**No. S23C1071**

**IN THE SUPREME COURT OF THE STATE OF GEORGIA**

THE AUGUSTA PRESS, INC.,
Plaintiff/Petitioner,

v.

RICHARD ROUNDTREE, SHERIFF OF RICHMOND COUNTY, GEORGIA
Defendant/Respondent.

# BRIEF OF AMICUS CURIAE THE GEORGIA FIRST AMENDMENT FOUNDATION

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July 6, 2023

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## INTRODUCTION

Pursuant to Rule 23 of the Georgia Supreme Court Rules, amici curiae the Georgia First Amendment Foundation ("GFAF") respectfully submits this brief in support of Plaintiff/Petitioner The Augusta Press, Inc. ("Augusta Press"), an online news publication.

This case calls upon the Court to correct an erroneously restrictive interpretation of Exception 26.2 of the Georgia Open Records Act ("ORA" or "the Act") that governs public access to police body camera recordings. In *The Augusta Press, Inc. v. Richard Roundtree, Sheriff of Richmond County, Georgia*, Case No. A23A0552, the Court of Appeals affirmed the Superior Court of Richmond County's dismissal of Augusta Press's action to obtain Richmond County Sheriff's Department body camera footage recorded during their investigation of a domestic violence call involving the Chief Assistant Solicitor for the State Court of Richmond County, Georgia. The Court of Appeals based its decision on Exception 26.2 of the ORA, which states that public disclosure is not required for:

> Audio and video recordings from devices used by law enforcement officers in a place where there is a reasonable expectation of privacy when there is no pending investigation[.]

O.C.G.A. § 50-18-72(a)(26.2) (emphasis added).

The Court of Appeals read Exception 26.2 to mean that public release of police body camera footage is not required if, "*but for* law enforcement's

presence for [purposes of] a pending investigation, it is made in a place where there is a reasonable expectation of privacy." Court of Appeals Opinion at 7 (emphasis in original). This interpretation means that police body camera footage recorded in a private home will, practically speaking, never have to be publicly released, even once the police investigation is concluded,[1] since a reasonable expectation of privacy nearly always exists in a private residence when no investigation is occurring there. In adopting this construction, the Court of Appeals rejected the narrower and more common-sense reading of Exception 26.2 advanced by Petitioner Augusta Press whereby body camera footage is exempt from mandatory public disclosure if it was: (1) made in a place where there is a reasonable expectation of privacy, and (2) where there was no pending investigation at the time the recording was made.

The Court of Appeals' access-restrictive reading of 26.2 is clear error for three reasons. First, it conflicts with the ORA's mandate in favor of broad public access to government records, and narrow construction of any exceptions. Whether capturing exemplary or wrongful conduct, there exists no alternative record of police activity that compares to contemporaneous

[1] A separate ORA exception allows law enforcement agencies to withhold public records, other than initial police arrest reports and initial incident reports, in any *pending* investigation or prosecution of unlawful activity. *See* O.C.G.A. § 50-18-72(a)(4).

audio and video body camera recordings. *See Morgan v. State*, 307 Ga. 889, 899 (2020) (noting with respect to police body camera recordings that "video and audio of an event is often much more emotionally powerful than testimony or even still photographs"). However, the Court of Appeals' interpretation of Exception 26.2 would broadly insulate this direct and illuminating record of police conduct from public scrutiny whenever it is recorded in a private home. This expansive reading of the exception, coupled with the Court of Appeal's rejection of the narrower and more reasonable interpretation advocated by Augusta Press, transgresses the ORA's edict that all exceptions set forth in the Act "shall be interpreted narrowly." O.C.G.A. § 50-18-70(a). Moreover, the effect of the Court of Appeal's misguided interpretation will be to significantly reduce the public's ability to evaluate "the efficient and proper functioning of its institutions," contravening the intent and purpose of the Opens Record Act. O.C.G.A. § 50-18-70(a).

Second, the Court of Appeals' interpretation of Exception 26.2 elevates individual privacy rights over public access rights, even when a matter of public concern—such as a police investigation—is occurring. This conflicts with well-established Georgia Supreme Court case law holding that, on matters of public concern, the public's interest in access to information generally outweighs an individual's right to privacy.

Lastly, with respect to private homes and other spaces that will always be considered private but for a pending police investigation occurring there, the Court of Appeals' reading of Exception 26.2 renders the "no pending investigation" clause of the exception unnecessary, and therefore superfluous. This violates fundamental rules of statutory interpretation. For each of these reasons, the Court of Appeals erroneous reading of Exception 26.2 must be reversed and corrected.

## IDENTITY & INTERESTS OF AMICUS CURIAE

The Georgia First Amendment Foundation ("the Foundation") is a not-for-profit, non-partisan organization which advocates for open, transparent government as achieved largely through the application and enforcement of Georgia's Open Records Act. For more than 25 years, the Foundation has worked to ensure public access to information about government operations throughout the state. This includes providing education, training, advocacy, and advisory services to public officials, citizens, journalists, and court personnel on public access to government records and proceedings.

## ARGUMENT

### I. The ORA Requires Broad Application, with Narrowly Construed Exceptions, in Order to Promote Public Trust in Law Enforcement

Georgia's public policy strongly favors open government such that the ORA "shall be broadly construed to allow the inspection of governmental records," with

any exception to be "interpreted narrowly." O.C.G.A. § 50-18-70(a); *see also Campaign for Accountability v. Consumer Credit Rsch. Found.*, 303 Ga. 828, 830 (2018) ("Government agencies therefore have a duty to disclose public records unless relieved of that duty by a specific exemption or court order."); *City of Atlanta v. Corey Ent., Inc.*, 278 Ga. 474, 476 (2004) ("Because public policy strongly favors open government, *any* purported statutory exemption from disclosure under the Open Records Act must be narrowly construed." (quotations and citations omitted) (emphasis in original)).

Nowhere is public oversight of government institutions more important than in the context of law enforcement, which is comprised of numerous public-facing agencies (e.g., police departments, sheriffs' offices, the Georgia Bureau of Investigation) that collectively wield enormously consequential use-of-force and detention power over every person in Georgia. *See Harper v. City of E. Point*, 237 Ga. App. 375, 378 (1999) (observing that a police officer "wields enormous power and intimidation over those vulnerable citizens [he or she] is sworn to protect"); *see also Terry v. Ohio*, 392 U.S. 1, 20 (1968) (noting power of police to disrupt civilian liberty without a warrant based upon "on-the-spot observations").

State authorization of police to maintain order and enforce the law is a necessary component of a safe and ordered society. Yet, like other government employees, members of law enforcement are "[p]ublic officers [who] are the

trustees and servants of the people and are at all times amenable to them." Ga. Const. art. I, § 2, ¶ 1. Public transparency and accountability—in other words, civilian review—of police activities provide an important check on abuse of law enforcement's significant powers. Indeed this, among other differences, is what separates a democracy from a totalitarian regime. *See* O.C.G.A. § 50-18-70(a) (stating that "open government is essential to a free, open, and democratic society" and that "public access to public records should be encouraged to foster confidence in government").

### A. Body Camera Footage is a Public Record of Paramount Importance to Police Accountability

Body camera video and audio-recordings of law enforcement engaged in carrying out their official duties are public records[2] of paramount importance to police accountability. *See Akbar v. Campbell*, 2020-CA-1176, 2020 Fla. Cir. LEXIS 13047, at *5 (Fla. Cir. Mar. 31, 2020) (observing with respect to police body camera recordings that "there are important public interests in the ability to ultimately review the video including interests of accountability, transparency and

[2] The ORA broadly defines "public record" to include "all documents . . . tapes, photographs, computer based or generated information, data . . . or similar material prepared and maintained . . . by an agency." O.C.G.A. § 50-18-70(b)(2). The ORA's codification of an exception for when "audio and video recordings from devices used by law enforcement officers" *do not* have to be disclosed establishes that, in general, such recordings are considered public records. *See* O.C.G.A. § 50-18-72(a)(26.2).

public trust"); Jamison S. Prime, *A Double-Barreled Assault: How Technology and Judicial Interpretations Threaten Public Access to Law Enforcement Records*, 48 Fed. Comm. L.J. 341, 345 (1996) ("Law enforcement records require a heightened level of openness . . . [to] enable the public to serve the 'watchdog' function of making sure their law enforcement officials are serving the public interest."). Indeed, in recent years, there has been a nation-wide movement toward greater use of body cameras by law enforcement and more public access to those recordings. *See generally* Steve Zansberg, *Public Access to Police Body-Worn Camera Recordings*, 36 Comm. Law. 51, 53–55 (2020) (observing that since 2016, multiple states—including Utah, Wisconsin, Connecticut, the District of Columbia, and New York—have passed laws requiring police to wear body cameras and requiring public release of footage).

The Court of Appeals interpretation of Exception 26.2 exempts police body camera footage recorded in a private home from public disclosure in practically every instance. This interpretation exists in tension with the fact that public disclosure of body camera recordings is of even greater public importance when police are carrying out their official duties *in someone's home*. This is because when police breach the "sanctity of a [person]'s home and the privacies of life" by

entering one's residence,[3] there is a heightened need to ensure that police do not abuse or transgress their lawful authority in that usually sacrosanct space. Public scrutiny in the form of public access to body camera footage safeguards against police acting with relative impunity simply because they are executing their duties at a residence rather than in a public or commercial location. *See* David Trausch, *Real Transparency: Increased Public Access to Police Body Camera Footage in Texas*, 60 S. Tex. L. Rev. 373, 405 (2019) ("Most importantly, accountability and real transparency—some of the intended purposes of using body cameras—can only be fully realized when the public has meaningful access to the footage."); *id.* at 401-02 (advocating that body camera footage should only be withheld from the public where private individual(s) involved can show the information is "highly intimate or embarrassing" and "is not of legitimate public concern").

### B. Under Georgia Common Law, Release of Body Camera Footage Recorded in a Private Home During a Pending Investigation Does Not Constitute "Unnecessary Public Scrutiny" and Therefore Does Not Violate a Privacy Right

Exception 26.2 of the ORA recognizes the need to balance the right of public access to government records and privacy interests. However, in the context of an open records request, the right of privacy "extends only to unnecessary public scrutiny." *Corey Entm't, Inc.*, 278 Ga. at 477 (holding that an individual's

[3] *Thomas v. State*, 203 Ga. App. 529, 532 (1992) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

tax returns were not exempt from ORA disclosure under invasion-of-privacy exemption). Public scrutiny is "unnecessary" when it involves "publicizing of one's private affairs with which the public has no legitimate concern." *Athens Observer, Inc. v. Anderson*, 245 Ga. 63, 65 n.3 (1980) (quoting *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 213 Ga. 682, 683 (1957)). But the right of privacy "does not protect legitimate inquiry into the operation of a government institution and those employed by it." *Id*. at 65-66; *accord Corey Entm't, Inc.*, 278 Ga. at 477. Thus, when officers conduct a police investigation in a private home, there is significant public interest in the contemporaneous video and audio record of how those officers, employed by the state, are carrying out their official duties. This legitimate concern eclipses the privacy interest that, absent a pending police investigation, would otherwise exist for the residents of that home. *See Waters v. Fleetwood*, 212 Ga. 161, 167 (1956) ("[w]here an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy"); *id*. ("During the pendency and continuation of the investigation . . . the matter will continue to be one of public interest, and the dissemination of information pertaining thereto would not amount to a violation of the . . . right of privacy."); *see also Macon Tel. Pub. Co. v. Tatum*, 263 Ga. 678, 679 (1993) (publication of sexual assault victim's name was not invasion of privacy where "the commission of the crimes, police

investigation, and departmental decision that [victim] acted in self-defense are matters of public interest").

This common-law principle that the public's right to access information on matters of public concern trumps individual privacy concerns holds true regardless of whether the person entered the public sphere willingly. *See Waters*, 212 Ga. at 164 (noting that when a person, "whether willingly or not, becomes an actor in an occurrence of public or general interest," the subject "emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence"); *see also Tucker v. News Publishing Co*., 197 Ga. App. 85, 86 (1990) (victim of a sexual attack by fellow high school students became the object of public interest "through no fault of his own").

Thus, under this Court's well-established case law, Exception 26.2 strikes the proper balance between access and privacy when it is read to mean that body camera footage is exempt from required disclosure when it was: (1) made in a place where there is a reasonable expectation of privacy, and (2) where there was no pending investigation at the time the recording was made to trigger legitimate public interest and concern.[4]

[4] Certain pieces of private information captured by an in-home police body-camera recordings (e.g., social security numbers, dates of birth, or nudity) could still be redacted or blurred as appropriate before public release pursuant to other ORA exceptions. *See, e.g.*, O.C.G.A. § 50-18-72(a)(20)(A) (requiring redaction of certain types of personal and financial information prior to disclosure).

## II. Exception 26.2's "Pending Investigation" Clause Must be Given Full Effect to Comport with the Plain Language and Legislative Purpose of the Open Records Act.

"A statute draws its meaning, of course, from its text." *Chan v. Ellis*, 296 Ga. 838, 839 (2015). "The common and customary usages of the words are important, but so is their context." *Id.* (citations omitted). "For context, we may look to other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question." *May v. State*, 295 Ga. 388, 391-92 (2014) (citations omitted).

Exemption 26.2 allows for withholding police body camera recordings from public disclosure "where there is a reasonable expectation of privacy *when there is no pending investigation*[.]" O.C.G.A. § 50-18-72(a)(26.2) (emphasis added). The natural reading of this provision is that withholding is authorized when there is a reasonable expectation of privacy and when there was no pending investigation at the time the recording was made. *See* Choyce W. Middleton, Jenna B. Rubin, *Offenses Against Public Order and Safety: Amend Part 1 of Article 3 of Chapter 11 of Title 16, Title 17, and Article 72 of Chapter 18 of Title 50 of the Official Code of Georgia Annotated*, 32 Ga. St. U. L. Rev. 79, 86 (2015) (providing legislative history and analysis of SB 94, Act No. 173, 2015 Ga. Laws 1046, which created Exception 26.2, and noting that "Section 5 of the Act adds a new paragraph

prohibiting public disclosure of audio and video recordings taken by law enforcement officers where there is a reasonable expectation of privacy and no pending investigation.") (emphasis added)).

"Courts should give a sensible and intelligent effect to every part of a statute and not render any language superfluous." *Berryhill v. Georgia Cmty. Support & Sols., Inc*., 281 Ga. 439, 441 (2006). Yet, reading Exception 26.2's "pending investigation" clause as a but-for condition rather than a necessary one renders that clause superfluous. If the exception was intended to refer to a reasonable expectation of privacy in the absence of a pending investigation, there would be no need to refer to a pending investigation *at all*. Under this theory, the provision would have the same effect if it simply read: "in a place where there is a reasonable expectation of privacy." In other words, the Court of Appeal's approach would make the existence of a pending investigation irrelevant to whether there is a reasonable expectation of privacy justifying withholding. This cannot be correct because it would render the "pending investigation" clause of Exception 26.2 a nullity. *See Blue Moon Cycle, Inc. v. Jenkins*, 281 Ga. 863, 864 (2007) ("The fundamental rules of statutory construction require us to construe a statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage."). The more natural reading of Exception 26.2, that makes the "pending investigation" clause additive

rather than unnecessary and which also comports with long-established principles of Georgia privacy law, is that the existence of a pending investigation creates a public interest in the records where there would otherwise usually be a reasonable expectation of privacy, and thereby negates the exception to disclosure.

Moreover, even if the Court of Appeal's reading of Exception 26.2 were a reasonable one from a statutory-construction perspective (which it is not), the narrower interpretation of 26.2 advanced by Petitioner would still necessarily control. This is because "[t]he cardinal rule to guide the construction of law is, first, to ascertain the legislative intent and purpose in enacting the law, and then to give it that construction which will effectuate the legislative intent and purpose." *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 467 (1950). The ORA specifically commands that its exceptions "shall be interpreted narrowly[.]" O.C.G.A. § 50-18-70(a); *see also* O.C.G.A. § 50-18-72(b) (same).

The Court of Appeals' reading of Exception 26.2's "pending investigation" clause as a but-for condition rather than a necessary one is far from narrow. Under this construction, body camera footage recorded inside someone's home *would almost never* be accessible to the public because very rarely will there *not* be a reasonable expectation of privacy in a private residence when there is no investigation pending. The narrower, and therefore correct, interpretation of Exception 26.2 is that it exempts body camera footage from public release only

where there is both a reasonable expectation of privacy and no pending investigation at the time the recording was made. Where the legislative intent is unmistakable that ORA exemptions are to be interpreted narrowly, the narrower of two possible readings must necessarily control.

This narrower reading of exemption 26.2 is also wholly consistent with the purpose of the ORA, which "is not only to encourage public access to such information in order that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public." *Athens Observer*, 245 Ga. at 66. Among other reasons, the public has a significant interest in reviewing the actions of its law enforcement agencies because they are expensive institutions.[5] Yet the Court of Appeal's interpretation of Exception 26.2 would substantially foreclose the public's ability to access the body camera record of police conduct in private homes, while giving law enforcement carte blanche to decide whether it would be convenient to invoke another's privacy interest to withhold the footage. This is because the majority of the ORA's exemptions, including Exception 26.2, are discretionary, not mandatory. *See Campaign for*

[5] 2020 data from the Georgia Budget & Policy Institute places spending on policing at an average of 30 percent when measured as a percentage of city general funds in Georgia's 41 most populous cities. *See* Alex Camardelle, *Police spending in Georgia's most populous cities*, GBPI (June 19, 2020), https://gbpi.org/data-on-police-spending-in-georgia/.

*Accountability*, 303 Ga. at 833 (distinguishing exemptions prohibiting disclosure from exemptions allowing discretionary disclosure). Thus, it is not the person whose privacy interest is at stake who is protected by the Court of Appeal's ruling, but the law enforcement agencies themselves. This unreasonable and unintended result can be avoided by giving full effect to the "pending investigation" clause of the exemption, which would require public release of body camera footage recorded in a home during pending investigations but otherwise preserve privacy rights where no investigation took place.

## CONCLUSION

In order to uphold the ORA's edict of broad application with narrow exceptions, it is essential that Exception 26.2, which governs public release of body camera footage recorded in a private home, be narrowly read to comport with the exception's plain language and with this Court's common law jurisprudence in the context of balancing privacy and public access. This is true regardless of whether the Court ultimately finds that such a narrowed reading as applied to the facts of the instant case would require release of the body camera footage.

Absent a narrow interpretation of Exception 26.2, body camera footage recorded in a residential dwelling will, practically speaking, almost never be required to be released because of the reasonable expectation of privacy that attaches in one's home. This deleterious outcome would deprive the public of the

ability to review and seek accountability for the actions of its law enforcement agencies when they operate within people's homes. Certiorari is warranted in this case to correct the Court of Appeal's error.

Respectfully submitted this 6th day of July, 2023.

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## CERTIFICATE OF SERVICE

This is to certify that I have this day caused a true and correct copy of the foregoing **Brief of Amicus Curiae the Georgia First Amendment Foundation** to be served on counsel for Petitioner and Respondent by placing a copy of same in the United States Mail via first class delivery, postage prepaid, addressed to the following:

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