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**IN THE
SUPREME COURT OF ILLINOIS**

PEOPLE OF THE STATE OF ILLINOIS	)	On Appeal from the Appellate Court
	)	of Illinois, First Judicial District,
	)	Sixth Division,
Plaintiff-Appellant,	)	No. 1-22-0372
	)	
	)	There on Appeal from the Circuit
vs.	)	Court of Cook County,
	)	Criminal Division,
	)	No. 00 CR 13572
	)	
ABDUL MALIK MUHAMMAD,	)	The Honorable
	)	Lawrence Flood,
	)	Leroy K. Martin, Jr., and
Defendant-Appellee.	)	Erika Reddick, Judges Presiding

**BRIEF OF *AMICUS CURIAE*
MCHENRY COUNTY STATE'S ATTORNEY'S OFFICE IN SUPPORT OF
BRIEF AND ARGUMENT OF PLAINTIFF-APPELLANT**

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Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The Appellate Court, First District, reversed the judgment of the circuit court and removed the Special Prosecutor, finding he had a conflict of interest pursuant to 55 ILCS 5/3-9008. *People v. Muhammad*, 2023 IL App (1st) 220372.

The McHenry County State's Attorney's Office files this brief *amicus curiae* in support of the People's challenge to the appellate court majority's broad holding that a prosecutor is disqualified when there is an allegation of misconduct. *People v. Muhammad*, 2023 IL App (1st) 220372. The McHenry County State's Attorney's Office will be required to adhere to the First District's ruling and the expansive language regarding disqualification of elected state's attorneys. McHenry County, especially, has a well-publicized history of the dangers posed by unconstrained special prosecutions.

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STATUTE INVOLVED

The Counties Code provides, in pertinent part:

> "§3-9008. Appointment of attorney to perform duties.
>
> . . .
>
> (a-10) The court on its own motion, or an interested person in a cause, proceeding, or other matter arising under the State's Attorney's duties, civil or criminal, may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause, proceeding, or other matter. The court shall consider the petition, any documents filed in response, and if necessary, grant a hearing to determine whether the State's Attorney has an actual conflict of interest in the cause, proceeding, or other matter. If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause, proceeding, or other matter."

55 ILCS 5/3-9008(a-10) (West 2024).

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ARGUMENT

At the outset, it is important to concede that the majority may well have a point. It is certainly peculiar that of all the lawyers in Illinois, the Cook County Court slated as special prosecutor a lawyer who, at the time in question, was overseeing the clearly suspect investigatory-prosecutorial complex in which this case situated. The problem, however, with the majority's decision is the same problem confronted by those seeking to slay the hydra – action to reduce a problem results in stimulating its multiplication.

In its opinion, the majority correctly recognizes prosecutorial might:

> 'Prosecutors "have available a terrible array of coercive methods to obtain information," such as "police investigators and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power." '

People v. Muhammad, 2023 IL App (1st) 220372, ¶ 92 (1st Dist. 2023).

In view of these powers, the special prosecutor presents a special danger. He is unconstrained by integral checks on prosecutorial power, such as accountability at the ballot box and limited resources that require a sober prioritization of efforts. Furthermore, the special prosecutor is often a well-connected emissary selected by the powers that be to sort those extra-sensitive prosecutions that, perhaps, risk political blowback or involve political rivals.

Justice Scalia presciently recognized these dangers in his lone dissent in *Morrision v. Olson*, a case in which the U.S. Supreme Court upheld the broad power of a federal independent counsel. 487 U.S. 654 (1988). Justice Scalia wrote:

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> "That is what this suit is about. Power. The allocution of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish"

Id. at 699. Justice Scalia also invoked U.S. Attorney Jackson, who presciently said in 1940:

> 'There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the department of justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.
>
> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm-in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.'

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Id. at 727-728.

Justice Scalia continues:

> "Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected, and can be removed, by a President whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration.
>
> ...
>
> But if, after a 90-day investigation without the benefit of normal investigatory tools, the Attorney General is unable to say that there are 'no reasonable grounds to believe' that further investigation is warranted, a process is set in motion that is *not* in the full control of persons 'dependent on the people,' and whose flaws cannot be blamed on the President. An independent counsel is selected, and the scope of his or her authority prescribed, by a panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment? There is no remedy for that, not even a political one. Judges, after all, have life tenure, and appointing a sure-fire enthusiastic prosecutor could hardly be considered an impeachable offense. So if there is anything wrong with the selection, there is effectively no one to blame. The independent counsel thus selected proceeds to assemble a staff. As I observed earlier, in the nature of things, this has to be done by finding lawyers who are willing to lay aside their current careers for an indeterminate amount of time, to take on a job that has no prospect of permanence and little prospect for promotion. One thing is certain, however: it involves investigating and perhaps prosecuting a particular individual. Can one imagine a less equitable manner of fulfilling the Executive responsibility to investigate and prosecute? What would be the reaction if, in an area not covered by this statute, the Justice Department posted a public notice inviting applicants to assist in an

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> investigation and possible prosecution of a certain prominent person? Does this not invite what Justice Jackson described as 'picking the man and then searching the law books, or putting investigators to work, to pin some offense on him'?"

Id. at 728-730.

If, as concluded by the majority in this case, a prosecutor is exercising a "quasi-judicial" role in determining whether to initiate or terminate proceedings, then the court is exercising a quasi-electoral role in replacing the duly elected representative of the People with a special prosecutor under 55 ILCS 5/3-9008(a-10). *See Muhammad*, 2023 IL App (1st) 220372 at ¶ 93. Indeed, replacing the duly elected representative with a special prosecutor that is insulated from any real accountability for unduly targeted and expensive prosecutions, overwrought methods, imprudence, caviling, or the pursuit of his/her own agendas. With the special prosecutor at the helm, the structure of the criminal justice system is removed from its bedrock and set adrift to land wherever and on whomever the fractious winds of well-positioned insiders direct. As such, the appointment of a special prosecutor should be a last resort and done only after an exacting showing of necessity.

The case at hand appears to be exhibit A in substantiating the foregoing discussion. For the current Cook County State's Attorney, the special prosecutor's appointment allows her to wash her hands of this perilous political entanglement, pitting a well-organized and well-funded political constituency of criminal justice reformers against the indigestible fact that the Defendant here may very well be guilty of murder.

For the court system, it gets its man in Mr. Milan. A man the court is, no doubt, well-familiar with and likes. A man who the court knows will meet its expectations.

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For Mr. Milan, he has fortuitously been hired into steady work, the Burge-related legal cottage industry, and is free to pursue his own vision of what is best so long as he does not unduly antagonize the court.

The only party now without a seat at the table is the People, in whose name this case is being prosecuted and who clearly have an undeniable interest in how it is resolved.

We at the McHenry County State's Attorney's Office, therefore, are alarmed by the First District's newly created standard that would allow an elected state's attorney to be removed, not upon an evidentiary showing of an "actual conflict of interest," but upon a plausible or *a priori* basis to believe there is the "risk" of an actual conflict or "risk of actual bias." *People v. Muhammad*, 2023 IL App (1st) 220372 at ¶ 35. Not only is this standard extra-statutory and a roundabout path back to something approximating the "appearance of impropriety" standard, but it is unworkable.

Risk is merely a hazardous chance, a constituent feature of reality, adhering in everything. With any prospect, it is not a question of whether there is risk, it is always a question of how much risk one is willing to tolerate. Toleration of risk is not a legal calculus; it is a personality trait or an unfalsifiable intuition that cannot be consistently adjudicated.

Should the majority's new standard be upheld, the entire body of court precedent interpreting section 5/3-9008(a-10) would potentially be voided. It would otherwise be hard to see how the "risk of actual bias" would not have been a credible prospect in *E.H. v. Devine,* 335 Ill. App. 3d 517 (1st Dist. 2002); *People v. Tracy,* 291 Ill. App. 3d 145 (1st Dist. 1997); *People v. Max*, 980 N.E. 2d 243 (3rd Dist. 2012); and *People v. Weeks,* 355 Ill. Dec. 688 (1st Dist. 2011).

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Not only is this standard unworkable, it also permits abuse in a way that may frustrate the will of the People. A judge who, as a matter of firm principle and practice, finds intolerable the progressive state's attorney's lenient approach to drug prosecutions, need only search out "risk," whether knowable or unknowable, that is always there to be discovered in appointing a more palatable prosecutor. *People v. Muhammad*, 2023 IL App (1st) 220372 at ¶ 33. Elites and powerful constituencies wishing to sideline the elected state's attorney stubbornly refusing to prosecute the outgroup or political antagonist can always plead risk.

The majority's application of its new standard is also problematic. It found that, in the face of allegations of misconduct, a threat to a lawyer's or his former employer's reputation is an adequate basis upon which a "risk of actual bias" may rest. Such a finding, however, would necessitate a special prosecutor upon any allegation of prosecutorial misconduct, no matter how dubious or pretextual. A special prosecutor would be required upon any *Batson* challenge, allegation of a *Brady* or *Giglio* violation, allegation of improper argument, or allegation of improper evidence admission. Summoning the dissent:

> "Under the majority's reasoning, a postconviction petition could disqualify a prosecutor by simply alleging a prosecutor or police misconduct because such allegations would call on the prosecutor to 'judge' his own conduct or the decision to prosecute or the conduct of the police. But no court has ever adopted such an expansive due process theory of prosecutor conflict. And for good reason. Appointing a special prosecutor implicates the public prosecutor's duty as an elected officer under the Illinois Constitution to represent the People."

Id. at 69.

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Allegations of prosecutorial misconduct are easily made and overwhelmingly rejected. The more imposing or dogged a prosecutor, the greater the incentive to make such an allegation. Indeed, though Mr. Milan had been assigned as special prosecutor on this case for nearly two years, it was not until he made the adverse decision to "terminate the proceedings" against the Defendant that the defense attorney suddenly realized he may have a conflict of interest and filed the instant motion to rescind his appointment as special prosecutor.

Inherent in the job of prosecuting is the <u>risk</u> of "striking foul blows." This risk arises from the corroding force of power, the lure of maintaining a public image, the seduction of sanctimony, the cry of the mob for vengeance, the driving compulsion to win, and the primal inclination to perceive as suspect and illicit the actions a disliked person or group. It is the very work of a state's attorney, vulnerable to these temptations as we are, to resist them; it is as much the prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about just one." *See Berger v. United States,* 295 U.S. 78, 88 (1935). The risk is always there, whether or not the prosecutor has succumbed to these risks is left to the sound discretion of the People every four years or upon an evidentiary showing of "actual prejudice" sufficient to justify the will of the People being pushed aside.

One interesting question is whether the majority's standard should be applied to judges on motions to substitute for cause. If "due process does not tolerate the 'risk of actual bias' in a prosecutor," neither should it in a judge. *See id.* Would not a judge who had previously worked at and been associated with the state's attorney's office that is now

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being accused of misconduct risk threatening his own reputation by substantiating those allegations?

Another interesting question is whether the Cook County State's Attorney had an actual conflict that necessitated the filing of a motion to appoint a special prosecutor in the first place. It is not unheard of for a state's attorney in a politically treacherous case to make a Washington-refuses-the-crown show of "reluctantly" filing a motion to appoint a special prosecutor on some high-minded grounds. In this case, as one misstep made way for the next, what the majority appears to take issue with is a system whose curious output upon being consulted for a special prosecutor is someone who had a unique position of influence in and with the very institutions whose conduct is at issue. Framed differently, the majority seems to take issue with the appointment of someone who is in no better position than the elected Cook County State's Attorney to handle the case.

Conceded, the selection of Mr. Milan is a curiosity. That said, the majority's response is unmeasured. A standard such as the one proposed by the majority is a threat to aspects of the justice system that are far more fundamental than the need for a perfectly unblemished prosecutor. Not just that, the majority's dispensing of the old standard in favor of the new smacks of being decidedly premature in that the old standard and procedure, if fully utilized, may very well have resulted in the majority's desired outcome. Only Mr. Milan, ultimately, knows the answer to the question at issue here. Has he ever been asked? Has he ever, under oath and during a formal hearing on the Defendant's motion to a new special prosecutor, been questioned about his alleged prejudice, history with the state's attorney's office, or his current perspectives on all relevant matters so that

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the court is able to factually assess his bias as opposed to draw inferences from the non-dispositive fact of his prior employment.

CONCLUSION

We at the McHenry County State's Attorney's Office urge this court to reverse the majority's ruling that a "risk of actual prejudice" or "risk of actual bias" is sufficient to sustain the removal of an elected state's attorney under section 5/3-9008(a-10) and reinstate the statutorily founded "actual conflict of interest" standard. In the alternative, should this court see fit not to overrule the majority's new standard, we would ask the court to clarify that this new standard only applies to special prosecutors and not duly elected state's attorneys.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 11 pages.

Dates: October 29, 2024 /s/ Patrick Kenneally

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Patrick D. Kenneally, an attorney, hereby certify that on October 29, 2024, I caused a true and complete copy of the foregoing Motion of the McHenry County State's Attorney's Office for Leave to File a Brief as *Amicus Curiae* in Support of Plaintiff-Appellant and Brief of Amicus Curiae to be filed electronically with the Clerk's Office of the Illinois Supreme Court, using the Odyssey eFileIL system, which sends notification and a copy of this filing by electronic mail to all counsel of record. I further certify that I caused an additional courtesy copy of this filing to be served by electronic mail upon the following:

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Under the penalties by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this notice of filing and certificate of service are true and correct to the best of my knowledge, information, and belief.

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