IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE on behalf of itself and its members *et al.*, Plaintiffs v. STATE OF GEORGIA, Defendant	CIVIL ACTION 2022CV367796

ORDER DISMISSING MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

On 26 July 2022, Plaintiffs filed their complaint in this action; through it, Plaintiffs bring a constitutional challenge (under Georgia's Constitution) to certain provisions of Georgia's LIFE Act[1], which Plaintiffs describe as a law "that is forcing pregnancy and childbirth upon countless Georgians, and at the same time prohibiting medically appropriate care for patients suffering pregnancy complications and miscarriages." (Complaint at ¶ 1). Specifically, Plaintiffs seek a declaratory judgment confirming their claims of the LIFE Act's unconstitutional nature as well as a permanent injunction enjoining the State from enforcing the constitutionally impermissible provisions of the LIFE Act.

Concomitantly with their complaint, Plaintiffs filed an emergency motion seeking preliminary injunctive relief that would temporarily enjoin the enforcement of those allegedly unconstitutional provisions of the LIFE Act until the claims brought in their complaint could be fully litigated. On 8 August 2022, the Court held a hearing on the

[1] The challenged provisions of H.B. 481 are codified at O.C.G.A. §§ 16-12-141, 31-9B-2, and 31-9B-3.

motion. Having reviewed the parties' briefs and arguments, relevant caselaw, and the constitutional provision that authorizes Plaintiffs to bring most[2] of their action, the Court DISMISSES Plaintiffs' motion, finding that the State has not waived sovereign immunity for claims for preliminary injunctive relief from aggrieved parties challenging the constitutionality of an act of our State's Legislature. Put more plainly, the Court is dismissing the motion not on its merits but because the Court lacks jurisdiction to consider its merits.

* * *

In Georgia, and in most states, one cannot sue "the State" unless the State has enacted a specific waiver, legislative or constitutional, that permits a particular claim or species of claim -- tort, contract, declaratory judgment, etc. -- to be brought. That is, the State and its agencies and agents enjoy sovereign immunity, a constitutional doctrine that "forbids our courts to entertain a lawsuit against the State without its consent." *Lathrop v. Deal*, 301 Ga. 408, 408 (2017); *see also* Ga. Const. art. I, § 2, ¶ IX(e).[3] Absent that consent, Georgia's courts lack jurisdiction to consider the claim brought against the State. *McConnell v. Dept. of Labor*, 302 Ga. 18, 18-19 (2017) (if sovereign immunity applies, a court "lacks authority to decide the merits of a claim that is barred"); *see also City of Coll. Park v. Clayton Cnty.*, 306 Ga. 301, 314-15 (2019). Consent, however, has often been given, typically in legislative form and occasionally through judicial interpretation. Laws

[2] In their complaint -- as in their emergency motion -- Plaintiffs seek temporary injunctive relief, a claim which this Court lacks jurisdiction to consider. (Complaint at ¶ 97).

[3] *Lathrop* sets forth a detailed history of the doctrine of sovereign immunity for those interested in tracing its origins in the common law of England.

like the Georgia Tort Claims Act do so expressly: "The state waives its sovereign immunity...." O.C.G.A. § 50-21-23 (a).

The past decade saw a sharp retrenchment of the scope of the commonly understood waivers of and exceptions to sovereign immunity in Georgia. It began with *Georgia Dept. of Natural Resources v. Center for a Sustainable Coast*, 294 Ga. 593 (2014), in which the Supreme Court ended a nearly twenty-year-old judicially created "exception" to the State's immunity from suits for injunctive relief seeking to restrain an illegal act. It continued with *Olvera v. University System of Ga. Board of Regents*, 298 Ga. 425 (2016), which found that suits for declaratory relief were similarly barred and no immunity had been waived. And it culminated with *Lathrop* -- ironically a suit about abortion -- in which the Supreme Court first reaffirmed that "the doctrine of sovereign immunity extends generally to suits against the State, its departments and agencies, and its officers in their official capacities" and then held that that immunity barred claims "for injunctive and declaratory relief from official acts that are alleged to be unconstitutional." *Lathrop*, 301 Ga. at 409. Meaning: a claim that a law of the State of Georgia should be declared unconstitutional could not be brought in Georgia's courts under the then-current language of the State's Constitution.

Understandably concerned legislators and citizens did not let this situation persist for long. Three years later, on 3 November 2020, in a part of the general election that does not appear to be contested, voters in Georgia ratified an amendment to the State Constitution that waived sovereign immunity for certain claims that the State or its agents had acted unconstitutionally. The language of the amendment relevant to Plaintiffs' motion (and complaint) is this:

> Sovereign immunity is hereby waived for actions in the superior court seeking declaratory relief from acts of the state … outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States. Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this Paragraph may, only after awarding declaratory relief, enjoin such acts to enforce its judgment.

Ga. Const. art. I, § 2, ¶ V ("Paragraph V").

Plaintiffs contend that the waiver set forth in Paragraph V contemplates and encompasses preliminary injunctive relief, so as to allow for actions that would enjoin enforcement of the law whose constitutionality is being challenged *before* the trial court has resolved the claim for declaratory relief. The State disagrees, emphasizing that the language of Paragraph V's waiver allows claims for injunctive relief only *after* a court has awarded declaratory relief. Plaintiffs bear the burden of establishing that the State has waived sovereign immunity for claims for preliminary injunctive relief in connection with suits challenging the constitutionality of a legislative enactment. *Ga. Dept. of Labor v. RTT Assocs., Inc.*, 299 Ga. 78, 81 (2016); *McBrayer v. Scarbrough*, --- Ga. App. ---, 874 S.E.2d 146, 148 (2022).

Waivers of sovereign immunity are to be strictly and narrowly construed. *Sawnee Elec. Membership Corp. v. Georgia Dep't of Revenue*, 279 Ga. 22, 23 (2005) (strict); *Doe v. Georgia Dep't of Corr.*, 268 Ga. 582, 583 (1997) (narrow). Implied waivers are not favored.[4] *Dep't of Transp. v. Mixon*, 312 Ga. 548, 550-51 (2021). It must be clear from the statute or constitutional provision upon which the claimant relies "that immunity is

[4] The Supreme Court has generally limited its recognition of implied waivers to situations in which the waiver is necessarily implied by the language of the statutory or constitutional provision. *Dep't of Transp. v. Mixon*, 312 Ga. 548, 551 (2021) (collecting cases). Implication by necessity does not apply here, given the language of Paragraph V which expressly allows for (*i.e.*, waives immunity for) claims for injunctive relief, albeit only *after* a court has provided declaratory relief. In other words, the waiver expressly considers and allows claims for injunctive relief, but only in limited circumstances.

waived and the extent of such waiver." *Georgia Lottery Corp. v. Patel*, 353 Ga. App. 320, 322 (2019).

Here there is no such clarity for Plaintiffs' claim for temporary injunctive relief. At best, Plaintiffs can point to a loosely implied waiver. Relying on *Georgia Dep't of Corr. v. Couch*, 295 Ga. 469 (2014), Plaintiffs argue that, because Paragraph V authorizes "actions … seeking declaratory relief," the waiver by implication encompasses all forms of relief attendant to a declaratory judgment action. This, Plaintiffs contend, includes temporary injunctive relief via either O.C.G.A. § 9-11-65 or O.C.G.A. § 9-4-3 -- *i.e.*, relief ordinarily available in connection with declaratory judgment actions. *Couch*, which addressed the availability of attorney's fees under O.C.G.A. § 9-11-68(b) in the context of a claim brought under the Georgia Tort Claims Act ("GTCA"), did note that waivers need not "use specific 'magic words' such as 'sovereign immunity is hereby waived' in order to create a specific statutory waiver of sovereign immunity." 295 Ga. at 473-74 (citation omitted).

The particular holding in *Couch* upon which Plaintiffs rely is the Supreme Court's conclusion that the

> GTCA's waiver of sovereign immunity from tort *actions* indicates that such cases proceed under the usual rules of practice and procedure applicable to such tort suits.... In other words, the GTCA did not enact a whole new scheme for civil practice in the tort lawsuits it authorizes. Instead, the General Assembly took the CPA [Civil Practice Act] as the default rules and crafted specific exceptions and limitations as deemed necessary.

Id. at 477-78 (emphasis in original). Thus, the GTCA's waiver of sovereign immunity, though it does not say so expressly, is quite broad: it encompasses tort actions in all their Civil Practice Act glory, with claims, counterclaims, discovery, summary judgment, trials, and, if appropriate, attorney's fees if a written offer of settlement is rejected and the final

judgment exceeds (or is less than) the offer by a certain percentage. Applying *Couch*'s "waiver of action incorporates the usual rules of practice and procedure" holding, Plaintiffs urge that Paragraph V's reference to "actions … seeking declaratory relief" means that all the "usual rules of practice and procedure applicable to such … suits" apply to claims brought under Paragraph V.

But the hand that giveth can also take away. The critical phrase from the *Couch* excerpt above, in its entirety, reads: "The GTCA's waiver of sovereign immunity from tort actions indicates that such cases proceed under the usual rules of practice and procedure applicable to such tort suits, *subject to the various exceptions and limitations specified in the GTCA*." *Id.* at 477 (emphasis added). And here, Paragraph V does have exceptions and limitations. They come in the very next sentence of the provision: "Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this Paragraph may, *only after awarding declaratory relief*, enjoin such acts to enforce its judgment." (Emphasis added). If Paragraph V's waiver of sovereign immunity is indeed a waiver for declaratory judgment actions and all their attendant procedural aspects (including preliminary injunctive relief), this second sentence makes clear that any such implied waiver is limited in at least one important respect: courts may not enjoin the allegedly unconstitutional acts until *after* they award declaratory relief.[5] Granting injunctive relief -- even temporary relief -- before declaratory relief would be inconsistent with the plain language of the waiver.[6] Thus Superior Courts in Georgia lack subject

[5] Paragraph V is of sufficiently recent vintage that there appears not to be any Georgia appellate case that has either applied or interpreted it directly. The Supreme Court did mention it in passing in *Mixon*, 312 Ga. at 561-62; that reference, though dicta, suggests an interpretation similar to this Court's, *i.e.*, that injunctive relief, under Paragraph V's waiver, is available only *after* declaratory relief.

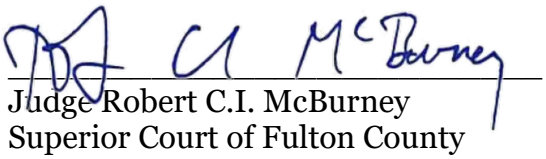
[6] The Court appreciates the impact of this interpretation. It means that patently unconstitutional acts may go unredressed for weeks or months before a declaratory judgment can be handed down, accompanied by

matter jurisdiction to entertain claims for preliminary injunctive relief against the enforcement of our Legislature's duly enacted laws.[7] *McConnell*, 302 Ga. at 19.

* * *

To repeat, the Court is making no finding on the merits of this important litigation. The question of whether it is constitutional for the State to force a woman to carry to term a six-week-old embryo against her wishes, even in the face of serious medical risk, remains to be answered.[8] Until it is, however, the LIFE Act remains in effect. The parties are directed to confer with the Court's Staff Attorney about establishing an expedited schedule for a final hearing on Plaintiffs' complaint.

SO ORDERED this 15th day of August 2022.



Judge Robert C.I. McBurney
Superior Court of Fulton County
Atlanta Judicial Circuit

injunctive relief. Depending on the nature of the constitutional violation, that delay can mean lost jobs, fortunes, or, in this case, lives. But the Court's role in interpreting constitutional provisions is not to assess their wisdom but rather to find their plain meaning, if possible. *Georgia Motor Trucking Ass'n v. Georgia Dep't of Revenue*, 301 Ga. 354, 356 (2017) ("we afford the constitutional text its plain and ordinary meaning, view the text in the context in which it appears, and read the text 'in its most natural and reasonable way, as an ordinary speaker of the English language would.'").

[7] Immediate injunctive relief may still be available to an aggrieved plaintiff seeking to temporarily enjoin an unconstitutional law, but that relief is delivered at the individual actor level and not on a statewide basis: "sovereign immunity does not bar suits for injunctive and declarative relief against state officials in their individual capacities." *Bd. of Commissioners of Lowndes Cnty. v. Mayor & Council of City of Valdosta*, 309 Ga. 899, 903 (2020); *see also Lathrop*, 301 Ga. at 434 ("the doctrine of sovereign immunity usually poses no bar to suits in which state officers are sued in their individual capacities for official acts that are alleged to be unconstitutional.")

[8] The Court appreciates that there are other important constitutional questions involved as well, such as treating physical health conditions differently from mental health conditions and the privacy rights of patients.