IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

State of Georgia v. Donald John Trump, *et al.*, Defendants.	Case No. 23SC188947

MOTION OF *AMICI CURIAE* ETHICS EXPERTS AND FORMER FEDERAL AND GEORGIA STATE PROSECUTORS TO FILE A BRIEF IN OPPOSITION TO DEFENDANTS ROMAN, TRUMP, AND CHEELEY'S MOTIONS TO DISMISS THE GRAND JURY INDICTMENT AND DISQUALIFY THE DISTRICT ATTORNEY, HER OFFICE, AND THE SPECIAL PROSECUTOR

Amici curiae, Richard Briffault, Amy Lee Copeland, Scott Cummings, Charles Geyh, Bruce Green, Peter Joy, David Luban, J. Tom Morgan, Richard Painter, Russell Pearce, Cassandra Burke Robertson, Rebecca Roiphe, Sarah Saldaña, Charles Silver, Abbe Smith, Brad Wendel, and Shan Wu, respectfully seek leave of this Court to appear as *amici curiae* and file their brief in opposition to Michael Roman, Donald J. Trump, and Robert Cheeley's motions to dismiss the grand jury indictment and disqualify the District Attorney, her office, and the special assistant district attorney. *Amici* are identified in the Appendix attached to this Motion. The brief is attached to this Motion as Exhibit A. In support of this motion, *amici curiae* state the following.

Interest of Amici Curiae

Amici curiae are ethics experts and former federal and Georgia state prosecutors and defense attorneys who collectively have decades of experience with the disqualification and conflict of interest issues that apply to prosecutors. Based on their years of experience with the very issues raised in Defendants' motions, *amici* respectfully submit that their amicus brief may assist the Court in its decisional process and in its evaluation of the legal issues raised in this

matter. The amicus brief is narrowly tailored to key issues before the Court and granting leave would not cause any delay or prejudice to the parties.

WHEREFORE, *amici curiae* request this Court accept and consider the brief attached hereto.

Respectfully submitted, this 5th day of February, 2024.

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Appendix

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**The *amici* are signing on in their personal capacities. Titles are for identification purposes only.

EXHIBIT A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

State of Georgia v. Donald John Trump, *et al.*, Defendants.	Case No. 23SC188947

BRIEF OF *AMICI CURIAE* ETHICS EXPERTS AND FORMER FEDERAL AND GEORGIA STATE PROSECUTORS IN OPPOSITION TO DEFENDANTS ROMAN, TRUMP, AND CHEELEY'S MOTIONS TO DISMISS THE GRAND JURY INDICTMENT AND DISQUALIFY THE DISTRICT ATTORNEY, HER OFFICE, AND THE SPECIAL PROSECUTOR

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I. INTRODUCTION[1]

It is well settled Georgia law that courts have the power to disqualify a prosecutor with a conflict of interest. *Williams v. State*, 258 Ga. 305, 314 (1988). Disqualifying conflicts occur when a prosecutor's previous representation of a defendant gives the prosecutor forbidden access to confidential information about the defendant or a conflict otherwise directly impacts fairness and due process owed a defendant. *E.g.*, *Frazier v. State*, 257 Ga. 690, 693 (1987). That kind of conflict is not at issue here. Instead, the conflict alleged is between District Attorney Fani Willis's (1) duty to discharge her prosecutorial duties impartially and in the public interest, *see State v. Wooten*, 273 Ga. 529, 531 (2001), and (2) her alleged personal interest in compensation paid to one of the Special Assistant District Attorneys (SADAs), Nathan Wade. Defendants Michael Roman, Robert Cheeley, and Donald Trump allege those funds have been shared with DA Willis due to a romantic relationship between the two.

As former prosecutors and scholars of ethics, *amici* have deep collective experience with the standards of prosecutorial disqualification for conflict of interest. We have no independent knowledge whether there was a personal relationship at the time of hiring or whether overall spending in the personal relationship was roughly evenly balanced. But even if all Defendants' allegations are true, they do not mandate disqualification here. Indeed, they do not even come close. As the Georgia disqualification cases show, prosecutors are trusted to discharge their duties impartially, even when they have conflicting interests that may generate an appearance of impropriety in the eyes of some. In part, this trust is a recognition that the cost of disqualification

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

is high. And in the case of an elected district attorney, disqualification is in tension with the Georgia Constitution's express, textual commitment of prosecutorial authority to the local district attorney. DA Willis's alleged conduct has caused some to question whether procurement rules or other obligations have been violated. But focusing on the questions before this Court, the relief Defendants seek—disqualification and dismissal of the indictment—is simply not warranted. The same is true with respect to the District Attorney's comments at AME Bethel Church because they were not directed at a particular defendant, much less comments on the guilt of any defendant or indeed, the merits of the case at all. *Williams*, 258 Ga. at 314.

The policy reasons are clear for rejecting disqualification under circumstances like the personal relationship presented here. As one of the amici has written, "These allegations are as irrelevant to the trial as allegations in other situations that prosecutors took office supplies for personal use, drove county vehicles for personal errands, or plagiarized portions of their student law review notes."[2] For courts to countenance disqualification based on these types of grounds would create perverse incentives for defense attorneys to ferret out irrelevant information about the private conduct of prosecutors and use the threat of exposure in a disqualification motion in order to inappropriately obtain unwarranted dismissal or other resolution of cases.

Because the allegations, even if taken as true, do not provide a basis for disqualification, *amici* respectfully submit that an evidentiary hearing on these motions is unnecessary. If the court determines to hold one, *amici* submit that it should be circumscribed to avoid a spectacle unjustified by the applicable disqualification law of Georgia. Finally, even if the Court concludes that there is a conflict, DA Willis should be permitted to cure, with any such cure tailored to address

[2] Norman L. Eisen, Joyce Vance, Richard Painter, *Why Fani Willis Is Not Disqualified Under Georgia Law*, Just Security (Jan. 21, 2024), https://www.justsecurity.org/91368/why-fani-willis-is-not-disqualified-under-georgia-law/.

the conflict at issue and avoid unnecessary and costly delays. *See Bayshore Ford Truck Sales, Inc. v. Ford Motor Co*., 380 F.3d 1331, 1338 (11th Cir. 2004) (affirming decision to deny disqualification where one attorney promptly withdrew representation due to conflict of representing plaintiff and defendant).

II. ARGUMENT

Amici begin by explaining four key principles of the law of disqualification that should guide the Court's consideration of the disqualification motions. They then explain why neither disqualification nor dismissal is warranted here.

A. Four key principles of the law of disqualification.

As Judge McBurney recognized when rejecting a previous motion to disqualify DA Willis, disqualification of a prosecutor is "uncommon relief" that requires a "significant showing." Order on Mot. to Quash, Preclude, and Recuse, 6, *In re 2 May 2022 Special Purpose Grand Jury*, No. 2022-EX-000024 (July 31, 2023). As it evaluates the Defendants' motions, *amici* urge the court to focus on four key principles of the law of disqualification:

- Disqualification imposes significant costs, leading courts to view motions for disqualification skeptically.
- In all but the most egregious cases, prosecutors are trusted to fulfill their duties despite competing personal interests.
- Disqualifying a district attorney in Georgia involves unique constitutional considerations that weigh against disqualification.
- The purpose of disqualification is to protect defendants' due process rights. Other tools are available for misconduct that does not implicate fairness toward a defendant.

1. The costs of disqualification encourage opportunism and justify caution.

Disqualification imposes heavy costs, justifying caution when evaluating any disqualification motion. These costs include delay, the loss of counsel's knowledge and experience on the case, and the cost of getting new lawyers up to speed. *Lewis v. State*, 312 Ga. App. 275, 282 (2011). The prospect of delay is particularly concerning in criminal cases, as "encouragement of delay is fatal to the vindication of the criminal law." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (explaining federal policy against interlocutory criminal appeals). These costs are often perceived as benefits by the movant, so parties "often move for disqualification for tactical reasons," whether for delay or to obtain opposing counsel that might be considered less formidable. *See Lewis*, 312 Ga. App. at 282.

These factors lead courts to "approach motions to disqualify with caution" and grant them "sparingly." *Hodge v. URFA-Sexton, LP*, 295 Ga. 136, 138-139 (2014); *Lewis*, 312 Ga. App. at 282. Indeed, the general rule is that disqualification should be reserved for situations where the movant can show that "any remedy short of disqualification would be ineffective." *In re Est. of Myers*, 130 P.3d 1023, 1025, 1027 (Colo. 2006); *see also Caruso v. Knight*, 124 So.3d 962, 964 (Fla. Dist. Ct. App. 2013) ("Disqualification is not appropriate if lesser alternatives can alleviate the harm."); *In re Bivins*, 162 S.W.3d 415, 421 (Tex. App. 2005) (holding that movant "*must show* that disqualification is necessary because the trial court lacks any lesser means to remedy his harm" (cleaned up)). Thus, courts will permit attorneys to cure a disqualifying situation by removing the conflict whenever possible. *See Bayshore Ford Truck Sales, Inc.*, 380 F.3d at 1338 (permitting cure of Georgia conflict-of-interest violation through withdrawing from representation).

2. Except in extreme cases, prosecutors are trusted to perform their duties impartially, despite conflicting interests.

The mere presence of a conflicting personal interest does not require disqualification. That is so even when everyday people might believe an interest would render a lawyer prone to bias. Examples abound. Consider spouses representing clients on opposite sides of a dispute. Even though marriage "may be the most intimate relationship of a person's life"—a relationship with ties of affinity and finance—spouses are not automatically disqualified from representing adverse clients because lawyers can be trusted not to "allow this intimacy to interfere with professional obligations." *Jones v. Jones*, 258 Ga. 353, 354 (1988) (quoting *Blumenfeld v. Borenstein*, 247 Ga. 406, 409 (1981)).[3] The Georgia Supreme Court took a similar approach when it overturned longstanding precedent prohibiting legislators from paid representation of clients against the State in *Georgia Ports Auth. v. Harris*, 274 Ga. 146 (2001). The court rejected the prior rule's premise that a "lawyer who serves as a public officer will, upon being offered a fee, automatically act contrary to both to the public trust and all professional obligations as an officer of the courts." *Id.* at 148. While recognizing the potential for a conflict, the court believed that those "entrusted by the public to represent their interest" could be trusted to adhere to the "highest standards of ethical behavior," despite financial temptation. *Id.*

Prosecutors are no exception. That prosecutors have a duty to make prosecutorial "decisions in the public's interest," *Wooten*, 273 Ga. at 531, does not mean that prosecutors must refrain from prosecuting cases that could benefit their own private interests or to remain as free from conflicting interests as judges are required to do. *Young v. U.S. ex rel. Vuitton et Fils S.A.*,

[3] The Rules of Professional conduct now treat this as a waivable conflict, Ga. R. Prof. Conduct 1.8(i), but *Jones* remains good law on disqualification. *See Ventura v. State*, 346 Ga. App. 309, 311 (2018). Moreover, by its terms, Rule 1.8(i) applies only to *related* lawyers representing clients who are *directly adverse* to one another. Neither condition exists here.

481 U.S. 787, 810-11 (1987); *Whitworth v. State*, 275 Ga. App. 790, 793 (2006) (physical precedent only). On the contrary, "prosecutorial conflicts are ubiquitous." Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 484 (2017). Prosecutors seek re-election based on results in the courtroom, depend on positive relationships with law enforcement to do their jobs, and may hope that their conduct in public service will yield financial benefits in private practice later. But these interests are not disqualifying. *See, e.g. Young v. Ninth Jud. Dist. Ct., In & For Cnty. of Douglas*, 818 P.2d 844, 847, 849 (Nev. 1991) (sanctioning public defender for motion to disqualify prosecutor running on "tough on crime" platform). As Judge McBurney has already recognized, prosecutors are trusted to act fairly despite the personal benefits that can accrue from bringing a high-profile criminal prosecution—whether in the form of campaign contributions or future earnings opportunities due to the publicity. Order on Mot. to Quash, Preclude, and Recuse, at 7 n.13, *In re 2 May 2022 Special Purpose Grand Jury*, No. 2022-EX-000024 (July 31, 2023); *accord Hollywood v. Superior Court*, 182 P.2d 590, 599 (Cal. 2008).

Only when a personal interest is so strong that a prosecutor appears to be "acting. . . for his personal or individual interest" rather than "in his character as an officer of the law" is disqualification required under Georgia law. *See State v. Sutherland*, 190 Ga. App. 606, 607 (1989). In making this assessment, courts refrain from "speculation and conjecture." *Whitworth*, 275 Ga. App. at 794. This standard allows prosecutors to prosecute cases when many might perceive a bias. For example, a district attorney is not disqualified from prosecuting a political opponent, despite the "possible appearance of impropriety." *State v. Evans*, 187 Ga. App. 649, 651 (1988).[4] Consistent with due process, a district attorney may accept assistance from an SADA that

[4] Although the prosecutor was not legally disqualified, the court exercised its discretion to assign a different prosecutor. *Id.* Courts can no longer disqualify district attorneys who are not "legally

the victim's family hires to prosecute the case, even though the availability of free assistance is undoubtedly intended to increase the odds of prosecution. *Rutledge v. State*, 245 Ga. 768, 769-70; *Brown v. State*, 242 Ga. 536, 536 (1978) (so holding where SADA also represented family in civil litigation arising out of the same events).[5] A prosecutor with a pending civil claim against a government board may simultaneously prosecute one of the board's members. *State v. Sutherland*, 190 Ga. App. 606, 607 (1989). Courts trust prosecutors to proceed fairly, even when the defendant is simultaneously suing for alleged misconduct. *See Moon v. State*, 258 Ga. 748, 752 (1988); *see United States v. Esformes*, 60 F.4th 621, 634 (11th Cir. 2023) (holding that a prosecutor's interest in "protect[ing] her professional reputation" in response to sanctions does not require disqualification). The law of disqualification thus places great trust in prosecutors to proceed fairly, even when their personal interests may be in tension with the duty to treat defendants fairly.

3. Prosecutorial disqualification focuses on fairness to the defendant, not third parties.

Disqualification protects a defendant's due process interest in fair treatment by limiting the possibility that a prosecutor will proceed against the defendant based on "irrelevant or impermissible factors." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-49 (1980). Because due process is concerned with "the fairness of the trial ***to the defendant in the case***," "[A]ll considerations of fairness . . . must, therefore, be made . . . through the lens of fairness ***to the defendant***, not third parties." *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 397 (Mo. 2018) (emphasis in original, cleaned up); *People v. Perez*, 238 P.3d 665 (Colo. 2010); *see also Smith v.*

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disqualified." *State v. Mantooth*, 337 Ga. App. 698, 702 (2016) (recognizing *Evans*'s abrogation on this point).

[5] The due process holdings remain good law, even though the practice is now prohibited by Superior Court Rule 42.1. As Defendant Cheeley notes, and as further discussed below, the Tennessee Supreme Court disagrees with this decision, but that non-binding case is of no moment. *See infra* at 13-14.

Phillips, 455 U.S. 209, 210 (1982) ("[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.")

This focus on fairness to the defendant renders certain arguments in the disqualification motion beside the point from a due-process perspective. If Wade lacks the experience to be part of the prosecutorial team, as Defendant Roman claims, Roman Mot. at 12-16, that is a windfall to Roman, not an unfair detriment. Similarly, any perceived impairment to the government's interest in unbiased contracting decisions is simply not relevant to any Defendant's due process rights. When analyzing the arguments for disqualification, the Court should focus squarely on the due process interests that prosecutorial disqualification is meant to serve.

4. Disqualifying a district attorney deviates from the Constitution's assignment to the district attorney of "all criminal cases" within the circuit's superior court.

Unlike disqualification in other contexts, disqualifying an elected district attorney also implicates structural concerns under Georgia's Constitution. The people of Georgia elect district attorneys to "represent the state in *all* criminal cases in the superior court of such district attorney's circuit." Ga. Const. art. 6, § 8, ¶ 1(d) (emphasis added). The job of the district attorney entails substantial discretion, including "determining who to prosecute, what charges to bring, which sentence to seek, and when to appeal." *Stephens v. State*, 265 Ga. 356, 359 (1995). She is the people's chosen representative to make these "decisions in the public's interest" and "seek justice," and is generally entitled to make these decisions "without having to account for each decision in every case." *State v. Wooten*, 273 Ga. 529, 531 (2001); *Stephens*, 265 Ga. at 359. When a court disqualifies a district attorney, it also disqualifies all the prosecutors the district attorney has chosen to staff her office. *McLaughlin v. Payne*, 295 Ga. 609, 612-13 (2014). Thus, while courts have the power to disqualify a district attorney under Georgia Supreme Court precedent, *id.*, doing so is in

tension with constitutional structure, again warranting that it be used with caution. As we explain below, none of the arguments for disqualification suffices to justify that extraordinary relief.

B. The relationship between DA Willis and Wade is not a basis for disqualification.

The basic rationale of the Defendants' argument is that because DA Willis is in a romantic relationship with Wade, who has paid for some travel with her, she has a disqualifying personal interest in pursuing the prosecution. But the reasons Georgia courts find that marriage is not disqualifying apply equally to this romantic relationship. Despite marriage being "the most intimate relationship of a person's life," courts refuse to "imput[e] professional wrongdoing… on the basis of marital status alone." *Blumenfeld*, 247 Ga. at 409; *see also Jones*, 258 Ga. at 354-355; *Ventura*, 346 Ga. App. at 311.

The same analysis should apply here. *See Blumenfeld*, 247 Ga. at 409. That Wade allegedly gave gifts to DA Willis does not change the analysis. *See* Cheeley Mot. at 5 (touting the alleged financial benefit to DA Willis as the "***most important[]***" factor justifying disqualification). Courts require "special circumstances" beyond the fact of marriage before inferring that the relationship would "prevent" the spouses from performing their professional duties. *Blumenfeld*, 247 Ga. at 408. Paying for gifts for a romantic partner out of one's income is normal in the context of a marriage or other romantic relationship. Neither the relationship, nor the alleged financial benefit to DA Willis justifies disqualification under Georgia law.

C. Wade's retention and hourly compensation do not support disqualification.

Wade's retention and compensation do not warrant disqualification, either. The Defendants lean heavily into claims that Wade's appointment was illegal, but there is nothing to these allegations. Under Georgia law, district attorneys possess "general inherent authority" to retain SADAs to assist in specific cases that is "[i]ndependent of specific statutory authorization." *State*

v. Cook, 172 Ga. App. 433, 436-38 (1984) (rejecting argument that statutes governing district attorney staff hiring governed retention of SADAs). The Georgia Court of Appeals has repeatedly rejected Defendants' claim that O.C.G.A. § 15-18-20 removes this inherent authority, construing that statute to apply only to attorneys who are "*employ[ed]*" as "general and on-going staff members" of the district attorney's office. *Id.*; *accord Amusement Sales, Inc. v. State*, 316 Ga. App. 727, 736 n.5 (2012); *Greater Ga. Amusements, LLC v. State*, 317 Ga. App. 118, 120 (2012); *see also* O.G.C.A. § 16-1-12 (prohibiting contingency fees for SADAs in forfeiture claims, while not "prohibiting or otherwise restricting . . . a district attorney from appointing special assistants or other attorneys to assist in the prosecution of any action brought pursuant to [the Criminal Code of Georgia]").[6] Defendant Cheeley's alternative argument that Wade violated O.C.G.A. § 15-18-21(a) by engaging in the private practice of law fares no better. Section 15-18-21(a) applies only to attorneys "employed by the district attorney," so it does not apply to SADAs for the same reason that § 15-18-20 does not apply. *See Greater Ga. Amusements*, 317 Ga. App. at 120 (explaining that § 15-18-20 does not apply to SADAs because they are not "employees" of the district attorney). And as the District Attorney's response demonstrates, Fulton County's code of ethics does not apply to her because she is a state officer. State's Opp. at 22. Regardless, none of these regulations provides for disqualification as a remedy, indicating that any remedy for violations lies elsewhere.

Turning to the alleged financial interest provided by Wade's hourly rate, Georgia case law rejects disqualification unless a prosecutor has a non-speculative financial interest in the outcome

[6] Defendant Cheeley argues (at Cheeley Mot. 19) that *Greater Georgia Amusements* is physical precedent that should be disregarded, but he overlooks *Amusement Sales* and *Cook*, which are binding precedent. Defendant Roman's arguments overlook all of these cases, while expressly acknowledging that "Wade was not a member of the district attorney's staff[.]" Roman Mot. at 22.

of a prosecution. In *Amusement Sales, Inc. v. State*, the Court of Appeals disqualified SADAs retained on a contingency fee to seek forfeiture under the RICO statute, finding a contingency fee gives an SADA a "personal financial stake in the outcome of the proceedings." 316 Ga. App. at 735-36. In contrast, an argument that a prosecutor's alleged financial interest in obtaining a conviction to impress a future employer serving as witness counsel was too speculative to require disqualification where the future employer had not conditioned employment on a conviction. *Whitworth*, 275 Ga. App. at 792, 794; *accord United States v. Isaacson*, 752 F.3d 1291, 1308-09 (11th Cir. 2014) (disqualification not required where prosecutor lacks "financial stake in the outcome") (quoting *United States v. Reagan*, 725 F.3d 471, 488 (5th Cir. 2013)).

Unlike the contingency fee in *Amusement Sales*, Wade's hourly compensation here does not create a financial interest in the outcome of the case. To the contrary, Wade's remuneration is not contingent on the outcome of the prosecution against Roman, Cheeley, Trump, or anyone else. Moreover, publicly available records reflect that Wade's hourly compensation was subject to monthly caps on the hours billed—caps which, according to the invoices attached to Roman's own motion, resulted in "significantly truncated" billings. *See* Roman Mot. Ex. H (Invoices). Viewed impartially, these caps would likely *reduce* the incentive to pursue as wide-ranging and complex a prosecution as this one, not increase it. After a certain point, the more complex the case, the more the caps are exceeded.

But putting that aside, the Defendants' basic premise—that any lawyer who serves as a public officer will, upon being offered an hourly fee, automatically act contrary to both the public trust and all of their professional obligations—is deeply flawed.[7] Taken to its logical conclusion,

[7] *See Georgia Ports Auth. v. Harris*, 274 Ga. 146, 148 (2001) ("declin[ing] to presume that the lawyer-legislator will always fail to honor his or her obligations to the public trust as a public

it would operate as a basis to disqualify every lawyer paid by the hour to prosecute or defend a case.[8] Such a rule would invalidate Georgia laws that specifically contemplate hourly pay for prosecutors. *See, e.g*., O.G.C.A. § 15-18-5 (specifying that private attorneys who serve as part-time district attorneys *pro tempore*, i.e., substitutes for absent or disqualified DAs, "shall be compensated at an hourly rate[.]"). And it would invalidate federal compensation practices for special prosecutors as well. *See Young v. U.S. ex rel. Vuitton et Fils S.A*., 481 U.S. 787, 806 (1987) (noting hourly compensation for special prosecutors without questioning the practice). Here, as in *Harris*, 274 Ga. 146, given the absence of evidence that the hourly compensation arrangements provided an improper incentive to obtain a conviction rather than to fairly pursue this prosecution, this Court should decline to presume otherwise.

Defendant Cheeley's reliance on a non-binding, out of jurisdiction case for the proposition that the hourly payments "created an 'actual conflict of interest [that has] tainted the entire prosecution" ignores settled Georgia practice and caselaw and misreads the case he cites. *See* Cheeley Mot. at 13, citing *State v. Culbreath*, 30 S.W.3d 309, 316-317 (Tenn. 2000). *Culbreath* found a disqualifying conflict primarily because the special counsel's compensation was paid by a private special interest group, thus creating conflicting duties of loyalty to the private special interest group and the public prosecutor. *Id*. Those dueling loyalties, on top of hourly compensation, led the court to conclude that the special prosecutor "could not exercise his

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servant and to the legal profession as an officer of the courts and prefer[ring] instead to expect the highest standards of ethical behavior from the men and women admitted to the bar who have been entrusted by the public to represent their interests."), abrogating *Georgia Dept. of Human Resources v. Sistrunk*, 249 Ga. 543 (1982).

[8] One could argue that the defense attorneys paid by the hour, like those referenced in Roman's Motion, may counsel their clients not to take a favorable plea deal in order to prolong the case and go to trial. *See* Roman Mot. Ex. D (flier advertising contract attorney assignments "for attorneys on a per-case basis, paying hourly rates, to handle C-3 conflict criminal cases"). But defense attorneys are trusted not to yield to this temptation.

independent professional judgment free of compromising influences and loyalties. *Id.* (cleaned up). On this point, *Culbreath* directly conflicts with Georgia law, *Rutledge v. State*, 245 Ga. 768 (1980) (holding that a victim-funded SADA does not violate due process). In any event, Defendants appear to acknowledge that none of the SADAs at issue here is being paid by outside groups. *See* Cheeley Mot. At 16; Roman Mot. At 14.

Wade's hourly rate does not suggest an improper motive behind the prosecution either. The SADA contracts that are publicly available show the SADAs' hourly rates are within close range of one another and of special assistant attorneys general (SAAGs) retained by the Georgia Attorney General's Office.[9] Likewise, records available on the Georgia Attorney General's website reflect more than one hundred SAAGs with hourly rates of $250 or more, some of whom have billed annual totals in excess of $1 million.[10] In light of Wade's lead role on the case, its complexity, public profile, and success to date, the payments to Wade do not suggest overpayment for the services rendered, especially because they are capped under his contract.[11]

Just as Wade's hourly compensation does not create a financial incentive for him to seek a conviction rather than prosecute the case fairly, it does not create one for DA Willis. Indeed, to argue DA Willis brought this case for improper personal benefit defies logic. Not only has she had

[9] The agreements for SADAs Cross and Floyd are attached to the State's Opposition as Ex. M (Cross Contracts) and Ex. N (Floyd Contracts).
[10] *See, e.g.,* FY 2022 SAAG Rates By Client, available at http://tinyurl.com/yk3befjt; FYR 2016 SAAG Rate Descriptions, available at http://tinyurl.com/4ep5trmb; and FY2022 SAAG Information – End of Year Report as of 06/30/2022, available at http://tinyurl.com/43krr8xe.
[11] *See* Alex Anteau, *Meet the Private-Sector Litigators Helping to Bring Ga.'s Case Against Donald Trump*, Law.com (Aug. 31, 2023, 6:34 PM), http://tinyurl.com/2s35z3mb.

to endure a barrage of personal attacks and death threats for pursuing the case,[12] a brief review of the history of the case confirms its seriousness and merit.

Following an extensive investigation that began in early 2021, a special purpose grand jury issued a final report recommending charges against 39 individuals, including Defendants Trump and Cheeley. A second grand jury then considered the evidence and indicted 19 defendants on charges related to interfering with the 2020 presidential election. Some of the evidence considered by these grand juries, such as the content of Trump's call to Secretary Raffensperger urging him to "find" votes, and the fake electoral college certificates, is publicly known. Four defendants have thus far pled guilty and agreed to cooperate, with others reported to have accepted immunity deals.[13] These indisputable facts belie Defendants' assertions that these are flimsy charges pursued for personal advantage.

D. DA Willis's public statements are not a basis for disqualification.

Trump argues DA Willis should be disqualified due to statements she made on January 14, 2024 at Atlanta's Big Bethel AME Church. Trump claims DA Willis's keynote address included "charged, extrajudicial statements" that "injected race into the case and stoked racial animus." Trump Mot. to Adopt and Suppl. Roman's Mot. at 1-2. But the DA's statements, excerpted in Trump's motion, where she comments on those questioning Wade's qualifications, cannot result

[12] *See, e.g.*, *Michael Gold, Trump's attacks on Fani Willis follow familiar lines*., The New York Times (Aug. 14, 2023), http://tinyurl.com/bds7h7kd; Jeff Amy, *Efforts to punish Fani Willis over Trump prosecution are 'political theater*,' *Georgia Gov. Kemp says*, The Associated Press (Aug. 31, 2023, 5:40 pm EST), http://tinyurl.com/84vtaccj; Ed Pilkington, *Trump prosecutor Fani Willis faces racist abuse after indicting ex-US president*, The Guardian (Aug. 16, 2023, 7:24 pm EDT), http://tinyurl.com/mpwau67j; Tamar Hallerman, *'Derogatory and false': Fulton DA denies rumors circulated by Trump*, The Atlanta Journal-Constitution (Aug. 9, 2023), http://tinyurl.com/ycksuv9f. *See also* State's Opp. Ex. B (Sample of Communications Received by DA Willis).

[13] *See* Tamar Hallerman, *Eight Georgia GOP electors accept immunity deals in Fulton Trump probe*, The Atlanta Journal Constitution (May 5, 2023), http://tinyurl.com/axbxmhr.

in disqualification. Even where—in a more extreme case not present here—a prosecutor expresses a personal belief in the defendant's guilt, the prosecutor is only disqualified if the statement is "egregious" and part of the prosecutor's "calculated plan evincing a design to prejudice the defendant in the minds of the jurors[.]" *Williams*, 258 Ga. At 314; *see also Barber v. State*, 204 Ga. App. 94, 95 (1992). DA Willis's comments, not directed at a particular defendant, and not commenting on the guilt of any defendant (or indeed, the merits of the case at all) cannot warrant disqualification. *Williams*, 258 Ga. At 314 ("[I]t is a quantum leap from any conclusion that extra-judicial statements made by the prosecutor were improper, to the holding that disqualification of the prosecutor is required as a result thereof."). To the extent that Trump is concerned DA Willis's comments might impact the jury pool, voir dire is the appropriate tool for that issue. *See Gissendaner v. State*, 272 Ga. 704, 706 (2000) (holding that striking jurors for cause adequately addressed pretrial publicity).

E. Disqualification would result in substantial costs and delays.

Granting Defendants' motions to disqualify would impose significant costs and, at the least, severely delay this case—to the detriment of Georgians. As explained above, Georgia courts do not lightly disqualify prosecutors, and instead impose a high barrier to disqualification. The practical costs of disqualification, aptly exemplified in this case, demonstrate why. DA Willis has been investigating and pursuing this case for approximately three years. She and her team are particularly familiar with the evidence and witness testimony garnered thus far, including having presented this evidence to two separate grand juries. Disqualifying her and the office from the case risks losing institutional knowledge and creating significant delays, if the case is pursued at a later date at all. *See Lewis v. State*, 312 Ga. App. 275, 280 n.8 (2011) (recognizing "lawyers are not fungible, swapping one lawyer for another is not without great consequence").

Following the one previously successful attempt at disqualification in this matter a year and a half ago—DA Willis and her entire office were disqualified from pursuing their investigation against Lieutenant Governor Burt Jones, *see* Order Disqualifying District Atty's Office, *In re 2 May 2022 Special Purpose Grand Jury*, No. 2022-EX-000024 (July 25, 2022)—no attorney has been appointed to continue the investigation. Such delays deny the citizens of Georgia the right to have justice pursued in this important matter and should not occur here unless the high bar of disqualification is met. *See Cobbledick*, 309 U.S. at 325 ("[E]ncouragement of delay is fatal to the vindication of the criminal law."); *United States v. Trump*, No. CR 23-257 (TSC), 2023 WL 8359833, at *11 (D.D.C. Dec. 1, 2023) (recognizing that "crimes are a breach and violation of the public rights and duties due to the whole community" (cleaned up)).

The Court should not impose these costs unnecessarily. If it determines that DA Willis has a disqualifying personal interest, she should be allowed to cure it. *See Bayshore Ford*, 380 F.3d at 1331 (permitting attorney to cure conflict in lieu of disqualification). Even judges may, consistent with due process, cure financial conflicts of interest. 28 U.S.C. § 455(f); *In re Literary Works Elec. Databases Copyright Litig.*, 509 F.3d 136, 142-43 (2d Cir. 2007). That is all the more appropriate here, given the lower demands of neutrality that apply to prosecutors. *Whitworth*, 275 Ga. App. at 793. To be clear, there is no basis for disqualifying DA Willis under Georgia law, even if all the movants' allegations are true. But should the Court disagree, DA Willis should be allowed to cure the disqualifying conflict so that this case may proceed in a timely manner, for example, by reimbursing Wade for any unreimbursed shared expenses or modifying Wade's involvement in the case.

F. Dismissal of the indictment would be inappropriate.

Defendants ask this Court to dismiss the grand jury indictment against them, but spend little, if any, time explaining why that extraordinary relief should be granted. Dismissal of an indictment is an "extreme sanction[]" that is "used only sparingly." *State v. Lampl*, 296 Ga. 892, 896 (2015); *see also Olsen v. State*, 302 Ga. 288, 294 (2017). Defendants have not shown that their constitutional rights were violated or that these proceedings were rendered fundamentally unfair due to any relationship between DA Willis and Wade. *Lampl*, 296 Ga. at 896. Nor can Defendants establish that they were actually prejudiced, so as to warrant this relief. *See Olsen*, 302 Ga. at 293-94. Courts have denied motions to dismiss indictments even where defendants have been able to establish some misconduct. *See, e.g., Lampl*, 296 Ga. at 897-98; *Wilcox v. State*, 250 Ga. 745, 755-56 (1983). Indeed, even where a court found disqualification was necessary after trial, the case was remanded for a new trial, not dismissed. *See Amusement Sales, Inc.*, 316 Ga. App. at 738. Dismissal is not warranted.

III. CONCLUSION

For the reasons stated above, the circumstances alleged here do not demonstrate a disqualifying conflict under Georgia law, even if all of the allegations are true. The Court should deny the motions to disqualify and dismiss in full.

Respectfully submitted,

this 5th day of February, 2024.

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**Pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion Of Amici Curiae Ethics Experts and Former Federal and Georgia State Prosecutors to File a Brief In Opposition to Defendants Roman, Trump, and Cheeley's Motions to Dismiss the Grand Jury Indictment and Disqualify the District Attorney, Her Office, and The Special Prosecutor, together with the related Brief in Opposition, using the eFileGA electronic filing system, thereby causing it to be electronically transmitted to counsel for all parties of record.

I further certify that, in compliance with Judge McAfee's Standing Order, a copy of this Motion has been emailed to the Court via the Litigation Manager Cheryl Vortice at *Cheryl.vortice@fultoncountyga.gov*.

This 5th day of February.

/s/ Amy Lee Copeland
Amy Lee Copeland