IN THE SUPREME COURT OF VIRGINIA

	)	
In re PARISA DEHGHANI-TAFTI,	)	
Petitioner.	)	No. ____________
________________________________	)	

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

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INTEREST OF AMICI

Amici Curiae, current and former elected prosecutors, file this brief in support of Petitioner's Memorandum in Support of Verified Petition For Writ of Prohibition.[1]

As elected prosecutors, 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 on what offenses do and do not warrant prosecution may differ, amici are fully aligned in their commitment to prosecutorial independence. For that reason, they are deeply troubled

[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 Arlington County, Virginia. Petitioner has consented to the filing of this brief. Because this amicus brief is being filed contemporaneously with Petitioner's petition for writ of prohibition, as required by Va. R. Sup. Ct. 5:30(d), counsel for Respondent has not yet made an appearance and cannot be contacted to determine their position on the filing of this brief.

by the Arlington court's erosion of settled and longstanding principles of prosecutorial discretion, and the court's apparent effort to intercede in the policy and resource allocation decisions of an elected prosecutor. Amici are intimately familiar with the balance and separation of powers necessary to 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 Exhibit A.

ARGUMENT

In 2019, Arlington and Falls Church voters elected Parisa Dehghani-Tafti, a prosecutor committed to reforming the criminal justice system, reducing incarceration, and ending wasteful prosecutions – all objectives consistent with the boundaries of the legal system, the sound exercise of prosecutorial discretion, and the job her community put her in office to carry out. But just weeks after she took office, the Arlington County Circuit Court issued an unprecedented order requiring the Office of the Commonwealth's Attorney to provide justification for nearly every decision it made that could advance the

stated goals of the new Commonwealth's Attorney. It required prosecutors to provide the court with written, advance notice, including a detailed factual basis, of every *nolle prosequi*, every decision to dismiss a case, every amended charge, and every plea agreement that had been negotiated with a defendant.

This intense scrutiny into purely prosecutorial functions is unprecedented, at odds with the well settled discretion of prosecutors, unwarranted, and potentially harmful. Counsel for Commonwealth's Attorney Dehghani-Tafti has demonstrated in their petition for writ of prohibition 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 from across the country, file this brief to add their voices to this important issue and explain how these requirements are also intrusive, harmful, and will undermine the exercise of prosecutorial discretion that is inherent in the responsibility of any elected prosecutor and critical to our justice system.

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, how to charge cases, 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."[2]

No prosecutor has the resources and ability to prosecute *every* case and *every* violation of the law. As a result, elected prosecutors – charged by their community with promoting public safety and well-being – make decisions every day about where and how limited resources are best exercised and what cases merit entry into the justice system.

Especially when making charging decisions, prosecutors use this discretion to carry out their duties as ministers of justice and in accordance with their ethical obligations. They are *ethically bound* to pursue the interests of justice in deciding what cases to prosecute or

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

dismiss. As American Bar Association rules make clear, it is the responsibility of the prosecutor to "do justice" on behalf of the people, which at times means "exercising discretion to *not* pursue criminal charges."[3] The Supreme Court has similarly highlighted the "special duty [prosecutors have] to seek justice, not merely to convict."[4]

Around the country, communities are retreating from the "tough on crime" policies that have driven mass incarceration over the past forty years and are electing prosecutors with a new vision for our justice system.[5] These prosecutors recognize that overly punitive approaches actually undermine public safety as well as community trust. They are making smarter and evidence-based decisions around when, and if, to exercise their tremendous power to pursue criminal charges and bring individuals struggling with poverty, homelessness, substance use disorder or mental illness into the criminal legal system. This shift in

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[3] ABA Standard 3-1.2(b) – Functions and Duties of the Prosecutor (emphasis added).

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

[5] 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/.

perspective, however, in no way justifies or permits judicial interference with the exercise of fundamental, prosecutorial discretion.

II. The order permits unnecessary and intrusive judicial inquiry that is harmful to the operation of the justice system

For good reason, judges have never wielded the power to make decisions about what cases to prosecute or dismiss. Indeed, the independence of the prosecutor is inherent in the separation of powers enshrined in both the United States and Virginia Constitutions.[6]

On the most basic level, judges are not, nor need they be, privy to the wide-ranging information considered by the prosecutor when making and revisiting charging decisions. Decisions to dismiss or *nolle prosequi* a case can turn on a host of factors that are uniquely within the knowledge of the prosecutor, such as how to make effective use of law enforcement resources, how to best protect witnesses and the integrity of ongoing investigations, and how to weigh deficiencies in the integrity of a case and concerns about the quality of evidence.

In many circumstances, it would be inappropriate – and even harmful – to require that these considerations be included in a written

[6] U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1; Va. Const. art. III, § 1.

public filing. A victim, for instance, may urge the prosecutor to consider an alternative resolution to the case, but may want their concerns and fears kept confidential. In other cases where downgraded or dismissed charges are influenced by information from a cooperating witness or confidential informant, making that information public could not only endanger the witness, but have a chilling effect on future cooperation with law enforcement. These charging and dismissal decisions may also be influenced by not-yet-public and ongoing criminal investigations. The office may decide that proceeding with a specific prosecution may impair a more substantial investigation underway, but it may not want that investigation to be divulged.

These are the *exact* decisions prosecutors are entrusted – and elected – to make. Requiring prosecutors to detail these factors in public filings is not only an interference with the duties a chief prosecutor is charged with carrying out, but it could also *endanger* witnesses or other investigations – and thus undermine public safety. When we ask victims and witnesses to get involved in criminal cases, we expose them to an inherently intrusive and public process. Their cooperation is critical to the integrity of the system, but we should not expose them to

unnecessary risks resulting from needless public disclosure of sensitive information.[7] In the context of an unopposed motion to dismiss charges, such exposure is irresponsible and plays no role in furthering the interests of justice.[8]

III. The engagement and resources required to comply with this order undermine a prosecutor's ability to pursue justice and public safety according to office priorities

The order requires that prosecutors in the Office of the Commonwealth's Attorney file an advance written motion detailing the factual bases for all decisions to enter a *nolle prosequi*, dismiss a case, or amend an indictment pretrial. It further demands that all plea agreements and justifications for sentencing departures be filed in writing the day before a sentencing hearing. The scope of this order should not be dismissed as a harmless procedural requirement. Given

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[7] In fact, the Virginia legislature codified the need to respect such interests in the "Crime Victim and Witness Rights" statute, where it recognized the need to ensure that "crime victims and witnesses are treated with dignity, respect and sensitivity; and that their privacy is protected to the extent permissible under law." Va Code § 19.2-11.01(A). This order unnecessarily and inappropriately threatens these concerns.

[8] Of course, a decision by the prosecutor to charge or terminate a case motivated by *bad faith* would be reviewable by the court, but the order here goes far beyond this limited and case-specific inquiry. *See Moore v. Commonwealth*, 59 Va. App. 795, 810 (2012).

the myriad factors that go into charging decisions, dismissals, and plea negotiations, already over-extended prosecutors will face additional obstacles to pursuing just outcomes. In any given week, a prosecutor may make dozens of decisions regarding dismissal, amending charges, or plea agreements. The paperwork this order would require is alarming. And it cannot be ignored that resources prosecutors spend trying to comply with this intrusive and unnecessary order equates to time prosecutors cannot devote to working on cases, investigations and issues that truly impact the safety of the community.

In Arlington and Falls Church, we have already seen the way such an order can strain and redirect resources. After the Commonwealth moved orally to enter a *nolle prosequi* for a possession of marijuana case, a court issued an order requiring the prosecutor to justify the decision in writing. The order tied up critical resources – resulting in nearly 50 pages of unopposed pleadings from both sides – and delayed justice for months.[9] Importantly, for nearly all cases that must go

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[9] The Commonwealth made a motion to enter a *nolle prosequi* on January 7, 2020. After being ordered to justify the reasons in writing, the Commonwealth filed a 19-page unopposed pleading, to which the defense replied expressing its agreement in a 28-page pleading. An order granting leave to enter the *nolle prosequi* was issued on July 10,

through this burdensome process, the resources and delays in proceedings will end up having no impact on the outcome required by law (*i.e.,* the court granting the dismissal order). After all, courts recognize an expansive list of permissible reasons for granting dismissals and only limited circumstances for permitting intervention.

Prosecutors need the power to dismiss cases in a responsive and timely manner and to ensure that the pursuit of justice is not delayed.[10] Given the burdensome requirements of this order, in the best case scenario, the timeliness of dismissals and charging determinations will surely be impacted. Where a prosecutor discovers information that changes the charging calculus, the requirement of written motions will delay pending proceedings and the administration of justice.[11] For both criminal defendants and victims, every day a case drags on brings with

2020, seven months after the original motion. *Commonwealth vs. Kelly, Jr.* No. CR 19-1103 (Arl. Va. Cir. Ct July 10, 2020).

[10] *See generally Commonwealth v. Williams*, 262 Va. 661, 670 (Va. 2001) (discussing that delays in a case may "impede the cause of justice").

[11] The order may further conflict with *Brady* obligations. If a prosecutor discovers exculpatory evidence that warrants dismissal the morning of a trial, for example, oral representations about the *Brady* evidence would be insufficient under the order.

it emotional and collateral consequences. Conscientious prosecutors work hard to minimize the impact of these consequences for all parties.

Even worse than simply delaying justice is another concerning scenario: the additional burdens imposed could discourage prosecutors from seeking such relief in the first place. Whether consciously or unconsciously, the order encourages prosecutors *not* to make decisions that benefit defendants even when there is relevant information to do just that. Where a prosecutor learns of mitigating information that warrants amending or dropping charges, judges should not be adding obstacles to their acting swiftly. The past decades have taught us the dangers of a culture where prosecutors are encouraged to pursue charging decisions and convictions, regardless of evidence that suggests otherwise. This moment in history demands that we *encourage*, not discourage, prosecutors to revisit charging decisions and be responsive to the demands of justice.

This order additionally infringes on the Commonwealth Attorney's ability to determine how to focus her office's resources. Every use of resources has ramifications for other priorities that a prosecutor's office deems important. If prosecutors are busy complying with this order –

and if their decisions when and if to prosecute cases are continually being second guessed – they will have fewer resources to engage in activities that further the safety and well-being of their community. They will have less time to focus on preparing cases involving more serious offenses, like sexual assault and homicide, and less time to invest in internal processes that further the ends of justice. They may have to deprioritize a host of other pursuits that elected prosecutors across the country are taking on, such as investigating unsolved homicides, providing additional lawyer training, assessing exculpatory evidence, and ensuring they are up-to-date on forensic science and new legal developments. By creating a mountain of paperwork for prosecutors to prepare and file, this order will negatively impact their ability to perform these critical duties that are at the core of the prosecutorial function.

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

Despite the order's procedural focus, there are good reasons for concern that the rationale underlying the order stems from a judicial attempt to oversee the prosecutor's decision-making, and in effect

intervene, to prevent the Commonwealth's Attorney from making independent decisions that the court does not agree with. *That is antithetical to the role of a judge.* The order sets a dangerous precedent that would strip elected prosecutors of the autonomy to make decisions around the safety and well-being of their local community and would, by extension, erode 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. These officials lay out their visions for public safety and in seeking office define their enforcement priorities. Local residents and voters choose the leader that best reflects and furthers their vision for the justice system in *their* community.

In Arlington and Falls Church, the current Commonwealth's Attorney was elected with 90% of the vote – more than 45,000 votes – on a platform of reform-minded and non-punitive approaches to many acts that have been criminalized in the past, but may instead be more effectively addressed outside the criminal legal system.[12] Specifically,

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[12] Airey Newman and Kalina Newman, *Parisa Dehghani-Tafti Elected Prosecutor as All Incumbents Win Down the Ballot*, ARLnow.com (November 5, 2019), https://www.arlnow.com/2019/11/05/parisa-dehghani-tafti-elected-prosecutor-as-all-incumbents-win-down-the-ballot/.

CA Dehghani-Tafti campaigned on a pledge to change the types of cases to which her office would devote its limited resources.[13] Yet three months after her election, and following her decision to shift resources away from marijuana possession cases, the circuit court *sua sponte* ordered filing requirements that make it significantly more burdensome to refocus time and efforts away from cases that have no impact on public safety and are being addressed outside the criminal legal system in an increasingly large swath of the nation.[14] Moreover, the resources the Commonwealth's Attorney has already spent replying to this order undermine her ability to fulfill other commitments to her community, such as establishing a conviction integrity unit and developing a restorative justice program. This order effectively diminishes the ability of the Arlington and Falls Church community to define for itself a plan for community safety.

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[13] Parisa for Justice, *On the Issues*, https://parisaforjustice.com/on-the-issues/.

[14] In recent years, an increasing number of states have decriminalized personal use of marijuana, and the trend continues to grow. *See* Marijuana Policy Project, *Decriminalization*, https://www.mpp.org/issues/decriminalization/ (last visited Aug. 10, 2020).

In these tumultuous times, when the country is being ravaged by COVID-19, judicial interference in these prosecutorial decisions is particularly problematic. During this crisis, prosecutors are serving a critical gatekeeping function. In many communities across the country, prosecutors have worked with police leadership, judges, and defense attorneys to reduce arrests and resulting jail populations and limit the spread of the virus, ensuring that only those who pose a substantial threat to public safety come into custody and remain in facilities that have become the nation's largest COVID-19 hot spots. After months where courts have operated in an extremely limited capacity and cases have been unable to move through the criminal legal system, it is more important now than ever that prosecutors have the authority to determine how their resources are used and on which individuals and cases they should be focused. Elected prosecutors are uniquely suited to make these determinations. The court must honor their discretion to do so.

V. Conclusion

The sweeping order issued by the Arlington County Circuit Court invites judges to substitute their own judgment for that of the executive

elected prosecutor when it comes to policy decisions and enforcement priorities. Where courts have done so in the past, they have been uniformly reversed.[15]

Tellingly, courts historically did not interfere with prosecutorial discretion when that discretion was being used 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 are being elected in cities and counties across the country,

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[15] *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."); *U.S. 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").

courts are intervening in charging and prosecutorial decisions perceived by some to be too lenient.[16] 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. Here, the Arlington and Falls Church communities overwhelmingly 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 vision and, in doing so, sets a dangerous precedent around intrusion into discretion uniquely vested in our nation's elected prosecutors.

[16] Where a judge tried to compel Suffolk County (Boston), MA District Attorney Rachael Rollins to prosecute a protester case, the Massachusetts Supreme Judicial Court promptly overruled the decision. *See* Roberto Scalese, *Mass. High Court Sides With Suffolk DA Rollins In Battle With Judge Over Protester Charge*, WBUR.org (Sept. 9, 2019), https://wbur.fm/2Elz1g6. Similar efforts are underway in Fairfax Country, where a judge tried to compel Commonwealth Attorney Steve Descano to bring marijuana charges. Ike Ejiochi, *Fairfax County Top Prosecutor's New Pot Policy Faces Challenge in Court*, Fox 5 DC (Jan. 2, 2020), https://bit.ly/3jQN25F.

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RULE 5:26 CERTIFICATE

Pursuant to Virginia Supreme Court Rule 5:26(h), I hereby certify that the foregoing brief complies with the type-volume limitation set forth in Virginia Supreme Court Rule 5:26(b). Exclusive of the exempted portions of our brief, the brief contains 3,399 words.

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