismissed all other claims on sovereign immunity grounds—holding, for example, that knowing falsification of state agency financial reports to hide the theft of funds was immunized as "financial oversight activity" under the tort negligence statute at OCGA § 50-21-24. App.17a-18a.

On appeal, these due process errors were noted. The Georgia Court of Appeals, however, converted the appeal of the trial court's dismissal order into a motion for summary judgment. App.3a.

The Court of Appeals backed up this un-noticed summary judgment with a holding that it was merely an imaginative theory to think that claims could be brought against state officials for a pattern of criminal predicate acts. The majority opinion, other than stating

its off-hand opinion about suing the State, did not examine the statute itself for evidence of waiver. App.7a; Georgia Const., Art. I, Sec II. Para IX(e). The dissent did, however, examine the language of the statute and determine that it did waive sovereign immunity.

Tricoli raised these additional due process violations to the Georgia Supreme Court, but the Georgia Supreme Court denied certiorari and also denied the mandatory appeal of the grant of summary judgment initiated without notice or opportunity to be heard by the Georgia Court of Appeals. OCGA § 9-11-56(h); App.1a, 21a.

REASONS FOR GRANTING CERTIORARI

As the Court will see, one compelling reason that this Court's intervention is needed is that Respondents and the courts below have committed a unique series of double violations. Every violation of the U.S. Constitution is embedded in a violation of the law and policy of Georgia, and vice versa. The extreme Due Process violations, upsetting what should be settled norms of what a written contract is, or whether a state agency should follow its own policies, have been triggered by a reaction to the use, for the first time, of a civil RICO action brought by a private citizen to challenge arbitrary actions by the government where, as here, they cross the line into criminal conduct prohibited by the statute.[20] This

[20] OCGA § 16-14-1 *et seq.*

case demonstrates that the arbitrary action has spread into the court system, barring any action to address government corruption on behalf of Petitioner, an individual who was crushed for opposing the establishment. The underlying actions in this case also resulted in the destruction of a state institution, Georgia Perimeter College, that had a $16 million budget deficit, lost 300 jobs and 10,000 students per semester, and has now gone out of existence. R600.

The normal posture of a case coming to this Court would be for a state to pass a law and for someone to complaint that it violated some overarching constitutional principle.

This case represents a phenomenon more akin to Georgia in the 1960s, where the State showed equal impunity towards its own laws and federal Constitutional requirements, manipulating both to evade the requirements of the rule of law and act in arbitrary fashion, and avoid all accountability. *NAACP v. Alabama*, 357 U.S. 449, 455 (1958); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

That includes an attempt by those representing—or misrepresenting—the State, to cause it to skirt its own laws in a way that gives this Court pause to consider whether it should meddle in state affairs. However, this Court should enforce the principle that the core requirements of the Constitution, such as the Due Process Clause of the Fourteenth Amendment, cannot be so easily brushed off. Moreover, the Court should not hesitate to read Georgia law for evidence that Respondents and the courts below are shading the citizens of their own State, as well as the U.S. Supreme Court.

I. DENIAL OF DUE PROCESS HEARINGS

The first issue the Court must confront is Tricoli being denied the right to appear at hearings required by state statute, as well as by the Board of Regents' own policy providing a statement of charges and a hearing for a president who is terminated. "In disposing of the first issue, there is no need to linger long" because It is clear that denying Tricoli the opportunity to appear at a hearing "violated the most rudimentary demands of due process of law.". *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

We have already established that Tricoli had protected property and liberty interests, and "there can be no doubt that at a minimum [the words of the Due Process Clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950).

If the state promises hearings allowing opportunity for redress to presidents terminated by the Board of Regents, movants seeking preliminary injunctions, and claimants facing summary judgment proceedings, "due process requires the State to provide the remedy it has promised. *Cf. Hudson v. Palmer*, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring). The obligation arises from the Constitution itself." *Alden v. Maine*, 527 U.S. 706, 740 (1999). In this case, though Respondents dearly hope it will never happen, Tricoli was promised hearing after hearing.

Though we did not know it until after the Georgia courts had tossed out Tricoli's case, he met the specific procedural requirements to obtain a hearing

before the Board of Regents. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 426 (1982).

By virtue of Tricoli's written contract, incorporating the policies of the Board of Regents that gave Tricoli an expectancy in continued employment, and set limitations on his termination that the Board of Regents failed to satisfy, most importantly the right to hearing, it was flagrant abuse of Due Process to terminate Tricoli and deny that hearing. *Perry v. Sindermann*, 408 U.S. 593, 600-601 (1972).

The need for that hearing is more acute since Respondents allowed Tricoli to take the blame for their misrepresentations—and misappropriations—of the state agency finances. There were "stigmatizing consequences of his removal" by an arbitrary government action prior to any investigation of the fiscal problems of GPC. *Vitek v. Jones*, 445 U.S. 480, 488 (1980). The fact that Respondents then pursued him around the country to maliciously spread that taint to any potential employer, irreparably harming his chances to gain other employment, invokes a liberty interest that gives Tricoli the right to roll back the whole series of hearing denials to get at the truth Respondents have sought to obscure. *Board of Regents v. Roth*, 408 U.S. at 573.

Documents obtained since all these hearings were denied show that even the Attorney General of Georgia, who has a duty to investigate and prosecute financial malfeasance in a state agency, actually sided with the Board of Regents in its refusal to hold a hearing, made material misrepresentations to Tricoli's counsel at the time to dissuade him from

pursuing any relief against the Board of Regents,[21] and failed to investigate the claims of criminal fraud in the University System.

It leaves the witnesses to this rebuff of the U.S. Constitution at all levels of Georgia state government to ponder, which is worse, the lengths of deceit, coercion and trickery the Board of Regents and Attorney General went to for the sole purpose of denying Tricoli a hearing that would expose Respondents' misdeeds, or the trial court allowing Tricoli's motion for an injunction based on criminal predicate acts to pass by the dismissal order like a ship in the night, evading the hearing on the motion required by state law. *Reich v. Collins*, 513 U.S. 106, 113 (1994) (state cannot hold out illusory injunctive remedy).

Assuming that was an innocent coincidence, it should have been corrected by the trial court when it had notice of the error. It surely should not have been rubber-stamped by the appeals court with the false statement that the trial court had "thoroughly addressed" the issue. App.3a. That is fake news, an empty statement with nothing to support it.

The Georgia Court of Appeals in its own turn denied Due Process in the same fashion, granting summary judgment without notice or the hearing required by state law, not to mention the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. App.3a; OCGA § 9-11-56(c).

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[21] The day after Tricoli's case was denied by the Georgia Supreme Court, Georgia Attorney General Sam Olens started work for the Board of Regents at $600,000 annual compensation.

Though it is hard to determine which deflection of the law is worse, the courts below have denied hearings specifically and unambiguously required by state statutes. The Respondents denied a hearing before the Board of Regents that could expose their role in the GPC financial fiasco, the unexplained payments of millions of dollars to outside contractors, and the failure to investigate it.

One thing is certain. The disingenuous denial of hearings required by the Due Process Clause of the Fourteenth Amendment, as well as by the State's own rules and statutes, is a violation egregious enough by itself to vacate the opinions below and require the State to start over, beginning with a meaningful hearing. *McKesson Corp. v. Division of Alcohol Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18, 37 (1990) ("root requirement of Due Process Clause is an opportunity for a hearing before being deprived of any significant property interest). That would give Tricoli the opportunity he has been denied to conduct discovery, attempt to vindicate himself and expose the wrongdoing of Respondents. That should be the starting point after five years of stonewalling by the State.

There is no end of weighty precedents, all the way back to the Court's ancient history that demand that result, that Tricoli receive a fair hearing concerning the termination of both his employment and his causes of action. *Windsor v. McVeigh*, 93 U.S. 274, 278 (1876). When a court overturns such precedents, or bypasses Petitioner's right to a hearing by simply ignoring it in the opinions as the courts below have done here, the courts themselves

have committed a due process violation. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

Nor can Respondents vitiate these rights by any assertion of sovereign immunity. According to this Court, the reverse is true: when Due Process Clause requires a remedy, the Supremacy Clause vitiates any claim of sovereign immunity. *Reich v. Collins*, 513 U.S. at 110.

Meanwhile, the obstruction of due process in the name of sovereign immunity also serves to obstruct investigation of the $9 million in GPC overspending that remains unaccounted-for at GPC from 2012.

II. UNCONSTITUTIONAL, INVOLUNTARY WAIVERS OF FUNDAMENTAL RIGHTS

Despite the clear Due Process violations committed by denying Tricoli a whole string of hearings required by rule and statute, Respondents and the courts below assumed away these fundamental rights in waivers that were completely unknown to Tricoli. In one unknowing waiver, the Georgia Court of Appeals relied on authority that provides a revelation how the infamous old backroads Southern speed traps have been replaced by a hidden summary judgment trap.

The authority cited by the appeals court below actually says, while winding its way towards a clandestine waiver of due process, that Tricoli had "no right to know the actual nature of the proceedings against him." *Bd. of Regents of the Univ. System of Ga. v. Barnes*, 322 Ga. App. 47, 743 S.E. 2d 609 (2013), cited at App.3a.

That is an insightful statement, because it encompasses the Respondents' modus operandi to shield themselves from all accountability. Anthony Tricoli certainly did not know the nature of the proceedings against him when Chancellor Huckaby was trying to trick Tricoli into resigning to forfeit Tricoli's right to a hearing.

And how could Tricoli know that when Huckaby was offering Tricoli another job, if he would only resign quietly and stop all the psychological pressure being applied, that Huckaby would whisk away that offer like Lucy yanking the football. Tricoli might as well have been sitting in the police station under the bright lights the way Huckaby was trying to impermissibly "threaten, trick, or cajole" Tricoli into giving up his fundamental right to a hearing. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

Then, when Huckaby failed to fraudulently induce Tricoli to resign—as opposed to accept the alternate job offer—Respondents denied Tricoli a hearing anyway.

The trial court never addressed the claim that Tricoli was denied due process when he was denied a hearing by the Board of Regents. The Court of Appeals took a more serpentine path, converting all of Tricoli's claims to summary judgment with no notice or opportunity to respond. No problem, said the appeals court, we can presume a waiver, though that does not pass constitutional muster. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (presumption against waiver of fundamental constitutional rights).

The Court of Appeals presumed the waiver, going so far as to say Tricoli "requested" summary judgment.

Why? The appeals court said Tricoli submitted matters outside the pleadings, which opened him up to summary judgment conversion, and requiring that Tricoli present evidence supporting all his claims.

However, this waiver the appeals court claims could in no way be knowing and voluntary. To the contrary, the controlling Georgia law limits summary judgment conversion to motions to dismiss for failure to state a claim under OCGA § 9-11-12(b)(6). So, according to the law, the motion to dismiss on grounds of sovereign immunity filed under OCGA § 9-11-12(b)(1) is not amenable to summary judgment conversion—but the court below did it anyway, without notice or opportunity to respond, in a glaring and increasingly common abuse of summary judgment.

OCGA § 9-11-12(b) also requires that if a motion to dismiss—for failure to state a claim under OCGA § 9-11-12(b)(6)-were converted to summary judgment, there must be a hearing consistent with the summary judgment statute. OCGA § 9-11-56(c) requires notice and an opportunity to respond at least 30 days before a required hearing.

Meanwhile, Respondent Attorney General argued that Tricoli had to provide evidence, for example, of his written contract to waive sovereign immunity. The Attorney General included two pages of case law in the motion to dismiss brief explaining why a motion to dismiss under OCGA § 9-11-12(b)(1) was not converted to summary judgment by submission of such matters outside the pleadings. R150-151.

That hardly qualifies as notice that submitting any matters outside the pleadings, in opposition to the 12(b)(1) motion to dismiss, or in support of

Tricoli's motion for a preliminary injunction, could trigger a summary judgment conversion—especially not a summary judgment conversion without notice or opportunity to responds. *Windsor v. McVeigh*, 93 U.S. at 280-281 (the tribunal that punishes first and then hears the party," is "but a solemn fraud, if is clothed with all the forms of a judicial proceeding").

Here is the point: the courts below consistently disregarded the State's own statutes-in a new, mutant form of sovereign immunity-in order to deny Tricoli Due Process of Law under the Fourteenth Amendment. In the process, the court below did what no court can do, which is to take away a constitutional right that had not been waived. *Hodges v. Eason*, 106 U.S. 408, 412 (1882).

That seizure, or pseudo-waiver was not harmless. There is plenty of evidence Tricoli could have marshalled to prove the elements of his claims, that he had a written contract waiving sovereign immunity, that provisions of his contract and Board of Regents policy were breached and violated, that Respondents committed torts and criminal predicate acts for which sovereign immunity was waived. He just never had that opportunity.

On the other hand, while there was ample evidence in the record to contradict the Georgia Court of Appeals' conclusion that came with "no warning," there was nothing in the record but the "proofs drawn from the clouds" to support the finding that Tricoli was an at-will employee who had no rights. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 307 (1937). That out-of-the-blue at-will finding is

a premise that could easily be debunked, with notice and an opportunity to respond. App.5a.

What we have, to put it simply, is a case of unforeseeable judicial distortion of what should be clear concepts in the law about notice and a hearing for summary judgment—to the point that they violate due process because it is not possible to know what the law is, or the nature of the proceeding. *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964).

Since everything in the final opinion flowed from the illegitimate summary judgment conversion, this Court should reverse and send the case back for proceedings consistent with due process, in which all parties do know the nature of the proceedings, especially since springing this summary judgment trap appears to be a growing pattern in Georgia, if not in other states.

Meanwhile, the obstruction of due process in the name of sovereign immunity also serves to obstruct investigation of the $9 million in GPC overspending that remains unaccounted-for at GPC from 2012.

III. Avoidance of Constitutional Rights on the Pretext of State Authority

All the attempts to evade constitutionally-required hearings and invoke phony waivers, hiding behind sovereign immunity, send a sure signal that "the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action," including those arising under the Due Process Clause of the Fourteenth Amendment. *Alden v. Maine*, 527 U.S. 706 (1999).

A state has no such freedom to disregard the core principles of the U.S. Constitution as embodied in the Fourteenth Amendment. *Alden*, 527 U.S. at 754-755. Furthermore, a state cannot avoid due process through a bait and switch, holding out a remedy in its written law that proves completely illusory. *Reich v. Collins*, 513 U.S. at 109-110.

So, as discussed in the previous two sections, If a statute says a hearing must be held for summary judgment, a court cannot convert to summary judgment without notice, or grant summary judgment without a hearing—not even if it manufactures a fake waiver.

Georgia cannot have a statute that says sovereign immunity is waived for a written contract, but then switch and say Tricoli's contract ended when Respondents tried to trick him into resigning and coerced him into accepting an alternate job which did not turn out to exist. The trial court floated the idea and the appeals court endorsed it, but shopping for means of denying a remedy is not allowed. 513 U.S. at 109-110.

As the Court of Appeals dissent pointed out, Georgia also consented to suit where a pattern of criminal predicate acts has been committed to satisfy the requirements of the Georgia RICO statute, as alleged and documented. App.9a-12a, App.50a-70a. Yet the courts below pulled another bait and switch, stating the wrong rule of law by falsely claiming, with no authority for the pre-emption, that the RICO statute is pre-empted by Georgia's tort claims act that is limited by its own terms to negligence claims. OCGA § 50-21-22(3); App.7a.

This switch relieved the courts below of the inconvenience of following the Ga Constitution, which

says the State consents to suit under any statute that specifically waives sovereign immunity. Aside from calling it an imaginative theory that state agencies and officials could be held accountable, no court has discussed the language of the Georgia RICO Act to determine if it states a waiver. The courts below ignored the case law, as well. In the only case in which a state official claimed he could not be subject to a civil RICO action, the Georgia Supreme Court held that the State Labor Commissioner was not protected by the mantle of state office. *Caldwell v. State*, 321 S.E.2d 704, 707, 253 Ga. 400 (1984).

Only the Georgia Court of Appeals dissenter examined the RICO Act for the provisions that were determinative in *Caldwell*. The statute, for example defines an enterprise to include governmental entities. OCGA § 16-14-3(3). Working from that definition, the Act can be violated by an employee of a governmental entity—that is, the Respondents who are state officials. OCGA § 16-14-4(b). Injunctive relief is specifically authorized against the State, including to reorganize a state agency as Tricoli tried to request but was ignored, or to rescind an approval by a state agency. OCGA § 16-14-6(a&b).

That reads like a statutory enactment by the Georgia legislature of consent to be sued. The Georgia Court of Appeals says that is imaginative. And that sounds like the manipulation of immunity in a systematic fashion that is not permitted by *Alden*, 527 U.S. at 758. It sounds like the bait and switch of remedial schemes prohibited in *Reich v. Collins*, even in the face of sovereign immunity. 513 U.S. at 110-

111. It sounds like the manipulation of state rules to evade the federal constitutional scheme which happens to include the Due Process Clause of the Fourteenth Amendment, which cannot be warded off by sovereign immunity. *NAACP v. Alabama*, 357 U.S. 449, 455 (1958) (attempt to rely on independent state ground, "without any fair or substantial support," to avoid federal constitutional review). In *Bouie v. City of Columbia*, this Court did not allow interpretations by a state court "clearly at variance with the statutory language. In this case, it should not allow the Georgia judiciary to rule that the Georgia RICO Act does not authorize a civil action against governmental entities and employees without so much as examining the statute. 378 U.S. at 356.

Meanwhile, the obstruction of due process in the name of sovereign immunity also serves to obstruct investigation of the $9 million in GPC overspending that remains unaccounted-for at GPC from 2012. This Court has an opportunity to take a concrete step to help rid our country of government corruption.

CONCLUSION

Where Due Process is denied, the actions of a court have no validity or jurisdictional basis. Rather, the failure to adhere to the most fundamental Constitutional principles produces a purely "arbitrary edict, clothed in the form of a judicial sentence," and "the sham and deceptive proceeding had better be omitted altogether." *Windsor v. McVeigh*, 93 U.S. at 278.

"The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens." *Alden*, 527 U.S. at 751.

To prevent the States from erecting a bulwark against the most fundamental Due Process protections, on the pretext of sovereign immunity, to allow criminal elements to take hold of public institutions, this Court should vacate the opinions below and allow Petitioner Tricoli to pursue his valid claims, starting with discovery and an opportunity to be heard commensurate with due process, beginning with a hearing before the Board of Regents.

Respectfully submitted,

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APRIL 7, 2017

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ORDER OF THE SUPREME COURT OF GEORGIA DENYING PETITION FOR WRIT OF CERTIORARI (NOVEMBER 7, 2016)

SUPREME COURT OF GEORGIA

ANTHONY S. TRICOLI,

v.

ROB WATTS ET AL.,

Case No. S16C1469

The Supreme Court today denied the petition for certiorari in this case. All the Justices concur.

OPINION OF THE COURT OF APPEALS OF GEORGIA (MARCH 30, 2016)

IN THE COURT OF APPEALS OF GEORGIA

TRICOLI,

v.

WATTS ET AL.,

A15A2256

Before: ANDREWS, P.J., BARNES, P. J., ELLINGTON, P. J., DILLARD, MCFADDEN, and BRANCH, JJ., MILLER, P. J.

ANDREWS, Presiding Judge.

Anthony Tricoli served as President of Georgia Perimeter College (GPC) for six years until he was blamed for a $16 million budget shortfall and resigned. He subsequently sued numerous individuals affiliated with GPC, the Board of Regents of the University System of Georgia, Board of Regents members, and the Georgia Attorney General for fraud, breach of contract, and violations of the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO). The trial court granted the defendants' motion to dismiss, and this appeal followed.

On appeal, Tricoli contends the trial court erred by: (1) finding there was no enforceable written employment contract between Tricoli and the Board of

Regents; (2) concluding that the Georgia Tort Claims Act (GTCA), OCGA § 50-21-20 et seq., barred his RICO claims; (3) rejecting his claims for fraud, extortion, and intentional infliction of emotional distress; (4) failing to consider his claims under the Open Records Act; (5) ignoring his abusive litigation claim; and (6) ignoring his motion for preliminary injunction. We find the trial court thoroughly addressed all the issues in this case and correctly concluded that Tricoli's claims failed under the Georgia Tort Claims Act (GTCA) and the doctrine of sovereign immunity.

1. Initially, we note that the standard of review applicable in this appeal is the one for review of a decision on a motion for summary judgment. Although the appeal is from the grant of a motion to dismiss, Tricoli's submission of documentary evidence in response to the motion to dismiss constituted, in effect, a request to convert the motion into one for summary judgment and waived the notice requirement for such a conversion. *See Gaddis v. Chatsworth Health Care Center*, 282 Ga.App. 615, 617 (639 S.E.2d 399) (2006); *Bd. of Regents of the Univ. System of Ga. v. Barnes*, 322 Ga.App. 47, 49 (1) (743 S.E.2d 609) (2013). (Exhibits attached to the pleadings would not operate to convert a motion to dismiss into a motion for summary judgment, *Gaddis*, *supra*, but because a motion to dismiss is not a pleading under OCGA § 9-11-7(a), any documents submitted in conjunction with such a motion are outside the pleadings.)

Where a defendant, who would not bear the burden of proof at trial, moves for summary judgment and shows an absence of evidence to support any essential element of the plaintiff's case, "the nonmoving party cannot rest on its pleadings, but rather must point to

specific evidence giving rise to a triable issue." *Cowart v. Widener*, 287 Ga. 622, 623 (1) (697 S.E.2d 779) (2010). But when we review a grant or denial of summary judgment, we must construe the evidence in the light most favorable to the nonmovant. *Home Builders Assn. of Savannah v. Chatham County*, 276 Ga. 243, 245 (1) (577 S.E.2d 564) (2003).

2. "[T]he defense of sovereign immunity is waived as to any action ex contractu for the breach of any written contract entered into by the state or its departments and agencies." (Punctuation and footnote omitted.) *Bd. of Regents of the Univ. System of Ga. v. Barnes*, 322 Ga.App. 47, 49 (2) (743 S.E.2d 609) (2013). Tricoli contends the trial court erred in concluding there was no valid written employment contract that effectuated a waiver of sovereign immunity.

However, in moving to dismiss the action, the defendants originally showed the absence of a written contract of employment, which was critical to Tricoli's ability to show a waiver of sovereign immunity. The trial court held a hearing on the motion on September 22, 2014. Subsequently, on October 10, 2014, Tricoli submitted an August 7, 2006 letter from the Chancellor of the Board of Regents offering him the GPC presidency, which he claimed constituted a written employment contract. That letter stated:

> It is my pleasure to offer you an appointment to the presidency of Georgia Perimeter College, subject to the policy and terms of the Board of Regents and the approval of the Board of Regents of the University System of Georgia at its regular meeting on August 9, 2006. The appointment would be effective on October 1, 2006. The total annualized

> compensation for the position is $190,000 . . . To accept the position, please return this letter with your signature.

The defendants objected to the consideration of that letter on the grounds Tricoli had not properly notified them of the submission, and also on the grounds the letter did not constitute a valid contract of employment. On November 21, 2014, "[a]fter consideration of the evidence, counsel's argument, and applicable statutory and case law," the trial court granted the motion to dismiss.

Assuming arguendo the letter created a contract of employment under this Court's ruling in *Bd. of Regents of the Univ. System of Ga. v. Doe*, 278 Ga.App. 878, 881 (1) (630 S.E.2d 85) (2006), it still didn't save Tricoli's breach of contract claim. The letter, which only specifies a salary and a starting date subject to the approval and policies of the Board of Regents, hardly supports a breach of contract claim. "An employment contract containing no definite term of employment is terminable at the will of either party, and will not support a cause of action against the employer for wrongful termination." *Burton v. John Thurmond Constr. Co.*, 201 Ga.App.10 (410 S.E.2d 137) (1991).

Tricoli contends his alleged written contract was subject to the Board of Regent's written policies and that the relevant policy, as provided by the Board in its answer to a request for admission, supplied sufficient terms to supplement the letter and form an enforceable employment contract. The text of that policy statement relied upon by Tricoli stated as follows:

> If the Board declines to re-appoint a president, it shall notify the president, through the Chancellor, of such decision immediately following the Board's regularly scheduled April [later amended to May] meeting. A decision by the Board not to re-appoint a president is not subject to appeal.

The quoted policy does not provide a definite term for the contract, a promise of employment, a specific deadline for providing the notice, or a provision that Tricoli's employment would be automatically extended for a year or some other period in the event the Board failed to provide notice of re-appointment within a certain time. As such, the policy in no way converts the August 2006 letter into an employment contract that is not terminable at will.

Further, Tricoli himself terminated any employment contract he may have had when he resigned his position as president of GPC. There was no demonstrable breach of contract by any of the defendants, and Tricoli's contention that the defendants forced him to resign asserted a tort, not a contract breach. Lastly, the Board of Regents' failure to renew Tricoli's contract or offer him a contract for a different position provided no basis for avoiding the application of sovereign immunity. *See, e.g.*, *Liberty County School Dist. v. Halliburton*, 328 Ga.App. 422 (762 S.E.2d 138) (2014).

As Tricoli failed to show an enforceable employment contract, there was no waiver of sovereign immunity on the basis of a written contract.

3. All of Tricoli's tort claims were barred by the Georgia Tort Claims Act. OCGA § 50-21-25 (a) provides

that the GTCA "constitutes the exclusive remedy for any tort committed by a state officer or employee . . . while acting within the scope of his or her official duties or employment . . . ." OCGA § 50-21-23 waives sovereign immunity for torts of state officers and employees, but that waiver is subject to the exceptions set forth in OCGA § 50-21-24. Virtually all of the tortious conduct Tricoli complains of falls within those listed exceptions, and so his claims based on that conduct are barred.

4. Tricoli also asserted a claim under the Georgia RICO Act, OCGA § 16-14-1 *et seq.*, based on the same conduct that predicated his tort claims. It is an imaginative theory of recovery to assert against the State itself, but that is about all it is–imagination. The Georgia RICO Act does not express any waiver of sovereign immunity. As noted above, OCGA § 50-21-25 (a) clearly states that the GTCA is the exclusive remedy for any torts committed by state officers and employees. Because the GTCA is the exclusive remedy, the Georgia RICO Act cannot be invoked as an alternate remedy or waiver of sovereign immunity for tortious conduct of state officers and employees.

Colon v. Fulton County, 294 Ga. 93, 95 (1) (751 S.E.2d 307) (2013), relied upon by Tricoli, does not support finding otherwise. *Colon* only involved the Georgia whistleblower statute, OCGA § 45-1-4, which more clearly contained a waiver of sovereign immunity, and did not involve any other statute that was designated as the exclusive remedy where sovereign immunity is at issue.

In conclusion, because Tricoli failed to establish a written enforceable employment contract that would avoid sovereign immunity, and because Tricoli's tort

claims were exclusively governed and barred by the GTCA, the trial court properly granted the defendants' motion.

Judgment affirmed. Barnes, P. J., Ellington, P. J., Dillard, McFadden, and Branch, JJ., concur. Miller, P. J., dissents.

DISSENTING OPINION OF JUSTICE MILLER (MARCH 30, 2016)

I respectfully dissent from the majority's conclusion that the trial court properly granted the defendants' motion to dismiss because the trial court did not convert the motion to dismiss into a motion for summary judgment, and the Georgia Tort Claims Act is not the exclusive remedy where the RICO statute created a separate waiver of sovereign immunity.

1. The majority concludes that the trial court converted the motion to dismiss into a motion for summary judgment. The trial court, however, could not do so without providing Tricoli with notice. *Bonner v. Fox*, 204 Ga.App. 666, 667 (420 S.E.2d. 1992). Instead, the trial court granted the defendant's motion to dismiss, and this Court should review the trial court's order consistent with that standard of review.[1]

2. The issue of whether the Georgia RICO statute provides a waiver of immunity is a question of statutory interpretation and a matter of first impression.

> [a] statute draws it[s] meaning, of course, from its text. When we read the statutory text, we must presume that the General Assembly meant what it said and said what it meant, and so, we must read the statutory text in its most natural and reasonable way,

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[1] We review de novo a trial court's decision to grant a motion to dismiss. *Liberty County School Dist. v. Halliburton*, 328 Ga.App. 422, 423 (762 S.E.2d 138) (2014). In doing so, we construe the pleadings in the light most favorable to the appellant, and we resolve any doubts in the appellant's favor. *Ewing v. City of Atlanta*, 281 Ga. 652, 653 (2) (642 S.E.2d 100) (2007).

> as an ordinary speaker of the English language would. The common and customary usages of the words are important, but so is their context. For context, we may look to the other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question.

(Citations and punctuation omitted.) *Tibbles v. Teachers Retirement System of Ga.*, 297 Ga. 557, 558 (1) (775 S.E.2d 527) (2015).

The RICO Act makes it unlawful for "any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity." OCGA § 16-14-4(b). The definition of "enterprise" includes governmental entities. OCGA § 16-14-3(3). Moreover, the statute specifically provides that "[a]ny aggrieved person" may initiate a civil action for treble damages and/or injunctive relief. OCGA § 16-14-6(b), (c).

Importantly, nothing requires the Legislature to "use specific 'magic words' such as 'sovereign immunity is hereby waived' in order to create a specific statutory waiver of sovereign immunity." *Colon v. Fulton County*, 294 Ga. 93, 95 (1) (751 S.E.2d 307) (2013). In drafting the RICO Act, the legislature made its intent clear:

> It is the intent of the General Assembly that [the RICO statute] apply to an interrelated pattern of criminal activity motivated by or the effect of which is pecuniary gain or

> economic or physical threat or injury. This chapter shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions.

OCGA § 16-14-2(b).

The RICO statute includes government entities in its definition of enterprise, and it specifically provides a private individual with a civil remedy for RICO Act violations. These provisions, when viewed together, create a waiver of sovereign immunity.[2] To read the RICO Act as the trial court and the majority do would result in a violation of statutory interpretation and led to a nonsensical result. *See Colon*, *supra*, 294 Ga. at 96 (1).

The majority argues that the Georgia Tort Claims Act is the exclusive remedy for Tricoli's claims and decides the case on this basis. *See* OCGA § 51-21-25(a). I beg to differ, however, with the trial court's and majority's conclusion that Tricoli cannot overcome the bar of sovereign immunity because the language of the RICO statute itself indicates otherwise. Imaginative[3] or not, it is irrelevant whether Tricoli will prevail

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[2] Moreover, in other contexts, the Georgia Supreme Court has found language similar to that found in the RICO Act sufficient to waive immunity. *See Colon*, *supra*, 294 Ga.App. at 95-96 (1). Specifically, in *Colon*, the Supreme Court concluded that the whistleblower statute, OCGA § 45-1-4, waived sovereign immunity with language that "[a] public employee . . . may institute a civil action[.]" As the Supreme Court explained, "in order for the statute to have any meaning at all here, it can only be interpreted as creating a waiver of sovereign immunity." (Citation omitted.) *Id.*

[3] *See* majority op. at 7 (4).

ultimately on the merits of his RICO allegations. The only issue before this Court now is whether he has pled claims that can overcome sovereign immunity at this stage of the litigation. Tricoli has certainly done so.

If Tricoli had alleged only isolated instances of tortious conduct, the Georgia Tort Claims Act would have barred his claims because the General Assembly, in drafting the RICO Act, did not intend to cover "isolated incidents of misdemeanor conduct." OCGA § 16-14-2(b) (emphasis supplied). Unlike the Georgia Tort Claims Act, however, the RICO Act is designed to prohibit (1) a pattern of activity, (2) intended to threaten or cause economic harm, even where that pattern involves tortious actions. *See id.* This is exactly what Tricoli has alleged in his RICO claim—a pattern of tortious and criminal acts designed to threaten him with and inflict economic harm upon him. This Court cannot overlook a remedy the legislature, in its wisdom, saw fit to create. Therefore, I conclude that the Georgia Tort Claims Act is not the exclusive remedy where, as in this case, the legislature intended for the RICO Act to provide a separate waiver of sovereign immunity. Accordingly, I dissent from the majority's opinion.

ORDER OF THE SUPERIOR COURT GRANTING MOTION TO DISMISS (NOVEMBER 19, 2014)

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEOGIA

ANTHONY S. TRICOLI,

Plaintiff,

vs.

ROB WATTS; RON CARRUTH; JIM RASMUS; MARK GERSPACHER; SHELETHA CHAMPION: HENRY HUCKABY; JOHN FUCHKO; STEVE WRIGLEY; BEN TARBUTTON; THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; SAM OLENS, the Attorney General of Georgia; and ROBIN JENKINS,

Defendants.

Case No. 14CV4911-7

Before: Daniel M. COURSEY, JR., Judge,
DeKalb Superior Court

This case came regularly before the Court on September 22, 2014 on Defendants' Motion to Dismiss based on sovereign immunity. Counsel for all parties presented argument. After consideration of the evidence, counsel's argument, and applicable statutory

and case law, the Court GRANTS Defendants' Motion to Dismiss.

Under the Georgia Constitution, "sovereign immunity extends to the state and all of its departments and agencies" and "can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver." 1983 Ga. Const. Art. I, Sec. III, Para. IX (e). "The party seeking to benefit from the waiver of sovereign immunity has the burden of proof to establish waiver." *Hagan v. Ga. Dept. of Transp.*, 321 Ga.App. 472, 474-475(1) (2013) (citations and punctuation omitted). Failure to establish waiver merits dismissal pursuant to OCGA § 9-11-12(b)(1) for lack of subject matter jurisdiction. "[A] trial court is entitled to make factual findings necessary to resolve the jurisdictional issue." *Board of Regents of University System of Georgia v. Brooks*, 324 Ga.App. 15, 16 (FN2) (2013).

Plaintiff Anthony Tricoli was President of Georgia Perimeter College (GPC) from 2006 to 2012, during which he won numerous leadership awards and accolades. His presidency came to an abrupt end in the spring of 2012 when a $16 million budget deficit came to light. Tricoli resigned—he alleges involuntarily. He claims that he was given a choice: either resign and accept a position at the University System of Georgia's central office or be fired. Tricoli resigned but due to additional reports of misconduct, he was not reassigned to the central office and instead placed on administrative leave until his existing contract expired on June 30. Media reports blamed Tricoli for the deficit.

Tricoli denies responsibility for the budget crisis. He alleges that he is the victim of a conspiracy to destroy his career: GPC's finance team "intentionally, systematically, and duplicitously fed [him] inaccurate numbers;" the Board of Regents "coerced" and "cajoled" him into resigning and denied his due process and appeal rights for improper termination; and the Board of Regents and the Attorney General's Office allowed evidence proving Tricoli's innocence to be "altered, misrepresented or concealed."[1] He filed a Complaint alleging violation of the Georgia RICO Act, OCGA § 16-14-1 *et seq.*; fraud; fraudulent inducement; violation of the Open Records Act, OCGA § 50-18-70 *et seq.*; breach of contract; promissory estoppel; reliance; retaliation; respondeat superior; intentional infliction of emotional distress; attorney's fees; punitive damages; and injunctive relief. Every named defendant is either a state agency or a state employee.

The breach of contract, promissory estoppel, and reliance claims fail. First, none of the individual defendants were parties to a contract with Tricoli. Secondly, there is no written contract to enforce against the Board of Regents. The Georgia Constitution waives sovereign immunity for "any action ex contractu" but only for breach of a written contract. Ga. Const. of 1983, Art. I, Sec. II, Para. IX (c). "An implied contract will not support a waiver of immunity under the provisions of the Georgia Constitution." *Bd. of Regents of Univ. System of Ga. v. Ruff*, 315 Ga.App. 452, 454 (2012) (no waiver of sovereign immunity when plaintiff could not show that he entered into a written contract with a university board of regents). Tricoli's

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[1] Complaint, ¶¶147, 148, 161, 176, and 184.

employment contract as President of GPC ended with his resignation, and no other written contract exists. The promissory estoppel, and reliance claims allege that Tricoli was falsely promised a position at the University System of Georgia's central office in return for his resignation. As explained in *Liberty County School Dist. v. Halliburton*, ___Ga.App.___, 762 S.E.2d 138 (2014), the waiver for actions ex contractu does not apply when a plaintiff seeks a new contract that a state agency refuses to issue. The breach of contract, promissory estoppel, and reliance claims are dismissed as to all defendants.

The tort claims against the individual defendants are barred by the Georgia Tort Claims Act, OCGA § 50-21-20 *et seq.* The GTCA expressly exempts state officers and employees from personal liability so long as the allegedly tortious actions fall within the scope of their official duties or employment. OCGA § 50-21-51(b). The breadth of the exemption is discussed in *Davis v. Standifer*, 275 Ga.App. 769, 771-772(1)(a) (2005):

> The GTCA exempts state officers and employees from liability for any torts committed while acting within the scope of their official duties or employment. The scope of the exemption has been construed broadly: Where the state employee acts in the prosecution and within the scope of his official duties, intentional wrongful conduct comes within and remains within the scope of employment. Even where the plaintiff alleges a state constitutional violation, if the underlying conduct complained of is tortious and occurred within the scope of the state employee's official duties, the employee is

> protected by official immunity under the GTCA.

Id. (citations and punctuation omitted). Consistent with the exemption, the GTCA requires that tort claims be filed against government entities, not individuals: "A person bringing an action against the state under the provisions of this article must name as a party defendant only the state government entity for which the state officer or employee was acting and shall not name the state officer or employee individually." OCGA § 5021-25(b). The GTCA "constitutes the exclusive remedy for any tort committed by a state officer or employee . . . while acting within the scope of his or her official duties or employment." OCGA § 50-21-25(a). Here, the tort claims against the individual defendants concern matters that arose "from the performance or nonperformance of their official duties or functions." OCGA § 50-21-21(b). Therefore, the tort claims against the individual defendants are dismissed.

The tort and RICO claims against the Board of Regents and the Attorney General's Office are barred by sovereign immunity. Although the GTCA waives the state's sovereign immunity for torts committed by state officers and employees, the waiver is subject to the exceptions and limitations set forth in Section 24. OCGA §§ 50-21-23 & 24. Whether an exception applies depends not on the causes of action asserted in the complaint but on the conduct that actually produced the claimed losses. *Board of Public Safety v. Jordan*, 252 Ga.App. 577, 583 (2001).

In *Jordan*, the superintendent of the Georgia Police Academy sued the Georgia Board of Public Safety and other defendants for intentional infliction of emotional

distress resulting from his wrongful termination. Jordan alleged that the Board fabricated cause and manipulated the media to discredit him and justify his termination. Even though intentional infliction of emotional distress is not an exception listed in Section 24, the court in *Jordan* found that the exceptions included the Board's conduct that caused the emotional distress. Specifically, the court held that the Board's actions in terminating Jordan were discretionary and protected by Subsection 24(2), and the Board's purported statements to the media and any notations in his employment record constituted libel and slander and were protected by Subsection 24(7).

Here, as in *Jordan*, the Board of Regents' conduct falls within the exclusions set forth in Section 24. Defendants' alleged misreporting of the college's budget is covered by Subsection 24(11), which retains immunity for financial oversight activities. Defendants' alleged defamatory statements are covered by Subsection 24(7), which retains immunity for libel and slander. Defendants' purported retaliation against Tricoli for his attempts at good governance and their trickery in procuring his resignation are also covered by Subsection 24(7), which retains immunity for interference with contractual rights. And the Board of Regents' remaining actions concerning Tricoli's departure as college president "were within the ambit of the Board's discretion inherent to the exercise of its administrative functions," and thus covered by Subsection 24(2), which retains immunity for discretionary acts, "whether or not the discretion involved is abused." *Jordan*, 252 Ga.App. at 584. Because Section 24 preserves the state's sovereign immunity for the Board's conduct, the tort claims are barred. The RICO

claim is barred because it is premised on the same conduct, and the GTCA "constitutes the exclusive remedy for any tort committed by a state officer or employee." OCGA § 50-21-25(a). The tort and RICO claims against the Board of Regents and the Attorney General's Office are dismissed.

Even if the GTCA was not the exclusive remedy, the RICO claim would still fail because Tricoli has not shown the explicit and unequivocal legislative waiver of sovereign immunity required by the state constitution. Tricoli relies on OCGA § 16-14-3(g), which defines a RICO "enterprise" to include "governmental as well as other entities," to establish the requisite waiver. However, defining enterprise to include governmental entities is not a legislative act that expressly waives sovereign immunity and delineates the extent of such waiver. Tricoli failed to carry his burden of establishing waiver, thus requiring dismissal of the RICO claim.

Nor can Tricoli rely on the doctrine of respondeat superior to impose liability on the Board of Regents. He alleges that the Board of Regents is liable for the malfeasance and malice of its employees, specifically naming professor Rob Jenkins who he alleges is guilty of libel and slander. The respondeat superior statute, OCGA § 51-2-5, "does not authorize suit against the state either explicitly or implicitly." *Department of Human Resources v. Johnson*, 264 Ga.App. 730, 734 (2003). The respondeat superior claim is dismissed.

The claim for violation of the Open Records Act, OCGA § 50-18-70 *et seq.*, fails because Tricoli has no standing and the issue is res judicata. David Schick made requests under the Open Record Act, not Tricoli. Furthermore, Schick litigated this issue in Fulton

County Superior Court, *Schick vs. the Board of Regents*. The claim for violation of the Open Records Act is dismissed as to all defendants.

The claims for attorney's fees, punitive damages, and injunctive relief are dependent on Tricoli's underlying substantive tort and contract claims. Because the substantive claims fail, the dependent claims also fail. Further, OCGA § 50-21-30 bars recovery of punitive damages.

SO ORDERED, this 19th day of November 2014.

/s/ Daniel M. Coursey, Jr.
Judge, DeKalb Superior Court

cc:

Stephen F. Humphreys, Esq.
C. McLaurin Sitton, Asst Attorney General

ORDER OF SUPREME COURT DENYING MOTION FOR RECONSIDERATION (DECEMBER 8, 2016)

SUPREME COURT OF GEORGIA

ANTHONY S. TRICOLI,

v.

ROB WATTS ET AL.,

Case No. S16C1469

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISONS

CONSTITUTIONAL PROVISIONS

- **U.S. Const. amend. XIV, Section 1**

  All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- **Georgia Const. Art. 1, Sec. 1, Par. 1**

  No person shall be deprived of life, liberty, or property except by due process of law.

- **Georgia Const. Art. I, Sec. II, Par IX**

  (a) The General Assembly may waive the state's sovereign immunity from suit by enacting a State Tort Claims Act, in which the General Assembly may provide by law for procedures for the making, handling, and disposition of actions or claims against the state and its departments, agencies, officers, and employees, upon such terms and subject to such conditions and limitations as the General Assembly may provide.

  (b) The General Assembly may also provide by law for the processing and disposition of claims

against the state which do not exceed such maximum amount as provided therein.

(c) The state's defense of sovereign immunity is hereby waived as to any action ex contractu for the breach of any written contract now existing or hereafter entered into by the state or its departments and agencies.

(d) Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions. The provisions of this subparagraph shall not be waived.

(e) Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

STATUTORY PROVISIONS

- 28 U.S.C. § 1257

  (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

- OCGA § 9-11-12(b)

  How defenses and objections presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion in writing:

  (1) Lack of jurisdiction over the subject matter;

  (2) Lack of jurisdiction over the person;

  (3) Improper venue;

  (4) Insufficiency of process;

  (5) Insufficiency of service of process;

  (6) Failure to state a claim upon which relief can be granted;

(7) Failure to join a party under Code Section 9-11-19.

A motion making any of these defenses shall be made before or at the time of pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Code Section 9-11-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Code Section 9-11-56.

- OCGA § 9-11-56(c)
  Motion and Proceedings Thereon

  The motion shall be served at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this Code section shall be construed as denying to any party the right to trial by jury where there are substantial

issues of fact to be determined. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damage.

- OCGA § 9-11-56(h) Appeal

  An order granting summary judgment on any issue or as to any party shall be subject to review by appeal. An order denying summary judgment shall be subject to review by direct appeal in accordance with subsection (b) of Code Section 5-6-34.

- OCGA § 16-10-20

  A person who knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes a false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of any department or agency of state government or of the government of any county, city, or other political subdivision of this state shall, upon conviction thereof, be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both.

- OCGA § 16-14-2

  (a) The General Assembly finds that a severe problem is posed in this state by the increasing sophistication of various criminal elements and the increasing extent to which the state and its citizens are harmed as a result of the activities of these elements.

(b) The General Assembly declares that the intent of this chapter is to impose sanctions against those who violate this chapter and to provide compensation to persons injured or aggrieved by such violations. It is not the intent of the General Assembly that isolated incidents of misdemeanor conduct or acts of civil disobedience be prosecuted under this chapter. It is the intent of the General Assembly, however, that this chapter apply to an interrelated pattern of criminal activity motivated by or the effect of which is pecuniary gain or economic or physical threat or injury. This chapter shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions.

- OCGA § 16-13-3(3)

  "Enterprise" means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.

- OCGA § 16-14-4(b)

  It is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

- OCGA § 16-14-6(a)

  Any superior court may, after making due provisions for the rights of innocent persons, enjoin

violations of Code Section 16-14-4 by issuing appropriate orders and judgments including, but not limited to:

[. . .]

(3) Ordering the dissolution or reorganization of any enterprise;

(4) Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any agency of the state; or

(5) Ordering the forfeiture of the charter of a corporation organized under the laws of this state or the revocation of a certificate authorizing a foreign corporation to conduct business within this state upon a finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting affairs of the corporation, has authorized or engaged in conduct in violation of Code Section 16-14-4 and that, for the prevention of future criminal activity, the public interest requires that the charter of the corporation be forfeited and that the corporation be dissolved or the certificate be revoked.

- OCGA § 16-14-6(b)

Any aggrieved person or the state may institute a proceeding under subsection (a) of this Code section. In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, provided that no showing of special or irreparable damage to the

person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

- OCGA § 16-14-6(c)

  Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred. The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this Code section.

- OCGA § 50-21-1

  Waiver of sovereign immunity as to actions *ex contractu* for breach of written contract to which state is party; venue

  (a) The defense of sovereign immunity is waived as to any action ex contractu for the breach of any written contract existing on April 12, 1982, or thereafter entered into by the state, departments and agencies of the state, and state authorities.

- OCGA § 50-21-22

  As used in this article, the term:

  (1) "Claim" means any demand against the State of Georgia for money only on account of loss caused by the tort of any state officer or employee committed while acting within the scope of his or her official duties or employment.

  (2) "Discretionary function or duty" means a function or duty requiring a state officer or employee to exercise his or her policy judgment in choosing among alternate courses of action based upon a consideration of social, political, or economic factors.

  (3) "Loss" means personal injury; disease; death; damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death; pain and suffering; mental anguish; and any other element of actual damages recoverable in actions for negligence.

[. . .]

- OCGA § 50-21-24

  The state shall have no liability for losses resulting from:

[. . .]

  (2) The exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused;

[. . .]

(11) Financing regulatory activities, including, but not limited to, examinations, inspections, audits, or other financial oversight activities;

BOARD OF REGENTS POLICY MANUAL– OFFICIAL POLICIES OF THE UNIVERSITY SYSTEM OF GEORGIA

2.3 Performance Assessment of Presidents

(Last Modified on May 28, 2009)

It is the intent of the Board of Regents that evaluation of the presidents shall be an ongoing process, which consists of open communication between the Chancellor or the president's supervisor and the president on both individual and institutional goals and objectives, as well as on the methods and processes used to achieve them. Evaluations will be factored into the annual appointment renewal for each president (BoR Minutes, September 2006).

2.4.2 Re-Appointment Declined

(Modifications from BOR Minutes Appendix II, August 20, 2014)

If the Board declines to reappoint a president, it shall notify the president, through the Chancellor, of such decision immediately following the Board's regularly scheduled ~~April~~ May meeting. A decision by the Board not to reappoint a president is not subject to appeal.

2.4.3 Removal for Cause

(Last Modified on May 28, 2009)

The Board may remove a president for cause at any time. A president removed for cause shall be entitled, upon written request within ten (10) days

of receiving notice of the removal, to a statement of charges against him/her. Such statement of charges shall be provided to the president within ten (10) days of the president's request. A president shall, after reviewing the statement of charges, be entitled to a hearing before the Board or a committee thereof under such procedures as the Board may determine. The actions of the Board shall be final.

A president terminated for cause shall not be eligible for re-employment within the USG.

2.4.4 Educational Leave and Continued Employment

(Last Modified on October 10, 2013)

Any person vacating a USG presidency that he/she has held for not less than five (5) years may, at the discretion of the Chancellor, be:

1. Granted twelve (12) months educational leave with pay. Such educational leave may be extended by the Chancellor for an additional twelve (12) months. In no event shall the duration of such educational leave exceed twenty-four (24) months. Any paid educational leave granted under this policy shall terminate immediately upon acceptance by the leave recipient of full-time employment during the period of leave.
2. Employed in a professional or administrative position within the USG. Employment beyond the second year, if any, shall be under such terms and conditions as determined by the Chancellor or the employing institution.

3. Awarded an academic appointment at the rank of professor at a USG institution. Such appointment may, consistent with accreditation requirements and the needs of the institution, include an award of tenure by the Chancellor. Compensation and other terms of employment beyond the second year of appointment shall be as determined by the institution.

Except as otherwise provided in this section, the terms and conditions of such employment in items 2 and 3 above shall be as provided in Section 8.0 of this Policy Manual . . . .

Georgia Perimeter College Policy 302

The Executive Vice President for Financial and Administrative Affairs shall inform the President of any expenditure trends that may affect the College's ability to live within its budget, any changes in revenue that were not anticipated in the original budget, and any external conditions that may require adjusting expenditures. The President will decide if mid-year budget adjustments are necessary.

LETTER FROM THE CHANCELLOR OF THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA (MAY 10, 2012)

BOARD OF REGENTS OF
THE UNIVERSITY SYSTEM OF GEORGIA
Chancellor Henry M. Huckaby
270 Washington Street, S.W.
Atlanta, GA 30334
Email: chancellor@usg.edu

Dr. Anthony Tricoli
8140 Tynecastle Drive
Atlanta, GA 30350

Dear Dr. Tricoli,

This letter is in follow-up to our meeting this morning. As you will recall, I informed you that at its meeting on Wednesday, May 9, 2012, the Board of Regents did not renew your contract for fiscal year 2013. I further informed you that your employment with the University System of Georgia will, therefore, end on June 30, 2012.

You are hereby placed on administrative leave until June 30, 2012. Thank you for your service to the University System of Georgia.

Sincerely,

/s/ Henry M. Huckaby
Chancellor

LETTER REQUESTING STATEMENT OF CHARGES AGAINST DR. TRICOLI (MAY 15, 2012)

LAW OFFICES PARKS, CHESIN WALBERT, P.C.
26th Floor, 75 Fourteenth Street
Atlanta, GA 30309
Telephone 404/873-8000
Facsimile 404/873-8050
website: www.pcwlawfirm.com

J. Matthew Maguire, Jr.
email: mmaguire@pcwlawfirm.com

Benjamin "Ben" J. Tarbutton, III
Chair, Board of Regents of the
University System of Georgia
206 North Smith St.
Sandersville, GA 31082

Re: Dr. Anthony S. Tricoli

Dear Mr. Tarbutton,

This law firm represents Dr. Tricoli in connection with his removal as President of Georgia Perimeter College ("GPC") and subsequent termination. Pursuant to Board of Regents Policy No. 2.4.3, Dr. Tricoli respectfully requests a statement of the charges against him within ten (10) days. Please direct the statement to my attention.

Following receipt of the statement of charges, we intend to request a hearing to enable Dr. Tricoli to clear his name. Policy No. 2.4.3 provides that the hearing shall be "before the Board or a committee

thereof under such procedures as the Board may determine." As a matter of due process, Dr. Tricoli is entitled to notice, an opportunity to be heard, and a trial in accordance with judicial procedure. *See, e.g.*, *Cotton v. Jackson*, 216 F.3d 1328, 1332 (2000). We respectfully submit that Dr. Tricoli has a constitutional right to at least the following process:

1. adequate notice;
2. a public hearing transcribed by a certified court reporter governed by judicial process and the rules of evidence;
3. before a neutral decision maker such as a judge or arbitrator;
4. the right to subpoena or otherwise compel evidence arid testimony;
5. the right to cross-examine adverse witnesses; and
6. a written decision with findings of fact and conclusions of law that is reviewable through a petition for certiorari by a superior court.

We would like to know in advance of any such hearing which process the Board will require. If the procedure proposed by the Board does not adequately safeguard Dr. Tricoli's due process rights, we intend to petition the superior court for a constitutionally-adequate hearing.

We look forward to hearing back from you or the Board's counsel on this as soon as possible.

Thank you for your cooperation.

Best regards,

Very truly yours,

/s/ J. Matthew Maguire, Jr.

cc: A. Lee Parks, Esq.
Dr. Anthony S. Tricoli

LETTER FROM GEORGIA ATTORNEY GENERAL'S OFFICE TO DR. TRICOLI'S FORMER ATTORNEY (JULY 3, 2012)

GEORGIA DEPARTMENT OF LAW
40 Capitol Square SW
Atlanta, GA 30334-1300
(404) 656-3300
www.law.ga.gov

Samuel S. Olens
Attorney General
(404) 656-3380
acowart@law.ga.gov

Mr. J. Matthew Maguire, Jr.
email: mmaguire@pcwlawfirm.com

Re: Dr. Tricoli

Dear Matt,

I very much appreciate your efforts and apparent success, albeit partial, in decreasing Dr. Tricoli's expectations as to what he can gain by continued communications or ultimately litigation with the Board of Regents. In our shared interest in resolving any dispute Dr. Tricoli may have with the Board, here is what I have learned about the budget process as it relates to Georgia Perimeter College as a unit institution of Regents, the Regents auditor and the State Department of Audits and Accounts. The following information clarifies that Dr. Tricoli's claimed unawareness of budget deficits at his College is not the responsibility of the Board of Regents.

First, the Board of Regents has no information concerning communications between Dr. Tricoli and Ron Carruth about the cumulative budget deficits over several fiscal years. If Dr. Tricoli's dispute concerns what he was told by Mr. Carruth or his staff, which I gather it is based on our discussions, this dispute is between Dr. Tricoli and Mr. Carruth, not with Regents.

For your information, the general audit schedule for fiscal year 2011 GPC was as follows:

July/August, 2011:
Institution prepares financial statements

August to October:
Statement audited by State Auditor;

November, 2011 to January, 2012:
Exit conferences and final report drafts are prepared; final sign-off letters from President are obtained (Please note that the email of January 12, 2011, provided you previously, shows that Dr. Tricoli declined participation in the exit interview);

December, 2011 to February, 2012:
Final published reports released by State Auditor.

A more in-depth description of the audit process is contained in the attached engagement letters, which also show that Dr. Tricoli indentified himself as the financial contact for the auditors to speak to regarding the engagement.

The information I have gathered from the Board of Regents and the Department of Audits indicates that the practice of the latter is to mail hard copies of

the draft annual budget reports to both the President and the chief financial officer. Once confirmation is received by Audits, the final report is issued. It contains the same figures that appear in the draft which has been accepted by the President.

An example of the deficit reported to Dr. Tricoli by Audits is at Tab 7 of the materials provided by him to Regents Auditor John Fuchko, which contains a section headed "Georgia Perimeter College, Management Discussion and Analysis." Page iii of that section shows the net assets of the College at the end of fiscal year 2009, ending June 30, 2009, at $104,835,320; while net assets at the end of fiscal year 2010 were $97,451,671, a change of over seven million dollars. The existing deficit at the end of fiscal year 2011, contained in the "Management Report for Fiscal Year Ended June 30, 2011," shows the difference from 2010 as almost five million dollars. Both pages are attached to this letter.

The next step after providing draft copies of the annual reports is to obtain confirmation of the figures therein from the President of each institution. Dr. Tricoli returned these documents for the fiscal years in question. An example, among the documents previously emailed to you, is dated January 26, 2011. Of course, Regents regards Dr. Tricoli, as former President of GPC, as responsible for overseeing the budget, as are the presidents of all the Regents institutions.

Again, of course, Regents is conducting an investigation to determine what happened to such large amounts of money. This is the reason for communications between John Fuchko and Dr. Tricoli. As there is no evidence at this point of criminal

activity, neither the Special Prosecutions Unit of the Attorney General's Office nor the Georgia Bureau of Investigations is conducting a separate investigation.

Although I would like to confirm with Regents as to the name-clearing hearing you are again requesting, at last check, Regents is amenable to participating to the extent the law requires. The last time I spoke with my contact, I was advised that the Board would prefer such hearing to be conducted outside any meeting of the Board or its committees, but rather before an administrative law judge of the State Office of Administrative Hearings. Such hearing would be conducted in accordance with the procedure established by the Georgia Supreme Court for a name-clearing hearing. *McBride v. Murray*, 287 Ga. 99 (2010).

Regents is under no obligation to assist Dr. Tricoli in finding employment. The alleged fact that he was lied to by Mr. Carruth does not figure into how they are proceeding in dealing with the budget deficit at GPC or in determining how it occurred. I hope this clarifies our approach to Dr. Tricoli's concerns.

Sincerely,

/s/ Annette M. Cowart
Senior Assistant Attorney General

ATTACHMENT TO ATTORNEY GENERAL LETTER. GEORGIA PERIMETER COLLEGE AUDIT, RELEVANT EXCERPT

In accordance with Government Auditing Standards, we have made a copy of our most recent peer review report available to you on the Georgia Department of Audits and Accounts website.

We believe the foregoing correctly sets forth our understanding, but if you have any questions, please let me know. If you find the arrangements acceptable, please acknowledge your agreement to the understanding by signing and returning to us the enclosed response.

Respectfully,

(Name not Legible)
Auditor Supervisor

cc:
Chief Financial Officer

Response

This letter correctly sets forth the understanding of Georgia Perimeter College. Georgia Perimeter College primary engagement representative will be:

Sheletha Y. Champion
AVP Financial Affairs

678-891-2518

Accepted:
By: Anthony Tricoli
Title: College President
Date: 2-21-11

OFFER ACCEPTANCE LETTER FROM ANTHONY TRICOLI (MAY 07, 2012)

From: Tricoli, Anthony
Sent: Monday, May 07, 2012 3:38 PM
To: chancellor@usg.edu
Cc: steve.wrigley@usg.edu;david.morgan@usg.edu; burns. newsome@usg.edu

Subject: FW: An Opportunity for Growth (a message from the president)

Dear Chancellor Huckaby,

Thank you for reaching out to me last week with an offer to join you and the team at the USG System Office. I accept your offer to help you make a difference for the USG on a much broader scale. Please know that I do not see this as "stepping down" but instead moving to the USG System Office to accept a much broader role in higher education in Georgia because of the success that I had in successfully moving several innovative initiatives forward at GPC.

I agree that my experience at GPC as well as my previous system-level experience as the Associate Vice Chancellor for Academic and Student Affairs position I held in Southern California can be most valuable to the USG, especially at this time of rapid change and opportunity relative to a number of extremely important initiatives. I can be most helpful to our new Vice Chancellor for Academic Affairs (Dr. Houston Davis) as he becomes acclimated to his new role in Georgia.

In the letter I sent to my GPC colleagues, I highlighted several initiatives where I could be most helpful, for example,

> ". . . eliminating duplication of effort; strengthening partnerships with the Technical College System; making the transition for students from the technical colleges into the institutions in the USG seamless; the merging of several colleges and universities around our state; increasing retention and graduation rates among all colleges (Complete College Georgia); implementing the best metrics and business analytics to help us to measure our success as a system; helping colleges and universities to strengthen prior learning assessment; increasing access to USG institutions by building more distance-learning opportunities for students across our state; and preparing our colleges and universities to be able to address the huge influx of military students expected to come to Georgia . . . ."

In addition to any of these initiatives above, I would love to talk with you about the possibility of assisting you and the Commissioner of the Technical College System about moving Georgia light-years forward with the creation of a true *"Comprehensive Community and Technical College System"* similar to those that exist in Kentucky, California and North Carolina. Not only are those states preparing students for transfer into senior institutions, they are also strengthening economic development through comprehensive initiatives including the recruitment of new business to the state by communicating the virtues of the comprehensive education programs offered by the community and technical college systems that exist in those states.

A wonderful example of the importance of this work is the success and role that GPC played in bringing Baxter International to Newton County. This was work in particular which included GPC, Athens Tech and Georgia Piedmont Technical College. It is collaborations like this that can truly make a difference in growing Georgia's economy. I have great strength in this type of work (did it for seven years in California) and would be happy to travel to different parts of the state to help coordinate the work and presentations made to those businesses considering Georgia as their new home.

Please let me know when we can talk about how I can best help you to help the State of Georgia!

Best, AT
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Anthony S. Tricoli, Ed.D.
President,
Georgia Perimeter College

OFFER LETTER FROM GEORGIA PERIMETER COLLEGE AND ACCEPTANCE OF DR. TRICOLI (AUGUST 7, 2006)

Robert Watts
Chief of Staff
Office of the Chancellor
Phone: (404) 656-2202
Fax (404) 657-4979

Dr. Anthony S. Tricoli
397 Harvard Avenue
Coalinga, California 93210

Dear Dr. Tricoli:

It is my pleasure to offer you an appointment to the presidency of Georgia Perimeter College, subject to the policy and terms of the Board of Regents and the approval of the Board of Regents of the University System of Georgia at its regular meeting on August 9, 2006. The appointment would be effective on October 1, 2006.

The total annualized compensation for the position is $190,000, which includes salary of $158,000, a housing allowance of $19,400 and an allowance of $12,600. The Georgia Perimeter College Foundation will also contribute $15,000 toward your moving expenses.

To accept the position, please return this letter with your signature via facsimile to 404-657-6979 and by mail to the address above.

Sincerely,

Robert Watts
Chief of Staff

RW/m

I accept the position of President of Georgia Perimeter College under the conditions stated above.

/s/ Dr. Anthony S. Tricoli

Date: 8-7-06

GPC CRIMES TIMELINE

(last modified 1-17-17)

Summary

In the financial scandal that erupted at Georgia Perimeter College in 2012, the USG Board of Regents and Attorney General admit that financial reports to the administration of former GPC President Anthony Tricoli from GPC and USG budget officials were wildly inaccurate. However, they claim that neither GPC VP for Finance Ron Carruth nor any USG officials had any knowledge of the discrepancies. There is plentiful documentation, however, from both USG and GPC records, that neither claim is true. The inescapable conclusion is that the budget information was knowingly misrepresented to Tricoli—which is a felony under OCGA 16-10-20 & 16-10-8—over a period of months if not years, by state officials working in concert, ranging from GPC VP for Finance Ron Carruth to USG Chancellor Hank Huckaby.

A review by the University System of Georgia (USG) of the $16 million budget shortfall in 2012 at Georgia Perimeter College (GPC)—a review that was explicitly relied on by Attorney General Sam Olens in his decision not to investigate further—found no evidence of fraud or criminal activity. [1]

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[1] The USG review, titled the "Special Report," also affirmed the USG decision to lay blame on GPC President Anthony Tricoli, who had already been removed from office immediately after the deficit announcement in April 2012, prior to any investigation of the 2012 financial crisis, and five months prior to the release of the "Special Report" in September 2012

That conclusion—that no crimes were committed—is based largely on the USG's acceptance of claims by GPC's Executive Vice President for Financial and Administrative Affairs, Ron Carruth, that he had no knowledge that his official reports of an ample budget surplus, even as reserves were being depleted to cover revenue shortfalls, were spectacularly false. In particular, Carruth blamed GPC Budget Director Mark Gerspacher[2] for misinforming him about spending vastly overtaking revenues and depleting GPC's reserve funds—which contained $20 million at the start of 2009 and disappeared by the end of 2011. [3]

It also depends on claims by USG officials, including the USG officials who conducted and oversaw the "Special Report," that they had no knowledge of GPC's insolvency prior to the announcement in late April of 2012.

The following 2011-2012 timeline demonstrates, however, that budget reports for GPC were *knowingly*

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[2] Gerspacher left the employ of GPC in March 2012, a month before the deficit was publicly revealed. Gerspacher left a month after preparing a report detailing orders from Carruth to spend down the GPC reserves in multi-million dollar chunks. The USG omitted the Gerspacher report from their review for the "Special Report." Former DeKalb County DA Robert James also disregarded the report prepared by Gerspacher in February 2012, without questioning Gerpsacher. The former DA justified this investigative oversight based on the assumption that Gerspacher had a vested interest in diverting blame from himself.

[3] The $20 million reserves had been explicitly ordered by President Tricoli after the budget crisis Tricoli inherited when he assumed the presidency in 2006 was resolved by almost doubling enrollment and tuition revenues, which created a large budget surplus.

and willfully falsified in felony violation of OCGA 16-10-20[4] & 16-10-8.[5] The timeline documentation also illustrates that the deficit situation was widely known to USG officials, despite their denials, at least a month before they claimed it was "newly discovered," and probably much longer. It is also documented that this information in the hands of both GPC and USG budget officials was withheld from President Tricoli, in violation of USG and GPC policy. GPC budget officials were aware for at least ten months without disclosing the information to Tricoli. An official report, never disclosed to this day to Tricoli, from GPC budget officials to the USG, documented at least a $12.8 million deficit in March of 2012. In all the after-the-fact investigation, that *actual report has never been produced*, though the report and its conclusions are documented in email. It is not addressed in the USG's "Special Report."

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[4] A person who knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes a false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of any department or agency of state government or of the government of any county, city, or other political subdivision of this state shall, upon conviction thereof, be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both.

[5] An officer or employee of the state or any political subdivision thereof or other person authorized by law to make or give a certificate or other writing who knowingly makes and delivers such a certificate or writing containing any statement which he knows to be false shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

This March 2012 financial report generated by Ron Carruth's office and transmitted to the USG[6]—but not to Tricoli or anyone at GPC outside of Carruth's office—is key to showing that the claims by GPC's budget officials that they did not know about the budget shortfalls at GPC, or that they merely arose from incompetence or a comedy of errors, are entirely false. The arrears were known an actively concealed and misrepresented. That is criminal by itself—yet we believe that the actual disposition of the funds that created the shortfall was also for corrupt, criminal purposes addressed separately in this report.

It appears that accurate budget information was knowingly withheld for over a year,[7] in violation of the misrepresentation of state business statutes, as well as GPC Policy 302 that required Carruth, as Executive VP for Financial and Administrative Affairs, to inform the President of any indication that the GPC budget was not sustainable.[8]

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6 The $12.8 million deficit report to the USG is mentioned in emails from Carruth's assistant VP, Sheletha Champion, who presumably actually transmitted it to the USG, though it is possible that it came directly from Carruth since we do not have the actual transmission.

7 Information on the depletion of the GPC auxiliary reserve funds was withheld by VP of Finance Ron Carruth for over a year, at a minimum, according to the available documents described in this timeline. It is possible that such knowledge was withheld and misrepresented for a longer period of time.

8 Policy 302 states, in part: "The Executive Vice President for Financial and Administrative Affairs shall inform the President of any expenditure trends that may affect the College's ability to live within its budget, any changes in revenue that were not anticipated in the original budget, and any external conditions

In the timeline below, green dates show when positive budget information was conveyed to the Tricoli administration. The dates in red reflect the actual negative reality known to, but not disclosed by, GPC and USG officials.

2011-2012 Timeline

March 10, 2011:

VP of Finance Ron Carruth and Budget Director Mark Gerspacher reported a budget surplus of $38 million to the GPC Faculty Senate.

July 1, 2011:

According to Gerspacher, Carruth ordered Gerspacher to withdraw $1.5 million from the reserve fund to cover revenue shortfalls—three months after reporting the $38 million surplus to the Faculty Senate.[9] [There should be other reports between March and July that will show whether Carruth reported more surpluses in the meantime]

July 2011:

According to Assistant VP of Finance Sheletha Champion, as recorded in the USG "Special Report," she passed on to Carruth a report of negative balances and dwindling reserves, but Carruth took no action—though GPC Policy 302 gave Carruth an affirmative duty to inform the president.

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that may require adjusting expenditures. The President will decide if mid-year budget adjustments are necessary."

[9] Source: Gerspacher report in February 2012, supra.

September 22, 2011:

> state auditors at the budget exit interview inform GPC budget staff of multiple negative balances in GPC accounts. The exit interview was attended by Carruth, Champion, and Gerspacher[10]—who never brought this negative review to the attention of GPC management outside Carruth's department, contrary to GPC Policy 302. These audit reports were also available to the USG, though we have not yet established the exact mechanism by which the USG received them or who would have been responsible for reviewing them. Tricoli's attorney in the civil action has been barred from all discovery, which would otherwise shed light on these quesitions.

January 23, 2012:

> The GPC budget staffer in charge of auxiliary reserve funds, Keith Chapman, writes to Assistant VP of Finance Sheletha Champion complaining about decreases in two different reserve funds, of $4.5 million and $3.2 million, and refers to plans by Carruth "to spend additional auxiliary reserves this year." In the email, Chapman expresses anger that millions in reserves are "gone with no explanation." Thus

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10 The USG "Special Report" implied fault by President Tricoli for not attending the exit interview with state auditors at which these negative balances were noted. However, USG policy in place at the time called for EVP Carruth and his budget staff to attend the interview—not the president. After the GPC budget fiasco of 2012, the USG changed its policy to bring the president of USG institutions into these conferences. Thus the USG implication of fault, based on the after-the-fact policy change, is fraudulent.

$7.7 million in arrears[11] are documented and known to GPC budget officials, with more deficit spending to come, ordered by Carruth, in January of 2012.[12]

February 3, 2012:

In response to Keith Chapman's email, Champion requested Gerpsacher to prepare a report on the GPC reserve funds depletion by February 10—and asked all GPC budget staff to report to her any knowledge they have of Champion and Carruth being aware of the reserve funds depletion. The focus on gathering up information proving what Carruth and Champion knew is the first clear sign of a contemplated cover-up.

February 9, 2012:

Gerspacher sent Champion the report on reserve depletion she requested. The report referenced

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[11] Repeated spending, in multi-million dollar chunks, from reserve accounts is a clear indication that expenses considerably exceed revenues, triggering Policy 302 and requiring Carruth to inform Tricoli. In the overall state budget crisis after the economic downturn of 2008, the SUG had changed its procedures to allow schools to spend from reserves without prior approval from the USG, but Carruth still would have been required to inform Tricoli. After the GPC budget meltdown, the USG switched back to its pre-2008 policy, requiring schools to get USG approval to spend from reerves.

[12] This correspondence from Chapman, concerning Carruth's directives to spend down auxiliary reserves, corroborates Gerspacher's statements that Carruth ordered Gerspacher to spend the reserves (not, as Carruth claimed in the "Special Report," that Gerspacher had misled Carruth). Once again, however, the corroborating evidence from Chapman was overlooked by the USG and actively rejected as probative, without explanation, by former DA Robert James.

discussions as early as July 2011 with Carruth and Champion about spending GPC reserve funds to avoid revenue shortfalls. This report was never shared with Tricoli or GPC management outside Carruth's budget office, contrary to GPC Policy 302.

Gerspacher and Champion were deemed by Robert James' DA office to have their own self-interest too much at stake to be credible witnesses. However, Gerspacher's account, and Champion's separate account of Carruth's knowledge, are seconded by Chapman, who was never under suspicion and had no need to defend himself.

March 6, 2012:

Carruth's official report to the President's Cabinet states $3.6 million in reserve and "normal USG budget process." This was two days before the USG budget hearing for GPC, so the only way there could be a normal budget process and a surplus is if the $7.7 million in arrears documented by Chapman in January were being misrepresented.[13]

March 8, 2012:

In the annual USG budget hearing attended by Carruth, President Tricoli informed Chancellor

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[13] Ron Carruth announced his retirement, effective in the summer of 2012, at the same March 6, 2012 meeting. Robert James' DA office cited the fact that Carruth was later required to resign by the USG in June 2012 as "evidence" that there was no criminal wrongdoing. However, as documented in the minutes of the March 6 meeting, Carruth was already scheduled to retire by the time he was told to resign. He is collecting his state pension, consistent with retirement.

Hank Huckaby of Tricoli's plan to raise GPC faculty salaries, using an $800,000 reserve set aside for that purpose.

In response, no one mentioned that there may not be a $800,000 reserve any more, given the $1.5 million withdrawal from reserves documented in July of 2011, and the $4.5 million and $3.2 million withdrawals documented by Keith Chapman's January 2012 email. More importantly, there is no record that deficits or deficit spending at GPC were ever mentioned during this March 2012 budget hearing, a month and a half before a $16 million deficit was announced and Tricoli was forced out in disgrace. This failure to raise issues of reserve depletion or deficit spending at a budget hearing is extraordinary in light of the evidence we now know existed: a July 2011 report by Sheletha Champion to Ron Carruth of reserve depletion, a September 2011 audit report of negative account balances, a January 2012 email from Keith Chapman complaining of $7.7 million in GPC reserves "gone with no explanation," and a February 2012 report by Mark Gerspacher on reserve depletion. In response to Open Records requests by Tricoli, the BOR has failed to produce any records related to the budget hearing—in particular, any records of GPC deficits in connection with the budget hearing. Yet, at the very least, the USG had access to the state auditors' negative balance reports in September of 2011 (and the USG was about to have a report directly from the GPC budget department—that was never shared with the rest of the GPC

administration—of a $12.8 million deficit. See entry for March 24).

March 15, 2012:

Budget Director Mark Gerspacher's last day on the job, one week after the budget hearing. He leaves GPC for a job at another USG institution.

March 21, 2012:

Champion forwarded Gerspacher's February 9 report on reserve depletion to Carruth—who in turn forwarded it without comment to Gerpsacher's replacement, Amy Jurgens. Champion's March 21 email references a prior conversation with Carruth about spending the auxiliary reserves. Carruth says nothing about how this contradicts the "normal budget process" in the budget hearing earlier the same month.

March 23, 2012:

Champion emails Carruth (contrary to his claims he was never informed) and other GPC finance staff regarding financial analysis for SACS accreditation. Champion's email states that the analysis "does not support a claim of financial stability." The attachment to the email states that GPC is $6.7 million in arrears on employee benefits with 3 months left in the fiscal year, and running a $6.1 million operating deficit. That is written notice to Carruth on March 23 of a $12.8 million deficit.

On the same day, March 23, Tricoli emails Carruth and Huckaby about Tricoli's plans to use the $800,000 set aside to raise faculty salaries. Carruth makes no mention of depleted reserves (per February budget report) or $6.1 million

operating deficit and $6.7 million fringe benefits arrears.

March 24, 2012:

The day after the discussion of faculty raises, Champion emails the financial analysis prepared for accreditation agency, SACS, saying the final report is due to the USG on March 26. That budget analysis shows $6.7 million arrears in employee fringe benefits with three months left in the fiscal year, as well as a $6.1 million deficit in GPC's operating expenses. Champion's March 24 email refers to Carruth's knowledge of "over spending and little to no fund balance" over the last two years—the day after Carruth made no response to Tricoli's discussion of spending the reserve supposedly set aside for faculty raises. This March 2012 report detailing at least a $12.8 million deficit was never shared with Tricoli or GPC management outside Carruth's budget office, contrary to GPC Policy 302.

More important than the demonstration of Carruth's knowledge and obfuscation, the transmission of this report to the USG in March of 2012, detailing an almost $13 million deficit at that time, completely contradicts the claims by Chancellor Huckaby, Vice Chancellor Fuchko in the "Special Report," Board of Regents Chairman Ben Tarbutton to the AJC, and others that no one at the USG level had any idea of GPC's financial straits before Tricoli requested USG auditors to review the books a month later, on April 26, 2012 (see entries for April 25 &26). The USG "Special Report," that was not released until September 2012, after plenty of time to investigate this

matter, falsely claimed that the GPC deficit situation had never been shared with anyone at the USG prior to the April 26 "discovery" of a $16 million deficit at GPC. This is an obvious fraudulent attempt to insulate the USG from culpability—given that the USG did, in fact, receive a report detailing at least $12.8 million in arrears at GPC over a month prior to the USG's April 26 public deficit announcement and calls for Tricoli's immediate resignation. The actual report and transmission document have never been produced in response to Open Records requests.

April 15, 2012:

Carruth informed President Tricoli that GPC had $4 million available to the end of the fiscal year (June 30). [Carruth did not mention that, according to his own department's March 2012 budget analysis, already transmitted to the USG but withheld from Tricoli, these funds fell $6.1 million short of operating needs. Note that, according to Carruth, the amount of available funds actually went up from the time of his March 6 report to the President's cabinet.]

April 25, 2012:

Contrary to what Carruth told Tricoli ten days earlier, Carruth walked into the office early and informed Tricoli that there was actually a small deficit of $1-2 million.[14] Tricoli called in GPC

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14 At the time Carruth made this "$1-2 million deficit" statement to Tricoli, Carruth already long since had extensive documentation that the problem was far worse than that. State auditors reported negative account balances at a meeting where Carruth was present in September 2011. Keith Chapman had identified $4.5 million and $3.2 million withdrawals from reserves, ordered

management the same day to find savings to balance the budget. However, Carruth then informed Tricoli that the deficit was larger than Carruth reported earlier that same day. Tricoli informed Chancellor Huckaby and called in USG auditors to assess GPC's financial condition.

April 26, 2012:

after reviewing GPC books overnight, USG auditors estimate deficit at $16 million. Huckaby demands Tricoli's immediate resignation. (Unbeknownst to Tricoli at the time, the USG already had most of the information they reported on April 26, not from an overnight review of GPC's books, but from the $12.8 million deficit report Sheletha Champion sent to the USG a month earlier for SACS accreditation. Even the USG's "Special Report," which was not issued until five months later (four months after Tricoli was terminated), tracks the identical numbers in the March 2012 report Sheletha Champion said she sent to the USG.[15]

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by Carruth according to Chapman, in January. Carruth's department sent a $12.8 million deficit report to the USG on March 24. On March 21, Champion had emailed Carruth Gerspacher's report on the depletion of GPC's reserves, which Carruth forwarded to Gerspacher's replacement without comment.

[15] Since no one has ever produced the actual transmittal documents, we do not know that the $12.8 million deficit report was not sent to the USG a month earlier by Carruth himself, since it fell under his job responsibility. We also do not know for sure who at the USG received and reviewed the report—much less what they did with it for the next month before announcing the same deficit numbers already in their possession and very publicly blaming Tricoli via the Atlanta Journal-Constitution.

April-May 2012:

The USG released a number of stories to the Atlanta Journal-Constitution, WABE radio, and WSB-TV. Many of these reports quote USG Chancellor Hank Huckaby and BOR Chairman Ben Tarbutton directly. The reports uniformly blame Tricoli for GPC's financial troubles and claim that the USG was not aware of the problems until April 26, after Tricoli requested help from USG auditors. The USG/BOR also claims that the deficit information came from an overnight review of GPC's books. In fact, the budget information released in the USG final report (See September 2012) were actually found in the GPC budget office report to the USG for SACS accreditation in March of 2012. Huckaby used the negative media reports to pressure Tricoli to resign. When Tricoli refused, Huckaby induced Tricoli to resign by offering him an alternate job at the USG central office and actually announcing the move in the media, as reported by the AJC and WABE. However, once Huckaby had Tricoli's acceptance of the new position (which did not include a statement of resignation) in hand, Huckaby reneged on the job offer that had already been reported as a fait accompli.

May 2, 2012:

USG VP Steve Wrigley falsely informs the Board of Regents members that the USG just learned of the arrears at GPC and began working to solve the problem within two days of learning about it. He is apparently referring to the April 26 public disclosure. His statement does not account, for

example, for the March 26 report transmitted to the USG by Sheletha Champion/Ron Carruth documenting a $12.8 million deficit.

May 7, 2012:

That morning the USG released a statement to the press that Tricoli had stepped down as GPC president and had been transferred to a new position in the USG central office. Media began reporting it that day. Late that afternoon, seeing the media reports and feeling his hand was forced, Tricoli rushed to accept the alternate USG job in writing. However, based on review of documents now available, Tricoli never resigned his old position and, in fact, disputed that characterization in the release issued by Huckaby.

May 8-9:

Board of Regents meets and consider annual renewal of presidential appointments. The BOR did not consider Tricoli, however, because they were informed by the USG that Tricoli had resigned.

May 10, 2012:

Huckaby terminates Tricoli by letter stating that Tricoli's annual contract expiring on June 30 was not renewed by the Board of Regents. Under BOR Policy, the Board's option to take that action and give Tricoli notice had expired in April, according to BOR 2.4.2.

After Tricoli sued, the BOR changed the policy to require notice after the May BOR meeting, instead of after the April meeting (and has since eliminated any deadline). Huckaby did not inform

the BOR that he had given Tricoli notice of termination until May 10, the day after their meeting concluded. This violated BOR policy requiring Tricoli's name to be presented to the BOR for consideration of annual renewal.

Also note that the BOR did not consider Tricoli because Huckaby told them Tricoli had resigned. Then Huckaby (ignoring the alternate job offer announced to the media and accepted in writing by Tricoli) told Tricoli he was being terminated because the BOR did not renew him (after Huckaby withdrew his name from consideration)

May 10, 2012:

on the same day Tricoli received his termination notice, John Fuchko provides Chancellor Huckaby a list of financial reports the USG received from Sheletha Champion over the preceding three years. *Missing* from Fuchko's list is the March 26 report transmitted by Champion detailing a $12.8 million deficit a month prior to the USG's alleged surprise discovery.

May 10, 2012:

On the same day that Fuchko delivers this incomplete report, the USG begins, in place of a scheduled state audit, its own review, prepared by Fuchko, of how the $16 million deficit occurred. This is what was eventually released as the "Special Report." Note that the alleged investigation begins after Tricoli has already been assigned the blame and removed from office. The Attorney General, though required to investigate the allegations of fraud in the USG, never investigated, leaving the USG self-review the only examination of what occurred at GPC.

May 10, 2012:

May 10 was a busy day. Also on that day, upon Tricoli's ouster, Rob Watts was placed in the position of GPC interim president in May of 2012. As such, the Special Report was prepared for Watts' review. Much of the criminal activity that is documented in this timeline comes from emails between GPC and USG budget staff. One of Watts' first acts as interim GPC president was to order all GPC vice presidents to purge emails from the Tricoli administration. This attempted destruction of evidence was reported by one of the vice presidents and, upon objection by Tricoli's counsel, the Attorney General sent GPC a letter warning against implementation of Watts' illegal directive.

May 13, 2012:

BOR Chairman Ben Trabutton tells the press that the USG only learned about the arrears at GPC two weeks ago and don't yet know how the arrears accrued, but "the important thing is that he [Tricoli] is gone."

May 15, 2012:

Tricoli's then-attorney filed a written demand for a hearing on Tricoli's forced termination before the BOR, on constitutional due process grounds, as required by BOR policy if a hearing, is requested within 15 days of a termination outside the annual renewal process—which the BOR did not follow.[16] The USG/BOR ignored this and

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[16] Contrary to the BOR policies governing Tricoli's written contract, the BOR violated their own policies requiring an annual performance evaluation (supposed to be done by Huckaby in 2012, but never occurred) informing the renewal decision,

subsequent requests for a hearing made by Tricoli directly to Hank Huckaby.

July 3, 2012:

a letter from the Attorney General's office confirms that 1) the USG denied Tricoli's request for a hearing under BOR Policy, and 2) the AG is not investigating, since the USG self-review has turned up no evidence of criminal activity—on itself.

September 17, 2012:

The USG's review of the GPC budget crisis, the "Special Report," released. The Special Report faults Tricoli and finds no evidence of fraud or criminal activity. Moreover, in the special USG report prepared by Vice Chancellor for Internal Audit John Fuchko, the conclusions actually contradict the facts on which they are based (similar to the 2016 USG review by Fuchko at Kennesaw State). For example, the report admits that GPC budget officials were emailing each other about a financial collapse over a period of months in which they were, at the same time, making false reports to Tricoli of budget surpluses and a "normal budget process." The Fuchko report blames these falsifications on Tricoli, as a "member of the GPC financial team,"

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submission of Tricoli's name to the BOR for consideration for annual renewal (never done) at the regular April BOR meeting, notice of any non-renewal immediately after April meeting (BOR changed this policy after the fact since it was not observed), a hearing on any termination outside this annual renewal process if requested in writing within 15 days (which it was), and consideration for two year's salary upon separation since Tricoli had served more than five years.

though it is undisputed that the emails were not sent to Tricoli. And the misrepresentations were made *to* Tricoli The Fuchko report also claims that none of these emails were shared with USG officials. That is a knowingly false statement since we have documentation of the GPC budget officials emailing USG officials about the budget crisis. Fuchko's denials that the USG knew of GPC's dire financial circumstances prior to April of 2012 are also contradicted by the September 2011 state audit reports, the March 2012 GPC accreditation report to the USG concerning a $12.8 million deficit, and USG official Ben Riden's statement to GPC administrators in April 2012 that the USG had long been aware of the reserve depletion problem but never raised it with GPC officials. The deficit numbers in the report, which Fuchko claimed came from the USG's own review, are identical to the numbers in the report transmitted to the USG by Sheletha Champion in March of 2012.

The Fuchko report also addresses an alleged reason for the overspending at GPC, which Fuchko blamed on Tricoli: $1.5 million a year that went to an outside contractor with strong ties to the USG, and allegedly with a close personal relationship to Carruth. Fuchko admits this spending on the outside contractor was wasteful, duplicative, and served no real purpose. The Cobb County financial consulting company, Skybridge Global, never appeared in the GPC budget reports. President Tricoli *had never heard the name of the company until it appeared in Fuchko's report*. There is extensive evidence that

> the existence of the outside consultant was actively hidden from Tricoli by Carruth on more than one occasion. It is also widely reported that the Skybridge consultant, Nancy Harris, had a close personal relationship with Ron Carruth that resulted in his divorce.
>
> The amount GPC paid Skybridge, at the hourly rate charged the USG, would exceed the amount that could be billed by two consultants working 24 hours a day, seven days a week, 365 days a year. It also roughly equals the $9 million shortfall at GPC in 2012 that has never been accounted for.[17]

The USG and Georgia Attorney General, when they determined that there was no evidence crimes were committed in connection with the GPC budget crisis, had all the same documentation referenced in this timeline available to them. This documentation on its face supports a different conclusion: that official budget reports of Georgia Perimeter College, a state

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17 Of the $16 million deficit announced by the USG in April 2012, $6.7 million was attributed to a HR department miscalculation of employee fringe benefits (the HR director responsible for that error remained in his position at GPC). The "Special Report" cited this exact figure, which is identical to the figure in the report sent by Champion/Carruth to the USG in March of 2012. That leaves $9 million of the deficit that has never been specifically accounted for, though it roughly corresponds to the amount paid to the outside consultant during Tricoli's presidency ($1.5 million a year for six years)—without Tricoli's knowledge. On several occasions, when GPC was having to cut expenses because of cuts in state appropriations, Carruth falsely reported to Tricoli that there were no significant payments to outside contractors—which otherwise would have been the first expenses to be considered when making budget cuts.

agency, were knowingly and willfully falsified and affirmatively misrepresented, and that material information was knowingly and willfully concealed, in violation of OCGA 16-10-20 & 16-10-8, resulting in $16 million in overspending ($9 million of which has never been accounted for), the loss of 300 jobs, a drop in enrollment by several thousand students per semester, extensive negative publicity for the school, and the destruction of the career of one of the USG's "rising stars"—Anthony Tricoli, who has never been able to obtain another job in higher education after being publicly blamed by the USG for all this damage.

Other possible criminal violations are documented in the record. Those include concealment of GPC payments of up to $1.5 million, fraud in the termination of Tricoli's contract, lying to state investigators, and attempts to conceal or destroy the documentary evidence on which this timeline is based. However, those other crimes are beyond the scope of this timeline, which concentrates strictly on the knowing falsification of budget reports to President Tricoli and to other GPC management outside of Carruth's department—as well as misrepresentations to the media and the public about the USG role in the GPC disaster.

The Attorney General of Georgia has refused to investigate any of this available documentation, on which the timeline is based, that supports the allegations of criminal actions. In fact, the Attorney General is defending Carruth and others in a civil lawsuit brought by Anthony Tricoli. Governor Nathan Deal has not responded to repeated requests to appoint an independent special investigator.