IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S21Q0068

BRIAN KEMP, GOVERNOR, et al.

Plaintiffs,

v.

DEBORAH GONZALEZ, et al.,

Appellees.

BRIEF OF APPELLEES

CERTIFIED QUESTION FROM
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT, CASE NO. 20-12649-G

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INTRODUCTION

This lawsuit was brought under 42 U.S.C. § 1983 by five Western Judicial Circuit residents seeking to protect their right to vote and run for the office of District Attorney. (Doc. 1).[1] The facts of this matter are undisputed. Ken Mauldin was elected as the District Attorney of the Western Judicial Circuit in November 2015 for a 4-year term beginning January 1, 2016 and ending December 31, 2020. (Doc. 1- ¶ 29). The next regularly-scheduled general election for the Western Circuit District Attorney was scheduled for November 3, 2020. (*Id*. at ¶ 34). On July 11, 2019, Plaintiff Deborah Gonzalez publicly declared her candidacy and launched her campaign for the Western Circuit District Attorney for the term beginning January 1, 2021. (*Id*. at ¶ 30). On February 5, 2020, Mauldin resigned from office, effective February 29, 2020. (*Id*. at ¶ 32).

Defendants then cancelled the election pursuant to the law that is challenged in this case, O.C.G.A. § 45-5-3.2 ("the 2018 Law"). (*Id*. at ¶ 35). Under the 2018 Law, if an incumbent resigns and the Governor does not appoint a replacement before May 3, 2020 (that is, six months prior to the general election), the eventual appointee serves for two years – well beyond the term of the vacating district attorney. At the time of filing this brief, Governor Kemp has not appointed a

[1] The citations to the docket ("Doc.") are to the District Court docket. All page number citations refer to the file-stamped number at the top of each page.

district attorney to fill the vacancy created by Mauldin's resignation.

Plaintiffs filed suit in the Northern District of Georgia Federal Court and raised three causes of action. (Doc. 1). The District Court granted a preliminary injunction, finding that Plaintiffs were substantially likely to succeed on the merits of their first cause of action which was based, *inter alia,* on the alleged unconstitutionality of O.C.G.A. § 45-5-3.2.[2] (Doc. 22). The District Court ordered the Secretary to take all actions necessary to conduct the election for district attorney of the Western Judicial Circuit on November 3, 2020. (*Id*. at pg. 21). The Secretary complied with the District Court's order. Plaintiff Gonzalez and two others have qualified for the election.[3]

Defendants moved in the District Court for a stay of the injunction, which the District Court denied. (Doc. 30). The Defendants also moved in the Eleventh Circuit for a stay of the injunction, which the Eleventh Circuit did not grant. (Order of July 27, 2020, pg. 2).

After briefing on the merits had been submitted, the Eleventh Circuit on August 20, 2020, issued an order certifying the following question:

> Does O.C.G.A. § 45-5-3.2 conflict with Georgia Constitution Article VI, Section VIII, Paragraph I (a) (or any other provision) of the Georgia Constitution?

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[2] The Court did not rule on Plaintiffs' remaining claims, as such determination was not required for purposes of preliminary injunctive relief. (Doc. 22 – Pg. 17 n. 8).

[3] Candidate information is listed on the Georgia Secretary of State's website at https://elections.sos.ga.gov/GAElection/CandidateDetails.

As explained below, this Court should answer this certified question in the affirmative.

ARGUMENT

In their Eleventh Circuit Brief of Appellees, Plaintiffs addressed the unconstitutionality of the 2018 Law comprehensively. In this Brief, Plaintiffs will not repeat those arguments, but instead will, first, address in greater detail how the Court's analysis in *Barrow v. Raffensperger,* 842 S.E.2d 884 (2020), informs the resolution of this case and, second, show how legislation passed nearly contemporaneously with the ratification of the 1984 Constitution confirms the unconstitutionality of the 2018 Law.

1. This Court's Barrow Decision Confirms Unconstitutionality of 2018 Law

Applying the language and analysis of this Court's *Barrow* decision to this case leads quickly to the conclusion that the 2018 Law is unconstitutional. Initially, just as the Georgia Constitution in Article VI, Section VII fixes a six-year term for justices and their successors, Article VI, Section VIII fixes a four-year term for district attorneys and their successors. Absent a vacancy appointment, the terms for both justices and district attorneys – to use Chief Justice Melton's metaphor – are handed like torches from incumbent to successor. 842 S.E.2d at 908 (Melton, C. J., concurring).

With vacancy appointments, however, the Georgia Constitution's treatment of justices and district attorneys diverges. Under Paragraph IV of Section VII, when a justice retires before the end of his or her term, the retiring justice's term "disappears with the incumbent, along with any hypothetical future terms associated with that incumbent." 842 S.E.2d at 896. The torch "will be immediately extinguished." *Id*. at 908 (Melton, C. J., concurring).

The constitutional provision that causes a justice's six-year term to be extinguished upon a vacancy appointment is Paragraph IV of Section VII. This Court in *Barrow* repeatedly emphasized the importance of Paragraph IV -- it materially changed existing law,[4] pursuant to which a vacancy appointment had no impact upon the term of the vacating justice.[5] But for Paragraph IV, a justice appointed to office would inherit and serve out the remainder of his or her predecessor's six-year term, and the six-year term would remain undisturbed.[6]

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[4] "We cannot ignore the import of Paragraph IV's definition of the initial period of service for judges appointed to elective office, because it was a significant change from prior Georgia Constitutions, under which an appointed judge simply served out all or part of the unexpired term of the prior incumbent. . . . When constitutional language is substantively changed, we must give that change effect." 842 S.E.2d at 895.

[5] "Read together, Paragraph III and IV make it clear that a judge appointed to an elective office does not inherit and serve out the remainder of his or her predecessor's term of office; that unexpired term, we have explained before, is "'eliminate[d]'" when the incumbent judge vacates the office." (citation omitted). 842 S.E.2d at 893-894.

[6] Defendants incorrectly assert that Article VI, Section VIII "does not provide an answer" regarding the term of office for district attorney vacancy appointees. (Appellants' Brief – Pg. 34; *see also* pg. 37-41). Their assertion relies on reading the final sentence of Paragraph 1(a)

Section VIII, which governs district attorneys, has no Paragraph IV. There is no *constitutional* provision that modifies the fixed four-year term of district attorneys or allows the four-year terms of district attorneys their "torches" – to be "extinguished." *See Barrow*, 842 S.E.2d at 908 (Melton, C. J., concurring).

The 2018 Law is an attempt by the Legislature to graft by legislation a constitutional provision that changes the term of district attorney appointees to match the term of appointees for justices. Indeed, Defendants concede the point, repeatedly characterizing the 2018 Law as the "statutory counterpart" to Paragraph IV (Appellants' Brief – Pg. 47; *see also id.* at 36 (describing the 2018 Law as "materially similar" to Paragraph IV)). Had the Framers of the 1983 Constitution intended for the terms of district attorneys – fixed in Paragraph 1(a) at four years – to be "extinguished" upon a vacancy appointment, they would have included such a provision in Section VIII, just as they did in Section VII.

("Vacancies shall be filled by appointment of the governor") in a vacuum, which is contrary to established rules of constitutional construction.

> The contentions urged by [Appellants], if sustained would have the effect of isolating a few words from the entire paragraph and giving to them a refined definition without due consideration of the context in which they are used. This, under all the recognized rules of construction, cannot be done. The true meaning of such words can be ascertained in no other way except by a consideration, inter alia, of the subject-matter to which they relate as disclosed by the entire paragraph.

Blum v. Schrader, 281 Ga. 238, 241 (2006); *see also Barrow*, 842 S.E.2d at 893-894 (relying on Art. VI, Sec. VII, Paragraph IV to determine the term of office of vacancy appointees appointed pursuant to Section VII, Paragraph III).

What little legislative history there is for House Bill 907 (which became the 2018 Law) demonstrates that the bill was intended to make the treatment of district attorney vacancies equivalent to the treatment of judicial vacancies. In his presentation to the Government Affairs Committee on February 21, 2018, the Bill's author, Representative Barry Fleming, stated that "HB 907 basically fixes what I think is an inconsistency in our election laws when it comes to how we treat judges and district attorneys. . . . This would simply change the law to make how we treat judges and how we treat district attorneys consistent."[7]

This Court has repeatedly emphasized that the Legislature has no authority to change the terms of a constitutional office: "where an office is created or guarded by express constitutional provision, its scope cannot be enlarged or lessened by statute." *Morris v. Glover,* 121 Ga. 751, 754 (1905). This principle extends to attempts by the legislature to tinker with the right of election that the "the people in their sovereign capacity" have "reserved unto themselves." *Jones v. Forston,* 223 Ga. 7, 14 (1967). Here, the people, in the Georgia Constitution, reserved unto themselves the right to elect district attorneys every four years. "Where the constitution prescribes the manner in which a particular public

[7] *See* www.youtube.com/watch?v=2IWdZmiSmP4&feature=youtu.be&list=PLIgKJe7_xdLXIA3_ikTaEGY_6ZirvVZqh&t=2982, minute 56:37 - 58:54; *see also* the Legislative Paper Trail at http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/907 (Legislative Paper Trail); and Minutes of the Senate Committee on Judiciary dated March 5, 2018 at http://www.senate.ga.gov/committees/Documents/2018Minutes80.pdf.

functionary is to be elected, or prescribes the terms during which he shall hold office, the legislature is thereafter powerless to modify, enlarge, or diminish that which is established by the constitution." *Id.* at 14-15. By attempting to diminish what is established in the Georgia Constitution, the 2018 Law is unconstitutional.

2. Contemporaneous Legislation Confirms Unconstitutionality of 2018 Law

The Georgia Constitution is interpreted "according to its original public meaning." *Elliott v. State*, 305 Ga. 179, 181 (2019); *see also Smith v. Baptiste*, 287 Ga. 23, 32 (2010) (Nahmias, J., concurring) ("Our task in interpreting the Constitution is to determine the meaning of the language used in that document to the people who adopted it as the controlling law of our State."). "Powerful evidence of the contemporary understanding of a constitutional provision" is a related statute enacted close in time to the adoption of a constitutional provision. *Clark v. Deal*, 298 Ga. 893, 899 n. 6 (2016). *See also Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (a related and contemporaneous statute is "contemporaneous and weighty evidence of its true meaning"). For example, when deciding whether the 1983 Georgia Constitution authorized the Governor to appoint judges to newly-created seats on the Georgia Court of Appeals, this Court relied in part on related bills passed in 1984 "at the regular session of the General Assembly following the effective date of the Georgia Constitution of 1983." *Clark*, 298 Ga. at 899 n. 6.

Legislation passed in 1984 on district attorney vacancy appointments confirms a contemporary understanding that Section VIII of Article VI contemplated vacancy appointees to serve no longer than the remainder of the unexpired term. In 1984, the Legislature amended O.C.G.A. § 45-5-3 to provide details for implementing the constitutional provisions regarding gubernatorial vacancy appointments to elective offices. Ga. Laws 1984, p. 1152, § 1 (amended 1996,[8] and 2018[9]). (Plaintiffs will refer to this law, as it existed prior to the 2018 Law that amended it, as "the Original Statute.") The Original Statute applied to vacancy appointments generally, including those made pursuant to Article V, Section II, Paragraph VIII(a) and, separately, "in those instances where the Governor fills a vacancy in the office of district attorney pursuant to Article VI, Section VIII, Paragraph I, subparagraph (a) of the Constitution." Ga. Laws 1984, p. 1152, § 1. The Original Statute required that, "[i]f the vacancy occurs during the final 27 months of a term of office, the Governor shall appoint a person to fill such vacancy for the remainder of the unexpired term." *Id*. Where a vacancy occurs earlier, the "Governor shall appoint a person to fill such vacancy until such vacancy is filled for the unexpired term of office at a special election." *Id*.

[8] The 1996 amendment added the clause "and in conjunction with such general election" at the end of O.C.G.A. § 45-5-3 (b). Ga. Laws 1996, p. 166, § 2.

[9] As discussed *infra*, the 2018 amendment enacted O.C.G.A. § 45-5-3.2, the 2018 Law. Ga. Laws 2018, p. 111, § 1.

The Original Statute is "powerful evidence" of the Framers' understanding of the *constitutional* limitations on the duration of vacancy district attorney appointments in two crucial respects. First, the Original Statute confirms an original understanding that vacancy appointments would never last beyond the end of the term. Under the Original Statute, no matter when a vacancy occurred in the middle of a four-year term, there would always be an election for district attorney every four years. The framers of the 1983 Constitution did not authorize extinguishing the 4-year term should a district attorney vacancy arise.

Second, the Original Statute defeats any argument that the Framers intended the "default provision" of Article V, Section II, Paragraph VIII(a) to give the Legislature the plenary authority to pass laws that conflicted with the specific constitutional provisions relating to district attorney terms found in the Constitution's District Attorney provision (Article VI, Section VIII). The Original Statute carefully enumerated two sources for its legislative authority. For offices *other than* district attorneys, it sourced the general default provision in Article V, Section II, Paragraph VIII(a). For provisions relating to district attorneys, however, the Original Statute sourced Article VI, Section VIII, Paragraph I(a) – the specific constitutional provision addressing district attorney terms and vacancies. Ga. Laws 1984, p. 1152, § 1. *See also Barrow,* 842 S.E.2d at 895 ("We have explained that the specific language of Paragraphs III and IV of the judicial

selection section in Article VI prevails over more general provisions relating to the Governor's authority to fill vacancies in Article V."). This "powerful evidence" of contemporaneous legislation, therefore, shows that the 2018 Law conflicts with the Georgia Constitution.

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In conclusion, a holding that the 2018 Law does not violate the Georgia Constitution not only rests uneasily alongside *Barrow, Morris,* and *Jones v. Forston,* it also is completely unnecessary. If the terms of appointed district attorneys need to be enlarged by extinguishing the constitutional term of the office of district attorney, that result can and must be achieved through a constitutional amendment. "The genius of our democracy is that, to the extent the people of Georgia now second-guess the system of elections and appointments they ratified in the 1983 Constitution, they have the power to seek amendment to that foundational document." *Barrow,* 842 S.E.2d at 908 (Melton, C.J., concurring).

For the foregoing reasons, the certified question should be answered in the affirmative.

Respectfully submitted this 28th day of August, 2020.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Appellees upon all counsel of record by email to:

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This 28th day of August, 2020.

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