THE LAW OFFICE OF
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January 5, 2024

David J. Smith, Clerk of Court
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street NW
Atlanta, Georgia 30303

Re: *Graham v. Georgia Attorney General*, No. 22-13396

Dear Mr. Smith:

In response to the Court's order of December 19, 2023, this letter addresses whether this appeal is moot. It is not.

I. "An issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Wood v. Raffensperger*, 981 F.3d 1307, 1316 (2020) (quoting *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011)). When circumstances have changed while a lawsuit has been pending, "the basic question is whether events have occurred that deprive this court of the ability to provide meaningful relief." *Health Freedom Def. Fund v. President of the United States*, 71 F. 4th 888, 891 (2023). A case is moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (quotations omitted). Any "concrete interest, however small, in the outcome of the litigation" is sufficient to prevent a case from becoming moot. *Id.* at 307-08.

Here, Ryan Graham and the Libertarian Party of Georgia asked for a preliminary injunction prohibiting the defendants from enforcing Georgia's leadership committee statute "in a manner that violates the plaintiffs' constitutional

rights." (App. 9.) They further asked for an injunction that would "either: (1) prohibit the defendants from limiting leadership committees to the nominees of 'political parties,' as that term is defined in Georgia law; or (2) prohibit the defendants from enforcing the leadership committee statute in its entirety." (*Id.*) This appeal isn't moot because the requested relief would still be meaningful to Graham and the Party.

A. The requested relief remains meaningful to Graham because it would allow him, like his Democratic counterparts, to raise unlimited funds for certain limited purposes. Under O.C.G.A. § 21-5-34.2(c), "[i]f a person chairing a leadership committee ceases to hold … the status as a nominee of a political party," the person can do one of three things: (1) "transfer the remaining assess of the leadership committee, if any, to another leadership committee within 60 days;" (2) "name an eligible person as the new chairperson of the leadership committee within 60 days," or (3) "dispose of the leadership committee's assets as provided by Code Section 21-5-33."[*] Two of those three things have a time limit. The third does not.

Under O.C.G.A. § 21-5-33, a candidate or committee can use contributions for seven purposes: (1) to "defray ordinary and necessary expenses" of a campaign; (2) charitable donations; (3) transfers to "any national, state, or local committee of any political party or to any candidate;" (4) transfers back to the contributors; (5) future campaigns for the same office; (6) to repay "any prior obligations incurred as a

[*] Under Georgia law, a person can cease to hold the status as a party's nominee by death, disqualification, or withdrawal. *See* O.C.G.A. § 21-2-134. It is not clear under Georgia law when a person ceases to be a party's nominee after losing a general election. This letter brief assumes that a person ceases to be a party's nominee at the earliest possible point—the moment that the election becomes final.

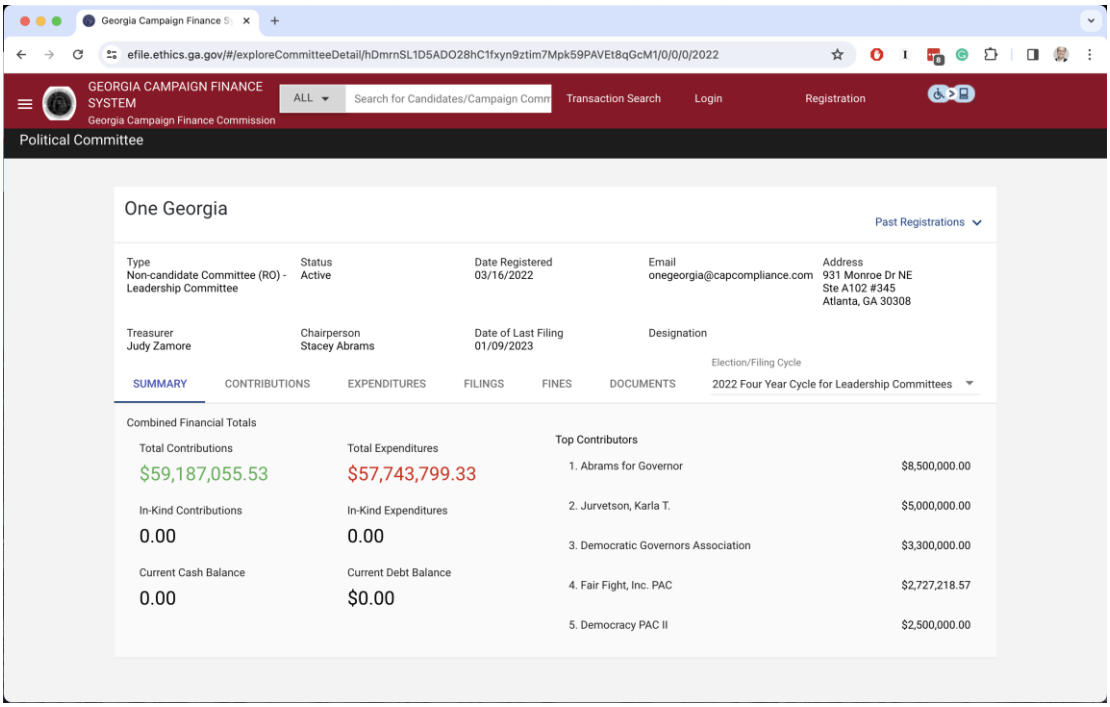
candidate;" and (7) transfers to "one or more political action committees." O.C.G.A. § 21-5-33(a), (b). These limited uses differ from those ordinarily available to a leadership committee, which can otherwise spend unlimited money "for the purpose of affecting the outcome of any election;" to "defray ordinary and necessary expenses incurred in connection with any candidate's campaign for elective office;" and to "defray ordinary and necessary expenses incurred in connection with a public officer's fulfillment or retention of such office." O.C.G.A. § 21-5-34.2(d). As a result, an injunction prohibiting the defendants from limiting leadership committees to political-party nominees would allow Graham, like his Democratic counterparts, to raise and spend unlimited money for the purposes in O.C.G.A. § 21-5-33(a) and (b) but not for the purposes in O.C.G.A. § 21-5-34.2(d).

This is consistent with the State's reading of the statute. As the State's counsel conceded repeatedly at oral argument, Georgia law doesn't prohibit Graham from raising money now to cover debts from his 2022 campaign. (Oral arg. at 13:55, 15:12, 18:10.) There is no time limit on accepting contributions under the leadership committee statute (or the statutes governing candidate committees, *see* O.C.G.A. §§ 21-5-30, 21-5-30.1), and paying down campaign debt is plainly one of the permitted uses of such contributions. The only question is whether Graham can accept contributions in unlimited amounts like his Democratic counterparts.

Both Stacey Abrams and Charlie Bailey, the Democratic nominees for Governor and Lieutenant Governor in 2022, maintain active leadership committees. Figures 1 and 2 below show the summary pages for each committee on the website of the body responsible for enforcing Georgia's campaign-finance laws. Both pages

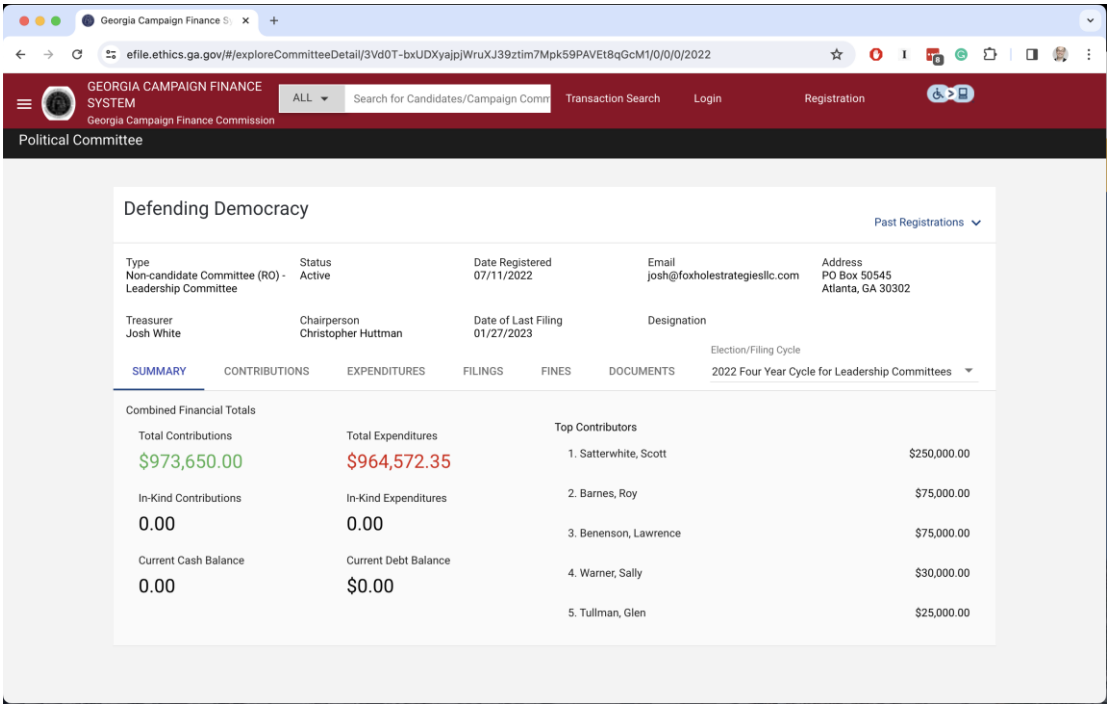
indicate that the leadership committee is in "active" status and that the filing cycle for leadership committees created in 2022 is four years long. Notably, both leadership committees show a positive cash balance, confirming that there is no time limit for disposing a leadership committee's assets as provided in O.C.G.A. § 21-5-33.

Figure 1.



https://efile.ethics.ga.gov/#/exploreCommitteeDetail/hDmrnSL1D5ADO28hC1fxyn9ztim7Mpk59PAVEt8qGcM1/0/0/0/2022

Figure 2.



https://efile.ethics.ga.gov/#/exploreCommitteeDetail/3Vd0T-bxUDXyajpjWruXJ39ztim7Mpk59PAVEt8qGcM1/0/0/0/2022

Nothing but the unconstitutional part of the leadership committee statute prevents Graham from accepting contribution in excess of the statutory limits like Abrams and Bailey can or from using those funds to pay down his campaign debt or for other permitted purposes. Accordingly, the original relief remains meaningful for Graham even today.

B. The requested relief also remains meaningful to the party. The Libertarian Party of Georgia is a nonprofit corporation founded in 1972. (App. 8.) Under Georgia law, Libertarian candidates for statewide offices, including Governor and Lieutenant Governor, are automatically entitled to ballot access. *See* O.C.G.A. § 21-2-180(2); *see also Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1346-47 (11th Cir. 2020). The

party has run candidates for Governor, Lieutenant Governor, or both, in every election since 1990. *See generally* https://sos.ga.gov/page/georgia-election-results.

The requested relief remains meaningful for the party because the current campaign-finance rules affect candidate recruitment and fundraising plans for future elections. The party needs to know *now* whether its candidates for Governor and Lieutenant Governor in 2026 will compete on a level or unlevel playing field. Needless to say, an unlevel playing field on which Libertarian candidates are at a built-in disadvantage hurts the party's chances of attracting quality candidates, and an injunction leveling the playing field in one way or another would improve those chances immediately.

The Libertarian Party and prospective Libertarian candidates also need to make fundraising plans now. To make those plans effectively, they need to know whether they can raise funds from large-dollar donors. The requested relief would allow the party and prospective candidates for Governor and Lieutenant Governor to begin building the appropriate campaign infrastructure for large-dollar fundraising.

The party therefore continues to have concrete interests in the outcome of this case, and the original relief would still provide redress.

II. This appeal also falls under an exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). "That exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. FEC*, 554 U.S. 724, 735 (2008)

(quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007)) (cleaned up); *accord Health Freedom Def. Fund v. President of the United States*, 71 F. 4th 888, 892-93 (11th Cir. 2023).

Here, the defendants' actions were too short in duration to be fully litigated before the 2022 election. In election cases, this Court has stated that there is often "not sufficient time between the filing of the complaint and the election to obtain judicial resolution of the controversy before the election." *Teper v. Miller*, 82 F.3d 989, 992 n.1 (11th Cir. 1996); *accord Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1343 (11th Cir. 2014). Election cases also frequently present issues that will persist in future elections, and resolving these disputes can simplify future challenges. *See id*.

It would be unreasonable to expect Graham or any other nominee of the Libertarian Party to obtain complete review of their claims in time for them to take full advantage of a leadership committee in a single election cycle. Indeed, three separate cases challenged the leadership committee statute on an expedited basis during the 2022 election cycle, and none of them was fully litigated before the election—much less early enough to be useful. "[A] decision allowing the desired expenditures would be an empty gesture unless it afforded appellants sufficient opportunity prior to the election date to communicate their views effectively." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978). This appeal, like many campaign-finance cases, thus satisfies the exception's first prong. *See, e.g., Davis,* 554 U.S. at 735; *Wis. Right to Life*, 551 U.S. at 462; *Stop Reckless Economic Instability Caused by Democrats v. FEC*, 814 F.3d 221, 232 (4th Cir. 2016); *Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001).

As to the second prong, there is a reasonable expectation that Graham and the Libertarian Party will be subject to the same action in the future. The verified complaint alleges that Graham intends to run as a Libertarian again in the future (App. 9), and there is also a reasonable expectation that the Libertarian Party, which has run a candidate for Governor, Lieutenant Governor, or both, in every election since 1990 will do so again in the future. These circumstances easily satisfy the second prong. *See, e.g., Davis,* 554 U.S. at 736; *Wis. Right to Life*, 551 U.S. at 463; *Stop Reckless Economic Instability Caused by Democrats,* 814 F.3d at 232; *Fla. Right to Life*, 273 F.3d at 1324 n.6.

As a result, this case falls squarely under the capable-of-repetition-yet-evading-review exception to the mootness doctrine. This is also a case that cries out for review. It presents issues "that will persist in future elections" and the district court's ruling on standing is patently wrong. *Teper*, 82 F.3d at 992 n.1. This Court should resolve the merits of this appeal now to prevent the district court's error from infecting future decisions and wasting even more judicial resources.

III. If this Court determines that the case is moot notwithstanding this letter's arguments, it should vacate the unreviewed and unreviewable decision of the district court. *See Health Freedom Def. Fund*, 71 F.4th at 894. This procedure "clears the path for future relitigation of the issues … and eliminates a judgment, review of which was prevented through happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). Vacatur also ensures that the "public interest is best served" by disallowing any "consequences of judicial judgments" when the congressionally prescribed route of review—"by appeal as of right and certiorari"—cannot be

followed. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994). Although the appellants believe that this appeal is not moot (and would fall within an exception to the mootness doctrine even if it were), *Munsingwear* vacatur is the settled practice if this Court disagrees.

Sincerely,

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Certificate of Interested Persons
and
Corporate Disclosure Statement

I hereby certify under Eleventh Circuit Rules 26.1, 26.1-2, and 26.1-3 that these persons and entities have or may have an interest in the outcome:

Burge, David

Carr, Christopher M.

Cohen, Mark H.

Georgia Government Transparency and Campaign Finance Commission

Graham, Ryan

Hicks, Darryl

Kreyenbuhl, James D.

Libertarian Party of Georgia, Inc.

Sells, Bryan

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Thompson, Rick

Vaughan, Elizabeth

Watts, Robert A.

Webb, Bryan L.

Willard, Russel D.

Young, Elizabeth

No publicly traded company has an interest in the outcome.

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Certificate of Compliance

This letter brief complies with the type-volume limitation of the Court's order because it contains no more than 10 pages.

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