Fulton County Superior Court
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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

STONE MOUNTAIN JUDICIAL CIRCUIT DISTRICT ATTORNEY SHERRY BOSTON, et al.,	)	
Plaintiffs,	)	CIVIL ACTION FILE
v.	)	NO. 24CV004942
JOSEPH COWART, et al.,	)	
Defendant.	)	

ORDER DENYING PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION

In this lawsuit, Plaintiffs Stone Mountain Judicial Circuit District Attorney Sherry Boston ("District Attorney Boston"), Towaliga Judicial Circuit District Attorney Jonathan Adams ("District Attorney Adams"), and Augusta Judicial Circuit District Attorney Jared Williams ("District Attorney Williams") (collectively, "Plaintiffs"), challenge (1) portions of statutes governing the Prosecuting Attorneys Qualifications Commission (the "Commission"), and (2) regulations promulgated by the Commission pursuant to O.C.G.A. § 15-18-32(g) (the Code of Conduct of Prosecuting Attorneys of Georgia ("Code of Conduct") and Rules of the Commission ("Commission Rules") (collectively, "Rules and Code")). The Plaintiffs also filed a motion for interlocutory injunction (the "Motion") to prevent the members of the Commission (the "Commissioners") from "taking any investigatory or disciplinary action." (Pls.' Br. in Supp. of the Mot. at 35.) The Court has considered the Plaintiffs' Complaint, the Motion, the Plaintiffs' Brief in Support of the Motion ("Plaintiffs' Motion"), the Commissioners' Brief in Opposition to the Motion ("Commissioners' Brief"), as well as the affidavits submitted by both parties. Based

on that review, the Plaintiffs' Motion is DENIED for each of the alternative and independent reasons discussed below.

FINDINGS OF FACT

Based on the pleadings and affidavits submitted by the parties, the Court makes the following findings of fact. See Pipkin v. Boggs, 282 Ga. 20, 21 (2007); O.C.G.A. § 9-11-52:

1. In 2023, the General Assembly passed Senate Bill 92 ("SB 92"), which, among other things, amended the list of statutory duties imposed on district attorneys and created the Commission. See O.C.G.A. §§ 15-18-6 (establishing duties), 15-18-32 (creating the Commission). Governor Kemp signed the legislation into law.
2. The legislation charged the Commission with promulgating the Regulations "with the assistance of the Prosecuting Attorneys' Council of the State of Georgia ("PAC"). O.C.G.A. § 15-18-32(g). SB 92 contained a provision that barred the Commission's standards of conduct and rules for the commission's governance from becoming effective until "review and adoption by the Supreme Court [of Georgia]." O.C.G.A. § 15-18-32(g) (2023). SB 92 also required that the Commission submit proposed standards and rules to that court on or before October 1, 2023. Id.
3. After the members of the Commission were appointed in July 2023, they began working on the proposed standards and rules.
4. Shortly thereafter, Plaintiffs filed two lawsuits—against the Commissioners and against the State—seeking to have SB 92 declared unconstitutional on August 2, 2023. Boston v. Cowart, No. 2023-cv-383555 (Fulton Super. Ct.); Boston v. State, No. 2023-cv-383558 (Fulton Super. Ct.). As here, in the 2023 lawsuit against the Commissioners, Plaintiffs also filed a motion for interlocutory injunction seeking to enjoin the

Commissioners from fulfilling their statutory duties imposed by SB 92 (the "2023 Motion").

5. During the pendency of this Court's consideration of the 2023 Motion, the Commission solicited the work product of the PAC SB 92 Rules Committee in advance of the Commission's September 11, 2023 meeting. (Pls.' Ex. E, Att. 1). The Commission received an unfinished draft of PAC's recommended rules on September 5, 2023 (the "PAC Draft Proposal") along with a letter explaining that PAC interpreted O.C.G.A. § 15-18-32(n)'s provision that the Commission's rules and regulations "shall be established no later than October 1, 2023" to be directory and promising delivery of PAC's recommended standards and rules "no later than October 1, 2023. (Pls.' Ex. E, Att. 3; McGinley Aff. ¶¶ 6–7).
6. This Court denied Plaintiffs' 2023 Motion on September 29, 2023 (the "2023 Order").
7. The Commissioners ultimately submitted the proposed standards and rules to the Supreme Court of Georgia on the same day—the last business day in advance of the deadline for submission to the Supreme Court under SB 92. The Commissioners then received PAC's recommended standards of conduct, and updated recommendations for the rules later the same day. (McGinley Aff. ¶¶ 10-11).
8. On November 22, 2023, the Supreme Court of Georgia declined to "take any action" on the Commission's proposals in the light of its *sua sponte* concerns about its jurisdiction to do so. <u>In re: Prosecuting Attorneys Qualifications Commission Rules & Code of Conduct</u>, Matter No. S24U0190 at 2 (Nov. 22, 2023).
9. The legislature responded in the 2024 session by passing Senate Bill 332 ("SB 332"), to make a single amendment to Code Section 15-18-32(g) to remove the provision that

made the standards and rules effective only upon approval by the State's highest court. (Compl. ¶ 70.) Governor Kemp signed SB 332 into law on March 13, 2024, and it became effective that day.

10. On March 25, 2024, the Commission adopted the previously proposed standards and rules, which became effective on April 1, 2024. The Rules reflect the structure and many of the recommendations in the PAC Draft Proposal. The Commission did not substantively edit the standards following receipt of PAC's recommended standards.[1] (Cranford Aff. ¶¶ 10, 17; Pls.' Ex. E, Att. 3.)

11. On April 16, 2024, Plaintiffs filed a lawsuit against the State of Georgia in this Court (the "2024 Companion Lawsuit"). A day later, they filed this lawsuit against the Commission and against the Commissioners in their individual capacities.[2] (Compl. ¶¶ 22-24.) Both lawsuits seek injunctive relief to prevent the Commission from acting pursuant to its statutory authority, and both lawsuits seek declaratory relief invalidating the Regulations in their entirety and portions of laws codified by the passage of SB 92 and SB 332.

12. Plaintiffs' complaint articulates six counts of relief. Count I alleges that O.C.G.A. § 15-18-32(i)(2) violates the separation of powers clause of the Georgia Constitution, Ga. Const. Art. I, § II, Para. III. (Compl. ¶¶ 121-29.) Counts II and III allege that O.C.G.A. § 15-18-32(i)(2)(E) violates Plaintiffs' rights to freedom of speech under the Federal and State Constitutions, respectively. (Compl. ¶¶ 130-56.) Count IV challenges, as an

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[1] Defendant Commissioners maintain that PAC's proposed Code of Conduct and further revised proposed Commission Rules are materially inconsistent with the Commission's statutory mandates. See, e.g. (McGinley Aff. ¶ 12).

[2] Commissioner Stacey Jackson passed away on May 5, 2024.

unconstitutional qualification for office, that part of Code Section 15-18-32(p) that bars any prosecutor removed by the commission from serving as a district attorney or solicitor general for a period of ten years from the date of the removal. (Id. ¶¶ 157-65.) Counts V and VI bring procedural challenges against the Regulations based on the theory that the Commission did not promulgate them with the "assistance" or PAC or pursuant to the Georgia Administrative Procedure Act (the "APA"). (Compl. ¶¶ 157-87.)

13. On April 22, 2024, Plaintiffs filed the Motion and, thus far, they have sought an interlocutory injunction in only this lawsuit.
14. Plaintiffs have each altered their manner of speaking to the public, due to their understanding of the "stated-policy" provision and corresponding possibility of future discipline. (Boston Aff. ¶¶ 25-29; Williams Aff. ¶¶ 31-34; Adams Aff. ¶¶ 49-50). District Attorney Adams and District Attorney Williams also allege alterations to or other actions with respect to adopted or contemplated "stated policies:" District Attorney Adams has rescinded a memorandum that he perceives to be in conflict with the statute, and he and District Attorney Williams assert they have refrained from pursuing other contemplated policies for similar reasons. (Williams Aff. ¶¶ 20–23; Adams Aff. ¶¶ 45-48).
15. Plaintiffs have provided no evidence that they or any other district attorney has been approached by or provided notice from the Commission stating that any of his or her acts do or could violate any provision of O.C.G.A. § 15-18-32. (Cranford Aff. ¶¶ 18-19; McGinley Aff. ¶¶ 18-19).

16. As of the date of filing of Defendants' response and brief in Opposition to Plaintiffs' Motion for interlocutory Injunction, the Commission has not commenced an investigation against any district attorney, including the Plaintiffs. Nor has the Commission instituted proceedings to sanction a district attorney (including the Plaintiffs); conducted a disciplinary hearing against any district attorney, including the Plaintiffs; sought to enforce the Code of Conduct; or disciplined any district attorney. (McGinley Aff. ¶¶ 18, 19).

STANDARD OF REVIEW

As this Court held in the 2023 Order, litigants seeking an interlocutory injunction bear a heavy burden. "An interlocutory injunction is an extraordinary remedy, and the power to grant it must be 'prudently and cautiously exercised.'" City of Waycross v. Pierce Cty. Bd. of Comm'rs, 300 Ga. 109, 110-11 (2016) (citations omitted). Indeed, interlocutory relief cannot be granted "except in clear and urgent cases." O.C.G.A. § 9-5-8. To determine whether a movant satisfies this burden, Georgia courts typically consider four factors, and an "interlocutory injunction should not be granted unless the moving party shows:" (1) a substantial threat of irreparable harm absent an injunction; (2) that irreparable harm outweighs the injury to the nonmoving party caused by an injunction; (3) it has a "substantial likelihood [it] will prevail on the merits" at trial; and (4) an injunction will not disserve the public interest. City of Waycross, 300 Ga. at 111 (citing Bishop v. Patton, 288 Ga. 600, 604 (2011)).

Here, those four factors are weighed after the application of three presumptions that make Plaintiffs' already difficult burden even more exacting. First, laws and rules are presumed to be constitutional, and any party saying otherwise "bears the burden to show that the statute 'manifestly infringes upon a constitutional provision or violates the rights of the people.'"

Taylor v. Devereux Foundation, Inc., 316 Ga. 44, 52 (2023) (citations omitted). Second, Georgia "law presumes … public officers will follow the law in the exercise of their statutory duties and authority." McDowell v. Judges Ex Officio, 235 Ga. 364, 365 (1975). Third, because Plaintiffs' complaint brings facial challenges, they must demonstrate that there is no way that the challenged laws can be applied in a constitutional manner. Dep't of Community Health v. Northside Hospital, Inc., 205 Ga. 446, 449 (2014). This is true even when the facial attack is based on an alleged violation of the freedom of speech. Final Exit Network, Inc. v. State, 290 Ga. 508, 511 (2012) (holding that the challenged law must be upheld if it is "readily subject to a narrowing construction").

THE CHALLENGED LAW AND THE LEGAL CHALLENGE

The Legislation and Regulations at Issue

The Georgia Constitution creates the offices of district attorneys, sets forth some qualifications of the office, and creates some duties, including "represent[ing] the state in all criminal cases in the superior court[s]." Ga. Const. Art. VI, § 8, Para. I. Such duties are not, however, exclusive. Indeed, the same paragraph of the State Constitution authorizes the General Assembly to impose additional duties on district attorneys by general law. Ga. Const. Art. VI, § 8, Para. I(d). The next paragraph specifically empowers the legislature to enact laws that "provide[]" for the "discipline[], remov[al], or involuntary retire[ment]" of "any district attorney." Ga. Const. Art. VI, § 8, Para. II.

Acting expressly "pursuant to" the constitutional authority to provide means for the discipline of district attorneys, SB 92 created the Commission. O.C.G.A. § 15-18-32(a). The Commission is empowered to investigate and potentially "discipline, remove, and cause involuntary retirement" of district attorneys who the Commission determines—after an

investigation, notice, and hearing—have committed acts prohibited by the statute or have become incapacitated.[3] O.C.G.A. §§ 15-18-32(h), 15-18-32(i). Code Section 15-18-32 governs the process by which such investigations and possible disciplinary actions occur, including appeals of Commission decisions to the State judiciary.[4]

Based on the constitutional authority in Ga. Const. Art. VI, § 8, Para. I(d), SB 92 also amended Code Section 15-18-6 by adding a new subsection (4), which specifically delineates and codifies the duty of district attorneys to "review every individual case for which probable cause for prosecution exists and to make a prosecutorial decision available under the law based on the facts and circumstances of each individual case."

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[3] The Commission's jurisdiction regarding complaints that are based on a "charging decision, plea offer, opposition to or grant of a continuance, placement of a case on a trial calendar, or recommendation regarding bond" is expressly limited to five bases. O.C.G.A. § 15-18-32(i)(2). Subparagraph (i)(2) of the statute identifies the five bases that allow for consideration of complaints based upon the aforementioned reasons, which require a showing that the district attorney (or solicitor-general, though not relevant here) "made or knowingly authorized" such a decision on: "(A) Undue bias or prejudice against the accused or in favor of persons with interests adverse to the accused; (B) An undisclosed financial interest in the outcome of the prosecution; (C) An undisclosed conflict of interest; (D) Factors that are completely unrelated to the duties of prosecution; or (E) A stated policy, written or otherwise, which demonstrates that the district attorney or solicitor-general categorically refuses to prosecute any offense or offenses of which he or she is required by law to prosecute." O.C.G.A. §§ 15-18-32(i)(2)(A) – (E).

[4] First, commencing an investigation requires the Commission to either (1) receive a sworn complaint identifying any interest the complainant may have in the outcome of the case; or (2) approve a motion to bring a complaint on its own, identifying any interest any non-recused member may have in the outcome of the case. O.C.G.A. § 15-18-32(i)(1). Second, a majority of the investigative panel must vote to investigate the allegations in the complaint. O.C.G.A. § 15-18-32(b). Third, after the investigation concludes, a majority of the investigative panel must vote to formally charge the subject district attorney or solicitor general. See O.C.G.A. §§ 15-18-32(b)(3)(A); 15-18-32(j)(2). Fourth, if the charges are approved, the hearing panel, which is comprised of different Commission members from those on the investigative panel, would then adjudicate the formal charges. O.C.G.A. § 15-18-32(b)(3)(A). Fifth, if the hearing panel imposes a sanction, the prosecutor may then appeal that decision to the superior court where they serve as the district attorney or solicitor general. O.C.G.A. § 15-18-32(m).

Plaintiffs' Request for Injunction

Plaintiffs assert that these provisions are unconstitutional and that the Regulations were improperly promulgated. Count I alleges that, by enacting SB 92, the legislature unlawfully limited district attorneys' prosecutorial discretion and, therefore, interfered with another branch of government in violation of the State Constitution's mandate of separate legislative, judicial, and executive powers. (Compl. ¶ 123.) Counts II and III challenge a more specific basis for the Commission to investigate and potentially discipline district attorneys: knowingly making certain prosecutorial decisions based 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." O.C.G.A. § 15-18-32(i)(2)(E).[5]

The remaining counts raise procedural challenges that seek to invalidate the Regulations. In Count V, citing Code Section 15-18-32(g), Plaintiffs allege that the Commissioners did not "promulgate" the Regulations "with the assistance of" PAC as required by the statute. Count VI is alleged against the Commission itself and asserts that the Regulations are invalid because they did not "satisfy the statutory prerequisites" imposed by the APA. (Compl. ¶ 181.)

Based on these allegations, the Motion asks this Court to enjoin the Commissioners from "conducting any investigation or disciplinary proceeding pursuant to O.C.G.A. § 15-18-32," and the Commission itself from "taking any action pursuant to" the Code of Conduct while this litigation is pending. (Pls.' Mot. for Interlocutory Inj. at 3.)

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[5] Plaintiffs argue that the Commission is empowered to impose discipline for a case-specific prosecutorial decision made based on a policy as set forth in O.C.G.A. § 15-18-32(i)(2)(E). However, that subsection circumscribes the Commission's ability to *entertain a complaint* based on a case-specific prosecutorial decision. To form a basis for discipline, such case-specific, stated policy-based prosecutorial conduct would have to establish one of the grounds for discipline enumerated in O.C.G.A. § 15-18-32(h).

The Defendants oppose the Motion on several grounds. They assert the jurisdictional defenses of standing, ripeness, and sovereign immunity.[6] (Defs.' Br.at 14.) The Defendants also argue that none of Plaintiffs' claims satisfy any of the four factors applicable to motions for interlocutory injunctions. (Id. at 14-42.)

BASES FOR DENIAL OF INJUNCTIVE RELIEF

The Court denies the Motion for several independent and alternative reasons:

Standing/Ripeness

As was the case in Plaintiffs' previous challenge to the Commission, Plaintiffs have again failed to show an injury that is concrete, particularized, actual, and imminent. Consequently, they have not satisfied their burden of establishing standing for an interlocutory injunction. Black Voters Matter Fund, Inc. v. Kemp, 313 Ga. 375, 381-82 (2022) (referred to as "BVMF").[7] Given the Commission's inaction on the investigatory and discipline fronts, especially as it relates to the Plaintiffs, Plaintiffs' alleged injuries remain "conjectural or hypothetical" and not based on a present set of facts. Id. Even their self-censoring attested to in the affidavits is based on "questions that have not yet arisen but which [Plaintiffs] fear may arise at a future date." Cheeks v. Miller, 262 Ga. 687, 688 (1993). Consequently, under the current state of facts, any injunction would constitute an impermissible "advisory opinion on hypothetical and legal questions that have not arisen." Id.

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[6] Defendants have moved to dismiss Plaintiffs' complaint in its entirety on each of the threshold defenses. This Order only denies Plaintiffs' Motion, but the Court will consider the jurisdictional defenses when it rules on the motion to dismiss.

[7] BVMF involved a question of organizational standing, but the Supreme Court of Georgia made clear that the "same standing test" applies to organizations and individuals. 313 Ga. at 381.

For similar reasons, Plaintiffs' alleged injuries are not actual or imminent. They are not based on any act of the Commission but instead some unmaterialized and unspecified future harm." Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 273 (2008) (cleaned up) (standing for a constitutional challenge to a Georgia statute requires showing "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."). This also means that Plaintiffs' claims are not sufficiently ripe to entitle them to injunctive relief. See Mattox v. Franklin Cty., 316 Ga. App. 181, 185 (2012) (deciding challenges to potential government action are not ripe).

Most importantly though, Plaintiffs have not pled a colorable free speech claim to confer standing. While harm in the free speech context may sometimes be presumed from pre-enforcement self-censorship, the self-censorship must be of arguably protected speech and must be based on an objectively reasonable fear of enforcement. Plaintiffs argue that their self-censorship is justified because the Commission's Regulations lack a provision defining "stated policy" and exempting political and campaign advocacy from its reach. (Pls.' Br. in Supp. of the Mot. at 32.) Yet, no reasonable reading of O.C.G.A. § 15-18-32((i)(2)(E) encompasses campaign, political, or other protected speech cited by Plaintiffs as causing them concern. (See, e.g., Compl ¶¶ 95-98).[8] Such speech is plainly outside the reach of Commission discipline. O.C.G.A. § 15-18-32(o) (limiting disciplinary authority of Commission to "conduct of a district attorney … as a holder of such office); Rule 1.2(f) and (nn) (limiting disciplinary grounds of "conduct prejudicial to the administration of justice which brings the office into disrepute" and "willful misconduct in

[8] Similarly, given O.C.G.A. § 15-18-32((i)(2)(E)'s qualifier that any stated policy must demonstrate a categorical refusal to prosecute an offense the district attorney is "required by law to prosecute," no reasonable reading of the statute authorizes Commission discipline for a decision to decline prosecuting an arguably unconstitutional penal proscription or a case which lacks sufficient evidence to convict. (Adams Aff. ¶¶ 35-39; Compl. ¶¶ 105-106).

office" in O.C.G.A. § 15-18-32(h) to actions taken "in their capacity as a prosecutor."). See Warren v. DiSantis, 90 F. 4th 1115, 1131 and 1142 (2024) (advocacy statements signed by elected State Attorney under title of State Attorney committing to refrain from prosecuting gender affirming care or abortion deemed (1) not to be "official policy" and (2) to be speech as a private citizen and not "under his official duties.").

Sovereign Immunity

At this stage, sovereign immunity precludes the Court from enjoining the Commission. Once sovereign immunity is asserted, the Plaintiffs bear the burden of establishing a waiver of the defense. Ga. Dep't of Transp. v. Wyche, 332 Ga. App. 596, 599 (2015). They have not satisfied that burden. See generally Lathrop v. Deal, 301 Ga. 408, 409 (2017). Accordingly, the Court lacks the subject matter jurisdiction to enter interlocutory relief against the Commission, which the Court finds is the real party in interest.[9]

Standard for Injunctive Relief

After applying the four factors applicable to motions for interlocutory injunction, the Court concludes that the Plaintiffs have not satisfied the weighty burden imposed on those who seek to enjoin a duly enacted state statute.

1. Irreparable Injury.

As the Georgia Supreme Court has instructed, injunctions should only be granted if the "injury is pressing and the delay dangerous [and not] to allay mere apprehensions of injury." Lue v. Eady, 297 Ga. 321, 329 (2015). Plaintiffs have not articulated an injury linked to an act of the

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[9] To the extent the waiver of sovereign immunity asserted by Plaintiffs relies upon the Administrative Procedure Act, Plaintiffs have not at this stage established the applicability O.C.G.A. §§ 50-13-3 - 50-13-7 to the Commission. In any event, these claims are not asserted based upon an accrued and complete state of facts. Rather Plaintiffs' suit and request for interlocutory injunction seek an abstract order on the validity or meaning of a statute, which is insufficient to confer standing. See Bd. of Nat. Res. v. Monroe Cty., 252 Ga. App. 555, 557 (2001); Pilgrim v. First Nat. Bank of Rome, 235 Ga. 172, 174 (1975).

Commission. Instead, they focus on their own conduct (e.g., self-censorship, repealing prior policies), and their concerns about how the Commission *may* act *if* it considers any of the individual Plaintiffs' conduct. There is not, therefore, any "vital necessity" to impose an injunction now. Treadwell v. Inv. Franchises, Inc., 273 Ga. 517, 518 (2001).

There is another reason that the Court cannot consider hypothetical future acts of the Commissioners a "substantial threat of irreparable injury." City of Waycross, 300 Ga. at 111 (citation omitted). Accepting Plaintiffs' premise requires the Court to ignore the mandatory presumption that public officials "will follow the law in the exercise of their statutory duties and authority," Lathrop v. Deal, 301 Ga. 408, 444 (2017) (internal quotations omitted), and that they will execute their duties in good faith and consistent with the constitutions of the United States and the State of Georgia. McDowell, 235 Ga. 365.

2. Balancing the Harms of an Injunction

On the one hand, Plaintiffs identify their current injuries as (1) choosing to forego or not pursue a few stated policies that they believe may express a categorical refusal to prosecute some offenses; and (2) deciding to exercise "more caution" when speaking about prosecutorial discretion. (See, e.g., Compl. ¶¶ 88, 100, 107.) As discussed, these injuries arise from Plaintiffs' own decisions based on predictions that the Commission will conduct itself not only against Plaintiffs but also in a manner that is wholly inconsistent with the mandatory presumption of good faith and lawfulness. McDowell, 235 Ga. 365. On the other hand, an injunction would cause immediate and actual harm to the State, as "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Hand v. Scott, 888 F.3d 1206, 1214 (11th Cir. 2018) (citation omitted). Under these circumstances,

Plaintiffs have not shown that their projected harms outweigh the actual harm an injunction would cause the State.

3. Substantial Likelihood of Success on the Merits

The Court also holds that Plaintiffs have not shown a substantial likelihood of success on the merits. This is for several reasons. First, Plaintiffs have not convinced the Court that the State's assertion of jurisdictional defenses lacks merit. Second, because the Georgia Constitution expressly authorizes the General Assembly to impose statutory duties on district attorneys and to create the grounds and process to discipline or remove district attorneys, there is no violation of the State Constitution's separation of powers clause. See Dominguez v. Enter. Leasing Co., 197 Ga. App. 664, 665 (1990). Third, permitting Commission consideration of case-specific prosecutorial decisions that are "made without any consideration to the specific facts and circumstances of a specific case" (Comment 3 to Canon 1 of the Code of Conduct) based on a limited type of "stated policy" which categorically excludes from prosecution and enforcement certain classes of offense which the district attorneys are required by law to prosecute, O.C.G.A. § 15-18-32(i)(2)(E), does not meaningfully impair prosecutorial discretion. This is particularly true when Code Section 15-18-6(4) mandates that prosecutors exercise their discretion in "every individual case … based on the facts and circumstances of each individual case" and "prosecute all indictable defenses."[10]

Fourth, because government policies represent unprotected government speech, the challenged statute does not impair Plaintiffs' free speech rights. Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469 (2009); Mech. v. Sch. Bd. of Palm Beach Cty., Fla., 806 F.3d 1070, 1074 (11th Cir. 2015). Plaintiffs ask the Court to interpret O.C.G.A. § 15-18-32(i)(2)(E) more

[10] This second duty pre-dated the passage of SB 92.

broadly to include political and campaign advocacy. The Court declines to do so as a matter of statutory construction and because the Court is bound to apply a "narrowing construction" in the light of Plaintiffs' facial challenge. Final Exit Network, Inc., 290 Ga. at 511. See also Premier Health Care Investments, LLC v. UHS of Anchor, L.P., 310 Ga. 32, 48 (2020) (requiring courts to adopt constitutional construction of statutes when possible). For the same reasons, the Court decides that Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claim that Code Section 15-18-32(i)(2)(E) is neither sufficiently tailored to the State's weighty interests, nor that the statute is fatally overly broad, nor that it is sufficiently underinclusive to be enjoined. See Willliams-Yulee v. Fla. Bar, 575 U.S. 433, 452 (2015) (rejecting underinclusive challenge to state law that restricted only a "narrow slice of speech").

Finally, Plaintiffs have not demonstrated a substantial likelihood of success on the merits to their procedural challenges to the Regulations. In the light of not only the Commission's own solicitation of PAC's input but the substantive similarities between the Commission Rules and the PAC Draft received in response to that solicitation, it appears that the Commissioners satisfied the low threshold of obtaining the "assistance" of PAC when they promulgated the Regulations. O.C.G.A. § 15-18-32(g). See also Assistance, WEBSTER'S NEW COLLEGIATE DICTIONARY (11th Ed. 2024) (defining assistance as the "act of helping"). In addition, given the unique and more specific administrative procedure codified in Code Section 15-18-32(g) (e.g., receiving "assistance" from PAC), not to mention the choice of language in O.C.G.A. § 15-18-32(j)(3)(C) and (D), the Court is not convinced that there is a substantial likelihood of success on the merits of Plaintiffs' claim that the APA governs the Commission's rulemaking process. See Bellsouth Telecommunications, LLC v. Cobb Cty., 305 Ga. 144, 151 (2019).

The Court has weighed all of the factors in determining whether to grant injunctive relief, but standing alone, the failure to demonstrate a substantial likelihood of success on the merits warrants denying the Motion. Toberman v. Larose Ltd. P'ship, 281 Ga. App. 775, 778 (2006) (citing examples).

4. The Public Interest

Finally, the public interest is served by allowing the Defendants to perform their duties. As duly enacted statutes that are presumed constitutional, O.C.G.A. §§ 15-18-6 and 15-18-32 represent the will of the people, declared through their representatives. Bonds v. Allen, 25 Ga. 343, 346 (1858).

Standing alone, each of these reasons warrants denying the Motion. Consequently, Plaintiffs' Motion is DENIED.

SO ORDERED, this 23rd day of July 2024.

The Honorable Paige Reese Whitaker
Superior Court of Fulton County

Service via e-filing system

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