No. S24A0617

The Supreme Court of the State of Georgia

DEBORAH GONZALEZ,
APPELLANT,

v.

JARROD MILLER,
APPELLEE.

BRIEF OF AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTRODUCTION

In accepting this appeal, the Court posed the question: "Does the Open Records Act apply to district attorneys' offices?" Dec. 27, 2023 Order. The only plausible reading of the statute is that it does.

By its terms after its amendments in 2012, it applies to all state "offices." Notwithstanding Appellant's long digression about the judicial branch, the statute's terms do not distinguish between offices that exercise executive and judicial functions. And the statute expressly exempts certain records maintained by prosecutors' offices—underscoring that its default rule encompasses those offices. Thus, which branch of government district attorneys' offices reside in—or what types of power they exercise—is irrelevant to this question of statutory interpretation. The only plausible reading of the text is that it applies to those offices. Because the text is clear and Appellant raises no constitutional challenge to the statute, that clear reading disposes of the Court's statutory question.

This reading also promotes the rule of law. To *amicus*'s knowledge, no similar sunshine law wholly exempts prosecutors' offices. Of course, many of those laws have exemptions, just like Georgia's, to preserve the necessary confidentiality in prosecuting crimes. But the default rule for prosecutors, like other public officers, is transparency, which keeps the government responsible to those who provide its legitimacy: the People.

If Appellant fears burdens from this law, that is a policy dispute for the General Assembly. The statute is clear, so the Court should affirm.

INTEREST OF *AMICUS CURIAE*

America First Legal Foundation (AFL) is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. AFL has a substantial interest in this case because it often relies on open records laws to provide public transparency and accountability.

Moreover, AFL recently sued the Fulton County District Attorney's Office on behalf of Bentley Media Group, whose reporter submitted an Open Records Request to Fulton County, requesting: "[A]ll records of meetings between District Attorney Fani Willis, special prosecutor Nathan Wade, or any other staff of the District Attorney's Office with any White House or federal Department of Justice officials both in Georgia and the District of Columbia from Jan. 1, 2021 to the present [and] all communications between DA Willis or special prosecutor Wade with White House or Department of Justice officials from Jan. 1, 2021 to the present." The Office failed to turn over any records, even though it admitted in an unrelated hearing that it had

communicated with the White House. The lawsuit is pending in the Superior Court of Fulton County (No. 24CV002511).

ARGUMENT

I. District attorneys' offices are "offices" under the Open Records Act.

A. The statute's text applies to district attorneys' offices.

Appellant's brief practically ignores the text of the Open Records Act (ORA). That is contrary to the textualist approach directed by this Court's precedents. When this Court "consider[s] the meaning of a statute," it "must presume that the General Assembly meant what it said and said what it meant." *CPF Invs., LLLP v. Fulton Cnty. Bd. of Assessors*, 330 Ga. App. 744, 746 (2015) (cleaned up) (quoting *Deal v. Coleman*, 294 Ga. 170, 172(1)(a) (2013)). So "if the language of the statute is plain and unambiguous," Georgia courts "simply apply the statute as written." *Id.* Indeed, "[w]here the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden." *Six Flags Over Georgia v. Kull*, 276 Ga. 210, 211 (2003).

Whether the ORA applies to district attorneys' offices is an everyday question of statutory interpretation that first principles can answer. Start with the text. Under the ORA, "[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). "Agencies shall produce for inspection all records responsive to a request within a reasonable amount of time," and

absent agency designation of a specific custodian, requests may be made to "the agency's director, chairperson, or chief executive officer, however denominated." *Id.* § 50-18-71(b)(1). "Public record" means "all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, data, data fields, or similar material prepared and maintained or received by an agency." *Id.* § 50-18-70(b)(2) And "agency" means, in relevant part, "[e]very state department, agency, board, bureau, *office*, commission, public corporation, and authority." *Id.* § 50-14-1(a)(1)(A) (emphasis added); *see id.* § 50-18-70(b)(1).

The primary question, then, is whether a district attorney's office is an "office" of the state. Yes: an office is an office. This Court has said that district attorneys are an "office[] of State Government." *Fortson v. Weeks*, 232 Ga. 472, 478 (1974). That should be the end of the matter. Recent cases have considered the matter so apparent as to warrant no discussion. *See, e.g.*, *Media Gen. Operations, Inc. v. St. Lawrence*, 337 Ga. App. 428, 431, 433 (2016) (explaining that public records "in the possession of the [sheriff's office] and/or, more recently, the district attorney" would "absolutely be subject to disclosure" after a prosecution is no longer pending).

When Appellant eventually gets around to this central question, she first deflects by noting that the District Attorney herself is not an "agency." Br. 22. Of course not—her office is. The District Attorney is the alleged custodian of her office's public records. She is thus a proper defendant in an ORA suit. *See* O.C.G.A.

§ 50-18-71(b)(1). "[D]ecisions to comply, or not, with the [ORA]" are necessarily "made by individuals." *Williams v. DeKalb Cnty.*, 308 Ga. 265, 275 (2020) (cleaned up).

Finally addressing the meaning of "office," Appellant suggests that her office is non-existent. Her primary support for this claim is that the Court has held that the district attorney's office is not a "separate legal entity capable of suing or being sued." Br. 24 (quoting *Meyers v. Clayton Cnty. District Attorney's Office*, 357 Ga. App. 705, 709–10 (2020)). Even if that's right, Appellant points to nothing in the ORA even hinting that its definition of "agency" is limited to entities that have a separate legal capacity to sue or be sued.

Instead, all that matters is that the Appellant's office is a state "office." So obvious is that conclusion that even Appellant cannot help but repeatedly referring—sometimes using quotations from this Court—to her *office*. *See, e.g.*, Br. 24 ("the office of district attorney" (quoting *Meyers*, 357 Ga. App. at 709–10)); *id.* at 5 (referring to "the constitutional provision creating the office of district attorney"). Appellant also concedes that she is an "officer." Br. 24. By necessity, then, she has an "office."

Georgia's statutes likewise establish that the district attorney's office is just that—an office. *See, e.g.*, O.C.G.A. § 15-18-5(a) ("a district attorney's office"); *id.* § 15-18-3 (the office of district attorney"); *id.* § 15-18-14(a)(1)(A) ("the district

attorney's office"); *id.* § 15-18-20 ("the district attorney's office"); *id.* § 15-18-20.1 ("the office of district attorney"); *id.* § 15-18-28(a), (b) ("the office of a district attorney"); § 15-18-12(d)(2) ("the district attorney's office"); *id.* § 15-18-14.1(c) ("the district attorney's office"); *id.* § 15-18-6(13) (referring to "their office"); *see also id.* § 15-18-1 ("The district attorney is the successor to the office of solicitor-general as it existed prior to July 1, 1977."); § 15-18-60 (titled "Office created" and referring to "a vacancy in the office of solicitor-general").

This Court's precedents reinforce the point, referring over and over to district attorneys' offices. *See, e.g.*, *Battle v. State*, 298 Ga. 661, 669 (2016) ("the District Attorney's Office"); *Ferguson v. State*, 294 Ga. 484, 485 (2014) ("the District Attorney's office"); *McLaughlin v. Payne*, 295 Ga. 609, 614 (2014) ("the district attorney's office"); *State v. Hanson*, 249 Ga. 739, 744 (1982) (referring to the prosecutor's "office").

"[W]hat a legislature normally does, if it wants to make sure that readers understand that a word with a broad ordinary meaning does not include something within that meaning, is to expressly define that thing out of the category." *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 363 (2012). Here, the ORA sweeps in all state offices. District attorneys' offices are state offices. And the General Assembly did not expressly exempt them. Thus, the statutory text directs their inclusion in the ORA. Appellant's contrary argument "alter[s] the plain meaning of" "office."

McBrayer v. Scarbrough, 317 Ga. 387, 397 (2023); s*ee Integon Indem. Corp. v. Canal Ins.,* 256 Ga. 692, 693 (1987) ("Statutes should be read according to the natural and most obvious import of the language, without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operation."); *see also United States v. Rodgers*, 466 U.S. 475, 480 (1984) (rejecting a "narrow, technical definition" of a statutory term when it "clashes strongly" with "sweeping" language).

B. The statute's context confirms its application.

Content confirms the ORA's plain text. "In construing language in any one part of a statute, a court should consider the statute as a whole" and "avoid a construction that makes some language mere surplusage." *Kinslow v. State*, 311 Ga. 768, 771 (2021) (cleaned up).

The most glaring contextual indicator that the ORA extends to prosecutors' offices is that it specifically exempts certain materials of prosecutors, while directing that all other materials are broadly included. Under Georgia law, "[i]n all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." O.C.G.A. § 1-3-1. In the ORA, the General Assembly "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. It further "declare[d] that there is a strong presumption that public records should be made available for public inspection," instructing that the ORA "shall be broadly construed." *Id.*

Even more specifically, the General Assembly directed that the ORA's exceptions "shall be interpreted narrowly to exclude only those portions of records addressed by such exception." *Id.* One of those exceptions is for "records compiled for law enforcement or prosecution purposes to the extent that production of such records is reasonably likely to disclose the identity of a confidential source" or raise other specific confidentiality issues. O.C.G.A. § 50-18-72(a)(3). Another is for "[r]ecords of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity." *Id.* § 50-18-72(a)(4).

These exceptions—especially (a)(3)—would be largely superfluous if prosecutors generally are not covered by the ORA to begin with. Why include "records complied for . . . prosecution purposes" if district attorneys are never subject to the ORA?

Appellant ventures no explanation, or even acknowledges these exceptions. But "[c]ourts 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). Because "courts presume that [the legislature]

has used its scarce legislative time to enact statut[ory provisions] that have some legal consequence," and Appellant's interpretation would deprive multiple carefully-crafted ORA exceptions of their effect, the Court should not adopt her strained reading. *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 877 (D.C. Cir. 2006) (Kavanaugh, J.).

More contextual evidence refuting Appellant's interpretation comes from the provision just discussed requiring courts to construe the ORA broadly. Again, the central focus of statutory interpretation is the legislative intent as expressed by the text. Here, the General Assembly gave "a specific admonition" about how to construe the ORA (*Parker v. Lee*, 259 Ga. 195, 198 (1989)): "broadly." O.C.G.A. § 50-18-70. So even if there was any ambiguity about how the ORA's terms should be interpreted, the statute provides a rule of decision: interpret them broadly. *Contra* Appellant, construing the ORA's terms broadly—including its reference to "office"—does not "expand the limited definitions and text of the Open Records Act to reach beyond its plain language," Br. 24 n.17, but is *required* by the plain language of the statute. That language, read both plainly and in context, extends to district attorneys' offices.

C. Appellant raises no constitutional challenge requiring avoidance.

As noted, most of Appellant's argument about the ORA's meaning is directed toward whether district attorneys are judicial or executive. But Appellant never

identifies anything in the ORA that would make its application turn on that question. So Appellant is left with only two options for why the classification of district attorneys might be relevant: either the Georgia Constitution or this Court's precedents require overriding the statutory text. Neither option works to nullify the statute adopted by the General Assembly.

First, for all her references to the Georgia Constitution, Appellant does not actually press a constitutional challenge to interpreting the ORA to cover district attorneys' offices. Without a constitutional challenge, there can be no constitutional issue for the Court to avoid in its statutory interpretation. Of course, the canon of constitutional avoidance "does not apply to a statute that . . . ha[s] [been] determined to be unambiguous," and this statute is unambiguous. *City of Winder v. Barrow Cnty.*, No. S23G0341, ___ Ga. ___, ___2024 WL 923102, at *5 (Mar. 5, 2024). But it is telling that Appellant does not even present a constitutional challenge on this point. With no ambiguity and no constitutional challenge, it is hard to see how Appellant's long discussion of the Georgia Constitution is relevant at all. Indeed, avoiding constitutional issues here counsels in favor of simply interpreting the statute as written, without getting into unnecessary questions about the judicial or executive nature of district attorneys' offices. *See, e.g.*, *Brugman v. State*, 255 Ga. 407, 413 n.5 (1986) (avoiding this precise question).

So in the end, Appellant is forced to fall back on precedent as a reason to disregard the statutory text. But that effort fails, too. The only precedent of this Court emphasized by Appellant held that the prior Sunshine Act did not apply to the General Assembly because it was limited "to the departments, agencies, boards, bureaus, etc. of this state and its political subdivisions," which did not describe "the General Assembly." *Coggin v. Davey*, 233 Ga. 407, 411 (1975). That holding is irrelevant here for at least two reasons.

First, the ORA was extensively amended in 2012 when the General Assembly added "offices" to the list of "agencies" covered. *See Inst. for Just. v. Reilly*, 351 Ga. App. 317, 320 (2019). Given that *Coggin* addressed neither the term "offices" nor district attorneys' offices, there is no plausible argument that *stare decisis* requires this Court to deviate from the plain text here.

Second, *Coggin* did not hold that non-executive state entities are presumptively uncovered by the (prior) statute. Nothing in *Coggin* turned on the constitutional status of the relevant entity—just as nothing in the ORA's text does.

Trying to bootstrap from *Coggin*'s thin analysis, Appellant relies on a couple Court of Appeals decisions. The first, *Institute for Justice v. Reilly*, was a divided decision holding that "considering the text of the current [ORA] within the history of the text and the broader context in which that text was enacted, including statutory and decisional law, the mere addition of the word 'office' cannot be read in context

and in light of *Coggin* to make offices within the General Assembly subject to the Act." 351 Ga. App. 317, 320 (2019) (citation omitted). That decision is irrelevant, given that the General Assembly is not at issue and that there was no comparable background precedent about district attorneys' offices for the General Assembly to legislate against.

The second decision, *Fathers Are Parents Too, Inc. v. Hunstein*, was issued 20 years before the significant 2012 statutory amendments. It held that a commission "[a]cting under the authority of the Supreme Court to assist the Court in the exercise of its judicial function" was not covered by the former Open Meetings Act. 202 Ga. App. 716, 717 (1992). The basis of the Court of Appeals's holding was two-hold: "the proper exercise of such judicial authority may not be limited by the legislative branch," and "the current Act . . . does not specifically reference the judicial branch, nor otherwise apply to the judiciary in clear and unmistakable terms." *Id.*

That rationale has no purchase here. Put aside the significant statutory amendments since 1992, and that this Court declined to endorse *Hunstein*'s rule even at the time. *See Green v. Drinnon, Inc.*, 262 Ga. 264, 264 (1992). Appellant does not appear to claim that interpreting the ORA to apply to her office would violate the separation of powers. Nor would that argument be plausible, in light of the many other ways that the General Assembly routinely regulates district attorneys' offices—as acknowledged by Appellant. *See* Br. 12–13 (describing the legislature's regulation

of district attorneys' offices' compensation); *see also, e.g.*, O.C.G.A. § 15-18-21 (regulating the qualifications of assistant district attorneys and investigators).

Hunstein also suggested a type of clear statement rule, asserting that the prior statute did not "apply to the judiciary in clear and unmistakable terms." 202 Ga. App. at 717. But it cited nothing in support of this clear statement rule, and no justification is apparent. Under Georgia law, "[i]n all interpretations of statutes, the ordinary signification shall be applied to all words." O.C.G.A. § 1-3-1(b). When the General Assembly wants a statute interpreted by reference to clear statement rules instead, it has defined those parameters. For instance, Georgia law provides that "[t]he state is not bound by the passage of a law unless it is named therein or unless the words of the law are so plain, clear, and unmistakable as to leave no doubt as to the intention of the General Assembly." O.C.G.A. § 1-3-8. But no one could dispute that the ORA is intended to apply to the state—that is its core point. And Appellant identifies no recognized clear statement rule applicable here.

There is no good reason to impose a clear statement rule before the ORA is applied according to its plain terms, particularly because Appellant raises no constitutional challenge. Clear statement rules "are in significant tension with textualism insofar as they instruct a court to adopt something other than the statute's most natural meaning." *Biden v. Nebraska*, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring). They "'load[] the dice for or against a particular result' in order to serve a

value that the judiciary has chosen to specially protect." *Id.* (quoting Antonin Scalia, *A Matter of Interpretation* 27 (1997)). But what matters for legal interpretation is *legislative* intent, not the judiciary's, which is why clear statement rules upset legislative compromises. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 404–05, 449 (2010). In enacting and amending the ORA, the General Assembly "struck the balance it thought right—generally favoring disclosure, subject only to a handful of specified exemptions—and did so across the length and breadth of the [State] Government." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 n.5 (2011). Its "plain and explicit terms" encompass district attorneys' offices. *Couch*, 291 Ga. at 364.

In all events, though it is irrelevant to the ORA's applicability, Appellant's description of district attorneys' offices as performing a purely judicial function is dubious. This Court has explained that "the operation of the district attorney's office is not a judicial function." *Wilson v. Southerland*, 258 Ga. 479, 480 (1988). Appellant notes this Court's statement that "[d]istrict attorneys are generally considered to be quasi judicial officers," Br. 16 (quoting *Fortson*, 232 Ga. at 478), without recognizing that "quasi" is the crucial limiting word in that statement. *See also Fortson*, 232 Ga. at 491 (Hall, J., concurring) ("[T]he office of District Attorney . . . is not per se a judicial office.").

Because the text and context of the ORA show that it encompasses district attorneys' offices, and Appellant presents no constitutional challenge to this conclusion, the Court should give the statute its plain meaning and affirm.

II. District attorney office transparency promotes the rule of law.

A theme of Appellant's brief (and application for interlocutory appeal) is that the Court should not apply the ORA to district attorneys' offices because they are already "understaffed and under-resourced." Br. 2. But "striking the right balance between competing legitimate policy interests is a political question" "properly directed to the General Assembly," not this Court. *Schmitz v. Barron*, 312 Ga. 523, 529 n.4 (2021) (cleaned up). In any event, no government entity *likes* being subject to open records laws like ORA and FOIA. Those laws always take effort to comply with. But the legislatures of the federal government and the states view these laws as a critical "means for citizens to know what their Government is up to." *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 171 (2004). As the U.S. Supreme Court emphasized, "This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Id.* at 171–72; *see* O.C.G.A. § 50-18-70 ("open government is essential to a free, open, and democratic society").

This necessity is no less acute in the context of prosecutors' offices. "[M]atters of substantive law enforcement policy" "are properly the subject of public concern." *U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 766 n.18

(1989). The District Attorney has "professional responsibilities as a public prosecutor to make decisions in the public's interest." *State v. Wooten*, 273 Ga. 529, 531 (2001). So the public has a "weighty" interest in knowing how the District Attorney "carrie[s] out" the "statutory duties to investigate and prosecute criminal conduct." *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Just.*, 854 F.3d 675, 679 (D.C. Cir. 2017) (cleaned up).

The practical problems hinted at by Appellant appear overblown, given that the federal government and most, if not all, states subject prosecutors to similar open records laws. The federal Department of Justice complies with FOIA. *See* 28 C.F.R. part 16. And to *amicus*'s knowledge, no other state's sunshine law exempts prosecutors. Yet prosecutors in all the other states and the federal government have managed to comply with open records laws that promote the public's interest and democratic accountability. The purported burdens of complying with the ORA are no reason to exempt prosecutors in Georgia from what the text requires.

CONCLUSION

For these reasons, the Court should affirm.

RULE 20(7) CERTIFICATION

This submission does not exceed the word-count limit imposed by Rule 20 (7,000 words).

Respectfully submitted,

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