To be Argued by:
AVI SCHICK
(Time Requested: 30 Minutes)

APL 2013-00322
Appellate Division–Second Department Docket No. 2013-02052

Court of Appeals

of the

State of New York

In the Matter of

WORKING FAMILIES PARTY,

Appellant,

– against –

FERN A. FISHER, *et al.*,

Respondents.

BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

The issue on this appeal is whether the established requirements for a court order that disqualifies an elected District Attorney from a particular case and appoints a special prosecutor in his place apply when it is a District Attorney who seeks disqualification.

This Court has already answered that question, and has consistently held that regardless of who makes the request, an order disqualifying a District Attorney and delegating his responsibility and authority to a special prosecutor must always comply with the statutory requirements. Those requirements, embodied in County Law § 701, require most prominently that delegation may only occur if the District Attorney is "disqualified" from proceeding, a standard that this Court has held arises only when there is a need to protect a defendant from "actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence." *Schumer v. Holtzman*, 60 N.Y.2d 46, 55 (1983); *Soares v. Herrick*, 20 N.Y.3d 139, 146 (2012).

Despite the unambiguous precedents from this Court and the carefully circumscribed scope of County Law § 701, Richmond County District Attorney Daniel Donovan took the position before the Appellate Division that he need not meet (and at least implicitly acknowledged that he could not meet) the standard imposed by County Law § 701 and enforced by *Schumer* and *Soares*. He argued

instead that a District Attorney may obtain an order appointing a special prosecutor merely by providing a "good faith application containing the reasonable grounds for his belief that he is so disqualified." (R.121-22; internal citations omitted.)

The Appellate Division did not reach the issue, but its ruling left undisturbed a judicial Order appointing a Special District Attorney even though the disqualification standard and the other requirements of County Law § 701 were not satisfied. In its attempt to sidestep the Order's non-compliance with the County Law, the Appellate Division ignored this Court's *Schumer* and *Soares* decisions, both of which expressly found that the relief requested and mechanism employed by the Petition before it—an Article 78 in the nature of prohibition to void an Order appointing a Special District Attorney—was available and appropriate. *Schumer*, 60 N.Y.2d at 54; *Soares*, 20 N.Y.3d at 145.

The Court should reject District Attorney Donovan's request to abandon decades of its precedents and prior decisions and to establish a new exemption that permits an elected District Attorney to have a special prosecutor installed whenever he pleases. By doing so, the Court will make clear that the standards for disqualification and appointing a special prosecutor function not as a prosecutorial prerogative, but rather as a protection for the prosecuted.

QUESTIONS PRESENTED

1. Are the actions of a Judge who invokes County Law § 701 to disqualify an elected District Attorney and delegate the authority of that District Attorney to a private Special District Attorney subject to review under an application for a writ of prohibition pursuant to Article 78?

2. Is a District Attorney who petitions for an order of disqualification and the appointment of a Special District Attorney pursuant to County Law § 701 required to establish that the order and appointment are necessary to "protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence"?

3. Did the January 12, 2012 Order appointing a Special District Attorney meet the strict requirements of County Law § 701 that such an order be limited to a "particular case" and be issued by a "superior criminal court in the county wherein the action is triable"?

STATEMENT OF JURISDICTION AND TIMELINESS

This Court has jurisdiction pursuant to C.P.L.R. § 5602(a)(1)(i) and granted leave to appeal by Order entered November 19, 2013. (R.v.) These proceedings, challenging an Order purportedly entered in the Richmond County Supreme Court, originated in the Supreme Court of the State of New York, Appellate Division, Second Department. The Appellate Division denied the Petition and dismissed the

proceeding. The Appellate Division's order finally determined the proceeding and was not appealable as of right. The issues presented on this appeal are preserved for this Court's review because the Working Families Party fully briefed and argued the issues in the Appellate Division. (R.5, 158.)

Counsel for the Working Families Party served Respondents with Notice of Entry and a copy of the Appellate Division's Decision and Judgment on August 26, 2013. (R.187.) The motion for leave to appeal was served within thirty days of August 26, 2013 and was therefore timely. *See* C.P.L.R. § 5513(b). Following the Court's entry of its November 19, 2013 Order granting permission to appeal, the Working Families Party submitted the Preliminary Appeal Statement on November 26, 2013.

STATUTORY BACKGROUND

This case involves the application of County Law § 701, which strictly limits the circumstances under which a judicial officer may relieve an elected District Attorney of his or her constitutional duties and appoint a Special District Attorney. As this Court has held,

> the District Attorney is a constitutional officer chosen by the electors of a county (NY Const, art XIII, §13) and charged by statute with the duty of conducting "all prosecutions for crimes and offenses cognizable by the courts of the county for which [s]he shall have been elected" (County Law, § 700).

Schumer, 60 N.Y.2d at 50.

County Law § 701 provides a narrow exception to the rule that criminal investigations and prosecutions are to be conducted exclusively by an elected District Attorney. Under County Law § 701, a District Attorney may be removed and a Special District Attorney appointed in the limited instance when the elected District Attorney is disqualified from fulfilling his or her constitutional duties. Specifically, County Law § 701 provides, in part, that:

> Whenever the district attorney of any county and such assistants as he or she may have . . . are disqualified from acting in a particular case to discharge his or her duties . . . a superior criminal court in the county wherein the action is triable may, by order:
>
> (a) appoint some attorney at law having an office in or residing in the county, or any adjoining county, to act as special district attorney . . .; or
>
> (b) appoint a district attorney of any other county within the judicial department or of any county adjoining the county wherein the action is triable to act as special district attorney[.]

N.Y. County Law § 701. In determining whether a District Attorney and all of his Assistant District Attorneys are disqualified,

> courts, as a general rule, should remove a public prosecutor *only* to protect a defendant from *actual prejudice* arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence.

Soares, 20 N.Y.3d at 146 (2012) (quoting *Schumer,* 60 N.Y.2d at 55 (emphasis supplied in *Soares* decision)). This standard is appropriate in light of the fact that "the legislature designed [County Law § 701] narrowly by its terms and by its purpose to fill emergency gaps in an elected prosecutorial official's responsibility."

Id. at 144 (internal quotations omitted). Moreover, "[t]he state has a fundamental and overriding interest in ensuring the integrity and independence of the office of district attorney." *Hoerger v. Spota*, 21 N.Y.3d 549, 553 (2013).

County Law § 702 allows the duties of the District Attorney to be handled by an Assistant District Attorney, and requires the District Attorney to designate the Assistant District Attorneys who act in his stead when he is unavailable. County Law § 702 provides, in part:

> 3. The assistant during the absence or inability of the district attorney shall perform the powers and duties of the office of district attorney.
>
> 4. In the event that more than one assistant is appointed, the district attorney shall designate in writing and file in the office of the county clerk and clerk of the board of supervisors the order in which such assistants shall exercise the powers and duties of the office in the event of a vacancy or the absence or inability of such district attorney to perform the duties of the office.

N.Y. County Law § 702 (1)-(4). *See also* N.Y. Public Officers Law § 9.

Article 78 of the C.P.L.R. provides that "[r]elief previously obtained by writ[] of . . . prohibition shall be obtained in a proceeding under this article." C.P.L.R. § 7801. "[P]rohibition is an appropriate remedy to void the improper appointment of a [special] prosecutor when made by a court." *Soares*, 20 N.Y.3d at 145 (quoting *Schumer*, 60 N.Y.2d at 54).

The question raised in an Article 78 Petition for a writ of prohibition is "whether the [judicial] officer proceeded, is proceeding or is about to proceed in

excess of jurisdiction." C.P.L.R. § 7803. In the Working Families Party's Article 78 Petition, the issue was whether the Judge exceeded the scope of authority granted under County Law § 701 when she entered the Order relieving Richmond County District Attorney Daniel Donovan of his constitutional responsibilities and appointing Roger Bennet Adler, an attorney in private practice, as a Special District Attorney, when the statutory requirements and the disqualification standard established by this Court were not met.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On or about February 19, 2010, District Attorney Donovan submitted a sealed application seeking to be disqualified from acting with respect to any proceedings relating to a 2009 City Council election on Staten Island. That application was made exactly one month after District Attorney Donovan had updated his "Order of Succession" with the Richmond County Clerk, pursuant to County Law § 702 and Public Officers Law § 9, designating six Assistant District Attorneys who were authorized to exercise the powers of the office in the event of District Attorney Donovan's absence or inability.

Two years later, on January 12, 2012, Judge Fisher entered an Order on District Attorney Donovan's application for disqualification and the appointment of a special prosecutor. The Order stated, in full:

> It appears to the satisfaction of this Court from the Affirmation of Daniel M. Donovan, Jr., District Attorney of Richmond County,

> dated February 19, 2010, that the District Attorney and his assistants should be relieved from acting further in the matter of a case involving possible violations of Election Law Section 14-126, Local Campaign Finance Law codified in the New York City Administrative Code Section 3-701, et. Seq. and Penal Law Articles 175 and 210 in connection with a 2009 City Council election on Staten Island, and for the appointment of a Special district Attorney in the matter; it is
>
> Ordered, pursuant to County Law section 701, that Roger Bennet Adler, Esq. is appointed to act as Special District Attorney in the captioned matters for all purposes, to represent the People with the power to discharge the duties of the Richmond County District Attorney in any and all stages of investigation and prosecution of this matter, and for all purposes, including direct appeal, as well as any post judgment proceeding in any court, and it is further
>
> Ordered, that the supporting application of District Attorney Daniel M. Donovan, Jr., remain under seal until further Order of the Court, and it is further
>
> Ordered, and that this Order be entered with the County Clerk, and shall not be under seal.
>
> Enter:
> [signature]
> Hon. Fern. A. Fisher
> Deputy Chief Administrative Judge
> New York City Courts

(R.1; bold text and capitalization removed). As is apparent, the Order did not explain the basis for District Attorney Donovan's application or upon which the Order was entered. The Order was also silent regarding the legal standard applied in determining that "the District Attorney and his assistants should be relieved from acting further in the matter." The brief Order is the only public document reflecting the request or reasons for disqualification.

Notwithstanding the final paragraph of the Order—directing that the Order be entered with the County Clerk, and "shall not be under seal," the Order was not—and to this day is not—publicly accessible in any file of the County Clerk. Not only was the Order issued two years after District Attorney Donovan's application, it was entered a year and a half after the United States Attorney's Office for the Southern District of New York publicly closed an investigation into the Working Families Party without filing any findings or charges.

On February 1, 2013, a year after his appointment, Special District Attorney Adler served grand jury subpoenas upon the Treasurer and Assistant Secretary of the Working Families Party. (R.35.)

On February 26, 2013, the Working Families Party filed its Article 78 Petition in the Appellate Division, Second Department. (R.3.) The Petition requested that the Appellate Division vacate Judge Fisher's Order because, among other reasons, the standard for disqualification of an elected District Attorney required under County Law § 701 and applied by this Court had not been met. The Petition sought a writ of prohibition. In her opposition papers, Judge Fisher did not state what disqualification standard, if any, was applied. (R.59.) In his papers, District Attorney Donovan argued that a District Attorney should have the ability to "self-disqualify" even when that triggers the appointment of a special prosecutor. (R.122.)

On August 7, 2013, the Appellate Division issued a Decision and Judgment denying the Petition and dismissing the proceeding. (R.184.) The Appellate Division held that prohibition was not an available remedy because Special District Attorney Adler would be acting in an executive capacity. The Appellate Division's ruling misconstrued the nature of the relief sought and ignored this Court's clear decisions in *Soares* and *Schumer*. It is undisputed that Judge Fisher was acting in a judicial capacity when she entered the Order. The Petition challenged the Order entered by *Judge Fisher* on the grounds that *Judge Fisher* acted in excess of her jurisdiction. The fact that *Special District Attorney Adler* might be acting in an executive capacity is irrelevant. As this Court clearly held in *Soares* and *Schumer*, "prohibition is an appropriate remedy to void the improper appointment of a [special] prosecutor when made by a court," *Soares*, 20 N.Y.3d at 145 (quoting *Schumer*, 60 N.Y.2d at 54).

The Appellate Division did not address what standard for disqualification should apply. However, denial of the Petition resulted in Judge Fisher's Order remaining in force even though the Order did not state what standard applied and neither Judge Fisher nor District Attorney Donovan asserted in the Appellate Division that the "actual prejudice" disqualification standard had been satisfied.

ARGUMENT
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THE ORDER APPOINTING A SPECIAL DISTRICT ATTORNEY SHOULD BE VACATED

The Order appointing a Special District Attorney should be vacated because there was no showing that District Attorney Donovan was disqualified based on a demonstrated conflict of interest that would cause actual prejudice to a defendant.

I. ARTICLE 78 RELIEF IS AVAILABLE TO CHALLENGE A JUDICIAL ORDER APPOINTING A SPECIAL DISTRICT ATTORNEY.

A. It is Undisputed That Article 78 Relief is Available Against a Judicial Officer.

This Court has consistently held that Article 78 relief in the nature of prohibition is available to restrain the actions of a judicial officer who improperly appointed a Special District Attorney. *Soares*, 20 N.Y.3d at 145 (stating that prohibition applies to an "officer acting in a judicial or quasi-judicial capacity"; affirming Appellate Division's grant of Article 78 petition seeking prohibition against judge and vacating judge's order appointing Special District Attorney); *Schumer*, 60 N.Y.2d at 51 ("[p]rohibition may be maintained solely to prevent or control a body or officer acting in a judicial or quasi-judicial capacity"). The Court's decisions permitting Article 78 relief against a judicial officer are supported by the language of the C.P.L.R., which provides that Article 78 petitions may be asserted against a "body or officer," defined in the C.P.L.R. to "include[] every court, tribunal, board, corporation, officer, or other person, or aggregation of

persons, whose action may be affected by a proceeding under this article." C.P.L.R. 7802(a).

There is no dispute among the parties to this action about whether Article 78 relief is available against a judicial officer. Nor did the Appellate Division disagree with this basic premise. (R.185; quoting *Soares*, 20 N.Y.3d at 145, for proposition that prohibition pursuant to Article 78 is available against "'a body or officer acting in a judicial or quasi-judicial capacity[.]'")

B. It is Undisputed That The Order Was Entered By a Judicial Officer.

Similarly undisputed is the simple fact that the Judge who entered the appointing Order is a judicial officer. This point requires little elaboration given the plain meaning of the relevant terms. Black's Law Dictionary 1193 (9th ed. 2009) (defining "judicial officer" as "1. A judge or magistrate.") (definition provided as a subcategory within dictionary entry for term "officer").

Further confirmation of this straightforward point can be found in case law and the New York General Construction Law. *See Ass'n of Secretaries to Justices of Supreme & Surrogate's Courts in City of New York v. Office of Court Admin. of State of N.Y.*, 75 N.Y.2d 460, 468 n.1, 553 N.E.2d 979, 982 n.1 (1990) (explaining that the title "Chief Administrative Judge" applies when the Chief Administrator appointed pursuant to Judiciary Law § 210(3) is a "judicial officer"); *Babigan v. Wachtler*, 133 Misc. 2d 111, 114, 506 N.Y.S.2d 506, 508 (Sup. Ct., N.Y. Cty.

1986) aff'd, 126 A.D.2d 445, 510 N.Y.S.2d 473 (1st Dept. 1987) *aff'd*, 69 N.Y.2d 1012, 511 N.E.2d 49 (1987) ("The term 'judicial officer' includes any person who exercises functions relating to the judicial branch of our tripartite form of government[.]"); N.Y. Gen Constr. Law § 26 ("The term 'judge' includes every judicial officer authorized . . . to . . . preside over a court . . . It also includes a . . . judicial officer authorized or required to act . . . with respect to the matter or thing referred to in the provision wherein that word is used").

Neither the Respondents opposing the Working Families Party's Petition nor the Appellate Division in its decision below questioned whether the Deputy Chief Administrative Judge is a Judicial Officer. It is therefore undisputed that: (1) Article 78 relief is available against a judicial officer; and (2) the Deputy Chief Administrative Judge who issued the Order is a judicial officer.

C. The Appellate Division Erred By Denying the Petition Because Article 78 Relief Might Not Be Available To Restrain A Special District Attorney.

Given that Article 78 relief is available against a judicial officer and that the Judge who entered the Order is a judicial officer, it follows that Article 78 relief is an available remedy to restrain the Judge who entered the Order. Indeed, this Court has specifically held that "prohibition is an appropriate remedy to void the improper appointment of a [special] prosecutor when made by a court." *Soares*, 20

N.Y.3d at 145 (internal citations omitted).[1] As in *Soares*, in this case the Working Families Party seeks Article 78 relief in the nature of prohibition to void the improper appointing order entered by a Judge. Such relief against the Judge who entered the Order is clearly authorized by this Court's precedent.

The Appellate Division erred by failing to address the appropriateness of Article 78 relief against the Judge who entered the appointing Order. Instead, the Appellate Division analyzed whether Article 78 relief would be available *against the Special District Attorney*. That relief was not requested by the Petition and was therefore not relevant to its determination.

By starting with the wrong question and point of departure, the Appellate Division then considered whether actions of the Special District Attorney were executive or quasi-judicial in nature, thus proceeding down a path that strayed far from the actual issue presented by the Petition.[2] Having traveled down the wrong

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[1] The District Attorneys Association of New York emphasized in an *amicus* brief in the *Soares* case that Article 78 relief in this context is exceedingly important: "given the nature of the order and the fact that the 'potential harm' from an order improperly invoking section 701 is 'most grave,' the Appellate Division was unquestionably correct in affording the People review by means of an Article 78 proceeding." (R.212-13; internal citations omitted.)

[2] The Appellate Division mistakenly relied upon *McGinley v. Hynes*, 51 N.Y.2d 116 (1980). That case is not at all like the instant case because it did not involve a court's order removing a District Attorney and appointing a Special District Attorney. *McGinley* involved a Special Nursing Home Prosecutor whose role was authorized by the governor in an Executive Order pursuant to Executive Law § 63. *See Id.* at n. 3. In *McGinley*, the issue was not whether the order appointing the special prosecutor was invalid, but whether the special prosecutor had exceeded his authority under a concededly valid appointment order. In this case, the Working Families Party contests the validity of the appointment Order made by Judge Fisher, who is unquestionably a judicial officer. *See Schumer*, 60 N.Y.2d 46 ("[t]his proceeding, however, does

(cont'd)

path, the Appellate Division reached the wrong conclusion. (R.186; "Here, the WFP failed to establish that Special District Attorney Adler was performing a quasi-judicial act. Accordingly, prohibition does not lie.") Consideration of the question that was in fact presented would have led to the opposite outcome: Prohibition is available to challenge an Order issued by a judicial officer that disqualifies a District Attorney and appoints a Special District Attorney.

II. THE DISQUALIFICATION STANDARD ESTABLISHED BY COUNTY LAW § 701 AND THIS COURT'S PRIOR DECISIONS REQUIRES A SHOWING OF ACTUAL PREJUDICE BASED ON A DEMONSTRATED CONFLICT OF INTEREST AND APPLIES WHEN THE DISTRICT ATTORNEY IS THE PARTY SEEKING HIS OWN DISQUALIFICATION.

A. A Special District Attorney May Not Be Appointed Unless the Elected District Attorney is Disqualified.

There is no dispute in this action over whether disqualification was required as a condition precedent to the appointment of a Special District Attorney. County Law § 701 requires that "the district attorney . . . and such assistants as he or she may have . . . are disqualified from acting in a particular case[.]" Thus, unless District Attorney Donovan met the disqualification standard, the January 12, 2012 Order appointing a Special District Attorney pursuant to County Law § 701 exceeded the bounds of the appointing Judge's statutory authority. Where the

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not challenge investigative activities of the prosecutor. . . . Nothing we said in *McGinley* suggests that prohibition is not available to void such an unlawful delegation of the power to direct and control a criminal prosecution.")

parties disagree is over the applicable standard for disqualification, and specifically whether there is a lower standard that applies when the District Attorney is the party seeking disqualification.

B. This Court Established the Disqualification Standard In Response to an Elected District Attorney's Attempted "Self-Disqualification," and Has Consistently Reiterated That Standard for Three Decades.

1. This Court's *Schumer* Decision Establishing the Disqualification Standard Was Made in the Context of a Request by an Elected District Attorney.

In *Schumer*, this Court articulated the following disqualification standard: "courts, as a general rule, should remove a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence[.]" *Schumer*, 60 N.Y.2d at 55 (internal citations omitted). The Court went on to state that "[t]he objector should demonstrate actual prejudice or so substantial a risk thereof as could not be ignored." *Id.* This standard was not limited to requests for disqualification made by a defendant, nor could it have been, since *Schumer* was a case in which the elected District Attorney was the party seeking disqualification.

In *Schumer*, the party that sought disqualification triggering the appointment of a special district attorney was Kings County District Attorney Elizabeth Holtzman. *Id.* at 48. It was in response to her actions that the Court established the "actual prejudice arising from a demonstrated conflict of interest" standard. There

can therefore be no question about whether this standard was intended to apply to situations where the District Attorney is the one who seeks disqualification.

Although District Attorney Holtzman did not present her request pursuant to County Law § 701, as discussed below the Court's subsequent decisions have consistently applied the standard articulated in *Schumer* when assessing disqualification arising under County Law § 701.

Like this case, *Schumer* involved an investigation into election-related activities. District Attorney Holtzman had previously held the Congressional seat won by Schumer. Holtzman and Schumer had political differences and under the circumstances, the District Attorney "believed she might be accused of bias or the appearance of bias against petitioner based upon past political differences with him and because she thought some of her former congressional staff might be witnesses in such an investigation[.]" *Id.* at 49-50. Nevertheless, District Attorney Holtzman recognized that she still could not satisfy the requirements of County Law § 701. In an Affidavit submitted to the Court, she stated:

> I considered seeking the appointment of a Special District Attorney under County Law § 701 but did not do so because that statute was and is not applicable: first, I am not disqualified, which is the predicate for relief under §701, and second, there is not a 'particular case' in a particular 'term of court' as required by §701.

(Affidavit of Elizabeth Holtzman, May 26, 1983 at ¶ 6.)[3]

District Attorney Holtzman therefore asked Governor Mario Cuomo for an order pursuant to Executive Law § 63(2), which permits the Governor to call upon the Attorney General to "exercise all the powers . . . in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise." Governor Cuomo declined to enter the requested order, explaining that

> I regard the privilege and duty of elective office to be so important to our society that its operation should not be suspended except under the most compelling circumstances, which I do not find to exist here.

Schumer v. Holtzman, 94 A.D.2d 516, 525 n.2, 465 N.Y.S.2d 522 (2d Dept. 1983), *aff'd as modified*, 60 N.Y.2d 46, 56 (1983).[4]

The District Attorney then proceeded to make an appointment of a special prosecutor without the intervention of either a court pursuant to County Law § 701 or the Governor pursuant to Executive Law § 63(2). This Court held that such a delegation of duties to a private attorney is not permitted outside of the limited channels authorized by statute. *Schumer,* 60 N.Y.2d at 49 ("we hold that petitioner

[3] The Affidavit of Elizabeth Holtzman is attached as Exhibit A to this brief.

[4] The Governor's rejection of the request highlights the seriousness of the risks inherent in the appointment of a prosecutor from outside of the District Attorney's office. Even though Executive Law § 63 offers the relative safety of delegating power to the Attorney General rather than an unknown private practitioner, and grants the Governor discretionary authority to make an appointment in the absence of facts sufficient to satisfy the requirements of County Law § 701, this discretion is rarely exercised.

may maintain this article 78 proceeding, that the written agreement between respondents formalizing [the special prosecutor's] appointment is void, and that his appointment pursuant to it is invalid").

The Court explained that "[t]he embarrassment of respondent Holtzman or the fact that she may be accused of a vendetta because of prior political differences are considerations which she must weigh in either proceeding with the matter herself or moving for the judicial appointment of a special prosecutor." *Id.* at 55-56. Ultimately, despite her concerns about an appearance of bias District Attorney Holtzman did proceed to conduct an investigation without the use of a special prosecutor,[5] confirming that an appearance of bias is not sufficient to justify a request for disqualification pursuant to County Law § 701 or to preclude a District Attorney from conducting an investigation.

2. This Court's Subsequent Decisions Have Consistently Reiterated the Disqualification Standard.

Over the course of thirty years following the *Schumer* decision, this Court has consistently reiterated the standard for disqualification of an elected District Attorney and appointment of a special prosecutor. None of the Court's decisions have created a different standard under which disqualification may be obtained

[5] *See Lesson of the Schumer Case*, N.Y. Times, August 26, 1985, *available at* http://www.nytimes.com/1985/08/26/opinion/lesson-of-the-schumer-case.html.

with a lesser showing simply because the party asking for disqualification is a District Attorney.

In *People v. Keeton*, 74 N.Y.2d 903, 904, 548 N.E.2d 1298 (1989), the Court quoted its prior decision in *Schumer*, and again stated that an elected District Attorney should be removed "only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence." The same standard was reiterated again in *People v. Herr*, 86 N.Y.2d 638, 641, 658 N.E.2d 1032 (1995) ("only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a *substantial risk of an abuse of confidence . . . The objector should demonstrate actual prejudice or so substantial a risk thereof as could not be ignored*") (quoting *Schumer*; emphasis supplied by Court in *Herr*).

In 2012, the Court once again applied the same disqualification standard in *Soares*. In that case, a Judge of the Albany County Court had entered an order pursuant to County Law § 701 which disqualified the elected District Attorney and appointed a Special District Attorney. *Soares*, 20 N.Y.3d at 142. The petitioner in *Soares* filed an Article 78 proceeding in the nature of prohibition, seeking a ruling that the Judge had exceeded the authority provided by County Law § 701 because the standard for disqualification was not satisfied. *Id.* at 143. This Court affirmed the decision of the Appellate Division, Third Department, which granted the

petition and vacated the appointing order. *Id.* at 147. In reaching its decision, this Court explained:

> Our analysis begins with the recognition that a "[d]istrict [a]ttorney is a constitutional officer chosen by the electors of a county" (*Matter of Dondi v Jones*, 40 NY2d 8, 19 [1976], citing NY Const, art XIII, § 13). County Law § 700 vests a district attorney with certain statutory duties including the duty "to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected or appointed" (County Law § 700 [1]; *Matter of Dondi*, 40 NY2d at 19). We have observed that a district attorney's broad statutory authority to prosecute all crimes and offenses within his or her jurisdiction is generally nondelegable (*see People v Soddano*, 86 NY2d 727, 728 [1995]).

Id. at 144. The Court went on to explain that County Law § 701 creates an exception which "the legislature designed . . . narrowly by its terms and by its purpose to fill emergency gaps in an elected prosecutorial official's responsibility." *Id.* (internal citations omitted).

The Court then considered whether the standard for disqualification was satisfied, stating again that "courts, as a general rule, should remove a public prosecutor *only* to protect a defendant from *actual prejudice* arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence." *Id.* at 146 (quoting *Schumer*; emphasis supplied by Court in *Soares*.) "Applying these principles to the facts presented . . . , [the Court] conclude[d] that respondent exceeded his authority under County Law § 701 in disqualifying [the elected District Attorney]." *Id.*

Most recently, in *People v. Adams*, 20 N.Y.3d 608, 612, 987 N.E.2d 272 (2013), the Court again stated that "[t]he courts, as a general rule, should remove a public prosecutor *only* to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence." (quoting *Schumer*, 60 N.Y.2d at 55; emphasis supplied by *Adams* Court).

Adams did not involve a pre-investigation challenge driven by concerns that an appearance of conflict would preclude a fair investigation. At issue in *Adams* was the actual conduct of a District Attorney during the course of an investigation in which he was hampered by a conflict.

The case arose from a prosecution by the Monroe County District Attorney which was prompted by a complaint from a Judge located in Monroe County (specifically Rochester City Court), who alleged that her neighbor and ex-paramour committed harassment by sending her offensive text messages. *Adams*, 20 N.Y.3d at 610. The District Attorney's office appeared on a daily basis before the Judge who was the alleged victim. *Id.* at 611. The record in *Adams* contained unrebutted evidence that the prosecutor refused to accept a plea bargain offered by the defendant which was similar to plea bargains that his office regularly accepted in other similar cases. *Id.* at 613. The Court noted that:

> Defendant's original counsel from the Public Defender's office, who had represented defendants in cases involving this District Attorney's office for more than a decade, averred that he had never before seen the office take such a hard-line position in a case involving

> comparable charges and a similar defendant. Although provided ample opportunity to respond, the District Attorney's office replied with nothing more than conclusory denials[.]

Id.

The Court's concern was "the appearance that the District Attorney's office refused to accept a reduced charge because the complainant was a sitting judge who demanded that the matter go to trial, rather than because a trial was, in its own disinterested judgment, appropriate." *Id.* Under these "unique circumstances," the Court held that "when the appearance is such as to discourage public confidence in our government and the system of law to which it is dedicated," disqualification was appropriate. *Id.* at 612 (internal quotations omitted).

Like each of the relevant decisions from the Court since *Schumer*, the *Adams* decision restates the general disqualification standard. *Id.* (". . . *only* to protect a defendant from actual prejudice . . .") (quoting *Schumer*, 60 N.Y.2d at 55; emphasis supplied by *Adams* Court). Also like each of the prior decisions, *Adams* does not establish a more lenient standard for cases where the District Attorney is the party seeking disqualification.

The Court has consistently applied the same disqualification standard on a half-dozen occasions over thirty years, regardless of whether disqualification was requested by a District Attorney or by a defendant. In either instance, disqualification is appropriate only "to protect a defendant from actual prejudice

arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence."

C. County Law § 701 Does Not Preclude a District Attorney From Recusing Himself and Allowing a Member of the District Attorney's Office to Oversee a Case.

In his opposition brief in the Appellate Division, District Attorney Donovan argued that applying a high standard for appointment of a special prosecutor pursuant to County Law § 701 is problematic because it interferes with "a district attorney's decision to recuse himself from participation in a criminal proceeding." (R.123.) To be clear, County Law § 701 does not just involve removal of the District Attorney from a case. Rather, disqualification triggers the substantial additional step of appointing an unaccountable special prosecutor to wield the powers normally reserved for the District Attorney. It is this delegation of duties that creates such great risks and that warrants carefully limiting the circumstances under which County Law § 701 may be invoked.

The appropriately high standard for appointment of a private special prosecutor does not impact other options which permit the District Attorney to recuse himself from a particular matter, while designating Assistant District Attorneys within that office to pursue it. Pursuant to County Law § 702, an Assistant District Attorney may "perform such duties pertaining to the office as

may be directed by the district attorney," County Law § 702(2), and a District Attorney is required to designate assistants to handle a case in his absence. County Law § 702(4) provides that:

> 4. In the event that more than one assistant is appointed, the district attorney shall designate in writing and file in the office of the county clerk and clerk of the board of supervisors the order in which such assistants shall exercise the powers and duties of the office in the event of a vacancy or the absence or inability of such district attorney to perform the duties of the office.

N.Y. County Law § 702(4).

This designation is made as a matter of course, and not for a particular investigation. Indeed, District Attorney Donovan had duly updated his designation on January 19, 2010—exactly one month before he made the application for a special prosecutor.[6] If District Attorney Donovan believed that recusal was warranted to avoid even an appearance of impropriety, any investigation or decision to investigate could have been (and can be) handled by the previously-designated Assistant District Attorneys. That is the appropriate approach when a possible appearance of impropriety does not rise to the level of disqualification.

The practice of a District Attorney recusing himself from a particular case while his assistants to pursue it was recognized in *People v. Cruz*, 60 A.D.2d 872,

[6] The January 19, 2010 Order of Succession is attached as Exhibit B to this brief. District Attorney Donovan's subsequent Orders of Succession dated April 6, 2012 and November 5, 2012 are attached hereto as Exhibits C and D, respectively.

401 N.Y.S.2d 267 (2d Dept. 1978). In *Cruz*, the Orange County District Attorney, Norman Shapiro, had previously served as Chief Attorney for the Orange County Legal Aid Society. *Id.* at 872. In that prior role, he had represented the defendant at a bail hearing. *Id.* Rather than seeking a private special prosecutor, "[a]fter his appointment as District Attorney, he immediately and effectively isolated himself from the prosecution of all pending cases in which the defendants were represented by the Legal Aid Society." *Id.* The Second Department found that this procedure was sufficient to protect the defendant from prejudice due to the District Attorney's prior affiliation.[7] *Id.*

Similarly, in *Fox v. Shapiro*, 84 Misc. 2d 223, 375 N.Y.S.2d 945 (Sup. Ct., Orange Cty. 1975), a challenge was presented in connection with a different defendant who was represented by the Legal Aid Society both before and after Norman Shapiro's transition from Chief Attorney of the Legal Aid Society to District Attorney. The court determined that it was not necessary to exclude the entire District Attorney's office from handling such cases and that the screening procedure established by the District Attorney was adequate. *Id.* at 228. The court explained that "it is not improper for the Assistant District Attorneys to proceed in

[7] *People v. Shinkle*, 51 N.Y.2d 417, 415 N.E.2d 909 (1980) involved a concern that an actual conflict of the Chief Assistant District Attorney could not be remedied by recusal. That is not relevant to the appearance concern articulated by District Attorney Donovan. *Shinkle* has in any event been limited by subsequent decisions from the Court. *See, e.g., Schumer*, 60 N.Y.2d at 55; *Soares*, 20 N.Y.3d at 144.

good faith to prosecute these cases as they have been directed to do by the District Attorney, provided they scrupulously observe the rules which isolate them from contact with the District Attorney with respect to these cases." *Id.*

The practice of recusing an individual prosecutor is also followed when other senior members of a District Attorney's office suffer from a potential conflict of interest. For example, in *People v. Loewinger*, 37 A.D.2d 675, 323 N.Y.S.2d 98 (3d Dept. 1971) *aff'd*, 30 N.Y.2d 587, 281 N.E.2d 847 (1972), the Third Department held that "we see no conflict of interest resulting in prejudice to appellant because Chief Assistant District Attorney Gellman had once represented appellant on the traffic charge out of which this incident arose. Since Gellman had no connection with the case while in the District Attorney's office, the entire office should not be disqualified." Despite the Chief Assistant's potential conflict, the circumstances in *Loewinger* did not require the drastic step of disqualifying the entire District Attorney's office and appointing a private special prosecutor.[8]

Permitting other members of a prosecutor's office to proceed with a case while the head of the office is recused is also the practice in the federal system. In

[8] The same approach was followed in 2011 when the Chief of the trial division in the Manhattan District Attorney's office recused herself individually from the Dominique Strauss-Kahn case because her husband's firm was retained to represent Strauss-Kahn. *See* John Eligon, *For Couple, Strauss-Kahn Is a Case for Silence*, N.Y. Times, June 19, 2011, *available at* http://www.nytimes.com/2011/06/20/nyregion/defense-in-strauss-kahn-case-means-recusal-for-prosecutor.html?_r=0.

a provision similar to County Law § 702, federal regulation 28 C.F.R. § 0.136 provides that "[e]ach U.S. Attorney is authorized to designate any Assistant U.S. Attorney in his office to perform the functions and duties of the U.S. Attorney . . . with respect to any matter from which he has recused himself." This practice has been accepted by the courts. *See, e.g., United States v. Goot*, 894 F.2d 231, 237 (7th Cir. 1990) (where U.S. Attorney had formerly represented defendant, holding that "the measures employed by the government sufficiently screened [the U.S. Attorney] from the prosecution of Goot so that each and every particular interest of Goot, the government, and the public was met"); *United States v. Morris*, 313 F. App'x 125, 131 (10th Cir. 2009) (rejecting request to disqualify entire U.S. Attorney's Office based on alleged conflict involving the U.S. Attorney individually); *United States v. Goff*, 2009 WL 223369 (M.D. Ala. Jan. 29, 2009) ("given the recusal of the United States Attorney [and] the implementation of screening mechanisms . . . the Court finds that disqualification of the entire United States Attorney's Office for the Middle District of Alabama is not warranted").

Recusal is likewise utilized when the New York Attorney General is subject to a potential conflict in a given case. This procedure was used by Attorney General Eric Schneiderman in a case involving the former President of NARAL Pro-Choice New York. A press release from the Attorney General's office explained: "[t]he Attorney General recused himself personally from the matter due

to his late father's past affiliation with the organization."[9] Staff members from the Attorney General's office, including the Charities Bureau Section Enforcement Chief and the Executive Deputy Attorney General for Social Justice were involved in the investigation and resulting litigation. *Id.*

Similarly, Attorney General Eliot Spitzer stated with regard to an investigation involving Comptroller Alan Hevesi: "[b]ecause I have previously endorsed Comptroller Hevesi for election, I will recuse myself from this review, which will be overseen by the First Deputy Attorney General. I have every confidence that the attorneys in my office will undertake this review based purely on the evidence and the law."[10]

Each of these cases demonstrates that recusal is the first option when the head of a prosecutor's office is unable to personally pursue a case. The appointment of a special prosecutor should be the last resort. This judgment is reflected in the statutory language adopted by the legislature in County Law § 701, as well as the decisions of this Court applying the demanding standard for disqualification of an entire District Attorney's office and appointment of a special prosecutor. There is no reason for the Court to lower that standard when the party

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[9] *Office Of Attorney General Sues Former NARAL President for Siphoning Over $250,000 from Charity For Personal Use*, June 29, 2012, *available at* http://www.ag.ny.gov/press-release/office-attorney-general-sues-former-naral-president-siphoning-over-250000-charity.

[10] *Statement By Attorney General Eliot Spitzer Regarding The State*, Oct. 23, 2006, *available at* http://www.ag.ny.gov/press-release/statement-attorney-general-eliot-spitzer-regarding-state.

requesting a special prosecutor is the District Attorney, and as discussed below there are important policy reasons for preserving the established standard and declining to invite the widespread use of private special prosecutors.

D. The Compelling Reasons For Limiting The Circumstances Under Which The Elected District Attorney's Authority is Delegated to a Special Prosecutor Are Equally Applicable When The District Attorney Makes The Request.

The narrow scope of County Law § 701 and the high standard for disqualification reflect an acknowledgement by the legislature and the Court that the immense powers of a District Attorney should not be transferred to a private special prosecutor except in very limited circumstances. The important reasons for carefully limiting the transfer of prosecutorial powers apply with equal force when the party requesting a special prosecutor is the District Attorney.

1. Accountability is Reduced When a Special Prosecutor is Appointed.

"[A] public prosecutor is a person most directly accountable to the people for his or her fair investigation and prosecution." *Matter of Rice*, 31 Misc. 3d 838, 845, 924 N.Y.S.2d 743 (Sup. Ct., Nassau Cty. 2011). District Attorney Donovan was elected by the citizens of Richmond County and is subject to the vetting process that an election produces. By contrast, the people of Richmond County have no say in the selection of Roger Bennet Adler, and no access to information that would be made public if the special prosecutor underwent the same vetting

process. The special prosecutor is an unaccountable and unknown entity who from one day to the next is transformed from a typical private practitioner to one with the vast powers of the District Attorney.

The inherent unaccountability of a private attorney wielding prosecutorial powers has been highlighted by various scholars. For example, Judge Joseph W. Bellacosa explained that:

> when special prosecutors . . . are appointed and exercise their mandates beyond the structure of the distribution of power calibrations to the executive branch, . . . then an inherent flaw in the harmonious system is exposed. Special prosecutors are too often given a kind of pass and seeming immunity from well-tested restraints on regular officers, and are perceived and empowered to be free agents[.]

Joseph W. Bellacosa, *Cogitations Concerning the Special Prosecutor Paradigm: Is the Cure Worse Than the Disease?*, 71 Alb. L. Rev. 1, 9 (2008).

Professor Roger A. Fairfax similarly explains:

> accountability . . . is a particular concern regarding the outsourcing of criminal prosecution. Private attorneys might have less accountability than public prosecutors. After all, public prosecutors ostensibly are answerable--either directly or indirectly--to the citizenry in whose name they prosecute.
>
> Chief prosecutors in the United States typically are either directly elected or appointed by an elected official. Even civil servant assistant prosecutors, therefore, are hired and supervised by an elected official or someone appointed by an elected official. It would seem to follow that elected prosecutors--or those who serve at the pleasure of someone who is elected--would be answerable to the voters and accountable for the prosecutorial decisions that they make.
>
> Furthermore, because much of prosecutorial decision making is done outside of public view, the lack of accountability associated with

> prosecution outsourcing is all the more worrisome. Although the decision making processes of public prosecutors are notoriously opaque, the decision making of private attorneys may be even less transparent, given that they may be exempt from free information laws and work in spaces far removed from other public actors.

Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. Davis L. Rev. 411, 443-44 (2009).

The unaccountability of the special prosecutor is particularly dangerous in light of the vast amount of power that is entrusted to prosecutors generally. As Justice Felix Frankfurter wrote more than half a century ago, the prosecutor has the power to wield "the most terrible instruments of government." Felix Frankfurter, Letter to the Editor, N.Y. Times, Mar. 14, 1941. Over time, "the American prosecutor . . . has emerged as the most pervasive and dominant force in criminal justice." Bernett L. Gershman, *The New Prosecutors*, 53 U. Pitt L. Rev. 393, 448 (1992). Professor Gershman goes on to state:

> The prosecutor's substantive and procedural powers continue to expand, while the courts increasingly defer to the prosecutor's decisions. Given the absence of meaningful legal and ethical constraints on the prosecutor's abuse of power, the inherent inequality between the government and the accused has become magnified.

With the scope of prosecutorial power being so great, it is all the more important that such authority and discretion be reserved for the elected prosecutor who is accountable to the people. The risks of a powerful yet unaccountable special prosecutor are the same regardless of who sought the appointment.

Lowering the standard for disqualification in cases where the District Attorney requests the appointment would only increase the frequency of special prosecutors and unnecessarily incur the grave risks inherent in an unaccountable prosecutor.

2. The Risk of Conflicts of Interest is Heightened With a Special Prosecutor.

One of the critical distinctions between a private practitioner and an elected District Attorney is that private lawyers have their own clients to whom they owe a duty of loyalty. Not only is a private lawyer unaccountable to the public, he or she is directly accountable to specific paying clients whose interests may diverge from the community's overarching interest in seeking justice in a particular investigation or prosecution. By contrast, an elected District Attorney does not have private clients and therefore does not suffer from the same potential conflicts.

There is also no way for the public to find out about any conflicts arising from a special prosecutor's existing clients or financial interests because private practitioners are not required to make the annual financial disclosures that District Attorneys make. *See, e.g.*, N.Y.C. Admin. Code § 12-110b3(a)(2).[11] The risk of conflicts is no less acute when the request for appointment of the special

[11] N.Y.C. Admin. Code § 12-110b3(a)(2) requires annual financial disclosures from "[e]ach officer or employee of . . . a district attorney's office . . . whose responsibilities . . . involve the independent exercise of managerial or policymaking functions[.]" Oddly, while a special prosecutor is free to earn income from private clients while simultaneously wielding prosecutorial authority, it does not appear that he follows the disclosure rule.

prosecutor was made by a District Attorney. Regardless of who made the request, an order appointing a private practitioner pursuant to County Law § 701 is an order appointing an individual who suffers from continuing loyalties to paying clients. There is much concern recently about the revolving door between government service and the private sector, but the special prosecutor is allowed to operate simultaneously as both a public official and a private lawyer. That should be permitted in only the most exigent circumstances.

3. A Special Prosecutor's Mission is Different From That of an Elected District Attorney Who is Charged Solely With Seeking Justice.

Unlike an elected District Attorney who is charged with the duty "to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected or appointed[,]" County Law § 700, a special prosecutor is hired to pursue a preselected target. Appointing a special prosecutor requires finding a lawyer who is:

> willing to lay aside their current career[] 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?

Morrison v. Olson, 487 U.S. 654, 730 (1988) (Scalia, J. dissenting).

> 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. (quoting Robert H. Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940.)

This fundamental difference between the mission of an elected District Attorney and that of a special prosecutor creates an immense risk of unfair prejudice to the special prosecutor's target. If the special prosecutor investigates and finds that charges are not warranted, he has nothing to show for his work. By contrast, an elected District Attorney is expected to pursue just and meritorious cases and decline to proceed where prosecution is not warranted. When an elected District Attorney makes the judgment that a prosecution is not warranted, he is not giving up the sole case that he was hired to pursue. Because the mission and incentives of a special prosecutor are so different and carry such a risk of unfair prejudice, it is essential that special prosecutors be deployed only when absolutely necessary, regardless of who requests the order of appointment.

4. Public Confidence in The Prosecutorial System is Undermined When a Private Special Prosecutor Replaces an Elected District Attorney.

A judicial determination that a District Attorney is disqualified in a particular case, even at the request of the District Attorney, politicizes the role of public prosecutors, undermines public confidence in the prosecutorial system, and encourages challenges to prosecutorial impartiality and independence. The public places its trust in the elected District Attorney and expects that he will exercise his

duties fairly and impartially each day, regardless of issues such as whether or not he and the target in a given investigation share the same political party affiliation.

If issues such as differences of political opinion are found to be sufficient to warrant removal of a District Attorney and appointment of a special prosecutor in a particular matter, the public will have reason to question whether it is appropriate to trust that the District Attorney is acting impartially in the other cases where such differences exist between the District Attorney and the defendant. The public might rightfully ask: If a difference of political opinion alone warranted self-disqualification in one case, why did the District Attorney decline to self-disqualify in another case? And if the response to that concern was for a District Attorney to self-disqualify whenever there was a difference of political opinion, then disqualification of elected District Attorneys and their replacement with judicially-appointed Special District Attorneys would become commonplace.

And since the risk of favoritism is no less than the risk of vendetta, a rule that political affiliation alone creates too great a risk of impropriety would in fact lead to the conclusion that an elected District Attorney (who is by definition affiliated with one party) could never prosecute any case involving election law.

It is for these reasons that courts have been skeptical of claims by a District Attorney that he is disqualified from fulfilling his duties. An appointed special prosecutor's lack of accountability will further erode trust in the fairness of the

criminal justice system. The Court should therefore not permit the appointment of a Special District Attorney to be so easily obtainable as to undermine public confidence in the prosecutorial system.

5. Government Resources Are Wasted When a Private Attorney is Hired and Paid to Prosecute Cases That Would Normally Be Handled By The Existing Staff of Attorneys in the District Attorney's Office.

In addition to the serious problems of unaccountability, potential conflicts of interest, distorted goals and incentives, and undermining public confidence, the appointment of a special prosecutor causes a waste of government resources. An elected District Attorney and his or her staff of Assistant District Attorneys are paid fixed salaries and do not receive extra pay for taking on an additional case. Therefore, if a case is handled by the District Attorney's office, taxpayers do not incur an incremental expense simply to cover the specific case.

By contrast, additional public funds are used to pay for the time of a special prosecutor.[12] This cost is yet another reason why the use of a special prosecutor is appropriately disfavored and the requirements for obtaining an order appointing a special prosecutor should not be lowered. Like each of the other reasons supporting

[12] In Fiscal Year 2013 and the first four months of Fiscal Year 2014, Richmond County paid a total of $130,400 to Roger Bennet Adler PC. *See* http://www.checkbooknyc.com. That is sufficient to pay the annual salary of two assistant district attorneys for a full year. *See* http://rcda.nyc.gov/pdf/jvn/JVN%20905-14-003.pdf ($59,870.00 salary for assistant district attorney).

a narrow interpretation of County Law § 701, the expense associated with hiring a private attorney as a special prosecutor is no less when the appointment was requested by the District Attorney as opposed to a defendant.

6. A Lower Disqualification Standard Would Encourage Elected District Attorneys to Step Aside When Faced With Difficult or Unpopular Cases.

In light of all of the risks inherent in the appointment of a special prosecutor, the legislature designed County Law § 701 as a mechanism through which a special prosecutor may only be appointed by court order based on a determination of the appointing court that all of the applicable requirements have been satisfied. Thus, County Law § 701 is not only crafted "narrowly . . . to fill emergency gaps in an elected prosecutorial official's responsibility[,]" *Soares*, 20 N.Y.3d at 144 (internal quotations omitted), but is also structured so that the District Attorney cannot simply choose to step aside and appoint a Special District Attorney without making application to a court, and making the required showing before that court. The approach proposed by District Attorney Donovan in his brief to the Appellate Division would render the statutory mechanism requiring court approval meaningless and superfluous. (R.122; arguing that a District Attorney may obtain a special prosecutor by providing only a "good faith application containing the reasonable grounds for his belief that he is so disqualified.")

Diminishing the courts' role in reviewing a District Attorney's request to delegate his responsibilities to a special prosecutor is not only contrary to the statutory language it is also highly problematic because such a procedure would encourage District Attorneys to step aside whenever they are faced with a case that would be potentially unpopular. With no check on an elected District Attorney's ability to excuse himself and his entire office from handling a case, the use of special prosecutors would become far more frequent and the attendant risks of unaccountability and conflicts of interest, among others, would be incurred far more often. This concern is particularly acute when it is the elected District Attorney who is requesting the special prosecutor.

III. THE ORDER ALSO CONFLICTS WITH THE ADDITIONAL REQUIREMENTS ESTABLISHED BY COUNTY LAW § 701.

A. The Order, Issued By the Deputy Chief Administrative Judge, Was Not Executed By "A Superior Criminal Court In The County Wherein The Action is Triable."

County Law § 701 requires that appointment of a Special District Attorney be made by "a superior criminal court in the county wherein the action is triable." "[T]he restrictive language referring to a 'superior criminal court' was added in 1974 (L.1974, ch. 456) and . . . these words replaced a more general reference to 'the court'" *People v. Anonymous*, 126 Misc.2d 673, 675, 481 N.Y.S.2d 987 (Crim. Ct. N.Y. Cty. 1984). Courts other than a superior criminal court in the county

where the action is triable are not empowered to grant a request for disqualification pursuant to County Law § 701. *People v. Davis*, 100 A.D.2d 747, 747, 473 N.Y.S.2d 354 (4th Dept. 1984) (rejecting request for disqualification presented to improper court, stating that "[u]nder section 701, 'a superior criminal court in the county wherein the action is triable' is empowered to grant this relief").

When a request pursuant to County Law § 701 is presented to the Chief Administrator of the Courts, she

> in consultation and agreement with the Presiding Justice of the appropriate Appellate Division, then shall designate a superior court judge to consider the application as provided by law.

22 N.Y.C.R.R.§ 200.15.

In this case, the Order appointing a special prosecutor was issued by the Deputy Chief Administrative Judge. In response to the Working Families Party's Petition, the Deputy Chief Administrative Judge argued that this satisfies the statutory requirements because she *had the authority to appoint* herself, and *could have appointed* herself, as a superior criminal court judge for Richmond County. (R.76-78.) But Respondents offered no evidence that the Deputy Chief Administrative Judge actually did designate herself a superior criminal court judge.

A careful review of the Respondent Judge's papers before the Appellate Division discloses that she does not state that she appointed herself a superior criminal court judge for Richmond County. The Order itself is signed by the court

as Deputy Chief Administrative Judge, not as a Richmond County superior criminal court judge. Moreover, the Deputy Chief Administrative Judge's office is in New York County, and it was there (not in Richmond County) that the Order was signed.

The Deputy Chief Administrative Judge's Affidavit uses very precise language to avoid specifically asserting that she actually appointed herself as a superior criminal court judge:

> 6. In or about February 2010, I received a confidential application from the Richmond County District Attorney's Office . . . for appointment of a special District Attorney under County Law § 701.
>
> 7. Exercising my authority to assign and reassign judges within the City of New York, I thereafter acted as a designee to a criminal term of the Supreme Court, Richmond County in order to consider the application's merits.

(R.86.) The glaring omission from this series of statements is what happened between when the Judge received the application and when she issued the Order. There is no evidence or assertion that that she designated herself a superior criminal court judge. *Compare Dwyer v. Evans*, 107 Misc. 2d 484, 485, 435 N.Y.S.2d 208 (Sup. Ct. Albany Cty. 1980) (signed written order designating judge to sit in a different county).

Moreover, even if a designation occurred, there is also no evidence or assertion that the required consultation and agreement with the Presiding Justice of

the Appellate Division—Second Department took place prior to (or even after) the designation. 22 N.Y.C.R.R. § 200.15; *compare Crandall v. Harrigan*, 183 A.D.2d 1009, 1009, 583 N.Y.S.2d 646 (3d Dept. 1992) ("By administrative order dated December 18, 1989, the Chief Administrator of the Courts and the Presiding Justice of the Appellate Division, Third Department, designated the County Judge to hear applications for the appointment of special District Attorneys in Schenectady County during 1990"). These errors constitute an additional independent basis for vacating the Order.

B. The Order Was Not Limited to a "Particular Case."

"The plain wording of County Law § 701 requires that a judicial appointment of a Special District Attorney be limited to a 'particular case'." *Leahy*, 72 N.Y.2d at 516. This requirement is strictly enforced. *Id.* (holding that special prosecutor appointed to investigate and prosecute case against five specific defendants lacked authority to prosecute sixth individual whose possible crime arose from the same set of facts); *Rice*, 31 Misc.3d at 843 (denying request to appoint special prosecutor because planned investigation into Nassau County Police Department's Crime Laboratory was too open-ended); *see Bd. of Supervisors of Montgomery Cnty. v. Aulisi*, 62 A.D.2d 644, 648, 406 N.Y.S.2d 570 *aff'd*, 46 N.Y.2d 731, 385 N.E.2d 1302 (1978) (granting writ of prohibition to

restrain implementation of order appointing special prosecutor to investigate gambling activity in Montgomery County).

In applying County Law § 701's "particular case" requirement, "a very important purpose is served by adhering to the plain language of the statute and to its exceptional function of displacing an elected constitutional officer." *Leahy*, 72 N.Y.2d at 514. Permitting an Order to stand which violates this requirement would undermine "the integrity of [the] statute." *Id.* at 513. For this reason, the appointing order must be narrowly tailored, and a "hypertechnical reading of the appointing order" is appropriate. *Id.* at 514 (internal quotations omitted).

Contrary to the statutory requirement, here the appointing Order purports to assign the special prosecutor broad responsibility for investigating a "case involving possible violations of Election Law Section 14-126, Local Campaign Finance Law codified in the New York City Administrative Code Section 3-701, et seq. and Penal Law Articles 175 and 210 in connection with a 2009 City Council election on Staten Island."

The Order refers to "a 2009 city Council election on Staten Island[,]" but there were at least five New York City Council elections on Staten Island in 2009:

- On February 24, 2009, there was a Special Election between candidates seeking to represent the 49th City Council District.
- On September 15, 2009, there was a Democratic Party primary election in the 49th City Council District.

- On November 3, 2009, there was a General Election between candidates seeking to represent the 49th City Council District.
- On November 3, 2009, there was a General Elections between candidates seeking to represent the 50th City Council District.
- On November 3, 2009, there was a General Elections between candidates seeking to represent the 51st City Council District.

Despite employing the singular "case," the scope of Order is far too broad to comply with the Section 701 "particular case" requirement. The Order does not specify *who* is to be investigated, *what* is to be investigated, *which* of the five City Council elections in 2009 is being investigated, or what *time period* before or after the election is to be covered by the investigation.

In *Leahy*, the appointing order granted authority to prosecute five individuals alleged to have beaten a police officer. *Leahy*, 72 N.Y.2d at 512. The special prosecutor's investigation "unearthed that just prior to [officer] Leahy's beating, Leahy himself had drawn and discharged a loaded weapon." *Id.* In addition to charging the individuals who perpetrated the beating, the Grand Jury returned a separate indictment against the officer for misdemeanor reckless endangerment. *Id.* at 513. Despite the close factual connection and proximity between the beating and the discharge of the officer's weapon, the Court held that the Special District Attorney's prosecution could not be expanded to include one additional defendant and could not cover an alleged offense that occurred within minutes of the primary offense. *Id.* Here, the Order is far broader than in *Leahy*—the Order does not

specifically identify any individual subjects of the investigation and includes all events "in connection with a 2009 . . . election[.]" As such, the Order is even farther from satisfying County Law § 701's "particular case" requirement.

In *Rice*, the Nassau County District Attorney submitted an application[13] for an order of disqualification in an investigation into the Nassau County Police Department's Crime Laboratory and, potentially, the state Office of Forensic Services. *Rice*, 31 Misc.3d at 840. The investigation focused on specific errors in the laboratory's analysis of evidence. *Id.* The court found that this investigation into at most two offices was too "open-ended" and "well beyond the scope of the County Law's authorization for a Special District Attorney." *Id.* Here, the targets and subject matter of the investigation into "possible violations . . . in connection with a 2009 City Council election on Staten Island" easily cover the activities of three or more political parties, five elections, ten or more candidates, dozens of polling locations, and hundreds of campaign workers, volunteers and vendors.

[13] In addition to demonstrating that the "particular case" requirement is narrowly interpreted and was not satisfied by the Order at issue in this proceeding, the decisions in *Leahy* and *Rice* also provide yet another reminder that the requirements of County Law § 701 are fully applicable when the District Attorney is the party making the request for disqualification and an order appointing a special prosecutor. This Court strictly enforced the statute's requirements in *Leahy* and made no special accommodations for the fact that the request came from the District Attorney. The court in *Rice* similarly did not lower any of the statutory requirements simply because the request came from the District Attorney.

CONCLUSION

For the reasons stated herein, the Working Families Party respectfully requests that the Court reverse the decision of the Appellate Division, grant the Working Families Party's Petition, and enter an Order pursuant to Article 78 in the nature of prohibition vacating the Deputy Chief Administrative Judge's Order appointing a Special District Attorney.

Dated: New York, New York
January 14, 2014

Respectfully submitted

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By: _____

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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the matter of the Application of CHARLES E. SCHUMER, Petitioner, For an order pursuant to Article 78 of the CPLR, -against- ELIZABETH HOLTZMAN, as District Attorney of Kings County, and DAVID G. TRAGER, as a Special Assistant District Attorney of Kings County, Respondents.	AFFIDAVIT OF ELIZABETH HOLTZMAN Index No. 11739/83

STATE OF NEW YORK)
) SS:
COUNTY OF KINGS)

ELIZABETH HOLTZMAN, being sworn, states:

1. I am the District Attorney of Kings County and respondent in this case. I submit this affidavit in support of respondents' motion to dismiss the petition brought under Article 78 of the C.P.L.R., for an order directing me to rescind my appointment of Professor David G. Trager as an Assistant District Attorney and prohibiting Professor Trager from taking any action pursuant to that appointment.

2. I make this affidavit in view of the Court's obvious concern, at the hearing on the petition and cross-motion, about the question whether I am disqualified in this matter within the meaning of County Law §701.

3. Petitioner does not argue that I should be disqualified, but instead alleges that I have already disqualified

myself. (Petition, para.7). That allegation is incorrect. I have never stated that I was disqualified, nor have I ever believed I was disqualified as a matter of law.

4. I have stated that there may be a possible appearance of a conflict of interest or partiality. (See Exhibits A, B, C, & D attached to this Affidavit). Thus, a decision to prosecute might be viewed as political retaliation and a decision not to prosecute might be viewed as political favoritism.

5. In order to assure public confidence in the decisions to be made in the matter I asked the Governor to designate the Attorney-General to handle this matter because the Governor has the broad power to make such a designation in the public interest even in the absence of actual disqualification. The Governor, however, noted I was not disqualified, and decided that in the absence of a disqualification he would not designate the Attorney-General to act.

6. I considered seeking the appointment of a Special District Attorney under County Law §701 but did not do so because that statute was not and is not applicable: first, I am not disqualified, which is the predicate for relief under §701, and second, there is not a "particular case" in a particular "term of court" as required by §701.

7. I still wanted to make some special effort to promote public confidence in the handling of this important investigation. For that purpose, I appointed Professor Trager as an Assistant District Attorney and assigned him to conduct the investigation.

8. Despite the claims of the petitioner, Professor Trager's appointment as an Assistant District Attorney is not invalidated by the fact that I have assigned him to only one matter, nor by the fact that he has unique stature and experience to assure the public that the recommendations he makes will be based solely on his own evaluation of the evidence, nor by the fact that his four years as United States Attorney make him especially well qualified to handle this complex matter, nor by the fact that he will be provided with the assistance necessary to carry out his responsibilities.

9. I chose Professor Trager because I have confidence in his ability and his judgment, and I believe the public shares that confidence. Nevertheless, should I disagree with him on any question reserved by law for the District Attorney, I will make that decision. This is totally consistent with our Memorandum of Understanding.

Elizabeth Holtzman
District Attorney

Sworn to before me this
26th day of May, 1983

EXHIBIT B

80002/10

COUNTY OF RICHMOND
STATE OF NEW YORK

CERTIFICATE PURSUANT TO THE
PROVISIONS OF SECTION 702 OF
THE COUNTY LAW AND SECTION 9
OF THE PUBLIC OFFICERS LAW

ORDER OF SUCCESSION

DANIEL M. DONOVAN, JR.
DISTRICT ATTORNEY
RICHMOND COUNTY
130 Stuyvesant Place
Staten Island, New York 10301
(718) 556-7050

January 19, 2010

I, Daniel M. Donovan, Jr., District Attorney of Richmond County, pursuant to the provisions of Section 702 of the County Law and Section 9 of the Public Officers Law, do hereby revoke any prior designations heretofore filed and do designate the order in which the following named and designated Assistant District Attorneys shall act as District Attorney of the County of Richmond and exercise the powers and duties of that office during my absence from said office, or in the event of my inability to perform the duties of said office, or during a vacancy in my office:

First:	Daniel L. Master, Jr.
Second:	Timothy Koller
Third:	Paul Capofari
Fourth:	Yolanda Rudich
Fifth:	Quentin Smith
Sixth:	Morrie Kleinbart

This designation shall continue until further notice according to law.

Daniel M. Donovan, Jr.
District Attorney
Richmond County, New York

Dated: January 19, 2010
Staten Island, New York

EXHIBIT C

80003/12

COUNTY OF RICHMOND
STATE OF NEW YORK

RICHMOND COUNTY CLERK
2012 APR -6 A 10: 26
DIVISION OF LAW & EQUITY

CERTIFICATE PURSUANT TO THE
PROVISIONS OF SECTION 702 OF
THE COUNTY LAW AND SECTION 9
OF THE PUBLIC OFFICERS LAW

ORDER OF SUCCESSION

DANIEL M. DONOVAN, JR.
DISTRICT ATTORNEY
RICHMOND COUNTY
130 Stuyvesant Place
Staten Island, New York 10301
(718) 556-7050

April 6, 2012

I, Daniel M. Donovan, Jr., District Attorney of Richmond County, pursuant to the provisions of Section 702 of the County Law and Section 9 of the Public Officers Law, do hereby revoke any prior designations heretofore filed and do designate the order in which the following named and designated Assistant District Attorneys shall act as District Attorney of the County of Richmond and exercise the powers and duties of that office during my absence from said office, or in the event of my inability to perform the duties of said office, or during a vacancy in my office:

First:	Daniel L. Master, Jr.
Second:	Timothy Koller
Third:	Paul Capofari
Fourth:	Yolanda Rudich
Fifth:	Wanda DeOliveira
Sixth:	Joanne Grippo

This designation shall continue until further notice according to law.

Daniel M. Donovan, Jr.
District Attorney
Richmond County, New York

Dated: April 6, 2012
Staten Island, New York

EXHIBIT D

COUNTY OF RICHMOND
STATE OF NEW YORK

80003/12

CERTIFICATE PURSUANT TO THE
PROVISIONS OF SECTION 702 OF
THE COUNTY LAW AND SECTION 9
OF THE PUBLIC OFFICERS LAW

ORDER OF SUCCESSION

DANIEL M. DONOVAN, JR.
DISTRICT ATTORNEY
RICHMOND COUNTY
130 Stuyvesant Place
Staten Island, New York 10301
(718) 556-7050

November 5, 2012

I, Daniel M. Donovan, Jr., District Attorney of Richmond County, pursuant to the provisions of Section 702 of the County Law and Section 9 of the Public Officers Law, do hereby revoke any prior designations heretofore filed and do designate the order in which the following named and designated Assistant District Attorneys shall act as District Attorney of the County of Richmond and exercise the powers and duties of that office during my absence from said office, or in the event of my inability to perform the duties of said office, or during a vacancy in my office:

First:	Daniel L. Master, Jr.
Second:	Timothy Koller
Third:	Yolanda Rudich
Fourth:	Wanda DeOliveira
Fifth:	Joanne Grippo

This designation shall continue until further notice according to law.

Daniel M. Donovan, Jr.
District Attorney
Richmond County, New York

Dated: November 5, 2012
Staten Island, New York