IN THE SUPREME COURT OF GEORGIA

EVA LATHROP, M.D., CARRIE CWIAK, M.D., and LISA HADDAD, M.D.,	)	
Appellants,	)	
v.	)	APPEAL NO. S17A0196
NATHAN DEAL, Governor of the State of Georgia, in his official capacity, and his successors in office, et al.,	)	
Appellees.	)	

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* THE SOUTHERN CENTER FOR HUMAN RIGHTS, ANTI-DEFAMATION LEAGUE, GEORGIA CARRY.ORG, INC., AND THE GOLDWATER INSTITUTE, IN SUPPORT OF APPELLANTS EVA LATHROP, M.D., CARRIE CWIAK, M.D. AND LISA HADDAD, M.D.

Ronan Doherty
Georgia Bar No. 224885
Manoj S. Varghese
Georgia Bar No. 734668
Michael R. Baumrind
Georgia Bar No. 960296
BONDURANT MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 881-4100

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

ARGUMENT

Amici Curiae the Southern Center for Human Rights, Anti-Defamation League, GeorgiaCarry.org, Inc., and the Goldwater Institute submit this Supplemental Brief in response to the Court's January 24, 2017 order. The Court directed the parties, and invited *Amici*, to file supplemental briefs addressing whether the doctrine of official immunity, Ga. Const. art. I, § II, ¶ IX(d), bars prospective declaratory or injunctive relief against a state officer in his individual capacity as to the future enforcement of an unconstitutional law by such officer. The answer is no, but in any event, an official capacity suit is the more appropriate vehicle to seek relief in this case.

Where an aggrieved citizen sues a state officer in his individual capacity, official immunity does not bar prospective declaratory or injunctive relief as regards the future enforcement of an unconstitutional law. The text of the official immunity provision of the Constitution, Ga. Const. art. I, § II, ¶ IX(d) ("Paragraph IX(d)"), reveals two limitations. First, official immunity applies only to actions arising out of an officer's *past* performance or nonperformance, and official immunity does not bar an action as to the future enforcement of an unconstitutional statute. Second, official immunity only protects officers engaged in "official functions." An officer who acts without lawful authority is not engaged in an official function. This textual analysis is consistent with the purpose of official

immunity. Official immunity is intended to free state officers to make discretionary decisions without fear of litigation or liability, not to insulate an officer's unconstitutional future actions from declaratory or injunctive restraint.

Here, however, the appropriate defendants are the relevant state officers in their *official* capacities. This Court has held that sovereign immunity does not protect state officers from suits seeking to prevent the officers from enforcing an unconstitutional statute. In reaching this decision, this Court essentially has adopted the legal fiction of *Ex parte Young*, 209 U.S. 123 (1908). Under *Ex parte Young*, although a suit against a state officer who acts under color of his office but beyond the scope of his authority is not a suit against the State, it nonetheless is a suit against the officer in his *official* capacity. If it were instead an individual capacity suit, it would provide an insufficient avenue for adequate relief because an injunction against an officer *individually* would not bind the officer's successors. For these reasons, *Amici Curiae* urge the Court to reverse the decision of the Superior Court and hold that this case against the defendants in their official capacity may proceed.

I. The text of Paragraph IX(d) demonstrates that official immunity applies only to suits brought against state actors for past performance or nonperformance of official functions, not for the future enforcement of an unconstitutional statute.

The text of Paragraph IX(d) leaves little room for doubt that it is directed towards individual capacity suits arising out of a state officer's past performance or

nonperformance of official functions, not his future enforcement of an unconstitutional statute. Courts construe constitutional provisions in the same manner as they construe statutes, striving to give the terms of such provisions their "most natural and obvious meaning, unless the subject indicates, or the text suggests, that they have been used in a technical sense." *Jones v. Darby*, 174 Ga. 71, 72 (1931); *Gwinnett Cty. Sch. Dist. v. Cox*, 289 Ga. 265, 271 (2011). "The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them." *Jones*, 174 Ga. at 72. But courts do not construe the words of a constitutional provision in isolation. Instead, courts place the terms of a constitutional provision in their textual context and, where possible, give effect to every section, clause, and word in the Constitution. *Park v. Candler*, 114 Ga. 466 (1902). Applying these rules of construction, two limitations to official immunity become apparent.

A. Official immunity only protects a state officer from suit or liability arising out of her *past* performance or nonperformance of official functions.

Paragraph IX(d) limits a state officer's "liab[ility] for injuries and damages" for actions she did or did not take, but this paragraph does not address lawsuits seeking declaratory or injunctive relief for the officer's future enforcement of an unconstitutional statute. This provision grants state actors general immunity from suit or liability—subject to the Georgia Tort Claims Act ("GTCA"), O.C.G.A.

§ 50-21-20 *et seq*., and two exceptions—"for the performance or nonperformance of their official functions." *Id.* The provision does not define the term "performance," which can take two different meanings. *Id.* "Performance" could refer generally to (1) "the execution of an action," without a limitation as to time, or (2) more specifically to "something accomplished," as in a previously completed task. Merriam-Webster Dictionary, Performance, https://www.merriam-webster.com/dictionary/performance, (last visited February 2, 2017); *see also* Webster's New Collegiate Dictionary at 844 (1st ed. 1981).

Here, a review of the entire paragraph demonstrates that "performance" refers only to past actions of the state officer or employee defendant. Courts normally "assume that the same terms have the same meaning in different sections of" a statute or constitutional provision. *See Barnhill v. Johnson*, 503 U.S. 393, 406 (1992); *accord Allen v. Donaldson*, 12 Ga. 332, 335 (1852) ("[T]he same term or phraseology occurring in the same Statute, is to receive the same interpretation, unless there be something in the Act which renders this construction manifestly improper."). The first sentence of Paragraph IX(d)—which describes the two exceptions to the general grant of official immunity—uses the same term "performance" to refer to conduct that has *caused* injury or damages, *i.e.*, conduct that has occurred. Under this provision, state officers or employees are subject to suit and liability for (1) the negligent "performance" of a ministerial duty that has

"caused" injuries or damages or (2) the "performance" of a discretionary function with actual malice or intent to cause injury. Ga. Const. art. I., § II, ¶ IX(d). In both exceptions, "performance" refers to conduct that has occurred, and the provision authorizes limited suits for damages or liability *caused* by such conduct. In contrast, a suit to enjoin enforcement of an unconstitutional statute is not based on a state actor's past performance and does not seek to impose liability for damages. Thus, a reading of the entire official immunity provision demonstrates that it targets suits based on the past conduct of state actors. A suit seeking prospective declaratory or injunctive relief as to the future enforcement of an unconstitutional statute does not fall within the scope of Paragraph IX(d).

B. Official immunity only protects officers or employees engaged in "official functions," and an officer who acts wholly without lawful authority is not engaged in an official function.

Official immunity is limited in a second way as well: an officer enforcing a void statute lacks lawful authority for her actions and thus enjoys no immunity for suits based on "the performance or nonperformance of [her] *official functions*." Ga. Const. art. I., § II, ¶ IX(d) (emphasis added). This Court has "interpret[ed] the term 'official functions' [in Paragraph IX(d)] to mean any act performed within the officer's or employee's *scope of authority*." *Gilbert v. Richardson*, 264 Ga. 744, 753 (1994) (emphasis added). A state officer's scope of *authority*, in turn, is defined by state law. *See Dennison Mfg. Co. v. Wright*, 156 Ga. 789 (1923).

Accordingly, if no law authorizes a state officer's conduct, such conduct exceeds the bounds of the officer's official functions, and the officer enjoys no official immunity under Paragraph IX(d). *See id.* Because an unconstitutional law "is in reality no law" at all, *id.* at 797; *accord* Ga. Const. art. I, § II, ¶ V, official immunity does not protect an officer from a suit to enjoin enforcement of such law. *See Holcombe v. Ga. Milk Producers Confederation*, 188 Ga. 358 (1939); *Smith v. Day*, 237 Ga. 48, 49 (1976) ("An injunction is the appropriate remedy to prevent a wrongful act by a public official even when acting under color of his office but without lawful authority, and beyond the scope of his official power." (internal quotation marks omitted)); *see also Dennison Mfg. Co.*, 156 Ga. at 794-95.

This principle—that a state official enjoys no immunity from a lawsuit seeking to enjoin his enforcement of an unconstitutional statute—existed at common law before the adoption of Paragraph IX(d), and there is no indication that Paragraph IX(d) altered this principle in any meaningful way. In *Holcombe*, for example, a nonprofit organization sued members of the Georgia Milk Control Board to enjoin the enforcement of an allegedly unconstitutional statute. 188 Ga. at 359-60. This Court held that the defendants were not immune from suit to the extent they were "attempting to execute an unconstitutional law" because, although they were acting under color of state law, they were "not acting by any authority of the state." *Id.* at 363. "An unconstitutional act is not a law," the Court explained.

Id. "[I]t confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.*; *accord Dennison Mfg. Co.*, 156 Ga. at 797 ("An unconstitutional statute, though having the form, features, and name of law, is in reality no law. . . . Such a statute confers no authority upon any one, and affords protection to no one."). Thus, at common law, a state officer who sought to enforce an unconstitutional statute enjoyed no protection from suit or liability.

There is no indication that the people intended to abrogate this common law limitation on official immunity by ratifying Paragraph IX(d). To the contrary, Paragraph IX(d) expressly covers only the "performance or nonperformance of [an officer's] *official functions*"—*i.e.* conduct within the scope of the officer's lawful authority. *See* Ga. Const. art. I, § II, ¶ IX(d) (emphasis added). Had the General Assembly, which drafted the language of Paragraph IX(d), intended to broaden official immunity beyond that provided under common law, it certainly knew how. The General Assembly adopted the language of Paragraph IX(d) and passed the GTCA contemporaneously as one unit. *See Kyle v. Georgia Lottery Corp.*, 290 Ga. 87, 89 n.1 (2011). For this reason, courts read these two texts together to interpret their meaning. *Id.* And generally, where the legislature uses two different terms in different parts of a legislative scheme, courts assume the two

terms have different meanings. *See Berryhill v. Ga. Cmty. Support & Sols., Inc.*, 281 Ga. 439, 442 (2006).

In stark contrast to Paragraph IX(d)'s narrower grant of immunity for an officer's *official functions—i.e.* within the scope of the officer's lawful authority—the GTCA provides some state officers with broad immunity for torts committed "while acting within the scope of [their] *official duties or employment*." O.C.G.A. § 50-21-25(a). Under general principles of law, an officer's *authority* is narrower than her scope of *employment*. *See Fielder v. Davison*, 139 Ga. 509 (1913) (recognizing that the employer may be liable for unauthorized acts conducted by his employee if those acts are performed during the course of employment); *Davis v. Standifer*, 275 Ga. App. 769, 772 (2005). Indeed, unlike official immunity under Paragraph IX(d), official immunity under the GTCA protects an officer from suit "[e]ven 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." *Davis*, 275 Ga. App. at 772 (internal quotation marks omitted). By using the narrower term "official functions" in Paragraph IX(d) rather than the broad term "official duties or employment" as used in the GTCA, the General Assembly embodied the narrower, common law application of official immunity in the Constitution. *See IBM v. Evans*, 265 Ga. 215, 221 (1995) (Benham, J., concurring in part and dissenting in part), *overruled by Ga. Dep't of*

Nat. Res. v. Ctr. for a Sustainable Coast, Inc., 294 Ga. 593 (2014) (reasoning that an officer would be entitled to official immunity only if he "acted with *lawful authority* and within the scope of his official power" (emphasis added)). Enforcing an unconstitutional statute is not an "official function." For this additional reason, the doctrine of official immunity, Ga. Const. art. I, § II, ¶ IX (d), does not bar an action seeking prospective declaratory or injunctive relief against a state officer in his individual capacity as to the future enforcement of an unconstitutional law by such officer.

II. Expanding official immunity to protect state actors from suits for prospective injunctive or declaratory relief does not further the purpose of official immunity.

Any remaining ambiguity regarding the scope of official immunity in this case evaporates when the Court weighs the purpose of official immunity both at common law and as expressed by the people who adopted Paragraph IX(d). *See Fair v. State*, 288 Ga. 244, 252 (2010) ("The cardinal rule of statutory construction is to seek the intent of the Legislature, and language in one part of a statute must be construed in the light of the legislative intent as found in the statute as a whole." (internal quotation marks omitted)) Official immunity at common law was intended to free state officers to engage in discretionary functions without the fear of suit or liability. "At common law, public officers were held personally liable for their torts." *Hennessy v. Webb*, 245 Ga. 329, 330 (1980), *superseded on other*

grounds by O.C.G.A. § 50-21-22(2). This threat of personal liability hampered the proper function of government by deterring public officers from acting independently and exercising discretion. *See Gilbert*, 264 Ga. at 750. Official immunity strived to reduce this threat by establishing a "general rule that tort liability should not be imposed for conduct of a type for which the imposition of liability would substantially impair the effective performance of a discretionary function." *Id.* (quoting Restatement (Second) of Torts § 895D comment b).

When the General Assembly adopted the official immunity provision of the Constitution in 1991, and contemporaneously passed the GTCA, the General Assembly expressly adopted the common law purpose of official immunity. *See Keenan v. Plouffe*, 267 Ga. 791, 796 (1997), *overruled on other grounds by Shekhawat v. Jones*, 293 Ga. 468 (2013); *see also Gwinnett Cty. Sch. Dist. v. Cox*, 289 Ga. at 269 (noting that the Court should give appropriate weight to "the understanding expressed by the people involved in the drafting and ratifying of the constitution"). In O.C.G.A. § 50-21-21, the GTCA "embodies the traditional justification for official immunity." *Keenan*, 267 Ga. at 796. This code section provides that the GTCA's purpose is to facilitate "the proper functioning of state government" by ensuring that "state officers and employees [are] free to act and to make decisions, in good faith, without fear of thereby exposing themselves to lawsuits and without fear of the loss of their personal assets." O.C.G.A. § 50-21-

21(b). The GTCA then immediately tracks the language of Paragraph IX(d), the official immunity provision of the Constitution: "Consequently, it is the public policy of this state that *state officers and employees shall not be subject to lawsuit or liability arising from the performance or nonperformance of their official duties or functions*." *Id.* (emphasis added). By tethering the traditional purpose of official immunity to the express language of the official immunity constitutional provision in Paragraph IX(d), the General Assembly indicated that the purpose of constitutional official immunity is, as it always has been, to preserve the independence and discretion of state officers and employees. *See id.*; *see also Hartley v. Agnes Scott Coll.*, 295 Ga. 458, 467 (2014) (stating that, "in light of the common origins of this constitutional provision and the GTCA," courts should consider a phrase in the GTCA when interpreting a similar phrase in the official immunity provision of the Constitution).

Unlike claims arising out of a state officer's past performance or nonperformance of official functions, an action challenging the constitutionality of a statute and seeking prospective declaratory or injunctive relief does not expose state officers to "fear of the loss of their personal assets" arising from liability for

past damages and has no effect on their independence or discretion. *See* O.C.G.A. § 50-21-21(b). Accordingly, official immunity does not preclude such an action.[1]

III. An official capacity suit is the more appropriate avenue for relief here.

Although official immunity does not bar an individual capacity suit in this case, an official capacity suit is the more appropriate avenue for relief. Appellants allege a palpable injury by the simple existence of an unconstitutional law. They face the untenable choice of violating the law and risking criminal penalties or complying with the law and abandoning their constitutional rights. Under such circumstances—where the plaintiff is "under a continued threat of prosecution" under an allegedly unconstitutional law and the plaintiff would suffer irreparable harm if it curtailed its actions to avoid prosecution—an injunction action lies. *Sarrio v. Gwinnett Cty.*, 273 Ga. 404, 406 (2001).

An injunction suit against an officer in his individual capacity, however, cannot eliminate the untenable choice Appellants face and thus does not offer a

[1] District attorneys also enjoy prosecutorial immunity "from private suit for actions arising from the performance of their duties." Ga. Const. art. VI, § VIII, ¶ I (e). The same basic rationale for official immunity supports prosecutorial immunity: "[p]rosecutors, like judges, should be free to make decisions properly within the purview of their official duties without being influenced by the shadow of liability." *Robbins v. Lanier*, 198 Ga. App. 592, 593 (1991) (internal quotation marks omitted). Allowing actions to enjoin a district attorney from bringing a criminal action under an unconstitutional statute does not cast a shadow of liability on the district attorney. Thus, a district attorney cannot employ prosecutorial immunity to avoid such actions.

sufficient remedy. At most, a successful injunction suit against a state officer individually could provide an injunction binding only the named officer; the court could not enjoin other unnamed state officers, including the defendant's successors in office. *See* O.C.G.A. § 9-11-65(d). Likewise, under Georgia preclusion law, a final decision against one district attorney in his or her individual capacity is not binding against other district attorneys, including the district attorney's own successors. *See Minnifield v. Wells Fargo Bank, N.A.*, 331 Ga. App. 512, 516 (2015) ("In Georgia, mutual identity of parties is required for collateral estoppel, which means that there must be an identity of parties or their privies in both actions."). Accordingly, an injunction against one officer individually would not eliminate the "continued threat of prosecution." *Sarrio*, 273 Ga. at 406. Appellants instead would face the prospect of endless, successive litigation to ensure relief. *See, e.g.*, *Phantom of E. Pa. v. N.J. State Police*, CIV. A. 07-2748, 2008 WL 2039461, at *6 (E.D. Pa. May 12, 2008) (recognizing that an injunction against government officials in their individual capacities "would not guarantee a remedy for [the plaintiff's] contention that the conduct of the [state officers] would continue in the future unless enjoined by the court"). And worse, Appellants could not rest assured that a successive district attorney would refrain from prosecuting them for conduct that predated that district attorney's tenure.

In contrast, an injunction binding the office of the district attorney would have enduring effect, and sovereign immunity would not bar such relief. Under this Court's longstanding precedent, sovereign immunity does not bar injunctive relief against state officers to prevent the enforcement of an unconstitutional statute. Even after the 1991 sovereign immunity amendment, this Court has recognized the rule that "the Constitution itself . . . can abrogate sovereign immunity." *Sustainable Coast*, 294 Ga. at 602. Here, the alleged violation of a constitutional right "must by necessary implication raise a cause of action in favor of the citizen against" state officers, for which sovereign immunity is no bar. *Smith v. Floyd Cty.*, 85 Ga. 420, 424 (1890). Under the analogous federal legal "fiction," plaintiffs maintain suits against individual officers in their *official* capacity and courts simply do not treat the official as the State for Eleventh Amendment sovereign immunity purposes. *See, e.g.*, *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 648 (2002); *Vann v. U.S. Dep't of the Interior*, 701 F.3d 927, 929-30 (D.C. Cir. 2012) (citing *Ex parte Young*, 209 U.S. 123 (1908)). "The doctrine is called a fiction because the suit in effect binds the government entity just as would a suit against the government entity itself. In such suits, the government in question stands behind the official as the real party in interest." *Vann*, 701 F.3d at 929 (internal quotation marks omitted). This approach also is consistent with history and precedent in this State. *See Amici*

Curiae's Initial Br. at 5-11.[2] Sovereign immunity does not protect a state official from a declaratory or injunctive relief action as to the future enforcement of an unconstitutional statute. Accordingly, although aggrieved citizens could bring individual capacity suits to enjoin, temporarily, the enforcement of an unconstitutional criminal statute, only a successful official capacity suit ensures complete relief.

CONCLUSION

Official immunity under Paragraph IX(d) does not apply in actions seeking prospective declaratory or injunctive relief against a state officer in his individual capacity as to the future enforcement of an unconstitutional law by such officer. Both Paragraph IX(d)'s text and the express purpose of official immunity support this conclusion. Nonetheless, an individual capacity suit is an inadequate substitute for an official capacity action. To obtain full relief from threatened prosecution under an unconstitutional statute, aggrieved citizens must be able to enjoin the State itself from enforcing the statute. Official capacity suits are the appropriate avenue to obtain such relief, and sovereign immunity does not stand in the way.

---

[2] *Amici* acknowledge that this Court has construed *Ex parte Young*-type cases as actions "against the official in his individual capacity." *Dennison Mfg. Co.*, 156 Ga. at 794. But a more faithful application of *Ex parte Young* would allow suits against the official in his *official* capacity and would apply the fiction that those suits are not actions against the State for sovereign immunity purposes.

This 24th day of February, 2017.

Respectfully submitted,

/s/ Michael R. Baumrind
Ronan Doherty
Georgia Bar No. 224885
Manoj S. Varghese
Georgia Bar No. 734668
Michael R. Baumrind
Georgia Bar No. 960296

BONDURANT MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 881-4100
(404) 881-4111 (fax)

Attorneys for *Amici Curiae* the Southern Center for Human Rights, Anti-Defamation League, GeorgiaCarry.org, Inc., and the Goldwater Institute.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Supplemental Brief of Amici Curiae The Southern Center For Human Rights, Anti-Defamation League, GeorgiaCarry.org, Inc., and the Goldwater Institute, in Support of Appellants Eva Lathrop, M.D., Carrie Cwiak, M.D. and Lisa Haddad, M.D., was served via the e-filing system and by email to the following counsel:

Susan Talcott Camp
American Civil Liberties Union Foundation
tcamp@aclu.org

Counsel for Appellants

Shalen S. Nelson
Senior Assistant Attorney General
snelson@law.ga.gov
Britt Grant
Solicitor General
bgrant@law.ga.gov

Counsel for Appellees

This 24th day of February, 2017.

/s/ Michael R. Baumrind
Michael R. Baumrind