

IN THE COURT OF APPEALS

STATE OF GEORGIA

**Daniel E. McBrayer, Sr., Alpha OB
GYN Group, PC and the McBrayer
Family Limited Partnership,**

Appellants,

v.

**The Governors Ridge Property
Owners Association, Inc., Executive
Data Systems, Inc., Governors
Ridge, LLC, KOA Properties, LLC,
and Portfolio Properties,**

Appellees.

Appeal No.: A21A0262

**Brief *Amici Curiae* of Law Professors, the Firearms Policy Coalition, and
the Georgia First Amendment Foundation**

Eugene Volokh
UCLA First Amendment Clinic
385 Charles E. Young Dr. E
Los Angeles, California 90095
(310) 206-3926
Fax (310) 206-7010
volokh@law.ucla.edu
Pro hac vice admission pending*

Darren Summerville
The Summerville Firm
1226 Ponce de Leon Avenue
Atlanta, Georgia 30306
(770) 635-0030
fax (770) 635-0029
darren@summervillefirm.com

* Counsel would like to thank Madison Way, a UCLA School of Law student who worked on this brief.

Table of Contents

Table of Contents.....	i
Table of Authorities.....	ii
Interest of <i>Amici Curiae</i>	1
Summary of the Argument	3
Argument	4
I. Dr. McBrayer should not be held liable for harms caused by his political enemies.....	4
A. Allowing liability against McBrayer would justify liability against a wide range of legal, constitutionally protected businesses.....	4
B. Courts have recognized that businesses need not bow to the demands of criminals; likewise, a business’s refusing to give in to threats and violent attacks does not make it a nuisance.....	11
C. Courts have rejected a “heckler’s veto” that would shut down unpopular but constitutionally protected activities	13
II. Georgia law does not authorize nuisance liability based on the conduct of a property owner’s enemies.....	14
III. A business does not become a nuisance simply because some people oppose it on moral grounds	18
Conclusion	21

Table of Authorities

Cases

<i>Adkins v. Ashland Supermarkets, Inc.</i> , 569 S.W.2d 698 (Ky. App. 1978).....	11
<i>Apolinar v. Thompson</i> , 844 S.W.2d 262 (Tex. App. 1992).....	8
<i>Bence v. Crawford Sav. & Loan Ass’n</i> , 400 N.E.2d 39 (Ill. App. 1980).....	12
<i>Bennett v. Estate of Baker</i> , 557 P.2d 195 (Ariz. App. 1976).....	11
<i>Benton v. Pittard</i> , 197 Ga. 843 (1944).....	19
<i>Bible Believers v. Wayne County</i> , 805 F.3d 228 (6th Cir. 2015) (en banc)	13
<i>Church of American Knights of Ku Klux Klan v. Gary</i> , 334 F.3d 676 (7th Cir. 2003)	13
<i>Citizens & Southern Trust Co. v. Phillips Petroleum Co., Inc.</i> 192 Ga. App. 499 (1989).....	15
<i>City of Atlanta v. Murphy</i> , 194 Ga. App. 652 (1990)	16
<i>City of Chicago v. Beretta U.S.A. Corp.</i> , 821 N.E.2d 1099 (Ill. 2004)	15
<i>City of Thomasville v. Shank</i> , 263 Ga. 624 (1993)	9
<i>Faulkner v. Lopez</i> , No. HHBCV01511200, 2006 WL 2949070 (Conn. Super. Ct. Sept. 29, 2006).....	9
<i>Fielder v. Rice Constr. Co.</i> , 239 Ga. App. 362 (1999).....	14
<i>George v. Hercules Real Estate Servs., Inc.</i> , 339 Ga. App. 843 (2016).....	15

<i>Gerber v. Herskovitz</i> , No. 19-13726, 2020 WL 4816145 (E.D. Mich. Aug. 19, 2020)	3
<i>Harris v. Sutton</i> , 168 Ga. 565 (1929)	19
<i>Helms v. Church’s Fried Chicken</i> , 344 S.E.2d 349 (N.C. App. 1986).....	12
<i>Holman v. Athens Empire Laundry Co.</i> , 149 Ga. 345 (1919)	18
<i>Kentucky Fried Chicken, Inc. v. Superior Court</i> , 927 P.2d 1260 (Cal. 1997).....	11
<i>Kimminau v. City of Hastings</i> , 864 N.W.2d 399 (Neb. 2015).....	17
<i>Langford v. City of Texarkana</i> , 478 F.2d 262 (8th Cir. 1973).....	13
<i>McCullen v. Coakley</i> , 573 U.S. 464 (2014).....	17
<i>McGowan v. May</i> , 186 Ga. 79 (1938)	19
<i>Morrison v. Slappey</i> , 153 Ga. 724 (1922)	19
<i>Nat’l Org. for Women, Inc. v. Scheidler</i> , 510 U.S. 249 (1994)	5
<i>Palmore v. Sidoti</i> , 466 U.S. 429 (1984).....	13
<i>People ex rel. Spitzer v. Sturm, Ruger & Co, Inc.</i> , 309 A.D.2d 91 (N.Y. App. Div. 2003).....	15
<i>Poultryland, Inc. v. Anderson</i> , 299 Ga. 549 (1946).....	16
<i>Roberts v. Rich</i> , 200 Ga. 497 (1946)	16
<i>Rojas v. Diaz</i> , No. B144346, 2002 WL 1292996 (Cal. Ct. App. June 12, 2002).....	8
<i>Schubowsky v. Hearn Food Store, Inc.</i> , 247 So. 2d 484 (Fla. Dist. Ct. App. 1971).....	12

<i>St. John’s Church in the Wilderness v. Scott</i> , 296 P.3d 273 (Colo. Ct. App. 2012)	4
<i>Strong v. Winn-Dixie Stores, Inc.</i> , 125 S.E.2d 628 (S.C. 1962)	16
<i>Survivors Network of Those Abused by Priests, Inc. v. Joyce</i> , 779 F.3d 785 (8th Cir. 2015)	4
<i>United States v. Bagaric</i> , 706 F.2d 42 (2d Cir. 1983)	5
<i>United States v. Hari</i> , No. 18-cr-150-1 (DWF/HB), 2019 WL 7838275 (D. Minn. Oct. 21, 2019)	4
<i>Watson v. City of Memphis</i> , 373 U.S. 526 (1963)	13, 19
<i>Wilson v. Evans Hotel Co.</i> , 188 Ga. 498 (1939).....	18
<i>Wright v. Georgia</i> , 373 U.S. 284 (1963)	13
<i>Yingst v. Pratt</i> , 220 N.E.2d 276 (Ind. App. 1966)	12

Statutes

18 U.S.C. § 247(a)(2)	5
-----------------------------	---

Other Authorities

<i>“Drag Queen Story Hour” Raises Concerns in New Port Richey—For Supporters and Protestors Alike</i> , TAMPA BAY TIMES, Aug. 26, 2019.....	5
<i>A.L.F. Takes Credit For Fire at Utah Foie Gras Restaurant</i> , ANIMAL LIBERATION FRONT ONLINE, July 7, 2010.....	8

Alexandra Deabler, <i>Protesters Call for Restaurant to Remove Foie Gras from Menu: 'It's Not Food, It's Violence'</i> , FOX NEWS, July 24, 2018	8
<i>Animal Rights Activists, Hunters Face Off in Hyannis</i> , BOSTON GLOBE, Feb. 11, 2018	5
Avery Anapol, <i>NRA Lobbyist Says His Home Has Been Vandalized Twice</i> , THE HILL, Apr. 21, 2018	7
<i>Black Live[s] Matter Demonstrators Hold Overnight Rally in Front of Georgia Governor's Mansion</i> , FOX 5 ATLANTA, June 19, 2020	7
Campbell Robertson, Christopher Mele & Sabrina Tavernise, <i>11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts</i> , N.Y. TIMES, Oct. 27, 2018	4
David Syrek, <i>In Graphic Mag Mile Protest, PETA Calls out Canada Goose for Using Down and Fur to Make Its Pricey Parkas</i> , CHI. TRIB., Oct. 2, 2020	7
<i>Federal Sentencing for St. Landry Parish Church Arsonist Continued to Monday</i> , KATC-3 (ABC), Oct. 30, 2020	4
<i>Greene County Democratic Party Headquarters Shot at Overnight</i> , WDTN-TV, June 1, 2020	7
Jaclyn Reiss, <i>Group Calls for Protest of Drag Queen Story Hour</i> , BOSTON GLOBE, June 1, 2019	6
Jason Boog, <i>Conservative Activists Threaten To Burn Berkeley Bookstore</i> , PUBLISHERS WEEKLY, Mar. 8, 2018	6
Laura Zuckerman, <i>Animal Group Claims It Set Fire to Idaho Fur Store</i> , REUTERS, Sept. 26, 2011	7
Marwa Eltagouri, <i>Riverdale Gun Store to Be Protest Target</i> , CHI. TRIB., Sept. 6, 2014	5

Michelle Krezter, <i>PETA Protests at Whole Foods: Reduce Suffering; Don't Just Lie About It</i> , PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, Sept. 24, 2015	8
Nicole Santa Cruz, <i>Mass Slaying's Effect on Seal Beach to Figure in Death Penalty Bid</i> , L.A. TIMES, May 3, 2012	9
Patricio G. Balona, <i>Republican Party Headquarters in Volusia County Vandalized by Gunfire</i> , JACKSONVILLE.COM, Oct. 29, 2018.....	7
<i>People Rally Outside Governor's Mansion over Reopening of Some Businesses</i> , WSB-TV, Apr. 24, 2020	7
Petra Mayer, <i>'American Dirt' Publisher Cancels Author Tour After Threats</i> , NPR, Jan. 29, 2020.....	6
<i>Spain: 7 Suspected Jihadists Jailed, Some Discussed Targeting Jewish Bookstore in Barcelona</i> , AP, Apr. 10, 2015	6
Tom Dart, <i>Protesters Decry Islam Outside Phoenix Mosque</i> , GUARDIAN (UK), Oct. 10, 2015	4
Transcript, CNN, Anderson Cooper, 360 Degrees, Aug. 11, 2010	4
<i>Why People Flinch When White Nationalists Stage a Protest at a Bookstore</i> , PEORIA JOURNAL STAR, May 1, 2019	6

Interest of *Amici Curiae*

The individual *amici* are all law professors, and most write and teach about torts or constitutional law (the law school names are given in parentheses, for identification purposes only):

- Thomas C. Arthur (Emory).
- Michael J. Broyde (Emory).
- Nicholas Johnson (Fordham).
- Thomas E. Kadri (Georgia).
- Hillel Y. Levin (Georgia).
- Dean Lyrissa Lidsky (Missouri).
- Clare Norins (Georgia).
- David F. Partlett (Emory).
- Jonathan Peters (Georgia).
- Michael Perry (Emory).
- Glenn Harlan Reynolds (Tennessee).
- Ani B. Satz (Emory).
- Julie Seaman (Emory).
- Eric Segall (Georgia State).
- Fred O. Smith (Emory).
- Alexander Volokh (Emory).

- Eugene Volokh (UCLA).
- Camilla E. Watson (Georgia).
- Sonja R. West (Georgia).
- Barbara Woodhouse (Emory).

Amicus Firearms Policy Coalition is a nonprofit organization whose mission is to protect and defend constitutional rights, including freedom of speech and the right to keep and bear arms. *Amicus* Georgia First Amendment Foundation is a nonpartisan nonprofit organization that works to educate citizens, public officials, journalists and lawyers on Georgia's open records, open meetings and free speech laws.

Summary of the Argument

Under the lower court's reasoning, many controversial businesses and organizations—churches, synagogues, mosques, bookstores, gun stores, political party offices, and more—may face economic ruin and be forced to shut down because they are targeted by protesters or criminals (or are even just morally disapproved of by their neighbors, despite being completely legal). Opponents could picket or attack those entities until neighbors file a nuisance lawsuit, forcing the opponents' targets to either pay massive damages or to abate the nuisance by closing up shop, which is the opponents' goal.

This sort of heckler's veto is inconsistent with Georgia law, which generally does not hold businesses liable for behavior of third parties that it cannot control, and which generally requires a showing that a nuisance was proximately caused by defendants rather than by the supervening acts of third parties. Indeed, the lower court's decision creates incentives for people to commit crimes; and it undermines the legal and constitutional rights of law-abiding businesses and their clients. The decision should be reversed.

Argument

I. Dr. McBrayer should not be held liable for harms caused by his political enemies

A. Allowing liability against McBrayer would justify liability against a wide range of legal, constitutionally protected businesses

Many religious, political, social, and commercial organizations and people are targeted by opponents for repeated protests, and some are targeted for violence.

These include:

- **Synagogues**, e.g., *Gerber v. Herskovitz*, No. 19-13726, 2020 WL 4816145 (E.D. Mich. Aug. 19, 2020) (weekly picketing, for over 15 years), *appealed*, No. 20-01870 (filed Sept. 9, 2020); Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES, Oct. 27, 2018 (mass shooting).¹
- **Mosques**, e.g., Tom Dart, *Protesters Decry Islam Outside Phoenix Mosque*, GUARDIAN (UK), Oct. 10, 2015 (“gathering of more than 120 demonstrators on either side of the issue, many carrying weapons”);² Transcript, CNN, Anderson Cooper, 360 Degrees, Aug. 11, 2010 (five different protests outside

¹ Available at <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> (last visited Dec. 6, 2020).

² Available at <https://www.theguardian.com/us-news/2015/oct/10/anti-islam-protest-phoenix-islamic-community-center> (last visited Dec. 7, 2020).

mosques) (available on LEXIS); *United States v. Hari*, No. 18-cr-150-1 (DWF/HB), 2019 WL 7838275 (D. Minn. Oct. 21, 2019) (bombing).

- **Churches**, e.g., *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 787 (8th Cir. 2015) (“regular[.]” picketing outside Catholic church); *St. John’s Church in the Wilderness v. Scott*, 296 P.3d 273, 275 (Colo. Ct. App. 2012) (picketing outside Episcopal church); *Federal Sentencing for St. Landry Parish Church Arsonist Continued to Monday*, KATC-3 (ABC), Oct. 30, 2020 (arson of historically black church);³ Church Arson Act, 18 U.S.C. § 247(a)(2) (federal statute enacted precisely because of a spate of arson of churches).
- **Gun stores**, e.g., Marwa Eltagouri, *Riverdale Gun Shop to Be Target of Protest*, CHI. TRIB., Sept. 6, 2014 (picketing organized by the Brady Center, a prominent pro-gun-control organization); *Animal Rights Activists, Hunters Face Off in Hyannis*, BOSTON GLOBE, Feb. 11, 2018 (“Hunters and gun rights activists traded jeers with animal rights advocates picketing outside a gun shop on Barnstable Road on Saturday to voice opposition to what the store is calling its ‘first annual Coyote Contest.’”).⁴

³ Available at <https://www.katc.com/news/st-landry-parish/st-landry-parish-church-arsonist-to-be-sentenced-friday> (last visited Dec. 6, 2020).

⁴ Available at <https://www.chicagotribune.com/news/ct-gun-dealer-protest-met-0906-20140906-story.html> (last visited Dec. 7, 2020); <https://www.>

- **Bookstores**, e.g., *United States v. Bagaric*, 706 F.2d 42, 66 (2d Cir. 1983) (bombing of a pro-Yugoslav bookstore, allegedly by a Croatian nationalist), *abrogated by Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994); “*Drag Queen Story Hour*” *Raises Concerns in New Port Richey—For Supporters and Protestors Alike*, TAMPA BAY TIMES, Aug. 26, 2019 (protests outside bookstore); Jaclyn Reiss, *A Drag Queen Story Hour is Coming to Fall River’s Library — And Now a Group is Planning to Protest It*, BOSTON GLOBE, May 30, 2019 (several protests nationwide, including at a Maine bookstore); *Why People Flinch When White Nationalists Stage a Protest at a Bookstore*, PEORIA JOURNAL STAR, May 1, 2019; *Spain: 7 Suspected Jihadists Jailed, Some Discussed Targeting Jewish Bookstore in Barcelona*, AP, Apr. 10, 2015; Jason Boog, *Conservative Activists Threaten To Burn Berkeley Bookstore*, PUBLISHERS WEEKLY, Mar. 8, 2018 (threats against pro-Communist bookstore); Petra Mayer, *‘American Dirt’ Publisher Cancels Author Tour After Threats*, NPR, Jan. 29, 2020 (“Flatiron Books, publisher of the controversial new novel *American Dirt*, has cancelled the remainder of author

bostonglobe.com/metro/2018/02/10/animal-rights-activists-and-hunters-face-off-hyannis-over-coyote-hunting-contest/3eQjy6RDKW0nIzuMBnWomJ/story.html (last visited Dec. 7, 2020).

Jeanine Cummins' book tour after what it called 'specific threats to booksellers and the author.'").⁵

- **Political organizations and political leaders' homes**, e.g., *People Rally Outside Governor's Mansion over Reopening of Some Businesses*, WSB-TV, Apr. 24, 2020; *Black Live[s] Matter Demonstrators Hold Overnight Rally in Front of Georgia Governor's Mansion*, FOX 5 ATLANTA, June 19, 2020; Avery Anapol, *NRA Lobbyist Says His Home Has Been Vandalized Twice*, THE HILL, Apr. 21, 2018; Patricio G. Balona, *Republican Party Headquarters in Volusia County Vandalized by Gunfire*, JACKSONVILLE.COM, Oct. 29, 2018; *Greene County Democratic Party Headquarters Shot at Overnight*, WDTN-TV, June 1, 2020.⁶

⁵ Available at <https://www.tampabay.com/pasco/drag-queen-story-hour-raises-concerns-in-new-port-richey-x2014-for-supporters-and-protestors-alike-20190808/> (last visited Dec. 7, 2020); <https://www.bostonglobe.com/metro/2019/05/30/drag-queen-story-hour-coming-fall-river-library-and-now-group-planning-protest/HFLCGMO718513lvWLu7kOO/story.html> (last visited Dec. 7, 2020); <https://www.pjstar.com/opinion/20190430/dvorak-why-people-flinch-when-white-nationalists-stage-protest-at-bookstore> (last visited Dec. 7, 2020); <https://www.foxnews.com/world/spain-7-suspected-jihadists-jailed-some-discussed-targeting-jewish-bookstore-in-barcelona.amp> (last visited Dec. 7, 2020); <https://www.publishersweekly.com/pw/by-topic/industry-news/bookselling/article/76232-conservative-activists-threaten-to-burn-berkeley-bookstore.html> (last visited Dec. 7, 2020); <https://www.npr.org/2020/01/29/801021867/american-dirt-publisher-cancels-author-tour-after-threats> (last visited Dec. 7, 2020).

⁶ Available at <https://www.wsbtv.com/news/local/people-rally-outside-governors-mansion-over-reopening-some-businesses/OXLYMLCKBNGJXA-BHTXU5UMQOZA/> (last visited Dec. 6, 2020); <https://www.fox5atlanta.com/>

- **Fur stores and stores that sell down jackets**, e.g., David Syrek, *In Graphic Mag Mile Protest, PETA Calls out Canada Goose for Using Down and Fur to Make Its Pricey Parkas*, CHI. TRIB., Oct. 2, 2020; Laura Zuckerman, *Animal Group Claims It Set Fire to Idaho Fur Store*, REUTERS, Sept. 26, 2011.⁷
- **Food stores that sell certain kinds of meat products**, e.g., Michelle Krezter, *PETA Protests at Whole Foods: Reduce Suffering; Don't Just Lie About It*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, Sept. 24, 2015 (protests outside a market based on allegations that one of the market's pork suppliers mistreated its pigs); Alexandra Deabler, *Protesters Call for Restaurant to Remove Foie Gras from Menu: 'It's Not Food, It's Violence'*, FOX NEWS, July 24, 2018 (protests outside of a restaurant that sold foie gras); *A.L.F. Takes*

news/black-live-matter-demonstrators-hold-overnight-rally-in-front-of-georgia-governors-mansion (last visited Dec. 6, 2020); <https://thehill.com/blogs/blog-briefing-room/384245-nra-lobbyist-says-his-home-has-been-vandalized-twice> (last visited Dec. 6, 2020); <https://www.jacksonville.com/news/20181029/republican-party-headquarters-in-volusia-county-vandalized-by-gunfire> (last visited Dec. 6, 2020); <https://www.wdtn.com/news/local-news/greene-county-democratic-party-headquarters-shot-at-overnight/> (last visited Dec. 6, 2020).

⁷ Available at <https://www.chicagotribune.com/lifestyles/fashion/ct-life-canada-goose-protest-chicago-1002-20201002-h4cmg4cjsx5confqt2dpnkopm5m-story.html> (last visited Dec. 6, 2020); <https://fr.reuters.com/article/us-crime-animalrights-idUSTRE78Q08A20110927> (last visited Dec. 6, 2020).

Credit For Fire at Utah Foie Gras Restaurant, ANIMAL LIBERATION FRONT ONLINE, July 7, 2010.⁸

- **Businesses whose employees are the targets of violent stalkers or jealous exes, or perhaps even the targets themselves**, *e.g.*, *Rojas v. Diaz*, No. B144346, 2002 WL 1292996, *2-*3 (Cal. Ct. App. June 12, 2002) (rejecting negligence claim brought by family of gardener who was shot when an abusive husband came to a house where his wife was temporarily staying); *Apolinar v. Thompson*, 844 S.W.2d 262, 263–64 (Tex. App. 1992) (allowing failure-to-warn claim brought by housesitter who was shot by someone who had earlier threatened the homeowner); *Faulkner v. Lopez*, No. HHBCV01511200, 2006 WL 2949070, at *4-*5 (Conn. Super. Ct. Sept. 29, 2006) (rejecting failure-to-warn claim brought by visitors who were shot by her abusive ex-boyfriend); Nicole Santa Cruz, *Mass Slaying’s Effect on Seal Beach to Figure in Death Penalty Bid*, L.A. TIMES, May 3, 2012 (describing Seal Beach nail salon mass shooting, in which murderer was ex-husband of

⁸ Available at <https://www.peta.org/blog/peta-protests-at-whole-foods-reduce-suffering-dont-just-lie-about-it/> (last visited Dec. 6, 2020); <https://www.foxnews.com/food-drink/protesters-call-for-restaurant-to-remove-foie-gras-from-menu-its-not-food-its-violence> (last visited Dec. 6, 2020); <https://animalliberationfrontline.com/alf-takes-credit-for-fire-at-utah-foie-gras-restaurant/> (last visited Dec. 6, 2020).

one employee, had a long criminal history, and had threatened to shoot his wife in one earlier incident).⁹

- **Government agencies**, which are generally liable for nuisance when their actions cause damages to neighboring property, *City of Thomasville v. Shank*, 263 Ga. 624, 624 (1993), and which have been targeted by protesters—and occasionally vandals or even arsonists—in cases too numerous to mention.

Some of this behavior by the targets' adversaries may be constitutionally protected. (Of course, nothing in this brief condemns peaceful, lawful protesting.) Some of it may be criminal. But in any event, under the plaintiffs' theory all these organizations could be driven out of business (and some individuals could lose their homes) because of massive damages awards—or even just the threat of such awards. And this would happen because of what their opponents do, not because of what the organizations do, what their clients do, or any annoyance the activity would itself cause in the absence of protests.

And of course behavior that gets rewarded gets repeated. If anti-abortion arsonists learn that their actions (and threats of future actions) can lead to massive monetary liability being imposed on family planning clinics, the result will be more such attacks. And the attacks will not be limited to such clinics: Extremists in other

⁹ Available at <https://www.latimes.com/local/la-xpm-2012-may-03-la-me-seal-beach-slaying-20120503-story.html> (last visited Dec. 7, 2020).

political movements will also likely learn that lesson, and engage in such attacks against a wide range of places of worship, locales that host political activity, and other controversial institutions and businesses.

The law should not allow this heckler's veto. Driving such entities out of operation, or perhaps banishing them to faraway places that are much harder for their patrons to access, violates their constitutional rights and the rights of their patrons. And even for constitutionally unprotected businesses—such as fur stores and restaurants—imposing such liability would violate their basic rights to operate freely, without being shut down by their vocal (or even criminal) opponents.

Even if a city can ban, say, fur stores, or zone them into certain areas, that should be done through peaceful political means, not by giving the stores' enemies an effective veto if they are willing to act aggressively and even criminally. Yet affirming the decision below would place all these businesses and organizations at the mercy of their adversaries.

B. Courts have recognized that businesses need not bow to the demands of criminals; likewise, a business's refusing to give in to threats and violent attacks does not make it a nuisance

Perhaps because of the examples given in the previous section, no court has to our knowledge allowed liability like that imposed by the court below. But courts have considered a similar question when it comes to businesses being sued in

negligence (rather than in nuisance) for refusing to comply with criminal demands—and they have rejected such lawsuits.

This principle is best laid out in *Kentucky Fried Chicken, Inc. v. Superior Court*, which held that a store cannot be held liable for a robber’s injuring a customer when the store’s employee refused to accede to the robber’s demands. 927 P.2d 1260, 1262 (Cal. 1997). Imposing such liability, the court held, would be against public policy. *Id.* at 1270: “[V]ictims have no legal duty to comply with the robber’s demands”—because if such a duty was imposed, robbers could “become aware of and be encouraged by the existence of such a duty.” *Id.* There is no legal obligation to submit to illegal and menacing behavior, whether robbery, arson, or otherwise.

Other courts have similarly held that requiring businesses to go along with criminals’ demands would wrongfully “furnish[] a criminal with an additional coercive advantage,” *Adkins v. Ashland Supermarkets, Inc.*, 569 S.W.2d 698, 700 (Ky. App. 1978), and “put yet another weapon at the disposal of the criminal.” *Bennett v. Estate of Baker*, 557 P.2d 195, 198 (Ariz. App. 1976); *see also Bence v. Crawford Sav. & Loan Ass’n*, 400 N.E.2d 39, 41 (Ill. App. 1980) (likewise rejecting a duty to comply with criminal demands); *Helms v. Church’s Fried Chicken*, 344 S.E.2d 349, 350-51 (N.C. App. 1986) (same); *Schubowsky v. Hearn Food Store, Inc.*, 247 So. 2d 484, 484 (Fla. Dist. Ct. App. 1971) (same); *Yingst v. Pratt*, 220 N.E.2d 276, 279 (Ind. App. 1966) (same).

Just as the law should not “put yet another weapon at the disposal of the criminal” by holding a business liable in negligence for refusing the demands of criminals, it should also not hold a business liable in nuisance for refusing the unlawful demands of arsonists and bombers. And even nonviolent protesters should not be empowered to turn their demands into legal commands, which is what plaintiffs’ theory would require.

C. Courts have rejected a “heckler’s veto” that would shut down unpopular but constitutionally protected activities

Indeed, the plaintiffs’ theory resembles the “heckler’s veto” that courts have rejected in First Amendment cases. When a speaker’s views risk so angering audiences that they may react violently, the government has sometimes stepped in to stop the speaker, rather than to stop or punish the violent hecklers. Courts have held that such government action violates the First Amendment.

“[A] permit for a parade or other assembly having political overtones cannot be denied because the applicant’s audience will riot. To allow denial on such a ground would be to authorize a ‘heckler’s veto.’” *Church of American Knights of Ku Klux Klan v. Gary*, 334 F.3d 676, 680-81 (7th Cir. 2003). “When a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals.” *Bible Believers v. Wayne County*, 805 F.3d 228, 252 (6th Cir. 2015) (en banc). And this is just one

facet of a broader principle, recognized in Equal Protection Clause cases as well as First Amendment cases, that “constitutional rights may not be denied simply because of hostility to their assertion or exercise.” *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963); *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984); *Langford v. City of Texarkana*, 478 F.2d 262, 268 (8th Cir. 1973). “[T]he possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present.” *Wright v. Georgia*, 373 U.S. 284, 293 (1963).

The same principle applies here, especially since the abortion clinics may be the only places where women who choose to have abortions can exercise their constitutional rights. Just as “the state may not silence [a] speaker” because of fears about the action of “a hostile crowd,” so a state may not impose ruinous damages on a constitutionally protected enterprise because of fears about the actions of hostile protesters (including “lawless behavior”).

II. Georgia law does not authorize nuisance liability based on the conduct of a property owner’s enemies

Georgia law recognizes that property owners are only liable for behavior and events within their control: “Ownership of land by the tortfeasor is not an element, but control is; the essential element of nuisance is control over the cause of the harm.” *Fielder v. Rice Constr. Co.*, 239 Ga. App. 362, 366 (1999). Small business owners do not have practical control over potential arsonists who would attack their

businesses; control of such serious crime is a matter for law enforcement. And property owners do not have legal power to control protesters who protest outside their property.

Thus, in *Fielder* this Court held that the Health Department could be liable for a nuisance caused by a septic system on the defendant's former property. *Id.* Though the department did not own the septic system, it "had control over whether or not the lot was approved for septic tank use and had such control that it could have required significant improvements" that would have avoided the problems. *Id.* When problems with the septic system did arise, the Health Department also "had the power to compel [the defendant] to abate the nuisance but allowed the nuisance to continue." *Id.* But McBrayer did not invite the protestors to the clinic, and he had no power to compel them to abate their disturbing or even violent conduct.

Moreover, "the cause of the harm" here includes a requirement of proximate cause, which is itself "an essential element in a nuisance claim." *George v. Hercules Real Estate Servs., Inc.*, 339 Ga. App. 843, 848 (2016). "A party is not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of his own acts or failure of duty. If such consequences were caused by the acts of others, so operating as to produce the injury, he would not be liable." *Citizens & Southern Trust Co. v. Phillips Petroleum Co., Inc.* 192 Ga. App. 499, 500 (1989) (citation omitted).

Yet “defendants’ lawful commercial activity, having been followed by harm to person and property caused directly and principally by the criminal activity of intervening third parties, may not be considered a proximate cause of such harm.” *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1136 (Ill. 2004) (internal quotation marks omitted) (rejecting nuisance claim against gun manufacturer based on misuse of guns by downstream buyers); *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91, 102 (N.Y. App. Div. 2003) (same). Just as a gun manufacturer is not liable for misconduct (even foreseeable misconduct) by downstream gun users, so an abortion or family planning clinic cannot be liable for misconduct by entirely unrelated parties who want to shut it down.

The only thing McBrayer could have done about the protesters (and about the potential criminal attackers) is close his business. But Georgia law does not view businesses as obligated to surrender to their enemies’ demands—nor should it.

Property owners may of course be required to manage their property consistently with state health and safety regulations. *See, e.g., City of Atlanta v. Murphy*, 194 Ga. App. 652, 652 (1990) (holding defendant may be liable for nuisance in part because it left open garbage uncovered overnight). They may of course be required to operate their business in a manner consistent with industry best practices. *See, e.g., Roberts v. Rich*, 200 Ga. 497, 497 (1946) (holding defendant may be liable for “operat[ing]” its grocery warehouse “in such a manner as to cause a nuisance,” for

instance if food is allowed to rot or attract vermin); *cf. Strong v. Winn-Dixie Stores, Inc.*, 125 S.E.2d 628, 632-34 (S.C. 1962) (citing *Roberts* and concluding that a grocery store may not be enjoined based on the possibility that it “will bring into the neighborhood . . . unsanitary conditions,” because those conditions “can be remedied” when they arise, for instance by complying with “ordinances dealing with such matters”).

They may of course be required to stop emitting noxious odors that spread onto neighbors’ property. *See Poultryland, Inc. v. Anderson*, 299 Ga. 549, 558 (1946). But no case holds that businesses must simply close because their political opponents will annoy or even threaten the controversial businesses’ neighbors.

More broadly, businesses necessarily have much less control over people—especially people who are not the business’s invitees—than over pests attracted by, for instance, rotting food on the business’s property. Animals may be trapped and exterminated, and their presence may be prevented by proper sanitary practices. Not so, of course, for people, especially ones who have a First Amendment right to protest in the public space beyond McBrayer’s property. *See McCullen v. Coakley*, 573 U.S. 464 (2014).

Of course, there are authorities whose job it is to control crime, and to keep protests from unduly interfering with businesses: they are local governments and, in particular, police departments. Indeed, even where a defendant negligently creates

an unsafe condition—something McBrayer did not do in this case—the law does not hold the defendant responsible for failure to repair the condition, when that is more safely done by law enforcement. “[I]t would be poor public policy to recognize a duty on the part of a motorist who creates an obstruction on a roadway to take further action with respect to the obstruction after public authorities have removed it to their satisfaction and declared the roadway safe for vehicular travel.” *Kimminau v. City of Hastings*, 864 N.W.2d 399, 412 (Neb. 2015). It is similarly unsafe to require ordinary business owners to itself thwart potential criminal attacks and control large groups of vocal protestors.

Property owners may have some control over their invitees, though practically there is only so much they can do when the clients are off the property. But even if McBrayer could be held liable in some measure because of his invitees’ alleged urination or defecation off his property, that could not justify a \$1.5 million award; and whether such liability should be imposed would in any event have to be decided by a jury instructed to focus only on misbehavior by McBrayer’s invitees, and not on the actions of McBrayer’s enemies.

III. A business does not become a nuisance simply because some people oppose it on moral grounds

The Plaintiffs complain that “the activities of Appellants in the clinic”—which is to say, performing abortions—“were discomforting, annoying and offensive to many in the Park.” Appellee Br. 5; *see also id.* at 21 (quoting testimony about the

“discomfort of what is a sensitive subject,” which “kind of rattled people”); *id.* (discussing “the emotional impact . . . of the clinic”); *id.* at 23 (“the claims of Appellees” rest on, among other things, “discomfort,” “offense,” and “embarrassment”).

But that a “business itself is offensive to others . . . or that persons of fastidious taste would prefer its removal” does not make it a nuisance. *Wilson v. Evans Hotel Co.*, 188 Ga. 498, 501 (1939) (quoting *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345 (1919)). The right to abortion is indeed controversial, and many people find abortion to be offensive and morally repugnant. Still, it remains a constitutionally protected right, and people who help women exercise that right cannot be driven out of their place of business simply because of neighbors’ disapproval. And even if abortion were not a constitutionally protected right, it is currently legal for abortion clinics to operate; people who harass and intimidate legal businesses should not be able to enlist the court system to effectively shut down those businesses.

Nor can abortion clinics in office parks be deemed nuisances by analogy to the mortuary nuisance cases. The mortuaries were located “in a section essentially and distinctively devoted to residential purposes,” which caused “inevitable injury to the health and happiness of [the] residents.” *McGowan v. May*, 186 Ga. 79, 79 (1938); *Harris v. Sutton*, 168 Ga. 565, 565 (1929); *Morrison v. Slaphey*, 153 Ga. 724, 724 (1922).

The most recent decision, *McGowan*, mentioned “residential” and “residents” five times in the span of the one-paragraph opinion. *Harris* likewise noted that the case involved a residential area; so did *Morrison*, though there the court stressed that it was not deciding whether “the operation of an undertaking establishment in a residential section is a nuisance per se.” See also *Benton v. Pittard*, 197 Ga. 843, 845-46 (1944) (enjoining operation of medical clinic in residential area, and repeatedly stressing that the case involved “a distinctly residential section”). McBrayer’s office is in an office park zoned for medical clinics, in which there is already a dental practice. V6-43-44, V10-222, -237.

And health care offices being allowed in the office park makes clear that any hostility to McBrayer’s clinic stems precisely from the clinic being engaged in the constitutionally protected activity of performing abortions. But, as noted above, “constitutional rights may not be denied simply because of hostility to their assertion or exercise.” *Watson*, 373 U.S. at 535.

McBrayer’s business is lawful and appropriate for its location. It emits no noxious gases or loud noises; rather, it is controversial because it helps people exercise a controversial constitutional right. People who conduct such enterprises should not be driven out of business by public hostility.

Conclusion

Upholding the lower court’s decision would set a precedent that endangers all sorts of controversial businesses and organizations, including constitutionally protected entities such as churches, synagogues, mosques, bookstores, gun stores, political organizations, and more. It would also encourage the enemies of such entities to protest more aggressively, and even to threaten or commit vandalism or arson. After all, such opponents might well reason, McBrayer’s abortion clinic was driven out by such tactics—perhaps they can do the same to the businesses or institutions that they hate, by creating such a nuisance that neighbors will sue.

Upholding the lower court’s decision would also be inconsistent with Georgia nuisance law, because it would impose liability on a party who lacked control over the alleged nuisance (except in the legally irrelevant sense that we can control our enemies by giving in to their demands). This court should reject the “heckler’s veto” of McBrayer’s constitutionally protected business, and reverse the decision below.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted, this 14th day of December, 2020

s/ Darren Summerville
Darren Summerville
GA Bar No. 691978
The Summerville Firm
1226 Ponce de Leon Avenue
Atlanta, Georgia 30306
(770) 635-0030
darren@summervillefirm.com

CERTIFICATE OF SERVICE

I certify that I have filed this *amicus* Brief with the Court's eFast system, which will distribute the Brief to the Court, the Clerk, and those registered with the Court's platform.

I have also served via first class mail this *amicus* Brief on the following counsel of record:

Alexander P. LeVorse, Esq.
aplevorselaw@msn.com
Northridge 400, Building 2
8325 Dunwoody Place
Atlanta, GA 30350-3307

Noah S. Rosner, Esq.
noahrosner@yahoo.com
Northridge 400, Building 2
8325 Dunwoody Place
Atlanta, Georgia 30350

Robert B. Remar, Esq.
rremar@rh-law.com
Michael L. Eber, Esq.
meber@rh-law.com
Rogers & Hardin, LLP
229 Peachtree Street, NE
Suite 2700
Atlanta, GA 30303

Redundantly, because a prior agreement in this matter regarding service of documents in *.PDF format exists, I have also effectuated service to each of the listed counsel at their respective e-mail addresses.

Respectfully submitted, this 14th day of December, 2020

s/ Darren Summerville
Darren Summerville
GA Bar No. 691978
The Summerville Firm
1226 Ponce de Leon Avenue
Atlanta, Georgia 30306
(770) 635-0030
darren@summervillefirm.com