IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

CASE NUMBER S18A1231

Jason Wyno, et al.,
Appellants/Plaintiffs,

v.

Lowndes County, et al.,
Appellees/Defendants

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

Kelly J. Long Pridgen
General Counsel
State Bar No. 587945
kpridgen@accg.org

Larry Ramsey
Deputy General Counsel
State Bar No. 593613
lramsey@accg.org

G. Joseph Scheuer
Assistant General Counsel
State Bar No. 629179
jscheuer@accg.org

191 Peachtree St., NE, Suite 700
Atlanta, Georgia 30303
(404) 522-5022

ATTORNEYS FOR *AMICUS CURIAE* ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA

I. Introduction

The legal issue in this appeal is a pure question of statutory and constitutional interpretation, and, as such, *Amicus Curiae* Association County Commissioners of Georgia ("ACCG") will not belabor the facts of the underlying case.[1] However, the academic nature of the underlying legal issue should not mask the dramatic real-world impacts upon public servants that a ruling in Appellants' favor would create, as will be discussed later in this brief. ACCG files this brief because this appeal, and specifically the position of the Attorney General as set forth in his brief as *Amicus Curiae*, represents a grave threat to the well-established system of governmental immunity in Georgia. Fortunately, however, the question posed by the Court to the Solicitor General need not be answered in the manner the Attorney General's brief suggests, which would upend decades of precedent and render more than a dozen long-standing statutes unconstitutional.

The operative legal question is whether the General Assembly has the authority to expand the baseline "official immunity" of local government

[1] To the extent any reference to the facts is necessary; ACCG adopts the Statement of Facts set forth in the Brief of Appellees. ACCG also adopts in the Statement of Argument and Authorities presented in Appellees' brief, and hereby incorporates such statements by reference as if set forth fully herein.

employees, as described in Article I, Section II, Paragraph IX(d) of the Georgia Constitution, via legislative action denominated as something other than a "State Tort Claims Act." Article I, Section II, Paragraph IX (d) need not be interpreted as establishing a State Tort Claims Act as the *exclusive* means by which immunity greater than the qualified official immunity provided in subparagraph (d) may be conferred. Although this is the Attorney General's interpretation of subparagraph (d), it is not the only plausible interpretation of that subparagraph – and critically, it is not the interpretation that gives effect to the actual language of the Constitution. Because the word "may" rather than the word "shall" is used in describing whether government officials are subject to suit or liability for negligent performance of their ministerial functions, subparagraph (d) leaves open the possibility that suit or liability may *not* be available even where negligence can be established and the Georgia Tort Claims Act[2] does not apply. This interpretation harmonizes Article I, Section II, Paragraph IX (d) with the numerous statutes outside of the Georgia Tort Claims Act conferring immunity on a variety of officials. The existence of such statutes is the reason that suit and liability are not a foregone conclusion if negligence can be established and the Georgia Tort Claims

[2] O.C.G.A. § 50-21-20 provides that Article 2 of Chapter 21 of Title 50 shall be known and may be cited as the "Georgia Tort Claims Act".

Act does not apply, and thus the reason that subparagraph (d) provides only that suit and liability "may" be available under those circumstances.

Because O.C.G.A. § 4-8-30 and Article I, Section II, Paragraph IX (d) *can* be interpreted in a way that renders the statute (and others like it) constitutional, they *must* be interpreted that way. The Court should hold that statutes conferring governmental immunity exceeding that provided in Article I, Section II, Paragraph IX (d) are authorized by that subparagraph's conditional language about the conditions under which suit and liability against government officials may be available.

II. Statement of Interest

ACCG is a nonprofit instrumentality of Georgia's county governments formed in 1914 with 19 county members and now serving as the consensus-building, training, and legislative organization for all 159 county governments in Georgia. The constituency of ACCG includes more than 800 county commissioners; more than 420 appointed county clerks, managers, administrators, and attorneys; and almost 81,000 full-time and part-time employees. ACCG works to ensure that counties can provide the necessary leadership, services, and programs to meet the health, safety, and welfare needs of Georgia citizens through

education and technical assistance with the objective of promoting more effective and efficient county government.

As part of its mission, ACCG periodically files *amicus curiae* briefs on matters which have statewide significance to counties and the people they serve. In this case, ACCG does not seek to speak solely for Appellees, the position of which has been presented thoroughly in Appellees' Brief. However, this case presents questions of law which are exceptionally important to all of ACCG's members. As further described in Section III of this brief, the ramifications to local government employees of a holding in Appellants' favor -- that statutes conferring immunity which supplement that provided in Article I, Section II, Paragraph IX (d) are unconstitutional if they are not a part of the Georgia Tort Claims Act -- would be grave, as none of ACCG's member counties or employees are covered by the Georgia Tort Claims Act. Because of ACCG's role in advancing the interests of counties in matters having state-wide ramifications, it has a direct and significant interest in the question of law raised by the Court.

III. Potential Impacts

As this Court has often noted, official immunity of governmental employees and officials relates to those persons' potential *personal* liability; the policy behind such immunity is "to preserve the public employee's independence of action

without fear of lawsuits and to prevent a review of his or her judgment in hindsight."[3] Consistent with the policy behind official immunity as embodied in Article I, Section II, Paragraph IX(d) of the Georgia Constitution, the General Assembly has, in many contexts, provided further immunities to protect public employees who are often performing high-risk and essential services to the public. Among those additional protections for local government employees – which would disappear if Appellants' arguments are accepted by the Court – are those in laws such as the following statutes[4]:

- Immunity for **firefighters** (including volunteer firefighters) for actions taken at emergency scenes, other than for willful acts (O.C.G.A. § 51-1-30)
- Immunity for **law enforcement officers** for actions taken at emergency scenes, other than for gross negligence or willful acts (O.C.G.A. § 35-1-7)
- Immunity for **ambulance service providers** rendering emergency care in good faith (O.C.G.A. § 31-11-8)
- Immunity for **9-1-1 operators** other than for wanton and willful misconduct or bad faith (O.C.G.A. § 46-5-131)

[3] *Grammens v. Dollar*, 287 Ga. 618, 619 (2010)(quoting *Cameron v. Lang*, 274 Ga. 122 (1)(2001).
[4] This is but a partial list of examples of such statutes and is not comprehensive.

- Immunity for **teachers and school personnel** for relaying in good faith information related to drug abuse by children (O.C.G.A. § 51-1-30.2)
- Immunity for **all local government officers and employees** from suit or liability related to motor-vehicle use (such claims being shifted to the governmental entity via a waiver of sovereign immunity)(O.C.G.A. § 36-92-3)
- Immunity for **uncompensated members of local governmental agencies, boards, and authorities** other than for willful and wanton misconduct (O.C.G.A. § 51-1-20)

The scope of the impacts from loss of such statutory immunity provisions cannot be overstated: in December 2018, the Georgia Department of Labor reported that there are 422,100 local government employees in Georgia.[5] A ruling in Appellants' favor in the present case and the associated loss of statutory protections like those listed above would have dramatic impacts on such public employees and volunteers and the ability of local governments to attract and retain

[5] "December, 2018 Current Employment Statistics (CES) Data for All Workers, Not Seasonally Adjusted, in Georgia." *Georgia LaborMarket Explorer*, Georgia Department of Labor, https://explorer.gdol.ga.gov/vosnet/analyzer/results.aspx?enc=PvekYVZKc0l9QsFcteZR9oKtyYU5X/yyKS3tq/nbAWeeSed1l3UgiSXTNHQts0oy6xgm0tJezEPJvJOFp/AkRw9y//UJn1ULmq7yfyT9/c4=.

such employees and volunteers – many of whom provide critical public-safety services to all citizens.

While counties, school systems, and municipalities are authorized to insure or indemnify employees "against *personal* liability for damages arising out of the performance of their duties,"[6] such actions are left to the discretion of local governments in recognition of the very different financial circumstances and resources that exist among those governments throughout the state.[7] The loss of additional statutory liability protections for public servants, such as those noted above, would further strain local governments' ability to provide such insurance or indemnification due to the increased risk (and therefore cost) associated with the heightened exposure to ordinary negligence claims for ministerial actions under the baseline constitutional official-immunity provision. Consider the strain to ACCG members such as these:

- The 2018 budget for the Unified Government of Webster County was $2.5 million.[8]

---

[6] *Hendon v. DeKalb County*, 203 Ga. App. 750, 754 (1992)(emphasis in original).
[7] O.C.G.A. §§ 45-9-20 through 45-9-22.
[8] "Approved 2018 Income Budget Unified Government of Webster County." *The Tax and Expenditure Data Center for Georgia Local Governments*, Carl Vinson Institute for Government, University of Georgia, The Tax and Expenditure Data Center for Georgia Local Governments, https://ted.cviog.uga.edu/financial-

- The 2016 budget for Schley County was $2.9 million.[9]
- The 2016 budget for Glascock County was less than $2 million.[10]
- The 2018 budget for Quitman County was less than $2.7 million.[11]
- The 2019 budget for Decatur County is less than $2.2 million.[12]

---

documents/sites/default/files//budgetdoc/budget-report/county-webster-fy2018-budget-report.pdf

[9] "Schley County FY2016 Budget." *The Tax and Expenditure Data Center for Georgia Local Governments*, Carl Vinson Institute for Government, University of Georgia, The Tax and Expenditure Data Center for Georgia Local Governments, https://ted.cviog.uga.edu/financial-documents/budget-reports?og_group_ref_target_id%5B%5D=180&field_fiscal_year_value%5Bmin%5D%5Byear%5D=2016&field_fiscal_year_value%5Bmax%5D%5Byear%5D=

[10] "Glascock County FY2016 Budget." *The Tax and Expenditure Data Center for Georgia Local Governments*, Carl Vinson Institute for Government, University of Georgia, The Tax and Expenditure Data Center for Georgia Local Governments, https://ted.cviog.uga.edu/financial-documents/sites/default/files//budgetdoc/budget-report/county-glascock-fy2016-budget-report.pdf

[11] "County Quitman FY2018 Budget Report." *The Tax and Expenditure Data Center for Georgia Local Governments*, Carl Vinson Institute for Government, University of Georgia, The Tax and Expenditure Data Center for Georgia Local Governments, https://ted.cviog.uga.edu/financial-documents/sites/default/files//budgetdoc/budget-report/county-quitman-fy2018-budget-report.pdf

[12] "Decatur County, Georgia Budget Document for the Budget Year Ending June 30, 2019." *The Tax and Expenditure Data Center for Georgia Local Governments*, Carl Vinson Institute for Government, University of Georgia, The Tax and Expenditure Data Center for Georgia Local Governments, https://ted.cviog.uga.edu/financial-documents/sites/default/files//budgetdoc/budget-report/county-decatur-fy2019-budget-report.pdf.

- The 2012 budget for Stewart County was less than $2.7 million.[13]

As noted above, of course, the immunities implicated in the present case impact the *personal* liability of local government employees. In the context of the present case, animal control officers simply will not have the capacity to respond to and pay claims that would become viable against them if Appellants' theory prevails:

- The Animal Control Budget for Talbot County (population 6,171) for 2019 is $46,912.[14] The 2017 starting salary for the Animal Control Officer was $9 per hour.[15] The maximum salary was $12 per hour.[16]
- The Animal Control Budget for Terrell County for 2019 is less than $40,000. Less than $10,000 per year is budgeted for employee salaries.[17]

---

[13] "Stewart County Fiscal Year 2012 Budget Report." *The Tax and Expenditure Data Center for Georgia Local Governments*, Carl Vinson Institute for Government, University of Georgia, The Tax and Expenditure Data Center for Georgia Local Governments, https://ted.cviog.uga.edu/financial-documents/sites/default/files//budgetdoc/budget-report/county-stewart-fy2012-budget-report.pdf.

[14] "Talbot County FY2019 Budget Report." *The Tax and Expenditure Data Center for Georgia Local Governments*, Carl Vinson Institute for Government, University of Georgia, The Tax and Expenditure Data Center for Georgia Local Governments, https://ted.cviog.uga.edu/financial-documents/sites/default/files//budgetdoc/budget-report/county-talbot-fy2019-budget-report.pdf

[15] *DCA Wage and Salary Survey*. *DCA Wage and Salary Survey*, apps.dca.ga.gov/dcawss/query_results.asp.

- McIntosh County (population 13,927) reported that it paid $8.54 per hour for its Animal Control Officer in 2017.[18] The county reported having only one Animal Control Officer.[19]
- Screven County (population 14,044) reported that the starting salary was $11.52 per hour and a maximum salary of $12.69 per hour for its Animal Control Officer in 2017.[20] The county reported having only one Animal Control Officer.[21]
- Cusseta-Chattahoochee County (population 10,922) reported a starting salary of $19,000 per year and a maximum salary of $34,000 per year for its Animal Control Officer in 2017.[22] The county reported having only one Animal Control Officer.[23]

---

[16] *Id.*
[17] "Terrell County FY2019 Budget Report." *The Tax and Expenditure Data Center for Georgia Local Governments*, Carl Vinson Institute for Government, University of Georgia, The Tax and Expenditure Data Center for Georgia Local Governments, https://ted.cviog.uga.edu/financial-documents/sites/default/files//budgetdoc/budget-report/county-terrell-fy2019-budget-report.pdf
[18] *DCA Wage and Salary Survey*. *DCA Wage and Salary Survey*, apps.dca.ga.gov/dcawss/query_results.asp.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

Only 69 counties reported a salary for an Animal Control Officer in the DCA Wage and Salary Survey for 2017.[24] Most of these counties have only one full time Animal Control Officer.[25] The pockets of these potential defendants have a starting annual salary of $16,120 and a maximum annual salary of $62,316.80.[26] The average starting salary is $26,722 and the average maximum salary is $39,635.80. [27] The median starting salary is $27,040 and the median maximum salary is $40,601. [28]

Again, a ruling that a State Tort Claims Act is the sole vehicle for the General Assembly to provide additional protections to local government employees would have profound impacts on public employees, local governments, and the citizens they serve throughout the state.

IV. Argument and Citation of Authority

A. Former O.C.G.A. § 4-8-30 can, and therefore must, be interpreted in a manner that harmonizes with Article I, Section II, Paragraph IX (d) of the Georgia Constitution.

[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*

Buried in a footnote in the Attorney General's brief is the bedrock principle that must guide the Court's analysis of the Constitutional and statutory provisions at issue:

> [S]tatutes are presumed constitutional and may be deemed unconstitutional only if the conflict between the statute and the Constitution is "clear and palpable." *Steiner*, 303 Ga. at 894. In addition, appellate courts "have a duty to construe a statute in a manner which upholds it as constitutional, if that is possible." *Freeman v. State*, 302 Ga. 181, 182 (2017) (quoting *Cobb Cty. Sch. Dist. v. Barker*, 271 Ga. 35, 37 (1999)).[29]

In order to hold a statute unconstitutional, the Court must thus find that the conflict between the statute and the Constitution is not only "clear and palpable," but unavoidable. [30]

Despite acknowledging this standard in passing, the Attorney General's brief fails to apply it. The format of the Attorney General's analysis would be appropriate if this case were an ordinary issue of *statutory* interpretation: it begins with the language of the statute at issue; evaluates the contents of the statute; and reaches a conclusion based on that analysis. But where, as here, it is the

---

[29] Brief of the Attorney General as *Amicus Curiae* (hereinafter "AG Brief") at 26 n. 6. *See also SEIU v. Perdue*, 280 Ga. 379, 380 (2006)([W]e must presume that acts of the General Assembly are constitutional, and never declare them void except in a clear and urgent case…." (internal punctuation omitted)).

[30] *Freeman v. State*, 302 Ga. 181, 182 (2017).

constitutionality of a statute at issue, the analysis must follow a different framework that honors the presumption of constitutionality. Specifically, the Court must begin with both the language of the statute at issue and a tentative conclusion that the statute is constitutional, and then evaluate whether there is *any* possible way to reach the latter from the former. If there is, the Court need not consider other ways in which the statute might be interpreted. Here, not only is there a way to interpret Article I, Section II, Paragraph IX (d) that renders former O.C.G.A. § 4-8-30 constitutional – that interpretation is the *only* one that gives the words in the constitutional provision their natural meaning.

The key question before the Court is the proper interpretation of the word "may" in Article I, Section II, Paragraph IX (d) of the Georgia Constitution:

> Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies *may* be subject to suit and *may* be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and *may* be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. . . .
> (Emphasis supplied).

The Attorney General argues, in essence, that the word "may" in this subparagraph must be read as "shall." Specifically, it is the position of the Attorney General that subparagraph (d) provides that a State Tort Claims Act is the *exclusive* means by

which an employee of the state or its departments may avoid suit and liability for negligent performance of ministerial functions.[31] Put another way, under this interpretation, governmental employees would *always* be subject to suit and would *always* be liable for negligent performance of their ministerial functions except in situations where the Georgia Tort Claims Act explicitly provides otherwise.

If subparagraph (d) stated that "Except as specifically provided . . . in a State Tort Claims Act . . . all officers and employees [] *shall* be subject to suit and *shall* be liable," the Attorney General's interpretation would be correct. But in interpreting this provision as actually written, the Court "must presume that the General Assembly meant what it said and said what it meant," affording the terms used their "plain and ordinary meaning" and reading the text "in its most natural and reasonable way, as an ordinary speaker of the English language would."[32] These guiding principles make clear that the Court should not simply read the word "shall" as the word "may" if the words in fact have different meanings – and they do.

---

[31] AG Brief at 13-14.

[32] *Deal v. Coleman*, 294 Ga. 170, 172–73 (2013) (citations and punctuation omitted).

It is well settled that the word "may" is generally permissive, while the word "shall" is generally mandatory.[33] Courts presume that the General Assembly is fully apprised of the difference between the two terms, and that the General Assembly's choice to use one over the other is considered and meaningful.[34] The presumption that the General Assembly was intentional in its choice of "may" over "shall" is especially strong where both terms appear in close proximity.[35] Here, the word "shall" is used three times in the two sentences that follow the sentence at issue. There is no question that the drafters of Article I, Section II, Paragraph IX (d) were aware of the word "shall" and its meaning, and could have employed it in discussing the availability of suit and liability had they wished to do so.

Where the ordinary, logical, and common meaning of a word is well established, a court interpreting that word may assign it a different meaning only if

---

[33] *See, e.g., Williams v. Wilkinson Cty.*, 146 Ga. 601, 601 (1917) (refusing to construe word "may" as "shall" where statute contemplated permissive rather than mandatory action).

[34] *See, e.g., Endsley v. Georgia Ry. & Power Co.*, 37 Ga. App. 439, 439 (1927), aff'd and vacated on other grounds, 167 Ga. 439 (1928), 39 Ga. App. 152 (1929) ("this statute is merely permissive, for had the Legislature determined to make the joinder obligatory, the word 'shall,' instead of 'may,' would doubtless have been used.").

[35] *See, e.g., Roe v. Pitts*, 82 Ga. App. 770, 772 (1950) ("From the juxtaposition of the words may and shall in the same sentence . . . it is obvious that the word may was there used in its permissive sense").

"a clear indication of some other meaning appears."[36] While there are maybe certain circumstances under which "may" ought to be interpreted as mandatory or obligatory, rather than given its ordinary conditional or permissive meaning, none of them are applicable here. For example, O.C.G.A. §1-3-3(10) acknowledges that "'[m]ay' ordinarily denotes permission and not command," but provides that "where the word as used concerns the public interest or affects the rights of third persons, it shall be construed to mean 'must' or 'shall.'" However, the Court has made clear that this rule applies only to the interpretation of statutes, not to interpretation of the Constitution.

In *Georgia, F. & A. Ry. Co. v. Sasser*, the Court was tasked with interpreting an Act of the General Assembly that potentially conflicted with a constitutional provision; the existence of a conflict turned on whether the word "may" in the constitutional provision was construed as permissive or mandatory.[37] After noting that the word "may" will be construed as "must" or "shall" when "*used in a statute* [] concern[ing] the public interest," the Court went on to decline to apply that rule in construing the Constitution despite explicitly acknowledging that the

---

36 *Hendry v. Hendry*, 292 Ga. 1, 2–3 (2012).

37 130 Ga. 394 (1908).

constitutional provision at issue did concern the public interest.[38] The *Sasser* Court's analysis was guided by the principle that "no statute [] be declared unconstitutional unless its enactment is prohibited by the Constitution in express terms or by necessary implication," and that any conflict between the Constitution and a statute "must be plain and unmistakable before the courts will hold the law void."[39] Because the statute and constitutional provision at issue in *Sasser* could be reconciled by interpreting the word "may" in the Constitution in its ordinary, permissive sense, the Court held that the statute was not unconstitutional.

The Attorney General advances two arguments that the Court should reach a different conclusion here, neither of which is persuasive. First, he argues that the word "may" in Article I, Section II, Paragraph IX (d) must be read as "shall" to give full meaning to the "except" clause that introduces the subparagraph.[40] This is not so. The Attorney General is correct that reading "may" as "shall" results in an interpretation that gives effect to the "except clause" – "Except as [] provided . . . in a State Tort Claims Act . . . all officers and employees [] *shall* be subject to suit and *shall* be liable" means that the only potential exception to suit and liability for

---

38 *Id.* (emphasis supplied).

39 *Id.*

40 AG Brief at 15.

negligent performance of ministerial duties must be found within a State Tort Claims Act.

But this is not the only way to make sense of the "except" clause, and it certainly does not give effect to the word "may" in the two places it appears. "Except as [] provided . . . in a State Tort Claims Act . . . all officers and employees [] *may* be subject to suit and *may* be liable" means that suit and liability for negligent performance of ministerial duties are potentially available under certain circumstances, but that a State Tort Claims Act may provide an exception to suit and liability even when those circumstances are met. In fact, the Attorney General essentially acknowledges that this is a proper reading of the subsection, but nonetheless goes on to argue that the subsection must be interpreted to mean that a State Tort Claims Act is the *sole* potential source of an exception to suit and liability.[41]

Nothing in the text of Article I, Section II, Paragraph IX (d) permits this second conclusion. Rather, the use of the conditional term "may" instead of "shall" in the clauses discussing potential liability leaves no question that even where a

[41] AG Brief at 13-14 ("[T]he general rule provides that officers and employees 'may' be subject to suit and liability under the provided standards. Logically, an exception to that general rule has to provide when those officers and employees are not subject to suit or liability, even under those common law-based standards.").

State Tort Claims Act does not apply; there are circumstances under which something else may prevent suit or liability for negligent performance of ministerial duties.[42] That "something else" is other laws like O.C.G.A. § 4-8-30 and the many others cited by Appellees in their brief, many of which predate – and thus must be assumed to have been considered in the drafting of – Article I, Section II, Paragraph IX (d).[43]

By using "may" rather than "shall" to introduce its clauses regarding suit and liability, Article I, Section II, Paragraph IX (d) explicitly leaves room for other laws to preclude suit or liability. The "except" clause discussing a State Tort Claims Act simply supplements this by providing that even where a potential plaintiff has been harmed by negligent performance of ministerial duties, and even where suit or liability would otherwise be authorized under other applicable law, a State Tort Claims Act can override the availability of suit or liability by providing additional immunity. Article I, Section II, Paragraph IX (d) provides that a State Tort Claims act *supersedes* existing statutory immunity law if they conflict, but it

---

[42] Had the intention been for suit and liability to be automatically available in the event that no State Tort Claims Act applies, "the word 'shall,' instead of 'may,' would doubtless have been used." *Endsley v. Georgia Ry. & Power Co.*, 37 Ga. App. 439, 439 (1927), aff'd and vacated on other grounds, 167 Ga. 439 (1928), 39 Ga. App. 152 (1929).

[43] Brief of Appellee at 17 n. 3.

does not provide that a State Tort Claims Act *supplants* existing statutory immunity. This interpretation – much of which the Attorney General has endorsed[44] – is the only one that gives effect to *all* of the words of Article I, Section II, Paragraph IX (d) as it is actually written.

The Attorney General's second argument in support of his position that the Court should substitute "shall" for "may" in interpreting Article I, Section II, Paragraph IX (d) is that "the permissive 'may' gives permission to sue officials, not permission to grant them immunity."[45] But this is not how the subparagraph is actually drafted, and the word "may" cannot be read away by claiming that it simply gives potential plaintiffs the choice of whether or not to bring suit. Certainly, the Attorney General's argument would be valid if subparagraph (d) provided that "Except as established in a State Tort Claims Act, a person injured or damaged by the negligent performance of ministerial functions by an officer or employee of the state or its departments or agencies *may* bring suit and *may* establish liability . . ." As the subparagraph is actually written, however, the word "may" relates to an official's ability to be sued or held liable – not to a potential plaintiff's ability to bring suit or establish liability. "May" is used in subparagraph

---

44 AG Brief at 13-14.

45 AG Brief at 15.

(d) because, regardless of the applicability of any State Tort Claims Act, an official's susceptibility to suit or liability is conditional.

O.C.G.A. § 4-8-30, and the many other statutes supplementing the immunity provided by Article I, Section II, Paragraph IX (d), may be found unconstitutional only if there is no possible way to reconcile them with the constitutional provision. But Article I, Section II, Paragraph IX (d) of the Constitution harmonizes perfectly with the immunity statutes, as discussed above. While the construction discussed above happens to be the most natural and intuitive reading of Article I, Section II, Paragraph IX (d), it actually need be only a *plausible* reading in order for the statutes to be deemed constitutional.

Because Article I, Section II, Paragraph IX (d) and the immunity statutes *can* be construed in such a way as to render the statutes constitutional, they *must* be so construed.

B. The reference to a State Tort Claims Act in Article I, Section II, Paragraph IX (d) of the Georgia Constitution involves the General Assembly's waiver of immunities, and is not a limitation on the General Assembly's authority to expand immunities.

At a very basic level, the Brief of the Attorney General starts from a demonstrably false premise: that the "State Tort Claims Act" referenced in Article

I, Section II, Paragraph IX (d) is the only vehicle for the grant of additional immunity to governmental employees and officers, beyond the ministerial/ discretionary official immunity provided in that subparagraph.[46] But a "Tort Claims Act" is very clearly a reference to a legislative Act that provides a vehicle for claims and potential further *waiver* of immunity; after all, it is a "Claims" Act, not an "Immunities" Act. This common-sense reading is only emphasized by the ballot question that accompanied the 1990 Amendment that revised Paragraph IX and added subparagraph (d):

> Shall the Constitution be amended to provide that the General Assembly may *authorize lawsuits against the state and its* departments, agencies, *officers, and employees* and to provide how public officers and employees may and may not be held liable in court?[47]

Other portions of the at-issue constitutional provision further demonstrate that the State Tort Claims Act concept was intended as a possible vehicle for potential further waiver of immunity:

> Except as provided in this subparagraph [i.e., including the General Assembly's option of enacting a State Tort Claims Act], officers and

[46] This is the entire premise of Section A of the AG's Brief, pp. 11-15: "Specifically, the exception grants the General Assembly exclusive power to provide government officials with *stronger* immunity from tort claims than Paragraph IX(d)'s qualified immunity—up to and including absolute immunity." (AG Brief, p. 13)(emphasis in original).

[47] Quoted in *Donaldson v. Dept. of Transp.*, 262 Ga. 49, 50 (1992)(emphasis supplied).

> employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them….[48]

Indeed, other portions of the Attorney General's Brief make this true purpose of a State Tort Claims Act abundantly clear: "As early as 1966, Georgia courts were suggesting that the General Assembly should enact a law to allow tort claims against the government, and they called that proposed law a 'State Tort Claims Act.'"[49] Unfortunately for present purposes, the internal inconsistency in the AG's Brief regarding exactly what is accomplished via a Tort Claims Act muddies what is otherwise a relatively clear matter of constitutional construction and interpretation, as described elsewhere in this Brief and that of Appellees.

In sum, contrary to the Attorney General's interpretation of the meaning of a State Tort Claims Act, a more reasonable reading of the introductory dependent clause of Article I, Section II, Paragraph IX (d) is that it has to do with *waivers* of official immunity beyond the constitutional baseline of that immunity -- not as a limitation on the General Assembly's power to *grant* further immunities via other legislative action such as was clearly intended by the General Assembly in O.C.G.A. § 4-8-30. When buttressed by the noted requirement that the courts seek

[48] Ga. Const. 1983, Art. I, Sec. II, Para. IX(d)(as amended 1990).
[49] AG Brief, p. 18 (citing *McCoy v. Sanders*, 113 Ga. App. 565, 571 (1966)). See generally the discussion on this point at AG Brief pp. 17-19.

a construction that upholds the constitutionality of Acts of the General Assembly, Article I, Section II, Paragraph IX(d) must be read to not limit the General Assembly's authority to grant to governmental officers and employees immunities beyond the baseline official immunity stated in that constitutional provision. Certainly, on multiple occasions since the 1990 Constitutional Amendment, the General Assembly has construed its own authority as being in keeping with this interpretation -- including the adoption of the successor statute to that at issue in the present case.[50]

V. Conclusion

For the reasons set forth above and in the Brief of Appellees submitted to this Court, ACCG submits that the Court should issue an opinion holding that Article I, Section II, Paragraph IX(d) of the Georgia Constitution does not preempt enforcement of a statute that provides local government officials with immunity that exceeds the official immunity provided by subparagraph (d). A holding to the contrary would have profound impacts on Georgia's counties, as well as the thousands of public employees whose potential individual liability would be

[50] *See, e.g.,* O.C.G.A. § 4-8-31 (2012)(absolute immunity for local government employees and officials for failure to enforce the Responsible Dog Ownership Law); O.C.G.A. § 46-5-131 (2018)(immunity from negligence claims for local government and state 9-1-1 operators).

expanded well beyond their expectations garnered from the many additional immunity statutes throughout the Georgia Code. For all of the above reasons, the order of the Superior Court of Lowndes County, finding O.C.G.A. §4-8-30 constitutional and dismissing all claims against Appellees on the basis of that statute, should be affirmed.

Respectfully submitted, this 7th day of February, 2019.

ASSOCIATION COUNTY
COMMISSIONERS OF GEORGIA

/s/ Kelly J. Long Pridgen
Kelly J. Long Pridgen
General Counsel
State Bar No. 587945
kpridgen@accg.org

/s/ Larry Ramsey
Larry Ramsey
Deputy General Counsel
State Bar No. 593613
lramsey@accg.org

/s/ G. Joseph Scheuer
G. Joseph Scheuer
Assistant General Counsel
State Bar No. 629179
jscheuer@accg.org

191 Peachtree St., NE, Suite 700
Atlanta, Georgia 30303
(404) 522-5022
Attorneys for *Amicus Curiae*
Association County Commissioners
of Georgia

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2019, I served this brief by mailing a copy of the brief to be delivered via first class mail, addressed as follows:

John Gee Edwards
108 East Valley Street
Valdosta, Georgia 31601-5573
Counsel for Appellant

O. Wayne Ellerbee
The Ellerbee Law Firm
P.O. Box 25
Valdosta, Georgia 31603-0025
Counsel for Appellant

James L. Elliott
Elliott, Blackburn & Goodring, P.C.
3016 N. Patterson St.
Valdosta, Georgia 31602
Counsel for Appellee