Fulton County Superior Court
EFILEDRM
Date: 9/29/2023 10:05 AM
Che Alexander, Clerk

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

ORDER DENYING PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION

Before this Court is Plaintiffs' Motion for Interlocutory Injunction (the "Motion"), filed on August 24, 2023. The Motion asks this Court to enjoin the Defendants, Commissioners of the newly-created Prosecuting Attorneys Qualifications Commission ("Commission"), from "conducting an investigation or disciplinary proceedings during the pendency of this litigation." (Mot. at 19.)[1] Defendants filed an opposition to the Motion on September 18, 2023. A hearing was held on the Motion on September 22, 2023. After consideration of the pleadings, the briefs, and the arguments at the hearing, Plaintiffs' Motion is DENIED.

[1] Plaintiffs, all district attorneys, conceded at the hearing that they have no standing to seek to enjoin any activities of the Commission related to the investigation or discipline of solicitors-general. See, e.g., Bell v. Austin, 278 Ga. 844, 846 (2005) (limiting standing to harms that may befall the individual plaintiff).

The Legislation at Issue

The Georgia Constitution provides for the existence of district attorneys, and that same Constitution specifically gives the Georgia legislature the authority both to delineate the duties of district attorneys[2] and to discipline or remove district attorneys.[3]

In keeping with that authority, the General Assembly recently passed Senate Bill 92 ('SB 92"), which was then signed into law by Governor Kemp. SB 92 amended O.C.G.A. § 15-18-6, which governs "[t]he duties of the district attorneys within their respective circuits," to enumerate a new statutory duty: "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. § 15-18-6 (4). SB 92 also added a new code section O.C.G.A. § 15-8-32 which establishes the Prosecuting Attorneys Qualification Commission ("Commission") as a body which may investigate and discipline or remove district attorneys or solicitors-general.[4] "The authority of the Commission shall be limited to incapacity or discipline regarding *the conduct* of a district attorney or solicitor-general as a holder of such office." Id. (emphasis added).

Plaintiffs' Request for Injunction

Plaintiffs assert that the legislature has overstepped its authority in violation of Georgia's Separation of Powers doctrine; that the Commission violates both the state and federal First Amendment and Due Process rights of Plaintiffs, and that a preliminary injunction barring

---

[2] "It shall be the duty of the district attorney to represent the state in all criminal cases [in the trial and appellate courts of their respective jurisdictions] and to perform such other duties *as shall be required by law*." Ga. Const. Art. VI, § VIII, Para. I (emphasis added).

[3] "Any district attorney may be disciplined, removed or involuntarily retired *as provided by general law*." Ga. Const. Art. VI, § VIII, Para. II (emphasis added).

[4] SB 92 requires the Commission to adopt rules and regulations that "comport with due process" "no later than October 1, 2023." O.C.G.A. § 15-18-32(g). And those rules "shall be effective only upon review and adoption by the Supreme Court [of Georgia]." Id. SB 92 also provides that that no complaint may be filed with the Commission against a prosecutor prior to October 1, 2023 or about misconduct occurring before May 1, 2023. Id. The Commission has thus far not published any proposed rules and has agreed that no prosecutor will be subject to discipline until the Supreme Court of Georgia reviews and adopts the proposed rules. McGinley Aff. ¶ 11.

Defendants from conducting any investigatory or disciplinary proceedings is warranted during the pendency of this litigation to prevent imminent and actual harm to Plaintiffs.

BASES FOR DENIAL OF INJUNCTIVE RELIEF

The Court reaches its decision to deny the Motion for several independent and alternative reasons:

Standing/Ripeness

At this point, Plaintiffs have failed to show a cognizable injury for purposes of standing. See Black Voters Matter Fund, Inc. v. Kemp, 313 Ga. 375, 382 (2022). Rather, their alleged injuries appear to be "conjectural or hypothetical" and not based on a present set of facts. Id. And Plaintiffs' self-censoring attested to in their affidavits is based on "questions that have not yet arisen but which [Plaintiffs] fear may arise at a future date." Cheeks v. Miller, 262 Ga. 687, 688 (1993). In addition, because Plaintiffs' alleged injuries are based on an "unspecified future harm," which would be caused, if at all, by the Defendants' future discretionary acts, any injury is neither actual nor imminent, as standing requires. Manlove v. Unified Gov't of Athens-Clarke Cty., 285 Ga. 637, 638-39 (2009).

Sovereign Immunity

In addition, Plaintiffs' federal law claims, as pled,[5] are barred by sovereign immunity. To overcome sovereign immunity, Plaintiffs must identify where the State has waived the defense. Georgia Dep't of Transp. v. Wyche, 332 Ga. App. 596, 599 (2015). Plaintiffs attempt to do so in Footnote One of their Motion: "Plaintiffs bring this lawsuit—and seek this injunction—against Defendants in their official capacities and on the federal law claims, pursuant to Ex Parte Young, 209 U.S. 123 (1908), and in their individual capacities on the state-law claims. Bd. of Comm'rs Lowndes Cty. v. Mayor & Council of City of Valdosta, 309 Ga. 899, 903 (2020)." This cannot overcome the State's assertion of sovereign immunity on the federal claims. The federal claims are pled pursuant to 42 U.S.C. § 1983, but § 1983 does not permit claims against "state officials acting in their official capacity." Prof'l Practices Comm'n v. Brewer, 219 Ga. App. 730, 731 (1995) (citing Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989)). And Plaintiffs'

[5] Claims II and V of the Complaint.

reliance on Ex Parte Young does not cure this error, as Ex Parte Young does not defeat sovereign immunity in all contexts. It is a means of establishing federal jurisdiction in federal courts. See Ex parte Young, 209 U.S. 123, 142 (1908). In those courts, it has been recognized as an exception to Eleventh Amendment immunity. 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.") (Citations omitted). Sovereign immunity, however, neither derives from, nor is limited by, the terms of the Eleventh Amendment." Alden v. Maine, 527 U.S. 706, 713 (1999).

Standard for Injunctive Relief

"An interlocutory injunction is an extraordinary remedy, and the power to grant it must be 'prudently and cautiously exercised.'" City of Waycross v. Pierce Cty. Bd. of Comm'rs, 300 Ga. 109, 110-11 (2016) (citations omitted); O.C.G.A. § 9-5-8. Injunctive relief should be granted only in "clear and urgent cases" after considering (1) whether there is a 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) whether an injunction would work a disservice to the public interest. Id. Plaintiffs have not satisfied the requisites to obtaining an injunction.

1. As the Georgia Supreme Court has instructed, injunctions should only be granted if the "injury is pressing and the delay dangerous [and not] to allay mere apprehensions of injury." Lue v. Eady, 297 Ga. 321, 329 (2015). Plaintiffs have not articulated an injury linked to the Commission's investigation of prosecutors, and the Commission has indicated it will not discipline a prosecutor until the Supreme Court of Georgia approves its proposed rules (sometime into the future). Further, Defendants enjoy a presumption that they "will follow the law in the exercise of their statutory duties and authority" Lathrop v. Deal, 301 Ga. 408, 444 (2017) (internal quotations omitted), and that the Commission will execute its duties in good faith and consistent with the constitutions of the United States and the State of Georgia. McDowell v. Judges Ex Officio, 235 Ga. 364, 365 (1975). This presumption prevents the Court from accepting Plaintiffs' concerns as factual at this stage of the litigation. Plaintiffs have not shown an injunction is a "vital necessity"

to preventing an immediate and irreparable injury. Treadwell v. Inv. Franchises, Inc., 273 Ga. 517, 518 (2001).

2. While the threatened injury to Plaintiffs is at this point speculative, it is also true that the Commission is newly-formed. But "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 (2018) (citation omitted). As the burden is movants' and since duly-enacted statutes enjoy a presumption of constitutionality, see, e.g., Taylor v. Devereux Foundation, Inc., 316 Ga. 44, 52-53 (2023), the balance of the equities weighs against enjoining Defendants from acting, once all statutory prerequisites to such action have been satisfied.

3. Plaintiffs have not demonstrated a substantial likelihood of success on the merits. And while the Court has weighed all of the factors in determining whether to grant injunctive relief, unlikelihood of success on the merits, standing alone, warrants the denial of injunctive relief. Toberman v. Larose Ltd. P'ship, 281 Ga. App. 775, 778 (2006) (citing examples). Among other things, the Court is persuaded that the Georgia Constitution expressly authorizes the General Assembly to impose duties on district attorneys and to create the grounds and processes to disciple or remove district attorneys who fail to meet those legal duties, and that SB 92 does so within the bounds of the state and federal constitutions.

4. Finally, the public interest is served by allowing the Defendants to perform their duties as SB 92, as duly-enacted by the legislature and enjoying a presumption of constitutionality, represents the will of the people. Bonds v. Allen, 25 Ga. 343, 346 (1858).

For each of these reasons, independently and collectively, Plaintiffs' Motion is DENIED.

SO ORDERED, this 29th day of September 2023.

The Honorable Paige Reese Whitaker
Superior Court of Fulton County

Service via e-filing system

Prepared by:
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

/s/ Josh Belinfante
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
Counsel for Defendants

(with edits by the Court)