IN THE SUPREME COURT OF GEORGIA

CASE NO. S19C1559

INSTITUTE FOR JUSTICE,

Plaintiff-Petitioner,

v.

WILLIAM L. REILLY, in his official capacity as Clerk of the Georgia House of Representatives; DAVID A. COOK, in his official capacity as Secretary of the Georgia State Senate; MARTHA WIGTON, in her official capacity as Director of the Budget & Research Office of the Georgia house of Representatives; MELODY DEBUSSEY, in her official capacity as Director of the Budget & Evaluations Office of the Georgia State Senate; ELIZABETH HOLCOMB, in her official capacity as Director of the Research Office of the Georgia State Senate; and RICHARD C. RUSKELL, in his official capacity as Legislative Counsel,

Defendants-Respondents.

On Petition for Certiorari to Review a Decision of the Court of Appeals of Georgia, Case No. A19A0076

BRIEF OF AMICUS CURIAE ACLU OF GEORGIA IN SUPPORT OF INSTITUTE FOR JUSTICE'S PETITION FOR CERTIORARI

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Amicus Curiae ACLU of Georgia (hereinafter, "ACLU") respectfully submits the following brief asking this Court to grant certiorari in this case.

INTRODUCTION

Petitioner Institute of Justice has asked this Court to review the Court of Appeals' determination—over dissent by Chief Judge McFadden—that the Open Records Act does not apply to the offices of the State General Assembly. This Court should grant the petition because this case presents an issue of first impression that is of great importance to Georgians and to the ACLU of Georgia.

The offices of the General Assembly have long refused to comply with the Open Records Act, shielding their records from public scrutiny. This hinders the public's and the ACLU of Georgia's ability to effectively scrutinize and monitor the legislative process. In the Open Records Act, the General Assembly has expressed that transparent government and open records are the "strong public policy" of Georgia. This public policy should apply to the offices of the General Assembly just as it does to all other state offices that are not specifically exempted from the Open Records Act.

Despite the importance of the question presented in this case, the Court of Appeals was unable to conclusively resolve the issue. Because its opinion is physical precedent only, it is not binding in any future cases. Without a binding answer to this question, a train of repetitive, piecemeal lawsuits will follow,

wasting precious judicial resources. The public is left not knowing whether it can obtain public records from the offices of the General Assembly, and the courts are left without guidance as to the scope of the Open Records Act.

Further, the majority's analysis departs from the plain text of the Open Records Act based on a flawed reading of two decisions issued by this Court. This Court should grant certiorari in this case to clarify the proper application of its prior decisions and to render a final and binding decision on the question of whether the Open Records Act applies to the offices of the General Assembly.

STATEMENT OF INTEREST

The ACLU of Georgia is a non-profit organization dedicated to preserving the civil liberties enshrined in the U.S. Constitution and the Bill of Rights. The ACLU of Georgia works to preserve and enhance the rights of all Georgians through litigation, lobbying, and communication efforts. Its work focuses on the rights to freedom of speech and religion, to equal treatment under the law, and to privacy. The ACLU of Georgia is interested in this case because the outcome would impact the organization's ability to obtain records from the offices of the General Assembly that would further their work.

A major component of the ACLU of Georgia's work involves advocating in the General Assembly for issues impacting civil liberties. The ACLU of Georgia has representatives at the state capitol throughout the General Assembly's annual

session, and it has a number of legislative advocates who work directly with lawmakers to help ensure that Georgia's laws adequately protect civil rights. In recent years, the ACLU of Georgia has advocated on behalf of bills to create an independent and nonpartisan redistricting commission and end partisan gerrymandering, has lobbied against a ban on abortion, and has worked to end cash bail in Georgia. Gaining a further understanding of the role of General Assembly offices in assessing these bills is often critical to the ACLU of Georgia's work. In addition to working directly with members of the General Assembly, the ACLU of Georgia also provides detailed legislative updates to its members regarding the progress of significant bills. Beyond the legislative process, the ACLU of Georgia routinely pursues legal challenges to laws that inappropriately infringe on civil rights. Those challenges sometimes require the ACLU of Georgia to understand the government's purported justifications for potentially unconstitutional laws, which are often reflected in the documents held by the offices of the General Assembly.

ARGUMENT AND CITATIONS TO AUTHORITIES

I. The proper application of the Open Records Act to the General Assembly is an important and novel question that warrants this Court's time and attention.

Though Georgia has long provided a right to access public records, this is the first case to present the question of whether the Open Records Act applies to

the offices of the General Assembly. This Court should grant certiorari in this case because this question is one of great importance, both to the work of the ACLU and, more generally, to the citizens of this state.

The offices of the General Assembly have unilaterally adopted a policy, divorced from the text of the Open Records Act, of exempting themselves from complying with requests for public records made under the Act. The General Assembly's refusal to comply with the Open Records Act has shielded important legislative records from public view, including documents that are circulated to members of the General Assembly, such as legislative reports and committee meeting notes. As a result, the public is unable to perform the basic task of monitoring the government that Georgia's Open Records Act was intended to foster. O.C.G.A. § 50-18-70(a) ("[P]ublic 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."). For example, the public cannot track which members provided certain edits to bills during the committee process, the public cannot evaluate the information that members use to assess bills, and taxpayers cannot scrutinize the budgetary analyses that dictate how their hard-earned money is being spent. The General Assembly's policy effectively means that the only legislative records that are available to the public are the final versions of bills and laws.

The General Assembly is in complete control of which, if any, other records are released to the public. General Assembly offices can—and do—release cherry-picked documents that may provide a skewed perspective to the public. There is no way for members of the public to gain a full understanding of the legislative process taking place in the General Assembly.

The General Assembly's policy is anathema to the purposes of the Open Records Act, as reflected in its text. In the Open Records Act, "[t]he General Assembly f[ound] and declare[d] 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; and that 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). Similarly, this Court has explained that, in the context of the judiciary, open court records "protects litigants both present and future, because justice faces its gravest threat when courts dispense it secretly." *Atlanta Journal v. Long*, 258 Ga. 410, 411 (1988). If the General Assembly wishes to exempt its offices from the Open Records Act, the proper way to do so is to amend the text of the statute through the legislative process, with the accompanying public scrutiny. It undermines both the Open Records Act and the public trust to allow the offices of the General Assembly to exempt themselves

from the Act, in contravention of the statute's plain language as explained in the following section.

The ACLU of Georgia's work is hindered by the General Assembly's failure to comply with the Open Records Act. The records described above would allow the ACLU of Georgia to advocate and lobby more effectively, but legislative offices have been so steadfast in their refusal to provide records that the ACLU of Georgia has stopped submitting open records requests for the documents of these offices. If the offices of the General Assembly complied with the plain language of the Open Records Act and provided public records, the ACLU of Georgia would frequently request legislative records to assist in its advocacy work. Given the importance of these legislative records, both to the ACLU's work and to the public interest at large, this Court should grant Institute for Justice's petition for a writ of certiorari and should consider whether the offices of the General Assembly are subject to the Open Records Act.

II. This Court should grant certiorari because the Court of Appeals' decision is wrong and is physical precedent only.

Respondents do not dispute that the question at issue in this case is important. Instead, Respondents' opposition to the petition for certiorari rests solely on the argument that this Court's attention is not necessary because the Court of Appeals correctly interpreted the Open Records Act. But Respondents fail to note that the Court of Appeals' order is physical precedent. That fact alone

counsels in favor of granting certiorari, and the petition is further supported by the fact that the analysis in the Court of Appeals' majority opinion is wrong.

The Court of Appeals did not settle the question presented by this case. Because the case was decided by a three-judge panel of the Court of Appeals and Chief Judge McFadden dissented, the majority opinion is physical precedent only and is not binding on other Georgia courts. Ga. Ct. App. R. 33.2. The issue of the Open Records Act's application to the offices of the General Assembly therefore remains unsettled. This Court should grant certiorari in this case so that it can render a conclusive and binding decision regarding the proper interpretation of the Open Records Act.

That the Court of Appeals was unable to render a unanimous decision in this case undermines Respondents' argument that the proper result in this case is "abundantly clear." Resp. Br. at 28. As Chief Judge McFadden's decision explains, the majority's analysis suffers from several serious flaws. For example, a plain reading of the statutory language supports Petitioner's position, as the Act requires "***every state . . . office***" to produce public records for inspection and copying upon request. O.C.G.A. § 50-18-71(b)(1)(A) (requiring all "agencies" to provide public records upon request); *id.* § 50-18-70(b)(1) (incorporating *id.* § 50-14-1(a)(1)(A), which defines "agency" as "[e]very state . . . office"). The phrase

"every state office" means what it says. The offices of the General Assembly are state offices. They are not exempted by the Act.

Both Respondents and the Court of Appeals' majority opinion depart from the plain meaning of the statute based on two opinions of this Court. In *Harrison Co. v. Code Revision Commission*, this Court held that "the General Assembly, including its committees, commissions, and offices, is not subject to a law unless named therein or the intent that it be included be clear and unmistakable." 244 Ga. 325, 328 (1979). And in *Coggin v. Davey*, this Court held that the predecessor statute to the Open Meetings Act did not apply to the General Assembly or its conference committees. 233 Ga. 407, 411-12 (1975). This Court reasoned that the General Assembly's intent not to be bound by the Act was apparent from the chambers' decision to adopt internal operating rules that conflicted with the requirements of the Open Meetings Act. *Id.*

Neither of these cases justify departing from the plain text of the Open Records Act. The test in *Harrison* is satisfied here because the Act's use of the term "every state . . . office" clearly and unmistakably encompasses the offices of the General Assembly. *Coggin* is inapplicable here because it (1) concerned the Open Meetings Act, not the Open Records Act; (2) considered the application of the Open Meetings Act to the General Assembly itself, rather than its offices; (3) interpreted a different definition of the word "agencies" than is used in the Open

Records Act; and (4) hinged on the General Assembly's adoption of internal procedures inconsistent with the Open Meetings Act, which is not the case here.

Despite the distinction between *Coggin* and this case, the majority of the Court of Appeals considered itself to be bound by this Court's interpretation of scope of the Open Meetings Acts in *Coggin*. Of course, upon deciding erroneously that *Coggin* applied here, the Court of Appeals believed that it was not at liberty to deviate from that decision. By contrast, this Court is in a much better position to determine the limits of *Coggin* and render a final decision as to whether Open Records Act applies to the offices of the General Assembly.

In sum, the question of whether the General Assembly is subject to the Open Records Act has not been conclusively settled. Further, the majority's analysis in the Court of Appeals opinion departs from the plain language of the Open Records Act based on an incorrect reading of two decisions issued by this Court. For these reasons, certiorari is more than warranted in this case.

CONCLUSION

For the foregoing reasons, Amicus Curiae ACLU of Georgia respectfully asks this Court to grant the Petition for a Writ of Certiorari.

[signature on following page]

Respectfully submitted, this 26th day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I have caused a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE ACLU OF GEORGIA IN SUPPORT OF INSTITUTE FOR JUSTICE'S PETITION FOR CERTIORARI** to be served on the following counsel of record by U.S. mail:

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