IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. CATHLEEN ALSTON LATHAM *et al.* Defendants.	Case Number: 23SC188947

DEFENDANT CATHLEEN A. LATHAM'S MOTION TO DISQUALIFY THE DISTRICT ATTORNEY FOR FULTON COUNTY, ATLANTA JUDICIAL CIRCUIT, AND THE OFFICE OF THE FULTON COUNTY DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, AS COUNSEL FOR THE STATE OF GEORGIA IN THIS ACTION

I. INTRODUCTION/SUMMARY OF ARGUMENT

Defendant Cathleen A. Latham moves to disqualify Fani T. Willis, the District Attorney for Fulton County, Atlanta Judicial Circuit (District Attorney), and the Office of the Fulton County District Attorney, Atlanta Judicial Circuit (Office), from the prosecution of this action on the grounds that (1) the Fulton County District Attorney, a member of the Democratic Party, has made herself into a witness regarding the motivation of this prosecution of the former Republican President of the United States, the former Republican White House Chief of Staff, and other members of the Republican Party; (2) and the District Attorney possesses a personal interest in the defendants' conviction which constitutes an improper and disqualifying conflict of interest.[1] The District Attorney and her Office should properly be disqualified from the prosecution of this action in order

[1] In filing this Motion to Disqualify the District Attorney for Fulton County, Atlanta Judicial Circuit, and the Office of the Fulton County District Attorney, Atlanta Judicial Circuit, as Counsel for the State of Georgia, Mrs. Latham does not waive any objection to the Court's jurisdiction over the alleged offenses, or any right which she may possess to remove this action to federal court.

to preserve the appearance of impartiality of this action. The District Attorney's conflicts of interest "call into question the fair or efficient administration of justice..." Ga. R. Prof. Cond. 1.7, cmt. 15.

The Judge supervising the Fulton County District Attorney's Special Purpose Grand Jury expressly found that the District Attorney's investigation of the defendants presented a risk of "*entirely reasonable concerns of politically motivated prosecution...*" *See* Exhibit A, p. 5. As laid out in this Motion to Disqualify the District Attorney for Fulton County, Atlanta Judicial Circuit, and the Office of the Fulton County District Attorney, Atlanta Judicial Circuit, as Counsel for the State of Georgia (Motion), the District Attorney has voluntarily made numerous extrajudicial statements to national and local news media regarding her investigation and prosecution of the defendants from the day the District Attorney took office on January 4, 2021. The District Attorney's voluntary extrajudicial statements and publicizing of her investigation and prosecution of the defendants have provoked continuous, intensive negative news coverage focusing on the defendants, causing the defendants severe prejudice and depriving them of an opportunity for a fair trial. Her statements concerning her investigation and the defendants, and her targeting of the potential Republican opponent of one of her Democratic political allies in her Special Purpose Grand Jury investigation while fundraising for the Democratic candidate, support entirely reasonable concerns of politically motivated prosecution. For approximately two-and-a half years, the District Attorney has abused her office and authority and used the threat of prosecution of the former President of the United States and other members of the Republican Party to generate publicity for herself and to aid the political fortunes of Democrats. The District Attorney has furthermore willfully used

media publicity in order to prejudice the defendants, culminating in the staging of a primetime national news event surrounding the return of the Indictment. She has unconstitutionally sought to preempt the defendant Republican Presidential Electors' defenses by labeling the defendants "*Fake Electors*" on national news.

Prior to winning election as Fulton County District Attorney, Ms. Willis told a local news station "*when you represent the citizens… you need to be beyond reproach.*"[2] The District Attorney has failed to live up to her own stated standard in her investigation and prosecution of the defendants, or the standards of the Georgia Rules of Professional Conduct and those applicable to prosecuting attorneys. The District Attorney and her Office have already been found to be subject to disqualification in her Special Purpose Grand Jury proceedings. Furthermore, prosecuting attorneys have been held to be disqualified in other cases involving fewer and less egregious extrajudicial statements than those made by the District Attorney to the media. The District Attorney has furthermore recklessly made statements on national news that the media has used to disparage Mrs. Latham's and the other 2020 nominee Georgia Republican Presidential Electors' central defenses in this action, as set forth in detail herein. The need for these proceedings to appear impartial to the public demands the disqualification of the District Attorney and her Office, given the District Attorney's disregard of investigative and prosecutorial standards in favor of publicity for herself and political advantage for her Party.

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[2] "Fani Willis talks about race against D.A. Paul Howard," 11Alive (August 6, 2020), https://www.youtube.com/watch?v=3CEM3GfiLdo .

II. BACKGROUND AND EVIDENCE OF DISQUALIFYING CONFLICTS OF THE DISTRICT ATTORNEY

A. The Fulton County District Attorney's Presumptions Regarding the Alleged Guilt of the Defendants

On February 19, 2021, a little over two weeks after assuming office as District Attorney, the Fulton County District Attorney made statements to local media regarding her investigation of the 2020 general election in Georgia: "Who else is going to do it? … *Nobody is above the law*." *See* Exhibit B, p. 8 (emphasis added). On or about April 19, 2022, the District Attorney made the following statements to local media:

> In this case, you have an allegation of a human being, a person, an American citizen possibly doing something that would have infringed upon the rights of lots of Georgians, specifically from my county, Fulton County, right to vote being infringed upon. *And the allegations were, quite frankly, not civil wrongdoing but a crime*.[3]

B. The Fulton County District Attorney's Announcement of the Investigation on "Day One"

On February 10, 2021, the Fulton County District Attorney sent a letter to the Governor of the State of Georgia, notifying the Governor that the District Attorney had opened an investigation into attempts to influence the administration of the 2020 Georgia General Election." *See* Exhibit C. On or about February 12, 2021, the District Attorney stated on a local news broadcast "*On the first official day in the office, January 4th, um, was the announcement of this issue.* And so, no, I would say that I probably had the most

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[3] "Fulton DA clarifies timeline for witness testimony in Trump probe," The Atlanta Journal-Constitution (April 19, 2022), https://www.youtube.com/watch?v=YY-CzKmVgVc .

unusual first day of work of anyone, ever."[4] (Emphasis added). A year later, on or about February 14, 2022, the District Attorney stated in an interview with a national newspaper:

> *How soon I knew an investigation may be warranted was on day one.* And so upon hearing the phone call and the reports that were done, almost immediately I knew if there was something to be investigated that we would be the appropriate office.[5]

(Emphasis added). The District Attorney also admitted: "*You know, people have become very frustrated with me because they'll say, you know, well you heard the phone call. That's enough.*[6]" (Emphasis added).

C. <u>The Fulton County District Attorney's Pre-Indictment Comment on the Defendant 2020 Presidential Electors for the Georgia Republican Party</u>

On the evening of May 2, 2022, the same day that the Fulton County District Attorney's Special Purpose Grand Jury was sworn by the Court, the District Attorney appeared on a national television broadcast.[7] The District Attorney made the following comments regarding the investigation on national television:

> Um, we are going to look at any thing connected with, um, interference with the 2020 election. And so I've allowed that to be a broad scope, not just the President's phone call that you played there. *But other things that indicate that there may have been interference with that… election. To include fake electorates.*[8]

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[4] *See* "EXCLUSIVE: Fulton County district attorney on decision to open investigation into Trump call," FOX 5 Atlanta (February 12, 2021), https://www.youtube.com/watch?v=mKcczSo5tK8.

[5] *See* "Georgia DA Fani Willis talks about Trump election probe," USA TODAY (February 14, 2022), https://www.youtube.com/watch?v=SuxGeLf3Mk4.

[6] *Id*.

[7] *See* "Georgia district attorney: Trump grand jury subpoenas will be enforced," CNN (May 2, 2022) https://www.youtube.com/watch?v=vHcu0ex8e7Q.

[8] *Id*. Judge Jones in his Order calls them "alternate electors"

(Emphasis supplied).

D. The Disqualification of the Fulton County District Attorney and Her Office from Investigating a 2020 Presidential Elector for the Georgia Republican Party

On July 25, 2022, the Judge supervising the Special Purpose Grand Jury issued an Order Disqualifying the District Attorney's Office, finding that on June 14, 2022, after the Fulton County District Attorney's Office's targeting of Georgia State Senator and 2020 Presidential Elector for the Georgia Republican Party Burt Jones in the Special Purpose Grand Jury investigation, the District Attorney hosted a fundraiser for Democratic candidate for Georgia Lieutenant Governor Charlie Bailey, a potential political opponent of Senator Jones in the November 2022 elections. See Exhibit A, p. 3. The Judge held that the circumstances created "*a plain – and actual and untenable – conflict.*" *Id.* (emphasis added). The Judge also recognized that the District Attorney had "*bestowed her office's imprimatur* upon Senator Jones' opponent." *Id.* (emphasis added). The Judge prohibited both the District Attorney or her Office from investigating Senator Jones or from making use of any evidence to develop any case against Senator Jones, and prohibited the Special Purpose Grand Jury from including any recommendations regarding Senator Jones in its final report. *Id.* at 5-6.

E. A Disqualifying Conflict of Interest Disqualifies a DA and Her Office From All Proceedings, From Preliminary Investigation Through Trial.

Under Georgia law, "A Georgia district attorney is of counsel in all criminal cases or matters pending in [her] circuit. *This includes the investigatory states of matters preparatory to the seeking of an indictment as well as the pendency of the case.*" *McLaughlin v. Payne*, 295 Ga. 609, 613 (2014) (quoting *King v. State*, 246 Ga. 386, 389 (1980) (emphasis added). And, as this Court noted in its July 25 Order, when the elected

DA is disqualified from an investigation and/or prosecution, so, too, in her entire office. *See* July 25 Order at 5 n. 11 (citing *McLaughlin*, 295 Ga. At 613).

In this case, there was a single Special Purpose Grand Jury investigating a specific subject – "any coordinated attempts to unlawfully alter the outcome of the 2020 elections in [Georgia]." *See* DA Willis January 20, 2022 Letter to Chief Judge Brasher Requesting Special Purpose Grand Jury. As the DA stated in her request letter, "the special purpose grand jury would be empowered to review this matter *and this matter only*, with an investigatory focus appropriate to the complexity of the facts and circumstances involved[.]". *Id.*

Instead of disqualifying the conflicted prosecuting entity as Georgia law suggests is the appropriate remedy, however, the July 25 Order essentially "disqualifies" or carves out Senator Jones, the individual with whom the prosecuting entity has the actual conflict from the investigation.

A prosecutor's ethical conflicts are not isolated or excisable. As the United States Supreme Court recognized in *Young v. United*, ex. rel. *Vuitton* et Fils, S.A. et. A1, 481, U.S. 787 (107 SCT 2124, 95 LE.d 2d 740) (1987), the existence of any actual conflict does not stop at the prosecution of one individual; it applies to the entire proceedings:

> This difference in treatment is relevant to whether a conflict is found, however, not to its gravity once identified. We may require a stronger showing for a prosecutor than a Judge in order to conclude that a conflict of interest exists. Once we have drawn that conclusion, however, we have deemed the prosecutor subject to influences that undermine confidence that a prosecution can be conducted in a disinterest fashion. If this is the case, we cannot have confidence in a proceeding in which this officer plays the critical role of preparing and presenting the case. .. " Id. At 811 (emphasis added)

The Judge, however, ignored that clear directive by excising one target of the District Attorney's investigation from the others, he thus undermined the fundamental fairness and reliability of the proceedings:

> Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into questions, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion each of which goes to shape the record in a case, but few of which are part of the record. *Id.* at 812

Indeed, the supervising Judge out to have called a halt to the whole process, rather that let a conflicted District Attorney press on. To do otherwise is to tolerate structural error:

> Furthermore, appointment of an interested prosecutor creates an appearance of impropriety that diminished faith in the fairness of the criminal justice system in general. The narrow focus of harmless-error analysis is not sensitive to this underlying concern. If a prosecutor uses the expansive prosecutorial powers to gather information for private purposes, the prosecution function has been seriously abused even if, in the process, sufficient evidence is obtained to convict a defendant. Prosecutors "have available a terrible array of coercive methods to obtain information, "such as "police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power." *Id.* at 811 (quoting C. Wolfram, *Modern Legal Ethics*, 460 (1986).
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> Public confidence in the disinterested conduct of that official is essential. *Harmless-error analysis is not equal to the task of assuring that confidence.* It is best suited for the review of discrete exercises of judgment by lower courts, where information is available that makes it possible to gauge the effect of a decision on the trial as a whole. In this case, however, *we establish a categorical rule against the appointment of an interested prosecutor,* adherence to which requires no subtle calculations of judgment. Given the fundamental and pervasive effects of such an appointment, we therefore hold that harmless-error analysis is inappropriate in reviewing the appointment of an interest prosecutor in a case such as this. *Id.*at 814 (emphasis added) (citing *United States v. Sells Engineering, Inc.* 463 U.S. 418, 432 (1983)).

That the Supervising Judge determined the District Attorney to have had a conflict of interest is conclusive. Defendant Latham respectfully requests this Court Order the District Attorney's disqualification from these proceedings.

F. <u>The Fulton County District Attorney's Alleged "Commitment to the American People" to Make a Decision Whether to Indict the Defendants</u>

Approximately two weeks before obtaining the Indictment against the defendants, on or about July 31, 2023, the Fulton County District Attorney stated to the media:

> Well, I mean *I made a commitment to the American people*, but most importantly the citizens of Fulton County *that, um, we were going to be making some big, uh, decisions regarding the election investigation and that I would do that before September the first of 2023. And I'm going to hold true that commitment… The work is accomplished. We've been working for two-and-a-half years. We're ready to go.*[9]

(Emphasis added). The previous Summer, on or about July 7, 2022, the District Attorney made the following statements which were reported by national televised news: "*You know, I think that there are people that… really appreciate the work that we're doing here. Appreciating that this is an office that has the courage to look into this matter and they send very kind words sometimes.*[10]" (Emphasis added). The District Attorney also stated: "*What I am doing is very serious. It's very important work.*[11]" (Emphasis added).

G. <u>The Fulton County District Attorney as "The Very Public Face" of "National and Non-Stop" Media Coverage</u>

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[9] *See* "Fani Willis reveals MAJOR UPDATE about Trump Investigation in New Interview," MediasTouch (July 31, 2023), https://www.youtube.com/shorts/Qh6t9A3w0Jw.

[10] *See* "Subpoenas Show Georgia Investigation Moving Into Trump's Inner Circle," MSNBC (July 7, 2022), https://www.youtube.com/watch?v=sojlZN2tdZ8.

[11] *Id.*

In disqualifying the Fulton County District Attorney and her Office from investigating or developing any case against Senator Jones or from making use of any evidence to develop any case against Senator and 2020 Republican Presidential Elector Jones, the Judge supervising the District Attorney's Special Purpose Grand Jury found that "*media coverage of the grand jury proceedings was national and non-stop and the District Attorney was the very public face of those proceedings.*" *See* Exhibit A, p. 3 (Emphasis added).

On August 14, 2023, members of the national and local news media were present in the courthouse. *See* Exhibit D. At approximately 8:50 p.m. Eastern time, while being broadcast nationally, the Judge supervising the criminal grand jury took the bench. *Id.* at 6. At approximately 9 p.m. Eastern time, a Sheriff's Deputy brought various indictments returned by the grand jury, including the Indictment in this case, into courtroom and presented them to the Judge. *Id.* at 4. The District Attorney then held a nationally televised press conference regarding the Indictment.

Google searches of news using the District Attorney's name and the name of the former President of the United States from around the time of the filing of this Motion return over 7,000 print news stories and over 500,000 news videos. *See* Exhibit E. Another search for "Georgia Fake Electors" yields over 12,000 print stories and over 100,000 video news results. *See* Exhibit F.

I. ARGUMENT

A. The Fulton County District Attorney Is The Defense's Primary Witness Regarding the Improper Motives Behind the District Attorney's Prosecution of the Defendants.

Mrs. Latham intends to call the Fulton County District Attorney as a necessary witness concerning the motives of her investigation and prosecution of the defendants in any trial in this proceeding. Under Georgia law:

> *Competent evidence, tending to show that the prosecution was instituted from improper motives, or affecting the credibility of the prosecutor as a witness, such as showing the state of his feelings to the defendant, is always admissible for the consideration of the jury.* Code, § 38-1712; *McCullough v. State*, 11 Ga. App. 612 [ ] [(1912)]; *Billings v. State*, 8 Ga. App. 672 [ ] [(1910)]; *Faulk v. State*, 47 Ga. App. 804 [ ] [(1933)]. The defendant should be allowed *a wide latitude to fully cross-examine the prosecutor upon these points.*

Duncan v. State, 58 Ga. App. 551, 199 S.E. 319, 319 (1938) (emphasis added). Similarly, "[t]he state of a witness's feelings towards the parties and the witness's relationship to the parties *may always be proved for the consideration of the jury.*" O.C.G.A. § 24-6-622 (emphasis added).

The Georgia Rules of Professional conduct mandate, however, that:

> (a) *A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness* except where:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.

Ga. R. Prof. Cond. 3.7(a) (emphasis added). The Rules recognize that:

> [1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.
> [2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Ga. R. Prof. Cond. 3.7, cmt. Accordingly, the Court of Appeals has held that, "'*[w]here the question arises, doubts should be resolved in favor of the lawyer testifying and against his... continuing as an advocate.*'" *Connors v. Omni Ins. Co.*, 195 Ga. App. 607, 608 (1990) (emphasis added) (quoting Ga. C. Prof. Resp. Canon 10 (1983)). "A lawyer is a necessary witness where 'the lawyer's testimony is relevant to disputed, material questions of fact and [where] there is no other evidence available to prove those facts.'" *Delevan v. State*, 345 Ga. App. 46, 51 n. 13 (2018) (quoting *Clough v. Richelo*, 274 Ga. App. 129, 132 (2005); citing *Martin*, 298 Ga. at 271). A lawyer is less likely to be allowed to serve as a witness in a trial than in a collateral matter. *See Coleman v. State*, 301 Ga. 753, 758 (2017) (quoting *Lance v. State*, 275 Ga. 11, 26 (2002); *Martin*, at 271).

The defense possesses both the right and the intention to call the Fulton County District Attorney as a witness in any trial in this proceeding and examine the District Attorney regarding the motives of the District Attorney's prosecution of the defendants. The defense furthermore anticipates examining the District Attorney at any trial in this proceeding concerning the District Attorney's feelings towards, and biases against, the defendants pursuant to Section 24-6-622. The jury in any trial in this action, in the interest of truth, should be permitted to consider the circumstances of this prosecution in full, and the District Attorney's motives and biases in investigating and prosecuting the defendants.

The District Attorney made voluntary, extrajudicial statements to the news media that she allegedly "*knew an investigation may be warranted... on day one...*" (Emphasis added). The defense is entitled to examine the District Attorney concerning the grounds on which the District Attorney allegedly knew that an investigation was allegedly warranted on the day she assumed the office of District Attorney--January 4, 2021. The

District Attorney furthermore told the media that there was an "*announcement of this issue*" in her Office on January 4, 2021. The defense possesses a right to question the District Attorney regarding what she announced to her Office, and to inquire into why there was an alleged announcement and disparate treatment of the investigation of the defendants, as opposed to other matters being handled by the District Attorney's Office.

The District Attorney furthermore made comments to the media that "*Nobody is above the law*" when asked about her investigation of the 2020 general election. The defense has the right to question the District Attorney concerning whether and why she believed that the defendants were allegedly "above the law." The District Attorney also told the media that there were "*allegations*" of "*a crime*." (Emphasis added). The defense is entitled to examine the District Attorney regarding what the alleged allegations were, who made the allegations, and why the District Attorney believed that the allegations set out an alleged crime.

The defense expects that it will also examine the Fulton County District Attorney at trial concerning her statements on national news on the date that her Special Purpose Grand Jury was sworn that there were "*things that indicate that there may have been interference with that... election. To include fake electorates.*" (Emphasis added). The jury in any trial of the defendants is entitled to consider what alleged "things" indicated to the District Attorney that there may have been alleged interference in the 2020 general election, what alleged "Fake Electors" are, and why the electors would allegedly be "fake." The District Attorney has charged three 2020 Georgia Republican Presidential Electors, including Mrs. Latham, and Mrs. Latham and her counsel indisputably possess a right to examine the Fulton County District Attorney regarding her statements concerning alleged

"Fake" United States Presidential Electors in the United States Electoral College on national news.

Finally, there are the Fulton County District Attorney's extrajudicial statements to the media that the District Attorney had allegedly "*made a commitment to the American people*" and that the District Attorney was going to allegedly "*hold true that commitment...*" The District Attorney's statements to the media were contrary to law in that a district attorney "represents the people of the state in prosecuting individuals who have been charged with violating our state's criminal laws." *State v. Wooten*, 273 Ga. 529, 531 (2001). The defense possesses a right for the jury in any trial of the defendants to consider the District Attorney's testimony concerning what her asserted "commitment to the American people" was.

Lawyers in criminal cases have been held to be disqualified, or their disqualification has been upheld, where the lawyer had some involvement in the underlying conduct or transactions. *See United States v. Evanson*, 584 F.3d 904, 906 (10th Cir. 2009); *United States v. Matsa*, 540 F. App'x 520, 524 (6th Cir. 2013); *United States v. Congi*, 420 F. Supp. 2d 124, 130 (W.D.N.Y. 2005); *United States v. Kwang Fu Peng*, 766 F.2d 82, 86 (2d Cir. 1985); *United States v. Castellano*, 610 F. Supp. 1151, 1167 (S.D.N.Y. 1985); *United States v. Santiago*, 916 F.Supp.2d 602, 616 (E.D. Pa. 2013); *United States v. Brodnik*, 710 F.Supp.2d 526, 566 (S.D.W.V. 2010); *United States v. Gomez*, 584 F. Supp. 1185, 1190 (D.R.I. 1984); *Commonwealth v. Delnegro*, 91 Mass. App. Ct. 337, 344 (2017); *People v. Koen*, 2014 IL App (1st) 113082, ¶ 41 (Il. App. 2014); *People v. Rivera*, 2013 IL 112467, ¶ 42, 986 N.E.2d 634, 648 (Il. App. 2013); *State v. Rogers*, 219 N.C. App. 296, 303 (2012); *People v. Pasillas-Sanchez*, 214 P.3d 520, 528 (Colo. App. 2009).

The Fulton County District Attorney initiated the criminal investigation and directed the investigation of the defendants. The District Attorney is the sole witness who can testify regarding the motives behind the investigation and this prosecution. The motives underlying the District Attorney's investigation are among the defendants' defenses and are an issue in this case. The Fulton County District Attorney will accordingly be a necessary witness for the defense at trial concerning the improper motives that resulted in the investigation and prosecution of the defendants in any trial of the defendants, and the District Attorney must therefore be disqualified pursuant to the rule of Rule of Professional Conduct 3.7(a) and *Connors*. *See United States v. Prantil*, 764 F.2d 548, 552 (9th Cir. 1985) (finding that the trial court abused its discretion in denying the defendant's motion for substitution of the participating prosecutor in order to subpoena the prosecutor as a witness where the prosecutor was "a witness to, and indeed a participant in, some aspect of all of the events alleged in the indictment").

Moreover, if the District Attorney is held to be disqualified, the District Attorney's Office must likewise be disqualified. The attorneys in a district attorney's office "'can perform no duties as such except those agreeable to and under the direction of the [district attorney].'" *McLaughlin v. Payne*, 295 Ga. 609, 613 (2014) (quoting *Jackson v. State*, 156 Ga. 842, 850 (1923)). Therefore, "[w]hen the elected district attorney is wholly disqualified from a case, the assistant district attorneys—whose only power to prosecute a case is derived from the constitutional authority of the district attorney who appointed them—have no authority to proceed." *Id*. The Court should accordingly disqualify the Fulton County District Attorney and her Office from representing the State of Georgia in this action.

B. The Fulton County District Attorney Possesses Conflicts of Interest in This Action and Has Engaged in Misconduct, Disqualifying the Fulton County District Attorney and Her Office as Counsel for the State of Georgia in This Action

The Fulton County District Attorney has made numerous extrajudicial statements to the national and local news media regarding the investigation resulting in this action. District attorneys in this State, including the District Attorney of Fulton County, swear to the following oath: ""I do swear that *I will faithfully and impartially and without fear, favor, or affection discharge my duties as district attorney* and will take only my lawful compensation. So help me God."" O.C.G.A. § 15-18-2 (emphasis added). Georgia law provides that "*[a] prosecuting attorney represents, not an ordinary party, but a sovereignty, whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice.*" *Collier v. State*, 266 Ga. App. 345, 352 (2004) (emphasis added) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). As the Georgia Supreme Court has acknowledged:

> "[I]t is the duty of a prosecuting attorney to see that justice is done and nothing more. That duty should not be forgotten in an excess of zeal or the eager quest for victory in his case. The people of the state desire merely to ascertain beyond a reasonable doubt that the accused is guilty of the crime charged, and do not countenance any unfairness upon the part of their representatives in court."

McIver v. State, 314 Ga. 109, 153 (2022) (quoting *Carr v. State*, 267 Ga. 701, 712 (1997); citing *Smith v. State*, 288 Ga. 348, 355-356 (2010)).[12] Pursuant to the State Bar Rules, a prosecutor possesses "obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Ga. R. Prof. Cond.

[12] "A prosecutor is the only one in a criminal action who is responsible for the presentation of the truth. Justice is not complete without the truth always being the primary goal in all criminal proceedings." NDAA Standards, Standard 1-1.4.

3.8, cmt. 1.[13] As the National District Attorney's Association (NDAA) has recognized, "[a] prosecutor is the only one in a criminal action who is responsible for the presentation of the truth. Justice is not complete without the truth always being the primary goal in all criminal proceedings." NDAA, Standard 1-1.4.[14]

In regard to media publicity generated by a prosecutor, Georgia Rule of Professional Conduct 3.8, entitled "Special Responsibilities of a Prosecutor, states that a prosecutor in a criminal case shall, "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, *refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused*." Ga. R. Prof. Cond. 3.8(g) (emphasis added). The NDAA recognizes that a prosecutor should avoid *"[c]reating or taking unlawful advantage of prejudicial or inflammatory arguments or publicity*." NDAA Standards, Standard 1-2.1(g) (emphasis added).

The many extrajudicial statements by the District Attorney during her investigation resulting in this action have generated intensive, inflammatory media and public focus on the investigation and prosecution and the defendants, with the overwhelming majority of the news reporting being extremely negative towards the defendants and consistent with the District Attorney's contested assertions of an asserted conspiracy to allegedly change the outcome of the 2020 United States presidential election in favor of former President

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[13] The District Attorney was furthermore, at all times, subject to the rule that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person..." Ga. R. Prof. Cond. 4.4(a).

[14] Mrs. Latham recognizes that the National District Attorneys Association's *National Prosecution Standards* are solely intended to be "an aspirational guide to professional conduct in the performance of the prosecutorial function." NDAA Standards, Introduction.

Trump, and the "fake" Georgia Republican Presidential Electors allegedly casting "false" votes. *See* Indictment, pp. 14, 17. The District Attorney's conduct has been partial and partisan, in violation of the rules and standards governing the conduct of lawyers and prosecuting attorneys, with little, if any, regard for the defendants' rights to due process and a fair trial.

A finding that the District Attorney's numerous, demonstrable extrajudicial statements concerning the investigation of the defendants compels the District Attorney's disqualification is supported by another case in which the alleged *de facto* leader of a Black Lives Matter march following the murder of George Floyd, Jr., in 2020 was charged with false imprisonment, obstruction of a thoroughfare, unlawful assembly, and disturbing the peace. *See People v. Lastra*, 83 Cal. App. 5th 816, 820 (2022), *as modified on denial of reh'g* (Sept. 28, 2022), *review denied* (Jan. 11, 2023). The defendant moved to disqualify the entire district attorney's office from prosecuting her case, the trial court granted the motion and directed the Attorney General to represent the State, and the district attorney and the Attorney General appealed. *Id.* The California Court of Appeals noted that the defendant had presented evidence showing that the district attorney had (1) appeared on a radio program hosted by an individual who had made anti-Black Lives Matter statements; (2) had made a posting on social media concerning his charging decision in the defendant's case, claiming that Black Lives Matter was alleged "domestic terrorism" and "evil;" (3) had sent a campaign fundraising email referencing the district attorney's fight against the "defund the police movement and anarchist groups," and (4) had spoken at an event for a secessionist organization at which another speaker had called Black Lives Matter a "racist" movement. *Id.* at 821-822. The district attorney

contended that the trial court erred in relying on newspaper stories, emails, and other out-of-court statements, and that the evidence showed at most only the appearance of a conflict and fell short of proving that the defendant was unlikely to receive a fair trial. *Id.* at 822.

The Court of Appeals acknowledged that the district attorney possessed a right to freedom of speech and association, and that the fact that a prosecutor might feel strongly about a particular prosecution or might commit to a prosecution for personal or political reasons did not inevitably indicate an actual conflict of interest or bar prosecution. *Id.* at 823 (quoting *People v. Vasquez*, 39 Cal.4th 47, 63 (2006)). The Court, however, affirmed the trial court's grant of the defendant's motion for recusal, observing that the district attorney's exercising his rights "*cannot deprive those he prosecutes of their own right to a fundamentally fair trial.*" *Id.* (emphasis added).

Evidence was presented in the *Lastra* case that the conservative district attorney personally made one communication, a social media post, which was critical of the movement with which the defendant was associated. In this case. In contrast, the Democratic Fulton County District attorney has made many public statements to national and local news outlets concerning her investigation which have had a likelihood of increasing condemnation of the defendants and has improperly taken advantage of prejudicial and inflammatory publicity against the defendants, portraying herself as the alleged representative of "the American people." If two public appearances, a social media post, and an email to the district attorney's supporters are sufficient to cause a court to disqualify a district attorney and his entire office, then the Fulton County District Attorney's propensity to give the national and local news media statements regarding her

investigation in this case calls out for the Court to protect the integrity of this proceeding and disqualify the District Attorney and her entire Office from representing the State in this case as a sanction.

As set forth above, the Fulton County District Attorney 's two-and-a-half years of extrajudicial statements to national and local news media, the District Attorney commented to local news media that the allegations relating to the defendants' conduct were "*a crime*" and not "*civil wrongdoing*," and that the targets of her investigation were not "*above the law*," as if Mrs. Latham and the majority of the other defendants had ever claimed otherwise. The American Bar Association's *Criminal Justice Standards, Prosecution Function* state that a prosecutor "*must take care not to imply guilt or otherwise prejudice the interests of... subjects of an investigation.*" American Bar Association, *Criminal Justice Standards, Prosecution Function*, Standard 3-1.10(c) (4th Ed. 2017) (ABA Standards) (emphasis added).[15] "The prosecutor should not offer commentary regarding the specific merits of an ongoing criminal prosecution or investigation, except in a rare case to address a manifest injustice and the prosecutor is reasonably well-informed about the relevant facts and law." ABA Standards, Standard 3-1.10(i). The Fulton County District Attorney has voluntarily given opinions to the media that the defendants are guilty and not "*above the law*," which has prejudiced the subjects of her prosecution.

The District Attorney also made statements on national news regarding alleged "*Fake Electors*". The District Attorney's statements improperly and prejudicially suggested

[15] Mrs. Latham acknowledges that the ABA Standards are only "aspirational or describe 'best practices...'" ABA Standards, Standard 3-1.1.

that she believes Mrs. Latham and the other Republican nominee Presidential Electors were illegitimate and acting unlawfully. At all times material to the District Attorney's Indictment, Mrs. Latham was qualified as a "lawful" Presidential Elector pursuant to Georgia law through her nomination as a Presidential Elector by the Georgia Republican Party. *See* O.C.G.A. § 21-2-130(3) & (4). She was nominated as a Presidential Elector by the Georgia Republican Party in March of 2020, approximately eight months before the November 2020 general election. In the conduct alleged in the Indictment, Mrs. Latham was acting pursuant to the advice of legal counsel, and she and the other nominee Republican Presidential Electors were following the precedent of the 1960 presidential election in the State of Hawaii.[16]

"A prosecutor acting as... a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the governing law." ABA Standards, Standard 3-1.10(i). The District Attorney's statements on national news concerning alleged "Fake Electors" were improper and highly prejudicial to Mrs. Latham and the other defendant nominee Republican Presidential Electors. In the more than 16 months since the District Attorney's statements, the news media have published numerous articles

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[16] *[I]n 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. See Josephson & Ross, Repairing the Electoral College*, 22 J. Legis. 145, 166, n. 154 (1996)...
Republican electors were certified by the Acting Governor on November 28, 1960. A recount was ordered to begin on December 13, 1960. *Both Democratic and Republican electors met on the appointed day to cast their votes.* On January 4, 1961, the newly elected Governor certified the Democratic electors. The certification was received by Congress on January 6, the day the electoral votes were counted. Josephson & Ross, 22 J. Legis., at 166, n. 154.

Bush v. Gore, 531 U.S. 98, 127 (2000) (Stevens, J., dissenting) (emphasis added).

regarding how Mrs. Latham and the other nominee 2020 Georgia Republican Presidential Elector defendants were allegedly "Fake Electors." A sample of the uniformly negative, contemptuous and condemning media coverage of Mrs. Latham and the other nominee Republican Presidential Elector defendants is collected in the following news articles:

- "Georgia prosecutors say all 16 fake Trump electors are targets in criminal investigation," CNN (July 20, 2022);
- Jason Morris & Paul LeBlanc, "Georgia judge declines to quash subpoenas for fake Trump electors," CNN (July 21, 2022);
- Jim Denery, "Capitol Recap: Georgia's fake electors now targets in 2020 election probe," The Atlanta Journal-Constitution (July 22, 2022);
- Mark Niesse, "Republicans back fake elector for state Senate," The Atlanta Journal-Constitution (August 2, 2022);
- Natasha Korecki and Kaitlyn Francis, "Dozens of Trump's phony electors, many under investigation, still hold powerful GOP jobs in key states," NBC News (September 21, 2022);
- Charlie Savage, "Lawyers Group Asks Court to Punish an Author of Trump Electors Scheme," The New York Times (October 12, 2022);
- Kate Brumback, "Judge: GOP head can't share lawyers with other fake electors," Associated Press News (November 30, 2022);
- Zachary Cohen, Sara Murray & Jason Morris, "Georgia GOP chairman singled out by judge for central role in fake elector plot," CNN (November 30, 2022);
- Kevin Johnson, "Fake Trump electors pointing fingers in Georgia election inquiry; DA seeks removal of defense attorney," USA Today (April 18, 2023);

- David Goldiner, "Fake GOP electors may flip in Trump election interference case: Georgia prosecutor," The New York Daily News (April 18, 2023);
- Sarah Murray, "Fulton Country DA: Fake Trump electors turning on each other," CNN (April 18, 2023);
- Hugo Lowell, "Claims of crime expose rift in Georgia's pro-Trump fake elector group," The Guardian (April 18, 2023);
- Jordan Rubin, "Fani Willis wants lawyer for Trump fake electors off the case, says there's conflict," MSNBC (April 20, 2023);
- Katie Brumback, "At least 8 fake electors have immunity in Georgia election probe," Associated Press (May 5, 2023);
- Mark Niesse, "Kemp picks fake elector for Georgia Board of Natural Resources," The Atlanta Journal-Constitution (May 11, 2023);
- EJ Montini, "As Trump election probe continues, if Georgia's fake electors get busted, so could Arizona's," USA Today (May 17, 2023);
- Ewan Palmer, "Full List of Trump Fake Electors in Each State And the Charges Against Them," Newsweek (July 19, 2023);
- Randy Travis, "Journalist who discovered GA alternate elector scheme called to testify," FOX 5 Atlanta (August 1, 2023);
- Farnoush Amiri, "How the Trump fake electors scheme became a 'corrupt plan,' according to the indictment," Associated Press (August 2, 2023);
- Kyle Cheney, "Trump attorneys guided false electors in Georgia, GOP chair says," Politico (August 22, 2023);

- David Wickert, "Two more fake Trump electors seek move to federal court," The Atlanta Journal-Constitution (August 25, 2023);
- David Goldiner, "3 Georgia fake electors claim Trump lawyers ordered them to sign bogus paperwork," The New York Daily News (August 25, 2023);
- Igor Derysh, "Ex-prosecutor: Fani Willis' strategy pays off as indicted fake electors 'point the finger' at Trump," Salon (August 25, 2023);
- Marshall Cohen, "Georgia prosecutors push back against claims of anti-Trump bias at fiery hearing for 3 fake GOP electors," CNN (August 25, 2023);
- Jose Pagliery, "The Untold Story of One Indicted Fake Trump Elector in Georgia," The Daily Beast (September 20, 2023);
- Summer Concepcion, "Three fake electors charged in Georgia election probe seek to move cases to federal court," NBC News (September 20, 2023);
- Bart Jansen, "Georgia fake electors indicted with Donald Trump ask to move their cases to federal court," USA Today (September 20, 2023);
- Hugo Lowell, "Fake Trump electors case should stay in Fulton county court, prosecutors argue," The Guardian (September 20, 2023); and
- Jordan Rubin, "Georgia 'fake electors' should lose removal effort like Meadows," MSNBC (September 21, 2023).

The District Attorney's "Fake Electors" statements continue to be highly prejudicial and injurious to Mrs. Latham and the other defendant nominee Republican Presidential Electors through their effect of diminishing the defendants' defenses to the charges. The District Attorney's "Fake Electors" label succeeded in prejudicing the Judge supervising the Special Purpose Grand Jury, who made reference to the alleged "alternate electors

scheme" and how the nominee Republican Presidential Electors allegedly "participated in the scheme merely out of partisan loyalty." Exhibit H, p. 5.

Additionally, the District Attorney's statements that she had allegedly made a "*commitment to the American people*," constituted an improper and prejudicial attempt to bolster her own public image at the defendants' expense. The District Attorney is the representative of the State, not the American people.

The Fulton County District Attorney, through her statements to the media, has acted in disregard of the rules of professional conduct and standards of conduct for prosecutors. The District Attorney's assertions that she is allegedly unbiased are self-serving and hollow, and are contradicted by her own statements and conduct. "[I]t would be unfair for... her to diminish the rights of a defendant to a trial by an unprejudiced jury of his or her peers by broadcasting information through the media where it would go untested by the time-tested procedures incorporated into our criminal justice system." NDAA Standards, Pt. II, § 14, cmt. The District Attorney, through her statements and conduct, has justified her disqualification from acting as the representative of the State of Georgia in this action.

D. <u>The Fulton County District Attorney and Her Office Should Be Disqualified In Order to Preserve an Appearance of Impartiality In This Proceeding</u>

> "In this State, where the stability of courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency *and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration*. The future of this State and of the Republic ... depend[ ] upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and motives of the members of our profession are such as to merit the approval of all just men."

Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 265 Ga. 374, 376 n. 5 (1995) (emphasis added) (quoting Preamble, Ch. 1, Part III, Appendix; 219 Ga. 885 (1963)). Accordingly, the administration of justice "'should be *free from all temptation and suspicion, so far as human agency is capable of accomplishing that object...*'" *Registe v. State*, 287 Ga. 542, 549 (2010) (emphasis added) (quoting *Gaulden v. State,* 11 Ga. 47, 50–51 (1852)).

A criminal defendant possesses a right to a disinterested prosecutor. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987). "*If the assigned prosecutor has acquired a personal interest or stake in the conviction, the trial court abuses its discretion in denying a motion to disqualify him...*" *Amusement Sales, Inc. v. State*, 316 Ga. App. 727, 735 (2012) (citing *Whitworth v. State*, 275 Ga. App. 790, 796 (2005); *Young v. United States*, 481 U.S. 787, 809–814 (1987)).[17] Such a personal interest or stake in the defendant's conviction causes a prosecutor to possess a conflict of interest in the case. *See Whitworth*, at 792 (citing *Williams v. State*, 258 Ga. 305, 314 (1988)). For a district attorney to have a conflict in a case "is contrary to public policy..." *McLaughlin*, 295 Ga. at 613 (citing *Lane v. State*, 238 Ga. 407, 408–410 (1977); *Clifton v. State*, 187 Ga. 502, 504 (1939)).

As the Court of Appeals has observed:

> Whether to prosecute and what charge to bring before a grand jury are decisions that generally rest in the prosecutor's discretion. Nevertheless, selectivity in the enforcement of criminal laws is subject to constitutional

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[17] The prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.

ABA Standards, Standard 3-1.7(f).

> constraints, the equal protection clause of the Fourteenth Amendment, while the due process clause of the Fourteenth Amendment protects against vindictive exercise of the prosecutor's discretion... Pursuit of a course of action designed to penalize one's reliance on a legal right is patently unconstitutional.

Sallee v. State, 329 Ga. App. 612, 621 (2014) (quoting *Lee v. State,* 177 Ga. App. 698, 700 (1986)). A prosecutor therefore "should exercise restraint in the discretionary exercise of governmental powers." *Wooten*, 273 Ga. at 531 (citing *Rules and Regulations of the State Bar of Georgia*, EC 7–13, 241 Ga. 643, 700 (1978)). "In exercising discretion to file and maintain charges, the prosecutor should not consider... partisan or other improper political or personal considerations... [or] hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor..." ABA Standards, Standard 3-4.4(b).

The District Attorney's prosecution of the defendants was brought for improper political and personal motivations. She possesses personal and political interests in the defendants' conviction, rendering her subject to disqualification. As another Court has observed, "trial courts must carefully scrutinize any case with... a high public profile or strong political overtones." *State ex rel. Romley v. Superior Ct. In & For Cnty. of Maricopa*, 184 Ariz. 223, 229 (Ct. App. 1995). In order to preserve the integrity and appearance of impartiality of this action, and of the prosecuting sovereign, the Court should rule that the Fulton County District Attorney and her Office are disqualified from representing the State of Georgia in this action.

II. CONCLUSION

Based upon the facts and authorities set forth herein, Defendant Cathleen A. Latham requests that the Court grant Defendant Latham's Motion to Disqualify the District Attorney for Fulton County, Atlanta Judicial Circuit, and The Office of The Fulton County District Attorney, Atlanta Judicial Circuit, From the Prosecution of This Action and disqualify the District Attorney for Fulton County, Atlanta Judicial Circuit, and the Office of the Fulton County District Attorney, Atlanta Judicial Circuit, from the prosecution of this action.

Respectfully submitted, this 5 day of February 2024.

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Exhibit A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE 2 MAY 2022 SPECIAL PURPOSE GRAND JURY	2022-EX-000024

ORDER DISQUALIFYING DISTRICT ATTORNEY'S OFFICE

On 20 January 2022, the District Attorney of Fulton County petitioned the Chief Judge of the Superior Court of Fulton County to convene the Superior Court bench to consider approving the District Attorney's request for impaneling a special purpose grand jury to investigate possible criminal interference in the November 2020 general election in Georgia. On 24 January 2022, the Chief Judge, having received a majority of the twenty judges' assent, issued an Order authorizing the special purpose grand jury. Among the various instances of possible electoral interference this body would be investigating was the decision by State Republican party officials to draft an alternate slate of Presidential electors -- despite the vote count indicating their candidate had lost by thousands of votes. One of the more prominent persons who chose to participate in this scheme was State Senator Burt Jones.

On 2 May 2022, the special purpose grand jury was selected and sworn in; in June 2022 it began receiving evidence.[1] The District Attorney serves as the "legal advisor" to the grand jury; she and her team of prosecutors also largely shape the grand jury's investigation by subpoenaing witnesses and leading their questioning. As forecast, the District Attorney -- and thus the grand jury -- began to investigate the alternate electors

[1] Notably, the District Attorney explained her pause in initiating the special purpose grand jury's investigative activity by referencing the 24 May 2022 primary elections in Georgia, indicating an awareness that her work with the grand jury could have an impact on electoral outcomes.

stratagem. The District Attorney has issued subpoenas to at least twelve of the alternate electors, including one to Senator Burt Jones, who is the Republican candidate for Lieutenant Governor in the upcoming 2022 general election.

Senator Jones has filed a motion to disqualify the District Attorney and her office from further investigation into his connection to the apparent efforts to interfere with or otherwise undermine the outcome of the 2020 general election. Eleven other alternate electors have jointly filed a motion to quash their grand jury subpoenas, asserting their Fifth Amendment privilege against compulsory incrimination. Senator Jones subsequently joined in his fellow electors' motion and they adopted his. On 21 July 2022, the Court held a hearing on these motions. Based on the arguments and evidence presented, and a review of relevant legal authorities, the Court GRANTS Senator Jones's motion to disqualify the District Attorney and her office -- as to Senator Jones only. The Court DENIES the motion to disqualify as to the other eleven alternate electors and also DENIES the motion to quash as to those eleven.[2]

DISQUALIFICATION

On 24 May 2022, Senator Jones won outright the Republican primary for Lieutenant Governor, earning over 50% of the vote.[3] On the Democratic side, a runoff was necessary, as Kwanza Hall, the top vote getter, secured only 30% of the vote. Trailing him with 18% of the vote was the second-place finisher, Charlie Bailey. Hall and Bailey

[2] Given the Court's ruling on Senator Jones's motion to disqualify, his adopted motion to quash is moot, as he is no longer a permissible subject (or target or object) of *this* special purpose grand jury's investigation and so may not be compelled to appear before the grand jury. As discussed below, this prohibition does not mean the grand jury cannot receive evidence about Senator Jones's involvement in efforts to undo legitimate electoral results; rather, such evidence simply may not come Senator Jones and he may not be included in any final recommendations from the grand jury.

[3] All 2022 state primary election information for the lieutenant governor's race is taken from https://ballotpedia.org/Georgia_lieutenant_gubernatorial_election,_2022.

stood for a run-off election on 21 June 2022. Bailey turned the tide and triumphed; he now faces Senator Jones in the 8 November 2022 general election.

On 14 June 2022, well after the grand jury had begun receiving evidence from witnesses called and examined by the District Attorney's team of prosecutors, the District Attorney hosted and headlined a fundraiser for Bailey. By this time, media coverage of the grand jury proceedings was national and non-stop and the District Attorney was the very public face of those proceedings. She also was one of the faces on the Bailey fundraiser announcement: it prominently featured the District Attorney's name, photo, and title and was widely shared on Bailey's campaign's social media outlets. The fundraiser appears to have been a success, earning Bailey's campaign thousands of dollars. It is important to note that, as counsel for the District Attorney rightly pointed out at the hearing on the motion to disqualify, the fundraiser was entitled a "Runoff Fundraiser" and occurred when Bailey was battling Kwanza Hall for the Democratic nomination. But more relevant -- and harmful -- to the integrity of the grand jury investigation is that the die was already cast on the other side of the political divide: whoever won the Bailey-Hall runoff would face Senator Jones. Thus, the District Attorney pledged her name, likeness, and office to Bailey as her candidate of choice at a time when, if Bailey were successful (which he was), he would face Senator Jones.[4]

[4] The District Attorney also, as a private citizen and in her personal capacity only, donated to Bailey's campaign. Senator Jones points to this private donation as another basis for disqualification. Alone, that is an insufficient basis for disqualification. *See, e.g., Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884 (2009) ("Not every campaign contribution by a litigant or attorney creates a probability of bias that requires ... recusal."); *Gude v. State*, 289 Ga. 46, 50 (2011) (same) (both cases involve judicial recusals, where rules are more stringent). However, it does add to the weight of the conflict created by the more extensive, direct, public, and job-related campaign work the District Attorney performed on behalf of candidate Bailey.

This choice -- which the District Attorney was within her rights as an elected official to make -- has consequences. She has bestowed her office's imprimatur upon Senator Jones's opponent. And since then, she has publicly (in her pleadings) labeled Senator Jones a "target" of the grand jury's investigation.[5] This scenario creates a plain -- and actual and untenable -- conflict.[6] Any decision the District Attorney makes about Senator Jones in connection with the grand jury investigation is necessarily infected by it. To label Jones a target or merely a subject, to subpoena him or instead allow him to proffer, to question him aggressively or mildly, to challenge or accept invocations of legislative privilege or assertions of Fifth Amendment privilege, to immunize or not -- each of these critical investigative decisions is different for him because of the District Attorney's actions taken on behalf of the Senator's electoral challenger. Perhaps the evidence shows that there should be a tighter, stricter focus on Senator Jones than on some of the other alternate electors.[7] Yet any effort to treat him differently -- even if justified -- will prompt

[5] The designation, borrowed from federal criminal practice, is a bit confusing in the context of this grand jury, which has no power to bring criminal charges against anyone. It is nonetheless a potent investigative signal that the District Attorney views Senator Jones (and the other alternate electors) as persons more closely connected to the alleged electoral improprieties than other witnesses who have come before the grand jury or who may yet do so.

[6] The Court appreciates the affidavit provided by Robert Smith, General Counsel for the Prosecuting Attorneys' Council of Georgia, on behalf of the District Attorney. His reliance on *Whitworth v. State*, 275 Ga. App. 79 (2005) and *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1247 (2nd Cir. 1979) is instructive but not persuasive. He is correct that a mere appearance of impropriety is generally not enough to support disqualification, except, as noted in *Nyquist*, in the "rarest of cases." This is one of those cases. But it is also a case where the conflict is actual and palpable, not speculative and remote.

[7] This is an entirely plausible scenario given the Senator's political experience and public responsibility. That is, if the District Attorney (or the grand jury) decides that participation in the alternate elector scheme constituted impermissible interference in the 2020 general election, someone of the Senator's public stature, influence, and presumed sophistication ought to be treated differently from an alternate elector who had no representative responsibility and who participated in the scheme merely out of partisan loyalty.

entirely reasonable concerns of politically motivated prosecution: is Senator Jones being singled out because of a desire to further assist the Bailey campaign?[8]

Of course, the actual answer does not matter.[9] It is the fact that concern about the District Attorney's partiality naturally, immediately, and reasonably arises in the minds of the public, the pundits, and -- most critically -- the subjects of the investigation that necessitates the disqualification. An investigation of this significance, garnering the public attention it necessarily does and touching so many political nerves in our society, cannot be burdened by legitimate doubts about the District Attorney's motives. The District Attorney does not have to be apolitical, but her investigations do. The Bailey fundraiser she sponsored -- in her official capacity -- makes that impossible when it comes to investigating Bailey's direct political opponent.[10]

The Court GRANTS Senator Jones's motion to disqualify the District Attorney and her office.[11] This District Attorney and her special prosecution team may no longer investigate Senator Jones in the following sense: they may not subpoena him (or seek to

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[8] Candidate Bailey has wielded the District Attorney's investigation as a cudgel in his campaign against Jones. *See, e.g.,* https://www.ajc.com/politics/contrasts-on-voting-laws-and-ballot-access-define-georgia-candidates/7QT7XHSAGNGVXBNQPZ64AX56OU/ in which Bailey is quoted as saying "The only danger to safe and secure elections is people like Burt Jones, who come in and substitute their will for the will of the voters and try to overturn the election."

[9] Nor is it knowable, which is another reason to separate the District Attorney and her office from any investigation into Senator Jones. An "actual" conflict does not mean that Senator Jones has definitive proof that an investigative decision was made explicitly to benefit candidate Bailey. This rarely, if ever, occurs, absent wiretaps or leaked e-mails. The conflict is "actual" because *any* public criminal investigation into Senator Jones plainly benefits candidate Bailey's campaign, of which the District Attorney is an open, avid, and official supporter.

[10] Senator Jones also sought to disqualify Special Prosecutor Nathan Wade for a campaign donation he made to Charlie Bailey's earlier aborted campaign for Attorney General. As discussed above, a routine campaign contribution is not enough – and this one was to a different campaign altogether, with no connection to Senator Jones.

[11] When the elected District Attorney is disqualified, so, too, is her entre office. *McLaughlin v. Payne*, 295 Ga. 609, 613 (2014).

obtain any records from him via subpoena), they may not publicly categorize him as a subject or target (or anything else) of the grand jury's investigation, and they may not ask the grand jury to include any recommendations about him in their final report. This does not mean that the District Attorney cannot gather evidence about Senator Jones's involvement in efforts to interfere with or undermine the 2020 general election results. Her office may ask witnesses about the Senator's role in the various efforts the State Republican party undertook to call into question the legitimacy of the results of the election. What her office may *not* do is make use of any such evidence to develop a case against the Senator. That decision, as to whether any charges should be brought, and what they should be, will be left to a different prosecutor's office, as determined by the Attorney General.

The Court DENIES the motion to disqualify as adopted by the other eleven electors. There has been no showing that the District Attorney or any member of her prosecution team is impaired by a conflict of interest vis-à-vis any of these individuals. One of those eleven, Shawn Still, is running for the State Senate but he has offered no evidence that the District Attorney or anyone else from her office has materially supported either his campaign or the campaign of his opponent.[12]

[12] Counsel for the eleven also raised the specter of the District Attorney releasing the special purpose grand jury's final report on the eve of the November 2022 general election in an effort to advantage Democratic candidates over Republican ones. Apart from offering no basis for this claim beyond unsubstantiated hearsay, counsel's concern displays a misunderstanding of the investigative grand jury process. The grand jury will prepare a final report recommending action (or inaction). That report is released to the undersigned, who in turn passes it to the Chief Judge. Only after a majority of the Superior Court bench subsequently votes to dissolve the grand jury will the report be released to the District Attorney. O.C.G.A. § 15-12-101(b). The undersigned will not begin this dissolution process at or near the time of the 2022 general election, should the grand jury complete its work by then.

QUASHAL

The eleven other alternate electors have moved to quash their subpoenas on the basis of their collective, blanket assertion of their Fifth Amendment privilege. This group assertion came after the District Attorney upgraded their status from witness to target in late June 2022 (following several alternate electors' voluntary interviews with the District Attorney's team (and the Bailey fundraiser)). These eleven now characterize the subpoenas for their testimony as "unreasonable and oppressive." The Court disagrees. Counsel for the eleven presented several creative legal arguments concerning the possible (in)validity of future charges that might conceivably be brought against these alternate electors. While intriguing, such argumentation is premature. This grand jury has no authority to bring charges. *Kenerly v. State*, 311 Ga. App. 190 (2011). It is merely investigating who did what after the 2020 general election and developing a perspective about whether anyone's post-election actions merit criminal prosecution in Fulton County.

The eleven electors' conduct falls well within the reach of this broad charter. It is not unreasonable to seek their testimony and it is not oppressive to require an appearance by way of subpoena. Nothing about that process deprives the electors of their Fifth Amendment privilege, which they may freely assert *as applicable* when they appear before the grand jury.[13] Their subpoenas will not be quashed. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 258-59 (1988); *State v. Lampl*, 296 Ga. 892, 898-99

[13] Counsel for the eleven revealed at the 21 July 2022 hearing that her advice to her clients will be to assert privilege as to *any and every* question asked, even something as mundane as name and profession. While this strikes the Court as a rather expansive view of what might be self-incriminating, that determination can be made at the time of the electors' appearances. *See State v. Pauldo*, 309 Ga. 130, 135 (2020) (investigating authorities may ask basic biographical questions, even in the face of the assertion of Fifth Amendment rights).

(2015) (target of grand jury investigation may be compelled to appear before grand jury); O.C.G.A. § 24-5-506(a) (only persons charged with the commission of a criminal offense are not compellable to testify).

SO ORDERED this 25th day of July 2022.

Judge Robert C.I. McBurney
Superior Court of Fulton County
Atlanta Judicial Circuit

CERTIFICATE OF SERVICE

I hereby certify that I have this 5 day of February 2024, filed the foregoing filing with the Court using the Court's Odyssey eFileGa system, serving copies of the filing on all counsel of record in this action, and furthermore have sent a copy of the filing to the parties and the Court.

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