IN THE SUPREME COURT OF GEORGIA

Supreme Court Case No. S17C2011

Court of Appeals Case No. A17A0265

EARTHLINK, INC.; EARTHLINK, LLC; DELTACOM, LLC; and BUSINESS TELECOM, LLC,

Defendants/Petitioners,

v.

COBB COUNTY, GEORGIA and GWINNETT COUNTY, GEORGIA,

Plaintiffs/Appellees.

BELLSOUTH TELECOMMUNICATIONS, LLC, D/B/A AT&T GEORGIA,

Defendants/Petitioners,

v.

COBB COUNTY, GEORGIA and GWINNETT COUNTY, GEORGIA,

Plaintiffs/Appellees.

JOINT BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE GEORGIA CHAMBER OF COMMERCE AS AMICI CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("the U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before state and federal legislatures, executive branches, and courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Georgia Chamber of Commerce (the "Georgia Chamber") represents more than 40,000 diverse businesses across the State of Georgia, is the state's largest business advocacy organization, and is dedicated to representing the interests of both businesses and citizens in this state. Established in 1915, the Georgia Chamber's primary mission is creating, keeping, and growing jobs in Georgia. The Georgia Chamber pursues this mission in part by advocating the viewpoints of businesses and industry, with the goal of shaping law and public policy to ensure that Georgia is economically competitive with other states. The U.S. Chamber and the Georgia Chamber are collectively referred to as "the Chambers."

This case presents questions of exceptional importance to the Chambers' members. The overriding issue is whether the Georgia courts may usurp the Georgia Assembly's legislative authority and function to expand and change the statutory enforcement scheme specifically created by the legislature in the Georgia 9-1-1 Act. Allowing state courts to disregard the plain language of statutes enacted by the Georgia General Assembly and unilaterally create new causes of action against Georgia businesses violates the separation of powers. More important to the Chambers, it creates an unpredictable and destructive business climate that directly harms businesses located in and doing business in Georgia, the ability of Georgia businesses to compete with other jurisdictions, and ultimately Georgia consumers themselves.

Additionally, the Court of Appeals' decision in this case turns Georgia law about implied causes of action squarely on its head. If allowed to stand, the decision will bring a sea change in Georgia tort law that will expose Georgia businesses and citizens alike to unexpected, broad-sweeping civil liability never before available under Georgia law, never contemplated by the Georgia General Assembly, and contrary to decades of this Court's precedent.

The Court of Appeals' decision permitting the Counties to pursue 911 Act claims through O.C.G.A. § 51-1-6 creates other material errors that call out for immediate correction. The decision ignores that several of the elements of O.C.G.A.

§ 51-1-6 are issues of law to be decided at the motion to dismiss stage, not issues of fact to be decided after lengthy and expensive discovery. It further ignores that several of these required elements of any O.C.G.A. § 51-1-6 are not and cannot be established here. For example, the 911 Act does not create any duty for Defendants ever to pay any telephone subscriber taxes, which is the "duty" that the Plaintiff Counties are attempting to enforce, and the Plaintiff Counties and their alleged damages are not in the class of people or harms intended to be protected or prevented by the 911 Act. Thus, even if O.C.G.A. § 51-1-6 could be written into the 911 Act, the Plaintiff Counties cannot satisfy its elements here as a matter of law.

And, the fact that the 911 charges are taxes is also dispositive of the case. This Court should accept the telephone service provider defendants' Joint Petition ("Joint Petition") to correct the Court of Appeals' error in declining to decide this legal issue at this juncture in the case.

The implications of the resolution of this case are far-reaching. This lawsuit is one of almost 100 filed on a contingency basis by or on behalf of local government entities in Georgia and across the United States accusing telephone companies/service providers of failing to bill, collect, report, and remit the proper amount of 911 charges from their customers. In these cases, the telephone companies had no reason to expect that they could be sued because the governing statutes, like the Georgia statute, provided no express or implied right of action against them. To

judicially create such liability upends these reasonable expectations and disrupts the carefully calibrated framework that Georgia and other legislatures established for the administration and enforcement of their 911 Act.

The Chambers encourage the Court to accept the Joint Petition to prevent the imminent problems that will result—in this case and in countless others—if the Court of Appeals' decision is not corrected.

INTRODUCTION

Cobb County and Gwinnett County (the "Counties" or the "Plaintiff Counties") allege that certain telephone service providers, EarthLink, Inc., EarthLink, LLC, Deltacom, LLC, Business Telecomm, LLC, and BellSouth Telecommunications, LLC d/b/a AT&T of Georgia ("Defendants"), have violated their obligations under the Georgia 911 Law, O.C.G.A. § 46-5-120 *et seq.*, by failing to collect taxes from their telephone subscribers. The Counties concede, and the Georgia Court of Appeals acknowledged, that the Georgia 911 Act does not give the Plaintiff Counties an express right of action to enforce the 911 Act against the telephone service providers. The Georgia Court of Appeals also correctly observed that implied causes of action are strongly disfavored in Georgia and that the 911 Act did not provide the Counties with any implied cause of action to enforce the Act.

Notwithstanding the absence of both express and implied causes of action in the 911 Act, the Court of Appeals judicially created a cause of action for the

Counties to enforce the 911 Act based upon Georgia's generalized tort statute, O.C.G.A. § 51-1-6. The language of O.C.G.A. § 51-1-6, however, makes clear that it does *not* apply in cases, like this one, where the underlying statute (here, the 911 Act) includes other express enforcement mechanisms.

The Georgia General Assembly specifically enacted an enforcement scheme in the 911 Act that includes civil causes of action by the Counties against a telephone *subscriber* for unpaid 911 charges. The legislature provided *no* such cause of action against the telephone service providers, and instead expressly limited the Counties' available remedy against providers to a right of audit. The Legislature even went so far as to make plain in its legislation that the telephone service providers had no responsibility to pursue telephone subscribers for the non-payment of these 911 charges. So, while the 911 Act does not include the enforcement mechanism Plaintiffs wish for here—a direct cause of action for damages against the telephone service providers—its enforcement scheme makes it abundantly clear that this omission was by design and that it represents the Georgia General Assembly's considered judgment on how the Act may *and may not* be enforced.

If, as the Court of Appeals has held, O.C.G.A. § 51-1-6 can be used to create tort liability even when (1) the Georgia Legislature has included a specific enforcement scheme in the statute that does *not* include the cause of action at issue, and (2) where the statutory scheme makes clear that there is no implied cause of

action available, then Georgia law's presumption against implied private causes of action is replaced by the *opposite* principle: statutes can *presumptively* be *privately enforced* by invoking O.C.G.A. § 51-1-6 unless they *affirmatively state* that O.C.G.A. § 51-1-6 cannot be used to enforce them.

Of course, this is not now, nor has it ever been, the law in Georgia. Since O.C.G.A. § 51-1-6 was passed in 1863, this Court has repeatedly made plain that O.C.G.A. § 51-1-6 is not intended as, and cannot be used as, a tool to override legislative pronouncements on how statutes are to be enforced or to vastly expand private enforcement of statutory schemes that include neither express nor implied private causes of action. Permitting the judicial creation of a tort cause of action in the 911 Act that the Georgia Legislature expressly excluded from the Act's statutory enforcement scheme is contrary to separation of powers in Georgia and to decades of Georgia jurisprudence disfavoring the recognition of implied causes of action and judicial activism.

At the end of the day, these suits are brought not because the current 911 systems in these Plaintiff Counties have been compromised, but instead as contingency-fee actions being promoted nationwide by the plaintiffs' bar and their consultant. Georgia law forecloses these lawsuits, and the Chambers urge this Court to act now to correct the Court of Appeals' departure from Georgia law and to avoid the problems that would inevitably ensue not just in this case (and its related cases)

but also in innumerable other contexts throughout the Georgia courts.

ARGUMENT AND CITATION OF AUTHORITIES

I. THE COURT OF APPEALS' DECISION USURPS THE LEGISLATIVE FUNCTION IN VIOLATION OF THE SEPARATION OF POWERS AND UPENDS DECADES OF ESTABLISHED GEORGIA LAW.

Only the Georgia Legislature has the "right and privilege to grant rights not given under common law and to extend and broaden any rights so granted. Such is not the function of the courts." *Delta Airlines, Inc. v. Townsend*, 279 Ga. 511, 512 (2005). A court's judicial amendment of a statute to create a private right of action is "wholly inappropriate, as well as constituting a clear violation of the separation of powers[.]" *Somerville v. White*, 337 Ga. App. 414, 417 (2016). Even while enunciating these core principles, however, the Court of Appeals has done exactly that: it judicially amended the 911 Act by engrafting upon it a nonexistent private cause of action that the Georgia Legislature itself specifically declined to include in the 911 Act's enforcement mechanisms. In so doing, the Court of Appeals usurped the province of the Georgia Legislature and ignored decades of Georgia precedent. If allowed to stand, the Court of Appeals' decision will have significant negative ramifications in this and many other matters. This Court should accept the Defendants' Joint Petition so that it may consider and reverse this decision.

A. In Enacting Georgia's 911 Act, the Georgia Legislature Expressly Provided the Specific Methods Through Which It Can Be Enforced.

Both the Court of Appeals' majority opinion and the special concurrence concede that O.C.G.A. § 51-1-6[1] can only provide a private cause of action to a plaintiff when another statute imposes a legal duty but does not *expressly provide a cause of action. See Bellsouth Telecomm. LLC v. Cobb County*, Case No. A17A0265, 2017 WL 2590853 at *4 ("Rather, O.C.G.A. § 51-1-6 and O.C.G.A. § 51-1-8 operate in conjunction with a statute, such as the 9-1-1- Act, that imposes a legal duty but does not expressly provide a cause of action.") (majority opinion); *see also id.* at *9 (conceding that O.C.G.A. § 51-1-6 "*only applies* when 'no cause of action is given in [the underlying statute's] express terms'") (Dillard, J., concurring fully and specially) (emphasis added). Here, it is undisputed that the 911 Act *expressly creates* a cause of action for its enforcement: specifically, the Georgia Legislature granted counties the right to bring a lawsuit against *telephone subscribers* to recover these 911 taxes. *See* O.C.G.A. 46-5-134(b)(2). The Georgia Legislature also *expressly provided* the Counties with other statutory enforcement

[1] O.C.G.A. § 51-1-6 states in pertinent part: "When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, *although no cause of action is given in express terms*, the injured party may recover for the breach of such legal duty if he suffers damage thereby." The Court also discusses O.C.G.A. § 51-1-8, but that statute is inapplicable here as it only applies to the enforcement of private duties.

rights in the 911 Act, including the right to audit (but not sue) telephone service providers like Defendants.[2]

The 911 Act declined to impose liability for the underlying 911 taxes on the telephone service providers, and it (logically) does not include any right or cause of action for counties to sue telephone service *providers*, such as Defendants, for the payment of these 911 taxes. *See* O.C.G.A. § 46-5-120 *et seq.* In fact, the 911 Act *specifically exempts* telephone service providers like Defendants from *any obligation or responsibility* to pursue telephone subscribers for the non-payment of these 911 charges. *See* O.C.G.A. 46-5-134(b)(2) ("service supplier [telephone company] shall have *no obligation to take any legal action to enforce the collection of the 9-1-1 charge.*") (emphasis added).[3]

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[2] Specifically, O.C.G.A. § 46-5-134(d)(4) authorizes local governments "on an annual basis, and at [their] expense, [to] audit or cause to be audited the books and records of service suppliers with respect to the collection and remittance of 9-1-1 charges."

[3] The Court of Appeals' opinion does not reconcile its opinion with this statutory exemption expressly given to service providers, and it is difficult to see how such reconciliation could be accomplished. Given that service providers have no obligation or duty under the Act to take any action to enforce the collection of the 911 taxes, it logically follows that they cannot be sued by anyone for the alleged failure to collect those taxes. And the Georgia Legislature's express refusal to impose a legal obligation on service providers is a clear message that it did not intend to create or permit a private cause of action by the Counties against the service providers.

The question, appropriately framed, is whether the Legislature included *any* express cause of action in the statute, *not* whether the Legislature enacted the private cause of action desired by a particular plaintiff. Here, the 911 Act contains express enforcement provisions. Where the Georgia Legislature has expressly enacted an enforcement mechanism, such as those included in the 911 Act, O.C.G.A. § 51-1-6 is, by its own terms, simply inapplicable. *See, e.g., Govea w. City of Norcross*, 271 Ga. App. 36, 41 (2004) (noting that lack of specific, express cause of action in favor of plaintiffs is particularly significant when the General Assembly includes other enforcement methods for the statute); *Cruet v. Emory University*, 85 F. Supp. 2d 1353, 1354 (N.D. Ga. 2000) (holding that the plain language of O.C.G.A. § 51-1-6 shows that it operates only where "no cause of action is given in express terms" and that where a cause of action and a remedy is given in express terms, O.C.G.A. § 51-1-6 does not provide a separate action); *Miller v. General Wholesale Co., Inc.*, 101 F. Supp. 2d 1374, 1380-81 (N.D. Ga. 2000) ("It seems *clear from the language of [O.C.G.A. § 51-1-6]* that *no cause of action is created where, as here, an express cause of action already exists*.") (emphasis added); *Garner v. Chambers*, 75 Ga. App. 756, 758 (1947) (when a statute provides a "particular method of proceeding under it, [the statute] debar[s] any other mode.").

In the 911 Act, the General Assembly "easily could have specifically created a cause of action for a breach of [the statute against the telephone service providers]"

but expressly chose not to do so. *Parris v. State Farm Mut. Auto. Ins. Co.*, 229 Ga. App. 522, 524 (1997) (emphasis added). Instead, it gave the Counties a cause of action against the telephone subscribers *only.* The Georgia General Assembly, therefore, expressly chose to define the contours of the available statutory action, and nothing suggests that the General Assembly intended additional common law tort remedies to be available as well. Indeed, the absence of a corresponding right against service providers evidences that the General Assembly intentionally did not create such a right. *See, e.g., Cellular One, Inc. v. Emanuel Cnty.*, 227 Ga. App. 197, 200 (1997); *Jordan v. Novastar Mortgage Inc.,* Case No. 1:08-CV-3587 (N.D. Ga. 2009), at *3 ("When a statute provides for a comprehensive administrative scheme, there is strong evidence that the legislature intended those remedies to remain exclusive").

Cellular One is analogous and illustrates this principle. There, the court rejected Emanuel County's claim that it had a right of action to sue telephone companies for allegedly underreporting to the state revenue commissioner the amount of local option sales taxes collected from customers. *Id.* at 197-200. The court explained that the statute permitted the state revenue commissioner to enforce its terms and provided "the *dealer* with a private right of action to collect unpaid taxes from a *purchaser*," but "no provision g[ave] a county a similar right of action against a dealer who fails to properly remit the tax to the commissioner." *Id.* at 199.

Based upon the Georgia Legislature's inclusion of express enforcement mechanisms in the statute, the *Cellular One* court concluded that "the legislature did not intend for counties to have an independent right of action." *Id.* at 53. Numerous other Georgia cases express the same principle. *See, e.g.*, *Georgia Reg'l Transp. Auth. v. Foster*, 329 Ga. App. 258, 259 (2014), *aff'd*, 297 Ga. 714 (2015) ("It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.") (quotations omitted); *State Farm Auto Ins. Co. v. Hernandez Auto Painting & Body Works,* 312 Ga. App. 756, 761 (2011) (no private cause of action under Georgia Motor Vehicle Accident Reparations Act where statute did not provide express cause of action and General Assembly provided Insurance Commissioner with the authority to enforce the statute's provisions); *Bender v. Southtowne Motors of Newnan II, Inc.*, Case No. A16A0784, 2016 WL 6747298, at *6 (Ga. App. Nov. 15, 2016) (holding no cause of action in favor of plaintiffs under Georgia Lemon Law where statute authorized specific, different private cause of action under the Fair Business Practice Act and otherwise delegated enforcement of the Lemon Law to the Attorney General); *Reilly v. Alcan Aluminum Corp.*, 272 Ga. 279, 280 (2000) (failure to provide a civil remedy for an employee to sue employer for violation of Georgia statute prohibiting age discrimination particularly significant where General Assembly created specific

civil remedies in other areas involving employer/employee interactions).[4]

Because the Court of Appeals' decision rewrites the 911 Act,[5] is inconsistent with the plain language of O.C.G.A. § 51-1-6, and has significant consequences far

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[4] Giving effect to the Georgia Legislature's choice to specifically enact only the enforcement mechanisms explicitly set forth in the 911 Act and to decline to permit judicial amendment of the 911 Act via O.C.G.A. § 51-1-6 is also consistent with the canons of statutory interpretation commanding that specific provisions control over more general ones. *See Reilly*, 272 Ga. at 280 (where underlying statutory scheme did not provide a civil remedy for plaintiffs to pursue, that specific statute's provisions "must control" over the more general tort provisions of O.C.G.A. § 51-1-6 and § 51-1-8); *Owens v. General Electric Co.*, Case No. 1-09-CV-1804, 2010 WL 11493297, at *6 (N.D. Ga. 2010) (because specific provisions of discrimination statutes control over the more general provisions of O.C.G.A. § 51-1-6, the general tort provisions in that statute cannot be read to create a separate civil action for gender discrimination based upon a violation of federal or state discrimination laws).

[5] In reaching its decision to allow plaintiffs to pursue claims under O.C.G.A. 51-1-6, the Majority Opinion cited as support the notion that the General Assembly is presumed to have knowledge of the existing state of the law, i.e., the provisions of O.C.G.A. 51-1-6 and 51-1-8 (passed in 1863), when it enacted the 911 Act (passed in 1977). *See, e.g., Bellsouth Telecomm. LLC*, 2017 WL 2590853, at *5. From this assumed knowledge of existing law, the Majority Opinion presumed that "in enacting the 9-1-1 Act, the General Assembly would have been aware of *the right of local governments to pursue claims under OCGA 51-1-6 and 51-1-8 if the telephone companies did not properly collect these charges.*" *Id.* (emphasis added). The majority's pronouncement, however, assumes its own conclusion and ignores other controlling law and facts. Here, when it enacted the 911 Act, the Georgia General Assembly knew that Georgia law strongly *disfavored* implied causes of action. It also knew that this Court had repeatedly repudiated attempts to circumvent these limiting principles through invocation of O.C.G.A. 51-1-6. And, the Georgia Legislature knew that when it created specific enforcement mechanisms within a statute, O.C.G.A. 51-1-6 and 51-1-8 could not be used to improperly expand or change those enforcement choices. Viewed in this light, the Court of Appeals' interpretation of the 911 Act does violence to the Georgia Legislature's expectations rather than honoring them.

beyond this case or even this 911 Act litigation, this Court should accept the Joint Petition and reverse the Court of Appeals decision creating a cause of action for Plaintiffs under O.C.G.A. § 51-1-6.

B. The Court of Appeals Decision Upends Decades of Georgia Precedent Disfavoring Implied Causes of Action.

This Court should also grant the Joint Petition because the Court of Appeals' decision to engraft Georgia's general tort statute onto the 911 Act is also at odds with decades of established Georgia precedent rejecting implied causes of action. Georgia has "longstanding precedential authority rejecting the creation of implied rights of action." *Somerville*, 337 Ga. App. at 417. In recognition of this established tenet of Georgia law, the General Assembly, in 2010, prospectively codified this presumption in the form of O.C.G.A. § 9-2-8: "No private right of action shall arise from any Act enacted after July 1, 2010, unless such right is expressly provided therein."

"[T]he plain language of O.C.G.A. § 9-2-8 . . . merely reflects the General Assembly's agreement with *long-standing Georgia precedent* that the imposition of 'civil as well as criminal penalty must be found i*n the provisions of the [statute] at issue. . ..*'" *Somerville*, 337 Ga. App. at 417 n. 12 (quoting *Anthony v. Am. Gen. Fin. Servs., Inc.*, 287 Ga. 448, 455 (2010)) (emphasis added). This Court has cautioned that, despite its prospective nature, the General Assembly's codification of this principle in O.C.G.A. § 9-2-8 "*certainly counsels against deviating* from Georgia's

established precedent to find new implied civil causes of action." *Anthony*, 287 Ga. at 459 (emphasis added); *see also TEC America v. DeKalb County Bd. Of Tax Assessors*, 170 Ga. App. 533, 537 (1984) ("[U]nless the contrary manifestly appears from the words employed, the language of a code section should be understood as intending to state existing law and not to change it.").

Here, the Court of Appeals' decision creating an implied right for the Counties to force telephone service providers to pay the 911 taxes of telephone subscribers, even where the statutory scheme only allows such enforcement against the telephone subscribers themselves, turns Georgia's decades-long presumption against implied causes of action on its head. As a practical matter, if the Court of Appeals decision were to stand, it would mean that in every statute in which the Georgia Legislature did not expressly state that O.C.G.A. §§ 51-1-6 and 51-1-8 are not intended to apply as enforcement mechanisms, such private causes of action must be allowed in courts across Georgia on a seemingly unlimited number of bases and theories. Not only is this not the law in Georgia—it is the very opposite of long-standing, bedrock Georgia legal principles and precedent disfavoring implied causes of action.

This Court should accept the Joint Petition to prevent such an upheaval in established Georgia law with such potentially wide-ranging consequences.

II. EVEN IF O.C.G.A. § 51-1-6 COULD BE USED TO SUE DEFENDANTS, WHICH IT CANNOT, PLAINTIFFS' CLAIMS NONETHELESS FAIL AS A MATTER OF LAW AND SHOULD BE DISMISSED AT THIS PRELIMINARY STAGE OF THE LITIGATION.

For the reasons outlined above, the 911 Act itself and established Georgia law prohibit the use of O.C.G.A. § 51-1-6 to create private causes of action in the 911 Act that the Georgia Legislature chose not to create. Even if the Court of Appeals were correct that this statute could theoretically be used to state such a claim, however, Plaintiffs, as a matter of law, cannot state such a claim in this case. For these reasons as well, this Court should grant the Joint Petition and prevent further waste of significant judicial and litigant resources.

To state a viable claim under O.C.G.A. § 51-1-6, Plaintiffs must be able to show at least these elements: (1) that Defendants owed Plaintiffs a duty; (2) that the duty is mandatory and expressly imposed; (3) that Plaintiffs were in the class of persons for whose benefit the statute from which the alleged duty arose was enacted; (4) that plaintiff suffered harm of the type the statute was intended to guard against; (5) that the duty was breached by Defendants; and (6) that the breach caused Plaintiffs' harm. *See Bellsouth Telecomm.*, 2017 WL 2590853, at *9-10 (collecting cases on elements of O.C.G.A. § 51-1-6). Plaintiffs cannot satisfy many of these required elements as a matter of law.

A. Whether Elements of O.C.G.A. § 51-1-6 Are Satisfied Are Questions of Law for the Court, Not Fact Issues Requiring Discovery.

Both the majority and the special concurrence recognize that Plaintiffs must be able to allege the required elements to state a claim under O.C.G.A. § 51-1-6, and both assume that each of these elements is an issue of fact to be sorted out after discovery and/or on a motion for summary judgment. *See Bellsouth Telecomm.*, 2017 WL 2590853, at *4, n. 8 ("The viability of these common law claims will more appropriately be tested pursuant to a motion for summary judgment after discovery.") (majority opinion); *see also id.* at *10 ("And here, it remains to be seen whether the Counties can present sufficient evidence to satisfy each of these requirements [to state a cause of action under OCGA 51-1-6] with respect to Defendants' alleged violations of the 9-1-1 Act.") (Dillard, J., concurring fully and specially). Under Georgia law, however, many of these elements are questions of law that should be decided at the motion to dismiss stage, not questions of fact or evidence to be determined later. *See, e.g., Dupree v. Keller Indus., Inc.*, 199 Ga. App. 138, 141 (1991) (whether a Defendant owes plaintiff a duty is a question of law); *id.* at 142 (no cause of action as a matter of law when Plaintiffs not within the class of persons to be protected by the statute at issue); *Combs v. Atlanta Auto Auction, Inc.*, 287 Ga. App. 9, 13–14 (2007) (causal connection between violation of statute and alleged injury can be decided as a matter of law); *Groover v. Johnston*,

277 Ga. App. 12, 13 (2005) ("*[T]he court* must then decide whether the person harmed *falls within the class of persons the legislation was intended to protect* and *whether the harm or injury actually suffered was the same harm the statute was intended to guard against.*") (emphasis added); *Norman v. Jones Lang Lasalle Americas, Inc.*, 277 Ga. App. 621, 628, 627 S.E.2d 382, 388 (2006) (court decides whether injured person falls within the class of persons it was intended to protect and whether the harm complained of was the harm the statute was intended to guard against).

To the extent, then, that the Court of Appeals decision suggests that the viability of Plaintiffs' alleged claims pursuant to O.C.G.A. § 51-1-6 cannot or should not be decided on a motion to dismiss, it is in error. And to allow this case and all the similarly situated cases currently pending to proceed to discovery based on a facially unavailable legal theory is to force Defendants to choose between being held hostage to the time and resources required to fight these legally invalid claims or to pay the ransom of unwarranted nuisance settlements with Plaintiffs. These legal questions of statutory interpretation are ripe for resolution at the motion to dismiss stage.

B. The 911 Act Does Not Impose an Express or Mandatory Duty on Telephone Service Providers to Pay Counties.

Contrary to the Court of Appeals' decision, the 911 Act does not expressly create a duty for Defendants to bill and collect 911 charges and to remit those fees

to the Counties. Even if this Court were to presume for the sake of argument that language in the 911 Act creates such a duty, and that this duty could properly be described as express and mandatory,[6] this duty is not the one that Plaintiffs seek to enforce. Instead, in their Complaint, Plaintiffs seek to impose and enforce a new duty on Defendants found nowhere in the 911 Act whatsoever: the duty to *pay* to the Plaintiff Counties 911 taxes that the Counties believe should have been, but were not, billed or collected.

The statute imposes no such duty on the defendant telephone service providers. Indeed, Defendants have no such financial duties under the 911 Act: "service supplier [telephone company] shall have *no obligation to take any legal action to enforce the collection of the 9-1-1 charge*." O.C.G.A. 46-5-134(b)(2) (emphasis added). Because Plaintiffs are not seeking enforcement of an actual duty owed to them by Defendants under the 911 Act, any claim under O.C.G.A. § 51-1-6 fails as a matter of law for this reason as well. *See Dupree*, 199 Ga. App. at 141

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[6] The 911 Act expressly exempts telephone service providers such as defendants from any obligation to enforce failures by telephone subscribers to remit the 911 taxes, *see* O.C.G.A. § 46-5-134(b)(2) ("service supplier [telephone company] shall have *no obligation to take any legal action to enforce the collection of the 9-1-1 charge*"), it provides a clear right of enforcement by the Counties to collect these monies directly from the subscribers, and it limits the Counties' recourse against Defendants to the right of audit. The plain language of the 911 Act, when read, does not support that the telephone service providers' obligations under the 911 Act rise to the level of a mandatory, express duty for purposes of applying O.C.G.A. § 51-1-6.

(whether defendant owes plaintiff a duty is a question of law); *see also* Bellsouth and Earthlink Joint Petition for Writ of Certiorari at 21-23 ("If the Counties have their way, Georgia courts—rather than the General Assembly—will create both the duties and the causes of action to enforce them. And they will do so after the fact, when it is too late for companies to comply, rather than through legislation that specifies those duties in advance.")

C. As A Matter of Law, Plaintiffs Are Not in the Class of Persons That the 911 Act Was Enacted to Protect, and Plaintiffs Have Not Suffered the Type of Harm That the 911 Act Was Enacted to Guard Against.

The legislative intent behind the 911 Act requires no guesswork: the Georgia General Assembly codified it. *See* O.C.G.A. § 46-5-121. The legislative intent includes as its stated purpose "to shorten the time required for a citizen to request and receive emergency aid." O.C.G.A. § 46-5-121(a). It further provides that "[t]he General Assembly further finds and declares that the safety and well-being of the citizens of Georgia is of the utmost importance, and it is in the public interest to provide the highest level of emergency response service on a local, regional, and state-wide basis. *Id.* at § 46-5-121(d).

By its plain terms, the 911 Act was passed for the protection and benefit of Georgia citizens, not for the benefit of the Counties. Because Plaintiffs are not within the class of persons for whose benefit the 911 Act was enacted, Plaintiffs cannot state a claim pursuant to O.C.G.A. § 51-1-6 as a matter of law. *See,*

e.g., Dupree, 199 Ga. App. at 142 (no cause of action as a matter of law when Plaintiffs not within the class of persons to be protected by the statute at issue); *Odem v. Pace Academy*, 235 Ga. App. 648, 656 (1998) (deciding as a matter of law that plaintiff was not within class of persons protected by statute and could not bring cause of action under O.C.G.A. § 51-1-6).

Similarly, the harm alleged by Plaintiffs here is not the harm that the 911 Act was passed to address. The 911 was passed to make emergency services widely available and to reduce response times for emergency responders. *See* O.C.G.A. § 46-5-121. Because Plaintiffs' alleged harm is not within the scope of the harm contemplated by the 911 Act, their claim for relief under O.C.G.A. § 51-1-6 is foreclosed as a matter of law. *See, e.g., Norman*, 277 Ga. App. at 628 (court decides whether harm complained of was harm statute intended to guard against).

III. BECAUSE THE 911 CHARGES AT ISSUE ARE TAXES, PLAINTIFFS' CLAIMS ARE FORECLOSED AS A MATTER OF LAW.

The arguments supporting the fact that the 911 charges at issue in this case are taxes are set forth in greater detail in the Joint Petition (pp. 24-30) and in the Amicus Brief of the Council on State Taxation ("COST") (pp. 1-13). For the reasons set forth in the Joint Petition and in the COST Amicus Brief, the Chambers ask that this Court accept the Joint Petition and correct the Court of Appeals decision regarding the tax issue as well.

CONCLUSION

Permitting private plaintiffs to override the legislatively enacted provisions of the 911 Act to bring a private of cause of action that is neither expressly stated nor implied in the Act is contrary to Georgia law and would damage Georgia companies and citizens alike. If allowed to stand, the Court of Appeals' approach threatens not only to impose substantial costs on telephone service providers that were not outlined or contemplated by the 911 Act, but also to swing wide the courthouse doors for private enforcement of every statute that imposes any sort of duty, regardless of the enforcement mechanism(s) chosen and enacted in those statutes by the Georgia Legislature.

Such judicial expansion and usurpation of the legislative function is an anathema to Georgia law, and it is no answer to suggest, as the Court of Appeals' decision does here, that the potential issues regarding whether Plaintiffs can successfully prove their claims under O.C.G.A. § 51-1-6 will be sorted out eventually through the discovery process. Neither businesses nor citizens should be subjected to litigation costs and burdens of defending against a lawsuit that the Legislature never intended to exist and that is not authorized by Georgia law. In reality, the cost of discovery alone in modern-day litigation is often unsustainable, and the economic realities will, in many cases, be sufficiently onerous as to force settlement regardless of the claims' ultimate merits. In cases such as this one

involving corporate defendants, these litigation costs will ultimately be absorbed by investors and employees or passed on to consumers. Here, the issues before the Court are questions of law that are appropriately decided now, before litigants are forced into full scale litigation.

For the reasons set forth here, in the Joint Petition, and in the briefs of the other amici, the Chambers' respectfully request that this Court accept the Joint Petition.

Respectfully submitted this the 25th day of October, 2017.

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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing upon all counsel of record, by e-mail and by depositing the same in the United States Mail, addressed as follows:

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