

CAROLYN TIPPINS (“TIPPI”) CAIN BURCH
United States Attorney’s Office for the Northern District of Georgia
75 Ted Turner Drive SW, Suite 600, Atlanta, Georgia 30303

LEGAL EXPERIENCE

United States Attorney’s Office for the Northern District of Georgia, Atlanta, Georgia

Assistant United States Attorney, Appellate and Legal Advice Division, February 2019 – Present

- Represent the United States in the Eleventh Circuit Court of Appeals, including drafting and editing of appellate briefs and preparing and presenting oral argument; coordinate with the Office of the Solicitor General and the Department of Justice Appellate Section on appellate issues; and advise the office on trial and appellate matters.

Chalmers Burch & Adams LLC (formerly Chalmers Pak & Burch LLC), Atlanta, Georgia

Member, June 2015 – February 2019

- Represented businesses, executives, and government entities in all aspects of business and complex litigation in state and federal trial and appellate courts in Georgia; represented candidates for office in election and qualifications matters.

The Burch Firm, LLC, Atlanta, Georgia

Sole Practitioner/Owner, July 2014 – May 2015

- Represented businesses, executives, and government entities in all aspects of business and complex litigation matters in state and federal trial and appellate courts in Georgia.

King & Spalding LLP, Atlanta, Georgia

Senior Associate and Associate, Business Litigation Practice Group, January 2007 – July 2014

- Handled all aspects of complex litigation and business disputes in state and federal trial and appellate courts.

Swift, Currie, McGhee & Hiers LLP, Atlanta, Georgia

Associate, Litigation Practice Group, September 2003 – December 2006

- Handled products liability matters and other litigation in state and federal trial and appellate courts.

United States District Court for the Middle District of Georgia, Macon, Georgia

Law Clerk to Judge C. Ashley Royal, April 2002 – August 2003

Superior Courts, Macon Judicial Circuit, Macon, Georgia

Law Clerk to Judge Wilcox, Judge Sizemore, and Judge Brown, June 2001 – March 2002

Office of the District Attorney, Western Judicial Circuit, Athens, Georgia; Office of the District Attorney,

Rockdale County, Conyers, Georgia

Intern through UGA Law Prosecutorial Clinic, January 2001 – May 2001 and September 2000 – December 2000

EDUCATION

University of Georgia School of Law, Athens, Georgia

Juris Doctor, cum laude, May 2001

- Vice Chair, Moot Court Board; Pupil, Joseph Henry Lumpkin Inn of Court; Intrastate Moot Court Team

Auburn University, Auburn, Alabama

Bachelor of Arts in Political Science, cum laude, May 1998

PROFESSIONAL MEMBERSHIPS & INVOLVEMENT

Master in the Joseph Henry Lumpkin Inn of Court; Atlanta Lawyers Chapter of the Federalist Society, Executive Board (2007-present); Georgia Legal History Foundation, Board of Trustees; State Bar of Georgia – Member (2001-present), Business Court Committee (Special Committee) (2018-present), Appellate Practice Section Member and Co-Chair of 2019 Appellate Practice Seminar, Criminal Law Section, and Government Attorneys Section; Former YLD Executive Council and Board of Directors; Former YLD Director of Legislation and YLD Leadership Academy Co-Chair; and YLD Leadership Academy Class of 2009; Georgia Association of Women Lawyers, Member.

CIVIC & COMMUNITY INVOLVEMENT

Georgia Dept. of Community Affairs, Board Chair (Aug. 2018 – Aug. 2019), Vice-Chair and Secretary (2017-18), and Member of the Board (appointed in 2015 by Gov. Deal to 5 year term); Citizens to Elect Justice Keith Blackwell, Inc., Treasurer (2012–present); Citizens to Elect Judge Stephen Dillard, Inc., Board of Directors (2013-16); Citizens to Elect Judge Keith Blackwell, Inc., Treasurer (2010-13); Leadership Georgia, Class of 2014; GeorgiaForward, Board of Directors (Feb. 2018-present); and Peachtree Road United Methodist Church, Member, Administrative Board (2016-18), and 1st/2nd Grade Sunday School Teacher (2017-19).

HONORS & RECOGNITION

Joseph Henry Lumpkin Inn of Court - Master (2018-present), Barrister (2010-12), Pupil (2000-2001); Martindale-Hubbell AV Preeminent Rating (2014-present); Daily Report’s On The Rise 40 Under 40 (2015); YLD Outstanding Service Award (2009-10); “Georgia Rising Star” in Business Litigation in 2009; YLD Leadership Academy Class of 2009; and Order of Barristers.

This questionnaire is submitted in connection with a vacancy on the

Georgia Court of Appeals

1. **Give your full name.**

Carolyn Tippins ("Tippi") Cain Burch

2. **State both your office and home addresses.**

Office: United States Attorney's Office for the Northern District of Georgia
75 Ted Turner Drive SW, Suite 600
Atlanta, Georgia 30303

Home:

State your office telephone number, home telephone number, and cell phone telephone number.

Office: (404) 581-6008

Home:

Mobile:

State your e-mail address.

3. **Give the date and place of your birth.**

I was born Columbus, Georgia.

4. **If you are a naturalized citizen, please give the date and place of naturalization.**

N/A

5. **Indicate your marital status; if married, the name of your spouse; and the names and ages of you**

I have been married to for eighteen years, and we have one

6. **Indicate the periods of your military service, including the dates, and the branch in which you served, your rank or rate.**

I have not served in the Armed Forces.

7. **List each college and law school you attended, including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.**

- Auburn University, Sept. 1994 to May 1998, B.A. *cum laude* (Political Science)
- University of Georgia School of Law, Sept. 1998 to May 2001, J.D. *cum laude*

8. **List all courts in which you are presently admitted to practice, including the dates of admission in each case. Give the same information for administrative bodies having special admission requirements.**

- All Superior and State Courts of Georgia, November 8, 2001;
- Georgia Court of Appeals, July 8, 2005;
- Supreme Court of Georgia, August 25, 2006;
- United States District Court for the Middle District of Georgia, November 21, 2001;
- United States District Court for the Northern District of Georgia, February 28, 2005;
- United States Bankruptcy Court for the Northern District of Georgia, October 12, 2017;
- United States District Court for the Southern District of Texas, February 28, 2005;
- United States District Court for the Eastern District of Texas, February 7, 2005;
- United States District Court for the Northern District of Texas, October 24, 2017; and
- United States Court of Appeals for the Eleventh Circuit, June 16, 2004.

9. **Are you actively engaged in the practice of law at the present time? If you are connected with a law firm, a corporate law department or a governmental agency, please state its name and indicate the nature and duration of your relationship.**

Yes. Since February 5, 2019, I have served as an Assistant United States Attorney in the Appellate and Legal Advice Division of the United States Attorney's Office for the Northern District of Georgia.

Also, while I am not employed by and do not practice law with any other group or agency, I am connected with the Georgia Department of Community Affairs. Specifically, in 2015, I was appointed by Governor Deal to a five year term on the Board. I also previously served as Chair, Vice Chair, and Secretary of the Board.

10. **If in the past you have practiced in other localities or have been connected with other law firms, corporate law departments or governmental agencies, please give the particulars, including the locations, the names of the firms, corporate law departments or agencies and your relationship thereto, and the relevant dates. Indicate also any period in the past during which you practiced alone.**

I was formerly a partner/member at Chalmers Burch & Adams LLC. In June 2015, I joined Doug Chalmers and BJay Pak to form Chalmers Pak & Burch LLC, which became Chalmers Burch & Adams LLC in October 2017. The firm is a litigation and political law boutique. My practice was focused on business litigation and appellate litigation.

In July 2014, I started The Burch Firm, LLC in Atlanta, Georgia, and worked as a solo practitioner from July 2014 – May 2015. I focused my practice on business litigation and appellate litigation.

I practiced law with King & Spalding LLP, in Atlanta, Georgia, from January 2007 until July 2014. From 2007 to 2011, I was an associate in the Business Litigation practice group. In 2012, I was promoted to senior associate in the Business Litigation practice group.

I practiced law with Swift, Currie, McGhee & Hiers, LLP in Atlanta, Georgia from September 2003 to December 2006 as an associate in the Litigation practice group. I also worked as a summer associate at Swift Currie in 2000.

From April 2002 until August 2003, I served as a law clerk to Judge C. Ashley Royal in the United States District Court for the Middle District of Georgia, Macon Division.

From June 2001 until March 2002, I served as a law clerk to Judge Tommy Day Wilcox, Judge S. Phillip Brown, and Judge Lamar W. Sizemore, Jr. in the Superior Court for the Macon Judicial Circuit in Macon, Georgia.

Prior to my admission to the Bar, I also worked with:

- The Office of the District Attorney for the Western Judicial Circuit, in Athens, Georgia where I served as an intern and was admitted to practice under the Law School Public Prosecutor Act of 1970, OCGA § 15-18-22, from January 2001 until May 2001;
- The Office of the District Attorney for the Rockdale Judicial Circuit in Conyers, Georgia, where I served as an intern and was admitted to practice under the Law School Public Prosecutor Act of 1970, OCGA § 15-18-22, from September 2000 until December 2000;
- Hatcher, Stubbs, Land, Hollis & Rothschild, in Columbus, Georgia where I worked as a summer associate in 1999 and 2000; and
- The Office of the District Attorney for the Chattahoochee Judicial Circuit in Columbus, Georgia, where I served as an intern in Spring of 1998 while attending Auburn University.

11. **Do you presently hold judicial office, or have you in the past held any such office? If so, give the details, including the court or courts involved, whether elected or appointed, and the period of service. Also state whether you have been an unsuccessful candidate for election to judicial office, stating the court and date involved.**

No.

12. **What is the general character of your practice? Indicate the character of your typical clients and mention any legal specialties which you possess. If the nature of your practice has been substantially different at any time in the past, give the details, including the character of such and the periods involved.**

As an Assistant United States Attorney in the Appellate and Legal Advice Division of the U.S. Attorney's Office for the Northern District of Georgia, I represent the United States in the United States Court of Appeals for the Eleventh Circuit and occasionally in trial matters. My practice is almost exclusively appellate and, more specifically, involves handling appeals in their entirety from drafting motions and briefs to presenting oral argument to the Eleventh Circuit Court of Appeals as well as developing appellate strategy on particular issues or cases, working with the Office of the Solicitor General and the Appellate Section of the United States Department of Justice on appellate issues, editing briefs that others have drafted before they are filed in the Eleventh Circuit Court of Appeals, and helping others to prepare for oral argument in the Eleventh Circuit Court of Appeals. Although our division handles both criminal and civil appeals, the overwhelming majority of appeals are in criminal matters. Our division also serves as the Legal Advice section for the rest of the office and, in this role, I assist attorneys in our office with more challenging and complex legal questions and strategy. I am also trial co-counsel representing the United States in prosecuting a number of public corruption

and fraud matters.

Prior to joining the Appellate and Legal Advice Division of the United States Attorney's Office for the Northern District of Georgia, my practice at Chalmers Burch & Adams LLC (formerly Chalmers Pak & Burch LLC) (June 2015-February 2019) and at The Burch Firm LLC (July 2014-May 2015) was focused on appellate litigation and business litigation in Georgia state courts and federal court. With respect to my appellate practice, I represented businesses, business owners, and other entities in appellate litigation in the Georgia Court of Appeals and the Supreme Court of Georgia and, less often, in the Eleventh Circuit Court of Appeals. This included appeals of matters in which I represented clients at the trial level as well as matters in which I was retained on appeal. My clients included real estate developers, private real estate investment management companies, local government entities, 501(c)(4) social welfare organizations, candidates/former candidates for office, and small businesses. With respect to my business litigation practice, I represented businesses and business owners in litigation involving claims of breach of contract, fraud, breach of fiduciary duty, intentional and negligent misrepresentation, violations of the Georgia and federal Racketeer Influenced and Corrupt Organizations Acts, investment fraud, business torts, trademark violations, and violations of the False Claims Act. I also represented businesses, business owners, local government entities, and social welfare organizations in mandamus actions, political boundary disputes, and discovery disputes. Both at the trial level and appellate level, many of my cases involved a political aspect, which added to the complexity of the legal and litigation strategy and necessitated a public relations/media strategy.

At King & Spalding LLP (2007-2014), my practice included business litigation, employment defense litigation, and appellate litigation in state and federal courts across the nation. The business litigation was largely the same as in my practice at Chalmers Burch & Adams LLC/Chalmers Pak & Burch LLC – though the stakes were often higher (damages at issue ranging from tens of millions to billions) and the cases longer (average of 5+ years from inception to resolution). With respect to my employment practice, I defended employers being sued for employment discrimination under Title VII, ADEA, ADA, FMLA, Pregnancy Discrimination Act, and other state and federal laws and represented employers seeking recourse against current and/or former employees or competitors in violation of agreements and contracts the employer had secured. I also handled appeals in business litigation and employment matters in the Supreme Court of Georgia and the Eleventh Circuit Court of Appeals. I represented manufacturers, retailers, local government entities, securities brokerage firms, pharmacies, pharmaceutical companies, and other healthcare companies.

At Swift Currie McGhee & Hiers LLP (2003-2006), my practice was focused on products liability defense and appellate matters. With respect to products liability defense, I represented major automobile manufacturers, major pharmaceutical manufacturers, and major elevator and escalator manufacturers and maintenance providers in state and federal trial courts. With respect to my appellate practice, I represented major automobile manufacturers, major pharmaceutical manufacturers, professionals, and local government entities in appeals in the

Georgia Court of Appeals, the Fifth Circuit Court of Appeals, and the Eleventh Circuit Court of Appeals. My appellate practice included appeals of matters in which I represented clients at the trial level as well as matters in which I was retained on appeal.

13. (a) Have you regularly appeared in court during the past five years?

Yes.

(b) What percentage of your appearances in the last five years was in:

(1) Federal Courts (list each court):

In the last five years, 50% of my appearances were in federal courts, including:

- U.S. Court of Appeals for the Eleventh Circuit
- U.S. District Court for the Northern District of Georgia
- U.S. Bankruptcy Court for the Northern District of Georgia
- U.S. District Court for the Middle District of Tennessee
- U.S. District Court for the Northern District of Texas

(2) State Courts (list all courts):

In the last five years, 50% of my appearances were in State courts, including:

- Supreme Court of Georgia
- Georgia Court of Appeals
- Superior Court of Carroll County
- State Court of Cherokee County
- Superior Court of DeKalb County
- Superior Court of Fannin County
- Magistrate Court of Fulton County
- Superior Court of Fulton County

- Superior Court of Gwinnett County
- Superior Court of Henry County
- Superior Court of Jones County
- Superior Court of Paulding County

(3) other courts (please list all states other than Georgia in which you have appeared):

I have appeared in federal district court in Texas and Tennessee in the past five years. I have not appeared in any state courts outside of Georgia in the last five years.

(c) What percentage of your court appearances in the last five years was:

(1) civil?

From October 2014 to Feb. 5, 2019, 100% of my court appearances were in civil matters.

(2) criminal?

Since February 5, 2019, 100% of my court appearances have been in criminal matters or proceedings related to criminal matters.

(d) What percentage of your trials in the last five years was:

(1) jury?

0%

(2) non-jury?

100%

(e) State the approximate number of cases you have tried to conclusion in courts of record during each of the past five years, indicating whether you were sole, associate, or chief counsel.

2014 – I tried one civil non-jury case to conclusion in 2014 in Fulton County Superior Court in which I was lead counsel. The trial court ruled in my client's favor. I also appeared regularly as sole counsel, lead counsel, and co-counsel in court for motions and other procedural matters in 2014.

2015 – I did not try any cases to conclusion in 2015. I did appear regularly as sole counsel, lead counsel, and co-counsel in court for motions and other procedural matters in 2015.

2016 – I tried one civil non-jury case to conclusion in 2016 in which I was lead/sole counsel. It was a mandamus action brought by my small business owner client against a local government, which had denied him a business permit on improper grounds. Following the trial, the trial court ruled in favor of my client and granted the mandamus relief. I appeared regularly as sole counsel, lead counsel, and co-counsel in court for motions and other procedural matters in 2016.

2017 – I did not try any cases to conclusion in 2017 in courts of record. I also appeared regularly as sole counsel, lead counsel, and co-counsel in court for motions, injunctive relief hearings, and other procedural matters in 2017. As noted below, I served as lead counsel in a three-day evidentiary hearing before the Secretary of State in a county boundary line dispute.

2018 – I did not try any cases to conclusion in 2018 in courts of record. I did appear regularly in courts of record as sole counsel, lead counsel, and co-counsel in court for motions, injunctive relief hearings, and other procedural matters in 2018. As noted below, I also served as co-counsel in an evidentiary hearing before an OSAH Administrative Law Judge in an elections qualifications matter pending before the Secretary of State.

2019 – I have not tried any cases to conclusion in 2019. My practice as an Assistant United States Attorney for the Northern District of Georgia in the Appellate and Legal Advice Division is almost exclusively appellate. I have appeared in the Eleventh Circuit Court of Appeals for oral argument. I have also appeared as lead counsel in post-trial proceedings and as co-counsel in pre-trial proceedings, including evidentiary hearings, in federal district court.

(f) Describe five of the more significant litigated matters which you have handled.

Below are five of the more significant litigated matters I have handled in roughly chronological order:

1. Flury v. Daimler Chrysler Corp.

Flury v. Daimler Chrysler Corp., 427 F.3d 939 (11th Cir. Ga. 2005) (cert. denied 548 U.S. 903, 126 S. Ct. 2967, 165 L. Ed. 2d 950 (2006)).

I represented Daimler Chrysler Corporation on appeal along with others, including now Sixth Circuit Judge Ray Kethledge. Through the appeal, we had the jury verdict against our client reversed by the Eleventh Circuit Court of Appeals with instructions that judgment be entered for my client on the grounds that critical evidence over which the plaintiff had control had been spoliated and that my client had thereby been deprived of an opportunity to put on a complete defense at trial. Prior to this decision, it was unsettled in the Eleventh Circuit whether federal or state law applied

to an analysis of spoliation in a diversity case – a question on which the Circuits were split. The opinion of the Eleventh Circuit Court of Appeals made clear that federal law applied and that, in any case, the disposal of the vehicle involved in the crash at issue had robbed my client of an opportunity to present a complete defense at trial against the plaintiff's allegations of an enhanced injury due to a manufacturing defect in the vehicle's airbag. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. Ga. 2005). This decision had two direct and important effects. It directly benefitted my client by resulting in a dismissal of the lawsuit. It also set the spoliation standard in the Eleventh Circuit. It not only made clear that federal law applied but also made clear that while dismissal is the most severe sanction warranted only where there is bad faith and where a lesser sanction will not suffice, bad faith does not require malice on the part of the spoliator; specifically, "the court should weigh the degree of the spoliator's culpability against the prejudice to the opposing party." *Flury*, 427 F.3d at 946.

Following the decision of the Eleventh Circuit Court of Appeals, I also worked with now-Judge Kethledge in preparing the response to the petition for certiorari in the United States Supreme Court, which was denied. *Flury v. DaimlerChrysler Corp.*, 548 U.S. 903, 126 S. Ct. 2967, 165 L. Ed. 2d 950 (2006). The Eleventh Circuit's decision in the *Flury* case has been cited in over three hundred fifty cases.

2. Schaaf v. SmithKlineBeecham

Schaaf v. SmithKline Beecham Corp., 602 F.3d 1236 (11th Cir. 2010).

I defended GlaxoSmithKline (GSK), formerly SmithKline Beecham, in the trial of the plaintiff's Family and Medical Leave Act (FMLA) and Pregnancy Discrimination Act claims in the Northern District of Georgia and was chief author of the appellate brief in the Eleventh Circuit Court of Appeals. The plaintiff was a current employee of GSK who had been demoted from a Regional Vice President (RVP) position upon her return from maternity leave based on performance issues discovered during her leave, but which occurred prior to her leave. Specifically, during her leave, GSK discovered significant administrative problems that had occurred on the plaintiff's watch, including scores of expense reports that she had ignored and several invoices from outside creditors that she had failed to pay. Additionally, the plaintiff's poor management style became apparent when, among other things, her subordinates reported that, under the interim RVP, productivity had increased, communication had improved, and morale was markedly higher. At the jury trial, in addition to serving on the trial strategy team, I had responsibility for six witnesses presented by deposition and for argument on behalf of GSK at the charge conference. Following four and a half weeks of trial, after the close of evidence, the trial court granted GSK's motion for judgment as a matter of law at the conclusion of evidence and dismissed the plaintiff's claims.

On appeal, I was principally responsible for the preparation of the appellate brief on behalf of GSK when the plaintiff appealed the trial court's decision to grant judgment as a matter of law as well as a number of the trial court's other decisions. The appeal presented a question of law not previously addressed by the Eleventh Circuit Court of Appeals: whether the discovery of information during an employee's FMLA leave can properly factor into a decision to demote or discharge the employee. The Eleventh Circuit Court of Appeals upheld the trial court's dismissal of the plaintiff's claims as well as the trial court's other decisions challenged on appeal.

This was a significant victory for my client, but it is also significant for having created clear and positive law for employers in the Eleventh Circuit, who now have clear guidance that an employee's misdeeds or deficiencies discovered during the employee's FMLA leave may be considered in disciplining or terminating the employee. The decision is reported at *Schaaf v. SmithKline Beecham Corp.*, 602 F.3d 1236 (11th Cir. 2010).

3. Franklin v. Consus Ethanol, LLC

Franklin v. Consus Ethanol, LLC, 1:11-CV-4062-TWT, 2013 WL 11903794 and 2012 WL 3779093, N.D. Ga..

I served as lead counsel for Defendants Northeast Securities, Inc. and Robert Bonelli in defending the plaintiff's claims against them in the United States District Court for the Northern District of Georgia related to a failed ethanol business – Consus Ethanol, LLC. The plaintiff's ninety-five page complaint sought tens of millions of dollars in damages, punitive damages, and attorneys' fees, as well as injunctive relief against my clients for alleged securities fraud, federal and Georgia RICO violations, breach of fiduciary duty, and negligent and intentional misrepresentation. My clients had been tasked with raising capital for Consus Ethanol, LLC, the new ethanol venture. One of the primary misrepresentations alleged to have been made by my clients was forwarding a press release from another defendant, which announced the Board of Directors for Consus Ethanol, LCC to include then former Iowa Governor Terry Branstad (who was also named as a defendant in the litigation). (Now-Ambassador Branstad was Governor of Iowa from 1983-1999 and again from 2011-2017.)

This matter was significant both for the plaintiff's theories of liability for securities fraud and RICO violations as well as the fact that the key witness in the case was the sitting Governor of Iowa, Terry Branstad. After successfully having the RICO claims against my clients dismissed, the case proceeded into discovery. No item in discovery was more critical than the knowledge of Governor Branstad as related to his agreement to serve on the Board of Directors for Consus Ethanol. After months of scheduling attempts, the deposition of Governor Branstad was scheduled, and I took the deposition of Governor Branstad in Iowa. Not long after Governor Branstad's deposition, the parties were able to reach a resolution, and the case was dismissed.

4. Monroe County/Bibb County Boundary Line Dispute

Bibb County v. Monroe County, et al. (No. S13D0931) and *Kemp, Secretary of State v. Monroe County* (No. S13D0848), 294 Ga. 730 (2014); *Bibb County v. Monroe County* (No. S15A1252) and *Kemp v. Monroe County* (No. S15A1251), 298 Ga. 67 (2015).

I was lead counsel representing Monroe County in its ongoing boundary line dispute with Bibb County for nearly a decade in proceedings before the Secretary of State, his appointed Special Assistant Administrative Law Judge (SAALJ), the Fulton County Superior Court, and the Supreme Court of Georgia (twice). I began work on this case during my time at King & Spalding LLP. Upon my departure from King & Spalding LLP, I remained on the case, as did King & Spalding LLP. I continued to serve as lead counsel.

The boundary line between Bibb County and Monroe County has been in dispute for years. In 2005, the confusion over the location of the line led Monroe County's grand jury to institute the process of establishing a disputed boundary line pursuant to O.C.G.A. §§ 36-3-20, *et seq.* This statutory scheme provides for the resolution of boundary lines between counties by the Governor's appointment of a qualified surveyor to set out and mark the line. After the survey is submitted to the Secretary of State, the counties involved can challenge the survey, and the Secretary of State must determine from the law and evidence the true boundary line in dispute between the respective counties. Here, the survey submitted by the Governor's appointed surveyor favored Monroe County, and Bibb County filed objections challenging the survey.

In 2011, I was lead trial counsel in the pre-trial proceedings and three day non-jury trial/final hearing before the SAALJ in which Monroe County and Bibb County presented the testimony of nine witnesses and over 150 exhibits. Following the SAALJ's recommendation, which was favorable to Monroe County, I presented argument on behalf of Monroe County at the appellate-style hearing before the Secretary of State. After that hearing, the Secretary of State issued a Final Determination that did not resolve the disputed boundary line.

I continued as lead counsel for Monroe County in its petition for mandamus in Fulton County Superior Court, in the two appeals to the Supreme Court of Georgia that ensued, and in oral argument on both appeals to the Supreme Court of Georgia. I had the opportunity to argue against Georgia's first Solicitor General, now Supreme Court of Georgia Justice Nels Peterson, in the first oral argument and against Georgia's second Solicitor General, now Eleventh Circuit Court of Appeals Judge Britt Grant, in the second oral argument.

In August 2017, I was lead counsel for Monroe County in the continued trial/final hearing before the Secretary of State in which Monroe County and

Bibb County presented evidence and testimony of fact and expert witnesses. The trial/final hearing was stayed prior to closing argument pending the resolution of litigation between the Secretary of State and the Surveyor over whether the Surveyor can be subpoenaed to testify at the trial/final hearing.

The ultimate determination of this case is critically important to Monroe County because, under the provisions of the statutory scheme for the resolution of disputed county boundary lines, it will forever set the disputed boundary line and cannot again be challenged. This case is also significant because it presented unique questions regarding mandamus and the statutory provisions regarding the resolution of county boundary line disputes that were unsettled under Georgia law, and which presented significant challenges for the counties, the Secretary of State, and everyone involved in the county boundary line dispute process.

5. Chip Lake and the Committee to Protect Paulding County v. Silver Comet Terminal Partners, LLC.

(Chip Lake, et al. v. Silver Comet Terminal Partners, LLC, et al., 347 Ga. App. 266 (2018)).

I represented Chip Lake and the Committee to Protect Paulding County, a 501(c)(4) social welfare organization, in litigation related to the commercialization of the Paulding County airport. Mr. Lake had served as a political consultant to the Committee. Mr. Lake and the Committee were not parties to the underlying litigation pending in Paulding County Superior Court and specially assigned to Senior Judge Grant Brantley, but they were served with non-party subpoenas seeking their testimony.

A dispute arose after we refused to disclose attorney-client privileged information and information protected under the First Amendment and federal law regarding the identity of supporters of the 501(c)(4) Committee to Protect Paulding County. Following a motion to compel, the trial judge ordered my clients to disclose both the attorney-client privileged information (based on a finding that Mr. Lake's failure to register as a lobbyist invoked the crime-fraud exception) and information regarding the identity of the supporters of the 501(c)(4) organization.

We sought appellate review of the trial court's order in the Georgia Court of Appeals under the collateral order doctrine. The Court of Appeals accepted our direct appeal under the collateral order doctrine and set the case for oral argument. In May 2018, I had the good fortune to present oral argument in the case in Swainsboro/Emanuel County, Georgia during one of the Court of Appeal's off-site oral argument days. The Court of Appeals reversed the trial court on the threshold question – finding that the identity of the supporters of the 501(c)4 Committee were not relevant to and did not appear reasonably calculated to lead to the discovery of admissible evidence with respect to the only remaining issue in the underlying litigation (the county's breach of contract claim against bond purchaser) and that the trial court had abused its

discretion in finding otherwise. Appellees sought certiorari in the Supreme Court of Georgia, which was denied.

This case was significant because of the legal issues presented by the trial court's erroneous order, which (1) threatened the well-established First Amendment protections against the compelled disclosure of the identity of supporters of a 501(c)(4) organization, and (2) threatened to establish untenable law for lobbyist registration requirements for local government lobbying and for when a failure to register as a lobbyist can constitute a crime. This case was also significant due to the high profile nature of the underlying litigation and dispute surrounding the commercialization of the Paulding County airport.

In addition to being significant for the legal issues presented and high profile nature of the underlying dispute, this case was also significant for me as an appellate practitioner because of the interesting appellate procedural issue of appellate review under the collateral order doctrine, and because it gave me the opportunity to present oral argument during one of the Court's off-site oral arguments.

- (g) State with reasonable detail your experience in adversary proceedings before administrative boards or commissions during the past five years.**

In 2018, I served as co-counsel for a statewide elected official and candidate for office in a challenge to his qualifications for office filed with the Secretary of State. This included an evidentiary hearing before an Administrative Law Judge.

As noted in subsection (f) above, I represented Monroe County for nearly a decade in its boundary line dispute with Bibb County. This included proceedings in courts of record, but also included other proceedings that seem to most appropriately fit here. Specifically, I served as lead counsel in proceedings related to the boundary line before the Secretary of State. In 2017, I served as lead counsel in a three-day trial/evidentiary hearing before the Secretary of State.

I also served as co-counsel for a former candidate for office in a matter before the Georgia Government Transparency & Campaign Finance Commission (formerly the State Ethics Commission), but my involvement in the matter was focused on judicial review and other proceedings in superior court and in the appellate courts of Georgia.

14. **(a) Summarize your experience in court prior to the last five years. If during any prior period you appeared in court with greater frequency than during the last five years, indicate the periods during which this was so and give for such prior periods the same data which was requested in item 13 above.**

Following two years of clerking in state and federal trial courts, I have appeared in court regularly as lead counsel or co-counsel in state and federal trial and appellate courts over the last 16 years. As is the case with my practice over the past five years, the vast majority of my cases have been settled or otherwise resolved prior to trial but have involved considerable motions and hearings practice. However, those cases that I have had which have proceeded to trial prior to the last five years are listed below:

- Associate counsel in five-week jury trial in pregnancy discrimination case in the U.S. District Court for the Northern District of Georgia;
- Associate counsel in four-week jury trial in the U.S. District Court for the District of South Carolina (settled after four weeks of trial);
- Second chair in jury trial defending major appliance manufacturer and service provider in the Superior Court of Cobb County, Georgia;
- Lead counsel in trial defending a local manufacturing and installation company and subsidiary of a Fortune 50 Company in the Magistrate Court of Gwinnett County, Georgia; and
- Associate Counsel in jury trial defending major automotive manufacturer in products liability claim in the U.S. District Court for the Northern District of Georgia.

Likewise, my appellate practice predates the last five years. In addition to the appeals listed below, I formally appeared in the following appeals prior to the last five years:

- *Bibb County v. Monroe County, et al.* (No. S13D0931) and *Kemp, Secretary of State v. Monroe County* (No. S13D0848), 294 Ga. 730 (2014) - lead counsel for Appellee, including presentation of oral argument;
- *Laosebikan v. Coca-Cola Co.*, No. 10-11312 (11th Cir. 2011) (unpublished opinion at 415 Fed. Appx. 211, 2011 U.S. App. LEXIS 3721) - co-counsel for Appellee;
- *Everson v. Coca-Cola Co.*, No. 06-15752 (11th Cir. 2006) (unpublished opinion at 241 Fed. Appx. 652, 2007 U.S. App. LEXIS 17448 (11th Cir. July 23, 2007)) - co-counsel for Appellee;
- *Solid Waste Management v. City of Warner Robins*, A06A2482 (Ga. App. 2006); and *City of Warner Robins v. Solid Waste Management*, A06A2481, (Ga. App. 2006) – lead appellate counsel for Appellee (retained on appeal);
- *Flury v. DaimlerChrysler Corp.*, 427 F.3d 939 (11th Cir. 2005) - co-

counsel for Appellant;

- *Piechota v. Marriott Int'l, Inc.*, No. 04-12341 (11th Cir. 2004) (unpublished opinion at 144 Fed. Appx. 45; 2005 U.S. App. LEXIS 16506, (11th Cir. August 5, 2005)) - co-counsel for Appellee;

Although I did not enter a formal appearance, I was principally responsible for the preparation of appellate briefs in *Schaaf v. SmithKline Beecham Corp.*, 602 F.3d 1236 (11th Cir. 2010).

Additionally, although I did not enter a formal appearance (as I had not been practicing long enough to be a member of the U.S. Supreme Court bar), I assisted in the drafting of the response to the petition for writ of certiorari in *Flury v. DaimlerChrysler Corp.*, 548 U.S. 903, 126 S. Ct. 2967, 165 L. Ed. 2d 950 (2006) (denying cert.).

(b) Summarize your experience in adversary proceedings before administrative boards or commissions prior to the last five years.

As noted above, I represented Monroe County for nearly a decade in its boundary line dispute with Bibb County. This included proceedings in courts of record, but also included other proceedings that seem to most appropriately fit here. Specifically, I served as lead counsel in proceedings related to the boundary line before the Secretary of State and before the Special Assistant Administrative Law Judge (specially appointed by OSAH at the request of the Secretary of State). In 2011, I served as lead counsel in a three-day trial/evidentiary hearing before a Special Assistant Administrative Law Judge.

I appeared before the Maine Human Rights Commission on behalf of an employer alleged to have discriminated against an employee in about 2009.

15. Describe your appellate practice during the past five years in detail and give citations if your cases were reported.

As Assistant United States Attorney for the Northern District of Georgia in the Appellate Division (since February 5, 2019), my practice has been almost exclusively a federal, appellate practice. More specifically, I represent the United States as lead appellate counsel in cases in the Eleventh Circuit Court of Appeals, including in appellate motions and briefs and in oral argument. Additionally, I work with other attorneys in our office on appellate matters, including appellate strategy, preparation of appellate motions and briefs, and oral argument preparation. I also coordinate with the Office of Solicitor General and the Appellate Section of the United States Department of Justice on appellate matters.

Prior to joining the U.S. Attorney's Office and while in private practice, over the last five years, I served as lead counsel, sole counsel, and co-counsel in appeals in the the Georgia Court of Appeals and the Supreme Court of Georgia. These include

appeals of matters in which I represented clients at the trial level, as well as matters in which I was retained on appeal.

A list of my appellate cases in the past five years is listed below. This list is limited to those cases where I appeared as counsel of record and does not include, for example, cases in which I have edited or even primarily authored the briefs but not appeared as counsel of record.

- *Griffin v. United States* (No. 18-10351), 775 F. App'x 583 (11th Cir. 2019) - counsel for United States in oral argument in the Eleventh Circuit Court of Appeals;
- *Brown v. United States*, No. 19-10469, Eleventh Circuit Court of Appeals – lead appellate counsel for the United States;
- *Williams v. United States*, No. 18-12436, 2019 WL 4010683 (11th Cir. 2019) – lead appellate counsel for the United States;
- *Gomez-Gonzalez v. United States*, No. 19-12142, Eleventh Circuit Court of Appeals – lead appellate counsel for the United States;
- *Reyez v. United States*, No. 17-12431, Eleventh Circuit Court of Appeals - lead appellate counsel for the United States;
- *Robinson v. United States*, No. 17-13929, Eleventh Circuit Court of Appeals - lead appellate counsel for the United States;
- *Silva v. United States*, No. 18-13102, Eleventh Circuit Court of Appeals - lead appellate counsel for the United States;
- *Latimer v. United States*, No. 19-11823, Eleventh Circuit Court of Appeals - lead appellate counsel for the United States;
- *Zoriano v. United States*, No. 19-11582, Eleventh Circuit Court of Appeals - lead appellate counsel for the United States;
- *Chip Lake, et al. v. Silver Comet Terminal Partners, LLC, et al.* (No. A18A1027), 347 Ga. App. 266 (2018) (direct appeal) - lead/sole counsel for Appellants;
- *Chip Lake, et al. v. Silver Comet Terminal Partners, LLC, et al.*, No. A18I0044 (interlocutory appeal), Georgia Court of Appeals - lead/sole counsel for Appellants;
- *John W. Oxendine, et al. v. Government Transparency & Campaign Finance Commission*, A18A1452 (direct appeal), Georgia Court of Appeals - co-counsel for Appellants;

- *John W. Oxendine, et al. v. Government Transparency & Campaign Finance Commission*, A18D0353 (discretionary appeal), Georgia Court of Appeals - co-counsel for Appellants;
- *City of Carrollton, Georgia, et al. v. American Eagle Auto Sales, et al.*, No. S17A1323, Supreme Court of Georgia - lead/sole counsel for Appellees;
- *John W. Oxendine v. Georgia Government Transparency & Campaign Finance Commission* (No. A17A0242), 341 Ga. App. 901 (2017) - co-counsel for Appellant;
- *Bibb County v. Monroe County* (No. S15A1252) and *Kemp v. Monroe County* (No. S15A1251), 298 Ga. 67 (2015) - lead counsel for Appellee;
- *Schraut, et al. v. Bidez*, A15A0177, Georgia Court of Appeals (2015) - lead/sole counsel for Appellee (retained on appeal); and
- *Schraut, et al. v. Bidez*, S15C1806, Supreme Court of Georgia (2015)-lead/sole counsel for Appellee (retained on appeal).

16. **Please submit a representative sample of your writing (e.g. brief, order, opinion, opinion letter).**

Attached.

17. **Describe your practice other than trial practice during the past five years in some detail as it may relate to office and business practice, as well as any other phases of your practice.**

My current practice is almost entirely appellate. While in private practice, my practice was primarily a trial and appellate practice, but like any member/partner of a law firm, I spent time as necessary on firm administrative and strategic matters.

18. **Have you ever been engaged in any occupation, business or profession other than the practice of law? If so, please give the details including dates.**

No.

19. **Are you presently acting in a fiduciary capacity? If so, state details.**

I have fiduciary duties in connection with my service on the Board of the Department Community Affairs, the Board of Trustees for the Georgia Legal History Foundation, on the Board of Directors of GeorgiaForward, and as Secretary and Treasurer of Citizens to Elect Justice Keith Blackwell, Inc.

20. **Please describe your opinion of the role a law clerk or a staff attorney should serve with respect to assisting a judge.**

A law clerk or staff attorney can provide vital assistance by conducting legal

research and reviewing the record. Assisting the judge in this work is critical, particularly given that practitioners may not identify every legal issue and will not always cite to or identify every case from the Georgia Court of Appeals or Supreme Court of Georgia that relates to the questions before the court. Identifying issues not raised by the parties as well as other cases dealing with or related to the issues before the court is vitally important to ensure that the court is not reaching issues that it should not, is not overlooking precedent, and is not creating inconsistent case law.

A law clerk or staff attorney can also be an invaluable resource in discussing complicated cases and/or legal issues and assisting the judge in preparing for oral argument.

Finally, a law clerk or staff attorney can also provide critical support by participating in the drafting and editing of opinions. But the judge has ultimate responsibility for her cases – the decisions in those cases and the disposition of those cases. Accordingly, the judge must be sufficiently familiar with the case, issues, relevant law, and procedure to decide each of her cases and to ensure that her opinions and the language of those opinions are her own.

21. **Please describe how a judge of the court for which you are applying might improve the efficiency and effectiveness of the legal system in administering justice.**

One of the primary ways that an individual judge of the Georgia Court of Appeals can improve the efficiency and effectiveness of the legal system in administering justice is through the opinions she authors. In particular, an individual judge can improve the effectiveness of the court and the legal system by writing opinions that are clear, that avoid reaching unnecessary issues, that are narrow and do not risk having unintended consequences, that do not create inconsistent case law, and that interpret the law as written and do not seek to make policy. If I were fortunate enough to have the opportunity to serve on the Georgia Court of Appeals, I would be committed to doing just this.

Additionally, the Georgia Court of Appeals has made great strides in improving its own efficiency and effectiveness over the last few years through technological and rule changes. The Court has improved efficiency through technology including the highly anticipated (by appellate practitioners like me at least) implementation of electronic records as well as electronic voting by judges on whether to hear cases in banc. Additionally, with the Court's relatively new ability to make such changes itself (rather than having to have them changed legislatively), the recent rule changes enacted by the Court regarding the "2-1 rule," voting on motions, judgment as precedent, and overruling precedent should also improve the efficiency and effectiveness of the Court. Of course, the Court will need to continue to monitor whether the rule changes are having the desired effect or if additional changes or revisions to the rules are needed.

A judge of the Court of Appeals can help improve the efficiency and effectiveness of the Court of Appeals by participating in efforts to monitor recent changes and

identifying other areas for rule changes or the use of technology to improve efficiency and effectiveness. The constraints of the two-term rule make efficiency an important consideration for all members of the Court.

Additionally, an appellate court is more effective when it is more accessible, or at least is not perceived as inaccessible or mysterious. The technological advances and improvements noted above will make the Georgia Court of Appeals more accessible, but I also believe that outreach efforts to make the Court more accessible to lawyers throughout the state are important. The Court's off-site oral arguments are an excellent example of this, and if given the chance to serve I would encourage and participate in the continued and increased use of such opportunities. I also think that individual judges can contribute to the Court's accessibility and perception by participating in CLEs, conferences, and speaking engagements throughout the state. I believe that if practitioners have a better understanding of the Court's rules and procedures, it will improve the work they submit to the Court and, in turn, allow the Court to be more effective in those cases. If given the chance to serve, I would look forward to opportunities to participate in CLEs, conferences, and speaking engagements throughout the state.

Finally, a judge on the Court of Appeals also has the opportunity to improve the efficiency and effectiveness of the state's legal system beyond just the Court of Appeals through service on a number of judicial committees and commissions. Given the constraints of the particular circumstances of the cases that come before the Court, involvement on such committees and commissions provides the opportunity for appellate judges to provide guidance and input on broader issues of law and procedure. If given the chance to serve on the Court of Appeals, I would look forward to working with other judges and court administrators to improve the effectiveness and efficiency of Georgia's courts and legal system. I would be happy to serve where needed and as directed by the Chief Judge, but would also be sure to share my areas of interest and areas in which I could be most effective.

- 22. Have you ever held public office, other than judicial office, or have you ever been a candidate for such an office? If so, give the details, including the offices involved, whether elected or appointed, and the length of your service.**

I am not sure this qualifies as public office, but out of an abundance of caution and full disclosure:

In 2015, I was appointed to a five year term the board of the Georgia Department of Community Affairs by Governor Deal. I served as Chair of the board from August 2018-August 2019, and I served as Vice Chair and Secretary from 2017-August 2018.

- 23. Have you ever been sued by a client? If so, please give particulars.**

No.

24. **Have you ever been a party or otherwise involved in any other legal proceedings? If so, give the particulars. Do not list proceedings in which you were merely a guardian ad litem or stakeholder. Include all legal proceedings in which you were a party in interest, a material witness, were named as a co-conspirator or a co-respondent, and any grand jury investigation in which you figured as a subject, or in which you appeared as a witness.**

Yes. Along with all other members of the Georgia Department of Community Affairs Board and the DCA Commissioner, I am a named Defendant in *Board of Commissioners of County, et al. v. Mayor and Council of City of Valdosta, et al.*, 2017-CV-65, Superior Court of Lowndes County, Georgia. We are represented by the Attorney General's Office. This matter is a dispute between Lowndes County and the City of Valdosta regarding Lowndes' County's Service Delivery Strategy (SDS). Under Georgia law, DCA administers the Service Delivery Act. Lowndes County did not provide DCA with a required, amended SDS setting forth how essential services would be delivered in the County due to disagreements regarding the SDS with the City of Valdosta. DCA placed the County on a non-compliant list, which prevented their access to any state funds until resolved. Lowndes County filed a lawsuit against the City of Valdosta and against DCA, which, among other things, challenges the constitutionality of the Service Delivery Act and DCA's finding of non-compliance. Presumably to get around sovereign immunity with respect to its claims against DCA, Lowndes County named DCA Board members and the Commissioner in their individual capacities. DCA Board members and the Commissioner filed a motion to dismiss on the basis that sovereign immunity still barred the claims for injunctive and declaratory relief and that the mandamus claim failed to state a claim for relief, and the trial granted the motion and dismissed all claims against DCA Board members and the Commissioner. Lowndes County appealed, and earlier this week, on October 21, 2019, the Georgia Court of Appeals affirmed the trial court's dismissal of the claims. Lowndes County is still within the timeframe to seek reconsideration or to petition for certiorari.

25. **Have you published any legal books or articles? If so, please list them, giving the citations and dates.**

I authored a few short articles and/or case summaries for the newsletter published and distributed by the Litigation Team at my former firm, Swift Currie, during my time there (2003-2006). I have not published any legal books or articles.

26. **List any honors, prizes, awards, or other forms or recognition which you have received.**

- AV rating from Martindale-Hubbell (2014-present);
- Georgia's Top Rated Lawyers, Legal Leaders (2014-2019);
- Joseph Henry Lumpkin Inn of Court - Master (2018-present), Barrister (2010-2012), and Pupil (2000-2001);

- Fulton County Daily Report's On The Rise 40 Under 40 (2015);
- Leadership Georgia Class of 2014;
- Georgia Super Lawyers Rising Star, *Law & Politics* and *Atlanta Magazine* (2009);
- YLD Outstanding Service Award for 2009-2010;
- YLD Leadership Academy Class of 2009;
- Order of Barristers;
- Finalist, Talmadge Moot Court Competition at UGA Law;
- UGA Law Moot Court Team and Moot Court Board;
- Ellender Dickson Scholarship, Gamma Phi Beta Foundation;
- Auburn University Bar Association Scholarship;
- Pi Lamda Sigma (Pre-Law Honor Society, Auburn University);
- Omicron Delta Kappa (Leadership Honor Society); and
- Auburn University Honors Program.

27. List all bar associations and professional societies of which you are a member and give the titles and dates of any offices which you have held in such groups. List also chairmanships of any committees in bar associations and professional societies, and memberships on any committees which you believe to be of particular significance.

I am a member of the following bar associations and professional societies:

- State Bar of Georgia (2001 to Present), including the following titles and offices:
 - Appellate Practice Section Member, Co-chair 2019 Appellate Practice Seminar, Programming and Events Committee (2014-2015);
 - Business Court Committee (Special Committee) (2018-present);
 - Executive Council and Board of Directors for the Young Lawyers Division (YLD) (2009-2011);

- Director of Legislation for the YLD (2009 -2010);
 - Co-Chair of the YLD Leadership Academy (2010–2012); and
 - YLD Leadership Academy (Class of 2009).
- Federalist Society for Law and Public Policy Studies, Member and Executive Board Member of Atlanta Lawyers Chapter (2007-Present);
 - Joseph Henry Lumpkin American Inn of Court, Master (2018-Present), Barrister (2010-2012), and Pupil (2000-2001); and
 - The Georgia Legal History Foundation, member of the Board of Trustees (2012-Present).

28. Have you read and carefully studied the Code of Judicial Conduct?

Yes.

29. Will you adhere to the letter and the spirit of such Code should you be appointed as Judge?

Yes.

30. You are requested to execute and transmit to the Chairman of the Commission two copies of the form of Authorization for Access to Information Concerning Disciplinary Matters Included with this questionnalre.

Attached.

31. If you are now an officer or director of any business organization or otherwise engaged in the management of any business enterprise, please give details, including the name of the enterprise, the nature of the business, the title of your position, the nature of your duties, and the term of your service. If it is not your intention to resign such positions and give up any other participation in the management of any of the foregoing enterprises, please so indicate, giving reasons. List all companies in which you, your spouse or minor children hold stock.

I am an officer or director of the following business organizations or enterprises:

1. Name: Board, Georgia Department of Community Affairs

Nature of Business: The Georgia Department of Community Affairs ("DCA") promotes and implements community and economic development, local government assistance, and safe and affordable housing.

Using state and federal resources, DCA helps communities spur private job creation, implement planning, develop downtowns, generate affordable housing solutions and promote volunteerism. DCA also helps qualified low and moderate income Georgians buy homes, rent housing, and prevent foreclosure and homelessness.

Title: Member of Board of Directors

Nature of Duties: Attend and participate in board meetings and related meetings and events; attend and participate in committee meetings

Term of Service: 2015 – 2020

If appointed to serve on the Georgia Court of Appeals, I will resign from this position.

2. Name: Citizens to Elect Justice Keith Blackwell, Inc.

Nature of Business: Campaign organization for the election of Justice Keith Blackwell to his seat on the Supreme Court of Georgia

Title: Secretary & Treasurer

Nature of Duties: Maintain bank and other financial records for campaign; prepare and file campaign disclosure reports; advise candidate and assist with campaign strategy

Term of Service: 2013 - Present

If appointed to serve on the Georgia Court of Appeals, I will resign from this position.

Additionally, my family has ownership shares in WayForth, LLC and owns stock in the following companies: The Coca-Cola Company, Home Depot, and Bank of America. We also own shares of several mutual funds.

32. List the non-professional organizations to which you belong and civic and service activities in which you have participated in the past two years.

I have been involved in the following organizations and activities in the past two years:

- Georgia Department of Community Affairs Board, Member (appointed in

2015 by Governor Deal to five year term), Chair (August 2018-August 2019), Vice Chair and Secretary (2017-2018);

- Peachtree Road United Methodist Church, Member (2008-present), Administrative Board (2016-2018), and 1st/2nd Grade Sunday School Teacher (2017-2019);
- GeorgiaForward, Board Member (Feb. 2018–present);
- Leadership Georgia, Class of 2014;
- Citizens to Elect Justice Keith Blackwell, Inc., Secretary and Treasurer (2013-present);
- Citizens to Elect Judge Stephen Dillard, Inc., Board of Directors (February 2013 – April 2016); and
- Junior League of Atlanta, Sustainer Council (2015-2016). I also previously served on the Board of Directors, as Vice-President of Community Outreach, on the Nominating Committee, on the Advisory Planning Board, and as Chair of the Political Affairs Committee.

33. **Have you ever been arrested, charged, or held by federal, state or other law-enforcement authorities for violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations for which a fine of \$50.00 or less was imposed.**

Yes. I received a traffic citation for speeding in Athens, Georgia in 1998 or 1999. I also received two traffic citations for failure to come to a complete stop at a stop sign around 2007/2008. For each of these citations, I paid a fine, did not contest the citation, and was not required to make any court appearance. I do not recall the precise amount of the fines, but I believe they were all in excess of \$50. I also received a citation for an expired tag in 2012 in Atlanta, Georgia for which I paid a fine in excess of \$50.00.

34. **Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group? If so, please give the particulars.**

No.

35. **The Governor's Ethics Order prohibits the appointment by the Governor of any person to fill a judicial vacancy:**

(a) who has made a contribution to, or expenditure on behalf of, the Governor or the Governor's campaign committee at any time after the vacancy occurs; or

(b) who has made a contribution to, or expenditure on behalf of, the Governor or the Governor's campaign committee within the 30 days preceding the vacancy, unless such person requests and is granted a refund of such contributions or reimbursement of such expenditure.

36. Have you made a contribution or expenditure as described in 35(a) above?

No.

37. (a) Have you made a contribution or expenditure as described in 35(b) above?

No.

(b) If you answered yes to 37(a), have you been granted a refund or reimbursement?

N/A

A handwritten signature in blue ink that reads "Caryl Tippin-Burch". The signature is written in a cursive style with a horizontal line underneath it.

Applicant's Signature

Date: 10/25/2019

IN THE COURT OF APPEALS
STATE OF GEORGIA

CHIP LAKE and)
THE COMMITTEE TO PROTECT)
PAULDING COUNTY,)
)
Appellants,)
)
v.)
)
SILVER COMET TERMINAL)
PARTNERS, LLC,)
)
Appellee.)

Case No.: A18A1027

**BRIEF OF APPELLANTS CHIP LAKE AND
THE COMMITTEE TO PROTECT PAULDING COUNTY**

COME NOW Appellants Chip Lake and the Committee to Protect Paulding County, non-parties in the proceedings below, and, pursuant to the collateral order doctrine, respectfully submit this direct appeal of (1) the Paulding County Superior Court’s September 16, 2017 Order in Case No. 15-CV-002989, Granting Silver Comet’s Motion to Compel Depositions of Chip Lake and the Committee to Protect Paulding County, and Denying the Motion for Protective Order by RTA Strategy LLC and R. Thompson & Associates, LLC (“Order Compelling Disclosures”) (R-2290-2305),¹ and (2) the trial court’s September 23, 2017 Order Denying Motions for

¹ Except as otherwise noted, all record citations herein are to the record in the related case *RTA Strategy LLC and R. Thompson & Associates, LLC v. Silver Comet Terminal Partners, LLC*, A18A1026.

Reconsideration (“Order Denying Reconsideration”) (R-2310-2314). At issue in this appeal is whether the trial court properly compelled non-parties Chip Lake and the Committee to Protect Paulding County (hereinafter “the Committee”) to disclose both information protected by attorney-client privilege based on the crime-fraud exception to the privilege as well as the identity of donors to the Committee, a non-profit 501(c)(4) social welfare organization. Notably, whether a trial court can compel a non-party to disclose information concerning the identity of supporters and donors to a 501(c)(4) social welfare organization despite the protection of such information from compelled disclosure under federal law and the First Amendment to the Constitution of the United States raises an issue of first impression in Georgia courts. For the reasons set forth below, the trial court committed plain legal error and abused its discretion in requiring such disclosures in its Order Compelling Disclosure and Order Denying Reconsideration and should be reversed.

MATERIAL FACTS AND PROCEEDINGS BELOW

Appellants Lake and the Committee are not parties to the case below, which involves claims between Plaintiff Paulding County (hereinafter “the County” or “Paulding County”), Defendant Paulding County Airport Authority (hereinafter “Paulding County Airport Authority” or “the Airport

Authority”), and Intervenor/Defendant Silver Comet Terminal Partners, LLC (hereinafter “Silver Comet”) related to the Paulding County airport and efforts to expand the airport to offer commercial air service. (R-2907, R-469-470, R-477-482; Case A17A1273² R-24-34, R460-493, R-827-841, R-955-965, R-1194, R-1214). Notably, this case, along with related cases, has made a prior appearance in this Court. *See Avery v. Paulding County Airport Authority*, A17A1273 and A17A1274, ___ Ga. App. ___, 808 S.E.2d 15 (Oct. 24, 2017). The only claims remaining in the case are Paulding County’s claims against Silver Comet for breach of contract for failure to make bond payments and for attorneys fees, and Paulding County’s claim for declaratory judgment against the Paulding County Airport Authority. (R-3382, l. 21-24; R-3384, l. 23 – 3385, l.2; Case A17A1273 R-1194, R-1214); *Avery*, 808 S.E.2d 15 at 21 n. 9, 25-30. A succinct, but thorough and helpful history of this case and the related cases is set forth in *Avery*, 808 S.E.2d at 17-21.

Non-parties Lake and the Committee became involved in this case in late 2016/early 2017 when Silver Comet sought to take the deposition of Chip Lake and later the Committee. (R-2907-2913). Chip Lake is a

² Filings in the trial court pre-dating approximately January 23, 2017 can be found in the record of the prior appeal in this case -- A17A1273. Citations to the record in that case are designated as “Case A17A1273.”

political consultant who was hired by and serves as CEO for the Committee. (R-3211, l. 10-13, R-3297 l. 13 - 3298, l. 1, R-3029). The Committee is a non-profit 501(c)(4) social welfare organization that was organized for the improvement of Paulding County, including organizing already-existing public opposition to commercialization of the Paulding County airport. (R-3205, l. 17-25). Silver Comet also sought the depositions of non-parties RTA Strategy LLC and R. Thompson & Associates, LLC, (R-483, R-497), who also have a direct appeal pending in this Court -- A18A1026. A brief history leading up to those non-party depositions at issue in this appeal is helpful.

In December 2013, Paulding County was in the process of expanding its airport, Silver Comet Field. (Case A17A1273 R-24-34, R-460-493). Silver Comet had signed a Bond Agreement with the Paulding County Airport Authority wherein Silver Comet agreed to pay the Airport Authority for bond payments made to expand the airport taxiways. (R-3382, l. 21 – 3383, l. 12); *Avery*, 808 S.E.2d at 20. At the time, there was considerable public opposition in Paulding County to the commercialization of the Paulding County airport. (R-3217, l. 13 - 3218, l. 4). In December 2013, the Committee was formed and hired Chip Lake to organize “the grass roots within the County and the opposition [to the commercialization of the

airport] that existed already that was organic against it.” (R-2916-2921, R-2922, R-3188, R-3420-3421).

The expansion of the Paulding County airport was a prominent issue in the November 2014 election of candidates running for the Paulding County Board of Commission, and the candidates’ positions on the commercialization of the Paulding County airport were well-known. (R-3215, l. 7 – 3216, l. 2, R-3221, l. 19 – 3222, l. 17). Following the November 2014 election in Paulding County, the Paulding County Board of Commission (“BOC”) shifted from a majority in favor of the commercialization of the Paulding County airport to a majority opposing the commercialization of the Paulding County airport. (R-3231, l. 11 – 3232, l.1). This shift was no secret or surprise given that the commercialization of the Paulding County airport had been a prominent issue in the election and given that opposing the commercialization of the Paulding County airport had been the main platform of the newly elected commissioners. (R-3213). Once the newly elected commissioners took office, the BOC took action opposing the commercialization of the Paulding County Airport. Specifically, on January 13, 2015, the BOC passed Resolution 15-01, which withdrew the Part 139 Certificate application to the Federal Aviation Administration (“FAA”). (R-2977-2981). The Part 139 Certificate

application, which had been purportedly submitted to the FAA jointly by Paulding County and the Paulding County Airport Authority sought a Class I airport operating certificate that would allow the airport to handle, among other things, “scheduled operations of large air carrier aircraft.” *See* 14 CFR § 139.5. More specifically, Resolution 15-01 provided:

NOW, THEREFORE, be it resolved by the [BOC] as an Airport sponsor that the application to the FAA for a Part 139 Certificate is hereby withdrawn and any associated environmental review is hereby terminated. . . . Accordingly, the [BOC] hereby directs the Clerk to transmit immediately this Resolution to the FAA.

The BOC then submitted a copy of the resolution to the FAA. (R-2979-2981). Thereafter, Silver Comet stopped payments under the Bond Agreement with the Paulding County Airport Authority as they contended Resolution 15-01 made the airport expansion worthless. (Case A17A1273 R-827, 832).

In November 2015, Paulding County filed a claim for declaratory judgment against the Paulding County Airport Authority seeking a declaration that the Airport Authority could not move forward with the application without Paulding County's consent. (Case A17A1273 R-24-34). Silver Comet successfully intervened and filed a counterclaim against Paulding County seeking a declaratory judgment and asserting a claim under 42 USC § 1983, alleging the County violated the Contracts Clause of both

the United States Constitution and the Constitution of the State of Georgia. (Case A17A1273 R-455); *Avery*, 808 S.E.2d 15 at 21. The County amended its complaint to state claims against Silver Comet for breach of contract for its failure to make payments under the Agreement with the Paulding County Airport Authority and for attorneys fees. (Case A17A1273 R-827-841).

After Silver Comet's claims against Paulding County were dismissed on October 31, 2016 (affirmed on appeal in *Avery*, 808 S.E.2d at 27-30), the only remaining claims in the case involving Silver Comet were Paulding County's claims against Silver Comet for breach of contract for failure to make bond payments and for attorneys fees. (R-3382, l. 21-24, R-3384, l.23 - 3385, l.2); *see also Avery*, 808 S.E.2d 15 at 21, n.9, 25-30. In December 2016, Silver Comet issued a subpoena for the deposition of non-party Chip Lake, and began efforts to discover who hired, appointed, or elected Chip Lake as the CEO of the Committee and how the Committee was funded. (R-2907-2913, R-3192, l. 19 – 3193, l. 16, R-3203, l. 18 – 3204, l. 11, R-3368, R-3380-3381).

On January 27, 2017, Silver Comet took the deposition of Chip Lake. (R-3173-3356). At his deposition, Chip Lake was asked to disclose the identities of the supporters of the Committee; he refused. (R-3210, R-3216-3217, R-3269, l. 9-15, R-3315, l. 8 – 3316, l. 4). Additionally, Mr. Lake

refused to answer questions protected by the attorney-client privilege raised during his depositions. (R-3190, 1. 2 – 3191, 1. 5, R-3192, 1. 19 – 3193, 1. 12, R-3203, 1. 18 – 3204, 1. 11). Thereafter, Silver Comet sought the 30(b)(6) deposition of the Committee seeking the very same information that was asked and answered in Chip Lake's individual deposition, or otherwise asked and objected to based on privilege and/or other well-settled protections from disclosure. (R-477-482).

Following Mr. Lake's deposition, Silver Comet also began efforts to discover how Rick Thompson came to be the CFO of the Committee and again sought to uncover the identity of donors to the Committee. Understanding the legal protections provided nonprofit contributors, Mr. Thompson likewise did not provide the 501(c)(4) donor information sought by Silver Comet. (R-908, R-922, R-955, 1. 2-7).

Silver Comet the filed a Motion to Compel seeking to force Chip Lake and the Committee to disclose information that is attorney-client privileged, as well as information regarding the identity of supporters and donors to the Committee, which is privileged/protected from disclosure under federal law and the First Amendment. (R-412-436). Chip Lake and the Committee filed a response to Silver Comet's Motion to Compel setting forth the privileged and protected nature of the information Silver Comet sought to compel. (R-

575-671). RTA Strategy LLC and R. Thompson & Associates, LLC, filed a Motion For Protective Order seeking to prevent the disclosure of this same privileged and protected information. (R-558-562).

On September 1, 2017, a hearing was held in Paulding County Superior Court on Silver Comet's Motion to Compel and on RTA Strategy LLC and R. Thompson & Associates, LLC's Motion For Protective Order. (R-3360-3493). Thereafter the trial court granted Silver Comet's Motion to Compel, denied RTA Strategy LLC and R. Thompson & Associates, LLC's Motion for Protective Order, and asked counsel for Silver Comet to prepare an order. (R-2290-2305). Chip Lake and the Committee, as well as RTA Strategy LLC and R. Thompson & Associates, LLC, filed objections to the proposed order prepared by counsel for Silver Comet and moved for reconsideration. (R-2218-2243, R-2244-2262). The trial court entered the September 16, 2017 Order Compelling Disclosures prepared by counsel for Silver Comet over the objections of Chip Lake, the Committee, RTA Strategy LLC and R. Thompson & Associates, LLC (R-2290-2305), and on September 23, 2017, denied the Motions for Reconsideration. (R-2310-2314).

In the trial court's Order Compelling Disclosures, the court specifically held that sufficient evidence was presented to evoke the crime-

fraud exception to the attorney-client privilege and ordered the information sought by Silver Comet be produced. (R-2300-2305). In support of this finding, the trial court's Order Compelling Disclosures cited several questions that Mr. Lake refused to answer on attorney-client privilege grounds (R-2292-2293) -- but as set forth in the Argument and Citation of Authorities below, none of these questions touches on the alleged crime of Mr. Lake's failure to register as a lobbyist or communications with an attorney regarding Mr. Lake's registration as a lobbyist.³ The trial court's Order Compelling Disclosures also ordered Chip Lake and the Committee to disclose the information sought by Silver Comet, including the identity of the Committee's members and donors. (R-2304-2305). The trial court's

³ The trial court's Order Compelling Disclosures lists the following as questions that were not answered by Mr. Lake on the grounds of attorney-client privilege, but that it seeks to have answered:

- "Is Stefan Passantino the person who reached out to Lake on behalf of the Committee?"
- "When we asked you earlier about who retained you on behalf of the Committee to Protect Paulding County, you refused to give the names. We are asking for those names now..."; and
- "Do you know whether Stefan Passantino was acting on behalf of Delta Airlines?"

(R-2292-2293). The trial court's Order Compelling Disclosures also lists the following questions for which it sought answer in efforts to avoid a Motion to Compel:

- "Is Chip Lake willing to identify who contacted him on behalf of the Committee to Protect Paulding County?"; and
- Is he willing to disclose whether that person was working for or on behalf of Delta Airlines?"

(R-2293).

Order Compelling Disclosures contained numerous factual and legal errors, which Lake and the Committee pointed out in their objections and Motion for Reconsideration. (R-2218-2243).

On September 26, 2017, Chip Lake and the Committee filed a Notice of Appeal for a direct appeal to this Court pursuant to the collateral order doctrine.⁴ (R-2306-2309). On January 5, 2018, the case was docketed in this Court, and on January 24, 2018, this Court granted an extension until February 8, 2018, to file this Brief, which is hereby timely filed.

ENUMERATION OF ERRORS
AND
STATEMENT OF JURISDICTION

I. Enumeration of Errors.

First, the trial court erred and abused its discretion in requiring disclosure of information that is not discoverable under the Georgia Civil Practice Act in the first instance.

⁴ Chip Lake and the Committee also filed an Application to Appeal Interlocutory Order with the Court of Appeals on October 2, 2017 -- A18I0044. On October 26, 2017, the Court of Appeals issued an Order dismissing Appellants appeal for failure to obtain a Certificate of Immediate Review from the trial court. On November 6, 2017, Appellants filed their Motion for Reconsideration with the Court of Appeals. On December 21, 2017, the Court of Appeals issued an Order Granting Appellants Motion for Reconsideration and permitting their interlocutory appeal. On December 28, 2017, Chip Lake and the Committee filed their Notice of Appeal on their interlocutory appeal. Appellants' interlocutory appeal has not yet been docketed in this Court.

Second, the trial court committed plain legal error and abused its discretion in requiring the disclosure of the identity of members of and contributors to the Committee, a 501(c)(4) social welfare organization, which are protected from disclosure by federal law and the First Amendment to the Constitution of the United States.

Third, the trial court committed plain legal error and abused its discretion in finding the crime-fraud exception applies here and requiring disclosure of attorney-client privileged information.

II. Statement of Jurisdiction.

This Court, rather than the Supreme Court of Georgia, has jurisdiction over this matter as the issues involved are not reserved to the Supreme Court of Georgia. Ga. Const. Art. VI, § 5, ¶ 3; Ga. Const. Art. VI, § 6, ¶¶ 2-4.

Further, the collateral order doctrine applies here. In order to take a direct appeal, an appellant must usually appeal from a final order. However, the Supreme Court of Georgia has “created an exception for ‘collateral orders’ when the issue is substantially separate from the basic issues in the complaint, an important right may be lost if review must wait until a case is finally resolved, and nothing further in the underlying action can affect the issue on appeal.” *Waldrip v. Head*, 272 Ga. 572, 574 (2000). This

exception is commonly known as “the collateral order doctrine,” and the Supreme Court of Georgia has directed that:

the collateral order exception is to be applied if the order being appealed (1) resolves an issue that is ‘substantially separate’ from the basic issues to be decided at trial, (2) would result in the loss of an important right if review had to await final judgment, and (3) completely and conclusively decides the issue on appeal such that nothing in the underlying action can affect it.

Britt v. State, 282 Ga. 746, 748 (2007).

A. Discovery Orders Directed at a Disinterested Third Party. Such As Here. Are Immediately Appealable Under the Collateral Order Doctrine.

While “discovery orders do not fall within the collateral order doctrine,” *see Expedia, Inc. v. City of Columbus*, 305 Ga. App. 450, 452-454 (1) (2010), both this Court and the Supreme Court of Georgia have recognized that the collateral order doctrine does apply where, as here, a **third party** seeks to appeal a trial court discovery order that requires the third party to disclose protected or confidential information. *Hickey v. RREF BB SBL Acquisitions, LLC*, 336 Ga. App. 411, 411-14 (2016) (holding “a discovery order directed at a disinterested third party is treated as an immediately appealable final order”); *Britt*, 282 Ga. at 748-49 (holding trial court discovery order requiring non-party Public Defender Standards Council to turn over information regarding the funding of other capital

defendants was directly appealable under the collateral order doctrine); *In re Paul*, 270 Ga. 680, 681-83 (1999) (holding that the collateral order doctrine applies and allows for a direct appeal of a trial court's discovery order denying a reporter's privilege not to disclose confidential source information).

In 2016, this Court in *Hickey* considered whether the collateral order doctrine applied to an appeal sought by the wife of the defendant in the underlying action who was not a party in the underlying action to a subpoena to their financial institution. *Hickey*, 336 Ga. at 411. The respondent argued that a discovery order was not directly appealable and that “the collateral order doctrine in Georgia does not extend to discovery orders.” *Id.* at 411-12. This Court noted that respondents relied “primarily on *Johnson & Johnson v. Kaufman*, 226 Ga. App. 77, 485 S.E.2d 525 (1997), a case in which ‘a majority of this Court adopted the United States Supreme Court's rationale in finding discovery disputes not subject to the collateral order doctrine.’” *Id.* at 412. In considering the question, this Court found:

The rationale of the United States Supreme Court that we adopted in *Johnson & Johnson* does not apply, however, to a discovery order directed at a disinterested third party. Rather, “under the so-called *Perlman* doctrine, a **discovery order directed at a disinterested third party is treated as an immediately appealable final order** because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance.” *Church of Scientology v.*

United States, 506 U.S. 9, 18 n. 11, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (citing *Perlman v. United States*, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918)).

Id. at 413 (emphasis added).

Appellants here are not parties to the underlying litigation. Rather, Mr. Lake and the Committee, like the appellants in *Hickey*, *Britt*, and *In re Paul*, are disinterested third parties. As set forth above, Mr. Lake and the Committee here were the subject of third party subpoenas from Silver Comet and came before the trial court on the Motion to Compel filed by Silver Comet. (R-2907-2913, R-412-436, R-469-470, R-477-482). Accordingly, the direct appeal of Mr. Lake and the Committee here involves a discovery order directed at a disinterested third party and is treated as an immediately appealable final order. *Hickey*, 336 Ga. App. at 411-14; *Britt*, 282 Ga. at 748-49; *In re Paul*, 270 Ga. at 681-83.

B. This Appeal Meets Requirements for Direct Appeal Under the Collateral Order Doctrine.

Further, this appeal otherwise meets the requirements for direct appeal under the collateral order doctrine because it: (1) resolves an issue that is ‘substantially separate’ from the basic issues to be decided at trial; (2) would result in the loss of an important right if review had to await final judgment; and (3) completely and conclusively decides the issue on appeal such that nothing in the underlying action can affect it. *Britt*, 282 Ga. at 748.

The appeal here resolves issues that are substantially separate from the basic issues to be decided at trial in the proceedings below. Specifically, the issues raised in this appeal by Mr. Lake and the Committee, who are non-parties in the proceedings below, relate to two subject matters wholly unrelated to the underlying dispute: (1) the constitutional protection against compelled disclosure of member and donor identity for a non-profit 501(c)(4) social welfare organization; and (2) the application of the crime fraud exception to the attorney-client privilege to non-parties. Each of these distinct legal issues is separate from the remaining issue under consideration in the underlying proceeding – a breach of contract claim by Paulding County (Plaintiff below) against Silver Comet (Defendant below) for failure to make bond payments and a related claim for attorneys fees.

Additionally, the appeal in this case will completely and conclusively decide the issues on appeal and nothing in the underlying breach of contract action can affect it.

Further, as set forth below, important rights (including the First Amendment rights of non-parties) will be lost if review must wait until the case is finally resolved. If non-party Appellants Lake and the Committee are forced to comply with the trial court's orders and make disclosures that are constitutionally and statutorily protected, those revelations will render moot

the question of whether the trial court has properly compelled those disclosures and the question of whether the privilege and protection apply. *See e.g., Peterson v. Baumwell*, 202 Ga. App. 283, 284 (1991) (compliance with court order compelling disclosure of document(s) claimed to be protected by attorney-client privilege rendered issue of applicability of attorney-client privilege to testimony concerning those documents moot). This will leave non-party Appellants Lake and the Committee with no opportunity to seek appellate review, and important rights will be lost. Once the requested information is revealed, the damage will be done, and no appeal after final judgment can rectify that harm. *Britt*, 282 at 748 (finding that once requested information was revealed, the damage would have been done, and no appeal after final judgment could rectify the harm); *Hickey*, 336 Ga. App. at 414 (finding the privacy interest claimed by a non-party in the information in her bank account was an important claim of right substantially separate from, and collateral to, other issues in the case and could not be undisclosed by a later reversal of an erroneous order).

Because Appellants Lake and the Committee are not parties to the proceedings below, but are disinterested third parties, and because they otherwise meet the requirements for the application of the collateral order

doctrine, “the collateral order doctrine is to be applied.” *Britt*, 282 Ga. at 748 (emphasis added).

ARGUMENT AND CITATION OF AUTHORITIES

I. The Trial Court Erred And Abused Its Discretion In Requiring Disclosure Of Information That Is Not Discoverable Under The Georgia Civil Practice Act In The First Instance.

As an initial matter, the trial court erred in granting Silver Comet’s Motion to Compel requiring the additional depositions of non-parties Chip Lake and the Committee and the disclosure of privileged and protected information because the discovery sought is not reasonably calculated to lead to the discovery of admissible evidence with respect to the remaining claims against Silver Comet for breach of contract for failure to make bond payments and for attorneys fees. *See* O.C.G.A. § 9-11-26(b)(1).

Here, the trial court found that Resolution 15-01 passed by Paulding County (Plaintiff in the proceedings below) makes the expansion of the taxiways at Paulding County airport worthless, thereby causing a failure of consideration (a defense of Silver Comet to the claim against it for breach of contract for failure to make bond payments). (R-2298). The trial court also found the additional depositions of Mr. Lake and the Committee are relevant to demonstrate the County’s bad faith as relevant to Silver Comet’s defense to the County’s claim against it for attorneys fees. (R-2298-2299).

However, Silver Comet did not demonstrate, and the trial court did not articulate, how forcing Mr. Lake and the Committee to disclose attorney-client privileged information or the identity of the Committee's members and contributors could be relevant to Silver Comet's defense of failure of consideration to the County's breach of contract claim against Silver Comet for failure to make bond payments. (R-2290-2305). The identity of the members of and contributors to the Committee has absolutely no bearing on whether Resolution 15-01 makes the expansion of the taxiways at Paulding Airport worthless, thereby causing a failure of consideration.

Neither the trial court nor Silver Comet has provided any explanation for how forcing Chip Lake and the Committee to disclose the identity of its members and contributors will demonstrate *the County's* bad faith. This is because they cannot do so. The County and its Commissioners, like all outside parties unrelated to the Committee, have no knowledge of the identity of the Committee's members or the contributors – confidential information protected by both federal law and the First Amendment. This fact is supported by the record, which both: contains no evidence that either the County or its Commissioners knew or had reason to know the identity of the Committee's members of or the contributors; and provides no

explanation for how such information could be considered remotely connected to any demonstration of bad faith on the part of the County.

Accordingly, the additional depositions of Chip Lake and the Committee, the disclosure of attorney-client privileged information, and the disclosure of the identity of members and contributors to the Committee are not authorized under the Georgia Civil Practice Act because they are not reasonably calculated to lead to the discovery of admissible evidence, as required by O.C.G.A. § 9-11-26(b)(1), with respect to the remaining claims against Silver Comet for breach of contract for failure to make bond payments and for attorneys fees. The trial court thereby erred and abused its discretion in requiring the additional depositions of non-parties Chip Lake and the Committee, and requiring the disclosure of privileged and protected information.

II. The Trial Court Committed Plain Legal Error And Abused Its Discretion In Requiring The Disclosure Of The Identity Of Members Of And Contributors To The Committee, A 501(c)(4) Social Welfare Organization, Which Is Protected From Disclosure By Federal Law and The First Amendment To The Constitution Of The United States.

While the standard of review on a trial court's decision on a motion to compel or motion for protective order is generally for an abuse of discretion, where the trial court bases its decision on a question of law, as here, the review is more appropriately governed by the plain legal error standard.

McMillian v. McMillian, 310 Ga. App. 735, 737-38 (2011). Here, the trial court committed plain legal error and abused its discretion in requiring the disclosure of the identity of the members and supporters of and contributors to the Committee, a non-profit 501(c)(4) social welfare organization, because that information is privileged and protected information. “Organizations that qualify for a tax exemption under section 501(c)(4)—“501(c)(4) organizations”—are not required to disclose the names of their donors to the public.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of the Treasury, Internal Revenue Serv.*, 21 F. Supp. 3d 25, 29 (D.D.C. 2014); 26 U.S.C. § 6104(b), (d)(3)). Stated differently, federal law protects from disclosure the names or identities of donors to 501(c)(4) organizations such as the Committee. 26 U.S.C. § 6104(b) (“Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any [501(c)(4)] organization. . . .”); *see also* 26 U.S.C. § 6104(d)(3).

Moreover, “[f]reedom of speech is one of this nation’s most treasured rights. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.” *State v. Miller*, 260 Ga. 669, 671 (1990) (citing *Boos v. Barry*, 485 U.S. 312, 318, 108 S.Ct. 1157, 1165 (1988)) (quotations omitted).

Further, the right to anonymous speech – grounded in the First Amendment’s freedom of speech and freedom of association – has long been recognized to prohibit the very thing the trial court has ordered here – compelled disclosure of the identity of the members of and contributors to a 501(c)(4).

In the seminal case, *Nat’l Ass’n for Advancement of Colored People v. State of Ala. Ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163 (1958), the United States Supreme Court held that courts cannot compel disclosure of membership and affiliation with organizations, such as 501(c)(4) organizations, engaged in political and social advocacy. In *NAACP v. Alabama*, the Supreme Court found that the “compelled disclosure” of the NAACP’s Alabama membership list requested through discovery was a “substantial restraint” on the NAACP’s members’ constitutionally protected right of association because it was “likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.” *Id.* at 462-63, 78 S. Ct. 1163. The Supreme Court therefore, subjected the trial court’s

disclosure order to exacting scrutiny and invalidated the trial court's order. *Id.* at 463-66, 78 S. Ct. 1163. Here, as in *NAACP v. Alabama*, the trial court's Order Compelling Disclosures and Order Denying Reconsideration are discovery orders compelling the disclosure of the Committee's members and contributors, and these orders violate the First Amendment.

Additionally, any corporation that is a member of or contributor to a 501(c)(4), such as the Committee, is entitled to protections under the First Amendment, just as individuals are. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 312, 130 S. Ct. 876, 883, 175 L. Ed. 2d 753 (2010) ("The Court has recognized that the First Amendment applies to corporations, *e.g.*, *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n. 14, 98 S.Ct. 1407, 55 L.Ed.2d 707, and extended this protection to the context of political speech, see, *e.g.*, *NAACP v. Button*, 371 U.S. 415, 428-429, 83 S.Ct. 328, 9 L.Ed.2d 405."). Accordingly, Silver Comet's argument that they only want to know if a particular corporation was a contributor to the committee is unavailing and still seeks compelled disclosure of the Committee's contributors in violation of federal law and the First Amendment.

Quite simply, Georgia law contains no exception to the protections against compelled 501(c)(4) member and contributor disclosure provided by

federal law and the First Amendment. The identity of such members and contributors to non-profit social welfare organization are protected, regardless of whether they are individuals, corporations, or other organizations. Accordingly, the trial court's Order Compelling Disclosures and Order Denying Reconsideration are erroneous.

Further, the trial court's Order Compelling Disclosures and Order Denying Reconsideration are also erroneous to the extent that the trial court based its finding that the identity of members of and contributors to the Committee are discoverable based on the crime-fraud exception (as Silver Comet contended). The crime-fraud exception is an exception to the attorney-client privilege (and the accountant-client privilege)⁵ but is not an exception to the protections of the identity of members of and contributors to a 501(c)(4) under federal law and the First Amendment to the U.S. Constitution.

The trial court's Order Compelling Disclosures recites Mr. Lake's comments on a podcast, (R-2304), which describe how a company who may want to weigh in on an issue but not want to put its brand name on it can do so by making a contribution to a 501(c)(4) organization. The trial court's Order Compelling Disclosures then improperly notes "[t]hat description

⁵ Notably, the crime-fraud exception is inapplicable here as set forth below in Section III.

does not match the public education purpose underlying Section 501(c)(4).” (R-2304). A 501(c)(4) organization is a social welfare organization (not just a public education organization) “primarily engaged in promoting in some way the common good and general welfare of the people of the community.” 26 C.F.R. § 1.501(c)(4)-1. Such organizations can legally engage in a wide range of activities beyond public education, including issue advocacy activities, grassroots engagement, political activities, and other forms of public outreach. Further, Mr. Lake’s comments in the podcast are not grounds to deny or to ignore the protections for members of and contributors to a 501(c)(4) organization. Rather, they are simply an explanation of how citizens, including corporate citizens, may make a contribution to a 501(c)(4) organization in order to engage on a particular issue and remain anonymous under the rules governing such organizations. Examples of such permissible engagement include citizens (including corporate citizens) who choose to support or oppose particular kinds of tax reform through belonging to or contributing to 501(c)(4) organizations such as Citizens for Tax Justice or Americans for Tax Reform. There is nothing untoward about citizens (including corporate citizens) participating in or supporting 501(c)(4) organizations. Nor is there anything untoward about citizens keeping such participation anonymous. To the contrary, federal law expressly and

affirmatively allows for this as detailed above. Silver Comet may not like the law associated with non-profit organizations, but such dislike does not convert an invalid complaint into a valid one, make an irrelevant fishing expedition somehow relevant to the underlying matter, nor change the fact that federal law and the First Amendment protect from disclosure the identities of citizens, including corporate citizens, who participate in or contribute to 501(c)(4) organizations, such as the Committee.⁶

Compelling the disclosure of the identity of members of and contributors to the Committee, as the trial court has done in its Order Compelling Disclosures and Order Denying Reconsideration, ignores the protections provided by federal law and provided by the First Amendment against the compelled disclosure of members of and contributors to a 501(c)(4) organizations and other non-profit entities. If permitted to stand, the trial court's ruling is an invitation for all who seek to pierce these long-standing legal protections to use Georgia courts as a means to discover and publish the identities of members of 501(c)(4) and other non-profit members and donors. For no compelling reason, Georgia would instantly become the

⁶ It is also important to note that, despite claims to the contrary by Silver Comet, a public explanation of how the law permits 501(c)(4) organizations to protect member and donor identities from public discovery in no way constitutes some sort of waiver of the protections against disclosure guaranteed by federal law and the U.S. Constitution.

preferred venue of choice for individuals and organizations seeking data on non-profit donor and member identities, regardless of purpose (benign or otherwise.) Whether you gave money to the Committee, the ACLU, the AARP, Americans for Tax Reform, Citizens for Tax Justice, Georgia Right to Life, the NAACP, the National Rifle Association of America (NRA), The Sierra Club, or the Planned Parenthood Action Fund, your heretofore undisturbed right to anonymity in this setting would be jeopardized. This would generate a litany of harms, both seen and unforeseen. Compelling such disclosure by 501(c)(4) organizations and other non-profits would chill participation in non-profit organizations within Georgia (and beyond), discourage speech and engagement on important public policy matters by non-profits within the state, and eviscerate the long-recognized right to anonymous speech protections for 501(c)(4) members and contributors under the First Amendment. For these reasons and others stated herein, the trial court's decisions (in the Order Compelling Disclosures and Order Denying Reconsideration) requiring the disclosure of the identity of the members and supporters of the Committee is both plain legal error and an abuse of discretion.

III. The Trial Court Committed Plain Legal Error And Abused Its Discretion In Finding The Crime-Fraud Exception Applies Here And Requiring Disclosure Of Attorney-Client Privileged Information.

Again, while the standard of review on a trial court's decision on a motion to compel or motion for protective order is generally for an abuse of discretion, where the trial court bases its decision on a question (or questions) of law, as here, the review is more appropriately governed by the plain legal error standard. *McMillian*, 310 Ga. App. at 737-38. Here, the trial court found in its Order Compelling Disclosures that the crime-fraud exception applies and requires the disclosure of attorney-client privileged information. (R-2300-2305). It did so based on Silver Comet's contention that the crime-fraud exception applies here based on Chip Lake's alleged failure to register as a lobbyist for his work with the Committee. (R. 2300-2303). However, the trial court's finding that the crime fraud exception applies here and that attorney-client privileged information must be disclosed is plain legal error and an abuse of discretion because: (a) Chip Lake was not required to register as a lobbyist under Georgia law; (b) Chip Lake did not knowingly fail to register as a lobbyist; (c) participation in a 501(c)(4) social welfare organization is not a fraud; and (d) there is no evidence in the record that any attorney-client privileged communications sought were made *in furtherance* of any alleged crime or fraud. Under

these circumstances, Silver Comet did not make a showing of prima facie evidence of a crime or fraud as required under Georgia law because there can be no crime or fraud here and even if there were, there is no evidence of communications with attorneys made in furtherance of any crime or fraud. *Rose v. Commercial Factors of Atlanta, Inc.*, 262 Ga. App. 528, 529 (2003) (applicability of the crime-fraud exception “depends upon whether a prima facie case has been made that the communication was made in furtherance of an illegal or fraudulent activity.”)

A. Crime-Fraud Exception Does Not Apply Here Because Chip Lake Was Not Required to Register as a Lobbyist Under Georgia Law.

First, the crime-fraud exception does not apply here because Chip Lake was not required to register as a lobbyist under the O.C.G.A. § 21-5-71(a)(1) because he did not meet the definition of a lobbyist under O.C.G.A. § 21-5-70(5)(D). In particular, he was not compensated *specifically* for undertaking to promote or to oppose the passage of any ordinance or resolution. This is critical as the definition of lobbyist under O.C.G.A. § 21-5-70(5)(D) requires that an individual “either individually or as an employee of another person, [be] compensated specifically for undertaking to promote or oppose the passage of any ordinance or resolution” and not fall within one of the stated exceptions to lobbyist registration as set forth in

O.C.G.A. § 21-5-71(i) and its associated regulations. O.C.G.A. § 21-5-70(5)(D).

Silver Comet alleges that Chip Lake was required to register as a lobbyist because he was compensated by the Committee for his consulting work opposing the commercialization of the airport. Further, the trial court's Order Compelling Disclosures (which was prepared by counsel for Silver Comet) states "there is prima facie evidence that Lake was 'specifically compensated' for his consulting work to 'to fight the expansion of the airport to add commercial passenger service.'" (R-2301). That simply is **not the same** as being specifically compensated to promote or to oppose the passage of an ordinance or resolution⁷ and ignores the plain language of O.C.G.A. § 21-5-70(5)(D). Being compensated for consulting work to fight the expansion of the airport to add commercial passenger service does not meet the definition of lobbying under O.C.G.A. § 21-5-70(5)(D). The fact that Chip Lake was paid to do consulting work for the

⁷ Contrary to the court's Order Compelling Disclosures finding that "Silver Comet presented prima facie evidence that Lake opposed the passage of Resolution 15-01 with Commissioner Pownall . . ." (R-2301), Mr. Lake testified that he did not recall whether he discussed Resolution 15-01 with Commissioner Pownall when asked about particular phone calls and testified that when Commissioner Pownall mentioned Resolution 15-01, Mr. Lake changed the subject. (R-3244-3246, R-3253). And Commissioner Pownall testified that they did not discuss Resolution 15-01. (R-1036, R-1057, l. 1-21).

Committee does not mean that he was specifically compensated for undertaking to promote or to oppose the passage of any ordinance or resolution. To the contrary, as the record establishes, Mr. Lake was specifically compensated for organizing “the grass roots within the County and the opposition [to the commercialization of the airport] that existed already that was organic against it.” (R-3188, l. 12-18).

Being specifically compensated for grass roots organization within the County and for organizing the organic opposition to the commercialization of the airport that already existed against it does not make Mr. Lake a lobbyist within the meaning of O.C.G.A. § 21-5-70(5)(D). Further, as this Court has established, provisions of the Georgia Election Code “must be strictly construed, and in a manner as favorable to the person” alleged to have violated a provision of the Georgia Election Code. *State Ethics Com'r v. Moore*, 214 Ga. App. 236, 238 (1994). Under these circumstances, it cannot be said that Chip Lake was required to register as a lobbyist or was in violation of the Election Code’s requirement to register as a lobbyist.

Accordingly, the trial court abused its discretion in finding that the crime-fraud exception to the attorney-client privilege applies here because there is no evidence in the record that Chip Lake was compensated specifically for undertaking to promote or oppose the passage of any

ordinance or resolution; in fact, the evidence is to the contrary. Further, the trial court committed plain legal error because it misapplied the law in finding that the crime-fraud exception to the attorney-client privilege applies here by treating all of Mr. Lake's consulting work for the Committee as specific compensation for undertaking to promote or oppose the passage of an ordinance or resolution. O.C.G.A. § 21-5-70(5)(D) (defining lobbyist as an individual that "either individually or as an employee of another person, is compensated specifically for undertaking to promote or oppose the passage of any ordinance or resolution . . .").

B. Crime-Fraud Exception Does Not Apply Here Because Chip Lake Did Not Knowingly Fail to Register as a Lobbyist.

Second, the crime-fraud exception does not apply here because even if Chip Lake should have registered as a lobbyist, only a *knowing* violation of the requirement to register could constitute a misdemeanor under O.C.G.A. § 21-5-9. Contrary to the erroneous statement in the trial court's Order Compelling Disclosures that "failure to register as a lobbyist is a misdemeanor," (R-2301) -- which Mr. Lake and the Committee pointed out in their Motion for Reconsideration, (R-2236) -- the mere failure to register as a lobbyist under O.C.G.A. § 21-5-71(a)(1) is not a criminal offense. Rather, O.C.G.A. § 21-5-9 provides "any person who *knowingly* fails to

comply with or who *knowingly* violates this chapter shall be guilty of a misdemeanor.” O.C.G.A. § 21-5-9 (emphasis added). Accordingly, for there to be any criminal aspect to a failure to register as a lobbyist, there is a clear requirement for scienter. *See Phagan*, 268 Ga. at 278 (finding that the statute at issue “clearly contains a scienter requirement: the accused must *knowingly* use or induce . . .”). There is no evidence in the record of scienter on the part of Chip Lake. The trial court and Silver Comet cite (as prima facie evidence that Mr. Lake knowingly violated the registration requirements for lobbyists in connection with his work with the Committee) the fact that Mr. Lake had previously registered as a lobbyist in past, unknown circumstances. (R-2301-2302). However, as Mr. Lake and the Committee pointed out in their Motion for Reconsideration (R-2237), simply because Mr. Lake registered as a lobbyist at other times for past work under different circumstances does not demonstrate scienter on the part of Mr. Lake with the respect to the alleged failure to register as a lobbyist (or that Mr. Lake knowingly violated such a provision) with respect to his work with the Committee. Mr. Lake’s work with the Committee necessarily involved a different engagement and different circumstances than those involved when Mr. Lake previously registered as a lobbyist in connection with different projects for other clients. Notably, there are nine alternative subsections

defining a lobbyist in O.C.G.A. § 21-5-70(5) – eight subsections other than subsection (D), which the trial court found to be the applicable subsection in the instant setting. The fact that Mr. Lake may have registered as a lobbyist for other engagements under other circumstances, potentially under different requirements of O.C.G.A. § 21-5-70(5), does not demonstrate any scienter or knowing violation of the registration requirement of O.C.G.A. § 21-5-70(5)(D) on his part with respect to his work with the Committee. Again, provisions of the Georgia Election Code “must be strictly construed, and in a manner as favorable to the person” alleged to have violated a provision of the Election Code. *Moore*, 214 Ga. App. at 238. There is absolutely nothing in the record that supports any scienter on the part of Mr. Lake or a knowing violation of the registration requirement – particularly given that it seems unlikely, as set forth above, that Mr. Lake was required to register at all. To the extent that Mr. Lake was required to register as a lobbyist, which is fervently denied, there is no evidence that his failure to do so was anything other than a mistake and there is no evidence that it was a knowing violation of the Election Code by Mr. Lake. As such, the trial court committed plain legal error and abused its discretion in finding that the crime-fraud exception to the attorney-client privilege applies here.

C. Crime-Fraud Exception Does Not Apply Here Because Participation in a 501(c)(4) Social Welfare Organization Is Not a Fraud.

The trial court also found that prima facie evidence was presented by Silver Comet of fraud -- apparently based on the allegations and alleged evidence that a particular company, Delta Air Lines, was “behind the efforts of Lake and the Committee.” (R-2302). Quite simply, this assertion is laughable as prima facie evidence of fraud. Assuming, arguendo, that Delta Air Lines or any other corporate entity was “behind the efforts of Lake and the Committee” – whatever that means – such membership in, contribution to, or connection with the Committee is neither problematic, nor fraudulent. Mere membership in or donation to a non-profit social welfare organization is specifically permitted under the law. In fact, the law encourages such participation by granting tax-exempt status to such organizations and by protecting the anonymity of donors and members associated with such entities. *See* Section II., *supra*. To characterize conduct expressly permitted by law as fraudulent is nonsensical, and the trial court’s finding of prima facie evidence of fraud here is essentially a proclamation that all 501(c)(4)s are inherently a fraud. That is both irrational and far from a prima facie showing of fraud that would justify the breaking of the attorney-client

privilege. The trial court's determination thus clearly qualifies as an abuse of discretion and plain legal error.

D. Crime-Fraud Exception Does Not Apply Here Because No Evidence in the Record that Any Communication Was Made *in Furtherance* of an Illegal or Fraudulent Activity.

Finally, while Silver Comet has not made a showing of prima facie evidence of a crime or fraud because there can be no crime or fraud here as set forth above, for the crime-fraud exception to apply, there must also be a prima facie showing that “the communication was made *in furtherance* of an illegal or fraudulent activity.” *Rose*, 262 Ga. App. at 529 (emphasis added). The trial court cited nothing, Silver Comet pointed to nothing, and there is nothing in the record to indicate that the attorney-client privileged communications the trial court ordered to be disclosed were *in furtherance* of the alleged crime of Mr. Lake's failure to register as a lobbyist.

Rather, Silver Comet seeks, and the trial court has ordered, disclosure of information that has nothing to do with Mr. Lake registering or not registering as a lobbyist. For example, the trial court's Order Compelling Disclosures lists the following as a question that was not answered by Mr. Lake on the grounds of attorney-client privilege but that it seeks to have answered: “Is Stefan Passantino the person who reached out to Lake on behalf of the Committee?” (R-2292-2293). The trial court's Order

Compelling Disclosures also lists the following questions that Mr. Lake refused to answer at his deposition on attorney-client privilege grounds: “When we asked you earlier about who retained you on behalf of the Committee to Protect Paulding County, you refused to give the names. We are asking for those names now...”; and “Do you know whether Stefan Passantino was acting on behalf of Delta Airlines?” (R-2293). The trial court’s Order Compelling Disclosures also lists the following questions for which Silver Comet sought answers in efforts to avoid a Motion to Compel: “Is Chip Lake willing to identify who contacted him on behalf of the Committee to Protect Paulding County?; Is he willing to disclose whether that person was working for or on behalf of Delta Airlines?” (R-2293). What none of these questions mentions or even remotely touches on is whether Mr. Lake knowingly failed to register as a lobbyist for his work on behalf of the Committee or even discussed such registration with any attorney.

As such, even if there were some crime here, which is denied, this would not be a proper application of the crime-fraud exception because Silver Comet has pointed to no evidence and there is no evidence in the record to support that the attorney-client privileged communications sought were somehow *in furtherance* of the alleged crime. Accordingly, the trial

court committed plain legal error and abused its discretion in finding in its Order Compelling Disclosures that the crime-fraud exception applies and requiring disclosure of attorney-client privileged information.

CONCLUSION

As set forth above, the trial court committed plain legal error and abused its discretion in its Order Compelling Disclosure and Order Denying Reconsideration by requiring disclosure of attorney-client privileged information and requiring the disclosure of the identities of members and donors to the Committee in contravention of the protections against compelled disclosure provided by federal law and the First Amendment to the U.S. Constitution. For these reasons, the trial court should be reversed.

Respectfully submitted this 8th day of February, 2018.

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RULE 24 CERTIFICATION

I hereby certify that this submission does not exceed the word count limit imposed by Rule 24 of the Court of Appeals of Georgia.

This 8th day of February 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **BRIEF OF APPELLANTS CHIP LAKE AND THE COMMITTEE TO PROTECT PAULDING COUNTY** via email to the following counsel of record and that there is a prior agreement with counsel of record in this case to allow documents in a .pdf format sent via email to suffice for service:

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This 8th day of February, 2018.

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