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 SCHEER, JOHN OTT, HOWARD SIMMS, JOHN HERBERT CRANFORD, JR., STACEY JACKSON, JASON SALIBA, and RANDY McGINLEY, in their individual and official capacities, Defendants.	)	CIVIL ACTION FILE NO. 2023CV383558

DEFENDANTS' RESPONSE IN OPPOSITION TO
<u>PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION</u>

Defendants Joseph Cowart, Steven Scheer, John Ott, Howard Simms, John Herbert Cranford, Jr., Stacey Jackson, Jason Saliba, and Randy McGinley (collectively or individually, the "Commissioners" as members of the "Commission") file this response in opposition to Plaintiffs' Motion for Interlocutory Injunction (the "Motion"), showing the Court as follows:

"[I]t is a fundamental principle of our constitutional tradition that no public officer—whether constitutional or only statutory—is above the law." <u>Dekalb Cty. Sch. Dist. v. Georgia State Bd. of Education</u>, 294 Ga. 349 (2013). An elected prosecutor is no different. Prosecutors are entrusted to protect the public and represent the sovereign according to the law, and with that power and responsibility come special responsibilities to ensure that such authority and power is not

abused—ethically or legally. As specifically authorized by the Georgia Constitution beginning in 1983, Senate Bill 92 ("SB 92" or the "Act") finally creates a disciplinary process and Prosecuting Attorneys Qualification Commission (the "Commission") so that any elected prosecutor who engages in ethical and legal misconduct, such as financial improprieties or failing to follow the law due to improper motives, can be held accountable and maintain the public's confidence.

FACTUAL BACKGROUND

A. The Georgia Constitution Specifically Authorizes the Discipline, Removal, or Involuntary Retirement of District Attorneys

The Georgia Constitution of 1983 instills in elected district attorneys the duty to "represent the <u>state</u> in all criminal cases" in all jurisdictions in which that duty is assigned. Ga. Const. Art. VI, Sec. 8, Para. I(d) (emphasis added). Married to that vast grant of power and responsibility, and recognizing the necessity of ensuring that elected district attorneys do not violate and abuse that authority and the public's trust, the next paragraph in the Georgia Constitution provides that "[a]ny district attorney may be disciplined, removed or involuntarily retired as provided by general law." Ga. Const. Art. VI, Sec. VIII, Para. II. Thus, the Georgia Constitution specifically authorizes the Legislature to enact laws creating and governing the disciplinary oversight of district attorneys.

B. Legislative History of SB 92

While the Legislature did not avail itself of the authorization to create such a commission for many years, recent and national public allegations of misconduct on the part of several state prosecutors magnified the need for a disciplinary system for district attorneys. Exh. 1, Affidavit of Rep. Joseph Gullett ("Gullett Aff.") ¶¶ 4-13, 17; Exh. 2, Affidavit of District Attorney Stacey Jackson ("Jackson Aff.) ¶¶ 4-6; Exh. 3, Affidavit of District Attorney Randy McGinley ("McGinley Aff.) ¶¶ 15-16. These instances included allegations of sexual harassment against

office employees,[1] financial improprieties,[2] and decisions made contrary to governing rules and law due to improper motives.[3] The recognition of the need for prosecutor accountability has been both national[4] and statewide, and the General Assembly began attempts to create this Commission **in 2020** to address that void.

Plaintiffs ignore this history and imply SB 92 is partisan in nature. However, the first bill to create the Commission was authored in 2020 and sponsored by Representative Robert Trammell, a Democrat and then-House Minority Leader. Five other Democrats signed onto the legislation, known as House Bill 1214 ("HB 1214"); Gullett Aff. ¶ 9. H.B. 1214, 2020 Leg. Sess. (Ga. 2020). Like SB 92, HB 1214 sought to create a commission and disciplinary system for prosecutors. Gullett Aff. ¶ 9. The outbreak of the COVID-19 pandemic, however, shifted the legislature's focus that year. Efforts continued the following year when Democratic Representative William Boddie and five other Democratic State Representatives introduced House Bill 143, which again sought to create an oversight commission for prosecutors. H.B. 143, 2021 Leg. Sess. (Ga. 2021). Gullett Aff. ¶ 11.

That same year, State Representative Joseph Gullet, a Republican from Paulding County, introduced House Bill 411 ("HB 411"). H.B. 411, 2021 Leg. Sess. (Ga. 2021); Gullett Aff. 12. He introduced the bill in response to misconduct in office by then-Paulding County District Attorney Dick Donovan. Gullett Aff. ¶ 12. Donovan had been sued for sexually harassing a female

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[1] Gullett Aff. ¶¶ 4-7, 17, Attachments A, B, and D; Jackson Aff. ¶6, Attachment B; McGinley Aff. ¶ 16, Attachment B.

[2] Gullett Aff. ¶ 12, 17, Attachment D; Jackson Aff. ¶ 6, Attachment B; McGinley Aff. ¶ 16, Attachment B.

[3] Gullett Aff. ¶ 12, 17, Attachment D; Jackson Aff. ¶ 5-6, Attachment B; McGinley Aff. ¶ 16, Attachment B.

[4] *Why prosecutors get away with misconduct*, Washington Post, Nov. 18, 2021, https://www.washingtonpost.com/opinions/2021/11/18/why-prosecutors-get-away-with-misconduct/?=undefined.

employee, and he settled the claim for approximately $300,000 after audio recordings documenting the sexual misconduct had been released to the public. Gullett Aff. ¶¶ 4, 6, Attachments A and B. Still, Donovan remained in office. Gullett Aff. ¶ 7. Only after law enforcement discovered that Donovan committed crimes in office involving attempts to bribe a fellow prosecutor that Donovan was finally suspended **with pay** under the authority vested in the Governor. Gullett Aff. ¶ 13, Attachment C. He ultimately resigned in 2022 in conjunction with a plea agreement. Gullett Aff. ¶ 13, Attachment C. HB 411 passed the Georgia House of Representatives and the Senate Judiciary committee, but it was ultimately tabled. Gullett Aff. ¶ 12. In 2022, the bill failed to make it out of conference committee on Sine Die. Gullett Aff. ¶ 14.

In 2023, two bills would be introduced to create commissions like those considered in prior legislative sessions: House Bill 231 ("HB 231") and SB 92. H.B. 231, 2023 Leg. Sess. (Ga. 2023); S.B. 92, 2023 Leg. Sess. (Ga. 2023); Gullett Aff. ¶ 15. The bills were similar, and ultimately legislators passed SB 92, and Governor Kemp signed it on May 5, 2023. Gullett Aff. ¶ 15.

C. Description of Legislation

Pursuant to and citing Article VI, Section VIII, Paragraph II of the Georgia Constitution, SB 92 92 creates the Commission, establishes its jurisdiction, duties, and other aspects.[5] The intent of the bill is intended to hold accountable prosecutors—regardless of political party—who do not follow their duties.[6] As described by Governor Kemp, the Commission is "very similar to

[5] While Plaintiffs begin discussing the passage of SB 92 with a lengthy and obtuse attack on the alleged political motivations of Governor Kemp in supporting the passage of a prosecutorial oversight commission, their carefully selected and cherry-picked phrases are of no import in legally applying the law as passed. Further, as Governor Kemp stated as recently as three weeks ago, he didn't authorize this bill, it "went through a legislative process." Exh. 4, August 31 Press Conference by Governor Brian Kemp Tr. 13:14-17.

[6] "The bottom line is that in the State of Georgia, as long as I'm governor, we're going to follow the law and the Constitution, regardless of who it helps or harms politically. Exh. 4, August 31 Press Conference by Governor Brian Kemp Tr. 3:16-19.

the Judicial Qualifications Commission that oversees our judges in the state" as its "their own colleagues that are on there, so you can deal with misconduct and other things." Exh. 4, August 31 Press Conference by Governor Brian Kemp Tr. 13:17-21.

SB 92 Sections 1 and 3 also added a provision to the duties of district attorneys and solicitors-general "[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 of each individual case under oath of duty as provided in Code Section 15-18-2." O.C.G.A. §§ 15-18-6(4) and 15-18-66(b)(1). While not previously codified, that duty has existed for a myriad of obvious reasons inextricably intertwined with the daily duties of a prosecutor.[7] Section 2 creates the Commission and represents the heart of the bill. O.C.G.A. § 15-18-32(a). The Commission is comprised of eight appointed members and is divided into a five-member investigative panel and a three-member hearing panel. O.C.G.A. §§ 15-18-32(c) and (d).

SB 92 also provides grounds for the Commission to investigate and potentially sanction district attorneys and solicitors general. Code Section 15-18-32(h) provides seven bases to discipline a prosecutor (e.g., willful misconduct), while paragraph (i)(2) authorizes the Commission to receive complaints of other types of specified misconduct (e.g., undue bias, undisclosed conflict of interest). The provisions regarding willful and persistent failures to follow the law are analogous to Georgia Code of Judicial Conduct Rule 1.1, which requires that judges

[7] Among the reasons that an individual review of each case presented to a prosecutor's office is necessary regardless of codification, included are: determination that the correct charge(s) were brought by law enforcement, ensuring the case is not related to other cases for double jeopardy purposes, ensuring probable cause for the charge as written actually exists, verifying that venue for the charge exists, determining if the case is related to other charges offenders and how to properly assign the case, and reviewing any preliminary legal issues that may impact the defendant's rights. While there are a number of other reasons for an individual review of each case submitted to a prosecutor's office, these are obvious examples of that minimally-necessary individual review process.

"respect and comply with the law." The Supreme Court has previously addressed the applicability of this rule, and has disciplined judges for repeatedly and knowingly failing to follow well-settled rules and laws while also explaining the interplay with judicial discretion.[8] Thus, many elected officials in the judicial branch are already subject to requirements imposed by SB 92.

The Act directs the Commission to promulgate "standards of conduct and rules" by October 1, 2023, and the policies must be approved by the Supreme Court of Georgia before they are effective. O.C.G.A. § 15-18-32(g). Similar to the Judicial Qualification Commission, SB 92 also expressly requires that any and all standards and rules comply with due process. Compare id. with O.C.G.A. § 15-1-21(j) (governing the JQC).

STANDARD OF REVIEW

Plaintiffs bear a heavy burden by seeking to enjoin a duly-enacted statute. See Jansen-Nichols v. Colonial Pipeline Co., 295 Ga. 786, 788 (2014). Injunctive relief is permitted only in "clear and urgent cases," O.C.G.A. § 9-5-8, after considering the four factors of (1) substantial threat of irreparable injury; (2) whether the threatened injury outweighs the harm caused to the enjoined party; (3) whether there is a substantial likelihood of success on the merits; and (4) the public interest is not disserved by the injunction. City of Waycross v. Pierce Cty. Bd. of Comm'rs., 300 Ga. 109, 110-11 (2016). Plaintiffs have not satisfied this burden.

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[8] See Inquiry Concerning Baker, 313 Ga. 359 (2022) (disciplining a judge for failing to respect and comply with the law by improperly dismissing cases contrary to clear and determined law periodically over the course of years); Inquiry Concerning Gundy, 314 Ga. 430 (2022) (disciplining a judge for misconduct including failing to respect and comply with the law by refusing to afford defendants an opportunity to appear in court to which they were entitled by law); In re Judicial Qualifications Commission Formal Advisory Opinion No. 239, 300 Ga. 291, 298 (2016) (explaining that "legal error amounts to judicial misconduct where 'a legal ruling or action [is] made contrary to clear and determined law about which there is no confusion or question as to its interpretation and where this legal error was egregious, made in bad faith, or made as a part of pattern or practice of legal error'").

ARGUMENT AND CITATION TO AUTHORITIES

I. This Court Lacks Jurisdiction To Decide Plaintiffs' Motion.

Plaintiffs' Motion suffers from threshold, jurisdictional flaws involving standing, sovereign immunity, and ripeness. Each precludes consideration of the merits.

A. Plaintiffs Lack Standing

Plaintiffs lack standing because they rely on a hypothetical, abstract, and uncertain to occur injury-in-fact.[9] Standing is a jurisdictional requirement required of any plaintiff who seeks a judicial remedy. See Black Voters Matter Fund, Inc. v. Kemp, 313 Ga. 375, 381-82 (2022) (referred to as "BVMF").[10] As in cases arising under the United States Constitution, plaintiffs bear the burden of establishing standing by showing: "(1) an injury in fact; (2) a causal connection between the injury and the alleged wrong; and (3) the likelihood that the injury will be redressed by a favorable decision." Id. (citation omitted) (parentheticals in original). Plaintiffs fail to satisfy the first prong of this analysis, because their alleged injury is not "concrete and particularized [and] actual or imminent." BVMF, 313 Ga. at 375.

First, Plaintiffs' alleged harm is neither concrete nor particularized. Instead, it is entirely abstract and hypothetical. Specifically, Plaintiffs ask this Court to stop a hypothetical investigation that may (or may not) lead to an even more remote and hypothetical disciplinary action against them, individually. (First Am. Compl., Ad Damnum Clause No. 3; Mot. at 19.) Such "conjectural or hypothetical" injuries are not concrete and particularized and fall short of establishing standing. BVMF, 313 Ga. at 382 (citation omitted).

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[9] As district attorneys, Plaintiffs also lack standing to challenge any provision of SB 92 that governs solicitors general, because any purported harm to solicitors is not an individual harm to the Plaintiffs. See Bell v. Austin, 278 Ga. 844, 846 (2005)

[10] BVMF involved a question of organizational standing, but the Supreme Court of Georgia made clear that the "same standing test" applies to organizations and individuals. 313 Ga. at 381.

That Plaintiffs' alleged injuries are speculative at best should not be disputed. They do not allege any current or even imminent investigation, and Plaintiffs improperly demand that this Court make several presumptions in their favor. For example, and **first**, the Commission must promulgate rules and regulations. O.C.G.A. § 15-18-32(g). **Second**, the Supreme Court of Georgia must adopt the proposed rules.[11] Id. **Third**, to commence an investigation, the Commission would have to first (1) receive a sworn complaint identifying any interest the complainant may have in the outcome of the case; or (2) approve a motion to bring a complaint on its own. O.C.G.A. § 50-18-32(i)(1). **Fourth**, a majority of the investigative panel must vote to investigate the allegations in the complaint. O.C.G.A. § 15-18-32(b). **Fifth,** after the investigation concludes, a majority of the investigative panel must vote to formally charge the subject district attorney or solicitor general. See O.C.G.A. §§ 15-18-32(b)(3)(A); 15-18-32(j)(2). **Sixth**, if the charges are approved, the hearing panel, which is comprised of different attorneys from those on the investigative panel, would then adjudicate the formal charges. O.C.G.A. § 15-18-32(b)(3)(A). **Seventh**, if the hearing panel imposes a sanction, the prosecutor may then appeal that decision to the superior court where they serve as the district attorney or solicitor general. O.C.G.A. § 15-18-32(m). Not only do Plaintiffs ask this Court to presume that all of these acts will occur soon, but also that they would be injurious to them individually.

The Supreme Court of Georgia rejected an even more concrete but still hypothetical injury in Cheeks v. Miller, 262 Ga. 687, 688 (1993). There, present and former members of the General Assembly brought an action seeking "injunctive, mandamus, and declaratory relief challenging the authority of the Governor and Attorney General to enter into a proposed settlement of certain

[11] One would be loath to argue that the Supreme Court will adopt, approve, and allow standards and rules to take effect that violate due process as alleged by Plaintiffs.

federal litigation concerning the Voting Rights Act." Id. at 687. The court described the Plaintiffs lawsuit as challenging "a tentative agreement entered into in the federal litigation." Id. at 688. The court then explained that it could not entertain the lawsuit, because of the hypothetical nature of the alleged injury asked the "court to do what it is not authorized to do: to render an advisory opinion on hypothetical and legal questions that have not arisen but which [plaintiffs] fear may arise at a future date." Id.

The same is true here. The Commission has established no rules and regulations. The Supreme Court of Georgia has not approved any proposed rules or regulations. The Commission has not received a valid complaint, nor has it met and decided to commence an investigation on October 1, 2023, or anytime thereafter. The investigative panel has not met, commenced an investigation, or brought charges against any prosecutor. The hearing panel has not convened, and it has no cases before it. Consequently, and as in Cheeks, any order would impermissibly be advisory only and based on acts not before the Court.[12] 262 Ga. at 688.

Not only have Plaintiffs failed to allege a concrete harm, their alleged injury is not actual and imminent as precedent requires. BVMF, 313 Ga. at 375. Indeed, the **possibility** that the Commission disciplines one of the Plaintiffs is insufficient to establish an actual or imminent injury, especially given the necessity of a hypothetical complaint, hypothetical investigation by the investigative panel, hypothetical decision by the investigative panel to file formal charges, and then hypothetical vote of the hearing panel to sanction the district attorney. O.C.G.A. § 15-18-32; BVMF, 313 Ga. at 382 (citation omitted). See also McDowell v. Judges Ex Officio, 235 Ga. 364,

[12] Although Cheeks could be read as deciding the case on the grounds of ripeness, the issues are similar, and BVMF cited Cheeks favorably for the rule that hypothetical controversies do not establish standing. BVMF, 313 Ga. at 382

365 (1975) ("[t]he law presumes these public officers will follow the law in the exercise of their statutory duties and authority").

Another case cited approvingly in BVMF makes this plain. See Manlove v. Unified Gov't of Athens-Clarke Cty, 285 Ga. 637 (2009). In Manlove, individual college students challenged the Athens-Clarke County noise ordinance despite that they had "never been cited, prosecuted, or fined for violation of the ordinance." 285 Ga. at 638. The lawsuit raised free speech claims under the state and federal constitutions. The trial court dismissed the complaint for lack of standing, and the Supreme Court of Georgia affirmed. Id. at 638-39. The court considered that the plaintiffs were "never subject to any fine or penalty as a result of violating [the] noise ordinance, nor [were] they otherwise harmed for running afoul of [it]." 285 Ga. at 638. Consequently, the plaintiffs in Manlove, like the Plaintiffs here, could not show "an imminent threat of prosecution." Id. Instead, and also like the Plaintiffs here, the Manlove plaintiffs' claims impermissibly required the court to "judge the constitutionality of a law based on speculation an conjecture of … an unspecified future harm." Id.

The same is true of Plaintiffs' fear of a possible, future investigation or disciplinary proceeding, and this fact deprives the Plaintiffs of standing and this court of jurisdiction. See BVMF, 313 Ga. at 380 (citing Parker v. Leeuwenburg, 300 Ga. 789, 790 (2017)). Put simply, Plaintiffs' potential injury, which could only occur—if ever—well into the future, is materially indistinguishable from those of the plaintiffs in BVMF, Manlove, and Cheeks, and an order granting Plaintiffs' Motion would be premature and advisory only.

B. Ripeness and Mootness

When issues are not concrete and particularized, they are often not ripe for adjudication. See Cheeks, 262 Ga. at 688; see also Mullin v. Roy, 287 Ga. 810, 812 (2010).[13] Such is the case here. None of the **seven** acts required to discipline a prosecutor have occurred. Yet, Plaintiffs' Motion presumes that—at some distant point in the future—they may engage in conduct that the Commission may investigate and then may penalize. Courts have properly rejected similar claims. See Cheeks, 262 Ga. at 688; Mattox v. Franklin Cty., 316 Ga. App. 181, 185 (2012) (Boggs, J.) (deciding that challenges to potential government action are not ripe).[14] Cf. Oconee Fed. Sav. & Loan Ass'n v. Brown, 351 Ga. App. 561, 567 (2019) (McMillian, J.) For this additional reason, Plaintiffs' Motion should be dismissed before reviewing the merits.

C. Plaintiffs' Claims Are Barred By Sovereign Immunity And The Action Must Be Dismissed As A Matter Of Law

In a novel approach, Plaintiffs have brought suit against the commissioners in both their individual and official capacities, asking this Court for a declaration that SB 92 violates the United States and Georgia Constitutions, along with "an interlocutory and permanent injunction enforcing" such a declaratory judgment. Am. Compl. at ¶¶ 170, 172, 181–182, 190–191, 197, 199, 213, 215, 224, 226. Specifically, Plaintiff's Amended Complaint seeks declaratory and injunctive relief against the Commissioners in their individual capacities under the Georgia Constitution (Counts I, III, IV, and VI, generally concerning separation of powers, freedom of speech,

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[13] Federal caselaw has also recognized that claims lacking a concrete injury may present disputes that are not ripe for consideration. See Dermer v. Miami-Dade Cty., 599 F.3d 1217, 1221 (11th Cir. 2010). They have also decided that ripeness is a jurisdictional consideration. See, e.g., Baxter v. Strickland, 381 F. Supp. 487, 490 (N.D. Ga. 1974) (deciding that ripeness is a jurisdictional consideration).

[14] In some cases, the Georgia Court of Appeals has applied the same analysis to deem a case "moot," and, therefore, non-justiciable. In Interest of I.B., 219 Ga. App. 268, 270 (1995) (citing Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction No. 2d, § 3532).

nondelegation, and due process, respectively) and in their official capacities under the United States Constitution (Counts II and V, concerning freedom of speech and due process). Plaintiffs' claims, however, fall within Article I, Section II, Paragraph V of the Georgia Constitution and they have impermissibly filed suit against individual Commissioners, contravening Paragraph V(b)(2) thereof and requiring dismissal of the action. Moreover, Plaintiffs cannot obtain the interlocutory injunctive relief sought since Paragraph V(b)(1) authorizes such "only *after* awarding declaratory relief." Ga. Const. Art. I, Sec. II, Para. V(b)(1) (emphasis added).

As Georgia Supreme Court precedent "make[s] clear, a suit against a state officer in his official capacity amounts to a suit against the State itself, and the doctrine of sovereign immunity bars suits against the State to which the State has not consented." Lathrop v. Deal, 301 Ga. 408, 425 (2017) (cits. omitted). That immunity, absent waiver, extends broadly to cover suits for injunctive and declaratory relief as well. Id. (citing Olvera v. Univ. Sys. of Ga. Bd. of Regents, 298 Ga. 425, 427 (2016) and Ga. Dep't of Nat. Resources v. Center for a Sustainable Coast, 294 Ga. 593, 603 (2014)). And a plaintiff bears the burden of demonstrating the waiver from which he seeks to benefit. Bd. of Regents of the Univ. Sys. of Georgia v. Doe, 278 Ga. App. 878, 881 (2006). In Lathrop, the Georgia Supreme Court held that suits for prospective declaratory and injunctive relief alleging unconstitutional acts could instead be brought against officers, in their individual capacities. Lathrop, 301 Ga. at 434. Georgia's Constitution, however, has since changed.

In November 2020, Georgia citizens adopted a constitutional amendment (the "Amendment"), brought about "in the wake of Lathrop." State v. SASS Grp., LLC, 315 Ga. 893, 903 (2023). That Amendment provides for a limited waiver of sovereign immunity for actions brought in superior court, seeking declaratory relief from "acts of the State" (or its agencies,

officers, or employees) which are "outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States," and further provides for a waiver of immunity from injunctions "only after awarding declaratory relief." Importantly the provision goes on to state:

> Actions filed pursuant to this Paragraph against this state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof shall be brought **exclusively against the state and in the name of the State of Georgia**. … . Actions filed pursuant to this Paragraph naming as a defendant any individual, officer, or entity other than as expressly authorized under this Paragraph **shall be dismissed**.

Ga. Const. Art. I, Sec. II, Para. V(b)(2) (emphasis added). Applying these terms, in the light of their ordinary meaning while paying "careful attention to … its broader legal and historical context[,]" SASS Grp., 315 Ga. 897–898 (citing Ammons v. State, 315 Ga. 149, 163 (2022)), confirms that Plaintiffs' claims are brought "pursuant to this Paragraph." This remains so notwithstanding Plaintiffs' creative attempt to avoid Paragraph V's requirements by naming the Commissioners in their individual capacities for the State law claims.

The historical and legal context of the Amendment and its ordinary meaning all indicate it was commonly understood to permit suits against the State seeking declaratory and injunctive relief concerning "acts" alleged to be without lawful authority or in violation of the constitution, while precluding suits against state officials, personally, on the same basis. In other words, it operates to open the door which the Supreme Court found to be closed in Sustainable Coast and Olvera, while foreclosing the individual-capacity suits condoned in Lathrop, the decision which prompted the Amendment in the first instance. SASS Grp., 315 Ga. at 903 (noting its adoption "Paragraph V was enacted in the wake of Lathrop"). The official ballot summary publicized throughout the State confirms this understanding, informing voters that the Amendment

"authorizes superior courts to order state and local officers and employees to cease violations of" the U.S. and Georgia Constitutions or Georgia statutory law, but requires "that such suits be brought only against the State of Georgia," and further "requires superior courts to dismiss any such lawsuit that names any individual state … officer or employee as a defendant." Ga. Sec'y of State, Attorney General, and Legislative Counsel, Summaries of Proposed Constitutional Amendments at 7 (2020).[15] This reading is further confirmed by the plain text of Paragraph V(b)(2) itself, which governs actions brought "pursuant to" that provision, meaning those brought "[i]n compliance with; in accordance with," or "[a]s authorized by" Paragraph V. PURSUANT TO, Black's Law Dictionary (11th ed. 2019). This action is one brought "in accordance with" or "as authorized by" Paragraph V its own allegations and prayers for relief confirm it seeks to declare "acts of the … commission" as "outside the scope of lawful authority or in violation of" the Georgia and Federal Constitutions. Ga. Const. Art. I, Sec. II, Para. V(b); compare Amend. Compl., ¶ 12 (citing Declaratory Judgment Act), Am. Compl. at ¶¶ 170, 172, 181–182, 190–191, 197, 199, 213, 215, 224, 226 (requesting the Court "declare" statutory provisions as in violation of U.S. and Georgia Constitutions and "an interlocutory and permanent injunction enforcing its declaratory judgment"). Moreover, finding this action to exist in some common-law penumbra beyond the reach of Paragraph V would render the prohibition against naming defendants individually and its dismissal consequence meaningless: if Paragraph V did not encompass the individual-capacity suits condoned by Lathrop, then there would be no purpose of the text requiring such actions be brought "**exclusively** against the state and in the name of the state of Georgia," much less to require

[15] A copy of this booklet is available at https://sos.ga.gov/sites/default/files/2022-03/2020_amendment_and_referendum_qs.pdf. See also Ga. Const. Art. 10, Sec. 1, Para. 1 (requiring summaries be prepared and distributed and creating the Constitutional Amendments Publication Board).

dismissal for naming a defendant "other than as expressly authorized" therein. Ga. Const. Art. I, Sec. II, Para. V (emphasis added).[16] And, of course, "[e]stablished rules of constitutional construction prohibit [courts] from any interpretation that would render a word superfluous or meaningless." Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 271 (2011); accord Camden Cnty. v. Sweatt, 315 Ga. 498, 509 (2023) ("This 'canon of statutory construction applies with at least equal force in the constitutional context.'") (cits. omitted).

Nonetheless, this Court need not determine whether individual-capacity suits may be viable in some other context following enactment of Paragraph V: Plaintiffs' official-capacity claims under 24 U.S.C. § 1983 are unavailable under black letter law and therefore must be construed as claims for declaratory relief brought "pursuant to" Paragraph V. Indeed, those, "§ 1983 claims cannot be asserted against a state agency or state officials acting in their official capacity." Prof'l Practices Comm'n v. Brewer, 219 Ga. App. 730, 731 (1995) (citing Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989)). Such claims are available only where a waiver of sovereign immunity exists, and the only potentially applicable waiver for such claims is in Paragraph V.[17] Indeed, the

[16] Even still, Plaintiffs' suit here is one in which the State is the real party in interest—suits which even under pre-Amendment precedent were barred. Lathrop, 301 Ga. at 415 (noting "the doctrine of sovereign immunity at common law was broad enough to bar" individual-capacity suits where the State itself was the real party in interest) (citing Roberts v. Barwick, 187 Ga. 691, 695 (1939)). Here, Plaintiffs do not seek a declaration that "acts" of the Commissioners are or were without authority or in violation of the U.S. or Georgia Constitutions and injunction prohibiting such acts, rather they seek to declare the General Assembly's entire statutory scheme "void and unenforceable" in the first instance. Am. Compl. at p. 43.

[17] While Plaintiffs assert that their claims are also brought "pursuant to Ex Parte Young, 209 U.S. 123 (1908)," Br. at 1, n.1, the "legal fiction" of Ex Parte Young is an exception to *Eleventh Amendment immunity* of the states for claims in federal court. See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105–106 (1984) ("Ex Parte Young was the culmination of efforts by [the] Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.") (quoting Perez v. Ledesma, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part)) But the "sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." Alden v. Maine, 527 U.S. 706, 713 (1999).

Georgia Supreme Court found similarly just two weeks ago. In Kuhlman v. State a plaintiff sought declaratory relief from the prohibition on felons possessing firearms asserting that the statute requiring such prohibition violated his right to bear arms under the U.S. and Georgia Constitutions. No. S23A0699, 2023 WL 5760690 at *1 (Ga. Sep. 6, 2023). The trial court granted summary judgment to the State, finding that his § 1983 claims were barred. Id. On appeal, the Supreme Court, noting that a § 1983 claim is unavailable "because the defendant is the State or a State board and therefore not a 'person' against whom a section 1983 claim will lie," id. at *4–5, and instead construed his claim as one for declaratory relief under Paragraph V of the Georgia Constitution. Kuhlman, 2023 WL 5760690 at *5; see also Knox v. State, 316 Ga. 426, 427 ("An action against the State of Georgia in the superior court for a declaratory judgment is the appropriate litigation mechanism for [review of alleged unconstitutionality], and enforcement of unconstitutional statutes may be enjoined") (citing Ga. Const. Art. I, Sec. II, Para V and O.C.G.A. § 9-4-2; 9-4-3). The same is true here: the review Plaintiffs erroneously seek under § 1983 is unavailable and their claims must therefore be construed as coming "within the constitutional waiver of sovereign immunity in Article I, Section II, Paragraph V (b)(1)," if they are to have any viability at all. Kuhlman, 2023 WL 5760690 at *2.

Having brought a suit pursuant to Paragraph V(b), Plaintiffs' claims must comply with the provisions thereof and this Court is likewise limited by Paragraph V in the relief it can award. Here, Plaintiffs' complaint fails to comply with the exclusivity provision, naming the individual Commissioners as Defendants in contravention of Paragraph V(b)'s express terms, unlike the plaintiffs in Kuhlman or Knox. For this reason, "the entire lawsuit must be dismissed" as required by the plain language of the Georgia Constitution. SASS Grp., 315 Ga. at 904. This, of course, forecloses any ability for Plaintiffs to demonstrate a substantial likelihood of success on the

merits—it is "fatal" to the entire action. Id. Moreover, their request for preliminary injunctive relief is separately foreclosed by Paragraph V(b)(1), which permits a court to enjoin acts "to enforce its judgment," but "**only after** awarding declaratory relief." Ga. Const. Art. I, Sec. II, Para. V(b)(1) (emphasis added). Here, no judgment (declaratory or otherwise) has been entered and, consequently, there is no act to be enjoined in furtherance of **enforcing** that non-existent judgment. Indeed, Plaintiffs have not even sought such a judgment—if they believe they are entitled to one, they can and should move for judgment on the pleadings, summary judgment, or even accelerated final adjudication (in a suit which otherwise complies with Paragraph V), and **then** proceed to seek an injunction enforcing such judgment. See Smith v. Ticor Title Ins. Co. of Cal., 200 Ga. App. 534, 535 (1991) ("Where a party seeking a declaratory judgment contends that he is entitled to judgment … he may move for judgment on the pleadings pursuant to OCGA § 9–11–12(c) or for summary judgment pursuant to OCGA § 9–11–56(a)."); see also O.C.G.A. § 9-4-5 (permitting trial as early as twenty days following service). This alone precludes Plaintiffs' request for an interlocutory injunction.

II. Plaintiffs Are Unlikely To Succeed On The Merits

Even if this Court considered the merits of Plaintiffs' claims raised in the Motion, denial remains warranted because Plaintiffs cannot demonstrate a "substantial likelihood of success on the merits." Toberman v. Larose Ltd. P'ship, 281 Ga. App. 775, 778 (2006). And the Court would be well within its discretion to deny the Plaintiffs' Motion on this basis alone. Id.

Plaintiffs' Motion raises three facial constitutional challenges to SB 92, namely, that it: (1) violates the Georgia Constitution's mandate to maintain a separation of powers between the legislative and judicial branches; (2) restricts free speech rights under the federal and state constitutions; and (3) is unconstitutionally vague under federal and state guarantees of due process.

Plaintiffs fail to show a substantial likelihood of success on the merits on any of these claims. First, the General Assembly acted within its jurisdictional authority when it passed SB 92, and because any rule of the Commission is not valid until it is approved by the Supreme Court of Georgia, the legislation does not violate Georgia's requirement that the three branches of government "shall forever remain separate and distinct." Ga. Const., Art. VI, Sec. VIII, Para. III. In addition, public officials' pronouncements of policy and speech as public officials are each afforded far less protection than statements of public officials in their individual capacities on matters of public importance. Consequently, SB 92 does not violate any free speech rights of Plaintiffs. Finally, SB 92 can be constitutionally applied, which precludes a finding that it is unconstitutionally vague on its face. See, e.g., Prof'l Standards Comm'n v. Alberson, 273 Ga. App. 1, 8 (2005) (upholding statute authorizing suspension of educator certificate for, among other things, "any other good and sufficient cause").

Before consideration of Plaintiffs' specific facial challenges to portions of SB 92, it is important to recognize certain judicial presumptions that apply to each of the claims. First, each of Plaintiffs' claims run headlong into the stout presumption of constitutionality afforded to statutory laws. S&S Towing & Recovery, Ltd. v. Charnota, 309 Ga. 117, 118 (2020). Indeed, for Plaintiffs to succeed on the merits, they must "clearly" demonstrate a "clear and palpable" conflict between SB 92 and the Federal or Georgia Constitution. Id. (addressing claims arising under the Federal Constitution) (citation omitted); Ga. Dep't of Human Res. v. Word, 265 Ga. 461, 463 (1995) (applying same rule to separation of powers challenge). Indeed, appellate courts have described the presumption of constitutionality as a judicial "duty to construe an act as constitutional where possible." Word, 265 Ga. at 463 (Georgia Constitutional challenge). See also

Charnota, 309 Ga. at 118 (Federal constitutional challenge). Plaintiffs are nowhere near approaching this threshold, much less satisfying it.

The presumption of constitutionality is distinct from, but similar to another cannon of construction that the Plaintiffs must overcome: the cannon of constitutional doubt. As recently explained by a majority of the Supreme Court of Georgia, "[u]nder the cannon of constitutional doubt, 'if a statute is susceptible of more than one meaning, one of which is constitutional and the other not, we interpret the statute as being consistent with the Constitution.'" Premier Health Care Invs., LLC v. UHS of Anchor, L.P., 310 Ga. 32, 48 (2020) (citing Charnota, 309 Ga. at 117). This cannon "'militates against not only those interpretations that would render the statute unconstitutional, but also those that would even raise a serious question of constitutionality.'" Id. (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 247-48 (2012)). In other words, the tie goes to upholding the law.

Finally, public officials who implement statutory law are "presumed to perform their duties lawfully and in good faith unless proven otherwise." Coleman v. Montgomery Cty., 228 Ga. App. 276, 276 (1997). See also Fair Fight Action, Inc. v. Raffensperger, 634 F. Supp. 3d 1128, 1234 (N.D. Ga. 2022) (applying good faith presumption in federal court to state policymakers). This means that Commission members are presumed to execute their duties in good faith and in a manner consistent with constitutional requirements. Plaintiffs' speculation or fears to the contrary do not overcome this presumption. McDowell, 235 Ga. at 365.

A. Plaintiffs' Separation of Powers Claim Will Not Succeed on the Merits.

Plaintiffs' separation of powers argument, which is limited to O.C.G.A. § 15-18-32(i), is meritless for several reasons. (Pls.' Mot. at 10.) First, there is no textual basis to support Plaintiffs' contention that the Georgia Constitution empowers them with inherent powers or that the General

Assembly unlawfully encroached on that authority when enacting SB 92. Worse yet for Plaintiffs, the Georgia Constitution expressly empowers the legislature to discipline, remove, or involuntarily retire a district attorney. Ga. Const. Art. VI, Sec. 8, Para. II. Second, the legislature acted within its textual constitutional authority when it enacted SB 92. Third, the presumption of good faith precludes consideration of Plaintiffs' feared parade of horribles. See McDowell, 235 Ga. at 365. Each of these reasons demonstrates why Plaintiffs are highly unlikely to succeed on the merits of their separation of powers argument.

The first flaw with Plaintiffs' argument is based on the actual text of the Georgia Constitution. Nowhere does it provide district attorneys with "inherent powers" that SB 92 offends. Indeed, this is why Plaintiffs cannot and do not cite to any provision of the Georgia Constitution to support their foundational premise. (Pls.' Mot. at 9.) The Supreme Court of Georgia said nearly a century ago that there is nothing inherent about judicial power, and it is conferred from the Georgia Constitution. Grimmett v. Barnwell, 184 Ga. 461, 462 (1937). Put differently, "every power exercised by any Court, must be found in, and derived from the law of the land, and also be exercised in the mode and manner that law prescribes." Id. More recently, the Georgia Court of Appeals decided that any inherent judicial powers are "limited by the Constitution." Csehy v. State, 346 Ga. App. 747, 753 (2018). (considering claim under the Federal Constitution).

Standing alone, Plaintiffs' reliance on phantom constitutional text precludes a finding of substantial likelihood of success on the merits. Any remaining doubt is resolved by the actual text of the Georgia Constitution, which expressly empowers the legislature to provide for the

"discipline[], remove[al] or involuntarily retire[ment]" of district attorneys through general law.[18] Ga. Const. Art. VI, Sec. 8, Para. II. Plaintiffs ignore this altogether despite that SB 92 cites this very constitutional provision. O.C.G.A. § 15-18-32(a). Thus, where the Plaintiffs offer distinguishable caselaw and dicta, the legislature properly relied on actual constitutional text. This is dispositive, because when the General Assembly acts pursuant to an express power, it cannot exceed its constitutional legislative authority. As held by the Supreme Court of Georgia decades ago, "laws which intrude on the judiciary must be authorized by some express constitutional provision; otherwise they violate the principle of separation of powers." Dominguez v. Enter. Leasing Co., 197 Ga. App. 664, 665 (1990). See also Froug v. Harper, 220 Ga. 582, 585 (1965) (recognizing broad sweep of legislative authority).

Plaintiffs' separation of powers attack generally and wrongly claims that the SB 92 empowers the Commission to interfere with prosecutors' discretion to decide cases. It cites O.C.G.A. § 15-18-6(4) as an example. That Code Section, however, merely requires district attorneys to review every individual case and then "make a prosecutorial decision available under the law based on the facts and circumstances of each individual case." Thus, the Act does not interfere with prosecutorial discretion, it simply mandates that it is applied to each case.[19]

The second reason Plaintiffs' separation of powers claim fails is structural. The Commission, like district attorneys themselves, is part of the judicial branch. In addition, the members of the Commission are also judicial officers like district attorneys. O.C.G.A. §§ 15-18-

[18] The Georgia Constitution neither creates nor describes the role for solicitors-general who practice in the State Courts of Georgia. Their authority is, therefore, statutory only. See O.C.G.A. § 15-18-60.

[19] As discussed below, the Act does permit sanction if a prosecutor chooses, on a wholesale and uniform basis, to ignore or not enforce a criminal ordinance within their jurisdiction. O.C.G.A. § 15-18-32(i)(2)(E).

32(b), 15-18-32(d)(3)(A), 15-18-32(d)(4). Moreover, the Commission's rules cannot be effective until they approved by the Supreme Court of Georgia, which oversees the judicial branch. O.C.G.A. § 15-18-32(g). Consequently, Commission acts are within the judicial branch, governed by members of the judicial branch, and its operating and disciplinary regulations are approved by the judicial branch.

Plaintiffs' separation of powers claim fails for a third reason: the General Assembly acted within its constitutional authority when it passed SB 92. When considering the constitutional requirement of separate powers, the Supreme Court of Georgia has repeatedly explained that the mandate is flexible and not rigid as Plaintiffs suggest. See Ward v. City of Cairo, 276 Ga. 391, 393 (2003); Word, 265 Ga. at 463; Dep't of Transp. v. City of Atlanta, 260 Ga. 699, 702 (1990). For example, in Word, the court held that the doctrine of separation of powers "does not mean a separation in all respects." 265 Ga. at 433. Ward likewise described the requirement as "sufficiently flexible to permit practical arrangements in a complex government." 276 Ga. at 393. And in the City of Atlanta decision, the Supreme Court of Georgia acknowledged that the "doctrine of separation of powers cannot mean a separation in all respects … '[it] is not and from the nature of things cannot be total.'" 260 Ga. at 702 (citation omitted).

SB 92 represents a legislative act well within this broad and flexible continuum, as established by prior cases. For example, in Dean v. Bolton, 235 Ga. 544, 546 (1975), the Supreme Court of Georgia held that public officials in one branch of government could investigate "the official conduct of any person performing duties in any branch of government" without offending the separation of powers. This holding forecloses the Plaintiffs' claim that they are entitled to an injunction preventing the Commission from "conducting an investigation." (Pls.' Mot. at 9.) Indeed, if the Supreme Court of Georgia is not concerned with the legislature investigating a

district attorney, this Court should not be troubled by an investigation conducted by a commission of judicial officers.

Similarly, the General Assembly can also regulate attorneys generally, so long as the statute does not "limit the power of the court over attorneys." James v. State, 61 Ga. App. 860 (1940). Plaintiffs do not contend that SB 92 limits the authority of the Supreme Court of Georgia, nor can they. Instead, Plaintiffs' concern is that the Act creates additional bases for removal. Because those additions do not subtract from the judiciary's own grounds for removal, applying James necessitates a decision that SB 92 is constitutional.

The authority cited by the Plaintiffs does not require a different conclusion. The principal case upon which Plaintiffs rely is State v. Wooten, 273 Ga. 529 (2001), which is distinguishable and not tethered to any actual constitutional text. (Pls.' Mot. at 2.) The issue there was whether the district attorney's "limited role in assigning cases to a judge and calling the court calendar … violate[d the criminal defendant's] right to due process under the Georgia Constitution or United States Constitution." Wooten, 273 Ga. at 532. The answer was "no." Id. Nowhere did the Wooten court indicate that the legislature could not—pursuant to its constitutional authority—decide grounds or manners for the disciplining, removal, or involuntary retirement of district attorneys. Ga. Const. Art. VI, Sec. 8, Para. II. Thus, Plaintiffs' interpretation not only expands Wooten beyond its actual holding, it would impermissibly render meaningless actual constitutional text.

The same is true of other cases cited by the Plaintiffs. See State v. Kelley, 298 Ga. 572 (2016); McLaughlin v. Payne, 295 Ga. 609, 613 (2014); State v. Hanson, 249 Ga. 739 (1982). None address legislative power.[20] Nor did any hold that prosecutorial discretion provided

[20] Kelley addressed questions of a trial judge's authority to unilaterally alter a specific plea agreement. Kelley, 298 Ga. at 527 ("[w]e granted certiorari …. to address whether, absent the consent of the State, a trial court has the authority to enter judgment and impose sentence on a

immunity from oversight.[21] Id. More importantly, the cases represent Plaintiffs' attempt to build a strawman. Nowhere does SB 92 does not prevent or alter decisions made by prosecutors, and the mandatory presumption of constitutionality forbids such an interpretation. Premier Health Care Investments, LLC, 310 Ga. at 42 (addressing cannon of constitutional doubt); Word, 266 Ga. at 463 (describing the "duty [of courts] to construe an act as constitutional where possible"). Instead, SB 92 establishes clear guidelines and expectations of prosecutors, and it provides a procedure with due process to address complaints that prosecutors failed to abide by those guidelines. See generally SB 92. This is what the Georgia Constitution expressly allows.

Finally, Plaintiffs' separation of powers claim fails because the presumption of good faith afforded to the Commission members (and the Justices of the Supreme Court of Georgia who must approve the Commission's proposed rules) prevents this Court from deciding that Commission members will exercise their discretion—in a hypothetical case—in an unconstitutional or otherwise unlawful manner. See Fair Fight Action, Inc. v. Raffensperger, 634 F. Supp. 3d at 1234; McDowell, 235 Ga. at 365.

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guilty plea to an uncharged, lesser offense … and what authority, if any, the State has to withdraw its consent to a negotiated plea"). Payne applied Georgia Rules of Professional Conduct to answer the question of when a district attorney could testify as a witness for the prosecution, and whether that potential conflict applied to the entire office. 295 Ga. at 611-13. And, Hanson examined the scope of transactional immunity. 240 Ga. at 739.

[21] Other cases cited in Plaintiffs' Motion are similarly distinguishable. See Lord v. State, 304 Ga. 532 (2018); Sentence Review Panel v. Moseley, 284 Ga. 128 (2008); Lee v. King, 263 Ga. 116 (1993). Lord held that a defendant does not have a "constitutional right or entitlement to a plea bargain." 304 Ga. at 538. Moseley decided that the legislature cannot create a process to impose alternative sentences after a court has imposed a final sentence. 284 Ga. at 130. King decided that a district attorney has discretion to "dismiss cases prior to indictment in exchange for information." 263 Ga. at 116.

B. Plaintiffs' Free Speech Claim Fails.

Plaintiffs' free speech claim targets only Code Section 15-18-32(i)(2)(E), and it fails. (Pls.' Mot. at 10.) That provision of the Act authorizes the Commission to hear complaints based on "a charging decision, plea offer, opposition to or grant of a continuance, placement of a case on a trial calendar, or recommendation regarding bond" when the complaint is accompanied by an affidavit, and "plausibl[y]" show that the prosecutor "made or knowingly authorized the decision based on … (E) 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) (emphasis added). This subparagraph addresses prosecutors' decisions to adopt certain official policies and not their actual speech. Consequently, free speech concerns are not implicated, and even if they were, the statute is sufficiently tailored to satisfy strict scrutiny.

i. Code Section 15-18-32(i)(2)(E) Addresses Unprotected Government Speech.

The Plaintiffs' Motion implicitly acknowledges that SB 92 addresses only official government policy. It lists, as examples of potential grounds for discipline, "direct[ions to] their staff," "communication throughout the district attorney's office," " training and informal communications as well as written policies," "community meetings," an official "memorandum," and "stated policies." (Pls.' Mot. at 3-4, 7.) These examples represent communications made as public officials in official capacities. They are distinct from prosecutors' statements on public concern when speaking as individual citizens. This distinction matters, and it is fatal to Plaintiffs'

free speech claims. See Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015); Garcetti v. Ceballos, 547 U.S. 410, 422 (2006).[22]

The First Amendment does not protect official government policies or public officials' communications adopting or explaining those policies. As the Supreme Court said in Walker, "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." 576 U.S. at 207. Such "statements" and "actions" are sometimes referred to as "government speech." Id. Government speech can also encompass statements made by public officials, like prosecutors, when they are "conducting [their] daily professional activities, such as supervising attorneys, investigating charges, and preparing filings." Garcetti, 547 U.S. at 422 (emphasis added). When deciding whether a public official is speaking as an individual or not, courts have often looked to whether the relevant speech was about something regulated by the public official's office. See Warren v. DeSantis, Case No. 4:22cv302-RH-MAF, 2023 WL 345802 at * 12 (N.D. Fla. 2023) (appeal pending). If it is, then courts have severely limited the protection of the First Amendment. Id.

Unlike private speech, the First Amendment "does not regulate government speech." Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009). See also Mech v. Sch. Bd. of Palm Beach Cty., Fla., 806 F.3d 1070, 1074 (11th Cir. 2015). Consequently, government may restrict and regulate the content of government speech. For example, in Summum, the Supreme Court of the United States held that "public officials' … advocacy may be limited by law, regulation, or practice." 555 U.S. at 469. The Eleventh Circuit decided that the legislature may regulate

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[22] Plaintiffs' Motion contends that state and federal law are indistinguishable on this claim. (Pls. Mot. at 11-12.) The Commission disagrees, but it will presume without conceding the point in this response.

government speech, even by "'speaking through the removal' of speech that the government disapproves.'" Mech, 806 F.3d at 1074 (citation omitted). Thus, even if SB 92 regulated speech as Plaintiffs contend, the legislature can constitutionally regulate government speech. Summum, 555 U.S. at 469.

Plaintiffs attempt to avoid this inescapable conclusion by citing cases addressing protected political speech of individual citizens. (Pls.' Br. at 11-13.) This misapplies SB 92, and it ignores the presumption of constitutionality afforded to statutes. Specifically, the challenged portion of the Act addresses a "**stated policy** … [of] **categorically** refus[ing] 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) (emphasis added). Thus, the text of SB 92 reveals that the Act does not regulate speech at all. It is concerned, instead, with policy decisions, and this matters.

When Georgia courts interpret statutes, they must:

> 'presume that the General Assembly meant what it said and said what it meant.' To that end, [the judiciary] must afford the statutory text its 'plain and ordinary meaning,' [courts] must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would.

Deal v. Coleman, 294 Ga. 170, 172–73 (2013) (citations omitted). Courts frequently use dictionaries to determine the ordinary meaning of a statutory phrase. Catoosa Cty. v. Rome News Media, 349 Ga. App. 123, 128 (2019). These definitions confirm that a "policy" is a plan or decision and not speech. Webster's New Collegiate Dictionary defines "policy" as "management or procedure based on material interest," "a definite course or method of action selected from alternatives," and "a high-level overall plan embracing the goals and acceptable procedures esp. of a governmental body." (1977) (emphasis added). This definition is consistent with Plaintiffs' own description of official acts addressed by the Act. It is also consistent with the precedent that

distinguishes government speech from protected speech, and it demonstrates that, by using the word "policy," SB 92 reaches only unprotected government speech.[23]

Indeed, all of the types of speech they identify would be made in Plaintiffs' official capacities as part of their duties of managing the offices of district attorney. So too do many of the cases that they cite. (Pls.' Mot. at 9-13.) See Houston Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253. 1261 (2022); Brown v. Hartlage, 456 U.S. 45, 55-56 (1982); Wood v. Ga., 370 U.S. 375, 395 (1962). Wilson involved an unsuccessful challenge to a censure for repeated comments and conduct made in violation of policies regulating members of a college system board of trustees like the plaintiff. 142 S. Ct. at 1257-58. It did not, as this case does, involve possible discipline for adopting an official policy of a prosecutor's office contrary to Georgia's statutory law and legislative directives. Brown reviewed a campaign speech and not an elected official's choice of policy. 456 U.S. at 46-50. Last, Wood involved a Georgia sheriff's open and published letter about and to a grand jury investigation with which he did not participate, and which did not involve any aspect of his office or duties as sheriff.[24] 370 U.S. at 376-81.

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[23] Plaintiffs can already be disbarred for some types of speech. Georgia Rule of Professional Conduct 3.8(g) prohibits prosecutors from, in most cases, "making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."

[24] Plaintiffs also cited Keyishaian v. Board of Regents, 385 U.S. 589, 604 (1967), for the proposition that the "prosect of discipline … chills the speech of Plaintiffs and their fellow district attorneys." The flaw in this argument is two-fold. First, it wrongly presumes that "stated policy" is the same as the protected academic speech at issue in Keyishaian. Id. at 604. Second, the policy in Keyishaian prohibited "treasonable or seditious [statements] or the doing of any treasonable or seditious act or acts." Id. at 598. As addressed more fully in the next section, deciding what constitutes seditious speech if far less clear than identifying a "stated policy," much less a policy that "demonstrates that the [prosecutor] categorically refuses to prosecute any offense or offenses." O.C.G.A. § 15-18-32(i)(2)(E) (emphasis added). Where Keyishaian made sanction possible for a particular type of speech, the Act addresses a prosecutor's stated policy of not prosecuting offenses, which are identifiable and set forth in the Criminal Code. The two could not be more different.

These distinctions matter, as "speech made pursuant to an employee's job duties is not speech made as a citizen and is therefore not protected by the First Amendment." Moss v. City of Pembroke Pines, 782 F.3d 613, 618 (11th Cir. 2015).[25] Even if this Court disagreed with this construction of O.C.G.A. § 15-18-32(i)(2)(E), the interpretation is doubtlessly reasonable, which is all that is needed to uphold it. Haley v. State, 289 Ga. 515, 522 (2011) (citations omitted).[26] Consequently, Plaintiffs cannot show a substantial likelihood of success on the merits.

ii. Code Section 15-18-32(b)(2)(E) Survives the Inapplicable Strict Scrutiny Standard.

Even if the Court applied the strict scrutiny standard that Plaintiffs erroneously seek, Plaintiffs will still not likely succeed on the merits. Federal and state courts applying the First Amendment strict scrutiny standard will uphold laws that serve a "compelling interest and are narrowly drawn to serve that interest." First Exit Network, Inc. v. State, 290 Ga. 508, 509 (2012) (citing Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 799 (2011)).

[25] The bulk of cases cited by Plaintiffs ignores this distinction. See Brown v. Ent. Merchants Ass'n., 564 U.S. 786, 788, 799 (2011) (regulation of "violent video games," without disputing the First Amendment applied); Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (rejecting facial First Amendment challenge to the federal Child Online Pornography Act); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (finding First Amendment violation when public university withheld funds from religious-based student newspaper on viewpoint grounds); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978) (striking on First Amendment grounds state law prohibiting certain corporations' political contributions); Final Exit Network, Inc. v. State, 290 Ga. 508, 509 (2012) (addressing state statute that prohibited any promotion or advertisement for assisted suicide).

[26] The Supreme Court of the United States has said that the traditional presumption of constitutionality does not apply to content-based restrictions of protected speech. See United States v. Playboy Entm't Grp., Inc., 529 U.S. 803-04 (2000). Citing federal caselaw, Georgia courts have applied the same rule. See, e.g., McKenzie v. State, 279 Ga. 265 (2005). Federal caselaw also establishes, however, that this reversal of the traditional presumption of constitutionality, like other aspects of First Amendment jurisprudence, does not apply to government speech like that at issue in this lawsuit. Walker, 576 U.S. at 207.

Generally speaking, the passage of SB 92 demonstrates that the State has a clear interest in providing a means for elected judicial officials to be accountable to a set of standards. See Inquiry Concerning Coomer, S21Z0595, 2023 WL 5242627 (Ga. Aug. 16, 2023) (adopting recommendation sanctioning sitting judge) (referred to as "Coomer II"). Even cases cited by the Plaintiffs demonstrate this. See Payne, 295 Ga. at 614 (describing a district attorneys' conflict of interest as "contrary to public policy"). Precedent also weighs strongly against Plaintiffs' challenge to Code Section 15-18-32(i)(2)(E), because it establishes that the State has a strong interest in seeing that its Criminal Code (e.g., Title 16) is enforced. See Bennett v. Kimmel, 163 Ga. 725 (1927) (describing enforcement of criminal laws as an important public policy). Consequently, when the Act authorizes discipline if prosecutors choose to ignore criminal conduct **in its entirety**, it is upholding a compelling state interest. Plaintiffs have cited no authority to the contrary.

This focus of O.C.G.A. § 15-18-32(i)(2)(E) also shows it is also narrowly tailored by addresses only prosecutors' conscious decision(s) to forego enforcing a particular crime or group of crimes regardless of the individual circumstances. This is made evident by the statutory text, which establishes three elements for potential discipline: (1) a "stated policy;" (2) that "categorically … refuse[s] to prosecute;" (3) an identifiable "offense or offenses." O.C.G.A. § 15-18-32(i)(2)(E).[27]

Applying methods of statutory construction demonstrates the foundational weaknesses of Plaintiffs' free speech claim. As discussed above, a "policy" is distinct from speech itself and, instead, is a "definite course or method of action selected from alternatives [or] a high-level overall

[27] Unlike the Code of Judicial Conduct, SB 92 does not reach candidates for public office. Cf. Inquiry Concerning Coomer, 315 Ga. 841, 842-43 (2023) (addressing scope of the Code of Judicial Conduct).

plan embracing the goals and acceptable procedures esp. of a governmental body." Webster's New Collegiate Dictionary (1977). Thus, SB 92 addresses the act of adopting a practice and not mere expressions of a prosecutorial philosophy.

Next, the word "categorically" limits which policies fall under SB 92's purview by excluding prosecutors' decisions made on an individual, case-by-case basis. Rome News Media, 349 Ga. App. at 128. The Oxford Dictionary of English defines categorical as "unambiguously explicit and direct." (3d Ed. 2010).[28] Finally, "criminal offense" means one that is set forth in the Georgia Code: "No conduct constitutes a crime unless it is described as a crime in this title or in another statute of this state." O.C.G.A. § 16-1-4. See also Moore v. State, 94 Ga. App. 210, 211 (1956) (reaffirming that Georgia does not recognize common law offenses).

Taken together, these definitions mean that the General Assembly sought to regulate prosecutors who adopt policies that choose to **always** ignore a type of crime occurring in their jurisdiction. Such crimes are prohibited by statutes, which "represent[] legitimate public policy of this state," and the General Assembly narrowly tailored SB 92's reach to only conduct that ignores the will of the people, acting through their elected legislators, to criminalize certain conduct. Kimmel, 163 Ga. at 725. This survives constitutional scrutiny, even if it were applicable to the Act.

C. Plaintiffs' Due Process Claims Fail, Because SB 92 is Understandable to a Person of Ordinary Intelligence.

Plaintiffs' Motion's third and final claim alleges that portions of SB 92—Code Sections 15-18-6(4), 15-18-32(i)(2)(D), 15-18-32(i)(2)(E), and 15-18-33(h)(3)—are unconstitutionally

[28] Webster's New Collegiate Dictionary also defines "categorical" as "absolute, unqualified; relating to a category." (1977). The same dictionary defines "category" as "a general class to which a logical predicate or that which it predicates belong." Id.

vague and violate their Federal and State Constitutional rights to due process.[29] (Pls.' Mot. 13-16.) As with the others, Plaintiffs' due process claim misapplies the applicable legal standards established by binding precedent, and it ignores statutory text.[30] Plaintiffs agree that, under federal and state constitutional law, statutes will survive vagueness challenges based on due process if "persons of reasonable intelligence can derive a core meaning from a statute." High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1228 (11th Cir. 1982). See also Lindsey v. State, 277 Ga. 772, 773 (2004) (holding that "[s]tatutory language is sufficiently definite to satisfy due process requirements so long as it has a commonly understood meaning").

As an initial matter, it is important to identify what Plaintiffs' vagueness claim is and is not. It is a due process claim: "SB 92 is Impermissibly Vague, Depriving District Attorneys of Due Process." (Pls.' Mot. at 10 (emphasis added); First Am. Compl. ¶¶ 202-28.) It is not a free speech claim. It is also a facial challenge. This matters.

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[29] Code Section 15-18-6(4) imposes a duty on district attorneys 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 under oath of duty as provided in Code Section 15-18-2." O.C.G.A. § 15-18-32(i)(2)(D) authorizes the Commission to investigate and sanction based on complaints that a prosecutor "made or knowing authorized" a decision to charge, plea, oppose or grant a continuance, place on a trial calendar, or make a recommendation regarding bond based on "[f]actors that are completely unrelated to the duties of prosecution." O.C.G.A. § 15-18-32(i)(2)(E) is quoted and discussed extensively above. Plaintiffs' Motion cites O.C.G.A. § 15-18-33(h)(3), which does not exist. It appears they are challenging O.C.G.A. § 15-18-32(h)(3), which they correctly describe as empowering the Commission to sanction a district attorney (only) for "willful and persistent failure to carry out duties pursuant to Code Section 15-18-6."

[30] Plaintiffs do not explain if their claim arises under procedural or substantive due process. Eleventh Circuit opinions treat vagueness challenges under the Federal Constitution as procedural due process. See Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374, 1378 (11th Cir. 1994). Georgia courts do not appear to have explicitly addressed whether substantive or procedural due process applies to vagueness claims under Georgia's constitution, but they have provided a consistent analysis to apply. See State v. Old S. Amusements, Inc., 275 Ga. 274, 276 (2002) (considering whether "persons of common intelligence will readily ascertain what the act prohibits").

First, the presumption of constitutionality applies to vagueness/due process claims. See Davies Warehouse Co. v. Bowles, 321 U.S. 144, 153 (1944) (reviewing state statute); JIG Real Estate, LLC v. Countrywide Home Loans, Inc., 289 Ga. 488, 490 (2011) (applying Georgia Constitution).[31] Second, parties challenging a statute as facially vague must show that: "the law is impermissibly vague in all of its applications … and cannot be validly applied to any conduct." Busbee, 673 F.2d at 1228. As explained by Justice Melton, a facial vagueness challenge will succeed only if there are "no set of circumstances under which the [statute] would be valid, i.e., that the law is unconstitutional in all its applications, or at least that the [law] lacks a plainly legitimate sweep." Dep't of Community Health v. Northside Hospital, Inc., 205 Ga. 446, 449 (2014). See also JIG Real Estate, LLC, 289 Ga. at 491 ("facial vagueness challenge will be upheld only if the enactment is impermissibly vague in all of its applications"). Third, legislatures are given significant leeway in drafting statutes. "Mathematical certainty" is not the standard under federal or state law. Grayned v. City of Rockford, 408 U.S. 104, 110 (1972); Prof'l Standards Comm'n v. Alberson, 273 Ga. App. 1, 8 (2005).

Given these principles, it is not surprising that federal and state courts have upheld statutes with far greater breadth than those Plaintiffs challenge in the Act. Indeed, the Supreme Court acknowledged that even the "'most conscientious of codes that define prohibited conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.'" Arnett v. Kennedy, 416 U.S. 134, 161 (1974) (citation omitted). A federal

[31] This presumption is particularly strong in cases arising under Georgia's Constitution. Binding precedent explains that Plaintiffs must show that there are "no set of circumstances under which the [statute] would be valid, i.e., that the law is unconstitutional in all its applications, or at least that the [law] lacks a plainly legitimate sweep." Dep't of Community Health v. Northside Hospital, 205 Ga. 446, 449 (2014). Put differently, a "facial vagueness challenge will be upheld only if the enactment is impermissibly vague in all of its applications." JIG Real Estate, LLC, 289 Ga. at 491.

district court in the Northern District of Georgia rejected an Atlanta Police Officer's assertion that Atlanta's "work rules" were unconstitutionally vague when they required, among other things, employees to "conform to rules, regulations, directives, and standard operating procedures of the department." Byrd v. City of Atlanta, 709 F. Supp. 1148, 1153 n.3 (N.D. Ga. 1989). And, statutes that do not define terms are not always constitutionally vague, as courts will use methods of statutory construction to determine the meaning of the legislative text. See Tracy v. Florida Atl. Univ. Bd. of Trustees, 980 F.3d 799, 807 (11th Cir. 2020).

Georgia courts have approved similarly broad grounds for professional sanction. In another context, the Georgia Court of Appeals upheld a regulation that allowed suspension of a county school superintendent for "good and sufficient cause."[32] Alberson v. Prof'l Standards Council, 273 Ga. App. 1, 9 (2005). As a final illustrative example, the Georgia Rules of Professional Conduct already impose far less specific obligations on prosecutors. Rule 3.8(g) prohibits prosecutors from, in most cases, "making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused." The Rules do not define "substantial likelihood" or "heightening condemnation."

i. *Code Section 15-18-6(4).*

Considering this precedent and background, it is evident that Plaintiffs' due process claim fails. The Motion cites Code Sections 15-18-6(4) (requiring district attorneys to review individual cases when making prosecutorial decisions) and 15-18-32(h)(3) (subjecting prosecutors to

[32] As further example, every professional licensed by the State of Georgia (save attorneys) can have their license revoked or not renewed for such thing as: "unprofessional, immoral, unethical, deceptive, or deleterious conduct or practice harmful to the public that materially affects the fitness of the licensee or applicant to practice a business or profession licensed under this title or is of a nature likely to jeopardize the interest of the public;" or having "an inability to practice a business or profession licensed under this title with reasonable skill and safety to the public." O.C.G.A. §§ 43-1-19(a)(6), 43-1-19(a)(10).

potential sanction for violations of the duties imposed by Code Section 15-18-6). (Pls. Mot. at 14.) Taken together, these two statutes empower the Commissioner to consider and sanction prosecutors who "willful[y] and persistent[ly]" refuse to make prosecutorial decisions based on the "facts and circumstances in each individual case."[33] O.C.G.A. §§ 15-18-32(h)(3), 15-18-4(4).

This is plainly understandable to a person of ordinary intelligence, and Plaintiffs' rhetorical questions are red herrings. (Pls.' Mot. at 14.) Plaintiffs first ask whether the duty imposed by the new Code Section 15-18-4(4) "concern[s] cases which are never presented for indictment or accusation." The answer is simple, so long as the prosecutor made a prosecutorial decision not to prosecute based on the individual case, there would be no sanction (and a sanction would require intentional, repeated opposite acts). Next Plaintiff ask how prosecutors establish that they made an individual review. (Pls.' Mot. at 14.) The Act does not codify best practice for compliance, though the Commission's rules conceivably could. This, however, is irrelevant. Prosecutors can doubtlessly maintain sufficient records to assist in this determination, and the question does not render the statute vague; it speaks to how to make a known, substantive defense. Plaintiffs' final question asks what "prosecutorial decisions are not 'available under the law?'" (Pls.' Mot. at 14.) This answer is also easily addressed. If the law does not provide a basis to prosecute, e.g., a common law crime, no facts and circumstances would make prosecution available because the law would not allow a conviction.

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[33] Using an ordinary dictionary, the Georgia Court of Appeals has defined "willful" as "intentional, deliberate, self-determined." Byrd v. State, 216 Ga. App. 316, 318 (1995) "Persistent" is uniformly defined as something that occurs more than once and is continuing. See Oxford Dictionary of English (3d Ed. 2010) (defining "persistent" as "continuing in an opinion or course of action in spite of difficulty or opposition"); Webster's New Collegiate Dictionary (1977) (defining "persistent" as "continuing or inclined to persist [defined as 'to go on resolutely or stubbornly in spite of opposition, importunity or warning'] in a course").

Each of these responses provides at least some "set of circumstances under which the [Act] would be valid," which is all that is necessary to uphold it. Northside Hospital, Inc., 205 Ga. at 449. Further, the presumption of good faith means that the Commission members would not be presumed to adopt a cavalier approach to these issues. McDowell, 235 Ga. at 365. Ultimately, Plaintiffs' wish for more statutory text does not "invalidate [a] statute which a reviewing court believes could have been drafted with greater precision." Lindsey v. State, 277 Ga. 772, 773 (2004) (citations omitted).

ii. *Code Section 15-18-32(h)(6)*

Plaintiffs next claim that persons of reasonable intelligence cannot determine what O.C.G.A. § 15-18-32(h)(6) means. It empowers the Commission with authority to discipline prosecutors who engage in "[c]onduct prejudicial to the administration of justice which brings the office into disrepute." Decisions of the Supreme Court of Georgia render this meritless this contention. Inquiry Concerning Coomer, 315 Ga. 841, 859 (2023) (referred to as "Coomer I"); Coomer II, 2023 WL 5242627, at *7; Matter of Inquiry Concerning Judge No. 491, 249 Ga. 30, 31 (1982) (citing O.C.G.A. § 2-4203 (1982)) (referred to as "Judge No. 491").

In 1982, the court rejected a vagueness challenge to a statute subjecting judges to discipline for violating the statutory prohibition on "'conduct prejudicial to the administration of justice which brings the judicial office into disrepute." Judge No. 491, 249 Ga. at 31. This is the exact same language legislators codified in O.C.G.A. § 15-18-32(h)(6). The court easily rejected the vagueness challenge, upheld and then applied the statute. The Supreme Court of Georgia recently favorably cited Judge No. 491 in Coomer II. 2023 WL 5242627, at *7.

The two cases involving former Court of Appeals Judge Coomer are also instructive and provide additional reasons why Plaintiffs will not succeed on the merits. In Coomer I, the court

considered the broad constitutional language requiting judges to avoid "conduct prejudicial to the administration of justice … [as] 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. Prejudicial conduct may also refer to actions taken in bad faith by a judge acting outside her judicial capacity." Coomer I, 315 Ga. at 859 (citing Ga. Const. art. VI, Sec. 7, Para. VII(a)). The Coomer II court also rejected a vagueness claim to Rule 1.2(A) of the Code of Judicial Conduct, which requires judges to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." 2023 WL 5242627, at *7. These provision are similar to Code Section 15-18-32(h)(6), and its prohibition against conduct that "brings the office into disrepute." And just as in Coomer II, this Court should reject arguments that the statute is constitutionally infirm. Id.

Plaintiffs' arguments to the contrary are meritless. (Pls.' Mot. at 15.) Plaintiffs first contend, without authority, that cases and laws applying the same language to judges are irrelevant to concerns about prosecutorial misconduct. (Id.) The lack of authority is not surprising. Judges and prosecutors are viewed very similarly by Georgia law. The Constitution addresses both in Article VI, which establishes the State's judiciary. See Ga. Const. Art. VI. The legislature treats judges and prosecutors alike as well: they are both governed by Title 15 of the Code, which is titled "Courts." Plaintiffs then shift to Rule 3.8 of the Georgia Rules of Professional Conduct and claim that it alone provides "longstanding norms" of prosecutors' duties. This is false. The legislature has also imposed statutory "duties" on district attorneys since at least 1851 when it enacted the predecessor to Code Section 15-18-4. See Laws 1799, Cobb's 1851 Digest, p. 574 (describing duties of State Law Department as including the prosecution of all crimes). The last time the legislature amended the statute was in 1933, when it codified all the current provisions of Code

Section 15-18-6 save the addition of subparagraph (4) by SB 92. O.C.G.A. § 24-2908 (1933). Code Section 15-18-6 remains good law, and the duties it imposes (in addition to those of the Rules of Professional Conduct) have never been modified or stricken by an appellate court.[34]

Finally, the legislature's decision to codify language in SB 92 that was interpreted and applied in Judge No. 491 provides another reasonable interpretation that overcomes Plaintiffs' due process challenge. This is because the legislature is presumed to know how courts interpret statutory text. Bradshaw v. State, 296 Ga. 650, 654 (2015). Thus, a legislative decision to codify statutory text that courts have already interpreted is treated as an intentional choice that reflects legislative intent to adopt the judicial definition. Id. Applied here, this maxim means that it must be presumed that the General Assembly intended to adopt the definition of "prejudicial to the administration of justice which brings the office into disrepute" articulated in Judge No. 491. This resolves any purported vagueness in the Code Section, and in addition to the interpretations provided above, provides another reasonable interpretation to overcome Plaintiffs' due process challenge. Busbee, 673 F.2d at 1228; Northside Hospital, Inc., 205 Ga. at 449. Given that the existence of only one reasonable interpretation of Code Section 15-18-32(h)(6) requires the provision to be upheld, Plaintiffs will not likely succeed on the merits of their due process challenge.

[34] Rather than supporting their due process claim, Plaintiffs' reliance on the Rules of Professional Conduct undercuts it. Both the Rules of Professional Conduct and the Code of Judicial Conduct must be approved by the Supreme Court to be effective. Ga. Bar R. 5-101; In re Judicial Qualifications Comm'n Formal Advisory Opinion No. 239, 300 Ga. 291, 294-95 (2016). Thus, given that the court adopted and then applied language in Coomer I and Coomer II that is no reason to believe it would not interpret similar language from SB 92 in a similar way.

iii. Code Sections 15-18-32(i)(2)(D) and 15-18-32(i)(2)(E)

Plaintiffs' third due process challenge focuses on Code Sections 15-18-32(i)(2)(D) and 15-18-32(i)(2)(E).[35] The former allows complaints and discipline based on a "charging decision, plea offer, opposition to grant of a continuance, placement of a case on a trial calendar, or recommendation regarding bond" if the prosecutor "made or knowingly authorized the decision based on … factors that are completely unrelated to the duties of prosecution." O.C.G.A. § 15-18-32(i)(2) and 15-18-32(i)(2)(D). This challenge is easily dismissed.

The General Assembly codified the "duties of" district attorneys in Code Section 15-18-6, and then referred to those "duties" in the challenged portion of Code Section 15-18-32(i)(2). As a matter of statutory construction, the reference to "duties" in the later statute necessarily refers to the earlier one. See Zaldivar v. Prickett, 297 Ga. 589, 592 (2015) (citation omitted). Thus, a reasonable interpretation of Code Section 15-18-32(i)(2)(D) is that it authorizes discipline if a prosecutor makes one of the decisions listed in O.C.G.A. § 15-18-32(i)(2) based on something other than the duties proscribed in Code Section 15-18-6. This satisfies due process. Busbee, 673 F.2d at 1228; Northside Hospital, Inc., 205 Ga. at 449.

III. Plaintiffs Will Not Suffer An Irreparable Injury Absent An Injunction.

Plaintiffs have failed to demonstrate any irreparable injury that will occur before a final determination is reached in this case. No one is facing disciplinary investigation, and the Plaintiffs lack any evidence suggesting that they will be subject to an investigation much less an actual disciplinary hearing. Under these circumstances, they cannot satisfy the burden of establishing the sweeping power of an injunction is of "vital necessity." Treadwell v. Inv. Franchises, Inc., 273 Ga.

[35] The Commission Members discuss extensively O.C.G.A. § 15-18-32(i)(2)(E) above and will not repeat but incorporate that analysis in response to Plaintiffs' due process argument.

517, 518 (2001). Moreover, in addition to depriving the Plaintiffs of standing, the speculative nature of their purported, possible injuries by the Commission precludes the Plaintiffs from showing irreparable harm as well.

> 'Injunction ought not to be granted unless the injury is **pressing** and the **delay dangerous**, and there is no adequate remedy at law.' … No allegation is made that [the defendant has acted or threatened to act], although the record reflects [plaintiffs] are concerned that she may have plans to do so. 'Courts of equity will not exercise [the power of injunctive relief] to allay mere **apprehensions of injury**, but only where the injury is imminent and irreparable and there is no adequate remedy at law.'

Lue v. Eady, 297 Ga. 321, 329 (2015) (emphasis added) (citations omitted). See also McDowell, 235 Ga. at 365 ("[t]he issuance of an injunction is a much more rigorous remedy and cannot be based upon mere possibilities").

Plaintiffs' fears are not only inadequate to show an immediate and irreparable injury, the are factually unfounded. Plaintiffs assert that they will suffer an irreparable injury immediately on October 1, but this claim is belied by evidence and common sense. As District Attorney McGinley swears in his affidavit, even if the Commission is able to submit a draft of the standards and conduct and proposed rules to the Supreme Court on or before October 1, 2023, it is unlikely that the court will act immediately upon the submission. (McGinley Aff. ¶ 10.) Moreover, and providing the nail in the coffin to Plaintiffs' request that an injunction stop all disciplinary proceedings until a trial on the merits, District Attorney McGinley also explained that the members of the Commission unanimously agreed that no prosecutor will be "subject to discipline by the Commission" until the Supreme Court reviews and adopts the proposed rules. (Id. ¶ 11.)

Finally, Plaintiffs' concerns are overblown at best and manufactured at worst. The Motion wrongly suggests that the Commission will impose "partisan control over prosecutorial

discretion." (Pls.' Mot. at 18.) Not so. The Commission is non-partisan, and that it oversees all prosecutors, regardless of political party affiliation. And the legislative history shows that the first bills to form the Commission were filed by members of the House Democratic leadership. Further, Plaintiffs ignore that such oversight already exists for other elected officials, such as the JQC for Judges. See O.C.G.A. § 15-1-21. Perhaps most importantly, though, the presumption of good faith bars accepting Plaintiffs' accusations at this stage of the litigation. McDowell, 235 Ga. at 365.

In short, no irreparable damage will occur by the Commission moving submitting rules and proceeding to the Supreme Court of Georgia. And Plaintiffs' subjective and baseless fears do not justify enjoining a state law and preventing government officials from performing the work demanded of them by the people of Georgia acting through the General Assembly.

IV. The Balance of the Equities Weighs Against Enjoining A Duly-Enacted Statute Based on Plaintiffs' Hypothetical Fears.

Further, the balance of equities favors the Commission, as State would be irreparably harmed if it were unable to enforce its statutes. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Hand v. Scott, 888 F.3d 1206, 1214 (11th Cir. 2018). By enjoining the challenged statutes, the Court would impairing the State legislature's right to create an oversight committee, as granted by the Georgia Constitution. This is not an academic point. As Chief Justice Rehnquist wrote in 1977, the public interest "is infringed by the very fact that the State is prevented from engaging in investigation and examination." New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, C.J., in chambers) (emphasis added).

V. The Public Interest Weighs Against An Injunction.

Georgians' interest in the Commission moving forward in enforcing SB 92 also weighs against an injunction. Id. As of recent, the need for more prosecutor accountability has been

recognized nationwide. See, supra, at 2–3. By enjoining SB 92 or the challenged provisions, the Court would impair the State's ability to respond to this need and its determination to safeguard the integrity of the prosecutorial process. Additionally, an injunction would not prevent the release of the "sword of Damocles over the head of each district attorney, threatening severe disciplinary action" (Pls' Mot. at 17) because the Commission could still move forward with submitting draft rules for approval, and the rules, as approved by Georgia Supreme Court, would comport with due process. Accordingly, the public's interest in the Commission carrying out its duties weighs against an injunction.

CONCLUSION

For the forgoing reasons, Defendants respectfully request that the Court dismiss all counts against the Commission.

Respectfully submitted this 18th day of September, 2023.

/s/ Josh Belinfante

Christopher M. Carr
Attorney General
Georgia Bar No. 112505
Logan B. Winkles
Deputy Attorney General
Georgia Bar No. 136906
Georgia Department of Law
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3236

Josh Belinfante
Georgia Bar No. 047399
jbelinfante@robbinsfirm.com
Carey Miller
Georgia Bar No. 976240
cmiller@robbinsfirm.com
Charles P. Boring
Georgia Bar No. 065131
cboring@robbinsfirm.com
Anna Edmondson
Georgia Bar No. 289667
Javier Pico Prats
Georgia Bar No. 664717
Special Assistant Attorneys General
ROBBINS ALLOY BELINFANTE LITTLEFIELD LLC
500 14th Street, N.W.
Atlanta, Georgia 30318
(678) 701-9381