IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STONE MOUNTAIN JUDICIAL CIRCUIT DISTRICT ATTORNEY SHERRY BOSTON, *et al.*, Plaintiffs, v. PROSECUTING ATTORNEYS' QUALIFICATIONS COMMISSION, *et al.*, Defendants.	Case No. 2024-cv-

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

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I. INTRODUCTION AND SUMMARY

As district attorneys representing urban, suburban, and rural communities in Georgia, Plaintiffs seek an injunction that will prevent the Prosecuting Attorneys' Qualifications Commission (PAQC) from beginning investigations and discipline arising from prosecutorial decisions and speech.

This is not the first time that Plaintiffs have sought this remedy from this Court. Last year, soon after Senate Bill 92 created the PAQC and added O.C.G.A. § 15-18-32 ("the Statute") to the code books, Plaintiffs filed suit and sought a similar injunction. When they initially filed suit, the PAQC had not yet been fully appointed, let alone taken action. It had yet to develop its procedural rules or standards of conduct for prosecutors, for which the statute then required Georgia Supreme Court approval. *See* O.C.G.A. § 15-18-32(g) (West 2023). Nonetheless, Plaintiffs identified several constitutional flaws in the statute and sought judicial relief.

Recognizing that the PAQC was not poised to take immediate action, this Court denied Plaintiffs' motion for an interlocutory injunction. It found that Plaintiffs did not yet present an actual controversy or Plaintiffs' injuries that were "actual [] or imminent," depriving them of both standing and the irreparable injury necessary for an injunction. Exh. A, Affidavit of Valencia Scott ("Scott Aff.") ¶ 3, Att. 1 (Order, *Boston, et al. v. Cowart, et al.,* No. 2023CV383558, Fulton County Sup. Ct. (Sept. 23, 2023)) at p. 3. The Court's analysis was borne out soon after, as the Georgia Supreme Court declined to review the PAQC's proposed rules and code of conduct, paralyzing the agency. *See* Scott Aff. ¶ 4, Att. 2 (Order, Matter No. S24U0190, Ga. Supreme Court Order (Nov 22, 2023)). Because of this decision, there was no opportunity for the Superior Court to consider its further preliminary conclusions, including that

the Statute was a valid exercise of the General Assembly's authority to assign additional duties to district attorneys and to provide for their discipline. Scott Aff. ¶ 3, Att. 1 (*Boston* Order) at 4.

Today, Plaintiffs return to this Court, as the General Assembly and PAQC have cleared the obstacles that stand in the agency's way. The PAQC no longer is required to obtain Supreme Court approval for its rules and code of conduct, and it adopted the same, effective April 1. It has begun collecting complaints and, by all appearances, investigating district attorneys. Given these changes in circumstance, Plaintiffs again seek an injunction preventing the PAQC from directing its disciplinary efforts toward their exercise of prosecutorial discretion or their speech. As described below, there is good reason for the Court to reconsider its earlier assessment that the General Assembly could provide for such discipline. Moreover, alongside the First Amendment claims that the Court did not reach in the prior litigation, the PAQC's actions have given rise to a new claim: its code of conduct was improperly adopted and, as such, cannot serve as a basis for disciplinary action.

Accordingly, an interlocutory injunction is now justiciable for the reasons discussed below. Plaintiffs have standing to bring this case, and they present a substantial likelihood of success on the merits. Plaintiffs experience present injury from the pending threat of discipline that outweighs the general harm of enjoining a statute, and the public interest supports the issuance of an injunction.

II. STATEMENT OF FACTS

A. District Attorneys Must Exercise Prosecutorial Discretion To Fulfill The Duties Communities Elect Them To Perform.

The Georgia Constitution gives voters in each judicial circuit the power to elect a district attorney every four years. The district attorney has the duty "to represent the state in all criminal cases in the superior court of such district attorney's circuit." Ga. Const. art. VI, § VIII, para.

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

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

Beyond the constitutional command, prosecutorial discretion is required by simple practicality. Prosecutors must allocate scarce resources and consider the long-term effects of their prosecutorial decisions. Exh. B, Affidavit of Sherry Boston ("Boston Aff.") ¶ 6; Exh. C, Affidavit of Jared Williams ("Williams Aff.") ¶ 16. Limited resources must be preserved to address the most serious crimes in the community. Exh. D, Affidavit of Jonathan Adams ("Adams Aff.") ¶¶ 22–23. Sometimes, criminal prosecution is not the most effective way to address harmful behavior. Williams Aff. ¶ 13; Boston Aff. ¶ 16. Further, many district attorneys maintain that it is an abuse of office to subject someone to criminal prosecution—and to expend governmental resources—where there is not clearly sufficient evidence to convict at the time of indictment. Boston Aff. ¶ 14; Williams Aff. ¶ 7.

External resource constraints present additional challenges. For example, the Georgia Bureau of Investigation Crime Lab limits its testing capacity, especially for drug cases, and often takes substantial time to return results. Adams Aff. ¶ 23. In recent years, court closures due to the COVID-19 pandemic, combined with existing resource constraints among law-enforcement

partners, have caused or exacerbated case backlogs. Boston Aff. ¶¶ 18–20; Williams Aff. ¶ 9; Adams Aff. ¶ 9. These backlogs deprive victims, criminal defendants, and the community of swift adjudications, while overwhelming prosecutorial capacity. Boston Aff. ¶ 21.

Plaintiffs, and other district attorneys, address such backlogs through the exercise of discretion—guided by principles communicated throughout the district attorney's office. Without such communication, it is impossible to ensure that the dozens of assistant district attorneys across multiple courtrooms (and sometimes courthouses) are aligned. This communication occurs through training and informal communications, as well as through written policies, such as DA Boston's Bill of Values and DA Adams's Sentencing Guidelines. Boston Aff. ¶¶ 13, 23, Att. 2 (Bill of Values); Adams Aff. ¶¶ 25–32, Att. 2 (Sentencing Guidelines). The Georgia Legislature has recognized the value of such written guidelines, specifically requiring them for pretrial diversion programs established pursuant to O.C.G.A § 15-18-80.

B. With O.C.G.A. § 15-18-32, The Georgia Legislature Targets Prosecutorial Discretion, And The PAQC's Procedurally Flawed Rules Do Not Salvage The Statute.

In 2023, the Georgia legislature passed the Statute, which created an unaccountable, politically appointed commission, the PAQC, designed to investigate and discipline prosecutors, including for the exercise of their prosecutorial discretion.

The PAQC has "the power to discipline, remove, and cause involuntary retirement of appointed or elected district attorneys." O.C.G.A. § 15-18-32(a). Any prosecutor removed or involuntarily retired by the PAQC will be disqualified from being appointed or elected as a district attorney for ten years. O.C.G.A. § 15-18-32(p). Voters may not override a PAQC's evaluation of a district attorney's approach to the position. While some decisions of the PAQC are subject to judicial review, O.C.G.A. § 15-18-32(m), there is no higher body to which the Commission reports.

The Statute enumerates certain grounds for discipline that may subject an elected prosecutor to investigation and disciplinary action, up to and including removal and disqualification from office for ten years. O.C.G.A. §§ 15-18-32(h), (p). Alongside policy-neutral grounds such as "mental or physical incapacity" and "willful misconduct while in office," O.C.G.A. §§ 15-18-32(h)(1), (h)(2), the statute adds the new, undefined ground of "[c]onduct prejudicial to the administration of justice which brings the office into disrepute." O.C.G.A. § 15-18-32(h)(6). The statute also provides for discipline based on "willful and persistent failure to carry out" the statutory duties of a district attorney, including a newly added duty for a district attorney to "review every individual case for which probable cause for prosecution exists, and make a prosecutorial decision available under the law based on [individual] facts and circumstances." O.C.G.A. §§ 15-18-6(4); 15-18-32(h)(6).

Although the Statute places no limits on investigations initiated by the PAQC itself, it does set out requirements for the PAQC to investigate outside complaints aimed at a prosecutors' "charging decision, plea offer, opposition to or grant of a continuance, placement of a case on a trial calendar, or recommendation regarding bond." O.C.G.A. § 15-18-32(i)(2). For the PAQC to investigate a complaint related to such a prosecutorial decision, the complainant must provide evidence that "it is plausible that the district attorney . . . made or knowingly authorized the decision based on," *inter alia*: "a stated policy, written or otherwise, which demonstrates that the district attorney . . . categorically refuses to prosecute any offense or offenses of which he or she is required by law to prosecute" or "factors that are completely unrelated to the duties of prosecution." O.C.G.A. § 15-18-32(i)(2).

The Statute instructs the PAQC to "elaborate, define, or provide context" for the statute's grounds for discipline. O.C.G.A. § 15-18-32(c)(3). "[T]he commission, *with the assistance of the*

Prosecuting Attorneys' Council of the State of Georgia, shall promulgate standards of conduct and rules for the commission's governance which will comport with due process." O.C.G.A. § 15-18-32(g) (emphasis added). In the original version of the Statute, the PAQC was to present those rules to the Georgia Supreme Court for review and, if the standards and rules were adequate, approval. O.C.G.A. § 15-18-32(g)

On September 30, 2023, the PAQC submitted rules to the Georgia Supreme Court without assistance or consultation from the Prosecuting Attorneys Council ("PAC"). Exh. E, Affidavit of Elizabeth Dalia Racine ("Racine Aff.") ¶¶ 10–14. PAC promptly began its efforts to assist the PAQC in developing its rules, forming a bipartisan committee of prosecutors and professional staff. Racine Aff. ¶¶ 4–7. This committee regularly met for over four months to research, draft, and provide the PAQC recommendations for the standards and procedures of the commission. Racine Aff. ¶ 7. Meanwhile, the formation of the PAQC itself lagged, reaching its full composition only on August 4. Scott Aff. ¶¶ 5–9, Att. 3–7 (Announcements of PAQC Appointments). The PAQC did not take public steps to hire staff until September 29. Racine Aff. ¶ 13, Att. 7 (September 29, 2023 Cranford Email).

PAC was contacted by the PAQC for the first and only time on September 1. PAQC member District Attorney Stacey Jackson sent a letter inquiring about the status of the PAC committee's work and requesting proposed rules by September 8. Racine Aff. ¶¶ 10, 14, Att. 1 (September 1, 2023 PAQC Email to PAC). PAC replied with a draft of the procedural rules on September 5 and notified DA Jackson that it was further refining proposals for the procedural and substantive rules, which would be provided before October 1. Racine Aff. ¶ 11, Att. 2 (September 5, 2023 PAC Letter to PAQC), Att. 3 (Draft PAC Recommended Rules). DA Jackson did not respond. Racine Aff. ¶ 15.

On September 29, 2023, at 4:42 p.m., PAC Executive Director Peter Skandalakis sent a final version of PAC's recommended rules to the PAQC. Racine Aff. ¶ 12, Att. 4 (September 29, 2023 PAC Letter to PAQC), Att. 5 (Final PAC Recommended Rules), Att. 6 (PAC Recommended Code of Conduct). At 5:27 p.m. on the same day, District Attorney Herb Cranford, chair of the PAQC's investigative panel, sent an email to PAC's district attorney listserv stating that the "Prosecuting Attorneys Qualification Commission met today and approved the attached documents. As determined in that meeting, we have sent to the clerk of the Supreme Court the attached PAQC Letter to Supreme Court, Code of Conduct, and PAQC Rules." Racine Aff. ¶ 13, Att. 7 (September 9, 2023 Cranford Email). DA Cranford did not acknowledge in that email or in any other correspondence that the PAC committee's proposals had been reviewed by the PAQC. There is no sign that the PAQC met in the 45 minutes that had elapsed after the proposed rules were sent. Racine Aff. ¶ 14. Nor had the PAQC offered PAC or the PAC committee any opportunity to review the rules before they were sent to the Supreme Court. Racine Aff. ¶ 14.

The PAQC did not incorporate any portion of the PAC proposals in its final promulgated code of conduct. *Compare* Racine Aff. ¶ 12, Att. 6 (PAC Recommended Code of Conduct) *with* ¶ 13, Att. 10 (Adopted PAQC Code of Conduct). For example, PAC proposed a detailed preamble to the Code of Prosecuting Attorneys' Conduct which contained recommended terminology and rules. Racine Aff. ¶ 12, Att. 6 (PAC Georgia Code of Prosecuting Attorneys' Conduct Preamble). There is no trace of the preamble in the PAQC's code of conduct. Further, the 45 minutes that passed between the PAQC's receipt of PAC's recommendations and submission of the promulgated rules to the Supreme Court was not sufficient to support meaningful review or consideration of the 58 pages provided by PAC for assistance in

promulgating standards of conduct and rules for the commission's governance. After the Supreme Court declined review (discussed in greater detail below), the PAQC still did not take the opportunity to seek the assistance of PAC. Instead, it simply adopted the standards and rules that it had submitted to the Supreme Court, without change. Racine Aff. ¶ 13.

Because the PAQC did not promulgate standards of conduct and rules for the commission's governance with the assistance of PAC, the PAQC failed to adhere to the requirements of O.C.G.A. § 15-18-32.

C. O.C.G.A. § 15-18-32 Interferes With Prosecutorial Discretion And Chills Speech.

The Statute inserts a partisan, unaccountable body over every district attorney, inviting the PAQC to second-guess each prosecutorial decision. Section 15-18-32(i) expressly contemplates such intrusion into prosecutorial decision-making, while the ability for the PAQC to initiate any investigation it chooses expands its unchecked authority. The Governor's recent signing statement on SB 332 made clear that a core intent of this law is to police prosecutors' discretionary decisions and not to address conflicts of interest or sexual harassment. *See* Scott Aff. ¶ 11 (Kemp Statement).

The "stated-policy" provision goes further, chilling district attorneys' speech, both on the campaign trail and in the exercise of their offices. The threat of discipline inhibits Plaintiffs from clearly articulating their prosecutorial philosophies and informing their constituents of how they are fulfilling voters' mandates. Williams Aff. ¶¶ 31–32; Adams Aff. ¶¶ 45–49; Boston Aff. ¶¶ 31–33. DA Williams's experience this year, as he faces a challenger for reelection, is instructive. As he goes from a County Commissioner's community breakfast to a Rotary Club luncheon, DA Williams often finds himself pausing and tempering his responses to community members' questions, seeking to avoid a misunderstood "stated policy." Williams Aff. ¶¶ 26–31. Meanwhile, his opponent speaks freely, setting him at a disadvantage, particularly with those

community members in whom he has not yet built trust. Williams Aff. ¶¶ 30, 34–35. The prospect of removal of an elected DA threatens to disenfranchise the voters who chose that DA for their approach to the job.

Even those Plaintiffs who are not presently on the campaign trail have refrained from speech because of the "stated-policy" provision. Where DA Boston had periodically signed onto statements by groups of prosecutors about prosecutorial approach, she now is more hesitant to put her name to words drafted by another, lest they be taken out of context, and generally refers to previous statements. Boston Aff. ¶ 32. DA Adams avoids public discussion of his skepticism about the legality of traffic enforcement cameras because those statements could be construed as a "stated policy" not to enforce resulting speeding tickets. Adams Aff. ¶ 47–48.

The "stated-policy" provision has also undermined the day-to-day operations of Plaintiffs' offices. For example, DA Adams had previously established a policy on adultery, to communicate to magistrates and community members his understanding that such misdemeanors are unconstitutional and unenforceable. Adams Aff. ¶¶ 35–37, Att. 3 (Memorandum Regarding Adultery Related Charges). Because of the Statute, he rescinded that policy. Adams Aff. ¶ 45. Although he continues to believe that adultery would be found to be an unconstitutional crime, he interprets such a policy to run afoul of the stated-policy provision of O.C.G.A. § 15-18-32. Adams Aff. ¶¶ 39, 43. Both Adams and Williams have declined to consider additional nonenforcement policies that address legal concerns or resource constraints because they understand such policies to be a basis for discipline under the statute. Williams Aff. ¶ 23; Adams Aff. ¶ 48. Without these policies—or similar communications regarding other prioritization decisions—law enforcement and Magistrate Courts spend their limited time and resources on matters that are unlikely to be prosecuted.

D. After The Georgia Supreme Court Initially Blocked PAQC Action, Recent Legislation Reanimated The Body.

On November 22, 2023, the Supreme Court of Georgia refused to review the proposed rules of the commission, stating that it had "grave doubts" about its constitutional authority to do so. Scott Aff. ¶ 4, Att. 2 (Ga. Supreme Court Order) ¶ 1. The Court stated that it is limited to exercising only the judicial power that the Georgia Constitution vests in it, and questioned whether the adoption of standards and rules governing the exercise of non-judicial power by state officers was within that judicial power. The Court contrasted SB 92 with Article VI, § VII of the Georgia Constitution, which vests the Court with express authority over the discipline of judges. Scott Aff. ¶ 4, Att. 2 (Ga. Supreme Court Order). Regulation of the conduct of judges, unlike that of district attorneys, has been affirmatively delineated as both an inherent part of the Court's judicial power and specifically authorized by the Constitution. *See Inquiry Concerning Coomer,* 315 Ga. 841, 854 n.10 (2023).

The Court thus declined to take any action regarding the Commission's draft standards of conduct and rules for the Commission's governance. Without approved rules, the PAQC did not take any investigatory or disciplinary actions.

On March 5, 2024, the General Assembly passed SB 332, which modified the Statute to remove the requirement that the Supreme Court approve the PAQC's rules. Scott Aff. ¶ 12, Att. 9 (Senate Bill 332). The Governor signed SB 332 on March 13, 2024, and it took immediate effect. Scott Aff. ¶ 11. The PAQC adopted its previously proposed rules on March 25, 2024, designating them as effective April 1. Racine Aff. ¶ 17, Att. 14 (March 25, 2024 PAQC Press Release).

The PAQC now stands poised to pursue investigations and disciplinary proceedings of district attorneys, on the basis of their speech about prosecutorial philosophies and of their

decisions to exercise prosecutorial discretion. This Court's intervention is necessary to prevent these violations of law, as detailed below.

III. ARGUMENT AND CITATIONS TO AUTHORITY

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

1) there is a substantial likelihood that the moving party will prevail on the merits of its claims at trial;
2) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted;
3) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; and
4) granting the preliminary injunction will not disserve the public interest.

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

Although Plaintiffs do not need to "prove all four of these factors," *id.*, all are present here, as described below. Plaintiffs identify multiple constitutional and statutory violations; the prospect of discipline by the PAQC is already affecting Plaintiffs' ability to communicate freely with constituents; and the public interest in local democracy and consistent administration of the law all weigh in favor of the issuances of an injunction.

A. Plaintiffs Are Substantially Likely To Prevail On The Merits Of Their Claims.

1. The Legislature's Effort to Discipline District Attorneys for Exercise of Discretion Violates the Separation of Powers.

Plaintiffs are likely to succeed on their claim that the Statute violates the separation of powers. "The legislative, judicial, and executive powers shall forever remain separate and distinct." Ga. Const., art. I, § II, para. III. A statute runs afoul of this separation when it "prevents [another] Branch from accomplishing its constitutionally assigned functions." *Perdue v. Baker*, 277 Ga. 1, 13 (2003) (cleaned up). The Statute does this in two ways: the legislation itself first constitutes an impermissible legislative intrusion into district attorneys' core powers, while it also creates an executive branch agency to supervise judicial officers.[1] Each of these violations would separately render the Statute invalid.

The General Assembly does not have the authority to direct district attorneys' exercise of core prosecutorial authorities, including through the exercise of its powers to impose additional duties and to discipline district attorneys. The Georgia Constitution establishes the position of district attorney with a clearly articulated duty "to represent the state in all criminal cases in the superior court of such district attorney's circuit and in all cases appealed from the superior court and the juvenile courts of that circuit to the Supreme Court and the Court of Appeals." Ga. Const. art. VI, § 8, para. 1. "[T]o represent the state" goes beyond the attorney's appearance before the court and "includes the investigatory stages of matters preparatory to the seeking of an indictment as well as the pendency of the case." *King v. State*, 246 Ga. 386, 389 (1980). This includes the core decision of whether to bring a particular case at all. "From the beginning of our criminal justice system prosecutors have exercised the power of prosecutorial discretion in deciding which defendants to prosecute." *State v. Hanson*, 249 Ga. 739, 742–43 (1982). This

[1] Plaintiffs are mindful that there remains some ambiguity whether district attorneys exercise executive or judicial powers under Georgia law. Even if the PAQC and district attorneys are both executive actors, however, the General Assembly would still lack authority to interfere with district attorneys' core exercise of powers.

suite of discretionary powers is exclusive. An attempt to override or control the district attorney's exercise of these inherent powers constitutes "impermissible interference with the state's right to prosecute." *Kelley*, 298 Ga. at 529.

The legislature may not direct the exercise of this power, any more than it can direct the exercise of the judicial power by, for example, directing the application of a law to a particular set of facts. The Georgia Supreme Court long ago made clear the importance of this rule as applied to intrusion on the courts' authority. "[I[f rights have grown up under even a law of somewhat ambiguous meaning, then the universal rule of our system—indeed of the English system of government, and of other systems which approximate to free government, applies. That rule is, the Courts declare what the law *is*—the Legislature declares what the law *shall be*." *Wilder v. Lumpkin*, 4 Ga. 208, 212 (1848) (emphasis in original); *see also United States v. Klein*, 80 U.S. 128 (1871) (expounding a similar rule for federal courts). The Legislature may not even interfere with judicial officers' exercise of implied, inherent authority. *Grimsley v. Twiggs Cnty*., 249 Ga. 632, 634 (1982) (holding that a statute could not constrain courts' exercise of their inherent authority to fund their operations). Likewise, the district attorney's power is to determine how the law will be brought to bear against a particular individual who has engaged in a particular set of actions.

Yet the Statute intrudes on the district attorney's domain. It specifically contemplates discipline on the basis of a prosecutor's "charging decision, plea offer, opposition to or grant of a continuance, placement of a case on a trial calendar, or recommendation regarding bond." O.C.G.A. § 15-18-32(i)(2). Given the Statute's structure and purpose, such decisions are to be reviewed by the PAQC to determine whether they constitute "willful misconduct," "conduct prejudicial to the administration of justice which brings the office into disrepute," and/or a

"willful and persistent failure to carry out" prosecutorial duties, O.C.G.A. §§ 15-18-32(h)(2), (3), (6). Even *good faith* actions taken in an official capacity may constitute "conduct prejudicial to the administration of justice." *Inquiry Concerning Coomer*, 315 Ga. 841, 859 (2023); *see also* Racine Aff. ¶ 17, Att. 13 (Adopted PAQC Code of Conduct) at 1 (adopting the *Coomer* standard). Accordingly, the Legislature has created the PAQC with the authority to review individual decisions core to the district attorney's representation of the state.

The General Assembly is not granted the power to regulate these core prosecutorial functions, whether in its power to assign additional duties to district attorneys or its general power to discipline district attorneys. As for the provision for district attorneys "to perform such other duties as shall be required by law," Ga. Const. art. VI, § 8, para. 1(d), this clause merely allows for the General Assembly to identify additional responsibilities *apart from* the matters of criminal prosecution. These include, for example, district attorneys' responsibility to collect unpaid claims on request of the State Revenue Commissioner, which has little relationship to the district attorney's core constitutional duty. O.C.G.A. § 15-18-6(10). *Cf. Roberts v. Cuthpert,* 317 Ga. 645, 654 (2023) (discussing assignment of non-judicial duties, such as issuance of marriage and firearm licenses, to probate judges).

The Constitution's statement that "[a]ny district attorney may be disciplined, removed or involuntarily retired as provided by general law," Ga. Const. art. VI, § 8, para. 2, offers no greater support for the General Assembly's intrusion. While this paragraph may authorize some form of disciplinary regime and body, it says nothing to empower the Legislature to meddle with core prosecutorial functions. This provision is more appropriately understood to enable the General Assembly to enact general law to address misconduct unrelated to discretionary acts. *See Bd. of Tax Assessors of Columbus, Ga. v. Tom's Foods, Inc.*, 264 Ga. 309, 311 (1994) (noting

that a "general authority" under the constitution did not incorporate a "specific authority" that raised more complex issues).

By subjecting prosecutorial decisions, including those made in charging and plea-bargaining, O.C.G.A. § 15-18-32(i), to legislative judgment, the Statute intrudes on the sphere of exclusive prosecutorial power that is protected by the Georgia Constitution. In so doing, it prevents district attorneys from "accomplishing [their] constitutionally assigned functions." *See Perdue*, 277 Ga. at 13. This intrusion violates the separation of powers, regardless of whether district attorneys exercise executive or judicial power.

The Statute further violates the separation of powers by empowering an *executive* body to supervise district attorneys' core functions. As an administrative agency, the PAQC is executive. A legislatively created agency's "authority is not the same and, therefore, is distinguishable from the exercising of the 'judicial powers' of this State." *Bentley v. Chastain*, 242 Ga. 348, 350 (1978) (addressing a zoning board). To the extent that the PAQC may once have been more tightly connected to the judiciary, SB 332 cut that tether by removing the Supreme Court's role in approving the body's rules and standards. *See Jud. Council of Georgia v. Brown & Gallo, LLC*, 288 Ga. 294, 298 (2010) (noting Supreme Court oversight as a characteristic of the exercise of judicial power). District attorneys, on the other hand, have regularly been held to have a judicial character when they are making prosecutorial decisions. *See Mosely v. Sentence Review Panel*, 280 Ga. 646, 649–50 (2006) (*Moseley I*) (describing district attorneys' role as judicial).

Administrative agencies may not exercise control of judicial powers, including those of the district attorney. For this reason, the Supreme Court recognized that the Judicial Council of Georgia (with its ultimate accountability to the Court) was a judicial actor. *Judicial Council of Georgia*, 288 Ga. at 297–98. *Cf. Exec. Limousine Transportation, Inc. v. Curry*, 361 Ga. App.

626, 629 (2021) (noting the limitations on judicial deference to agency interpretations of statutes, to preserve judicial power of interpreting statutes.) It makes no difference that some members of the PAQC are district attorneys themselves. *See Sentence Rev. Panel v. Moseley (Moseley II)*, 284 Ga. 128, 131 (2008) (holding that the legislature lacked constitutional authority to create a new sentencing-review court, regardless of the fact that all members were duly empowered superior-court judges). An administrative agency may not properly exercise non-judicial power over judicial officers.

For both of these reasons, the Statute violates the Georgia Constitution's provisions for the separation of powers and is invalid.

2. O.C.G.A. 15-18-32(i)(2)(E) Is an Unconstitutional Infringement on District Attorneys' Speech Rights.

Plaintiffs are likely to succeed on their claim that the free speech clauses of the United States and Georgia Constitutions cannot permit O.C.G.A. § 15-18-32(i)(2)(E)'s provision for discipline based in part on "a stated policy, written or otherwise, which demonstrates that the district attorney . . . categorically refuses to prosecute any offense or offenses of which he or she is required by law to prosecute."[2] The Statute constitutes a content- and viewpoint-based regulation of protected speech, which is not narrowly tailored to advance a compelling state interest.[3] To the extent that the statute permissibly regulates some speech, it is nonetheless unconstitutionally vague and overbroad.

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[2] The PAQC's rules reproduce this language verbatim. *See* Racine Aff. ¶ 17, Att. 13 (Adopted PAQC Code of Conduct), Rule 1.1(c)(5).

[3] The fact that the statute provides for discipline only when the speech act is paired with a prosecutorial decision does not immunize its regulation of speech from constitutional infirmity. Where a statute penalizes conduct where the conduct is preceded by speech (and not otherwise), Georgia courts consistently recognize that the statute regulates the prerequisite speech. *See, e.g., West v. State*, 300 Ga. 39, 44 (2016) (speech analysis of prohibition on remaining on school premises after certain speech acts); *Final Exit Network, Inc. v. State*, 290 Ga. 508, 509 (2012)

The "stated-policy" subsection threatens discipline for prosecutors' speech to the public. "The Supreme Court has repeatedly emphasized, as a general matter, that 'First Amendment protection is at its zenith' when applied to 'core political speech.'" *Warren v. DeSantis*, 90 F.4th 1115, 1143 (11th Cir. 2024) (Newsom, J., concurring) (quoting *Meyer v. Grant*, 486 U.S. 414, 420, 425 (1988)). Accordingly, "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood v. Georgia*, 370 U.S. 375, 395 (1962) (holding that a Georgia sheriff may not be penalized for his speech); *see also Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1261 (2022) ("The First Amendment surely promises an elected representative . . . the right to speak freely on questions of government policy."). In fact, elected-official speech promotes democratic principles, as it "enhance[s] the accountability of government officials to the people whom they represent, and assist[s] the voters in predicting the effect of their vote." *Brown v. Hartlage*, 456 U.S. 45, 55–56 (1982).

"The manifest function of the First Amendment in a representative government" is to provide for public debate and ensure that voters understand the positions of their representatives. *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966). As elected officials, Plaintiffs hold the "right to speak freely on questions of government policy," *Wilson,* 142 S. Ct. at 1261, and "to enter the field of political controversy," *Wood,* 370 U.S. at 394. Their statements on matters of policy reflect the concerns of those who voted them into office.[4]

(speech analysis of statute criminalizing assistance in suicide by an individual who "publicly advertises" suicide assistance).

[4] The role of district attorneys as public representatives defining the governmental position is why the government-speech doctrines do not apply here. This is the reason "*Garcetti*'s rationale makes little sense for elected officials." *Warren*, 90 F.4th at 1129 (referring to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which addresses regulation of government employees' speech by the elected or appointed officials who supervise them).

District attorneys' ability to speak freely is particularly urgent in election years such as this one. DA Williams regularly speaks to members of his community who seek to understand his approach to the position. Williams Aff. ¶ 26. He faces an electoral challenger who loudly describes her own perspectives on the exercise of prosecutorial discretion. Williams Aff. ¶ 25. However, because of the threat of PAQC discipline, DA Williams is not able to answer so freely. Williams Aff. ¶¶ 31, 36. These limitations also may impact his ability to connect with voters who do not know him or his record well and may cause a misperception of his approach to being a prosecutor.

i. The "Stated-Policy" Subsection is a Content- and Viewpoint-Based Regulation of Protected Speech.

The "stated-policy" provision explicitly regulates speech on the basis of its content. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Here, the Statute subjects a prosecutor to discipline based on the topic of speech, not its location, volume, or another content-neutral feature. Such regulation "slips from the neutrality of time, place, and circumstance into a concern about content." *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980) (internal quotation marks and alteration omitted).

In fact, the regulation in the stated-policy provision goes beyond content-based regulation of speech to disadvantage one perspective, relative to another. The PAQC will investigate and seek potential discipline for a stated policy that "demonstrates that the district attorney . . . categorically refuses to prosecute," but not a complaint which reflects the opposite perspective—such as one that promotes a zero-tolerance approach to a certain offense, without regard to the underlying circumstances. For example, DAs Boston and Williams have joined other elected

prosecutors, in the wake of the *Dobbs* decision overruling *Roe v. Wade*, to state, "we decline to use our offices' resources to criminalize reproductive health decisions and commit to exercise our well settled discretion and refrain from prosecuting those who seek, provide, or support abortions." Boston Aff. ¶ 28; Scott Aff. ¶ 13, Att. 10 (FJP Post-Dobbs Abortion Joint Statement); *cf. Warren*, 90 F.4th at 1134 (finding that another prosecutor's signing of this statement was protected by the First Amendment). While Plaintiffs fear that this statement may open themselves to future discipline by the PAQC, an opposite statement—proclaiming an intent to prosecute abortion providers—would not qualify for discipline.

Courts are particularly wary of speech restrictions when "the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 785–86 (1978); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (characterizing such viewpoint discrimination as "an egregious form of content discrimination"); *see also Warren,* 90 F.4th at 1137. (citations omitted) ("[I]f a government actor's controlling motivation behind an adverse action is gaining political benefit from punishing protected activity, the government actor flouts the First Amendment"). In fact, viewpoint discrimination of even unprotected speech, such as obscenity or fighting words, is subject to scrutiny. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 388–89 (1992) (striking down a restriction on bias-motivated speech limited only to "fighting words" as viewpoint-discriminatory and discussing related hypotheticals).

"In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011). For a content- or viewpoint-based regulation of speech to survive review, it must satisfy strict

scrutiny: the state "must establish that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Union City Bd. of Zoning Appeals v. Just. Outdoor Displays, Inc*., 266 Ga. 393, 401 (1996) (cleaned up). The "stated-policy" provision does not satisfy this standard.

Defendants cannot articulate a compelling interest in limiting public understanding of prosecutorial philosophies. In fact, elected-official speech promotes democratic principles, as it "enhance[s] the accountability of government officials to the people whom they represent, and assist[s] the voters in predicting the effect of their vote." *Brown v. Hartlage,* 456 U.S. 45, 55–56 (1982). Conversely, disciplining elected officials for transparent communications on political issues erodes the democratic process and undermines the ability of the public to make an informed decision.

Nor can the legislature's purported interest in a platonic ideal of complete enforcement of the criminal code justify the speech restriction. First, as discussed above with respect to the separation of powers, such a direction of district attorneys' exercise of discretion is beyond the legislature's ken. The limited resources for prosecution will always require difficult choices, for which each district attorney will take a different approach. The Statute can thus be contrasted with one of the few content-based restrictions to survive strict scrutiny, Florida's prohibition on judicial fundraising. *See Williams-Yulee v. Florida Bar,* 575 U.S. 435, 445 (2015). While Florida passed that content-based restriction to "maintain[] the public's confidence in an impartial judiciary," there is no similar expectation of neutrality for the prosecutor. Rather, a prosecutor "represents the people of the state" and bears "responsibilities as a public prosecutor to make decisions in the public's interest." *Wooten,* 273 Ga. At 531. There is no compelling interest in preventing voters from understanding how those decisions will be made.

ii. To the Extent that the "Stated Policy" Subsection Addresses Unprotected Speech, it is Overbroad and Vague.

Even assuming that certain district-attorney communications, such as explicit written directives to staff, are not entitled to speech protection, subsection (i)(2)(E) is still fatally overbroad and vague.

In determining whether a statute is overbroad, "a court's first task is to ascertain whether the enactment reaches a substantial amount of constitutionally protected conduct." *Boos v. Barry*, 485 U.S. 312, 329 (1988). If "a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep," it is overbroad and therefore unenforceable. *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (cleaned up). However, a statute will not be deemed facially invalid "unless it is not readily subject to a narrowing construction . . . and its deterrent effect on legitimate expression is both real and substantial." *Final Exit Network, Inc. v. State,* 290 Ga. 508, 511 (2012).

Here, the statute subjects a district attorney to discipline based on a "stated policy, written or otherwise, which demonstrates" a district attorney's "categorical refusal 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). The legislature does not penalize only a policy to refuse to prosecute, but the broader category of "stated policies" which *demonstrate* a refusal. While the standard definition of a policy is "a standard course of action which is established by [a government office]," Black's Law Dictionary (11th ed. 2019), here, the course of action is the "refusal to prosecute." A statement that merely *demonstrates* a refusal is one step removed from a statement that itself proclaims an actual policy of refusal. As such, the statute prohibits any statement of prosecutorial philosophy, including core political speech, that the PAQC could choose to interpret as demonstrating a categorical refusal to prosecute particular offenses.

The "stated-policy" subsection "is not readily subject to a narrowing construction and its deterrent effect on legitimate expression is both real and substantial." *Final Exit Network*, 290 Ga. at 511. Appropriately narrowing the statute would require deleting the word "demonstrate" or otherwise crafting clearer text, but courts "will not rewrite a law 'to conform it to constitutional requirements.'" *Id.* (quoting *Virginia v. American Booksellers Assn*, 484 U.S. 383, 397 (1988)). Moreover, the statute is deterring not only "legitimate expression," but core political speech in an election year. Accordingly, even if some part of the statute's scope may address unprotected speech, it reaches too far and is facially invalid.

These challenges in identifying which speech would "demonstrate a refusal" also illustrate the vagueness of the Statute. The vagueness doctrine can render a statute unenforceable "for either of two independent reasons. First, if [a statute] fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). "[S]tandards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963). A vague "content-based regulation . . . raise[s] special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. A.C.L.U.*, 521 U.S. 844, 845 (1997).

The stated-policy provision meets both definitions of vagueness. First, there is little clarity regarding what speech will be a "stated policy," how a "policy . . . demonstrates" a refusal to prosecute crimes, and which crimes a prosecutor is "required by law to prosecute," or what counts as "prosecuting" a crime. Even the Plaintiffs, who are accustomed to interpreting laws, have chilled their speech in response to this law by refraining from frank discussions on the campaign trail, Williams Aff. ¶ 31, and rescinding a policy that addressed an unenforceable

crime, Adams Aff. ¶ 45. Further, the Statute's broad terms leave the PAQC with latitude to decide which speech to investigate and discipline and which to ignore. Such ambiguity cultivates impermissible arbitrariness.[5]

As an unjustified content- and viewpoint-based regulation of speech that reaches beyond any plainly legitimate scope, the stated-policy provision is likely to be found facially unconstitutional.

3. <u>The PAQC's Code of Conduct is Invalidly Promulgated.</u>

When the legislature creates a body, it may act only pursuant to the legislation that creates it and must follow the mandates of that legislation. Because the PAQC ignored the statutory mandate to obtain the assistance of PAC, its code of conduct for prosecutors is invalid. Moreover, to the extent that the PAQC is located outside the judiciary, the requirements of the Administrative Procedure Act would also apply; the PAQC followed none of them. Accordingly, the PAQC may not properly take investigatory or disciplinary action pursuant to the invalid code of conduct.

i. The PAQC Failed to Obtain Assistance of PAC.

The Statute provides that the PAQC "*shall* promulgate standards of conduct and rules for the commission's governance" "with the assistance of the Prosecuting Attorneys' Council of the State of Georgia." O.C.G.A. 15-18-32(g) (emphasis added). PAC was the sensible partner for development of PAQC rules, as it is the formal center of prosecution across the state. Racine Aff. ¶¶ 5–6. PAC bears the responsibility to train prosecutors, keep them up to date with legal

[5] The PAQC did not correct these vagueness problems with its code of conduct, despite clear examples from the PAC proposals on how to do so. For example, the PAC recommendations specifically exclude political speech from the definition of a "stated policy." *See* Racine Aff. ¶ 12, Att. 6 (PAC Recommended Code of Conduct) at 10.

developments, help them manage finances and obtain state funds, and generally assist prosecution throughout the state. O.C.G.A. §§ 15-18-40, *et seq.; see also* Racine Aff. ¶ 9.

PAC sought to fulfill its half of the obligation, investing considerable effort to advise the PAQC. *See* Racine Aff. ¶¶ 7–9, 11–12. The PAQC's sole engagement with PAC was a single, apparently pro forma, inquiry for suggestions, at which point the PAC committee was still developing a consensus recommendation on the code of conduct. Racine Aff. ¶ 10. Instead of incorporating the PAC committee's forthcoming input, the PAQC effectively refused these efforts to assist, finalizing its rules (pending Supreme Court approval) hours before PAC was expected to provide its own drafts and suggestions. Racine Aff. ¶ 13. The PAQC continued to avoid engagement with PAC even after the Supreme Court withheld its approval. It made no further efforts to engage while legislation was pending to allow it to adopt its own rules or after SB 332 passed, Racine Aff. ¶ 15, and it made no changes to its rules or code of conduct based on PAC's proposals.

There is no definition of "with the assistance of PAC" that PAQC's minimal engagement could satisfy. Notably, where the General Assembly has otherwise instructed administrative bodies to obtain assistance, those bodies have cooperated to a much greater degree. For example, the Department of Community Affairs administers the Georgia Broadband Ready Community Site Designation Program "*with the assistance of* the Department of Economic Development." O.C.G.A. § 50-40-61(emphasis added). As a symbol of the close working relationship this statutory mandate created, applicants to the program must notify both agencies. Scott Aff. ¶ 13, Att. 11 (Georgia Broadband Office: Broadband Application). Likewise, the Qualified Long-term Care Partnership Program is "administered by the Department of Community Health, *with the assistance of* the Commissioner [of Insurance] and the Department of Human Services."

O.C.G.A. § 49-4-162(a) (emphasis added). In practice, the Commissioner actively regulates long-term care insurance products offered through the program, while the Department of Human Services ensures that the program does not perversely penalize Medicaid recipients. *See* Scott Aff. ¶ 14, Att. 12 (Ga. Medicaid Policy Manual, Policy 2348). The "assisting" agencies are substantially involved in the day-to-day administration of the program, alongside the Department of Community Health. In contrast, despite PAC's best efforts, PAQC refused to accept anything approaching this degree of assistance.

The PAQC's failure to comply with its obligation to obtain the assistance of PAC cannot be salvaged by the substantial compliance doctrine. While "substantial compliance with any statutory requirement, especially on the part of public officers, shall be deemed and held sufficient," O.C.G.A. § 1-3-1(c), a "plain and unambiguous" requirement will not be "thwarted by invocation of the rule of 'substantial compliance,'" *Resnik v. Pittman*, 203 Ga. App. 835, 836 (1992). Here, the requirement to obtain the assistance of PAC was plain. Nor can the PAQC's feeble single contact with PAC be considered "substantial compliance." Not only did the PAQC entirely ignore PAC's intent to provide further commentary, the Commission also left PAC in the dark about its own drafting and plans.

ii. If the PAQC Is an Executive Agency, It Failed to Comply with the APA's Procedural Requirements.

The deficiencies of the PAQC's promulgation of the code of conduct are even starker if it is an agency outside the judiciary. In that instance, the PAQC would fall within the definition of "agency" for the Georgia Administrative Procedure Act. O.C.G.A. § 15-13-2(1) (defining "agency" broadly, albeit with an exception for "the judiciary"). Unlike other agencies, the General Assembly did not explicitly designate the PAQC as "an agency within the judicial branch." *Compare* O.C.G.A. § 15-18-32 *with* O.C.G.A. § 15-14-23 (so defining the Judicial

Council of Georgia); *cf. Judicial Council of Ga. v. Brown & Gallo, LLC*, 288 Ga. 294 (2010) (holding that the Judicial Council is within the "judiciary" for APA purposes). Moreover, as the Supreme Court expressed in its decision not to approve the PAQC rules, there are "grave doubts" regarding the PAQC's nature as a judicial agency. *See* Scott Aff. ¶ 4, Att. 2 (Ga. Supreme Ct. Order) at 6. Accordingly, the PAQC has less basis to assert its location in the judiciary and its nature as a non-APA agency.

When an APA agency promulgates a rule, it must follow a specific process. It must give at least 30 days' notice of the intended action. O.C.G.A. § 50-30-4(a)(1). It must afford a reasonable opportunity for interested persons to submit data, views, or arguments. O.C.G.A. § 50-30-4(a)(1). It must provide notice to the legislative counsel. O.C.G.A. § 50-30-4(e). The PAQC performed none of these steps in adopting its code of conduct or rules. Racine Aff. ¶ 15–18.

iii. The PAQC's Code of Conduct is Unreasonably Vague.

The PAQC's code of conduct is unreasonable, and therefore invalid. "An agency rule might be reasonable but unauthorized by statute, or authorized by statute but unreasonable. In either event, it could not stand." *Georgia Real Est. Comm'n v. Accelerated Courses in Real Est., Inc.*, 234 Ga. 30, 32 (1975). Here, the code of conduct is unreasonable in part because it fails to provide a reasonable opportunity to understand what is prohibited and is so broad that it authorizes and encourages seriously discriminatory enforcement. Due to its vagueness, the code of conduct also runs afoul of the statutory requirement that it "comport with due process." O.C.G.A. § 15-18-32(g).

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *See Roemhild v. State*, 251 Ga. 569, 308 S.E.2d 154 (1983) (statute was unconstitutionally vague in that it failed to provide fair notice to person of ordinary

intelligence and to establish minimum guidelines to local officials as to what constituted "private school"); *Hall v. State*, 268 Ga. 89, 485 S.E.2d 755 (1997) ("reckless conduct" statute, prohibiting causing of bodily harm by "consciously disregarding a substantial or unjustifiable risk," was unconstitutionally vague as applied and failed to provide explicit standards for those who would apply it, such that it was susceptible to arbitrary and selective enforcement).

The PAQC's code of conduct fails to provide district attorneys with clear guidelines that would allow them to confidently avoid conduct prejudicial to the administration of justice as defined by the PAQC. The PAQC code of conduct defines "conduct prejudicial to the administration of justice which brings the office into disrepute" as "inappropriate actions, which are harmful to the public's esteem of the criminal justice system or the office of prosecuting attorney, taken in good faith by the prosecuting attorney acting in their capacity as a prosecutor or taken in bad faith by the prosecuting attorney acting outside their capacity as a prosecutor." Racine Aff. ¶ 17, Att. 13 (Adopted PAQC Code of Conduct). The PAQC's rules and code of conduct do not define "inappropriate actions," nor do they provide any metrics for determining when an action is "harmful to the public's esteem" such that it brings the office into "disrepute."

Instead, Rule 1.3(c) provides only that Prosecuting Attorneys "shall not act in a manner, including but not limited to violations of laws, rules, or regulations applicable to the prosecuting attorney and the office that demonstrates a disrespect for the rule of law." Racine Aff. ¶ 17, Att. 13 (Adopted PAQC Code of Conduct). While the PAQC commentary provides additional context for commissions and convictions of crimes of moral turpitude, it does not provide an understanding of what non-criminal acts would demonstrate a "disrespect for the rule of law."

The code of conduct commentary provided by the PAQC on this rule offers no additional insight as to the scope of their disciplinary authority. Instead, the commentary simply references

the statutory provision and makes clear that discretionary decisions can be considered in a complaint. *See* Racine Aff. ¶ 17, Att. 13 (Adopted PAQC Code of Conduct) (stating "O.C.G.A. § 15-18-32 (i) (2) limits situations when the Commission may not entertain a complaint for discipline. This is due to the wide discretion prosecutors have in making prosecutorial decisions on individual cases. However, O.C.G.A. § 15-18-32 (i)(2)(A)–(E) lays out specific types of misconduct that fall under the authority of this Commission").

In contrast, commentary provided in the PAC recommendations provided practical guidance on what would not constitute a "categorical refusal to prosecute" and requirements of review for complaints involving prosecutorial decision-making, including consideration of the full record including results of any hearings, trials, and appeals that have taken place. *Compare* Racine Aff. ¶ 17, Att. 13 (Adopted PAQC Code of Conduct) *with* Racine Aff. ¶ 12, Att. 6 (PAC Recommended Code of Conduct).

Finally, the PAQC failed to consider important factors of prosecutorial decision-making and relied instead on the sole factor of indictability. Under Rule 2.1, the PAQC points to O.C.G.A. § 15-18-6, which states, in part, that it is the duty of the prosecutor to "draw up all indictments or presentments, when requested by the grand jury, and to prosecute all indictable offenses." In their subsequent commentary, the PAQC states that "[d]ifferent statutes prescribe the statutory duty of District Attorneys and Solicitors General. Because these duties are described in those statutes and because O.C.G.A. § 15-18-32 (h) (3) and (4) specifically reference those statutes, there is no reason to deviate from the language of those statutes." Racine Aff. ¶ 17, Att. 13 (Adopted PAQC Code of Conduct). This ignores important aspects of the problem. *Compare id. with* Racine Aff. ¶ 12, Att. 6 (PAC Recommended Code of Conduct) (outlining 16 different factors commonly considered in the exercise of prosecutorial discretion).

These deficiencies highlight the unreasonably vague nature of the PAQC code of conduct, as well as the ways that compliance with the statutory mandate to obtain the assistance of PAC would have reduced the probability of unreasonable rules. There is a sufficient likelihood of success on this claim to enjoin the PAQC from acting pursuant to an unreasonable code of conduct that was promulgated without the statutorily mandated assistance of PAC and in violation of the APA.

B. Plaintiffs Demonstrate Irreparable Injury That Supports Standing And An Injunction.

Because Plaintiffs experience present and imminent harms from the Statute and the PAQC's invalidly promulgated rules, they have standing to pursue this lawsuit. To challenge the constitutionality of a statute, Georgia courts require a showing of "an individualized injury to the Plaintiff," analogous to the federal injury requirement for Article III standing. *Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners*, 315 Ga. 39, 54 n.13 (2022).[6] This standard can be met with a showing that "the plaintiff was injured in some way by the operation of the statute or that the statute has an adverse impact on the plaintiff's rights." *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 273 (2008).[7]

Moreover, there is a "substantial threat" that Plaintiffs will "suffer irreparable injury" absent preliminary relief. *SRB Inv. Services*, 289 Ga. at 5. While not dispositive, this portion of the analysis is "the most important factor … when deciding whether to grant a request for injunctive relief," *Bishop v. Patton*, 288 Ga. 600, 604–05 (2011), because the purpose of the

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[6] The Georgia Supreme Court recently explained that it is not clear that this requirement is of a constitutional nature. *See Sons of Confederate Veterans*, 315 Ga. at 54 n.13. As such, Plaintiffs do not concede that it applies to their parallel litigation against the State of Georgia pursuant to Ga. Const. art. I, § 2, para. V(b).

[7] Likewise, a plaintiff has standing under the Georgia Administrative Procedure Act to seek a declaration that a rule is invalid if the rule "interferes with or impairs the legal rights" of that party. O.C.G.A. § 50-13-10(a).

injunction is to maintain the status quo pending resolution of the case. Here, Plaintiffs seek to maintain the status quo *ex ante*: before passage of the law.

First, the Georgia Supreme Court has recognized that district attorneys have not only standing to challenge violations of the separation of powers "which allegedly interfere[] with [their] authority," but an "obligation" to do so. *Moseley I*, 280 Ga. at 648. This obligation stems from the district attorney's role as "the state's counsel." The representation of the state carries with it "additional professional responsibilities as a public prosecutor to make decisions in the public's interest," including protecting the structures of the criminal justice system and prerogatives of his office. *Id.* (citing *State v. Wooten*, 273 Ga. 529, 531 (2001). Plaintiffs similarly have the obligation "to zealously protect [the judicial branch's] function from invasion of the [other branches]" through O.C.G.A. § 15-18-32. *Id.* (citing *McCutcheon v. Smith*, 199 Ga. 685, 691 (1945)). Moreover, this intrusion on Plaintiffs' authority as district attorneys justifies an injunction as it is itself irreparable.

Second, the injury to Plaintiffs' speech rights is sufficient for standing and is an irreparable injury justifying injunction. Plaintiffs may show standing on a First Amendment claim because they "definitely and seriously want[] to pursue a specific course of action which they [know is] at least arguably forbidden by the pertinent law." *Hallandale Pro. Fire Fighters Loc. 2238 v. City of Hallandale*, 922 F.2d 756, 762 (11th Cir. 1991). They have changed how they speak out of fear of discipline under the stated-policy provision of § 15-18-32(i)(2)(E). Where the alleged danger of legislation is one of self-censorship, harm can be realized even without an actual prosecution." *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1305 (11th Cir. 2017) (cleaned up).

Amid a contested election, DA Williams changed his campaign materials to avoid forward-looking statements that could be construed as policies, and he hesitates to describe his prosecutorial philosophy in detail at community meetings or in the media. Williams Aff. ¶¶ 31–32. He is campaigning with one hand tied behind his back, while his opponent has no such constraints. Williams Aff. ¶ 36; DA Boston likewise has hesitated to sign onto statements with other prosecutors and will frequently point to her past statements, rather than provide a new clarification or description of her approach to prosecution. Boston Aff. ¶¶ 28, 31–32. And even as DA Adams continues to believe that nearly any adultery prosecution would be unwise—and likely unconstitutional—he has rescinded his memo to the public articulating a strict policy not to pursue such an offense. Adams Aff. ¶¶ 37–39, 45. Courts have regularly found pre-enforcement standing where "[a]ll that remained between the plaintiff and the impending harm was the defendant's discretionary decision—which could be changed—to withhold prosecution." *Hallandale Pro. Fire Fighters Loc. 2238*, 922 F.2d at 762.

In the First Amendment context, the prerequisites for standing and injunctive relief are less burdensome. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Great Am. Dream, Inc., v. DeKalb Cnty*, 290 Ga. 749, 752 (2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also, e.g., Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020) (concluding that enforcing statutes that penalize protected speech constitutes a per se irreparable injury). In fact, where a colorable free speech claim is proffered, irreparable harm is *presumed*. *Mama Bears of Forsyth Cnty. v. McCall*, 642 F. Supp. 3d 1338, 1359 (N.D. Ga. 2022); *see also FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017) ("[A]n ongoing violation of the First Amendment constitutes an irreparable injury."); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d

1261, 1272 (11th Cir. 2006) (noting that it is "well established" that the loss of First Amendment freedoms, even if temporary, embodies irreparable harm).

Third, the specter of enforcement by the PAQC as well as its review of individual charging decisions has caused Plaintiffs to change their operations and avoid certain policy options. DA Adams rescinded his policy on adultery, inhibiting his communication with magistrates and the public regarding his perception of the constitutional viability of that crime. Adams Aff. ¶¶ 45–46. Both DA Adams and DA Williams have refrained from pursuing additional policies that would run afoul of the stated-policy provision. Williams Aff. ¶¶ 20–23; Adams Aff. ¶ 48. When government offices or entities are forced to take steps to comply with changes brought on by a challenged program or action, those additional requirements or steps are irreparable harm. *See, e.g.*, *City of Waycross v. Pierce Cnty. Bd. of Commissioners*, 300 Ga. 109, 112 (Ga. App. Ct. 2016) (county entitled to injunction because of obligation to provide water to residents of de-annexed area).

Unlike Plaintiffs' prior litigation, there is no remaining contingency before the PAQC can take action. The PAQC's rules are in effect, and it is accepting complaints from the public. Racine Aff. ¶ 17, Att. 14 (March 25, 2024 PAQC Press Release). Moreover, Plaintiffs' choices to censor their speech are justified by the PAQC's specific decision not to incorporate PAC's suggested language to insulate campaign speech and other discussion of prosecutorial philosophy from discipline as a "stated policy." *Compare* Racine Aff. ¶ 17, Att. 13 (Adopted PAQC Code of Conduct) *with* Racine Aff. ¶ 12, Att. 6 (PAC Recommended Code of Conduct).

C. <u>**The Other Factors Weigh in Favor of a Preliminary Injunction.**</u>

Plaintiffs satisfy additional requirements for an interlocutory injunction, as public interest would be served by an injunction and Plaintiffs' injuries from the imposition of an unlawful body outweigh the State's injuries from maintaining the status quo.

First, the Statute's impermissible restrictions on Plaintiffs' speech cause harm not only to them as speakers, but also to the public interest by stifling protected and core political speech. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("the Constitution protects the right to receive information and ideas"). Whether as voters going to the polls or community members seeking to advocate for their preferred prosecutorial approach, the Statute deprives them of clarity regarding their elected prosecutors' positions.

Second, while the State surely suffers injury from the injunction of a valid law, *see Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018), that injury does not extend to a fundamentally flawed law. Presumptions of good faith or constitutionality have little bearing, in light of the clear constitutional deficiencies in this law. Plaintiffs' claims do not turn on the good faith of the members of the PAQC. So long as the PAQC is empowered to second-guess prosecutorial decisions and punish district attorneys' speech, it is fundamentally flawed even if it were composed of angels. Accordingly, the harm to the State from refraining from acting pursuant to this unconstitutional law is far outweighed by the injuries to Plaintiffs.

Plaintiffs are officers with powers created by the Georgia Constitution. The Statute curtails this power by restricting their exercise of authority over case decisions. Plaintiffs are now subject to direct review and investigation by the PAQC for individual charging decisions, which is a clear abridgment of their powers under law. Plaintiffs simply seek to maintain the status quo that existed before the Statute was enacted while this lawsuit is pending. Moreover, given the public nature of the PAQC's actions, Plaintiffs would suffer reputational and other harms were they to be investigated by the Commission.

In contrast, if the statute is preliminarily enjoined, the state will experience minimal harm, as there are existing means to address prosecutorial misconduct. *See* Boston Aff. X;

O.C.G.A. § 21-4-1; O.C.G.A. § 15-18-26. Most importantly, district attorneys face the judgment of the voters every four years. Beyond democratic accountability, the Georgia Rules of Professional Conduct impose significant duties: a duty of candor to the courts under Rule 3.3, fair treatment of opposing parties under Rule 3.4, and special responsibilities of the prosecutor under Rule 3.8. District attorneys who engage in criminal conduct are also subject to prosecution. *See In re Madison*, 283 Ga. 482, 482 (2008) (district attorney sentenced to six years imprisonment following a guilty plea of two felony theft charges, one felony count of violation of oath of office, four felony counts of false statements and writings, and one felony count of conspiracy to defraud a political subdivision). A district attorney who is convicted of a felony is also subject to loss of licensure. Rule 8.4(a)(2). The State Bar, in conjunction with the Supreme Court of Georgia, has executed this disciplinary authority on district attorneys. *See, e.g., Matter of Jones*, 313 Ga. 571, 571 (2022) (executing a voluntary surrender of license of a district attorney for a violation of Rule 8.4(a)(2) following a felony conviction of oath by a public officer; *In re Ellis*, 278 Ga. 900, 900 (2005) (same following felony conviction for giving false statements).

Between elections, district attorneys who commit malfeasance or misconduct, violate the oath of office, fail to perform their ministerial duties, or misappropriate public funds are also subject to recall. *See* O.C.G.A. § 21-4-1, *et. seq.* If a district attorney accepts something of value in exchange for a prosecutorial decision, they may be subject to disqualification, criminal prosecution, and subsequently to impeachment. O.C.G.A. § 15-18-26. In sum, an injunction is necessary to ensure Plaintiffs' rights, authority, and reputations are protected during the pendency of this action.

IV. CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated above, Plaintiffs respectfully request that this court issue an interlocutory injunction preventing the PAQC from taking any investigatory or disciplinary action—entered against the PAQC on the Administrative Procedure Act claim, and the individual-capacity defendants as to the remaining claims.

Respectfully submitted this 16th day of April, 2024.

/s/ David N. Dreyer
David N. Dreyer
Georgia Bar No. 141322
Quinton G. Washington
Georgia Bar No. 159067
WASHINGTON DREYER & ASSOCIATES, LLC
david@washingtondreyer.com
quinton@washingtondreyer.com
270 Peachtree St. NW, Suite 1040
Atlanta, GA 30306
(404) 437-6641

/s/ Joshua A. Rosenthal
Joshua A. Rosenthal*
Jonathan B. Miller*
Jordan L. Phillips*
PUBLIC RIGHTS PROJECT
josh@publicrightsproject.org
jon@publicrightsproject.org
jordan@publicrightsproject.org
490 43rd Street, Unit #115
Oakland, CA 94609
(510) 738-6788

/s/Bruce P. Brown
Bruce P. Brown
BRUCE P. BROWN LAW LLC
Georgia Bar No. 064460
bbrown@brucepbrownlaw.com
1123 Zonolite Road, Suite 6
Atlanta, GA 30306
(404) 386-6856

**Pro hac vice* application forthcoming