V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	)	Case No. MI 2020-585
	)	
vs.	)	
	)	
HARWINDER SANGHA,	)	
	)	
Defendant.	)	
	)	

BRIEF OF AMICUS CURIAE

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA

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The American Civil Liberties Union Foundation of Virginia submits this amicus brief upon invitation of this Court dated December 8, 2020.

Statement of Amicus Curiae

The American Civil Liberties Union Foundation of Virginia ("ACLU-VA") is a statewide, nonprofit, nonpartisan organization with approximately 28,000 members. The ACLU of Virginia appears frequently before the state and federal courts of this Commonwealth, both as counsel and as *Amicus Curiae*. Since its founding, the ACLU of Virginia has been a forceful advocate for civil liberties and civil rights, including due process of law for people accused of criminal offenses, and has a strong interest in reducing racial disparities in the criminal justice system.

Question Presented

Whether the circuit court may conduct a trial where the Commonwealth Attorney has declined to prosecute a case and, if so, what role, if any, a police officer may play in such a trial and what role if any, the court has in calling and examining witnesses. A brief amicus curiae should address, inter alia, the effect of Va. Const. Art. 1 §5, and Va. Const. Art. 3, §5 as well as the effect, if any, of Code § 15.2-1704(A), Code §19.2-265.5, Va. Sup. Ct. R. 2:614, and *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

Introduction

The procedure in the Circuit Court of Fairfax County, which, upon the declination of a prosecution by the elected representative of the executive department with both statutory and constitutional authority to prosecute criminal cases, requires the judicial branch to take on this responsibility, violates the most fundamental principles of separation of powers, due process of law, and the right of the accused to have a fair trial. It erodes the strong division of powers carefully laid out, twice, in the Virginia Constitution, and undermines democratic accountability and public confidence in the independence of the judicial branch. It is fundamentally the executive's prerogative to determine whether to use finite resources to prosecute, and the judiciary unconstitutionally usurps the role of elected Commonwealth Attorneys by making that determination in their stead—and further still by conducting trials in their absence—notwithstanding the presence of the complaining police officer witness. Mr. Sangha's prosecution in this case would violate these fundamental principles and therefore *amicus* respectfully urges this Court to dismiss his summons.

Argument

I. The strong division of powers embedded in the text of the Virginia Constitution demands that the judicial and executive branches remain distinct

The principle of separation of powers holds a special importance in Virginia's constitutional structure that is perhaps unmatched even by its analog in the federal constitution. First appearing in the 1776 Virginia Declaration of Rights drafted by George Mason, the concept that the judiciary, legislature, and executive are separate and independent branches of the Virginia government whose powers are to remain distinct, has made its way into every Virginia Constitution since that time, and did so in the form of two separate constitutional provisions that substantially overlap in phrasing. Va. Const. Art. 1, § 5; Va. Const. Art. III, § 1; *Carter v. Commonwealth*, 96

Va. 791, 812, 32 S.E. 780, 784 (1899) ("Of such importance is this principle deemed that it is repeated and constitutes a distinct article . . ."); *Canales v. Torres Orellana*, 67 Va. App. 759, 776 n.10, 800 S.E.2d 208, 217 (2017) (remarking in relation to the two provisions addressing separation of powers that "our Constitution's framers have clearly underscored this constitutional imperative thereby reminding us that . . . they really mean it!"). Moreover, unlike the United States Constitution, the Virginia Constitution specifies explicitly that none of the three branches may "exercise the powers properly belonging to the other." Va. Const. Art. III, § 1; *see also* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. R. 327, 335–36 (2002) (noting that the United States Constitution contains no explicit clause prohibiting delegations of power by the various branches of government, although such clauses were known to the founding generation).

II. The conduct of a prosecution involves policy judgments regarding the appropriate use of law enforcement resources that are fundamentally within the competency of the executive branch and democratically accountable Commonwealth Attorneys

Article V, § 7 of the Virginia Constitution vests in the executive branch the authority to "enforce the execution of the laws." Commonwealth Attorneys—elected members of the executive branch—have exclusive authority under the Virginia Code to "prosecute" violations of "any penal law," including misdemeanors. Va. Code Ann. § 19.2-201; *Price v. Commonwealth*, 72 Va. App. 474, 486, 849 S.E.2d 140, 146 (2020). Under Virginia law, Commonwealth's Attorneys also have the authority to decline to prosecute misdemeanors. Va. Code Ann. § 15.2-1627 (B).

In carrying out a core part of the executive's obligation to ensure that the laws are faithfully executed, namely, determining whether and how to prosecute someone for a crime, Commonwealth Attorneys are afforded wide discretion. *See, e.g.*, *Boyd v. Cty. of Henrico*, 42 Va. App. 495, 521, 592 S.E.2d 768, 781 (2004) ("the structure of tripartite government creates a judicial presumption in favor of 'broad' prosecutorial discretion"); *In re Horan*, 271 Va. 258, 264,

634 S.E.2d 675, 679 (2006) (collecting cases for the proposition that prosecuting on behalf of the people is an inherently executive function). To fulfill their responsibilities, Commonwealth Attorneys make daily decisions on how best to use limited resources while remaining accountable to the people and the rule of law. Those determinations include when to prosecute and when to decline to prosecute, whether to seek alternatives to prosecution, what charges to bring or dismiss, what discovery to provide (other than that mandated by law), what witnesses to call, what questions to ask, what tactics to take, and what types of cases not to pursue. They necessarily involve policy judgments as to whether and how to bring to bear the force of the state's criminal-legal apparatus onto particular acts or categories of acts, recognizing the profound, often-lifelong consequences such decisions carry for the accused individuals and their families, crime victims, and the broader community.

Amici believe that prosecutorial discretion should be wielded as a tool to reduce injustice, including the racial and socioeconomic disparities in the criminal justice system,[1] and to focus finite prosecutorial resources on the most serious offenses. But wherever one stands on the appropriate use of such resources, these are fundamentally policy judgments that are entrusted to

[1] People of color in Fairfax County bear the brunt of police and prosecutorial decisions at every stage of the criminal legal system. Researchers studying misdemeanor case processing in eight jurisdictions, including Fairfax County, Virginia, found "Relative to the demographics of the general population, black people were overrepresented in the misdemeanor defendant population in every single jurisdiction." Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C.L. Rev. 971 (2020), https://lawdigitalcommons.bc.edu/bclr/vol61/iss3/4 (noting Black citizens in Fairfax County comprise of 10% of the general population but 25% of the misdemeanor defendant population). Demographic data provided by the Fairfax County Police Department showed that communities of color in Fairfax County are disproportionately represented in all interactions with the criminal legal system, and that "the risk for Black[] Fairfax residents to have an arrest charge is more than 4 times that of a White resident, considering their representation in the overall Fairfax population. *See* ACLU "People Power Fairfax, Disparity in FCPD Arrests (June 28, 2020), https://acluva.org/en/press-releases/fairfax-county-police-department-racial-disparity-arrests-raises-concerns.

the competence and prerogative of the executive department, via the elected Commonwealth Attorney. As the United States Supreme Court noted in *United States v. Armstrong*, there is a strong presumption against judicial intervention into the decision whether to prosecute:

> Judicial deference to the decisions of these executive officers [prosecutors] rests in part on an assessment of the relative competence of prosecutors and courts. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

517 U.S. at 465; *see also Boyd*, 42 Va. App. at 521. Just as courts are loathe to second-guess a Commonwealth Attorney's decision to prosecute absent extraordinary circumstances such as constitutional violations, *see, e.g.*, *Boyd*, 42 Va. App. at 521; *Bradshaw v. Commonwealth*, 228 Va. 484, 492, 323 S.E.2d 567, 572 (1984) ("the institution of criminal charges, as well as their order and timing, are matters of prosecutorial discretion"); *Leonard v. Commonwealth*, 39 Va. App. 134, 142–45, 571 S.E.2d 306, 310–12 (2002), so too must they decline to overrule a decision *not* to prosecute, to avoid supplanting and frustrating the policy judgments of the officials with the most competence and training to weigh and balance the many factors involved in such a decision.

Ensuring that the prosecutorial function remains within the executive branch also allows for maximum accountability by enabling the public to know who to credit or blame for exercises of, or refusals to exercise, prosecutorial authority. The popular election of Commonwealth Attorneys reflects the principle that criminal prosecutions are public acts that concern not only the accused and any direct victims, but society at large. *See Price*, 72 Va. App at 486 ("the idea of private prosecution is alien to modern America, as is its basic supposition that crime is essentially a private concern between the aggressor and the victim"). Thus, for example, even as Virginia recognizes the common-law practice of private prosecutors' assisting in prosecution, their role is heavily circumscribed by the broader principle that prosecutorial authority is vested in a publicly-

elected Commonwealth Attorney who "must remain in continuous control of the case." *Id*. (reversing conviction where private prosecutor represented victim in a civil action against criminal defendant, creating conflict of interest that violated prosecutor's ethical duty to seek justice and defendant's due process right to a fair trial).

Voters elect their Commonwealth Attorney based in part on how they believe limited prosecutorial resources should be used. In his 2019 campaign for Fairfax County Commonwealth Attorney, then-candidate Steve Descano promised to, among other things, "tackle mass incarceration," "discard the tough on crime approach," "create policies aimed at fixing [racial] disparities" in the criminal justice system, end the practice of "charging misdemeanors where a dismissal or diversion would be more appropriate," and ensure that prosecutors chase down leads that might yield exculpatory information to ensure that defendants are provided adequate and timely discovery and "trial by ambush" avoided. *See* Steve Descano, *Progressive Justice: The Case for Criminal Justice Reform in Fairfax County*, *available at* http://stevedescano.com/ProgressiveJustice (last visited December 26, 2020). He alone is accountable to the voters for fulfilling these campaign promises and for whatever consequences may follow.

And it was against this backdrop that Commonwealth Attorney Descano decided, in the interest of justice, not to prosecute certain categories of misdemeanor cases after determining that because of the sheer number of misdemeanor cases, his office had been unable to meet its ethical obligations, case resolutions were being driven by a need to clear dockets rather than seek justice, and that "innocent people could be wrongly convicted." *See* Steve Descano, 2020 Fairfax County Commonwealth's Attorney Resources Report, 3 (Sept. 22, 2020), https://www.fairfaxcounty.gov/boardofsupervisors/sites/boardofsupervisors/files/assets/meeting-

materials/2020/sept22-public-safety-commonwealths-attorney-resources-presentation.pdf; Justin Jouvenal, Fairfax's Top Prosecutor Says Staffing 'crisis' Will Hurt County's Ability to Seek Justice, Wash. Post (Sept. 22, 2020), https://www.washingtonpost.com/local/public-safety/fairfax-county-prosecutor-says-staffing-crisis-will-hurt-ability-to-seek-justice/2020/09/22/a81d37ee-fcda-11ea-b555-4d71a9254f4b_story.html.

That decision was reflected in this case, where, because of the nature of the underlying offense, no Commonwealth Attorney entered an appearance in either the General District Court or the Circuit Court. Under these circumstances, forcing the criminal prosecution to proceed notwithstanding the Commonwealth Attorney's decision that his own office could not ethically participate frustrates the will of the electorate and encroaches on policy judgments of the executive. The decision to conduct a prosecutor-less trial—without any resources or personnel dedicated to carrying out important prosecutorial functions prior to and during the trial, such as plea bargaining and identifying and disclosing exculpatory information and other discovery—is itself a policy judgment, albeit one that would not be traceable to the elected official in whom the authority to prosecute criminal offenses is vested under Virginia law, *Price*, 72 Va. App. at 486; Va. Code Ann. § 15.2-1627(B), and thereby would be stripped of democratic accountability.

III. Proceeding with a criminal prosecution in the absence of a Commonwealth Attorney necessarily embroils the judge in the role of prosecutor and extends the judicial power beyond constitutional limits

Notwithstanding the Virginia Constitution's strong separation of powers, the "court's inherent power has been recognized to extend to matters incident to the exercise of judicial power which is vested in" the Virginia Supreme Court and inferior courts that the Virginia General Assembly has established. *See White v. Commonwealth*, 67 Va. App. 599, 605, 798 S.E.2d 818, 821 (2017) (quoting *Starrs v. Commonwealth*, 287 Va. 1, 7, 752 S.E.2d 812, 816 (2014)). But in

exercising those powers incident to the exercise of judicial power, a court "may not intrude upon the powers of other branches of government." *Id.* at 605 (after guilt was established, inherent authority of court to take a case under advisement until a written conviction is entered cannot be used as a source of judicial clemency or as a pardon power if court simply believes the offender undeserving of a conviction).

A court's decision to conduct a criminal trial in the absence of a Commonwealth Attorney is bound to cross this line and embroil the judge in the role of prosecutor in several ways. First, as noted above, even before the first witness, the very fact of the trial's occurrence means the court will have usurped the executive's role and obligation, as the people's attorney, to decide which cases merit expending judicial and prosecutorial resources—a decision on which the Fairfax County Commonwealth Attorney has been anything but silent. Second, even the most principled and meticulous judge will necessarily shed some degree of impartiality when attempting to alternate rapidly between the vastly different mindset required to perform roles normally reserved for advocates—such as questioning—on the one hand, and judges—such as evaluating a defendant's answers—on the other. In *Figueroa Ruiz v. Delgado*, 359 F.2d 718, 721–22 (1st Cir. 1966), the United States Court of Appeals for the First Circuit discussed this phenomenon in what is perhaps the most thorough evaluation of the constitutionality of a similar practice in any American jurisdiction:

> Thus, when interrogating a witness [the judge] is examining for the people, but when listening to the answer to the question he has propounded, he is weighing it as judge, and at the same time considering what question, as prosecutor, to ask next. Correspondingly, when he listens to the answer to a question put by the defense, he must, as judge, impartially evaluate the answer, but, simultaneously, as prosecutor, he must prepare the next question for cross-examination. The mental attitudes of the judge and prosecutor are at considerable variance. To keep these two personalities entirely distinct seems an almost impossible burden for even the most dedicated and fairminded of men.

Figueroa Ruiz, 359 F.2d at 720. A misdemeanor prosecution without a prosecutor raises as much if not even greater constitutional concerns where, as here, the defendant is represented by counsel, because:

> [I]t would be a rare judge who did not, at least unconsciously, seek to set the balance. While he may not be the ardent, striving, advocate that the Commonwealth's brief envisages as a public prosecutor, if he has to see that justice is done for the people's cause, he must, to some extent at least, act as prosecutor.

Id.; *see also Giles v. Prattville*, 556 F. Supp. 612, 613–17 (M.D. Ala. 1983) (enjoining misdemeanor prosecutions where "the Judge of the Municipal Court acted both as prosecutor and judge" because "the practice . . . of having the same official serve as judge and prosecutor will not meet minimal constitutional standards."). Notably, the court in *Figueroa* distinguished such prosecutions from the accepted right of judges to ask questions of witnesses on the basis that such questioning is necessarily limited and supplemental and does not entirely substitute either the prosecution or the defense. *Figueroa*, 359 F.2d at 720; *see also Hill v. Commonwealth*, 88 Va. 633, 639, 14 S.E. 330, 332 (1892) (noting that the trial court's discretion to call witnesses "ought to be very cautiously exercised" and allow for examining by both sides); Va. R. Sup. Ct. 2:614 ("The calling of a witness by the court . . . should be exercised with great care"). On the other hand, the judge's questioning in *Figueroa*, like that which has become customary in Fairfax County courts, is "not ancillary. It is fundamental and continuous throughout the trial," and thereby prohibited. *Figueroa*, 359 F.2d at 720.

By commingling the prosecutorial and advocacy functions and enmeshing the judiciary into the province of the executive, such a proceeding violates not only separation of powers but thereby due process as well. *See id.* at 721–22. It undermines both the appearance and actuality of impartiality and denies both the accused and the executive their right to a fair trial by an impartial judiciary. *See id.* ("a federal or state court procedure, by which the judge was the one to introduce

the government's evidence, and cross-examine on the government's behalf, would neither satisfy the appearance of justice nor be considered free of the possible temptation not to hold the balance nice, clear and true between the State and the accused, and hence would deny the accused due process of law."); *Cf Wong Yang Sung v. McGrath*, 339 U.S. 33, 46, 50 (1950) (construing deportation proceedings in a manner that avoided commingling of prosecuting and decision-making functions so as to sidestep constitutional concerns).

Nor may a judge avoid such constitutional concerns by relying on the presence of the complaining police officer witness at the prosecution. Among other reasons not to permit police officers to carry out prosecutions on behalf of the Commonwealth,[2] it would raise many of the same conflict-avoidance concerns that require public prosecutors to maintain strict supervision over private counsel involved in a prosecution. An arresting officer in a criminal case may well be the subject of allegations of misconduct stemming from the arrest—such as fabrication of evidence, destruction of exculpatory information, or excessive force. This can create powerful conflicts of interest that would prevent, or at a minimum give the appearance of preventing, the officer from carrying out the Commonwealth Attorney's ethical duties to be an "impartial minister of justice." *Price*, 72 Va. App. at 485–86. Specifically, arresting officers who may have engaged in misconduct may be more zealous in their efforts to convict the arrested individual and thereby obtain additional protection in a later civil or criminal prosecution in which the officer is a defendant. *See* Andrew Horwitz, *Taking the Cop Out of Copping A Plea: Eradicating Police Prosecution of Criminal Cases*, 40 Ariz. L. Rev. 1305, 1312 (1998) (collecting examples of

[2] *Amicus* understands that the briefs of defendant and other amici will explore some of these reasons, including rules against unauthorized practice of law, and officers' lack of competence and training to carry out discovery obligations such as those under *Brady* and *Giglio*, or to engage in plea bargaining with an accused.

institutional biases police prosecutors are likely to face, and citing "a significant body of literature [that] suggests that police officers commonly file charges that are largely or entirely untrue . . . to insulate themselves from such allegations" of misconduct). For example, a criminal defendant seeking to bring a federal civil rights lawsuit arising out of an arrest is subject to the *Heck* bar, under which a plaintiff seeking relief under the federal civil rights statute, 42 U.S.C. § 1983, must first show that her conviction was favorably terminated if success in the civil action would necessarily imply the invalidity of the conviction. *See Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994). Thus, police officers who engage in misconduct relating to an arrest and are then able to obtain a conviction will largely insulate themselves from civil liability unless and until the conviction is overturned, raising an additional and significant conflict counseling against permitting the officer to act as *de facto* prosecutor.

Conclusion

For the foregoing reasons, Mr. Sangha's prosecution in this case would violate fundamental principles of separation of powers and due process. *Amicus* respectfully urges this Court to so find and to dismiss his summons.

Respectfully Submitted,

Vishal Agraharkar (VSB #93265)
701 E. Franklin Street, Ste. 1412
Richmond, VA 23219
Telephone: (804) 523-2151
Facsimile: (804) 649-2733
Email: vagraharkar@acluva.org

Counsel for *Amicus Curiae*