IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S24C0198

RYAN MILLIRON,

Petitioner/Plaintiff,

v.

MANOS ANTONAKAKIS,

Respondent/Defendant.

On Appeal from the Georgia Court of Appeals
No. A22A0227

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER BY GEORGIA FIRST AMENDMENT FOUNDATION

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Counsel for Georgia First Amendment Foundation

Amicus curiae Georgia First Amendment Foundation ("GFAF") respectfully moves pursuant to Rule 23 for leave to file the attached proposed brief of amicus curiae in support of Petitioner Ryan Milliron's Petition for a Writ of Certiorari. (attached hereto as "Exhibit 1").

GFAF 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 government institutions is threatened. GFAF has an interest in this case—and is encouraging the Supreme Court of Georgia's review of it—because the Court of Appeals' opinion will have serious and negative implications for the public's ability to access open records in the state of Georgia. GFAF therefore seeks to submit its brief to provide additional context, based on its substantial knowledge of public access to government institutions.

GFAF respectfully requests that the Court grant this motion and accept the attached proposed amicus curiae brief for filing.

Respectfully submitted this 13th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER BY GEORGIA FIRST AMENDMENT FOUNDATION to be served on the following counsel of record by U.S. mail:

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This 13th day of December, 2023.

/s/ Sarah Brewerton-Palmer
Sarah Brewerton-Palmer

Counsel for Amicus Curiae Georgia First Amendment Foundation

Exhibit 1

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BRIEF OF AMICUS CURIAE GEORGIA FIRST AMENDMENT FOUNDATION

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Amicus curiae Georgia First Amendment Foundation ("GFAF") respectfully submits the following brief in support of Petitioner Ryan Milliron's Petition for a Writ of Certiorari.

INTEREST OF AMICUS CURIAE

GFAF 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 government institutions is threatened. GFAF has an interest in this case—and is encouraging the Supreme Court of Georgia's review of it—because the Court of Appeals' opinion will have serious and negative implications for the public's ability to access open records in the state of Georgia.

INTRODUCTION

When enacting the Georgia Open Records Act ("the Act"), the General Assembly found that "the strong public policy of this state is in favor of open government; that open government is essential to a free, open, and democratic society." O.C.G.A. § 50-18-70(a). The Court of Appeals' opinion in this case is contrary to these values, and review by this Court is necessary to correct course. Specifically, the opinion below has effectively (1) insulated public records from disclosure as long as they are in the custody of a private person, and (2) sanctioned the arbitrary imposition of a punitive fee award that cannot help but deter citizen

enforcement of the Act. For the reasons described below, the Court should grant Petitioner's petition for a writ of certiorari and consider these important and consequential issues.

ARGUMENT AND CITATION TO AUTHORITIES

I. The Act does not require a party to request public records from an open records officer when requesting public records from a private person or entity.

The Court of Appeals ruled that Petitioner's records request to Respondent, a private individual, was improper because his request could have been made only to Georgia Institute of Technology's ("Georgia Tech") designated open records officer. This ruling is contrary to the plain text of the Act. It is well established that the Act must be broadly construed. O.C.G.A. § 50-18-70(a); *Cent. Atlanta Progress, Inc. v. Baker*, 278 Ga. App. 733, 734 (2006). The Act states that "[a]ll public records shall be open for personal inspection and copying, except those which by order of a court of this state or by law are specifically exempted from disclosure." O.C.G.A. § 50-18-71(a). "Public record" is defined in part as material that is "prepared and maintained or received by an agency or ***by a private person*** or entity ***in the performance of a service or function for or on behalf of an agency***." *Id.* § 50-18-70(b)(2) (emphasis added). As made clear by both the plain language of the Act and case law interpreting the Act, a party may make an open records request to a private person who performed services or functions for or on

behalf of an agency. *See, e.g.*, *id.*; *United HealthCare of Georgia, Inc. v. Georgia Dep't of Cmty. Health*, 293 Ga. App. 84, 87 (2008) ("[T]he Act requires the disclosure of documents possessed by a *private entity* performing a service or function for or on behalf of a public agency." (emphasis in original)).

The Act further provides that "[a] request made pursuant to this article may be made to ***the custodian of a public record*** orally or in writing." O.C.G.A. § 50-18-71(b)(1)(B) (emphasis added). As described above, a custodian of a public record may be an agency ***or*** a private person who performs services for an agency. In the very next sentence, the Act provides that "***[a]n agency*** may, but shall not be obligated to, require that all written requests be made upon" a designated open records officer. *Id.* (emphasis added). Thus, if the custodian of a public record is an agency, then a requestor may need to make the request to a designated open records officer, if the agency so requires. But if the custodian of a public record is a private person who performs services for an agency, then the provision concerning designated open records officers is not applicable, as it only governs agencies.

Petitioner submitted open records requests to two records custodians: Georgia Tech (through its designated open records officer) and Respondent, a private person who performed services on behalf of Georgia Tech. Georgia Tech, as an agency, can require that requests for records in its possession be made to its

designated open records officer. But because Respondent is a private person, the Act allowed Petitioner to directly request from Respondent any records in his possession. Indeed, the reason why a request would be directed to a private person is because the agency does not have custody of the requested records—otherwise, the requestor would simply make the request to the agency, which is more likely to be familiar with its obligations under the Act and to have an established process for providing records. The Court of Appeals' contrary ruling has created an opportunity for Respondent (and other private individuals) to avoid disclosure of public records that are in the custody of a third party. This reading of the Act is inconsistent with its text and evident purpose and should be corrected. The Court of Appeals' opinion is particularly concerning to GFAF, given GFAF's mission to advocate for government transparency and access to public information. If the Court of Appeals' ruling were to stand, access to public records would be significantly curtailed because public records in the custody of private parties will evade disclosure.

II. The court's treatment of the fee award against Petitioner will deter legitimate citizen enforcement of the Act.

The fee award in this case is yet another reason why this Court should grant certiorari. The Act provides for reasonable attorney's fees and other litigation costs if a party acted "without substantial justification" for instituting litigation. O.C.G.A. § 50-18-73(b). "Substantial justification" means "substantially frivolous,

substantially groundless, or substantially vexatious." O.C.G.A. § 9-15-14(b). And the Act "only authorizes an award of attorney fees and expenses of litigation in actions brought to enforce the statute if the court determines that the action constituting a violation of the statute was ***completely without merit*** as to law or fact." *McBride v. Wetherington*, 199 Ga. App. 7, 7 (1991) (emphasis added).

The Court of Appeals implicitly affirmed the trial court's ruling that Petitioner's case was without substantial justification by remanding solely for an evidentiary hearing on the amount of the fee award. Petitioner argued both in the trial court and on appeal that his case has substantial justification, meaning that an attorney's fees award was not warranted. The trial court held that Petitioner lacked substantial justification for his action, but the Court of Appeals did not consider the issue. While it described the law on substantial justification, it remanded the case only with instructions for the trial court to conduct a hearing on the reasonableness of Respondent's attorney's fees and without considering whether Petitioner was substantially justified in bringing this action. Such a hearing would be moot if there was substantial justification for the litigation, so by remanding for a hearing, the Court of Appeals implicitly affirmed the award. But as described above, Petitioner's legal position is not completely without merit—just the opposite, it is supported by the Act itself and by case law interpreting the Act. Yet the Court of Appeals presupposed that a fee award was justified here.

In GFAF's experience—which includes decades counseling members of the public about the Act—allowing a fee award in this case will have a serious chilling effect on the public's willingness to sue to enforce the Act's terms. Individuals will be discouraged from pursuing litigation about valid open records requests out of fear that they might be forced to pay thousands of dollars in legal fees if the trial court disagrees with their legal arguments. This undermines the "strong public policy of this state in favor of open government" and turns the Act's fee-shifting provision—which was intended in part to incentivize private enforcement—on its head. *See* O.C.G.A. § 50-18-70(a). Private enforcement of the Act plays an important part in ensuring that the public has meaningful access to government records. This is particularly true for state agencies, given that the Georgia Attorney General's Office—which is charged with criminal enforcement of the Act—has concluded that it is conflicted from bringing any enforcement action against a state-level entity. As a result, private enforcement suits are the *only* mechanism to address Open Records Act violations by state agencies. Chilling the public's willingness to bring such litigation will inevitably mean less compliance with the Act. GFAF urges this Court to grant a writ of certiorari to consider the issue of whether a fee award was justified at all in this case.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted this 13th day of December, 2023.

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