IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STONE MOUNTAIN JUDICIAL CIRCUIT DISTRICT ATTORNEY SHERRY BOSTON, *et al.* Plaintiffs, v. JOSEPH COWART, *et al.*, in their individual and official capacities, Defendants.	Case No. 2023-cv-383558

PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION

Pursuant to O.C.G.A § 9-4-3, Plaintiffs, four duly elected District Attorneys of Georgia, request that this Court enter an order for an interlocutory injunction against Defendants, the named Commissioners of the Prosecuting Attorneys Qualifications Commission ("PAQC"), to prohibit the enforcement of Georgia Senate Bill 92 ("SB 92"). Enacted earlier this year, SB 92 amended various provisions of Georgia law to create new obligations for, oversight over, and mechanisms for punishment and removal of local prosecutors. *See, e.g.*, O.C.G.A. §§ 15-18-6(4); 15-18-32. SB 92 is an unprecedented intrusion into the power and authority of district attorney protected by the Georgia Constitution, *State v. Wooten*, 273 Ga. 529, 531 (2001), and poses an imminent threat to Plaintiffs and their offices, the administration of the criminal justice system, the rights of defendants in criminal proceedings, and the will of voters who have duly elected prosecutors throughout the state.

As detailed in Plaintiffs' Memorandum of Law, the equities favor the entry of an interlocutory injunction before the PACQ's authority to investigate and make determinations on complaints against Plaintiffs and other district attorneys goes into effect on October 1, 2023. *See SRB Inv. Servs., LLP v. Branch Banking & Tr. Co.*, 289 Ga. 1, 5 (2011) (describing the factors courts consider in granting an interlocutory injunction). SB 92 violates the Georgia Constitution in at least three ways: (1) by interfering with the judicial branch it constitutes an abridgement of the separation of powers command of the Georgia Constitution; (2) by punishing district attorneys for their speech on criminal justice and their work as prosecutors, it violates free speech principles under both the federal and Georgia constitutions; and (3) by establishing vague standards by which the PAQC will evaluate the action and choices of Plaintiffs and other prosecutors, it runs afoul of due process requirements of both the federal and Georgia constitution.

Although Plaintiffs do not need to "prove all four of the [interlocutory injunction] factors," *SRB Inv. Servs., LLP* 289 Ga. at 5, all are present here. In addition to the clear constitutional violations, Plaintiffs' offices are already affected by SB 92, with further ramifications threatened by the imminent activation of the PAQC; the effects on the district attorneys and their offices are far more consequential than any harm from delaying the operation of a commission that has never existed, and given other existing mechanisms to oversee and remove local prosecutors for misconduct under state law; and the public interest in local democracy, fair administration of justice, and constitutional rights of defendants all weigh in favor of the issuances of an interlocutory injunction.

For these reasons and for the reasons set forth in the accompanying Memorandum of Law, Plaintiffs respectfully request that this Court issue a preliminary injunction prohibiting

Defendants, their officers, agents, servants, employees, representatives, and anyone acting on behalf of, in active participation with, or in concert with Defendants, from conducting any investigation or disciplinary proceeding pursuant to SB 92, during the pendency of this litigation. Plaintiffs respectfully request expedited consideration of the request for interlocutory injunction so that any order may be entered on or before September 30, 2023.

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION

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I. INTRODUCTION AND SUMMARY

Plaintiffs, four district attorneys from across Georgia, filed this lawsuit to challenge the constitutionality of Senate Bill 92, 2023 Ga. Laws 349, which created a new disciplinary body with wide-ranging authority to remove district attorneys: Prosecuting Attorneys Qualifications Commission ("PAQC"). The Plaintiffs now seek interlocutory injunctive relief, pursuant to O.C.G.A. §§ 9-4-3 and 9-11-65(a), to preserve the status quo, by enjoining Defendants[1] from conducting any investigation or disciplinary proceedings during the pendency of this lawsuit.

An interlocutory injunction is justified here. Plaintiffs are substantially likely to prevail on the merits, as SB 92 infringes on district attorneys' constitutional role; regulates speech on the basis of content and viewpoint without a compelling justification; and provides unconstitutionally vague standards for discipline of prosecutors—up to removal and disqualification from office. Further, while the law is already interfering with the operation of Plaintiffs' offices, as well as the criminal justice system and the community more broadly, the injunction would do no harm to defendants and would serve the public interest.

II. STATEMENT OF FACTS

A. District Attorneys Must Exercise Prosecutorial Discretion to Fulfill the Duties Communities Elect Them to Perform.

The Georgia Constitution gives voters in each judicial circuit the power to elect a district attorney every four years. The district attorney has the duty "to represent the state in all criminal cases in the superior court of such district attorney's circuit." Ga. Const. Art. 6, § 8 ¶ III(d). The

[1] Plaintiffs bring this lawsuit—and seek this injunction—against Defendants in their official capacities on the federal-law claims, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), and in their individual capacities on the state-law claims. *See Bd. of Commissioners of Lowndes Cnty. v. Mayor & Council of City of Valdosta*, 309 Ga. 899, 903 (2020) ("[S]overeign immunity does not bar suits for injunctive and declarative relief against state officials in their individual capacities.").

district attorney's "duty is to seek justice, not merely to convict . . . because the prosecutor represents the sovereign and should exercise restraint in the discretionary exercise of governmental powers." *State v. Wooten*, 273 Ga. 529, 531 (2001).

Accordingly, the office of district attorney bears the responsibility to exercise "broad discretion in making decisions prior to trial about who to prosecute, what charges to bring, and which sentence to seek." *Id.* Prosecutors bear this duty from before an indictment through to sentencing. *McLaughlin v. Payne*, 295 Ga. 609, 613 (2014). Each district attorney's exercise of her constitutionally protected authority is "inherent in [her] office and is of the utmost importance in the orderly administration of criminal justice." *State v. Kelley*, 298 Ga. 527, 530 (2016). Infringement of this authority "impermissibly interferes with the State's right to prosecute." *Id*.

Beyond the constitutional command, prosecutorial discretion is required by simple practicality. Prosecutors must allocate scarce resources and consider the long-term effects of their prosecutorial decisions. Exh. 1, Affidavit of Sherry Boston ("Boston Aff.") ¶ 6; Exh. 2, Affidavit of Jared Williams ("Williams Aff.") ¶ 16. Limited resources must be preserved to address the most serious crimes in the community. Exh. 3, Affidavit of Jonathan Adams ("Adams Aff.") ¶ 22-23. External resource constraints present additional challenges. For example, the Georgia Bureau of Investigation Crime Lab limits its testing capacity, especially for drug cases, and often take substantial time to return results. Williams Aff. ¶ 27; Exh. 4, Affidavit of Flynn Broady, Jr. ("Broady Aff.") ¶ 7.

B. The Plaintiff District Attorneys Exercise Their Discretion to Promote Public Safety in Their Circuits.

All Plaintiffs exercise their discretion to use their offices' resources efficiently and promote justice and public safety in their communities. Facing significant case backlogs, Plaintiffs have

directed their staff to prioritize prosecution of crimes that pose the most serious risk to public safety. Boston Aff. ¶ 9; Williams Aff. ¶ 14. In recent years, court closures due to the COVID-19 pandemic, combined with existing resource constraints among law-enforcement partners, have caused or exacerbated case backlogs. Boston Aff. ¶ 25-27; Williams Aff. ¶¶ 9-10; Adams Aff. ¶ 9. These backlogs deprive victims, criminal defendants, and the community of a swift adjudication, while overwhelming prosecutorial capacity. Williams Aff. ¶ 9; Exh. 5, Affidavit of Courtney Elizabeth Guthrie-Papy ("Guthrie-Papy Aff.") ¶¶ 18-19. To address the backlog, DA Williams reorganized his office to create a Major Crimes Division. Williams Aff. ¶ 15. The Plaintiffs use pretrial diversion and other programs and accountability courts to resolve cases more efficiently, while providing services that promote public safety in the long term. Boston Aff. ¶¶ 18-24; Williams Aff. ¶¶ 17-23; Adams Aff. ¶¶ 12-19; Broady Aff. ¶¶ 8-11.

These efforts rely on clear communication throughout the district attorney's office, to ensure that the dozens of assistant district attorneys across multiple courtrooms (and sometimes courthouses) are aligned. This communication occurs through training and informal communications, as well as through written policies, such as DA Boston's Bill of Values and DA Adams's Sentencing Guidelines. Boston Aff. ¶¶ 13-15 & Att. B; Adams Aff. ¶¶ 26-32 & Att. B. The Legislature has recognized the value of such written guidelines, specifically requiring guidelines for pretrial diversion programs established pursuant to O.C.G.A § 15-18-80.

Plaintiffs also communicate regularly with the public, from DA Broady's quarterly updates to DA Boston's participation in community meetings. This openness promotes transparency and fosters trust in the office. Boston Aff. ¶ 40; Broady Aff. ¶¶ 13-15

To protect the resources for cases that prosecutors seek to address, Plaintiffs must also direct resources away from those cases that do not merit as much attention. DA Adams's office

resolves about 30% of cases outside of traditional adjudication. Adams Aff. ¶ 25. DA Boston's Bill of Values includes a commitment to seek indictments only on cases that the prosecutor is confident can be proven beyond a reasonable doubt. Boston Aff. ¶ 14. DA Williams shares this approach. Williams Aff. ¶ 7. Through the Early Intervention Court, and now Alternative Resolution Court, DA Broady resolves certain cases quickly, connecting defendants with services and avoiding the expense of traditional adjudication. Broady Aff. ¶¶ 9-10. To address the substantial backlog created by COVID-19, DA Boston adopted an evidence-based policy, which directs the dismissal or non-presentation of certain low-level crimes to focus resources on more serious matters. Boston Aff. ¶¶ 25-37 & Att. E. And in response to citizen-filed warrants, DA Adams issued a memorandum noting his refusal to prosecute adultery, and certain other crimes that he believes to be an unwise use of prosecutorial resources and unconstitutional. Adams Aff. ¶¶ 33-39 & Att. C.

C. <u>The Georgia Legislature Passed SB 92 to Target Prosecutorial Discretion.</u>

Earlier this year, the Georgia legislature passed SB 92, which aims to discipline prosecutors, including for the exercise of their prosecutorial discretion. In the lead-up to the 2023 legislative session, Governor Kemp posted on Twitter, "Far-left local prosecutors are failing their constituents and making our communities less safe. I look forward to working with members of the General Assembly and [Attorney General Chris Carr] to address it this session."[2] When he ultimately signed the law, he announced that the law would crack down on "rogue or incompetent prosecutors" who, "driven by out-of-touch politics," allegedly "refuse to uphold the law."[3]

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[2] Brian Kemp, TWITTER, https://perma.cc/87B9-MY6U?type=image (Dec. 23, 2022).
[3] Brian Kemp, Office of the Governor, *Gov. Kemp Signs Legislation Creating Prosecuting Attorneys Qualifications Commission*, https://perma.cc/4TMP-K3BY (May 5, 2023).

First, SB 92 establishes a new "individual-review" duty for district attorneys and solicitors general. Section 1 of SB 92 amends the statutory list of duties of a district attorney to add a new duty: "[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). Section 3 of the law adds a parallel duty to the statutory list of duties of a solicitor general. O.C.G.A. § 15-18-66(b)(1). Section 4 relatedly amends the recall statute to provide that district attorneys and solicitors general may be subject to recall for discretionary decisions, unlike all other Georgia officials. O.C.G.A. § 21-4-3(7).

Second, SB 92 creates a new politically appointed commission, the Prosecuting Attorneys Qualifications Commission ("PAQC"). The PAQC has "the power to discipline, remove, and cause involuntary retirement of appointed or elected district attorneys or solicitors-general." O.C.G.A. § 15-18-32(a).

Third, SB 92 enumerates certain grounds for discipline that may subject an elected prosecutor to investigation and disciplinary action, up to and including removal and disqualification from office for ten years. O.C.G.A. § 15-18-32(h), (p). Alongside well-understood grounds such as "mental or physical incapacity" or "willful misconduct while in office," O.C.G.A. § 15-18-32(h)(1), (h)(2), the statute adds the new, undefined ground of "[c]onduct prejudicial to the administration of justice which brings the office into disrepute." O.C.G.A. § 15-18-32(h)(6). The statute also provides for discipline based on "willful and persistent failure to carry out" the statutory duties of a district attorney—including the new individual-review duty created by SB 92. O.C.G.A. § 15-18-32(h)(6).

SB 92 has no limits on who may file a complaint with the PAQC, but it sets out requirements before the PAQC may investigate a complaint that addresses a prosecutors' "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). The PAQC may investigate such a complaint where the complainant provides evidence that "it is plausible that the district attorney . . . made or knowingly authorized the decision based on," among other factors: "A stated policy, written or otherwise, which demonstrates that the district attorney . . . categorically refuses to prosecute any offense or offenses of which he or she is required by law to prosecute" or "Factors that are completely unrelated to the duties of prosecution." O.C.G.A. § 15-18-32(i)(2).

Several phrases in SB 92 lack a clear definition under Georgia law. It is left to the PAQC to "elaborate, define, or provide context" for the statute's grounds for discipline. O.C.G.A. § 15-18-32(c)(3). The factors that are related or unrelated to the duties of prosecution are not defined by SB 92 or elsewhere in Georgia law, nor is there any explanation regarding what offenses a district attorney is required by law to prosecute. Although the statute does not explicitly provide in subsection (h) that non-prosecution is a ground for discipline, its inclusion as a prerequisite for filing a complaint shows that a categorical policy would constitute one of the subsection (h)'s grounds: "willful misconduct," "failure to carry out [statutory] duties," or "conduct prejudicial to the administration of justice."

Any prosecutor that is removed or involuntarily retired by the PAQC will be disqualified from being appointed or elected as a district attorney or solicitor general for ten years. O.C.G.A. § 15-18-32(p). In other words, the voters may not override a PAQC's evaluation of a prosecutor's exercise of discretion.

D. SB 92 Disrupts the Criminal-Justice System and Interferes with Self-Governance.

SB 92's threat of discipline, potentially including removal and disqualification, has already led certain prosecutors to hesitate in their exercise of discretion. DA Adams has rescinded his policy on adultery. Adams Aff. ¶ 43. Although he continues to believe that adultery would be found to be an unconstitutional crime, *id.* ¶ 39, he interprets such a policy to run afoul of the stated-policy provision of SB 92. *Id.* ¶ 43 . Similarly, community leaders in Fulton and Chatham County had successfully partnered with their district attorneys to pursue reforms in the past, but they have noted diminished interest in diversion and other reform efforts due to the passage of SB 92. Guthrie-Papy Aff. ¶¶ 28-32; Exh. 6, Affidavit of Dominique Grant ("Grant Aff.") ¶¶ 21-23. Both Plaintiffs and the criminal defense bar have concerns about the systematic delays resulting from the individual-review duty and other infringements on prosecutorial discretion. Boston Aff. ¶ 44; Williams Aff. ¶ 25; Adams Aff. ¶ 44; Broady Aff. ¶ 18; Exh. 7, Affidavit of Mazie Lynn Guertin ("Guertin Aff.") ¶¶ 8-10

The threat of discipline, particularly for "stated policies," has also inhibited Plaintiffs from clearly articulating their prosecutorial philosophies and informing their constituents of how they are fulfilling voters' mandates. Boston Aff. ¶ 50-51; Williams Aff. ¶ 32; Adams Aff. ¶ 45; Broady Aff. ¶¶ 20-21. The prospect of removal of an elected DA also threatens to disenfranchise the voters that chose that DA for their particular approach to the job. Exh. 8, Affidavit of Rev. Anthony Maurice Booker ("Booker Aff.") ¶ 16.

At the same time, partisan actors have already noted their intention to use the PAQC to target prosecutors who they perceive to be too aggressive in enforcing crimes. State Senator Clint Dixon announced his intention to file a complaint with the PAQC and seek discipline against Fulton County District Attorney Fani Willis for her indictment of former President Donald Trump. Boston Aff. Att. F. Because SB 92 permits any person to file such a complaint and fails

to offer meaningful standards for discipline, such complaints pose a threat to DA Willis and any other district attorney that becomes an attractive political target. Boston Aff. ¶ 47.

If the PAQC begins to take action, such as to penalize DA Boston for the COVID-19 Backlog Policy or to punish the use of a diversion program, the consequences could be more far-reaching. An end or restriction to either program would throw sand in the gears of the criminal justice system and delay justice for victims and defendants alike. Guertin Aff. ¶¶ 9-10.

III. ARGUMENT AND CITATIONS TO AUTHORITY

The decision to grant an interlocutory injunction "is a matter committed to the discretion of the trial court." *Jansen-Nichols v. Colonia Pipeline Co.*, 295 Ga. 786, 787 (2014). "The purpose for granting interlocutory injunctions is to preserve the status quo . . . pending a final adjudication of the case." *Kinard v. Ryman Farm Homeowners Ass'n, Inc.,* 278 Ga. 149, 149 (2004) (internal quotation marks omitted). When deciding whether to grant the injunction, a trial court should consider whether:

1) there is a substantial likelihood that the moving party will prevail on the merits of their claims at trial;

2) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted;

3) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; and

4) granting the preliminary injunction will not disserve the public interest.

SRB Inv. Services, LLP v. Branch Banking and Trust Co., 289 Ga. 1, 5 (2011).

Although plaintiffs do not need to "prove all four of these factors," *id.* at 5, all are present here, as described below. Plaintiffs identify multiple constitutional violations; their offices are already affected by SB 92, with further ramifications threatened by the imminent activation of the PAQC; the effects on the district attorneys and their offices are far more consequential than

any harm from delaying the operation of a commission that has never existed; and the public interest in local democracy, fair administration of justice, and constitutional rights of defendants all weigh in favor of the issuances of an injunction.

A. Plaintiffs are Substantially Likely to Prevail on the Merits of Their Claims.

1. SB 92 Violates the Separation of Powers by Infringing on District Attorneys' Constitutional Role.

The Georgia Constitution's provision for separation of powers protects the district attorney's inherent discretion from interference. "The legislative, judicial, and executive power shall forever remain separate and distinct." Ga. Const., Art. 6 § 8 ¶ III. A statute runs afoul of this separation when it "prevents [another] Branch from accomplishing its constitutionally assigned functions. *Perdue v. Baker*, 277 Ga. 1, 13 (2003) (cleaned up). Georgia DAs are constitutional officers assigned to prosecute cases within each circuit. Ga. Const. Art. VI, § 8; *see also McLaughlin v. Payne*, 295 Ga. 609, 612 (2014) ("The elected district attorney is not merely any prosecuting attorney. He is a constitutional officer. . . . In a Georgia criminal prosecution, the whole proceeding, from the time the case is laid before the [district attorney] until the rendition of the verdict, is under the direction, supervision, and control of that officer, subject to such restriction as the law imposes.") In line with her duty "to seek justice, not merely to convict," *Wooten,* 273 Ga. at 531, the DA has "broad discretion in making decisions about whom to prosecute, what charges to bring, and which sentences to seek." *Kelley*, 298 Ga. at 529 (quoting *Wooten*, 273 at 571 (cleaned up)). This authority, especially "the authority of the prosecutor to bargain," is "inherent in his office and is of the utmost importance in the orderly administration of criminal justice." *Id.* (quoting *State v. Hanson*, 249 Ga. 739, 743 (1982)). An attempt to override or control the prosecutor's exercise of her inherent powers constitutes "impermissible interference with the state's right to prosecute." *Id.*

SB 92 impermissibly imposes the legislature's judgment regarding how a DA should do their job, interfering with Plaintiffs' constitutionally protected "right to prosecute" that is "of the utmost importance in the orderly administration of criminal justice." *Kelley*, 298 Ga. at 530. By threatening a district attorney with removal and disqualification from office for any prosecutorial decision that does not comport with, for example, the Commission's unilateral view of what constitutes factors related to prosecution, SB 92 impermissibly interferes with Plaintiffs' "right to prosecute" in alignment with the demands of their office, including their community's prosecutorial priorities, and inflicts grave damage to "the orderly administration of criminal justice" for which Plaintiffs are constitutionally responsible.

The Supreme Court has repeatedly affirmed that "the sole discretion to dismiss cases prior to indictment" and plea bargain are inherent powers of the district attorney. *State v. Hanson*, 249 Ga. at 744; *Lord v. State*, 304 Ga. 532, 539 (2018) (reiterating *Hanson*'s holding that "the authority of the prosecutor to bargain is inherent in his office and is of utmost importance in the orderly administration of criminal justice"); *see also Lee v. King*, 263 Ga. 116 (1993) (district attorney's discretion to dismiss case pre-indictment in exchange for information is inherent to her office). This suite of discretionary powers is exclusive and protected from interbranch interference by the Georgia Constitution's provision for the separation of powers. *Kelley*, 298 Ga. at 530 (rebuffing court's attempt to dismiss charge over the district attorneys' objection because it "impermissibly interferes with the [district attorney's] right to prosecute") (citations omitted).

By interposing legislative judgment about what constitutes proper prosecutorial policy via threat of draconian sanctions for prosecutorial decisions, including those made in charging and plea-bargaining decisions, OCGA § 15-18-32(i), SB 92 intrudes on the sphere of exclusive

prosecutorial power that is protected by the Georgia Constitution. In so doing, it prevents district attorneys from "accomplishing [their] constitutionally assigned functions," *see Perdue*, 277 Ga. at 13. A law that improperly interferes with another branch's domain is invalid. For example, the Sentence Review Panel was an improper legislative intrusion on judicial functions, rendering it invalid. *Sentence Rev. Panel v. Moseley*, 284 Ga. 128, 131 (2008). SB 92 likewise violates the Georgia Constitution's provisions for the separation of powers and is invalid.

2. By Threatening Discipline for Speech Expressing Only Certain Viewpoints on Prosecutorial Philosophy, SB 92 Impairs Plaintiffs' Speech Rights.

SB 92 provides for a prosecutor to be investigated, disciplined, and removed because of what they say. The PAQC may investigate a complaint that reflects 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). Because this provision threatens discipline on the basis of the content and viewpoint expressed by speech, it is permissible only if it meets strict scrutiny: if "the State can demonstrate it is justified by a compelling interest and is narrowly drawn to serve that interest." *Final Exit Network, Inc. v. State*, 290 Ga. 508, 509 (2012) (citing *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 799 (2011)). SB 92 does not meet this standard.

There is one basis on which the statute limits the statements that could be the basis of a complaint: the content and viewpoint of the statement. The PAQC will investigate and seek potential discipline for a stated policy about non-prosecution or diversion, but not a complaint which reflects the opposite perspective—one that is more hostile to diversion or other public-safety approaches.

This differential treatment of prosecutors' speech based on its content and perspective is a bedrock violation of the federal and Georgia Constitutions' free-speech guarantees. *See* U.S.

Const., Amdt. 1; Ga. Const. Art. I, § 1, ¶ V. "As a general matter . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Final Exit Network*, 290 Ga. at 508 (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) and applying this principle to the Georgia Constitution). The free-speech problem is particularly egregious when "the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 785–86 (1978); *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (characterizing such viewpoint discrimination as "an egregious form of content discrimination").

The Plaintiffs do not sacrifice their rights to free expression by entering public service. Rather, "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood v. Georgia*, 370 U.S. 375, 395 (1962) (holding that a Georgia sheriff may not be penalized for his speech); *see also Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1261 (2022) ("The First Amendment surely promises an elected representative . . . the right to speak freely on questions of government policy."). In fact, elected-official speech promotes democratic principles, as it "enhance[s] the accountability of government officials to the people whom they represent, and assist[s] the voters in predicting the effect of their vote." *Brown v. Hartlage*, 456 U.S. 45, 55–56 (1982). In contrast, the prospect of discipline, removal, and disqualification by the PAQC chills the speech of Plaintiffs and their fellow district attorneys. "When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (internal quotation marks omitted).

Georgia cannot articulate a compelling interest in limiting public understanding of prosecutorial philosophies. Contrast this provision with one of the few content-based restrictions to survive strict scrutiny, Florida's prohibition on judicial fundraising. *See Williams-Yulee v. Florida Bar*, 575 U.S. 435, 445 (2015). While Florida passed that content-based restriction to "maintain[] the public's confidence in an impartial judiciary," *id.*, there is no expectation of neutrality for the prosecutor. Rather, a prosecutor "represents the people of the state" and bears "responsibilities as a public prosecutor to make decisions in the public's interest." *Wooten*, 273 Ga. at 531. This role makes SB 92's muzzling counterproductive to the state's interest. It is all the more important for the public to understand prosecutorial philosophy and for prosecutors to clearly communicate their approach internally.

3. SB 92 is Impermissibly Vague, Depriving District Attorneys of Due Process.

As Georgia elected officials, district attorneys are entitled to due process before they are subject to discipline by the PAQC. Georgia law recognizes that an "elected . . . official who is entitled to hold office under state law has a property interest in his office which can be taken from him only by procedures meeting the requirements of due process." *City of Ludowici v. Stapleton*, 258 Ga. 868, 869 (1989). The federal due-process clause, in turn, looks to state law to determine whether an interest is protected. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Accordingly, Georgia's recognition of a property interest in elected office entitles district attorneys to due process protections under both provisions.

"A fundamental principle [of due process] is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012). Under the "void for vagueness" due process doctrine, a law "can

be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Wollschlaeger v. Governor*, 848 F.3d 1293, 1319 (11th Cir. 2017) (en banc) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)); *see also Bryan v. Ga. Pub. Svc. Comm'n*, 238 Ga. 572, 574 (1977) (establishing this test under the Georgia Constitution).

SB 92 is vague in both respects: prosecutors are left guessing as to what conduct may be subject to discipline by the PAQC, and the ambiguous standards encourage arbitrary enforcement.

First, SB 92 added a new duty to the extensive list of prosecutorial duties within O.C.G.A. § 15-18-6: "To 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 of each individual case." O.C.G.A. § 15-18-6(4). Failure to perform this duty adequately is a ground for discipline, per O.C.G.A. § 15-18-33(h)(3), which lists "willful and persistent failure to carry out duties pursuant to Code Section 15-18-6" as a ground for discipline. But it is ambiguous what this new duty requires. It suggests some additional activity and duty beyond what had already been expected of prosecutors; otherwise. *See Lawson v. State,* 224 Ga. App. 645, 647(3)(a) (1997) (Courts must "give meaning to each part of the statute, and avoid constructions which result in surplusage and meaningless language."). Does the duty concern cases which are never presented for indictment or accusation? How does a prosecutor establish that she made such an individual review before declining to prosecute a case? What prosecutorial decisions are not "available under the law?"

Second, the statute adds another unclear basis for discipline, providing for discipline for "Conduct prejudicial to the administration of justice which brings the office into disrepute." O.C.G.A. § 15-18-33(h)(6). This standard has a settled meaning in the context of judicial officers, but it has no clear analogue for a prosecutor. For a judge, the phrase refers to "inappropriate actions taken in good faith by the judge acting in her judicial capacity, but which may appear to be unjudicial and harmful to the public's esteem of the judiciary," as well as bad-faith activities outside the official capacity. *Inquiry Concerning Coomer*, 315 Ga. 841, 859 (2023). While judges are expected to abide by longstanding norms of judicial conduct, it is not clear what those norms would entail for prosecutors, apart from those articulated in State Bar rules. *See* Ga. R. Prof. Cond. 3.8 ("Special Responsibilities of the Prosecutor"). Accordingly, to the extent that this provision addresses official-capacity activities of a prosecutor, there is no way for a district attorney to know what behavior the PAQC would consider inappropriate for his role. The origins of this law reflect fundamentally political disagreements about what exercises of prosecutorial discretion are "prejudicial to the administration of justice," which is why that decision is best left to the electorate. The presence of a clear definition in a different context does not establish clarity here. *See Wollschlaeger*, 848 F.3d at 1321-22 (holding that a prohibition on "unnecessary harassment" is vague, notwithstanding clear understandings of "harassment").

Third, although the limitations on complaints in subsection (i) should shed light on the scope of these standards, they instead contribute to the ambiguity. Subsection (i)(2)(D) allows for complaints about prosecutorial decisions which are "based on . . . [f]actors that are completely unrelated to the duties of prosecution." There is no established list of factors that are "related to the duties of prosecution." Would a resource-allocation question pass muster? A philosophical difference regarding public safety?

Subsection (i)(2)(E) also fails to offer clear guidance. As noted above, the subsection provides for complaints where there is plausible evidence of "[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." It is not clear what it means for a prosecutor to be "required by law to prosecute" an offense. Would DA Adams's good-faith determination that the adultery statute is unconstitutional run afoul of this provision? *See* Adams Aff. ¶¶ 38-39 and Att. C. Moreover, how would a policy "demonstrate" a categorical refusal to prosecute certain offenses, particularly if the alleged policy is unwritten? Would this apply to the guidelines for pretrial diversion, which the legislature explicitly required at O.C.G.A. § 15-18-80? Because these ambiguities touch on protected speech, the prohibitions must satisfy "'a more stringent vagueness test,'" *Wollschlaeger*, 848 F.3d at 1320 (quoting *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). But the stated-policy provision cannot satisfy the ordinary vagueness test, let alone the stricter variety.

These ambiguities effectively remove district attorneys' broad discretion, handing unfettered discretion to the PAQC instead. Because the standards governing its disciplinary activity are undefined, the PAQC may investigate, discipline, and even remove and disqualify a prosecutor based on nearly any decision that leads to a less punitive result whenever the commission considers the prosecutor's actions inappropriate. In other words, the statute "encourage[s] arbitrary enforcement." The threat of arbitrary enforcement has already surfaced, as multiple state legislators and supporters of SB 92 have called on the PAQC to immediately investigate and discipline Fulton County DA Fani Willis. *See* Boston Aff. ¶ 47 & Att. F.

B. <u>Plaintiffs will Suffer Irreparable Injury if SB 92 is Permitted to Take Full Effect.</u>

Plaintiffs satisfy the separate consideration for an interlocutory injunction, as there is a "substantial threat" that Plaintiffs will "suffer irreparable injury" absent an injunction. *SRB Inv.*

Services, 289 Ga. at 5. SB 92 interferes with district attorneys' ability to run their offices effectively and chills them from expressing their prosecutorial philosophies. Even if the law takes only temporary effect until a final judgment declaring it to be unconstitutional, the months of altered prosecutorial approach and stifled communication cannot be returned.

First, Plaintiffs are threatened with immediate and irreversible punishment under SB 92. The law hangs a sword of Damocles over the head of each district attorney, threatening severe disciplinary action if they cross the invisible lines of the PAQC in exercising their discretion.

Second, Plaintiffs are harmed by their lack of freedom to exercise prosecutorial discretion, a fundamental authority in their offices. By imposing the prospect of discipline for decisions not to prosecute, to divert, or to take a lenient approach, the law discourages Plaintiffs and their staff from fully exercising their discretion. Because the PAQC's investigation and review are not limited by clear standards, Plaintiffs' staff are likely to "steer far wider of the unlawful zone," *Keyishian*, 385 U.S. at 604, contrary to the approaches that Plaintiffs were elected to pursue. *Cf. Cobell v. Norton*, 334 F.3d 1128, 1140-43 (D.C. Cir. 2003) (finding sufficient irreparable injury to justify mandamus to correct "violat[ion] of the separation of powers").

Third, the stated-policy provision interferes with Plaintiffs' ability to clearly communicate their priorities to staff in their offices, whether through formal policies and training or less formal guidance and feedback. *See* Boston Aff. ¶ 52; Adams Aff. ¶ 41; Williams Aff. ¶¶ 26-30. Meanwhile, the threat of discipline for violating the individual-review provision, for its part, will lead Plaintiffs to devote additional time to cases that do not merit prosecution, diverting resources from serious violent felony prosecutions and other matters. *See* Boston Aff. ¶ 44; Adams Aff. ¶ 44; Williams Aff. ¶ 44; Broady Aff. ¶ 18.

Fourth, Plaintiffs are irreparably injured by the stated-policy provision's infringement on free-speech rights. Even while facing a challenger in an upcoming election, DA Williams hesitates to explain his prosecutorial philosophy in detail in community meetings and to the media. Williams Aff. ¶ 32. Although DA Broady has prioritized transparency to build community trust, he now intends to limit the information he shares with the public. Broady Aff. ¶¶ 20-21. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Great Am. Dream, Inc., v. DeKalb Cnty*, 290 Ga. 749, 752 (2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

C. The Balance of Equities Favors an Injunction, as Defendants Will Not Suffer Injury From an Interlocutory Injunction Preserving the Status Quo.

The irreparable injury described above far outweighs the nonexistent injury to Defendants from delaying the operation of the PAQC. SB 92's imposition of statewide, partisan control over prosecutorial discretion is unprecedented under Georgia law. However, there are several existing mechanisms under existing law to address prosecutorial misconduct: State Bar discipline, including for violation of Rule 3.8's special responsibilities of the prosecutor; impeachment, pursuant to O.C.G.A. § 15-18-36; and recall, *see* O.C.G.A. § 21-4-1, *et. seq*. Of course, the ultimate check on prosecutorial misconduct is the electorate. With these alternative avenues in place, an injunction will not meaningfully harm Defendants.

D. If SB 92 Takes Full Effect, the Interference with Prosecutorial Discretion Will Harm Other Participants in the Criminal-Justice System and the Public Interest.

Finally, an interlocutory injunction would serve the public interest. Generally, "the public interest is served when constitutional rights are protected." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019); *see also Unified Gov't of Athens-Clarke Cnty. v. Stiles Apartments, Inc.*, 290 Ga. 740, 742 (2012) (affirming a finding that a "governmental entity

depriving a private entity of its property without the due process of law can rarely, if ever, be in the public interest").

But SB 92 also threatens to harm the public interest in more specific ways, negatively affecting various third parties within and outside the criminal justice system. Advocates for increased pretrial diversion and other reforms have already seen a new reluctance from certain prosecutors, owing to SB 92's threat of discipline and removal. Guthrie-Papy Aff. ¶¶ 28-32; Grant Aff. ¶¶ 22-25 If the PAQC is permitted to further deter the exercise of prosecutorial discretion, including through policies like DA Boston's COVID-19 Backlog policy, the consequences would be felt primarily by those criminal defendants who must wait longer, sometimes in jail, for a resolution of their case. Guertin Aff. ¶ 10. But it would also impair the ability of the criminal defense bar to adequately meet its responsibilities, and clog the machinery of the criminal courts. *See* Guertin Aff. ¶¶ 8-9.

Disciplinary and removal action by the PAQC also threatens the core Georgia value of self-government, as exercised by local voters through the franchise. In each Judicial Circuit, voters select a district attorney to pursue that community's vision of public safety and justice. *See, e.g.,* Booker Aff. ¶¶ 16-17.

Because SB 92 threatens to destabilize each of these interests, an interlocutory injunction to preserve the status quo would serve the public interest.

IV. CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated above, Plaintiffs respectfully request that this court issue an interlocutory injunction, against the official-capacity defendants as to the federal claims and the individual-capacity defendants as to the state claims, preventing the PAQC from conducting an investigation or disciplinary proceedings during the pendency of this litigation.

Respectfully submitted this 24th day of August, 2023.

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*Pro hac vice application forthcoming