IN THE SUPREME COURT OF THE STATE OF GEORGIA

CASE NO.: S24G1346

CHRISTINA GUY

Appellant

v.

HOUSING AUTHORITY OF THE CITY OF AUGUSTA, GEORGIA

Appellee

FROM THE COURT OF APPEALS
CASE NO: A24A0080

BRIEF OF APPELLEE HOUSING AUTHORITY OF THE CITY OF AUGUSTA, GEORGIA

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INTRODUCTION

Appellant asks the Court to turn Georgia immunity law on its head by holding that a governmental entity does not have governmental immunity unless granted expressly by the General Assembly. That is opposite of what the law dictates. Governmental entities at "all levels" have immunity automatically until it is waived by the General Assembly. *Cameron v. Lang*, 274 Ga. 122, 126 (2001); *Sheley v. Board of Public Education*, 233 Ga. 487, 488 (1975).

Appellant's claim against the Housing Authority of the City of Augusta, Georgia ("Housing Authority") is barred by sovereign immunity. Sovereign immunity is a common law doctrine, "also known as governmental immunity, [that] protects all levels of governments from legal action unless they have waived their immunity from suit." *Cameron*, 274 Ga. at 126 (emphasis added). It has existed at common law throughout the State's history, but was only recently reflected in the Georgia Constitution by an amendment ratified in 1974. *City of College Park v. Clayton County*, 306 Ga. 301, 305 (2019) ("Our Constitution did not create sovereign immunity; instead, it incorporated sovereign immunity from the common law."). This history alone resolves the issue. The General Assembly need not affirmatively create something the was clearly established at common law. Appellant argues there should be no common law analysis, and no governmental entity should be protected unless expressly named to have immunity in a statute, but that would be a sweeping change to Georgia law.

The recent additions to the Georgia Constitution do not express the boundaries or limits of governmental immunity, but rather the waiver of immunity that otherwise exists

at common law. *Id.* The 1974 additions to the Constitution do not specify when governmental immunity exists, but rather how the General Assembly may waive it. *Id.* Given that (a) governmental immunity is a common law doctrine that protects all levels of government, and (b) the doctrine is not established in the constitution, but only recognized there—the Court should not get bogged down in constitutional construction over its parameters. Courts must, however, determine the status of a government entity as State or local when the issue is waiver of immunity after the passage of the tort claims act. That is because the process for waiver for State entities is set out on the Georgia Tort Claims Act (GTCA), whereas the process for local entities is set out by municipal statutes. *See Holmes v. Chatham Area Transit Auth.*, 234 Ga. App. 42, 43 (1998) (GTCA waiver applies to state departments and authorities, not "local government" or "housing or other local authorities"); O.C.G.A. § 50-21-22(5).

All governmental entities have immunity except when they perform a private franchise. *City of Atlanta v. Mitcham*, 296 Ga. 576, 577-78 (2015). It is not alleged here that the function of a public housing authority (PHA) is private (ministerial) and not governmental. Rather, Appellant states that PHAs are for a "public purpose and exercise public and perhaps essential governmental functions." (App. Brief at 6). That stipulation should also be the end of the analysis.

Governmental immunity is practically necessary for PHAs to operate in Georgia. PHAs clear slums and operate public housing with government funds and make no profit. They were created specifically to improve the conditions of the poor, and they operate on funds allocated (or not) by government politicians. The original concept of immunity is

that the king cannot be sued in his own court (the authority creating the right is not subject to suit on it), though courts also explain that private citizens should not collect funds from the public purse. As applied here, taxpayers should allocate public funds to house the homeless, and not then be sued by those would-be homeless for not providing better housing (i.e., allocating more public money). Appellant is not a victim of the PHA but a recipient of governmental charity work.

Appellant would have the floodgates opened against PHAs for premises liability lawsuits that are rampant today. Public housing projects, like this one, are operated on public streets where every person is constitutionally allowed to enter. Here, the assailants are unidentified, there were no related incidents, and no other relationship is shown to the PHA. Without immunity, every criminal act on or near a PHA property can inevitably result in a lawsuit. A PHA should not be statutorily restricted in what it can charge, limited in who it can house and prohibited from making a profit, only to then be sued for the ramifications of those limitations. Ironically, the PHA was created as a government effort to eliminate slums and thereby reduce crime, but this lawsuit would argue the PHA thence became liable for all third-party crimes in the area of a former slum. In order for PHAs to exist and provide housing for the homeless (which the General Assembly has determined the private sector cannot do), this Court should clearly hold that PHAs are protected by governmental immunity.

There are numerous acts in place to limit the scope of immunity. The General Assembly can waive it altogether, waive it for private functions, waive it for certain actions like vehicle accidents, or waive it to limited extents including expressed amounts or based

on the applicable coverage of an insurance policy. Waiver measures are carefully crafted and limited, and better formulated by a legislative body. This Court should not usurp that legislative authority by declaring that there is no immunity at all (ever) for local governmental authorities, boards, and commissions that perform essential government functions.

PART ONE:
STATEMENT OF THE PLEADINGS AND FACTS

I. Background of Public Housing Agencies (PHAs)

In 1933, through New Deal initiatives, Congress appropriated $3.3 billion for the creation of the Federal Emergency Administration of Public Works. It created the United States Housing Authority, and subsidized the building of low-rent public housing by local housing authorities. *Williamson v. Housing Authority, etc., of Augusta*, 186 Ga. 673, 675 (1938).

The Georgia General Assembly promptly recognized the prevalence of unsanitary, unsafe, and unaffordable housing for low-income people, and it enacted the Housing Authorities Law of 1937 (1937 Ga. L. 210, Code Ann. § 99-1101, et. sq.). In order to participate in the New Deal initiatives, the General Assembly "created public bodies corporate and politic to be known as housing authorities to undertake slum clearance and projects to provide dwelling accommodations for persons of low income...." *Id.* Housing Authorities were created by the General assembly, not by local governments, but they may not operate until the locality declares by proper resolution a need for it. O.C.G.A. § 8-3-4. In 1937, the Augusta Mayor signed a resolution of "need for a housing authority in the city

of Augusta, in that unsanitary and unsafe dwelling accommodations exist in said city, and there is a shortage of safe and sanitary dwelling accommodations in said city available to persons of low income at rentals they can afford." (R-80; R-72, Smith Aff. ¶ 2). Appellee was thus the first public housing authority (PHA) operated in Georgia, after the City of Augusta was authorized to fund its initial operations. *Williamson,*186 Ga. at 675. It now serves over 5,000 public housing residents[1] in fourteen developments. (R-72, Smith Aff. ¶ 2). The City of Augusta was then consolidated with Richmond County in 1996. (Ga. L. 1995, p. 3648).

The General Assembly did not create local PHAs to waive immunity. Rather, PHAs were created around the country by state governments and activated by cities to comply with the locality requirements of federal law that preserve the ability of local areas to reject this form of public funds. *See e.g., Hills v. Gautreaux*, 425 U.S. 284, 303 (1976) (citing former 42 U.S.C. §§ 1415(7)(b) and 1421b(a)(2), and finding "local housing authorities and municipal governments had to make application for funds or approve the use of funds in the locality before HUD could make housing-assistance money available."); *see also* 42 U.S.C. § 1437c(e) and 42 U.S.C. § 12747(a)(1) (allocating funds among State and local entities).

[1] In Georgia, the Section 8 Program is also administered by PHAs, including the Appellee. *Hous. Auth. of Augusta v. Gould*, 305 Ga. 545, 547 (2019). Section 8 of the Housing Act of 1937 (42 U.S.C. § 1437f), commonly referred to as the "Section 8 Program" provides for the payment of federal rental housing assistance to private landlords on behalf of low-income households. The Housing Choice Voucher Program (HCV), the most identifiable Section 8 Program, is funded totally by federal dollars and serves tens of thousands of Georgia families. The U.S. Department of Housing and Urban Development (HUD) manages the Section 8 Program. 24 CFR Pt. 982 (2017).

However, PHAs fulfill the State and local need for the government to house the poor, clear slums, and reduce crime. The local nature of the instrumentality (PHA's were created in "each city and each county" under O.C.G.A. § 8-3-4) reflects the need to comply with the federal funding source and was not intended by the Georgia General Assembly to waive the State's immunity from lawsuits for providing housing to the homeless. In fact, cities and counties can also join together to make regional or consolidated PHAs that, "within the area of operation of such consolidated housing authority, have the same functions, rights, powers, duties, privileges, immunities, and limitations as those provided for housing authorities created for cities…." O.C.G.A. § 8-3-14 (emphasis added). There are thus city, county and regional PHAs in Georgia, which all require local determinations to operate.

PHAs are not ordinary landlords. Unlike private housing, PHA projects often inherently started from slum areas. PHAs are charged with clearing slums and administering aid from the U.S. Department of Housing and Urban Development ("HUD") to manage public housing for low-income residents at rents they can afford. Congress and HUD establish extensive federal rules for the public housing program that PHAs must follow, which do not apply to private landlords. (24 CFR §§ 5, 135, 902, 905, 941, 943, 945, 960, 963, 964, 966, 970, 971, 972, 984, and 990).[2]

Unlike private rental property, public housing is limited by State law to low-income families and individuals who must have incomes below 80% of the area median income.

[2] *See Notices Rules, and Regulation, HUD,* https://www.hud.gov/program_offices/public_indian_housing/regs (last visited 9/5/23).

(O.C.G.A. § 8-3-12; R-72, Smith Aff. ¶ 5). Tenants pay very limited rent based upon a percentage of reported household income. (R-72, Smith Aff. ¶ 6; O.C.G.A. § 8-3-12(a)(2)). PHAs thus have limited control in selecting tenants so as not to compete with the private sector. PHAs must also conduct annual reexaminations of family composition, community service, self-sufficiency, and other criteria related to continued occupancy. At least once annually, the PHA resident is required to provide the PHA with accurate and current information on the income and composition of the household. (24 CFR § 966.4; R-72, Smith Aff. ¶ 8).

Unlike private landlords, PHAs cannot refuse to renew a lease. A tenant may only be terminated for cause based upon specific criteria. 24 CFR § 966.4(l). Termination can only take place after grievance hearing rights of a tenant are given, and through a court process that satisfies due process requirements. *Id.*; 24 CFR § 966.51. Because they are administering federal funds, PHAs are encouraged or require to pursue the recovery of federal funds from tenants who have committed fraud against the programs they administer.[3] 24 CFR § 792.101, et seq.

Unlike private landlords, PHAs must also undergo annual physical inspections of their properties conducted by HUD's Real Estate Assessment Center (REAC) in order to ensure they meet "decent, safe, and sanitary" conditions. *See* 24 CFR Part 5, Subpart G. This process ensures that public housing is decent, safe, and sanitary through a process above and beyond anything applied in the private sector.

[3] The GTLA amicus brief likely references such instances.

Dogwood Terrace is a public housing project developed in 1959 on public streets with public streetlights maintained on power poles in the right of way. (R-72, Smith Aff. ¶¶ 2,11). It is not gated, and there are no fences that prevent access to the public. (R-72, Smith Aff. ¶ 11). Public access to public streets is a constitutional right. *Hirsh v. City of Atlanta*, 261 Ga. 22, 25 (1991). Appellee claims that the PHA here was negligent in failing to provide a private security force on a public street even though the PHA lacks power to arrest or expel a person from that street.

Unlike private housing, public housing is exclusively funded by Congressional appropriations. Because Congress has not adequately funded public housing for decades, public housing units nationwide are in need of substantial renovation and repairs. Congress has not provided funds to build new public housing units since the mid-1990s. (R-72, Smith Aff. ¶ 4). While public housing stock is becoming obsolete, unlike private development, a PHA must obtain written approval from HUD before undertaking any demolition or disposition of PHA-owned property. 24 CFR § 970.7. It must certify that the project is "obsolete as to physical condition, location, or other factors, making it unsuitable for housing purposes, and no reasonable program of modifications is cost-effective to return the public housing project or portion of the project to useful life." 24 CFR § 970.15(a)(1). Dogwood is slated for demolition now.[4]

Unlike private landlords, the PHA is operated by public servants for no profit. O.C.G.A. § 8-3-11. Commissioners are appointed by the mayor to serve without pay.

[4] *See* https://www.augustapha.org/public-notice-dogwood-demolition/ (last visited 2/22/25).

O.C.G.A. § 8-3-5. Rents are statutorily restricted to "the lowest possible rates consistent with its providing decent, safe, and sanitary dwelling accommodations for persons of low income."[5] *Id.* Unlike private parties, a PHA cannot simply sell its property, move to a new area, increase its rates, alter its tenant makeup, or close down its housing projects.

II. Facts of This Case

Appellant was a resident of Dogwood from July 2020 to May 2022 with her 20-year-old daughter and 4-year-old grandson. (R-11, Compl. ¶ 4; R-72, Smith Aff. ¶ 9). Her rent was subsidized, so she paid as little as 2% of market rent based upon her reported income from child support and unemployment compensation. (R-72 ¶ 9).

The Housing Authority had no knowledge of the incident until receiving the *ante litem* notice in April 2022 indicating that on Tuesday, November 16, 2021, at 11:15 p.m., Appellant received a gunshot injury to her leg outside of her apartment. (R-72 ¶ 11). She alleges the Housing Authority is liable for her injuries, but no one has identified the assailants or any connection to it. (R-72 ¶ 12 and Exhibit "B"). No detail has been provided to explain how the Housing Authority was potentially negligent, except to say it should be liable for all crime on or near its premises since it does not have a private police force patrolling public streets. (R-72 ¶ 11). Appellee filed its motion asserting that it is protected by immunity, which the trial court granted, and the Court of Appeals affirmed.

[5] Public housing is operated on an extensive multi-year waiting list that is only opened periodically. 24 CFR § 982.205; *See* https://www.augustapha.org/conventional-public-housing-closing/ (list visited 2/17/25).

PART TWO:
ARGUMENT AND CITATION OF AUTHORITY

I. Standard of Review

This Court reviews de novo a trial court's ruling based on governmental immunity grounds, which is a matter of law. *Bryant v. Ga. Ports Auth.*, 364 Ga. App. 285, 285 (2022). It upholds the trial court's factual findings if there is any evidence supporting them, and "the burden of proof is on the party seeking the waiver of immunity." *Id.* (citation and punctuation omitted); *Ramos v. Owens*, 366 Ga. App. 216, 216 (2022). A waiver of immunity "must be established by the party seeking to benefit from that waiver," *Bd. of Regents of the Univ. System of Ga. v. Daniels*, 264 Ga. 328, 328 (1994), and when a litigant fails to bear this burden, the trial court must dismiss the complaint for lack of subject-matter jurisdiction. *Southerland v. Ga. Dept. of Corrections*, 293 Ga. App. 56, 57 (2008). A court should not make a legal determination on governmental immunity based upon facts construed in the light most favorable to one plaintiff, as it appears occurred in *Files v. Hous. Auth. of City of Douglas*, 368 Ga. App. 455 (2023). The material facts are not in dispute for purposes of the pending rulings.

II. Governmental Immunity Protects Public Housing Authorities (PHAs).

A. The Common Law Doctrine of Governmental Immunity Protects All Levels of Government

It has long been settled that sovereign immunity protects "all levels" of government inherently. *Ga. Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 597 (2014) ("In 1784, Georgia adopted the common law doctrine of sovereign immunity, which protected governments at all levels from unconsented-to legal actions."); *Cameron*, 274

Ga. at 126 ("The doctrine of sovereign immunity, also known as governmental immunity, protects all levels of governments from legal action unless they have waived their immunity from suit."); *Gilbert v. Richardson*, 264 Ga. 744, 745 (1994) ("The common law doctrine of sovereign immunity, adopted by this state in 1784, protected governments at all levels from unconsented-to legal actions."); *Knowles v. Hous. Auth. of Columbus*, 94 Ga. App. 182, 183 (1956) ("the functions of the housing authority … are governmental in nature … no action sounding in tort can be maintained against it.") (overruled on other grounds); *Wyatt v. Rome*, 105 Ga. 312, 315 (1898) (citing caselaw for the proposition that a "city is not liable for the negligence of its officers or agents in executing sanitary regulations, adopted for the purpose of preventing the spread of contagious disease, or in taking the care and custody of persons afflicted with such disease, or the houses in which such persons are kept."); *Dollar v. Olmstead*, 232 Ga. App. 520, 522 (1998) ("The common law doctrine of sovereign immunity, adopted by this state in 1784, protected governments at all levels from unconsented legal actions.").

Governmental immunity, "as it exists in Georgia, is a continuation of English common law as it was understood in Georgia at the time it became part of our State Constitution." *City of College Park*, 306 Ga. at 307. Despite "the popular, contemporary notion that sovereign immunity is principally about the protection of the public purse, (Cit.) the doctrine at common law was understood more broadly as a principle derived from the very nature of sovereignty." *Lathrop v. Deal*, 301 Ga. 408, 412-13 (2017) *citing Kawananakoa v. Polyblank*, 205 U. S. 349, 353 (1907) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical

ground that there can be no legal right as against the authority that makes the law on which the right depends.").

Prior to 1974, while the constitution did not mention immunity, statute provided that "[m]unicipal corporations shall not be liable for failure to perform, or for errors in performing, their legislative or judicial powers." O.C.G.A. § 36-33-1(b); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 Ga. St. L. Rev. 405, 406 (1993) ("The statute reportedly originated with the Civil Code of 1895, as derived from earlier decisions of the Georgia Supreme Court.").

While governmental immunity has existed at common law for 230 years, it was first mentioned in the Georgia Constitution by an amendment ratified in 1974. *City of College Park*, 306 Ga. at 305.

> Our constitution did not create sovereign immunity; instead, it incorporated sovereign immunity from the common law. Therefore, we must look to the understanding of the common law doctrine of sovereign immunity in Georgia by 1974 — the date at which Georgia gave the doctrine constitutional status. And, though the relevant text of our State Constitution regarding sovereign immunity has undergone certain revisions leading up to its current form in the Georgia Constitution of 1983 as amended in 1991, those provisions generally address only the waiver of sovereign immunity.

Id. Thereupon, in 1975, the Supreme Court dispensed with its ability and authority to abrogate the doctrine, and left that duty to the General Assembly:

> the immunity rule as it has heretofore existed in this state cannot be abrogated or modified by this court. The immunity rule now has constitutional status, and solutions to the inequitable problems that it has posed and continues to pose must now be effected by the General Assembly. The enactment of statutes by the General Assembly pursuant to this constitutional provision can, in a fair and orderly manner, eliminate the inequities and injustices that have become apparent in our modern-day society because of the rigid immunity rule.

Sheley, 233 Ga. at 488. There has never been any doubt about the existence of immunity, but only about the General Assembly intent and power in applying waivers versus the restrictions established by the Constitution at a given time.

The constitution did not and does not express the limits of governmental immunity, but only deals with waiver of it. Hence, governmental immunity continues to protect all levels of government unless abrogated by the General Assembly. Article IX of the constitution assumed the existence of immunity for local government entities and restricted to "the General Assembly" the power of waiving that immunity "by law." GA. CONST. of 1983, Art. IX, Sec. II, Par. IX ("The General Assembly may waive the immunity of counties, municipalities, and school districts by law."). For the State and "its departments and agencies," the 1983 constitution in Article I expressly declared immunity but conferred the option of waiver directly upon the protected entities themselves. GA. CONST. of 1983, Art. I, Sec. II, Par. IX. Sentell, Jr., 9 Ga. St. L. Rev. at 408.

The General Assembly has passed the Georgia Tort Claims Act (GTCA) in 1992, which provides a limited waiver of the State's immunity, but excludes from the waiver "counties, municipalities, school districts … [and] housing and other local authorities." O.C.G.A. §§ 50-21-22(5), 50-21-22 and 50-21-24. Comparable local government immunity waivers are found in O.C.G.A. § 36-33-1 (ministerial acts), O.C.G.A. § 33-24-51 (liability insurance), and O.C.G.A. § 36-92-2 (motor vehicles). One result of the GTCA, was the need to classify the origin of immunity as State or local to determine if the GTCA waiver and notice requirements were applicable. *See Miller v. Ga. Ports Auth.*, 266 Ga. 586 (1996) (analyzing GTCA notice requirement); *Youngblood v. Gwinnett Rockdale*

Newton Cnty. Serv. Bd., 273 Ga. 715 (2001) (General Assembly cannot declassify local entity outside of GTCA).

Appellant, without reference to this legal history, points to the limited language of Article IX of the Constitution as somehow restricting the common law doctrine or the scope of local governmental immunity. But nothing in the single sentence of Article IX purports to limit or define any form of common law immunity. Rather, it limits the ability to waive such immunity to the General Assembly. That text should not be read by this Court as limiting or modifying immunity. The General Assembly may take action to abrogate that common law immunity as necessary to eliminate rigidity and injustices through a waiver as noted in *Sheley*, 233 Ga. at 488. However, a waiver is a "voluntary relinquishment of some known right." *Jordan v. Flynt*, 240 Ga. 359, 266 (1977). Here, the General Assembly has not intentionally relinquished immunity for local housing authorities, but has endorsed immunity as shown herein.

B. "All Levels of Government" Includes Authorities (Municipal Entities that Perform Public Duty Directives from the State).

"All levels of government" protected by immunity includes "instrumentalities" of government in performing governmental functions. "Of course, it is well recognized that so far as its purely governmental functions are concerned,--that is, so far as it undertakes to perform for the State any of those duties which the State should perform, <u>either directly or indirectly</u>, for its citizenry,--such as the maintenance of the public morality, peace, safety and health, <u>a city has the same immunity from liability that the State itself possesses</u>." *Huey v. Atlanta*, 8 Ga. App. 597 (1911) (emphasis added); *Wyatt*, 105 Ga. at 315 (quoting

Ogg v. Lansing, 35 Iowa 495 (1872), for the proposition that a "city is not liable for the negligence of its officers or agents in executing sanitary regulations, adopted for the purpose of preventing the spread of contagious disease, or in taking the care and custody of persons afflicted with such disease, or the houses in which such persons are kept."). The *Wyatt* Court cited *Summers v. Commissioners*, 103 Ind. 262 (1885), finding that "Counties are instrumentalities of government, and are not liable for injuries caused by the negligence of the commissioners in the selection of an unskilful or incompetent physician for the care of the poor." *Wyatt* 105 Ga. at 315.

The test is whether the actions are governmental or not.[6] "Municipal corporations shall not be liable for failure to perform or for errors in performing their legislative or judicial powers. For neglect to perform or improper or unskillful performance of their ministerial duties, they shall be liable." O.C.G.A. § 36-33-1(b). "This provision has for more than a century been interpreted to mean that municipal corporations are immune from liability for acts taken in performance of a governmental function but may be liable for the negligent performance of their ministerial duties." *Mitcham*, 296 Ga. at 577-78 .

> Governmental functions traditionally have been defined as those of a purely public nature, intended for the benefit of the public at large, without pretense of private gain to the municipality. (Cit.) The exemption from liability for governmental functions "is placed upon the ground that the service is performed by the corporation in obedience to an act of the legislature, is one in which the corporation has no particular interest and from which it derives no special benefit in its corporate capacity." (Cit.) Ministerial functions, in comparison, are recognized as those involving the "exercise of some private franchise, or some franchise conferred upon [the municipal corporation] by law which it may exercise for the private profit or convenience of the

[6] While the Housing Authority is a municipal corporation, its status as such is not essential to immunity, but only to the mechanisms available for waiver of immunity. *See infra*, Section C.

> corporation or for the convenience of its citizens alone, in which the general public has no interest.

Id. at 578 (the care of inmates in the custody of a municipal corporation is a governmental function).

Appellant concedes that the functions of the PHA are governmental in nature and not ministerial, (App. Brief at 6), because the Housing Authority was housing the poor, and "furnishing of aid or assistance to the poor is a 'governmental function.'" *Aven v. Steiner Cancer Hosp., Inc*., 189 Ga. 126, 140 (1939); *Wyatt*, 105 Ga. at 315; *Williamson*, 186 Ga. at 675. *See also* Court of Appeals Opinion, n.6.

"Housing authority" means "any of the public corporations created by or pursuant to" the Georgia Housing Authorities Law. O.C.G.A. § 8-3-3(2), (4) (emphasis added). A housing authority "shall constitute a public body corporate and politic exercising public and essential governmental functions …." O.C.G.A. §§ 8-3-4, 8-3-30(a) (emphasis added). Housing authorities were created because the housing shortage for persons with low income could not be relieved by private enterprise, and so a government actor was required to use public funds to provide housing for persons of low income. O.C.G.A. § 8-3-2. Clearly, this is the use of public funds for a governmental purpose. The "service is performed by the [Housing Authority] in obedience to an act of the legislature," and so it "is one in which the corporation has no particular interest and from which it derives no special benefit in its corporate capacity." *Mitcham*, 296 Ga. at 578 . The Housing Authority is instructed to perform the service at the "lowest rates possible" and without any profit. O.C.G.A. § 8-3-11. There is no evidence or indication that the Housing Authority was

performing any private function or private franchise for its own benefit, or doing anything competitive with private enterprise.[7] Governmental immunity thus applies, and an individual tenant should not be permitted to bring a lawsuit for damages to challenge the discretion of the PHA in determining whether a private security force is consistent with providing housing at the "lowest possible rates."

The holding of the Court of Appeals in this case is consistent with its same holding seventy years ago. In 1956, it found PHAs were protected by governmental immunity because "the functions of the housing authority … are governmental in nature." *Knowles v. Hous. Auth. of Columbus*, 94 Ga. App. 182, 183 (1956). It was reversed by the Supreme Court, but not because the housing authority could not have immunity. Rather, the Supreme Court held that the language "sue and be sued" as a "power" in O.C.G.A § 8-3-30(a)(1) was a waiver of immunity by the General Assembly relying primary upon federal law cites. *Knowles v. Hous. Auth. of Columbus*, 212 Ga. 729 (1956) ("The controlling question in this case is the effect of the 'sue and be sued' clause in our housing act."). Both courts in the 1950s followed the analysis discussed above. Neither questioned whether the PHA should have governmental immunity inherently under the common law because of its region of operation or authority status, and neither looked for a statute granting it immunity. The analysis was that governmental immunity exists, inherently, unless waived by language in a statute. So, the courts looked for evidence of waiver, a voluntary

[7] The Amicus brief filed by the GTLA suggests the PHA function could be classified as ministerial, but it does not cite the standards for determining ministerial functions under governments immunity law, and that argument was not contested in this appeal. (Court of Appeals Opinion, n.6; App. Brief at 6).

relinquishment of immunity by the General Assembly. The Supreme Court later reversed itself, finding that the "sue and be sued" language "does not signify a waiver of sovereign immunity against suit." *Self v. Atlanta*, 259 Ga. 78, 80 (1989). These decisions clearly demonstrate that PHAs, as governmental entities, are inherently vested with immunity under the common law as incorporated into the Constitution, unless waived by the Constitution or General Assembly.[8]

This is consistent with the laws of other states, also deriving from English common law. *See Hous. Auth. of Austin v. Garza*, No. 03-22-00085-CV, 2023 Tex. App. LEXIS 5639, at *10 (Tex. App. July 31, 2023) (holding that PHA "is a governmental entity entitled to sovereign immunity"); *Page v. Portsmouth Redevelopment & Hous. Auth.*, 2023 Va. App. LEXIS 407, at *15-16 (Va. App. June 20, 2023) (holding that a municipal PHA occupied same status as the municipality that brought it into existence and was entitled to same sovereign immunity); *Garanin v. Scranton Hous. Auth.*, 286 A.3d 401 (Pa. Commw. Ct. 2022) ("housing authorities and their employees are generally immune from suit pursuant to the Sovereign Immunities Act"); *Bryant v. Louisville Metro Hous. Auth*., 568 S.W.3d 839, 853 (Ky. 2019) (Louisville Metro Housing Authority is entitled to governmental immunity).

[8] *See also Hiers v. City of Bawick*, 262 Ga. 129 (1992) ("Municipalities are entitled to assert governmental or sovereign immunity when they undertake to perform for the State duties which the State itself might perform, but which have been delegated to the municipality. …The immunity of a municipality is derivative from the State….") (quotations and citations omitted). At the time of the *Hiers* decision, the insurance waiver for immunity was contained in Article I of the 1983 Constitution, and so the struggle was determining whether there was a waiver of immunity, as always, with this case dealing with waiver for a city as compared to the State. *Id.* at 130. After that case was initiated, waiver was then removed from Article I of the Constitution altogether, and reserved for the General Assembly. *Miller*, 266 Ga. at 588; Sentell, Jr., 9 Ga. St. L. Rev. at 412.

Appellant cites *Thomas v. Hosp. Auth. of Clarke County*, 264 Ga. 40, 42-43 (1994), which held "that the operation of a [county] hospital is not the kind of function, governmental or otherwise, entitled the protection of sovereign immunity. The very functions performed by the Hospital Authority are performed by private hospitals and the Hospital Authority is in direct competition with these private hospitals for patients." *Id.* (emphasis added). While the *Thomas* analysis about instrumentalities (division 1) has been rejected,[9] the private function analysis aligns with *Mitcham*'s government function test that "municipal corporations are immune from liability for acts taken in performance of a governmental function but may be liable for the negligent performance of their ministerial duties." *Mitcham*, 296 Ga. at 577-78. The *Thomas* Court found that (1) the hospital authority was involved in an area of business ordinarily carried on by private enterprise (a private franchise); and (2) the extension of the doctrine of immunity to hospital authorities would have no impact on one of the doctrine's primary purposes, protecting the public purse. 264 Ga. at 42-3.

The *Thomas* court appears to have considered the overlap and competition between hospital authorities and private hospitals. The *Thomas* analysis would not apply if the governmental entity was only providing public services to the poor and not competing with the private sector. Here, PHAs do not compete with private enterprise as matter of law in

[9] Division 1 of *Thomas*, 264 Ga. at 42, had held that instrumentalities were not entitled to immunity under Article I, but that rational has been subsequently rejected. *See Kyle v. Ga. Lottery Corp*., 290 Ga. 87, 89 (2011) (discrediting division 1 of *Thomas*).

performing the governmental function of housing the poor. O.C.G.A. § 8-3-2; Ga.L.1937, p. 210.

The *Thomas* holding was distinguished in *English v. Fulton Cty. Bldg. Auth.*, 266 Ga. App. 583, 584-85 (2004), which held that a local building authority was protected by governmental immunity, in part, because the two policy factors from *Thomas* were inapplicable.

> In this case, the Authority was created as "a body corporate and politic … which shall be deemed to be an instrumentality of the State … and a public corporation. It is authorized to issue negotiable revenue bonds for the purpose of financing its projects. "[T]he creation of the Authority, and the carrying out of its corporate purpose, is in all respect for the benefit of the people of this State, and is a public purpose and … the Authority … perform[s] an essential governmental function in the exercise of the power conferred upon it by [the County Building Authorities] Act."

Id. at 586.

Appellant's theory is that no local government entity other than a city, town or county has immunity. But that has never been the law. Governmental immunity extends to the State and it instrumentalities, and to local governments and their instrumentalities as well. *Culberson v. Fulton-Dekalb Hosp. Auth.*, 201 Ga. App. 347, 348 (1991); *Hospital Auth. of Fulton County v. Litterilla*, 199 Ga. App. 345, 346-347 (1991), overruled on other grounds by *Litterilla v. Hosp. Auth. of Fulton County*, 262 Ga. 34 (1992); *Youngblood v. Gwinnett Rockdale Newton Cnty. Serv. Bd.*, 273 Ga. 715 (2001) (county community service boards created by the general assembly as public agencies to govern publicly funded programs for mental health, mental retardation, substance abuse, and other disability

services are entitled to state immunity). Only the General Assembly can waive immunity, and it has not broadly waived immunity for local authorities.

C. PHAs are Municipal Corporations or Instrumentalities Protected by Governmental Immunity.

In 1937, the General Assembly recognized the prevalence of unsanitary, unsafe, and unaffordable housing for low-income people, and it enacted the Housing Authorities Law. It "created public bodies corporate and politic … to undertake slum clearance and projects to provide dwelling accommodations for persons of low income..." *Id.* (emphasis added). A "public body" is clearly understood to mean "any department, agency, special purpose district, or other instrumentality of a State or local government; any Indian tribe; or any agency of the Federal Government." 41 CFR § 102-37.560 (2002) (emphasis added); Oxford Reference, available at https://www.oxfordreference.com/, last visited on August 7, 2024 (A public body is "[a]ny body, corporate or otherwise, that performs its duties and exercises its powers for the public benefit, as opposed to private gain.").

The General Assembly has made clear that it considered PHAs to be municipal corporations, or instrumentalities thereof, for purposes of its immunity analysis:

> "Municipality" means a municipal corporation of the State of Georgia. Such term shall include any public authority, commission, board, or similar agency which is created by general or local Act of the General Assembly and which carries out its functions wholly or partly within the boundaries of the municipality. The term shall also include such bodies which are created or activated by an ordinance or resolution of the governing body of the municipality individually or jointly with other political subdivisions of the state.

O.C.G.A. § 36-85-1(10) (emphasis added). As a defined "municipality" and "municipal corporation," the Housing Authority was clearly intended by the General Assembly to

retain immunity under O.C.G.A. § 36-33-1(a). The General Assembly defined authorities as municipal corporations when particularly dealing with insurance coverages and immunity waivers.

The City of Augusta activated the Housing Authority by a resolution after its creation by the General Assembly as a government entity, such that the Housing Authority is a municipal corporation with immunity and an instrumentality[10] of local and state government. *See Holmes*, 234 Ga. App. at 46 (Chatham Area Transportation Authority is "a creature of local government"); *Heyward v. Public Housing Administration*, 154 F. Supp. 589, 591 (S.D.Ga. 1957) (Housing Authority of Savannah is a "municipal corporation" organized under the Housing Authorities Law of Georgia) (overruled on other grounds); *Stegall v. Sw. Ga. Reg'l Hous. Auth.*, 197 Ga. 571, 588 (1944) (referring to PHA as "municipal corporation" for purposes of treating its property as public property exempt from taxation); *Culbreth v. Sw. Ga. Reg'l Hous. Auth*., 199 Ga. 183, 189 (1945) ("Since the housing authority is thus a public corporation, and is using this property exclusively for a declared public and governmental purpose, and not for private or corporate benefit or income, it is in effect an instrumentality of the State.").

Even if the Court were to disregard the intent of the legislature in defining the Housing Authority as a municipality and municipal corporation, that does not mean the

[10] An instrumentality "is a device—a 'means or an agency,' according to Random House Dictionary—which enables an individual or a government to achieve an end. Typically state and local authorities and public corporations which were created to serve public purposes, but which did not fall within the traditional definition of a public subdivision of the state were referred to as instrumentalities." *Holmes*, 234 Ga. App. at 44 (collecting citations showing authorities and public corporations are instrumentalities that retain many benefits reserved for the state and its political subdivisions).

Housing Authority lacks immunity for performing government functions. It is beyond dispute that the PHA is a governmental entity (public body) formed by the State and performing a governmental function that cannot be performed by private enterprise. O.C.G.A. §§ 8-3-2, 8-3-3, 8-3-4, 8-3-30. There is clearly immunity—whether the Court considers the PHA a governmental entity, a municipal corporation, or simply an instrumentality designed to perform a governmental function of the City and State—unless and until the General Assembly waives it.

Because they are public entities serving a governmental function and using public funds as an instrumentality of the city and State, PHAs are "exempt from all taxes and special assessments of the city, the county, and the state of any political subdivision thereof." O.C.G.A. § 8-3-8; *Culbreth*, 199 Ga. at 189 . "The property of an authority is declared to be public property used for essential public and governmental purposes and not for purposes of private or corporate benefit and income." O.C.G.A. § 8-3-8. For that reason, a contractor must provide a payment bond before performing work on Housing Authority property because a materialman's lien or judgment lien cannot be effective against a housing authority's property. *B & B Elec. Supply Co. v. H.J. Russell Constr. Co.*, 166 Ga. App. 499, 500 (1983). Hence, even if plaintiffs could procure a judgment against a PHA, there is no practical way to collect it because housing authorities are immune from judgment liens. PHAs cannot just borrow money, but may only issue debt through the public bond validation process. O.C.G.A. § 8-3-17.

Similarly, the property on which a public housing project is developed is "public property used for essential public and governmental purposes and not for purposes of

private or corporate benefit and income." O.C.G.A. § 8-3-8. It is reserved for persons of low income as a subsidized house, and it inherently satisfies the governmental function test of O.C.G.A. § 36-33-1(b). *Mitcham*, 296 Ga. at 577-578. The Housing Authority undoubtedly represents the public purse as its entire purpose is to use public funds to provide subsidized housing to persons of low income (who might otherwise be homeless). It would not make sense that the PHA property cannot be taxed, assessed, or used as collateral in order to protect the public purse, but the same property could be levied against by a tenant in a premises liability action. Additional costs of housing or liability must inherently be paid by taxpayers. Such a holding would be illogical and create disharmony in the law.

PHAs, as municipal corporations formed to perform a specific function of government, are thus immune from suit under the present constitution and statutory framework except to the extent that immunity has been waived by the General Assembly.

D. PHAs Also Have the Same Immunity Under Article I.

Article I, Sec. II, Par. IX of the constitution provides that "sovereign immunity extends to the state and all of its departments and agencies," which are terms it does not define. The process for waiver of immunity for State entities is then set out on the Georgia Tort Claims Act (GTCA), which includes waivers for State instrumentalities and authorities, and excludes "local government" and "housing or other local authorities." O.C.G.A. § 50-21-22(5). However, the immunity of local entities derives from the State. *Hiers*, 262 Ga. at 129 ("Municipalities are entitled to assert governmental or sovereign immunity when they undertake to perform for the State duties which the State itself might

perform, but which have been delegated to the municipality. …The immunity of a municipality is derivative from the State….")

To determine whether an entity is an instrumentality of the state for governmental immunity purposes, courts evaluate whether an entity has immunity by examining (1) the legislation creating the entity, and (2) the public purposes for which it was created. *Miller*, 266 Ga. at 586; *Campbell v. Cirrus Educ., Inc.*, 355 Ga. App. 637, 642 (2020) (local charter school created through general legislation is a local non-profit and state instrumentality entitled to immunity). The concept of State versus local matters only for determining how ante litem notice is given and when immunity is waived.

The General Assembly created the PHA as an instrumentality, calling it a "public body corporate and politic." O.C.G.A. § 8-3-4. That is the same terminology used to describe counties. GA. CONST. of 1983, Art. IX, Sec. I, Par. I ("Each County shall be a body corporate and politic with such governing authority … as provided by law."). The term "public" is used in designating the legal character of various acts, that "affect or belong to the collective body of a state or community." Webster's International Dictionary (2d. ed.) (1953). Similarly, "politic" means "of or pertaining to polity, or civil government." Webster's International Dictionary (2d. ed.) (1953). The governmental nature of a PHA is also confirmed by O.C.G.A. § 8-3-30(a), which states that PHAs exercise "essential public and governmental functions." This legislation strongly suggests that the housing authority is an agency of, or an instrumentality of, the State created by the State to serve its governmental purpose. Municipal authorities may also be combined into regional authorities to better serve the local and State needs. O.C.G.A. § 8-3-14.

Georgia courts have recognized that housing authorities perform a public purpose as "instrumentalities of the State." *Culbreth*, 199 Ga. at 189. The functions of the housing authority, and not its territory, should determine the immunity analysis. O.C.G.A. § 8-3-14 (PHAs should have the same "immunities" whether they are city, county or regional authorities); *Knowles*, 212 Ga. at 730 (discussing *Culbreth* and analysis that a PHA is "an instrumentality of the State which performs governmental functions" but finding the sue and be sued language waived immunity) (*overruled by Self*, 259 Ga. 78). The legislation creating the PHA declares it to be a government entity, and the public purposes for which it was created do not compete with the private sector. O.C.G.A. § 8-3-2.

Georgia courts construe statutes of similar subject matter "together, and harmonize them whenever possible, so as to ascertain the legislative intendment and give effect thereto." *Montgomery v. Montgomery*, 287 Ga. App. 77, 79 (2007); *Macon Sash, Door & Lumber Co. v. Macon*, 96 Ga. 23 (1895). Pursuant to this rule, the Court should construe the following statutes together to find they indicate the PHA is an instrumentality of the State entitled to immunity: O.C.G.A. § 50-18-70 (PHAs are considered agencies of the State for purposes of the Open Records Act making their records available for public inspection); O.C.G.A. § 50-14-1(a)(1)(A) (PHAs are state "agencies" for open meeting laws); O.C.G.A. § 50-21-22(5) (the GTCA waives the State's immunity, but expressly excludes from the waiver "counties, municipalities, school districts … [and] housing and other local authorities"); O.C.G.A. § 36-33-1 (recognizing immunity for municipal corporations); O.C.G.A. § 36-85-1 (3) and (10) ("Municipality" encompasses "any <u>public authority</u>") (emphasis added); O.C.G.A. §§ 22-1-2, 22-1-4 (eminent domain is a right of

the State, and the General Assembly may exercise that right "directly through officers of the state" or indirectly through other entities); O.C.G.A. § 8-3-31 (housing authorities have the right to use eminent domain); O.C.G.A. § 8-3-2 (housing authorities serve public purposes). The Housing Authorities Law (O.C.G.A. § 8-3-1, *et. seq.*), construed so as to "harmonize" with other State laws, demonstrates that PHAs should be considered an instrumentality of the State of Georgia entitled to immunity.

E. Public Policy Cannot Overturn Immunity

Appellant's public policy argument technically has no application here under *Sheley*, 233 Ga. at 488 ("The immunity rule now has constitutional status, and solutions to the inequitable problems that it has posed and continues to pose must now be effected by the General Assembly."). If the public desires to change immunity law, it should do so through an act of the General Assembly, not by a sweeping legislative change enacted by the Supreme Court. The General Assembly has already limited immunity through specific acts for vehicles, insurance coverage, ministerial acts, governmental officials, and private functions. It could broadly waive immunity for all PHAs, if that is the public desire, but it is not.

Public policy does not support money judgment awards against PHAs. PHAs rely on the public purse to provide free or nearly-free housing in lieu of slums. Public votes and funding decisions determine the level of funding for projects, not tort claims. Moreover, "no housing authority shall construct or operate the dwelling accommodations … for a profit." O.C.G.A. § 8-3-11. This is not a situation where a private slum landlord motivated by profit should be put out of business by a large judgment from a tenant or the

costs of low income housing should be spread among its tenants. Additional costs of housing or liability must inherently be paid by taxpayers. Taxpayers have not decided to fund private security forces for public streets in public housing.

Because they are governmental entities performing a governmental function and using public funds, PHAs are "exempt from all taxes and special assessments of the city, the county, and the state of any political subdivision thereof." O.C.G.A. § 8-3-8; *Culbreth*, 199 Ga. at 189 . Public policy would not hold that a government cannot take funds from a PHA in the form of taxes, but a court can award funds to a plaintiff.

A contractor must provide a payment bond to work on PHA property because a materialman's lien or judgment lien is precluded. *B & B Elec. Supply Co.*, 166 Ga. App. at 500 . It would not be public policy that a tenant receiving free housing can recover from the public purse when a subcontractor performing a service cannot.

Even if plaintiffs could procure a judgment against a PHA, there is no practical way to collect it because PHA property is immune from judgment liens under express public policy. O.C.G.A. § 8-3-80. Public policy thus does not support a premises liability action against a PHA to obtain a money judgment by its tenants.

III. CONCLUSION

WHEREFORE, the Housing Authority respectfully requests that the Court affirm the decision dismissing this lawsuit for lack of subject matter jurisdiction because the Housing Authority is protected by immunity.

Respectfully submitted this 24th day of February, 2025.

This submission does not exceed the word-count limit imposed by Rule 20.

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CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case by Unites States mail and by email at the address listed below and by electronic filing:

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This 24th day of February, 2025.

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