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.	)	

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Rule 23, the Southern Center for Human Rights ("Southern Center"), Anti-Defamation League ("ADL"), GeorgiaCarry.org, Inc., and the Goldwater Institute, file this brief as *Amici Curiae* in support of Appellants Eva Lathrop, M.D., Carrie Cwiak, M.D., and Lisa Haddad, M.D., board-certified obstetricians and gynecologists licensed to practice in Georgia. Appellants challenge the constitutionality of O.C.G.A. §§ 16-12-140, 16-12-141, 31-9B-1, 31-9B-2, and 31-9B-3, as set forth in House Bill 954 ("the Act"), under the state constitutional rights of due process and equal protection. But their substantive challenge to the Act is not before the Court, because the superior court erroneously dismissed this case on sovereign immunity grounds. On the State's motion,[1] the court held that the State, its subdivisions, and its officers enjoy complete sovereign immunity, even in an action seeking to enjoin enforcement of an unconstitutional statute or requesting an order declaring such statute void.

The Southern Center, ADL, GeorgiaCarry.org, Inc., and the Goldwater Institute urge the Court to reverse the decision of the superior court and hold that sovereign immunity does not undermine the judicial power to rule on the constitutionality of state laws. This Court has long held that sovereign immunity is inapplicable when an aggrieved citizen challenges a statute as unconstitutional and

[1] *Amici* refer to the Appellees collectively as the "State."

seeks declaratory or injunctive relief. The basis for this conclusion has been either (1) the recognition that conduct beyond the bounds of the constitution is not conduct of the sovereign to which immunity attaches or (2) the understanding that an express constitutional right begets a cause of action to vindicate that right, amounting to a waiver of sovereign immunity. Whether the Court adopts the former or latter basis, the result is the same. Sovereign immunity is no bar to the constitutional challenges the Appellants raise.

If the Court holds for the first time that sovereign immunity forecloses actions to enjoin enforcement of an unconstitutional statute or declare such statute void, at least two classes of void statutes could go unchallenged: (1) statutes that chill constitutionally protected conduct and (2) statutes that permit unconstitutional state action. The judiciary's mandate to declare unconstitutional statutes void would be meaningless in important cases challenging these statutes, and aggrieved citizens could go without a viable remedy. Unless constitutional rights are illusory, this result should be untenable. But if the Court nonetheless adopts the State's position, *Amici* urge the Court to articulate what the appropriate remedy is in a case like this.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae the Southern Center, ADL, GeorgiaCarry.org, Inc., and the Goldwater Institute are civil rights organizations that protect the constitutional

rights of Georgia's citizens. The Southern Center is a non-profit, public interest law firm dedicated to protecting the civil and human rights of people in the criminal justice system. In its pursuit of justice, the Southern Center relies on and invokes the State Constitution. Sovereign immunity has never prevented the Southern Center from bringing actions for declaratory or injunctive relief seeking to vindicate constitutional rights. The trial court's contrary ruling threatens to undermine the Southern Center's efforts to fight for justice in several important cases.

ADL was organized in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, it is one of the world's leading organizations safeguarding individual religious liberty and fighting hatred, bigotry, discrimination, and anti-Semitism. ADL is a staunch supporter of constitutional equal protection and the religious rights and liberties guaranteed by both the Establishment and Free Exercise Clauses of the Georgia Constitution. ADL's interest in this litigation, therefore, goes far beyond reproductive freedom, touching on all aspects of constitutionally protected individual rights.

GeorgiaCarry.Org, Inc. is a non-profit corporation organized under the laws of the State of Georgia. Its mission is to foster the rights of its members to keep and bear arms. Its interest in this case is to advance the ability of Georgians to

bring appropriate actions against the State and its political subdivisions for violations of those rights.

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, the Goldwater Institute litigates and files amicus briefs in state and federal court to enforce the protections of the U.S. Constitution and the constitutions of the fifty states, including in Georgia state courts. If sovereign immunity were expanded as the State proposes, the time-honored tradition of public interest litigation in defense of individual rights will cease to exist in Georgia.

ARGUMENT

I. Sovereign immunity does not bar an action to enjoin enforcement of or to declare void a statute that violates an express constitutional right.

The State enjoys no sovereign immunity in an action seeking to enjoin enforcement of or to declare void a statute that violates an express constitutional right. This is true whether the Court decides that sovereign immunity simply does not attach in such cases—as this Court has suggested in the past—or that the constitutional right serves as a waiver of sovereign immunity—as this Court more

recently has held. *Amici* explain both approaches below, but either way, the result is the same.

A. Sovereign immunity does not bar suits challenging statutes as unconstitutional and seeking declaratory or injunctive relief against state officials in their official capacity.

Sovereign immunity is inapplicable in cases like this one challenging a statute as unconstitutional and seeking declaratory or injunctive relief against state officials. "[S]overeign immunity extends to the state and all its departments and agencies" except in a series of enumerated circumstances or where the State waives sovereign immunity. Ga. Const. art. I, § II, ¶ IX. But the meaning of the term "sovereign immunity" derives from common law. *See Gilbert v. Richardson*, 264 Ga. 744, 745 (1994) (recognizing that Georgia adopted the common law doctrine of sovereign immunity in 1784). And as discussed below, sovereign immunity at common law did not apply to State action outside the bounds of the Constitution. Accordingly, sovereign immunity today is no bar to an action seeking to declare an unconstitutional statute void or to enjoin its enforcement, and no waiver is necessary before a citizen can bring such an action against the State.

The concept of sovereign immunity derives from an "ancient maxim of the common law that 'the king is not bound by any statute if he be not expressly named to be so bound.'" *City of Atlanta v. Smith*, 99 Ga. 462,467 (1896). In the American adaptation of this principle, the State stands in the place of the crown.

See id. But "the supreme authority in this State is the people." *Smith v. City Council of Augusta*, 203 Ga. 511, 517 (1948); *accord* Ga. Const. art. I, § II, ¶ I ("All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."). And the people, through the State Constitution, have granted the State limited authority. *See Smith v. City Council of Augusta*, 203 Ga. at 517; *Hubbard v. State,* 176 Ga. App. 622, 626 (1985) (Deen, J., concurring specially) (recognizing that the Georgia Bill of Rights "constitutes a limitation on the power of government"); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power."). In other words, the Constitution circumscribes the State's sovereign power.

The Constitution, in turn, limits the power of the General Assembly. "The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state." Ga. Const. art. III, § VI, ¶ I. Thus, the Georgia Constitution has conferred no sovereign power on the General Assembly to enact unconstitutional laws.

It follows, therefore, that when the government nonetheless "passes a statute, under which an officer purports to act, which in fact is in violation of a constitutional limitation, the government has exceeded its legal powers and the officer is not protected by the statute against judicial control by suit." Edwin M. Borchard, *Government Liability in Tort*, 34 Yale L.J. 1, 19-20 (1924), *cited favorably by Gilbert*, 264 Ga. at 745.[2] Accordingly, sovereign immunity is inapplicable in an action seeking to declare an unconstitutional statute void.

For well over a century, in the context of eminent domain and the Takings Clause of the Georgia Constitution, this Court has reaffirmed the basic principle that unconstitutional conduct is not protected by sovereign immunity. The Takings Clause generally provides that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." Ga. Const. art. I, § III, ¶ I. In *Smith v. Floyd County*, the plaintiff sued the county alleging a violation of the Takings Clause and injuries suffered when the county's

[2] Some courts have adopted the reasoning of *Ex parte Young*, 209 U.S. 123, 159-60 (1908), and held that a suit against a state official enforcing an unconstitutional statute is not actually a suit against the State. *See, e.g.*, *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 850 (Tenn. 2008) ("Essentially, an officer acting pursuant to an unconstitutional statute does not act under the authority of the state; thus, the officer does not enjoy the immunity that would normally be granted pursuant to official authority."). To the extent the Court takes this approach, *Amici* urge the Court to hold that State officials in their individual capacity are not entitled to official immunity in such an action. *See* note 13 below.

construction efforts blocked the street to his property. 85 Ga. 420, 424 (1890). This Court held that the sovereign immunity cases did not apply to the plaintiff's constitutional challenge because those cases "were not within the terms of the constitution." *Id.* In other words, the State is entitled to sovereign immunity only when it functions within its constitutional power. No waiver of sovereign immunity is necessary in a case alleging the government violated the Constitution because sovereign immunity does not attach in the first place. *See City of Thomasville v. Shank*, 263 Ga. 624, 625 (1993) (reasoning that in a nuisance action premised on a violation of the Takings Clause, "we are dealing not with a waiver of but an exception to sovereign immunity"). In the 125 years since *Smith v. Floyd County*, this Court reaffirmed that where the State allegedly violates the Takings Clause it enjoys no sovereign immunity. *See, e.g.*, *Layer v. Barrow Cty.*, 297 Ga. 871, 872-73 (2015); *see also State Bd. of Educ. v. Drury*, 263 Ga. 429, 430 (1993) ("Since the recovery of just and adequate compensation for private property which is taken for public purposes is itself an express constitutional right, sovereign immunity is not a viable bar to an action to enforce that right.").

The Court's recent decision in *Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc.*, 294 Ga. 593 (2014), did not alter the fundamental principle that sovereign immunity is inapplicable in a suit seeking declaratory or injunctive relief against the State based on a constitutional violation.

In *Sustainable Coast*, the Court held only that, absent waiver, sovereign immunity barred plaintiffs from bringing a suit to enjoin State action that allegedly violated a *statute*; no constitutional violation was at issue. *Id.* at 593; *see also Olvera v. Univ. Sys. of Georgia's Bd. of Regents*, 298 Ga. 425, 428 & n.3 (2016) (holding that Georgia's Administrative Procedure Act does not waive sovereign immunity for students' declaratory judgment action against the Board of Regents challenging the interpretation of a policy manual, but suggesting that the case might be different had the students challenged the policy manual's "very constitutionality").

Although the Court in *Sustainable Coast* rejected the notion that there was an exception to sovereign immunity for injunction actions against state officials generally, the Court emphasized that sovereign immunity did not apply where the Constitution itself restricted the State's conduct. *Sustainable Coast*, 294 Ga. at 597. The eminent domain cases, the Court reasoned, had "proper[ly] recogni[zed] that the Constitution itself requires just compensation for takings and cannot, therefore, be understood to afford immunity in such cases." *Id.* at 600.[3] In other

[3] To be sure, the Court in *Sustainable Coast* described the Takings Clause both as "a proper waiver of sovereign immunity" and "a proper recognition that the Constitution itself requires just compensation for takings and cannot, therefore, be understood to afford immunity in such cases." 294 Ga. at 600. For the reasons explained above, *Amici* submit that the latter rationale—that sovereign immunity simply is not afforded in cases involving the violation of a constitutional right—is the better approach.

words, when the Constitution places limitations on the State as it does in the Takings Clause, the State enjoys no sovereign immunity outside those limitations.

Adopting this approach—and holding that sovereign immunity simply does not attach in a declaratory or injunctive relief action against a state official who acts beyond the limits of the state Constitution—would align Georgia with other states that have considered the issue. *See, e.g*, *Jones v. Bd. of Trustees of Ky. Ret. Sys.*, 910 S.W.2d 710, 713 (Ky. 1995) ("It would undermine and destroy the principle of judicial review to hold that the General Assembly could act with immunity, contrary to the Kentucky Constitution. Any such holding would leave citizens of this Commonwealth with no redress for the unconstitutional exercise of legislative power."); *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994) ("Sovereign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will."). In contrast, *Amici* found no case in Georgia or any state holding that sovereign immunity barred actions challenging a statute as unconstitutional and seeking only declaratory or injunctive relief.[4]

[4] In *Health Facility Investments, Inc. v. Georgia Department of Human Resources*, the Court summarily affirmed the dismissal on sovereign immunity grounds of a suit seeking declaratory, injunctive, *and* monetary relief for violations of "a plethora of federal and state constitutional provisions, the now defunct Medical Assistance for the Aged Act and the Magna Carta." 238 Ga. 383, 383-84

Amici urge the Court to hold that this case does not raise an issue of sovereign immunity. The Appellants allege that the Act violates, among other provisions, the Due Process Clause of the Georgia Constitution. Accordingly, the State should enjoy no immunity from suit here. The Superior Court erred when it held otherwise.

B. The Georgia Constitution establishes the rights of liberty and equal protection and thus a cause of action against the State to vindicate those rights.

Alternatively, the Court could hold that the express protection of a constitutional right constitutes a waiver of sovereign immunity. There are two ways the State may waive its sovereign immunity: by legislative enactment or by the Constitution itself. Ga. Const. art. I, § II, ¶ IX; *Olvera*, 298 Ga. at 426 (citing *Shank*, 263 Ga. 624(1)). Contrary to the State's argument, these two forms of

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(1977). However, this case lends no support to the State's broad claim regarding sovereign immunity. This Court recently explained that it has not considered whether "the doctrine of sovereign immunity bars claims for injunctive or declaratory relief from state action that is alleged to be unconstitutional." *State v. Int'l Keystone Knights of the Ku Klux Klan, Inc.*, 299 Ga. 392, 395 n.11 (2016). And *Health Facility Investments* did not even identify, much less analyze, the constitutional provisions at issue, which may have been among those that do not trigger a right of action against the State. *See infra* at page 13. In any event, the Court has continued to hold after *Health Facility Investments* that sovereign immunity does not apply in actions brought under constitutional provision like the Takings Clause, which protects an express constitutional right. *Shank*, 263 Ga. at 624. At bottom, *Health Facility Investments* simply does not address sovereign immunity as regards declaratory or injunctive relief claims alleging a violation of an express constitutional right. And *Amici* have found no case applying sovereign immunity to dismiss such claims.

waivers differ in at least one important way. A legislative waiver by the General Assembly generally must be express. *Colon v. Fulton Cty.*, 294 Ga. 93, 95 (2013). In contrast, a constitutional waiver of sovereign immunity—the kind of waiver applicable in this case—arises by "necessary implication" when the State "violates a constitutional right of a citizen." *Baranan v. Fulton Cty.*, 232 Ga. 852, 856 (1974).

The rationale for this constitutional form of waiver of sovereign immunity originates in the concept that a right is illusory if there is no accompanying remedy. *Smith v. Floyd Cty..*, 85 Ga. at 424. Indeed, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *see* Ga. Const. art. I, § I, ¶ XII ("No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state."). Thus, this Court has held that the violation of a constitutional right "must by necessary implication raise a cause of action in favor of the citizen against the county [for which sovereign immunity is no bar], unless some means of redress other than suit has been afforded by the legislature." *Smith v. Floyd Cty.*, 85 Ga. at 424; *accord State Hwy. Bd. of Ga. v. Hall*, 193 Ga. 717, 719 (1941).

The Georgia Constitution expressly protects the rights of liberty and equal protection at issue here, and thus it necessarily authorizes a cause of action against the State to vindicate these rights. Ga. Const. art. I, § I, ¶ I ("No person shall be deprived of life, liberty, or property except by due process of law."); Ga. Const. art. I, § I, ¶ II ("No person shall be denied the equal protection of the laws."). Because the rights of liberty and equal protection are themselves "express constitutional right[s], sovereign immunity is not a viable bar to an action to enforce [those] right[s]." *Drury*, 263 Ga. at 430; *see, e.g.*, *Huff v. DeKalb Cty., Ga.*, No. 1:05-cv-1721-WSD, 2007 WL 295536, at *9 (N.D. Ga. Jan. 30, 2007) (Duffey, J.) (holding that sovereign immunity did not apply in an action seeking to vindicate equal protection rights under the Georgia Constitution).

The express constitutional rights that trigger a waiver of sovereign immunity are those found in self-executing constitutional provisions; "[t]hey need no legislative sanction to give them efficacy[,] are . . . too plain to be misunderstood, and [are] not to be violated or evaded by the legislature or the courts." *C.F.I. Constr. Co. v. Bd. of Regents of Univ. Sys. of Ga.*, 145 Ga. App. 471, 477 (1978) (internal quotation marks omitted), *superseded in part by constitutional amendment*, art. I, § II, ¶ IX(c) (1983); *see, e.g.*, *Gray v. Virginia Sec'y of Transp.*, 662 S.E.2d 66, 71-72 (Va. 2008) (recognizing that a self-executing constitutional provision, one requiring no further legislation to make it operative, constitutes a

waiver of sovereign immunity). Other examples of self-executing constitutional provisions include "constitutional provisions in bills of rights[,] . . . those merely declaratory of common law[, and those] . . . which specifically prohibit particular conduct." *Gray*, 662 S.E.2d at 71. The constitutional provisions involved in this case, including the Due Process and Equal Protection Clauses, are self-executing and thus trigger a waiver of sovereign immunity.

The State's arguments to the contrary are unavailing. First, the State erroneously asserts that constitutional waivers of sovereign immunity must be express. But the cases cited at page 11 of the State's brief each involve *statutory* waivers of sovereign immunity. Moreover, this Court's eminent domain cases belie the State's argument about constitutional waivers by recognizing that a violation of an express constitutional right "by necessary *implication* raise[s] a cause of action in favor of the citizen against the" State. *Smith v. Floyd Cty.*., 85 Ga. at 424 (emphasis added). The Takings Clause waiver exists not because the Constitution expressly provides a *waiver* of sovereign immunity; after all, the clause does not mention "immunity" or "waiver." Ga. Const. art. I, § III, ¶ I. *Compare* Appellees' Br. at 17 (erroneously arguing that if a clause of the Constitution does not mention "immunity," "waiver," or "State," then "by its plain terms, the Clause does not give any party the right to sue the State"). Instead, the Takings Clause expressly protects a *right* and limits the State's power to infringe

that right; thus, the Takings Clause serves as an *implied* waiver of sovereign immunity. *Baranan*, 232 Ga. at 856. To the extent the State conflates statutory and constitutional waivers of sovereign immunity, it is wrong.

Second, the State acknowledges that an express constitutional right may amount to a waiver of sovereign immunity. *See* Appellees' Br. at 11-12 (recognizing that the express right to just compensation in the Takings Clause constitutes a waiver of sovereign immunity). But the State would have the Court pick and choose between the rights of Georgia's citizens by ignoring the express constitutional rights the Appellants invoke in this case: the rights to liberty, equal protection, and freedom of conscience.[5] It is true that Appellants specifically invoke the right to privacy, but the State is wrong when it suggests that the right to privacy is a "judicially-recognized addition to the procedural due process clause." Appellees' Br. at 12. It is not an addition. It is "a 'liberty of privacy' guaranteed by the Georgia constitutional provision which declares that no person shall be deprived of liberty except by due process of law." *Powell v. State*, 270 Ga. 327, 329 (1998). In other words, a violation of the right of privacy *is* a violation of the

[5] *See* Ga. Const. art. I, § I, ¶ I ("No person shall be deprived of life, liberty, or property except by due process of law."); *Id.* art. I, § I, ¶ II ("No person shall be denied the equal protection of the laws."); *Id.* art. I, § I, ¶ III ("Each person has the natural and inalienable right to worship God, each according to the dictates of that person's own conscience; and no human authority should, in any case, control or interfere with such right of conscience.").

express right to liberty in the Due Process Clause. *See id.* This violation raises the Appellants' right of action for declaratory or injunctive relief.

Finally, the State argues that an express constitutional right only amounts to a waiver of sovereign immunity to the extent the Constitution also expressly provides the remedy. Appellees' Br. at 13-14.[6] The State is wrong again, because the Court rejected this very argument in *Baranan*. The issue in *Baranan* was whether the Takings Clause gives rise to an action for injunctive relief even though the Clause makes no mention of such a remedy. 232 Ga. at 856. There, a citizen sued the county to enjoin changes to the drainage system that would increase the flow of surface water on his property. *Id.* at 852. The county conceded that the Takings Clause gives rise to an action for damages; the clause expressly states that just and adequate compensation must be paid. *Id.* at 856. But the county maintained that injunctive relief was unavailable because the clause does not specifically mention that remedy. *Id.* The Court disagreed. "[T]he form of action is unimportant," the Court held, "where the right of action arises under the Constitution." *Id.* The citizen was free to pursue an action for injunctive relief to vindicate his express constitutional right. Likewise, here, even though the Due Process Clause does not identify injunctive or declaratory relief as the appropriate

[6] Again, the State relies only on cases involving *legislative* waivers of sovereign immunity to argue that *constitutional* waivers of sovereign immunity must expressly provide the remedy. *Id.* at 13.

remedy, "the right of action . . . arise[s] by necessary implication from the constitutional provision." *Id.*[7]

In sum, whether the Court considers a Constitutional provision expressly protecting a right as a waiver of sovereign immunity, *Olvera*, 298 Ga. at 426 n.1, or simply a "proper recognition that" immunity does not apply, *Sustainable Coast*, 294 Ga. at 600, the result is the same. Sovereign immunity is no bar to a suit against the State to enjoin enforcement of an unconstitutional statute. The Court should reverse the dismissal of this action on sovereign immunity grounds and remand for further proceedings.

II. The State's sovereign immunity position is incompatible with the Constitution because it threatens a core function of the coequal judicial branch of government and, if adopted, could leave aggrieved citizens without a remedy.

If the Court adopts the State's position—and concludes for the first time in Georgia's history that sovereign immunity protects the State from actions seeking to declare an unconstitutional statute void and enjoin its enforcement—that would reduce significantly one of the judiciary's core powers and could leave aggrieved

[7] In the eminent domain context, the Constitution expressly establishes a right to just compensation, and thus, the State has no sovereign immunity in cases seeking declaratory, injunctive, *or compensatory* relief. *See Columbia Cty. v. Doolittle*, 270 Ga. 490, 491 (1999). Here, *Amici* do not suggest that the constitutional right of liberty also establishes a right to compensation when that right is infringed, and in any case, the Appellants here seek only injunctive and declaratory relief.

citizens without a remedy. The Constitution provides, "Legislative acts in violation of this Constitution or the Constitution of the United States are void, *and the judiciary shall so declare them*." Ga. Const. art. I, § II, ¶ V (emphasis added). In other words, "[i]t is the duty of this Court, and all courts, to ensure that, absent a compelling state interest, legislative acts do not impinge upon the inalienable rights guaranteed by our State Constitution." *Powell*, 270 Ga. at 336 (Sears, J., concurring). But according to the State, the judiciary only can perform this duty in limited circumstances including (1) when the executive branch brings a case and the citizen raises the Constitution as a defense or (2) when the legislative branch waives immunity. Appellees' Br. at 14-15, 23-24.

This novel application of sovereign immunity subordinates the judicial branch of government, crippling its power in cases challenging at least two important classes of unconstitutional statutes: (1) those that bar citizens from engaging in constitutionally protected conduct and (2) those that authorize the State to engage in unconstitutional actions. Allowing such unconstitutional statutes to go unchallenged would be more than just "harsh." Appellees' Br. at 26-27. It would thoroughly undermine the constitutionally-enshrined check on legislative and executive power in important civil rights cases. Any interpretation of the sovereign immunity provision of the Constitution should avoid this constitutional conflict. *See Foster v. Brown*, 199 Ga. 444, 449 (1945) (recognizing

that courts should construe constitutional provisions together to avoid conflict if possible).

A. Preenforcement lawsuits are the only viable remedy to constitutional injuries caused by the simple existence of an unconstitutional statute.

The first type of void statute that the State's position would immunize against any meaningful challenge is one whose simple existence results in a palpable injury. Yet, the State's position could eliminate lawsuits seeking to redress this injury and allow the State's legislative power to go unchecked.

Take for example cases like the Appellants', where a statute forces a citizen to abandon her rights or to risk criminal prosecution. This Court has long held that if a citizen is faced with this dilemma, the proper remedy is a preenforcement lawsuit against the State. *Jenkins v. Manry*, 216 Ga. 538, 540-41 (1961); *see also City of Atlanta v. Lopert Pictures Corp.*, 217 Ga. 432, 438 (1961) ("A petition for declaratory judgment is an available remedy where there exists a justiciable issue, involving uncertainty and danger of loss or detriment to the applicant in the event he chooses the wrong one of two or more legally uncharted courses that appear to be open to him."). This Court has explained that a citizen should not "be forced to violate the law which he thinks unconstitutional, and suffer a criminal prosecution, in order to test the validity of the law." *Jenkins*, 216 Ga. at 540-41; *see, e.g.*, *Sarrio v. Gwinnett Cty.*, 273 Ga. 404, 406 (2001); *accord Total Vending Serv., Inc. v. Gwinnett Cty.*, 153 Ga. App. 109, 111 (1980) (Carley, J.) (holding that a

declaratory judgment action was the appropriate remedy to test the validity of an allegedly void criminal statute).

If the Court adopts the State's position, however, citizens faced with the choice of abandoning their rights or risking prosecution will be "effectively coerced" to choose restraint. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). And the legislative coercion itself would be a constitutional harm for which the aggrieved citizen is entitled to a remedy. *See* Ga. Const. art. I, § II, ¶ IV; *Powell*, 270 Ga. at 336 (Sears, J. concurring).

This Court reaffirmed these principles in *Sarrio*, where the American Legion wished to conduct its annual turkey shoot to generate funds that it would donate to various charities. *Sarrio*, 273 Ga. at 404. A county ordinance, however, prohibited the discharging of a weapon within 500 feet of a residence, and the turkey shoot fell within that zone. *Id.* The American Legion believed the statute was unconstitutional, and faced a choice: cancel the shoot and lose money or proceed with the shoot and risk incurring a fine of between $100 and $1,000 and imprisonment of up to 60 days. *See id.*[8] So the American Legion brought an action for declaratory and injunctive relief against the county. *Id.*

[8] The relevant code provision, Gwinnett County Code § 74-6, did not provide specific penalties, and thus the general penalties provision in § 1-11 applied. *See* Gwinnett Cty. Code § 1-11 (providing that where a code provision is

The Court held that both the declaratory judgment and injunctive relief claims were cognizable. The Court explained that if the American Legion could show that enforcement of the ordinance was about to be undertaken and that it was in "imminent danger of losing some valuable and irrecoverable property right as a result of a threatened prosecution," the American Legion would be entitled to a declaratory judgment. *Id.* at 406 (internal quotation marks omitted). And because the American Legion showed that it faced a threat of prosecution if it went forward with the turkey shoot or lost revenue if it did not, injunctive relief was also a viable option. Sovereign immunity was not an issue. *See id.*

The Appellants here confront a much more severe choice than the one that faced the American Legion in *Sarrio*, and their dilemma demonstrates just how wrongheaded the State's position is. On one hand, the Appellants could succumb to the coercive power of the Act and refrain from providing medical care to their patients. On the other hand, the Appellants could violate the law and risk a *minimum* of one year and up to ten years in prison, O.C.G.A. § 16-12-140, not to mention the loss of their medical licenses and damage to their reputations. Moreover, the Appellants would have to risk these harsh consequences to protect

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silent as regards the specific penalty, "the violation of that provision of the Code . . . shall be punished by the proper court by the imposition of a fine of not less than $100.00 nor more than $1,000.00, or imprisonment for not more than 60 days, or both").

someone else's rights. Here, there is an immediate, preenforcement constitutional harm. And yet, if the State prevails, the Court would have no power to hear this case. Were the sovereign immunity clause of the Constitution intended to eviscerate the judiciary's power in this significant way, it would have said so expressly.

A rule prohibiting affirmative challenges to state statutes on constitutional grounds would free the General Assembly to wield virtually unrestrained power in a variety of other contexts. For example, free speech cases routinely reach the court on a preenforcement basis because irreparable injury occurs when citizens comply with a law by refraining from engaging in protected expression. *See, e.g.*, *Great Am. Dream, Inc. v. DeKalb Cty.*, 290 Ga. 749, 751-52 (2012). As this Court has recognized, a violation of Georgia's constitutional right to free speech, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). This is also why courts have relaxed the standing requirements in free speech cases challenging statutes as overbroad. *See, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (recognizing that an overbroad statute's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression"). If Georgia citizens cannot sue the State to challenge a statute burdening their free

speech rights, the constitutional chilling effect of the statute would continue unabated.

Some constitutional injuries only can be redressed through preenforcement lawsuits against the State or its officers. Adopting the State's position on sovereign immunity would eliminate such suits, potentially leaving aggrieved citizens without a remedy and allowing the General Assembly to exceed its constitutional limits without recourse.

B. For some constitutional rights to have any meaning, citizens must be able to sue the State to enjoin implementation of an unconstitutional statute.

A second type of void statute that the State's position would immunize against any challenge is one that authorizes the executive branch to engage in unconstitutional conduct. Consider an example involving the Establishment Clause, which prohibits the state from requiring religious material in public schools. *See* Ga. Const. art. I, § II, ¶ VII; *Bennett v. City of La Grange*, 153 Ga. 428, 432 (1922) (explaining that the nearly identical prior version of this constitutional provision "undertakes to protect the citizens of this state against having money . . . taken or appropriated in aid of any" religion). The Establishment Clause would be toothless if citizens had no way to enjoin the implementation of a statute that violates it. The State could, for instance, require

the posting of religious material on the wall of each public classroom,[9] and citizens could have no viable way to stop it. Sovereign immunity does not authorize what essentially amounts to a legislative elimination of a constitutional right.

The thought that the State could enact and enforce a law in this way, while cutting the judicial branch out of the picture, is troubling. Taken to the extreme, the State could close public schools in violation of Article VIII, Section I, Paragraph I,[10] take away guns in violation of Article I, Section I, Paragraph VIII,[11] or eliminate media outlets in violation of Article I, Section I, Paragraph V.[12] These

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[9] *See, e.g.*, *Stone v. Graham*, 449 U.S. 39, 42-43 (1980) (invalidating a state statute requiring the posting of a copy of the Ten Commandments on the wall of each public classroom in the State). That there may be a remedy under federal constitutional law has no bearing on whether State sovereign immunity bars claims arising under the State constitution. The rights afforded under the State constitution are separate from and independent of the rights under the federal constitution. *See Pope v. City of Atlanta*, 240 Ga. 177, 178 (1977) (recognizing that, although similar, state and federal constitutional rights are separate and independent, and "[q]uestions of the construction of the State Constitution are strictly matters for the highest court of this State"); *accord Selman v. Cobb Cty. Sch. Dist.*, 449 F.3d 1320, 1338 (11th Cir. 2006) (recognizing that the federal and Georgia Establishment Clause issues may be decided differently). Moreover, the rights under Georgia's Establishment Clause are stronger than those under the federal constitution. *See Birdine v. Moreland*, 579 F. Supp. 412, 417 (N.D. Ga. 1983) (Shoob, J.) (citing Ga. 1960-61 Op. Ga. Att'y Gen. at 349).

[10] "Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation . . . ." Ga. Const. art. VIII, § I, ¶ I.

[11] "The right of the people to keep and bear arms shall not be infringed . . . ." Ga. Const. art. I, § I, ¶ VIII.

[12] "No law shall be passed to curtail or restrain the freedom of speech or of the press." Ga. Const. art. I, § I, ¶ V.

hyperbolic examples are impossible when citizens can bring a constitutional challenge against the State to enjoin implementation of such draconian laws. But if the Court announces a new rule in this case that sovereign immunity closes the courthouse doors to constitutional challenges seeking declaratory or injunctive relief against state statutes, the judicial check on legislative and executive power will be all but eliminated. For these reasons, the Court should reject the State's position and hold that sovereign immunity does not apply here.

III. If sovereign immunity bars Appellants' suit against the State, it is unclear what their remedy would be.

If contrary to history and precedent, this Court decides that sovereign immunity precludes suit against State actors in their official capacity seeking to enjoin and declare void an unconstitutional statute, it is unclear what the appropriate remedy would be. Contrary to the State's suggestion, *see* Appellees' Br. at 23-24, private civil suits, *quo warranto* suits, and writs of mandamus do not allow the judiciary to rule on the constitutionality of a criminal statute in a case such as this one. It is difficult to imagine how the constitutionality of a criminal statute would ever arise in a private civil suit. And neither *quo warranto* actions nor writs of mandamus are applicable where an aggrieved citizen seeks to prevent the State from enforcing an unconstitutional statute. *See* O.C.G.A. § 9-6-60 (providing that a *quo warranto* action is appropriate where a person seeks "to inquire into the right of any person to any public office the duties of which he is in

fact discharging"); O.C.G.A. § 9-6-20 (providing that a writ of mandamus is used to *compel* performance, not enjoin it); *Brissey v. Ellison*, 272 Ga. 38, 39 (2000) ("A writ of mandamus . . . is the remedy for *inaction* of a public official." (internal quotation marks omitted) (emphasis added)).

Although this Court recently suggested that individual capacity suits may be appropriate where sovereign immunity bars claims against public officers in their official capacity, *Sustainable Coast*, 294 Ga. at 603, it is unclear whether an individual capacity suit is appropriate here. For one thing, even if the Appellants sued state officers in their individual capacity, courts could nonetheless construe the action as one against the State because it seeks to enjoin the State (and not just individual State officers) from enforcing the Act. *See Evans v. Just Open Government*, 242 Ga. 834, 838-39 (1979) (holding that, despite suing state officials in their individual capacity, the plaintiffs' case was really against the State, and thus sovereign immunity applied unless waived). And it is not at all clear that a judgment against officers in their individual capacity would bind the officers' successors. Without such a binding effect, any judgment in Appellants' favor may not remedy the constitutional harm they suffer. Moreover, as the State recognizes, "[o]utside the context of tort liability, the Constitution establishes strict limitations

on the availability of suits against officers in their individual capacities." Appellees' Br. at 22 n.3 (citing Ga. Const. art. I, § II, ¶ IX (d)).[13]

If the Court decides that sovereign immunity bars this action, *Amici* urge the Court to explain what the viable alternative remedy is, because when there is a constitutional injury, there must be a remedy. *Marbury*, 5 U.S. at 163; Ga. Const. art. I, § I, ¶ XII. The rights preserved in the Constitution are not illusory, and the General Assembly's power is not limitless.

CONCLUSION

For the reasons presented above and in the Appellants' Brief, *Amici Curiae* request that this Court reverse the entry of dismissal in favor of Appellees. The doctrine of sovereign immunity does not bar an action seeking a declaratory

[13] *Amici* submits that, if sovereign immunity bars Appellants' claims against the defendants in their official capacity, qualified immunity does not bar claims against the defendants in their individual capacity. State qualified immunity, also called "official immunity," applies only to suits alleging the performance or nonperformance of "official functions." Ga. Const. art. I, § II, ¶ IX(d); *Cameron v. Lang*, 274 Ga. 122, 123 (2001). When an official acts pursuant to an unconstitutional statute, however, her conduct is not an "official function" because the action is beyond the power of the State. *See* supra Part I.A. In addition, as under federal law, "qualified immunity is unavailable in a suit to enjoin future conduct." *Pearson v. Callahan*, 555 U.S. 223, 242-43 (2009); *c.f. Wallace v. Greene Cty.*, 274 Ga. App. 776, 780 (2005) (holding that official immunity barred an action for damages and not addressing official immunity as regards the separate claim for injunctive relief); *see also Cameron*, 274 Ga. at 123 (looking to federal law of qualified immunity when analyzing a state official immunity issue). Of course, there is no need to reach qualified immunity issues if the Court concludes, as Appellants and *Amici* urge, that sovereign immunity is not a bar to the Appellants' case.

judgment that a statute violates the Georgia Constitution and an injunction against the enforcement of the unconstitutional statute. *Amici* urge the Court to remand this case for a decision on the merits.

This 6th day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Amici Curiae The Southern Center For Human Rights, Anti-Defamation League, GeorgiaCarry.org, Inc., and the Goldwater Institute, on Behalf 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:

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