Case No. S22A0837

In The
Supreme Court of Georgia

CAMDEN COUNTY, GEORGIA,

Petitioner-Appellant

v.

ROBERT C. SWEATT JR.,

Respondent-Appellee,

and

JAMES GOODMAN & PAUL A. HARRIS,

Intervenors-Appellees.

APPEAL FROM THE SUPERIOR COURT OF CAMDEN COUNTY
CASE NO. SUCV2022000161

PRINCIPAL BRIEF OF APPELLANT

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INTRODUCTION

This case raises a fundamental question regarding the nature and structure of local government in this State: Does the County Home Rule Provision contained in Article IX, Section II, Paragraph 1 of the Georgia Constitution codify a ballot initiative procedure enabling a county's electorate to exercise legislative power at the local level?

Since 2015, the Camden County Board of Commissioners (the "Board") has sought to locate a rocket launch facility in the County for commercial space exploration (the "Spaceport"). To this end the Board authorized the County to enter into a real estate transaction to purchase land within the County where the Spaceport would be located. At some point, a select group of citizens became unhappy with that decision. Those dissatisfied citizens then sought to repeal the Board's actions through a ballot initiative procedure—a procedure they contend is authorized by Paragraph 1(b)(2) of the Home Rule Provision. But, that sub-provision authorizes no such procedure. Constitutional text, history, and structure, as well as first principles, precedent, and practice all point to the same conclusion: Paragraph 1(b)(2) provides only a mechanism for the county electorate to amend the organic law of a county. Paragraph 1(b)(2) does not grant the electorate a veto power over a county's board of commissioners—much less grant general legislative power to the electorate to exercise directly via a ballot initiative.

Nevertheless, on February 8, 2022, Respondent-Appellee Robert Sweatt Jr., Probate Court Judge for Camden County, issued an order sanctioning the dissatisfied citizens' petition calling for the referendum, and he ordered the County to hold the referendum on March 8, 2022. Prior to the election being held, the County filed a Petition for a Writ of Prohibition and for Other Relief in the Superior Court of Camden County, through which the County sought to resolve the validity of the March 8 referendum and Judge Sweatt's jurisdiction and authority to order the referendum. However, on March 4, 2022, the superior court denied the County's petition, and the election was ultimately held. In the end, the vote in favor of repeal prevailed. A bare minority of the County's electorate purported to repeal the actions of the Board and squander the time, effort, and money the County has devoted to the Spaceport.

This Court must now decide whether the March 8 referendum was actually valid. As explained below, it was not. The enactment of home rule in Georgia reformulated local government in the State. But no one at the time would have understood home rule as conferring such a radical grant of legislative power directly into the hands of the electorate, nor would anyone expect to find such a revolutionary power hiding in an obscure clause within an ancillary sub-provision of the Constitution. Elephants, in other words, do not hide in mouseholes.

In short, the March 8 referendum was a nullity, and this Court should so declare it.

STATEMENT OF JURISDICTION

By virtue of Article VI, Section VI, Paragraph 2 of the Georgia Constitution, the Court has exclusive, appellate jurisdiction over this appeal because it "involves the construction of a provision of the Constitution . . . and does not address issues involving settled principles of constitutional law." [Order at 1, *Camden County v. Sweatt, et al.*, Case No. S22M0759 (S.Ct. Mar. 10, 2022)]. The superior court's denial of the County's Petition for a Writ of Prohibition and Other Relief on March 4, 2022, is directly appealable under O.C.G.A. § 5-6-34(a)(7), and all other rulings are appealable by virtue of O.C.G.A. § 5-6-34(d). [*See* Order at 1, *Camden County v. Sweatt, et al.*, Case No. S22I0782, (S.Ct. Mar. 30, 2022)]. The County timely filed its Notice of Appeal on March 7, 2022. [R.1].

CONSTITUTIONAL PROVISION AT ISSUE

The central issue in this appeal involves the interpretation of Article IX, Section II, Paragraph 1 of the Georgia Constitution of 1983. The full text of the Home Rule Provision is reproduced in the Appendix.

ENUMERATION OF ERROR

The superior court erred in denying the County's Petition for a Writ of Prohibition and for Other Relief.

STANDARD OF REVIEW

"Because the issue presented is a question of law involving undisputed facts," the "standard of review is de novo." *See Luangkhot v. State*, 292 Ga. 423, 424 (2013).

STATEMENT OF THE CASE

I. Legal Background

This case and the issue presented cannot be understood without an appreciation for the legal background from which it arises.

Through the Constitution of this State, the people have delegated their sovereign authority to public officers who act on behalf of the people. Ga. Const. Art. I, Sec. II, Para. 1. The Constitution then divides that sovereign authority, or "power," into three branches of government: the legislative, the judicial, and the executive. Ga. Const. Art. I, Sec. II, Para. 3. As for the legislative power, the people have "vested" it in the General Assembly. Ga. Const. Art. III, Sec. I, Para. 1. And this vesting of power in the General Assembly has been consistently interpreted to mean only the General Assembly "has the right to legislate and prescribe the laws of this State." *See Long v. State*, 202 Ga. 235, 237 (1947). Nevertheless, as a means of facilitating its duty to govern across the State, the General Assembly created local governments, like counties, and it has devolved onto such local governments aspects of its legislative power to exercise at the local level. *See Troup County Elec. Membership Corp. v. Georgia Power Co.*, 229 Ga. 348, 352 (1972) ("Counties are subdivisions of the state government to which the state parcels its duty of governing the people.") (quotation omitted).

When the General Assembly creates a local government, it does so through a "local act," which creates the organic law for the jurisdiction from which most of the local government's power flows. For counties, the local

act of the General Assembly establishes the county's "governing authority," which is typically a board of commissioners, upon which the General Assembly then confers its legislative power. *See, e.g.*, 1941 Ga. Laws 800 (establishing Camden County Board of Commissioners).[1]

Historically, modifications to the organic law of the local government had to be done via legislation through the General Assembly. Local governments lacked the power to change their organic law; they were merely creatures of the General Assembly. Having been established by the General Assembly, local governments therefore had to lobby the General Assembly for changes to their organic law whenever those changes were desired.[2] With the adoption of "home rule" in Georgia, this inefficient system changed.

Home rule is a legal doctrine characterizing the establishment of a particular form of relationship between the state and local government. *See* R. Perry Sentell Jr., *The Georgia Home Rule System*, 50 MERCER L. REV. 99, 100 (1998). Unfortunately, few legal doctrines "possess a more convoluted

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[1] For municipalities, on the other hand, the General Assembly passes a local act that establishes the charter of the city, through which the General Assembly confers the legislative power. *See, e.g.*, 2012 Ga. Laws 5527 (creating charter for City of Brookhaven).

[2] Thus, for example, should the Clarke County Board of Commissioners require a salary increase, that had to be done through a local act amending the original local act establishing the Clarke County Board of Commissioners. *See* 1951 Ga. Laws 2044, § 4 (amending local acts so as to increase salary for commissioners).

heritage or content" than home rule. *Id.* at 99. Generally speaking, though, scholars agree that the concept of home rule was "a product of the eternal tension between local governments and the state." *Id.* at 100. Though hard to define, the concept traces its heritage to an era when railroads dominated American life and the great debate that occurred between two legal titans of that era: Thomas Cooley and John Dillon.

Cooley, a legal scholar and eventual justice of the Michigan Supreme Court, declared that local governments possessed an "inherent right" absolute and beyond the control of the state legislature. *See id.* at 100–101. Dillon, a railroad lawyer who became an esteemed jurist in his own right, declared just the opposite: "[A]ll municipal power derived solely from the state legislature." *Id.* at 101. Ultimately, Dillon triumphed over Cooley, and "Dillon's Rule" of legislative supremacy took root across the country and especially in this State. *Id.*

Following Dillon's Rule, Georgia's "devotion to legislative supremacy held strong for many centuries." *Id.* at 105; *see, e.g.*, *Long v. State*, 202 Ga. 235 (1947). Around the country, however, local governments began to seek relief from Dillon's Rule. Sentell, *supra*, at 102. What developed was the home rule movement, but "[f]ew jurisdictions equaled Georgia's adamant resistance to [it]." *Id.* Eventually though, "a rather unique home rule system took its place in the corpus of Georgia local government law." *Id.* at 105; *see id.*, at 105–106 & nn. 23–24 (describing prior failures to establish home rule). Following passage of the Municipal Home Rule Act of 1965, the General Assembly

proposed, and the voters adopted, home rule for counties. *See* 1965 Ga. Laws 752.

County home rule is contained in Article IX, Section II, Paragraph 1 of the Constitution (the "Home Rule Provision"). This Provision is largely identical to the statutory provision establishing municipal home rule. *Compare* Ga. Const. Art. IX, Sec. II, Para 1, *with* O.C.G.A. § 36-35-3. While the language of the provisions differs slightly, the variations are largely distinctions without a difference. *See* Sentell, *supra*, at 110; *but see id.* at 138 (noting one critical distinction).

Both home rule systems confer two sorts of "legislating powers" upon the local government. *Bd. of Comm'rs of Miller County v. Callan*, 290 Ga. 327, 328 (2012) ("hereinafter "*Miller County*") (citing and quoting Sentell, *supra*, at 133). The "first-tier" power, as it is often called, enables the county governing authority to adopt legislative measures that do not rise to the level of affecting state legislation. *Id.* The county governing authority may adopt local measures relating to its "property, affairs, and local government," so long as no provision has been made by "general law" and the local measure is not "inconsistent" with the Constitution or any "local law" made applicable to the county governing authority. Ga. Const. Art. IX, Sec. II, Para I(a); *Miller County*, 290 Ga. at 328–29. This is the "legislative power" devolved from the General Assembly to the "governing authority of each county." Ga. Const. Art. I, Sec. II, Para. 1(a).

The "second-tier" power enables the county to amend its organic law (*i.e.*, the local acts applicable to its governing authority). *See* Ga. Const. Art. IX, Sec. II, Para. 1(b) ("a county may, as an incident of its home rule power, amend or repeal the local acts applicable to its governing authority"); *Miller County*, 290 Ga. at 329. This second grant of power was the significant change home rule brought because it empowered counties with the ability to change state-level law without having to go through the General Assembly to do so. *Miller County*, 290 Ga. at 329; *see* Sentell, *supra*, at 136 ("The second-tier delegation . . . comprises, no less, the essence of Georgia's home rule complex."). Under the second-tier, there are two methods the home rule power may be exercised. *See* Ga. Const. Art. IX, Sec. II, Para 1(b). The first method is through a local measure duly adopted at two regular meetings of the county governing authority. Ga. Const. Art. IX, Sec. II, Para 1(b)(1). The second method is through a petition and referendum process. Ga. Const. Art. IX, Sec. II, Para 1(b)(2). This second method is what is at issue in this case.

The home rule referendum method allows the electorate to change the organic law of the county by filing a petition (containing a requisite number of signatures) with the judge of the probate court calling for a referendum on the proposed amendment or repeal. The judge then determines the "validity" of such petition upon 60 days of its filing and, if found valid, "it shall be his duty to call for an election for the purpose of submitting" the proposed "amendment or repeal." Ga. Const. Art. IX, Sec. II, Para 1(b)(2). Paragraph 1(b)(2) further specifies that the election shall be held between 60

and 90 days after the filing of the petition. The county shall bear the expense of the election, and it shall be the duty of the probate judge to conduct such election. Paragraph 1(b)(2) further obligates the probate judge to certify the result of a successful referendum to the Secretary of State, who then must publish all such amendments to the local acts at least annually. Ga. Const. Art. IX, Sec. II, Para. 1(b)(2), Para. (1)(g).

II. Factual Background

Since at least 2015, Camden County has endeavored to facilitate the location of a rocket launch facility within the County that would primarily be used for commercial space exploration (the "Spaceport"). [R. 18, Petition for a Writ of Prohibition and Other Relief, at ¶26]. To that end, the County has invested significant resources to achieve this goal, including by entering into an option agreement (the "Option Contract") with the Union Carbide Corporation to purchase certain real estate within the County where the Spaceport would be located. The Option Contract was approved in an open meeting by the Camden County Board of Commissioners (the "Board") on June 3, 2015. [*Id.* at ¶ 26 n.2 (Ex. A)].

The Option Contract has been extended occasionally to accommodate the extensive government licensing and approval process that the Spaceport must obtain before operation. [*Id.* at ¶ 27]. For example, the Federal Aviation Administration required an Environmental Impact Statement (an "EIS") to be completed and formally approved. [*Id.*]. Relevant here, the Option Contract was set to expire on January 13, 2022; however, it was extended

once more in light of the intervening developments discussed below. These developments now threaten the future of the Spaceport, including the County's rights under the Option Contract. [*See id.* at ¶28].

II. Procedural Background

On December 14, 2021, James Goodman, Paul A. Harris, and others filed a petition in the Probate Court of Camden County under Paragraph 1(b)(2) of the Home Rule Provision. The dissatisfied citizens sought a referendum to repeal the actions of the Board authorizing the Option Contract. The petition was "docketed" in the probate court before Respondent-Appellee Sweatt. [*Id.* at ¶30].

On January 3, 2022, the County, through the Board, filed a caveat in the case. [*Id.* at ¶31]. On February 8, 2022, Judge Sweatt issued an order denying the caveat. [*Id.* at ¶32].[3] That same day, Judge Sweatt issued the order sanctioning the petition. He then called for a special election to be held on March 8, 2022, on the following question:

> "Shall the resolutions of the Board of Commissioners of Camden County, Georgia authorizing the Option Contract with Union Carbide Corporation and Camden County's right and option to purchase the property described therein be repealed."

[*Id.* at ¶ 33].

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[3] Judge Sweatt determined that there did not appear to be any legal authority authorizing a caveat to challenge a petition filed pursuant to the constitutional procedure. [*Id.* at ¶ 32]. This ruling confirms that the County appropriately resorted to an extraordinary writ to attack the petition.

Around the same time of the filing of the petition, Goodman and Harris filed for a temporary restraining order and for injunctive relief against the County in the Superior Court of Camden County. [*Id.* at ¶34]. Harris and Goodman sought to block the County from exercising the Option Contract in light of the pending petition and potential referendum, notwithstanding the County's entitlement to sovereign immunity. A TRO was initially granted to allow consideration of preliminary or permanent relief. [*Id.* at ¶35]. At a hearing held on January 11, 2022, before the Honorable Stephen G. Scarlett, the County presented the same arguments identified herein: that the petition and referendum procedure did not allow for the referendum election the petition sought, and thus, no injunctive relief should be ordered. The superior court recognized the merits of the County's argument, especially in light of this Court's decision in *Kemp v. City of Claxton*, 269 Ga. 173 (1998) (holding similar referendum not authorized under the municipal home rule provision). Ultimately, the superior court denied the injunctive relief sought, finding that the doctrine of laches applied. [*Id.* at ¶¶ 36–37].[4]

Following Judge Sweatt's order sanctioning the petition, the County then petitioned the superior court for a writ of prohibition and for other appropriate relief to address the validity of the March 8 election. [*See generally*, *id.*]. The case was also docketed before Judge Scarlett, and the

[4] An appeal from this order was docketed in the Court of Appeals under Case No. A22A1077, but it was later dismissed as moot given the occurrence of the March 8 election.

superior court granted James Goodman and Paul A. Harris leave to intervene. [R.127]. The superior court then held an emergency hearing on the County's petition for relief on March 3, 2022. [R.128; *see also* Transcript]. On March 4, 2022, the superior court denied the County's requested relief. [R.9].

On March 8, 2022, the County filed an emergency motion in the Court of Appeals under its Rule 40(b) procedure seeking a stay of the certification process in order to provide clarity with respect to the County's rights under the Option Contract during the appellate process, given the approaching deadline to exercise the Option Contract. The Court of Appeals then transferred the case to this Court, which was docketed under Case No. S22M0759. On March 10, 2022, this Court denied the County's emergency motion.

In the interim, the March 8 election occurred. Of the "34,814, active electors" registered to vote in Camden County, 4,169 voted in favor of the purported repeal while 1,613 voted against it, a result that can hardly be characterized as resounding.[5] Instead, a bare minority of the active, registered voters in the County—12 percent (rounding up)—voiced their displeasure with the Board in a straw-vote, called just 30 days prior, that should have never occurred in the first place. Judge Sweatt then certified the results to the Secretary of State some time thereafter.

[5] [*Compare* R.95, *with* Supplement Brief, Ex 1 (Case. No. S22M0759)].

ARGUMENT

I. The Home Rule Provision does not authorize the electorate to exercise legislative power at the local level.

Article IX, Section II, Paragraph 1 does not provide a mechanism for a county's electorate to exercise legislative power at the local level. Yet, that is precisely what a bare minority of Camden County's electorate purported to do through the March 8 referendum. Properly construed, however, the Home Rule Provision provides only a mechanism for the electorate to amend the organic law of the county. Thus, the March 8 election was a nullity, and this Court should so declare it.

A. The enactment of home rule reformulated local government but did not codify a revolutionary form of initiative government.

To resolve this dispute, the Court must construe the Home Rule Provision, which will require that the Court give the text its meaning as it was originally understood by those who adopted it. *Elliot v. State*, 305 Ga. 179, 182 (2019); *see Lathrop v. Deal*, 301 Ga. 408, 428–29 (2017); *see also Smith v. Baptiste*, 287 Ga. 23, 32 (2010) (Nahmias, J., concurring). The meaning of a text, or course, depends on the language and its usage; but its meaning also requires understanding the legal and factual context in which the text appears, as well as the structure of the Constitution in general. *Lathrop*, 301 Ga. at 429.

To that end, a proper interpretation of the Home Rule Provision does not read, solely in isolation, the vague phrase found in Paragraph 1(b)(2)

upon which Appellees place so much emphasis. *See* Ga. Const. Art. IX, Sec. II, Para. 1(b)(2) ("or ordinances, resolutions, or regulations adopted pursuant to subparagraph (a)"). Instead, it requires understanding the meaning of the term central to the *entire* Home Rule Provision itself—"home rule"—and interpreting Paragraph 1(b)(2) harmoniously with the meaning of that term. In other words, to fully appreciate the meaning of Paragraph 1(b)(2), one must truly understand what "home rule" itself came to mean when it was adopted in the Constitution. *See Lathrop*, 301 Ga. at 411–25 (surveying the background law to explain the meaning of "sovereign immunity").

As explained earlier, the "foundational essence" of Georgia's home rule system "consists of two 'legislating' delegations." Sentell, *supra*, at 108. "The distinction between the two grants, *although appearing as one of degree*," instead connotes two very different types of actions the local government may take. Sentell, *supra*, at 133 (emphasis added). To reiterate, at the first-tier "the governing authority is empowered to adopt measures for its municipality or county that do not rise to the level of affecting state legislation." *Miller County*, 290 Ga. at 328 (quoting Sentell, *supra*, at 133). This is the general "legislative power" devolved from the General Assembly and vested in the "governing authority" of the county to govern at the local level. *See* Ga. Const. Art. IX, Sec. II, Para. 1(a) ("The governing authority of each county shall have legislative power . . ."). At the second tier, the county is empowered to adopt local measures that *modify* state law. *Miller County*, 290 Ga. at 329. This is the ability of the county to modify its organic law—the

"local acts applicable to its governing authority"—without resort to the General Assembly. *See* Ga. Const. Art. IX, Sec. II, Para. 1(b) ("a county may, as an incident of its home rule power, amend or repeal the local acts applicable to its governing authority").

Furthermore, as is evident from the text, first-tier power is granted to the "governing authority" of the county, while second-tier power is granted to the "county" more broadly, so as to include the electorate acting by referendum. *Compare* Ga. Const. Art. IX, Sec. II, Para. 1(a) ("The *governing authority* shall have legislative power"), *with* Para. 1(b) ("a *county* may . . . amend or repeal the local acts applicable to its governing authority") (emphasis added). Even in those prior formulations of home rule, which ultimately failed, this critical distinction about who can wield which type of power was evident *See* 1947 Ga. Laws 1118, 1121, § 3(h); 1951 Ga. Laws 116, 120, § 3(h). Both prior iterations provided a mechanism (similar to Paragraph 1(b)(2)) for the electorate to amend—through referendum—the organic law of the local government. Neither iteration, however, provided an initiative procedure for the electorate to exercise legislative power locally.

B. The Home Rule Provision's text and internal structure confirm that a referendum may only modify the organic law of a county.

Against that backdrop, the Home Rule Provision's text and its internal structure further demonstrates that Paragraph 1(b)(2) provides only a mechanism for the electorate to modify the organic law of the county.

Start with the text of subparagraph (a). Subparagraph (a) embodies the entire grant of home rule power. The first sentence of subparagraph (a) codifies first-tier power, while the second sentence of subparagraph (a) codifies second-tier power. Thus, subparagraph (a)'s first sentence states that, the "governing authority of each county" has the power "to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property affairs, and local government." Ga. Const. Art. IX, Sec. II, Para. 1(a). And the second sentence states that, to the extent "[a]ny such local law" applicable to the county's governing authority exists, it "shall remain in force and effect until amended or repealed as provided in subparagraph (b)." In other words, and consistent with the history and understanding of "home rule" noted above, the first sentence of subparagraph (a) grants "legislative power" to the county's governing authority to legislate within the confines of existing state law; and the second sentence of subparagraph (a) grants to the county's governing authority—as well as the electorate—the ability to modify the county's organic law (the "local law applicable thereto") through either of the mechanisms provided in subparagraph (b). Ga. Const. Art. IX, Sec. II, Para. 1(a).[6]

[6] That subparagraph (a) is the source of all home rule power is further evidenced by the final two sentences in Paragraph 1(a), which explain how to deal with conflicts between general law and local measures, as well as local acts by the General Assembly touching on the topics reserved in subparagraph (c).

Turn next to subparagraph (b). Subparagraph (b) explains that this particular provision is not itself an independent source of power. Rather it is a procedural provision reiterating that the county may act, merely as an *implication* of the power granted in subparagraph (a), "by following either of the procedures" in the two subparts that follow subparagraph (b). *See Gray v. Dixon*, 249 Ga. 159, 161 (1982) (explaining Paragraph 1(b) "sets forth . . . procedures" of amending local acts). Thus, subparagraph (b) states that, "a county may, as an *incident* of its home rule power"—the power granted in subparagraph (a)—"amend or repeal the local acts applicable to its governing authority." Ga. Const. Art. IX, Sec. II, Para. 1(b) (emphasis added).

Therefore, the text of subparagraph (b) is important because it tracks the scope of power granted in the second sentence of subparagraph (a): the county's ability to amend or repeal "such local law" "as provided in subparagraph (b)." The text of subparagraph (b) is also important because it is explicitly self-limiting in two respects. First, in the way the power may be exercised: "by following either of the procedures" in subparts (b)(1) and (b)(2). Second, and more importantly, by explicitly restricting the objects to which the power may reach: "local acts applicable to [the county's] governing authority." Ga. Const. Art. IX, Sec. II, Para. 1(b).

Appellees ignore these distinct limiting principles found in the text of the two operative provisions in favor of a somewhat ambiguous phrase found in the second subpart to subparagraph (b). Appellees read the phrase "Amendments to or repeals of such local acts or ordinances, resolutions, or

regulations adopted pursuant to subparagraph (a)" found in Paragraph 1(b)(2) as authorizing the county's electorate to exercise *both* tiers of power—that is, the power to amend the county's organic law in addition to the power to amend the board of commissioners' exercises of first-tier power. This reading can only make sense if the phrase is read solely in isolation devoid of the text that surrounds it, as well as the broader context of home rule. That, however, is not how this Court typically reads the Constitution. *Elliot*, 305 Ga. at 186 ("[When we determine the meaning of a particular word or phrase in a constitutional provision or statute, we consider text in context, not in isolation."). A particular phrase cannot be read in isolation; it must be squared with the rest of the text that surrounds it. Originalism, and textualism more broadly, does not mean hyper-literalism. *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW 356 (2012) ("Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text.").

Appellees' reading of Paragraph 1(b)(2) also fails to reconcile itself with the constitutional text in several other respects. For example, Appellees' reading does not reconcile itself with subparagraph (a)'s vesting of general, "legislative power" in the "governing authority of each county." Subparagraph (a) does not vest the legislative power in the "county." Rather, the text distinguishes between the particular power the "governing authority of each county" may exercise, and the particular power the "county"—the governing authority *or* the electorate more broadly—may

exercise. First-tier power may be exercised by the "governing authority of each county." Second-tier power may be exercised by the governing authority via Paragraph 1(b)(1) *or* by the electorate through a referendum via Paragraph 1(b)(2).

Had the people who framed and ratified the constitutional text truly understood first-tier power being vested in the "county," they would have spoken more clearly in the text. Indeed, if Paragraph 1(b)(2) encompassed a form of first-tier power vested in the electorate itself, the text would not have explicitly vested first-tier power solely in "the governing authority" in the first sentence of subparagraph (a); nor would subparagraph (b) have reiterated that second-tier power reaches only those "local acts applicable to [the county's] governing authority."

Furthermore, it would be especially strange to find such a revolutionary power granted to the electorate hiding in an ancillary sub-provision, which is almost exclusively focused on minute details of procedure, like that the call for any election must be published in the legal organ once weekly for three consecutive weeks. *See* Ga. Const. Art. IX, Sec. II, Para. 1(b)(2). To borrow the vignette the late-Justice Scalia once quipped: one would not expect to find an elephant hiding in a mousehole. *Cf. Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2012) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Yet, Appellees' reading depends on the assumption that there is indeed an

elephant hiding in Paragraph 1(b)(2): carte blanche legislative power vested in the electorate to exercise it at the local level.

The County's reading of Paragraph 1(b)(2), on the other had, squares the text of the particular provision itself with the surrounding text and the broader context of home rule. Consider, again, that second-tier power is the power to change state-level law. Turn then to the remaining portions of Paragraph 1(b)(2). The sub-provision's text commands the probate judge of the county, after administering the election, "to certify the result thereof to the Secretary of State in accordance with the provisions of subparagraph (g)[.]" Ga. Const. Art. IX, Sec. II, Para. 1(b)(2). Subparagraph (g) then explains that the referendum and the amendment does not "become effective until" the Secretary of State receives the requisite certification, and the text further obligates the Secretary to publish and distribute "all such amendments or revisions at least annually." *See* Ga. Const. Art. IX, Sec. II, Para. 1(g).

The reason for this notification and publication provision is because, as explained above, an exercise of second-tier power effects a change to state law. It is an amendment to or a repeal of a law that was once passed by the General Assembly. Thus, the Secretary of State is required to receive notification whenever a second-tier measure occurs because the Secretary should circulate throughout the state whenever changes are made to state law at the local level—just as is done when similar changes to *local acts* are made at the *state level* by the General Assembly. In fact, second-tier changes

are published in the Georgia Laws along with any other local acts the General Assembly amends. Yet, to interpret Paragraph 1(b)(2) to allow for exercises of first-tier legislative power by the electorate, then subparagraph (g) commands the Secretary of State to publish changes to mundane local ordinances or resolutions in the Georgia Laws. That results in an absurdity.

To borrow an example from the case law, Appellees' reading of Paragraph 1(b)(2) would require that the Georgia Laws be littered with things like the following:

> The electorate of the City of Claxton, Georgia, held a referendum on the question of repeal of that certain resolution adopted by the Mayor and City Counsel of Claxton closing the railroad crossings at Newton Street and Peters Street within the City. The referendum being successful, the railroad crossings at Newton Street and Peters Street in the City of Claxton are hereby re-opened.

See Kemp v. City of Claxton, 269 Ga. 173 (1998). The Constitution of this State cannot be interpreted to result in absurdities. *See Bunger v. State*, 146 Ga. 672, 674 (1917) ("It is a cannon of statutory construction that an absurd result is presumed not to have been intended by the lawmakers. We cannot in justice and reason deny to the framers of the constitution the same presumption.") There is no reason for the Georgia Laws to be littered with such local legislative measures.

C. Precedent, practice, and first principles also support the County's interpretation of Paragraph 1(b)(2).

Beyond the text itself and the internal structure of the Home Rule Provision, precedent, practice, and first principles also support the County's interpretation. Should this Court disagree, then the Court must sound the death-knell for its decision in *Kemp*.

There the Court interpreted the materially analogous referendum provision applicable to municipalities consistent with the County's interpretation of the Home Rule Provision here. Consistent with the similar textual clues found in O.C.G.A. § 36-35-3 as well as the broader understanding of home rule, this Court explained in *Kemp* that the overriding purpose of second-tier power was "to relieve the General Assembly of its earlier burden of separately amending each and every charter in the state." *Kemp*, 269 Ga. at 175. Thus, the "petition procedure of O.C.G.A. § 36-35-3(b)(2)," which again is materially similar to Paragraph 1(b)(2), was held to apply "only to amendments to municipal charters." *Id.* at 176. Such an interpretation made even more sense in order to reconcile the doctrine of home rule with the doctrine of legislative supremacy. Municipalities, like counties "are creations of the state, possessing only those powers that have been granted to them, and allocations of power from the state are strictly construed." *Kemp*, 269 Ga. at 176. Thus, should doubt exist, it must be resolved in favor of a narrower delegation of power from the

General Assembly. *Id.*; *see Wood v. Gwinnett County*, 243 Ga. 833, 834 (1979) ("Counties are creatures whose limited powers must be strictly construed.").

More fundamental principles of government likewise favor the County's interpretation. The people entrusted the sovereign power over legislative matters in the General Assembly to exercise on behalf of the people. Deriving from this notion, the more fundamental principle follows: the people *did not* reserve the legislative power in themselves to exercise directly. And thus, therein lies the "demonstrated wisdom of our American system of representative government and public laws enacted by representatives freely chosen." *Phillips v. City of Atlanta*, 210 Ga. 72, 77 (1953). Indeed, this fundamental principle underlying the Constitution's establishment of a republican form of government should be "enough to demand extreme caution and critical examination of any proposed departure therefrom." *Id.* Yet, Appellees' reading of Paragraph 1(b)(2) necessarily assumes an ancillary sub-provision *tacitly* departed from that fundamental principle. "History warns us," however "of tragedies endured by the individual under practically every other system" of government. *Id.*

Historical practice also confirms Appellees' reading is incorrect. Were the expansive power truly there—were there really an elephant hiding in the mousehole of a passing phrase within Paragraph 1(b)(2)—one would expect to find other instances of the electorates in Georgia's 159 counties resorting

to this provision.[7] After all, those instances should be recorded in the Georgia Laws. Yet, one can flip through thousands of pages and countless volumes of the Georgia Laws and find no instances of any electorate trying to wield such power. The reason: it never existed, nor was it thought to exist.[8] Instead, the procedure for voicing one's dissatisfaction with elected representatives' exercise of power in this State's republican form of government is by voting those representatives out of office.

Consider prospective applications of the provision as well: how does Appellees' reading truly play out in the real world? It creates many more questions of constitutional magnitude. For example, nothing stops the governing authority from immediately repealing whatever first-tier measure the electorate may have enacted through a referendum. Paragraph 1(b)(1) limits the governing authority from acting on any referendum measure that relates to the "local acts applicable to it[ ]" or any "local act of the General Assembly ratified in a referendum," unless "12 months have elapsed." *See*

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[7] *Cf. Barrow v. Raffensperger*, 308 Ga. 660, 674 (2020) (observing that past practice was consistent with the Court's interpretation of a constitutional provision), *and NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring) ("Of course, where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision. . . . But past practice does not, by itself, create power." (quotations and citations omitted))

[8] *Cf. Noel Canning*, 573 U.S. at 584 ("Yet there is no record of anyone, ever, having so much as *mentioned the possibility* that the . . . power [existed].").

Ga. Const. Art. IX, Sec. II, Para. 1(b)(1). But nothing in the text limits first-tier modifications to first-tier measures, just as it would be illogical to constrain a legislature from amending or repealing its own legislation. Thus, county business would never be final under Appellees' reading; it would be locked in a constate state of flux: enactment by the governing authority, repeal by the electorate, repeal of the repeal by the governing authority—over and over.

Perhaps one county may believe a local initiative procedure is a more equitable form of government. Indeed, through the second-tier home rule power, one county could (arguably) achieve such a system. In fact, even before *Kemp* was decided, that is precisely what the City of Atlanta did. The city council exercised second-tier power and codified within its organic law an initiative procedure that the electorate could avail itself of in order to change any exercise of first-tier power by the city council. *See* 1984 Ga. Laws 5376 (amending charter to codify local initiative procedure); 1996 Ga. Laws 4469 (adopting new charter containing initiative procedure); *see also* City of Atlanta Charter, § 2-501. However, the question before this Court in this case is whether the constitutional text *demands* that sort of initiative procedure for all of Georgia's 159 counties. Absent a clear textual command, the Court should not declare it to be so by judicial fiat.

D. The County's interpretation faithfully adheres to the text of the Home Rule Provision.

At bottom, the most plausible reading of Article IX, Section II, Paragraph 1(b)(2) is the County's reading of it. A county's electorate may amend or repeal the "local acts applicable to its governing authority," or it may amend or repeal those modifications made to "such local acts" by the county's governing authority acting under Paragraph 1(b)(1). In other words, the phrase "or ordinances, resolutions, or regulations" should—and must—be construed to mean something similar to the words that phrase is found to be associating with in the text: "local acts applicable to [the county's] governing authority." *See Anderson v. Southeastern Fidelity Ins. Co.*, 251 Ga. 556, 556 (1983) ("Words, like people, are judged by the company they keep."). Thus, contrary to Appellees' reading, the passing phrase does not imply a greater power in subpart (b)(2) from a narrower power reflected in the operative provisions of subparagraphs (a) and (b), rather the phrase captures a similar notion as what is meant by the term "such local acts" that the phrase directly follows.

The following hypothetical demonstrates this. Suppose there is a local act on the books in 1960. Once the Home Rule Provision was adopted, that local act still remained "in full force and effect." Ga. Const. Art. IX, Sec. II, Para. 1(a). The only way to amend or repeal that local act is through the authorization of power contained in subparagraph (a) to act via subparagraph (b). The board of commissioners then exercises authority

under Paragraph 1(b)(1), and it amends the particular local act. That local legislative measure is then published in the Georgia Laws in accordance with Paragraph 1(g). Suppose, then, at a later time the electorate is unhappy with *that* amendment. That amendment—which is now in existence as an ordinance, resolution, or regulation and appearing in the Georgia Laws—can then be amended through Paragraph 1(b)(2). Thus, that is the necessity of including the additional language "ordinances, resolutions, or regulations," in addition to the phrase "such local acts," in Paragraph 1(b)(2). This language captures the scenario of the electorate amending any amendments to the local act by the county governing authority.

In short, the "legislative power" has been vested in the "governing authority of each county," and if the governing authority of a county, or the electorate, desires a change to its *organic* law, then either may resort to "the procedures . . . set forth" in Paragraph 1(b)(1)–(b)(2), just as Paragraph 1(a) dictates. Ga. Const. Art. IX, Sec. II, Para. 1(a) ("Any such local law [may be] amended or repealed as provided in subparagraph (b)).

II. This case is justiciable, and the Court should not shirk from its duty to clarify the meaning of the Constitution for Georgia's 159 counties.

The Intervenors-Appellees, Harris and Goodman, have previously argued that this case is somehow non-justiciable or that the Court is somehow precluded from reaching the important issue. Those arguments lack merit. The case is not moot, the issues have not been waived, nor can this Court shirk from its duty to declare what the Constitution means. No

measure adopted via Paragraph 1(b)(2)'s referendum method "shall be valid if inconsistent with any provision of [the] Constitution." Ga. Const. Art. IX, Sec. II, Para. 1(b)(2). Thus, this Court must determine whether the purported repeal effected by the March 8 referendum is even permissible under the Home Rule Provision itself.

A. This case is not moot.

Mootness presents no obstacle to the Court's adjudication of this case. This case does not present "an abstract question" lacking foundation in "*existing* facts or rights." *See Chastain v. Baker*, 255 Ga. 432, 433 (1986) (quotation omitted, emphasis original). Determining whether the Home Rule Provision authorized the March 8 referendum, and thereby nullified the County's rights under the Option Contract, is not some "academic" endeavor. *See In re. I.B.*, 219 Ga. App. 268, 270 (1995) (quotation and citation omitted). Nor would this Court's adjudication of this case fail to provide "the specific relief requested." *See Bell v. Raffensperger*, 311 Ga. 616, 619 (2021). If the March 8 referendum was not authorized, then it was thereby "unconstitutional from its inception," and that issue is certainly "still alive." *Bruck v. City of Temple*, 240 Ga. 411, 413 (1977) (rejecting mootness concerns notwithstanding occurrence of election because central issue was whether the local act voted on in referendum was constitutional).

Furthermore, merely because an election occurred means nothing if the election itself was beyond the jurisdiction of Judge Sweatt to call and preside over. *See Thompson v. Talmadge*, 201 Ga. 867, 878 (1947) ("It

necessarily follows that all such action beyond the jurisdiction of the General Assembly was null and void and must be disregarded entirely."). And resolving whether Judge Sweatt possessed the jurisdiction to call the March 8 referendum election is precisely the relief sought by the County's writ of prohibition. *See Stokes v. Edwards*, 272 Ga. 98, 98 (2000) (explaining purpose of writ of prohibition is to challenge an inferior officer's erroneous exercise of jurisdiction).[9]

Regardless, even if mootness seemed to present an obstacle, the case would *still not be moot* because the issue is capable of repetition yet will evade review. "[A] case which contains an issue that is capable of repetition yet evades review is not moot because a decision in such a case would be based on existing facts or rights which affect, if not the immediate parties, an existing class of sufferers." *Collins v. Lombard Corp.*, 270 Ga. 120, 121–22 (1998). Here, the case falls squarely in that category. The timing deadlines within Paragraph 1(b)(2) demonstrate this. From filing to election, no more than 90 days may pass. Ga. Const. Art. IX, Sec. II, Para. 1(b)(2). Thus, the underlying issue could never result in proper judicial review from this Court if the issue would cease to exist merely upon a referendum occurring.

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[9] Furthermore, the County also sought a writ of mandamus. Part of the mandamus relief the County sought was requiring Judge Sweatt to declare the Petition "invalid" as he was obligated to do under Article IX, Section II, Paragraph 1(b)(2). The County also sought a declaratory judgment declaring, among other things, the County's rights under the Option Contract notwithstanding the purported repeal.

B. The County's resort to extraordinary writs was appropriate.

The Intervenors have also argued that an appeal should have been taken from Judge Sweatt's case in which he sanctioned the petition for repeal. That argument is rather shallow considering Judge Sweatt dismissed the County's caveat in the case after concluding the County had no authority to intervene for want of mechanism provided in Paragraph 1(b)(2). Thus, the County clearly lacked standing to even appeal the issue, just as Judge Sweatt concluded. *See Booker v. Booker*, 286 Ga. App. 6 (2007) (holding O.C.G.A. § 5-3-2 only enables "the party plaintiff or party defendant to appeal from the probate court"). Regardless, this still does not foreclose the County's resort to an extraordinary writ or declaratory relief. An appeal is not adequate remedy here for the same reasons the case is not moot. Even had an ordinary appeal been taken under O.C.G.A. § 5-3-2, the case would still not have reached the superior court, or even this Court, before the election occurred.

CONCLUSION

For the reasons above, the March 4, 2022 Order of the Superior Court of Camden County should be REVERSED and the case should be REMANDED with appropriate instructions, including that the March 8 referendum be declared invalid.

Respectfully submitted this 12th day of April 2022.

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APPENDIX

Article IX, Section II, Paragraph 1 of the Georgia Constitution of 1983 provides as follows:

> (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. Any such local law shall remain in force and effect until amended or repealed as provided in subparagraph (b). This, however, shall not restrict the authority of the General Assembly by general law to further define this power or to broaden, limit, or otherwise regulate the exercise thereof. The General Assembly shall not pass any local law to repeal, modify, or supersede any action taken by a county governing authority under this section except as authorized under subparagraph (c) hereof.
>
> (b) Except as provided in subparagraph (c), a county may, as an incident of its home rule power, amend or repeal the local acts applicable to its governing authority by following either of the procedures hereinafter set forth:
>
> > (1) Such local acts may be amended or repealed by a resolution or ordinance duly adopted at two regular consecutive meetings of the county governing authority not less than seven nor more than 60 days apart. A notice containing a synopsis of the proposed amendment or repeal shall be published in the official county organ once a week for three weeks within a period of 60 days immediately preceding its final adoption. Such notice shall state that a copy of the proposed amendment or repeal is on file in the office of the clerk of the superior court of the county for the purpose of examination and inspection by the public. The clerk of the superior court shall furnish anyone, upon written request, a copy of the proposed amendment or repeal. No

amendment or repeal hereunder shall be valid to change or repeal an amendment adopted pursuant to a referendum as provided in (2) of this subparagraph or to change or repeal a local act of the General Assembly ratified in a referendum by the electors of such county unless at least 12 months have elapsed after such referendum. No amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law.

(2) Amendments to or repeals of such local acts or ordinances, resolutions, or regulations adopted pursuant to subparagraph (a) hereof may be initiated by a petition filed with the judge of the probate court of the county containing, in cases of counties with a population of 5,000 or less, the signatures of at least 25 percent of the electors registered to vote in the last general election; in cases of counties with a population of more than 5,000 but not more than 50,000, at least 20 percent of the electors registered to vote in the last general election; and, in cases of a county with a population of more than 50,000, at least 10 percent of the electors registered to vote in the last general election, which petition shall specifically set forth the exact language of the proposed amendment or repeal. The judge of the probate court shall determine the validity of such petition within 60 days of its being filed with the judge of the probate court. In the event the judge of the probate court determines that such petition is valid, it shall be his duty to issue the call for an election for the purpose of submitting such amendment or repeal to the registered electors of the county for their approval or rejection. Such call shall be issued not less than ten nor more than 60 days after the date of the filing of the petition. He shall set the date of such election for a day not less than 60 nor more than 90 days after the date of such filing. The judge of the probate court shall cause a notice of the date of said election to be published in the official organ of the county once a week for three weeks immediately preceding such date. Said notice shall also contain a synopsis of the proposed amendment or repeal and shall state that a copy thereof is on file in the office of the judge of the

probate court of the county for the purpose of examination and inspection by the public. The judge of the probate court shall furnish anyone, upon written request, a copy of the proposed amendment or repeal. If more than one-half of the votes cast on such question are for approval of the amendment or repeal, it shall become of full force and effect; otherwise, it shall be void and of no force and effect. The expense of such election shall be borne by the county, and it shall be the duty of the judge of the probate court to hold and conduct such election. Such election shall be held under the same laws and rules and regulations as govern special elections, except as otherwise provided herein. It shall be the duty of the judge of the probate court to canvass the returns and declare and certify the result of the election. It shall be his further duty to certify the result thereof to the Secretary of State in accordance with the provisions of subparagraph (g) of this Paragraph. A referendum on any such amendment or repeal shall not be held more often than once each year. No amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law.

In the event that the judge of the probate court determines that such petition was not valid, he shall cause to be published in explicit detail the reasons why such petition is not valid; provided, however, that, in any proceeding in which the validity of the petition is at issue, the tribunal considering such issue shall not be limited by the reasons assigned. Such publication shall be in the official organ of the county in the week immediately following the date on which such petition is declared to be not valid.

(c) The power granted to counties in subparagraphs (a) and (b) above shall not be construed to extend to the following matters or any other matters which the General Assembly by general law has preempted or may hereafter preempt, but such matters shall be the subject of general law or the subject of local acts of the General

Assembly to the extent that the enactment of such local acts is otherwise permitted under this Constitution:

(1) Action affecting any elective county office, the salaries thereof, or the personnel thereof, except the personnel subject to the jurisdiction of the county governing authority.

(2) Action affecting the composition, form, procedure for election or appointment, compensation, and expenses and allowances in the nature of compensation of the county governing authority.

(3) Action defining any criminal offense or providing for criminal punishment.

(4) Action adopting any form of taxation beyond that authorized by law or by this Constitution.

(5) Action extending the power of regulation over any business activity regulated by the Georgia Public Service Commission beyond that authorized by local or general law or by this Constitution.

(6) Action affecting the exercise of the power of eminent domain.

(7) Action affecting any court or the personnel thereof.

(8) Action affecting any public school system.

(d) The power granted in subparagraphs (a) and (b) of this Paragraph shall not include the power to take any action affecting the private or civil law governing private or civil relationships, except as is incident to the exercise of an independent governmental power.

(e) Nothing in subparagraphs (a), (b), (c), or (d) shall affect the provisions of subparagraph (f) of this Paragraph.

(f) The governing authority of each county is authorized to fix the salary, compensation, and expenses of those employed by such governing authority and to establish and maintain retirement or pension systems, insurance, workers' compensation, and hospitalization benefits for said employees.

(g) No amendment or revision of any local act made pursuant to subparagraph (b) of this section shall become effective until a copy of such amendment or revision, a copy of the required notice of publication, and an affidavit of a duly authorized representative of the newspaper in which such notice was published to the effect that said notice has been published as provided in said subparagraph has been filed with the Secretary of State. The Secretary of State shall provide for the publication and distribution of all such amendments and revisions at least annually.

CERTIFICATE OF SERVICE

I certify that I served a copy of the **Principal Brief of Appellant** on the below via email *prior to filing* and that there is a prior agreement among counsel/parties to accept service via email.

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