

**SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA**

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION and  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION OF  
GEORGIA,

Plaintiffs,

v.

STATE OF GEORGIA,

Defendant,

Civil Action No. 26CV007672

**RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND  
MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'  
MOTION FOR JUDGMENT ON THE PLEADINGS**

## TABLE OF CONTENTS

|                                                                                                                                      |    |
|--------------------------------------------------------------------------------------------------------------------------------------|----|
| TABLE OF CONTENTS .....                                                                                                              | i  |
| TABLE OF AUTHORITIES.....                                                                                                            | ii |
| INTRODUCTION .....                                                                                                                   | 1  |
| BACKGROUND .....                                                                                                                     | 2  |
| ARGUMENT .....                                                                                                                       | 4  |
| I. Georgia’s Ban Chills Plaintiffs’ Proposed Representation.....                                                                     | 5  |
| II. Plaintiffs’ Pro Bono Representation of Election Workers Is<br>Protected by the First Amendment and the Georgia Constitution..... | 11 |
| III. Application of Section 21-2-18 to Pro Bono Legal Representation<br>Does Not Survive Constitutional Scrutiny. ....               | 16 |
| CONCLUSION .....                                                                                                                     | 18 |
| CERTIFICATE OF SERVICE .....                                                                                                         | 19 |

## TABLE OF AUTHORITIES

### Cases

|                                                                                             |        |
|---------------------------------------------------------------------------------------------|--------|
| <i>Bates v. City of Little Rock</i> ,<br>361 U.S. 516 (1960).....                           | 17     |
| <i>Borough of Duryea v. Guarnieri</i> ,<br>564 U.S. 379 (2011).....                         | 13     |
| <i>Buckley v. Valeo</i> ,<br>424 U.S. 1 (1976).....                                         | 17     |
| <i>City of Guyton v. Barrow</i> ,<br>305 Ga. 799 (2019) .....                               | 9      |
| <i>Cobb County v. Floam</i> ,<br>319 Ga. 89 (2024) .....                                    | 10, 11 |
| <i>Grady v. Unified Government of Athens-Clarke County</i> ,<br>289 Ga. 726 (2011) .....    | 11, 14 |
| <i>Great American Dream, Inc. v. DeKalb County</i> ,<br>290 Ga. 749 (2012) .....            | 14     |
| <i>Haitian Refugee Center, Inc. v. Baker</i> ,<br>953 F.2d 1498 (11th Cir. 1992).....       | 15     |
| <i>Heckler v. Community Health Services of Crawford County</i> ,<br>467 U.S. 51 (1984)..... | 7      |
| <i>In re Primus</i> ,<br>436 U.S. 412 (1978).....                                           | passim |
| <i>Jean v. Nelson</i> ,<br>727 F.2d 957 (11th Cir. 1984).....                               | 9      |
| <i>Kennedy v. Carlton</i> ,<br>294 Ga. 576 (2014) .....                                     | 8      |
| <i>Lawline v. American Bar Association</i> ,<br>956 F.2d 1378 (7th Cir. 1992).....          | 15     |

|                                                                                                     |                |
|-----------------------------------------------------------------------------------------------------|----------------|
| <i>Little v. City of North Miami</i> ,<br>805 F.2d 962 (11th Cir. 1986) .....                       | 15             |
| <i>NAACP v. Button</i> ,<br>371 U.S. 415 (1963) .....                                               | 12, 13, 14, 15 |
| <i>Novare Group, Inc. v. Sarif</i> ,<br>290 Ga. 186 (2011) .....                                    | 2              |
| <i>Roberts v. State</i> ,<br>278 Ga. 610 (2004) .....                                               | 7              |
| <i>Susan B. Anthony List v. Driehaus</i> ,<br>573 U.S. 149 (2014) .....                             | 10             |
| <i>Total Vending Service, Inc. v. Gwinnett County</i> ,<br>264 S.E.2d 574 (Ga. Ct. App. 1980) ..... | 10             |
| <i>United Transportation Union v. State Bar of Michigan</i> ,<br>401 U.S. 576 (1971) .....          | 15             |
| <i>Williams v. Powell</i> ,<br>320 Ga. 221 (2024) .....                                             | 17             |

## **Statutory Authorities**

|                                                         |        |
|---------------------------------------------------------|--------|
| Official Code of Georgia Annotated § 9-4-2(a) .....     | 10     |
| Official Code of Georgia Annotated § 9-11-12(c) .....   | 1      |
| Official Code of Georgia Annotated § 9-11-56 .....      | 1      |
| Official Code of Georgia Annotated § 16-4-7 .....       | 10     |
| Official Code of Georgia Annotated § 21-2-18 .....      | passim |
| Official Code of Georgia Annotated § 21-2-33.1(a) ..... | 4      |
| Official Code of Georgia Annotated § 21-2-71(b) .....   | 3      |
| Official Code of Georgia Annotated § 21-2-212(f) .....  | 3      |

**Constitutional Authorities**

Georgia Constitution Article 1, § 1, paragraph XII .....14

## INTRODUCTION

Plaintiffs American Civil Liberties Union Foundation (“ACLU”) and American Civil Liberties Union Foundation of Georgia (“ACLU-GA”) respectfully submit this memorandum of law in opposition to Defendant State of Georgia’s motion to dismiss, as well as in support of their motion for judgment on the pleadings. *See* O.C.G.A. § 9-11-12(c).<sup>1</sup>

“For the ACLU, . . . litigation is not a technique of resolving private differences; it is a form of political expression and political association.” *In re Primus*, 436 U.S. 412, 428 (1978) (internal quotation marks omitted). Yet Plaintiffs are chilled from engaging in litigation relevant to their mission of expanding and protecting all Georgians’ voting rights by O.C.G.A. § 21-2-18, which bans elections officials, poll workers, and other elections workers receiving anything of value in support of their duties. This ban is expansively phrased, extending not just to monetary grants meant to help administer elections but also to the provision of services that in any way support the performance of an election worker’s duties, such as pro bono legal representation by Plaintiffs. Fearing liability for themselves and

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<sup>1</sup> Although O.C.G.A. § 9-11-12(c) contemplates a motion for judgment on the pleadings “[a]fter the pleadings are closed,” the questions presented by this case are fundamentally legal and thus amenable to resolution to at this stage in the litigation. To the extent that there exist any factual disputes that preclude resolving this dispute on the papers, Plaintiffs respectfully request the right to present relevant material as contemplated by O.C.G.A. § 9-11-12(c) and § 9-11-56.

their potential clients, Plaintiffs have already foregone representing covered workers in both affirmative and defensive litigation.

This violates the Georgia Constitution. The First Amendment to the U.S. Constitution—which the Georgia Supreme Court has held establishes a floor for the state provision—protects the right of civil rights groups like Plaintiffs to provide pro bono legal representation as part of their core political expression and association. Plaintiffs have a constitutional right to offer and, if accepted, give their services to elections workers, a right burdened by the risk of liability under Section 21-2-18.

Plaintiffs therefore seek declaratory and injunctive relief to clarify their rights to engage in this protected activity. In its motion to dismiss, the State argues that Section 21-2-18 does not apply to Plaintiffs’ intended activities. While Plaintiffs welcome that position, they still require relief so that they and their potential clients can move forward without the threat of enforcement hanging over their heads.

## **BACKGROUND**

The following facts are drawn from the Verified Complaint. *See Novare Grp., Inc. v. Sarif*, 290 Ga. 186, 191 (2011) (“[A] motion for judgment on the pleadings is authorized where the undisputed facts that appear from the pleadings establish that the movant is entitled to judgment as a matter of law.”).

On March 25, 2021, Georgia enacted a limitation on how local officials could fund elections. Compl. ¶¶ 15–16. That law stated that superintendents of elections

could not “take or accept any funding, grants, or gifts from any source other than the governing authority of the county or municipality, the State of Georgia, or the federal government.” *Id.* ¶ 16 (quoting O.C.G.A. § 21-2-71(b) (effective Mar. 25, 2021, to May 2, 2023)). A parallel provision barred county boards of registrars from accepting funding from non-governmental sources. *Id.* (citing O.C.G.A. § 21-2-212(f) (effective Mar. 25, 2021, to May 2, 2023)).

In May 2023, the legislature broadened the ban, barring counties and municipalities from receiving any grants or gifts from sources other than the federal or state government. *Id.* ¶¶ 17–18. The May 2023 amendments also added the provision at issue here, Section 21-2-18. *Id.* ¶ 19. That section reads:

Notwithstanding any other provision of law to the contrary, no county or municipal government, government employee, or election official shall solicit, take, or otherwise accept from any person a contribution, donation, service, or anything else of value for the purpose of conducting primaries or elections or in support of performing his or her duties under this chapter.

O.C.G.A. § 21-2-18(c). A government employee is defined to “include, but not be limited to, election superintendents, registrars, poll workers, and the agents and employees thereof.” *Id.* § 21-2-18(a)(1). The law contains a proviso, carving out an exception for “the donation or use of locations for voting purposes, services provided by individuals without remuneration, or goods that have nominal value of less than \$500.00.” *Id.* § 21-2-18(d). Violation of Section 21-2-18 can be prosecuted as a felony, with a minimum penalty of one year’s imprisonment and a fine of \$10,000;

and the State Election Board may also enforce the law through administrative proceedings. *Id.* § 21-2-18(e); Compl. ¶¶ 21–22 (citing O.C.G.A. § 21-2-33.1(a)).

ACLU and ACLU-GA are nonprofit, nonpartisan organizations that work to advance the civil rights and civil liberties of all Georgians. *Id.* ¶ 5. This mission includes protecting the right to vote, expanding access to the franchise, and defending lawful electoral results from baseless attacks. *Id.* One key way ACLU and ACLU-GA accomplish these goals is through legal representation and litigation. *Id.* ¶¶ 5–6. Plaintiffs bring affirmative litigation to protect Georgians’ voting rights, challenging state laws and rules that make it more difficult to vote or thwart the lawful administration of elections, and representing clients as defendants in suits that, if successful, would limit access to the ballot. *Id.* ¶ 24.

Plaintiffs wish to provide pro bono legal services to elections officials, poll workers, and other elections workers as part of their work. *Id.* ¶ 6. Since the passage of Section 21-2-18, Plaintiffs have refrained from representing elections workers as clients, due to the risk of liability. *Id.* ¶ 25. This burdens Plaintiffs’ core political speech, as expressed through both affirmative and defensive litigation. *Id.* ¶¶ 24, 26–27.

## **ARGUMENT**

Plaintiffs seek a declaratory judgment that application of Section 21-2-18 to their representation of elections officials, poll workers, and other elections workers

would violate the Georgia Constitution, and injunctive relief effectuating this declaration. A plain reading of Section 21-2-18 reaches Plaintiffs’ proposed pro bono representation of elections workers, because such representation is arguably a “service . . . [offered] in support of performing [an election worker’s] duties.” O.C.G.A. § 21-2-18. Plaintiffs have therefore abstained from providing this representation for fear of subjecting potential clients to liability. Yet the U.S. Supreme Court has repeatedly recognized that the federal First Amendment—which is less expansive than Georgia’s free-speech provision—protects the right to engage in litigation as a form of political expression and political association. Those rights preclude Section 21-2-18 being applied in these circumstances. Because Georgia’s law chills Plaintiffs from engaging in core political speech, declaratory and injunctive relief is necessary.

#### **I. Georgia’s Ban Chills Plaintiffs’ Proposed Representation.**

A natural reading of Section 21-2-18 covers the exact conduct that Plaintiffs wish to engage in: pro bono legal representation of elections workers in both affirmative and defensive litigation. Because Plaintiffs reasonably fear enforcement of Section 21-2-18 against potential clients, they have refrained from representing elections workers. *See* Compl. ¶¶ 23, 25, 27–28. Due to the breadth of the statute, relief is necessary.

As the State acknowledges, the plain text of Section 21-2-18 sweeps broadly. *See* State of Georgia’s Mot. to Dismiss and Br. in Supp., at 2, Dkt. No. 11 (“MTD Br.”). Its expansive language could be read to encompass Plaintiffs’ proposed activities. Pro bono legal representation clearly constitutes a “service” (or something “of value”) provided to elections workers. And the representation of elections workers arguably would be given in support of them performing their duties. Georgia acknowledges that both affirmative and defensive litigation “may relate to or even arise out of [an election] worker’s employment.” *Id.* Affirmative litigation can clarify how elections workers are to comply with certain laws, rules, and restrictions and can challenge those that prove unworkable or burdensome. *See* Compl. ¶ 24. Success in such litigation would support an elections worker in performing their duties. So too would defensive representation of, say, poll workers targeted by harassment or baseless accusations of malfeasance. Attorneys have provided crucial legal defense and advice for poll workers in those circumstances.

The statutory proviso—which carves out an exception for “the donation or use of locations for voting purposes, services provided by individuals without remuneration, or goods that have nominal value of less than \$500.00,” O.C.G.A. § 21-2-18(d)—offers no comfort to Plaintiffs. While Plaintiffs offer their legal services pro bono, the attorneys employed by Plaintiffs receive

compensation—meaning the services are arguably not given without remuneration. And the fair market value of those services would certainly be greater than \$500.

In its motion to dismiss, Georgia denies that Section 21-2-18(c) applies to the services Plaintiffs wish to provide. MTD Br. at 2. Although the State disclaims that Section 21-2-18 covers Plaintiffs’ proposed activities, this does not obviate the need for declaratory relief, because counsel’s representations in this action do not bind the State. *Roberts v. State*, 278 Ga. 610, 612 (2004) (holding that judicial estoppel does not apply in criminal proceedings, due to the risk that “the Government is unable to enforce the law because the conduct of its agents” (quoting *Heckler v. Cmty. Health Servs. of Crawford Cnty.*, 467 U.S. 51, 60 (1984))).

Throughout its brief, the State relies on subsection (b), which states that “[a]ll costs and expenses related to conducting primaries, elections, runoffs, or other undertakings authorized or required by this chapter shall be paid from lawfully appropriated funds.” O.C.G.A. § 21-2-18(b). In the State’s view, this is the inverse of subsection (c), limiting its scope: because subsection (b) requires expenses related to conducting elections to come from public funds, subsection (c) only prohibits the receipt of funds that directly constitute “an election administration expense.” MTD Br. at 9–10. But this ignores key textual differences between the two subsections that indicate they were meant to function independently, and that subsection (c) has a much broader scope.

First, subsection (b) speaks of “costs and expenses,” while subsection (c) sweeps much more broadly, barring the receipt of any “contribution, donation, service, or anything else of value.” O.C.G.A. § 21-2-18(b)–(c). Pro bono legal representation is unambiguously a service (or “[some]thing else of value”) in a way that it is not as clearly a cost or expense.

Moreover, subsection (b)’s ban is limited to expenditures “related to conducting primaries, elections, runoffs, or other undertakings authorized or required by [law].” *Id.* § 21-2-18(b). Subsection (c) adds a critical component: elections workers may not accept a broad category of things of value “for the purpose of conducting primaries or elections” *or* “in support of performing his or her duties.” *Id.* § 21-2-18(c). In other words, subsection (c) applies when an elections worker accepts something of value “in support of performing [their] duties”—a situation distinct from an election worker’s direct activity in conducting elections. Under Georgia law, a court construing “[a] statute, including one criminalizing conduct, is to . . . avoid[] . . . render[ing] some of the statutory language mere surplusage.” *Kennedy v. Carlton*, 294 Ga. 576, 578 (2014). A service rendered “in support of performing [an election worker’s] duties” must apply to something in addition to funds given directly for election administration. Representation in litigation is one such example: although it is not given “for the purpose of conducting . . . elections,”

it does support an elections worker in “performing [their] duties.” O.C.G.A. § 21-2-18(c).

Georgia also offers a red herring, stating that, if Georgia law prohibits pro bono representation, Section 21-2-18(b) would also bar an individual election worker from hiring counsel. *See* MTD Br. at 10–11. But this again ignores that Section 21-2-18(c) applies more broadly to include anything of value given in support of an election worker’s performance of their duties. The pro bono nature of Plaintiffs’ work is relevant because the subsection bars “accepting” any “contribution, donation, service, or anything else of value”—a category which focuses on things given freely, rather than commercial relationships. *See City of Guyton v. Barrow*, 305 Ga. 799, 805 (2019) (“[W]hen interpreting legal text, [courts] do not read words in isolation, but rather in context.” (quotation marks omitted)). Plaintiffs’ pro bono representation also presents distinct free speech concerns and constitutional interests, discussed *infra*. *See Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984) (en banc) (recognizing counsel’s First Amendment “to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration”).

Finally, Georgia relies on the fact that officials have not yet enforced Section 21-2-18(c) against Plaintiffs. *See* MTD Br. at 4. This misses the point: a violation of the statute can be punished as a felony, with a minimum sentence of one year’s

imprisonment and a fine of \$10,000. O.C.G.A. § 21-2-18(e). Plaintiffs cannot reasonably subject potential clients to that liability. And other provisions of Georgia law potentially create criminal liability for Plaintiffs. *See* O.C.G.A. § 16-4-7 (“A person commits the offense of criminal solicitation when, with intent that another person engage in conduct constituting a felony, he solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct.”). Plaintiffs need not wait for a felony prosecution to be brought against their clients—or themselves—before they may seek relief. *Total Vending Serv., Inc. v. Gwinnett Cnty.*, 264 S.E.2d 574 (Ga. Ct. App. 1980) (“[A challenger] is not required to violate a law about which there is an actual controversy concerning its enforceability and suffer a criminal prosecution, in order to test its validity.”); *cf.* *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014) (“[A] plaintiff who wishes to challenge the constitutionality of a law [does not need] to confess that he will in fact violate that law.”).

For similar reasons, the State’s arguments that there is no case or controversy here fall flat. To obtain relief under the Declaratory Judgment Act, Plaintiffs need only “allege[] threatened future injury that a declaration would prevent them from suffering.” *Cobb Cnty. v. Floam*, 319 Ga. 89, 99 (2024); *see* O.C.G.A. § 9-4-2(a). They must also “allege that they are at risk of taking some undirected future action incident to their rights and that such action might jeopardize their interests.” *Floam*,

319 Ga. at 100 (emphasis omitted); *see also Grady v. Unified Gov't of Athens-Clarke Cnty.*, 289 Ga. 726, 727 n.1 (2011) (noting the “relaxed standing rule [courts] apply in free speech cases under Georgia law” (quotation marks omitted)).

Plaintiffs have done so; indeed, the risk of liability has already prevented them from proceeding with representations of elections workers. *See* Compl. ¶¶ 25–28. Unlike in *Floam*, where the election already occurred and plaintiffs had “no decision to make about where to vote,” 319 Ga. at 100, Plaintiffs have a crucial decision to make about the upcoming election: whether to proceed with representing clients, including potentially in emergency litigation. The declaratory relief Plaintiffs seek would dispel “uncertainty and insecurity with respect to the propriety of some future act or conduct which is properly incident to [their] alleged rights,” allowing them to understand their rights “before taking some dangerous step which might or might not be authorized.” *Id.* at 96 (quotation marks omitted). Such relief is necessary here, so Plaintiffs may immediately begin representing clients.

## **II. Plaintiffs’ Pro Bono Representation of Election Workers Is Protected by the First Amendment and the Georgia Constitution.**

Plaintiffs’ reasonable fears about Section 21-2-18 prevent them from engaging in constitutionally protected activity. For Plaintiffs, litigation on behalf of election workers is integral to their association and core political expression. The U.S. Supreme Court and Eleventh Circuit have repeatedly recognized, including in cases dealing with the ACLU and its state affiliates, that the right to free expression and

association guaranteed by the First Amendment of the federal Constitution allows civil rights organizations to solicit and represent clients in litigation. The Georgia Constitution's right to free speech is even more protective than the First Amendment—meaning it encompasses the representation Plaintiffs wish to provide, representation which forms an integral part of their commitment to civil rights and civil liberties.

In the landmark cases *NAACP v. Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978), the U.S. Supreme Court recognized that, for civil rights organizations including the ACLU, litigation is a form of core political speech and that otherwise-permissible state rules that burden such litigation are unconstitutional as applied in those circumstances. In *Button*, the Court held that Virginia could not apply its ban on attorney solicitation to NAACP lawyers who hosted meetings to recruit plaintiffs for desegregation cases. 371 U.S. at 421–22. These activities were “modes of expression and association protected by the First and Fourteenth Amendments,” because litigation was “a means for achieving the lawful objectives” of civil rights. *Id.* at 428–29. *Primus* built on *Button*, holding that a lawyer affiliated with a local ACLU chapter could not be punished for solicitation where she suggested bringing a lawsuit to women who had been sterilized as a condition of receiving public assistance, and offered free legal assistance from the ACLU in doing so. 436 U.S. at 416–17. The Court found that, as in *Button*, this

constituted protected activity, because “the ACLU and its local chapters . . . ‘engage in extensive educational and lobbying activities’ and ‘also devote much of their funds and energies to an extensive program of assisting certain kinds of litigation on behalf of their declared purposes.’” *Id.* at 427–28 (brackets omitted) (quoting *Button*, 371 U.S. at 419–20). “For the ACLU, as for the NAACP, ‘litigation is not a technique of resolving private differences’; it is ‘a form of political expression’ and ‘political association.’” *Id.* at 428 (quoting *Button*, 371 U.S. at 429, 431). Legal representation therefore fell under the protection of the First Amendment.

First Amendment caselaw therefore recognizes a robust right for counsel at nonprofit organizations to offer and provide pro bono legal services as part of their political expression. “Litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society.” *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 397 (2011). Recognizing this, Plaintiffs wish to “offer[] [their] services free of charge to individuals who may be in need of legal assistance.” *Primus*, 436 U.S. at 437.

And the First Amendment provides only a floor. Plaintiffs assert a right under Article I, Section I, Paragraph 5 of the Georgia Constitution, the state’s guarantee of freedom of speech. The Georgia Supreme Court has repeatedly recognized that “Georgia’s constitutional protection of free speech is broader than that provided by the First Amendment.” *Great Am. Dream, Inc. v. DeKalb Cnty.*, 290 Ga. 749, 751

(2012); *see also Grady v. Unified Gov't of Athens-Clarke Cnty.*, 289 Ga. 726, 728–31 (2011) (summarizing authority regarding the relationship between the state and federal free speech provisions). In addition, Georgia's Constitution protects the right to access the courts, guaranteeing that “[n]o person shall be deprived of the right to prosecute or defend, . . . by an attorney, that person's own cause” in court. Ga. Const. Art. 1, § 1, para. XII. This further supports a broad reading of Georgia's free speech guarantee in these circumstances.

Georgia's remaining arguments that Plaintiffs' proposed activities are not constitutionally protected are unpersuasive. Defendant argues that *Button* and *Primus* mean only that counsel may *offer* representation, and because Section 21-2-18 targets only elections workers, it instead governs who can *accept* it. This argument fails because, although *Button* and *Primus* addressed soliciting clients, their reasoning and subsequent cases also apply to actual representation. For one, a First Amendment right to solicit potential clients, but not actually represent them, would be meaningless. *See Primus*, 436 U.S. at 431 (“[T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants.”). For another, while the state restriction in *Button* and *Primus* targeted solicitation, those cases establish that solicitation was only part of the protected activity—which included the litigation itself. *See Button*, 371 U.S. at 434, 436 (recognizing that prohibiting solicitation

poses “the gravest danger” because doing so prevents “the eventual institution of litigation” and “could well freeze out of existence all such activity on behalf of . . . civil rights”); *Primus*, 436 U.S. at 431 (“The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public.”).

Subsequent cases have declined to artificially cabin *Button* and *Primus* to the protection of solicitation. *See, e.g., Little v. City of N. Miami*, 805 F.2d 962, 967–68 (11th Cir. 1986) (“By representing the Florida Defenders of the Environment, himself and others in state litigation, appellant was engaging in a ‘form of political expression’ entitled to First and Fourteenth Amendment protection.” (quoting *Primus*, 436 U.S. at 428; *Button*, 371 U.S. at 429); *see also Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1513 (11th Cir. 1992) (“*Button* and *In re Primus* recognize a narrow First Amendment right to associate for the purpose of *engaging in litigation* as a form of political expression.” (emphasis added)). This makes sense, because lawyers’ solicitation is only one aspect of the “fundamental right” to engage in “collective activity . . . to obtain meaningful access to the courts.” *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971); *see also Lawline v. Am. Bar Ass’n*, 956 F.2d 1378, 1387 (7th Cir. 1992) (“[L]aypersons have a right to obtain meaningful access to the courts, and to enter into associations with lawyers to effectuate that end.”).

And even if *Button* and *Primus* were limited to just protect a right to solicit clients, Section 21-2-18 directly burdens Plaintiffs’ right to do so. Section 21-2-18 threatens potential clients (for accepting any services) and counsel (simply for offering them), under other provisions of Georgia law, such as prohibitions on aiding and abetting and criminal solicitation. Plaintiffs clearly cannot solicit clients for a matter which they know they cannot ultimately litigate.

Relatedly, Georgia argues that Plaintiffs assert a right to represent elections workers in their official capacities, even though as government employees, those workers lack the ability to accept legal representation in their official capacities. *See* MTD Br. at 14. Defendant misunderstands Plaintiffs’ claim. Plaintiffs do not seek to displace counsel retained by the government, nor do they challenge state laws allowing governments to litigate on their or their employees’ behalf. Instead, they challenge Section 21-2-18, which prevents all elections officials—even volunteer poll workers, *see* O.C.G.A. § 21-2-18(a)(1)—from accepting the legal representation that Plaintiffs offer. Defendant’s argument also contemplates only defensive representation, totally ignoring when elections officials or poll workers want to sue as a plaintiff.

### **III. Application of Section 21-2-18 to Pro Bono Legal Representation Does Not Survive Constitutional Scrutiny.**

Because Section 21-2-18 chills Plaintiffs’ exercise of core rights, it “must withstand . . . the ‘exacting scrutiny applicable to limitations on core First

Amendment rights.” *In re Primus*, 436 U.S. at 432 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (per curiam)). Georgia must show “‘a subordinating interest which is compelling,’ and that the means employed in furtherance of that interest are ‘closely drawn to avoid unnecessary abridgement of associational freedoms.’” *Id.* (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960), and *Buckley*, 424 U.S. at 25)); accord *Williams v. Powell*, 320 Ga. 221, 225 (2024) (allowing restrictions on speech “only if the regulation furthers a substantial governmental interest that is unrelated to the suppression of free expression; and the incidental restriction on First Amendment freedom is no greater than necessary to further the governmental interest”).

The State does not even contend that it has a compelling interest in prohibiting Plaintiffs’ activity. Nor could it. Any policy concerns that might support the funding ban—such as promoting election integrity or preventing the appearance of impropriety in election administration—do not apply to Plaintiffs’ legal representation. Section 21-2-18 sweeps beyond conducting elections to prohibit elections workers from accepting any assistance whatsoever in support of their duties. This broad proscription is unnecessary and far from the “carefully tailored regulation that does not abridge unnecessarily the associational freedom of nonprofit organizations . . . [like] the ACLU.” *Primus*, 436 U.S. at 439. Plaintiffs seek only to “make legal assistance available to suitable litigants” “as a means of advancing the

cause of civil liberties.” *Id.* at 431. Georgia does not claim that this raises even the specter of impropriety. As applied to Plaintiffs’ constitutional rights here, Section 21-2-18 fails to survive exacting scrutiny.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant’s motion to dismiss, as well as grant Plaintiffs’ judgment on the pleadings.

Respectfully submitted July 31, 2026,

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## CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2026, a true and correct copy of the foregoing brief was electronically filed with the Court using the Court's eFileGA electronic filing system, which will automatically send an email notification of such filing to all attorneys of record.

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