IN THE SUPREME COURT OF GEORGIA

CASE NO. S22Q0097

Nikema WILLIAMS, et al.,

Plaintiffs-Appellants,

v.

Colin POWELL, et al.,

Defendants-Appellees.

Certified Question from the United States District Court
Northern District of Georgia
Case No. 1:20-CV-4012-MHC

BRIEF OF AMICUS CURIAE ACLU OF GEORGIA, ASIAN AMERICANS ADVANCING JUSTICE-ATLANTA, FEMINIST WOMEN'S HEALTH CENTER, GEORGIA EQUALITY, GEORGIA STAND UP, GEORGIA STATE CONFERENCE OF THE NAACP, PLANNED PARENTHOOD SOUTHEAST ADVOCATES, AND THE SOUTHERN POVERTY LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS NIKEMA WILLIAMS ET AL.

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Amici Curiae ACLU of Georgia, Asian Americans Advancing Justice-Atlanta, Feminist Women's Health Center, Georgia Equality, Georgia STAND UP, Georgia State Conference of the NAACP, Planned Parenthood Southeast Advocates, and the Southern Poverty Law Center respectfully submits the following brief in support of Plaintiff-Appellants. The purpose of this *amicus* brief is to demonstrate how and why the free speech protections provided in the Georgia Constitution, Ga. Const. Art. I, § 1, ¶¶ V, IX, are broader than those of the First Amendment to the United States Constitution. This is especially true in this case, which concerns the important right of constituents to speak to elected officials inside the State Capitol Building, the seat of Georgia's democracy. For the following reasons, this Court should hold that O.C.G.A. § 16-11-34.1(a), and the ban on "utter[ing] loud" and "abusive language" found in O.C.G.A. § 16-11-34.1(f),(g), are unconstitutionally overbroad under Article I, Section I, Paragraphs V and IX of the Georgia Constitution.

INTRODUCTION AND STATEMENT OF INTEREST

Protest within the hallways of the State Capitol Building,[1] *potentially illegal under O.C.G.A. § 16-11-34.1*

The Gold Dome is not a public library. Anyone who has visited the State Capitol Building during the peak of the legislative session can attest to the loud hustle and bustle that takes place, a teeming marketplace of ideas where concerned hawkers sell their ideological wares. On any day, an observer can see elected lawmakers chatting loudly with constituents in the hallways as they walk to and

[1] Alyssa Pointer, photograph of demonstrators displaying signs at the Georgia State Capitol Building on March 22, 2019, *in* Bill Rankin, *NEW: Who could be prosecuted under Georgia's 'heartbeat' law?* (May 16, 2019), https://www.ajc.com/news/local/who-could-prosecuted-under-georgia-heartbeat-law/sjmrBSuG3ZT4eM9kkAKPuL/.

from their offices, people delivering speeches in the spacious Rotunda, media cameras and reporters scurrying up and down the hallways to interview lawmakers and advocates, activists anxiously watching TV screens of legislative proceedings and applauding or booing in response to critical votes, lobbyists waiting by the rope line to deliver key information to legislators as they make their way into the chamber, and smartphones endlessly ringing and buzzing with news of the latest closed-door committee hearing that was scheduled at the last minute. Signs, T-shirts, and buttons—not always with the most family-friendly messages—are ubiquitous, with some constituents even wearing costumes to deliver pointed messages they feel are important.

Amici are organizations whose members routinely exercise their constitutional "freedom of speech" within the noisy scrum of the Gold Dome during the legislative session "on all subjects" touching upon the general welfare. Ga. Const. Art. 1, § 1, ¶ V. The Gold Dome is where "those vested with the powers of government for redress of grievances" sit, and where *amici* "assemble peaceably for their common good and to apply by petition or remonstrance" to those whom the people have elected. Ga. Const. Art. 1, § 1, ¶ IX. In addition, Georgia has one

of the shortest legislative sessions in the country,[2] and those tight deadlines result in a flurry of last-minute bills and amendments being introduced, often in the dead of night. Advocates and constituents must often scramble to ensure that their voices are heard as quickly as possible before critical votes take place.

Amici's interest in this matter is substantial because their speech rights are at stake. To be sure, freedom of speech is not absolute, and no one has the constitutional right to disrupt ongoing legislative sessions (which is a difficult task, since those sessions occur behind massive, well-guarded doors). The ostensible purpose of O.C.G.A. § 16-11-34.1 is to prevent disruption of the legislative process. But this criminal statute does far more. The overbroad wording of subsections (a), (f), and (g) of O.C.G.A. § 16-11-34.1 bans any speech "which *may* reasonably *be expected to* prevent or disrupt a session or meeting of the Senate or House of Representatives" (emphasis added) or *any* "loud" or "abusive" language—whether or not they *actually* disrupt anything.

Into this criminal statute's capacious maw falls broad swaths of non-disruptive speech and assembly engaged in by *amici*—raucous and often heated conversations in the hallways, intermittent clapping or cheers in the Rotunda,

[2] *See* Selena Saucedo, *Legislative Session Length* (July 1, 2017), https://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx.

crowds of ordinary citizens holding signs or wearing T-shirts with provocative language—none of which actually disrupts any ongoing legislative proceeding occurring behind closed doors. At most, the challenged statute reflects an "'undifferentiated fear or apprehension of disturbance (which) is not enough to overcome the right to freedom of expression.'" *Cohen v. California*, 403 U.S. 15, 23 (1971) (quoting *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 508 (1969)). Legislators' feelings are not so fragile that they cannot handle their constituents' vigorous exercise of free speech in the hallways of the State Capitol Building—even when "loud" or "abusive"—when such speech does not actually disrupt the legislative session. Otherwise, they are in the wrong line of work.

SUMMARY OF ARGUMENT

"The text of the Georgia Constitution's Speech Clause is quite different from the Speech Clause of the First Amendment." *Maxim Cabaret, Inc. v. City of Sandy Springs*, 304 Ga. 187, 196 (2018) (Peterson, J., concurring) (citations omitted). In particular, the Georgia Constitution affirmatively guarantees that that "Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty." Ga. Const. Art. I, § 1, ¶ V ("Paragraph V"). The First Amendment does not contain this affirmative guarantee. But while this Court has already held that the speech protections of the Georgia Constitution are broader than those of the First Amendment, *State v. Miller*, 260 Ga. 669, 671

(1990), this Court has also lamented the lack of "any citation of authority or any discussion of the text, history, or case law" to support that proposition. *Grady v. Unified Gov't of Athens-Clarke Cnty.*, 289 Ga. 726, 729 (2011).

This *amicus* brief hopes to fill that gap. Part I will demonstrate how the text, history, and case law surrounding the Georgia Constitution's speech protections establish that they are generally more extensive than those provided by the First Amendment. Part II will discuss how Paragraph V contains more expansive protections than the First Amendment in at least three ways directly applicable to this case. Unlike the First Amendment, Paragraph V explicitly protects the right to speak "on all subjects," bans prior restraints on non-disruptive speech, and affirmatively guarantees the freedom to speak. Part III will briefly discuss how Paragraph IX of the same section, which not only protects the right to "petition" but the right to "remonstrance," also provides more expansive protections than the First Amendment in this context.

For these reasons, O.C.G.A. § 16-11-34.1(a) and subsections (f) and (g)'s categorical ban on "utter[ing] loud" and "abusive language" in the State Capitol Building are unconstitutionally overbroad under the Georgia Constitution.

ARGUMENT AND CITATION OF AUTHORITY

I. THE TEXT, HISTORY, AND CASE LAW OF GEORGIA CONSTITUTION'S SPEECH PROTECTIONS

The "text, history, [and] case law" concerning the speech protections found in the Georgia Constitution, *Grady v. Unified Gov't of Athens-Clarke Cnty.*, 289 Ga. 726, 729 (2011), demonstrate that those protections are broader than those found in the First Amendment.

A. The Text of the Georgia Constitution is More Expansive than the First Amendment

Courts must, as always, start with the text. Here, the text of the Georgia contains an explicit, affirmative guarantee that is not found in the First Amendment: "Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty." Ga. Const. Art. 1, § 1, ¶ V ("Paragraph V"). This separate guarantee made its first appearance in the Georgia Constitution of 1861 as part of a larger bill of rights inserted for the first time in Georgia constitutional history, and it remains in essentially the same form today. *See Maxim Cabaret, Inc. v. City of Sandy Springs*, 304 Ga. 187, 196-97 (2018) (Peterson, J., concurring) (tracing history). Furthermore, starting in 1877, this affirmative "on all subjects" provision was placed alongside text mirroring the

prohibitory language of the First Amendment.[3] Thus, this additional, expansive "on all subjects" language cannot be read to simply duplicate the same speech protections of the First Amendment as applied to the State. *See Gwinnett Cty. Sch. Dist. v. Cox*, 289 Ga. 265, 271 (2011) ("Established rules of constitutional construction prohibit [courts] from any interpretation that would render a word superfluous or meaningless."). Rather, this extends to Georgians an affirmative right to speak "on all subjects" that exceeds the floor set by the federal constitution.

It is clear from the text that the Georgia Constitution's speech protections are more expansive than those of the First Amendment. As *amici* will elaborate in Part II, unlike the First Amendment, the speech protections of Paragraph V: (a) explicitly guarantee the right to speak "on all subjects"; (b) clearly ban prior restraints; and (c) affirmatively protect the freedom to speak as a standalone right, not just in situations involving state action. And, as discussed in Part III, Paragraph IX not only protects the right to "petition" for a redress of grievances like the First

[3] Just as the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I, the Georgia Constitution was amended in 1877 to provide that "No law shall ever be passed to curtail, or restrain the liberty of speech," 1877 Ga. Const. Art I, § 1, ¶ XV. This amendment, however, did not alter the expansive language already present in Paragraph V affirming that "any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." *Id.*

Amendment, but also the distinct right to "remonstrance." Ga. Const. Art. I, § 1, ¶ IX.

Many other states have a virtually identical "on all subjects" provision like Paragraph V of the Georgia Constitution, and from as early as 1896, the highest courts in at least 10 of these states have observed that the speech protections in their state constitutions are broader than those of the First Amendment *because of* these textual differences. *See, e.g.*, *Dailey v. Super. Ct. of City and Cnty. of San Francisco*, 44 P. 458, 459 (Cal. 1896) ("This provision of the constitution as to freedom of speech varies somewhat from that of the constitution of the United States . . . ; the provision here considered is the broader, and gives him greater liberty in the exercise of the right granted.").[4]

[4] *See also, e.g.*, *Bock v. Westminster Mall Co.*, 819 P.2d 55, 58 (Colo. 1991) ("the second clause of Article II, Section 10 of the Colorado Constitution necessarily enhances the already preferred position of speech under the First Amendment of the United States Constitution"); *Pap's A.M. v. City of Erie*, 812 A.2d 591, 603 (Pa. 2002) ("As a purely textual matter, Article I, § 7 is broader than the First Amendment in that it . . . specifically affirms . . . the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused"); *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 248 (N.Y. 1991) ("Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms"); *Vill. Of S. Holland. v. Stein*, 26 N.E.2d 868, 871 (Ill. 1940) ("The constitution of Illinois is even more far-reaching than that of the constitution of the United States in providing that every person may speak freely, write and publish on all subjects"); *State v. Schmid*, 423 A.2d 615, 626 (N.J. 1980) ("The constitutional pronouncements [are] more sweeping in scope than the language of the First

This Court should similarly recognize that the text of the Georgia Constitution generally provides greater speech protections than the First Amendment.

B. The History and Case Law Is Consistent With an Expansive Reading of the Georgia Constitution

The history and case law surrounding the speech protections of the Georgia Constitution is not inconsistent with the proposition that the Georgia Constitution's text provides greater protection than the First Amendment. At best, it does not provide clear guidance one way or another, but since the text itself provides the clearest guidance, historical silence should be of no moment here. *See Olevik v. State*, 302 Ga. 228, 237-39 (2017) ("we necessarily must focus on objective indicators of meaning, not the subjective intent of particular individuals").

Amici could not find any historical evidence specifically establishing one way or another as to why the Georgia framers chose this more expansive language instead of simply mirroring the First Amendment. There also does not appear to be

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Amendment"); *State v. Henry*, 732 P.2d 9, 11 (Or. 1987) ("The text of [the state constitutional provision] is broader [than the First Amendment] and covers any expression of opinion"); *State v. Linares*, 655 A.2d 737, 754 (Conn. 1995) ("By contrast, the first amendment does not include language protecting free speech 'on all subjects'"); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 903 (Ariz. 2019) ("[A]rticle 2, section 6 does, by its terms, provide greater speech protection than the First Amendment."); *Alsworth v. Seybert*, 323 P.3d 47, 56 (Alaska 2014) ("[T]he Alaska Constitution protects free speech at least as broad[ly] as the U.S. Constitution and in a more explicit and direct manner").

consensus as to why the larger bill of rights was first introduced.[5] One theory states that because Georgia had just seceded from the Union, "a written bill of rights served as a demonstrative statement to Georgians that their state had not forsaken the fundamental principles upon which the U.S. government was founded."[6] The historical sources reviewed by *amici* suggest that there were other concerns that preoccupied the framers during the 19th-century constitutional conventions, such as protecting slavery (1861), abolishing slavery and dealing with war debt (1865), protecting reconstruction (1868), and resolving massive public debt (1877).[7]

In all likelihood, the Georgia framers chose that more expansive language in 1861 simply because that "on all subjects" language had already been widespread

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[5] *See* Stewart D. Bratcher, *Georgia Bill of Rights* (July 13, 2018), https://www.georgiaencyclopedia.org/articles/government-politics/Georgia-bill-rights ("[t]he reasons for the emergence of a bill of rights at this point in history have been much debated.").

[6] *Id.*

[7] *See* Albert B. Saye, *A Constitutional History of Georgia, 1732-1945* (1948) at 134, 138-40, 152-53, 169-70; Melvin B. Hill, Jr. & G. LaVerne Williamson Hill, *The Oxford Commentaries on the State Constitutions of the United States: The Georgia State Constitution, 2nd Edition* (2018) at 10-16; Ethel K. Ware, *A Constitutional History of Georgia* (1967) at 131, 144, 160, 170; *see also White v. Clements*, 39 Ga. 232 (1869) (recounting 1868 convention history); McElreath, Walter, *Treatise on the Constitution of Georgia* § 92, 125 (1912); Melvin B. Hill Jr., *The Georgia State Constitution: A Reference Guide*, 38-40 (1994); Robert N. Katz, *The History of the Georgia Bill of* Rights, 3 Ga. St. U. L. Rev. 83, 92-93 (1986). *Amici* also reviewed the Journals to the proceedings of each of the 19th century conventions.

in other state constitutions for decades and could even have derived from Blackstone's formulation of the common law. *See Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352, 366 n.9 (Cal. 2000); *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 248 (N.Y. 1991); *Davenport v. Garcia*, 834 S.W.2d 4, 32 (Tex. 1992) (Hecht, J., concurring) (discussing similar provision in Texas Constitution, noting, "By 1833, when a constitution was first proposed for Texas, 15 of the 24 states then in the United States had constitutional provisions protecting free speech in words similar to Blackstone's"). After all, 1861 was during a time when "state constitutions routinely borrowed heavily from earlier state models," "facilitated by the existence of numerous pocket-sized compilations of state constitutions."[8] "In terms of the core subject matter for a bill of rights, by 1849 the constitutional field had been thoroughly explored."[9]

Indeed, even in 1848, before this language was formally enshrined in the Georgia Constitution in 1861, the Supreme Court of Georgia cited this formulation as if it were *already* the understood rule. *See Giddens v. Mirk*, 4 Ga. 364, 367 (1848) ("The great constitutional rule of the American Union, embracing both the

[8] *See* Christian G. Fritz, *More Than "Shreds and Patches": California's First Bill of Rights*, 17 Hast. Const. L.Q. 13, 16 (1989). Free copies of this journal are available online at hastingsconstitutionallawquarterly.org.

[9] *Id.*

freedom and the restraint of the press and of speech, has been laid down by eminent authority in the following words, 'every citizen may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right*'"); *see also White v. Clements*, 39 Ga. 232, 244-45 (1869) (insertion of bill of rights in 1861 did not "grant" any rights, but simply reflected the rights that the people of Georgia already had). In sum, the history and case law are not inconsistent with the notion that the Georgia Constitution provides greater speech protections than the First Amendment.

For these reasons, when assessing the available "text, history, [and] case law" of the speech protections found in the Georgia Constitution, *Grady v. Unified Gov't of Athens-Clarke Cnty.*, 289 Ga. 726, 729 (2011), this Court should conclude that, on balance, and especially because of the text, the Georgia Constitution generally provides greater speech protections than those of the First Amendment.

II. O.C.G.A. § 16-11-34.1(a), (f), (g) ARE UNCONSTITUTIONAL UNDER PARAGRAPH V OF THE GEORGIA CONSTITUTION

To be sure, Paragraph V's broader language "doesn't necessarily mean that it would be broader" than the United States Constitution "in every . . . context." *Maxim Cabaret, Inc. v. City of Sandy Springs*, 304 Ga. 187, 198 (2018) (Peterson, J., concurring). But Paragraph V's broader language does warrant greater protections in the context *of this case*, for at least three reasons.

A. Unlike the First Amendment, Paragraph V Explicitly Protects the Right to Speak "On All Subjects"

First, the constitutional freedom to speak "on all subjects" warrants greater protections in this context because subsections (f) and (g) of O.C.G.A. § 16-11-34.1 explicitly bans the "utter[ing]" of "abusive language"—a provision which cannot be enforced without reference to the substance, or "subject," of that speech. *Cf. Gooding v. Wilson*, 405 U.S. 518, 525 (1972) (Georgia statute violated First Amendment by banning "abusive" language, defined as "harsh insulting language").[10] Other courts have also recognized the straightforward principle that freedom to speak "on all subjects" means what it says, at least absent some historically established exclusion. *See, e.g.*, *State v. Henry*, 732 P.2d 9, 10 (Or. 1987) ("on any subject" provision protects obscenity because obscenity not historically regulated in Oregon); *People v. Ford*, 773 P.2d 1059, 1065 (Colo. 1989) ("on any subject" provision does not protect obscenity because obscenity

[10] The meaning of "abusive" did not materially change when O.C.G.A. § 16-11-34.1 was passed in 1987. *See* Pocket Oxford Dictionary of Current English (1984) ("Using insulting language, reviling"); The American Heritage Dictionary of the English Language (1978) ("Insulting or coarse language"). The term "abusive" as used in another statute, O.C.G.A. § 16-11-39, is expressly defined *in the statute* as being limited to "fighting words." O.C.G.A. § 16-11-39(a)(3); *see also, e.g.*, *Crolley v. State*, 182 Ga. App. 2, 3-4 (1987) (construing "abusive" to only mean "fighting words"). The statute challenged here, however, does not define "abusive" as being limited to fighting words, and is thus susceptible to an overbroad definition just like the challenged statute in *Gooding*.

was historically regulated in Colorado); *see also Gerawan Farming, Inc. v. Lyons*, 12 P.3d 720, 736 (Cal. 2000) (state constitution's "right to freedom of speech, unlike the First Amendment's, is 'unlimited' in scope. Whereas the First Amendment does not embrace all subjects, [the state constitution] does indeed do so" (citations omitted)). *Amici* could find no historical exception for *non-disruptive* insulting speech directed to elected officials in Georgia or anywhere. *Cf. New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (free speech "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). A passionate constituent who says that "legislators who support abortion rights are eternally damned" could be found guilty of violating the ban on "abusive speech" precisely because of the "subject" of their speech, in direct violation of Paragraph V. "[T]here is no power in courts to make one person speak only well of another." *Ex parte Tucker*, 220 S.W. 75, 76 (Tex. 1920) (overturning injunction forbidding "vilifying, abusing, or using opprobrious epithets" on the grounds that it violated the "on any subject" provision of Texas Constitution).

But even subsection (a) of O.C.G.A. § 16-11-34.1, which doesn't explicitly ban speech based on its substance, contains overbroad language that threatens to do so. Certain "subjects" of speech, if sufficiently provocative, "may reasonably be expected to" disrupt a legislative meeting. For instance, people silently holding signs pointedly criticizing a committee chairperson during a committee hearing

that the chairperson is in the process of running could be unlawfully restricted from doing so.[11] Protesters wearing buttons using provocative four-letter words for emphasis could distract the attention of legislative pages, interfering with their ability to deliver messages to legislators and delaying an ongoing legislative vote.[12] Visitors in the legislative gallery wearing black T-shirts, each with a giant block letter that spells out "B-L-A-C-K L-I-V-E-S M-A-T-T-E-R" when the visitors sit in a particular order, could distract legislators as they look up into the gallery while a vote is taking place.[13] "[I]t does not even matter whether the act,

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[11] In March 2018, the ACLU of Georgia had to file a lawsuit on behalf of a protestor who was unconstitutionally prohibited from silently holding a protest sign inside the State Capitol Building, securing a temporary restraining order ("TRO") that ultimately caused the Georgia Building Authority to lift its ban on hand-held signs. *See Rasman v. Stancil*, No. 1:18-cv-1321-WSD (N.D.Ga. 2018), ECF No. 2-1 (brief in support of TRO); No. 3 (TRO). In February 2020, in response to reports that protestors were not being permitted to bring signs into committee hearings, the ACLU of Georgia contacted State attorneys in advance to ensure that they could do so.

[12] In March 2019, the ACLU of Georgia filed a lawsuit on behalf of a protestor who wore a button saying, "Don't F**k With Us," within the State Capitol Building, securing a TRO. *See Rubin v. Young*, 373 F. Supp. 3d 1347 (N.D.Ga. 2019). The State said it had an interest in protecting legislative pages (who are minors) from seeing profanity. *See Rubin v. Young*, No. 1:19-cv-1158-SCJ (N.D.Ga. 2019), ECF No. 11 at 2-3.

[13] In January 2019, in response to reports that students were prevented from entering the legislative gallery because they wore T-shirts with messages on them, the ACLU of Georgia wrote to the Senate President Pro Tempore and the Speaker of the House, requesting that they clarify that the public may wear T-shirts with messages on them while silently sitting in the legislative gallery. *See* Letter from Sean J. Young to Senator Butch Miller, Representative David Ralston and Captain

upon its commission, results in any actual prevention or disruption," *State v. Fielden*, 280 Ga. 444, 447 (2006) (interpreting and striking down as unconstitutional O.C.G.A. § 16–11–34(a))—speech on any attention-grabbing subject could be chilled under subsection (a).

The statutory provisions challenged in this case threaten to chill a substantial amount of speech in the State Capitol Building based on the "subject" of that speech, in direct violation of Paragraph V's guarantee that people be able to speak "on all subjects." Accordingly, they are unconstitutionally overbroad under the Georgia Constitution.

B. Unlike the First Amendment, Paragraph V Directly Bans Prior Restraints on Protected Speech

Second, the provision, "Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty," has historically been interpreted as a ban on any kind of prior restraint of protected speech. The challenged statute essentially imposes a prior restraint on broad swaths of *non-disruptive* speech in the State Capitol Building in violation of the Georgia Constitution.

Lewis Young (January 23, 2019) (on file with author), https://rb.gy/knepp2. The policy was subsequently amended to permit such expression.

As the Supreme Court of California recognized as early as 1896, "The meaning of this provision, or others of similar import, has been declared with unanimity by all commentators upon the law. Blackstone declares that the liberty of the press consists in laying no previous restraints upon publications." *See Dailey v. Super. Ct. of City and Cnty. of San Francisco*, 44 P. 458, 459-60 (Cal. 1896).[14] The Georgia Constitution's "abuse of that liberty" clause simply emphasizes that a private person must be free to speak on any subject on the front end but must then be responsible for whatever libel or slander liability may come on the back end.[15] As the Supreme Court of Georgia put it over a century-and-a-half ago when

[14] Though the case was about the freedom of the press, the Supreme Court of California made clear that the right at issue was the right to "speak, write, and publish[.]" *Dailey v. Super. Ct. of City and Cnty. of San Francisco*, 44 P. 458, 459 (Cal. 1896).

[15] *See Dailey v. Super. Ct. of City and Cnty. of San Francisco*, 44 P. 458, 459 (Cal. 1896) ("The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility."); *see also Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992) ("Under our broader guarantee, it has been and remains the preference of this court to sanction a speaker after, rather than before, the speech occurs."); *McKinney v. City of Birmingham*, 296 So. 2d 236, 239 (Ala. 1974) (similar); *see, e.g.*, *Pittman v. Cohn Communities, Inc.*, 240 Ga. 106, 109 (1977) ("abuse" language in Georgia Constitution means that injunctions to restrain slander or libel are forbidden (citing *Singer Mfg. Co. v. Domestic Sewing Machine Co.*, 49 Ga. 70, 72 (1873)).

interpreting this phrase, "The two great elements of this rule are *freedom* and *accountability*." *Giddens v. Mirk*, 4 Ga. 364, 367 (1848); *see also Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992) ("section eight of the Texas Constitution … both grants an affirmative right to 'speak ... on any subject,' but also holds the speaker 'responsible for the abuse of that privilege.' The presumption in all cases under section eight is that pre-speech sanctions or 'prior restraints' are unconstitutional"); *O'Day v. King Cty.*, 749 P.2d 142, 146-47 (Wash. 1988) ("Unlike the First Amendment, article 1, section 5 categorically rules out prior restraints on constitutionally protected speech under any circumstances.").

In this context, that means that people have the freedom to speak, but may not "abuse" their freedom to speak by doing so in a way that intentionally and substantially disrupts or prevents a legislative session (such as, for instance, barging into legislative chambers and yelling loudly inside the chambers where a vote is taking place). *See, e.g.*, *State v. Linares*, 655 A.2d 737, 741-42 (Conn. 1995) (upholding conviction where protestors entered the gallery of the Hall of the House where the governor was giving a speech and "chanted or shouted … over and over again without stopping," thus shutting down the speech). The freedom to speak does not mean that speakers cannot be held accountable for their actions if they cross the line into abuse.

But the law cannot just prophylactically fill in the gray areas between freedom and accountability by preemptively banning more speech than is necessary—including swaths of non-disruptive speech (however offensive or distasteful)—as a front-end cushion to prevent some speech from rising to the level of disruptive "abuse." Doing so raises the specter of an improper prior restraint. *See O'Day v. King Cnty.*, 749 P.2d 142, 147 (Wash. 1988) ("Unlike the First Amendment, article 1, section 5 categorically rules out prior restraints on constitutionally protected speech under any circumstances. . . . Regulations that sweep too broadly chill protected speech prior to publication, and thus may rise to the level of a prior restraint." (citation omitted)); *cf. Coleman v. Bradford*, 238 Ga. 505, 509 (1977) ("the effect of the ordinance is to inhibit and chill the showing of admittedly nonobscene motion pictures . . . . We hold the trial court correctly concluded that this ordinance constitutes an invalid prior restraint," in First Amendment context).

Here, the State may ban speech that intentionally and substantially disrupts or prevents a legislative session—an "abuse" of that liberty of speech—and it can easily do so by prohibiting intentional speech that substantially disrupts a legislative meeting. But "[t]his does not mean that the house may be burned in order to get the rats out of it." *K. Gordon Murray Prods., Inc. v. Floyd*, 217 Ga. 784, 792 (1962). By going further and banning *non-disruptive* speech, the

challenged statute unconstitutionally sets fire to all manner of non-disruptive speech that does not actually disrupt any legislative meeting. As this Court explained in *K. Gordon Murray*, a case in which this Court found that the speech protections of the Georgia Constitution were broader than the First Amendment in that context, "*[o]nly* the abuses of the liberty are held subject to restraint," while "*all* interference" with "speech or press that is not an abuse of the liberty … is absolutely interdicted by the Constitution." *Id.* (emphasis added). Indeed, "no interference, no matter for how short a time nor the smallness of degree, can be tolerated." *Id.*

In this respect, the Georgia Constitution's test for overbreadth ought to be even more protective of speech than the federal standard. While the First Amendment standard requires that a statute's overbreadth be "substantial" relative to the statute's plainly legitimate sweep, *United States v. Williams*, 553 U.S. 285, 292 (2008), under the clear freedom-vs-abuse dichotomy of the Georgia Constitution, "intrusion even for the shortest time and in the most superficial manner would be an invasion of [a person's] constitutionally protected liberty." *K. Gordon Murray*, 217 Ga. at 792; *cf., e.g.*, *Soundgarden v. Eikenberry*, 871 P.2d 1050, 1058 (Wash. 1994) ("This court has concluded that the Washington Constitution is less tolerant of overly broad restrictions on speech than the Federal First Amendment").

Accordingly, subsections (f) and (g) operate as an improper prior restraint on all "abusive language," whether or not such language substantially disrupts or prevents any legislative meeting. Their ban on "loud . . . language," without any qualification whatsoever, also imposes an unlawful restraint on anything "loud" but non-disruptive, and it is even more problematically broader than the noise ordinances this Court has *already* suggested are overbroad. *See Grady v. Unified Gov't of Athens-Clarke Cnty.*, 289 Ga. 726, 732 (2011) (suggesting that banning any "loud or unusual noises which are detrimental or annoying to the public" was overbroad, before ordinance was appropriately narrowed). In *amici*'s experience, nearly *all* speech that occurs in the echoing, tumultuous hallways and Rotunda of the Gold Dome could fairly be described as "loud," especially near the end of legislative session.

Furthermore, while subsection (a) does not explicitly impose any prior restraint, its language is so hopelessly overbroad that ordinary constituents may have to seek preclearance of their signs, T-shirts, and buttons beforehand to ensure that such speech "may" not "reasonably be expected to prevent or disrupt a session or meeting." As early as 1920, the Texas Supreme Court overturned a speech restriction containing these similar features precisely because it imposed a prior restraint. *See Ex parte Tucker*, 220 S.W. 75, 75 (Tex. 1920) (overturning injunction against "vilifying, *abusing*, or using opprobrious epithets . . . *which might be*

calculated to provoke or inspire a breach of the peace" because it imposed a prior restraint, in violation of the "on any subject" provision of Texas Constitution (emphasis added)).

The above also establishes ample textual basis to support the "least restrictive means" test. *See Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 297 Ga. 513, 523 n.12 (2015). The least restrictive way to ban intentionally disruptive speech is to ban intentionally disruptive speech. By going beyond, and imposing a prior restraint on non-disruptive speech, the challenged statute is unconstitutionally overbroad.

C. Unlike the First Amendment, Paragraph V Provides an Affirmative Guarantee

Third, Paragraph V's "Every person may speak, write, and publish sentiments on all subjects" provision differs from the First Amendment in that it *affirmatively* protects the freedom to speak, period, whether or not the unconstitutional suppression of speech comes from the government. In other words, no state action is required, as courts in other states with similar provisions have recognized. *See, e.g.*, *Davenport v. Garcia*, 834 S.W.2d 4, 7-8 (Tex. 1992) ("Rather than a restriction on governmental interference with speech such as that provided by the First Amendment of the United States Constitution, Texans chose

from the beginning to assure the liberties for which they were struggling with a specific guarantee of an affirmative right to speak").[16]

Affirmatively protecting the freedom to speak means that this Court has a special responsibility to consider the chilling effect that overbroad statutes may have. When someone stays home for fear of arrest instead of going to protest at the State Capitol Building, no formal state enforcement action has been taken. But that is irrelevant: so long as a person is reasonably deterred from exercising their freedom to speak by an overbroad statute, this Court has the affirmative constitutional obligation to step in. It would thus be entirely consistent with this Court's *affirmative* constitutional obligation to find that the chilling impact of O.C.G.A. § 16-11-34.1(a), (f), and (g) is too sweeping to be countenanced.

[16] *See also, e.g.*, *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Com'n*, 773 P.2d 455, 459 (Ariz. 1989) ("The first amendment to the United States Constitution provides only a protection against government action. The words of art. 2, § 6 of the Arizona Constitution, on the other hand, directly grant every Arizonan a broad speech right[.]"); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 58 (Colo. 1991) ("In contrast, Article II, Section 10 of the Colorado Constitution advances beyond the negative command of its first clause to make an affirmative declaration in the second clause"); *State v. Schmid*, 423 A.2d 615, 627 (N.J. 1980) ("[T]he rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well."); *Alderwood Assocs. v. Wash. Environmental Council*, 635 P.2d 108, 114 (Wash. 1981) ("In contrast [to the First Amendment], [the state constitutional provision] is not by its express terms limited to governmental actions").

III. O.C.G.A. § 16-11-34.1(a), (f), (g) ARE UNCONSTITUTIONAL UNDER PARAGRAPH IX OF THE GEORGIA CONSTITUTION

Lastly, the text of the Georgia Constitution also expands upon the First Amendment's Petition Clause, which has particular salience here because the challenged statute directly regulates speech that is directed at legislators. While the First Amendment protects "the right of the people . . . to petition the Government for a redress of grievances," the Georgia Constitution since 1877 has protected "the right . . . to apply by petition *or remonstrance* to those vested with the powers of government for redress of grievances." Ga Const. Art. 1, § 1, ¶ IX (emphasis added). The Georgia Constitution's inclusion of the word "remonstrance" in addition to "petition" means that it offers greater speech protections than those found in the First Amendment's Petition Clause. *See, e.g.*, *State v. Linares*, 655 A.2d 737, 754 (Conn. 1995) ("[O]ur state constitution offers language, i.e., 'remonstrance,' that sets forth free speech rights more emphatically than its federal counterpart…. [T]hese differences warrant an interpretation separate and distinct and distinct from that of the first amendment." (citation omitted)).

In 1877, the term "remonstrance" was defined to mean "strong representation of reasons against a measure or not; earnest advice or reproof."[17]

[17] *See* Noah Webster, *Illustrated Edition of Dr. Webster's Unabridged Dictionary of All the Words in the English Language: Containing 10,000 More Words Than Any Other Dictionary*, 1115 (Chauncey A. Goodrich et al. eds. 1864).

Unlike petitions, which affirmatively seek to redress an issue, a remonstrance is framed as an *opposition* or *protest* of something proposed. *See Prof. Ass'n of College Educators v. El Paso Cnty.*, 678 S.W.2d 94, 95-96 (Tex. Ct. App. 1984) (specifically discussing right to "remonstrance" in Texas Constitution as distinct from "petition"). A passage from the above cited dictionary contrasting the verb "remonstrate" with the synonymous verb "expostulate" is instructive:

> We *expostulate* when we unite argument and entreaty to dissuade some one from the course he has chosen. When we *remonstrate*, we go further, and *show or set forth*, in the strongest terms, the danger or the guilt of his pursuing it. We *remonstrate with* a person, and *against* the course he has adopted.

Thus, the right to engage in "remonstrance" with elected officials encompasses the right to engage in speech that is strongly critical of an elected officials' proposed course of action, and it recognizes that this criticism may be delivered in passionate terms.

The right to remonstrance is especially precious to *amici*. Georgia lawmakers often propose bills and hefty, substantive "amendments" (that may as well be standalone bills) at the last minute. Because there is so little time to coordinate and communicate community opposition, protesting such bills at the State Capitol Building is a last resort. Indeed, it may be the only time that a protestor can ensure that lawmakers will physically notice such opposition, because lawmakers must enter any meeting through publicly-accessible hallways. So long as protestors do not physically obstruct passage in violation of O.C.G.A. §

16-11-34.1(c) (which is not challenged in this case), their constitutional right to remonstrance should not be infringed upon by the overbroad restrictions of subsections (a), (f), and (g).

CONCLUSION

The State Capitol Building is the seat of our democracy. Pursuant to the unique and expansive speech protections of the Georgia Constitution, this Court should ensure that it stays that way. For the foregoing reasons, this Court should hold that O.C.G.A. § 16-11-34.1(a), and the ban on "loud" and "abusive language" found in subsections (f) and (g), violate Paragraphs V and IX of Article I, Section 1 of the Georgia Constitution.

Respectfully submitted, this the 25th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2021, I have caused a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE ACLU OF GEORGIA ET AL. IN SUPPORT OF APPELLANT NIKEMA WILLIAMS to be electronically filed, and served on the following counsel of record by U.S. mail:

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