IN THE SUPREME COURT
STATE OF GEORGIA

GEORGIA ASSOCIATION OF PROFESSIONAL PROCESS SERVERS, ET AL.,

Appellants,

– versus –

THEODORE JACKSON, AS SHERIFF OF FULTON COUNTY, ET AL.,

Appellees.

Supreme Court Case No. S17A1079

APPELLEES' SUPPLEMENTAL BRIEF

To the Honorable Justices of the Supreme Court of Georgia:

COME NOW Appellees, and pursuant to Rule 24 of the Rules of the Supreme Court of Georgia, submit this supplemental brief to address certain questions raised by Justice Nahmias and Justice Peterson at the May 15, 2017 hearing pertaining to Appellants' mandamus claim and Appellees' discretion in determining whether to allow certified process servers to serve process in their respective counties under O.C.G.A. § 9-11-4.1(a).

I. MANDAMUS IS NOT AN APPROPRIATE VEHICLE TO CHALLENGE A SHERIFF'S DECISION TO DISALLOW CERTIFIED PROCESS SERVERS UNDER O.C.G.A. § 9-11-4.1

In Georgia, a citizen has a right to file a petition for mandamus in superior court to compel a public official to perform a duty required by law where there is no other adequate legal remedy. See Ford Motor Co. v. Lawrence, 279 Ga. 284, 285, 612 S.E.2d 301, 303 (2005) ("Writs of mandamus… are extraordinary remedies available in limited circumstances to compel action… on the part of a public officer when there is no other adequate legal remedy). In the case of a discretionary duty, mandamus will only lie where there has been a "gross abuse" of that discretion. O.C.G.A. §§ 9-6-20 & 9-6-21; R.A.F. v. Robinson, 286 Ga. 644, 646, 690 S.E.2d 372, 374 (2010). "[A] public official's exercise of discretion will not be disturbed by a mandamus order unless the official's actions were arbitrary, capricious, and unreasonable." Burke Cnty. v. Askin, 291 Ga. 697, 700-01, 732 S.E.2d 416, 419 (2012).

However, mandamus relief is not appropriate when a statute provides a "general grant of discretionary authority" as opposed to imposing an "express official duty." Bland Farms, LLC v. Georgia Dept. of Agr., 281 Ga. 192, 193-94, 637 S.E.2d 37 (2006). Moreover, mandamus relief is not appropriate when the

petitioner seeks a general course of conduct or the performance of continuous duties. Speedway Grading Corp. v. Barrow County Bd. of Com'rs, 258 Ga. 693, 373 S.E.2d 205(1988). Thus, this Court rejects the premise that mandamus can be used to "interfere" with policy enactments, Schrenko v. DeKalb County School Dist., 276 Ga. 786, 795, 582 S.E.2d 109 (2003), force government to enact a particular regulation within its discretionary power, City of College Park v. Wyatt, 282 Ga. 479, 481, 651 S.E.2d 686 (2007), or compel government to validate a legislative enactment. Lowe v. State of Georgia, 267 Ga. 754, 755, 482 S.E.2d 344 (1997).

Under the law at issue, Georgia sheriffs are required to review applications of individuals seeking to become certified statewide process servers. To be entitled to serve as a statewide process server under the authority of O.C.G.A. § 9-11-4.1, an individual who has not otherwise been appointed by courts to serve process must first meet specified certification requirements under subsection (b) of the statute. In the instant litigation, there are no issues before the Court related to the performance of this duty.

After being certified, subsection (a) of the statute provides that the individual "shall be entitled to serve in such capacity for any court of the state, anywhere

within the state, ***provided that the sheriff of the county for which process is to be served allows such servers to serve process in such county***." O.C.G.A. § 9-11-4.1 (a) (emphasis added). It is this highlighted portion that forms the sole issue in this appeal. Notably, the statute does not say, "...provided that the sheriff of the county for which process is to be served allows that server to serve process in such county." As evidenced by the use of the collective term "such servers," instead of an individual term, such as "that server" or "him or her," the Legislature intended for sheriffs to make an all-or-nothing policy determination regarding whether they would allow certified process servers to serve in their jurisdictions.

In the instant case, consistent with the italicized statutory language, sheriffs are permitted to determine the appropriateness of certified process servers operating within their respective jurisdictions. Because this all-or-nothing decision involves a policy determination, the statute understandably places no restrictions upon their discretion and no obligation that they promulgate rules or regulations or consider any factors when determining as a matter of policy whether to allow certified process servers to serve process in a particular county. For a variety of legitimate reasons, Appellees independently decided that they will not authorize such activities in their counties. (R-2—Petition, ¶ 36; Exhibits 2 and 3 to the Petition.)

As it relates to the certification process codified in paragraph (a) of the statute, Appellees recognize that an aggrieved applicant could seek mandamus relief as the statute clearly articulates that aspiring process servers have a right to be certified absent "good cause." Moreover, the trial court correctly ruled that mandamus relief would be available if a sheriff refused to decide whether certified process servers would be permitted to operate within the county. (Order, p. 8.) However, the trial court also properly ruled that mandamus relief would not be available to compel a sheriff to make a particular election under the statute. (Id.)

Neither a citizen who desires the sheriff to maintain the status quo nor a certified process server who desires to be permitted to operate in the county would have standing to compel the desired result through mandamus as reflected by the plain language of the statute. Although O.C.G.A. § 9-11-4.1 "confers on" Sheriffs the "general discretionary authority" to permit certified process servers in their respective jurisdictions, it "does not impose on" them the "express official duty" to make a particular policy determination. Bland Farms, 281 Ga. at 193-94. Moreover, this Court does not countenance a mandamus action being used to force government to pursue a particular course of conduct—such as the enactment of a

policy or regulation—or to take action to validate a statute. Wyatt, 282 Ga. at 481; Schrenko, 276 Ga. At 795; Lowe, 267 Ga. at 755.

To the extent that certified process servers want to force sheriffs to allow them to operate, their recourse is to petition the General Assembly. See Ingram v. Payton, 222 Ga. 503, 511 (1966) ("If the independent school system of the City of Decatur wants the State Board of Education to allocate more of the state, moneys for the support of its system, the request should be made to the General Assembly and not to the courts"). Political recourse is the obvious solution as this colloquy between Justice Peterson and opposing counsel during oral argument illustrates the frivolity of a mandamus contest:

> J. Peterson: "What does the contest look like at that point? If the Sheriff says as a matter of policy, I don't like people outside my county coming in to serve process because I think process is best served by a government official, what is there to contest?
>
> Counsel: Uh…the fact that process servers routinely work in the county through judicial appointment, the fact that none of them have ever …
>
> J. Peterson: But the sheriff made a determination that as a matter of policy that he prefers not to allow that. I mean that's a subjective preference on his part. How do you contest that?
>
> Counsel: The legislature has spoken and it has said …

J. Peterson: and said the Sheriffs get to decide."[1]

Pretermitting the question of the viability of mandamus relief, there is no evidence here that any of the Appellees frivolously or illegally exercised their policy judgment. Rather, the evidence in the instant case actually shows that Appellees considered public safety, training, background, lack of accountability and potential litigation in their policy decisions not to allow certified process servers to work in their jurisdictions.

Stated Gwinnett County Sheriff Butch Conway: "[T]he service of civil process... has the potential to devolve into violent encounters. In respondent's judgment, service of civil process should generally be performed by law enforcement persons who have been specially trained to perform that function . . . ." (R-100—Conway Response to Interrogatory No. 7.) Likewise, Paulding County Sheriff Gary Gulledge observed that a variety of criminal complaints may arise

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[1] This is not to suggest that an aspiring process server would not have legal recourse if the sheriff's discretionary policy decision was motived by racial animus or guided by a frivolous process, e.g., a flip of a coin. Appellees recognize that all state action, including the decision contemplated by O.C. G.A. § 9-11-4.1, implicates due process and equal protection considerations, and, as a result, an action could be maintained under the United States and Georgia Constitutions to challenge such a decision. See, e.g., Walker v. Cromartie, 287 Ga. 511, 511 , 696 S.E.2d 654, 656 (2010) (state action triggers substantive due process and equal protection).

when a non-uniformed individual attempts to serve process; therefore, the sheriff believes that it is safer for process to be served by a uniformed deputy, who has engaged in extensive training and knows how to deal with people, protect himself/herself, and protect the public. (R-100—Gulledge Response to Interrogatory No. 8; R-123—Gulledge Deposition, pp. 18-19.) Cobb County Sheriff Neil Warren also expressed concern over the potential for violence where non-uniformed private process servers attempt to serve process: "I've been in this business for, like I say, almost 40 years. It's getting worse out there. When individuals show up at someone's house and that individual is not sure that there's a law enforcement officer dressed in uniform, there's a lot of potential there for a lot of folks to get hurt." (R-125—Warren Deposition, p. 18.) Clayton County Sheriff Victor Hill observed that since some people get so "emotional" when they are served with papers there is a potential for violence, particularly in situations such as evictions. Sheriff Hill testified that deputy sheriffs are sufficiently trained and equipped to deal with those situations. (R-124—Hill Deposition, pp. 10; 12.) Fulton County Sheriff Theodore Jackson testified that some rural sheriffs were having trouble with bounty hunters coming into their counties to serve process, requiring the redeployment of deputies from regular assignments. (R-122—Jackson Deposition, p. 18.) Sheriff

Jackson was also concerned that the background vetting for certified process servers was not adequate, particularly when compared to that required of P.O.S.T. certified deputies: "We check them [deputies] out completely with psychological evaluations and polygraphs, background checks. You don't have the same authority over process servers." (R-122—Jackson Deposition, p. 21.) Sheriff Jackson further stated: "If I'm going to be responsible for them out servicing [sic] process and they shouldn't be out there, I want to be assured that the right people are going out there and that they are fully qualified." (Id., p. 29.)

Additionally, many Appellees were apprehensive of the inadequate accountability and oversight available to ensure appropriate behavior by certified process servers. (R-100—Conway Response to Interrogatory No. 8 (b); R-121—Conway Deposition, pp. 20, 21; R-124—Hill Deposition, pp. 31, 34; R-125—Warren Deposition, pp. 19, 29.) Forsyth County Sheriff Duane Piper testified as to a reason for not allowing private process servers: "Because my deputies work for me and I know what they do and I can control and tell them to work harder or put more people in there if they're not getting enough papers served." (R-126—Piper Deposition, p. 49.) Sheriff Piper also reasoned that he did not see a need for private process servers in Forsyth County given the lack of any issue he was aware of in his

deputies' performance of the duty of civil process services, stating, "I...had never heard of any backlogs or any problems with getting civil papers served...once I took office, I checked and made sure we didn't have any backlogs or anything . . . So I had never seen any need to bring outside people in to do one of our duties." (R-126—Piper Deposition, pp. 17-18.)[2] While O.C.G.A. § 9-11-4.1 authorizes sheriffs to decide for themselves whether certified process servers will be allowed to serve process in their counties, should they do so, the law does not grant sheriffs direct or indirect control over the process servers. Shockingly, a sheriff who permits certified process servers to operate in his or her jurisdiction has no more control over rogue certified servers than the general public possesses as the only recourse afforded to both sheriffs and members of the public is filing a suit in Superior Court. O.C.G.A. § 9-11-4.1(c).

Finally, several sheriffs expressed concern that, if they permitted process servers in their jurisdiction, members of the public could seek to hold them legally responsible for the misbehavior of the process servers they allowed to work within

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[2] During oral argument, Justice Nahmias even remarked that maybe it would be sufficient if the Sheriffs said when challenged that "I've looked at this, and I don't think I need private process servers in my county." As demonstrated by the testimony of record in this matter highlighted herein, the Sheriffs have said this and a whole lot more in explaining their respective non-arbitrary discretionary decisions.

their counties. (R-100—Conway Response to Interrogatory No. 7(c); R-125—Warren Deposition, pp. 19, 29 ("I don't want to be responsible for someone that does not work for me; that I know how they can handle themselves in dealing with a controversy when you're trying to deliver process to get somebody moved out of the house or whatever. It's dangerous. It's very dangerous."); R-122—Jackson Deposition, p. 28-29.) DeKalb County Sheriff Thomas Brown testified: "I didn't want the authority of having to give the oversight of numerous process servers to go out and serve. And if they were to go out and conduct themselves in an unprofessional manner, then I'm the one who has to be held accountable [for] dealing with their actions, if for no other reason, from a perception standpoint of the citizens. I don't need that. I don't need that." (R-120—Brown Deposition, p. 25.)

Given that there is no doubt that Appellees performed the discretionary duty mandated by paragraph (a) of the statute and made the decision as to whether certified process servers are permitted in their respective jurisdictions, the trial court correctly granted summary judgment as to Appellants' claim for mandamus relief.

II. O.C.G.A. § 9-11-4.1 IS NEITHER A UNIQUE NOR EXCEPTIONAL STATUTE WITH RESPECT TO THE AMOUNT OF DISCRETION CONFERRED TO LOCAL GOVERNMENT

The General Assembly routinely delegates to local government the discretion with respect to implementing a framework endorsed by the state. For example, despite the fact that the General Assembly has declared that the creation of a development authority "is in all respects for the benefit of the people of this state" and authorities perform "an essential governmental function," O.C.G.A. § 36-62-3 (2010), the General Assembly nonetheless conferred upon county governing authorities the discretion whether to activate development authorities within their boundaries. O.C.G.A. § 36-62-4(c) (2010). The statute does not articulate any guidelines relating to the determination as to whether a development authority is necessary. See O.C.G.A. § 36-62-4 (2010). Similarly, the General Assembly has conferred upon county governing authorities plenary discretion as to whether hospital authorities should be activated within their boundaries. O.C.G.A. § 31-7-72(a). Another example of the General Assembly conferring discretion upon local governments can be found at O.C.G.A. § 42-8-101(a)(1), which invests in local governing authorities the power to determine whether to authorize private

"probation supervision, counseling, [and] collection service."[3] In a similar vein, here the General Assembly through the enactment of O.C.G.A. § 9-11-4.1 has created a framework for private service of process, but conferred upon sheriffs the discretion as to whether to activate that framework.

As evidenced by the foregoing examples, there is nothing novel about O.C.G.A. § 9-11-4.1 as the General Assembly merely employed the very framework it has repeatedly utilized in the past.[4]

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[3] This court declared that a previous and substantially similar iteration of this statute did not constitute an impermissible delegation of legislative authority to local governments. Ward v. City of Cairo, 276 Ga. 391, 393 (2003).

[4] While Appellants appear to concede in their Supplemental Brief that they do not have a declaratory judgment remedy, their argument that this Court can take judicial notice of the purported fact of service of their Petition on the Attorney General pursuant to O.C.G.A. § 9-4-7(c) should be rejected. The purported proof of service attached to Appellants' Supplemental Brief (a letter sent by Appellants' counsel to the trial court judge only after entry of the Order on summary judgment) was not judicially noticed by the trial court, was never actually filed of record in the trial court, and is not a part of the designated record subject to review by this Court on appeal. Thus, this Court cannot take judicial notice of any purported fact that is not anywhere in the record on appeal. See Rymuza v. Rymuza, 292 Ga. 98, 102, 734 S.E.2d 384, 388 (2012) (a reviewing court is limited to the record before it on appeal, and wife failed to include the necessary materials from first divorce action in the record on appeal); Petkas v. Grizzard, 252 Ga. 104, 108, 312 S.E.2d 107 (1984) ("Because a ruling on the effect of the prior case may be raised on appeal, the record or portion thereof considered by the trial court should be designated to be included in the appeal if a party wishes to enumerate error on the ruling."); Graham v. Ault, 266 Ga. 367, 367, 466 S.E.2d 213, 214 (1996); Wilkes v. Ricks, 126 Ga. App. 266,

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267, 190 S.E.2d 603, 604 (1972) (Court of Appeals could not take judicial cognizance of local court rule nor of publication of notice in official newspaper where the fact of publication was not in the record on appeal); Garrison v. Dept. of Human Resources, 184 Ga.App. 449(1), 361 S.E.2d 860 (1987) (appellate court cannot consider facts which do not appear in the record sent from the trial court); Colevins v. Federated Department Stores, 213 Ga.App. 49, 51, 443 S.E.2d 871 (1994) (attaching documents to briefs cannot be used as a procedural device to add evidence to the record).

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CERTIFICATE OF SERVICE

It is certified that I have this day served a true and correct copy of **APPELLEES' SUPPLEMENTAL BRIEF** upon counsel for the Appellants by causing a copy of same to be deposited in the United States mail with proper postage affixed thereto and addressed as follows:

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