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

BRIEF OF AMICUS CURIAE INSTITUTE FOR INNOVATION IN PROSECUTION AT JOHN JAY COLLEGE

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INTEREST OF AMICUS CURIAE

There are more than 2,300 elected prosecutors in the United States, managing offices ranging from one to one thousand attorneys. As elected officials with broad discretion, prosecutors represent "the people" of their jurisdictions and are entrusted to make decisions that significantly impact their communities.

The Institute for Innovation in Prosecution at John Jay College (the "IIP") is a nonpartisan thinktank that brings together prosecutors, policy experts, and the communities they serve to promote data-driven strategies, cutting-edge scholarship, and innovative thinking related to prosecution and criminal justice issues. Working closely with prosecutors across the country—including in Georgia—the IIP promotes policies that advance community-centered standards regarding safety, fairness, and dignity. As one of the nation's leading prosecutorial organizations, the IIP is deeply invested in ensuring that prosecutors have the freedom to exercise their independence and discretion in service of their communities.

The IIP respectfully submits this amicus brief in support of plaintiffs' motion for an interlocutory injunction, to provide the Court with specific information regarding the unique role that prosecutors play in American systems of justice and the damage that will result if Senate Bill 92, 2023 Ga. Laws 349 ("SB 92"), is not enjoined. Those harms include interfering with prosecutors' discretionary decisions based on their good faith assessments of how best to protect and to serve the interests of justice in their communities, chilling communications to the public regarding their criminal enforcement priorities and policies, hampering their ability to implement reforms that are responsive to their particular communities' needs, and undermining voters' expectations and mandates regarding how justice should be administered.[1]

[1] This brief was principally authored by the IIP, along with Proskauer Rose LLP, counsel for the IIP. No party's counsel authored this brief in whole or in part. Neither any party nor any

INTRODUCTION

As "administrator[s] of justice," legal systems in the United States endow prosecutors with unique powers and broad discretion.[2] That is because the prosecutor's primary duty is "not merely to convict," but "to seek justice within the bounds of the law."[3] To fulfill that duty, prosecutors are expected to "act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion ***to not pursue criminal charges*** in appropriate circumstances."[4] Thus, "[t]he prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system" with a responsibility to "reform and improve the administration of criminal justice . . . ."[5]

That broad mandate lends itself to various approaches for administering criminal justice, ranging from increasing enforcement across the board to focusing prosecutorial resources on the most pressing needs of a community. In recent years, a number prosecutors seeking to advance innovative criminal justice strategies tailored to the unique circumstances and needs of their individual communities have taken office.[6] Recognizing that the criminal justice system has fueled a cycle of recidivism and often failed to promote meaningful accountability, safety, or

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party's counsel contributed money related to the preparation or submission of this brief. No person—other than the Institute, its members, or its counsel—contributed money related to the preparation or submission of this brief.

2 CRIM. JUST. STANDARDS, PROSECUTION FUNCTION 3-1.2(a) (AM. BAR ASS'N 2017) ("ABA Standards").

3 *Id*. at 3-1.2(b).

4 *Id.* (emphasis added).

5 *Id*. at 3-1.2(f).

6 *E.g.*, Caren Morrison, *Progressive Prosecutors Scored Big Wins in 2020 Elections, Boosting a Nationwide Trend*, THE CONVERSATION (Nov. 18, 2020, 8:22 AM), https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322.

healing, they have decided to utilize new criminal justice strategies by declining to charge or seek prison time for certain crimes, such as marijuana possession. Instead, they have prioritized other approaches, such as pretrial diversion, restorative justice programs, and other initiatives designed to prevent recidivism and advance long-term public safety.[7]

Many of those prosecutors openly campaigned against "tough-on-crime" agendas, pointing to research showing that hardline approaches have failed to make communities safer.[8] And, citizens in many of these communities have elected district attorneys precisely because of those campaign promises, in the free exercise of their constitutional rights. For example, in 2016, Kim Foxx was elected as state's attorney for Cook County, Illinois after vowing to reduce incarceration for nonviolent crimes, increase accountability for police misconduct, and improve office transparency and communications with the public. Prosecutors advancing similar approaches have also been elected, sometimes in place of an incumbent, in states as diverse as California, Indiana, Minnesota, Pennsylvania, Tennessee, and Virginia, to name a few.[9]

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[7] Emily Bazelon, *The Response to Crime*, N.Y. TIMES (Apr. 7, 2023), https://www.nytimes.com/2023/04/07/briefing/legislators-response-to-crime.html.

[8] Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, THE GUARDIAN (July 23, 2019, 2:00 PM), https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty.

[9] Annelise Finney, *Pamela Price Becomes First African American DA of Alameda County*, KQED (Nov. 19, 2022), https://www.kqed.org/news/11931436/alameda-county-da; Jeremy B. White, *Gascón Unseats Los Angeles DA Lacey in Major Progressive Win*, POLITICO (Nov. 11, 2020, 9:45 PM), https://www.politico.com/news/2020/11/11/gascon-unseats-lacey-progressive-win-436260; Johnny Magdaleno & Sarah Nelson, *Ryan Mears Overcomes Police Union Opposition to Win Marion County Prosecutor Race*, INDYSTAR (Nov. 9, 2022, 6:06 PM), https://www.indystar.com/story/news/politics/elections/2022/11/08/ryan-mears-cyndi-carrasco-marion-county-prosecutor-indiana-election/69542560007/; Max Nesterak, *Former Public Defender Mary Moriarty Wins Race for Hennepin County Attorney,* MINNESOTA REFORMER (Nov. 8, 2022, 10:13 PM), https://minnesotareformer.com/livefeeds/former-public-defender-mary-moriarty-wins-race-for-hennepin-county-attorney/; Jessica Gertler, *Mulroy Unseats Weirich in Shelby County District Attorney's Race,* WREG MEMPHIS (Aug. 5, 2022, 12:03 PM), https://wreg.com/news/your-local-election-headquarters/da-weirich-faces-challenge-from-steve-mulroy/; Alex Burness, *Reform Prosecutors Sweep Three Northern Virginia Primaries,* BOLTS (June 21, 2023), https://boltsmag.org/virginia-prosecutor-primaries-arlington-fairfax-loudoun/.

Upon taking office, prosecutors strive to fulfill the promises they made on the campaign trail. For example, State's Attorney Foxx has taken steps to ensure transparency in the community she serves by publicly releasing, for the first time, six years' worth of felony case data, granting her constituents and others a clear view into her—as well as her predecessor's—approach to those cases.[10] She also has helped secure the elimination of cash bail throughout the state, and prioritized the implementation of diversion programs in place of incarceration.[11] And her community ratified her approach by reelecting her with overwhelming support.[12]

Likewise, Travis County, Texas District Attorney Jose Garza made good on his campaign promises to hold police accountable for improper conduct and to implement new policies to better serve survivors of sexual assault.[13] And Durham County, North Carolina District Attorney Satana Deberry was reelected after upholding her vow to promote alternatives to incarceration by implementing restorative justice and diversion programs.[14]

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[10] Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, THE MARSHALL PROJECT (Oct. 24, 2019, 6:00 AM), https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county

[11] Blair Paddock, *Kim Foxx Sees Elimination of Cash Bail as Step Toward Equal Justice*, WTTW (July 19, 2023, 6:41 PM), https://news.wttw.com/2023/07/19/kim-foxx-sees-elimination-cash-bail-step-toward-equal-justice#:~:text=Cook%20County%20State%27s%20Attorney%20Kim,a%20threat%2C"%20Foxx%20said; Matt Masterson, *Report: Incarceration Rates Drop Nearly 20% Under Kim Foxx,* WTTW (July 30, 2019, 10:55 AM), https://news.wttw.com/2019/07/30/report-incarceration-rates-drop-nearly-20-under-kim-foxx.

[12] Shelby Bremer, *Kim Foxx Wins Second Term as Cook County State's Attorney After Pat O'Brien Concedes Contentious Race,* NBC CHICAGO (Nov. 3, 2020, 10:56 PM), https://www.nbcchicago.com/news/local/chicago-politics/kim-foxx-wins-second-term-as-cook-county-states-attorney-after-pat-obrien-concedes-contentious-race/2363832/.

[13] Austin Sanders, *Here's Why Travis County D.A. Jose Garza Seeking Reelection Matters,* THE AUSTIN CHRONICLE (Aug. 8, 2023, 4:23 PM), https://www.austinchronicle.com/daily/news/2023-08-08/heres-why-travis-county-d-a-jose-garza-seeking-re-election-matters/.

[14] Thomasi McDonald, *Six Months In, Satana Deberry Talks About How She's Changing Durham's Criminal Justice System*, INDY WEEK (July 26, 2019), https://indyweek.com/news/durham/satana-deberry-six-month-report/; David A. Graham, *Incumbents Are Out and a New Democrat is In,* THE ATLANTIC (May 9, 2018),

Recently, some jurisdictions in Georgia also have elected prosecutors who have emphasized new criminal justice approaches—many of whom are persons of color who are representative of the communities they were elected to serve and protect.[15] Like others across the country, a number campaigned on the need for criminal justice reform and against a punitive approach to public safety, and have sought to implement new enforcement strategies in furtherance of those promises. They also campaigned on platforms of increased transparency with their constituencies, and have sought to make good on those promises once elected.[16]

The shift in certain prosecutors' approaches has sometimes led to statewide attempts to undo the results of local elections. For example, the Pennsylvania legislature attempted to impeach Philadelphia's elected district attorney Larry Krasner, and Florida Governor Ron DeSantis unilaterally removed two elected prosecutors.

Against this backdrop, Governor Brian Kemp signed SB 92. Although SB 92 purports to expand the duties of district attorneys, in reality, it only dictates the manner in which they must carry out their core duty to decide whom to charge and for which crimes. Specifically, district attorneys must now review every case for which probable cause exists and make a charging decision based solely on the facts and circumstances of that individual case—a requirement that deprives prosecutors of the ability to consider non-case specific factors when making charging

https://www.theatlantic.com/politics/archive/2018/05/grassroots-criminal-justice-in-north-carolina/560015/.

[15] Hassan Kanu, *Georgia Prosecutors Sue Over State Law They Say Undermines Their Power*, REUTERS (Aug. 2, 2023, 6:05 PM), https://www.reuters.com/legal/government/column-georgia-prosecutors-sue-over-state-law-they-say-undermines-their-power-2023-08-02/.

[16] *E.g.*, Affidavit of Sherry Boston ¶¶ 39–41, attached as Exhibit 1 to Memorandum of Law in Support of Plaintiffs' Motion for Interlocutory Injunction (describing communications to public about criminal justice approach during campaign and once elected); Affidavit of Flynn Broady, Jr., attached as Exhibit 4 to Memorandum of Law in Support of Plaintiffs' Motion for Interlocutory Injunction (discussing efforts to rebuild trust in local district attorney's office by regularly discussing prosecutorial approach with the public and providing quarterly updates regarding office activities).

decisions, such as the particular enforcement needs of their community, whether their offices' limited resources would be better deployed to investigating and prosecuting other types of crimes, or whether prosecution is even in the public interest at all. *See* O.C.G.A. § 15-18-6(4).

SB 92 also creates the Prosecuting Attorneys Qualifications Commission (the "PAQC"), which is vested with broad powers to "discipline, remove, and cause involuntary retirement of appointed or elected district attorneys" who choose not to prosecute certain offenses based on "[a] stated policy" or "bring[] the office into disrepute," whatever that might mean. O.C.G.A. § 15-18-32(a), (i)(2)(E), *id.* § 15-18-32(h)(6). District attorneys who are removed or involuntarily retired are disqualified from being appointed or elected as a district attorney or solicitor general anywhere in the state for ten years. O.C.G.A. § 15-18-32(p). Voters are therefore powerless to nullify or overturn any decision made by non-elected PAQC members.

Although Governor Kemp's public statements reveal that the immediate purpose of the bill is to target "far-left local prosecutors,"[17] whom he characterized as "rogue or incompetent," the effect of the bill is to improperly intrude on the authority of all elected district attorneys—whether characterized as traditionally "tough on crime" or "reform minded"—to make decisions about how to allocate scarce resources and best serve the communities that elected them.[18] Indeed, although the bill may seem to apply only to a prosecutor who vows not to prosecute low-level marijuana offenses, for example, it applies equally to a district attorney who instructs his or her assistants to temporarily dedicate all resources to a single crisis engulfing a community whether that be a terrorist attack, a violent crime wave, or fentanyl trafficking.

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[17] Brian Kemp (@BrianKempGA), TWITTER (Dec. 23, 2022, 12:06 PM), https://twitter.com/BrianKempGA/status/1606335486502502401.

[18] Press Release, Governor Brian N. Kemp, Office of the Governor, Gov. Kemp Signs Legislation Creating Prosecuting Attorneys Qualifications Commission (May 5, 2023), https://gov.georgia.gov/press-releases/2023-05-05/gov-kemp-signs-legislation-creating-prosecuting-attorneys-qualifications.

Through SB 92, Georgia's legislature is attempting to circumvent the free election process and penalize prosecutors for exercising their professional judgment and discretion in the manner they promised voters they would. In so doing, SB 92 violates a fundamental principle of Georgia's constitution, namely, that "[a]ll government, of right, originates with the people, [and] is founded upon their will only." GA. CONST. art. I, § II, ¶ I.

Moreover, SB 92 intrudes on the power to enforce the laws that has been conferred on prosecutors, members of a separate and co-equal branch of Georgia's government, thereby violating the bedrock separation-of-powers doctrine, also enshrined in Georgia's constitution. That constitutional provision provides that "[t]he legislative, judicial, and executive powers shall forever remain separate and distinct." *Id.* ¶ III. SB 92's encroachment on powers belonging to another branch of government is especially offensive in the criminal sphere, where the citizenry's liberty is at stake.

Several other states possess constitutional structures similar to Georgia's. Absent appropriate judicial intervention here, legislatures in those states may be emboldened and encouraged to turn their attention away from addressing issues actually within their purview and towards similarly improper and unlawful legislation that cuts further at the core of our criminal justice system. That system unambiguously entrusts discretion to the local prosecutors who have been elected by their communities to pursue particular priorities. This will spur further litigation and require additional judicial resources to reign in, harming local communities all the while.

ARGUMENT

I. PROSECUTORIAL DISCRETION IS FUNDAMENTAL TO THE ROLE OF THE PROSECUTOR AND THE OPERATION OF THE LEGAL SYSTEM.

In our criminal justice system, the discretion to decide whether or not to initiate a criminal case, and how to do so, is a fundamental aspect of the prosecutor's role. *See, e.g.*,

McCleskey v. Kemp, 481 U.S. 279, 311–12 (1987). The Supreme Court has explained that "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether ***or not*** *to prosecute*, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citation and internal quotations marks omitted, emphasis added)).

Georgia courts also have consistently reiterated these foundational principles, which critically include that discretion is not a one-way rachet requiring a prosecutor to prosecute every crime for which there is probable cause or to charge the highest-level offense possible. To the contrary, prosecutors are expected to exercise restraint when making those decisions:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because the prosecutor represents the sovereign and ***should exercise restraint in the discretionary exercise of governmental powers***. Therefore, the district attorney is more than an advocate for one party and has additional professional responsibilities as a public prosecutor to make decisions in the public's interest.

State v. Wooten, 273 Ga. 529, 531 (2001) (internal quotation marks and citations omitted, emphasis added).

Indeed, prosecutorial discretion is necessary to the operation of the criminal justice system as a whole. Practical realities require prosecutors to make decisions about whether and how to prosecute cases based upon a constellation of factors, including resource limitations, the needs and wishes of their communities, the personal history and characteristics of the alleged perpetrator, and the interests of justice. For example, "[i]n some jurisdictions, individual prosecutors handle more than one thousand felony cases per year. Prosecutors often have hundreds of open felony cases at a time and multiple murder, robbery, and sexual assault cases

set for trial on any given day."[19] Those burdens are compounded by the fact that "[d]istrict attorneys' offices across the U.S. are struggling to recruit and retain lawyers, with some experiencing vacancies of up to 16% and a dearth of applicants for open jobs . . . ."[20] Thus, a prosecutor's internal charging policies—including an informed assessment of which particular crime problems are plaguing his or her community and determining which categories of crimes to prioritize and prosecute as a result—are essential components of prosecutorial discretion.

Georgia's antiquated laws against adultery, fornication, and sodomy provide illustrative examples. *See* O.C.G.A. § 16-6-19 (Adultery); O.C.G.A. § 16-6-18 (Fornication); O.C.G.A. § 16-6-2 (Sodomy). It is no secret that prosecutors have long decided that it would be inappropriate and unjust to prosecute those offenses despite the fact that they remain on the books.[21] To our knowledge, however, no legislator has ever suggested that decisions not to prosecute those crimes were somehow illegal or provided any basis to create a commission to investigate, discipline, and remove district attorneys.

It is no different when district attorneys determine that it would be inimical to the public interest to prosecute certain other categories of crimes—such as marijuana possession or healthcare access. For example, DA Boston has adopted and implemented a "COVID-19 Backlog Policy" through which she instructed her assistant district attorneys not to prosecute certain low-level felonies, such as marijuana charges, to address the increased health risks to

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[19] Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 262-63 (2011).

[20] Disha Raychaudhuri & Karen Sloan, *Prosecutors Wanted: District Attorneys Struggle to Recruit and Retain Lawyers*, REUTERS (Apr. 13, 2022, 4:39 AM), https://www.reuters.com/legal/transactional/prosecutors-wanted-district-attorneys-struggle-recruit-retain-lawyers-2022-04-12/.

[21] *See* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 148 (2008) (noting that elected prosecutors must make charging and sentencing decisions that respond to the evolving public conceptions of justice).

both inmates and correctional officers that incarceration posed at the height of the pandemic, as well as the immense backlog of cases that accumulated due to court closures.[22] That policy aligns with her decision to prioritize the prosecution of more serious criminal offenses—including violent crime—over minor drug offenses in an effort to further enhance public safety. DA Boston's approach is supported by DeKalb County voters and social science research demonstrating the "counter-productive effects of low-level enforcement" of drug crimes,[23] and has freed up valuable resources to seek justice swiftly in cases needing those assets the most—those involving violent and dangerous crimes. These worthwhile goals would be thwarted if DA Boston were required to expend resources documenting every drug offense her office declines to prosecute so as to avoid being removed from office, which is the foreseeable consequence if SB 92 is not enjoined.[24]

SB 92 also ignores the fact that prosecutors nationwide have routinely announced prosecutorial priorities and related guidance to ensure fair, consistent, impartial, and non-arbitrary enforcement of the law by line staff members. For example, in August 2013, then-Deputy U.S. Attorney General James M. Cole issued a widely publicized memorandum, stating that the Justice Department would not enforce federal laws criminalizing marijuana in states that had legalized it in some form.[25] On the other end of the spectrum, Jacksonville state attorney Melissa Nelson implemented a policy requiring her line prosecutors to seek longer prison

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[22] Affidavit of Sherry Boston ¶¶ 25–37 & Attachment E, attached as Exhibit 1 to Memorandum of Law in Support of Plaintiffs' Motion for Interlocutory Injunction.

[23] Becca Cadoff et al., *Lower-Level Enforcement, Racial Disparities, & Alternatives to Arrest: A Review of Research and Practice from 1970 to 2021*, JOHN JAY COLL. CRIM. JUST. (Feb. 2023), https://datacollaborativeforjustice.org/wp-content/uploads/2023/02/A2AReport.pdf

[24] *See* Affidavit of Sherry Boston ¶ 44, attached as Exhibit 1 to Memorandum of Law in Support of Plaintiffs' Motion for Interlocutory Injunction.

[25] Memorandum from James M. Cole, Deputy Att'y Gen., on Guidance Regarding Marijuana Enforcement, for all U.S. Attorneys, U.S. DEP'T JUST. (Aug. 29, 2013) https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

sentences for people with prior felony convictions who are subsequently arrested for illegally carrying firearms.[26] These examples reflect the unremarkable reality that prosecutors of all political stripes with differing views as to the best enforcement strategies rely on the ability to implement office-wide policies to carry out the criminal justice missions that their communities elected them to pursue, a practical necessity with which SB 92 interferes.

Requiring prosecutors to charge or at least review every single case where the facts support probable cause would also overwhelm the legal system and would delay the most serious cases from their resolution. For this reason, among others, it is widely acknowledged that no prosecutor's office should—or could—prosecute every case for which probable cause exists. Empirical data supports that conclusion, as barely more than half of all arrests are being prosecuted, even in jurisdictions led by "tough-on-crime" prosecutors.[27] Thus, policies implemented to streamline and standardize prosecution decisions are merely part and parcel of the discretion inherent in the prosecutorial function.

It is also imperative that prosecutors have the flexibility to deploy scarce prosecutorial, investigative, and intelligence resources to the most pressing and dangerous crime problems in their jurisdictions. In this regard, it is important to recognize that crime problems and community needs are not static; they change over time, often dramatically and usually

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[26] Andrew Pantazi, *Jacksonville prosecutors will seek longer sentences for felony gun charges. Will it stop crime?*, FLA. TIMES-UNION (Sept. 11, 2020, 4:30 PM), https://www.jacksonville.com/story/news/crime/2020/09/11/jacksonville-state-attorney-melissa-nelson-adopts-harsh-gun-policy-without-citing-evidence-it-works/3467589001/.

[27] *E.g.*, *Data Dashboards: Data Transparency and Data Driven Decision-Making*, SF DIST. ATT'Y, https://www.sfdistrictattorney.org/policy/data-dashboards/ (last visited Aug. 30, 3023) (indicating that the district attorney who was appointed and then elected following the recall of a progressive, reform-minded district attorney charged 52.3% of all arrests in 2023); *Data Dashboard,* MARICOPA CNTY. ATT'Y'S OFF., https://www.maricopacountyattorney.org/419/Data-Dashboard#glossary (last visited Aug. 30, 2023) (indicating that conservative office charged 55.9% of all arrests in 2022).

unpredictably. As a consequence, a prosecutor's critical enforcement needs also change over time. Prosecutors must be able to respond in real time—with sufficient staffing, funding, and effort—to forcefully combat whatever particular problem is most pronounced in their jurisdictions at any given time. Having a completely arbitrary rule—such as that imposed by SB 92—mandating that district attorneys always dedicate their resources to investigating minor, non-violent offenses and then charging or documenting prosecutorial decisions with respect thereto would prevent them from re-deploying those same assets to where they are needed most and where they could best protect the citizens and communities in their jurisdictions.[28]

II. SB 92, AND LEGISLATIVE BILLS LIKE IT, ARE IMPERMISSIBLE INTRUSIONS INTO ANOTHER BRANCH'S DELEGATED POWERS.

The discretion at the "core" of prosecutors' responsibility to decide whom to charge and for which crimes is traditionally understood to be an executive—not legislative—power.[29] As a result, the separation-of-powers doctrine—which protects liberty by making imprisonment contingent on "consensus from ***all three branches [of government]***"—immunizes prosecutorial

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[28] For example, consider a community that, for the first time, finds itself victimized by a series of deadly terrorist bombing attacks. Any experienced prosecutor would recognize that investigating and prosecuting terrorist organizations is extremely time-consuming and labor-intensive. And, with that understanding, such a prosecutor would allocate significant available resources to investigating those homicidal attacks and to preventing future ones. But what would happen if that prosecutor did not have adequate staffing and funding to re-allocate to the terrorist bombings due to a statutory scheme requiring the prosecutor to detail his or her personnel to prosecuting all minor non-violent crimes, such as marijuana offenses? The result would be as obvious as it would be unacceptable: many more marijuana offenders would be prosecuted, at the considerable expense of failing to appropriately prioritize a series of violent terrorist attacks in which scores or even hundreds of people would be in grave danger of being killed or maimed.

[29] *United States v. B.G.G.*, 53 F.4th 1353, 1361 (11th Cir. 2022) ("The 'core' or 'essence' of prosecutorial discretion is 'the decision whether or not to charge an individual with a criminal offense in the first place.'" (citation omitted)); *id.* ("The Supreme Court has repeatedly reaffirmed the principle—which dates back centuries—that 'the [e]xecutive [b]ranch has exclusive authority and absolute discretion to decide whether to prosecute a case.'" (quoting *In re Wild*, 994 F.3d 1244, 1260 (11th Cir. 2021) (en banc) (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)), *cert. denied*, 142 S. Ct. 1188 (2022)); *see also* Logan E. Sawyer III, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 615 (2020) ("Prosecutors are most often understood to exercise executive authority.").

discretion from legislative interference. *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 921 (6th Cir. 2021) (Murphy, J., dissenting) (emphasis added), *cert. denied*, 143 S. Ct. 83 (2022).

Thus, any legislation that seeks to control, interfere with, or compel the manner in which district attorneys—elected constitutional officers who are part of a separate and co-equal branch of government[30]—allocate limited prosecutorial resources or guide line prosecutors' charging decisions violates these separation-of-powers principles, enshrined in every state's system of government.[31] Indeed, the Bill of Rights to Georgia's Constitution expressly and unequivocally commands that "[t]he legislative, judicial, and executive powers shall forever remain separate and distinct." GA. CONST. art. I, § II, ¶ III. It also imposes this constitutional mandate, providing that "no person discharging the duties of one shall at the same time exercise the functions of either of the others . . . ." *Id.*

But that is exactly what SB 92 does. By requiring district attorneys to review every case for which there is probable cause and to "make a prosecutorial decision" based solely "on the facts and circumstances of each individual case," O.C.G.A. § 15-18-6(4), Georgia's legislature is seeking to control and restrict district attorneys' constitutional authority to consider the resources

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[30] In accord with "historical analyses [that] have suggested that prosecutors were considered judicial rather than executive officers at the founding," Sawyer, *supra* n.29, at 617, district attorneys in Georgia are constitutionally elected officers belonging to the judicial branch. GA. CONST. art. VI, § VIII, ¶ I; *History*, PROSECUTING ATTORNEYS' COUNCIL OF GEORGIA, https://pacga.org/about-pacga/. Thus, Georgia's constitutional choice not only insulates district attorneys from improper *legislative* encroachments into the ways in which they exercise their constitutionally bestowed discretion, but from encroachments by *executive* branch officials, as well.

[31] Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190–91 (1999) ("Separation of powers is a bedrock principle to the constitutions of each of the fifty states. . . . The overwhelming majority of modern state constitutions contain a strict separation of powers clause."); *State and Local Government*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/state-local-government/ (last visited August 17, 2023) ("All State governments are modeled after the Federal Government and consist of three branches: executive, legislative, and judicial.").

available to prosecute *other* cases when deciding whether any particular case is worthy of prosecution. Likewise, by authorizing a district attorney's removal from office based solely upon his or her articulation of a clearly defined policy that prosecuting certain offenses would not be in the public's interest, O.C.G.A. § 15-18-32(i)(2)(E), SB 92 is an unlawful legislative incursion into a prosecutor's constitutional authority. This "gradual concentration of the several powers in the same department" is precisely the threat that James Madison warned against in Federalist Paper No. 51, and why he counseled that each department of government "should have as little agency as possible in the appointment of the members of the others." FEDERALIST No. 51. SB 92 runs afoul of both those admonitions.

Moreover, it cannot be overlooked that these legislative intrusions into district attorneys' "core" powers will have the effect of disempowering communities that knowingly and voluntarily elected particular prosecutors with particular visions of how best to serve and protect those jurisdictions. These prosecutorial policies have sometimes included a plan to decline to prosecute low-level drug offenses, with a view towards allocating more resources to investigating and prosecuting more serious crimes that might put citizens in grave danger of physical harm, or even death. Some have also been designed to help alleviate the problems flowing from decades of "tough-on-crime" mass-incarceration policies, which have disproportionately affected low-income communities of color.[32]

As far as we can determine, legislatures have never expressed concern or previously sought to intervene when prosecutors were basing charging and sentencing decisions on aggressive, broad-based policies like those generally requiring line prosecutors to charge the

[32] Allison Young, *The Facts on Progressive Prosecutors*, CENTER FOR AMERICAN PROGRESS (Mar. 19, 2020), https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice/.

most serious offenses or seek the harshest penalties.[33] Only now that some prosecutors have started responding to communities calling out certain harms caused by past criminal justice approaches are prosecutorial policies being subjected to unconstitutional intrusions by the legislative branch.[34]

This sudden interference in prosecutors' "core" powers is clearly designed to undermine and remove prosecutors based on political disagreement with how some are weighing indisputably relevant factors when exercising their constitutionally protected discretion. Governor Kemp essentially admitted as much when he acknowledged that SB 92's goal was to target "far-left local prosecutors"[35] that, in his opinion, are "driven by out-of-touch politics."[36] But each of the prosecutors that SB 92 targets are constitutional officers who were elected to serve a four-year term, and if their constituents deem them to be "out of touch" with their priorities and needs, they can vote those prosecutors out of office in the next election.

By allowing state legislators to effectively remove duly elected local district attorneys based on a disagreement over their enforcement policy approaches or undefined "conduct" that the PAQC finds "prejudicial to the administration of justice," SB 92 is an anti-democratic measure that flouts Georgia's constitutional promise that "[a]ll government . . . originates with

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33 *E.g.*, Memorandum from Att'y Gen., on Department Charging and Sentencing Policy, for All Federal Prosecutors, OFF. OF ATT'Y GEN. (May 10, 2017), https://www.justice.gov/archives/opa/press-release/file/965896/download (declaring that "it is a core principle that prosecutors should charge and pursue the most serious, readily provable offense.").

34 Of course, in the event a more liberal majority later comes to power, the broad and vague power that SB 92 confers on the PAQC to discipline district attorneys who, in its view, engage in "[c]onduct prejudicial to the administration of justice which brings the office into disrepute," O.C.G.A. § 15-18-32(h)(6), could one day be wielded to punish tough-on-crime district attorneys.

35 Brian Kemp (@BrianKempGA), TWITTER (Dec. 23, 2022, 12:06 PM), https://twitter.com/BrianKempGA/status/1606335486502502401.

36 Press Release, *supra* n.18.

the people, [and] is founded upon their will only." GA. CONST. art. I, § II, ¶ I. This Court should remain vigilant and continue to protect Georgia's district attorneys from this unprecedented incursion into their powers by the legislative branch. *Moseley v. Sentence Rev. Panel*, 280 Ga. 646, 648 (2006) ("This court has zealously protected each of the three branches of the government from invasion of its functions by the others whenever it has had the opportunity." (citation omitted)).

III. SB 92 WILL CHILL PROSECUTORS' ABILITY TO OPENLY COMMUNICATE THEIR CRIMINAL ENFORCEMENT PRIORITIES AND APPROACHES.

SB 92's attempt to restrict district attorneys' constitutional right to exercise the discretion that they have always enjoyed and been understood to possess when making charging decisions will also have a chilling effect on both candidates' and elected officers' willingness to openly discuss their criminal enforcement philosophies and approaches, and therefore violates the First Amendment. Because SB 92 only prohibits stated policies relating to ***non-***enforcement, it is not content neutral. O.C.G.A. § 15-18-32(i)(2)(E). As a content-based restriction, SB 92 is subject to "exacting scrutiny," and will be deemed to pass constitutional muster only if the restriction on speech is narrowly drawn to serve a compelling interest. *West v. State*, 300 Ga. 39, 40 (2016).

Likewise, it is well-settled that candidates for public office and elected officials enjoy a high degree of First Amendment protection, and that any legislation interfering with that right also must be narrowly tailored to achieve a compelling government interest. *See*, *e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 776–77 (2002) (holding Minnesota State Supreme Court's rule prohibiting judicial candidates from announcing their views on disputed legal and political issues violated the First Amendment); *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966) (holding states have "no interest in limiting its [public officials'] capacity to discuss their views of local or national policy" and explaining that the "manifest function of the First

Amendment in a representative government requires that [they] be given the widest latitude to express their views on issues of policy"); *Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007) (strict scrutiny applies to restrictions on elected officials' speech).

SB 92 implicitly acknowledges, as it must, that a district attorney has the right to decline to charge any individual for any particular offense. *State v. Hanson*, 249 Ga. 739, 744 (1982) ("[T]he prosecutor, as part of the authority of his office, has the ***sole*** discretion to dismiss cases prior to indictment. The operation of his office and the fulfillment of his function in our criminal justice system demands that he have this power." (Emphasis added)). That is because the statute does not impose a categorical obligation to charge certain individuals or certain offenses. O.C.G.A. § 15-18-32(i)(2)(E) (prohibiting adoption of general nonenforcement policies, but not imposing obligation to charge any particular case). Georgia cannot point to any compelling interest preventing district attorneys from announcing that they plan to or have adopted a systematic—and therefore fairer, more impartial, and less arbitrary—nonenforcement policy based on macro-level factors that are equally applicable in every case of a certain type.[37] SB 92, which establishes a commission to investigate and remove prosecutors based on stated nonenforcement policies, is therefore not narrowly tailored to serve any compelling governmental interest. Thus, it impermissibly interferes with prosecutors' rights to clearly communicate to the public how they intend to enforce the law.

In Georgia, as in almost every other state,[38] those hoping to serve as the chief law

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[37] *See, e.g.*, Young, *supra* n.32 (indicating that "prosecutors refusing to prosecute entire classes of crimes[] . . . is simply a different application of the standard discretion afforded to prosecutors to decide which cases they will pursue"); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 4–5 (2019) (prosecutors' nonenforcement policies are exercises of prosecutors' charging discretion).

[38] Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 n.3 (2012) ("Today, only four states—Connecticut, Delaware, New Jersey, and Rhode Island—do not elect district attorneys.").

enforcement officer of a particular locality campaign against one another. Citizens of each locality are therefore presented with competing visions regarding how criminal laws should be enforced. SB 92 will discourage full and frank disclosure regarding a candidate's intentions to charge certain crimes, else he or she will face possible removal shortly after being elected. This will deprive voters of the opportunity to consider highly relevant information when casting their ballots. In this way, SB 92 both violates the First Amendment and undermines democracy. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("In barring certain public statements . . . the State ban runs directly contrary to the fundamental premises underlying the First Amendment as the guardian of our democracy. That Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office.").

SB 92 also chills district attorneys' communication once elected, and that has several negative consequences, as well. By undercutting any incentive to fully and accurately communicate enforcement policies, SB 92 reduces community members' ability to determine whether the officeholder shares their values and priorities, thereby reducing trust between the community and law enforcement. Moreover, without full transparency, communities' ability to hold district attorneys accountable for failing to follow through on their policies—or conversely, for failures of the policies themselves—will be impeded. In this way, SB 92 "interferes with broader debates on ways to improve the criminal justice system."[39]

CONCLUSION

SB 92 may have ripple effects by influencing the public's understanding of the unique role that the prosecutor plays in American justice systems, and impact the way that prosecutors

[39] Sawyer, *supra* n.29, at 626.

themselves, over time, view their responsibility to not only seek convictions, but to continually seek ways to reform imperfect systems in a manner that best serves justice and the public interest. If allowed to stand, SB 92 will fundamentally alter prosecutors' role in our legal system and hinder their ability serve their local communities. Prosecutors and those who care about prosecutorial independence around the country, like the IIP, are watching what happens in Georgia closely.

For the foregoing reasons, the IIP respectfully submits that plaintiffs' motion for an interlocutory injunction should be granted.

Dated: September 5, 2023
Atlanta, Georgia

Respectfully submitted,

By: */s/ Peter C. Canfield*

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NOTICE OF ELECTRONIC FILING
AND CERTIFICATE OF SERVICE

This is to certify that on September 5, 2023, I sent, via Odyssey e-filing, a copy of the foregoing to counsel of record for plaintiffs and defendants.

This the 5th day of September, 2023.

/s/ *Peter C. Canfield*
Peter C. Canfield