No. S24A0591

In the
SUPREME COURT OF GEORGIA

Nikema Williams, et al.,
Plaintiff-Appellants,

v.

Colin Powell, et al.,
Defendant-Appellees.

On Appeal from
the Superior Court of Fulton County, Georgia
No. 2022CV373299

PLAINTIFF-APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

This case squarely presents the constitutionality of O.C.G.A. § 16-11-34.1(a) (f) and (g) under the Georgia Constitution. Like O.C.G.A. § 16-11-34, which was found to be unconstitutionally overbroad in *State v. Fielden*, the similarly drafted O.C.G.A. § 16-11-34.1 violates the Georgia Constitution's protections for free speech because it does not require proof of intent to disrupt, proof that acts would substantially impair legislative business, or proof of any actual disruption. 280 Ga. 444, 447-448 (2006). Thus, the statute proscribes significant protected expression in violation of the Georgia Constitution, and the dismissal of this case and denial of a preliminary injunction should be reversed. The text of O.C.G.A. § 16-11-34.1 is identical to *Fielden*'s O.C.G.A. § 16-11-34, rendering O.C.G.A. § 16-11-34.1 facially overbroad.

Defendant-Appellees emphasize each of the ways that the scope of § 34 is different from § 34.1. But these differences are exaggerated on the one hand and immaterial on the other. Appellees' argument is simply not faithful to *Fielden* and its logic. They assert that "it is difficult to imagine" a statute worded any other way and, if *Fielden* applied, the only "alternative would be to shut down public access to the Capitol altogether." *Id.* The reality is that *Fielden* charts a clear path for a legislative fix. Intent to disrupt, substantial impairment, and actual disruption are critical bulwarks that balance protection of free speech against

orderly administration at the State Capitol. In the generation since this Court rendered its judgment in *Fielden*, the skies have not fallen upon Georgia's public meetings. If this Court applies the clear and well-reasoned principles from *Fielden* to O.C.G.A. § 16-11-34.1, the skies will likewise not fall upon our Capitol.

RESPONSE TO APPELLEES' STATEMENT OF FACTS

Appellees' slanted account of the facts in this case includes, *inter alia*, claims of a "raucous" gathering with "angry shouting" and "several warnings" at the first event in the Capitol Rotunda, and "continually pounding," "banging," and "disrupting" as to the second event at the Governor's office door. *Appellee Brief* at 2-3, 5-7, 34. Appellees' recitation of facts, directly contradicted by the Complaint and sharply disputed in this litigation, is not appropriate on the appeal of a Motion to Dismiss.[1] Moreover, these factual disputes are simply not relevant given the facial overbreadth doctrine in free speech cases:

> [A]ltered traditional rules of standing to permit—in the First Amendment area—"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

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[1] *Norman v. Xytex Corp.*, 310 Ga. 127, 130-131 (2020) ("any doubts regarding the complaint must be construed in favor of the plaintiff") (citing *Austin v. Clark,* 294 Ga. 773, 775 (2014)); *see also Mabra v. SF, Inc.,* 316 Ga. App. 62, 65 (2012) ("In considering a motion to dismiss for failure to state a claim, the trial court is required to take the factual allegations in the complaint as true.").

Broaderick v. Oklahoma, 413 U.S. 601, 611-612 (1973) (*quoting Dombroski v. Pfister*, 380 U.S. 479, 486 (1965)) (emphasis added).

The deep factual disputes regarding these events will have their day in discovery in the damages case in federal court, but the facial constitutionality question before this Court does not turn on those facts for purposes of facial constitutionality or the disposition of the motion to dismiss.

I. O.C.G.A. § 16-11-34.1(a) IS FUNCTIONALLY IDENTICAL TO THE CODE SECTION THIS COURT STRUCK DOWN IN *FIELDEN* AS FACIALLY AND SUBSTANTIALLY OVERBROAD, THOUGH IT APPLIES TO A DIFFERENT LOCATION

Appellees' argument focuses on the different geographic location/scope of the statute here versus the geographic footprint in *Fielden*. The Appellees suggest that overbreadth analysis is only applicable to laws placing a large footprint across the state. *Appellee Brief* at 25 (law applied to "single, identifiable, government entity . . . poses . . . [no] overbreadth concerns"). That is inconsistent with overbreadth precedent and protection for core free speech.

Appellees' Geographic Footprint Argument: First, Appellees' geographic footprint argument simply ignores the dispositive maladies identified in *Fielden* that rendered the otherwise identical statute unconstitutionally overbroad:

> Under the literal language of the statute, the only proof required is that the person recklessly or knowingly committed any act that may reasonably be expected to prevent or disrupt a lawful meeting, gathering or procession. It does not matter under the statute where or when the accused commits the proscribed act; it does not even

> matter whether the act, upon its commission, results in any actual prevention or disruption.

State v. Fielden, 280 Ga. 444, 447 (2006).

Any fair reading of *Fielden* should embrace the laser focus of that decision on these maladies. *Id.* ("These examples demonstrate that the literal language of O.C.G.A. § 16-11-34 reaches conduct that is at once innocent and protected by the guarantees of free speech, thereby affecting and chilling constitutionally protected activity."). O.C.G.A. § 16-11-34.1 has identical, and similarly problematic, textual elements.[2]

In attempting to distinguish *Fielden*, Appellees stray far from the language and logic of that opinion, and instead rely on their belief that it is "nonsensical" to suggest that a statute limited to disruptions of a single, identifiable, government entity … poses … overbreadth concerns…." *Appellee Brief* at 25. Appellees make this argument despite the nearly identical language of the statute at issue in *Fielden*, and the statute here. This unsupported argument

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[2] Appellees seek to rely on this Court's decision upholding Georgia's terroristic threats statute. *Appellee Brief* at 18, 24 (citing *Major v. State*, 301 Ga. 147 (2017)). The terroristic threats statute covered more concerning speech but, more importantly, that statute required an actual and "serious" impact. *Id.* at 151-52 (statute "requires that a person communicate a threat of violence in a purposeful or reckless manner, both of which are true threats"). *See also* O.C.G.A. § 16-11-37(a) ("to burn or damage property with the purpose of terrorizing another or of causing the evacuation of a building, place of assembly, or facility of public transportation or otherwise causing serious public inconvenience or in reckless disregard of the risk of causing such terror or inconvenience….").

might well preclude overbreadth analysis of local ordinances regulating city and county public meetings, restricting speech in other narrow geographic footprints. Indeed, under Appellee's argument, an overbroad city ordinance might be upheld, while an otherwise identical state law might be struck down simply because it has a larger footprint. Yet, local laws are frequently subject to successful overbreadth challenges despite narrow geographic footprints because a significant amount of speech in that location is criminalized. *See e.g., Pel Asso, Inc. v. Joseph,* 262 Ga. 904 (1993) (finding city ordinance criminalizing some forms of nude dancing unconstitutionally overbroad); *Reeves v. McConn,* 631 F.2d 377 (5th Cir. 1980) (finding unconstitutionally overbroad criminal ordinance on limiting use of sound equipment in a city).

Not surprisingly, Appellees' argument cites no overbreadth cases that turn only on the breadth of the geographic footprint. In fact, the United States Supreme Court invalidated a statute criminalizing free speech activities on an even smaller footprint than the location here: "in the United States Supreme Court building and on its grounds." *Grace v. United States,* 461 U.S. 171, 171 (1983). As here, the Supreme Court ground covered both public forum areas and non-public forum areas. *Id.* at 180. While rejecting that statute under time, place, and manner analysis, *Id.* at 183-84, the Supreme Court has noted the overlap of these doctrines and that "[f]acial overbreadth claims have [ ] been entertained where statutes, by their terms, purport to regulate the time, place and manner of

expressive or communicative conduct…." *Broaderick v. Oklahoma,* 413 U.S. 601, 612-613 (1973).[3]

Moreover, this Court has applied overbreadth analysis to a non-public forum on school grounds. *West v. State*, 300 Ga. 39, 39-44 (2016) (finding statute "unconstitutionally overbroad" that "makes it a misdemeanor for any person not a student—after being advised that pupils are present and continuing to speak critically, reproachfully, indignantly, or disparagingly toward any public school teacher, administrator, or bus driver in the presence and hearing of a pupil—to remain on the school premises or bus after being ordered to leave by a school official"). Like *Fielden,* the *West* overbreadth analysis did not focus on the statute's geographic reach to a mostly non-public forum, but on the "practical effect of the plain language," which impacted a substantial amount of protected speech in that forum. *Id.* at 44.

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[3] While the Appellees have belatedly argued that a time, place, and manner analysis should apply, *Appellee Brief* at 16-17, *Fielden* did not employ or consider that doctrine. The Supreme Court has repeatedly held "overbroad" measures that unduly restricted the time, place, or manner of expression. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 59 n. 17 (1976) ("Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place and manner of expressive or communicative conduct.") Finally, Appellees curiously cite *State v. Lindares*, 232 Conn. 345 (1995) in support of their argument, but that Connecticut statute had the elements that are lacking in *Fielden* – specific intent and actual disruption of Connecticut's General Assembly. This Court should follow *Fielden*, *West*, and *Cunningham* by employing overbreadth analysis. Regardless, O.C.G.A. § 16-11-34.1 fails under either analysis.

The substantial overbreadth of the statute here is amply demonstrated by the breadth of free speech activity proscribed by O.C.G.A. § 16-11-34.1, the dozen-plus arrests, numerous threats of arrests by Capitol Police, and the common-sense applications criminalized by O.C.G.A. § 16-11-34.1.

O.C.G.A. § 16-11-34.1's Geographic Footprint: The geographic reach of O.C.G.A. § 16-11-34.1 is broader, and the protected speech criminalized far more substantial, than Appellees suggest. On the question of substantial overbreadth, the evidence here is powerful. First, even Appellees admit that the Capitol Rotunda is a designated public forum – a location to "hold events, stage protests, give press conferences, erect religious displays, and engage in *any* form of otherwise lawful expression." *Appellee Brief* at 11, 19 (emphasis in original). Any of these activities might (and some have) run afoul of O.C.G.A. § 16-11-34.1, demonstrating the statute's substantial reach.[4] Second, Appellees concede that "informal 'caucuses' in a hallway," a routine form of lawful expression at the Capitol, could disrupt General Assembly business. *Appellee Brief* at 21. Additionally, Appellees appear to concede that "study committees that meet all

[4] For example, in March 2018, a protestor was prohibited from silently holding a sign—a form of lawful expression. The protester, represented by the ACLU of Georgia, secured a temporary restraining order after she filed a lawsuit that challenged O.C.G.A. § 16-11.34.1 as the source of the ban on signs. (V1 – 208-210.) These instances clearly demonstrate that O.C.G.A. § 16-11-34.1, like the *Fielden* statute, "reaches conduct that is at once innocent and protected by the guarantees of free speech, thereby affecting and chilling constitutionally protected activity." *State v. Fielden*, 280 Ga. 444, 447 (2006).

over the state" are within the reach of O.C.G.A. § 16-11-34.1's broad geographic scope. *Appellee Brief* at 25.

Arrests and Threats of Arrest: Appellees attempt to explain away prior documented incidents where Capitol Police prohibited entry into the State Capitol with protester signs and buttons as well as entry into the legislative gallery. They argue that these prior incidents were untethered from O.C.G.A. § 16-11-34.1. Yet, Appellees cite no other statute justifying law enforcement limiting speech at the Capitol, nor do Appellees explain why Capitol Police passed out copies of O.C.G.A. § 16-11-34.1 to some protesters entering the Capitol, thus silencing the protestors, who feared being arrested. *Appellee Brief* at 20. In all these documented instances, there was no arrest, because the citizens were forced to forgo their intended expression (signs, buttons, and speech) when entering the Capitol grounds.

Common-Sense Hypotheticals: Appellees reject as "fanciful hypotheticals," scenarios drawn directly from the *Fielden* opinion. Their argument is wholly inconsistent with *Fielden*, yet they, correctly, do not argue that *Fielden* was wrongly decided or that it should be overruled. This Court in *Fielden* found the similarly worded O.C.G.A. § 16-11-34 substantially overbroad even absent any other arrests or incidents in the record. In finding substantial overbreadth, *Fielden* exclusively explored hypothetical situations, many of which are also criminalized by O.C.G.A. § 16-11-34.1(a).

Simply "leaving on the audible ringer of a cellphone," which was specifically mentioned by this Court in *Fielden*, or even coughing at a General Assembly committee meeting, could lead to arrest under O.C.G.A. § 16-11-34.1(a). *See* 280 Ga. at 447. In contentious meetings at the Georgia State Capitol, there is a distinct possibility that strongly spoken contrary viewpoints may violate O.C.G.A. § 16-11-34.1(a). *Fielden* identified "heckling . . . at a sports venue" as evidence of overbreadth. *Id*. It is surely equally true that the contentious Georgia General Assembly or any meeting statewide for study committees are frequently places where "heckling," "loud," or "abusive" speech may occur. Heated rhetoric is, for better or worse, part of our political heritage. These are not, as Appellees claim, "imaginary" incidents, but are echoed in the facts of prior actual cases.[5] *Appellee Brief* at 21.

In numerous other cases, this Court found statutes substantially overbroad premised on the text of statutes, a single arrest, and hypotheticals. *West v. State*, 300 Ga. 39, 43-44 (2016) (finding statute substantially overbroad based upon facts of single arrest and "practical effect of plain language" when considering

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[5] *See also Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499 (11th Cir. 1990) (finding school employee's "quiet and nondisruptive" exit was expressive conduct that could not be considered disruptive); *Acosta v. City of Costa Mesa*, 718 F.3d 800, 815 (9th Cir. 2013) ("Accordingly, a comment amounting to nothing more than bold criticism of City Council members would fall in this category, whereas complimentary comments would be allowed. Nothing guarantees that such a comment would rise to the level of actual disruption."); *Freeman v. State,* 302 Ga. 181, 185 (2017) (addressing lewd gesture in a meeting).

hypothetical fact scenarios); *Cunningham v. State*, 260 Ga. 827, 831 (1991) (finding statute overbroad based upon single arrest and hypothetical factual scenarios and concluding statute "reaches a substantial amount of constitutionally protected speech and unconstitutionally restricts freedom of expression as guaranteed by the First and Fourteenth Amendments of the United States Constitution and by the Georgia Constitution"). Here, substantial overbreadth is demonstrated by (1) multiple arrests (of persons speaking, those silent/present, and knocking), and (2) other incidents of silencing protesters (buttons/signs/ speaking), and (3) the realistic hypotheticals drawn from *Fielden*.

The import of free expression at the Georgia State Capitol—the centerpiece of the legislative and executive branches of government—is given disturbingly short shrift in Appellees' substantial overbreadth calculus. *See Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d. 1383, 1388 (11th Cir. 1993) (en banc) ("As a matter of course, Georgia grants private speakers equal and unimpeded access to the Rotunda, a designated public forum."). The Supreme Court has found far more narrow limits on less protected core free speech were unconstitutionally overbroad. *See, e.g., United States v. Stevens*, 559 U.S. 460 (2010) (finding a federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty substantially overbroad); *Pel Asso, Inc. v. Joseph,* 262 Ga. 904, 906 (1993) (finding a city nude dancing ordinance overbroad).

Appellees even suggest that a ruling in favor of Appellants here may shut the doors on "the State Capitol [being] open to the public," *Appellee Brief* at 1, 18, stating that the "obvious alternative would be to shut down public access to the Capitol altogether."[6] Appellees ignore *Fielden*'s previously outlined legislative fix—appropriate modifications to O.C.G.A. § 16-11-34.1(a) following the roadmap established by this Court – specifically by modifying the elements of intentional and actual disruptions of the orderly proceedings of the General Assembly:

> Our review of cases in our sister states reveals that they have often been able to cure their disruption of lawful meeting statutes by narrowing them in such a manner that the statutory proscription extends only to constitutionally unprotected activities, i.e., those activities intended to prevent or disrupt a lawful meeting and which either cause the untimely termination of the lawful meeting or substantially impair the conduct of the lawful meeting.

Fielden, 280 Ga. at 448 (2006).[7]

Appellees fail to distance this case from *Fielden* and traditional overbreadth analysis. O.C.G.A. § 16-11-34.1(a) has the same textual problems as the *Fielden*

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[6] Appellants note that they challenge only three of the eight subsections of O.C.G.A. § 16-11-34.1 and that the unchallenged sections all create separate crimes about a variety of disruptive conduct at the Georgia General Assembly. No party has suggested that the challenged subsections are not severable.

[7] Other states have such statutes. *See* Tenn. Code Ann. § 39-17-306 (discussed in *Fielden*); S.C. Code Ann. § 30-4-70; N.C. Gen. Stat. § 143-318.17; and Cal. Gov't Code § 54957.95.

statute, and Appellants have shown that those textual problems catch a substantial amount of protected speech in the net of this statute.

II. O.C.G.A. § 16-11-34.1(f) AND (g) ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD

While Appellants recognize that the *Fielden* statute was not found to be vague, the actual application illustrated here, as well as two additional subsections unique to O.C.G.A. § 16-11-34.1, subsections (f) and (g), present significant vagueness and overbreadth concerns:

> (f) It shall be unlawful for any person willfully and knowingly to enter or to remain in any room, chamber, office, or hallway within the state capitol building or any building housing committee offices, committee rooms, or offices of members, officials, or employees of the General Assembly or either house thereof with intent to disrupt the orderly conduct of official business or to utter loud, threatening, or abusive language or engage in any disorderly or disruptive conduct in such buildings or areas.
>
> (g) It shall be unlawful for any person to parade, demonstrate, or picket within the state capitol building or any building housing committee offices, committee rooms, or offices of members, officials, or employees of the General Assembly or either house thereof with intent to disrupt the orderly conduct of official business or to utter loud, threatening, or abusive language or engage in any disorderly or disruptive conduct in such buildings or areas.

Appellees fail to properly address both subsections' glaring textual problems, their potential for arbitrary enforcement, and the undefined terms within each subsection.

A. Proper Statutory Construction of Subsections (f) and (g)

Appellees appear to concede that these subsections may be applied unconstitutionally, but they say the "basic sweep of these provisions prohibits intentionally disruptive conduct." *Appellee Brief* at 29. They argue that the scienter and disruptive impact requirements of each subsection carry through to all acts proscribed by that subsection. The fundamental problem with their argument is textual: both subsections utilize identical language that separates out three offenses (with "or"), rather than combining elements (with "and") into one crime. Put another way, O.C.G.A. § 16-11-34.1 (f) and (g) each contain three separate offenses rather than one offense that has intent **and** disruption elements. Thus, despite the Appellees' suggestion that they are "perfectly understandable to the general public," these subsections are overbroad and vague. *Appellee Brief* at 27.

Critically, while they argue that one would be "hard pressed" to read these prohibitions as "freestanding," their reading substitutes the key word "or" with "and." *Appellee Brief* at 30-31. The term "or" (rather than "and") is used by both Subsection (f) and (g) and creates three separate (but unconstitutional) offenses rather than one potentially constitutional offense.

Subsection (f) addresses "willfully and knowingly [entering] or [remaining] in any room, chamber, office, or hallway within the state capitol building or any building housing committee offices, committee rooms, or offices

of members, officials, or employees of the General Assembly or either house thereof." But critically, that activity is prohibited if conjoined with any one of three additional elements (rather than all three elements) because of the use of "or" rather than "and":

(1) "with intent to disrupt the orderly conduct of official business **or**"

(2) "to utter loud, threatening, or abusive language **or**"

(3) "engage in any disorderly or disruptive conduct in such buildings or areas."

O.C.G.A. § 16-11-34.1(f).

If the word "and" were used in drafting for these three categories, then a person would have to "enter or [] remain" with prohibited intent **and** engage in "loud, threatening or abusive" speech or conduct, **and** the act would have to create an actual "disorderly or disruptive" effect. However, the use of "or" separates, rather than adds, those factors into separate offenses, creating three freestanding possibilities to violate the statute.

Subsection (g) suffers the same problem. The subsection is directed at citizens who "parade, demonstrate, or picket within the state capitol building or any building housing committee offices, committee rooms, or offices of members, officials, or employees of the General Assembly or either house thereof." And again, like Subsection (f), three independent things are prohibited by the statutes use of "or" rather than "and":

(1) "intent to disrupt the orderly conduct of official business **or**"

(2) "to utter loud, threatening, or abusive language **or**"

(3) "engage in any disorderly or disruptive conduct in such buildings or areas."

O.C.G.A. § 16-11-34.1 (g).

Like Subsection (f), this subsection creates three separate offenses that are unconstitutional, rather than one constitutional offense.

This Court has repeatedly dealt with similar uses of "or" rather than "and." In *State v. Riggs*, the Georgia Supreme Court addressed a statute that, unlike similar statutes in other states, used "or" rather than "and," and rendered a different analysis than the similar statutes in other states:

> If our statute were written in the disjunctive like the statutes of Indiana and Oregon, we might arrive at a conclusion similar to Indiana's high court. "The natural meaning of 'or' where used as a connective, is to mark an alternative and present choice, implying an election to do one of two things[.]" But our statute is not written in the disjunctive.

301 Ga. 63, 73 (2017); *see also Gearinger v. Lee*, 266 Ga. 167, 169 (1996) ("[W]here a legislative provision is phrased in the disjunctive, it must be so construed absent a clear indication that a disjunctive construction is contrary to the legislative intent. Applying the rules of statutory construction, we hold that the use of the disjunctive in O.C.G.A. § 42-8-34.1(c) indicates that violation of probation can result from two separate, alternative possibilities: the commission of a felony offense or the violation of a special condition.") (citation omitted); *see also In re*

J.C.W., 318 Ga. App. 772, 782-783 (2012) ("The natural meaning of 'or,' where used as a connective, is 'to mark an alternative and present choice, implying an election to do one of two things.'" And, where the Legislature has intended a preference for relative placement, it has previously made its intention clear.") (citation omitted).

Moreover, given that O.C.G.A. § 16-11-34.1 is a criminal statute:

> [E]ven if such meaning was not entirely clear, and if we were to conclude that the statute is ambiguous on this point, the rule of lenity should resolve this ambiguity against the State . . .. "Under the rule of lenity, ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor." It "is applied only when an ambiguity still exists after having applied the traditional canons of statutory construction."

Kinslow v. State, 311 Ga. 768, 776 (2021) (citations omitted).

"And" is not the same as "or." Of course, this Court "must presume that the General Assembly meant what it said and said what it meant." *Deal v. Coleman*, 294 Ga. 170, 172–73 (2013) (internal quotation marks and citations omitted). Relatedly, "the legislature is presumed to know . . . the rules of grammar." *Id.* (internal quotation marks and citations omitted). Using the appropriate statutory construction, and giving import to the words chosen by the legislature (in this case the use of "or," not "and"), Subsections (f) and (g) of O.C.G.A. § 16-11-34.1 are facially unconstitutional because none of the three

offenses[8] contained in each subsection include both an intent to disrupt, and a showing of actual disruption – the twin maladies this Court identified in *Fielden*.[9]

B. O.C.G.A. § 16-11.34.1 (f) and (g) are Susceptible to Arbitrary Enforcement

O.C.G.A. § 16-11.34.1 (f) and (g) are crimes susceptible to arbitrary enforcement and are impermissibly vague because:

> [A] criminal statute must set sufficiently definite standards for those who are assigned the duty to enforce it so that basic policy matters are not impermissibly delegated "to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

Roemhild v. State, 251 Ga. 569, 572 (1983) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972)).

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[8] Appellees suggest that these subsections are the same as the language in *Fielden* that was found not to be vague, *Appellee Brief* at 28. However, in the instant case, there are three offenses separated by "or," not one offense that has both intent and disruption elements. *See Kinslow*, 311 Ga. at 778 ("Because O.C.G.A. § 16-9-93(b)(2) lists these three actions in the disjunctive, any one of them may be sufficient to support a verdict of computer trespass. The natural meaning of 'or' where used as a connective, is to mark an alternative and present choice, implying an election to do one of two things.'") (citation omitted) (Melton, C.J. *dissenting*).

[9] In distinguishing *Gooding v. Wilson*, Appellees note that the statute there targeted only speech, while O.C.G.A. § 16-11-34.1(f) and (g) have some conduct components. *Appellee Brief* at 32. However, each of the categories of offenses (1) largely concern speech, (2) lack a requirement of actual disruption, and (3) the second two categories of offenses in each subsection also lack any intent requirement.

Regardless, "hiding speech restrictions in conduct rules is not only a 'dubious constitutional enterprise'—it is also a losing constitutional strategy." *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1278 (11th Cir. 2024).

Appellees suggest that Appellants failed to show "why" the statute is susceptible to arbitrary enforcement. *Appellee Brief* at 33. However, Appellees' position overlooks a glaring problem: the use of "or" makes it textually permissible to arrest someone for being "loud," "abusive," or "disorderly," without any guidance or explanation of what being "loud," "abusive," or "disorderly" means and without the twin *Fielden* requirements of intent and disruptive impact.

C. Undefined "Loud," "Abusive," and "Disruptive"

Even assuming the *mens rea* can apply throughout subsections (f) and (g) (and ignoring the "or" breaks in offenses), the undefined terms "loud," "abusive," and "disruptive" present additional vagueness concerns.

On this score, Appellees simply ignore this Court's decision on criminalizing undefined volume. *Appellee Brief* at 30-31. Volume alone, without additional disruptive conduct, is not a sufficient reason to arrest a person for their speech. This is especially problematic where, as here, free speech is the source of the volume, there are no standards to determine what speech is loud enough to be criminal,[10] and there is no requirement that anything be disrupted.

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[10] *Cf. City of Chicago v. Morales*, 527 U.S. 41, 57 (1999) (deciding that because "the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not.").

Appellees neither cite nor distinguish *Thelen v. State*, where a law criminalizing "any ... unnecessary or unusual sound or noise which . . . annoys . . . others," was held to be impermissibly vague because it "fails to provide the requisite clear notice and sufficiently definite warning of the conduct that is prohibited." 272 Ga. at 82 (2000). As this Court explained, "unnecessary or unusual sound" "depends upon the ear of listener" and "the individualized sensitivity of each complainant." *Id.*

Here, the lack of definition regarding volume is even more problematic because the challenged subsection criminalizes (primarily) speech, while *Thelen* involved a county noise ordinance applied to a helicopter pilot. *See Wilkerson v. Seymour*, 736 F.3d 974, 978 (11th Cir. 2013) (First Amendment does not permit "officers to arrest disagreeable individuals who may be exercising their constitutionally protected rights to free speech, albeit in a loud manner.").

Likewise, courts have found that criminalizing undefined "abusive" speech is unconstitutional,[11] especially in a traditional public forum. The

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[11] *Gooding v. Wilson*, 405 U.S. 518 (1972) (striking down Georgia disorderly conduct statute as facially invalid where not proscribed to speech properly classified as "fighting words"); *Lewis v. City of New Orleans*, 415 U.S. 130, 138 (1974) (striking down a disorderly conduct conviction for calling a policeman "you goddamn m. f. police"); *Wilkerson v. Seymour*, 736 F.3d 974, 978 (11th Cir. 2013) (affirming the denial of summary judgment where the plaintiff spoke in a loud voice to officers while in the parking lot of a sports bar and used the words "hell" and "damn" when objecting to an officer's request that she move her parked car); *Merenda v. Tabor*, 506 Fed. App'x 862, 866 (11th Cir. 2013) (holding an arrestee's comment to a police officer that he was a "fucking asshole" did not

complete absence of a definition of "disorderly" here fails under *Gooding v. Wilson*, 405 U.S. 518 (1972). *See also Freeman,* 302 Ga. at 185 (holding that Georgia's disorderly conduct statute was not facially overbroad because "as applied to expressive conduct, the statute **only** reaches expressive conduct that amounts to "fighting words" or a "true threat.") (emphasis in original).

Ultimately, subsections (f) and (g) are vague and overbroad in similar ways to laws that were struck down by the Georgia Supreme Court and the United States Supreme Court.[12] In the centerpiece of Georgia government, where divergent viewpoints are commonplace and spirits are high, criminalizing enthusiastically conveyed or strongly worded speech, signs, and buttons with such malleable guidance creates too great a risk that protected speech will become a crime. O.C.G.A. § 16-11-34.1 (f) and (g), are vague and/or overbroad.

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give rise to arguable probable cause to make an arrest for disorderly conduct in Georgia); *Berger v. Lawrence*, 1:13-CV- 03251, 2014 WL 12547268, at *8 & n.3 (N.D. Ga. Sept. 19, 2014) (ruling that the undisputed evidence that plaintiff yelled at officer to "go fuck yourself" was insufficient justification to arrest).

12 *See McKenzie v. State*, 279 Ga. 265, 265 (2005) (statute banning "obscene" telephone communications as overbroad because it also barred "lewd" and "indecent" communications, which could be protected speech); *Cunningham v. State*, 260 Ga. 827, 832 (1991) (striking down statute as overbroad because of its "absurd effect of criminalizing the display of a bumper sticker bearing any profanity in combination with words referring to any part of the human body"); *Gooding*, 405 U.S. at 520 (striking Georgia statute allowing arrests for "abusive" language or any arrests for disorderly conduct without the required showing of "fighting words" or an imminent breach of the peace).

III. REPRESENTATIVE CANNON'S AS-APPLIED CLAIM IS STRAIGHTFORWARD

Appellee's argument as to Representative Cannon focuses on whether knocking on a door is expressive conduct. *Appellee Brief* at 34-36.[13] First, while Appellees again seek to slant the evidence by claiming that Cannon was "banging," it is clear that knocking has been the functional equivalent of "Hello, may I enter," since the existence of doors. *See, e.g.*, *Martin v. Struthers of Ohio*, 319 U.S. 141, 149 (1943) ("For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings.").

Door knocking—an inherently communicative activity especially in the context of this case[14]—is "'sufficiently imbued with elements of communication' to implicate the First Amendment." *State v. Miller*, 260 Ga. 669, 670 n.2 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).[15]

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[13] This argument need only be reached if the facial challenge here fails.

[14] For context, Cannon was a public official at the Georgia State Capitol seeking the attention of the Governor at his office about the status of pending legislation, and she spoke words to that effect as she knocked.

[15] The First Amendment also protects "expressive conduct," meaning nonverbal acts intended to convey a message where "at least some" viewers would understand it to communicate *some* message, even if they would not "necessarily infer a *specific* message." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (emphasis in original); *see also Fort Lauderdale Food*

Finally, Appellees argue that even if knocking is expressive conduct, Representative Cannon was knocking "loudly enough" to be disruptive. *Appellees Brief* at 37. Without repeating the argument *infra* drawn from this Court's decision in *Thelen,* the standard here, "loud," gives no fair warning to the citizen that their conduct is unlawful and no guidance to the Capitol Police concerning when a knock crosses from commonplace to criminal. 272 Ga. at 82 (2000) ("unnecessary or unusual sound" "depends upon the ear of listener" and "the individualized sensitivity of each complainant" and "fails to provide the requisite clear notice and sufficiently definite warning of the conduct that is prohibited"). Accordingly, Representative Cannon's as-applied challenge to O.C.G.A. § 16-11-34.1 was not subject to dismissal.

CONCLUSION

For these reasons, Appellants request that this Court reverse the Superior Court's Final Order Granting Defendants' Motion to Dismiss and Denying as Moot Plaintiffs' Motion for Preliminary and/or Permanent Injunctive Relief, and remand for additional proceedings.

This submission does not exceed the word-count limit imposed by Rule 20.

The Court's March 19, 2024, Order granting Appellants through April 4, 2024, to file this Reply Brief is attached as **Exhibit A**.

Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018) (feeding unsheltered persons expressive conduct).

Respectfully submitted, this the 3rd day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that there is a prior agreement with the Georgia Department of Law to allow documents in a PDF format sent via email to suffice for service under Supreme Court Rule 14. I hereby certify that on April 3, 2024, I served Plaintiffs-Appellants' Reply Brief to the following counsel of record:

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EXHIBIT A

SUPREME COURT OF GEORGIA
Case No. S24A0591

March 19, 2024

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

NIKEMA WILLIAMS, CONGRESSWOMAN et al. v. COLIN POWELL et al.

Your request for an extension of time to file the reply brief of appellant in the above case is granted. You are given an extension until April 4, 2024.

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk