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

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

I. The plethora of procedural objections raised lack merit.

Intervenors-Appellees raise a plethora of procedural issues that are not truly at issue. The Court can quickly brush these distracting arguments aside and get to the merits. As explained below, the merits question subsumes most of the procedural issues anyway.

A. This case is not moot.

A case is moot on appeal when the appellate court's resolution of the case will have no effect as to the rights of the parties before the court. *McCallister v. Clifton*, Case. No. S22A0144, 2022 WL 1143442, at *3 (Apr. 19, 2022). Thus, so long as a decision in the case would alleviate a continuing, concrete injury, the case is not moot. For example, the State cannot convict someone of a felony, sentence the defendant to a year in jail, and then argue the case is moot on appeal simply because the sentence is complete. *See generally*, *Paris v. State*, 232 Ga. 687, 689 (1974); *see also Atkins v. Hopper*, 234 Ga. 330, 333 (1975). Despite the sentence being served, other concrete harms may still flow from the conviction; and if the judgment is reversed, those harms will be alleviated through the appellate court's resolution of the case. *See also In re. M.F.*, 305 Ga. 820, 821 (2019).[1]

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[1] This concept has typically been recognized in the criminal context, but the concept is not so limited. It applies equally to civil cases. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, § 2:5 at 143 (7th ed.). It is but a simple recognition that, "while a plaintiff's emotional concern about the outcome of the case is not enough to keep it from becoming moot, any continuing injury means that there is a live controversy." CHMERINSKY, at 143.

Intervenors seem to believe that because the "election occurred successfully, and Judge Sweatt has certified the results," there is nothing left for this Court to review. [*See* Ints. Br. at 7–8]. Herman Talmadge made a similar argument during the Three Governors Crisis; this Court quickly saw through it. *See Thompson v. Talmadge*, 201 Ga. 867, 874 (1947). Certainly *Thompson* was not an advisory opinion merely because the General Assembly took an action before the constitutional validity of that action reached the Court. And of course this Court cannot turn back the clock and prevent the March 8 referendum from occurring, just like it could not prevent the General Assembly's "election" in *Thompson*; however, resolving whether Judge Sweatt actually had the authority to order the referendum resolves whether the County's rights under the Option Contract still exist. *See Thompson*, 201 Ga. at 878 ("It necessarily follows that all such action beyond the jurisdiction of the General Assembly was null and void and must be disregarded entirely."). That issue is still alive notwithstanding the fact that "the election has been held." *See Bruck v. City of Temple*, 240 Ga. 411, 413 (1977); *see also Merry v. Williams*, 281 Ga. 571, 572–73 (2007) ("Furthermore, although the particular dispute regarding the 2006 election is over, we cannot conclude that the more general issue of the appropriate method of counting abstentions is moot.").[2]

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[2] Intervenors seem to acknowledge this when they concede that the case is only moot insofar as the Court cannot now "stop the election or certification from happening in the first place." [Ints. Br. at 7 n.4].

The superior court's refusal to issue the extraordinary writs likewise does not mean the case is moot.[3] This conflates this Court's review for error with the merits issue. As is often the case with extraordinary writs, resolving (on appeal) whether the lower court *erred* in granting or denying the writ inevitably subsumes the merits issue—given the issuance of the writ is collateral to the merits. That was the case in *Kemp v. City of Claxton*, 269 Ga. 173, 174–76 (1998), and it has been the case for centuries. *See, e.g.*, *Tipton v. City of Dudley*, 242 Ga. 807, 807 (1979); *S.C. R. Co. v. Ells*, 40 Ga. 87, 89–91 (1869) (resolving merits of challenge to jurisdiction of justices of the peace in order to determine that writ of prohibition was erroneously denied). To know whether there was error, one must resolve the merits question. Thus, here, if the Home Rule Provision did not authorize Judge Sweatt to sanction the petition, then the superior court did in fact err by denying the writs. *See Kemp*, 269 Ga. 175. And, again, from that conclusion of error flows the County's ultimate relief: a conclusive ruling that the County's rights under the Option Contract necessarily remain intact, given that the March 8 referendum was not authorized by the Home Rule Provision. *See Thompson*, 201 Ga. at 878; *S.C. R. Co.*, 40 Ga. at 90–91.[4]

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[3] For example, Judge Sweatt notes that mandamus becomes moot once the public duty is performed. [Resp. Br. at 10 n.5].

[4] Thus, Judge Sweatt has not actually performed the public duty to which he is obligated: declaring the petition invalid. *See* Ga. Const. Art. IX, Sec. II, Para. 1(b)(2).

Moreover, as the County has previously explained, the issue presented is capable of repetition and will evade review, and therefore should not be moot. Intervenors nevertheless cite and quote *McCallister* as if it shows the capable-of-repetition principle is inapplicable. Yet, the fact that Intervenors had to butcher the quotation they borrowed from *McCallister* demonstrates why their reliance on the case is misguided. [*See* Ints. Br. at 8]. *McCallister* rejected the capable-of-repetition principle because the equitable caregiver statute's constitutionality would almost certainly *not* evade review in the vast majority of cases: such cases become moot only if the child turns 18. Thus, it is fairly probable a proper case will arise in which a child has not reached the age of majority while the case is on appeal. Here, however, it is inconceivable that an erroneous decision by a probate judge could ever be reviewed on appeal prior to a referendum occurring. Only 90 days may elapse from the filing of the petition to the occurrence of the election. *See* Ga. Const. Art. IX, Sec. II, Para. 1(b)(2).

Furthermore, resolving the scope and power of the County's electorate under the Home Rule Provision is "an issue of significant public concern" relating to foundational principles of local government. *See Perdue v. Baker*, 277 Ga. 1, 4 (2003); *see also Hopkins v. Hamby Corp.*, 273 Ga. 19, 19 (2000). Georgia's 159 counties deserve an answer on the question from the body with the final and exclusive say on what the Constitution means in this context. An answer should not be withheld merely due to a happenstance inherent to the Home Rule Provision "that prevented the

appeal from being heard in time." *Hopkins*, 273 Ga. at 19.[5]

B. The County has not waived the referendum's validity.

Appellees raise several interrelated arguments, suggesting the issue of the March 8 referendum's validity has been waived. For example, Intervenors cite *Smith & Wesson Corp. v. City of Atlanta*, 273 Ga. 431, 433 (2001), as if it supports their argument that the County's resort to extraordinary relief was inappropriate in lieu of an appeal. [*See* Ints. Br. at 14]. Yet, that decision explains why the extraordinary writs the County sought were appropriate vehicles to raise the issue. The general disfavor of judicial-review-by-writ is irrelevant when no "statutory appeal process" exists. *Smith & Wesson Corp.*, 273 Ga. at 433–34. Intervenors point to O.C.G.A. § 5-3-2 as providing the mechanism for appeal, but their argument is premised on their erroneous assumption that the "proceeding" before Judge Sweatt was a judicial one, like a typical will contest before a probate court. Intervenors conveniently ignore (or simply do not understand) that probate judges wear multiple hats.

Since the founding of this State, probate judges have "always performed certain ministerial acts, especially those pertaining to county

[5] The "significant public concern" principle is not an ad hoc "public policy" exception to mootness. *But see Perdue v. Baker*, 276 Ga. 822, 825 (2003) (Benham, J., dissenting). Rather, it is simply an application of the capable-of-repetition principle in a narrower class of cases wherein an issue is presented regarding the government's relationship to its citizens. *See Hopkins*, 273 Ga. at 19.

business," including certain election functions. *Carrol v. Wright*, 131 Ga. 728 (1908).[6] This is why the Home Rule Provision vests the responsibility of a referendum with the probate judge. Rather than mocking the County for providing important historical context, [*See* Ints. Br. at 21], Intervenors should have instead appreciated history's role in supplying the Home Rule Provision with meaning. When "presiding" over a Home Rule referendum, the probate judge appears to be performing one of his or her historical, ministerial functions, and thus, the "proceeding" should not be thought of as something like a judicial proceeding.[7]

Regardless, O.C.G.A. § 5-3-2 should not be misconstrued as applicable in order to avoid the important question before the Court. First, as Judge Sweatt determined, the County was not a party to the proceeding, nor entitled to intervene. [R.92]. Therefore, the County had no standing to appeal under O.C.G.A. § 5-3-2. *Booker v. Booker*, 286 Ga. App. 6 (2007); *Townsend v. Cain*, 140 Ga. App. 251 (1976).

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[6] *See* MARY F. RADFORD, REDFEARN WILLS AND ADMINISTRATION IN GEORGIA, § 6:1 (2022) (explaining that probate court was the successor office to the "court of ordinary").

[7] This is why the County sought a writ of mandamus, in addition to a writ of prohibition. [R.25]. If Judge Sweatt is actually performing one of his ministerial functions when acting under Paragraph 1(b)(2), then the writ of mandamus lies against him, and its issuance turns on the discretion conferred (or lack thereof). If he is instead performing a judicial function, then the writ of prohibition is perhaps more appropriate, and its issuance turns on the jurisdiction conferred (or lack thereof). As explained below, this is why the merits dispute subsumes many of the procedural issues.

Second, Intervenors' argument also erroneously assumes that an appeal under O.C.G.A. § 5-3-2 would be "equally convenient, complete, and beneficial." *See N. Fulton Med. Ctr., Inc. v. roach*, 265 Ga. 125, 127 (1995) (quotation omitted). It would not. Judge Sweatt had exceeded his "legitimate powers in the particular matter," given a Home Rule referendum was not authorized in this circumstance. *See City of Macon v. Anderson*, 155 Ga. 607 (1923) (surveying history and purpose of the writ of prohibition). Neither an appeal, nor a writ of certiorari, would have restrained Judge Sweatt from sanctioning the petition, conducting the election, and certifying the result. *Id.* at 614–16 (explaining the writ of prohibition is appropriate in this circumstance).[8]

Putting that aside, an appeal (via O.C.G.A. § 5-3-2 or a writ of certiorari) still would not have provided meaningful relief for a different reason: an appeal would have been limited to Judge Sweatt's ruling denying the County intervention. That issue would have become moot after the referendum. And thus, even with an appeal, the Parties would still

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[8] Judge Sweatt points to the potential availability of a writ of certiorari. A writ of certiorari is functionally the same as an appeal; it is a writ issued to an inferior tribunal for the correction of legal errors. *Hayes v. Brown*, 205 Ga. 234, 236 (1949). Therefore, this argument also assumes Judge Sweatt is performing a judicial function rather than a ministerial one. *But see* Note 7, *supra*; *see also Hayes*, 254 Ga. at 236 (explaining writ of mandamus is more appropriate "to correct errors relating to ministerial acts"). Nevertheless, even when applicable, certiorari does not preclude prohibition in such cases where the lower tribunal "is acting in excess of its jurisdiction." *Anderson*, 155 Ga. at 616.

be in the same place they are now: wondering whether the Home Rule Provision authorized the March 8 referendum and whether the referendum (after it occurred) vitiated the County's rights under the Option Contract.

Finally, Intervenors also make a curious collateral estoppel argument, though they do not engage in meaningful analysis. [*See* Int. Br. at 11–13]. There was not a "previous action" in the probate court, as explained above; even if there was, the County was not a party to that action, as Judge Sweatt concluded; and even then, whether the Home Rule Provision authorizes this type of referendum was not "actually litigated." So estoppel cannot preclude this Court's review. *See Thompson*, 201 Ga. at 874 ("The judgment of a court having no jurisdiction . . . is a mere nullity, and may be so held in any court when it becomes material to the interests of the parties to consider it." (quotation omitted)).

C. Judge Sweatt's decision to sanction the petition is not insulated from review.

Appellees also raise another point about the supposed vehicle issues in this case: Judge Sweatt has discretion when considering the validity of the petition and "extraordinary relief will not lie to dictate the manner in which the action is taken or the outcome of the action." [*See* Ints. Br. at 28; Resp. Br. at 6–7]. Taken to its logical end, Appellees appear to argue that Judge Sweatt would have discretion to sanction a petition on anything presented to him, since a petition's "validity assessment" "begin[s] and end[s]" with the probate judge. [*See* Int. Br. at 11]. That cannot be the rule.

See Ga. Const. Art. IX, Sec. II, Para. 1(b)(2) ("No amendment hereunder shall be valid if inconsistent with any provision of [the] Constitution . . ."). Nor is it, for several reasons.

First, again, the issue of there being discretion is subsumed into the merits. If the County is correct, then Judge Sweatt lacked discretion (or jurisdiction) to sanction the petition. *See Kemp*, 269 Ga. at 176. That the merits question has not yet been resolved by this Court does not mean that the Home Rule Provision did not *already* impose a specific duty to declare the petition invalid. This point "may seem anachronistic to lawyers and judges trained and professionally steeped in relativist theories of legal realism." *See Coon v. Med. Ctr., Inc.*, 300 Ga. 722, 730 (2017). But it derives from the basic principle that this Court does not *make law*; it declares what the *law is*. *See id.* If the Court determines here, like in *Kemp*, that the Home Rule Provision does not authorize this sort of referendum, then neither Judge Sweatt nor any other probate judge ever had the discretion (or jurisdiction) to sanction such a petition because the Home Rule Provision *never* conferred that authority. *See Mut. Life Ins. Co. v. Barron*, 70 Ga. App. 454 (1943); *see also Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 744 (2010) (Nahmias, J., concurring in part) (explaining judicial decisions operate retroactively because judges do not make law but declare what the law is and always was).

Second, and relatedly, Intervenors use the term "discretion" a bit too loosely. As used in the sense of an extraordinary writ, the term means the

decision at issue "is not, and cannot be governed by any fixed principles or rule." *See Manor v. McCall*, 5 Ga. 522, 525 (1848). It means that the official has a range of *valid* options to chose from. *Id.* It does not mean that the official has authority to chose an option that is not allowed. *Id.*[9]

D. The County has not confused the appellate remedy.

Intervenors argue that the County "gets the [appellate] remedy wrong," that it would be inappropriate to remand with instructions, including that the March 8 referendum was invalid under the Home Rule Provision. [*See* Int. Br. at 29]. This misunderstands how extraordinary writs operate. That would be the necessary conclusion resulting from this Court's holding. *How* that holding would be effectuated upon remand consistent with the Court's decision is appropriately left to the superior following the Court's mandate.[10]

[9] Even when used in its more common sense in litigation, a lower court's exercise of "discretion" does not bring with it the ability to misinterpret or misapply the law. *See, e.g.*, *Stockert v. Rogers*, 361 Ga. App. 276, 277 (2021) ("[A]n abuse of discretion occurs when the trial court commits a significant legal error that affects the exercise of discretion."). An example of the type of discretion that could not be controlled by mandamus here is the level of "detail" the probate judge provides when explaining the *invalidity* of a petition. *See* Ga. Const. Art. IX, Sec. II, Para. 1(b)(2). *Compare Manor*, 5 Ga. at 525 (offering example of duty to provide "reasonable" compensation).

[10] It is doubtful declaratory relief against Judge Sweatt in his official capacity is barred by sovereign immunity. [*See* R.29]. See also Ga. Const. Art. I, Sec. II, Para. 5(b)(1). Likewise, it is doubtful declaratory relief cannot run against Intervenors. The Court need not reach those thorny issues here, as they can be resolved on remand, if truly necessary.

II. The Home Rule Provision does not authorize the type of referendum that occurred.

Intervenors pay scant attention to the merits question. They merely argue that Paragraph 1(b)(2) is plain and unambiguous, requiring no construction by the Court. They also argue the County commits the cardinal sin of interpretation by rendering the phrase "ordinances, resolutions, or regulations adopted pursuant to subparagraph (a)" in Paragraph 1(b)(2) as surplusage. They are wrong on both points.

A. The Court need not ignore or strike constitutional text.

The County has previously explained what the phrase means. [Br. at 26–27]. Intervenors simply ignore the argument. The phrase refers to those "ordinances, resolutions, or regulations" that a county's board of commissioners may have adopted to amend or repeal the "local law applicable to [it]," which had nevertheless "remain[ed] in force and effect," following the enactment of Home Rule. *See* Ga. Const. Art. IX, Sec. II, Para. 1(a). This reading makes sense in light of the Home Rule Provision's text as a whole, including subparagraph (b) which limits the scope of subpart (b)(2) to "the local acts applicable to [the county's] governing authority." Ga. Const. Art. IX, Sec. II, Para. 1(b). It makes even more sense, the County explained, when the *noscitur* cannon is applied. [Br. at 26 (citing and quoting *Anderson v. Southeastern Fidelity Ins. Co.*, 251 Ga. 555, 556 (1983))]. Given the phrase follows "such local acts," the phrase should be construed as meaning something similar to the term "such local acts." The phrase

does not become surplusage when given this meaning; it captures the circumstance of the board of commissioners adopting a local measure that amends or repeals one of the local acts applicable to it. That local measure would not be termed a "local act," but instead an "ordinance, resolution, or regulation," amending "such local act," and therein lies the need for the broader phrase in Paragraph 1(b)(2).[11]

Intervenors attack the Court's decision in *Kemp* as eliminating the similar phrase found in the municipal home rule provision—though they excuse the Court's error given municipal home rule is statutory, not constitutional. [Ints. Br. at 23]. The Court in *Kemp* did no such thing. While *Kemp* loosely reasoned that statutory language may sometimes be eliminated in order to further "legislative intent," *Kemp*, 269 Ga. at 176, the Court did not strike the phrase to reach its holding, and accusing the Court of doing so is a little unfair. Instead, *Kemp* read the phrase consistent with the County's reading above. *Kemp* held that the phrase means those measures that are "amendments to municipal charters." *Id.* That is to say, *Kemp* held the referendum procedure is only available to amend or repeal the organic law of a municipality. When a city council adopts an ordinance, resolution, or regulation *amending its charter*, the electorate may amend or repeal *that measure* via the referendum. The referendum procedure,

[11] It is therefore no surprise that the phrase does not appear in Paragraph 1(b)(1); it would be unnecessary to say the county's governing authority may also amend or repeal its *own* measures. That is obvious.

however, cannot be interpreted as authorizing the electorate to "exercise" "general legislative power" and revise other local measures that do not rise to the level of charter amendments. *Id.*

B. Intervenors' "plain language" reading ignores proper contextual analysis and disregards most of the text.

According to Intervenors, the Court does not consult extra-textual sources of meaning for context unless the text is ambiguous. [Ints. Br. at 21]. This is wrong. *See Elliot v. State*, 305 Ga. 179, 186 (2019) ("The State is wrong; when we determine the meaning of a particular word or phrase in a constitutional provision . . ., we consider text in context, not in isolation."). Consider the Seventh Amendment to the U.S. Constitution, which enshrines the right to a civil jury trial in federal court when the amount in controversy "shall exceed twenty dollars." U.S. Const. amend. VII. Bereft of context, the term "twenty dollars" would seem to plainly and unambiguously refer to the $20 bill one may find in his or her pocket. But one would be mistaken to reach such a conclusion. That is what occurs, however, when one ignores context in favor of supposedly plain text. *See* Lawrence B. Solum, *Originalist Methodology*, 84 U Chi. L. Rev. 269, 281–82 (2017). Regardless, the phrase at issue in Paragraph 1(b)(2) is plainly *not* unambiguous—given the County's competing interpretation is equally sensible (and comports with the Court's conclusion in *Kemp*).

Intervenors' "plain language" reading suffers from other errors. It does not account for subparagraph (a), which references subparagraph (b)

as the mechanism for amending or repealing *the* local acts applicable to the county's governing authority. It does not account for subparagraph (b), which does indeed limit the scope of the subparts that follow to those certain local acts. Nor does it account for subparagraph (g), which does indeed reiterate that revisions under subparagraph (b) are limited to those certain local acts. [*See* Br. at 16–21]. Intervenors dismiss these textual arguments as merely "sparse attempts to engage the constitutional text." [Ints. Br. at 24]. But their "plain language" reading is what a "sparse attempt" to engage the text looks like.

C. The Attorney General opinions are not binding or persuasive.

Judge Sweatt has cited two Attorney General opinions, touching on the issue.[12] "While opinions of the Attorney General are persuasive authority, they are not binding on the appellate courts." *Moore v. Ray*, 269 Ga. 457, 458 (1998). Here, neither opinion is even persuasive. First, neither opinion engages in any textual analysis; both are merely *ipse dixit*. Second, and relatedly, neither opinion engages with the broader context of the Home Rule Provision, including history, precedent, practice, or first principles. Neither opinion cites a case or principle of law to support its conclusion. The opinions, moreover, were issued before this Court's decision in *Kemp*, and thus, it is doubtful the Attorney General would continue to rely on them. Finally, it is "for this Court alone to determine"

[12] *See* Op. Atty. Gen. 3 (1984); Op. Atty. Gen. 122 (1985).

the "meaning of the Constitution," and thus, it can and should ignore the opinions as it has done so in the past in different contexts. *See Gwinnett County School Dist. v. Cox*, 289 Ga. 265, 272 & 272 n.9 (2011).

D. The policy arguments raised can be ignored.

Finally, the First Amendment Amici raise a few policy arguments in support of Intervenors. [Br. Amici Goff, et al. at 10–17]. It should go without saying, but this Court "cannot change the Georgia Constitution, even if [it] believe[s] there may be good policy reasons for doing so." *Elliot*, 305 Ga. at 223. "Perhaps one county may believe a local initiative procedure is a more equitable form of government." [Br. at 25]. As the County previously explained, "through the second-tier home rule power, one county could (arguably) achieve such a system." [*Id.*].[13] "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." [*Id.*]. The Court should not conclude that it does.

CONCLUSION

The superior court's March 4, 2022 Order should be REVERSED and the case should be REMANDED with appropriate instructions, including that the March 8 referendum be declared invalid.

Respectfully submitted this 19th day of May 2022.

[13] "In fact, even before *Kemp* was decided, that is precisely what the City of Atlanta did." [Br. at 25].

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I certify that I served a copy of the **Reply Brief of Appellan**t 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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