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12/13/2021	Appellant Brief	2	Appellant's brief filed by Water, Light, and Sinking Fund Commission of City of Dalton. [21−13663] (ECF: Lindsey Mann)
03/24/2022	Reply Brief Filed	74	Reply Brief filed by Appellant Water, Light, and Sinking Fund Commission of City of Dalton. [21−13663] (ECF: Lindsey Mann)

APPEAL NO. 21-13663-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JARROD JOHNSON,

Appellee / Plaintiff,

v.

THE CITY OF DALTON, GEORGIA, ACTING THROUGH ITS BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS, d/b/a DALTON UTILITIES,

Appellant / Defendant.

Appeal from the United States District Court
for the Northern District of Georgia
No. 4:20-cv-0008-AT

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-4, the undersigned counsel for Appellant The City of Dalton, Georgia, Acting Through Its Board of Water, Light and Sinking Fund Commissioners, d/b/a Dalton Utilities, hereby certifies that the following persons and entities have or may have an interest in the outcome of this appeal:

1. 3M Company (NYSE: MMM)
2. Aladdin Manufacturing Corporation
3. Americhem, Inc.
4. Arrowstar, LLC
5. Chem-Tech Finishers, Inc.
6. The City of Dalton, Georgia, Acting Through Its Board of Water, Light and Sinking Fund Commissioners, d/b/a Dalton Utilities – Defendant-Appellant
7. Color Express, Inc.
8. Columbia Recycling Corp.
9. Cory Watson, P.C. – Counsel for Plaintiff-Appellee
10. Cycle Tex, Inc.
11. Daikin America, Inc.

12. Dalton-Whitfield Solid Waste Authority

13. Davis, Gary A. – Counsel for Plaintiff-Appellee

14. Davis & Whitlock, P.C. – Counsel for Plaintiff-Appellee

15. DyStar, L.P.

16. E.I. du Pont de Nemours and Company

17. Engineered Floors, LLC

18. Fibro Chem, LLC

19. Herring, Nina Towle – Counsel for Plaintiff-Appellee

20. IMACC Corporation

21. INV Performance Surfaces, LLC

22. JB NSD, Inc.

23. Johnson, Jarrod – Plaintiff-Appellee

24. Kelleher, Christopher J. – Counsel for Defendant-Appellant

25. Lutz, III, Hirlye R. "Ryan"– Counsel for Plaintiff-Appellee

26. Mann, Lindsey B. – Counsel for Defendant-Appellant

27. MFG Chemical, LLC

28. Milliken & Company

29. Mohawk Carpet, LLC

30. Mohawk Industries, Inc. (NYSE: MHK)

31. Oriental Weavers USA, Inc.

32. Polyventine LLC

33. Secoa Technology, LLC

34. Shaner, J. Houston – Counsel for Defendant-Appellant

35. Shaw Industries, Inc.

36. Shaw Industries Group, Inc.

37. Smith, Brooks M. – Counsel for Defendant-Appellant

38. Stone, Ryals D. – Counsel for Plaintiff-Appellee

39. Stone, William S. – Counsel for Plaintiff-Appellee

40. Tarkett USA, Inc.

41. The Chemours Company (NYSE: CC)

42. The Dixie Group, Inc. (NASDAQ: DXYN)

43. The Stone Law Group – Trial Lawyers, LLC – Counsel for Plaintiff-Appellee

44. Tapley, F. Jerome – Counsel for Plaintiff-Appellee

45. Thompson, Brett C. – Counsel for Plaintiff-Appellee

46. Totenberg, The Honorable Amy M. – District Judge, United States District Court for the Northern District of Georgia

47. Troutman Pepper Hamilton Sanders LLP – Counsel for Defendant-Appellant

48. Veira, E. Fitzgerald – Counsel for Defendant-Appellant

49. Watson, R. Akira – Counsel for Plaintiff-Appellee

50. Whitlock, James S. – Counsel for Plaintiff-Appellee

The undersigned counsel hereby certifies pursuant to Eleventh Circuit Rule 26.1-3(b) that, other than as reflected above, no other publicly traded company or corporation has an interest in the outcome of this particular appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellant The City of Dalton, Georgia, acting through its Board of Water, Light and Sinking Fund Commissioners, d/b/a Dalton Utilities ("Dalton Utilities") respectfully requests that oral argument be heard in this case. This is an appeal from the Order of the United States District Court for the Northern District of Georgia denying Dalton Utilities' motion to dismiss Plaintiff-Appellee Jarrod Johnson's nuisance abatement claim on sovereign immunity grounds.

To answer the sole dispositive question on appeal—namely, whether Plaintiff-Appellee's nuisance abatement claim usurps Dalton Utilities' sovereign immunity—the Court will necessarily confront several complex issues relating to the evolution of municipal sovereign immunity under Georgia law, including the scope of immunity afforded to municipalities at the time that Georgia adopted English common law as its own in the late Eighteenth Century, the subsequent interpretation and development of that doctrine over nearly two centuries, and the impact of Georgia voters' 1974 ratification of a constitutional amendment expressly reserving sovereign immunity on both pre- and post-ratification case law interpreting the scope of immunity afforded to municipalities. The Court will also be tasked with interpreting and applying a recently illuminated "nuisance doctrine" that the Georgia Supreme Court has acknowledged raises "complicated questions" of significant constitutional import. Moreover, in its Order denying Dalton

Utilities' invocation of sovereign immunity, the District Court announced—and relied upon—a novel interpretation of an intervening Georgia Supreme Court decision and made several *sua sponte* rulings on issues and arguments that were neither raised nor briefed by the parties below. Accordingly, Dalton Utilities respectfully submits that the Court's disposition of this case would be aided by oral presentation to this Court.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court has jurisdiction over Plaintiff-Appellee Jarrod Johnson's Clean Water Act ("CWA") claim against Dalton Utilities under Section 505(a) of the CWA, 33 U.S.C. § 1365(a), and 28 U.S.C. § 1331. The District Court has jurisdiction over the state-law claims brought by Plaintiff-Appellee Jarrod Johnson against Dalton Utilities under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2)(A), because the underlying action is a class action in which any member of a class of plaintiffs is a citizen of a State different from any Defendant, and the amount in controversy exceeds the sum of five million dollars ($5,000,000), exclusive of interest and costs. (Appellant's Appendix ("App'x") I.418 at 6-9.)

This Court has jurisdiction over this appeal based on 28 U.S.C. § 1291 and the United States Supreme Court's collateral order doctrine. Specifically, Dalton Utilities is a municipal corporation that is entitled to sovereign immunity pursuant to Article IX, Section II, Paragraph IX of the Georgia Constitution of 1983, and because sovereign immunity under Georgia law provides "immunity from suit rather than just a defense to liability," an order denying sovereign immunity is immediately appealable under the collateral order doctrine. *Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1367 (11th Cir. 2016); *see also Griesel v. Hamlin*, 963 F.2d 338, 340-41 (11th Cir. 1992).

In this case, Dalton Utilities appeals from the September 20, 2021 Order entered by the District Court denying Dalton Utilities' motion to dismiss Plaintiff-Appellee's nuisance abatement claim on sovereign immunity grounds, which was a final order within the meaning of 28 U.S.C. § 1291 and is immediately appealable under the collateral order doctrine because it conclusively determined an important jurisdictional issue that is both separate from the merits of Plaintiff-Appellee's case and effectively unreviewable on appeal from final judgment. *Parker*, 835 F.3d at 1367-68; *Griesel*, 963 F.2d at 340-41. Dalton Utilities timely filed its notice of appeal on October 19, 2021. (App'x IV.650 at 1-3.)

STATEMENT OF THE ISSUES

This case arises out of the purported contamination of Plaintiff-Appellee's drinking water and a subsequent increase in rates paid to the City of Rome, Georgia to cover the costs of water treatment equipment to address the purported contamination. Plaintiff-Appellee does not seek to recover money damages from Dalton Utilities but instead alleges that Dalton Utilities is liable for maintaining a purported nuisance that allowed certain compounds to be released into groundwater and surface water upstream of the City of Rome. Relying on the longstanding sovereign immunity enjoyed by municipalities under Georgia law, Dalton Utilities sought dismissal of Plaintiff-Appellee's nuisance abatement claim. The District Court denied Dalton Utilities' motion to dismiss, concluding that

Dalton Utilities is not entitled to immunity from suit for a nuisance claim as a matter of law. On appeal, Dalton Utilities raises the following issue:

1. Since 1784, all levels of Georgia's state government have enjoyed broad immunity from facing any suit without granting prior consent, and the Georgia Constitution provides that a municipality's consent to be sued can be obtained in just two ways: (1) through a legislatively-enacted waiver of sovereign immunity; or (2) by the terms of the Georgia Constitution itself. Plaintiff-Appellee's nuisance claim against Dalton Utilities does not implicate any legislative waiver or constitutional exception that would provide the requisite consent to maintain the instant suit against Dalton Utilities. Did the District Court err in concluding that Dalton Utilities was not entitled to sovereign immunity from Plaintiff-Appellee's nuisance abatement claim?

STATEMENT OF THE CASE

I. Course of Proceedings Below.

Plaintiff-Appellee filed the Third Amended Individual and Class Action Complaint ("Third Amended Complaint") on December 14, 2020. (App'x I.418.) On January 28, 2021, Dalton Utilities filed a motion to dismiss Counts One (violation of the Clean Water Act), Six (public nuisance), and Seven (public nuisance abatement) of Plaintiff-Appellee's Third Amended Complaint under

Federal Rule of Civil Procedure 12(b)(6). (App'x II.474 at 1-250; III.474 at 251-56.) Plaintiff-Appellee opposed Dalton Utilities' motion to dismiss (App'x III.511), and Dalton Utilities filed a reply brief in further support of its motion to dismiss (App'x III.533). The District Court held oral argument on Dalton Utilities' motion to dismiss on June 4, 2021. (App'x III.571.) On September 20, 2021, the District Court granted Dalton Utilities' motion to dismiss with respect to Count Six, but denied Dalton Utilities' motion to dismiss Counts One and Seven. (App'x IV.629.) Dalton Utilities timely appealed the District Court's denial of its motion to dismiss Count Seven of the Third Amended Complaint to this Court on October 19, 2021. (App'x IV.650.)[1]

II. Statement of Facts.

A. The Parties' Relationship.

Dalton Utilities is a municipal corporation organized under the laws of the State of Georgia and operating exclusively in Dalton, Georgia. (App'x I.418 at 14.) Dalton Utilities owns and operates the Dalton Utilities Publicly Owned Treatment Works ("POTW"), which is a wastewater treatment system that collects and treats wastewater from household, commercial, and industrial users in and around Dalton, Georgia. (App'x I.418 at 3; II.474 at 2-3.) The system includes

[1] The District Court's denial of Dalton Utilities' motion to dismiss Count One is not immediately appealable; however, Dalton Utilities reserves the right to seek appellate review of that portion of the District Court's Order when it is appealable.

three wastewater treatment plants that pretreat wastewater before it is land-applied to a 9,800-acre land application system ("LAS"). (App'x I.418 at 32-33.)

Plaintiff-Appellee Jarrod Johnson is an individual and a resident of Floyd County, Georgia. (App'x I.418 at 10.) Plaintiff-Appellee brought a putative class action on behalf of himself and all owners and occupiers of property in Rome and Floyd County, Georgia who receive domestic water service through the Rome Water and Sewer Division ("RWSD") or the Floyd County Water Department ("FCWD"). (App'x I.418 at 4, 49.)

B. Manufacture, Use, and Disposal of PFAS in Northwest Georgia.

Plaintiff-Appellee's claims relate to a group of man-made chemicals known as per- and polyfluoroalkyl substances ("PFAS"). (App'x I.418 at 21-32.) PFAS are notable for their chemical stability and ability to repel oil and water, which has resulted in widespread industrial and commercial application of these chemicals to treat carpets, rugs, and other home textiles to confer stain, soil, water, and oil resistance. (App'x I.418 at 22.)

Plaintiff-Appellee contends that various chemical companies manufacture and supply PFAS to carpet manufacturers in and around Dalton, Georgia. (App'x I.418 at 5, 11-21.) The carpet manufacturers, in turn, use PFAS as part of their manufacturing processes, and subsequently discharge PFAS-containing wastewater from their respective manufacturing facilities. (App'x I.418 at 5, 32.) The

industrial manufacturers discharge their PFAS-containing wastewater directly into Dalton Utilities' POTW. (App'x I.418 at 5, 32-34.) Consistent with the requirements of permits issued by the Georgia Environmental Protection Division, Dalton Utilities collects the wastewater, treats it using conventional water treatment processes, and then applies the treated wastewater to the LAS. (App'x I.418 at 32-33.) Plaintiff-Appellee alleges (and Dalton Utilities disputes) that PFAS-containing water is discharged from the LAS to the Conasauga River and then travels downstream to the Oostanaula River, which supplies drinking water to the City of Rome and its water subscribers. (App'x I.418 at 27, 34-35.)

In 2016, the City of Rome implemented an emergency temporary filtration process to address PFAS contamination. (App'x I.418 at 39.) To recoup the costs of this emergency process and the anticipated need for a permanent filtration system, the City of Rome implemented a surcharge on the price of water for all ratepayers and estimates that the rate will increase at least 2.5% each year for the foreseeable future. (App'x I.418 at 39.)

C. Plaintiff-Appellee's Claims Against Dalton Utilities.

In the Third Amended Complaint, Plaintiff-Appellee alleged three claims against Dalton Utilities: (1) violation of Section 301 of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a) (Count One); (2) public nuisance (Count Six); and (3) abatement of public nuisance (Count Seven). (App'x I.418 at 40-44, 60-64.)

Plaintiff-Appellee brought the latter two claims in a representative capacity on behalf of a proposed class consisting of ratepayers within the City of Rome and Floyd County's water systems. (App'x I.418 at 49, 60-64.) Regarding the nuisance claims, Plaintiff-Appellee generally alleged two primary categories of damages arising out of the alleged "expos[ure] to the harmful effects of PFAS": *first*, that he suffered personal injury to his "health and well-being" because he "consumed drinking water provided by RWSD and/or FCWD" and thus is at "increased risk of physical harm"; and *second*, that he must "pay the added costs" of the "increased rates and surcharges" he incurred as an RWSD and/or FCWD ratepayer. (App'x I.418 at 62-64.) Plaintiff-Appellee asserted that these injuries were not unique to him or his private property, but were instead shared by "all consumers of drinking water supplied by the RWSD and/or the FCWD" because the right to "safe drinking water" is "a right common to the general public." (App'x I.418 at 62, 65.) Plaintiff-Appellee also vaguely claimed to have suffered "damage to property" and "interference with property rights," but did not specify a particular property or property right that had been damaged or interfered with. (App'x I.418 at 56, 63.) At oral argument, Plaintiff-Appellee clarified that "what we're alleging here" is "a danger to life or health" rather than "a taking of property." (App'x III.571 at 70).

D. Motion to Dismiss and District Court Opinion.

On January 28, 2021, Dalton Utilities filed a motion to dismiss each of Plaintiff-Appellee's claims. (App'x II.474.) Relevant here, Dalton Utilities argued that Count Seven should be dismissed because, *inter alia*, Dalton Utilities enjoys sovereign immunity under Georgia law. (App'x II.474 at 37-39.) Specifically, Dalton Utilities argued that because "[s]overeign immunity shields municipalities from liability *unless* the court finds that sovereign immunity was specifically waived by the General Assembly or by the terms of the State Constitution itself," Plaintiff-Appellee's failure to identify a specific waiver of Dalton Utilities' sovereign immunity was fatal to his nuisance abatement claim. (App'x III.533 at 12 (emphasis in original).) Dalton Utilities further argued that, although the Just Compensation Provision of the Georgia Constitution excepts municipal sovereign immunity for nuisance claims alleging the taking or damaging of private property without compensation, "nuisance claims seeking other forms of relief—such as monetary damages for personal injury or non-monetary injunctive relief—do not implicate the 'just compensation for takings' concerns underlying the exception . . . and, as such, remain subject to sovereign immunity." (App'x II.474 at 39; III.533 at 12.) Because Plaintiff-Appellee's nuisance abatement claim failed to implicate the narrow constitutional exception for takings-based nuisance claims and Plaintiff-Appellee otherwise failed to carry his burden of showing that any other

specific waiver or exception to sovereign immunity applied, Dalton Utilities moved to dismiss Count Seven in its entirety. (App'x III.533 at 12-14.)

The District Court disagreed, holding that "both longstanding and current Georgia legal authority supports the Court's conclusion that Dalton Utilities is not entitled to sovereign immunity and that Plaintiff may maintain a claim for abatable nuisance against Dalton Utilities under the facts alleged in the Complaint." (App'x IV.629 at 92.)[2] Specifically, the District Court found that Plaintiff-Appellee's Third Amended Complaint:

> [S]ufficiently alleges a nuisance claim against Dalton Utilities under both the more constrained understanding of the nuisance doctrine, allowing only for nuisance claims based on injury to property or the use and enjoyment thereof, and also under the more expansive post-*Town of Fort Oglethorpe* notion, allowing for claims based on personal injury. As detailed thoroughly above in the Economic Loss Rule Section, the Court determines that Plaintiff has adequately alleged injury to property or the use and enjoyment thereof, as well as additional personal injury harm.

(App'x IV.629 at 91.) The District Court thus concluded that "Dalton Utilities is not entitled to sovereign immunity," and denied Dalton Utilities' motion to dismiss. (App'x IV.629 at 92.)

This appeal followed.

[2] The District Court also denied Dalton Utilities' motion to dismiss Count One, and granted Dalton Utilities' motion to dismiss Count Six. (App'x IV.629 at 20-54, 84 n.13.) Neither ruling is before the Court in the instant appeal.

III. Standard of Review.

This Court reviews a district court's denial of sovereign immunity *de novo*. *McCullough v. Finley*, 907 F.3d 1324, 1330 (11th Cir. 2018). A *de novo* review is likewise applied to a district court's denial of a motion to dismiss based on sovereign immunity. *LeFrere v. Quezada*, 582 F.3d 1260, 1263 (11th Cir. 2009). In conducting this review, the Court applies the same standard employed by the district court, and thus "must accept the factual allegations in the complaint as true," and "must view them in the light most favorable to the plaintiff." *McCullough*, 907 F.3d at 1330 (citation omitted). Nevertheless, "[t]he burden of demonstrating a waiver of sovereign immunity falls on the party seeking to benefit from it." *Carter v. Butts Cty., Ga.*, 821 F.3d 1310, 1324 (11th Cir. 2016).

SUMMARY OF THE ARGUMENT

This appeal arises from the District Court's erroneous denial of Dalton Utilities' motion to dismiss Plaintiff-Appellee's nuisance abatement claim on sovereign immunity grounds. Since 1784, when the State of Georgia adopted the common law of England as its own, all levels of state government—including municipalities—have enjoyed broad immunity from suit such that the sovereign cannot, without its own express permission, be subject to a suit of any kind. In 1974, Georgia voters gave constitutional status to the common-law doctrine of

sovereign immunity, thereby enshrining the doctrine as it existed at English common law and shielding it from judicial abrogation.

In order to maintain a nuisance abatement claim against Dalton Utilities, Plaintiff-Appellee was required to show that Dalton Utilities waived its sovereign immunity, which could be done in only two ways: (1) through a duly-enacted law; or (2) by the terms of the Georgia Constitution itself. Plaintiff-Appellee failed to carry his burden of showing that either waiver applied.

First, Plaintiff-Appellee failed to allege, let alone show, that any legislatively-enacted waiver of Dalton Utilities' sovereign immunity was applicable.

Second, Plaintiff-Appellee failed to show that the Georgia Constitution permitted him to maintain a nuisance claim against Dalton Utilities. Although the Just Compensation Provision waives sovereign immunity where a plaintiff brings a nuisance claim arising out of the taking or damaging of private property without adequate compensation, the so-called "nuisance exception" is not implicated where, like here, the plaintiff only alleges a nuisance to life and health.

Spurning this well-established, bright-line limitation on the waiver of municipal sovereign immunity, the District Court adopted Plaintiff-Appellee's position that cities *never* enjoy immunity from suit for a nuisance claim. Neither Plaintiff-Appellee nor the District Court was able to point to a specific provision of

the Georgia Constitution or statutory law supporting this argument; instead, it was based on an erroneous belief that a wrongly decided Georgia Supreme Court case—*Town of Fort Oglethorpe v. Phillips*—that radically departed from the bright-line limitation on waivers of sovereign immunity by permitting a plaintiff to maintain a non-takings-based nuisance claim against a city remained binding authority following the 1974 constitutional reservation of sovereign immunity, despite both legislative history and subsequent Supreme Court decisions to the contrary. It did not. Therefore, Plaintiff-Appellee's nuisance claim was barred by Dalton Utilities' sovereign immunity.

But even if *Town of Fort Oglethorpe* permitted Plaintiff-Appellee to pursue a non-takings-based nuisance claim against Dalton Utilities, the District Court erred in applying the expansive framework announced in that case to Plaintiff-Appellee's Third Amended Complaint. Plaintiff-Appellee failed to allege that Dalton Utilities undertook any affirmative acts that *created* the nuisance; Plaintiff-Appellee likewise failed to assert that Dalton Utilities was under a specific "duty to act." Accordingly, even under *Town of Fort Oglethorpe*'s expansive nuisance framework, Plaintiff-Appellee's allegations fail to state a viable nuisance claim.

For each of these reasons, the Court should reverse the District Court's denial of Dalton Utilities' motion to dismiss and remand for further proceedings.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Consistent with the Georgia Constitution, Which Reserved the Broad Scope of Sovereign Immunity Existing at Common Law, Dalton Utilities Is Entitled to Sovereign Immunity.

A. Sovereign Immunity for Both the State and Municipalities Originated at Common Law.

Both the existence and scope of Dalton Utilities' broad immunity from suit are derived from English common law. Originally, the doctrine of sovereign immunity "'was imbedded in the common law of England' and adopted by Georgia as its own after the War for American Independence." *Bd. of Commissioners of Lowndes Cty. v. Mayor & Council of City of Valdosta*, 309 Ga. 899, 901, 848 S.E.2d 857, 859 (2020) (quoting *Lathrop v. Deal*, 301 Ga. 408, 411, 801 S.E.2d 867 (2017)). At common law, this doctrine "was understood . . . as a principle derived from the very nature of sovereignty," and thus existed to provide broad protection to the government from any suit such that "[t]he State could not, without its own express consent, be subjected to an action of any kind." *Lathrop*, 301 Ga. at 413, 801 S.E.2d at 871 (citation omitted); *see also Peeples v. Byrd*, 98 Ga. 688, 693-94, 25 S.E. 677, 679 (1896) ("It is hardly necessary to cite authority for the proposition that a sovereign State is not liable to suit at the instance of a citizen, unless permission to sue has been expressly granted."). Since at least 1784, therefore, sovereign immunity has served to "protect[ ] governments at all

levels from unconsented-to legal actions." *Gilbert v. Richardson*, 264 Ga. 744, 745, 452 S.E.2d 476, 478 (1994).

The immunity afforded to the State at common law has long been extended to municipalities, which are "afforded immunity from civil liability akin to the immunity afforded to the State." *Gatto v. City of Statesboro*, --- Ga. ---, 860 S.E.2d 713, 716 (2021). Indeed, as early as 1880, the Georgia Supreme Court recognized that municipalities enjoy "the same immunity" as the State when carrying out governmental functions because such acts "are deemed to be but the exercise of a part of the state's power." *Rivers v. City Council of Augusta*, 65 Ga. 376, 378 (1880); *see also City of Savannah v. Jordan*, 142 Ga. 409, 410-11, 83 S.E. 109, 110 (1914) ("It seems to be well settled that where the municipality undertakes to perform for the state duties which the state itself might perform, but which have been delegated to the municipality . . . and in the exercise of such function under the department a private citizen is injured by the negligence of the servants of the department while engaged in such work, no cause of action arises against such municipality."); *Gravitt v. Olens*, 333 Ga. App. 484, 488, 774 S.E.2d 263, 268 (2015) ("Sovereign immunity as applied to a municipality . . . is not direct or inherent in the municipality, but derives from the State's delegated sovereignty.").

As such, the immunity afforded to municipalities at common law was the same as the immunity afforded to the State, and any protections afforded to the State were also enjoyed by municipalities. *Gatto*, 860 S.E.2d at 716.

B. Sovereign Immunity for Both the State and Municipalities Was Given Constitutional Status in 1974 and Can Only Be Waived by the Constitution Itself or the Legislature.

In 1974, Georgia voters ratified an amendment to the Georgia Constitution of 1945, which first gave sovereign immunity constitutional status and provided that "sovereign immunity was expressly reserved and could only be waived by our Constitution or legislature." *Georgia Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 597, 755 S.E.2d 184, 188 (2014); *see also Lathrop*, 301 Ga. at 419-21, 801 S.E.2d at 875-77. This constitutionalization of sovereign immunity had the effect of "reserv[ing] constitutionally the common-law doctrine of sovereign immunity *as traditionally understood by Georgia courts*." *Dep't of Transp. v. Mixon*, --- Ga. ---, 864 S.E.2d 67, 70 (2021) (emphasis added). Importantly, the 1974 constitutional amendment affirmed that the State (and municipalities) enjoy broad immunity from suit "except to the extent of any waiver of immunity provided in this Constitution and such waiver or qualification of immunity as is now or may hereafter be provided by act of the General Assembly." *Sheley v. Bd. of Pub. Ed. for City of Savannah*, 233 Ga. 487, 487-88, 212 S.E.2d 627, 628 (1975) (quoting Ga. L. 1973, pp. 1489-90). As a result, to the extent that

the judiciary previously could abrogate sovereign immunity because it was a matter of common law, the 1974 constitutional amendment restored sovereign immunity to its bright-line foundation, and "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." *Sustainable Coast*, 294 Ga. at 597, 755 S.E.2d at 189.

Sovereign immunity retained its constitutional status in the Georgia Constitution of 1983, which the Georgia Supreme Court recognized as a mere "continuation" of "the constitutional reservation of the sovereign immunity that had been recognized by the Georgia courts since the Founding." *Lathrop*, 301 Ga. at 421, 801 S.E.2d at 877. This status was again reaffirmed when the Georgia Constitution was amended in 1991, which "carried forward the constitutional reservation of sovereign immunity at common law as it was understood in Georgia" and "quite clearly reserved the power to abrogate, limit, or waive the doctrine of sovereign immunity to the People themselves and their elected representatives in the General Assembly." *Id*. at 422, 424, 801 S.E.2d at 878-79. Thus, absent an applicable legislative waiver or constitutional exception, the sovereign immunity enjoyed by the State and municipalities today is the same as the sovereign immunity that was carried over from England in 1784 and constitutionally reserved by Georgia voters in 1974. *See Elliott v. State*, 305 Ga.

179, 183, 824 S.E.2d 265, 269 (2019) ("[A] constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary.").

Accordingly, "[t]hough originating in the common law, the doctrine of municipal immunity now enjoys constitutional status," *Gatto*, 860 S.E.2d at 716, and is now enshrined in Article IX, Section II, Paragraph IX of the Georgia Constitution, *see* Ga. Const. of 1983, Art. IX, § II, ¶ IX (recognizing "the immunity of counties, municipalities, and school districts").[3] Therefore, subject to

[3] Two distinct provisions of the Georgia Constitution provide the basis for sovereign immunity: Article I, Section II, Paragraph IX, which confers sovereign immunity upon "the state and all of its departments and agencies," and Article IX, Section II, Paragraph IX, which confers sovereign immunity on "counties, municipalities, and school districts." *See* Ga. Const. of 1983, Art. I, § II, ¶ IX; Art. IX, § II, ¶ IX. Although applicable precedent "used to hold that municipal immunity was additionally grounded in Article I, Section II, Paragraph IX of our Constitution," the Supreme Court has since made clear that it "does not apply to municipalities," and that municipal immunity is instead grounded solely in Article IX, Section II, Paragraph IX of the Georgia Constitution. *Gatto*, 860 S.E.2d at 716 n.3; *see also City of Atlanta v. Mitcham*, 296 Ga. 576, 577, 769 S.E.2d 320, 322-23 (2015). However, the Supreme Court recently clarified that case law construing the State's sovereign immunity under Article I, Section II, Paragraph IX is interchangeable with case law construing municipal sovereign immunity under Article IX, Section II, Paragraph IX in the specific context of municipal nuisance liability. *Mixon*, 864 S.E.2d at 70 n.2; *see also City of Greensboro v. Rowland*, 334 Ga. App. 148, 150, 778 S.E.2d 409, 412 (2015) ("Although the sovereign immunity discussion in *Sustainable Coast* was with respect to the waiver of sovereign immunity for the State under Article I, Section II, Paragraph IX (e) of the Georgia Constitution, we see no reason why the rationale of *Sustainable Coast* does not equally apply to waivers of sovereign immunity under Article IX, Section

any applicable constitutional exceptions to or statutory waivers of Dalton Utilities' sovereign immunity, *see infra* § II, Dalton Utilities enjoys immunity from Plaintiff-Appellee's nuisance abatement claim as a matter of settled constitutional law. *City of College Park v. Clayton Cty.*, 306 Ga. 301, 310, 830 S.E.2d 179, 186 (2019), *cert. denied* (May 18, 2020) ("[T]he nature of sovereign immunity appears to be clear—the sovereign cannot be called into the courts of its own making by private persons without the permission of the sovereign.").

II. Plaintiff-Appellee's Nuisance Claim Does Not Fall Within Any Statutory Waiver or Constitutional Exception to Dalton Utilities' Sovereign Immunity.

The doctrine of sovereign immunity "forbids our courts to entertain a lawsuit against the State without its consent." *Lathrop*, 301 Ga. at 408, 801 S.E.2d at 869. Under the Georgia Constitution, the sovereign's consent to be sued can be obtained in only two ways: (1) by a legislatively-enacted waiver of sovereign immunity; or (2) by the terms of the Georgia Constitution itself. *Id.* at 424-25, 801 S.E.2d at 879 (observing that any "exception" to sovereign immunity "must be found in the constitution itself, or in the statutory law.") (internal citation omitted). This bright-line rule applies with equal force for municipalities. *City of Albany v. Stanford*, 347 Ga. App. 95, 97, 815 S.E.2d 322, 325 (2018) (physical precedent only) ("[T]he Georgia Constitution confers sovereign immunity on municipalities, and any

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II, Paragraph IX, particularly where *Sustainable Coast* relied upon and clarified its decision in *Shank*, which dealt with sovereign immunity for municipalities.").

exception or waiver must be found in that same document or in a law passed by the General Assembly."); *City of Hapeville v. Sylvan Airport Parking, LLC*, 359 Ga. App. 448, 450, 858 S.E.2d 538, 541 (2021) (observing that "[t]he constitutional doctrine of sovereign immunity bars any suit against the State," which "includes suits against municipalities," and thus "[t]o avoid dismissal of its claims against the city . . . [a plaintiff] must point to a waiver in either our state Constitution or statutory law."). The party seeking to benefit from a waiver of or exception to municipal sovereign immunity bears the burden of proving that any such waiver or exception is applicable. *Georgia Dep't of Lab. v. RTT Assocs., Inc.*, 299 Ga. 78, 81, 786 S.E.2d 840, 843 (2016) ("The burden of demonstrating a waiver of sovereign immunity rests upon the party asserting it."). In the case below, Plaintiff-Appellee failed to carry his burden of proving that Dalton Utilities' sovereign immunity was waived by law or excepted by the Georgia Constitution, and the District Court thus erred in rejecting Dalton Utilities' sovereign immunity defense.

A. There Are No Applicable Statutory Waivers of Dalton Utilities' Sovereign Immunity.

The Georgia Constitution provides that "[t]he General Assembly may waive the immunity of counties, municipalities, and school districts by law." Ga. Const. of 1983, Art. IX, § II, ¶ IX. As this constitutional provision makes clear, "only the General Assembly has the authority to enact a law that specifically provides for

such a waiver" of municipal sovereign immunity, and any waiver "is solely a matter of legislative grace." *Godfrey v. Georgia Interlocal Risk Mgmt. Agency*, 290 Ga. 211, 214, 719 S.E.2d 412, 414 (2011) (citation omitted). For the avoidance of doubt, the Georgia Legislature has also spoken to this issue, stating explicitly that "except as provided in" Georgia law, "it is the public policy of the State of Georgia that *there is no waiver of the sovereign immunity of municipal corporations of the state* and such municipal corporations shall be immune from liability for damages." O.C.G.A. § 36-33-1(a) (emphasis added). Simply put, "[t]here is no authority for a waiver of sovereign immunity beyond the legislative scheme." *Godfrey*, 290 Ga. at 214, 719 S.E.2d at 414; *Sustainable Coast*, 294 Ga. at 599, 755 S.E.2d at 189 ("The plain and unambiguous text of the 1991 constitutional amendment shows that only the General Assembly has the authority to waive the State's sovereign immunity."); *Sharma v. City of Alpharetta*, --- S.E.2d ---, 2021 WL 5001916, at *3 (Ga. Ct. App. Oct. 28, 2021) ("[O]ur Constitution recognizes municipal immunity, but it explicitly requires an act of the General Assembly—a statute—to define any waivers of that immunity."). As such, "where the plain language of a statute does not provide for a specific waiver of sovereign immunity and the extent of the waiver, the courts do not have the power to imply a waiver." *Georgia Lottery Corp. v. Patel*, 353 Ga. App. 320, 322, 836 S.E.2d 634, 636 (2019).

Consistent with this grant of authority, the Georgia General Assembly has enacted several narrow waivers of municipal sovereign immunity, none of which apply in this case. For example, Georgia law expressly provides that a municipality may waive its sovereign immunity by purchasing liability insurance, but any such waiver is limited to the coverage provided by the relevant insurance policies. O.C.G.A. § 36-33-1(a).[4] In his Third Amended Complaint, Plaintiff-Appellee failed to allege the existence of any such insurance coverage, and this limited waiver is thus inapplicable. Similarly, Georgia law provides that municipalities "shall not be liable for failure to perform or for errors in performing their legislative or judicial powers," but nevertheless provides a limited waiver of municipal sovereign immunity for "neglect to perform or improper or unskillful performance of [a municipality's] ministerial duties." O.C.G.A. § 36-33-1(b). Plaintiff-Appellee failed to allege that Dalton Utilities was engaged in a ministerial duty when conducting the acts or omissions underlying Plaintiff-Appellee's nuisance abatement claim, and thus has likewise failed to show that this waiver is applicable.[5] Accordingly, although the legislature can waive municipal sovereign

[4] The legislature has enacted a similar waiver of municipal sovereign immunity for claims arising out of the negligent use of a governmental motor vehicle, but only to the extent that the negligent act is covered by liability insurance. *See* O.C.G.A. §§ 33-24-51, 36-92-2. This narrow waiver is likewise inapplicable here.

[5] Even if Plaintiff-Appellee had so alleged, Dalton Utilities would nevertheless be entitled to sovereign immunity because the active operation of a public utility is a

immunity by law, neither of the narrow legislatively-enacted waivers of municipal sovereign immunity under O.C.G.A. § 36-33-1 applies to Plaintiff-Appellee's nuisance abatement claim under the facts of this case.[6] *See Young v. Johnson*, 359 Ga. App. 769, 771, 860 S.E.2d 82, 84 (2021) (affirming dismissal of suit against municipality on sovereign immunity grounds because plaintiff failed to "explicitly plead" a specific waiver of municipal sovereign in her complaint, noting that "sovereign immunity is not an affirmative defense, and the City did not have a duty to negate the *possibility* that the defense of sovereign immunity had been waived.") (citation omitted) (emphasis in original). Because "[t]here is no authority for a waiver of sovereign immunity beyond the legislative scheme," *Godfrey*, 290 Ga. at

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governmental, not ministerial, function. *See, e.g.*, *Ingram v. City of Acworth*, 90 Ga. App. 719, 722, 84 S.E.2d 99, 102 (1954) (holding that municipality's collection and disposal of wastewater was a governmental function); *Banks v. City of Albany*, 83 Ga. App. 640, 643, 64 S.E.2d 93, 95 (1951) (municipality's maintenance of a fire department was a governmental function); *City of Atlanta v. Chambers*, 205 Ga. App. 834, 835, 424 S.E.2d 19, 21 (1992) (municipality's garbage collection service was a governmental function).

[6] Plaintiff-Appellee has never alleged or argued that these statutory exceptions applied. Instead, Plaintiff-Appellee made only a passing reference to them in his opposition brief, arguing for the first time that "dismissal would still be inappropriate at this stage, as Plaintiff has had no chance to conduct discovery as to whether, *inter alia*, Dalton Utilities has purchased liability insurance that would waive any such immunity pursuant to O.C.G.A. § 33-36-1(a), or if O.C.G.A. § 33-36-1(b) is applicable." (App'x III.511 at 38.) Because "any unilateral attempt" to "constructively amend" a pleading through a response brief is "ineffective," *Bd. of Comm'rs of Glynn Cty. v. Johnson*, 311 Ga. App. 867, 873, 717 S.E.2d 272, 277 (2011), Plaintiff-Appellee cannot salvage his deficient pleading by raising these arguments for the first time in response to a motion to dismiss.

214, 719 S.E.2d at 414, there is no statutory authority that supports the District Court's errant legal conclusion that Dalton Utilities' sovereign immunity was waived for Plaintiff-Appellee's nuisance abatement claim.

B. Plaintiff-Appellee's Reliance on a Categorical "Nuisance Exception" to Municipal Sovereign Immunity Is Misguided.

Failing to find legislative support for any alleged waiver of Dalton Utilities' sovereign immunity, Plaintiff-Appellee instead argued that his nuisance claim was not barred by Dalton Utilities' sovereign immunity because "municipalities may be liable for the creation or maintenance of a nuisance," and "municipal liability and responsibility for nuisance . . . is a historic principle of Georgia law." (App'x III.511 at 37; III.571 at 68.) Plaintiff-Appellee's reliance on this so-called "nuisance exception" to Dalton Utilities' sovereign immunity is misguided because neither Georgia statutory law nor the Georgia Constitution recognizes a categorical exception to municipal sovereign immunity for nuisance-based claims. *Cf. Lathrop*, 301 Ga. at 424-25, 801 S.E.2d at 879 (observing that any "exception" to sovereign immunity "must be found in the constitution itself, or in the statutory law."); *Stanford*, 347 Ga. App. at 97, 815 S.E.2d at 325 ("[T]he Georgia Constitution confers sovereign immunity on municipalities, and any exception or waiver must be found in that same document or in a law passed by the General Assembly."). Because Georgia law does not recognize a categorical "nuisance

exception" to municipal sovereign immunity, the District Court erred in denying Dalton Utilities' motion to dismiss.

1. In *Sustainable Coast*, the Supreme Court Clarified that the "Nuisance Exception" Is Inextricably Tied to the Georgia Constitution's Just Compensation Provision.

Plaintiff-Appellee's argument for defeating Dalton Utilities' sovereign immunity in the District Court rested exclusively on a so-called "nuisance exception" to municipal sovereign immunity. First articulated by the Georgia Supreme Court in its 1993 decision in *City of Thomasville v. Shank*, 263 Ga. 624, 437 S.E.2d 306 (1993), the nuisance exception was represented to be a mere continuation of the common-law notion that "[a] municipality like any other individual or private corporation may be liable for damages it causes to a third party from the operation or maintenance of a nuisance, irrespective of whether it is exercising a governmental or ministerial function." *Id*. at 624, 437 S.E.2d at 307 (quoting *Town of Fort Oglethorpe v. Phillips*, 224 Ga. 834, 837-38, 165 S.E.2d 141, 144 (1968)). Nevertheless, the *Shank* Court classified this as an "exception" to municipal sovereign immunity, and specifically observed that its holding was "based on the principle that a municipal corporation cannot, under the guise of performing a governmental function, create a nuisance dangerous to life and health or take or damage private property for public purpose, *without just and adequate compensation being first paid*." *Id*. at 624-25, 437 S.E.2d at 307 (citation omitted)

(emphasis added). In so holding, the *Shank* Court sidestepped the notion that, in accordance with the plain terms of the Georgia Constitution, only the legislature had the authority to enact a waiver of sovereign immunity because "in the case of nuisance we are dealing not with a waiver of but an exception to sovereign immunity." *Id*. at 625, 437 S.E.2d at 308.

In 2014, the Supreme Court revisited *Shank* and, in doing so, significantly limited the application of the "nuisance exception" to municipal sovereign immunity. In *Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc.*, 294 Ga. 593, 755 S.E.2d 184 (2014), the Supreme Court clarified that, although it was "denominated as an 'exception' in *Shank*, the rationale behind [the nuisance exception] is rooted in the concept that the government may not take or damage private property for public purposes without just and adequate compensation." *Id*. at 600, 755 S.E.2d at 190 (citing Ga. Const. of 1983, Art. I, § III, ¶ I (the "Just Compensation Provision")). The Court thus held that the so-called "nuisance exception" articulated in *Shank* "was not an exception at all, but instead, a proper recognition that *the Constitution itself requires just compensation for takings* and cannot, therefore, be understood to afford immunity *in such cases*." *Id*. (emphasis added). In other words, because the Georgia Constitution prohibits the government from taking or damaging private property without providing just compensation, it similarly prevents the government

from invoking sovereign immunity when the Just Compensation Provision is implicated by a citizen's nuisance claim.[7] *Id.*; *see also Mixon*, 864 S.E.2d at 71 (citing *Sustainable Coast* for the proposition that "the Just Compensation Provision waives sovereign immunity as to claims for money damages flowing from a nuisance.").

Accordingly, *Sustainable Coast* reaffirmed the longstanding principle that any exceptions to municipal sovereign immunity must come from the constitution itself or an act of the Georgia legislature, rather than through judge-made waivers of sovereign immunity, because courts "may not read an exception into the text or interpret the text to provide for an exception where none is present" and "if [courts] were to create exceptions to sovereign immunity, the exceptions could swallow the rule permitting only the General Assembly to do so." 294 Ga. at 600, 755 S.E.2d at 190 (emphasis added); *see also Lathrop*, 301 Ga. at 424, 801 S.E.2d at 879 ("In *Sustainable Coast*, we reaffirmed that the doctrine of sovereign

[7] The Supreme Court in *Sustainable Coast* did not expressly overrule *Shank* because although *Shank* wrongly announced an across-the-board "exception" to sovereign immunity that had no foundation in law or the Georgia Constitution, the Court nevertheless reached the correct outcome. In *Shank*, the plaintiff brought a nuisance claim against the city seeking damages for the flooding of her private property with raw sewage that was allegedly caused by the city's wrongful acts. 263 Ga. at 624. As such, the plaintiff alleged that the city damaged her private property without providing due compensation, and thereby squarely implicated the Just Compensation Provision. Accordingly, the holding in *Shank* fits squarely within *Sustainable Coast*'s narrower application of the municipal nuisance doctrine that requires a taking or damaging of private property to sustain a nuisance claim against a municipality.

immunity bars suits against the State, . . . except to the extent that sovereign immunity is waived by the Constitution itself or the statutory law."); *Bd. of Commissioners of Lowndes Cty.*, 309 Ga. at 903, 848 S.E.2d at 860 (recognizing that the Supreme Court "corrected course" in *Sustainable Coast* by "reaffirming that the clear language of our Constitution authorizes only the General Assembly to waive sovereign immunity, without exception.") (citation omitted).

2. The "Nuisance Exception" Is Inapplicable Because Plaintiff-Appellee's Nuisance Claim Does Not Implicate the Just Compensation Provision.

Plaintiff-Appellee's nuisance claim against Dalton Utilities does not fall within *Sustainable Coast*'s narrow exception to sovereign immunity for takings-based nuisance claims because his claim does not implicate the Just Compensation Provision, which is expressly limited to the taking and damaging of *private property*. *See* Ga. Const. of 1983, Art. I, § III, ¶ I ("[P]rivate property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."); *Mixon*, 864 S.E.2d at 69 ("[T]he Just Compensation Provision waives sovereign immunity for damages claims premised on a taking or damaging of private property."). Indeed, Plaintiff-Appellee conceded at oral argument that "what we're alleging here" is "a danger to life or health" and *not* "a taking of property." (App'x III.571 at 70.) Because *Sustainable Coast* inextricably tied the "nuisance exception" to the Just Compensation Provision, the District Court erred

in permitting Plaintiff-Appellee to sustain a nuisance claim that expressly did *not* allege "a taking of property." (App'x III.571 at 70.)

Plaintiff-Appellee never argued below that his nuisance abatement claim implicated the Just Compensation Provision—and, as noted above, expressly took the opposite position at oral argument (App'x III.571 at 70); yet, the District Court ruled, *sua sponte*, that Plaintiff-Appellee "sufficiently allege[d] a nuisance claim against Dalton Utilities" under the Just Compensation Provision "based on injury to property or the use and enjoyment thereof." (App'x IV.629 at 91.) In support of its conclusion, the District Court cross-referenced the unrelated "Economic Loss Rule Section" of its Order, in which the Court held that Plaintiff-Appellee "has a property right in the household water he has paid for, even when it comes out of the faucet in his kitchen," and thus concluded that Plaintiff-Appellee "has adequately alleged damage to his own property—his household water—and the use and enjoyment thereof." (App'x IV.629 at 73, 75, 91.) This Court owes no deference to the District Court's unprompted alternative holding. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable."). Even so, in addition to contradicting Plaintiff-Appellee's own concession at oral argument, this holding was wrong for several reasons.

First, the District Court's ruling is inconsistent with the nuisance-based allegations in the Third Amended Complaint, which plainly did not implicate the Just Compensation Provision. Specifically, Plaintiff-Appellee's nuisance abatement claim was based on two alleged harms related to "the health and well-being of the Plaintiff, and Proposed Class Members, and everyone who consumes PFAS contaminated drinking water," which included: (1) the "increased risk of physical harm" as a result of consuming PFAS-containing drinking water; and (2) having to "pay the added costs of attempting to remove the PFAS contamination by way of increased rates and surcharges they incur as ratepayers." (App'x I.418 at 62-64.) Neither alleged harm—the increased risk of physical harm from alleged PFAS exposure or the increased rates paid by all water customers—implicated the taking or damaging of Plaintiff-Appellee's *private property*, and thus Plaintiff-Appellee's allegations failed to trigger application of the narrow exception to municipal sovereign immunity for takings-based nuisance claims. *See Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 732 (11th Cir. 1993) (holding that plaintiff could not recover from government for personal injuries under a nuisance theory because the nuisance exception is "not applicable to actions for personal injury damages and that the principle, based upon the eminent domain powers of the sovereign, does not contemplate the 'taking' of a human being.") (citation omitted); *City of Atlanta v. Benator*, 310 Ga. App. 597, 606, 714 S.E.2d 109, 117 (2011) (claim for

refund of excess fees paid to city for water service did not constitute a claim for "damages due to injury to their persons or to their real or personal property.").

Although Plaintiff-Appellee vaguely alleged that Dalton Utilities "interfere[d] with the property rights of Plaintiff and Proposed Class Members," (App'x I.418 at 62-63), he failed to specify any specific *private* "property rights" that were allegedly interfered with other than those rights shared by the class members as a whole. Indeed, other than ambiguous and conclusory allegations of "property damage" sprinkled throughout the Third Amended Complaint, Plaintiff failed to offer any specific factual allegations regarding actual damage to his private property, and later conceded at oral argument that "what we're alleging here" is "a danger to life or health," rather than "a taking of property." (App'x III.571 at 70.) Such vague assertions—later contradicted by Plaintiff-Appellee's own concession—are insufficient to carry Plaintiff-Appellee's burden of proving a waiver of Dalton Utilities' sovereign immunity. *See Graveling v. Castle Mortg. Co.*, 631 F. App'x 690, 694 (11th Cir. 2015) (stating that "naked assertion[s]" are "insufficient without further factual enhancement to survive a motion to dismiss.").

Second, despite the District Court's contrary determination—which was based on the District Court's novel-but-unsupported analogy between permanent groundwater on or beneath real property (which is provided a limited statutory

possessory right under Georgia law)[8] and utility-provided drinking water (which is not) (App'x IV.629 at 73-74)—undersigned counsel for Dalton Utilities has located no binding authority supporting the District Court's conclusion that the public drinking water supply is "private property" that is capable of being taken or damaged within the meaning of the Just Compensation Provision. Other state courts that have considered this novel argument have largely rejected the suggestion that alleged pollution of the state's water sources can simultaneously constitute an unconstitutional taking of *private* property. *See, e.g.*, *In re Town of Nottingham*, 153 N.H. 539, 549, 904 A.2d 582, 592-93 (2006) (holding there is no protected property interest in drinking water sufficient to permit a landowner to maintain a takings-based claim arising out of groundwater pollution or diminution); *Bd. of Water Works Trustees of City of Des Moines v. SAC Cty. Bd. of Supervisors*, 890 N.W.2d 50, 72 (Iowa 2017) (holding that "no compensable takings claim is alleged under the Iowa Constitution" because there is no support for "the proposition that the presence of nitrates in raw river water above the level allowed for drinking water in homes results in a compensable taking of a riparian landowner's property right."); *Smith v. Summit County*, 131 Ohio App. 3d 35, 43, 721 N.E.2d 482, 488 (1998) ("The loss of the use of ground water is not a loss of

[8] *See, e.g.*, O.C.G.A. § 44-8-3 ("The owner of a nonnavigable stream is entitled to the same exclusive possession of the stream as he has of any other part of his land."); O.C.G.A. § 44-1-2 ("The property right of the owner of real estate extends downward indefinitely and upward indefinitely.").

the use or enjoyment of the overlying land. In this case, plaintiffs' complaint, alleging only a deprivation of the flow of groundwater, did not state a claim for compensation.").

Third, Plaintiff-Appellee has not stated a claim for the taking or damaging of "private property" as required to implicate the Just Compensation Provision because his public nuisance claim is based on harm that is common to and shared by the public as a whole. Indeed, Plaintiff-Appellee acknowledges that the right to "safe drinking water" is "a right common to the general public." (App'x I.418 at 62.) Georgia courts considering takings-based claims have long drawn a distinction between "damages which are common to the public in general (non-compensable) and those which affect the special property rights of the landowner (compensable)." *Metro. Atlanta Rapid Transit Auth. v. Fountain*, 256 Ga. 732, 733, 352 S.E.2d 781, 782 (1987); *see also Dep't of Transp. v. Robinson*, 260 Ga. App. 666, 669, 580 S.E.2d 535, 538 (2003) (holding that in takings-based cases, "it is well established that such shared inconveniences are not compensable as a matter of law."). Here, Plaintiff-Appellee's claim for "safe drinking water"—and, in turn, any harm to alleged "private property" rights in that drinking water—is shared with every member of the proposed class and, under Georgia law, this shared inconvenience does not constitute a private harm that is compensable in a

takings-based action.[9] *See Stanford*, 347 Ga. App. at 102-03, 815 S.E.2d at 328 (Gobeil, J., concurring) ("[I]t appears that appellees are attempting to assert a public nuisance claim, which is traditionally recognized as an unreasonable interference 'with a right common to the general public.' But *we have been shown no cases finding that the municipality exception to sovereign immunity applies to a claim for a public nuisance*. Further, given the rationale for the municipality exception—that the government may not unreasonably interfere with private property rights—I see no basis for extending the exception to include claims arising from a private [sic] nuisance.") (citation omitted) (emphasis added).

Accordingly, Plaintiff-Appellee has failed to state a viable claim for the taking or damaging of "private property," and the Just Compensation Provision—and the corresponding narrow exception to Dalton Utilities' sovereign immunity—is therefore inapplicable to the public nuisance abatement claim.

[9] The fact that Plaintiff-Appellee seeks to represent a class with respect to his public nuisance claims further undercuts any argument that he has suffered a *specific* injury to his *private* property. In other words, if Plaintiff-Appellee's public nuisance claims were based on specific damage inflicted upon his private property, then Plaintiff-Appellee would be unable to represent a class of thousands of absent class members whose alleged property damages would bear no relation to Plaintiff-Appellee's own purported damage. *See, e.g.*, *Mays v. Tennessee Valley Auth.*, 274 F.R.D. 614, 625 (E.D. Tenn. 2011) (denying class certification on typicality grounds because "[g]iven the unique location of each plaintiff's individual property, and the unique situation of each plaintiff and his or her use and enjoyment of the property, individualized inquiries will apply to both the property damage and the nuisance claims.").

3. The District Court Erred In Holding That Plaintiff-Appellee Could Maintain a Nuisance Claim That Does Not Implicate the Just Compensation Provision.

In addition to erroneously concluding that Plaintiff-Appellee's nuisance claim implicated the Just Compensation Provision, the District Court also erred in adopting a "more expansive" interpretation of the nuisance exception "allowing for claims based on personal injury" under the Georgia Supreme Court's 1968 decision in *Town of Fort Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968). (App'x IV.629 at 88-89, 91.) This holding is inconsistent with Georgia law and should be reversed.

a. *Town of Fort Oglethorpe* Was Wrongly Decided and Did Not Survive the Constitutional Reservation of Sovereign Immunity.

The District Court wrongly relied on the Georgia Supreme Court's decision in *Town of Fort Oglethorpe* to hold that Dalton Utilities' sovereign immunity was waived for a nuisance claim that did not implicate the Just Compensation Provision. (*See* App'x IV.629 at 88-89, 91.)

In *Town of Fort Oglethorpe*, the plaintiff alleged that the city created and maintained a nuisance by failing to repair a defective traffic signal, and that this nuisance caused the personal injuries the plaintiff sustained in a motor vehicle collision. 224 Ga. at 834-38, 165 S.E.2d at 142-44. Although the claim did not fit within any then-existing exceptions to or waivers of sovereign immunity, the

Supreme Court concluded that the municipality's sovereign immunity was inapplicable to the nuisance claim because the city engaged in the "active operation and maintenance of a dangerous condition" by failing to repair the malfunctioning traffic signal, and thus held that the city could be liable for "knowingly allowing such condition to continue to the injury of the plaintiff." *Id.* at 838, 165 S.E.2d at 144. The Supreme Court's holding in *Town of Fort Oglethorpe* reflected a significant departure from—and expansion of—the nuisance exception to municipal sovereign immunity by entirely divorcing that concept from its constitutional takings-based foundation. *See Gatto*, 860 S.E.2d at 719 ("By extending the nuisance doctrine to include personal injuries beyond those tied to the plaintiff's property, [*Town of Fort Oglethorpe*] enlarged the scope of municipalities' potential liability in nuisance."); R. Perry Sentell, Jr., Local Government Law, 21 MERCER L. REV. 183, 195 (1969) (recognizing that by divorcing the municipal nuisance doctrine from its takings-based foundation, *Town of Fort Oglethorpe* "appears to open a Pandora's box for the nuisance concept in municipal liability.").

Notably, the District Court did not attempt to reconcile *Town of Fort Oglethorpe*'s expansive, non-takings-based application of the municipal nuisance doctrine with the Georgia Supreme Court's clear edict that any waiver of sovereign immunity "must be found in the constitution itself, or in the statutory law."

Lathrop, 301 Ga. at 424-25, 801 S.E.2d at 879 (internal citation omitted). Instead, the District Court concluded that this expansive application of municipal nuisance liability attained independent constitutional status *solely* because *Town of Fort Oglethorpe* was not expressly overruled before sovereign immunity was "enshrined in the Georgia Constitution" in 1974. (App'x IV.629 at 88-89.) This contention is incorrect.

The District Court's holding directly conflicts with binding Supreme Court authority obviating the precedential value of pre-1974 sovereign immunity decisions. In *Sustainable Coast*, the Supreme Court expressly held that "[o]pinions of Georgia appellate courts dealing with the judicial application of sovereign immunity prior to the 1974 constitutional amendment are not applicable to claims against the State arising after the 1974 amendment because the 1974 amendment created an entirely new ball game with regard to sovereign immunity." 294 Ga. at 601, 755 S.E.2d at 190-91 (citation omitted); *see also S. LNG, Inc. v. MacGinnitie*, 290 Ga. 204, 207-08, 719 S.E.2d at 475 (2011) (Benham, J., dissenting) ("With the ratification of the 1974 constitutional amendment came an entirely new ball game as far as the doctrine of sovereign immunity is concerned and other opinions of the courts of this state dealing with the judicial application of the rule prior to the 1974 amendment are not applicable to claims against the state arising since the 1974 amendment.") (citation and punctuation omitted). Further illustrating this

point, the Supreme Court in *Sustainable Coast* expressly overruled a 1995 sovereign immunity decision by the same Court in *International Business Machines Corp. v. Evans*, 265 Ga. 215, 453 S.E.2d 706 (1995), holding that *Evans* "was wrongly decided because many of the cases it relied upon" for its sovereign-immunity-related holding "predate the constitutional ratification of sovereign immunity in 1974," and thus no longer constituted valid authorities. *Sustainable Coast*, 294 Ga. at 601, 755 S.E.2d at 190. In so holding, the Court restored sovereign immunity to its narrow common-law foundation, expressly finding that "a bright line rule that only the Constitution itself or a specific waiver by the General Assembly can abrogate sovereign immunity is more workable than *IBM v. Evans*' scheme"—based on pre-1974 case law—that permitted "judicially created exceptions" to sovereign immunity to persist following the 1974 constitutional reservation of sovereign immunity. *Id*. at 602, 755 S.E.2d at 191.

The logic underlying the Court's reasoning in *Sustainable Coast* applies with equal force in this case. That is to say, to the extent that judges could alter the scope of municipal sovereign immunity before 1974, any such authority was expressly revoked when sovereign immunity was given constitutional status and thereafter "could only be waived by our Constitution or legislature." *Id*. at 597, 755 S.E.2d at 188; *see also Bd. of Commissioners of Lowndes Cty.*, 309 Ga. at 904 n.2, 848 S.E.2d at 861 ("[T]o the extent that we ever had the authority to alter the

parameters of sovereign immunity or recognize new exceptions, the constitutionalization of sovereign immunity took away any such authority."). Indeed, when the common-law doctrine of sovereign immunity was expressly reserved in 1974, the legislature made clear that what it was reserving was the bright-line version of sovereign immunity—without any judge-made exceptions that may have arisen in the interim—"except to the extent of any waiver of immunity provided in this Constitution and such waiver or qualification of immunity as is now or may hereafter be provided by act of the General Assembly." *Sheley*, 233 Ga. at 487-88, 212 S.E.2d at 628 (quoting Ga. L. 1973, pp. 1489-90). Accordingly, the District Court's reliance on pre-1974 case law recognizing a judge-made exception to sovereign immunity for nuisance-based personal injury claims is subject to reversal because, like *Evans*, the Opinion below is "wrongly decided because many of the cases it relied upon" for its sovereign-immunity-related holding—i.e., *Town of Fort Oglethorpe*—"predate the constitutional ratification of sovereign immunity in 1974." *Sustainable Coast*, 294 Ga. at 601, 755 S.E.2d at 190.

b. The District Court's Reliance on *Gatto* Is Misplaced.

Despite *Sustainable Coast*'s holding to the contrary, the District Court supported its errant conclusion by wrongly announcing that the Supreme Court "directly confront[ed] this issue" in *Gatto v. City of Statesboro*, 860 S.E.2d 713

(Ga. 2021), and that the Supreme Court "acknowledged" the "reality" that "the 1974 amendment preserved the expansion of municipal liability articulated in *Town of Fort Oglethorpe*." (App'x IV.629 at 85-86, 88-89.) But the Supreme Court in *Gatto* did not "acknowledge" any such "reality." To the contrary, the Court carefully avoided taking any position on the issue, observing only that *Town of Fort Oglethorpe* "***may*** have" expanded the scope of municipal nuisance liability by "***apparently***" abandoning the takings-based limitation on waivers of municipal sovereign immunity in nuisance cases, but expressly holding that the Court "need not address these doubts and questions to resolve the case before us." *Gatto*, 860 S.E.2d at 719-20 & n.6 (emphasis added). As such, to the extent that there remained questions concerning the continuing viability of *Town of Fort Oglethorpe*'s unfounded expansion of the municipal nuisance doctrine following *Sustainable Coast*, those questions remained unanswered after *Gatto*.

Nevertheless, the *Gatto* Court did not leave future litigants in the dark about how it may rule when directly confronted with the issue. In a footnote, Justice LaGrua acknowledged that at least some members of the Court continue to "have doubts about the legal foundations of [*Town of Fort Oglethorpe*]" precisely because it "divorced municipal nuisance liability from its basis in our Constitution's Takings Clause." *Id*. at 719 n.6. The Court also acknowledged that there are "complicated questions" about how *Town of Fort Oglethorpe* "relates to

the subsequent constitutionalization of sovereign immunity"—including, pertinently, whether a case that was decided based on a "doubt[ful] . . . legal foundation" and radically departed from sovereign immunity as it was understood at common law could survive the constitutional reservation of sovereign immunity. *Id*. Based on the Court's prior opinion in *Sustainable Coast*, it could not. *See* 294 Ga. at 601, 755 S.E.2d at 190-91 ("Opinions of Georgia appellate courts dealing with the judicial application of sovereign immunity prior to the 1974 constitutional amendment are not applicable to claims against the State arising after the 1974 amendment").

More fundamentally, the Supreme Court has voiced doubts about whether the Court in *Town of Fort Oglethorpe* had the authority to abrogate sovereign immunity in the first place. In its 2020 decision in *Board of Commissioners of Lowndes County*, the Supreme Court observed that because "in 1784 Georgia adopted the common law of England as of May 14, 1776, as its own as a general matter," it is "arguabl[e]" that the Supreme Court "could not alter it at all" following Georgia's adoption of English common law. 309 Ga. at 904 n.2, 848 S.E.2d at 861; *see also Lathrop*, 301 Ga. at 412 n.9, 801 S.E.2d at 871 ("In 1784, our General Assembly adopted the statutes and common law of England as of May 14, 1776, except to the extent that they were displaced by our own constitutional or statutory law. *That adoption of English statutory and common law remains in*

force today.") (citing O.C.G.A. § 1-1-10(c)(1)) (emphasis added) (internal citation omitted). And, in fact, three years *after* the Supreme Court decided *Town of Fort Oglethorpe*, the same Court reaffirmed that the doctrine of sovereign immunity "has continued in force in this State since 1784" and "[w]hether it should now be abrogated is a matter of public policy *which addressed itself to the legislative, not the judicial, branch of our state government*." *Crowder v. Dep't of State Parks*, 228 Ga. 436, 440, 185 S.E.2d 908, 911 (1971) (emphasis added).[10]

Accordingly, because *Town of Fort Oglethorpe* "divorced municipal nuisance liability from its basis in our Constitution's Takings Clause," there is a reasonable basis to conclude that the Court lacked the authority to affect such abrogation of municipal sovereign immunity in the first instance and, even so, that *Town of Fort Oglethorpe*'s abrogation did not survive the 1974 constitutional reservation of the doctrine. *Gatto*, 860 S.E.2d at 719 n.6. Though the Supreme Court in *Gatto* expressly reserved the definitive resolution of those "complicated

[10] Even if—as Plaintiff-Appellee contends—the 1974 reservation of sovereign immunity somehow "preserved all pre-1974 appellate decisions applying municipal immunity under the common law, including over a hundred years of precedent," (*See* Appellee's Reply in Supp. Mot. to Dismiss Appeal at 2), then such reservation would necessarily have encompassed the Supreme Court's 1971 decision in *Crowder*, which squarely rejected *Town of Fort Oglethorpe*'s earlier attempt to judicially abrogate the scope of municipal sovereign immunity. *See White v. Georgia*, 305 Ga. 111, 122 n.10, 823 S.E.2d 794, 803 (2019) ("When a high court finds discordant opinions among its own horizontal precedents the court generally follows its decision in the most recent case, which must have tacitly overruled any truly inconsistent holding.") (citation and punctuation omitted).

questions" for another day, it nevertheless signaled that the continuing viability of *Town of Fort Oglethorpe* is far from the "reality" announced and relied upon by the District Court in issuing its errant decision below.[11]

In sum, the District Court's reliance on *Gatto* is misplaced because, contrary to the District Court's contention, the *Gatto* Court did not "directly confront" the issue of *Town of Fort Oglethorpe*'s continuing viability or "acknowledge" the "reality" that Plaintiff-Appellee can maintain a nuisance claim entirely divorced from the Just Compensation Provision. Because the expansive, judge-made nuisance exception articulated in *Town of Fort Oglethorpe* runs afoul of the Supreme Court's unambiguous instruction that any waiver of sovereign immunity "must be found in the constitution itself, or in the statutory law," *Lathrop*, 301 Ga. at 424-45, 801 S.E.2d at 879 (internal citation omitted), it is invalid and did not survive the 1974 reservation of sovereign immunity. *See Sustainable Coast*, 294 Ga. at 601, 755 S.E.2d at 190-91 ("Opinions of Georgia appellate courts dealing with the judicial application of sovereign immunity prior to the 1974 constitutional amendment are not applicable to claims against the State arising after the 1974

[11] To the extent that this Court determines that resolution of the questions regarding the continuing viability of *Town of Fort Oglethorpe* are "determinative of the cause but unanswered by controlling precedent of the Supreme Court of Georgia or any other Georgia appellate court," Dalton Utilities respectfully encourages the Court to exercise its authority to certify any such questions to the Georgia Supreme Court for resolution. *Ryan v. State Farm Mut. Auto. Ins. Co.*, 934 F.2d 276, 276 (11th Cir. 1991).

amendment because the 1974 amendment created an entirely new ball game with regard to sovereign immunity.") (citation omitted). As such, the District Court erred in holding that *Town of Fort Oglethorpe* permitted Plaintiff-Appellee to maintain a non-takings-based nuisance claim that displaced Dalton Utilities' longstanding sovereign immunity.

III. Even If the District Court Applied the Proper Framework, Dalton Utilities Is Not Subject to Municipal Nuisance Liability Under the Facts Alleged in the Third Amended Complaint.

Even if the District Court correctly held that *Town of Fort Oglethorpe* permitted Plaintiff-Appellee to maintain a nuisance claim untethered from any specific constitutional or statutory authority, the Court nevertheless erred in applying *Town of Fort Oglethorpe*'s framework to Plaintiff-Appellee's nuisance claim against Dalton Utilities. In setting forth the parameters for *Town of Fort Oglethorpe*'s "more expansive notion of municipal liability," *Gatto*, 860 S.E.2d at 719, the District Court observed:

> To be held liable for maintenance of a nuisance, the municipality must be chargeable with performing a continuous or regularly repetitious act, or creating a continuous or regularly repetitious condition, which causes the hurt, inconvenience or injury; the municipality must have knowledge or be chargeable with notice of the dangerous condition; and if the municipality did not perform an act creating the dangerous condition . . . the failure of the municipality to rectify the dangerous condition must be in violation of a duty to act.

(App'x IV.629 at 89 (quoting *Mayor of Savannah v. Palmerio*, 242 Ga. 419, 425, 249 S.E.2d 224, 229-30 (1978).) Stated differently, even if a municipality is aware

of a dangerous condition, it is "not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of [its] own acts or failure of duty.'" *Citizens & S. Tr. Co. v. Phillips Petroleum Co.*, 192 Ga. App. 499, 500, 385 S.E.2d 426, 428 (1989) (quoting *Brimberry v. Savannah, F. & W. Ry. Co.*, 78 Ga. 641, 645, 3 S.E. 274, 276 (1887)); *see also* 18 McQuillin Mun. Corp. § 53:109 (3d ed. Sept. 2021) ("A municipality will only be liable if the condition which constitutes a nuisance was created by some positive act of the municipality, and the failure to remedy a condition not of the municipality's own making is not considered the equivalent of the required positive act.").

In this case, Plaintiff-Appellee failed to plead any non-conclusory factual allegations that Dalton Utilities undertook affirmative acts that *created* the dangerous condition; to the contrary, Plaintiff-Appellee alleged that the PFAS in question originated with other Defendants. (App'x I.418 at 5 ("Industrial wastewater discharged from Defendants' manufacturing facilities into the City of Dalton's POTW contains high levels of PFAS").) Further, Plaintiff-Appellee failed to allege that Dalton Utilities was under a specific "duty to act." (*See generally* App'x I.418.). Therefore, even under the expansive post-*Town of Fort Oglethorpe* nuisance framework, Plaintiff-Appellee's nuisance claim fails to state a viable claim for relief.

A. Plaintiff-Appellee Did Not Allege That Dalton Utilities Performed a Positive Act That Created the Dangerous Condition.

To sustain a nuisance claim under the first prong of the *Town of Fort Oglethorpe* framework, Plaintiff-Appellee was required to plead facts showing that Dalton Utilities engaged in affirmative misfeasance—that is, that the city *performed* a positive act that *created* the dangerous condition. *See Bowen v. Little*, 139 Ga. App. 176, 177, 228 S.E.2d 159, 161 (1976) (observing that, in municipal nuisance cases, "a clear line is drawn between a discretionary nonfeasance and the negligent maintenance of something erected by the city in its discretion in such manner as to create a dangerous nuisance, and which amounts to misfeasance.").

This bright-line rule is evidenced by *Town of Fort Oglethorpe*, where the Supreme Court held that the city could be liable in nuisance because it *created* the dangerous condition underlying the nuisance claim by undertaking the affirmative act of erecting and maintaining a defective traffic signal that was found to have directly caused the plaintiff's injuries. 224 Ga. at 838, 165 S.E.2d at 144. Consequently, a municipality may be held liable for a nuisance under *Town of Fort Oglethorpe*'s expansive framework when it has chosen to act and, in so acting, has *created* the dangerous condition that was the *cause* of the plaintiff's harm.

On the other hand, Georgia courts have consistently refused to sustain nuisance claims where a city's liability was predicated on mere nonfeasance—that is, the failure of the city to act in the face of a preexisting nuisance. In *Tamas v.*

Columbus, 244 Ga. 200, 259 S.E.2d 457 (1979), for example, the Supreme Court affirmed the trial court's dismissal of the plaintiff's nuisance claim against the city when the plaintiff alleged only that the city failed to take steps to protect the plaintiff's decedent from a steep embankment leading from the road into a neighboring creek, finding that the city did not *create* the dangerous condition, but instead engaged only in nonfeasance by failing to abate the nuisance. *Id*. at 201-02, 259 S.E.2d at 457-58. Likewise, in *Hancock v. City of Dalton*, 131 Ga. App. 178, 205 S.E.2d 470 (1974), the Court of Appeals refused to expand *Town of Fort Oglethorpe* to "a classic case of non-action by the city," holding that there is "no authority to extend a nuisance principal to a situation" in which the city was accused of merely failing to place a traffic signal at an already dangerous intersection. *Id*. at 180-81, 205 S.E.2d at 472. Continuing this trend, the Supreme Court in *Palmerio* refused to apply *Town of Fort Oglethorpe* to the plaintiffs' nuisance claim because "the main thrust of the plaintiffs' complaint was that the city had created a nuisance by *failing to act*, that is, by failing to install proper traffic-control signals *rather than by having done an affirmative act creating a nuisance*." 242 Ga. at 424, 249 S.E.2d at 228 (emphasis added). Accordingly, there is a significant—and often dispositive—distinction between nuisance claims alleging *mis*feasance that *created* the dangerous condition and those alleging mere *non*feasance.

In this case, and in direct contrast to the District Court's erroneous holding, Plaintiff-Appellee's nuisance claim against Dalton Utilities alleged no affirmative misfeasance to state a viable nuisance claim against Dalton Utilities under *Town of Fort Oglethorpe*. Fairly read, Plaintiff-Appellee's claims arose out of the presence of PFAS in the City of Rome's water supply and, in turn, his drinking water. (*See generally* App'x I.418 at 2-6.) Plaintiff-Appellee did not allege that Dalton Utilities ever manufactured, supplied, used, or distributed PFAS; rather, Plaintiff-Appellee acknowledged that certain carpet chemical manufacturers produced PFAS, that these chemical manufacturers distributed the PFAS to Dalton-based carpet manufacturers, and that the carpet manufacturers then used PFAS at their manufacturing facilities and were responsible for discharging that PFAS via their industrial wastewater. (App'x I.418 at 5.) It is only *after* those industrial defendants created the hazard underlying Plaintiff-Appellee's nuisance—i.e., their use and disposal of PFAS—that the wastewater was discharged to Dalton Utilities' water treatment system, at which time Plaintiff-Appellee conceded the wastewater *already* contained "high levels of PFAS." (App'x I.418 at 5, 21, 32.) At most, then, Plaintiff-Appellee's theory of nuisance liability against Dalton Utilities was one of nonfeasance; that is, that Dalton Utilities—in Plaintiff-Appellee's own words—"has taken no action" to remedy the carpet manufacturers' prior purported PFAS discharges into the City of Dalton's water supply. (App'x I.418 at 61.)

Plaintiff-Appellee's factual allegations against Dalton utilities are similar to those confronted by the Georgia Court of Appeals in *City of Atlanta v. Demita*, 329 Ga. App. 33, 762 S.E.2d 436 (2014). In *Demita*, the plaintiff sued the City of Atlanta under a nuisance theory because her property was repeatedly flooded after a residential homebuilder constructed a house across the street from the plaintiff's property that diverted rainwater across a public street maintained by the City and onto the plaintiff's land. *Id*. at 33-37, 762 S.E.2d at 437-40. Although the City was aware of the flooding and identified several ways in which the flooding could be remediated, the City took no action to address the flooding. *Id*. at 36, 762 S.E.2d at 439. On appeal, the Court of Appeals reversed the trial court's judgment in the plaintiff's favor on the nuisance claim, finding that the City could not be held liable for the alleged nuisance because "there [was] no evidence that the City negligently constructed or maintained a sewer or drainage system under its control which has *caused* the repeated flooding of [plaintiff's] property." *Id*. at 37, 762 S.E.2d at 440 (emphasis added). In finding that the nuisance claim failed, the Court found it dispositive that the City did not engage in any affirmative misfeasance, such as by "divert[ing] or chang[ing] the flow of water so that it flooded adjacent property," but instead simply stood idly by as "the builder placed new construction adjacent to an existing city street and natural forces did the rest." *Id*. at 38, 762 S.E.2d at 441.

Here, like in *Demita*, the alleged nuisance—the presence of PFAS in Plaintiff-Appellee's drinking water—originated from the acts of third-party chemical suppliers and carpet manufacturers who directly caused the release of PFAS. Though Plaintiff-Appellee alleges that Dalton Utilities is liable for purportedly failing to remove the PFAS from the water as it passed through Dalton Utilities' treatment system, *Demita* also makes clear that the mere existence of untapped remedial measures is insufficient to foist liability on the municipality when the harmful condition is caused by a third-party's preceding acts. *Id*., 762 S.E.2d at 441.

According to the allegations in Plaintiff-Appellee's Third Amended Complaint, Dalton Utilities is chargeable with, at most, failing to act, and mere misfeasance cannot serve as the basis of an actionable municipal nuisance claim even under the expansive post-*Town of Fort Oglethorpe* framework absent an affirmative duty to act.[12] *See Tamas*, 244 Ga. at 202, 259 S.E.2d at 458 (recognizing that after *Town of Fort Oglethorpe*, "a clear line is drawn between a discretionary nonfeasance and the negligent maintenance of something erected by the city in its discretion in such manner as to create a dangerous nuisance, and

[12] As discussed immediately below, Plaintiff-Appellee did not allege that Dalton Utilities was under a specific affirmative duty to remove PFAS from the wastewater during its standard water treatment processes. *See infra* § III.B.

which amounts to misfeasance.") (quoting *Bowen*, 139 Ga. App. at 177, 228 S.E.2d at 161).

B. Plaintiff-Appellee Did Not Allege That Dalton Utilities Is Under a Duty to Remove Unregulated Chemicals from Wastewater.

At most, Plaintiff-Appellee's nuisance claim against Dalton Utilities alleged that Dalton Utilities engaged in nonfeasance by failing to take steps to remove preexisting PFAS from wastewater; Plaintiff-Appellee, however, failed to allege that Dalton Utilities was under a specific duty to act. (*See generally* App'x I.418.) It is well-settled that "if the municipality did not perform an act *creating* the dangerous condition, such as installing and maintaining a defective traffic signal as in [*Town of Fort Oglethorpe*], the failure of the municipality to rectify the dangerous condition *must be in violation of a duty to act*." *Palmerio*, 242 Ga. at 426, 249 S.E.2d at 230 (emphasis added); *see also* O.C.G.A. § 36-33-2 ("Where municipal corporations are not required by statute to perform an act, they may not be held liable for exercising their discretion in failing to perform the act."). Absent a law or ordinance requiring a municipality to take a specific action, any such action is solely "discretionary," and a municipality "cannot be held liable for mere failure to perform such act." *Bowen*, 139 Ga. App. at 176, 228 S.E.2d at 160.

Consistent with this distinction between affirmative misfeasance and discretionary nonfeasance, Georgia courts have rejected nuisance claims even under the expansive post-*Town of Fort Oglethorpe* framework where, like here, a

municipality merely exercised its discretion not to abate a then-existing nuisance when it had no duty to do so. *See, e.g.*, *City of Toccoa v. Pittman*, 286 Ga. App. 213, 217, 648 S.E.2d 733, 738 (2007) (reversing denial of city's motion for summary judgment on nuisance claim because the city "was not charged with maintaining the private business" that created the nuisance-causing condition); *Hancock*, 131 Ga. App. at 181, 205 S.E.2d at 472 (holding that, in the absence of a statutory duty to act, "[t]he failure of the city to take further action with regard to the [alleged nuisance] either by enforcing its ordinance or the terms of the contract would not involve the maintenance of a nuisance."); *City of Alpharetta v. Vlass*, 360 Ga. App. 432, 436, 861 S.E.2d 249, 252 (2021) ("[I]n the absence of a statute or ordinance requiring the city to act, the dismissal of the nuisance action against the city was proper.").

In this case, Plaintiff-Appellee's Third Amended Complaint failed to identify a statute or ordinance that imposed a duty upon Dalton Utilities to remove preexisting PFAS from industrial wastewater during its regular water treatment process. Tellingly, while Plaintiff-Appellee alleges that "numerous states have taken action to pursue stricter guidelines for PFAS in drinking water," Georgia is conspicuously absent from the list of states that have implemented PFAS

restrictions.[13] (App'x I.418 at 26.) Absent allegations identifying a *specific* duty to remove this non-regulated chemical compound from wastewater during its water treatment process, Plaintiff-Appellee cannot maintain a nuisance claim premised on alleged nonfeasance.[14] *Compare Mayor & Aldermen of City of Savannah v. Herrera*, 343 Ga. App. 424, 428, 808 S.E.2d 416, 420 (2017) (finding duty sufficient to support nonfeasance-based nuisance claim arising out of "the duty of a municipality to maintain city streets in a reasonably safe condition for travel."); *with Spooner v. City of Camilla*, 256 Ga. App. 179, 183, 568 S.E.2d 109, 113

[13] Moreover, the restrictions identified all relate to drinking water standards, not wastewater treatment standards.

[14] Nor can Plaintiff-Appellee contend that Dalton Utilities owes a general duty to remove preexisting PFAS from wastewater that runs to the public as a whole. As the Georgia Supreme Court has held, "[t]o impose liability on the City based on a general duty to protect all citizens from the actions of third parties would expand the City's duty and potential liability beyond that imposed [on private parties] under traditional tort analysis." *City of Rome v. Jordan*, 263 Ga. 26, 28, 426 S.E.2d 861, 862 (1993) (citation omitted). Accordingly, unless there is "a special relationship between the individual and the municipality which sets the individual apart from the general public and engenders a special duty owed to that individual," a municipality may not be subject to liability for nonfeasance arising out of a duty running to the public generally. *Id*. at 28-29, 426 S.E.2d at 863. To establish a special relationship, a plaintiff must show: "(1) an explicit assurance by the municipality, through promises or actions, that it would act on behalf of the injured party; (2) knowledge on the part of the municipality that inaction could lead to harm; and, (3) justifiable and detrimental reliance by the injured party on the municipality's affirmative undertaking." *Id*. at 29, 426 S.E.2d at 863. Here, Plaintiff-Appellee alleged no facts establishing that any special relationship existed between himself and Dalton Utilities, and thus the public duty doctrine precludes Plaintiff-Appellee basing a nuisance claim off of any alleged general duty running from Dalton Utilities to the public as a whole. *Id*. at 28, 426 S.E.2d at 863.

(2002) (finding no duty sufficient to support nuisance claim because "the City had no duty to [erect a barricade or warning signs to warn of a hazard on private property], and it cannot be held liable for failing to do so.").

In sum, the doctrine of discretionary nonfeasance applies to deny nuisance recovery under the post-*Town of Fort Oglethorpe* framework when a municipality fails to act when it is under no affirmative duty to do otherwise. Because Plaintiff-Appellee has not alleged any facts supporting the conclusion that Dalton Utilities was under a statutory or regulatory duty to remove an unregulated, emerging contaminant from wastewater during its traditional water treatment process, the Court should find that Plaintiff-Appellee's nuisance claim fails as a matter of law.

CONCLUSION

The Court should reverse the District Court's order denying Dalton Utilities' motion to dismiss Count Seven of the Third Amended Complaint and remand for further proceedings.

Respectfully submitted, this 13th day of December, 2021.

TROUTMAN PEPPER HAMILTON SANDERS LLP

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,562 words, excluding the parts of the brief exempted by Eleventh Circuit Rule 32-4.

This 13th day of December, 2021.

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By signature below, counsel certifies that the foregoing BRIEF OF APPELLANT was electronically filed with the Clerk of Court using the ECF system.

This 13th day of December, 2021.

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APPEAL NO. 21-13663-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JARROD JOHNSON,

Appellee / Plaintiff,

v.

THE CITY OF DALTON, GEORGIA, ACTING THROUGH ITS BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS, d/b/a DALTON UTILITIES,

Appellant / Defendant.

Appeal from the United States District Court
for the Northern District of Georgia
No. 4:20-cv-0008-AT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel hereby certifies pursuant to Eleventh Circuit Rule 26.1-2(b) that the Certificate of Interested Persons and Corporate Disclosure Statement contained in the Brief of Appellant is complete.

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ARGUMENT AND CITATIONS OF AUTHORITY

Georgia law provides sovereign immunity to Dalton Utilities from suit, subject to a narrow waiver for nuisance claims that are predicated on allegations of a taking of private property under the Just Compensation Provision of the Georgia Constitution. Because Plaintiff-Appellee does not raise a takings-based nuisance claim, sovereign immunity protects Dalton Utilities from Plaintiff-Appellee's claim.

Georgia law provides a narrow waiver of sovereign immunity for takings-based nuisance claims, and this Court should reject Plaintiff-Appellee's attempt to invoke an outdated and inapplicable pre-1974 judge-made exception to sovereign immunity for nuisance claims grounded in allegations of personal injury. Plaintiff-Appellee relies upon fragments of Georgia law to argue that the 1974 constitutionalization of sovereign immunity "preserved" pre-1974 judge-made exceptions (Appellee Br. 22–23), but he has no response to the Georgia Supreme Court's holding in *Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc.*, 294 Ga. 593, 755 S.E.2d 184 (2014), that declared the waiver of sovereign immunity is limited to takings-based nuisance claims and overruled a post-1974 case in which the Court had applied a pre-1974 judge-made exception to sovereign immunity. Nor does he have any answer for the two recent decisions in which the Georgia Court of Appeals followed the Georgia Supreme

Court's reasoning in *Sustainable Coast* and held that sovereign immunity is not waived for nuisance claims predicated on allegations of personal injury. *Gatto v. City of Statesboro*, 353 Ga. App. 178, 182–83, 834 S.E.2d 623, 628 (2019), *aff'd* 312 Ga. 164 (2021); *City of Albany v. Stanford*, 347 Ga. App. 95, 98–99, 815 S.E.2d 322, 326 (2018).

Despite only arguing in the district court that Georgia law waives Dalton Utilities' sovereign immunity because that waiver applies to personal injury nuisance claims (App'x III.511 at 36; App'x III.571 at 67–70), Plaintiff-Appellee pivots on appeal to argue that his claim also triggers the narrow waiver of sovereign immunity for takings-based nuisance claims. Yet even in *post hoc* arguments, Plaintiff-Appellee relies upon distinguishable authority that fails to show he has a protected property right to city-supplied water or that the alleged contamination of the City of Rome's water supply has caused him special harm that is peculiar and distinct from that which every other member of the public purportedly has suffered. Moreover, Plaintiff-Appellee never argued below that his nuisance claim is predicated upon an alleged taking of private property under the Just Compensation Provision; he instead admitted that "what we're alleging here" is "a danger to life or health"—not "a taking of property" (App'x III.571 at 70), which was consistent with his complaint and district court briefing. Because his nuisance claim does not raise allegations predicated upon an alleged taking of

private property, Plaintiff-Appellee has failed to prove a waiver of Dalton Utilities' sovereign immunity.

In any event, Plaintiff-Appellee does not allege that Dalton Utilities created or maintained a nuisance—a requirement to waive Dalton Utilities' sovereign immunity whether his claim is predicated upon alleged property damage or personal injury. Having no argument that Georgia law imposes a specific duty upon Dalton Utilities to remediate the alleged contamination, Plaintiff-Appellee wrongly contends that Dalton Utilities created the alleged nuisance. This is inconsistent with Plaintiff-Appellee's allegation that *third parties* create the purported contamination and introduce it to Dalton Utilities' wastewater treatment facility; he does not allege that Dalton Utilities operates the facility in a defective manner necessary to create a nuisance.

Dalton Utilities thus is entitled to sovereign immunity on Plaintiff-Appellee's nuisance claim.

I. This Court Has Jurisdiction Over the Appeal.

As set forth in Dalton Utilities' response to Plaintiff-Appellee's motion to dismiss appeal for lack of jurisdiction, this Court has jurisdiction over this appeal. This appeal satisfies the requirements of the collateral order doctrine, as the order denying sovereign immunity to Dalton Utilities conclusively determined that question, resolved an important legal question that is completely separate from the

merits of the action, and is effectively unreviewable on appeal from a final judgment after Dalton Utilities will have been forced to proceed through discovery and trial despite its sovereign immunity from suit.

Plaintiff-Appellee raises no new arguments regarding jurisdiction in his merits brief and instead simply further demonstrates that this Court has jurisdiction over the appeal. Although Plaintiff-Appellee argues that Dalton Utilities' merits brief "only reinforces" that this appeal raises questions that "are on the merits—directly" (Appellee Br. 2–3), the examples that he cites in support of his argument show that whether Dalton Utilities is entitled to sovereign immunity turns entirely upon discrete questions of law and the Third Amended Complaint's allegations that are separate from the merits of Plaintiff-Appellee's claims. *See* Resp. in Opp'n to Appellee's Mot. to Dismiss Appeal for Lack of Jurisdiction at 19–21; *see also Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) ("[A] question of immunity is separate from the merits of the underlying action . . . even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue."); *Bonner v. Peterson*, 301 Ga. App. 443, 443, 687 S.E.2d 676, 678 (2009) ("A motion to dismiss asserting sovereign immunity, however, is based upon the trial court's lack of subject matter jurisdiction, rather than the merits of the plaintiff's claim."). This Court has jurisdiction under the collateral order doctrine.

II. Dalton Utilities Is Entitled to Sovereign Immunity Because Plaintiff-Appellee's Nuisance Claim Is Not Predicated on an Alleged Taking of Private Property.

Dismissal of Plaintiff-Appellee's nuisance claim against Dalton Utilities is warranted because sovereign immunity safeguards Dalton Utilities from Plaintiff-Appellee's claim.

Sovereign immunity protects Georgia municipalities from suit, subject to a narrow waiver for nuisance claims predicated on an alleged taking of private property. Georgia law provides municipalities with sovereign immunity from suit, *Gatto v. City of Statesboro*, 312 Ga. 164, 166–67, 860 S.E.2d 713, 716 (2021), which can "only be waived by our Constitution or legislature," *Sustainable Coast*, 294 Ga. at 597, 755 S.E.2d at 188. In analyzing the narrow waiver of sovereign immunity under Georgia law for nuisance claims, the Georgia Supreme Court has clarified that "the rationale behind [the nuisance waiver] is rooted in the concept that the government may not take or damage private property for public purposes without just and adequate compensation." *Id.* at 600, 755 S.E.2d at 190. Georgia law thus waives municipal sovereign immunity for nuisance only if the claim is predicated upon an alleged taking of private property under the Just Compensation Provision. *Id.*

Plaintiff-Appellee concedes he "does not allege a statutory waiver of sovereign immunity" (Appellee Br. 4), which means he must prove that the

Georgia Constitution waives Dalton Utilities' sovereign immunity.[1] He wrongly asks this Court to apply a pre-1974 judge-made exception to sovereign immunity for nuisance claims predicated on allegations of personal injury. The Georgia Supreme Court has clearly recognized that the narrow waiver of municipal sovereign immunity for nuisance is limited to claims predicated on an alleged taking of private property, and the Georgia Court of Appeals recently has held that no waiver of sovereign immunity exists for personal injury nuisance claims.

Plaintiff-Appellee has failed to establish that his claim triggers the narrow waiver of municipal sovereign immunity for takings-based nuisance claims, for several independent reasons: (1) public drinking water supply does not constitute private property under the Just Compensation Provision; (2) Plaintiff-Appellee's nuisance claim raises no special damage necessary to trigger the Just Compensation Provision; and (3) Plaintiff-Appellee is bound by his judicial

[1] Plaintiff-Appellee cannot avoid his burden to prove a sovereign immunity waiver by arguing that the "nuisance doctrine" is not a "waiver" but instead that "immunity is wholly non-existent." (Appellee Br. 13 n.5.) The Georgia Supreme Court has reasoned that "the 'nuisance exception' recognized in [*City of Thomasville v. Shank*, 263 Ga. 624, 437 S.E.2d 306 (1993),] was not an exception at all, but instead, a proper recognition that the Constitution itself requires just compensation for takings." *Sustainable Coast*, 294 Ga. at 600, 755 S.E.2d at 190. "[I]t is on this theory that we have indicated that the Just Compensation Provision *waives* sovereign immunity." *Dep't of Transp. v. Mixon*, 312 Ga. 548, 551, 864 S.E.2d 67, 71 (2021) (emphasis added). Plaintiff-Appellee thus bears the burden of proving waiver. (Appellant Br. 10, 19.) Even so, Plaintiff-Appellee fails to cite any authority showing that he would not bear the burden of proving that "immunity is wholly non-existent."

admission below that his nuisance claim is predicated solely upon alleged personal injury, which is consistent with the allegations of his complaint.

A. Georgia Law Does Not Waive Sovereign Immunity for Nuisance Claims Predicated on Alleged Personal Injury.

The Georgia Supreme Court has recognized that the narrow waiver of sovereign immunity for nuisance is limited to claims predicated on an alleged taking of private property under the Just Compensation Provision, yet Plaintiff-Appellee wrongly asks this Court to apply a judge-made exception to sovereign immunity for personal injury nuisance claims that was created before the doctrine was enshrined in the Georgia Constitution in 1974 and that no longer applies today. (Appellee Br. 24, 42–45 (citing *Town of Fort Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968)).)

The narrow waiver of sovereign immunity for nuisance is for those claims that arise under the Just Compensation Provision. The Georgia Supreme Court in *Sustainable Coast* recognized the limited waiver for takings-based nuisance claims, concluding that "the rationale behind [the waiver] is rooted in the concept that the government may not take or damage private property for public purposes without just and adequate compensation." 294 Ga. at 600, 755 S.E.2d at 190. The Georgia Court of Appeals, in an opinion authored by now-Justice Bethel, followed *Sustainable Coast* and rejected the argument that an exception to sovereign immunity applies to personal injury nuisance claims, reasoning that the waiver of

sovereign immunity "triggering application of the eminent domain clause of the Constitution does not apply . . . where the 'damage' is injury to a person or loss of life." *Stanford*, 347 Ga. App. at 98–99, 815 S.E.2d at 326; *accord Gatto*, 353 Ga. App. at 182–83, 834 S.E.2d at 628 (same).

Although the Georgia Supreme Court has recognized that the narrow waiver of sovereign immunity for nuisance applies only to claims predicated on an alleged taking, the Georgia Court of Appeals' decisions control if the Georgia Supreme Court's precedent was for some reason ambiguous. *Sustainable Coast* provides clear evidence that a waiver of sovereign immunity for nuisance exists only for claims predicated on an alleged taking of private property. But even if it was unclear whether the Georgia Supreme Court would recognize a waiver of sovereign immunity for personal injury nuisance claims, "federal courts are bound by decisions of a state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise." *Bravo v. United States*, 577 F.3d 1324, 1325 (11th Cir. 2009) (per curiam) (citation omitted). The Georgia Court of Appeals has held that such a waiver does not exist under Georgia law, *Gatto*, 353 Ga. App. at 182–83, 834 S.E.2d at 628;[2] *Stanford*, 347 Ga. App. at

[2] The Georgia Supreme Court's affirmance did not reject or disturb the Georgia Court of Appeals' holding in *Gatto* that only takings-based nuisance claims trigger a sovereign immunity waiver. *See Pender v. Witcher*, 194 Ga. App. 72, 73, 389 S.E.2d 560, 562 (1989) (Court of Appeals decision "must be followed" notwithstanding Supreme Court's affirmance on other grounds).

98–99, 815 S.E.2d at 326, and Plaintiff-Appellee has set forth no persuasive evidence that the Georgia Supreme Court has ruled or would rule otherwise.

Despite this clear authority, Plaintiff-Appellee argues that the 1974 amendment "preserved" a pre-1974 judge-made exception to sovereign immunity for personal injury nuisance claims. (Appellee Br. 22–27.) He is wrong for several reasons. *First*, the 1974 amendment to the Georgia Constitution forbids judge-made waivers of sovereign immunity. "[S]uch sovereign immunity is expressly reserved except to the extent of any waiver of immunity provided in this Constitution and such waiver or qualification of immunity as is now or may hereafter be provided by Act of the General Assembly." Ga. L. 1973, p. 1489. Applying a judge-made exception to sovereign immunity after the 1974 amendment would "swallow the rule permitting only the General Assembly" to create a sovereign immunity waiver, contrary to the Georgia Constitution. *Sustainable Coast*, 294 Ga. at 600, 755 S.E.2d at 190; *see also Bd. of Comm'rs of Lowndes County v. Mayor & Coun. of Valdosta*, 309 Ga. 899, 903, 848 S.E.2d 857, 860 (2020) ("[T]he clear language of our Constitution authorizes only the General Assembly to waive sovereign immunity, without exception." (citation omitted)).

Second, the Georgia Supreme Court's opinion in *Sustainable Coast* refutes Plaintiff-Appellee's reading of Georgia law. Contrary to Plaintiff-Appellee's depiction of *Sustainable Coast* as recognizing only that courts cannot "create *new*

exceptions to sovereign immunity *after* the 1974 amendment" (Appellee Br. 26 n.9 (emphasis in original)), the Georgia Supreme Court overruled its decision in *IBM v. Georgia Department of Administrative Services*, 265 Ga. 215, 453 S.E.2d 706 (1995), *because* that post-1974 decision applied a pre-1974 "long recognized . . . exception to sovereign immunity," *id.* at 216, 453 S.E.2d at 708. The Court declared that *IBM* was "unsound" because the "cases we relied on" in applying a pre-1974 judge-made exception to sovereign immunity "either predate the incorporation of sovereign immunity into our state Constitution or ignored the impact thereof." *Sustainable Coast*, 294 Ga. at 597, 601, 755 S.E.2d at 188, 190–91. It is on this basis—that the Court in *IBM* "wrongly" applied a pre-1974 judge-made sovereign immunity exception—that the Court explained that the "[o]pinions of Georgia appellate courts dealing with the judicial application of sovereign immunity prior to the 1974 constitutional amendment are not applicable to claims . . . arising after the 1974 amendment because the 1974 amendment created an entirely new ball game with regard to sovereign immunity." *Id.* at 601, 755 S.E.2d at 190–91. The Court concluded that *IBM* wrongly relied upon *Shank* as supporting that pre-1974 judge-made exceptions to sovereign immunity apply today, reasoning that the nuisance waiver in *Shank* "was not an exception at all, but instead, a proper recognition that the Constitution itself requires just compensation

for takings." *Sustainable Coast*, 294 Ga. at 600, 755 S.E.2d at 190.[3] Because *Phillips* is a pre-1974 judge-made exception to sovereign immunity that "divorced municipal nuisance liability from its basis in our Constitution's Takings Clause," *Gatto*, 312 Ga. at 171 n.6, 860 S.E.2d at 719 n.6, it no longer applies. *Sustainable Coast*, 294 Ga. at 597, 601, 755 S.E.2d at 188, 190–91.

Third, even if we could put *Sustainable Coast*'s holding aside, Plaintiff-Appellee misconstrues Georgia Supreme Court authority addressing pre-1974 sovereign immunity case law. The Court has recognized that Georgia "adopted the common law of England as [its] own" in 1784, which included "the doctrine of sovereign immunity." *Lathrop v. Deal*, 301 Ga. 408, 412, 801 S.E.2d 867, 871 (2017). That "common law remains in force today." *Id.* at 412 n.9, 801 S.E.2d at 871 n.9. To the extent the Court has noted that pre-1974 case law may not be "irrelevant" today, *Lowndes County*, 309 Ga. at 904 n.2, 848 S.E.2d at 861 n.2, pre-1974 case law may be pertinent only if it bears upon understanding the

[3] Plaintiff-Appellee cannot avoid *Sustainable Coast* because it addressed State, rather than municipal, sovereign immunity. (Appellee Br. 28–30.) The Georgia Supreme Court has explained that "the scope of whatever waiver the Just Compensation Provision provides is not limited to the sovereign immunity of the State, but extends to other sorts of governmental immunity as well, including municipal immunity." *Mixon*, 312 Ga. at 550 n.2, 864 S.E.2d at 70 n.2. The Georgia Court of Appeals likewise has held, in an opinion issued by now-Justice McMillian, that *Sustainable Coast* "equally appl[ies] to waivers of sovereign immunity . . . for municipalities." *City of Greensboro v. Rowland*, 334 Ga. App. 148, 150, 778 S.E.2d 409, 412 (2015).

contours of the doctrine that Georgia adopted in 1784 that "remains in force today"—not by carrying forward judge-made exceptions created after 1784 that "enlarged the scope of municipalities' potential liability in nuisance." *Gatto*, 312 Ga. at 170, 860 S.E.2d at 719; *see also Sustainable Coast*, 294 Ga. at 601, 755 S.E.2d at 190–91. Plaintiff-Appellee fails to cite a single case in which a court has held that a pre-1974 judge-made sovereign immunity waiver applies today.

Fourth, even if Plaintiff-Appellee was correct regarding the weight to be accorded to pre-1974 sovereign immunity case law, he cannot establish that Georgia law *ever* permitted judge-made exceptions to sovereign immunity. Plaintiff-Appellee ignores Georgia Supreme Court precedent holding that even before the 1974 amendment, sovereign immunity "has continued in force in this State since 1784" and "[w]hether it should now be abrogated is a matter of public policy which addressed itself to the legislative, not the judicial, branch of our state government." *Crowder v. Dep't of State Parks*, 228 Ga. 436, 440, 185 S.E.2d 908, 911 (1971). (*Accord* Appellant Br. 41 & n.10.) The Georgia Supreme Court likewise recently recognized that "in 1784 Georgia adopted the common law of England as of May 14, 1776, as its own as a general matter, such that arguably this Court could not alter it at all." *Lowndes County*, 309 Ga. at 904 n.2, 848 S.E.2d at 861 n.2.

Plaintiff-Appellee next argues that the Georgia Supreme Court in *Gatto* "squarely rejected" *Sustainable Coast* (as well as the Court of Appeals' holdings in *Gatto* and *Stanford*) and "reaffirmed" an exception to sovereign immunity for personal injury nuisance claims. (Appellee Br. 11, 15, 21, 23.) To the contrary, the Georgia Supreme Court stated explicitly in *Gatto* that it did "*not* address these doubts and questions" relating to "the legal foundations of *Phillips*" and "[h]ow *Phillips* relates to the subsequent constitutionalization of sovereign immunity," reasoning that those issues were unnecessary to the Court's holding. 312 Ga. at 171 n.6, 860 S.E.2d at 719 n.6 (emphasis added).[4] That the Court decided the case on other grounds does not "speak[ ] volumes" to *Phillips*' "current validity." (Appellee Br. 44–45.) Nor does the Court's statement that Georgia courts "now" lack authority to abrogate sovereign immunity imply that pre-1974 judge-made exceptions remain good law (*see id.* at 22–23 (quoting *Gatto*, 312 Ga. at 173, 860 S.E.2d at 721); *accord* Appellee Br. 44); the Court expressly declined to reach that issue and did not disturb its holding in *Sustainable Coast* overruling the application

[4] Plaintiff-Appellee omits critical language from the dicta in *Beasley v. Department of Corrections*, 360 Ga. App. 33, 861 S.E.2d 106 (2021). (Appellee Br. 45.) The court stated that "our Supreme Court recently noted *(albeit with some degree of skepticism)*—that there *may be* recovery for personal injuries sustained by the maintenance of a nuisance in the municipality context under certain circumstances." *Beasley*, 360 Ga. App. at 38 n.14, 861 S.E.2d at 111 n.14 (emphasis added).

of a pre-1974 judge-made exception.[5] *Gatto*, 312 Ga. at 171 n.6, 860 S.E.2d at 719 n.6; *see also Lowndes County*, 309 Ga. at 904 n.2, 848 S.E.2d at 861 n.2.

Although Dalton Utilities believes that Georgia law is clear regarding the scope of sovereign immunity, if there is any doubt, this Court should certify this significant state constitutional question to the Georgia Supreme Court. This Court, "more than any other circuit, use[s] th[e certification] tool," *Blue Cross & Blue Shield v. Nielson*, 116 F.3d 1406, 1413 (11th Cir. 1997), to obtain authoritative answers "when there are insufficient sources of state law to allow a principled rather than conjectural conclusion," *Grange Mut. Cas. Co. v. Woodard*, 826 F.3d 1289, 1300 (11th Cir. 2016). Certification is "especially important" where resolution of the "difficult question[ ] of state law . . . transcends the result in [this] case," which is particularly true when the question involves State constitutional issues. *Sultenfuss v. Snow*, 35 F.3d 1494, 1504–06 (11th Cir. 1994) (en banc) (Carnes, J., dissenting) (citation omitted) (second alteration in original). Federalism principles strongly warrant certification to resolve any uncertainty as to the narrow legal question concerning the scope of sovereign immunity under Georgia law. The scope of sovereign immunity under the Georgia Constitution is

[5] *Gatto* did not cite *Delta Air Corporation v. Kersey*, 193 Ga. 862, 20 S.E.2d 245 (1942), for the proposition that a personal injury nuisance claim can waive sovereign immunity (Appellee Br. 30–31); *Kersey* did not address sovereign immunity.

of vital importance concerning whether Georgia municipalities across the State are immune from nuisance claims predicated on alleged personal injury, and the powerful and unique comity considerations as to this question demand an authoritative statement from the Georgia Supreme Court.

Plaintiff-Appellee wrongly argues that certification is inappropriate because the scope of sovereign immunity is not "determinative" of his nuisance claim or of the case. (Appellee Br. 45 n.18.) That question is determinative of his nuisance claim, which does not survive in the absence of an expanded judge-made sovereign immunity exception. *See supra* 15–21. This Court does not artificially restrict certification of unsettled questions of state law to those that would decide an entire case; this Court regularly certifies questions to the Georgia Supreme Court that are determinative of a claim on appeal where other "claims remain pending in the district court." *FDIC v. Skow*, 741 F.3d 1342, 1344 n.2 (11th Cir. 2013) (per curiam).

B. Plaintiff-Appellee's Nuisance Claim Does Not Arise Under the Just Compensation Provision.

Plaintiff-Appellee has failed to prove the waiver of Dalton Utilities' sovereign immunity because his nuisance claim is not predicated on an alleged taking of private property under the Just Compensation Provision, for several reasons.

First, Plaintiff-Appellee has failed to show that city-supplied water is private property subject to the Just Compensation Provision. Georgia law requires that "a taking . . . involve the deprivation of a protected property interest" such that the plaintiff "must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it" under the "existing rules or understandings" of "state law." *Abramyan v. State*, 301 Ga. 308, 310, 800 S.E.2d 366, 369 (2017). A takings claim "fail[s] as a matter of law" where the plaintiff "fail[s] to identify the deprivation of or damage to a protected property interest." *Id.* at 312, 800 S.E.2d at 370. Because Plaintiff-Appellee has not proven that Georgia recognizes a "protected property interest" or that he has "a legitimate claim of entitlement to" city-supplied water, he does not raise a takings-based nuisance claim. *Id.* at 310, 800 S.E.2d at 369.

Casting any alternative as a "radical position" (Appellee Br. 36), Plaintiff-Appellee nonetheless fails to cite a single case in which a Georgia court has held that an individual has a protected property interest in city-supplied water. His attempt to create such a right by comparing city-supplied water to groundwater fails. (*Id.* at 36–39.) Groundwater rights are derived from Georgia law providing that real estate rights "extend[ ] downward indefinitely." O.C.G.A. § 44-1-2(b); *accord Boardman Petroleum v. Federated Mut. Ins. Co.*, 269 Ga. 326, 329, 498 S.E.2d 492, 495 (1998). Plaintiff-Appellee cites no authority showing that such

rights apply to water supplied by the city via pipe. Instead, a Northern District of Georgia court considering a similar issue concluded that "[n]o Georgia statute or case suggests that Georgia recognizes a property interest with respect to sewer services." *Georgia v. City of E. Ridge*, 949 F. Supp. 1571, 1582 (N.D. Ga. 1996); *see also Ga. Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 561, 212 S.E.2d 628, 631 (1975) ("[T]he consumer has no 'property' right in the rate he pays for utilities."). [6] Plaintiff-Appellee's attempt to distinguish authority holding that individuals have a right to use drinking water, rather than an absolute and protected property right, fails because he does not show that Georgia treats an individual's right to city-supplied water with any greater protection. *Bd. of Water Works Trs. of City of Des Moines v. SAC Cty. Bd. of Supervisors*, 890 N.W.2d 50, 72 (Iowa 2017); *In re Town of Nottingham*, 153 N.H. 539, 549, 904 A.2d 582, 592–93 (2006); *Smith v. Summit County*, 131 Ohio App. 3d 35, 43, 721 N.E.2d 482, 488 (1998).

Second, Plaintiff-Appellee's nuisance claim does not arise under the Just Compensation Provision because he does not allege a special injury. The only

[6] That city-supplied water may be considered city "property" when stolen "from city water mains," *Reynolds v. State*, 101 Ga. App. 715, 718, 115 S.E.2d 214, 217 (1960), does not demonstrate that an individual has a "legitimate claim of entitlement to" city-supplied water or show that Plaintiff-Appellee has anything more than a right to use the water. *Abramyan*, 301 Ga. at 310, 800 S.E.2d at 369.

alleged non-personal injury harm[7] that Dalton Utilities' conduct purportedly has caused is "the increased rates and surcharges" that all members of the public incur and a vague and undefined injury to the "use and enjoyment" of property, each of which stems from the purportedly contaminated water shared by all individuals who receive city-supplied water. (App'x I.418 at 62–64.) These alleged harms plainly qualify as "inconvenience[s] shared by the public in general." *Dep't of Transp. v. Taylor*, 264 Ga. 18, 21, 440 S.E.2d 652, 655 (1994). Neither harm "*exclusively*" and "uniquely" applies to Plaintiff-Appellee such that the injury "is special to the landowner and not . . . shared by the public in general." *Dep't of Transp. v. Robinson*, 260 Ga. App. 666, 668, 580 S.E.2d 535, 538 (2003) (emphasis in original). Plaintiff-Appellee raises no well-pled allegation of injury that is distinct from the purported injury that every member of the public who receives city-supplied water allegedly suffers.

Plaintiff-Appellee's cited authorities support the unremarkable principle that a special injury is not merged with a public injury. (Appellee Br. 39–41 & n.17.) But those cases confirm that to state a nuisance claim, the plaintiff must allege a "special or peculiar" injury that is distinct from harm to "the enjoyment of [a] common right." *Savannah, Fla. & W. Ry. Co. v. Parish*, 117 Ga. 893, 895–96, 45

[7] Plaintiff-Appellee's alleged personal injury cannot constitute a special injury for a takings-based nuisance claim, as "personal injury . . . does not constitute personal property that can be taken." *Rutherford v. DeKalb County*, 287 Ga. App. 366, 369, 651 S.E.2d 771, 774 (2007) (citation omitted).

S.E. 280, 280–81 (1903). *Parish* does not stand for the proposition that "any" injury to property constitutes special injury, as Plaintiff-Appellee contends. (Appellee Br. 40–41.) Rather, the Court emphasized that no special injury exists where a nuisance "affect[s] a whole community, [or] depress[es] property in an entire city," but only "where the cause and effect are close and immediate . . . due to a special and particular cause close at hand." *Parish*, 117 Ga. at 896, 45 S.E. at 280. Because the alleged harm is shared by all individuals who receive city-supplied water and Plaintiff-Appellee does not allege any injury that applies "*exclusively*" and "uniquely" to him, he fails to raise a special injury. *Robinson*, 260 Ga. App. at 668, 580 S.E.2d at 538 (emphasis in original). His allegation that a class suffered common injury only further evidences that he raises no special injury; any special injury would require assessing "the unique situation of each plaintiff and his or her use and enjoyment of the property" that would fail the typicality prerequisite for class certification that Plaintiff-Appellee alleges he satisfies. *Mays v. Tenn. Vall. Auth.*, 274 F.R.D. 614, 625 (E.D. Tenn. 2011).

Third, Plaintiff-Appellee is bound by his concession that his nuisance claim is not predicated upon an alleged taking, which is consistent with the allegations in his complaint. "The verbal admission by [Plaintiff-Appellee]'s counsel at oral argument is a binding judicial admission, the same as any other formal concession made during the course of proceedings." *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d

677, 680 (7th Cir. 2002). Plaintiff-Appellee stated unequivocally below that Georgia law recognizes an expanded waiver of sovereign immunity for "either a danger to life or health – *what we're alleging here* – *or* a taking of property." (App'x III.571 at 70 (emphasis added).) His "judicial admission is conclusive" and "may not be controverted at trial or on appeal." *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995).

Plaintiff-Appellee cannot escape his binding judicial concession by relying upon separate arguments he made outside the context of sovereign immunity. (Appellee Br. 34 n.12 (citing App'x III.571 at 76–77 (addressing "special injury" inquiry)).) Plaintiff-Appellee's opposition to Dalton Utilities' motion to dismiss confirms that his concession was unequivocal and purposeful; he never argued in his briefing that his claim is predicated on an alleged taking of private property. (App'x III.511 at 34–38.) Plaintiff-Appellee argued only that Georgia law does not limit the waiver of sovereign immunity to takings-based nuisance claims. (*Id.*) The reason for Plaintiff-Appellee's argument and concession below is simple: the complaint raises only allegations of personal injury and financial harm relating to money paid to the City of Rome for the *city* to remediate the *city's* water supply. (App'x I.418 at 62–64.) Conclusory allegations of "interference with the property rights of Plaintiff" fail to provide sufficient factual detail necessary to invoke the Just Compensation Provision in the context of allegations that focus exclusively on

other purported injury, nor can they overcome Plaintiff-Appellee's binding concession to the contrary.

Finally, Plaintiff-Appellee cannot avoid this Court's review by arguing that Dalton Utilities "failed to address below any of Plaintiff's property-related allegations." (Appellee Br. 32 n.11; *accord id.* at 31–32, 36, 39 & n.10.) Dalton Utilities stated below that "Plaintiff has not alleged that Dalton Utilities engaged in any conduct that would implicate the eminent domain clause by taking or damaging private property without just and adequate compensation" necessary to waive sovereign immunity. (App'x III.533 at 12–13; *accord* App'x III.571 at 55–56, 98.) It also argued that Plaintiff-Appellee "suffer[ed] no special harm, and his public nuisance claim must be dismissed." (App'x II.474-1 at 40.) Moreover, "new *arguments* relating to preserved claims may be reviewed on appeal," which is particularly true where, as here, "the parties have fully briefed and argued the question" on appeal. *Black v. Wigington*, 811 F.3d 1259, 1268–69 (11th Cir. 2016) (emphasis in original). Dalton Utilities raised sovereign immunity (App'x II.474-1 at 37–39; App'x III.533 at 12–14; App'x III.571 at 54–57, 98), and sovereign immunity arguments are properly before this Court. *Black*, 811 F.3d at 1268–69.

III. Even if Plaintiff-Appellee Alleged a Takings-Based Nuisance Claim or Georgia Law Waived Sovereign Immunity for Personal Injury Nuisance Claims, Dalton Utilities Still Is Entitled to Sovereign Immunity.

Even if Plaintiff-Appellee were right that Georgia law waives sovereign immunity for personal injury nuisance claims or that his nuisance claim is predicated on an alleged taking of private property under the Just Compensation Provision, he has not proven a waiver of sovereign immunity because he does not allege that Dalton Utilities created or maintained a nuisance.[8] (Appellant Br. 43–53.) "[A] municipality enjoys sovereign immunity" unless it causes damage "to a third party from the creation and maintenance of a nuisance." *Hibbs v. City of Riverdale*, 267 Ga. 337, 337, 478 S.E.2d 121, 122 (1996); *accord Gatto*, 312 Ga. at 168–69, 860 S.E.2d at 717–18. Absent a specific duty for the city to act in the case of "discretionary nonfeasance," a city creates or maintains a nuisance only in the event of "negligent maintenance of something erected by the city in its discretion in such manner as to create a dangerous nuisance, and which amounts to misfeasance." *Bowen v. Little*, 139 Ga. App. 176, 176–77, 228 S.E.2d 159, 160–61 (1976). The complaint presents a classic case of discretionary nonfeasance: Dalton Utilities allegedly has allowed per- and polyfluoroalkyl substances

[8] Plaintiff-Appellee raises another incorrect waiver argument. (Appellee Br. 46 n.19.) Dalton Utilities moved to dismiss Plaintiff-Appellee's nuisance claim on sovereign immunity grounds, preserving the issue. *See infra* 21. These issues also were not at stake in light of *Sustainable Coast*; the Georgia Supreme Court did not issue its opinion in *Gatto* until after briefing and argument.

("PFAS") that third parties manufactured and introduced to industrial wastewater to pass through its water treatment facility (App'x I.418 at 5, 21, 32); Plaintiff-Appellee does not allege Dalton Utilities "create[d] a dangerous nuisance" by manufacturing PFAS and introducing it to the wastewater treatment system or by maintaining a defective wastewater treatment facility. *Bowen*, 139 Ga. App. at 176–77, 228 S.E.2d at 160–61. Because Plaintiff-Appellee fails to show that Georgia law imposes a specific duty requiring Dalton Utilities to remediate third party-created PFAS to some specified amount, Plaintiff-Appellee does not allege that Dalton Utilities created or maintained a nuisance. *Tamas v. Columbus*, 244 Ga. 200, 202, 259 S.E.2d 457, 458 (1979); *City of Atlanta v. Demita*, 329 Ga. App. 33, 33–38, 762 S.E.2d 436, 437–41 (2014).[9] Sovereign immunity thus protects Dalton Utilities from Plaintiff-Appellee's claim.

Plaintiff-Appellee wrongly argues he has alleged that Dalton Utilities created the purported nuisance because it maintains a wastewater treatment facility and "takes the 'positive acts' of continually applying PFAS-contaminated water to the [Land Application System ("LAS")] every day." (Appellee Br. 49.) A city engages in misfeasance only where it "*maintain[s]* a defective [property], thereby

[9] Plaintiff-Appellee wrongly contends that he will have proven a waiver of sovereign immunity if he raises a takings-based nuisance claim. (Appellee Br. 17–18.) Georgia courts also require the plaintiff to show that a city has engaged in misfeasance or has failed to rectify a danger in violation of a specific duty to act for takings-based nuisance claims. *See Demita*, 329 Ga. App. at 33–38, 762 S.E.2d at 437–41.

creating a nuisance." *Tamas*, 244 Ga. at 202, 259 S.E.2d at 458 (emphasis in original). Here, as Plaintiff-Appellee concedes, third parties create the alleged nuisance—the purported contamination—that purportedly passes through Dalton Utilities' wastewater treatment system; Plaintiff-Appellee does not allege that the system itself was designed to remediate the alleged contamination and is defective in failing to do so, thereby creating a nuisance. Plaintiff-Appellee's cases, which address defective city property and wrongful city conduct that created a nuisance, are inapposite. *City of Columbus v. Myszka*, 246 Ga. 571, 571, 272 S.E.2d 302, 304 (1980) (per curiam) (city "creat[ed] a nuisance" where it "knowingly allowed a leaking sanitary sewer to flow human sewage across [the plaintiff]'s property" and "approved construction projects" that caused "increased rainwater run-off"); *accord Duffield v. DeKalb County*, 242 Ga. 432, 432, 249 S.E.2d 235, 236 (1978) (facility created "noise and odors"); *Ingram v. Acworth*, 90 Ga. App. 719, 720–722, 84 S.E.2d 99, 101–02 (1954) ("fumes given off from the installation").

Plaintiff-Appellee also fails to distinguish the Georgia Court of Appeals' holding in *Demita*, which supports that Dalton Utilities did not create the alleged nuisance. The court in *Demita* did not analyze whether "the city could be liable for the mere fact it erected the street" (Appellee Br. 48–49), but rather whether "the City's conduct in *maintaining* a street" caused the alleged nuisance. 329 Ga. App. at 37–38, 762 S.E.2d at 440–41 (emphasis added). The court concluded that the

city's street maintenance did not create the alleged nuisance because "[t]his is not a case where the City's conduct in maintaining a street diverted or changed the flow of water so that it flooded adjacent property." *Id.* at 38, 762 S.E.2d at 440–41. Instead, "new construction adjacent to an existing city street and natural forces" caused water to rush onto the street and then flood the plaintiff's property. *Id.* Just as the city did not engage in misfeasance in *Demita* because third-party construction caused water to rush onto the city-maintained street that flooded the plaintiff's property, Plaintiff-Appellee does not (and cannot) allege misfeasance because third-party conduct allegedly caused contamination to pass through Dalton Utilities-maintained water treatment plant and purportedly contaminate the City of Rome's water supply. In both situations, the plaintiffs failed to allege that the city engaged in "negligent maintenance" of its property, thereby "*creat[ing]* a dangerous nuisance." *Bowen*, 139 Ga. App. at 177, 228 S.E.2d at 160–61 (emphasis added); *accord Demita*, 329 Ga. App. at 37–38, 762 S.E.2d at 440–41.

Plaintiff-Appellee effectively concedes that if he does not raise allegations of misfeasance, Dalton Utilities is entitled to sovereign immunity because Georgia law imposes no specific duty to prevent the alleged harm. He does not dispute that "[a]bsent an ordinance or statute requiring the City to [take certain action], it may not be held liable for exercising its discretion not to do so." *City of Alpharetta v. Hamby*, 352 Ga. App. 511, 514, 835 S.E.2d 366, 370 (2019); *accord* O.C.G.A.

§ 36-33-2 ("Where municipal corporations are not required by statute to perform an act, they may not be held liable for exercising their discretion in failing to perform the act."); *City of Alpharetta v. Vlass*, 360 Ga. App. 432, 436, 861 S.E.2d 249, 252–53 (2021); *City of Toccoa v. Pittman*, 286 Ga. App. 213, 217, 648 S.E.2d 733, 737–38 (2007); *Spooner v. City of Camilla*, 256 Ga. App. 179, 183–84, 568 S.E.2d 109, 113 (2002); *Hancock v. Dalton*, 131 Ga. App. 178, 181, 205 S.E.2d 470, 472 (1974).

Plaintiff-Appellee fails to identify any specific duty requiring Dalton Utilities to remove PFAS discharged by third parties into the collection system during treatment. While Plaintiff-Appellee argues that Dalton Utilities' LAS "exists and operates on the condition that Dalton Utilities prevent *any* pollutant discharges to the Conasauga River (or other waters of the United States)—much less those it knows are toxic" (Appellee Br. 49) (emphasis in original), his only support for this sweeping contention is a conclusory allegation in the complaint that relates to the conduct of *other defendants*: "[T]he LAS Permit . . . in no way authorizes Defendants' discharges of PFAS into the Dalton [Utilities Publicly Owned Treatment Works]." (App'x I.418 at 34; *see also id.* at 3 ("*As a result of unauthorized discharges by industrial users*, Dalton Utilities has discharged and continues to discharge PFAS from its wastewater collection system and the [LAS] . . . ." (emphasis added).)) Plaintiff-Appellee fails to allege or show that

Georgia law imposes a *specific* duty upon *Dalton Utilities* to prevent discharge of PFAS that third parties have introduced to its wastewater treatment system. In the absence of a specific duty, Plaintiff-Appellee's nuisance claim fails to allege that Dalton Utilities created or maintained a nuisance. *Vlass*, 360 Ga. App. at 436, 861 S.E.2d at 252–53; *Hamby*, 352 Ga. App. at 514–15, 835 S.E.2d at 370; *Pittman*, 286 Ga. App. at 217, 648 S.E.2d at 737–38; *Spooner*, 256 Ga. App. at 183–84, 568 S.E.2d at 113; *Hancock*, 131 Ga. App. at 181, 205 S.E.2d at 472.

CONCLUSION

The Court should reverse the order denying Dalton Utilities' motion to dismiss Count Seven of the Third Amended Complaint and remand for further proceedings.

Respectfully submitted, this 24th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,498 words, excluding the parts of the brief exempted by Eleventh Circuit Rule 32-4.

This 24th day of March, 2022.

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CERTIFICATE OF SERVICE

By signature below, counsel certifies that the foregoing REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of Court using the ECF system.

This 24th day of March, 2022.

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