IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STONE MOUNTAIN JUDICIAL CIRCUIT DISTRICT ATTORNEY SHERRY BOSTON, TOWALIGA JUDICIAL CIRCUIT DISTRICT ATTORNEY JONATHAN ADAMS, AUGUSTA JUDICIAL CIRCUIT DISTRICT ATTORNEY JARED WILLIAMS, and COBB JUDICIAL CIRCUIT DISTRICT ATTORNEY FLYNN BROADY

Plaintiffs,

v.

JOSEPH COWART, STEVEN SHEER, JOHN OTT, HOWARD SIMMS, and HERB CRANFORD, in their individual and official capacities,

Defendants.

Case No. 2023-cv-383558

MOTION OF AMICI CURIAE 84 CURRENT AND FORMER ELECTED PROSECUTORS AND ATTORNEYS GENERAL, AND FORMER U.S. ATTORNEYS AND U.S. DEPARTMENT OF JUSTICE OFFICIALS, TO FILE AN AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION

Amici, a bipartisan group of 84 current and former elected prosecutors and Attorneys General, and former U.S. Attorneys and U.S. Department of Justice

Officials, respectfully move this Court for leave to file the attached amicus brief in support of Plaintiffs. Amici are criminal justice leaders from jurisdictions across the country, with decades of expertise in the criminal legal system.

In the proposed brief, amici seek to offer the perspective of prosecutors and other criminal legal system leaders that understand the importance of preserving and protecting prosecutorial independence, including the ability to use settled prosecutorial discretion to allocate inherently limited resources to the most serious crimes and cases. Amici also understand the vital role that prosecutors play in promoting public safety, and the critical importance of trust in the fairness and integrity of the legal system in advancing that objective.

Amici have a strong interest in this case because of the deeply troubling ways that SB 92 erodes the independence of duly elected prosecutors, constrains prosecutorial decision making and threatens to entangle those decisions in politics, and infringes on the inherent discretion prosecutors have had for decades, thereby trampling bedrock constitutional principles. Amici have collectively spent decades working in the criminal legal system, making decisions designed to promote public safety and support victims of crime. We worry that this misguided legislation, if implemented, will create significant and wide-reaching disruptions in the fair administration of justice.

WHEREFORE, amici request that this Court accept and consider the BRIEF OF AMICI CURIAE 84 CURRENT AND FORMER ELECTED PROSECUTORS AND ATTORNEYS GENERAL, AND FORMER U.S. ATTORNEYS AND U.S. DEPARTMENT OF JUSTICE OFFICIALS, IN SUPPORT OF PLAINTIFFS, attached hereto.

Respectfully submitted, this 5th day of September, 2023.

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EXHIBIT A

IN THE SUPERIOR COURT COUNTY
STATE OF GEORGIA

STONE MOUNTAIN JUDICIAL CIRCUIT DISTRICT ATTORNEY SHERRY BOSTON, TOWALIGA JUDICIAL CIRCUIT DISTRICT ATTORNEY JONATHAN ADAMS, AUGUSTA JUDICIAL CIRCUIT DISTRICT ATTORNEY JARED WILLIAMS, and COBB JUDICIAL CIRCUIT DISTRICT ATTORNEY FLYNN BROADY Plaintiffs, v. JOSEPH COWART, STEVEN SHEER, JOHN OTT, HOWARD SIMMS, and HERB CRANFORD, in their individual and official capacities, Defendants.	Case No. 2023-cv-383558

BRIEF OF AMICI CURIAE 84 CURRENT AND FORMER ELECTED PROSECUTORS AND ATTORNEYS GENERAL, AND FORMER U.S. ATTORNEYS AND U.S. DEPARTMENT OF JUSTICE OFFICIALS, IN SUPPORT OF PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION

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INTEREST OF AMICI

Amici Curiae, a bipartisan group of 84 current and former elected prosecutors and Attorneys General, and former U.S. Attorneys and U.S. Department of Justice Officials, file this brief in support of Plaintiffs' motion for interlocutory injunction and challenge to Georgia Senate Bill 92 and the new legislation it has enacted.[1] SB 92 seeks to control how elected prosecutors exercise their well-recognized discretion, allows for removal of elected prosecutors when a politically appointed board dislikes how they utilize that discretion, and interferes with the day-to-day operation of offices and elected officials tasked with protecting public safety.

As elected prosecutors and Attorneys General past and present, and former U.S. Attorneys and U.S. Department of Justice Officials, amici have a deep understanding of the important role that prosecutorial independence and discretion play in the criminal justice system. We are concerned that the legislation in this case undermines, in an unprecedented fashion, the longstanding constitutional authority, autonomy, and responsibility of prosecutors elected by their local communities. We fear that because of this law, prosecutors will no longer be able to focus on the critical role of protecting public safety, and instead will expend precious resources on guessing whether the newly-created Prosecuting Attorneys Qualifications Commission ("PAQC") approves of each elected official's choices. We worry this law will discourage badly needed transparency in the legal system, erode well-settled prosecutorial independence, and make application of the rule of law overtly political, rather than fair and equitable.

The PAQC upends our traditional system of justice and jeopardizes its legitimacy. Its flaws are numerous, and each one threatens public safety and

[1] *See* O.C.G.A. § 15-18-6 et. seq. We refer to SB 92 and the enacted or new legislation interchangeably throughout this brief.

undermines the democratic process. First, the enacted legislation raises serious constitutional concerns by eroding the bedrock separation of powers that exists between branches of government. Keeping these branches apart and distinct, especially in a legal system that has the ability to take away a person's freedom and liberty, is essential to a well-functioning, healthy democracy. *See Boumediene v. Bush*, 533 U.S. 723, 797 (2008) ("[s]ecurity subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."). SB 92, however, allows the legislature to intervene in how prosecutors implement policy and exercise their discretion, and it utilizes a politically appointed body to oversee prosecutors' work and day-to-day decisions. People can have no confidence in a system that so cavalierly ignores laws designed to preserve the delicate balance of power and independence that avoids government overreach.

Relatedly, the PAQC's impermissible infringement on how a prosecutor uses his or her well-established discretion will erode trust in our legal system. Every day, prosecutors are tasked with making extremely difficult decisions about how to implement outcomes that support and protect victims, keep the broader community safe, and also ensure the system is fair and equitable. That latter aspect of the job is not only important for equity reasons, but for improving public safety. When people think that the system works only for more advantaged members of society, or that it is predicated on a politically-driven application of the law, they are less likely to call the police, to serve as witnesses, and to cooperate in what are often intimidating and overwhelming legal proceedings.

For decades, the prosecutorial independence that serves as the core of the legal system was largely unquestioned. Legislators did not try to control prosecutors' discretion when more punitive and "tough on crime" penalties were implemented and drove escalating incarceration rates – including for low-level offenses that

disparately impacted people of color. Yet now, when some are aiming to more wisely use inherently limited prosecutorial resources, we see concerted efforts afoot to curb and challenge decades-old principles of prosecutorial independence.

The creation of the PAQC also makes prosecutors' ability to run their offices and prioritize serious cases much more difficult. A prosecutor will struggle to effectively shift resources toward serious cases like murder or sexual assault and away from things like simple marijuana use or possession.[2] Those more serious and time-intensive cases, where people have been injured and harmed, will therefore suffer from a lack of dedicated resources. Indeed, a requirement that an office is compelled to take the time to review *every possible* violation of the law they are aware of, as SB 92 appears to mandate, could bring an understaffed office to its knees and divert resources from the critical mission of protecting the public. It could also have absurd results. Under SB 92, for example, a prosecutor could need to consider whether to investigate and potentially prosecute an individual who had an extramarital affair, as adultery remains a crime in Georgia.[3] Likewise, in Georgia, it

[2] Following the enactment of SB 92, District Attorneys in Georgia terminated diversion programs they were previously advancing. *See* Memorandum of Law in Support of Plaintiffs' Motion for Interlocutory Injunction, p. 7 (hereinafter: Plaintiffs' Memorandum); Akela Lacy, *Georgia GOP Gears Up to Remove Atlanta Prosecutor Who Indicted Donald Trump*, The Intercept (Aug. 24, 2023), https://theintercept.com/2023/08/24/georgia-prosecutor-trump-gop/.

[3] *See* O.C.G.A. § 16-6-19. This concern is not theoretical – after SB 92 took effect, DA Jonathan Adams of Butts, Lamar and Monroe counties revoked his policy requiring magistrates to reject adultery charges. *See* Plaintiffs' Memorandum, *supra* note 2, at p. 7; Jeff Amy, *Georgia Prosecutors are Suing to Strike Down a New State Law that Undermines Their Authority*, AP (Aug. 2, 2023), https://apnews.com/article/georgia-prosecutors-lawsuit-commission-0f9593225ac0a5caf4de8d457907ae71.

is illegal to live on a boat for more than 30 days.[4] SB 92 would require a prosecutor to at least consider investing resources in such prosecutions.

This legislation and the Commission also threatens the core of democracy – a voter's right to elect their representative consistent with their values. A politically appointed commission now has the ability to remove a duly elected prosecutor from office, even when he or she is doing precisely what the community embraced in voting for that elected official and is implementing the exact changes to prosecutorial priorities they had promised. It also threatens local control by allowing state legislators to override the will of a local community and its choice at the ballot box. When people believe their votes do not count, our system of governance has no credibility.

SB 92 erodes our democratic process in another deeply concerning way, as it has the adverse effect of incentivizing prosecutors to shield their decisions from public view. It is critical that prosecutors be transparent when deciding how to run and operate their offices. Prosecutors' offices have long been considered black boxes, and for this reason, many people, especially those from historically marginalized communities, are disinclined to trust those offices. Over the last few years, many prosecutors have tried to ameliorate this tension by exposing their decision-making to community scrutiny. Now, such transparency and honesty can be punished as some seek to use announced policies, practices, and views on pressing legal issues as a basis for removal.

Because the issues raised by this case have national significance, amici come not only from Georgia, but also from jurisdictions across the country. Although

[4] Susie Davis and Virginia Prescott, *Why Can't Georgians Live on a Boat for More Than 30 Days? And Other Odd State Laws*, GBP News (Aug. 13, 2020), https://www.gpb.org/news/2018/07/03/why-cant-georgians-live-on-boat-for-more-30-days-and-other-odd-state-laws.

amici's views may differ as to whether a particular charge warrants prosecution, amici come together in our steadfast belief that an elected prosecutor must maintain his or her independence and ability to establish discretionary policies. We also agree that a Commission that penalizes policies, discretion, and transparency, while trampling bedrock principles of our democracy and constitutional system, harms public safety and does not serve the interests of justice.

For all these reasons, amici have deep concerns about the very troubling implications of this law and offer our views here respectfully as friends of the Court.

A full list of amici is attached as an Appendix.

ARGUMENT

For decades, prosecutors across the country have had discretion to decide what charges to bring and what charges to decline. Until recently, prosecutorial discretion has largely gone unchallenged, except when voters go to the ballot box and exercise their prerogative to elect a prosecutor. The existence of prosecutorial discretion has been a cornerstone of the criminal legal system in both state and federal court. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[i]n our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); *see also United States v. Nixon*, 418 U.S. 683, 693 (1974). Very few concerns were raised when prosecutors used their discretion to punish people as harshly as possible, or when purportedly tough-on-crime prosecutors' offices failed to devote adequate resources to the most serious cases, leaving many of them unresolved.[5]

[5] *See, e.g.*, Wells Dunbar et al., *Women are Suing Austin, Travis County for Failing to Prosecute Sexual Assault*, KUT 90.5 (June 11, 2019),

That reluctance to impede or intrude on a prosecutor's well-settled use of discretion shifted when prosecutors started implementing evidence-based initiatives proven to promote safer and healthier communities and reduce racial disparities in the legal system.[6] Specifically, many prosecutors promised to stop using limited resources to prosecute – and instead divert away from the criminal legal system – cases where no public safety threat existed, such as simple marijuana use or possession or sleeping on the streets, opting to focus their time and effort on more serious crimes. They also promised to look at growing evidence around brain science and rethink charging juveniles as adults, and vowed to give victims multiple restorative options for case resolutions that went beyond prison or jail. Many of their decisions sought to reduce racial disparities in cases where the disparities were especially pronounced and public safety benefits nonexistent.[7] By deprioritizing

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https://www.kut.org/texas/2019-06-11/women-are-suing-austin-travis-county-for-failing-to-prosecute-sexual-assault; Craig McCoy, Nancy Phillips, Dylan Purcell, *Justice: Delayed, Dismissed, Denied*, Philadelphia Inquirer (Dec. 13, 2009), https://www.inquirer.com/philly/news/20091213_Justice__Delayed__Dismissed__Denied.html (reviewing Philadelphia data and finding that, under D.A. Lynne Abraham, only one in ten people charged with gun assaults was convicted and only two in ten charged with armed robbery were convicted of that charge).

[6] *See* Consider This, *Cities Voted for Progressive Prosecutors. Republican State Leaders are Pushing Back*, NPR (Aug. 20, 2023), https://www.npr.org/2023/08/18/1194773812/cities-voted-for-progressive-prosecutors-republican-state-leaders-are-pushing-ba.

[7] Peter Reuter, *Why has US Drug Policy Changed so Little Over 30 Years?*, in 42 Crime and Justice, 98 (Michael Tonry ed., 2013); *see also* Alex Stevens, *Modernising Drug Law Enforcement Report: Applying Harm Reduction Principles to the Policing of Retail Drug Markets* 6, International Drug Policy Consortium (March 2013) (available at: https://www.drugsandalcohol.ie/19567/1/MDLE-report-3_Applying-harm-reduction-to-policing-of-retail-markets.pdf); Samuel R. Friedman, *Drug Arrests and Injection Drug Deterrence*, 101 Am. J. Public Health 344 (Feb. 2011) (available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3020200/).

certain charging decisions, prosecutors could increase the fairness and equity of their local criminal legal system without negatively impacting public safety.

Although research uniformly shows that policies such as these have no impact on public safety and may in fact increase it,[8] some officials decided to use these prosecutors and their policies as a political punching bag in an effort to deflect or even place blame for the rising crime that occurred across the country during the COVID-19 pandemic. Virginia's Attorney General, for example, gave a speech in 2022 instructing other elected officials to find a progressive prosecutor and "[m]ake them famous" to win more elections.[9] Following this strategy, several legislators across the country have sought to undo the results of democratic elections by impeaching or removing prosecutors for implementing the very policies on which they ran.[10]

Sadly, these practices have also taken root in Georgia. This legislative session, Georgia legislators voted to pass SB 92. The resulting law amends the list of statutory duties for district attorneys and solicitors general and requires them "[t]o review every individual case for which probable cause for prosecution exists, and make a prosecutorial decision available under the law based on the facts and circumstances under oath of duty." O.C.G.A. § 15-18-6(4). It also creates a Prosecuting Attorneys Qualifications Commission (PAQC) with "the power to

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[8] Todd Foglesong, Ron Levi, et al., *Violent Crime and Public Prosecution: A Review of Recent Data on Homicide, Robbery, and Progressive Prosecution in the United States* (2022) (available at: https://munkschool.utoronto.ca/research/violent-crime-and-public-prosecution).

[9] Philip Wegmann, *'Make Them Famous': Virginia AG Tells GOP to Focus on Progressive Prosecutors*, Real Clear Politics (May 30, 2022), https://www.realclearpolitics.com/articles/2022/05/03/make_them_famous_virginia_ag_tells_gop_to_focus_on_progressive_prosecutors_147546.html.

[10] Emily Bazelon, *The Response to Crime*, N.Y. Times (April 7, 2023), https://www.nytimes.com/2023/04/07/briefing/legislators-response-to-crime.html.

discipline, remove, and cause involuntary retirement of appointed or elected district attorneys or solicitors-general." O.C.G.A. § 15-18-32(a). This commission has extensive investigative authorities. The statute provides several grounds to investigate a complaint addressing a prosecutor's "charging decision, plea offer, opposition to or grant of a continuance, placement of a case on a trial calendar, or recommendation regarding bond." O.C.G.A. § 15-18-32(i)(2).[11] SB 92 further amends the recall statute to allow for the removal of district attorneys and solicitors general because of their discretionary decisions, setting them apart from other elected officials in the state. O.C.G.A. § 21-4-3(7). The statute allows for removal based on vaguely defined "[c]onduct prejudicial to the administration of justice which brings the office into disrepute," and predicates potential discipline on "willful and persistent failure to carry out" statutory duties, including the newly created duty to review every violation of the law and resulting potential prosecutions on a case-by-case basis. O.C.G.A. § 15-18-32(h)(3), 15-18-32(h)(6).

This law invades elected prosecutors' discretionary authority at every step, tramples on separation of powers, thwarts the will of the electorate, disrupts purely prosecutorial functions, and interferes with prosecutors' management of their offices. The law does nothing to improve public safety; instead, by upending democratic and constitutional norms, it shatters public trust in the integrity of the legal system that serves as the predicate for keeping communities safe.

Amici, a group of current and former elected prosecutors and attorneys general and former U.S. Attorneys and U.S. Department of Justice Officials from across the country, file this brief to add their voices to this important issue and to

[11] Among these grounds, the commission may investigate any complaint based on "a stated policy, written or otherwise, which demonstrates that the district attorney or solicitor-general categorically refuses to prosecute any offense or offenses of which he or she is required by law to prosecute." O.C.G.A. § 15-18-32(i)(2)(E).

underscore their view that SB 92 is harmful, undermines the democratic process, and violates constitutionally protected separation of powers norms.

I. Invading the Discretion of Prosecutors Violates Core Separation of Powers Principles and Illegally Infringes on Their Discretion

"The capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law." *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987) (internal quotations omitted). Prosecutors across the country, including in Georgia, exercise largely unfettered discretion on whether to charge cases, what charges and penalties to pursue, and what plea bargains to offer. As the Georgia Supreme Court has noted, "'from the beginning of our criminal justice system prosecutors have exercised the power of prosecutorial discretion in deciding which defendants to prosecute.'" *Bishop v. State*, 265 Ga. 821, 822 (1995), quoting *State v. Hanson*, 249 Ga. 739, 742–743(1) (1982). "The Georgia appellate courts have historically safeguarded the prosecutor's independence in the performance of the duties of that office and the separation of the judicial and prosecutorial functions." *State v. Rish*, 222 Ga. App. 729, 732 (1996).

This prosecutorial independence over discretionary choices is fundamental to the operation of the criminal justice system and to Georgia's governing system writ large. The Georgia Constitution makes clear that "[t]he legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided." Ga. Const., Art. 1 § 2 ¶ III. As Georgia Courts have time and again recognized, "prosecutorial discretion comes into play under every criminal statute," *see Knight v. State*, 243 Ga. 770, 771 (1979); it is perhaps the most fundamental part of prosecutors' job. As such, it should be shielded from infringement by any other branch of government. *See also State v. Santiago*, 776 S.E.2d 824 (Ga. App. 2015) (quoting *Bass v. State*, 285 Ga. 89, 91, 674 SE2d

255 (2009)) ("[o]ur adversary system of criminal justice demands that the respective roles of the prosecution and defense and the neutral role of the court be kept separate and distinct in a criminal trial.").

SB 92 shatters these clear legal principles by invading the core function of a prosecutor. Under SB 92 and its enacted law, the legislature has severely limited prosecutors' discretion to decline charges while simultaneously allowing a body, appointed in part by the legislative branch, to oversee and examine the office's policies and practices on a daily basis. By telling prosecutors that they must exercise their discretion in a certain way, effectively mandating prosecutorial review of any and all violations of the law, and threatening the penalty of removal if they are perceived to not follow this directive, the legislature is disrupting the core of Georgia's system of governance and supplanting the independent role of the prosecutor.

The legislature's actions here are deeply problematic, and they go beyond infringing on the outcome of an individual case. Instead, the legislature is intervening in the essence of an elected prosecutor's duty to utilize their discretion to pursue justice and protect public safety. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").[12]

[12] *See also* Marc. L. Miller & Ronald F. Wright, *The Black Box*, 94 Iowa L. Rev. 125, 148 (2008) (available at: https://wakespace.lib.wfu.edu/bitstream/handle/10339/16121/Wright%20Black%20Box,%20The.pdf) (hereinafter: Miller & Wright) (noting that elected prosecutors must make charging and sentencing decisions that respond to the evolving public conceptions of justice. "Current public opinion constantly rewrites the terms of a criminal code drafted by legislatures over many decades.").

Seeking justice requires much more than fair play or a proportionate outcome in the context of a single case or trial. An elected prosecutor also has a duty as a "'minister[] of justice' to go beyond seeking convictions and legislatively authorized sentences in individual cases, and to think about the delivery of criminal justice on a systemic level, promoting criminal justice policies that further broader societal ends."[13]

Inherent in this larger duty to the public is the prosecutor's obligation to spend limited criminal justice resources efficiently and strategically to protect the safety and well-being of the community.[14] No prosecutor has the resources and ability to prosecute every violation of the law, nor would doing so promote public safety or be an effective use of public resources. Instead, elected prosecutors – empowered by their community to carry out the duties of that job – make decisions every day about where and how limited resources are best expended, what cases merit entry into the justice system, and what charges and penalties to seek when a case does warrant criminal prosecution.

Considerations about justice, promoting the best interests of victims and the community, and resource allocation necessarily impact decisions regarding charging policy. There is no question that prioritizing serious, violent crimes over pursuing the prosecution of low-level offenses – in particular, prosecutions that disproportionately burden Black residents and yield no public safety benefit – is consistent with that mission. But SB 92 effectively precludes prosecutors from making these hard but critical decisions on prioritization.

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[13] R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 Loyola Univ. of Chicago L.J. 981, 983 (2014) (available at: https://lawecommons.luc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1480&context=luclj).

[14] *Id*. at 996.

If the community decides that the prosecutor's weighing of cost and benefits is inconsistent with the office's mission and the community's vision for justice, voters can elect someone else, as discussed *infra*. But many have decided that using discretion to focus on more serious crimes is exactly what they want. Today, around the country, communities are retreating from "tough on crime" or "zero tolerance" policies that have perpetuated systemic racism and come at great fiscal and societal cost, and are instead electing prosecutors who seek to advance data-driven, equitable and proactive solutions to crime.[15] These prosecutors – and the communities that elect them – recognize that overly punitive approaches undermine public safety and community trust. They are making evidence-based decisions around when, and if, to exercise their tremendous power to pursue criminal charges. This shift in perspective in no way justifies or permits legislative or political interference with the exercise of discretion that is fundamental to the prosecutorial function.

II. Second-guessing Policy Decisions of Elected Prosecutors – and Potentially Removing Them for Those Decisions – Undermines Local Control and Erodes the Right of Voters to Community Self-governance

District Attorneys are directly accountable to the people and community they serve. These officials lay out their visions for public safety and in seeking office define their enforcement priorities. Local residents and voters choose the leader that best reflects and furthers their vision for the justice system in *their* community. If District Attorneys fail to adhere to promises made, or if the public decides it disapproves of them, they will inevitably be voted out of office.

[15] Allison Young, *The Facts on Progressive Prosecutors*, Center for American Progress (Mar. 19, 2020), https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice/; *see also* Miriam Aroni Krinsky, *Change from Within: Reimagining the 21st-Century Prosecutor*, vii-xviii (2022).

SB 92 wrests away that local control by taking certain policy choices off the table for prosecutors, no matter what the community desires. The law's mandate requiring prosecutors to expend time and resources to examine every possible case and violation of the law, no matter the charge or circumstances, means that the community cannot have a say in where and how limited resources are expended, including whether they are placed toward low-level offenses or crimes of poverty. Across the country, murder and sexual assault clearance rates are abysmally low,[16] and it is reasonable for a community to decide that priorities should shift to help change that. If a prosecutor must utilize precious office resources to analyze 1,000 or more marijuana possession or use violations every year, then that office cannot use those attorneys to analyze the much more complicated sexual assault or murder cases that come through the door.[17] Those cases will inevitably suffer, as will the victims who experienced the serious harm.

Worse, SB 92 gives the PAQC the opportunity to remove a prosecutor if he or she makes those hard prioritization decisions that the community supports. The PAQC can remove an official, no matter how many people voted for that person, how well the prosecutor's decisions reflect their values, and how safe the community

[16] *See, e.g.*, Weihua Li and Jamiles Lartey, *As Murders Spiked, Police Solved About Half in 2020*, The Marshall Project, (Jan 1, 2022), https://www.themarshallproject.org/2022/01/12/as-murders-spiked-police-solved-about-half-in-2020.

[17] This statute also raises serious questions about the nature and breadth of case review that must occur. A prosecutor has no guidance on what a review of each violation of the law must entail to satisfy the Commission – is reviewing any arrest report sufficient? Must the prosecutor talk to witnesses in the case? Are other steps required before a decision not to investigate further or prosecute a known violation of the law is free from attack? These vagueness concerns provide yet another basis for concluding that this misplaced law is invalid.

is. This aspect of the law cuts the will of the voters off at the knees. That effect is devastating on the integrity of the legal system.

When a community thinks they will have no say in how their democratically elected official carries out their job, and whether that individual stays in office, public trust in the system suffers, and necessarily, so does public safety. The community cannot rely on democratic norms, will not think the system is fair, and may as a result not feel compelled to participate in it. That result is especially likely here, where the legislature is blasting through *both* core separation of powers principles and the voters' choice on who should represent them and how. Mandating policies, subjecting prosecutors and their exercise of well-established discretion to intrusive scrutiny, and then clearing the path for the removal of an elected official who does not follow the will of a politically appointed Commission, is a very dangerous path to be on.

III. SB 92 Will Lead to a Concerning Erosion of Transparency

This law also will lead to less transparency in the legal system, further eroding public trust. For decades, prosecutor offices have been "black box[es]," where prosecutors "do their daily work without explaining their choices to the public."[18] Naturally, many communities, especially those from communities of color disproportionately impacted by the system, but also women and LGBTQ+ communities, lacked trust in the fairness of those offices and the choices they made.

[18] Miller & Wright, *supra* note 12, at 129; Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC L. Rev. 275, 278 (2004) (available at: https://digitalcommons.law.udc.edu/cgi/viewcontent.cgi?article=1164&context=udclr) ("This lack of transparency only serves to increase cynicism about the process."); Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 Lewis. Clark L. Rev. 573, 588-89 (2017) (available at: https://law.lclark.edu/live/files/25150-sarmareadyforwebsitepdf).

Now, officials are making an effort to be clear about how they make decisions, including when they decide a certain type of case should not be prioritized by the office. Some are running on a promise to be more transparent. By penalizing prosecutors who make and openly announce important policy choices about the use of limited resources, the legislature has decreased the likelihood that prosecutors will be open about what they are doing. Indeed, prosecutors will not want to be open and honest about their prosecution guidelines and office policies – even when those policies help guide and ensure consistency within an office – for fear that their words will be misconstrued by the PAQC and they will find themselves subject to a removal petition.[19]

The PAQC has sweeping investigative abilities. It has authority to investigate, discipline, and remove a prosecutor. The PAQC can discipline prosecutors for their decision-making on cases, and there are no standards that meaningfully guide what constitutes grounds for an investigation or removal. As explained, the PAQC may investigate a wide berth of complaints regarding prosecutorial policies and individual decisions regarding investigations, charging and plea offers. There is no part of a prosecutor's office that is immune from oversight, and therefore, the office has every incentive to keep their work out of the public domain. This law will, therefore, move the relationship between law enforcement and the communities they represent backwards.

As discussed *supra,* such distrust can have profound effects on public safety. To combat crime, police officers "need the full cooperation of victims and witnesses."[20] Police must interact with their communities in a manner that builds

[19] See Plaintiffs' Memorandum, *supra* note 2, at p. 18.
[20] Hearing Before the S. Comm. on the Judiciary, 114th Cong. 2 (2015) (statement of Tom Manger, Chief, Montgomery Cty., Md., Police Dep't & President, Major Cities Chiefs Ass'n), https://perma.cc/SKM2-QKV9.

trust and encourages cooperation, beginning by listening openly and honestly to the public they serve. Similarly, prosecutors depend upon public trust to realize their mission of upholding justice and promoting public safety for all members of the community. Indeed, "trust between the community and the prosecutor's office is essential to maintain the office's legitimacy and credibility."[21] Prosecutors who engage with their communities can see enhanced public confidence in the criminal justice system, which in turn makes the public more likely to report crimes and to cooperate as witnesses.

In contrast, when the public does not trust law enforcement and prosecutors, community members may be less willing to report crimes, serve as witnesses, or testify in cases.[22] This reluctance hampers the ability of the police and prosecutors to seek justice and promote public safety.

IV. SB 92 Tramples on Prosecutors' Ability to Guide and Ensure Consistency Within Their Office, Making Them Less Effective

SB 92 will also hamper elected prosecutors' ability to run and manage their offices, which will also harm public safety. Office-wide policies, enacted by the elected prosecutor and consistent with the public's sense of justice, play a critical role in establishing, communicating, and guiding the governing culture in an office.[23]

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[21] Fair and Just Prosecution, *Building Community Trust: Key Principles and Promising Practices in Community Prosecution and Engagement* 1 (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/03/FJP_Brief_CommunityProsecution.pdf.

[22] *See generally* German Lopez, *Police Have to Repair Community Trust to Effectively do Their Job*, Vox (Nov. 14, 2018), https://www.vox.com/identities/2016/8/13/17938262/police-shootings-brutality-black-on-black-crime.

[23] Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 Temp. Pol. & Civ. Rts. L. Rev. 369, 373-74 (2010) (available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2428&context=faculty_scholarship) (hereinafter: Bibas); *see also* Bruce Frederick and Don Stemen, *The*

"Policy priorities in the office… might not result from any actual change in the criminal law, but they palpably change the norms that define what prosecutors are expected to do."[24]

But these policies can do little to shift norms and practices if they are not enforceable. A DA's ability to ensure adherence to his or her vision of justice, especially when seeking to change the culture of an office, is largely dependent on whether line prosecutors are required to comply with office guidelines.[25] While some employees may feel a moral obligation to comply with a new approach, others will not, particularly when those new policies conflict with previous norms in the office.

SB 92 takes away an effective tool from elected prosecutors – their ability to set policies, including on which cases to prioritize, to ensure line attorneys adhere to the office's values. Instead, SB 92 sets up a system where the luck of the draw as to the line prosecutors will drive the result – and potentially lead to troubling disparate treatment of individuals – as the elected prosecutor cannot possibly review every case in the office to ensure that the outcome adheres to the office's values.

Aside from constraining an elected prosecutor's efficacy in changing culture, SB 92 substantially undermines the elected DA's ability to manage the office and prioritize actions that promote public safety. Without certain office policies that govern how prosecutors should decide cases, seek cash bail, or request punishment

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Anatomy of Discretion: An Analysis of Prosecutorial Decision Making 15 Vera Institute of Justice (Dec. 2012) (available at https://www.ojp.gov/pdffiles1/nij/grants/240335.pdf) (a study of decision-making by line prosecutors revealed that "norms and policies" limiting discretion are the "contextual factor with the most direct impact on prosecutorial decision making.").

[24] Miller & Wright, *supra* note 12, at 178.

[25] Bibas, *supra* note 23, at 371 (elected prosecutors must "create a culture, structures, and incentives within prosecutors' offices so that prosecutors use their discretion consistently and in accord with the public's sense of justice").

(or not), many prosecutors will simply not know how to handle cases, especially new attorneys. That too is deeply problematic for the people of Georgia.

V. SB 92 Raises Serious Questions About Fairness in the Justice System, and the Need to Avoid its Politicization

Finally, the potential impact of this ill-conceived legislation will inevitably raise troubling questions about the fairness of a legal system that needs to stay above the political fray. Because the PAQC may be looking over their shoulders, elected prosecutors may be concerned over whom they decide to indict, and not just whom they do not. The PAQC is a politically appointed body that may well have political ties. As such, a prosecutor who indicts a powerful person could trigger scrutiny by the PAQC over their actions. With this starting point, SB 92 necessarily chills investigations into the powerful, and could entangle what are intended to be independent decisions by prosecutors in the world of politics.

Unfortunately, this concern is not merely hypothetical. The recent call by a Georgia State Senator for the PAQC to investigate Fulton County District Attorney Fani Willis following the grand jury indictment of former President Donald Trump serves as a live example of this exact problem.[26] In challenging this prosecution, the Senator evoked the newly created PAQC, opining: "The oversight committee has the investigative power to look into rogue D.A.s like Fani Willis."[27] Whether the PAQC will in fact find the complaint reasoned and decide to take action against DA

[26] Grace King, *State Lawmaker Calls for New Commission to Investigate Fulton County Election Indictments*, 11Alive (Aug. 22, 2023), https://www.11alive.com/article/news/special-reports/ga-trump-investigation/state-lawmaker-commission-investigate-fulton-county-election-indictments/85-f7e7db6d-bdad-4a9b-bacd-d31574b6db11 (hereinafter: King).
[27] *Ibid.*

Willis or not[28] – the mere inquiry into DA Willis' work is itself profoundly troubling and disruptive, and undermines the autonomy of the duly elected prosecutor. As another Georgia DA aptly noted in response to this concerning intrusion into DA Willis' discretion, prosecutors "make decisions that are unpopular every day… to drag D.A.s in front of a commission around decisions that they have been given constitutional right to make [is] embarking on a very dangerous journey."[29]

[28] Georgia's Governor has weighed in and made clear that he has "not seen any evidence that DA Willis' actions or lack thereof warrant action by the [PAQC]," but he also acknowledged that – pursuant to the process now in place under this new law – any potential action against DA Willis "will ultimately be a decision the commission will make." *See* Rachel Looker and Phillip M. Bailey, *Gov. Brian Kemp Rejects Calls to Discipline or Remove Fulton County DA Fani Willis After Trump Indictment*, USA Today (Aug. 31, 2023), https://www.usatoday.com/story/news/politics/2023/08/31/gov-kemp-gop-remove-fani-willis/70727801007/.

[29] King, *supra* note 26.

CONCLUSION

SB 92 violates separation of powers, overrides the will of the people, infringes on well-established prosecutorial discretion, and erodes public trust by undermining prosecutorial independence and potentially entangling prosecutorial decision-making in politics. If allowed to stand it has the potential to do tremendous damage to Georgia's criminal justice system, while also promoting mischief in other parts of the nation.

As such, we urge this Court to enjoin SB 92's implementation and enforcement.

Respectfully submitted, this 5th day of September, 2023.

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