IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STONE MOUNTAIN JUDICIAL
CIRCUIT DISTRICT ATTORNEY
SHERRY BOSTON, *et al*.

Plaintiffs,

v. Case No. 2023-cv-383558

JOSEPH COWART, et al., in their
Individual and official capacities,

Defendants.

MOTION OF *AMICI CURIAE* 109 LEGAL SCHOLARS TO FILE AN AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION

Amici curiae[1], a group of 109 legal scholars, former prosecutors and legal ethics experts, respectfully move this Court for leave to file the attached *amicus* brief in support of Plaintiffs. *Amici* are law professors and criminal justice standard-bearers from across the country, with decades of expertise in legal ethics, professional responsibility and/or criminal procedure.

In the proposed brief, *amici* seek to offer their perspective based upon decades of experience trying thousands of criminal cases as attorneys and former prosecutors, as well as years of teaching the topics of legal ethics and professional responsibility to law students and crafting the practice standards for prosecutors nationwide. Their academic work addresses the

[1] The *amici curiae* include the legal scholars listed in Appendix A to the Brief, who join as *amici* in their individual capacities. Academic and professional affiliations are for identification purposes only.

professional norms and expectations governing prosecutors, including those relating to prosecutorial discretion and accountability, as well as the mechanisms by which prosecutors are regulated to ensure accountability while preserving prosecutorial independence. Several of the *amici* sit on committees of the American Bar Association and have participated in the development of the ABA's standards for the Prosecution Function, which have guided prosecutorial discretion and standards of conduct for more than fifty years.

Amici have a formidable interest in assisting this Court to resolve questions of law that strike at the core of their personal, professional and academic expertise. Allowing the circumvention of the independence of duly elected prosecutors undermines a core value in the criminal justice system—the inherent discretion that allows prosecutors to balance their duty to seek justice against the practical and financial limits of an already strained legal system utilizing limited resources.

WHEREFORE, *amici* request that this Court accept and consider FORMER PROSECUTORS' AND LEGAL SCHOLARS' *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION, attached hereto.

Respectfully submitted, this 11th day of September, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 11, 2022, I have electronically filed with the Clerk of Court using the Odyssey eFileGA e-filing system, which will automatically send e-mail notification of such filing to the attorneys of record for the parties in this cause.

/s/ Morris Weinberg, Jr.
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EXHIBIT A

IN THE SUPERIOR COURT OF FULTON COUNTY
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CIRCUIT DISTRICT ATTORNEY
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FORMER PROSECUTORS' AND LEGAL SCHOLARS' *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION

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INTEREST AND IDENTITY OF *AMICI CURIAE*

Amici are former prosecutors and legal scholars whose scholarship, teaching, and professional service focus on legal ethics, professional responsibility, and/or criminal procedure. Collectively, *amici* have tried thousands of cases or authored hundreds of articles and other writings, including casebooks, on these subjects. Their academic work addresses the professional norms and expectations governing prosecutors, including those relating to prosecutorial discretion and accountability, as well as the mechanisms by which prosecutors are regulated to ensure accountability while preserving prosecutorial independence. Some of the *amici* have also participated in developing or revising the American Bar Association Criminal Justice Standards, Prosecution Function, which have guided prosecutorial discretion and standards of conduct for more than fifty years.

Drawing on their professional and academic expertise, *amici,* who join in their independent capacity and are listed in Appendix A to the Brief (academic and professional affiliations are for identification purposes only) offer a perspective which is broader than the parties regarding the vagueness of Georgia Senate Bill 92. As enacted, SB 92 contradicts the ABA Criminal Justice Standards and undermines the prosecutor's role in the criminal justice system. *Amici* support the Plaintiffs' Motion for Interlocutory Injunction and submit that Georgia Senate Bill 92 is unconstitutional and must be enjoined.

INTRODUCTION

The very first provision of the Constitution of the State of Georgia is the right to due process. *See* Georgia Const., Art. I, § 1, Par. 1. ("No person shall be deprived of life, liberty, or property except by due process of law.") Due process is, of course, also guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution. It is well-understood that due process requires fair notice as to what the State commands or forbids. But Georgia Senate Bill 92 eschews this fundamental constitutional right by creating vague "offenses" that, should a politically-appointed commission determine a district attorney or solicitor-general commits, he or she can be disciplined, including being removed from office and disqualified from serving for ten years. Those "offenses," which SB 92 fails to define, and which have no origin or precedent in any known standard, include: (1) the "willful and persistent failure to carry out" statutorily-prescribed duties; (2) "conduct prejudicial to the administration of justice which brings the office into disrepute"; (3) prosecution decisions that may "plausibly" be based on "factors that are completely unrelated to the duties of prosecution"; and (4) any "stated policy, written or otherwise, which demonstrates that the district attorney or solicitor-general categorically refuses to prosecute any offense." O.C.G.A. §§ 15-18-32(h)(3), (h)(6), (i)(2)(D), (i)(2)(E). No elected or line prosecutor could possibly discern from these provisions precisely what conduct may subject him or her to discipline, and possible removal from office.

Aside from being unconstitutionally vague, and because of it, SB 92 imposes constraints on a prosecutor's independence and exercise of discretion that contravene the well-established standards for prosecutors, which Georgia has adopted, promulgated by the American Bar Association and others. Thus, were the Court to permit implementation of the law, it will severely

undermine the ABA Criminal Justice Standards for the Prosecution Function, which have existed for decades and have been thoughtfully crafted by experienced criminal defense practitioners, prosecutors, and judges, including several of the *Amici*.

What is clear from the origins of SB 92, however, is *who* the law is intended to target – so-called "reform" prosecutors who choose to exercise their discretion in a manner that some may disagree with. The partisan effort to control or limit the prosecutor's independent exercise of discretion, a bedrock principle of our legal system, is a fundamental threat to both the criminal justice system and democracy. *Amici* thus urge the Court to grant Plaintiffs' Motion for Interlocutory Injunction and enjoin the implementation of Senate Bill 92, as enacted.

I. FACTUAL BACKGROUND

On May 5, 2023, Governor Brian Kemp signed Senate Bill 92 which amended the Georgia Code to create a "Prosecuting Attorneys Qualifications Commission" (PAQC), composed of eight members appointed by the Governor, Lieutenant Governor, Speaker of the House, and Senate Committee on Assignments (each with individual appointment responsibilities), charged with investigating and disciplining elected prosecutors, including by removal from office, for certain enumerated offenses. *See* O.C.G.A. § 15-18-32. The impetus for SB 92, as reported in the Atlanta Journal-Constitution the day Governor Kemp signed the measure, was to rein in "rogue district attorneys who aren't doing their job." *See Georgia DAs Could Be Punished, Or Ousted Under New Law*, Greg Bluestein, Atlanta Journal-Constitution (May 5, 2023) (quoting state Representative Houston Gaines, an Athens Republican).[1]

[1] Available at: https://www.ajc.com/politics/georgia-das-could-be-punished-or-ousted-under-new-law/BZDXKRTZQRCM5DPJJQN4AADLQY/.

To do this, alongside traditional, well-understood grounds such as "mental or physical incapacity" or "conviction of a crime of moral turpitude, which State Bar rules already address, under SB 92 a prosecutor may now be subject to discipline and removal from office for the ***"willful and persistent failure to carry out"*** the duties of a prosecutor (O.C.G.A. § 15-18-32(h)(3) and ***"[c]onduct prejudicial to the administration of justice which brings the office into disrepute"*** (O.C.G.A. § 15-18-32(h)(6)).

Even more concerning, the Code permits for a complaint or investigation of a prosecutor's charging decision – the very essence of prosecutorial discretion - when ***"it is plausible"*** that the decision was based on ***"[f]actors that are completely unrelated to the duties of prosecution"*** or 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)(D),(E). The Code does not imbue any of these provisions with definition or meaning. And none of these new sanctionable actions are tethered to any known professional standard, ethical rule, or any provision in Georgia law.

A complaint may be initiated by anyone, including the PAQC itself. O.C.G.A. § 15-18-32(i)(1). A prosecutor who is removed or involuntarily retired by the PAQC will be disqualified from being appointed or elected as a district attorney or solicitor general for 10 years. O.C.G.A. § 15-18-32(p).

II. ARGUMENT

Two due process concerns permeate Georgia Senate Bill 92: (1) the lack of clarity with respect to the novel grounds for discipline or removal; and (2) without such precision or guidance, the new law empowers the PAQC to act in an arbitrary or discriminatory way. *In the Interest of K. R. S.*, 284 Ga. 853, 854, 672 S.E.2d 622 (2009) ("[V]ague laws without clear enforcement

criteria can result in unfair, discriminatory enforcement.") Both concerns counsel that SB 92 should be deemed void for vagueness. These concerns are particularly acute for a penal statute like SB 92.[2] *See FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012); *Hall v. State*, 268 Ga. 89, 92 (Ga. 1997) ("the principle that due process requires that criminal statutes give sufficient warning to enable [individuals] to conform their conduct to avoid that which is forbidden is one of the great bulwarks of constitutional liberty."). When a statute is punitive, it violates due process if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *See FCC*, 567 U.S. at 253 The harm posed by SB 92's vagueness is not merely theoretical. As Plaintiffs' Motion demonstrates, and *amici* submit below, SB 92 has and will undermine the prosecutorial discretion and independence foundational to the criminal justice system.

A. SB 92 Is Unconstitutionally Vague.

It is a fundamental principle that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. *See Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristouv v. City of Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids' " (quoting *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939) (alteration in original))).

[2] Though SB 92 does not seek to define or punish criminal activity, it is a "penal statute," under the legal definition of the phrase. *See* Black's Law Dictionary (defining "penal statute" as a law that provides the punishment for a crime or offense). Because SB 92 attempts to create various offenses which merit punishment, it simply cannot leave space for any vagueness or ambiguity as to what it prohibits.

This clarity requirement is essential to the due process protections contained in the United States and Georgia Constitutions and requires the invalidation of laws that are impermissibly vague. *See FCC*, 567 U.S. at 253. A regulation is vague when "it is unclear as to what fact must be proved." *See United States* v. *Williams*, 553 U.S. 285, 306 (2008). "When speech is involved," as it is here, "rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *See FCC*, 567 U.S. at 253-54.

Four provisions of SB 92 fail to provide fair notice of what conduct is prohibited, and absent clear guidance are ripe for discriminatory or arbitrary enforcement:

> (1) Subsection h(3), which provides for discipline for the ***"willful and persistent failure to carry out"*** the duties of a prosecutor (O.C.G.A. § 15-18-32(h)(3));
>
> (2) Subsection h(6), providing for discipline for ***"[c]onduct prejudicial to the administration of justice which brings the office into disrepute"*** (O.C.G.A. § 15-18-32(h)(6));
>
> (3) Subsection (i)(2)(D), permitting an investigation into, and possible discipline for, exercises of prosecutorial discretion based on ***"[f]actors that are completely unrelated to the duties of prosecution"*** (O.C.G.A. § 15-18-32(i)(2)(D); and
>
> (4) Subsection (i)(2)(E), permitting an investigation into, and possible discipline for, 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).

Far from informing what is prohibited, these provisions only raise questions. When is a prosecutor's failure to carry out her duties "willful and persistent"? Does two instances suffice? Or three? Or must it be much more, say, ten or twenty or a hundred instances? What conduct is prejudicial to the administration of justice which brings the office into disrepute? And disrepute by whom? What factors are completely unrelated to the duties of prosecution? What suffices, beyond a stated policy, to demonstrate a categorical refusal to prosecute an offense? And what does categorically mean? Does it include a presumptive non-prosecution policy?

For each provision, "it is unclear what fact must be proved." *See Williams*, 553 U.S. at 306; *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (statute requiring citizens to submit 'credible and reliable' identification that provided 'reasonable assurance' of authenticity was impermissibly vague because it contained no standard regarding how it could be satisfied and vested virtually complete discretion in the police to determine if the requirements had been met); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (holding vagrancy statute unconstitutionally vague because it provided no standards governing the exercise of the discretion it granted and thus permitted arbitrary and discriminatory enforcement); *Cf. Coalition for Good Governance v. Kemp*, 558 F. Supp. 3d 1370, 1389 (N.D. Ga. Aug. 2021) (election monitoring rules which precisely described the activity prohibited were not unconstitutional).

B. SB 92 Contradicts and Undermines Well-Established Professional Standards.

The vagueness problems in these provisions are even further magnified when juxtaposed with the well-established ABA Criminal Justice Standards for the Prosecution Function (the "ABA Standards"). For nearly fifty years, the qualities of a good prosecutor – oft-described as "elusive"[3] – have been crystallized and distilled in the ABA Standards, and the National District Attorneys Association National Prosecution Standards, among others. While these standards do not possess the force of law unless courts adopt them, they exemplify best practices for any prosecutor. Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 Hastings L.J. 1093, 1103-04 (2011). The ABA Standards, in particular, are the consensus view of the entire criminal justice community – prosecutors, defense lawyers, judges, and academics – about what good, professional practice is and should be. *Id*. at 1099.

[3] R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940, 24 J. Am. Jud. Soc'y 18 (1940), 31 J. Crim. L. 3 (1940).

The State Bar of Georgia has adopted these standards, noting that they are the product of "prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense." *See* The State Bar of Georgia Handbook, Georgia Rules of Professional Conduct, Comment to Rule 3.8. The thrust of the ABA Standards is clear: to ensure the prosecutor is a minister of justice, not simply an advocate, and does nothing to prejudice the right of the accused to a full and fair trial. *See, e.g*, Comment to Georgia Rule 3.8 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").

The key attribute of a prosecutor's roles as zealous advocate, administrator of justice, and officer of the court is the exercise of discretion. The ABA Standards provide that the "prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function." ABA Standard 3-1.2 (a) (2017). The prosecutor "serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances." *Id.* 3-1.2(b).

A routine and common exercise of that discretion is the allocation of scarce resources. A prosecutor cannot pursue each violation of the criminal code – there are simply not enough resources to do so. He or she must establish priorities. The chief prosecutor, such as the State Attorney, also cannot make every decision in every case brought to his or her office. It is thus natural and expected, consistent with professional standards, that he or she will promulgate policies to guide the line prosecutor's exercise of discretion. *See* ABA Standard 3-2.4(a) ("Each prosecutor's office should seek to develop general policies to guide the exercise of prosecutorial

discretion, and standard operating procedures for the office. The objectives of such policies and procedures should be to achieve fair, efficient, and effective enforcement of the criminal law within the prosecutor's jurisdiction.").

Policies governing discretion and establishing priorities for enforcement are common at all levels of government.[4] One such example is an October 19, 2009 Department of Justice Memorandum from David W. Ogden, then Deputy Attorney General, concerning federal investigations and prosecutions in States authorizing the medical use of marijuana, which states:

> "[T]his memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities. … The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. … ***The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources***. …The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, ***pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana***. ***For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources***."

Ogden Memorandum at 1-2 (emphasis added).

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[4] *See* Ellen S. Podgor, Department of Justice Guidelines: Balancing "Discretionary Justice," 13 Cornell J. L. & Pub. Pol'y 167, 170-75 (2004) (describing provisions of U.S. Attorneys' Manual, including those that "provide guidance in a wide array of areas such as charging"); U.S. Dep't of Just., United States Attorneys' Written Guidelines for the Declination of Alleged Violations of Federal Criminal Laws: A Report to the United States Congress (1981).

Under current Georgia law, would this DOJ policy amount to a categorical refusal to prosecute a federal offense? Or is it a willful and persistent failure to carry out a duty? Does it prejudice the administration of justice and bring the Department of Justice into disrepute among those who oppose legalization of marijuana? The answer to each of these questions, without further guidance or definition in Georgia law, is "maybe." It may depend on who is enforcing. That is precisely why SB 92 as enacted is so dangerous.

There are many other such examples of resource allocation and presumptive non-prosecution in prosecutor's offices around the country and throughout our Nation's history. For example, in the early twentieth century it was somewhat common for prosecutors to exercise their discretion by not prosecuting liquor possession offenses. As one such prosecutor reported when admitting he never enforced the liquor possession law, "we do not think of enforcing this law, and if we did, we would not get enough votes at the ensuing election to tell of the existence of the franchise." *See* Schuyler C. Wallace, *Nullification: A Process of Government*, Political Science Quarterly, Vol. 45, No. 3 (Sept. 1930), pp. 347-358 at 355. It seems that this sort of common-sense non-prosecution policy is now a punishable offense in Georgia.

Even more fundamental is the prosecutor's exclusive authority to decide whether to charge an offense. The ABA Standards, and traditional norms, make clear that "the decision to institute formal criminal proceedings is the responsibility of the prosecutor." ABA Standard 3-4.2(a). But "the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support," and may consider such factors in exercising this discretion as "the strength of the case, the prosecutor's doubt that the accused is in fact guilty, the extent or absence of harm caused by the offenses, the impact of prosecution or non-prosecution on the public welfare," among other factors. ABA Standard 3-4.4. By permitting anyone to second-guess those decisions if they can

"show it is plausible" the district attorney considered other unknown factors or had a non-prosecution policy with respect to an offense, even though each case is reviewed individually on its own merits, SB 92 infringes on the prosecutor's discretion. If a prosecutor is worried whether someone, anyone, will complain or question his or her decision – or simply target him or her for having a policy – it is very possible the prosecutor will be driven by SB 92 to consider something the ABA Standards are clear he or she should not: "partisan or other improper political or personal considerations." ABA Standard 3-4.4(b)(i).

Finally, SB 92 violates ABA Standard 3-2.5 governing the Removal or Suspension and Substitution of Chief Prosecutor. Under ABA Standard 3-2.5(a), "[f]air and objective procedures should be established by appropriate legislation that empowers the governor or other public official or body to suspend or remove, and supersede, a chief prosecutor for a jurisdiction and designate a replacement, upon making a public finding after reasonable notice and hearing that the prosecutor is incapable of fulfilling the duties of office due to physical or mental incapacity or for gross deviation from professional norms." Beyond failing to establish "fair and objective procedures," SB 92 seeks to punish the exercise of prosecutorial discretion, when the exercise of such discretion is a core professional norm discharged in accordance with professional standards, not a gross deviation from them. ABA Standard 3-2.5(c) admonishes that "[r]emoval, suspension or substitution of a prosecutor should not be permitted for improper or irrelevant partisan or personal reasons." But that is exactly what SB 92 aims to do.

III. CONCLUSION

Undermining the independent discretion a prosecutor is entrusted with in our criminal justice system is troubling, and the vague means – which could be weaponized by anyone at any time for any purpose – are reason alone to reject SB 92. Without notice as to what will subject them to punishment, SB 92 also undermines the critical resource allocation determined by the

elected district attorney necessary to ensure community safety and carry out the goals for which prosecutors are elected by their communities. It puts Georgia district attorneys in the untenable position of risking removal simply for exercising independent judgment, consistent with their ethical obligations, where that judgment is contrary to that of the PAQC, the Governor, or any Georgia citizen. SB 92 must be enjoined.

Respectfully submitted, this 11th day of September, 2023.

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