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

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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. Appellants were all arrested, in two separate incidents, and charged with "preventing or disrupting General Assembly sessions or other meetings of members," in violation of O.C.G.A. § 16-11-34.1, which, *inter alia,* make it unlawful for "any person recklessly or knowingly to commit any act which may reasonably be expected to prevent or disrupt a session or meeting of the Senate or House of Representatives, a joint session thereof, or any meeting of any standing or interim committee, commission, or caucus of members thereof." O.C.G.A. § 16-11-34.1(a) is facially unconstitutional for the same reasons that the virtually identical statute regarding disruption of other government meetings was declared unconstitutional in *State v. Fielden*, 280 Ga. 444, 629 S.E.2d 252 (2006).

Specifically, in *Fielden*, this Court struck down O.C.G.A. § 16-11-34(a) under the overbreadth doctrine. *Id.* The decision in *Fielden* addressed overbreadth under the United States Constitution, but this Court also emphasized that "'[t]he 1983 Constitution of Georgia provides even broader protection.'" *Id.* at 445 (*quoting State v. Miller*, 260 Ga. 669, 671, 398 S.E.2d 547 (1990)). Like O.C.G.A. § 16-11-34, the challenged statute violates the Georgia Constitution's protections for free speech because it does not require proof of intent to disrupt, does not require proof that acts would substantially impair

legislative business, and does not require proof of any actual disruption. Thus, the statute proscribes significant protected activity in violation of the Georgia Constitution.

Section I below sets out the Plaintiffs' arguments as to § 16-11-34.1(a) — the problematic subsection that aligns with the problematic elements addressed in *Fielden*. Section II addresses two other subsections of § 16-11-34.1—(f) and (g)—that exacerbate the overbreadth and present additional constitutional concerns. Section III, while not necessary for disposition of this appeal, illustrates how the Georgia Constitution may provide greater protection from overbroad laws than the United States Constitution. Section IV addresses Representative Cannon's as-applied claim for expressive conduct (knocking on the Governor's Office door) under the Georgia Constitution.

STATEMENT OF JURISDICTION

The Supreme Court of Georgia has jurisdiction of this case on appeal because it has exclusive jurisdiction over claims in "which the constitutionality of a law, ordinance or constitutional provision has been drawn in question." *See* Ga. Const. art. VI, § VI, Para. II. The Georgia Supreme Court also has appellate jurisdiction over "all equity cases." Ga. Const. art. VI, § 6, ¶ III.

The Final Order Granting Defendants' Motion to Dismiss and Denying as Moot Plaintiffs' Motion for Preliminary and/or Permanent Injunctive Relief, was entered on September 27, 2023. (V1 - 292-300.) The lower court dismissed

Plaintiffs' claim that O.C.G.A. § 16-11-34.1(a) is facially overbroad and vague in violation of the Georgia Constitution, and Plaintiffs' as-applied claim under the free speech provision of the Georgia Constitution. (V1 - 292-300) (proposed order drafted by Defendants). The Plaintiffs filed a timely notice of appeal on October 5, 2023. O.C.G.A. § 5-6-38(a) (2022). (V1 – 1-4.)

STATEMENT OF FACTS

Plaintiffs in this case were all arrested under the challenged statute, and they have also presented Affidavits outlining many other incidents where citizens were threatened with arrest or prevented from engaging in speech at the Georgia State Capitol. The facts below outline each incident and illustrate the reach and application of O.C.G.A. § 16-11-34.1.

I. Facts Outlining Impact of O.C.G.A. § 16-11-34.1.

a. The November 13, 2018, Wrongful Arrests for "Count Every Vote."

The rotunda of the Georgia State Capitol is a public forum where the public is permitted to congregate and speak. *See Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d. 1383, 1388 (11th Cir. 1993) (en banc). (V1 – 20-21.) The rotunda of the Georgia State Capitol has historically been used as a location for protests, press conferences and other free speech activity, and is the central location for free speech activity within the Georgia State Capitol. (*Id.*)

The Count-All-The-Votes Plaintiffs gathered in the Rotunda area to protest to ensure that all votes were counted. (*Id.*) Plaintiff Mary Hooks spoke to the

assembled persons about the election and the importance of speaking up to ensure that every vote was counted. (*Id.*) Some of the Count-All-The-Votes Plaintiffs chanted "Count every vote!" while other Plaintiffs stood by and did not chant. (*Id.*) No Plaintiff used any amplification. (*Id.*)

Then, as Plaintiff Mary Hooks affirmed to the assembled persons that "elections are important," she was approached from behind by one of the Defendants and arrested. (*Id.*) The Arresting Defendants then proceeded to arrest each of the Count-All-The-Votes Plaintiffs. (*Id.*) Defendants began to arrest people who had chanted as well as people who had simply silently associated with people who had chanted. (*Id.*) The Georgia House of Representatives was in session at the time of the arrests, but their work was not disrupted in any way, either before or during the arrests. (*Id.*)

Each of the Count-All-The-Votes Plaintiffs would like to return to the rotunda area to engage in similar speech activity, but the Count-All-The-Votes Plaintiffs fear that if they repeat similar speech activity, they will be arrested again. (*Id.*)

b. The March 25, 2021, Arrest of Representative Cannon for Knocking on Door.

In another incident, Plaintiff Representative Cannon was arrested on March 25, 2021. (V1 – 27-28.) That day, the Georgia House of Representatives passed Senate Bill 202 ("SB 202"), the Georgia Senate approved the changes the

House made to the bill, and SB 202 was transmitted to the Governor for his signature the same day. (*Id.*) This bill altered Georgia's voting system, which various many described as imposing voter restrictions. (*Id.*)

In her role as a State Representative, Representative Cannon began trying to obtain guidance directly from the Governor's Office regarding when SB 202 was going to be signed and become the law of the State of Georgia. (*Id.*) After knocking on the door of the Governor's office, law enforcement arrested Representative Cannon, lifting her off the ground and restraining her hands behind her back. (*Id.*)

Representative Cannon would like to engage in similar speech activity in the future, but she too fears that if she engages in similar speech activity, she will be arrested again. (*Id.*)

If and when this Court determines that O.C.G.A. § 16-11-34.1 is facially unconstitutional, the Count-All-The-Votes Plaintiffs and Representative Cannon will resume their speech activities at the Capitol.

c. Other Speech Restricted by O.C.G.A. § 16-11-34.1.

In addition to the Plaintiffs-Appellants, numerous other citizens have been threatened with arrest and had their free speech activities prohibited by the Defendants and other officials pursuant to O.C.G.A. § 16-11-34.1:

- In March 2018, a protestor was prohibited from silently holding a sign. 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.)

- In January 2019, a group of students was prevented from entering the legislative gallery while wearing t-shirts that spelled out a message. (V1 - 194, FN 10.)
- In March 2019, protestors were prevented from wearing buttons that contained a provocative four-letter word. (V1 – 212-216.)
- In February 2020, protestors were not permitted to bring any signs into the Georgia State Capitol until ACLU attorneys intervened on their behalf. (Brief for the ACLU of Georgia, et al. as Amicus Curiae Supporting Plaintiffs at 16 n.11, *Williams v. Powell*, No. S22Q0097 (Ga. Oct. 25, 2021)).
- At a gathering at the Rotunda on March 8, 2021, a citizen chose to sit and did not speak at all, fearing arrest after being handed a copy of the O.C.G.A. § 16-11-34.1(a) by Georgia State Capitol Police. (V1 – 222-225.)

COURSE OF PROCEEDINGS BELOW

On November 29, 2022, Plaintiffs filed an action for injunctive relief and declaratory judgment related to their unlawful arrest in violation of the Article I, Section I, Paragraphs I, II, V, VII, IX, and XIII of the Georgia Constitution.

Plaintiffs sought injunctive relief to bar further enforcement of O.C.G.A. § 16-11-34.1 and an order of the Court that O.C.G.A. § 16-11-34.1 is unconstitutional because it is overbroad and unconstitutional on its face and as-applied to the Plaintiffs. (V1 – 10-41.)

Defendants moved to dismiss arguing that O.C.G.A. § 16-11-34.1 was not facially unconstitutional, and that Representative Cannon's arrest did not violate her right to free speech under the Georgia Constitution. (V1 – 118-139.)

On September 27, 2023, after briefing and oral argument, and a short remote hearing before Honorable Ural Glanville, the Superior Court of Fulton County entered a Final Order drafted by Defendants granting Defendants' Motion to Dismiss and Denying as Moot Plaintiffs' Motion for Preliminary and/or Permanent Injunctive Relief. (V1 – 292-300.)

Plaintiffs appeal the Superior Court's order. On appeal, "a trial court's ruling on a motion to dismiss for failure to state a claim for which relief may be granted is reviewed de novo and the pleading being challenged . . . is construed in favor of the party who filed it." *Northway v. Allen*, 291 Ga. 227, 229, 728 S.E.2d 624, 625 (2012).

ARGUMENT

I. O.C.G.A. § 16-11-34.1(a) has the Same Problematic Elements as the Code Section This Court Struck Down in *Fielden* as Facially Overbroad, Despite Application to Different Meetings.

a. Both Statutes have Identically Problematic Overbroad Elements.

Although the Superior Court discounted the near identical language in O.C.G.A. § 16-11-34 and O.C.G.A. § 16-11-34.1, the problematic elements common to both statutes were the very reason the *Fielden* Court struck down O.C.G.A. § 16-11-34 as facially overbroad.[1] *Fielden*, 280 Ga. at 444.

The substantive portion of O.C.G.A. § 16-11-34 ("Disturbance of meeting gathering or procession") that is addressed in *Fielden* reads:

> (a) A **person who recklessly or knowingly commits any act which may reasonably be expected to prevent or disrupt** a lawful meeting, gathering, or procession is guilty of a misdemeanor. (Emphasis added).

O.C.G.A. § 16-11-34.1(a), which is challenged here, likewise reads:

> It shall be unlawful for any **person recklessly or knowingly to commit any act which may reasonably be expected to prevent or disrupt** a session or meeting of the Senate or House of Representatives, a joint session thereof, or any meeting of any standing or interim committee, commission, or caucus of members thereof. (emphasis added).

The only difference between the two provisions is the type of meetings

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[1] Like the Superior Court Order, the parallel action in federal court discounted the nearly identical language in both statutes based on a belief that O.C.G.A. § 16-11-34.1 should be analyzed differently because it addressed speech in close proximity to the Georgia General Assembly. However, *Fielden*'s reasoning and holding did not rest on the type of meetings covered or the type of meeting at issue. Rather, the focus is the common problematic elements of the speech criminalized under both statutes. (*See* Order at p. 27, *Williams v. Powell*, No. 1:20-CV-4012-MHC (N.D. Ga. Sept. 26, 2023)). Finally, as explained *infra*, the statute here is arguably more problematic in its restrictions on speech at the epicenter of state government.

covered.

This Court declared O.C.G.A. § 16-11-34 "unconstitutional and void" in *Fielden*, utilizing the overbreadth doctrine. In reaching its conclusion, this Court examined decisions of other states involving similar statutes and raising similar overbreadth challenges. This Court joined those other states' courts in recognizing a "legitimate concern" that "unruly" assertions of rights may cause interference with other citizen's rights to "association and discussion." *Id*. at 447. Yet, this Court also recognized the need to "balance" the rights of those "expressing opposing points of view." *Id.* at 446.

Critically, in striking that balance, this Court compared O.C.G.A. § 16-11-34(a) to a Tennessee statute and concluded that Georgia's law was overbroad because Georgia's statute did not have two key limiting terms: (1) an intent to disrupt the meeting and (2) a showing that "the committed act substantially impair[ed] the ordinary conduct of the meeting." *Id*. at 447. This Court concluded that the statute could only pass muster if it were **legislatively** narrowed to only criminalize "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." *Id.* (emphasis added).[2] This Court reasoned:

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[2] "The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and

> O.C.G.A. § 16-11-34 does not require proof of a person's intent to disrupt or prevent a lawful meeting as an element of the offense. Nor does it require that the committed act substantially impair the ordinary conduct of the meeting. 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**. Any recklessly or knowingly committed act that could reasonably be expected to prevent or disrupt a lawful meeting, gathering or procession is a misdemeanor, **regardless where it is committed, how trivial the act, its impact, or the intent of the actor other than the intent to commit the act itself**. O.C.G.A. § 16-11-34 thus applies to the reckless or knowing commission of such acts as heckling a referee at a sports venue, leaving on the audible ringer of a cellphone during a business symposium, changing lanes into a funeral procession on a rainy day, even playing the stereo loudly in an apartment while a neighbor hosts a dinner party. 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**.
>
> We recognize that where conduct and not merely speech is involved, "the overbreadth of a statute must not only be real but substantial as well, judged in relation to the statute's plainly legitimate sweep." Based on our analysis of the statutory language in O.C.G.A. § 16-11-34, **we conclude that it significantly impacts constitutionally**

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images." *Reno v. ACLU*, 521 U.S. 844, 871 (1997); *see also Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (holding that an ordinance making it unlawful to "curse or revile or to use obscene or opprobrious language" toward police was unconstitutionally overbroad); *District of Columbia v. Guery*, 376 A.2d 834, 838-39 (D.C. App. 1977) (deciding that an order barring disruption at meetings could only stand if narrowly interpreted to require that the "loud, threatening, or abusive language be **disruptive, or nearly so**," and to require that the actions were commenced with the "specific **intent** of causing disruption.") (emphasis added); *see also Survivors' Network for those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785 (8th Cir. 2015) (ruling facially unconstitutional a Missouri statute that prohibited profane language that disrupts a house of worship).

> **permitted conduct without the requisite narrow specificity and fails to balance in a reasonable way the First Amendment rights of those desiring to express opposing points of view**. Accordingly, we find its overbreadth is both real and substantial. 280 Ga. at 447 (citations omitted) (emphasis added).

This Court also provided a specific roadmap to legislatively cure the constitutional overbreadth:

> 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. *Id.* at 448.

While this Court considered whether a judicially created limiting construction would be possible, it rejected that path of changing elements of the offense because "curing the overbreadth . . . would be less a matter of reasonable judicial construction than a matter of substantial legislative revision." *Id*.

The two identified maladies of *Fielden*'s O.C.G.A. § 16-11-34 also dog the identical language of O.C.G.A. § 16-11-34.1(a). First, O.C.G.A. § 16-11-34.1(a), exactly like O.C.G.A. § 16-11-34, is silent as to an **intent to "prevent or disrupt"** General Assembly meetings.[3] Second, O.C.G.A. § 16-11-34.1(a), exactly like

[3] Justice Bethel and Peterson correctly noted at oral argument on the certified question from the federal court the glaring issue with O.C.G.A. § 16-11-34.1(a): "Paragraph (a) does not say anything about [a person's] intent to disrupt . . . That's the problem. *Fielden* said that the law in *Fielden* was unconstitutional because it did not have an intent requirement" and "paragraph (a) does not say anything about [someone's] intent to disrupt."

O.C.G.A. § 16-11-34, fails to limit its scope to activities that "**either cause the untimely termination of the lawful meeting or substantially impair the conduct of the lawful meeting**." *Id*. at 448.

The Defendants argue that O.C.G.A. § 16-11-34.1(a) is not overbroad because it covers different types of meetings than O.C.G.A. § 16-11-34, despite the identical problematic elements existing in both Georgia statutes. However, there are even greater free-speech implications with O.C.G.A. § 16-11-34.1(a) because O.C.G.A. § 16-11-34.1(a) targets speech at the Georgia State Capitol, the epicenter of two of the three branches of Georgia Government and a locus of free speech.

> As a matter of course, Georgia grants private speakers equal and unimpeded access to the Rotunda, a designated public forum. Its citizens may come and go, speak and listen, applaud and condemn, and preach and blaspheme as they please. Georgia neither approves nor disapproves such conduct, no matter how sordid or controversial it might be. Instead, the state remains aloof; it is neutral toward, and uninvolved in, the private speech.

Chabad-Lubavitch of Georgia v. Miller, 5 F.3d. 1383, 1388 (11th Cir. 1993) (en banc).

Regardless, *Fielden*'s reasoning and holding did not rest on the type of meeting covered or the type of meeting at issue. Rather, this Court focused on the problematic language in the statute at issue in *Fielden* identical to the language here; specifically, both statutes' elements fail to limit the scope of the prohibited conduct to "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." 280 Ga. at 448.[4]

If the legislature were to make the appropriate modifications to O.C.G.A. § 16-11-34.1(a) according to the roadmap set out by this Court in *Fielden*, intentional/actual disruptions of orderly proceedings of the General Assembly would still be subject to criminal sanctions.[5] Notably, the Georgia General Assembly has not seen fit to amend O.C.G.A. § 16-11-34 since *Fielden* and defendants have not identified problems in the absence of that statute. In contrast, many states have constitutional limits on disruptive activities at public meetings that strike the right constitutional balance.[6]

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[4] While Defendants argue that O.C.G.A. § 16-11-34.1(a) has not been struck down by the Georgia Supreme Court "in the nearly 15 years since *Fielden*," [Doc. 9 at 18], they fail to show that such a challenge has ever been made or entertained by this Court or any other—much less that the statute has been ratified by this Court.

[5] O.C.G.A. § 16-11-34.1(a), without appropriate modifications, covers a wide-ranging scope of meetings including meetings far from the capitol, making it overbroad and far-reaching. As Justice Peterson noted at oral argument on the certified question, "There are study committees that meet all over the state." Moreover, this Court in *Fielden* noted that the purview of the nearly identical O.C.G.A. § 16-11-34 could be just as far-reaching, potentially encompassing "heckling … at a sports venue," thus evidencing overbreadth. 280 Ga. at 447.

[6] *See* Tenn. Code Ann. § 39-17-306 (discussed in *Fielden*); see also S.C. Code Ann. § 30-4-70 ("This chapter does not prohibit the removal of any person who willfully disrupts a meeting to the extent that orderly conduct of the meeting is seriously compromised."); see also N.C. Gen. Stat. § 143-318.17 ("A person who willfully interrupts, disturbs, or disrupts an official meeting and who, upon being directed to leave the meeting by the presiding officer, willfully refuses to leave the meeting is guilty of a Class 2 misdemeanor.").

b. The Overbreadth in O.C.G.A. § 16-11-34.1(a) is Substantial.

Actual Arrests: On multiple occasions, Georgia citizens' speech has been chilled or speakers faced arrest under O.C.G.A. § 16-11-34.1 in circumstances where they neither intended to cause disruption nor caused any disruption to any proceedings. Plaintiffs, including one current Congressperson, were all arrested in the Rotunda area even though no General Assembly proceeding was disrupted. (V1 – 21-22.) Some of the Plaintiffs that were arrested were simply standing in the Rotunda and did not even speak.[7] *Id*. No Plaintiff used any amplification.[8] *Id*. One additional Plaintiff was a State Representative arrested for knocking on the door of the Governor's Office.

Other Incidents Chilling Speech: These criminal cases are not the only evidence of actual application of the challenged statute. Incidents at the capitol from 2018 to 2021 reveal that citizens were threatened with arrest, or their speech

[7] Justice Peterson noted at oral argument on the certified question that, "This occurred in the Rotunda, which is not even on the same floor as the House or Senate chambers."

[8] In contrast to the Plaintiffs who did not disrupt a General Assembly proceeding, Justice Bethel rightly identified at oral argument, "[T]here are any number of occasions where the noise outside both the Senate and House Chambers is significant and boisterous and can be heard at the door and inside the door of the rooms. And, as [Defendants] point out [they] have not prosecuted on many occasions at all." Additionally, "[O]rchestras play in the Rotunda on days when the legislature is in session."

was restricted. (V1- 194, 208-210, 212-216, 222-225.)[9] The incidents illustrate the substantial overbreadth of the statute.

The Superior Court's order notes that only one of the listed non-arrest incidents involve action taken specifically under the auspices of O.C.G.A. § 16-11-34.1(a), and the order suggests that the speech at issue in the listed incidents is somehow not prohibited by § 16-11-34.1. (V1 – 319.)

Neither theory is correct. First, in none of these other incidents was any other law identified justifying restrictions on speech, and indeed the Appellees have never cited any such authority. Moreover, the other incidents that did result in arrests also did not involve either intent to disrupt or actual disruption (the failures of O.C.G.A. § 16-11-34.1(a) flagged in *Fielden*). Thus, these examples too may well be covered by the challenged statute. This pattern of violating the constitutional rights of citizens at the Georgia State Capitol, joined with the overbreadth of O.C.G.A. § 16-11-34.1(a), yields a substantial chilling effect on future speech. Indeed, many of those involved in prior incidents have expressed concerns that they will be subject to arrest under O.C.G.A. §16-11-34.1 if they engage in protected speech at the Georgia State Capitol and have limited their free speech activities near the Georgia State Capitol.

[9] *See also Rubin v. Young*, 373 F. Supp. 3d 1347 (N.D. Ga. 2019); *see* Mark Niesse, et al., "Georgia representative arrested after governor signs elections bill," ATLANTA JOURNAL CONSTITUTION (Mar. 25, 2021).

Common Sense Hypotheticals Identified in *Fielden*: While this Court in *Fielden* found the similarly worded O.C.G.A. § 16-11-34 substantially overbroad even absent any other arrests/incidents, Appellants have identified numerous arrests, threats of arrests and restrictions on speech at the Georgia State Capitol. In addition, the *Fielden* decision of this Court 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," specifically mentioned by this Court in *Fielden*, or even coughing, at a General Assembly committee meeting could also lead to arrest under O.C.G.A. § 16-11-34.1(a). *See* 280 Ga. at 447; *see also, e.g., Freeman v. State,* 302 Ga. 181, 185, 805 S.E.2d 805 (2017) (upholding as constitutional O.C.G.A. § 16-11-39(a)(1) because it is specifically limited to expressive conduct "that amounts to 'fighting words' or a 'true threat.'"). In the inevitable and sometimes contentious meetings at the Georgia State Capitol, there is a very significant possibility that strongly spoken contrary viewpoints could be considered a violation of O.C.G.A. § 16-11-34.1(a). *Fielden* identified "heckling … at a sports venue" as evidence of overbreadth. 280 Ga. at 447. It is surely 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. *See also Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499 (11th Cir. 1990) (school employee's "quiet and nondisruptive" exit expressive conduct that could 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.").

As Justice Peterson noted at the prior oral argument, "[T]here are study committees that meet all over the state" leaving citizens vulnerable across the state to prosecution under O.C.G.A. § 16-11-34.1(a), evidencing substantial overbreadth.[10]

The Superior Court order simply ignores that, as *Fielden* itself demonstrates, overbreadth analysis includes considering common-sense hypotheticals as evidence of overbreadth. 280 Ga. at 447. Indeed, the circumstances, such as the ringer of a cellphone or strongly spoken contrary viewpoints, 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" and can, nonetheless, lead to arrest—the very concern enunciated by the Court in *Fielden* when evaluating the near identical language of O.C.G.A. §16-11-34. [11] 280

[10] Justice Bethel also correctly noted at oral argument that "[I]t is not entirely true that [O.C.G.A. § 16-11-34.1(a)] only applies to the capitol building."

[11] The order also fails to construe the incidents in favor of the Plaintiffs-Appellants as required when considering a motion to dismiss. To prevail on their motion to dismiss, the Defendants had to demonstrate that "(1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the

Ga. at 447.

To the extent there is a constitutional difference between public meetings under § 16-11-34 and meetings of the General Assembly under § 16-11-34.1, there are perhaps greater cause for overbreadth concerns here. While O.C.G.A. § 16-11-34 applied to any "lawful" public meeting, § 16-11-34.1 applies to not just official meetings of the full General Assembly, but also to "any" meeting of any committee, commission, or even caucus. Official public meetings, like city council meetings, are readily identifiable by the public. But the "meetings"

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movant established that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of relief sought." *Norman v. Xytex Corp.*, 310 Ga. 127, 130-131 (2020). In applying this test, "any doubts regarding the complaint must be construed in favor of the plaintiff." *Id*. at 131 (citing *Austin v. Clark,* 294 Ga. 773 (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."). When evaluating a motion to dismiss, "any doubts regarding the complaint must be construed in favor of the plaintiff." *Norman v. Xytex Corp.*, 310 Ga. 127, 131 (2020) (citing *Austin v. Clark,* 294 Ga. 773 (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."). This test is "a demanding one," *Norman*, 310 Ga. at 131, and Appellees' did not meet it here. Appellants' Complaint has more than demonstrated a claim that the described incidents establish a pattern of O.C.G.A. §16-11-34.1 creating a chilling effect on future speech in violation of the Georgia Constitution.

Additionally, the court was foreclosed from granting a motion to dismiss based on a mere pleading defect without providing an opportunity to amend the pleadings. *Minnesota Lumber Co. v. Hobbs & Livingston*, 122 Ga. 20, 49 S.E. 783, 784 (1905) ("A motion to dismiss . . . cannot reach mere defects in pleading such as may be cured by appropriate amendment").

described in § 16-11-34.1 may take place in *ad hoc* form and may not be readily identifiable to the public as such. "Caucuses," in particular, may be loosely organized by nature, small in membership, and may "meet" informally in hallways or by chance. Such a broad swath of purportedly shielded meetings, combined with the loose *mens rea* requirements common to both statutes, creates a significant likelihood that the civically engaged public would unwittingly commit a criminal offense by engaging in protected speech in a traditional public forum. Like O.C.G.A. § 16-11-34, O.C.G.A. § 16-11-34.1(a) is facially overbroad.

c. The Statute is Unconstitutionally Vague.

While the *Fielden* statute was not found to be vague, the actual application of O.C.G.A. § 16-11-34.1(a) in numerous incidents as well as the other additional crimes (addressed infra) illustrates that the challenged subsections are unconstitutionally vague. The Due Process Clause of the Georgia Constitution forbids the state from depriving "any person of life, liberty, or property, except by due process of law." Ga. Const. art. I, § 1. A basic tenet of due process is the requirement "that an individual be informed as to what actions a governmental authority prohibits with such clarity that he is not forced to speculate at the meaning of the law." *Armstrong v. Mayor & Aldermen of Savannah,* 250 Ga. 121, 123 (1982).[12] The degree of scrutiny varies depending on the nature of the law, and

[12] This extends to criminal laws: "Due process requires that criminal ordinances give a person of ordinary intelligence fair warning that his specific

both criminal statutes and laws "interfer[ing] with the right of free speech" are subject to the strictest of vagueness review.

In O.C.G.A. § 16-11-34.1(a), the term "any act which may reasonably be expected to prevent or disrupt" fails to provide notice because it is unclear what conduct is forbidden by the phrase. When read as a whole, the phrase, and therefore, the entire subsection, does not provide sufficient clarity on what conduct is illegal and will subject a person to arrest. The scienter in the statute, recklessly or knowingly, falls short of what the Court required in *Fielden*. 280 Ga. at 448. In addition, what is considered "reckless" or "knowing" is determined by the subjectivity of the arresting officer, leaving citizens all the more vulnerable to arrest. *See Chicago v. Morales*, 527 U.S. 41, 42 (1999) (plurality) (finding a criminal ordinance's vagueness ripe for a facial challenge based on the absence of a *mens rea* requirement). The language of the statute does not provide the constitutionally required notice, does not contain the scienter required by the Georgia Supreme Court in *Fielden*, and risks chilling free speech when citizens avoid engaging in free speech because of the lack of clarity in the law.

II. O.C.G.A. § 16-11-34.1(f) and (g) are Also Unconstitutionally Vague and Overbroad.

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contemplated conduct is forbidden, so that he may conform his conduct to the law." *Thelen v. State*, 272 Ga. 81, 82, (2000) (citing *Hall v. State*, 268 Ga. 89, 92 (1992)).

Like O.C.G.A. § 16-11-34.1(a), the additional challenged subsections, O.C.G.A. § 16-11-34.1 (f) and (g), are unconstitutional.

Subsections (f) and (g) of O.C.G.A. § 16-11-34.1 are facially unconstitutional because they proscribe speech without any evidence of an intent to disrupt, or any actual disruption -- the twin maladies this Court identified in *Fielden*. Further, these provisions are vague and overbroad under United States Supreme Court precedent because their language chills large swaths of constitutionally protected speech while failing to apprise a person of ordinary intelligence about what conduct is proscribed. The fundamental problem is that both subsections broadly purport to make it a crime "to utter loud, threatening, **or** abusive language **or** engage in any disorderly or disruptive conduct in such buildings or areas." (emphasis added).

Additionally, O.C.G.A. § 16-11.34.1(f) and (g) are susceptible to arbitrary enforcement and 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)); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162–63 (1972) (finding statute unconstitutionally vague "because it encourages

arbitrary and erratic arrests and convictions" and because it "makes criminal activities which by modern standards are normally innocent"). Subsections (f) and (g) are unconstitutionally vague because they provide officers no guidance at all and give an impermissible level of discretionary authority to make determinations about what conduct could be disruptive under § 16-11-34.1 (f), and (g) and to enforce the law—through criminal arrests—in an arbitrary and potentially discriminatory manner.

Although the Superior Court noted that subsections (f) and (g) prohibit only actions made "with the intent to disrupt the orderly conduct of official business," rather than "loud" or "abusive" language in the abstract, this misunderstands the flaw inherent in subsections (f) and (g). (V1 – 292-300.) The repeated 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. Additionally, when applying the intent requirement to subsections (f) and (g) there is no limitation in scope requiring the activities "either cause the untimely termination of the lawful meeting or substantially impair the conduct of the lawful meeting." *Fielden*, 280 Ga. at 448. The First Amendment requires far more specificity before an individual can be arrested for speaking.

First, volume alone, without additional disruptive conduct, is not a

sufficient reason to arrest a person for their speech,[13] especially where, as here, there are no standards to determine what speech is loud enough to be criminal[14] and no requirement that anything be disrupted. This statute is like that in *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.*

Further, "abusive" speech is often constitutionally protected,[15] especially

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[13] *Wilkerson v. Seymour*, 736 F.3d 974, 978 (11th Cir. 2013) (holding that the 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.").

[14] *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.").

[15] *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 (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

in a traditional public forum.[16] Even a detailed definition of "disorderly" was found to lack sufficient specificity in *Gooding v. Wilson*, 405 U.S. 518 (1972), because the definition failed to require that conduct threaten an imminent breach of the peace. *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).

The additional subsections are overbroad in ways similar to laws that have been struck down by the Georgia Supreme Court and the United States Supreme Court. *See McKenzie v. State*, 279 Ga. 265, 265 (2005) (statute banning "obscene" telephone communications 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"

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an arrestee's comment to a police officer that he was a "fucking asshole" did not 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).

[16] *See Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d. 1383, 1388 (11th Cir. 1993) (en banc) (recognizing that the Georgia Capitol is a traditional public forum).

language or any arrests for disorderly conduct without the required showing of "fighting words" or an imminent breach of the peace). Expressive conduct (signs, dancing, rude gestures, etc.) is generally constitutionally protected and such expressive conduct is criminalized under O.C.G.A. § 16-11-34.1(f) and (g). O.C.G.A. § 16-11-34.1 (f) and (g), are vague and/or overbroad.

III. In this Context, The Georgia Constitution May Provide Greater Protections Than the First Amendment.

The Georgia Constitution provides "even broader protection" for free speech than the First Amendment. *State v. Miller*, 260 Ga. 669, 671, 398 S.E.2d 547 (1990). While not necessary for a decision in favor of Appellants, this Court may choose to address this possible split in authority here on the "least restrictive means" test.

In one line of cases, this Court has specifically departed from the federal First Amendment to require that tailoring of content-neutral laws be the "least restrictive means" of balancing government interests and free expression. *See Statesboro Pub. Co. v. City of Sylvania*, 271 Ga. 92, 95, 516 S.E.2d 296, 299 (1999) (adopting least restrictive means test for content-neutral laws). Elsewhere, however, the Court has noted that the oft-repeated proclamation from *Miller* is "dictum." *Grady v. Unified Government of Athens–Clarke County*, 289 Ga. 726, 728–29, 715 S.E.2d 148 (2011); *see Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184, 1216 (N.D. Ga. 2005) (analyzing sign ordinances and noting "no analytical

distinction between the state and federal constitutions.").

This Court may employ the rule from *Statesboro Publishing* of "least restrictive means" "to laws that **directly** regulate the time, place, and manner of protected expression." *See Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 297 Ga. 513, 523 n.12, 773 S.E.2d 728, 737 (2015) (emphasis in original). If so, O.C.G.A. § 16-11-34.1 is a time, place, and manner regulation with regard to a place—the Georgia State Capitol. The burden is then on the State to show that the statute is the least restrictive means of protecting the government's interest. It fails that test. O.C.G.A. § 16-11-34.1 lacks the heightened *mens rea* requirement and any requirement of actual disruption, as described in *Fielden*. The statute is not the least restrictive means of furthering the government interest. Accordingly, O.C.G.A. § 16-11-34.1(a), (f) and (g) would fail under the *Statesboro Publishing* test.

IV. Representative Cannon States an As-Applied Claim for the Violation of her Right to Free Speech Under the Georgia Constitution.

The Defendants concede that expressive conduct is speech entitled to constitutional protection. But they attempt to make illogical distinctions between Representative Cannon's actions in the present case, and the other expressive conduct in order to dismiss Representative Cannon's as-applied challenge to the statute. Defendants further argue that knocking on a door "is not by itself communicative." (V1 – 137.) That argument is squarely foreclosed by precedent.

The United States Supreme Court has repeatedly addressed knocking on doors as expressive conduct. *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—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)); *see also Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1241 (11th Cir. 2018) (feeding unsheltered persons expressive conduct). Accordingly, Representative Cannon was engaged in inherently expressive conduct protected under the Georgia Constitution.

CONCLUSION

For these reasons, Plaintiffs 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.

Respectfully submitted, this the 14th day of February, 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 February 14, 2024, I served Plaintiffs-Appellants' Brief to the following counsel of record:

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