

No. 22-341

In The
Supreme Court of the United States

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STATE OF NEBRASKA EX REL.
TIMOTHY L. ASHFORD, P.C. L.L.O.,
and TIMOTHY L. ASHFORD,

Petitioners,

v.

DONALD KLEINE, DOUGLAS COUNTY ATTORNEY,
STATE OF NEBRASKA,

Respondent.

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**On Petition For Writ Of Certiorari
To The Nebraska Court Of Appeals**

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners have offered four separate questions presented, one of which ultimately ignores the relief sought in his original Petition for Writ of Mandamus (Petitioners did not file a § 1983 lawsuit), and three of which rephrase the same essential question to this Court:

Whether a victim of a crime has standing to seek a writ of mandamus commanding a prosecutor to investigate and prosecute the alleged perpetrator, or appoint a special prosecutor, based upon the alleged victim's assertion of a prosecutorial conflict of interest.

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INTRODUCTION

Since at least the 1960s, this Court has held that to have standing to challenge a prosecutor's charging decisions, one must have been prosecuted or threatened with prosecution. It is a staple of American jurisprudence that a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Yet Petitioners seek this Court's review of that very legal principle without giving the Court a valid reason to do so. There is no need for this Court's review because the Nebraska Supreme Court has not decided an important federal question previously undecided by this Court. Further, no state court of last resort or United States court of appeals has issued an opinion conflicting with this Court's longstanding precedent. Instead, Petitioners rely on a misguided comparison to a *criminal defendant's* standing to challenge a prosecutor's charging decisions. Accordingly, certiorari should be denied.



STATEMENT OF THE CASE

In 2021, Petitioners filed a Complaint/Petition for Writ of Mandamus in the Fourth Judicial District Court of Nebraska asking the trial court to order Respondent to “immediately file said attempted extortion charges and appoint a special prosecutor.” Pet. App. 115-136. Petitioners are an attorney and his law firm. *Id.* at 115. Respondent is the duly-elected Douglas County Attorney in Douglas County, Nebraska, who is

responsible for the prosecution of criminal proceedings on behalf of Douglas County and the State. *Id.* at 115-116.

In their Complaint/Petition for Writ of Mandamus, Petitioners allege that the wife of a former client attempted to extort Petitioners in 2018 by threatening to file a bar complaint and write a negative review of the Petitioners' law firm if Petitioners did not release an attorney lien. *Id.* at 117-118. Petitioners refused to cancel the lien, and a bar complaint and negative review of the Petitioners' law firm were submitted and posted in March 2019. *Id.* at 118. In December 2020 and January 2021, nearly two years after the attempted extortion took place, Petitioners delivered a letter to Respondent requesting that Respondent prosecute the alleged attempted extortionist. *Id.* at 117. Respondent did not prosecute the alleged extortionist. *Id.* at 119-121.

In the 111 paragraphs and nearly twenty-two pages of Petitioners' Complaint/Petition and Affidavit, Petitioners allege multiple times that Respondent declined to charge the alleged extortionist because Petitioners are a "black business." *Id.* at 115-150. In support of this assertion, Petitioners further assert that Respondent has opposed Petitioners' claims of racial discrimination as counsel in other lawsuits and later charged the same alleged extortionist for embezzlement committed against a "white business." *Id.* at 119-121.

Respondent moved to dismiss the Complaint/Petition under Neb. Ct. R. Pldg. § 6-1112(b)(1) and (6), asserting a lack of subject matter jurisdiction and failure to state a claim for relief. Pet. App. 3. The trial court granted Respondent's motion to dismiss on the basis of a lack of subject matter jurisdiction. *Id.* at 1-11. Specifically, the trial court held that Petitioners lacked standing to "challenge the prosecutor's investigation and charging decisions." *Id.* at 5-11. Further, the trial court held that, under Nebraska's common law standing doctrine, Petitioners cannot establish that their injuries can be redressed or are fairly traceable to Respondent's decision to not investigate or charge the alleged extortionist. *Id.* at 10.

Petitioners moved for the trial court to alter or amend its dismissal order and the trial court overruled that motion. *Id.* at 12. Petitioners then appealed to the Nebraska Supreme Court and Court of Appeals. *Id.* at 14. Respondent moved for summary affirmance, which was granted. *Id.* at 151. In the summary affirmance order, the Nebraska Court of Appeals cited to *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (private citizen lacks judicially cognizable interest in prosecution or nonprosecution of another) and *Parkhurst v. Tabor*, 569 F.3d 861 (8th Cir. 2009) (lower federal courts have maintained distinction in standing between those prosecuted by the state and those who would urge prosecution of others, even when failure to prosecute was allegedly discriminatory). Petitioners sought further review by the Nebraska Supreme Court, which was denied. Pet. App. 35.

Petitioners' statement of the case includes several misstatements of fact or law that need correction. First, Petitioners assert that Respondent carries a ministerial duty to appoint a special prosecutor. Pet. 5. This is a reference to the mandamus requirement in Nebraska that a duty be ministerial, not discretionary. *Huff v. Brown*, 941 N.W.2d 515, 532 (Neb. 2020). However, Nebraska law is clear that, while a county attorney *may* move for a special prosecutor to be appointed, it is within the trial court's discretion to appoint a special prosecutor. Neb. Rev. Stat. § 23-1205; *State v. Chauncey*, 890 N.W.2d 453 (Neb. 2017). County attorneys have the discretion to choose whether to move for appointment of a special prosecutor.

Second, Petitioners allege that Respondent violated 42 U.S.C. § 1983; however, Petitioners have only filed a Complaint/Petition for Writ of Mandamus. Pet. 8. Petitioners have not otherwise filed a lawsuit against Respondent asserting a § 1983 claim. Petitioners' § 1983 allegations are not properly before this Court. In support of the § 1983 allegation, Petitioners assert that he "has a legal right to have charges filed on his behalf [. . .] because the Petitioners' business is located in Douglas County." *Id.* But Nebraska law is clear that county attorneys retain broad discretion as to whom to prosecute and what charges to file. *State v. Sandoval*, 788 N.W.2d 172, 225 (Neb. 2010). Accordingly, Petitioners do not have the right claimed. *See Linda R.S.*, 410 U.S. 614.

Third, Petitioners seek to equate their case with Respondent's motion to appoint a special prosecutor in a separate and distinguishable case involving the unfortunate shooting death of James Scurlock. This is an unworkable comparison. Further, Petitioners make the unsupported legal conclusion that Respondent was executing his ministerial duty in the Scurlock case when he appointed a special prosecutor. As noted above, the appointment of a special prosecutor is a matter of discretion for the trial court. Neb. Rev. Stat. § 23-1205; Neb. Rev. Stat. § 29-1408. County attorneys may move for the appointment of a special prosecutor for several reasons, including "good cause." Neb. Rev. Stat. § 23-1205. The Court ultimately decides whether to appoint a special prosecutor. *Id.*

Fourth, Petitioners repeatedly and inaptly compares himself to former President Donald Trump—and Respondent to Attorney General Merrick Garland—to argue that Respondent should recuse himself from making a prosecuting decision as to Petitioners' alleged attempted extorters. But this misguided analogy ignores that Petitioners are victims, not criminal defendants. In Petitioners' own analogy, they argue that AG Garland should recuse himself from the investigation and potential prosecution of former President Trump. Here, Petitioners are neither being prosecuted, nor threatened with prosecution.

Finally, Petitioners' requested relief is impossible, so their petition is moot. The statute of limitations for extortion in Nebraska is, at most, three years. Neb. Rev. Stat. §§ 28-513 & 29-110. Petitioners' alleged

attempted extortion occurred in March of 2019, so the statute of limitations has already run. Pet. App. 118.

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ARGUMENT

I. THIS CASE DOES NOT POSE A NEW OR SUFFICIENTLY DEBATABLE IMPORTANT FEDERAL QUESTION FOR THIS COURT TO REVIEW.

Petitioners present neither a novel federal question nor a substantial or important federal question that is sufficiently debatable. Instead, Petitioners seek review of a federal question that has been resolved since at least the 1960s. *Bailey v. Patterson*, 369 U.S. 31, 32 (1962) (“Appellants lack standing to enjoin criminal prosecutions under Mississippi’s breach-of-peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under them.”). Since then, this Court has reaffirmed and clarified its position on standing from *Bailey* multiple times. In *Linda R.S. v. Richard D.*, this Court held: “[A] citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. . . . [I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.” 410 U.S. 614 (1973).

In 1986, this Court applied the holding from *Linda R.S.* in the context of a pediatrician who asserted that his interests in the enforcement of an anti-abortion law

permitted him to defend that law. *Diamond v. Charles*, 476 U.S. 54, 64 (1986). There, the pediatrician attempted to equate his position with that of the physicians who sought to prevent enforcement of the anti-abortion law. *Id.* But the physicians performing abortions faced possible prosecution, thereby granting them standing to bring suit against the state officials charged with enforcing the anti-abortion law. The pediatrician sought only to defend the abortion bill. *Quoting Linda R.S.*, this Court held: “The conflict presented by *Diamond* is different. Were the Abortion Law to be held constitutional, *Diamond* could not compel the State to enforce it against appellees because a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.” *Id.* (citing *Leeke v. Timmerman*, 454 U.S. 83 (1981); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984)).

As recently as 2000, this Court reiterated the narrow holding of *Linda R.S.* in analyzing standing. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 188 n.4 (2000) (“In *Linda R. S.*, [. . .] the Court drew attention to the special status of criminal prosecutions in our system, and carefully limited its holding to the unique context of a challenge to [the nonenforcement of] a criminal statute.”) (citations omitted). In 2005, the same holding from *Linda R.S.*, was cited to approvingly by this Court when it held that Colorado law did not create a due process right to police enforcement of restraining orders. “Perhaps most radically, the alleged property interest here arises incidentally, not out of some new species of

government benefit or service, but out of a function that government actors have always performed—to wit, arresting people who they have probable cause to believe have committed a criminal offense.” *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 766–67 (2005).

Significantly, this Court declined to review its holding in *Linda R.S.* when applied by the Eighth Circuit in the context of victims alleging a discriminatory prosecutorial policy. *Parkhurst v. Tabor*, 558 U.S. 1148 (2010), *denying cert. to* 569 F.3d 861 (8th Cir. 2009). In *Parkhurst*, an adoptive father and biological mother asserted claims under § 1983 against state prosecutors based on their decision to not prosecute the biological father for sexual assault. 569 F.3d at 863. There, the Eighth Circuit relied heavily on *Linda R.S.* in rejecting a direct nexus between the vindication of victims’ interests and enforcement of a state’s criminal laws. “Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.” *Id.* at 867 (*quoting United States v. Batchelder*, 442 U.S. 114, 124 (1979)).

Here, Petitioners seek review of the same exact legal holding from *Linda R.S.* for which this Court denied certiorari to in 2010. *Parkhurst*, 558 U.S. 1148, *denying cert. to* 569 F.3d 861. And the facts here are not so dissimilar to those in *Parkhurst* to require additional or substantially different analysis. Petitioners allege that Respondent acted discriminately in not pursuing charges against third parties who Petitioners accuse of attempted extortion. Petitioners do not assert

that they were prosecuted or threatened with prosecution. Instead, like in *Parkhurst*, Petitioners seek to compel the prosecution of a wrongdoer, either through Respondent or a special prosecutor. 569 F.3d at 867. Neither Petitioners' questions presented nor the facts of their case present this Court with a novel, or important and sufficiently debatable, federal question. Accordingly, certiorari should be denied.

II. THE NEBRASKA SUPREME COURT'S RELIANCE ON *LINDA R.S.* DOES NOT CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR CIRCUIT COURTS.

There are no conflicts between this Court's prior rulings and any circuit courts' prior rulings on this issue. Nearly every federal circuit court of appeals has relied on *Linda R.S.* in holding that citizens lack standing to contest decisions of a prosecutor or demand an investigation or prosecution. Respondent's decisions as to prosecution or the appointment of a special prosecutor are decisions that generally rest in the prosecutor's discretion. See *United States v. Batchelder*, 442 U.S. 114 (1979). It is not the province of the judiciary to dictate to prosecutors who to investigate and prosecute, even when a victim asks for it. *Lefebure v. D'Aquilla*, 15 F.4th 650, 654 (5th Cir. 2021), *cert. denied*, 142 S.Ct. 2732 (2022). This is true even when a victim alleges that the decisions of the prosecutor were allegedly discriminatory. *Parkhurst*, 569 F.3d at 866, *cert. denied*, 558 U.S. 1148.

Those legal principles memorialized in *Linda R.S.* have been enforced in case after case across the country. See, e.g., *United States v. Grundhoefer*, 916 F.2d 788, 792 (2d Cir. 1990) (“[A] private citizen generally lacks standing ‘to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.’”) (quoting *Linda R.S.*); *United States v. Wegeler*, 941 F.3d 665, 668 (3d Cir. 2019) (“[W]e maintain ‘the long line of precedent holding that a [private individual] lacks a judicially cognizable interest in [another]’s prosecution’ and likewise, ‘in [another’s] sentence’”) (citation omitted); *Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) (rejecting claim that crime victims have “an enforceable right as a member of the public at large and as a victim to have the defendants criminally prosecuted”); *Oliver v. Collins*, 914 F.2d 56, 60 (5th Cir. 1990) (affirming dismissal of a prison inmate’s claim against the sheriff for failing to press criminal charges against correctional officers involved in an alleged assault because the plaintiff “does not have a constitutional right to have someone criminally prosecuted”); *Mitchell v. McNeil*, 487 F.3d 374, 378 (6th Cir. 2007) (“There is no statutory or common law right, much less a constitutional right, to an investigation.”); *Vance v. Rumsfeld*, 701 F.3d 193, 204 (7th Cir. 2012), *cert. denied*, 133 S.Ct. 2796 (2013) (“no one can demand that someone else be prosecuted”); *Parkhurst*, 569 F.3d at 866 (8th Cir. 2009), *cert. denied*, 130 S.Ct. 1143 (2010) (“federal courts have maintained the distinction in standing between those prosecuted by the state and those who would urge the prosecution of others”); *Entler v.*

Gregoire, 872 F.3d 1031, 1044 (9th Cir. 2017) (recognizing the distinction between filing a criminal complaint with law enforcement and forcing the local prosecutor to pursue charges and citing *Linda R.S.*); *Meyer v. Bd. of Cnty. Comm’rs of Harper Cnty., Okla.*, 482 F.3d 1232, 1243 n.5 (10th Cir. 2007) (same holding as *Entler*, which relied on *Meyer*); *Smith v. Shook*, 237 F.3d 1322, 1324 (11th Cir. 2001) (relying on *Linda R.S.* to hold that a complainant lacks standing to sue a state bar grievance officer based on the officer’s refusal to prosecute an attorney for alleged ethics violations); *Sargeant v. Dixon*, 130 F.3d 1067, 1069–70 (D.C. Cir. 1997) (if a person has “an interest in ‘being heard’ by the grand jury,” it is “only because” he has an “interest in seeing certain persons prosecuted”—which is “not legally cognizable within the framework of Article III” under *Linda R.S.*). The lack of a conflict with *Linda R.S.* among lower courts is reason enough to deny certiorari. There is no compelling reason for this Court to revisit *Linda R.S.*

III. IGNORING THE HOLDING IN *LINDA R.S.*, PETITIONERS STILL CANNOT SATISFY THE ARTICLE III STANDING REQUIREMENTS.

Even if this Court ignored the narrow holding in *Linda R.S.* that “a citizen generally lacks a judicially cognizable interest in the prosecution or non-prosecution of another,” Petitioners still cannot satisfy the Article III standing requirements as adopted by the Nebraska Supreme Court. *Linda R.S. v. Richard D.*, 410

U.S. at 619. Petitioners cannot show an injury in fact that is either fairly traced to the nonprosecution or likely to be redressed by an eventual prosecution. First, Petitioners have not alleged how Respondent's non-prosecution have harmed Petitioners. Any injuries Petitioners incurred were solely caused by the third party extorters. Second, Petitioners cannot show how their injuries are likely to be redressed by prosecution. Any arguments by Petitioners as to redressability would be merely conjectural, which is insufficient to confer standing.

Nebraska's standing doctrine—requiring an injury in fact (causation) and redressability—was adopted from federal law's Article III standing requirements. *State v. Baltimore*, 495 N.W.2d 921, 926 (Neb. 1993) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, (1990)); see Art. III, § 2. To have standing under Article III, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *California v. Texas*, 141 S.Ct. 2104, 2113 (2021). A plaintiff seeking relief must demonstrate that he has a personal stake in the outcome, distinct from a general grievance about the government. *Gill v. Whitford*, 138 S.Ct. 1916, 1923 (2018).

First, Petitioners fail to show that their injuries are fairly traceable to Respondent's prosecutorial decisions. To establish traceability, Petitioners must show a causal connection between his injury and the conduct of Respondent. *Collins v. Yellen*, 141 S.Ct. 1761, 1779 (2021). Here, there is a clear absence of a direct

relationship between the injuries sustained by Petitioners and Respondent's decision to not prosecute or seek appointment of a special prosecutor. *Lefebure*, 15 F.4th at 654, *cert. denied*, 142 S.Ct. 2732 (finding a lack of causation where a sexual assault victim sought to hold a prosecutor accountable for injuries she suffered from her assailant after the prosecutor failed to investigate or indict the perpetrator). Throughout the nearly twenty-two pages of Petitioners' Complaint and Affidavit, Petitioners do not assert even once that the alleged harm they sustained as a result of the extortion was in any way caused, worsened, or perpetuated by Respondent's non-prosecution of the extortionist. Pet. App. 115-150. Instead, Petitioners only assert that it is Respondent's duty to prosecute the alleged extortion, regardless of the circumstances. *Id.* at 116-117.

Upon the facts originally pled, any injury Petitioners incurred was solely caused by the alleged extortion that occurred two years prior to Respondent's involvement. That Petitioners only complained to Respondent nearly two years after the alleged extortion undermines any inference this Court may make that the Complaint asserts that Respondent's non-prosecution allowed the harm to continue. *Id.* at 117. The only injuries Petitioners address in their Complaint are the negative review and bar complaint. *Id.* at 117-118. According to the Complaint, the alleged extortion took place on December 13, 2018 when the alleged extortionist threatened to file a bar complaint and write a negative review if Petitioners did not release an attorney lien. *Id.* at 117. The bar complaint and negative

review were completed on March 19 and 20, 2019, respectively. Petitioners did not report this to Respondent until December 8, 2020, nearly two years after the alleged extortion took place. *Id.* at 119. Petitioners have not asserted, and no reasonable inference can be drawn, that there was any connection between Respondent’s non-prosecution and Petitioners’ injuries.

Second, Petitioners’ injuries cannot be redressed by prosecution of the extorter or the appointment of a special prosecutor. For an injury to be redressable under Article III’s standing requirements, it must be likely—as opposed to merely speculative or conjectural—that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Setting aside the principal holding from *Linda R.S.*—that citizens lack a cognizable judicial interest in the prosecution of another—the analysis of redressability from that case support a finding here that Petitioners’ injuries are not redressable. In *Linda R.S.*, this Court found that even if the plaintiff were granted the requested relief—prosecution of a father for non-payment of child support—“it would result only in the jailing of the child’s father.” 410 U.S. at 618. Jail time would not guarantee that the child support would be paid, so the prospect of redressability was purely speculative. *Id.*

Similar to *Linda R.S.*, the prospect that prosecution and jail time for Petitioners’ alleged extortionist would redress a negative Google review or bar complaint is, at best, speculative. Petitioners do not assert that prosecution or a guilty verdict would cause Google

to delete a negative review, recoup lost income, or resolve a bar complaint. Petitioners also do not assert how the appointment of a special prosecutor would redress their alleged injuries, especially in light of Neb. Rev. Stat. §§ 29-1408 & 1419. Those statutes explicitly limit the authority for appointment of a special prosecutor to the Courts and the Governor, not a county attorney. *Id.* Instead, Petitioners merely allege the existence of injuries that had already occurred and may continue to occur regardless of prosecution.

None of the acts sought in Petitioners' Complaint would guarantee, or make more likely, the redress of their injuries. If the perpetrator is prosecuted, it is speculative at best to say they would be found guilty. If the perpetrator is found guilty, it is speculative at best to say that any restitution would be awarded or paid. If the Governor and court chose to appoint a special prosecutor, which alone is speculative, it would be complete conjecture to say that the special prosecutor would press charges or call a grand jury. What's more, the extortion criminal statute cited by Petitioners, Neb. Rev. Stat. § 28-513, carries with it, at most, a statute of limitations of three years. Neb. Rev. Stat. § 29-110. Petitioners' alleged attempted extortion occurred in March of 2019, so the statute of limitations has already run. Pet. App. 118. Every means of redress sought by Petitioners requires this Court to postulate on multiple levels. Accordingly, Petitioners cannot show that their injuries are fairly traceable to the acts of Respondent or that their injuries can be redressed

by a favorable decision in court. This Court should deny certiorari.



CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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