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Legal Ethics Experts Back Pausing Ga. Prosecutor Watchdog

By **Emily Johnson**

Law360 (September 12, 2023, 4:43 PM EDT) -- More than 100 former prosecutors and legal scholars have urged a Georgia state court to pause a new state law that created a state prosecutorial watchdog, arguing that the law's unclear reasons for discipline or removal violate due process rights, given that they can be wielded in "an arbitrary or discriminatory way."

The amicus brief argued that the law creating the commission violates due process rights guaranteed by the U.S. Constitution and by the Peach State's Constitution. The commission has the authority to investigate district attorneys and solicitor generals and can discipline them, including removing them from office and barring them from serving for a decade.

This is the third amicus brief supporting the four district attorneys in **their suit filed** last month that seeks to overturn as unconstitutional the law that created the Prosecuting Attorneys Qualifications Commission, or PAQC, earlier this year. The district attorneys are challenging S.B. 92, which was signed into law in May by Republican Gov. Brian Kemp.

In **amicus briefs filed last Tuesday**, more than 80 current and former state and federal prosecutors and U.S. Department of Justice officials, along with a college-affiliated institute, supported the district attorneys' request for an injunction against S.B. 92.

The most-recently filed amicus said that the law's vagueness in how a prosecutor can run afoul of the offenses does not provide the clarity needed for prosecutors to know how to avoid getting tangled in the commission's disciplinary process.

"It puts Georgia district attorneys in the untenable position of risking removal simply for exercising independent judgment, consistent with their ethical obligations, where that judgment is contrary to that of the PAQC, the Governor, or any Georgia citizen," the amicus brief said. "SB 92 must be enjoined."

The amicus brief pointed to when the U.S. Supreme Court found in **FCC v. Fox TV Stations Inc.** in 2012 that the FCC's rule change regarding what was indecent — updating the rule from repetitive use of offensive material to fleeting use of such material — did not provide notice to the broadcasters. The high court left in place a lower appellate court's decision that invalidated the FCC's rule due to its vagueness.

"When a statute is punitive, it violates due process if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement,'" the amicus brief said.

The offenses that the law states are not defined and "have no origin or precedent in any known standard," the amicus brief argued.

The brief pointed to the law's offenses such as "willful and persistent failure" to handle duties, conduct that "brings the office into disrepute," decisions that may "plausibly" stem from "factors that are completely unrelated to the duties of prosecution" and a policy that "categorically refuses to prosecute any offense."

"No elected or line prosecutor could possibly discern from these provisions precisely what conduct

may subject him or her to discipline, and possible removal from office," the amicus brief said. "Aside from being unconstitutionally vague, and because of it, SB 92 imposes constraints on a prosecutor's independence and exercise of discretion that contravene the well-established standards for prosecutors, which Georgia has adopted, promulgated by the American Bar Association and others."

The amicus brief said that if the law is allowed to stand, it will violate the long-standing national best practices — the American Bar Association's Criminal Justice Standards for the Prosecution Function — that the State Bar of Georgia has adopted in its professional conduct rules.

The amicus brief also argued that the law's "vagueness problems" are "magnified" when considered next to those standards.

"The key attribute of a prosecutor's roles as zealous advocate, administrator of justice, and officer of the court is the exercise of discretion," the amicus brief said. "The ABA Standards provide that the 'prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function.'"

A prosecutor's discretion involves the "routine and common exercise" of how to use "scarce resources," the brief said.

"A prosecutor cannot pursue each violation of the criminal code — there are simply not enough resources to do so," the amicus brief said. "He or she must establish priorities. The chief prosecutor, such as the State Attorney, also cannot make every decision in every case brought to his or her office. It is thus natural and expected, consistent with professional standards, that he or she will promulgate policies to guide the line prosecutor's exercise of discretion."

The brief said the law clearly targets "so called 'reform' prosecutors who choose to exercise their discretion in a manner that some may disagree with."

Critics of the law have expressed concern that the Peach State's conservative leaders simply want to get rid of reform-minded prosecutors unwilling to dedicate limited resources to low-level crimes such as marijuana possession.

The amicus brief said that in the 20th century, it was common for prosecutors to not prosecute people for liquor possession.

"It seems that this sort of common-sense non-prosecution policy is now a punishable offense in Georgia," the amicus brief said.

In response to the first two amicus briefs filed this month, Georgia Attorney General Chris Carr told Law360 Pulse in a statement that district attorneys "who choose to violate their oaths of office are not immune from accountability" and that his office will "vigorously defend" the law in court.

"Unfortunately, some district attorneys have embraced the progressive movement across the nation of refusing to enforce the law," Carr said. "That is a dereliction of duty, and as a result, Georgia's communities suffer. All Georgians deserve to be safe, and all crime victims deserve justice."

Counsel for the amici curiae, Sara Alpert Lawson, partner at Zuckerman Spaeder LLP, told Law360 Pulse on Tuesday that it was "fairly easy" to obtain the signatories supporting the amicus brief.

"If we had more time, I think we would likely have collected additional signatories, because both scholars and criminal practitioners around the country have been following the recent political efforts targeting prosecutorial discretion and independence that are happening," Lawson said. "These efforts really strike at the heart of our democracy and the foundation of our criminal justice system."

Lawson said it's crucial that elected, independent prosecutors "are free from outside control" as a way of maintaining constitutionally protected separation of powers.

"By providing a perspective beyond the parties' own, we hope our brief will aid the court in recognizing that this is not simply about politics or partisan differences, and that permitting the Senate Bill 92 to be implemented as enacted threatens the rule of law," Lawson said. "The measure

unlawfully constrains prosecutorial discretion and independence and is so vague that it is ripe for weaponization by whoever is in power."

Lawson said the law is also "wholly unnecessary" because there are already existing professional standards, including the ABA's Criminal Justice Standards for the Prosecution Function that have "guided the exercise of prosecutorial discretion for more than 50 years."

"Even worse than that, Senate Bill 92 is inconsistent with those standards by seeking to cabin that discretion and subject it to the influence of improper or partisan reasons," Lawson said.

Counsel for the district attorneys, Josh Rosenthal, legal director of Public Rights Project, told Law360 Pulse on Tuesday that the outpouring of support is appreciated.

"We are extremely grateful for the broad and bipartisan support we received from prosecutors and legal scholars in Georgia and across the country," Rosenthal said. "These amicus briefs provide rich context for the court about the danger that S.B. 92 poses and the ways that it directly interferes with public safety."

Counsel for the commission did not immediately respond to a request for comment.

The nonparty amici curiae are represented by Morris Weinberg Jr. and Sara Alpert Lawson of Zuckerman Spaeder LLP.

The district attorneys are represented by David N. Dreyer and Quinton G. Washington of Washington Dreyer & Associates LLC, Joshua A. Rosenthal and Jonathan B. Miller of Public Rights Project and Bruce P. Brown of Bruce P. Brown Law LLC.

The commission members are represented by Christopher M. Carr and Logan B. Winkles of Georgia's Office of the Attorney General and Josh Belinfante, Chuck Boring, Carey Miller and Anna Edmondson of Robbins Alloy Belinfante Littlefield LLC.

The cases are Boston et al. v. Cowart et al., case number 2023CV383558, and Boston et al. v. State of Georgia, case number 2023CV383555, in the Superior Court of Fulton County, Georgia.

--Additional reporting by Rosie Manins. Editing by Andrew Cohen.