

No. 20-____

IN THE SUPREME COURT OF THE UNITED STATES

KIM R. HELPER,
Cross-Petitioner,

v.

PATRICK H. STOCKDALE, et al.,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

HERBERT H. SLATERY III
Attorney General and Reporter
of the State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

JOSEPH F. WHALEN
Associate Solicitor General
Counsel of Record
P.O. Box 20207
Nashville, TN 37202
(615) 741-3499
joe.whalen@ag.tn.gov

QUESTION PRESENTED

Patrick Stockdale and Shane Dunning, two city police officers, sued Kim Helper, a state district attorney, for First Amendment retaliation when they were terminated from the city police department by the city manager after Helper communicated to the city manager her decision regarding them under *Giglio v. United States*. In their pending petition for a writ of certiorari (Case No. 20-1632), the former officers challenge the Sixth Circuit's grant of qualified immunity to Helper. Helper, as Cross-Petitioner, conditionally presents the following additional question for review should the pending petition of the officers be granted:

Did the Sixth Circuit err in denying Helper absolute immunity for communicating to the officers' employer her decision regarding them under *Giglio v. United States*?

**PARTIES TO THE PROCEEDINGS BELOW
AND RULE 29.6 STATEMENT**

Kim Helper, Cross-Petitioner here, was the appellant in the Sixth Circuit Court of Appeals and a defendant in the district court. Patrick Stockdale and Shane Dunning, Cross-Respondents here, were the appellees in the Sixth Circuit and the plaintiffs in the district court. As this conditional cross-petition is not being filed by or on behalf of a nongovernmental corporation, no corporate disclosure statement is included.

RELATED PROCEEDINGS

See Petition at iii, *Stockdale v. Helper*, No. 20-1632 (U.S.).

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Kim Helper, District Attorney General for Tennessee’s 21st Judicial District, conditionally cross-petitions for a writ of certiorari to review the October 30, 2020 judgment of the United States Court of Appeals for the Sixth Circuit. Patrick Stockdale and Shane Dunning, two former officers of the Fairview, Tennessee Police Department, have petitioned for review of the Sixth Circuit’s judgment in *Stockdale v. Helper*, No. 20-1632. If the Court denies certiorari in that case—and Helper maintains that it should¹—then this cross-petition for certiorari would also be denied. U.S. Sup. Ct. R. 13.4.² But if the Court should decide to grant review in that case, then this cross-petition should also be granted.

OPINIONS BELOW

See Petition at 1, *Stockdale v. Helper*, No. 20-1632 (U.S.). As the relevant opinions and orders are set forth in the Petition Appendix in Case Number 20-1632, no additional appendix is being filed with this conditional cross-petition. See U.S. Sup. Ct. R. 12.5.

¹ Helper has contemporaneously filed her Brief in Opposition in Case No. 20-1632.

² Cf. *Ashcroft v. al-Kidd*, 563 U.S. 731, 744 (2011) (having held that the petitioner “did not violate clearly established law” and was therefore entitled to qualified immunity, the Court determined that it need not address whether the petitioner enjoyed absolute immunity).

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on October 30, 2020. Pet. App. 1a. Patrick Stockdale and Shane Dunning timely filed a petition for rehearing and suggestion for rehearing en banc, which was denied by the Sixth Circuit on December 21, 2020. Pet. App. 113a. Invoking this Court's jurisdiction under 28 U.S.C. § 1254(1), Stockdale and Dunning timely filed a petition for a writ of certiorari in this Court on May 20, 2021, under U.S. Sup. Ct. R. 13.1 and this Court's Order of March 19, 2020. *Stockdale v. Helper*, No. 20-1632 (U.S.). Kim Helper, respondent to that petition, also invoking this Court's § 1254(1) jurisdiction, timely files this conditional cross-petition for a writ of certiorari under U.S. Sup. Ct. R. 12.5 and 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS

See Petition at 2, *Stockdale v. Helper*, No. 20-1632 (U.S.).

STATEMENT

See Brief in Opposition at 1-7, *Stockdale v. Helper*, No. 20-1632 (U.S.).

REASONS FOR GRANTING REVIEW

The Sixth Circuit erred in denying absolute immunity to Helper for communicating her decision under *Giglio v. United States*³ to the officers' employer.

³ 405 U.S. 150 (1972).

Both the Fourth and Ninth Circuits have held that a prosecutor's communication of a *Giglio* decision under similar circumstances was entitled to absolute immunity. This Court's review of the absolute-immunity question is warranted.

I. The Sixth Circuit Erred in Denying Absolute Immunity.

The doctrine of absolute prosecutorial immunity bars claims against prosecutors for performing their prosecutorial duties. *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976). This Court has dictated use of a “functional approach” to determine whether prosecutorial immunity applies to the act performed by the prosecutor. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993); see *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997). Immunity applies if the act performed is connected to the prosecutor's duties as an advocate for the State, even if the act is taken before the initiation of a prosecution or occurs outside the courtroom. *Buckley*, 509 U.S. at 272 (citing *Imbler*, 424 U.S. at 431 n.33); see also *Kalina*, 522 U.S. at 125 (quoting *Buckley*, 509 U.S. at 273) (“[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.”)

Here, Helper made a witness evaluation; she determined that Stockdale and Dunning's testimony in future prosecutions would be vulnerable to impeachment under *Giglio*, and she communicated that determination to the officers' employer, the city manager, via email. This was action taken in her prosecutorial capacity, connected to her duties as an advocate for the State; she is therefore entitled to absolute immunity from the lawsuit Stockdale and Dunning filed against her for that

action. *See Imbler*, 424 U.S. at 426 (noting that “[t]he veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify” and that prosecutors need protection from suit for “exercising their judgment as to the use of such witnesses”); *cf. Van de Kamp v. Goldstein*, 555 U.S. 335, 344 (2009) (holding absolute immunity applied to systemic failure to provide impeachment-related information under *Giglio*—an obligation that is “directly connected with the conduct of a trial”). That Helper’s action occurred outside the courtroom, before any future prosecution was initiated, matters not. *See Buckley*, 509 U.S. at 272-73. A prosecutor’s evaluation of a witness, as well as any decision about how that evaluation will impact the prosecution of future cases involving that witness, are prosecutorial functions.

Absolute immunity applies to Helper’s action even though it is alleged to have been retaliatory. *See Imbler*, 424 U.S. at 427 (noting that even “malicious or dishonest” acts are subject to immunity). As with a judicial act, a prosecutorial act like evaluating the credibility of a witness under *Giglio* “does not become less judicial by virtue of an allegation of malice or corruption of motive.” *Mireles v. Waco*, 502 U.S. 9, 13 (1991). And Helper’s communication of her *Giglio* decision to the city manager is entitled to the same absolute immunity. The email contained *only* her *Giglio* decision, i.e., only her witness evaluation of the officers. Logic dictates that when a decision has been made that the prosecution of a category of cases will be negatively impacted by the credibility of an individual police officer, communication of that

decision cannot be divorced from the decision itself. Both are “intimately associated with the judicial phase of the criminal process.” *Imbler*, 424 U.S. at 431.

The Sixth Circuit recognized that “absolute immunity applies to a prosecutor’s decision not to prosecute a case involving individual police officers, no matter the motive.” Pet. App. 10a. The court also acknowledged that “a prosecutor can make a blanket decision, and an unchallengeable decision, with respect to all prosecutions involving certain officers.” Pet. App. 13a. But the Sixth Circuit nevertheless denied absolute immunity to Helper. Based largely on “the sequencing of her conduct,” the court concluded that while Helper’s *Giglio* email may have been an act of advocacy, “it just wasn’t case-driven advocacy”—“she tried only to affect personnel decisions in the department, not to win a case.” Pet. App. 9a.

The Sixth Circuit’s analysis was flawed for at least two reasons. First, in determining immunity, it is “the nature of the function performed,” i.e., “the character of the act,” that matters, *Kalina*, 522 U.S. at 127 & n.13—not what the “sequencing of conduct” may reveal about the actual purpose of, or motive behind, the act. See *Buckley*, 509 U.S. at 271 (“[T]he *Imbler* approach focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful.”). And by focusing on the overall “context” of Helper’s *Giglio* email, rather than its self-standing nature, Pet. App. 14a, 15a, the Sixth Circuit improperly shifted the inquiry toward identifying Helper’s *motive* in sending the email. See Pet. App. 8a (stating that “Helper’s actions are known by the backdrop of these [other] communications”); Pet. App. 11a (noting that “a single act may serve

different ends” and concluding that Helper’s “general references to exculpatory evidence arose in the main from efforts to fire the two lieutenants”).⁴ Again, the focus for purposes of absolute immunity is on the *nature* of the function; whether the prosecutor had some improper motive or purpose for engaging in that function is irrelevant.

Second, while the Sixth Circuit concluded that Helper’s *Giglio* email was administrative, Pet. App. 9a, and absolute immunity generally does not extend to a prosecutor’s administrative duties, the functional approach does not preclude affording absolute immunity even to some administrative acts. *Van de Kamp*, 555 U.S. at 342-44. When the complained-of act—though administrative in nature—is “directly connected with the prosecutor’s basic trial advocacy duties,” the prosecutor is entitled to absolute immunity. *Id.* at 346. While a prosecutor’s sending an email to a police officer’s employer might typically be regarded as an administrative task, Helper’s email here conveyed only her evaluation of Stockdale and Dunning as potential witnesses under *Giglio*. And her *Giglio* decision is directly connected with her basic trial advocacy duties.⁵ Indeed, it is among the “sensitive issues” related to

⁴ The court offered that if Helper had “sent one email related to her case duties . . . , it’s easy to see our case coming out differently.” Pet. App. 14a. But Helper *had* sent such a message; just two months before her *Giglio* email, Helper sent a text message to a sheriff’s detective, indicating that she would not prosecute Stockdale’s or Dunning’s cases. (Pet. App. 4a.) The Sixth Circuit also said that it was not denying absolute immunity on the basis of “pretext” but was merely asking “whether [Helper] functioned as a prosecutor” when she sent the email. Pet. App. 13a. But the court reached the wrong answer to the right question. A prosecutor is surely functioning as a prosecutor when she sends an email relating her concerns about two police officers’ credibility and her determination that “[w]ithout independent corroboration from another” witness, their testimony in future prosecutions “may be impeached, thus creating challenges for the State in proving its case beyond a reasonable doubt.” Pet. App. 5a-6a; 29a.

⁵ In concluding that Helper engaged in an administrative, rather than a prosecutorial, function, the Sixth Circuit noted that “Helper’s email offered no justification and no principle tied to the judicial

judicial proceedings that a prosecutor is obligated to address. *Imbler*, 424 U.S. at 426, 430 n.33; *see id.* at 424 (“A prosecutor is duty bound to exercise [her] best judgment both in deciding which suits to bring and in conducting them in court.”).

II. The Fourth and Ninth Circuits Have Granted Absolute Immunity in Similar Situations.

Two circuit courts have granted absolute immunity in situations similar to the one here. The Fourth and the Ninth Circuits have held that both a prosecutor’s *Giglio* decision and the communication of that decision to an officer’s employer were entitled to absolute immunity. *See Savage v. Maryland*, 896 F.3d 260 (4th Cir. 2018); *Botello v. Gammick*, 413 F.3d 971 (9th Cir. 2005).

In *Savage*, the prosecutor sent a letter to the mayor and city council regarding the plaintiff police officer. Citing his legal obligation to disclose potential impeachment evidence, the prosecutor concluded, “If we are unable to independently corroborate [plaintiff’s] testimony and therefore must rely solely on his word, the likely outcome will be a dismissal of the case.” *Id.* at 266. The prosecutor later also called the plaintiff’s employer and told him that he would not call plaintiff as a witness. *Id.* Plaintiff was terminated, and he sued the prosecutor for retaliation in violation of the First Amendment. *Id.* at 267.

The Fourth Circuit held that “when, as here, the alleged prosecutorial conduct involves the decision not to call an officer as a witness and communication of that

process.” Pet. App. 16a. But the email did both these things. The email related that “[b]ecause of the information contained in the Williamson County Sheriff’s Department Investigative report,” Helper’s office would need to disclose that report in cases involving Stockdale and Dunning. And in addition to citing *Giglio* itself, the email cited the potential for impeachment of the officers’ testimony at trial and the State’s consequent challenge in proving its case. Pet. App. 29a.

decision to the relevant employer, it is intimately tied to the judicial process and thus entitled to absolute immunity.” *Id.* at 273-74 (internal quotation marks omitted). The court expressly rejected the argument that the prosecutor’s action was merely administrative because it interfered with the plaintiff’s employment: “That a judgment about witness credibility or which cases to try has negative employment consequences—even readily foreseeable ones—does not change the underlying nature of that judgment.” *Id.* at 272. The court also determined that even if the communication of the prosecutor’s *Giglio* decision to the officer’s employer were regarded as “administrative,” it would still be protected by absolute immunity because it was “inextricably linked with the underlying assessment” of a witness’s credibility and thus “directly connected with the conduct of a trial.” *Id.* at 273 (citing *Van de Kamp*, 555 U.S. at 338-39.).

In *Botello*, 413 F.3d 971, the plaintiff, a child-abuse investigator, notified prosecutors that the State’s nurse had incorrectly identified sexual abuse in two cases. The prosecutors responded to the plaintiff’s disclosure with anger and threatened to retaliate against him. *Id.* at 974. The plaintiff reported the situation to state and federal authorities; he also resigned his job and began working for a county school-district police department. *Id.* The prosecutors called the school district and communicated, among other things, that they would not file any case involving plaintiff. *Id.* The school district assigned plaintiff to desk duty, and the plaintiff sued the prosecutors, alleging that they had attempted to have him fired, in violation of the First Amendment. *Id.* at 973, 977.

The Ninth Circuit held that the prosecutors were entitled to absolute immunity. *Id.* at 977. “[The prosecutors’] decision not to prosecute Botello’s cases and their communication of that decision is intimately tied to the judicial process and is thus entitled to absolute immunity.” *Id.* at 977 (citing *Roe v. City & County of San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997)); see *Roe*, 109 F.3d at 583-84 (granting absolute immunity where prosecutors informed officer’s employer that they would not prosecute his cases without corroborating evidence; “[t]his kind of witness evaluation falls entirely within a prosecutor’s judicial function regardless of whether one case or a line of cases is at issue”).⁶

The reasoning of the Fourth and Ninth Circuits demonstrates that the Sixth Circuit was wrong to deny Helper absolute immunity.⁷ While the Sixth Circuit did go on to grant Helper *qualified* immunity, Pet. App. 17a, Stockdale and Dunning have petitioned for certiorari regarding that aspect of the Sixth Circuit decision. Such review is unwarranted.⁸ But if the Court should decide to grant certiorari with

⁶ See also *Harrington v. Almy*, 977 F.2d 37, 40 (1st Cir. 1992) (cited in *Roe*) (holding that “[t]he conduct of the District Attorney’s Office complained of here—‘District Attorney Almy’s refusal to prosecute cases brought by Officer Harrington’—is squarely within the scope of [absolute] immunity”) (internal footnote omitted).

⁷ The Sixth Circuit distinguished both *Savage* and *Botello*, pointing to the “context” of Helper’s *Giglio* email. See Pet. App. 14a (noting that “context drives the inquiry”); Pet. App. 15a (“Remember the context of her email.”). As discussed above, this focus on overall context was an improper basis on which to deny absolute immunity. Indeed, in *Botello*, the Ninth Circuit *denied* absolute immunity for two other actions of the same prosecutors—separate from their *Giglio* communication—regarding the same officer. 413 F.3d at 977, 978. The Ninth Circuit could therefore have likewise denied immunity for the prosecutors’ *Giglio* action on the basis of “context,” but the court recognized that a prosecutor’s entitlement to absolute immunity “depends on which of the prosecutor’s actions are challenged,” *id.* at 976, and that immunity is justified “only for actions that are connected with the prosecutor’s role in judicial proceedings,” *id.* (quoting *Burns v. Reed*, 500 U.S. 478, 494 (1991)).

⁸ See Brief in Opposition at 7-14, *Stockdale v. Helper*, No. 20-1632 (U.S.).

respect to the grant of qualified immunity, it should also grant certiorari with respect to the denial of absolute immunity, for the reasons stated above.

CONCLUSION

If the Court grants the petition for a writ of certiorari in Case No. 20-1632, the conditional cross-petition for a writ of certiorari should also be granted.

Respectfully submitted,

HERBERT H. SLATTERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

/s/ Joseph F. Whalen

JOSEPH F. WHALEN
Associate Solicitor General
Counsel of Record
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-3499
joe.whalen@ag.tn.gov

Counsel for Cross-Petitioner