

Case No. S23A0994

IN THE SUPREME COURT OF GEORGIA

DEBORAH GONZALEZ, DISTRICT ATTORNEY FOR THE WESTERN JUDICIAL DISTRICT
OF GEORGIA,
Appellant/Respondent,

v.

JARROD MILLER,
Appellee/Applicant.

On Appeal from the Superior Court's Denial of Appellant's Motion to Dismiss

Superior Court of Athens-Clarke County, State of Georgia,
Civil Action No. SU23CV0108.

**BRIEF OF AMICI CURIAE 57 CURRENT AND FORMER ELECTED
PROSECUTORS AND ATTORNEYS GENERAL, AND FORMER U.S.
ATTORNEYS AND U.S. DEPARTMENT OF JUSTICE OFFICIALS IN
SUPPORT OF APPELLANT/RESPONDENT**

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INTEREST OF AMICI

Pursuant to Rule 23 of the Rules of the Supreme Court of Georgia, Amici Curiae, 57 current and former elected prosecutors and Attorneys General, and former U.S. Attorneys and U.S. Department of Justice Officials, file this brief in support of District Attorney (“DA”) Deborah Gonzalez’s challenge to the Superior Court’s denial of her motion to dismiss a writ of mandamus alleging, among other things, that DA Gonzalez exhibited an “unwillingness” to perform the duties of her office and asking the court to oversee the exercise of discretion within the District Attorney’s office.

As elected prosecutors and Attorneys General past and present and former U.S. Attorneys and U.S. Department of Justice Officials, amici have a deep understanding of the important role that prosecutorial independence and discretion plays in the criminal justice system, and we are extremely concerned that the litigation in this case undermines, in unprecedented fashion, the longstanding constitutional authority, autonomy, and responsibility of prosecutors elected by their local communities to execute the community’s vision of justice.

In denying the motion to dismiss, the Superior Court held that DA Gonzalez’s alleged policy¹ of declining to prosecute two low-level misdemeanors,

¹ The Court appears to have addressed the language in DA Gonzalez’s Day One policy memo related to marijuana prosecutions, which was amended and followed by a policy memo issued at the beginning of her second year in office that further clarified her positions and altered this language. DA Gonzalez has since withdrawn these policy memos. See Alexia Ridley, *DA Deborah Gonzalez Withdraws Memorandums*, WUGA (June 27, 2023), <https://www.wuga.org/local-news/2023-06-27/da-deborah-gonzalez-withdraws-memorandums>. Regardless of the withdrawal of the policy memos, the lower court’s intrusion into well-settled prosecutorial discretion continues to threaten the ability of DA Gonzalez, as well as other elected prosecutors, to exercise their discretion in accordance with the community’s vision of justice, guided by evidence-based practices that enhance public safety. As more fully explained herein, the rationale, practice, and existence

marijuana possession and truancy, was a “dereliction of duty” and a “gross abuse of discretion.” *Miller v. Gonzalez*, Order Denying Defendant’s Motion to Dismiss, Case No. SU23CV0108 (Super. Ct. Ga., Clarke County, May 9, 2023). Yet prosecutors for decades have made decisions around when and if to prosecute cases, and how to use their inherently limited resources to best promote public safety in accordance with the community’s values. Indeed, the essence of the Court’s ruling threatens the very core of the prosecutor’s well settled discretion and role as an elected official, while eroding the separation between branches of government that are essential to a well-functioning, healthy democracy. This ruling undermines the essential building blocks upon which our legal system is built, and therefore, will erode public trust in the integrity of that system.

Prosecutors are elected and sworn to uphold the law and protect public safety, and DA Gonzalez’s policies at issue in the court’s order do just that. No prosecutor has the ability and resources to prosecute *every* case and *every* violation of the law – nor should they. As such, it is well settled that elected prosecutors make decisions about what cases merit entry into the justice system.

This authority to decide what cases to bring is fundamental to the prosecutor and essential to the operation of our criminal legal system. Furthermore, an elected district attorney must be able to guide the exercise of discretion of her deputies and the use of inherently limited criminal justice resources through transparent and straightforward policies. Indeed, the district attorney is elected by the community to do exactly that – and is accountable to the voters for those decisions.

of office policies and priorities fulfilled the duties and obligations of an elected prosecutor and did not, in any way, represent a dereliction of duty. As such, the lower court’s order and reasoning – as long as it remains intact – establishes a deeply concerning precedent and an unlawful intrusion into settled prosecutorial discretion.

Because the issues raised by this case have national significance, amici come not only from Georgia, but also from jurisdictions across the country. Although amici's views may differ as to whether a particular charge warrants prosecution, amici come together in our steadfast belief that an elected prosecutor cannot effectively carry out his or her constitutional responsibilities if he or she cannot ensure employees implement office wide policies and is, instead, forced to prosecute cases that, in the elected prosecutor's judgment, do not advance public safety or serve the interests of justice.

Amici are also intimately familiar with the challenges of effectively and efficiently running an office in times of limited resources, as well as transforming office culture and ideas about justice; these challenges require decisions and leadership by the elected office head and clear instructions that guide deputy discretion and avoid disparate results based on the views and happenstance of the individual prosecutor in the case. We are deeply troubled by the Superior Court's willingness to override the lawful, discretionary policy decisions of an official who was transparent about her views on how to best promote public safety and whom voters in Georgia's Western Judicial District elected to carry out that important work.

For all these reasons, amici have an interest in preserving the proper roles and responsibilities in the criminal legal system. We offer our views here respectfully as friends of the Court.

A full list of amici is attached as an Appendix.

ARGUMENT

The 2020 election of Deborah Gonzalez to serve as the District Attorney for the Western Judicial District, encompassing Athens-Clarke and Oconee Counties, was historic on several fronts. Gonzalez is the first Latina to ever serve as DA in Georgia and the first woman to hold the position in the Western Judicial District.

Her campaign platform focused on evidence-based initiatives proven to promote safer and healthier communities and reduce racial disparities in the legal system.²

In particular, DA Gonzalez promised to address systemic racism and prioritize prosecuting violent offenders over marijuana possession cases, where racial disparities were particularly pronounced and public safety benefits nonexistent.³ For example, one investigation concluded that disparate enforcement made Black residents of Athens, Georgia *five times more likely* to face a marijuana arrest and prosecution than were white residents.⁴ These arrests and prosecutions also yield no societal benefits, as decades of research show that drug use is unresponsive to punitive controls.⁵ By deprioritizing those prosecutions and encouraging police officers to end marijuana enforcement and arrests, DA Gonzalez could increase the fairness and equity of her local criminal legal system, without negatively impacting public safety.

² Katie Jane Fernelius, *New D.A. Commits to Fixing Georgia's 'Back Door to Incarceration'*, The Appeal (Jan. 11, 2021), <https://theappeal.org/politicalreport/athens-georgia-probation-reform/>.

³ Keri Blakinger, *Prosecutors Who Want to Curb Mass Incarceration Hit a Roadblock: Tough-on-Crime Lawmakers*, The Marshall Project (Feb. 3, 2022), <https://www.themarshallproject.org/2022/02/03/prosecutors-who-want-to-curb-mass-incarceration-hit-a-roadblock-tough-on-crime-lawmakers>.

⁴ Joshua Eaton, *The Wide Racial Disparity in Marijuana Arrests*, Flagpole (Apr. 20, 2016), <https://flagpole.com/news/news-features/2016/04/20/the-wide-racial-disparity-in-marijuana-arrests/>.

⁵ Peter Reuter, *Why has US Drug Policy Changed so Little over 30 years?*, in Michael Tonry, ed., *Crime and Justice in America, 1975-2025*, v. 42 (2013), 98; see also Alex Stevens, *Modernising Drug Law Enforcement Report -- Applying harm reduction principles to the policing of retail drug markets*, International Drug Policy Consortium (March 2013) at 6, https://www.drugsandalcohol.ie/19567/1/MDLE-report-3_Applying-harm-reduction-to-policing-of-retail-markets.pdf; Samuel R. Friedman, *Drug Arrests and Injection Drug Deterrence*, 101 AM J PUBLIC HEALTH 344 (Feb. 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3020200/>.

DA Gonzalez’s position on some truancy prosecutions advanced the same objectives. Studies reveal that Black students are much more likely to have “unexcused absences” than white students.⁶ Schools typically designate absences that result from “transportation issues, family concerns such as providing care for younger children so parents can work, [and] safety concerns” as “unexcused.”⁷ Further exacerbating these differences, schools located in more socioeconomically disadvantaged areas also tend to utilize more punitive approaches towards truancy than do those serving more advantaged students.⁸ Like marijuana prosecutions, punitive responses to chronic absenteeism are unlikely to increase school attendance and may in fact decrease it.⁹ Instead, efforts to strengthen the bonds between children and their schools, an effort that criminalization directly undermines, are substantially more likely to improve attendance than are punishment-based schemes founded on suspension and prosecution.¹⁰

⁶ Hedy Chang, Clea McNeely, and Kevin Gee, *Disparities in Unexcused Absences Across California Schools*, PACE (March 2023), <https://edpolicyinca.org/publications/disparities-unexcused-absences-across-california-schools>.

⁷ Editors, *The Racial Gap in Attendance and Absenteeism in Public Schools*, *Journal of Blacks in Higher Education* (Jan. 4, 2021), <https://www.jbhe.com/2021/01/the-racial-gap-in-attendance-and-absenteeism-in-public-schools/>.

⁸ Chang, McNeely, and Gee, *supra* note 6.

⁹ Gil Keppens and Bram Spruyt, *The impact of interventions to prevent truancy: A review of the research literature*, 65 *Studies in Educational Evaluation* Article No.100840 (June 2020), <https://www.sciencedirect.com/science/article/abs/pii/S0191491X19303979?via%3Dihub> (meta-analysis of 16 different studies of truancy interventions).

¹⁰ *Id.*

Now, a single resident of Athens¹¹ is using the courts to block DA Gonzalez’s discretionary choices about how to prioritize cases that will be prosecuted and expend resources – choices that are within the prerogative of the duly-elected district attorney and that were part of the platform that the district’s voters embraced at the ballot box.

By permitting this litigation to continue and finding that DA Gonzalez’s policies amounted to a “dereliction of duty,” the Superior Court disrupted purely prosecutorial functions, interfered with DA Gonzalez’s management of her office, invaded the well-settled discretion of elected prosecutors, and thwarted the will of the local electorate.

Amici, a group of current and former elected prosecutors and former U.S. Attorneys and U.S. Department of Justice Officials from across the country, file this brief to add their voices to this important issue and to underscore their view that the lower court’s order is intrusive, harmful, and undermines both the democratic processes that put DA Gonzalez in office and the exercise of prosecutorial discretion that is inherent in the responsibility of any elected prosecutor and critical to the functioning of our justice system.

I. All prosecutors – including Georgia District Attorneys – have well settled discretion and authority, free of court intervention, to make decisions that are fundamental to the allocation of scarce resources and the pursuit of justice

“The capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law.” *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987) (internal quotations omitted). Prosecutors across the country, including in

¹¹ Stephen Fowler, *Lawsuit alleges Athens DA ‘unable and unwilling’ to do her job*, Georgia Public Broadcasting (Mar. 14, 2023), <https://www.gpb.org/news/2023/03/14/lawsuit-alleges-athens-da-unable-and-unwilling-do-her-job>.

Georgia, exercise discretion on whether to charge cases, what charges and penalties to pursue, and what plea bargains to offer. As this Court has noted, “[f]rom the beginning of our criminal justice system prosecutors have exercised the power of prosecutorial discretion in deciding which defendants to prosecute.” *Bishop v. State*, 265 Ga. 821, 822 (1995), quoting *State v. Hanson*, 249 Ga. 739, 742–743(1) (1982). “The Georgia appellate courts have historically safeguarded the prosecutor’s independence in the performance of the duties of that office and the separation of the judicial and prosecutorial functions.” *State v. Rish*, 222 Ga. App. 729, 731 (1996).

This prosecutorial independence is fundamental to the operation of the criminal justice system. As Georgia’s courts have recognized, “[o]ur adversary system of criminal justice demands that the respective roles of the prosecution and defense and the neutral role of the court be kept separate and distinct in a criminal trial.” *State v. Dorsey*, 364 Ga. App. 731, 737–38 (2022), citing *State v. Santiago*, 333 Ga. App. 742, 743, 776 S.E.2d 824 (2015). Any decision to allocate the prosecution authority to the courts, and thereby mandate prosecutorial actions that necessarily impact office policy and the use of limited resources, disrupts the core of our system of governance.

An elected prosecutor’s duty is to utilize their discretion to pursue justice and protect public safety. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (A prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”).¹² In individual cases,

¹² *See also* 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.

the prosecutor has “a heightened duty to ensure the fairness of the outcome of a criminal proceeding from a substantive perspective – to ensure both that innocent people are not punished and that the guilty are not punished with undue harshness.”¹³ But seeking justice requires much more than fair play or a proportionate outcome in the context of a single case or trial. An elected prosecutor also has a duty as a “‘minister[] of justice’ to go beyond seeking convictions and legislatively authorized sentences in individual cases, and to think about the delivery of criminal justice on a systemic level, promoting criminal justice policies that further broader societal ends.”¹⁴

Inherent in this larger duty to the public is the prosecutor’s obligation to spend limited criminal justice resources efficiently to protect the safety and well-being of the community.¹⁵ No prosecutor has the resources and ability to prosecute every violation of the law, nor would doing so promote public safety or be an effective use of public resources.¹⁶ Instead, elected prosecutors – empowered by their community to carry out the duties of that job – make decisions every day

“Current public opinion constantly rewrites the terms of a criminal code drafted by legislatures over many decades.”).

¹³ Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 Fordham Urb. L.J. 607, 636 (1999).

¹⁴ R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 45 Loyola Univ. of Chicago L.J. 981, 983 (2014), <https://lawecommons.luc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1480&context=luclj>.

¹⁵ *Id.* at 996.

¹⁶ For example, Georgia, like many states, criminalizes adultery. *See* Ga. Code § 16-6-19. Other jurisdictions maintain similarly outdated laws that do not promote public safety, including laws criminalizing profanity, playing pinball by minors, and eavesdropping. *See, e.g.*, Okla. Stat. tit. 21 § 906; Okla. Stat. tit. 21 § 1202; Miss. Code § 97-29-47; S.C. Code § 63-19-2430. It strains credulity to suggest that an elected District Attorney would exceed her discretion in declining to prosecute such crimes.

about where and how limited resources are best expended, what cases merit entry into the justice system, and what charges and penalties to seek when a case does warrant criminal prosecution.

Considerations about justice, promoting the best interests of individuals and the community, and resource allocation necessarily impact decisions regarding charging policy. There is no question that prioritizing serious, violent crimes over pursuing the prosecution of low-level offenses – in particular, prosecutions that disproportionately burden Black residents and yield no public safety benefit – is consistent with that mission.

Today, around the country, communities are retreating from “tough on crime” or “zero tolerance” policies that have created racial disparities and harmed communities by electing prosecutors who seek to advance proven data-driven solutions.¹⁷ These prosecutors – and the communities that elect them – recognize that overly punitive approaches undermine public safety and community trust. They are making evidence-based decisions around when, and if, to exercise their tremendous power to pursue criminal charges. This shift in perspective in no way justifies or permits judicial interference with the will of the voters or the exercise of the discretion that is fundamental to the prosecutorial function.

II. Second-guessing the policy decisions of the elected prosecutor undermines local control, invades clearly established separation of powers doctrine, and erodes the right of voters to community self-governance

After a competitive and hard-fought campaign, voters in the Western Judicial District elected DA Gonzalez based on her vision for how best to address

¹⁷ Allison Young, *The Facts on Progressive Prosecutors*, Center for American Progress (Mar. 19, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice/>.

the needs and concerns of her community.¹⁸ During the campaign, District Attorney Gonzalez specifically pledged to address these issues in part by revisiting the prosecution of low-level offenses such as simple marijuana possession.¹⁹ The voters of the district embraced those goals, and upon assuming office, DA Gonzalez did exactly what she promised to do. Whatever one may think about these approaches, if the community decides that they are dissatisfied with her policy choices or performance, the appropriate remedy is to allow the democratic process to function and make a different choice in the next election.

Though presented as a purported issue of legality and prosecutorial ethics, this suit is simply an attempt by a single individual to harness the authority of the court system to prevent DA Gonzalez from making policy decisions with which he does not agree. Similarly, the Superior Court's intervention here set a dangerous precedent, as the Court decided how an elected prosecutor should utilize her office's resources and allowed a single individual to strip the elected District Attorney of her authority as head of the office. The decision also necessarily eroded the rights of local voters to have a say in that vision.

District Attorneys are directly accountable to the people and community they serve. These officials lay out their visions for public safety and in seeking office define their enforcement priorities. Local residents and voters choose the leader that best reflects and furthers their vision for the justice system in *their* community. If District Attorneys fail to adhere to promises made, or if the public decides it disapproves of them, they will inevitably be voted out of office.

¹⁸ Blake Aued, *Deborah Gonzalez Wins Athens District Attorney Race*, Flagpole (Dec. 1, 2020), <https://flagpole.com/news/in-the-loop/2020/12/01/deborah-gonzalez-wins-athens-district-attorney-race/>.

¹⁹ Voting While Black, *Vote Deborah Gonzalez*, Color of Change PAC, <https://votingwhileblack.com/wp-content/uploads/2020/10/Deborah-Gonzalez-voter-guide.pdf> (last visited May 18, 2023).

This suit by a single dissatisfied voter asked the court system to step in and force an outcome that is more appropriately pursued through the democratic process. Unfortunately, the Superior Court was willing to embrace this intrusion into prosecutorial discretion. The integrity of the elections process, and the prosecutorial function writ large, underscore the need for this court to reverse the lower court's flawed decision.

III. To carry out the duties of their job and effectuate the will of the voters, elected prosecutors must be able to implement and enforce policies that guide their line attorneys' exercise of discretion

Office-wide policies, enacted by the elected prosecutor and consistent with the public's sense of justice, play a critical role in establishing, communicating, and changing the governing culture in an office.²⁰ "Policy priorities in the office... might not result from any actual change in the criminal law, but they palpably change the norms that define what prosecutors are expected to do."²¹

But these policies can do little to shift norms and practices if they are not enforceable. A DA's ability to ensure adherence to his or her vision of justice, especially when seeking to change the culture of an office, is largely dependent on whether line prosecutors are required to comply with office guidelines.²² While

²⁰ *Id.* at 374; see also Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making*, Vera Institute of Justice (Dec. 2012) at 15, <https://www.ncjrs.gov/pdffiles1/nij/grants/240335.pdf> (a study of decision-making by line prosecutors revealed that "norms and policies" limiting discretion are the "contextual factor with the most direct impact on prosecutorial decision making.").

²¹ Miller & Wright, *supra* note 12, at 178.

²² Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 Temp. Pol. & Civ. Rts. L. Rev. 369, 371 (2010), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2428&context=faculty_scholarship (elected prosecutors must "create a culture, structures, and incentives within prosecutors' offices so that prosecutors use their discretion consistently and in accord with the public's sense of justice").

some employees may feel a moral obligation to comply with a new approach, others will not, particularly when those new policies conflict with previous norms in the office.

Here, the lower court has essentially barred the DA from guiding the discretion of her assistant district attorneys. In so doing, it substantially undermined the elected DA's ability to manage the office and prioritize actions that promote public safety in line with the platform that the voters of the Western Judicial District embraced through the democratic process.

CONCLUSION

The Superior Court's decision overrides the will of the voters and allows judges to substitute their judgment for that of an elected prosecutor when it comes to policy decisions and enforcement priorities. Such a decision cannot stand.

So far, Courts have not interfered with prosecutorial discretion when that discretion has been used to increase incarceration following decades of policies that promoted "tough on crime" thinking. It is particularly troubling that, now, as data-driven prosecutors are looking for evidence-based practices to advance public safety and are being elected in cities and counties across the country, some courts are attempting to intervene in prosecutorial decisions they perceive as too lenient.²³ The misuse of mandamus seen here, if allowed to stand, would be equally applicable to intrusions on prosecutorial autonomy by elected leaders who bring a different philosophical starting point than that of DA Gonzalez. Yet such

²³ For example, where a judge tried to compel the former Suffolk County (Boston), Massachusetts District Attorney to prosecute a protester case, the Massachusetts Supreme Judicial Court promptly overruled the decision. *See* Roberto Scalse, *Mass. High Court Sides With Suffolk DA Rollins In Battle With Judge Over Protester Charge*, WBUR.org (Sept. 9, 2019), <https://wbur.fm/2Elz1g6>.

intervention is not only at odds with well-settled prosecutorial discretion, it also usurps local control.

Here, the Western Judicial District voters chose their District Attorney based on her stated view of how to allocate limited resources and promote public safety. The lower court's decision threatens that local community choice and sets a dangerous precedent by permitting intrusion into discretion uniquely vested in our nation's elected prosecutors. As such, we urge this Court to reverse that decision.

Dated: July 20, 2023

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CERTIFICATE OF FONT

Undersigned counsel certifies that this submission is double-spaced and utilizes 14-point Times New Roman font and therefore complies with R. Sup. Ct. Ga. 16.

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I declare under penalty of perjury under the laws of the State of Georgia that the above is true and correct. Executed at Macon, GA, this 20 day of July, 2023.

/s/ Andrea Bone
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APPENDIX – LIST OF AMICI

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