IN THE
COURT OF APPEALS
OF THE STATE OF GEORGIA

APPEAL NO. A24I0160

DONALD J. TRUMP, et al.,

Appellants,

vs.

STATE OF GEORGIA,

Appellee.

BRIEF OF AMICUS CURIAE THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law, including the integrity of our constitutional structure and the separation of powers. ACLJ attorneys have appeared often before the United States Supreme Court as counsel for parties, *e.g.*, *Colorado Republican State Central Committee v. Anderson,* U.S. No. 23-696 (2023); *Heritage Foundation v. Parker*, U.S. No. 21A249 (2021); *Trump v. Vance*, 140 S. Ct. 2412 (2020); and *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for *amici*, *e.g.*, *Fischer v. United States*, U.S. No. 23-5572 (2024); and *McDonnell v. United States*, 579 U.S. 550 (2016), addressing various constitutional issues, including those impacted by overaggressive prosecution with political ramifications.

The ACLJ's specific concern is the integrity and preservation of the judicial system in a case with national implications. The ACLJ files this brief on behalf of its members who reside in Georgia, as the District Attorney at issue in this case represents, quite literally, the entirety of the people of Georgia. The ACLJ also files this brief on behalf of its members who do not reside in Georgia, but who are concerned that their

ability to meaningfully vote for President may be hampered by a politically motivated and infected prosecution still very much bearing "an odor of mendacity." To preserve justice and confidence in the judicial process, Amicus Curiae urges this Court to grant review.

ARGUMENT

I. This Court Should Grant Review the Superior Court's Decision in Order to Preserve the Proper Administration of Justice.

This Court should prevent the maladministration of justice by granting review to correct the trial court's failure to disqualify the District Attorney based on the glaring conflict of interest or, at a minimum, the appearance of a conflict. This Court's discretion to grant review under O.C.G.A. § 5-6-34(b) gives it authority to correct an order "of such importance to the case that immediate review should be had." This case presents such a question. The existence of a conflict of interest, including an apparent conflict, is an issue of such structural magnitude that it affects the entirety of a criminal proceeding. A conflicted prosecutor who nonetheless proceeds with prosecution casts an "odor of mendacity" over an entire proceeding that cannot be corrected or remedied after the fact. Beyond its unconstitutionally injurious impact

on the Defendants, the odor negatively impacts the public's perception of and confidence in the judicial system—especially when the prosecution is that of a leading *national* candidate for the highest office in the land. The structural defect can only be corrected immediately by rooting out all sources of the conflict. Neither a slap on the wrist nor removal of some of the conflict will suffice.

As the United States Supreme Court has noted, "some errors 'are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case.'" *Young v. United States*, 481 U.S. 787, 809-10 (1987) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). "An error is fundamental if it undermines confidence in the integrity of the criminal proceeding." *Young*, 481 U. S. at 10 (citations omitted). As the *Young* Court found, "the appointment of an interested prosecutor raises such doubts," and constitutes "such an error." *Id*.

There is a reason for severe treatment of prosecutorial decisions undermining confidence in the integrity of the criminal proceeding including those which generate even the appearance (or odor) of impropriety: our system of government depends on that integrity. Indeed,

"[i]t is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters." *Id*. "Prosecution by someone with conflicting loyalties 'calls into question the objectivity of those charged with bringing a defendant to judgment.'" *Id*. (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986)).

The critical need for integrity and the values served by the application of conflict jurisprudence applies with special force in this case. To be sure, these principles must and do govern in the prosecution of *anyone*. Justice, after all, is supposed to be blind. But they apply at least as strongly, if not more so, in the prosecution of a *national* candidate in an election year. Millions of Americans from the other forty-nine states who have no ability to influence Georgia's local political conduct are watching this case and will be directly affected by its outcome. The bad choices, prejudices, and personal political motivations of Fulton County's District Attorney, and Georgia's judiciary's response thereto, impact the entire nation. The integrity of Georgia's criminal justice system—implicating its prosecutors and its courts—is at stake.

A. Even an Appearance of Impropriety is Unacceptable in Criminal Cases and Erodes Confidence in the Judicial Process.

The United States Supreme Court has emphasized that even the appearance of impropriety can be constitutional grounds for the disqualification of a prosecutor. *Young*, 481 U.S. at 806. An appearance of conflict is just as dangerous to a criminal proceeding and the integrity of the judicial system as any other conflict, because such a conflict still pervades the trial and prevents the fair administration of justice.

A prosecutor, impaired by an actual or apparent conflict, has created a structural error affecting the entire process of a criminal proceeding. "Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision." *Id.* at 812.

It is particularly necessary to hold prosecutors accountable for their conflicts of interest because "[a] prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, . . . which persons should be charged with

what offenses, which persons should be utilized as witnesses, . . . and whether any individuals should be granted immunity." *Id.* at 807. Unlike evidentiary defects that can be excised from their particular moment in a case, the harm that results from a conflicted prosecutor permeates the entire proceeding. As the *Young* Court explained,

> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.

Id. at 814. As agents of the State, charged with the administration of justice, the prosecutor's ethical responsibility bears weighty force in the interests of protecting and preserving justice. As the Supreme Court made crystal clear in *Berger v. United States*:

> [t]he [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.

295 U.S. 78, 88 (1935).

The Georgia Courts have embraced the structural importance of preventing conflicts of interest, apparent or actual, and made clear that an appearance of impropriety may certainly constitute grounds for disqualification for a prosecutor. *Battle v. State*, 301 Ga. 694, 698, 804 S.E.2d 46, 51 (2017) ("Certainly, a conflict of interest or the appearance of impropriety from a close personal relationship with the victim may be grounds for disqualification of a prosecutor."). This standard is time-honored. In 1852, the Georgia Supreme Court emphasized that "[t]he administration of the law should be free from *all* temptation and suspicion, so far as human agency is capable of accomplishing that object." *Gaulden v. State*, 11 Ga. 47, 50 (1852) (emphasis added). Upon that basis, the Court disqualified a former Solicitor General from representing defendants that he had charged during his time as prosecutor even though his term had since expired. This holding was not dependent on the facts of the case, but instead on *the inherent appearance of impropriety* from such a representation:

> no positive abuse of his professional confidence has been made to appear, and none is imputed to him in this case, by the judgment which we have felt it to be our duty to award; but we affirm the judgment of the Court below, as before stated, on the ground of public policy, irrespective of the particular facts of this case.

Id. at 51.

The Georgia Supreme Court further clarified, in a similar factual situation, that when an appearance of impropriety exists, no representation should be permitted, regardless of whether there is evidence of wrongful intent. In other words, an appearance of wrongdoing alone is disqualifying. *Conley v. Arnold*, 93 Ga. 823, 825, 20 S.E. 762, 762 (1894) (removing defendant's legal counsel and noting that the lack of evidence of a specific wrongful intent was irrelevant: "[w]e have not the slightest idea that anything intentionally wrong or unbecoming on his part was intended, but we feel constrained to hold that he had no right to be in any way connected with the defence [sic] to Conley's action.").

Likewise, this Court has emphasized that "[t]he administration of the law, and especially that of the criminal law, should, like Caesar's wife, be above suspicion, and should be free from *all* temptation, bias, or prejudice, so far as it is possible for our courts to accomplish it." *Nichols v. State*, 17 Ga. App. 593, 606, 87 S.E. 817, 821 (Ga. Ct. App. 1916). Again, the mere existence of an apparent conflict was inherently disqualifying, regardless of the motive of the particular prosecutor. By proceeding despite an apparent conflict, "the alleged conduct of the solicitor-general

was so at variance with that impartiality and high ethical standard of one who is the 'official counselor' of the grand jury, and who is 'controlled by public interests alone.'" *Id.* at 610, 87 S.E. at 822.

As the court below acknowledged, "even when no actual conflict exists, a perceived conflict in the reasonable eyes of the public threatens confidence in the legal system itself. When this danger goes uncorrected, it undermines the legitimacy and moral force of our already weakest branch of government." *Georgia v. Trump, et al*, No. 23SC188947, at 12 (Ga. Super. Ct., Fulton Cnty., Mar. 15, 2024). Conflicts of interest, whether perceived or actual, have "undermined public confidence" and "deepened public suspicion of the criminal justice system." Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 506 (2017). Accordingly, the issue in a conflict analysis is not simply whether the prosecuting attorney actually committed an inherently wrongful act or made bad decisions. The issue is instead the higher one of maintaining the interests of justice in protecting the public perception of its prosecutors and its judicial system. That interest can only be served by meaningfully extinguishing apparent conflicts, too.

In recognition of these principles, the Georgia Supreme Court has

reiterated that Georgia courts have an interest and duty to "'ensure[] that criminal trials are conducted within the ethical standards of the profession and that legal proceedings *appear fair to all who observe them*.' *Wheat v. United States*, 486 U.S. 153, 160 (1988)." *Registe v. State*, 287 Ga. 542, 544, 697 S.E.2d 804, 807 (2010) (emphasis added); *see e.g., id.* (noting that even where a defendant is willing to waive legal counsel's apparent conflict of interest, such waiver "does not always cure the problem"). This is why Georgia statutory and case law vests courts with a broad power to "control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto[.]" O.C.G.A. § 15-1-3(4).

In the present case, merely stopping the continuation of the "repeatedly" made "bad choices," *Georgia v. Trump et al*, No. 23SC188947, at 9, is not enough. Nor is the removal of *some* of the conflict. The law deserves—and requires—more than that. It requires disqualification of *all* conflicted parties.

Courts do not allow factual disputes over what amounts to an "actual" conflict to diminish the policy and constitutional reasons implicated by an appearance of impropriety. For example, in *Love v.*

State, 202 Ga. App. 889, 416 S.E.2d 99 (Ga. App. 1992), an attorney represented the State at a defendant's preliminary hearing and then subsequently began working for the law firm representing the same defendant. The parties disputed certain factual questions specifically relating to the extent of the former prosecutor's involvement in the case. Importantly, the factual dispute was immaterial to this Court's resolution of the disqualification question: "'sometimes an attorney, guiltless in any actual sense, nevertheless is required to stand aside for the sake of public confidence in the probity of the administration of justice.'" *Id.* at 891, 416 S.E.2d at 101-02 (quoting *State v. Rizzo*, 350 A2d 225 (N.J. 1975)). The District Attorney in this case must be made to stand aside.

B. This Court Should Ensure that the "Odor of Mendacity" That Pervades this Case is Removed Before It is Too Late.

This petition's question is not whether an appearance of conflict exists; the trial court made that finding and is entitled to deference thereupon. *Rosser v. Clyatt*, 364 Ga. App. 101, 101, 874 S.E.2d 140, 142 (2022) ("Under an abuse of discretion standard of review, we are to review the trial court's legal holdings de novo, and we uphold the trial court's

factual findings as long as they are not clearly erroneous, which means there is some evidence in the record to support them.") (citation and punctuation omitted).

The question is instead whether such an appearance of conflict can be cured, while the very prosecutor who created that conflict by repeatedly making bad choices and creating an odor of mendacity remains on the case. The trial court sought to correct the conflict by simply requiring that either the District Attorney or the attorney with which the District Attorney engaged in a relationship, withdraw. But that remedial action remediates nothing and is insufficient to correct the constitutional problem that exists here.

The superior court ruled that the District Attorney's conduct created "a *significant* appearance of impropriety that infects the current structure of the prosecution team." *Georgia v. Trump et al*, No. 23SC188947, at 2, (emphasis added). Nonetheless, the court declined to remove the District Attorney from the case. Herein lies the error in the superior court's decision.

The superior court's finding that an appearance of a conflict of

interest existed in this case was well-supported, and based on ample evidence:

> Even if the romantic relationship began after SADA Wade's initial contract in November 2021, the District Attorney chose to continue supervising and paying Wade while maintaining such a relationship. She further allowed the regular and loose exchange of money between them without any exact or verifiable measure of reconciliation. This lack of a confirmed financial split creates the possibility and appearance that the District Attorney benefited - albeit non-materially - from a contract whose award lay solely within her purview and policing.
>
> Most importantly, were the case allowed to proceed unchanged, the prima facie concerns raised by the Defendants would persist. As the District Attorney testified, her relationship with Wade has only "cemented" after these motions and "is stronger than ever."

Id. at 15. Examining the evidence, the lower court found that "an outsider could reasonably think that the District Attorney is not exercising her independent professional judgment totally free of any compromising influences." *Id.* at 15-16. The court concluded that "neither side was able to conclusively establish by a preponderance of the evidence when the relationship evolved into a romantic one. However, an odor of mendacity remains." *Id.*

Also noteworthy, the court specifically concluded that the district

attorney's testimony had not proven credible: "[R]easonable questions about whether the District Attorney and her hand-selected lead SADA testified untruthfully about the timing of their relationship further underpin the finding of an appearance of impropriety." *Id.* at 17. The impropriety of the District Attorney's actions did not end there. The superior court also found that District Attorney's conduct of giving a speech at a church and commenting extensively on this very case was "legally improper," adding that "[p]roviding this type of public comment creates dangerous waters for the District Attorney to wade further into." *Id.* at 20.

These factual findings serve as the basis for which this Court should examine the case. After detailed examination of the witnesses and lengthy testimony, the court found that District Attorney Willis' actions had created an appearance of impropriety and that an "odor of mendacity" was still present in this case, as well as the continuing possibility that "an outsider could reasonably think that District Attorney Willis is not exercising her independent professional judgment totally free of any compromising influences." *Id.* at 15-16.

The United States Supreme Court is clear. Once a conflict of

interest, including an apparent conflict, is established, "we have deemed the prosecutor subject to influences that undermine confidence that a prosecution can be conducted in disinterested fashion." *Young*, 481 U.S. at 811. If a prosecutor is shown to have a conflict of interest, her presence cannot continue. Otherwise, when a conflict exists, "we cannot have confidence in a proceeding in which this officer plays the critical role of preparing and presenting the case for the defendant's guilt." *Id.*

The court below cited several *civil* cases where an appearance of conflict on the part of private representation did not necessarily result in attorney disqualification, but instead, could be corrected with some lesser remedy. *Blumenfeld v. Borenstein*, 247 Ga. 406, 409-10 (1981); *Stinson v. State*, 210 Ga. App. 570, 571 (1993). But those are civil cases with very different dynamics and constitutional and policy interests at stake. For one, civil cases do not involve state actors representing the entire body politic of a sovereign State in a criminal proceeding pursuing the interests of justice. Life and liberty are not on the table. Underscoring the material difference between civil and criminal conflicts, a conflict of interest among private parties affects only those parties and can accordingly be waived. A conflict of interest in a criminal proceeding

affects the public's interest in the faithful administration of the laws. In no circumstance can it be waived by that public.

The continuance of a prosecutor on a case despite the "odor of mendacity" emanating from the appearance of impropriety is an error pervasively affecting an entire proceeding. It is a drastic error for which the only remedy is a drastic one, the replacement of the prosecutor. Disqualification cannot be based merely on a harmful error analysis: "A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice." *Young*, 481 U.S. at 811. It is not "lawful or consistent with public policy or with sound professional ethics" for a prosecutor to continue despite an appearance of conflict, regardless of whether "anything intentionally wrong or unbecoming on h[er] part was intended[.]" *Conley*, 93 Ga. at 825. Her intention is irrelevant. "The administration of the law should be free from *all* temptation and suspicion, so far as human agency is capable of accomplishing that object." *Gaulden*, 11 Ga. at 50 (emphasis added). Simply removing the attorney with whom the District Attorney had "ma[de] bad choices – even repeatedly" while the repeatedly bad decisionmaker remains at the helm is woefully insufficient. The odor of

mendacity remains and can only be corrected by removing the disqualified District Attorney herself.

CONCLUSION

For these reasons, and others, Amicus Curiae respectfully urges this Court to grant review and definitively correct the District Attorney's conflict of interest by removing the District Attorney.

Respectfully submitted this 4th day of April 2024.

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RULE 24
CERTIFICATION

This submission does not exceed the word count limit imposed by Rule 24.

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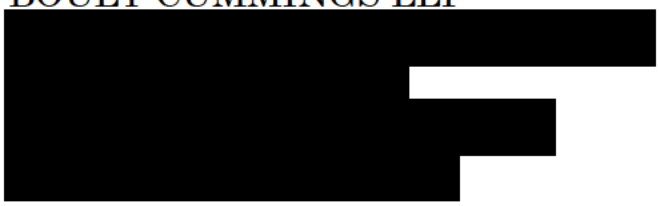

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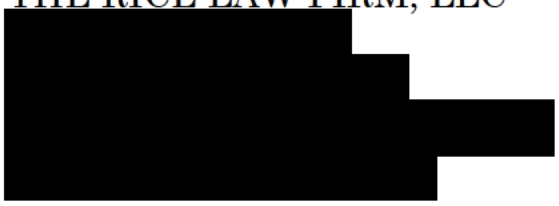

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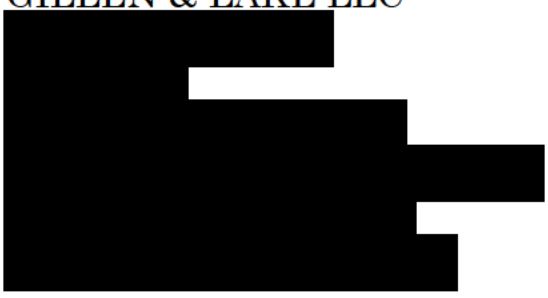

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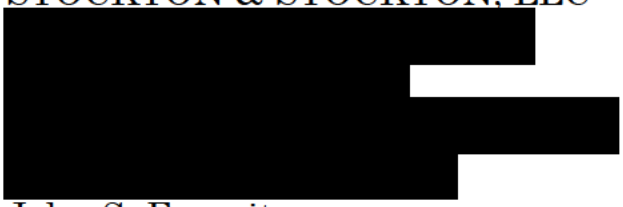
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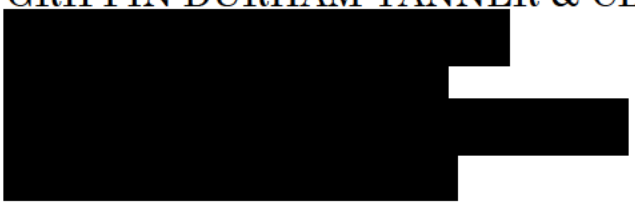

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