remaining specific and detailed provisions of the Statute, including O.C.G.A. § 9-11-14.1(b-c), and the implementing Rules related to the certification of Certified Servers, meaningless and a mere nullity. That could not have been the intention of the General Assembly in passing the complex and far-reaching Statute and delegating rule making responsibility to the JCG. The trial court's interpretation does not "square with common sense" or harmonize all parts of the Statute. Its finding that O.C.G.A. § 9-11-14.1(a) gives Appellees unfettered power to destroy the certification process must be reversed.

B. If the trial court's interpretation of the law were correct, it should have blue-penciled the statute.

While it is patently clear the General Assembly did not intend to provide the Sheriffs with discretion to effectively repeal the Statute, the trial court should have stricken the contested portion of § 9-11-4.1(a) from the Statute as unconstitutional when it reached the opposite conclusion. If the General Assembly intended to delegate legislative authority to non-legislative branch officers like the Sheriffs to determine where a Certified Server could work under the statewide statutory certification program, such a delegation is unconstitutional unless "the General Assembly has also provided sufficient guidelines for the delegatee" to exercise that authority. *Dept. of Transportation v. City of Atlanta, et al.*, 260 Ga 699, 703

(1990). The Statute here is silent in that regard unless you properly apply the listed qualifications established for certification as set forth in the Stature and Rules, which Appellees admittedly do not do. As such, Appellees are wielding absolute legislative authority and discretion with no guidelines in place whatsoever.

The case of *Mitchell v. Wilkerson*, 258 Ga. 608, 372 S.E.2d 432 (1988), is instructive. In *Mitchell* the Supreme Court held that a public official recall statute amounted to an unconstitutional delegation of legislative power because it provided that persons initiating a recall petition were required to state the basis for the recall. Because the underlying constitutional provision required that the grounds for recall be provided by law, the statute's delegation of power to persons initiating the petition to specify the grounds for recall was constitutionally impermissible: "The statutory attempt to transfer the selection of the reasons to the applicant amounts to an impermissible delegation of legislative authority."

Similarly, in *HCA Health Services of Georgia, Inc. v. Roach*, 265 Ga. 501, 458 S.E.2d 118 (1995), the plaintiff contended that the State agency's construction of its authority under O.C.G.A. § 31-6-47(c) would permit it to do far more than merely administer an existing enactment of the General Assembly. The agency was seeking complete and unbridled authority to determine what health care

facilities were subject to the Act, since it would then have the power to exempt any facility from the mandate of the Act. This construction was rejected since it would make the statutory provision at issue an unconstitutional delegation of the legislative power "to define the thing to which the statute is to be applied...." *Id.*; *See also*, *Sundberg v. State*, 234 Ga. 482, 216 S.E.2d 332(Ga. 1975)("Statute held unconstitutional as an improper delegation of legislative power if it authorizes an executive board or officer to decide what shall and what shall not be an infringement of the law, because any statute which leaves the authority to a ministerial officer to define the thing to which the statute is to be applied is invalid."); *Howell v. State*, 238 Ga. 95, 230 S.E.2d 853 (1976) (legislative enactment making criminal a violation of "any of the rules or regulations promulgated by [an executive branch] commission" was held to be an improper delegation of legislative power).

Here, the trial court read the Statute as delegating to the Sheriffs the absolute power to bar all Certified Servers from working in their respective Counties. (Order, p. 5). This allows for the Sheriffs to conspire and impose a statewide ban on Certified Servers even though the General Assembly saw it proper to create the certification program.

While Appellants contend this interpretation is incorrect, there can be no question that, as interpreted, the provision constitutes an unlawful delegation of legislative authority to the Sheriffs. Neither the Statute nor the Rules provide sufficient guidelines so to limit the exercise of such power in a way that is consistent with constitutional limits on the delegation of legislative authority. As such, the fact the Statute lacks any guidelines over the exercise of authority to allow or disallow Certified Servers necessarily cause it to be unconstitutional. Under the trial court's ruling, Appellees are improperly allowed define the thing to which the Statute is to be applied.

In such circumstances, courts should "blue pencil" the statute. "When a statute cannot be sustained as a whole, the courts will uphold it in part when it is reasonably certain that to do so will correspond with the main purpose which the legislature sought to accomplish by its enactment, if, after the objectionable part is stricken, enough remains to accomplish that purpose." *Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 404 (1996). *See also Fortson v. Weeks*, 232 Ga. 472 (1974). The Supreme Court has repeatedly held this to be the law. *Elliott v. State*, 91 Ga. 694, 17 S.E. 1004 (1893); Hancock v. State, 114 Ga. 439 (1901).

Because the trial court's ruling requires a finding that the Statue improperly delegated legislative powers to the Sheriffs without any guidelines regarding the exercise of that power, the trial court necessarily should have found that the Statute was unconstitutional in this respect and blue-penciled the Statute as requested by Appellants. But it did not do so even though removal of the contested provision of § 9-11-4.1(a) would preserve the legislative intent behind the Statute and allow the statewide certification process to continue to provide litigants with a private alternative method for serving process, and ensure those persons have been vetted and certified via a highly regulated state approved process. The Rules established by the Statute and promulgated by the JCG would continue to govern the certification and re-certification process, and the purpose of the Statute as intended by the General Assembly would be vindicated. Should this Court find that trial court's interpretation of the Statute is correct, it should blue-pencil the Statute to remove the offending provision of § 9-11-4.1(a) that renders the Statute unconstitutional or reverse the Order granting summary judgment and remand the case with instruction to the trial court to do the same.

IV. APPELLANTS' PETITION BELOW PRESENTED THE TRIAL COURT WITH A BASIS FOR A DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

The trial court also improperly found that the Appellants' petition did not set forth a basis for a declaratory judgment. (Order, p. 7). The Trial Court ruled in favor of Appellees on the declaratory judgment premised on a finding that Appellants "here have no uncertainty as to any future action they must take or refrain from taking. If they pursue certification in any of … the counties in which the sheriff has declined to participate in O.C.G.A. 9-11-4.1's certification program …, they will be unsuccessful." (*Id.*). The trial court's reading of the petition and interpretation of the real dilemma facing Appellants landed far afield of the mark.

Here, Appellants sought a declaration that Appellees' claim to possess complete and absolute discretion to prohibit Certified Servers from actually serving process in a particular county rendered the Statute invalid and constitutes a violation of the Constitution of the State of Georgia. (R 15-34; Petition ¶ 61). In other words, Appellants sought a declaratory judgment construing the Statute so to effectuate its clear purpose and intent, i.e, the implementation a statewide certification program, as opposed to the interpretation espoused by Appellees which renders such a program meaningless. (*See* R 696).

Despite the trial court's ruling, this case remains ripe for a declaratory judgment. The uncertainty present in this case involves whether Appellees' shameless efforts to nullify the statewide certification Statute and render the Statute meaningless are in fact valid and constitutional. Appellants do not request an advisory opinion. They were and are uncertain as to whether the Sheriffs may act as they have done and repeatedly preclude them from working in their counties in spite of the Statute that allows them to do so. Appellants are uncertain as to whether the Sheriffs may ban them from a county despite their possession of statewide certification and prevent their actual efforts to serve process in those counties using their certification. This is a proper basis for a declaratory judgment claim and for the requested injunctive relief, and the Court erred in rendering its Order to the contrary

Georgia law is well-settled that the uncertainty about the enforceability of the Statute is an appropriate basis for a declaratory judgment and injunctive relief. An action for declaratory judgment is "an available remedy to test the constitutionality of a statute in a case where an actual controversy exists with respect thereto." *Higdon v. City of Senoia*, 273 Ga. 83, 85, 538 S.E.2d 39, 41 (2000). As was done here, a petition may be filed seeking a judgment declaring a

statute or ordinance unconstitutional and praying for an injunction against the enforcement of the questioned law. *See*, *e.g.*, *James B. Beam Distilling Co. v. State*, 263 Ga. 609, 613, 437 S.E.2d 782, 786 (1993); *Gravely v. Bacon,* 263 Ga. 203, 429 S.E.2d 663 (1993); *State of Georgia v. Private Truck Council, etc.,* 258 Ga. 531, 371 S.E.2d 378 (1988); *City of Atlanta v. Spence,* 242 Ga. 194, 249 S.E.2d 554 (1978); *State of Georgia v. Golia,* 235 Ga. 791, 222 S.E.2d 27 (1976).

Appellants have attempted to serve process using their statewide certification obtained under the Statute and Appellees have precluded them from doing so. They seek a declaration that the enforcement of the law in this manner is invalid and unconstitutional, which provides grounds for declaratory relief. Accordingly, the trial court's ruling that Appellants do not have a proper basis for a declaratory judgment simply because Appellees have expressed their intention to enforce the Statute in a particular way is in error and must be reversed.

V. A CLAIM FOR MANDUMUS IS APPROPRIATE UNDER THE UNDISPUTED MATERIAL FACTS OF THIS MATTER

The trial court erred by finding that Appellants have "an alternative course of action" in the form of seeking appointments directly from the various courts of

the State pursuant to O.C.G.A. § 9-11-4(c)(4) thus precluding their claim for mandamus. It is facially apparent that obtaining individual appointments on an *ad hoc* basis in all courts of Georgia is not an adequate remedy at law for the Appellees' refusal to exercise their statutory duty to allow Certified Servers based on the statewide certification contemplated in the Statute. Even the trial court acknowledged that to obtain the appointments to serve would be "piecemeal and cumbersome," which is an understatement when one considers Georgia's 159 counties and the multiple courts found therein.

A writ of mandamus must issue if (1) no other adequate legal remedy is available to effectuate the relief sought; and (2) the applicant has a clear legal right to such relief. *See also* Richard Ruskell, Davis & Shulman's Ga. Practice & Procedure, § 29:2 (2013–2014 ed.); *McClung v. Richardson,* 232 Ga. 530, 207 S.E.2d 472 (1974). To preclude mandamus, an alternative legal remedy must be "equally convenient, complete and beneficial" to the petitioner. *S. LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 657, 755 S.E.2d 683, 685 (2014) (internal citations omitted). There can be no question that *ad hoc* appointments under O.C.G.A. § 9-11-4(c)(4) are not equally convenient, complete and beneficial as the state-wide process intended by the General Assembly under O.C.G.A. § 9-11-4.1. As such,

to the extent the trial court's ruling on Appellants' mandamus claim is predicated on the existence of an adequate remedy at law, the order must be reversed.

The trial court's remaining basis for dismissing the mandamus claim is premised on the incorrect conclusion that the Statute grants the Sheriffs unlimited discretion to deny Certified Servers the right to serve in their respective counties, and that the Court cannot mandate that Appellees elect to allow Certified Servers in such counties provided they meet the statutory requirements. As stated in Section III, *supra*, this conclusion is not supported by Georgia law. Thus, a writ of mandamus does lie to require the Sheriffs to adhere to their clear statutory duty to review the Notices of Intent and allow qualified Certified Servers to serve process in their counties where the requirements for such service are met.

In addition, the trial court ignored well-established Georgia law that a writ of mandamus is appropriate means to remedy a gross abuse of discretion that denies Appellants due process of law. In *Pryor Organization, Inc. v Stewart*, 274 Ga. 487 (2001), the newly elected Sheriff of Spalding County purported to "exercise his discretion" by prohibiting the plaintiff from continuing to write bonds. Plaintiff sought a writ of mandamus to require the Sheriff allow him to work. The Supreme Court agreed with the plaintiff: "The Sheriff's discretion is

not absolute, but is circumscribed by the statutes from which his authority derives. [cit] O.C.G.A. §17-6-50 establishes the qualifications of "professional bondspersons." *If Pryor met those statewide qualifications, then the refusal to permit it to conduct business at the county level cannot be upheld. The Sheriff's decision, under those circumstances, would be "without legal justification or excuse,….arbitrary, illegal and capricious and an abuse of discretion." Id.* at 488. (Emphasis added).

The situation hypothesized by Justice Carley is precisely what is presented by the Sheriffs' conspiracy to nullify the Statute. When Appellees deny a Certified Server the ability to work in a County, they must base the decision on the applicant's failure to meet the objective criteria set forth in the Statue and implementing Rules which set forth the qualifications required both for certification as a statewide process server and authorization to work in any particular County. Otherwise, Appellees are acting in a vacuum with no guidelines, and they make no effort to contend they are following any guidelines. Even the trial court recognized that Appellees have not been able to articulate any specific basis for their statewide ban. (Order, p. 4-5, n 5-8). Here, Appellants presented ample evidence that the blanket ban proposed by Appellee admittedly is

not justified by any meaningful objective criteria and is a gross abuse of discretion that denies Appellants due process of law.

Certification is the equivalent of qualification. Due process necessitates far more than mere fiat—it requires the Sheriffs employ specific objective criteria based on qualifications to determine whether a Certified Server will be permitted to serve process in their County. That approach insures there is a statewide standard for the exercise of the Sheriffs' discretion that is consistent with the criteria for qualifications created by the Statute and implementing Rules. Blanket rules do not suffice to satisfy due process and a writ of mandamus is an appropriate remedy to remove such gross abuses of discretion. Several appellate decisions based on analogous circumstances cement this well-settled point. *Arras v. Herrin*, 255 Ga. 11 (1985) (ordinance allowing absolute discretion to deny liquor license properly supported the issuance of a writ of mandamus); *Fulton County v. Bartendfeld*, 257 Ga. 766 (1988) (denial of special use permit despite the satisfaction of all objective conditions and prerequisites was an abuse of discretion); *Ga. Dept. Of Trans. v Peach Hill Properties Inc.*, 278 Ga. 198 (2004) (finding that State DOT blanket rule that it would not grant exemptions from the

limitations on buildings near airports under any circumstances was an abuse of discretion and that DOT was required to establish objective guidelines).

Once again the trial court did not address Appellants' arguments that it was an entitled to a writ of mandamus requiring the Sheriffs to abandon their blanket ban on Certified Servers and follow the Statute's objective criteria or develop objective criteria to govern their decisions to allow Certified Servers. For this reason, the Order must be reversed.

VI. THE TRIAL COURT'S DENIAL OF APPELLEES CLAIM FOR ATTORNEYS' FEES MUST BE REVERSED

The trial court's decision to grant Appellees' motion for summary judgment as to Appellants' claim for attorneys' fees is premised entirely on its finding Appellants are not a prevailing party. As established through the foregoing argument, the trial court's determination that Appellees are entitled to summary judgment was made in error. Accordingly, there is no basis for the denial of the claim for fees on the grounds that Appellants have not prevailed and the trial court's order should be reversed.

Attorney's fees may be recovered by plaintiff if defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense; it is only necessary to the plaintiff's recovery that he show

any one of these three conditions exists. O.C.G.A. § 13-6-11. Attorney's fees are also available under O.C.G.A. § 9-15-14 for the Sheriffs' defense of this litigation which, as shown above, lacks substantial justification. Appellees wholesale ban prohibiting Certified Servers from plying their trade for reasons that are utterly devoid of any legitimate underlying rationale or justification, is unreasonable, arbitrary, and in contravention of their statutory duty. As such, Appellants should be entitled to their fees under O.C.G.A. § 13-6-11and O.C.G.A. § 9-15-14.

VII. CONCLUSION

Appellants have shown that the trial court's Order allows the enforcement of the Statute in a manner that causes the Statute as a whole to be meaningless and a nullity, and that further causes the Statute to be unconstitutional. Appellants have also established that there are grounds for their declaratory judgment, injunctive relief, mandamus, and attorneys' fees claims under the facts of this matter. As such, applying a *de novo* standard of review, the Court should recognize the Appellees' conspiratorial actions for what they are and reverse the trial court's Order as requested herein.

Respectfully,

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