IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

PLAINTIFFS' UNOPPOSED MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION

Plaintiffs seek leave of this Court to submit a reply brief in support of Plaintiffs' Motion for Interlocutory Injunction. In support of this request, Plaintiffs state as follows:

1. On August 24, 2023, Plaintiffs filed and served a motion for interlocutory injunction, seeking relief against the implementation and enforcement of SB 92 by Defendants. Plaintiffs limited their brief to the 20 pages required by the rules.

2. On September 18, 2023, Defendants filed and served their opposition to the motion. With the Court's permission, Defendants submitted a brief of 42 pages in length.

3. The Court will hold a hearing on Plaintiffs' motion on September 22, 2023.

4. Defendants' opposition raises arguments that necessitate a response by Plaintiffs.

5. Plaintiffs also believe that a written response filed in advance of the hearing will aid the Court in its review of the arguments presented.

6. Defendants do not object to the filing of a reply by Plaintiffs.

7. The reply brief is attached hereto as **Exhibit A**.

For the foregoing reasons, Plaintiffs respectfully request leave to file a reply brief in support of Plaintiffs' Motion for Interlocutory Injunction.

Respectfully submitted, this 21st day of September, 2023,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date filed a true and complete copy of the foregoing Motion for Leave to File Reply in Support of Plaintiffs' Motion for Interlocutory Injunction with the Court's e-filing system and electronically served a copy of the same on the below-identified counsel via email:

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Filed on this 21st day of September, 2023

/s/ David N. Dreyer
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Exhibit A

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PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR INTERLOCUTORY INJUNCTION

By delaying all investigations and disciplinary proceedings, Defendants have acknowledged that they have no interest in SB 92 taking full effect before this lawsuit, and the companion lawsuit against the State of Georgia, are resolved. *See* Jackson Aff. ¶ 13; McGinley Aff. ¶ 11. Without judicial action, however, this voluntary suspension offers little security to Plaintiffs and other District Attorneys. If Defendants change their minds, prosecutors will again be subject to immediate intrusions on their discretion and infringement on their speech rights, exacerbated by the vague standards of SB 92. "[T]here is a difference between the controversy having gone away, and simply being in a restive stage." *True the Vote, Inc. v. IRS*, 831 F.3d 551, 561 (D.C. Cir. 2016) *as cited by Int. of C.C.*, 314 Ga. 446, 450 (2022).

Plaintiffs thus maintain their request for an interlocutory injunction. As described below, Plaintiffs' claims are justiciable, and the balance of factors tips more decisively in favor of an injunction, in light of Defendants' self-imposed delay.

I. Plaintiffs' Claims Are Justiciable.

A. Plaintiffs' Uncontroverted Testimony Supports Their Standing to Bring this Pre-Enforcement Challenge of SB 92.

Georgia courts, like the federal courts, recognize that it is appropriate to bring a pre-enforcement challenge to an unconstitutional statute. For a plaintiff to show sufficient injury in such a challenge, she must show that she has taken "affirmative action . . . to seek to comply with [the law] or to run afoul of its restrictions." *Bo Fancy Prods., Inc. v. Rabun Cnty. Bd. of Comm'rs*, 267 Ga. 341, 344 (1996) (citation omitted); *see also Wollschlaeger v. Governor, Fla*., 848 F.3d 1293, 1305 (11th Cir. 2017) ("Where the alleged danger of legislation is one of self-censorship, harm "can be realized even without an actual prosecution.") (cleaned up). In the motion for an interlocutory injunction, Plaintiffs presented evidence that they have stifled their own speech and conduct to avoid potential discipline. *See, e.g.*, Pl. Exh. 1 ¶¶ 43-52 (DA Boston Aff.); Pl. Exh. 2 ¶¶ 24-32 (DA Williams Aff.). They further identified their reasonable concerns that continued exercise of discretion would risk discipline under the law. *See, e.g.*, Pl. Exh. 3 ¶¶ 40-48 (DA Adams Aff.); Pl. Exh. 4 ¶¶ 17-20 (DA Broady Aff.). Defendants present no evidence to contravene any of this testimony.

Rather, Defendants attack the very premise of pre-enforcement review, pointing out the various stages of investigation and discipline. Opp. Br. at 9. But this logic is true of any pre-enforcement challenge to a statute. There are always several steps that need to be taken for a case to be prosecuted. There is always uncertainty regarding whether a relevant authority will pursue any person's conduct, but "[i]t is not necessary that petitioner first expose himself to actual arrest

or prosecution to be entitled to challenge a statute" as unconstitutional. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

The cases that Defendants cite to question standing are irrelevant. Unlike the hypothetical settlement in *Cheeks v. Miller*, 262 Ga. 687 (1993), SB 92 has entered the Georgia Code. Nor do Plaintiffs point to hypothetical future conduct, like the students in *Manlove v. Unified Gov't of Athens-Clarke Cty.*, 285 Ga. 637 (2009); they identify present actions that could give rise to discipline. *See, e.g.*, Boston Aff. ¶¶ 49-51; Williams Aff. ¶¶ 26-30. Moreover, regardless of these particular actions, Plaintiffs have asserted a cognizable injury—a diminution of their authority and powers as prosecutor. The pledges of individual Defendants (and not even the entire PAQC) to interpret SB 92 in a particular way are not enough to protect Plaintiffs' rights or ensure that Plaintiffs have not and will not suffer harm from the statute. Plaintiffs present a live controversy that merits judicial intervention.

B. Sovereign Immunity Does Not Bar This Lawsuit.

In arguing that sovereign immunity bars this lawsuit, Defendants likewise mischaracterize the litigation and prevailing law. This lawsuit is not brought "pursuant to" Paragraph V of Article I, Section II of the Georgia Constitution, and Plaintiffs' lawsuit against the State pursuant to that paragraph was appropriately filed separately from this action. *See State v. SASS Grp., LLC*, 315 Ga. 893, 904 (2023) (holding that the state must be the only defendant in any lawsuit filed pursuant to this paragraph). Rather, this lawsuit seeks to enjoin the eight individuals who currently sit on the PAQC from violating the state constitution, while applying standard federal-law principles to prevent violations of the federal constitution.

Georgia courts have long recognized the propriety of individual-capacity lawsuits to enjoin unconstitutional activity, as noted in *Lathrop*. Such a lawsuit runs against the human being who

happens to occupy an office (and the people subject to his or her direction), and it would therefore become moot when the individual left office. *See, e.g.*, *Riley v. Georgia Ass'n of Club Executives*, 313 Ga. 364, 367 (2022). As such, the injunction does not run against the sovereign.[1] Nothing in Paragraph V, as enacted by the Georgia voters, addresses individual-capacity lawsuits or other lawsuits between private individuals that raise questions about the constitutionality of a statute. Lacking such text, Defendants must resort to the ballot summary that was compiled by a state agency, *see* Opp. Br. at 14, but that summary was not voted into the constitution. Defendants present no authority for reading the ballot summary to override the text of a constitutional amendment, and Plaintiffs could find none.

Nor are Plaintiffs' *Ex parte Young* claims barred by sovereign immunity. First, a state official, sued in his or her official capacity for injunctive relief, is a "person" for the purposes of 42 U.S.C. § 1983 and is not interpreted to represent the state. *Will v. Mich. Dept of Pub. Safety*, 491 U.S. 58, 71 n.10 (1989). Defendants' citation to dicta in *Kuhlman v. State* proves nothing to the contrary, as the plaintiff in that case never sought to invoke § 1983. No. S23A0699, 2023 WL 576069 at *5 (Ga. Sep. 6, 2023). Second, to the extent that the Paragraph V scheme would prevent Plaintiffs from obtaining preliminary review and injunction of laws that are federally unconstitutional, such a procedural regime would raise substantial Supremacy Clause concerns. *See Haywood v. Drown*, 556 U.S. 729, 741–42 (2009) (rejecting a New York procedural regime as limiting the full enforcement of federal rights).

[1] Defendants also misunderstand the scope of the longstanding "real party in interest" exception to individual-capacity suits. *See* Opp. Br. at 15 n.16. Georgia "case law has applied [the exception] primarily when the claimed relief would control or take the State's real property or interfere with contracts to which the State is a party." *Bd. of Commissioners of Lowndes Cnty. v. Mayor & Council of City of Valdosta*, 309 Ga. 899, 899 (2020). Neither is applicable here.

II. Defendants' Actions Reinforce Their Lack of an Interest in Avoiding an Injunction, and the Remaining Factors Still Weigh in Favor of an Injunction.

Plaintiffs seek an injunction to prevent the members of the PAQC from conducting investigations or disciplinary proceedings until this lawsuit reaches final judgment. Defendants now reveal that last Friday (September 15), they voted to adopt such a delay—at least until the Georgia Supreme Court approves the Commission's standards and procedural rules. This decision reflects the lack of any interest, either on the part of Defendants or the public, for the PAQC to begin its investigatory or disciplinary work while this lawsuit moves forward.

Meanwhile, Defendants' affidavits do not eliminate the irreparable injury that Plaintiffs face absent an injunction. A party's voluntary cessation of unlawful activity is insufficient to resolve litigation, particularly where there "is evidence that a policy change is unilateral such that the government could [reverse itself] immediately after litigation concludes." *Int. of C.C.*, 314 Ga. at 450. Here, Defendants make no commitments to maintain this delay, merely noting their prior unilateral decision. Without a binding commitment, Plaintiffs remain subject to SB 92's legislative intrusion on their authority, and its interference with their ability to exercise discretion or communicate freely. *See* Br. in Supp. of Interloc. Inj. at 17; *see also id.* at 18-19 (describing the corresponding harms to the public).

Meanwhile, Defendants have failed to undermine Plaintiffs' likelihood of success on the merits. Rather than grappling with Plaintiffs' actual claims, Defendants attack a series of straw men and rely on bare assertions about the nature of SB 92.

First, Defendants ignore Georgia courts' longstanding recognition that prosecutorial discretion is an inherent part of the role of District Attorneys. Few powers and roles within the constitution are explicitly defined. For example, "[t]he Judicial Power Paragraph does not purport to define what is meant by '[t]he judicial power,'" *Sons of Confederate Veterans v. Henry Cnty.*

Bd. of Commissioners, 315 Ga. 39, 47 (2022) (quoting Ga. Const. Art. IV., Sec. I., Par. I). Yet the courts have developed an understanding of the contents of that power over time. *See, e.g.*, *id.* at 49-53 (drawing on historical precedent to define the judicial power). Likewise, Georgia courts have identified discretion as core to the District Attorney's powers. For example, the Georgia Supreme Court, in *Hanson*, grounded its recognition of transactional immunity in that inherent authority. "[T]his authority of the prosecutor to bargain is inherent in his office and is of utmost importance in the orderly administration of criminal justice." *State v. Hanson*, 249 Ga. 739, 743 (1982). Accordingly, these characteristics of the District Attorney are no less protected against intrusion by the legislative branch.

Second, Defendants rely heavily on Ga. Const. Art. VI, Sec. 8, Para. II, which authorizes the legislature to create a legal regime for discipline of District Attorneys. However, this broad grant of authority does not, and could not, override other constitutional provisions—such as the protections of the separation of powers, free speech, and due process. Accordingly, this general grant of authority is not relevant to the question presented in this lawsuit: whether *this law* (SB 92) is a permissible exercise of legislative authority and adequately safeguards Plaintiffs' rights.

Third, Defendants repeatedly minimize the effect of SB 92 without clear justification. They assert blithely that the law does not "empower[] the Commission to interfere with prosecutors' discretion," Opp. Br. at 21, but there is nothing in the statute imposing that limitation. They likewise assert that SB 92 "addresses only the act of adopting a practice and not mere expressions of a prosecutorial philosophy." Opp. Br. at 31. But to reach this result, Defendants ignore the actual text of the statute. Section 15-18-32(b)(2)(E) provides for a complaint based on a "stated policy, written or unwritten, that *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."

(emphasis added). For a policy to *demonstrate* a refusal, it does not necessarily constitute the refusal itself. As such, the statute invites discipline of a wide range of speech which *demonstrates* a prosecutorial approach.

Fourth, Defendants mischaracterize the government-speech cases. No case that Defendants cite addresses one branch of government's attempt to regulate the speech of another elected official. Rather, they each concern either the speech of an employee in a hierarchical relationship with the government entity, *e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), or a private party's attempt to make use of a government forum, *see, e.g.*, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). Neither situation applies here, while the cases concerning elected-official speech, such as *Wilson* and *Wood*, clearly illustrate the importance of protecting the ability of elected officials like Plaintiffs to communicate with the public. Defendants also fail to dispel the clear First Amendment infringement that Plaintiffs suffer in their capacity as candidates for office—some of whom already or soon will face challengers for upcoming elections.

Finally, Defendants rely heavily on the purportedly facial nature of Plaintiffs' vagueness challenge to the statute. Yet Plaintiffs never labeled the challenge—rather, the complaint and motion for an interlocutory injunction both repeatedly addressed the application of SB 92's vague standards to exercises of prosecutorial discretion, and particularly decisions not to pursue a particular set of charges. *See, e.g.*, First Am. Compl. ¶¶ 132 (describing the "vague" new individual-review duty), 156 (same); Br. in Supp. Of Interloc. Inj. at 14-16 (specifically highlighting the uncertainty of the statutory language in the context of an exercise of prosecutorial discretion); *see also* Amicus Brief of Legal Scholars at 6-7 (noting the vague nature of several SB 92 standards). Accordingly, Defendants fail to undermine Plaintiffs' claim with their examples of clarity that have nothing to do with a decision not to prosecute or another exercise of prosecutorial

discretion. Even if Plaintiffs' claims were interpreted as facial, Defendants' proposed standard does not apply to claims that "implicate" other constitutional concerns, as here, where SB 92's vague standards undermine Plaintiffs' ability to fully exercise their constitutional powers and infringe on their speech rights. *Whatley v. State*, 297 Ga. 399, 400 (2015).

For all these reasons, Plaintiffs maintain their respectful request that this Court issue an interlocutory injunction barring Defendants from pursuing an investigation or discipline for conduct occurring during the pendency of this lawsuit.

Respectfully submitted, this 21st day of September 2023,

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