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April 10, 2020

VIA ELECTRONIC SUBMISSION AND U.S. FIRST-CLASS MAIL

The Hon. Brian P. Kemp
Governor of the State of Georgia
206 Washington Street
Suite 203, State Capitol
Atlanta, GA 30334
georgia.governor@gov.state.ga.us

David Dove, Esq.
Executive Counsel to the Governor
206 Washington Street
Suite 203, State Capitol
Atlanta, GA 30334

RE: District Attorney for the Western Circuit

Dear Governor Kemp and Mr. Dove:

This firm represents Deborah Gonzalez for DA, Inc., the campaign to elect The Hon. Deborah Gonzalez District Attorney for the Western Circuit (the "Campaign"). The former officeholder, The Hon. Ken Mauldin, resigned his office and actually relinquished the powers and duties of that office on February 28, 2020. Since that time, the former Chief Assistant District Attorney has served on an acting basis.

I write on the Campaign's behalf to request that you appoint someone to this office soon, and definitely before May 3, 2020. Further delay in the appointment of a District Attorney will raise troubling questions. This non-exercise of your appointment powers contrasts sharply with your solicitation of a short list of nominees for a position as Associate Justice on the Georgia Supreme Court, though Justice Blackwell's seat will by all public accounts remain occupied until mid-November. I understand that a short list of nominees has been formed, but that no further action has occurred.

To be clear, the Campaign and Ms. Gonzalez are mindful and concerned by the ongoing public health emergency imposed by the novel coronavirus throughout the State and the nation. She also understands well, as a former legislator, how challenging the pandemic is for you both and for so many of our State's elected leaders and key staff. Even so, we are aware that the Governor has made several appointments since the arrival of the pandemic, and after the General Assembly provided the Governor with emergency powers to address it. Ms. Gonzalez, and her supporters in Clarke and Oconee Counties, remain concerned at the delay in appointing a Western Circuit District Attorney. That delay can in turn delay the election for this position for over two years. Delaying the election delays democracy and the opportunity for the voters of the Western Circuit to express their opinion through the democratic process for the reasons that follow.



The Hon. Brian P. Kemp
April 10, 2020
Page 2

As you know, your appointment power vests upon the creation of an actual vacancy in the position of District Attorney. 1983 Ga. Const. Art. VI, Sec. VIII, Para. I(a). The provision of the Georgia Constitution addressing the appointment of a vacancy in the office of District Attorney reads as follows:

District attorneys; vacancies; qualifications; compensation; duties; immunity.

(a) There shall be a district attorney for each judicial circuit, who shall be elected circuit-wide for a term of four years. The successors of present and subsequent incumbents shall be elected by the electors of their respective circuits at the general election held immediately preceding the expiration of their respective terms. District attorneys shall serve until their successors are duly elected and qualified. Vacancies shall be filled by appointment of the Governor.

As you also know, there is no constitutional text providing for the preemption of an election for district attorney when an actual vacancy is filled by appointment shortly before the next-scheduled general election. By contrast, the Georgia Constitution does provide for the filling of vacancies for elective justices or judges. *Compare id.*, 1983 Ga. Const., Art. VI, Sec. VII, Para. IV (“An appointee to an elective office shall serve until a successor is duly selected and qualified and until January 1 of the year following the next general election which is more than six months after such person’s appointment.”) *with* Art. VI, Sec. VIII, Para. I(a) (“District attorneys shall serve until their successors are duly elected and qualified.”). Rather, a law enacted in 2018, O.C.G.A. § 45-5-3.2(a), provides for a district attorney appointed fewer than six months prior to the date of the next-scheduled general election to be immune from that election, and provides for an election to be held contemporaneously with the *following* general election. That subsequent general election will be scheduled for a date more than *two years* from the time of appointment.

This statute impinges on the constitutional rights of voters and of potential candidates for the office of district attorney throughout Georgia. The statute provides the Governor with unbridled discretion in the timing of the appointment to fill a vacancy in the office of district attorney, and thereby, unbridled discretion to prevent the election of a district attorney for as long as two and one-half years. In the present case, by refraining from exercising the appointment power until fewer than six months remain before this year’s November 3, 2020 general election date, your office would prevent Western Circuit voters from choosing their District Attorney until November 2022.

The absence of standards constraining your exercise of this appointment power violates the First Amendment of the United States Constitution. In particular, it violates the expressive rights of voters for District Attorney and of candidates for District Attorney. See generally *Barrett v. Walker Cty. Sch. Bd.*, 872 F.3d 1209 (11th Cir. 2017). As with granting a permit or permitting



The Hon. Brian P. Kemp
April 10, 2020
Page 3

speech at a public meeting, an official with unbridled discretion over whether and when to fill a vacancy could censor political expression with which the official disagrees by delaying a decision on whom to appoint to fill the vacancy, and thus on core political expression and activity, for more than two years. This constitutes a prior restraint on expression, which “exists when the government can deny access to a forum for expression before the expression occurs.” *U.S. v. Frandsen*, 212 F.3d 1231, 236-37 (11th Cir. 2000). Further, no content regulation need be present in the statute or elsewhere in an appointment power for the governing authority to discern the viewpoint(s) likely to be expressed after exercising unbridled discretion to permit speech. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757-59, 108 S. Ct. 2138 100 L.Ed.2d 771 (1988); *Café Erotica of Fla., Inc. v. St. Johns Cty.*, 360 F.3d 1274 (11th Cir. 2004).

Failing to fill an actual vacancy when it occurs by appointment prevents effective political activity and speech by would-be candidates, and prevents voting by voters at all, because no election will be held as it would be had the appointment power been promptly exercised. A governmental mechanism that denies the citizen the opportunity to express political opinion is a *sine qua non* of prior restraint, to say nothing of denial of the right to vote for an office, election to which is guaranteed under the Constitution of the State of Georgia. The absence of any statutory time limit after an actual vacancy occurs within which the Governor must exercise his vested appointment power is, at best, questionable. It follows that an election is analogous to a designated public forum for governments may also limit elections to a particular class of eligible and qualified candidates, provided that all eligible citizens may qualify for access. *See Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677-80 (1998).

Arbitrary deprivation of the right to vote based on the timing of an appointment to fill a vacancy, of course, contradicts our system of government and the right of the governed to elect their constitutional officers. *See* 1983 Ga. Const., Art. I, Sec. I, Para. II (“No person shall be denied the equal protection of the laws.”); *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”). Risking the erasure or actually erasing an entire election creates the appearance of placing “backroom deals hatched by politicians in Atlanta before the will of the people of Clarke and Oconee Counties.”¹ As a fellow resident of the Western Circuit, Ms. Gonzalez is confident that you have no interest in creating such an impression.

¹ “Deborah Gonzalez’s Response to Mauldin Resignation” (Feb. 7, 2020), available at <https://www.youtube.com/watch?v=iIgFXvg1Jp8>.



The Hon. Brian P. Kemp
April 10, 2020
Page 4

Ms. Gonzalez has openly and enthusiastically spoken of her plans to run for the office of District Attorney of the Western Circuit. She and the Campaign have taken several concrete steps toward that objective for many months, including holding fundraising activities, publishing a website, developing a policy platform, speaking to potential supporters, donors, and volunteers, and otherwise investing a great deal of time in pursuing this office. Absent an actual election, however, these steps will go for naught.

Unfortunately, there are ample similarities to the absence of an appointment in the Western Circuit today and the lengthy delay in filling the vacancy created in the Douglas Judicial Circuit two years ago:

- As in Douglas County, there is reason to surmise that an election in the Western Circuit would result in voters choosing a new path and electing a candidate with a viewpoint that challenges the status quo;
- As in Douglas County, a woman of color has endorsements from progressive citizens or organizations and seeks the chief law enforcement office of a community with growing numbers of younger and non-White voters; and
- As in Douglas County, an actual vacancy has gone unfilled for weeks on end as the sun sets on the opportunity to require the gubernatorial appointee to face the voters in the next-scheduled general election.

Ultimately, in the Douglas Circuit, Governor Deal appointed a district attorney nearly ten weeks after appointing the duly-elected district attorney to the bench – and mere days after the appointee would have been required to run for election that year–. So too here, the silencing of the People’s voice via a preempted election looms large, yet no appointment has been forthcoming.

The solution is simple and apparent: exercise the vested appointment power to appoint a District Attorney for the Western Circuit without further delay. Waiting until after May 3, 2020 and applying O.C.G.A. § 45-5-3.2(a) would cause the appointee to serve not through the end of the year, but through the end of 2022, and no election would be held for this critical post in November 2020 as has long been expected. With no elected, permanent District Attorney having filled that post since March 1, with this actual vacancy having been anticipated for many months now, and with multiple attorneys having submitted their materials in application for this appointment, there is simply no reason not to exercise the appointment power without delay, and in any event by the end of this month. Waiting beyond May 3 would deprive voters and candidates alike of their First Amendment rights and in light of the circumstances described above could only be seen as calculated to have precisely that effect.



The Hon. Brian P. Kemp
April 10, 2020
Page 5

Ms. Gonzalez does not want to litigate this matter, the likely constitutional infirmities of the statutory scheme notwithstanding. Even so, she reserves all options at her disposal should the anticipated election not occur due to delay in exercising the Governor's vested appointment power. She respectfully requests that the Governor exercise his powers under Art. VI, Sec. VIII, Para. I(a) consistent with the powers and obligations of his office.

Sincerely,

KREVOLIN & HORST, LLC

A handwritten signature in blue ink, appearing to read "Adam M. Sparks".

Adam M. Sparks
*Attorneys for Deborah Gonzalez for
DA, Inc.*

Cc: Client
Halsey G. Knapp, Jr.