
In The
Supreme Court of Virginia

Record No. 220343

In re BUTA BIBERAJ,
Petitioner.

**AMICUS CURIAE BRIEF
BY CURRENT AND FORMER ELECTED PROSECUTORS
AND ATTORNEYS GENERAL
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI*

Amici Curiae, current and former elected prosecutors and Attorneys General, file this brief in support of Petitioner's Verified Petition For Writs of Prohibition and Mandamus.¹

As elected prosecutors and Attorneys General, *amici* have a deep understanding of the important role that prosecutorial discretion and independent decision-making play in the criminal justice system and the strong need to insulate that discretion from outside interference, including interference from the judiciary.

Because the issues this case raises have national significance, *amici* come not only from Virginia, but also from jurisdictions across the country. Although *amici*'s views may differ on what plea offer or sentence is appropriate for any given case, *amici* are fully aligned in

¹ Pursuant to Va. R. Sup. Ct. 5:30, *amici* state that this brief is filed in support of Petitioner, the Commonwealth's Attorney of Loudoun County, Virginia. Counsel for Petitioner has consented to the filing of this brief. Undersigned counsel has spoken with counsel for Respondent, and counsel for Respondent opposes the filing of this brief. *Amici* is filing this brief contemporaneously with a Motion for Leave to File the Amicus Brief and, as noted in that Motion, would not oppose any request by Respondent for leave to file a supplemental pleading addressing the issues raised by *amici* in their brief. Counsel for Petitioner has similarly indicated that they would consent to any such supplemental filing.

their commitment to prosecutorial independence and in their belief in the importance of respecting local voters' choice of their elected prosecutor. For those reasons, they are deeply troubled by the lower court's extraordinary and unprecedented order disqualifying Commonwealth's Attorney Buta Biberaj's entire office from a case simply because it disagreed with the office's handling of a plea offer. Worse, the court gave Petitioner no notice or opportunity to be heard on the issue.

Amici are intimately familiar with the balance and separation of powers necessary for a functioning criminal justice system. *Amici* therefore have an interest in preserving the proper allocation of roles in the criminal legal system, and offer their views here respectfully as friends of the Court.

A full list of *amici* is attached as Appendix A.

ARGUMENT

In 2019, Loudoun County voters elected Buta Biberaj, a prosecutor committed to reforming the criminal justice system, reducing incarceration, focusing on racial and socioeconomic equality, and diverting cases away from the justice system where incarceration serves

no public safety purpose² – all goals consistent with sound objectives of the legal system and the well-settled exercise of prosecutorial discretion. She was transparent about her objectives on the campaign trail, and the community put her in office to carry them out.

Commonwealth’s Attorney (“CA”) Biberaj replaced James Plowman, who had been in office since 2004, shortly after the General Assembly elected him to the bench.³

CA Biberaj’s reform-minded approach has, not surprisingly, threatened some entrenched interests, especially those firmly committed to maintaining the status quo.⁴ Over the course of her

² Buta Biberaj for Commonwealth’s Attorney, *Policy Priorities*, <https://www.biberajforloudoun.com/policy-priorities/> (last visited July 15, 2022).

³ Plowman left the Commonwealth’s Attorney’s Office on October 31, 2019 and his deputy, Nicole Whittman, served as CA for the remaining two months of Plowman’s term. CA Biberaj defeated Whittman in the 2019 general election and took office on January 1, 2020. Karen Graham, *Democrat Biberaj wins Commonwealth’s Attorney Race*, Loudoun Times- Mirror (Nov. 5, 2019), https://www.loudountimes.com/news/democrat-biberaj-wins-commonwealths-attorney-race/article_9f64b0c4-0036-11ea-b6bc-ffacec829375.html; Loudoun Now, *Plowman Elected to Circuit Court Judgeship* (Feb. 14, 2019), <https://www.loudounnow.com/2019/02/14/plowman-elected-to-circuit-court-judgeship/>.

⁴ Justin Jouvenal, *Group launches effort to recall liberal prosecutors in Northern Virginia*, Washington Post (Aug. 2, 2021),

tenure, these individuals have targeted her, her policies, and her office, seeking to derail the very changes voters elected her to implement.⁵

These challenges to her prosecutorial authority and discretion are ever-present and threaten not only CA Biberaj's mission, but also the will and choice of the voters in Loudoun County.

It is against this backdrop that Judge Plowman, whose policies CA Biberaj identified during her campaign as causing harm to the community and in need of reform, made the unprecedented move of disqualifying CA Biberaj's *entire office* from the prosecution of a criminal case. Judge Plowman did so after expressing his dissatisfaction about the way a specific Assistant Commonwealth Attorney handled a plea agreement. Judge Plowman provided no notice or opportunity for CA Biberaj to be heard on his *sua sponte* decision to disqualify and remove her and her entire office from the case.

https://www.washingtonpost.com/local/legal-issues/northern-virginia-prosecutor-recall/2021/08/02/06b2c808-f147-11eb-a452-4da5fe48582d_story.html.

⁵ See, e.g., Paul Bedard, *Virginia AG Miyares starts national bid to elect tough, anti-crime prosecutors*, Washington Examiner (Mar. 24, 2022), <https://www.washingtonexaminer.com/opinion/washington-secrets/virginia-ag-miyares-starts-national-bid-to-elect-tough-anti-crime-prosecutors>.

CA Biberaj’s petition for writs of prohibition and mandamus ably demonstrate that this order is both an unconstitutional infringement on separation of powers and contrary to Virginia law. *Amici*, a group of current and former elected prosecutors and Attorneys General from across the country, file this brief to add their voices to this important issue and to explain how this order threatens the exercise of prosecutorial discretion that is inherent in the responsibility of any elected prosecutor, while also undermining the will of Loudoun County voters.

I. For all prosecutors – including Virginia Commonwealth’s Attorneys – the exercise of discretion is well established and essential to their obligation to pursue justice

For decades, prosecutors have exercised discretion on whether to charge cases, what charges and penalties to pursue, and what plea bargains to offer. Indeed, it is well-settled that prosecutorial discretion is fundamental to the operation of the criminal justice system. “The capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law.”⁶

⁶ *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987) (internal quotations omitted).

The independence of the prosecutor is also inherent in the separation of powers enshrined in both the United States and Virginia Constitutions,⁷ and dates back to the founding of our country.⁸ “[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor’s] discretion.”⁹ Virginia courts have also recognized that, even where these charging decisions necessarily implicate the sentence an individual may receive, they remain exclusively within the Commonwealth’s Attorney’s power.¹⁰ Virginia prosecutors similarly have substantial authority over plea agreements that include agreed dispositions. The Court’s role in plea agreements is limited: it can either accept the agreement and impose the chosen disposition or reject it, permit the defendant to withdraw the guilty plea, and proceed to trial.¹¹

⁷ U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1; Va. Const. art. III, § 1.

⁸ J. Madison, Federalist No. 51.

⁹ *Wolfe v. Commonwealth*, 42 Va.App. 776, 780, 595 S.E.2d 27, 29 (2004).

¹⁰ *See Gray v. Commonwealth*, 233 Va. 313, 331, 356 S.E.2d 157, 167 (1987)(recognizing it is the province of the Commonwealth’s Attorney to decide against whom it will pursue capital murder charges).

¹¹ Va. R. Sup. Ct. 3A:8(c)(4); Va. Code § 19.2-254.

An elected prosecutor’s duty is to utilize their discretion to pursue justice and protect public safety.¹² In individual cases, the prosecutor has “a heightened duty to ensure the fairness of the outcome of a criminal proceeding from a substantive perspective – to ensure both that innocent people are not punished and that the guilty are not punished with undue harshness.”¹³ The United States Supreme Court has highlighted the “special duty [prosecutors have] to seek justice, not merely to convict.”¹⁴

What justice looks like in a given case is not a fixed point, however, and prosecutors utilize their discretion to craft resolutions

¹² See *Berger v. United States*, 295 U.S. 78, 88 (1935) (A 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.”); Marc. L. Miller & Ronald F. Wright, *The Black Box*, 94 Iowa L. R. 125, 148 (2008) (noting that elected prosecutors must make charging and sentencing decisions that respond to the evolving public conceptions of justice. “Current public opinion constantly rewrites the terms of a criminal code drafted by legislatures over many decades.”).

¹³ Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 Fordham Urb. L.J. 607, 636 (1999); see also Fair and Just Prosecution, Brennan Center for Justice, and The Justice Collaborative, *21 Principles for the 21st Century Prosecutor* (2018) at 5, available at https://www.fairandjustprosecution.org/staging/wp-content/uploads/2018/12/FJP_21Principles_Interactive-destinations.pdf.

¹⁴ *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011).

according to their policies, values, and goals, which are necessarily guided by the voters that elected them. Indeed, around the country, communities are retreating from the “tough on crime” approach that has driven mass incarceration over the past forty years. Instead, they are electing prosecutors with a new vision for our justice system.¹⁵

These prosecutors – and the communities that elect them – recognize that overly punitive policies actually undermine public safety, as well as community trust. They are making smarter, evidence-based decisions around whom to prosecute, what charges to pursue, and what penalties to seek. This shift in perspective, however, in no way justifies or permits judicial interference with the exercise of fundamental, prosecutorial discretion.

¹⁵ Allison Young, *The Facts on Progressive Prosecutors*, Center for American Progress (Mar. 19, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice/>; Emily Bazelon and Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice*, New York Times (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.

II. The trial court’s order, which disqualified CA Biberaj’s entire office, interfered with CA Biberaj’s clear discretion to enter into plea agreements consistent with her vision of justice and public safety

Through the exercise of their well-settled and critical discretion, the prosecutor’s values and views of justice are realized. The perspectives and priorities of prosecutors vary from community to community and shift over time; elections exist to enable voters to choose leaders who reflect their values and priorities. An abundance of data and empirical evidence illustrates that the exercise of discretion across offices yields startlingly different criminal justice outcomes, even between offices within the same state and governed by the same laws.¹⁶

¹⁶ See, e.g., Vera Institute of Justice, *Incarceration Trends in Texas* (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf> (reporting that “the highest rates of prison admissions [in Texas] are in rural counties, and pretrial detention continues to increase in smaller counties even as it is on the decline in larger counties”); Felicity Rose, et al., *An Examination of Florida’s Prison Population Trends*, Crime and Justice Institute (May 2017) at 12, [https://uploads-ssl.webflow.com/5b7074244c38194929197191/5ff48eea2f0a92390baae080_Crime%20%26%20Justice%20Institute%20-%20An%20Examination%20of%20Florida%27s%20Prison%20Population%20Trends%20\(2017\).pdf](https://uploads-ssl.webflow.com/5b7074244c38194929197191/5ff48eea2f0a92390baae080_Crime%20%26%20Justice%20Institute%20-%20An%20Examination%20of%20Florida%27s%20Prison%20Population%20Trends%20(2017).pdf) (reporting that trends in prison admissions rates vary widely by jurisdiction in Florida, from a low of 55 per 100,000 residents to a high of 612.7); Center on Juvenile and Criminal Justice, *2016 Total incarceration rates*, California Sentencing Institute,

These patterns are largely attributable to “prosecutors responding to social norms and living up to group expectations about what it means to be a prosecutor in that particular office,”¹⁷ norms that elected prosecutors play a critical role in forming – and reforming.¹⁸ “Policy priorities in the office... might not result from any actual change in the criminal law, but they palpably change the norms that define what prosecutors are expected to do.”¹⁹

Virginia’s laws and rules of procedure give judges very limited authority to override decisions uniquely in the prosecutor’s discretion and that reflect that elected leader’s values and norms. Although the court may refuse to accept a plea agreement, it must recuse itself from the case once it does, giving a different judge the opportunity to evaluate the justness of the negotiated plea.²⁰ This settled procedure prevents the judge from replacing the prosecutor as the primary agent

<http://casi.cjcj.org/Adult/> (last visited July 16, 2022) (reflecting vastly different incarceration rates between California counties).

¹⁷ Miller & Wright, *supra* note 12, at 131.

¹⁸ *Id.* at 178; Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 Temp. Pol. & Civ. Rts. L. Rev. 369, 373 (2010), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2428&context=faculty_scholarship.

¹⁹ Miller & Wright, *supra* note 12, at 178.

²⁰ Va. R. Sup. Ct. 3A:8(c)(4); Va. Code § 19.2-254.

guiding criminal case resolutions and thereby usurping prosecutorial autonomy.

The judge's order here attempted to bypass those restrictions and prevent CA Biberaj, whose plea offer he disagreed with and apparently viewed as too lenient under the circumstances, from having any further involvement in the case. Only by disqualifying the entire office, and assigning a different Commonwealth's Attorney – not elected by voters in Loudoun County – before he recused himself, could the judge preclude CA Biberaj and her office from any future engagement in the case. This dramatic and unprecedented move sent a clear message to CA Biberaj: exercise your discretion according to the *court's* values and judgment or risk losing oversight and control of your cases.

The court's improper overreach invaded CA Biberaj's exercise of discretion, robbing her of the inherent power that every elected prosecutor holds. Permitting such a usurpation would cut against the separation of powers and undermine the very operation of Loudoun County's justice system.²¹

²¹ The trial court cited *In re: Moseley*, 273 Va. 688 (2007), in support of his "inherent authority" to remove CA Biberaj's entire office from the prosecution of a criminal case. In the *Moseley* case, the trial court

III. Second-guessing the elected local prosecutor undermines local control and erodes the rights of voters to community self-governance

The court's trespass into CA Biberaj's sphere of authority is also deeply problematic for another reason: it strips the elected prosecutor of the autonomy to make decisions around the safety and well-being of her local community and erodes the rights of local voters to have a say in that vision.

Commonwealth's Attorneys are elected officials and accountable to the people and community they serve. While seeking office, these officials lay out their views on how to best achieve public safety, thereby defining their enforcement priorities for the public. Local residents and voters choose the leader that best reflects and furthers their vision for the justice system in *their* community.

This order, and others that would likely follow if this Court does not act, effectively diminish the ability of the Loudoun County

prohibited a civil attorney who engaged in outrageous and repeated misconduct during the course of litigation from practicing before it. This Court's approval of that action, which did not involve the disqualification of an elected prosecutor and concerned serious violations of the rules of professional conduct, in no way aligns with the facts presented here, nor does that decision provide support for Judge Plowman's extreme and *sua sponte* order.

community to define for itself a plan for community safety. The integrity of the elections process, and the prosecutorial function writ large, requires this Court to reject the lower court's commandeering of CA Biberaj's authority.

IV. Conclusion

If this Court fails to prohibit the lower court's abuse of power, it will invite judges to substitute their own judgment for that of the elected prosecutor, even where it concerns matters that are exclusively within the prosecutor's discretion, like entering into plea disposition agreements. Where courts have done so in the past, they have been uniformly reversed.²²

²² See *United States v. Smith*, 55 F.3d 157, 160 (4th Cir. 1995) (found that the lower court's weighing of its own policy concerns over those expressed by the government did not offer "adequate recognition to the Executive in the context of the Separation of Powers Doctrine as it exercises its duty in good faith to take care that the laws are faithfully executed." (citing *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975); *State v. Layman*, 214 S.W.3d 442, 452 (Tenn. 2007) ("None of the reasons stated . . . for rejecting the nolle prosequi – case too serious to avoid jury trial, penalty too lenient, State mistaken in its assessment of evidence, and dismissal would circumvent trial court's authority to reject plea agreement – suggest extraordinary circumstances indicating betrayal of the public interest."); *United States v. Scantlebury*, 921 F.3d 241, 250 (D.C. Cir. 2019) ("The 'leave of court' authority gives no power to a district court to deny [dismissal] based on a disagreement with the prosecution's exercise of charging authority."); *United States v. Fokker*

Tellingly, courts historically did not interfere with prosecutorial discretion when prosecutors used that discretion to ramp up prison and jail populations and fuel “tough on crime” thinking and mass incarceration. It is particularly troubling that now, as reform-minded prosecutors have been elected in cities and counties across the country, courts are intervening in charging and prosecutorial decisions perceived by some as too lenient.²³ Such intervention not only is at odds with well-settled prosecutorial discretion and usurps local control, but also runs counter to the growing consensus across the political spectrum about the need to reverse the course of mass incarceration and, instead, embrace smart approaches that align with data and research and promote safer and healthier communities. Here, the Loudoun County

to a district court to deny [dismissal] based on a disagreement with the prosecution’s exercise of charging authority.”); *United States v. Fokker Services B.V.*, 818 F.3d 733, 737 (D.C. Cir. 2016) (“[t]he Constitution allocates primacy in criminal charging decisions to the Executive Branch” and that “the Judiciary generally lacks authority to second-guess those Executive determinations, much less to impose its own charging preferences”).

²³ See Judith L. Ritter, *Making A Case For No Case: Judicial Oversight of Prosecutorial Choices -From In re Michael Flynn to Progressive Prosecutors*, 26 Berkeley J. Crim. L. 31, 41-48 (2021), <https://www.bjcl.org/assets/files/Ritter-Making-Case-For-No-Case.pdf> (discussing examples of courts obstructing or preventing actions by progressive prosecutors).

community elected someone who promised to do exactly that, and bring a new vision of how to allocate resources and promote public safety.

This order threatens that community's vision and, in doing so, sets a dangerous precedent around eroding the will of voters and intruding into discretion uniquely vested in our nation's and Virginia's elected prosecutors.

Respectfully submitted,

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