IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

CASE NUMBER S22A0837

CAMDEN COUNTY,
GEORGIA

Petitioner,

v.

ROBERT C. SWEATT, JR.,
et al.

Respondents.

BRIEF OF ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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ATTORNEYS FOR *AMICUS CURIAE* ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA

I. STATEMENT OF INTEREST AND AUTHORIZATION

This brief is filed by the Association County Commissioners of Georgia (ACCG) pursuant to the Order of this Court in Case No. S22A0837 dated May 16, 2022.

ACCG is a nonprofit instrumentality of Georgia's county governments formed in 1914 and serves as the consensus-building, training, and legislative organization for all 159 Georgia county governments. The constituency of ACCG includes more than 800 county commissioners; at least 426 appointed county clerks, managers, administrators, and attorneys; and almost 85,000 full-time and part-time employees. ACCG works to ensure that counties can provide the necessary leadership, services, and programs to meet the health, safety, and welfare needs of Georgia citizens through education and technical assistance, with the objective of promoting more effective and efficient county government.

This case presents a question that is exceptionally important to all ACCG members: "Does the initiative and referendum component of county home rule extend to matters beyond amendments to the organic local Act creating and regulating the county governing authority?" *Amicus* submits that the answer is no, and because of ACCG's role in advancing the interests of counties in matters having state-wide ramifications, it has a direct and significant interest in the question raised

by this case. Should this Court rule in Respondents' favor on this issue, the consequence will be cycles of actions by elected county and city governing authorities, followed by voter petitions to overturn those actions, then new local government actions and potential new petitions/referenda -- all in contravention of the constitution's establishment of governance by a county governing authority as the elected representatives of its citizens. Such an outcome would have a dramatic impact on ACCG's 159 county members, from both an operational and cost standpoint: counties would have to provide funding for the staffing, equipment, and locations for holding this new category of countywide special elections.

II. ARGUMENT AND CITATION OF AUTHORITY

ACCG adopts the arguments, citations of authority, and conclusions put forward by Petitioner, including the proper interpretation and applicability of the petition and referendum process contained in subparagraph (b)(2) of Art. IX, Sec. II, Para. I of the Georgia Constitution ("the County Home Rule paragraph"). However, in this Brief, ACCG will focus primarily on two issues: 1) whether the County Home Rule paragraph is even implicated by the underlying contractual action by Petitioner's governing authority; and 2) if the County Home Rule paragraph does apply to the underlying contractual action, whether this Court's directly relevant precedent should be reversed.

A. The County Home Rule paragraph is Inapplicable to Petitioner's Action to Enter a Real Estate Contract to Purchase Real Property.

In short, the Court need not reach the above interpretation question as posed in the main briefs in this case, because the action by Petitioner's governing authority was not legislative in nature and thus does not implicate the County Home Rule paragraph. Understanding and interpretation of that constitutional paragraph (and nearly identical statute for municipalities, O.C.G.A. § 36-35-3) requires a review of the context and setting in which it was adopted. As this Court has stated,

> A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them. Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption.[1]

1. Relevant History of Home Rule in Georgia

The origins of home rule in this state have been documented amply and ably in no less than five detailed studies by the preeminent and renowned Georgia local government law scholar, Professor R. Perry Sentell, Jr.[2] Professor Sentell describes

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[1] *Ga. Motor Trucking Association v. Ga. Dept. of Revenue*, 301 Ga. 354, 357 (2017).

[2] R. Perry Sentell, Jr., former Carter Professor of Law Emeritus, University of Georgia School of Law. *Home Rule Benefits or Homemade Problems for Georgia*

the genesis of the concept of home rule as a result of "the eternal tension between local governments and the state."[3] This tension was perhaps evidenced best by the polar opposite opinions of two noted scholars of law, Justice Thomas M. Cooley and Mr. John Dillon. Justice Cooley's opinion[4] was that cities possessed an inherent and absolute right of local self-government that could not be controlled by a state legislature.[5] Mr. Dillon, however, asserted the precise opposite by proclaiming that there was no local self-government because any power which a city might possess came solely and completely from the state legislature.[6] His assertions resolved themselves into what has become known popularly as Dillon's Rule, which states that "any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the [municipal] corporation, and the power is

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Local Government? and *"Home Rule:" Its Impact on Georgia Local Government Law*; both appearing in *Studies in Georgia Local Government Law*, 3rd Edition (1977); and *Local Government "Home Rule": A Place to Stop?*, *The Express Exclusions From Home Rule Powers*, and *The United States Supreme Court As Home Rule Wrecker*; all appearing in *Additional Studies in Georgia Local Government Law* (1983).

[3] *The Georgia Home Rule System*, 50 MERCER L. REV. 99, 100 (1998).

[4] *LeRoy v. Hurlbut*, 24 Mich. 44, 93 (1871).

[5] *The Georgia Home Rule System*, 50 MERCER L. REV. 99, 100-101 (1998).

[6] *Id.* at 101.

denied."[7] Professor Sentell noted that as Dillon's thinking became persuasive, it further became the backbone of "the doctrine of 'plenary' state legislative power" or, put another way, "the doctrine of legislative supremacy".[8] Parsed to its minimum, this means that because a city (or county) is an entity created by the state, it: 1) is subordinate to the state; 2) has and may exercise only those powers given it by the state; and 3) the state's control is limited only by the federal and state constitution.[9]

Additionally, under Art. III, Sec. I, Para. I of the constitution,[10] legislative power is vested in the General Assembly, and Art. III, Sec. VI, Para. III of the constitution prohibits the General Assembly from abridging its own powers.[11] Under this constitutional environment, this Court repeatedly held unconstitutional general or local Acts of the General Assembly that sought to grant legislative powers to counties or cities.[12] Combining this constitutional structure with Dillon's Rule, the only way available to take away legislative power from the General Assembly and

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Art. III, Sec. I, Para. I of the Georgia Constitutions of 1983, 1945, and 1877.

[11] Ga. Const. 1983, Art. III, Sec. VI, Para. III; Ga. Const. 1945, Art. IV, Sec. I, Para. II.

[12] See, e.g., *Richter v. Chatham County*, 146 Ga. 218, 220 (1913)(voter registration); *Phillips v. Atlanta*, 210 Ga. 72, 74-75 (1953)(annexation).

delegate that legislative power to a county or city governing authority would be to provide for that delegation in the constitution itself so as to provide for an exception to the Article III limitations noted above.

For purposes of interpreting the County Home Rule paragraph, relevant efforts to loosen those non-delegation restrictions and pave the way for the exercise of legislative authority at the local government level began with a 1954 constitutional amendment[13] of an enabling character, authorizing the General Assembly to provide for home rule for Georgia municipalities.[14] However, not until 1965 did the constitutional delegation of legislative home-rule powers to local governments become a reality, via the Municipal Home Rule Act of 1965[15] (adopted under authority of the 1954 constitutional amendment) and the corresponding (and

[13] 1953 Ga. Laws, p. 504, amending Ga. Const. 1945, Art. XV, Sec. I, Para. I ("The General Assembly is authorized to provide by law for the self-government of municipalities and to that end is hereby expressly given the authority to delegate its powers so that matters pertaining to municipalities upon which, prior to the ratification of this amendment, it was necessary for the General Assembly to act, may be dealt with without the necessity of action by the General Assembly…"). With non-substantive wording changes, this provision is now found at Ga. Const. 1983, Art. IX, Sec. II, Para. II.

[14] For a discussion of the prior fits and starts relating to home rule in Georgia, see Hynds, "Home Rule in Georgia," 8 MERCER L. REV. 337 (1957).

[15] 1965 Ga. Laws, p. 296, particularly § 3 (now O.C.G.A. § 36-35-3).

identical in all substantive respects) 1966 constitutional amendment that became the County Home Rule paragraph.[16] That 1966 amendment thus for the first time granted legislative powers to Georgia counties. As detailed by Professor Sentell, that authority exists in two categories or tiers of "crucial 'legislating' delegations,"[17] with the first tier being set forth in subparagraph (a):

> "The governing authority of each county shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which is not inconsistent with this Constitution or any local law applicable thereto." [18]

Thus, constitutional county home rule was specifically designed to overcome the preexisting prohibition on the exercise or delegation of legislative power from the

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[16] 1965 Ga. Laws, p. 752 (now Ga. Const. 1983, Art. IX, Sec. II, Para. I). Because the 1954 constitutional amendment only applied to municipalities, a constitutional amendment was necessary to grant or delegate legislative powers to counties for the reasons previously described. Rather than an enabling amendment and subsequent general law as in the municipal context, the General Assembly and voters chose to place county home rule powers directly in the constitution.

[17] Sentell, *supra* n. 2 at 111.

[18] Ga. Const. 1983, Art. IX, Sec. II, Para. I(a)(emphasis supplied). The second tier granted county governing authorities the power to amend or repeal (with some exceptions) acts of the General Assembly that apply to that particular county. See Ga. Const. 1983, Art. IX, Sec. II, Para. 1(b), discussed in detail in Petitioner's Brief.

state and to grant broad, uniform power to county governing authorities to legislate via ordinance, resolution, or regulation as those legislating bodies saw fit, in situations where other general law does not speak to the specific subject matter of a given county action.

2. Contractual and Property Powers of County Governing Authorities

The present case centers on Petitioner's contractual option to buy real estate and Respondents' efforts to reverse that option contract. In contrast to the background described above, no general constitutional authorization was necessary for matters that were or are not legislative in nature, such as the power to enter contracts relating to real property – that power existed prior to adoption of the County Home Rule paragraph, and continues to exist as recognized under general law such as O.C.G.A. §§ 36-5-22.1[19] and 36-60-13, as well as by local Act.[20] Indeed, long before adoption of the constitutional amendment at issue in this case, this Court characterized a county's act of entering a contract as quasi-judicial rather than

[19] This statute's grant of "original and exclusive jurisdiction" to county governing authorities over county properties has existed in Code since at least 1890. See Ga. Code 1890, § 337.

[20] As specifically relevant to the present action, Ga. L. 2002, p. 3609, Section 5 provides in pertinent part that the board of commissioners of Camden County shall have exclusive power and control over "the management, control, purchase, and sale of assets and property."

legislative.[21] Because Petitioner's action was not legislative, subparagraph (a) of the County Home Rule paragraph is not implicated. It therefore follows that Respondents' argument that the petition-and-referendum repeal process of subparagraph (b) can be applied to subparagraph (a) actions is irrelevant and inapplicable to the facts of this case.

Additionally, and as highlighted in the text quoted above, subparagraph (a) contemplates separate general law authorization for certain actions beyond the Home Rule paragraph. In this regard, the General Assembly has enacted a general law which authorizes a county to enter into certain contracts of all kinds for the acquisition of goods, materials, real and personal property, services, and supplies, provided that any such contract meets stated requirements,[22] in addition to the previously referenced general law giving exclusive jurisdiction to county governing authorities on property matters. Furthermore, the General Assembly has by local Act specifically empowered Petitioner's board of commissioners to exercise exclusive power and control over the purchase of property.[23] In this latter regard, Article IX,

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[21] *Paulding County v. Scoggins*, 97 Ga. 253 (1895)(county ordinaries – the predecessors of county commissioners – "exercise quasi-judicial functions" in contracting for bridge repairs).

[22] O.C.G.A. § 36-60-13(a).

[23] 2002 Ga. L., p. 3609, Section 5.

Section I, Paragraph I of the constitution specifically allows the General Assembly to vest powers in a county board of commissioners. Consequently, the relevant action by Petitioner's board of commissioners in this case is not a home rule action within the meaning of subparagraphs (a) or (b) at all but is an action that is specifically authorized by the Constitution, general law, and local Act within the meaning of the subparagraph (a) exception to subparagraph (b). Since the authorization for Petitioner's action does not flow from the County Home Rule paragraph, it necessarily follows that the petition and referendum procedure of subparagraph (b) is inapplicable and unavailable to undo or otherwise affect Petitioner's decision to enter the option contract.

3. Conclusion

Under the facts of this case, therefore, the Court need not parse the potentially conflicting language in Art. IX, Sec. II, Para. I in the introductory phrase of subparagraph (b) and the reference in subparagraph (b)(2) back to subparagraph (a). Furthermore, the Court need not revisit its decision in *Kemp v. City of Claxton*.[24] The action taken by Petitioner's governing authority was not the type of legislative matter that subparagraph (a) of the County Home Rule paragraph was intended to

[24] 269 Ga. 173 (1998).

enable. Rather than "legislating," Petitioner's board of commissioners took an action falling within the long-standing powers of counties – outside of and predating the County Home Rule paragraph -- to enter into contracts and to own real property. Because Petitioner's authority to make the at-issue contractual decision was not dependent upon the *legislative* authority set forth in subparagraph (a) of the County Home Rule paragraph and because other general law authorization existed for Petitioner's contractual decision, the present action is not a proper case for the Court to determine whether the petition and referendum procedure of subparagraph (b)(2) is available to overturn legislative acts under subparagraph (a).

B. The *Kemp* Analysis is Directly Applicable and Stare Decisis Should Apply, Even if the Court Finds Petitioner Acted under Home Rule.

Kemp v. City of Claxton[25] involved municipal home rule and the applicability of an exercise of second tier delegation in the form of petition and referendum purporting to amend an exercise of first tier delegation – the same factual scenario that exists in the present case (presuming the Court rejects the analysis above and concludes Petitioner was acting under its subparagraph (a) home rule authority). In *Kemp*, this Court held that a second-tier delegation petition and referendum cannot

[25] 269 Ga. 173 (1998).

be used to amend a mere first-tier ordinance or resolution.[26] While *Kemp* directly involved statutory municipal home rule rather than constitutional county home rule, the relevant language used by the General Assembly, which adopted each at the same time, is substantively identical. As described in Section A(1) of this Brief, the municipal home rule statute and the constitutional County Home Rule paragraph have a common origin,[27] and thus should be interpreted consistently.

> After applying rules of statutory construction, the *Kemp* Court concluded that when examined in the context of the structure of O.C.G.A. § 36-35-3, the very concept of home rule suggests that the provisions of (b)(2) apply only to charter amendments…. Under an interpretation of O.C.G.A. § 36-35-3(b)(2) that would allow the electorate to petition for a referendum on all ordinances and resolutions, the electorate would be exercising legislative power. As we must strictly construe the grant of legislative power to the governing authority, we must reject plaintiffs'

[26] The facts and analysis of *Kemp* are covered in detail in Petitioner's Brief, and thus are not reprised in detail here.

[27] The relevant municipal home rule provisions were enacted by 1965 Ga. Laws, p. 298, § 3. The County Home Rule paragraph was adopted in the 1965 regular session of the General Assembly, 1965 Ga. Laws, p. 752, and ratified at the 1966 statewide general election.

argument that the electorate can directly exercise such general legislative power. The petition procedure of O.C.G.A. § 36-35-3 (b) (2) applies only to amendments to municipal charters.[28]

Kemp ruled that legislative intent will be effectuated even if some language must be eliminated. The same analysis has equal force with regard to the present action and the interpretation of the County Home Rule paragraph. While the phrase "amendments to or repeals of ordinances, resolutions, or regulations" does appear in subparagraph (b)(2), it does not stand alone. It must be read in conjunction with the overall subparagraph (b) preface of the grant of second-tier home rule power, which provides clearly that the authorization refers to methods by which a county may amend local Acts of the General Assembly applicable to that county. Consistent with *Kemp*, the petition and referendum procedure in the County Home Rule paragraph was intended to be available only when a proposed amendment or repeal is sought with regard to a local Act of the General Assembly.

Because of the common origin and language of the municipal home rule statute at issue in *Kemp* and the County Home Rule paragraph, there appears to be no principled way in which the Court can rule for Respondents without overruling

[28] 269 Ga. at 176 (emphasis supplied).

or disavowing *Kemp.* Accordingly, such a step would require the Court to consider principles of *stare decisis*,

> under which courts generally stand by their prior decisions because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process…. [W]e have regularly considered in our *stare decisis* analyses a number of factors, including the age of the precedent, the reliance interests involved, the workability of the prior decision, and most importantly, the soundness of its reasoning. [29]

For the reasons described above regarding the origin and intent of the municipal and county home rule provisions and as discussed in more detail in Petitioner's Brief, the reasoning of *Kemp* is sound. Overruling *Kemp* and allowing government by citizen initiative is directly contrary to the reasons that the home rule provisions were initially put in place: to allow elected local governing authorities to exercise legislative powers.

[29] *Cook v. State,* 870 S.E.2d 758, Case No. S21A1270, *25-26 (2022)(punctuation and citations omitted).

As to the other common *stare decisis* factors, while *Kemp* is not quite a quarter-century old, both the relevant municipal and county home rule provisions have been in place for nearly 70 years without a contrary interpretation. In this regard, Professor Sentell's research is illuminating. In his voluminous review of home rule[30] he details home rule usage through 1999. He lists only two instances of petition and referendum being used at all, the remainder being second-tier home rule usage by county and city governing authorities.[31] From 1999 to date, no petition and referendum home rule actions are listed in Georgia Laws (as would be required by the County Home Rule paragraph, if applicable in this context). The point is to underscore that counties and cities have had, and continue to have, a clear understanding of how home rule operates, consistent with *Kemp*'s analysis.

Tremendous reliance interests are also involved, in that county and city governing authorities make voluminous decisions on ordinances, contracts, zoning matters, budget matters, employment matters, etc. that often involve outside parties – parties who, to this point, have been able to rely on the finality of those actions by the local government. Finally, the workability of *Kemp* is almost self-evident, given

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[30] The Georgia Home Rule System, 50 Mercer L. Rev. 99 (1998).

[31] *Id.* at 139-143 and 149-169. One other reported case simply proves the point: *Sadler v. Nijem*, 251 Ga. 375 (1983), involving a citizen petition under the municipal home rule statute (O.C.G.A. § 36-35-3) to overturn a city's amendment to its charter– the municipal equivalent of a county local Act.

the lack of evidence over the past 66 years that a citizen veto of local government decisions somehow has hobbled the functioning of local governments throughout Georgia. The workability of the reasoning of *Kemp* is even more obvious in light of our system of government: if citizens are dissatisfied with actions taken by their local elected officials, they can (and often do) find their remedy by voting those officials out of office. In sum, there is no apparent rationale for this Court to overrule *Kemp*.

III. CONCLUSION

The trial court and probate court decisions in this case have created a great deal of uncertainty on the application of the home rule process and have undercut the constitutional foundation of self-government by counties. Indeed, the entire local government "Home Rule" concept is stood on its head by a ruling in Respondents' favor, substituting in its place government by popular vote: an impractical, impracticable, and unsustainable model at best. Unless the lower court decisions are reversed, it would mean that no general exercise of power by the county governing authority could ever be 'final' - it could always be subject to citizen amendment or repeal. Of course, a ruling in Petitioner's favor does not deprive citizens of an ample

remedy: "If the electors of a political subdivision disagree with the position taken by their officials, the remedy is at the ballot box."[32]

For the reasons describe above, ACCG asks respectfully that this Court reverse the trial court and probate court decisions and hold that Petitioner's action of entering a contract does not implicate the legislative powers granted by subparagraph (a) of the County Home Rule paragraph, thereby making the petition and referendum procedure of subparagraph (b) inapplicable in this particular matter. If the Court does conclude that Petitioner's action falls within subparagraph (a) of the County Home Rule paragraph, ACCG requests that the Court hold that the citizen petition and referendum procedure is not available to overturn a subparagraph (a) legislative action, for the reasons described by this Court in *City of Claxton v. Kemp* (addressing the same language and issue in O.C.G.A. § 36-35-3, which shares a common origin with the County Home Rule paragraph) and as detailed in Petitioner's Brief.

[32] *Peacock v. Ga. Municipal Assn,* 247 Ga. 740, 743 (1981).

Respectfully submitted, this 16th day of May 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **BRIEF OF ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER** with the Clerk of Court using the SCED online system and served all counsel of record by depositing copies of the same in the United States Postal Service with adequate First-Class Mail postage thereon and addressed as follows:

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