



STATE OF GEORGIA
COURT REFORM COUNCIL

FINAL REPORT

**Submitted to Governor Nathan Deal
November 20, 2017**



Members of the Court Reform Council

Hon. Christopher M. Carr – Attorney General of Georgia, Chairman of the Court Reform Council

Hon. Charlie Bethel – Judge, Court of Appeals of the State of Georgia

Hon. Trent Brown – Judge, Superior Court of the Ocmulgee Judicial Circuit

Dennis T. Cathey – Member, Cathey & Strain, LLC

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Hon. Bill Cowsert – Majority Leader, Georgia State Senate

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Hon. Asha Jackson - Judge, Superior Court of the Stone Mountain Judicial Circuit

Hon. Michael Malihi – Chief Judge, Office of the State Administrative Hearings

Carey Miller – Executive Counsel (Incoming), Office of Governor Nathan Deal

Hon. Mary Margaret Oliver - Georgia House of Representatives

Hon. Nels Peterson – Justice, Supreme Court of Georgia

David Werner – Executive Counsel (Outgoing), Office of Governor Nathan Deal

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COURT REFORM COUNCIL

INTRODUCTION

On March 30, 2017, Governor Deal signed an Executive Order establishing the Court Reform Council to “review current practices and procedures within the judicial court system and the administrative law hearing system and make recommendations to improve efficiencies and achieve best practices for the administration of justice” by December 1, 2017.

Attorney General Chris Carr was appointed Chairman of the Council.

During its first meeting, the Court Reform Council agreed to establish the following three subcommittees to carry out the charge Governor Deal outlined in his Executive Order:

- The Administrative Procedure Act
 - Chaired by The Honorable Michael Malihi, Chief Judge, Office of the State Administrative Hearings
- Statewide Business Court
 - Chaired by Carey Miller (Incoming) and David Werner (Outgoing), Executive Counsel to Governor Nathan Deal
- Sovereign Immunity
 - Chaired by The Honorable Chris Carr, Attorney General of Georgia

The Court Reform Council met on May 23, 2017; July 17, 2017; September 25, 2017; and November 15, 2017, and the subcommittees met regularly during this time frame as well. This report, divided by subcommittee, contains the findings and recommendations of the Court Reform Council. The Court Reform Council respectfully submits this final report to Governor Deal for his consideration.

ADMINISTRATIVE PROCEDURE ACT SUBCOMMITTEE

ADMINISTRATIVE PROCEDURE ACT SUBCOMMITTEE

INTRODUCTION

Members of the Administrative Procedure Act Subcommittee

Hon. Michael Malihi (Chair)	Chief Judge, Office of State Administrative Hearings
Hon. Charlie Bethel	Judge, Georgia Court of Appeals
Hon. Christopher M. Carr	Attorney General of Georgia
Hon. Bill Cowsert	Majority Leader, Georgia House of Representatives
Carey Miller	Executive Counsel (Incoming), Office of Governor Nathan Deal
Hon. Mary Margaret Oliver	Georgia House of Representatives
Hon. Nels Peterson	Justice, Supreme Court of Georgia
David Werner	Executive Counsel (Outgoing), Office of Governor Nathan Deal

The Administrative Procedure Act Subcommittee (“Subcommittee”) was created to review current practices and procedures within Georgia’s administrative law hearing system. Through this comprehensive review, the Subcommittee has made recommendations to improve efficiencies and achieve best practices for the administration of justice. The Subcommittee held two public meetings on June 22 and August 11, 2017.

The Subcommittee heard from a number of individuals with various insights into the intricacies of administrative law, including Fulton County Superior Court Judge Shawn LaGrua; Jessica Gabel Cino, Associate Dean for Academic Affairs and Associate Professor of Law at Georgia State University College of Law; Judge Ronit Walker of the Georgia Office of State Administrative Hearings; and Judge John B. Gatto of the U.S. Occupational Safety and Health Review Commission. In addition, the Subcommittee reviewed statistical caseload data provided by the Georgia Office of State Administrative Hearings.

The Subcommittee also accounted for national trends in administrative law, having reviewed the most recent version of the Model State Administrative Procedure Act. Additionally, the Subcommittee reviewed feedback provided by the chief administrative law judges from Florida and North Carolina; a former administrative law judge who has written extensively on final decision authority; and the executive director of a comprehensive study on central administrative law panels throughout the United States.

The Subcommittee’s recommendations have been informed by its review and consideration of this information.

ADMINISTRATIVE PROCEDURE ACT SUBCOMMITTEE

SUMMARY

Final Decision Authority

Existing Law: All decisions issued by the Office of State Administrative Hearings (“OSAH”) are initial decisions, unless an agency provides by rule that OSAH may enter final decisions. “Initial decisions” are subject to agency review, while “final decisions” are reviewed by superior courts.

Reform Option: Provide the authority to issue final decisions for all contested cases. Exceptions shall be made for cases referred by agencies that are (i) responsible for licensing and supervising professionals; and (ii) were constitutionally created or are headed by constitutional officers.

Enforcement Authority

Existing Law: When a subpoena is disobeyed, a party may seek enforcement through the superior court of the county where the contested case is being heard.

In cases where an individual disobeys a lawful order, refuses to testify, or commits similar misconduct, the administrative law judge (“ALJ”) may certify the facts to the superior court where the offense was committed. The superior court, in turn, takes “appropriate action,” which may include making a finding of contempt.

Reform Options:

- (A) Provide the power to enforce subpoenas when individuals do not appear for administrative proceedings (through fines).
- (B) Provide the authority to sanction parties (e.g., through fines) for such actions as disobeying lawful orders, refusing to testify, filing pleadings that contain frivolous arguments, or other similar misconduct.

Filing Hearing Requests Under the Administrative Procedure Act

Existing Law: There is no set deadline by which agencies must refer contested cases for hearings before OSAH’s ALJs.

Reform Option: Establish that agencies must refer contested cases within a reasonable time period after the hearing request is filed. If the agency does not refer the case by the deadline, parties will be allowed to file hearing requests directly with OSAH.

ADMINISTRATIVE PROCEDURE ACT SUBCOMMITTEE

FINAL DECISION AUTHORITY

Existing Law

Under the Administrative Procedure Act (“APA”), all decisions issued by the Office of State Administrative Hearings (“OSAH”) are treated as initial decisions, unless an agency provides by rule that OSAH may enter final decisions in all or certain classes of cases. O.C.G.A. § 50-13-41(d), (e)(3). An “initial decision” is subject to additional review by the agency, either by request of the party or on order of the agency. O.C.G.A. § 50-13-17(a). A “final decision,” in contrast, is subject to immediate judicial review by a superior court. O.C.G.A. § 50-13-19.

Reform Option

1. Modify the APA to provide the authority to issue final decisions for all contested cases. Exceptions shall be made for cases referred by agencies that are
 - (i) responsible for licensing and supervising professionals, and which are comprised of members selected by the governor for their expertise in their respective fields; and
 - (ii) were constitutionally created or are headed by constitutional officers.

Suggested Exceptions to Final Decisions (i.e., keep as Initial)
Professional Licensing Boards Division
Professional Standards Commission
Real Estate Appraisers Board and Real Estate Commission
Department of Insurance
State Personnel Board
Secretary of State, Elections Division
Secretary of State, Commissioner of Securities
Peace Officer Standards and Training Council
Composite Medical Board
Board of Medical Examiners
Office of the Governor

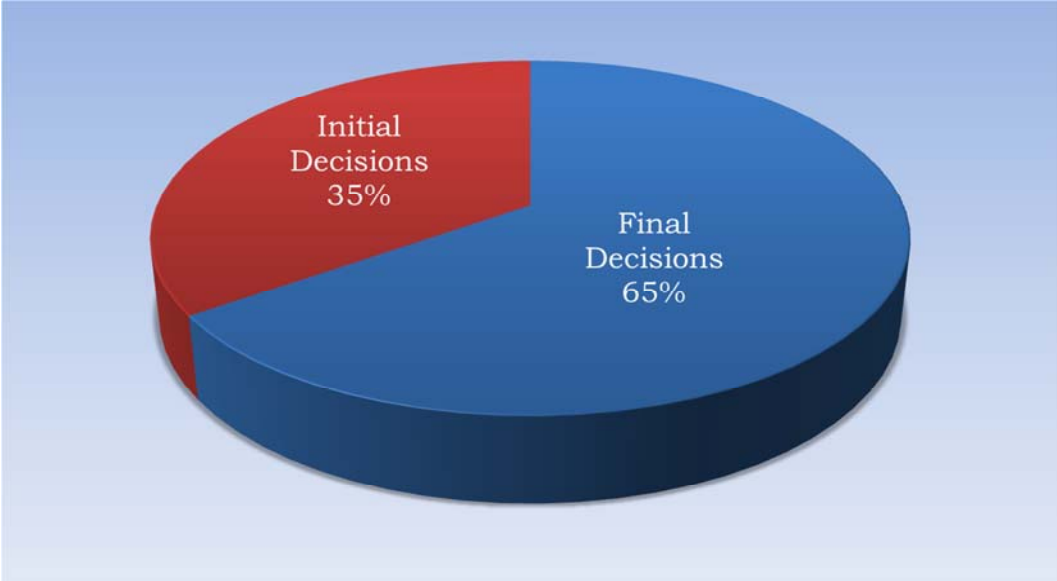
Advantages to Reform Option

- **Efficiency:** Finality removes an unnecessary level of review, thereby promoting judicial economy.
 - May lead to faster proceedings (30-60 days reduction in process).
 - Reduces the burden on taxpayers.
 - Reduces overall litigation costs for parties.

- **Impartiality:** Finality strengthens the appearance of impartiality, as an agency can no longer overturn decisions issued by an impartial body.

- **Precedent of Final Decisions for Other Agencies:** Multiple agencies with significant caseloads already refer cases to OSAH for the issuance of final decisions, including:
 - Department of Driver Services/Department of Public Safety (DDS/DPS) (12,923 cases referred to OSAH in FY17).
 - Department of Human Services (DHS), Office of Child Support Services (8,847 cases referred to OSAH in FY17).
 - DHS, Office of the Inspector General (1,530 cases referred to OSAH in FY17).
 - DHS, Child Abuse Registry (1,331 cases referred to OSAH in FY17).

CASE REFERRALS FOR FY17, BY TYPE OF DECISION



PROJECTED IMPACT OF REFORM OPTION (using FY17 case referral numbers)



CASE REFERRALS FOR FY17, BY TYPE OF DECISION

Case Description	Final/Initial	Count (FY2017)
Dep't of Driver Servs.-Dep't of Public Safety	Final	12,924
DHS, Child Support Servs.	Final	8,847
DHS, Office of the Inspector General	Final	1,530
DHS, Child Abuse Registry	Final	1,331
Tollway Authority	Final	1,005
Tax Tribunal	Final	987
Dep't of Education	Final	144
Board of Natural Resources	Final	66
DHS, Division of Family and Children Servs.	Initial	12,880
Dep't of Community Health	Initial	626
Dep't of Behav. Health & Dev. Disab.	Initial	243
Dep't of Early Care and Learning	Initial	227
Dep't of Labor	Initial	180
Professional Licensing Boards Division	Initial	81
Professional Standards Commission	Initial	38
Care Management Organizations	Initial	34
Real Estate Appraisers Board-Real Estate Commission	Initial	11
Dep't of Insurance	Initial	13
Dep't of Transportation	Initial	9
State Personnel Board	Initial	8
Sec. of State, Elections Division	Initial	8
Dep't of Public Health	Initial	7
Mediations	Initial	7
Secretary of State, Commissioner of Securities	Initial	6
Gov't Transparency and Campaign Finance Commission	Initial	6
DHS, Vocational Rehabilitation Agency	Initial	5
Peace Officer Standards and Training Council	Initial	5
Composite Medical Board	Initial	5
Student Finance Authority	Initial	4
Dep't of Juv. Justice	Initial	2
Public Retirement Systems	Initial	1
Office of Consumer Protection	Initial	0
Dep't of Revenue	Initial	0
Board of Medical Examiners	Initial	0
DHS, Division of Aging Servs.	Initial	0
County and Municipal Probation Advisory Council	Initial	0
Dep't of Economic Development	Initial	0
Office of the Governor	Initial	0
State Properties Commission	Initial	0
	Final:	26,834
	Initial:	14,406
	Total:	41,240

Case types highlighted in **red** represent the exceptions to finality, as proposed in the Reform Option

- **Recent Legislation:** Within the past five years, the General Assembly has explicitly provided ALJs with final-decision authority.
 - For Tax Tribunal cases: *See* O.C.G.A. §§ 50-13A-10, 50-13-16(g), 50-13-17; 2012 Ga. Laws 318 (H.B. 100).
 - For Child Abuse Registry cases: *See* O.C.G.A. § 49-5-183; 2015 Ga. Laws 552 (S.B. 138).
- **Nationwide Trend:** Observers of trends in administrative law have reported a nationwide evolution in central review panels being given the authority to issue final decisions.¹
 - **North Carolina:** ALJs “shall make a final decision or order” in contested cases. *See* N.C. Gen. Stat. § 150B-34(a).
 - **Florida:** The state’s APA does not allow for finality in all matters. *See* Fla. Stat. § 120.50 *et seq.* However, other statutes allow for finality in multiple case types, including child support establishment, workers’ compensation, and special education. *See* Fla. Stat. §§ 409.2563, 440.25, 1003.57.
 - **Louisiana:** Apart from certain enumerated exceptions, “the administrative law judge shall issue the final decision or order.” *See* La. Rev. Stat. § 49.992(B)(2).
 - **South Carolina:** ALJs have the authority to issue final orders, with the exception of cases for the Public Service Commission, Consolidated Procurement Code, Department of Employment and Workforce, and the Workers’ Compensation Commission. *See* S.C. Code Ann. §§ 1-23-600, 1-23-610.
- **Model State APA:** The 2010 Model State Administrative Procedure Act does *not* provide that ALJs shall issue final decisions.² However, the 2010 version has generally fallen out of favor.
 - No states have adopted the 2010 version of the Model.
 - The 2010 Model’s stance on finality was opposed by both the National Conference of the Administrative Law Judiciary and the American Bar Association.

Disadvantages to Reform Option

- **Agencies:** ALJs issuing more final decisions could reduce agencies’ authority over decisions directly affecting them.
 - Agencies are staffed with experts in respective fields.

¹ Based on a phone conference on August 2, 2017, with OSAH staff and the following individuals: the Honorable Robert S. Cohen, chief judge of the Florida Division of Administrative Hearings; the Honorable Julian Mann III, chief judge of the North Carolina Office of Administrative Hearings; Larry Craddock, who previously served as an ALJ in Texas and penned a 2013 law review article titled “Final Decision Authority and the Central Panel ALJ”; and Malcolm C. Rich, executive director of Chicago Appleseed Fund for Justice who is spearheading a comprehensive study on central ALJ panels.

² The relevant portion of the 2010 Model State APA states as follows: “If the administrative law judge is delegated final decisional authority, the administrative law judge shall issue a final order. If the administrative law judge is not delegated final decisional authority, the administrative law judge shall issue to the agency head a recommended order in the contested case.” Model State Admin. Proc. Act § 606 (2010). The Model State APA is drafted by the National Conference of Commissioners on Uniform State Laws.

ADMINISTRATIVE PROCEDURE ACT SUBCOMMITTEE

ENFORCEMENT AUTHORITY

Existing Law

The APA gives an agency representative or ALJ the authority to “sign and issue subpoenas.” O.C.G.A. § 50-13-13(a)(6). When a subpoena is disobeyed, a party may seek enforcement through the superior court of the county where the contested case is being heard. O.C.G.A. § 50-13-13(a)(7).

Also pursuant to the APA, an ALJ has the power to take action when a party (1) disobeys or resists a lawful order of process; (2) does not produce materials as ordered; (3) refuses to appear after having been subpoenaed; (4) refuses to take the oath to testify; and (5) refuses to testify after taking the oath. O.C.G.A. § 50-13-13(b). The ALJ may then certify the facts to the superior court where the offense was committed “for appropriate action, including a finding of contempt.” *Id.*

Reform Options

1. Modify the APA to provide the power to enforce subpoenas when parties do not appear (through the imposition of fines that can be enforced by a superior court, if necessary).
2. Modify the APA to provide the authority to sanction parties (*e.g.*, through the imposition of fines that can be enforced by a superior court, if necessary) for such actions as disobeying/resisting lawful orders of process; failing to produce material as ordered; refusing to appear after having been subpoenaed; filing frivolous pleadings; and refusing to take the oath to testify.³

Advantages to Reform Options

- **Efficiency:** Allowing for imposition of sanctions lessens the need for parties to seek action in superior courts while their case is ongoing.
 - Reduces the amount of time needed for parties to enforce subpoenas in proceedings, as they do not need to go before a superior court.
 - Discourages parties from issuing subpoenas to individuals they know or suspect will not appear (and thereby manufacturing grounds for a continuance).
- **Curbing Improper Pleadings:** ALJs may sanction attorneys or parties who submit pleadings for an improper purpose, or pleadings that contain frivolous arguments or arguments that have no evidentiary support. *See, e.g., Fed. R. Civ. P. 11.*

³ Enforcement authority should be limited to OSAH ALJs only, as opposed to both OSAH ALJs and agency representatives. OSAH ALJs are trained judicial officers who act as neutral third parties in disputes involving agencies. Accordingly, they are the more appropriate parties to impartially wield enforcement power that will directly affect an agency’s position in a contested case.

- **Precedent in State Law:** The State Board of Workers' Compensation has authority by statute to impose and collect fines. *See* O.C.G.A. §§ 34-9-18, 34-9-60.⁴

Disadvantages to Reform Options

- **Efficiency:** Superior courts may not face a high volume of requests for actions on sanctions or subpoenas.

⁴ Regarding civil penalties:

- (a) Any person who willfully fails to file any form or report required by the board, fails to follow any order or directive of the board or any of its members or administrative law judges, or violates any rule or regulation of the board shall be assessed a civil penalty of not less than \$100.00 nor more than \$1,000.00 per violation.
- (b) Any person who knowingly and intentionally makes any false or misleading statement or representation for the purpose of facilitating the obtaining or denying of any benefit or payment under this chapter may be assessed a civil penalty of not less than \$1,000.00 nor more than \$10,000.00 per violation.
- (c) In addition to the penalty and assessed fees as defined in subsection (b) of Code Section 34-9-126, the board may assess a civil penalty of not less than \$500.00 nor more than \$5,000.00 per violation for the violation by any person of Code Section 34-9-121 or subsection (a) of Code Section 34-9-126.
- (d) Any penalty assessed under subsections (a), (b), and (c) of this Code section shall be final unless within ten days of the date of the assessment the person fined files a written request with the board for a hearing on the matter.
- (e) Any person, firm, or corporation who is assessed a civil penalty pursuant to this Code section may also be assessed the cost of collection. The cost of collection may also include reasonable attorneys' fees.
- (f) All penalties and costs assessed under this Code section shall be tendered and made payable to the State Board of Workers' Compensation. All such penalties shall be deposited in the general fund of the state treasury.

O.C.G.A. § 34-9-18. Regarding subpoenas:

... Article 2 of Chapter 13 of Title 24 shall govern the issuance and enforcement of subpoenas pursuant to this Code section, except that the board, any member of the board, or any administrative law judge shall carry out the functions of the court and the executive director shall carry out the functions of the clerk of the court. The board shall not, however, have the power to order imprisonment as a means of enforcing a subpoena. The board shall have the power to issue writs of fieri facias in order to collect fines imposed pursuant to this Code section and such writs may be enforced in the same manner as a similar writ issued by a superior court.

O.C.G.A. § 34-9-60(a).

ADMINISTRATIVE PROCEDURE ACT SUBCOMMITTEE

FILING HEARING REQUESTS UNDER THE APA

Existing Law

Certain agencies that receive requests for a hearing in a contested case will refer the case to OSAH. O.C.G.A. § 50-13-41(a)(1); GA. COMP. R. & REGS. 616-1-2-.03. However, under the current APA, there is no set deadline by which agencies must make these referrals.

Reform Option

1. Establish that agencies must refer contested cases within a reasonable time period after the hearing request is filed. If the agency does not refer the case by the deadline, parties will be allowed to file hearing requests directly with OSAH.

Advantages to Reform Option

- **Efficiency:** Deadlines and/or direct filing with OSAH would improve the overall flow of cases from agency to ALJ.
 - Reduces any lag time between a party's request for a hearing and OSAH's docketing of the case.
 - Gives parties certainty as to when their cases will be received and docketed by OSAH for a hearing.
- *State/Federal Requirements:* Filing deadlines would assist the State in meeting state and federal statutory deadlines for certain decisions.

Disadvantages to Reform Option

- **Setting Deadlines:** Agencies may find it difficult to meet a set deadline, depending on the type of case.
 - Agencies often attempt settling cases with party before submitting case to OSAH.
 - Agencies reaching settlements have to wait for boards/commissions to convene to approve them; meetings often months apart.

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STATEWIDE BUSINESS COURT SUBCOMMITTEE

STATEWIDE BUSINESS COURT SUBCOMMITTEE

INTRODUCTION

Members of the Business Court Subcommittee

Carey Miller (Chair, Incoming)	Executive Counsel (Incoming), Office of Governor Nathan Deal
David Werner (Chair, Outgoing)	Executive Counsel (Outgoing), Office of Governor Nathan Deal
Hon. Charlie Bethel	Judge, Georgia Court of Appeals
Hon. Trent Brown	Judge, Superior Court of the Ocmulgee Circuit
Hon. Christopher M. Carr	Attorney General of Georgia
Dennis T. Cathey, Esq.	Member, Cathey & Strain, LLC
Hon. Christian Coomer	Majority Whip, Georgia House of Representatives
Chris Cummiskey, Esq.	Executive V.P. of External Affairs, Georgia Power
Hon. Asha Jackson	Judge, Superior Court of the Stone Mountain Judicial Circuit

The Business Court Subcommittee (“Subcommittee”) was created to evaluate the feasibility and efficacy of a statewide Business or Complex Litigation Court. The Subcommittee held two public meetings on July 13 and November 1, 2017, along with another discussion on September 25, 2017.

The Subcommittee heard from a number of individuals with experience practicing in business courts, including local practitioners who have litigated cases in such courts: Fulton County Superior Court Chief Business Case Division Judge John Goger; former State Bar President Bill Barwick, who was involved in the formation of that Fulton Court Division; representatives of the Georgia Trial Lawyers Association; Georgians for Lawsuit Reform; as well as the Chief Business Court Judge of the North Carolina Business Court, James Gale, who provided an overview of North Carolina’s court which has been in place since the mid-1990s.

In addition, the Subcommittee was provided and reviewed written materials published by the American Bar Association and others concerning the structure and experience of business courts in other states. The Subcommittee benefitted greatly from these materials, and from hearing directly from those with experience in business courts. Our recommendations have been informed by our review and consideration of this information.

STATEWIDE BUSINESS COURT SUBCOMMITTEE

SUMMARY

The Business Court Subcommittee of the Court Reform Council recommends the constitutional creation of a statewide business court in Georgia. The Georgia Business Court would provide specialized expertise for the adjudication of complex cases, ultimately enhancing litigation of complex matters by providing judicial resources specifically tailored to such cases. Throughout the course of its work, the Business Court Subcommittee has considered the following general framework as it relates to the establishment and practice of a Georgia Business Court.

Creation and Structure of the Georgia Business Court

The Subcommittee recommends this Georgia Business Court (GBC) be established with statewide jurisdiction. Cases could be filed in the superior or state court of any judicial circuit but would be transferred and removed to the GBC based on the jurisdictional requirements discussed herein. Technology and videoconferencing may be used to facilitate remote participation for some matters, such as pre-trial hearings, to reduce travel costs. If, however, a case goes to a jury trial in the GBC, the venue would be subject to current Constitutional requirements and the trial would be held in the filing location.

Transfer/Removal

Litigants seeking to transfer or remove to the GBC would be subject to some temporal limit on when a removal petition could be filed. A party opposing transfer to the GBC may file a petition in opposition seeking to remand a case to the superior or state court in which it was filed. A GBC judge would rule on the issue of proper subject matter for removal/remand to/from the GBC.

Subject Matter Jurisdiction and Appealability

The Business Court Subcommittee proposes limiting the subject matter jurisdiction of the GBC to the following topics:

- Actions brought pursuant to or governed by the Georgia Business Corporation Code, Uniform Partnership Act, Uniform Limited Partnership Act, Revised Uniform Limited Partnership Act, or Limited Liability Company act;
- The Uniform Commercial Code;
- Securities;
- Antitrust;
- Intellectual property;
- Actions arising out of or rooted in E-commerce that meet an amount-in-controversy requirement;
- Cybersecurity;
- Biotechnology;
- The Georgia International Arbitration Act;
- Professional malpractice claims with a duty arising out of a business dispute that do not involve personal injury, subject to an amount in controversy requirement; and,
- Contract or business tort cases, subject to an amount in controversy requirement.

The Committee proposes that decisions of the GBC would be appealable to the Georgia Court of Appeals, consistent with recent statutory changes to the jurisdiction of Georgia's appellate courts.

Judicial Selection and Qualification

Given the purpose of the Business Court—providing judicial resources tailored to the unique needs of complex litigation—the Subcommittee proposes that judges in the GBC be appointed, rather than elected, and have a demonstrable track record of experience in complex litigation practice. An ideal candidate would have at least 15 years of practice in business and/or other complex litigation. Given the experiential requirements of such judges, longer terms of office for the judges may also be necessary.

STATEWIDE BUSINESS COURT SUBCOMMITTEE

BACKGROUND OF THE BUSINESS COURT CONCEPT

The Overall Value and Benefit of a Statewide Business Court

Specialized courts dealing with complex business matters have been in the United States in one form or another as far back as the formation of the Delaware Court of Chancery in 1792 and, in recent years, businesses have associated the increasing complexity of litigation with the need for specialized business courts. Businesses report an increasing lack of predictability of outcome and time required to resolve matters, often due in part to increasing complexity of cases along with increasing time demands on judges. More recently, legislatures have increasingly turned to business courts for these complex business matters—now present in many states.

Delaware remains the “‘godfather’ of business courts” with its Chancery Court, which developed as “the original” business court because corporate governance cases “generally raise the kinds of questions with which equity deals: the duty of disclosure, the duty of good faith, and the like.”⁵

But all business courts offer the distinct advantages of any specialized court:

- (1) Certainty and predictability of outcome – judicial expertise gives business interests the security that their complex business issues will be heard in front of a judge who has substantial familiarity with complex business issues like fiduciary duties, disclosure issues, and duty of care.
- (2) Because of the specialized nature of the courts and the lawyers who practice before it, complex issues can be expedited.
- (3) Specialization, generally, leads to consistent case management and lower costs, with more efficient outcomes.

The creation of a statewide business court in Georgia would promote all these advantages and make Georgia a more attractive and competitive venue for business.

An Overview of Business Courts in Other Jurisdictions

The attached Survey of State Business Courts provides a non-exhaustive survey of subject matters that have been assigned to business courts in other states. Some states, such as New York, focus almost exclusively on commercial matters, for example, even taking jurisdiction over legal malpractice claims only insofar as they arise out of misrepresentation in commercial matters.⁶ Other states, like North Carolina, have sought to use the business court as a venue for developing expertise in other areas in addition to commercial and corporate law, like antitrust law and intellectual property disputes.⁷ South Carolina has also adopted a comprehensive statewide business court, recognizing the need for certainty for new business investment.⁸

⁵ Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 480-81 (2007).

⁶ Appendix at ix-x.

⁷ *Id.* at iii-iv.

⁸ *Id.* at xi.

The Metro Atlanta Business Case Division

In its recommendation for a statewide business court, the Subcommittee also considered the success of the Fulton County Superior Court Business Case Division (now known as the Metro Atlanta Business Case Division). The Subcommittee reviewed documents and heard from a number of practitioners and judges familiar with the establishment and operation of the Business Case Division, which was authorized by the Supreme Court in 2005 pursuant to Atlanta Judicial Circuit Rule 1004.⁹

The Business Case Division was established as a “pilot program” under Article VI, Section I, Paragraph X of the Georgia Constitution. Currently, the Fulton County Superior Court and the Gwinnett State and Superior Courts have adopted Rule 1004. Cases involving any of the following are eligible to be transferred to the Metro Atlanta Business Case Division: securities, the Uniform Commercial Code, the law governing corporations and other business organizations, and contract and business tort cases and other complex litigation in which the amount in controversy exceeds \$1 million. Cases are assigned to the Business Case Division by either (a) joint request; (b) motion by a party; or (c) request by the assigned state or superior court judge. A committee of the Business Case Division determines whether a case should be transferred to the Division. The Division is partially funded through a \$1,000 transfer fee.¹⁰

Since its inception, the Metro Atlanta Business Case Division has handled nearly 240 cases. The Division is known for its efficient disposition of matters and accessibility of its judges and staff. The Division utilizes case management conferences in the first 30 days after a case is assigned and promptly decides motions and discovery disputes.¹¹ In 2015 and 2016, the average time for disposition of motions was 16 days.¹² Cases assigned to the Business Case Division are also resolved between 50-60% faster than similar, complex cases on the regular docket. Moreover, surveys of practitioners in the Business Case Division reflect high levels of satisfaction by over 80% of those surveyed.¹³

⁹ Atl. Jud. Cir. R. 1004.

¹⁰ *Id.*

¹¹ Metro Atl. Bus. Ct. Report, 4 (2016).

¹² *Id.* at 6.

¹³ Rocco Testani, Testimony to Ga. Bus. Ct. Subcommittee, Nov. 1 2017.

STATEWIDE BUSINESS COURT SUBCOMMITTEE

PROPOSING A STATEWIDE BUSINESS COURT IN GEORGIA

Constitutional Considerations

Article VI of the Georgia Constitution sets forth the classes and duties of Georgia’s various courts – magistrate courts, probate courts, juvenile courts, state courts, superior courts, Court of Appeals, and Supreme Court. Amending Article VI would therefore be required to formally establish a Business Court in the Georgia judiciary. Article VI, Section I, Paragraph X, however, also contains an “[a]uthorization for pilot projects” that grants the General Assembly the power to enact pilot projects of limited duration to establish different courts. It is possible that the Business Court could be enacted as a limited-duration pilot project pursuant to Article VI, Section I, Paragraph X. As a practical matter, the General Assembly’s pilot-project authority requires a two-thirds majority in each house, so a proper constitutional amendment would not require significantly more political effort and could provide more stability for the long-term success of the Business Court.

The following paragraphs in Article VI will likely be affected and need to be amended to create constitutional authority for the proposed Business Court:

Section I, Paragraph I – “Business Court” to be added to the list of “classes of courts.”

Section I, Paragraph IV – “Business Court” could be added to the list of courts that may grant new trials, but even absent amendment, a newly created Business Court should be captured within the catch-all “other courts of record” language in that paragraph.

Section I, Paragraph V – In order to provide time for legislation and rules to be enacted, add “The provisions of this Paragraph, as they relate to the Business Court, shall be effected by law within 24 months of the effective date of this Amendment.”

Section II, New Paragraph IX – This section covers venue in Georgia. It should be amended to add a new paragraph covering the shifting venue proposal for the Business Court. *E.g.*, “All cases properly before the Business Court may have all pre-trial proceedings in the County prescribed by legislation and rules relating to the Business Court. Trial in Business Court cases will be in the county otherwise required by this Section.”

Section III, Paragraph I – Amend this section to add the Business Court to a class of court of limited jurisdiction.

* The amendment could either note the Business Court’s jurisdiction will be established “as provided by law” to allow the General Assembly to create jurisdiction, or jurisdictional constraints could be set forth in a new detailed Paragraph II.

* To the extent the proposal will be for Business Court decisions to be binding on other lower Georgia courts, the following paragraph would need to be added: “The decisions of the Business Court insofar as not in conflict with those of the Court of Appeals or Supreme Court shall bind all courts except the Court of Appeals and Supreme Court as precedents.”

* To the extent the proposal would reflect that the Business Court can certify questions to the Supreme Court, add a paragraph setting forth that authority: “The Business Court may certify a question to the Supreme Court for instruction, to which it shall then be bound.”

Section VII, Paragraph I – Section VII will need to be amended to reflect the selection of Business Court judges (Paragraph I), the minimum qualifications for Business Court judges (Paragraph II), and if vacancies will be filled by some method other than appointment by the Governor, set forth that method (Paragraph III).

Creation and Structure

Recommendation- The Subcommittee recommends this Georgia Business Court (GBC) be established with statewide jurisdiction. Cases could be filed in the superior or state court of any judicial circuit but would be transferred and removed to the GBC discussed herein. Technology and videoconferencing may be used to facilitate remote participation for these matters to reduce travel costs. If, however, a case goes to a jury trial in the GBC, the venue would be subject to current constitutional requirements and the trial would be held in the filing location.

Option 1: A business court with statewide jurisdiction based in Atlanta, similar to Georgia’s statewide appellate courts.

Option 2: A business court with statewide jurisdiction based in various regions of the state, similar to Georgia’s federal courts.

Analysis: The benefit of having a business court based in one location would likely limit the general expense of managing the court’s operations. Precedent exists for establishing a court of statewide jurisdiction in one central location. As noted above, video technology would be available for pre-trial matters to further limit expense, and any necessary jury trial would be held in the original filing location. The benefit of having the business court located in multiple regions across the state would be ease of access for parties located outside of the metro-Atlanta area, this model would closely resemble Georgia’s federal court model. Business court geographic organizational structures differ amongst other states. Florida, for example, has three business courts, each of which are located in different state trial court circuits.¹⁴ North Carolina, on the other hand, has four regional business court locations that have equal jurisdictional reach.¹⁵ Finally, states like Delaware have statewide jurisdiction in one central location, via the Delaware Court of Chancery.¹⁶

Transfer/Removal

Recommendation: Litigants seeking to transfer or remove to the GBC would be subject to some temporal limit on when a removal petition could be filed. A party opposing transfer to the GBC may file a petition in opposition seeking to remand a case to the superior or state court in which it was filed. A GBC judge would rule on the issue of proper subject matter for removal/remand to/from the GBC.

Options for Implementation: The Subcommittee considered several procedural options for transferring/removing a case to the GBC. First, litigants seeking to transfer or remove their case to the GBC could file a petition to do so with the GBC, notifying the superior or state court in which the case was filed. A

¹⁴ Appendix v-vi.

¹⁵ *Id.* iii-iv

¹⁶ *Supra* n. 1 at 479-82

party opposing removal would then be able to petition the GBC to remand the case. The Subcommittee also discussed at length the ability to partition trial when necessary. For instance, if an ancillary issue of fact arose that could be adjudicated fairly quickly by a state or superior court, perhaps the Court could send that single issue to trial with a judge in the original filing location. However, when the central or dispositive issue is due for trial, the GBC judge's familiarity with the matter may make it necessary for that judge to preside over the case in the proper venue. Finally, an additional consideration is the remand of cases back to a state or superior court once issues necessitating the transfer of the case to the GBC are resolved. The Subcommittee found merit to the various options but has chosen to defer to the will of the General Assembly on these matters of implementation.

Subject Matter Jurisdiction and Appeal

Subject matter jurisdictional formats vary throughout the states. A common model, such as New York's Commercial Division, requires a specific jurisdictional amount in controversy and provides a defined list of subject matter jurisdictional parameters.¹⁷ A defined, objective model such as this would provide for easier predictability but likely less flexibility to account for varying factual scenarios that may arise in the business context.

Another format, the complex business model used by New Jersey, requires some form of business, technology, or commercial dispute while additionally requiring the satisfaction of "complexity" standards according to a list of factors that are decided by a judge.¹⁸ This format is more subjective, providing judges greater discretion in managing the dockets while possibly reducing predictability for litigants.

The Subcommittee recommends a mixture of North Carolina's and Georgia's Fulton County business courts. North Carolina's model combines the objectivity and predictability of a defined list of parameters with the subjectivity and flexibility in determining "complexity" standards.¹⁹ Additionally, the Subcommittee proposes an amount in controversy requirement as another jurisdictional gatekeeper for the GBC.

Recommendation: The Business Court Subcommittee proposes limiting the subject matter jurisdiction of the GBC to the following topics:

- Actions brought pursuant to or governed by the Georgia Business Corporation Code, Uniform Partnership Act, Uniform Limited Partnership Act, Revised Uniform Limited Partnership Act, or Limited Liability Company Act;
- The Uniform Commercial Code;
- Securities;
- Antitrust;
- Intellectual property;
- Actions arising out of or rooted in E-commerce that meet an amount-in-controversy requirement;
- Cybersecurity;
- Biotechnology;
- The Georgia International Arbitration Act;
- Professional malpractice claims with a duty arising out of a business dispute that do not involve personal injury, subject to an amount in controversy requirement; and,
- Contract or business tort cases subject to an amount in controversy requirement.

¹⁷ Appendix at ix.

¹⁸ Appendix at ix.

¹⁹ Appendix iii-iv.

The Subcommittee proposes that decisions of the GBC would be appealable to the Georgia Court of Appeals, consistent with recent statutory changes to the jurisdiction of Georgia's appellate courts.

Options Regarding Amount in Controversy: The Subcommittee considered at length the need for an amount-in-controversy requirement for certain subject matters. In doing so, the Subcommittee reviewed various state business court amount-in-controversy requirements which ranged from as little as \$15,000 to as high as \$1 million. As such, the Subcommittee wishes to defer on selecting a specific amount but acknowledge the need of an amount-in-controversy for certain topics.

Judicial Selection and Qualification

Recommendation: Given the purpose of the Business Court—providing judicial resources tailored to the unique needs of complex litigation—the Subcommittee proposes that judges in the GBC be appointed, rather than elected, and have a demonstrable track record of experience in complex litigation practice. An ideal candidate would have at least 15 years of practice in business and/or other complex litigation. Given the experiential requirements of such judges, longer terms of office for the judges may also be necessary.

SOVEREIGN IMMUNITY SUBCOMMITTEE

SOVEREIGN IMMUNITY SUBCOMMITTEE

INTRODUCTION

Members of the Sovereign Immunity Subcommittee

Hon. Christopher M. Carr (Chair)	Attorney General of Georgia
Hon. Trent Brown	Judge, Superior Court of the Ocmulgee Judicial Circuit
Dennis T. Cathey, Esq.	Member, Cathey & Strain, LLC
Hon. Christian Coomer	Majority Whip, Georgia House of Representatives
Hon. Bill Cowsert	Majority Leader, Georgia State Senate
Hon. Asha Jackson	Judge, Superior Court of the Stone Mountain Judicial Circuit
Carey Miller	Executive Counsel (Incoming), Office of Governor Nathan Deal
Hon. Mary Margaret Oliver	Georgia House of Representatives
David Werner	Executive Counsel (Outgoing), Office of Governor Nathan Deal

The Sovereign Immunity Subcommittee was formed to examine the effect of the State’s sovereign immunity—a constitutional doctrine—on the availability of certain types of lawsuits in Georgia. Discussion of sovereign immunity has become increasingly prevalent in the wake of (among other things): (1) *Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc.*, a Georgia Supreme Court case decided in 2014; (2) House Bill 59, legislation pertaining to sovereign immunity, passed in 2015 but vetoed in 2016 (2016 Ga. Laws 380A); and (3) *Lathrop v. Deal*, another sovereign immunity case pending before the Georgia Supreme Court in 2016 (before the creation of this Subcommittee) and decided in 2017.

The Subcommittee identified two primary goals for its work as part of the Council:

- (1) **Identify issues related to the State’s sovereign immunity that should be reviewed to “achieve best practices for the administration of justice” as set forth in the Governor’s Executive Order.** A common theme discussed among Subcommittee members was that “the administration of justice” may be served by seeking clarity and certainty as it pertains to the scope of the State’s sovereign immunity, and as to the availability of certain types of legal remedies against the State.
- (2) **Offer the Governor a range of potential options for actions that he, the General Assembly, and/or the people of Georgia could undertake related to the State’s sovereign immunity.**

SOVEREIGN IMMUNITY SUBCOMMITTEE

HISTORY OF SOVEREIGN IMMUNITY IN GEORGIA

To better understand the context of the Subcommittee’s discussions, as well as its ultimate recommendations, some background on Georgia’s sovereign immunity doctrine is necessary.

The doctrine of sovereign immunity traditionally embodies the proposition that the State “[can]not, without its own express consent, be subjected to an action of any kind.”²⁰ Although sovereign immunity is commonly understood to protect primarily the “public purse,” the doctrine at common law also barred suits against the State that did not seek money damages, such as those for injunctive or other equitable relief.²¹

Sovereign immunity existed as a common-law doctrine in Georgia for almost 200 years—from 1784 until 1974. In 1974, the people of Georgia ratified an amendment to their Constitution, elevating sovereign immunity from a common-law doctrine to a constitutional doctrine.²² That amendment “provided that sovereign immunity was expressly reserved and could only be waived by our Constitution or legislature,” and because of it, “the courts no longer had the authority to abrogate or modify the doctrine, as they had when sovereign immunity was a product of the common law rather than constitutional law.”²³

When the 1983 Georgia Constitution was later ratified, the provision on sovereign immunity was revised so that “the State had the power to waive sovereign immunity for damages claims for which liability insurance existed, up to the extent of any insurance coverage.”²⁴ This represented a shift from the 1974 amendment, which expressly reserved waiver of sovereign immunity to the legislature.²⁵

²⁰ *Lathrop v. Deal*, 301 Ga. 408, 412 (2017) (quoting *Peeples v. Byrd*, 98 Ga. 688, 693-94 (1896)).

²¹ See *Lathrop*, 301 Ga. at 412-13.

²² See *Ga. Dep’t of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 597 (2014).

²³ *Id.*

²⁴ *Id.* at 598.

²⁵ See *id.*

SOVEREIGN IMMUNITY SUBCOMMITTEE

1991 CONSTITUTIONAL AMENDMENT

In 1991, a new sovereign immunity amendment was ratified, thus amending the 1983 Constitution.

The 1991 Amendment did four main things: it (1) enabled the General Assembly to pass a waiver of the State’s sovereign immunity through a state Tort Claims Act (Art. I, Sec. II, Para. IX(a)); (2) waived the State’s sovereign immunity for suits against the State for breach of written contract (Art. I, Sec. II, Para. IX(c)); (3) constitutionalized the traditional common-law doctrine of official immunity (Art. I, Sec. II, Para. IX(d)); and (4) revised the constitutional doctrine of state sovereign immunity (Art. I, Sec. II, Para. IX(e)).²⁶

Article I, Section II, Paragraph IX(e) sets the parameters of the State’s sovereign immunity:

(e) Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

Thus, the 1991 Amendment—the most recent constitutional treatment of sovereign immunity—“restored to the legislature the exclusive power to waive sovereign immunity.”²⁷

²⁶ See 1983 GA. CONST. Art. I, Sec. II, Para. IX(a)-(e) (amended 1991).

²⁷ *Sustainable Coast*, 294 Ga. at 598.

SOVEREIGN IMMUNITY SUBCOMMITTEE

SUSTAINABLE COAST *AND OTHER RECENT DECISIONS*

In 2014, the Georgia Supreme Court decided *Sustainable Coast*. The Court held that “the plain language of Paragraph IX(e) explicitly bars suits against the State or its officers and employees sued in their official capacities, until and unless sovereign immunity has been waived by the General Assembly,” and that “exceptions” to sovereign immunity were not permitted—even for “suits seeking injunctive relief to restrain an illegal act.”²⁸

Cases following *Sustainable Coast* further established the contours of the State’s sovereign immunity under Paragraph IX(e). For example, in *Olvera v. University System of Georgia’s Board of Regents* (2016), the Georgia Supreme Court held that sovereign immunity bars suits for declaratory relief against the State or its departments or agencies.²⁹ And in *TDGA, LLC v. CBIRA, LLC* (2016), the Court “concluded that sovereign immunity extends as well to conventional quiet title actions.”³⁰

Although the Georgia Supreme Court decided cases examining the effect of sovereign immunity on suits for declaratory and injunctive relief against the State for alleged statutory and common-law violations, it did not have “occasion to consider whether the doctrine of sovereign immunity extends to claims for injunctive or declaratory relief that rest upon *constitutional grounds*.”³¹

²⁸ *Id.* at 599 (overruling *Int’l Bus. Machines Corp. v. Evans*, 265 Ga. 215, 216 (1995)).

²⁹ *Olvera v. Univ. Sys. of Ga.’s Bd. of Regents*, 298 Ga. 425, 428 n.4 (2016).

³⁰ See *Lathrop*, 301 Ga. at 425 n.19 (citing *TDGA, LLC v. CBIRA, LLC*, 298 Ga. 510, 511-12 (2016)). The Court held, however, that “in rem actions for quiet title . . . are not barred by sovereign immunity.” *TDGA*, 298 Ga. at 510.

It is also worth noting that during the 2015-2016 legislative sessions, the General Assembly passed House Bill 59, a legislative waiver to the State’s sovereign immunity for a number of types of suits, including but not limited to suits for injunctive and declaratory relief. See <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/59>.

Governor Deal vetoed H.B. 59 on May 3, 2016, noting that “HB 59 creates a blanket waiver of sovereign immunity, with limited exceptions, as to claims seeking a declaratory judgment or injunctive relief against the state and local governments” and that “the waiver of sovereign immunity contained [in HB 59] is not sufficiently limited.” See <https://gov.georgia.gov/press-releases/2016-05-03/deal-issues-2016-veto-statements>.

³¹ *Lathrop*, 301 Ga. at 408-09 (emphasis added).

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LATHROP V. DEAL

In early 2017, the Georgia Supreme Court was “confronted squarely with that question” in *Lathrop v. Deal*.³² In that case, three physicians sued State officials for declaratory and injunctive relief, alleging that House Bill 954—which “concerns medical procedures for the termination of pregnancies”—violated their patients’ rights under the Georgia Constitution.³³

Faced with the question of whether sovereign immunity, as set forth in Paragraph IX(e) of the Georgia Constitution, prohibited a suit for injunctive or declaratory relief premised on alleged constitutional violations, the Court held that **“the doctrine of sovereign immunity extends generally to suits against the State, its departments and agencies, and its officers in their official capacities for injunctive and declaratory relief from official acts that are alleged to be unconstitutional.”**³⁴

The Court thus confirmed that sovereign immunity in Georgia is a constitutional doctrine that generally bars suits against the State—even for alleged constitutional violations—absent an express waiver by the General Assembly.

Importantly, however, the *Lathrop* Court “recognize[d] the availability of other means by which aggrieved citizens may obtain relief from unconstitutional acts, including prospective relief from the threatened enforcement of unconstitutional laws.”³⁵ The Court emphasized that immunity would generally bar “retrospective relief—monetary damages and other relief for wrongs already done and injuries already sustained”—against state officers and employees in their individual capacities.³⁶ But the Court noted that plaintiffs may be able to obtain relief by suing state officers “in their *individual capacities*” because the doctrine of *official immunity*³⁷ (as opposed to sovereign immunity) **“generally is no bar to claims against state officers in their individual capacities for injunctive and declaratory relief from the enforcement of laws that are alleged to be unconstitutional, so long as the injunctive and declaratory relief is only prospective in nature.”**³⁸

Lathrop v. Deal, which was decided while this Subcommittee was already engaged in its work for the Court Reform Council, confirmed the breadth and strength of the State’s sovereign immunity under the 1991 Amendment. But it also left open a potential avenue for litigants to seek prospective declaratory or injunctive relief from the enforcement of allegedly unconstitutional laws—so long as the litigants sought relief against

³² *Id.* at 408-09.

³³ *Id.* at 409; see O.C.G.A. § 31-9B-2.

³⁴ *Lathrop*, 301 Ga. at 409 (emphasis added)

³⁵ *Id.*

³⁶ *Id.* at 434.

³⁷ In Georgia, official immunity, like sovereign immunity, is a constitutional doctrine. However, official immunity—unlike sovereign immunity—applies to state officers and employees individually, and not to state departments and agencies. Official immunity is set forth in Article I, Section II, Paragraph IX(d) of the 1983 Constitution (amended 1991):

“(d) 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. Except as provided in this subparagraph, officers and 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, for the performance or nonperformance of their official functions. The provisions of this subparagraph shall not be waived.”

³⁸ *Lathrop*, 301 Ga. at 434-35 (emphasis added).

state officers and employees in their *individual* capacities and not in their *official* capacities.³⁹ Even so, questions remain about the availability, practicality, and viability of the type of individual suits described in *Lathrop*, and whether immunities (such as sovereign or official) could still bar such actions.⁴⁰

³⁹ Suits against State officers or employees in their official capacities are treated as suits against the State and are therefore barred by sovereign immunity. *See id.* at 424 (“In *Sustainable Coast*, we reaffirmed that the doctrine of sovereign immunity bars suits against the State, its departments and agencies, and its officers in their official capacities for injunctive relief.”).

⁴⁰ For example, the Court “recognize[d] the availability of other means by which aggrieved citizens *may* obtain relief”—but if such relief is not, in fact, available, it is not clear how aggrieved citizens could obtain relief from “the threatened enforcement of unconstitutional laws.” *See Lathrop*, 301 Ga. at 409 (emphasis added).

SOVEREIGN IMMUNITY SUBCOMMITTEE

POTENTIAL PATHS FORWARD

The Subcommittee offers the following potential paths forward for Governor Deal’s consideration.

- **Constitutional Amendment**
- **Legislation**
- **A Combination Approach**
- **No Action**

Constitutional Amendment

To the extent there is a desire to modify Georgia’s constitutional doctrine of sovereign immunity, one obvious path would be modifying the Georgia Constitution—and in particular, the 1991 Amendment pertaining to sovereign immunity.⁴¹ Although amending the Constitution is a direct means of addressing sovereign immunity, it is not the most efficient.

First, the Subcommittee did not identify a desire to re-work the 1991 Amendment, and many members acknowledged that changing even a few words or phrases in the Amendment could have far-reaching and unforeseen consequences.

Second, achieving consensus on a proposed Amendment—let alone securing ratification of the Amendment⁴²—would be a complex and difficult endeavor.

For those reasons, the Subcommittee acknowledges that changes may be made to Georgia’s sovereign immunity doctrine via constitutional amendment, but does not view that option as preferred.

Legislation

Another way to modify the State’s sovereign immunity is by legislation. That is because the Georgia Constitution gives the General Assembly the power to waive “[t]he sovereign immunity of the state and its departments and agencies” by legislation, so long as the “Act of the General Assembly . . . specifically provides that sovereign immunity is thereby waived and the extent of such waiver.” GA. CONST. Art. I, Sec. II, Para. IX(e). Addressing the State’s sovereign immunity through legislation is the option that garnered the most interest and support from the diverse stakeholders represented on the Subcommittee.

⁴¹ As the Georgia Supreme Court has repeatedly acknowledged, the two ways to effectuate a waiver of the State’s sovereign immunity are by legislative waiver or by the text of the Georgia Constitution itself waiving the State’s sovereign immunity. *See, e.g., id.* at 444 (“The constitutional doctrine of sovereign immunity bars any suit against the State to which it has not given its consent If the consent of the State is to be found, it must be found in the constitution itself or the statutory law.”).

⁴² There are two ways to propose an amendment to the Georgia Constitution: (1) through a proposal submitted by the General Assembly or (2) by a constitutional convention. *See* GA. CONST. Art. X, Sec. I, Para. I.

For the General Assembly to propose an amendment, the proposal must originate as a resolution by either the House or Senate, and two-thirds of each chamber must approve the proposal. GA. CONST. Art. X, Sec. I, Para. II. To amend the Constitution via a Constitutional Convention, two-thirds of the House and two-thirds of the Senate must call for a convention. GA. CONST. Art. X, Sec. I, Para. IV. At the convention, the representatives vote on whether to propose the amendment to the people of Georgia. *Id.*

If the proposed amendment passes through either method, then the State must hold a popular vote on the proposed amendment. *See* GA. CONST. Art. X, Sec. I, Para. II. A proposed amendment becomes ratified if it receives a majority vote. *Id.*

Why a Legislative Solution?

Unlike the constitutional amendment option, passing legislation does not require ratification. Equally important, the framers of the Georgia Constitution (and the drafters of the 1991 Amendment) expressly contemplated legislative waiver and Paragraph IX(e) permits the General Assembly to waive the State's sovereign immunity.

What Would a Legislative Solution Accomplish?

The Subcommittee spent time exploring, and expressed enthusiasm for, a potential legislative option that addresses an issue left open in *Lathrop*: the viability of suits against state officers or employees in their *individual* (as opposed to official) capacities for injunctive and declaratory relief from the enforcement of allegedly unconstitutional laws.⁴³

Given the *Lathrop* Court's affirmation of the strength of the State's sovereign immunity, and in light of the questions remaining in the wake of that decision, the Subcommittee focused attention on the possibility of passing a narrow and limited waiver of the State's sovereign immunity pursuant to Article I, Section II, Paragraph IX(e) of the Constitution. That limited waiver would in effect "replace" the possibility of *individual* suits against state officers and employees for the purpose of seeking to enjoin enforcement of allegedly unconstitutional laws in the future, or for seeking prospective declaratory relief as to such laws.

Why Replace Individual Capacity Suits With A Narrow Waiver of State Sovereign Immunity?

The Subcommittee identified a number of reasons why it would be preferable to be able to sue the State (as opposed to state officers or employees in their individual capacities) to obtain "prospective relief from the threatened enforcement of unconstitutional laws."⁴⁴ The reasons include:

- Unwillingness to subject state officers and employees to suits individually for the enforcement of allegedly unconstitutional laws, because state officers and employees have no authority to enforce laws apart from their employment with the State.
- Concern that officers and employees subjected to individual-capacity suits—even if only for prospective injunctive and declaratory relief—could suffer personal consequences, including financial ramifications.
- Concern that subjecting officers and employees to individual-capacity suits could deter otherwise qualified and interested Georgians from entering public service.
- Concern that individual-capacity suits are less convenient for plaintiffs than a suit against the State, given (for example) personnel changes that may occur in a given office over time, and that such suits may not "run" to an officer's or employee's successor.⁴⁵

⁴³ There is also some question about whether these types of individual-capacity suits could, in some circumstances, be barred by state sovereign immunity. To that end, the *Lathrop* court noted that "the doctrine of sovereign immunity at common law was broad enough to bar some suits against public officers in their individual capacities, although only to the extent that the State itself could be said to be the real party in interest." *Lathrop*, 301 Ga. At 413-14.

⁴⁴ *Id.* at 409.

⁴⁵ *See, e.g., id.* at 444 n.32 (acknowledging plaintiffs' concerns about individual-capacity suits against state officers and employees).

How Would A Legislative Solution Work?

1. Pass a narrow legislative waiver of the State’s sovereign immunity that mirrors the type of suit contemplated against individual state officers and employees in *Lathrop*.

The proposed waiver would not create a private right of action, but would simply make clear that the State’s sovereign immunity does not bar suits against the State for prospective injunctive or declaratory relief to prevent enforcement of allegedly unconstitutional laws.

To ensure that the proposed waiver does not abrogate any of the other protections outlined in the Georgia Constitution, we recommend framing the legislative waiver in the negative (for example: “Sovereign immunity shall not bar . . .”). We also recommend that the legislative waiver explicitly state that waiver of the State’s sovereign immunity in this narrow context does not extend to (and thus sovereign immunity would still bar) any actions against the State for monetary relief and actions against the State seeking relief for past alleged wrongs. It should also include caveat language that makes clear that the waiver does not create a new private right of action or disturb any other prerequisites to or limitations on relief, including but not limited to jurisdictional requirements, standing, statutory notice to the Attorney General, exhaustion of administrative remedies in the APA and elsewhere, and existence of adequate remedies at law.

Although such a waiver would be narrow in scope, its passage would meaningfully change the status quo by permitting certain suits for injunctive and declaratory relief against the State that are otherwise barred under the constitutional doctrine of sovereign immunity. Most importantly, it would provide procedural certainty for citizens seeking injunctive or declaratory relief with respect to an allegedly unconstitutional law.

2. Concurrently pass legislation prohibiting suits against state officers or employees in their individual capacities for “official acts that are alleged to be unconstitutional . . . including prospective relief from the threatened enforcement of unconstitutional laws.”⁴⁶

This aspect of a potential legislative solution would help to ensure that state officers and employees not be sued in their individual capacities for the type of suit that the proposed legislative waiver would permit against the State. Passing a narrow legislative waiver for certain types of suits against the State would not serve its full purpose (as outlined above) if the General Assembly did not prevent the same type of suits against individual state officers and employees.

The Georgia Tort Claims Act—itsself a legislative waiver of the State’s sovereign immunity—provides helpful language as an example. *See* O.C.G.A. § 50-21-25(b) (“A person bringing an action against the state under the provisions of this article must name as a party defendant only the state government entity for which the state officer or employee was acting and shall not name the state officer or employee individually.”). Similar language could be used as part of this proposed legislative package.

3. As part of the same legislation, include substitution of a State department or agency for officers and employees sued in their individual capacities.

The Subcommittee also recommends that any proposed legislation include a substitution provision that, by operation of law, substitutes the relevant state entity as the defendant if a plaintiff names as a defendant a state officer or employee in his or her individual capacity (notwithstanding the legislative direction against suing state officers or employees for these types of cases). The Georgia Tort Claims Act is also a helpful example on this point. It states: “In the event that the state officer or employee is individually named for an act or omission

⁴⁶ *See, e.g., id.* at 409.

for which the state is liable under this article, the state government entity for which the state officer or employee was acting must be substituted as the party defendant.” O.C.G.A. § 50-21-25(b). Passing similar language would ensure that any legislative waiver permitting certain types of suits against the State would in fact result in suits against the State and not against individual officers and employees.

4. Ensure that the legislation contains other key features.

Any proposed legislation should ensure that persons or entities seeking to avail themselves of the proposed waiver of the State’s sovereign immunity otherwise have legal standing to file suit against the State. In other words, the passage of a narrow waiver of the State’s sovereign immunity does not—and should not be construed to—confer legal standing on a party if that party has not suffered a cognizable injury or otherwise met the requirements for legal standing under applicable state and federal law.

The Subcommittee also discussed and favored including a jurisdictional *ante litem* notice (or a notice of intent to sue)—which requires a plaintiff to notify the State of its intent to sue before filing an action—similar to the one contained in the Georgia Tort Claims Act. Requiring such a notice would create a uniform process for filing this type of suit against the State, thus standardizing the process for plaintiffs and ensuring that the State is placed on notice of forthcoming suits. It could also give the State an opportunity to resolve claims prior to suit.

Finally, other considerations should be made if proposed legislation is drafted. For example, the Subcommittee recommends:

- Ensuring that any waiver of the State’s sovereign immunity for injunctive relief regarding allegedly unconstitutional statutes does not expand other waivers.
- Encouraging the General Assembly to include express statutory language to make clear its intent to waive the State’s sovereign immunity in any intended legislative waiver, and by contrast to include statutory language in other statutes disclaiming its intent to waive the State’s sovereign immunity when that is the General Assembly’s intent. This could be helpful for any later judicial review.
- Ensuring that any legislation considers the effect of—and aims to prevent—claim-splitting without application of preclusive effects.
- Clarify that any waiver affects only the State’s sovereign immunity in Georgia courts and does not waive any immunity with respect to actions brought in courts of the United States.

The Subcommittee also recognizes that, as with any proposed path forward, there are potential drawbacks to a legislative solution as well. For example, the Department of Administrative Services (DOAS) does not insure the defense of cases for declaratory or injunctive relief against the State. Thus, cost of defense should be considered as it pertains to any waiver of the State’s sovereign immunity for injunctive or declaratory relief. Similarly, we recommend considering whether suits for prospective declaratory or injunctive relief for which the State waives sovereign immunity should be eligible for awards of attorneys’ fees or other costs against the State.

Combination Approach

The options set forth in this report do not need to be considered or implemented in isolation. To that end, another approach to addressing state sovereign immunity would be to adopt some combination of the options explored in this report.

No Action

The Subcommittee discussed whether to include “no action” as a potential path forward. Taking no action is a more viable path because the *Lathrop* decision has provided more clarity about the scope of the State’s sovereign immunity, but as explained above, uncertainties remain about the availability of other types of suits in the wake of that decision. Although no Subcommittee members endorsed “no action” as a preferred recommendation, many members agreed that the Subcommittee should acknowledge that taking no action is one viable option among many. For that reason, a “no action” option is included here.

SOVEREIGN IMMUNITY SUBCOMMITTEE

OTHER POTENTIAL ISSUES AND ACTIONS

Conventional Quiet Title Actions

One member of the public who attended a Subcommittee meeting explained that sovereign immunity bars conventional quiet title actions for tax deeds under O.C.G.A. § 23-3-44, whereas “quiet title against the world” generally is not barred by sovereign immunity.⁴⁷ Because “quiet title against the world” is a more complicated and expensive legal process that is not always necessary for conventional actions, a request was made to consider passing a legislative waiver of the State’s sovereign immunity within O.C.G.A. § 23-3-44 (“Removing cloud on title caused by equity of redemption following tax sale”).

Sovereign Immunity for Municipalities

The Subcommittee also discussed whether political subdivisions of the State—such as counties or municipalities—enjoy the same sovereign immunity as the State when sued for declaratory or injunctive relief.⁴⁸ To that end, the Subcommittee discussed whether any legislative proposal should expressly delineate which political subdivisions of the State were included in any waiver of immunity.

The Subcommittee ultimately acknowledged, however, that the sovereign immunity enjoyed by counties and municipalities is derived from different portions of the Georgia Constitution and Georgia Code. The Georgia Constitution treats counties as a part of the State; counties are therefore protected by sovereign immunity.⁴⁹ By contrast, municipalities receive immunity only as provided for by the General Assembly.⁵⁰

Given these potential differences, the Subcommittee concluded that the best course for any proposed legislative waiver would be to refer only to the State, and not to delineate other political subdivisions. At the same time, the Subcommittee recommends considering the potential effect of a legislative waiver on counties and municipalities, and further considering whether those effects may warrant additional legislative action now or in the future.

Conduct vs. Acts

In explaining that constitutional official immunity may not bar certain types of claims against state officers or employees in their individual capacities, the Georgia Supreme Court in *Lathrop* explained that “official immunity generally is no bar to claims against state officers in their individual capacities for injunctive and declaratory relief *from the enforcement of laws that are alleged to be unconstitutional*, so long as the injunctive and declaratory relief is only prospective in nature.”⁵¹

There was some discussion among Subcommittee members about whether any proposed legislative waiver of the State’s sovereign immunity should extend beyond prospective injunctive and declaratory relief pertaining to allegedly unconstitutional *laws* to also waive sovereign immunity with respect to claims alleging

⁴⁷ See, e.g., *TDGA, LLC v. CBIRA, LLC*, 298 Ga. 510, 510 (2016).

⁴⁸ An example is whether counties or cities may validly assert sovereign immunity if a citizen sues for prospective injunctive or declaratory relief for an allegedly unconstitutional law or ordinance.

⁴⁹ See GA. CONST. Art. I, Sec. II, Para. IX(e); *Columbus Consol. Gov’t v. Woody*, 342 Ga. App. 233, 233 (2017) (“Sovereign immunity extends to the county and can only be waived by a legislative act of the General Assembly specifically providing for the waiver and its extent.”).

⁵⁰ See GA. CONST. Art. IX, Sec. II, Para. IX; see, e.g., O.C.G.A. § 36-33-1.

⁵¹ *Lathrop*, 301 Ga. at 434-35 (emphasis added).

unconstitutional *conduct* (beyond the enforcement of allegedly unconstitutional laws). The Subcommittee agreed that although this question may be worthy of examination in the future, it is not central to the legislative option proposed in this Report. Indeed, there was some concern that extending a proposed waiver of the State’s sovereign immunity beyond the narrow context discussed here could result in the same overbreadth issue that may have led to the demise of H.B. 59. *See* 2016 Veto Statement, *supra* n. 30 (“[T]he waiver of sovereign immunity contained therein is not sufficiently limited”).

Executive Orders and Other Actions Not Covered By O.C.G.A. § 50-13-10

Also raised was whether the General Assembly should consider passing a legislative waiver of the State’s sovereign immunity to permit suits challenging the constitutionality of Executive actions and orders. Although this suggestion falls outside the scope of the *Lathrop* paradigm—insofar as it extends beyond challenges to *laws*—it aligns with the idea that citizens may want additional and viable legal avenues to challenge the constitutionality of government acts and actions. In considering this possibility, we recommend evaluating the need (if any) for legislative waivers to Executive actions and orders not already covered by O.C.G.A. § 50-13-10(a), which allows for declaratory judgments pertaining to the “validity of any rule, waiver, or variance” in certain contexts. Additionally, the key aspects and limitations mentioned above in Subsection 4 should also be considered.