IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

WILSON, MORTON & DOWNS, LLC, Plaintiff, v. GEORGIA IMMIGRATION ENFORCEMENT REVIEW BOARD, an official board of the State of Georgia, Defendant.	CIVIL ACTION FILE NO. 2018CV303253

BRIEF OF AMICI CURIAE GEORGIA FIRST AMENDMENT FOUNDATION AND SOUTHERN POVERTY LAW CENTER IN OPPOSITION TO DEFENDANT'S SECOND MOTION TO DISMISS

Amici Curiae Georgia First Amendment Foundation and the Southern Poverty Law Center respectfully submit the following brief asking this Court to deny Defendant's motion to dismiss and hear the merits of this case regarding the Georgia Immigration Enforcement Review Board's ("IERB") improper interpretation of O.C.G.A. § 50-18-72(a)(4).

INTRODUCTION

This case presents the issue of whether O.C.G.A. § 50-18-72(a)(4), which exempts from the Open Records Act any records of ongoing criminal or regulatory agency investigations and prosecutions, applies to records in cases pending before the IERB. For years, the IERB has relied on this exemption to prevent public access to records of its ongoing cases, including in response to a records request submitted by Plaintiff. Only after this lawsuit was filed did the IERB produce the requested records to Plaintiff. Defendant now argues in its second motion to dismiss that its production of records renders this case moot.

The Georgia First Amendment Foundation respectfully suggests that this Court should deny Defendant's motion for two reasons, in addition to the reasons set forth in Plaintiff's

briefing. First, a party's voluntary cessation of challenged conduct does not normally render a case moot. *WMW, Inc. v. American Honda Motor Co., Inc.*, 291 Ga. 683, 685 (2012). Here, the IERB's attorney has stated that the board does not intend to rely on the Open Records Act exemption in O.C.G.A. § 50-18-72(a)(4) to refuse to produce documents related to ongoing cases. But the IERB has taken no official action that would prevent it from relying on the (a)(4) exemption in the future. To the contrary, the IERB has neither amended nor repealed its policy of refusing to disclose records of ongoing cases. And Defendant's attorney stated at the hearing on its first motion to dismiss that the IERB still believed the (a)(4) exemption applied to records in ongoing cases; it was simply exercising its discretion to release those documents to the public. Without any official action to cabin that discretion in the future or to change the IERB's interpretation of the (a)(4) exemption, the IERB cannot meet its heavy burden of showing that this case is moot.

Second, the importance of the legal question presented by this case counsels against a finding of mootness. Since the board's inception in 2012, the IERB's erroneous interpretation of the (a)(4) exemption has prevented numerous organizations, law firms, and private citizens from obtaining records that have traditionally been public, such as parties' filings with the board or the IERB's initial decisions. Given the IERB's broad powers in an area of great public interest—immigration law—members of the public will certainly continue to request these types of records in the future. In order to ensure that the IERB comports with Georgia's strong public policy for open government and publicly accessible records, this Court should deny Defendant's motion and proceed to consider the important legal question presented by this case.

STATEMENT OF INTEREST

Amicus Curiae Georgia First Amendment Foundation is a Georgia nonprofit corporation organized in 1994 to inform and educate the public on government access and First Amendment

issues and to provide legal support in cases in which the public's access to public institutions is threatened.

Amicus Curiae the Southern Poverty Law Center is a non-profit organization founded in 1971 that throughout its history has worked to make the nation's constitutional ideals a reality for everyone. The Southern Poverty Law Center advocates for fair treatment of immigrants in Georgia, including by representing Georgians in *Georgia Latino Alliance for Human Rights v. Deal*, a challenge to Georgia's harsh anti-immigrant HB87, and seeking transparency from Georgia's Immigration Enforcement Review Board. The Center is interested in a clear ruling that Georgia's open records act applies to government entities, such as the Review Board, that have attempted to operate in secrecy.

BACKGROUND

The IERB is a regulatory agency tasked with reviewing, investigating, and adjudicating complaints related to compliance with Georgia's immigration laws. The board was created in 2011, and since then has adjudicated more than 30 complaints against entities such as the City of Decatur, the City of Columbus, and Marietta City Schools. The IERB is both an investigative and an adjudicatory body. *See generally* O.C.G.A. § 50-36-3. It reviews and investigates complaints of immigration-law violations and determines whether those complaints state facts sufficient to merit a hearing before a review panel. RULES OF THE IMMIGRATION ENFORCEMENT REVIEW BOARD, Ch. 291-2. If so, the panel conducts hearings, hears evidence, and issues an initial decision determining whether or not there was a violation of or failure to enforce Georgia's immigration laws. *Id.* A party may appeal the initial decision up to the full board. *Id.* If either a review panel or the full board finds a violation, the IERB has the power to impose sanctions, including fines, against the governmental entity that has violated state immigration law. *Id.*

In 2012, the year after it was created, the IERB adopted an explicit policy of not publicly disclosing its case files—with the limited exception of the complaint initiating the case—in response to Open Records Act Requests. Am. Compl., Ex. H at 2. Since then, the IERB has routinely refused to provide records of cases pending before the board in response to Open Records Act requests. For example, in July 2013, the IERB responded to a document request by the American Civil Liberties Union, stating that "O.C.G.A. § 50-18-72(a)(4) specifies that records related to a pending investigation are not subject to open records requirements." *Id.*, Ex. J at 1. Based on that exemption from the Open Records Act, the IERB refused to produce the requested documents "beyond the initial complaint." *Id.*, Ex. K at 1. In October and December of 2013, the IERB twice relied on the same exemption in refusing to produce a copy of a report regarding an open case that was requested by private citizens. *Id.*, Ex. L at 1 & Ex. N at 1.

This pattern has continued through recent years. For example, in 2017, the IERB again relied on the O.C.G.A. § 50-18-72(a)(4) exemption to deny access to records requested by the Southern Poverty Law Center; the Atlanta Journal-Constitution; and the law firm Thompson, Sweeny, Kinsinger & Pereira. *Id.*, Ex. P at 1, Ex. R at 1, & Ex. T at 1. The IERB made the same objection in response to requests in 2018 by two private citizens and by Plaintiff Wilson Morton & Downs, LLC. *Id.*, Ex. V at 1, Ex. X at 1, & Ex. Y at 2.

The allegations in the Complaint and the documents attached thereto make clear that the IERB has relied on the (a)(4) exemption for nearly six years. This reliance long predates the Georgia Court of Appeals' decision that required agencies to withhold documents if an Open Records Act exemption applied. *Consumer Credit Research Found. v. Bd. of Regents of the Univ. Sys. of Ga.*, 341 Ga. App. 323, 329 (Ga. App. 2017).

ARGUMENT AND CITATIONS TO AUTHORITIES

I. The IERB's voluntary cessation of its policy of withholding all documents related to pending cases does not render this case moot.

Under Georgia law, a party's "'voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.'" *WMW, Inc.*, 291 Ga. at 685 (quoting *Knox v. Serv. Employees Int'l Union*, 567 U.S. 298, 306 (2012)). There is a narrow exception to this rule "'where the subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (internal alterations omitted) (quoting *Knox*, 567 U.S. at 306). The party asserting mootness bears the "'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (internal alterations omitted) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).[1]

[1] Courts have generally allowed governmental agencies like the IERB more leeway when considering issues of voluntary cessation. *See, e.g.*, *Sweet City Landfill, LLC v. Elbert Cnty.*, 818 S.E. 2d 93, 97 (Ga. Ct. App. 2018). However, this more lenient standard applies only when a governmental body has ceased the challenged activity by amending, repealing, or otherwise formally altering the challenged law or policy. *See, e.g.*, *id.* at 98 ("Whether the ***repeal of a law*** will lead to a finding that the challenge to the law is moot depends most significantly on whether the court is sufficiently convinced that the repealed law will not be brought back." (internal quotation marks omitted) (emphasis altered)); *Troiano v. Supervisor of Elections in Palm Beach Cnty., Fla.*, 382 F.3d 1276, 1285 (11th Cir. 2004) ("[T]his Court has consistently held that a challenge to a government policy ***that has been unambiguously terminated*** will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated." (emphasis added)); *Coral Springs Street Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1329 (11th Cir. 2004) ("Generally, a challenge to the constitutionality of a statute is ***mooted by repeal of the statute***." (emphasis added)).

Here, the IERB has not amended or repealed its policy of relying on the (a)(4) exemption to deny public access to records in ongoing cases. Am. Compl. ¶ 85 & Ex. H at 2. Instead, its attorney has merely represented that it does not intend to resume the policy. Without some official action changing the challenged policy, the IERB cannot take advantage of any presumption of mootness that is sometimes afforded to governmental agencies.

The IERB has not met that burden here. The board bases its mootness argument in large part on its assertion that it no longer plans to withhold records from pending cases on the basis of the (a)(4) exemption. But this is precisely the type of voluntary cessation that "does not ordinarily render a case moot." *Id.* The challenged behavior could recur because the IERB has taken no concrete steps to prevent itself from invoking the (a)(4) exemption in response to future records requests. Quite the opposite, in fact, as the board has left in place the policy of non-disclosure that it adopted in 2012. Am. Compl. ¶ 85 & Ex. H at 2. Indeed, at the hearing on its first motion to dismiss, the IERB's attorney stated that the board maintained its position that the (a)(4) exemption applied to the requested records, but it was exercising its discretion to disclose those records to Plaintiff. This is very similar to the factual situation in *WMW, Inc.*, where the appellee stated that it "decided not to engage in the challenged conduct only '***at this time***.'" 291 Ga. at 685 (emphasis added) (internal alterations omitted). The Georgia Supreme Court held that this cessation did not render the case moot because "[w]ere we to dismiss this case, nothing would prevent [appellees] from once again" engaging in the challenged conduct. *Id.* Like the *WMW* appellees, the IERB's position here does not render this case moot. Because nothing would prevent the IERB from improperly relying on the (a)(4) exemption in response to future records requests, this case presents a live controversy for resolution by this Court.

Further, this Court should treat IERB's argument with skepticism because its stated explanation for the sudden change in treatment of open records requests is not supported by the record. In June, the Supreme Court issued its decision in *Campaign for Accountability v. Consumer Credit Research Foundation*, 303 Ga. 828 (2018), reversing the Court of Appeals' decision from May 2017 and holding that agencies have discretion to produce records even where an Open Records Act exemption applies. The IERB asserts that it "decided to release all documents" to Plaintiff "[b]ecause of this change in the law." Mot. at 4. But the IERB adopted

its policy of non-disclosure five years before the Court of Appeals decided the *Consumer Credit* case—at a time when, as now, agencies were free to produce exempted records. And the IERB continued to enforce this policy for some weeks after the Supreme Court overruled *Consumer Credit*.

The best explanation of the IERB's actions here is not that a change in the law freed them to release the requested records. Rather, it is that disclosing the records at issue here would be advantageous in this lawsuit. The pretextual explanation for its change of course, combined with the IERB's failure to bind itself to this new course of action in the future, means that IERB cannot carry its "heavy burden" to show there is no reasonable likelihood that it will resume its past practice of withholding public records by improperly relying on the (a)(4) exemption. *Cf. WMW, Inc.*, 291 Ga. at 686 ("An appellee's 'post-certiorari maneuvers designed to insulate a decision from review must be viewed with a critical eye.'" (quoting *Knox*, 567 U.S. at 307)).

II. The legal dispute in this case is one of great public importance, counseling against a finding of mootness.

The importance of the legal question presented by this case provides even more reason to deny Defendant's Second Motion to Dismiss. In *WMW, Inc.*, the Georgia Supreme Court noted that the "public interest" in settling the question at issue there "militate[d] against a finding of mootness" because the issue was "important, and not only for these parties." 291 Ga. at 686. The same is true here. This case squarely presents the legal question of whether the Open Records Act exemption in O.C.G.A. § 50-18-72(a)(4) applies to records in ongoing cases before the IERB. This question is one of great importance and will impact the ability of a wide range of organizations and citizens to obtain documents from—and therefore perform oversight of—the IERB.

As the Open Records Act proclaims, "the strong public policy of this state is in favor of open government" and "public access to public records should be encouraged to foster

confidence in government and so that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions." O.C.G.A. § 50-18-70(a). These public policy goals are particularly salient in the context of an agency like the IERB, which occupies a unique position in Georgia government. The IERB functions both as an investigator and a decisionmaker in cases involving other governmental entities and their compliance with state immigration law. The board also has authority to sanction government entities by imposing fines, removing an entity from the list of qualified local governments under Chapter 8 of Title 50 of the Georgia Code, and clawing back appropriated state funds. O.C.G.A. § 50-36-3. Public scrutiny of agencies such as the IERB is an important check on government power, particularly where, as here, the board members are appointed, rather than elected. *Id.* § 50-36-3(b).

Despite Georgia's strong policy preference for open government, the IERB has shielded from public scrutiny all records of pending cases since 2012—even refusing to provide documents that are traditionally public, such as parties' filings and the board's own rulings. Plaintiff appears to be the only party to have successfully forced the production of such records, following the filing of this lawsuit. The IERB has justified its policy of non-disclosure with an impermissibly broad interpretation of the exemption in O.C.G.A. § 50-18-72(a)(4). Not only does the IERB's reading of that exemption run afoul of the plain statutory language, it also fails to account for the principle in O.C.G.A. § 50-18-70(a) that all Open Records Act exemptions must be "interpreted narrowly."

The resolution of the question presented in this case will not only benefit Plaintiff, it will provide certainty to members of the public who request records for ongoing IERB cases in the future. Even at this early stage of the case, the record shows that numerous advocacy organizations, law firms, and private citizens have sought access to records from ongoing IERB cases in the six years since the Board's inception. In response to each of these requests, the

IERB has relied on the (a)(4) exemption to deny the public access to records. Going forward, members of the public will continue to request records from the IERB. Accordingly, it is in the public interest for this case to proceed and for this Court to clarify the scope of the (a)(4) exemption. This is the only way to ensure that the IERB continues to comply with the Open Records Act in the future and that members of the public can request and receive the records to which they are entitled.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully asks this Court to deny Defendant's motion to dismiss.

Respectfully submitted, this 19th day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing document to be served upon all counsel of record by this Court's Odyssey E-fileGA System:

This 19th day of December, 2018.

/s/ Sarah Brewerton-Palmer
Sarah Brewerton-Palmer

Counsel for Amicus Curiae Georgia First Amendment Foundation